

SUPREME COURT OF QUEENSLAND

CITATION: *Seabrook v Allianz Australia Insurance Limited & Ors*
[2004] QSC 273

PARTIES: **MARK LEONARD SEABROOK**
(plaintiff/respondent)
v
ALLIANZ AUSTRALIA INSURANCE LIMITED
(first defendant/applicant)
CLUB MARINE LTD
(second defendant/applicant)
TROY ERIN LUCK
(third defendant/applicant)
BRIAN ERNEST ASHER
(fourth defendant)

FILE NO/S: S9379 of 2001

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 1 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 3 June 2004

JUDGE: Mullins J

ORDER: **1. The application for the relief set out in paragraph 3 of the amended application filed on 18 May 2004 be adjourned to a date to be fixed.**

2. The plaintiff be directed to identify each part of the statement of Troy Erin Luck dated 14 January 1999 which accords with the words used by Luck to tell Constable Lawrence each of the matters referred to respectively in subparagraphs (a), (b) and (c) of paragraph 18 of the further amended statement of claim (“the statement of claim”).

3. Paragraph 6(a) of the particulars contained in the plaintiff’s solicitors’ letter of 14 April 2004 be struck out and, with respect to paragraph 27 of the statement of claim, the plaintiff specify the dates on which he sought to insure the damaged boat.

4. The request for particulars contained in paragraphs 7(a) and (b) of the request dated 22 March 2004 for particulars of the statement of claim (“the request”) be struck out.

5. Paragraph 9 of the particulars contained in the plaintiff's solicitors' letter of 14 April 2004 be struck out and the plaintiff provide the further particulars requested of paragraph 36 of the statement of claim in paragraph 9 of the request.

6. Paragraphs 45(d), 45A(d) and 45B(d) of the statement of claim be struck out and the plaintiff be given liberty to replead.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – application to strike out parts of the statement of claim pursuant to rule 171 *Uniform Civil Procedure Rules* 1999 (Q) – adequacy of particulars

UCPR, r 157, r 171

COUNSEL: A J Glynn SC and P J Favell for the plaintiff/respondent
R M Derrington for the first, second and third defendants/applicants

SOLICITORS: Hemming & Hart for the plaintiff/respondent
McCullough Robertson for the first, second and third defendants/applicants

- [1] **MULLINS J:** In this same proceeding I dealt with an application by the fourth defendant to strike out parts of the further amended statement of claim filed on 4 March 2004 (“the statement of claim”): *Seabrook v Allianz Australia Insurance Limited & Ors* [2004] QSC 159. By amended application filed on 18 May 2004, the first, second and third defendants (“the applicants”) sought that identified paragraphs of the statement of claim be struck out pursuant to r 171 of the *UCPR*. At the commencement of the hearing of the application, however, the matters in dispute between the parties in relation to the statement of claim had been reduced. The paragraphs that were pursued on the application were paragraphs 17, 18, 18A, 24, 24A, 27, 29, 36, 45, 45A and 45B.
- [2] The applicants gave the plaintiff (to whom I shall refer in these reasons as the “respondent”) the request dated 22 March 2004 for further and better particulars of the statement of claim (“the request”). A response to the request was provided by the respondent by letter dated 14 April 2004 from the respondent’s solicitors. The applicants did not consider the response adequate in the respects set out in their solicitors’ letter dated 30 April 2004.

Para 17(b)

- [3] The allegation in para 17(b) of the statement of claim is that “the fourth defendant was a loss adjuster engaged by either Club Marine or MMI or both of them and was acting within the scope of his authority”. The particulars that have been provided of the engagement of the fourth defendant respectively by Club Marine and MMI are in the following terms:

“The terms of the engagement were as admitted by the First, Second and Third Defendants. He was engaged as a loss adjuster to investigate the fire and represent the first and second defendant’s (*sic*) interest when dealing with the police and in the terms set out in the letter date (*sic*) 28 April 1997 as disclosed including to “liaise (*sic*) with the police department and their investigations in respect of the persons responsible for the fire.”

