

SUPREME COURT OF QUEENSLAND

CITATION: *UI International Pty Ltd v Interworks Architects Pty Ltd & Ors* [2010] QSC 280

PARTIES: **UI INTERNATIONAL PTY LTD**
ACN 070 639 422 as trustee for the LIN FAMILY TRUST
(plaintiff)
v
INTERWORKS ARCHITECTS PTY LTD
ACN 087 985 402
(first defendant)
and
PAUL THOMAS SHEPPARD
(second defendant)
and
MOSTIA CONSTRUCTIONS PTY LTD
ACN 010 608 009
(third defendant)
and
GROGAN RICHARDS PTY LTD
ACN 006 346 087
(fourth defendant)
and
MOSTIA PROJECT MANAGEMENT PTY LTD
ACN 099 777 223
(fifth defendant)
and
ROWAN WOODFORTH
(sixth defendant)
and
REDLANDS SHIRE COUNCIL
(seventh defendant)

FILE NO: BS 10390 of 2004

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 30 July 2010

DELIVERED AT: Brisbane

HEARING DATE: 30 April 2010

JUDGE: Daubney J

ORDERS: **1. The application by the fourth defendant to strike out paragraph 101(e) of the sixth amended statement of claim is dismissed with costs;**

2. (a) The plaintiff shall, within 14 days, provide to the seventh defendant further and better particulars of the allegation of vulnerability in paragraph 66 of the sixth amended statement of claim;

(b) The plaintiff shall pay the seventh defendant's costs of and incidental to the application for further and better particulars.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – where the fourth defendant has brought an application to strike out paragraph 101(e) of the statement of claim as it is not a plea of material facts on which the plaintiff relies – where the plaintiff submits it that is justifiable according to the rules of pleading as under rule 149(1)(c) it is required to plead matters which, if not pleaded, might take the other party by surprise – whether paragraph 101(e) of the statement of claim should be struck out

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – FURTHER AND BETTER PARTICULARS – where the plaintiff pleads that the plaintiff was vulnerable to any failure by the seventh defendant to exercise reasonable care – where no particulars of the vulnerability asserted have been provided – whether the plaintiff should be ordered to provide further and better particulars of the alleged vulnerability

Uniform Civil Procedure Rules 1999 (Qld), r 149, r 149(1)(c)

Banque Commerciale SA en Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279, cited

Nelson v BHP Coal Pty Ltd [2000] QCA 505, cited

Thiess Pty Ltd v FFE Minerals Australia Pty Ltd [2007] QSC 209, cited

COUNSEL: JK Bond, SC with S Armitage for the plaintiff
D de Jersey for the first and second defendants
S Rudz, solicitor, for the third defendant
PA Freeburn, SC with S Monks for the fourth defendant
No appearance for the fifth and sixth defendants
AM Musgrave for the seventh defendant

SOLICITORS: Rodgers Barnes & Green Lawyers for the plaintiff
Thynne & Macartney Solicitors for the first and second defendants
James Byrne and Rudz Solicitors for the third defendant
Sparke Helmore Lawyers for the fourth defendant
HWL Ebsworth for the fifth and sixth defendants
Barry & Nilsson Lawyers for the seventh defendants

- [1] The plaintiff was the owner of certain land at Shore Street, Cleveland. The land abutted the Raby Bay marina harbour. When the plaintiff bought the land in 2001, it was the subject of a development approval issued by the seventh defendant (the relevant local authority) and there were some incomplete plans and drawings for a mixed commercial, retail and residential development on the land in existence. The plaintiff, after having some preliminary works completed on the land, lodged a community management statement pursuant to the *Body Corporate and Community Management Act 1997*, as a consequence of which the Raby Bay Harbour Community Titles Scheme 30942 (“**the Scheme**”) was created over the land. The plaintiff became the registered proprietor of specified lots within that Scheme, namely Lots 3, 4 and 6 to 22 on Survey Plan 147268, and Lot 4 on Survey Plan 147266.
- [2] This case consists of claims by the plaintiff consequent upon its decision in 2001 to develop the land by constructing a mixed commercial, retail and residential complex (known as “The Raby Bay Harbour development” and “The Raby Bay Marine Village”). It has sued:
- (a) the first defendant (a firm of consultant architects) which the plaintiff alleges was engaged by it as the consulting architect for the project, together with the second defendant (alleged to be the managing director of, and agent for, the first defendant);
 - (b) the second defendant (alleged to be the construction manager for the project), the fifth defendant, being the company said to have been engaged as the project manager, and the sixth defendant, who was the director and shareholder of the fifth defendant;
 - (c) the fourth defendant (a firm of consulting engineers), said to have been engaged by the first defendant to act as the civil, structural and hydraulic engineers for the Raby Bay Harbour development; and
 - (d) the seventh defendant, said to have been statutorily responsible as building certifier and assessment manager for the Raby Bay Harbour development.
- [3] The plaintiff claims that its lots are physically located above, and gained structural support from, a basement car park structure, and that there are structural inadequacies in the basement car park structure which give rise to structural deficiencies in the plaintiff’s lots. In brief, these problems are said to be:
- (a) The concrete floor slabs of the basement car park are structurally inadequate;
 - (b) The concrete walls of the supporting basement car park are structurally inadequate;
 - (c) The post-tensioned concrete roof slab of the supporting basement car park is structurally inadequate.

