SUPREME COURT OF QUEENSLAND

CITATION:	*Woodco Services Pty Ltd v John Holland Pty Ltd and Ports Corporation of Queensland* [2002] QSC 264
PARTIES:	**WOODCO SERVICES PTY LTD** **ACN 010 691 871** (Applicant) v **JOHN HOLLAND PTY LTD** **ACN 004 282 268** (First Respondent) and **PORTS CORPORATION OF QUEENSLAND** (Second Respondent)
FILE NO:	S43/2002
DIVISION:	Trial Division
DELIVERED ON:	9 August 2002
DELIVERED AT:	Rockhampton
HEARING DATE:	3 June 2002 in Mackay
JUDGE:	Dutney J
ORDERS:	1. **Defence of the First Defendant struck out;** 2. **First Defendant granted leave to re-plead;** 3. **First Defendant granted leave to serve a request for particulars on the Plaintiff within 14 days;** 4. **Direction that any defence be filed and served within 28 days of the response to the request for particulars being served or if no such request for particulars is made within the time directed, any defence must be filed within 28 days of today;** 5. **Each party granted liberty to apply;**
CATCHWORDS:	SUMMARY JUDGMENT – BUILDING AND ENGINEERING CONTRACTS – whether triable issue Uniform Civil Procedure Rules – rule 166(5), rule 293

COUNSEL:	T Mathews for the Applicant S Brown for the First and Second Respondent
SOLICITORS:	Barry, Beaverson & Stenson (now Mackays Barry, Beaverson & Stenson) for the Applicant Clayton Utz for the First and Second Respondent

[1] Woodco Services Pty Ltd ("the plaintiff") seeks judgement against the first defendant pursuant to rule 293 of the Uniform Civil Procedure Rules. The action relates to amounts said to be owing pursuant to a building contract relating to earth works and drainage at the Dalrymple Bay Coal Terminal.

[2] The plaintiff was an earthworks subcontractor. The first defendant was the head contractor. The work involved extensions to the bund wall at the coal terminal. The pleaded case is that throughout the performance of the works between 16 May 201 and 28 November 2001 the works were varied or added to and those variations caused disruption and further work to be performed by the plaintiff. The plaintiff says that the first defendant agreed to pay the cost of the disruption and additional works and that amounted to a variation of the contract. The additional works totalled $362,129.82. There was a further claim for about $63,000 in paragraph 4 of the statement of claim but that was resolved.

[3] Judgement is sought alternatively on admissions or on the merits. The first basis relied on is rule 166(5) which deems a denial not accompanied by a direct explanation to be an admission. Paragraphs 3, 4, 5, 6, 7 and 8 of the defence plead firstly that the statement of claim is embarrassing without descending to any explanation or particulars of any respect in which the pleading is deficient. The paragraphs then go on to deny the allegations of fact in the paragraphs to which they relate. Paragraph 9 contains a general denial of the claim. The balance of the pleading save for some admissions follows a similar format.

[4] If rule 166(5) is applied Mr Matthews for the plaintiff says that the defence contains no matter by way of defence and it is entitled to judgement on the pleadings. Prima facie this submission is, in my view, correct.

[5] Ms Brown for the first defendant supports the pleading by pointing to a lack of particularity in the statement of claim that she submits makes pleading a meaningful defence impossible. I can readily see that the statement of claim, on its face, is a broad brush document. The first defendant nonetheless chose to plead to it. On 26 April 2002 the first defendant wrote to the plaintiff's solicitors demanding the document be re-pleaded. By return letter of 30 April 2002 the plaintiff's solicitors refused. At that point it seems to me that the ball was in the first defendant's court. It could back its judgement on the statement of claim and seek to have it struck out. It could seek particulars of the matters it considered necessary or it could plead in accordance with the rules. It chose to plead but failed to do so in accordance with the rules.

[6] Whether this matter is ultimately of any consequence depends on my findings on the merits.

[7] The plaintiff's claims are based upon additional works and delays consequent upon a change in the construction method of the bund wall from a straight line from north to south to a construction in zones from south to north. An indication of the disruption and extra works involved in this change can be gleaned from the submission from the first defendant to the second defendant which is exhibit "A" to an affidavit of a Mr Killalea who was formerly the first defendant's project manager on the job. A second change in the construction method was that the eastern access road was to be kept open to the public throughout the construction. As a consequence, smaller equipment was employed with reductions in productivity. This also caused additional works to be performed. These changes were made at the direction of the Principal, the second defendant.

[8] A large number of factual issues were debated before me. I do not propose to deal with them in any detail. In particular it was submitted by the first

defendant's counsel that the claim was a productivity claim and inherently unsuitable for summary determination. The plaintiff seeks to distinguish the claim from a pure productivity claim by basing the calculations on the agreed hourly hire rates of the equipment employed. Nonetheless it seems to me that there is a legitimate issue between the parties concerning this. The material filed makes it difficult to separate that part of the claim relating to additional hours to perform the works set out in the schedule of rates which seems to be, at least arguably, a productivity claim from that part of the claim relating to works additional to the schedule.

[9] A second basis of the first defendant's defence is a reliance on clause 23 of the contract which provides, in part, that:

> *"If a claim relates to matters for which, under the Head Contract, the Principal is responsible, the Subcontractor's entitlement in respect of the claim under this Subcontract Agreement, shall not exceed the amount received by the Contractor under the Head Contract in respect of the Subcontractor's claim, after making due allowance for the Contractor's overheads and profit."*

[10] The claim against the Principal does not seem to have been formulated or , if it has, there is no evidence as to what sum has been allowed. There is some dispute as to whether this is because of a failure by the subcontractor to properly formulate the claim or because of a fault on the part of the head contractor but if it is the latter then there may well be different remedies available. Since it appears that the present claim is one for which the Principal is ultimately liable I am not in a position on this application to nominate any sum for which the first defendant is clearly liable. Put differently, I am not persuaded that the first defendant's chances of defending the claim are "*so slim as to be fanciful*".[1]

[11] I am not prepared on the material before me to give the plaintiff summary judgement on the merits.

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[1] *McPhee v Zarb* [2002] QSC 4

[12] Having reached the above conclusion I must decide whether to grant judgement on the basis of the deemed admissions.

[13] I am not prepared to do so for these reasons:

(a) At least in the first instance deficiencies in the pleadings should only rarely be a basis for judgement in a case where there is a legitimate issue to be tried.

(b) In this case the pleading appears to be the work of an in house lawyer in Victoria who might be excused for his ignorance of the Uniform Civil Procedure Rules requirements.

(c) The statement of claim is in fact spartan in its particularity and while it is plain from the affidavit material that both sides were well aware of the issues it sought to litigate the first defendant would have been entitled to some particulars if it had asked.

[14] In the result I strike out the defence of the first defendant. I give the first defendant leave to re-plead. I am not prepared to allow the first defendant to unduly delay the proper resolution of this matter to the detriment of the plaintiff. I accordingly give the first defendant leave to serve a request for particulars on the plaintiff within 14 days. I direct that any defence be filed and served within 28 days of the response to the request for particulars being served or if no such request for particulars is made within the time I have directed then any defence must be filed within 28 days of today. I give each party liberty to apply.