SUPREME COURT OF QUEENSLAND

CITATION:	*JM Kelly (Project Builders) Pty Ltd v Toga Development No. 31 Pty Ltd (No 4)* [2010] QSC 111
PARTIES:	**JM KELLY (PROJECT BUILDERS) PTY LTD** (plaintiff) **v** **TOGA DEVELOPMENT NO. 31 PTY LTD** (defendant)
FILE NO/S:	BS 3651 of 2006
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	24 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2010; 19 March 2010
JUDGE:	Daubney J
ORDER:	**1. Leave is granted for the plaintiff to file and serve the further amended claim.** **2. I will hear the parties as to the form of order now required and as to the directions necessary.** **3. Costs reserved.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – where the plaintiff has applied to amend the claim and statement of claim against the defendant – where the plaintiff seeks to have leave in order to completely recast the legal but not factual basis on which it seeks to claim against the defendant – where the plaintiff previously pleaded that the binding contract between the parties was not the formal contract executed but rather was evidenced by other agreements and alternatively that the defendant made representations which the plaintiff had relied on to its detriment giving rise to claims under the *Trade Practices Act* and for common law relief – where the plaintiff now seeks to primarily claim for relief for rectification of the formal instrument of contract

with an alternative claim in restitution for a quantum meruit – whether the plaintiff ought to have leave in order to completely recast the legal but not factual basis on which it seeks to claim against the defendant

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – OTHER MATTERS BEFORE TRIAL – where the plaintiff seeks leave to amend its pleading – where the application is brought in March 2010 and the matter is set down for a four week hearing listed to commence in May 2010 – wether the defendant would be prejudiced by being unable to prepare for a hearing within the time available - whether the four week hearing should be adjourned or vacated

Uniform Civil Procedure Rules (1999) Qld, r 157

Aon Risk Services Australia Limited v Australian National University [2009] 239 CLR 175, cited
Australian Gypsum Limited and Australian Plaster Company Limited v Hume Steel Limited [1930] 45 CLR 54, cited
Pukallus v Cameron [1982] 180 CLR 447, cited

COUNSEL: W Sofranoff QC with D Piggott for the plaintiff
G Inatey SC with D Clothier for the defendant

SOLICITORS: Tucker & Cowen Solicitors for the plaintiff
Clayton Utz Lawyers for the defendant

HIS HONOUR: The plaintiff, which has discontinued its claims against the second defendant, has applied to amend the claim and statement of claim against the first defendant. For convenience I will henceforth refer to the first defendant simply as “the defendant”.

This application gives rise to two questions: (a) whether the plaintiff ought have leave in order to completely recast the legal but not factual basis on which it seeks to claim against the defendant; (b) if so, whether the four week hearing listed to commence on 10 May 2010 for determination of preliminary questions ought be adjourned or vacated.

Details of the case advanced to date by the plaintiff against the defendant are contained in my previous judgments - [2008] QSC 312 and [2009] QSC 321. In very broad brush terms, the plaintiff's case to date has been:

(a) that the plaintiff tendered to construct the Swell project for the defendant for some $65 million;

(b) that the defendant advised the plaintiff that this figure was beyond its budget;

(c) that the parties then entered into a series of negotiations to reduce the tender price involving design changes, eliminating excess, review of the plaintiff's estimating software database, and obtaining further or revised

quotes. This process was called the "Toga Value Management Process";

(d) the outcome of this process was agreement that the plaintiff would undertake agreed trade packages for the prices determined under that process plus 6 per cent being a total contract price of some $50 million, and that the agreed scope of these packages were to be recorded in a document to be produced by the defendant described as the Trade Costs Allocation;

(e) that the parties subsequently executed a formal contract for the works but the scope of works in that formal contract was not the scope constituted by the Trade Cost Allocation Works.

The pleadings previously delivered by the plaintiff then sought to set up a case to the effect that the binding contract between the parties was not the formal contract which had been executed but rather was evidenced by the agreements arising from the Toga Value Management Process and also alternatively that the defendant had made representations in the course of the Toga Value Management Process about the scope of works which the plaintiff was required to complete and that the plaintiff had relied to its detriment on those representations, giving rise to claims under the Trade Practices Act and for common law relief.

The plaintiff now seeks, effectively, to completely jettison

the form of case previously advanced. The primary relief now sought by it is for rectification of the formal instrument of contract with an alternative claim in restitution for a quantum meruit.