- [4] The applicants submit there is no pleaded authority by which the fourth defendant was entitled to act on behalf of or to bind the first, second and third defendants on the basis that there is no asserted express authority to make representations to the police about the character or conduct of the respondent or it is not alleged that there is any implied or usual authority in the appointment of the fourth defendant to investigate and report to make such representations.
- [5] The respondent submits that it is expressly pleaded that the letter of engagement extends to liaising with the police department and their investigations in respect of the persons responsible for the fire and that it is arguable that that is sufficient to create the agency.
- [6] The particulars provided of the engagement show what the respondent relies upon to support the allegation of agency. Whether that letter has the effect contended for by the respondent will be an issue at the trial. The particulars are therefore adequate.

Para 18

- [7] Paragraph 18 of the statement of claim provides:
 - “18. Prior to the bringing of the charges, on a date or dates unknown to Seabrook, Luck falsely told Plainclothes Constable Nicole Lawrence, that:
 - (a) Seabrook was insisting on being paid \$500,000;
 - (b) Seabrook had never indicated that he just wanted the boat repaired or that he wanted to get money for repairs;
 - (c) Seabrook always wanted the half million dollars payout.”
- [8] In response to a request to specify with respect to each of the matters referred to in sub-paragraphs (a) to (c) of paragraph 18 the date or dates on which Luck told Lawrence the matters referred to, the respondent particularised:
 - “The dates on which Luck told Lawrence of the matters referred to in sub paragraphs (a) to (c) are unknown but after 24 April 1997 and on or before 17 December 1998.”
- [9] The applicants rely on the police running sheet and other evidence that show that Luck spoke to the police about the matter only after the bringing of charges against the respondent. The applicants therefore contend that the absence of any particulars as to these dates shows that the pleading is either in the nature of a fishing exercise or mere speculation and that it is vexatious for the respondent to continue the allegation without specifying the occasion.
- [10] The respondent has supplied the best particulars that it can at the present time. It has specified a range of dates that will circumscribe the cross-examination of Luck on this issue at the trial. In the circumstances, that does not make the particulars provided of that range of dates inadequate.

- [11] The respondent particularised that the words used by Luck to tell Lawrence the matters referred to respectively in subparagraphs (a), (b) and (c) were those words contained in Luck's statement to the police dated 14 January 1999. The respondent is intending to identify those words in the statement that accord with the subject matter of each of the subparagraphs. The parts of the statement that are relied upon by the respondent for that purpose should be identified with specificity. It is appropriate to direct that be done.

Para 18A

- [12] The pleading in para 18A is an alternative to what is pleaded in para 18 of the statement of claim. Paragraph 18A provides:
- “18A In the alternative, prior to the bringing of the charges on a date or dates unknown to Seabrook an employee or agent of the First and/or Second Defendants acting within the scope of their authority falsely told plain clothes constable Nicole Lawrence that:
- (a) Seabrook was insisting on being paid \$500,000.00;
 - (b) Seabrook had never indicated that he just wanted the boat repaired or that he wanted to get money for repairs;
 - (c) Seabrook always wanted the half a million dollars payout.”
- [13] To the extent that the respondent has provided the particulars that the dates for which the agent or employee of the first defendant told Constable Lawrence of the matters referred to in subparagraphs (a) to (c) are unknown, but after 24 April 1997 and on or before 17 December 1998, the particulars are not inadequate for the same reasons given above in respect of para 18.
- [14] At the committal hearing in respect of the charges brought against the respondent, Constable Lawrence gave evidence that she was told of the matters (that are the subject of subparagraphs (a) to (c)) “by the insurer”. In this proceeding it is not challenged by the respondent that Constable Lawrence *bona fide* formed the belief that the respondent wanted \$500,000 pursuant to the insurance policy. The respondent's case is primarily that it was what either Luck and/or Asher said to Constable Lawrence that resulted in her forming the relevant belief. The respondent is concerned, however, that he will be unsuccessful in his claims, if the state of the evidence is that Constable Lawrence obtained the information that formed the basis of her belief from a person acting on behalf of the first defendant, but cannot show that the person was either Luck or Asher. The respondent therefore has pleaded its case to incorporate an alternative claim that the decision of the police to charge the respondent was procured by an employee or agent of the first and/or second defendants. This is clearly an alternative allegation that is subsidiary to the primary claim of the respondent.
- [15] In response to the request of the applicants for particulars as to the agency and the authority of that unidentified person, the respondent provided the following particulars:
- “(b) The facts and matters relied upon to assert that the person who made the statements to Lawrence was an agent of the First Defendant and or the Second Defendant are Lawrence's belief that the insurer was maintaining that the Plaintiff wanted to be paid \$500,00.00 (*sic*). Otherwise the Plaintiff is unable to provide the facts and circumstances

relied upon to assert that the person who made the statements to Lawrence was an employee of the First Defendant or the Second Defendant.