The plaintiff’s pleadings particularise these alleged inadequacies, and their causes, in some detail.

- [4] There are presently two applications concerning the plaintiff's current pleading (the sixth amended statement of claim ("6ASOC")) for determination:
- (a) An application by the fourth defendant to strike out paragraph 101(e) of the 6ASOC; and
 - (b) An application by the seventh defendant for further and better particulars of paragraph 66 of the 6ASOC.

The application to strike out paragraph 101(e)

- [5] The plaintiff's case against the fourth defendant in contract and in tort is that, in providing its engineering consulting services, it failed to act with the care, skill and diligence that would reasonably be expected of a reasonably competent civil, structural or hydraulic engineer. Annexure A to the 6ASOC comprises a schedule of the particular acts or omissions which are alleged to constitute the particular incidents of negligent conduct by, inter alia, the fourth defendant. Paragraph 82 of the 6ASOC pleads:

"Breach of contract and/or duty by Grogan Richards

82 During the course of its purported discharge of the duties which this pleading alleges that Grogan Richards owed to the Plaintiff, Grogan Richards breached the Grogan Richards retainer and its duty of care in the respects identified in items 2 to 14, 16 to 22, 24 to 26, 28 to 29, 31, 33, 35 to 36, 38 to 39, and 41 to 42 of Annexure A to this pleading."

- [6] The plaintiff's pleading of the loss and damage it claims to have suffered commences at paragraph 90 of the 6ASOC. In particular, the plaintiff pleads facts and matters which it says entitles it to recover damages equal to the diminution in value of its lots. This part of the 6ASOC culminates in paragraph 101:

"101 In the premises of the foregoing, in consequence of the breaches of contract and/or duty of the defendants pleaded in the previous paragraph the Plaintiff has suffered loss and damage, the proper measure of which is the diminution in value of the Plaintiff's Lots caused by the breaches of contract and duty of which the Plaintiff complains.

Particulars

- (a) The Plaintiff has lost the whole of the value of the Plaintiff's Lots.
- (b) It measures that loss at not less than \$19,675,000, the calculation of which is particularised in Annexure C to this pleading and which may be summarised as follows:
 - (i) The current valuation of the Plaintiff's Lots without the structural deficiencies pleaded at [95] to [97] \$20,175,000
 - (ii) Less: the current valuation of the Plaintiff's Lot with the structural deficiencies pleaded at [95] to [97] \$nil

- (iii) Less the estimated additional cost the Plaintiff would have incurred to complete Lot 4 \$500,000.00
- (c) In the premises of the matters pleaded in [98] above, it is not reasonable to measure the plaintiff's loss by reference to the rectification costs.
- (d) The Plaintiff's case is that the various aspects of the defendants' conduct identified in [100] caused loss measured in the way identified.
- (e) On that case, the various aspects of the defendants' conduct which have elsewhere in this pleading been identified as conduct in breach of contract and/or duty, namely
 - (i) the breaches of contract and duty of Interworks and Mr Sheppard pleaded in items 1.1, 1.3, 30, 32, 34, 37, 40 43 and 52 of Annexure A to this pleading;
 - (ii) the breaches of contract and duty of Grogan Richards pleaded in items 28, 29, 31, 33, 35, 36, 38, 39, 41, 42, 50 and 51 of Annexure A to this pleading;
 - (iii) the breaches of contract and duty by Mostia Constructions pleaded in item 3 (so far as it relates to items 1.1, 1.3, 28, 29, 31, 33, 36, 39, 42 and 51 of Annexure A) of Annexure B to this pleading; and
 - (iv) the breaches of contract and duty of Mostia Project Management and Mr Woodforth pleaded in item 3 (so far as it relates to items 1.1, 1.3, 28, 29, 31, 33, 36, 39, 42 and 51 of Annexure A) of Annexure B to this pleading,

are not causally significant of the loss measured in the way identified but are matters which the Plaintiff will rely on at trial by way of background and which it pleads in compliance with the duty set out in rule 149(c) of the UCPR.”