This application first came before me on 5 March 2010. At that time the plaintiff's proposed new pleading also included a proposed new, or at least recast, claim under the Trade Practices Act. After hearing argument on that day, the application was adjourned to enable the defendant to request and the plaintiff to provide further and better particulars of the proposed new pleading.

The hearing then resumed before me on the earliest date on which counsel and I were all available, namely 19 March 2010. At that hearing the plaintiff proposed a further draft pleading in which relief under the Trade Practices Act was no longer pursued.

This action has now been on foot for numerous years. The pleadings have been the subject of judicial scrutiny on several occasions. The plaintiff's previous legal advisors expended much time and effort in advancing and justifying the case as it had been formulated. As has been pointed out by counsel for the defendant in the present application, the notion that the plaintiff's case ought to have been cast as one for rectification was expressly canvassed in argument in the course of case reviews and interlocutory applications as long ago as October 2007.

The plaintiff, by its advisors, apparently made a forensic decision not to pursue rectification but to advance its case on other grounds. It was on the basis of the case so formulated by the plaintiff that the decision was made effectively to split the issues of liability and quantum. The purpose of the hearing listed to commence in May was to adjudicate on the case then pleaded by the plaintiff as to whether the parties were bound by an agreement other than the formal contract executed by the parties, and if so to identify the terms of that agreement. The defendant has prepared for that hearing on the basis of the case as has now been advertised by the plaintiff for some years.

The only explanation for the plaintiff now seeking to change courses at a point so relatively close to the trial is that in late 2009 the plaintiff dispensed with the services of its previous legal advisors and retained a new team of solicitors and counsel. Counsel properly took time to review the plaintiff's pleadings. Mr Sofronoff QC, who now appears with Mr Piggott for the plaintiff, baldly and frankly informed me that the case hitherto pleaded on behalf of the plaintiff was, in effect, untenable and that his and his junior's review of the matter revealed that the proper claim to be pursued by the plaintiff was one for rectification of the formal instrument of agreement, such rectification being based on a common mistake by the parties that the formal agreement contained the scope of works which emanated from the Toga Value Management Process or alternatively a unilateral mistake on the plaintiff's part to the same effect in circumstances where the

defendant knew of that mistake. The proper alternative claim, if rectification be not granted, is on a quantum meruit for the value of the work performed over and above the contract price under the formal agreement.

It needs to be noted that very few amendments are sought to be made to the statements of material fact in the pleading. By and large the plaintiff would seek to rely on the same facts and circumstances as have previously been pleaded and particularised.

The defendant opposed the grant of leave to amend. A number of points were raised:

(a) initially it was said that the new pleading lacked particularity. This complaint raised at the first hearing was accepted as valid by the plaintiff and led to the adjournment of the hearing to enable the defendant to request, and the plaintiff to provide, further and better particulars;

(b) the defendant also complained that the rectification pleading was bad in form because it did not plead the precise terms of the rectification sought;

(c) the amendment is too late having regard to the proximity of the May hearing;

(d) the defendant would be prejudiced by not being able to prepare properly for the May hearing on the basis of the amended statement of claim.

Dealing first with the plea of rectification itself, paragraph 3 of the proposed new statement of claim is in the following terms: "JMK and Toga were mistaken in executing and incorporating by reference the contract documents because on their proper construction the terms of the contract documents required JMK to undertake for the agreed price works other than the trade cost allocation works as detailed in paragraphs 29 to 36 above." A similar plea is made in paragraph 84.1 of the proposed statement of claim for the purposes of the assertion of execution of the document under a unilateral mistake.

Having regard to the lengthy recitation of facts, including the definition of what constituted the Trade Cost Allocation Works, it is to my mind clear that the plaintiff is advancing a case that the contract be rectified so that it provide no more than that the plaintiff undertake for the agreed price the Trade Cost Allocation Works. The authorities to which the defendant referred me do not, as I understand them, require the plaintiff to plead at length the exact amendments to the formal instrument sought on the rectification.

