

SUPREME COURT OF QUEENSLAND

CITATION: *Townsend v BBC Hardware Ltd* [2003] QSC 003

PARTIES: **DOUGLAS VICTOR TOWNSEND**
(applicant)

v

BBC HARDWARE LIMITED (ACN 000 003 378)
(respondent)

FILE NO/S: S230 of 2000

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 15 January 2003

DELIVERED AT: Brisbane

HEARING DATE: 7 January 2003

JUDGE: Mackenzie J

ORDER: **(1) I order that further and better particulars of paragraph 15 of the claim and counterclaim be provided by 4pm on Monday, 20 January 2003.**

(2) I order that the applicant file and serve a reply and answer by 4pm on Wednesday, 22 January 2003.

(3) I order that the parties make disclosure by 4pm on Friday, 24 January 2003.

(4) Costs are reserved.

CATCHWORDS: PROCEDURE – QUEENSLAND – PLEADINGS – PARTICULARS – application to strike out counterclaim – whether failure to supply proper and better particulars

COUNSEL: C White for the applicant
F G Forde for the respondent

SOLICITORS: Roberts Nehmer McKee for the applicant
Quinlan Miller and Treston for the respondent

[1] **MACKENZIE J:** This was an application to strike out a counterclaim for failure to supply proper further and better particulars. Clause 15 of the counterclaim pleads that a contract between “the plaintiff and the defendant” expressly provided that the sub-contractor was principally responsible for safety. Further and better

particulars of acts, facts, circumstances and things relied on in support of the allegations that a contract existed between the plaintiff and the defendant were sought and, in particular, with respect to the following –

- (a) Whether or not the contract was in writing and/or oral, and/or to be implied;
- (b) If it was wholly or partly in writing, identifying it, stating who executed it for the respondent, by what authority and in whose presence;
- (c) If it was not executed by the applicant, who executed it on his behalf, by what authority, and in whose presence;
- (d) If the authority was express by identifying the document giving authority; and
- (e) If it was alleged that the plaintiff adopted the written contract, by stating the acts, facts, circumstances and things evidencing adoption.

- [2] The response to this request was that the contract was both oral and in writing. The writing was constituted by two documents MAM1 and MAM2, exhibits to the affidavit of Mr Miller. The former document was headed “Terms and Conditions” which shows McEwan’s Queensland Limited as one party, and the other party as “the sub-contractor”. This document is unexecuted by either party. The latter is part of a document, the parties to which can be inferred to be Campbell’s Hardware and Timber and “the sub-contractor”. The document contains handwritten modifications of the previous document.
- [3] In the affidavit of Mr Miller (but not in the counterclaim itself) it is stated that when the respondent took over the business, (a phrase which seems to have been picked up from the further and better particulars of the statement of claim), an agreement was entered into between the plaintiff/applicant and the defendant/respondent embodying the standard terms and conditions between McEwan’s and the applicant (MAM1). MAM 2 showed handwritten notations made by the applicant on the agreement embodied in MAM1.
- [4] With respect to the oral component, the further and better particulars refer to the plaintiff, on behalf of D & R Houseframing (“D & R”) being invited, soon after the respondent took over the business, by a named person on behalf of the respondent to continue making trusses through D & R for the respondent under the same terms and conditions (those in MAM1) as existed between D & R and the previous owner of the business. Later that year, it was agreed that the terms and conditions of the contract should be amended in accordance with MAM2.
- [5] It is accepted that there is a mis-description in the reference to “paragraph 2(b)” in the further and better particulars. It is accepted that this should be corrected. However, in context, it seemed to me plain enough what was being referred to to allow a proper understanding of the case. It is the kind of error that would have been readily corrected had it been raised before an application was brought.

- [6] In the interests of clarity, in my view, the further and better particulars should be amended to incorporate the essence of the information in Mr Miller's affidavit concerning the genesis of MAM2. It may be a matter on which minds differ whether it is strictly necessary to do so, but as a matter of practicality, since the sequence of events has already been exposed in other evidence, the amendment should be made. I am not persuaded that there is a need to do more than that to expose the respondent's case sufficiently.
- [7] Concern was expressed on the part of the applicant that there was an inconsistency between the allegation in paragraph 15 of the claim and counterclaim in reference to "the contract between the plaintiff and defendant", the further and better particulars of the respondent which refer to a conversation and subsequent agreement between the applicant "on behalf of D & R" and the respondent's representative, and the later agreement expressed in similar terms. It is noted that the further and better particulars of the Statement of Claim refer to the respondent orally contracting with the firm, D & R, of which the applicant was a partner. The respondent's response was that it was plain that, as a partner, the applicant was authorised to bind the partnership. I think that it is tolerably clear, when the counterclaim and the further and better particulars are read together, what the contract is alleged to be and who the parties are. However, if that is not what the respondent intends the pleading to mean, it should state clearly what its case is.
- [8] With regard to paragraph 2 of the request for further and better particulars, it was accepted upon analysis that, in the interests of clarity, it would be better if the "circumstances" referred to in the reply, which were said to be expressed elsewhere in the pleadings, were specifically referred to. Whether that is strictly necessary may also be marginal, but in the interests of clarity and because of the concession made, the further and better particulars ought to be amended in that regard.
- [9] The orders are the following:-
- 1) I order that further and better particulars of paragraph 15 of the claim and counterclaim be provided by 4 pm on Monday, 20 January 2003.
 - 2) I order that the applicant file and serve a reply and answer by 4pm on Wednesday, 22 January 2003.
 - 3) I order that the parties make disclosure by 4pm on Friday, 24 January 2003.
 - 4) Costs are reserved.