- [7] The fourth defendant contends that paragraph 101(e) should be struck out. The fourth defendant says that this plea, which, by its terms, is of matters which are “not causally significant of the loss measured in the way identified” by the plaintiff, is not only vague but is irrelevant. It is not a plea of material facts on which the plaintiff relies in prosecuting its claim against the fourth defendant. By reference to the 41 allegations in Annexure A to which it refers, the paragraph alleges some 12 instances of breach which are not relevant to any of the pleaded claims, and are pleaded only on the basis that proof of any one or more of those breaches will establish the breaches on which the plaintiff relies in its claim. The fourth defendant says that, at best, the plaintiff might seek to lead evidence at trial of the matters referred to in paragraph 101(e) on the basis that it is “similar fact” evidence which, if permitted to be led at trial, would be relied on by the plaintiff to demonstrate a propensity for negligence on the part of the fourth defendant. In any event, continued inclusion of the “non-causal” matters referred to in paragraph 101(e) will add significantly to the length, expense and complexity of the trial.

- [8] The plaintiff submits that the scheme of the pleading is that Annexure A identifies some 53 breaches, which are then separated into two separate categories, namely:
- (a) 41 items which caused or materially contributed to the state of the plaintiff's lots, being those which caused or materially contributed to the structural inadequacy of the basement car park, and
 - (b) 12 items which did not cause or materially contribute to the state of the plaintiff's lots. It is these which are referred to in paragraph 101(e) of the 6ASOC.
- [9] The plaintiff says that the inclusion of paragraph 101(e) is justifiable according to the rules of pleading because:
- (a) although they are matters which are not causally significant of the damages which the plaintiff claims, they are still elements of the causes of action for breach of the particular contract which the plaintiff seeks to establish; those causes of action are complete upon the allegation of breach and each of the items comprises an allegation of breach of contract;
 - (b) *UCPR* r 149(1)(c) requires the plaintiff to plead these as matters which, if not pleaded, might take the other party by surprise.
- [10] Rule 149 provides:
- “149 Statements in pleadings**
- (1) Each pleading must -
 - (a) be as brief as the nature of the case permits; and
 - (b) contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved; and
 - (c) state specifically any matter that if not stated specifically may take another party by surprise; and
 - (d) subject to rule 156, state specifically any relief the party claims; and
 - (e) if a claim or defence under an Act is relied on – identify the specific provision under the Act.
 - (2) In a pleading, a party may plead a conclusion of law or raise a point of law if the party also pleads the material facts in support of the conclusion or point.”
- [11] In *Thiess Pty Ltd v FFE Minerals Australia Pty Ltd*,¹ White J (as her Honour then was) observed:
- “More generally, the purpose of pleadings is to inform the opposite party of the case it has to meet and to permit, in a responsive pleading, the issues to be narrowed. Furthermore, the defendant cannot be expected to intuit what

¹ [2007] QSC 209 at [38].

the plaintiff intends to convey in its pleadings by its own understanding of the facts and circumstances giving rise to the litigation. That would be a certain path to disaster.”