In Pukallus v Cameron [1982] 180 CLR 447, Wilson J at 452 summarised the principles which govern rectification of a contract. Relevantly for present purposes, his Honour said (omitting citations): "The second principle governing the rectification of a contract which is material to this case is that which requires the plaintiff to advance "convincing proof" that the written contract does not embody the final

intention of the parties. The omitted ingredient must be capable of such proof in clear and precise terms. The court must not assume for itself the task of making the contract for the parties."(underlining added)

True it is that at the hearing of the matter the plaintiff will need to demonstrate "exactly and precisely the form to which the deed ought be brought" (see Australian Gypsum Limited and Australian Plaster Company Limited v Hume Steel Limited [1930] 45 CLR 54 per Rich, Stark and Dixson JJ at 64 quoting Lord Chelmsford in Fowler v Fowler [1859] 45 ER 97),but in its context I think that paragraph 83 (and paragraph 84 relating to unilateral mistake) are sufficient notice to the defendant of the case which the plaintiff would seek to prove at trial.

This segues into the defendant's complaint about particulars. At an earlier stage of the proceedings (several years ago) I set the parties the task of producing a schedule in which the plaintiff was to identify precisely the scope of what it contended were the agreed Trade Cost Allocation Works and in which the defendant was to provide its responses to the plaintiff's contentions.

The parties took a considerable period of time to complete that schedule. I do not mean that in a critical way because the document that has been produced is detailed and comprehensive, running to some 390 pages. The document also contains hyperlinks to the relevant contractual and other

documents which are referred to or picked up by reference in the schedule.

The defendant complains however that the proposed statement of claim does not enable one to identify which parts of the work which the plaintiff says it performed were works covered by the formal instrument of contract in the forms executed but which were not within the ambit of the Trade Cost Allocation Works. It is at this point that the production of the schedule is revealed to have been prescient. Indeed to the extent that the defendant has sought these particulars the plaintiff has provided those particulars by cross-referencing to and incorporating its assertions in that schedule.

Relevantly, in respect of each of the trade descriptions, the plaintiff in the schedule specifies:
(a) what it contends to be the scope as actually agreed between the parties;

(b) matters which the formal agreement did not include; and

(c) matters contained in the original tender documentation which were rendered "irrelevant and redundant" by the formal agreement.

I should also note that the defendant in its column of the schedule has provided extensive and detailed responses to these matters advanced by the plaintiff.

I am not persuaded that the particulars of the plaintiff's claim, found in the schedule and responded to in the schedule, have not served the necessary purpose of defining the issues and preventing surprise at trial, or to enable the defendant to plead a defence (UCPR Rule 157).

The defendant's remaining points, namely that the amendment is too late and the defendant could not properly prepare for a trial in May are, so far as opposing the amendment is concerned, it seems to me completely answered in practical terms by the frank submission by counsel for the plaintiff that it would in effect be a waste of time and money for the plaintiff's case to be run at trial on the current pleading.

Amendments should, where possible, be allowed to enable the true issues to be ventilated. Whether the circumstances are such as to permit the amendment requires an assessment of all the relevant circumstances including delay, wasted costs, the effects on the parties, the effect on the court and other litigants, the nature of the amendment, the importance of the amendment, the stage at which the application is made, and any explanation for the delay (see Aon Risk Services Australia Limited v Australian National University [2009] 239 CLR 175).

It seems to me that, in the circumstances as I have outlined them, it would be bordering on the perverse for me not to allow the amendment. Needless to say, as was accepted by counsel for the plaintiff, there will be costs consequences in adopting that course.

The real question then is: on the basis that the amendments are allowed, whether the May hearing ought to proceed or be vacated. The pre-eminent factor for consideration under this head is whether the defendant would be prejudiced by being unable to prepare for a hearing within the time available.

The defendant asserts that it would not be ready for a hearing in May. It raises a number of obstacles. First, so far as works other than the Trade Cost Allocation Works are concerned, the defendant says that the task of endeavouring to identify differences between the executed formal agreement and the version of the plaintiff's scope articulated in its scope of contract schedule is a task which requires adequate analysis, the taking of instructions and the provision of response and is one which would take the defendant a number of months. On this basis the solicitor for the defendant has deposed that the first defendant would not be able to prepare for the preliminary hearing and address the issue of any alleged differences in scope now raised on the proposed pleading.