- (c) The Plaintiff is unable to state the scope of the authority of the person who made the statements to Lawrence but says that such a person held himself/herself out as making statements on behalf of the insurer. Otherwise the Plaintiff is unable to provide further particulars.”

- [16] The applicants submit that para 18A in its entirety satisfies none of the criteria for a pleading and should be struck out.
- [17] Purposes of particulars include defining the issues for, and preventing surprise at, the trial and enabling the opposite party to plead: r 157 *UCPR*. Paragraph 18A of the statement of claim makes it clear to the applicants that if the respondent fails in showing that it was Luck and/or Asher that made the representations to Constable Lawrence giving rise to the claim, the respondent will still seek to establish liability on the part of the first and/or second defendants, if it can show that it was some other person who was in the employ or acting as agent of the first and/or second defendants that made the representations. The respondent has given the best particulars that it can. It has ensured that the applicants will not be taken by surprise at trial by reliance on this alternative allegation, if it becomes necessary for the respondent to do so. The allegation is confined to the extent that the alternative allegation depends on establishing that the presently unidentified person is either an employee or was acting within the scope of that person’s authority from either the first and/or second defendants. In the circumstances, para 18A is sufficiently particularised and should not be struck out.

Para 24

- [18] The problem identified by the applicants with respect to para 24 can be remedied by the deletion of the reference in that paragraph to para 29. An intention to do so had, in fact, been flagged by the respondent’s solicitors’ facsimile of 14 April 2004 to the applicants’ solicitors. As Mr Glynn QC who led Mr Favell of Counsel on behalf of the respondent agreed to that course on the hearing of the application, it is unnecessary to make any order with respect to para 24 of the statement of claim.

Para 24A

- [19] It is only necessary for the respondent to prove the allegation that is made in para 24A of the further amended statement of claim (which mirrors that contained in para 24), if the respondent is forced to rely on the alternative claim that it was an employee or agent of the first and/or second defendants (other than Luck or Asher) who made the statements that Constable Lawrence relied on. In substance, the same particulars are relied on against the unidentified employee or agent of the first and/or second defendants, as are relied on against Luck and Asher in the particulars given of para 24, on the basis that the first and/or second defendants had the same knowledge as Luck and Asher had.
- [20] The respondent seeks to rely on the implication that the unidentified employee or agent had the same knowledge that the first and/or second defendants had on the basis that, as an employee or agent who was making comments on the matter to

Constable Lawrence, he or she should be taken as making informed comments, based on the knowledge of the employer or principal.

- [21] Although there is an air of unreality about this alternative pleading, the respondent has made it clear by the particulars, as to what matters within the knowledge of the first and/or second defendants he relies on to allege that the statements referred to in para 18A were false or were made recklessly indifferent, as to whether they were true or false. The link with the unidentified employee or agent is the allegation that the first and/or second defendants had passed on their state of knowledge to the unidentified employee or agent. If the respondent cannot establish that the first and/or second respondents passed onto the employee or agent the matters that are relied on as particulars of para 24A, the respondent will not succeed with this alternative allegation. It may be, as was submitted by Mr Derrington of Counsel on behalf of the applicants, that knowledge usually goes up the line of delegation and not down, but that does not preclude the respondent from making the allegation that the knowledge of the unidentified employee or agent came from the first and/or second defendants. In the circumstances, I will not strike out para 24A of the statement of claim.