- [12] The plaintiff does not advance the pleadings in paragraph 101(e) as statements of material facts relied on, but rather as a specification of matters to avoid the fourth defendant being taken by surprise at trial.
- [13] In *Banque Commerciale SA en Liquidation v Akhil Holdings Ltd*,² Mason CJ and Gaudron J said:
 “The function of pleadings is to state with sufficient clarity the case that must be met In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision.”
- [14] Even accepting that the fundamental object of pleadings is to “bring the parties to the issue”³ that is left to the judge for determination, under the *Uniform Civil Procedure Rules*, particularly r 149(1)(c), and in practice pleadings extend beyond the sole function of identification and narrowing of issues to that of ensuring procedural fairness between the parties. So, in *Nelson v BHP Coal Pty Ltd*,⁴ McPherson JA noted that the practice of pleading terms implied as a matter of law only is a “convenient one, if for no other reason than that it might otherwise take the opposing party by surprise”, and invoked r 149(1)(c) in that regard.
- [15] It seems to me that the pleading in paragraph 101(e) can be justified on this basis alone. On a strictly technical basis, the plaintiff has the point that, even though the matters pleaded in paragraph 101(e) have no causal significance in respect of the damages claimed, the instances of breach articulated in that subparagraph are also expressly pleaded in paragraph 82 as breaches of the fourth defendant’s retainer and duty of care and that the causes of action in respect of those breaches are complete upon the allegations of breach. But even apart from that technical basis, it seems to me that it is quite appropriate for the plaintiff, in an action of this magnitude and complexity, to give notice not only of the bare elements of the case it intends to prove, but the basis on which it will seek to prove that case.
- [16] Nothing in what I say here is intended in any way to impact on the discretion of the judge managing this case to trial or of the trial judge in respect of the admissibility of evidence on these alleged instances of breach. There is clearly force in the fourth defendant’s submission that investigation of the issues raised in paragraph 101(e) will involve preparation and cost. If the evidence is allowed to be adduced, the trial may be lengthened. Management of these issues, however, involves considerations quite distinct from those which presently arise, namely whether the paragraph ought be struck out of the 6ASOC.

² (1990) 169 CLR 279 at 286.

³ To adopt the terminology of Brennan J in *Banque Commerciale v Akhil Holdings* at 288.

⁴ [2000] QCA 505 at [5].

- [17] For the reasons I have mentioned, it seems to me that paragraph 101(e), being a specific statement of matters which, if not stated specifically, may otherwise have taken the fourth defendant by surprise, is a pleading permitted by r 149(1)(c). The application to strike out that paragraph will be refused with costs.

The application for further and better particulars

- [18] As I have already noted, the seventh defendant is sued in its statutory capacity as building certifier and assessment manager. It is pleaded that the plaintiff, in making applications for development approval from the seventh defendant and developing the site, relied on the seventh defendant to exercise reasonable care in the manner it carried out its statutory responsibilities, and that such reliance was reasonable. The 6ASOC then pleads:

“65 Redland Shire Council both –

- (a) knew or ought to have known that persons such as the Plaintiff, and in fact the Plaintiff would so rely on it; and
- (b) assumed responsibility towards the Plaintiff for the exercise of reasonable care in the manner it carried out its statutory responsibilities.

Particulars

[Lengthy particulars are set out in the pleading]

66 It was reasonably foreseeable that failure to exercise such reasonable care would result in damage to the Plaintiff and further, the Plaintiff was vulnerable to any failure by the Redland Shire Council to exercise such reasonable care.”

- [19] The seventh defendant has sought further and better particulars of the vulnerability asserted by the plaintiff in paragraph 66.
- [20] The plaintiff has refused to provide these particulars on the grounds that:
- (a) the particulars are not necessary to enable the seventh defendant to understand the case it has to meet, and
 - (b) the vulnerability of the plaintiff to any failure by the seventh defendant to exercise reasonable care is not genuinely in issue.
- [21] These responses, however, put the cart before the horse. It is not at all apparent from the 6ASOC as to what particular facts, matters or circumstances are relied on by the plaintiff in making the assertion that the plaintiff was “vulnerable” as alleged. Without those particulars, the seventh defendant is unable to understand the basis on which it is alleged that the plaintiff was vulnerable. Moreover, it is plainly impossible for the seventh defendant either to admit or take issue with the allegation of vulnerability in the absence of a proper explanation and particularisation by the plaintiff as to the nature and basis of the vulnerability alleged.

[22] It is, in my opinion, clear that the plaintiff ought be ordered to provide these particulars.

Conclusion

[23] In argument before me, the counsel for the respective parties confirmed that there was no reason why costs ought not follow the event in respect of these applications.

[24] Accordingly, there will be the following orders:

1. The application by the fourth defendant to strike out paragraph 101(e) of the sixth amended statement of claim is dismissed with costs;
2. (a) The plaintiff shall, within 14 days, provide to the seventh defendant further and better particulars of the allegation of vulnerability in paragraph 66 of the sixth amended statement of claim;
- (b) The plaintiff shall pay the seventh defendant's costs of and incidental to the application for further and better particulars.