That however, it seems to me, ignores the fact that the plaintiff's claim in this regard is founded and particularised in the schedule to which I have already referred, being a schedule to which, as I've also already noted, the defendant has provided a substantive and detailed response. Mr Inatey SC who appeared with Mr Clothier for the defendant submitted that the defendant had not worked this aspect of the case up

to the degree required because, in effect, the defendant was so confident that the plaintiff's previously pleaded case was so hopeless that the application of time and resources on this issue was not warranted. Be that as it may, as I've already said, it is obvious from a review of the schedule that a significant amount of work has in fact been undertaken already on this task.

The next matter raised by the defendant is that the plaintiff pleads a unilateral mistake and contends that the defendant was aware of the mistake and the mistake was to the benefit of the defendant and the detriment of the plaintiff. The defendant says that the raising of this issue requires amongst other things examination of issues of quantum and that there is neither time nor proper resources available to address and investigate those issues before the scheduled commencement of the hearing on the 10th of May 2010.

It seems to me however that the defendant may be either misapprehending or inadvertently overstating the work that needs to be done in order to meet this aspect of the plaintiff's case. The case expressly advanced by the plaintiff in this regard, as was confirmed by counsel for the plaintiff in the course of argument, is not one which requires a detailed examination of quantum. Rather, the plaintiff's case at the hearing quite simply will be that the plaintiff was not prepared to do the work described in the tender specification (which it had tendered for at $65 million) for the price of $50 million. The plaintiff's case quite simply

is to point to the difference between those figures and the work that was performed under the contract and the work which was the subject of the Trade Cost Allocation Works.

A further issue raised by the defendant is that time is required in order to investigate equitable defences. Given that the works the subject of this proceeding have been fully executed, the scope of available equitable defences is limited. If any are available they ought in my view be able to be identified and pleaded in short order.

The defendant's other complaints of an inability to prepare on other aspects of the newly formulated claim are, with respect, variations on the same themes that I have already mentioned or have been rendered redundant by the plaintiff having dropped its Trade Practices Act claims.

A further complaint raised by the defendant was of the adequacy of the plea of the imputation of knowledge on the part of the defendant through the alleged knowledge of a Mr Portelli (who has long been mentioned in the statement of claim). That complaint however was completely answered in the course of argument by counsel for the plaintiff acknowledging that the plaintiff's case in that regard was limited to and could not go beyond the facts and matters pleaded and that it would be a matter of inference for the trial judge based on those facts and matters (if proved) which have been pleaded and known by the defendants for some considerable time.

Similarly, the defendant's complaints about there being "rolled up" pleas in the proposed statement of claim, when examined in argument, were revealed to be complaints about paragraphs incorporating previous allegations in the statement of claim by reference rather than offensive and impermissible “rolled up” pleas.

All in all, even at this stage, I am not presently persuaded that the material presently before me demonstrates that the defendant can not be ready for the hearing which is set to commence on the 10th of May 2010. That is not to say that the defendant will not have considerable work to do in the interim, much of which is work which the defendant made a forensic decision on when deciding not to undertake certain preparatory work having regard to its assessment of the merits of the plaintiff's case. I do not mean that in any way critically as against the defendant, but merely to make the point that the defendant is not now being requested or required to undertake work which, on a proper formulation of the case, would have needed to be done in any event.

The defendant should however be protected on costs so far as is reasonably possible by reason of the amendments. There is no doubt that the circumstances in which this application has been made and the frank and proper concessions made about the case as previously formulated and the circumstances in which the case has required to be changed make this an appropriate case in which any prejudice to the defendant by way of costs should be protected to the highest degree possible.

This is a case in which it is, in my opinion, clearly appropriate to order that the plaintiff pay the defendant's costs on an indemnity basis thrown away by reason of each of the amendments to the statement of claim up to and including the second amended statement of claim and the defendant's costs on an indemnity basis of and incidental to the present application. With those orders for costs, there will be leave for the plaintiff to file and serve the further amended claim and the third further amended statement of claim in the forms exhibited to the affidavit of Tyler Griffin sworn 19 March 2010. I will hear the parties as to the form of order now required and as to the directions necessary for the hearing to commence on the 10th of May 2010.

[Further argument]

Having heard further argument from Mr Sofronoff QC for the plaintiff, who proposes a regime with which Mr Clothier of counsel for the defendant is not opposition, I will not today make any order in relation to costs other than that the costs be reserved, and I will hear the parties further as to the question of indemnity costs in the terms as have fallen between counsel and me in the course of argument.