Para 27

- [22] Paragraphs 27 and 28 of the statement of claim provide:
- “27. By the terms of a renewal notice of 17th May, 1997 and a letter from his solicitors dated 10 July, 1997, Seabrook sought to insure the damaged boat against public liability and against further loss of the boat in its damaged state.
28. MMI, by its agent Club Marine, declined to insure the boat on the ground that the risk had altered.

Particulars

Letters from Club Marine to Hemming & Hart dated 28 May 1997 and 25 July 1997.”

- [23] The effect of both paragraphs is that the respondent alleges that he paid the premium required by the renewal notice of 17 May 1997 (even though the boat was at that stage in a damaged state), the first defendant by its agent the second defendant declined by the second defendant’s letter dated 28 May 1997 to insure the boat on the ground that the risk had altered, and by letter dated 10 July 1997 from the respondent’s solicitors the respondent sought to insure the damaged boat against public liability and further loss in its damaged state which was the subject of a further response by the second defendant’s letter dated 25 July 1997.
- [24] In response to the request to give particulars of the date or dates or between which dates the respondent sought to insure the damaged boat, the respondent provided the following particulars:
- “(a) The dates between which Seabrook sought to insure the damaged boat was between the date of the Renewal Notice of 17 May 1997 and the letter from his solicitors dated 10 July 1997 as pleaded.”

- [25] By responding to that part of the request that asked for particulars of “between which dates”, the respondent has provided particulars that are inconsistent with what is alleged in paras 27 and 28 of the statement of claim. I therefore will strike out para 6(a) of the particulars provided by the respondent of para 27 of the statement of claim in the respondent’s solicitors’ letter of 14 April 2004 and order that, with respect to para 27 of the statement of claim, the respondent specify the dates on which he sought to insure the damaged boat.

Para 29

- [26] Paragraph 29 of the statement of claim provides:
 “29. On 14 January, 1999, in a written statement provided to Plainclothes Constable Lawrence, Luck falsely said:

“This renewal was for \$500,000 and clearly the boat could not be worth that in the burnt-out state it was in. By doing this he effectively reinsured a write off for half a million dollars again. In my ten years working in the industry I have never seen this kind of action done before. A duty exists to disclose anything that has changed in the material facts of the existing policy and if this was breached it would be viewed upon as being fraudulent. As there was no disclosure of this substantial loss I can only suggest that the insured was making misrepresentations to us in an attempt to insure a badly damaged vessel.”.

Particulars

Statement signed by Luck and dated 14 January 1999 and provided to Queensland Police Service.”

- [27] Paragraphs 7(a) and (b) of the request sought particulars of the renewal that is referred to in the statement of Luck. That was an improper request, as the allegation in para 29 of the statement of claim is that the statement made by Luck about the renewal was false. The appellants could not seek particulars from the respondent about what Luck meant when he made the statement about the renewal. The respondent mistakenly attempted to provide particulars about the renewal, about which the applicants now complain. The matter is resolved by striking out the request for particulars contained in paras 7(a) and (b) of the request.

Para 36

- [28] Paragraph 36 of the statement of claim provides:
 “36. On 14 January, 1999, in a written statement provided to Plainclothes Constable Lawrence, Luck falsely said:

“There are other options for Club Marine to consider which include replacing the loss with another boat. At no stage did Seabrook indicate that he wanted anything other than the money. He never came forward with any ideas on how to come to an amicable agreement on the settlement of this matter

and the push was always through his solicitor for him to be paid out.”

Particulars

Statement signed by Luck and dated 14 January 1997 (*sic*) and provided to Queensland Police Service.”

- [29] In respect of para 36 of the statement of claim, the respondent was requested by para 9 of the request to:
- “(a) specify which parts of the alleged statement therein referred to were false;
 - (b) specify the facts and matters relied on to assert that each of the matters referred to was false.”
- [30] The respondent’s response in para 9 of the particulars was:
- “(a) The statement read as a whole and in particular the second and third sentences therein are false.
 - (b) The facts and matters relied on to assert that the matters referred to in subparagraph (a) herein were false are that Seabrook did indicate that he wanted something other than money, he did try to reach an amicable settlement and his solicitor did push for him to be paid out and as pleaded in paragraph 37 of the amended statement of claim.”
- [31] Paragraph 37 of the statement of claim sets out each of the factual matters on which the respondent relies to allege that the statement referred to in para 36 of the statement of claim was false.
- [32] On the hearing of the application, Mr Glynn QC conceded that the respondent needed to revisit the particulars which he had provided of para 36 and specify each part of the statement that is alleged to be false and the specific facts and matters on which the respondent relies to allege that part of the statement is false. That is the proper manner for providing the particulars sought in respect of para 36, rather than relying on the several facts set out in para 37 of the statement of claim, without linking each of them to each part of the statement made by Luck that is alleged to be false. I will therefore order that para 9 of the particulars contained in the respondent’s solicitors’ letter of 14 April 2004 be struck out and that the respondent provide the further particulars requested of para 36 of the statement of claim in para 9 of the request.

Paras 45, 45A and 45B

- [33] The allegation in para 45 of the statement of claim is that the first and second defendants had no reasonable or probable cause for the prosecution of the respondent on the charges. There are four subparagraphs of particulars provided. Subparagraph (d) provides:
- “(d) the information in the possession of Luck and Asher would not have justified a person of ordinary prudence or caution to believe that Seabrook was probably guilty of the two charges.”
- [34] A similar allegation to that made against the first and second defendants in para 45 is made against the third defendant in para 45A and against the fourth defendant in

para 45B. In each of paras 45A and 45B, there is included as a particular subparagraph (d) which is in similar terms to that set out in respect of para 45, except that the allegation in para 45A(d) relates only to Luck and the allegation in para 45(B)(d) relates only to Asher.

- [35] The request that was made of the respondent in respect of para 45(d) was to specify all the information that was in the possession of Luck and Asher. A similar request was made in respect of paras 45A(d) and 45B(d). The response of the respondent was that was not a proper request for particulars.
- [36] The vice identified by the applicants in respect of each of these subparagraphs is that it is positively alleged that the information in the possession of the various defendants or their agents would not have justified a person of ordinary prudence or caution to believe that the respondent was probably guilty of the two charges. As it presently stands as a positive allegation, the applicants are entitled to seek particulars of the information that it is alleged by the respondent is in the possession of Luck and Asher.
- [37] It was foreshadowed by Mr Glynn QC on the hearing of the application that what the respondent is intending to allege is the negative proposition that the lack of information in the possession of Luck and Asher would not have justified a person of ordinary prudence or caution to believe that the respondent was probably guilty of the two charges.
- [38] In view of the refusal of the respondent to provide the particulars requested of para 45(d) of the statement of claim and its equivalent provisions, it is appropriate that the existing paragraphs 45(d), 45A(d) and 45B(d) of the statement of claim be struck out and the plaintiff be given liberty to replead.

Orders

- [39] It follows the following orders should be made:
1. The application for the relief set out in paragraph 3 of the amended application filed on 18 May 2004 be adjourned to a date to be fixed.
 2. The plaintiff be directed to identify each part of the statement of Troy Erin Luck dated 14 January 1999 which accords with the words used by Luck to tell Constable Lawrence each of the matters referred to respectively in subparagraphs (a), (b) and (c) of paragraph 18 of the further amended statement of claim (“the statement of claim”).
 3. Paragraph 6(a) of the particulars contained in the plaintiff’s solicitors’ letter of 14 April 2004 be struck out and, with respect to paragraph 27 of the statement of claim, the plaintiff specify the dates on which he sought to insure the damaged boat.
 4. The request for particulars contained in paragraphs 7(a) and (b) of the request dated 22 March 2004 for particulars of the statement of claim (“the request”) be struck out.
 5. Paragraph 9 of the particulars contained in the plaintiff’s solicitors’ letter of 14 April 2004 be struck out and the plaintiff provide the further particulars requested of paragraph 36 of the statement of claim in paragraph 9 of the request.
 6. Paragraphs 45(d), 45A(d) and 45B(d) of the statement of claim be struck out and the plaintiff be given liberty to replead.

[40] The success which the applicants have had on the application has been mixed. Subject to hearing submissions from the parties on costs, I would be inclined to order that, as between the plaintiff and the first, second and third defendants, the costs of the application heard on 3 June 2004 be each party's costs in the proceeding.