SUPREME COURT OF QUEENSLAND

CITATION:	*The Avenues Tavern (Townsville) v K P Architects* [2015] QSC 182
PARTIES:	**THE AVENUES TAVERN (TOWNSVILLE) PTY LTD** ACN 105 304 434 (respondent / plaintiff) **v** **K P ARCHITECTS PTY LTD** ABN 40 068 270 806 (applicant / defendant)
FILE NO/S:	SC No 12262 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	17 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	17 June 2015
JUDGE:	Douglas J
ORDER:	**1. That part of paragraph 15(a) of the further amended defence alleging that the plaintiff's claim is an apportionable claim be determined on the basis that;** **(a) the plaintiff's claim against the defendant, made by the statement of claim filed 20 December 2012, is an apportionable claim for the purpose of part 2 of chapter 2 of the *Civil Liability Act 2003* (Qld);** **2. Each party's costs are to be costs in the cause.**
CATCHWORDS:	TORTS – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – APPORTIONMENT IN PARTICULAR SITUATIONS AND CASES – where the plaintiff was the owner of a property on which a tavern was constructed, designed by the defendant architect, at least in part – where the original design placed the building on power and sewerage easements, a problem which required a redesign and caused some delay – where the plaintiff alleged the delay caused loss to it in the vicinity of $1.8 million – where the defendant's case was that acts and omissions of both the local council and a town planner, each of whom was involved in the

planning process, contributed to the loss claimed – whether the claim was one for economic loss and whether it was an action arising from a breach of a duty of care – whether the defendant's claim was apportionable for the purpose of part 2 of chapter 2 of the *Civil Liability Act 2003* (Qld)

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – where the plaintiff did not oppose the application by the defendant for a declaration that the plaintiff's claim against the defendant was an apportionable claim for the purpose of part 2 of chapter 2 of the *Civil Liability Act 2003* (Qld) – where each party had sought that the other party pay the costs of the application – where the declaration would have assisted the defendant to decide whether or not to join another party or parties to the proceeding as a third party – whether the plaintiff could have admitted the allegation of law on the pleadings and consented to treat the proceedings as one where it was not in issue

Civil Liability Act 2003 (Qld), pt 2, ch 2
Uniform Civil Procedure Rules 1999 (Qld), r 149

ASF Resources Limited v Clarke [2014] NSWSC 252
Grey v Australian Motorists and General Insurance Co Pty Ltd [1976] 1 NSWLR 669
Holdway v Arcuri Lawyers (A Firm) [2009] 2 Qd R 18; [2008] QCA 218

COUNSEL:	R J Anderson for the applicant / defendant T J Mitchell (solicitor) for the respondent / plaintiff
SOLICITORS:	Barry Nilsson Lawyers for the applicant / defendant Colin Biggers & Paisley for the respondent / plaintiff

[1] This is an application, in effect, for a declaration that the plaintiff's claim against the defendant made by the statement of claim filed the 20th of December 2012 is an apportionable claim for the purpose of part 2 of chapter 2 of the *Civil Liability Act 2003* (Qld).

[2] The application is brought by the defendant and not opposed by the plaintiff. Each party seeks the costs of the declaration against the other. The argument mounted supporting the claim for the declaration relates to the facts of the case pleaded. The plaintiff is the owner of property in Townsville on which a tavern was constructed, designed by the defendant architect, at least in part. The original design placed the building on power and sewerage easements, a problem which required a redesign and caused some delay, which the plaintiff alleges caused loss to it in the vicinity of $1.8 million.

[3] The defendant's case is that acts and omissions of both the local Thuringowa Council and a town planner, each of whom was involved in the planning process, contributed to the loss claimed, and that is why it argues that it is an apportionable claim for the purposes of the Act. That argument is based on an analysis of whether the claim is one for economic loss and whether this is an action arising from a breach of a duty of care.

[4] Paragraph 15 of the statement of claim sets out the plaintiff's claim, which is for economic loss, particularly for additional costs, loss of profits and loss of opportunity. It does not mount a claim relying on physical damage or any other claim, so it seems clear that the claim is one for economic loss.

[5] Similarly, paragraphs 11, 12 and 13 support the conclusion that the allegations are ones of a breach of duty of care, and the definition of duty of care in the dictionary in schedule 2 of the Act provides, for example, that it means a duty to take reasonable care or to exercise reasonable skill (or both duties), and that a duty means a duty of care in tort or a duty of care under contract that is concurrent and coextensive with a duty of care in tort.

[6] Paragraph 11 of the statement of claim pleads that it was a term of the defendant's retainer that it would perform its obligations with due care and skill and with the skill and professionalism of a reasonably competent architect, while paragraph 12 pleads a coextensive duty in tort. On that basis, it seems to me that the claim can therefore be described as an action arising from a breach of a duty of care so that there is substance in the argument supporting the declaration sought.

[7] The practical consequence of the declaration is that it assists the defendant at this stage to decide whether or not to join another party or parties to the proceeding as a third party. With a declaration made in the form I propose to make, it is clear that the action can proceed on the basis that the claim is an apportionable claim with the possible result that the potential liability of the defendant may be reduced, in effect, if it can establish that the council or the town planner were concurrent tortfeasors compared to whose liability for the damage suffered theirs can be reduced.

[8] The attitude by the defendant is that the plaintiff could have consented to treat the proceeding as one where this was not an issue. The issue was raised on the pleadings, as is permissible pursuant to rule 149 of the *Uniform Civil Procedure Rules* 1999 (Qld), although the consequences of non-admission of an allegation of law like that are not as drastic as the Rules provide as a consequence for the non-admission of allegations of fact.

[9] Mr Mitchell, the solicitor for the plaintiff, however, submitted that it was not appropriate for his client, in effect, to admit the allegation of law. More accurately, he submitted there was no obligation on the plaintiff to admit the allegation of law, and that any admission from the plaintiff in regard to the allegation would not be ultimately determinative of the issue and would be of little utility, referring to a decision of the Supreme Court of New South Wales in *ASF Resources Limited v Clarke* [2014] NSWSC 252 at [48] to [49], where Justice Kunc expressed the view, amongst other things, that it was undesirable unless absolutely necessary for a piece of legislation like the *Civil Liability Act* to be construed outside a factual context determined after a full hearing.

[10] He also drew my attention to the decision of the Court of Appeal in *Holdway v Arcuri Lawyers (A Firm)* [2009] 2 Qd R 18, where Keane JA discussed at paragraph [64] the consequences of admissions of matters of law or of mixed fact and law, stating that they would not necessarily be decisive if other evidence in the case shows that the admission was made in error and the circumstances are such that the party who made the error can advance the true position consistently with procedural fairness to the other party.

[11] His Honour went on to refer to a passage of a decision of Glass JA in the New South Wales Court of Appeal in *Grey v Australian Motorists and General Insurance Co Pty Ltd* [1976] 1 NSWLR 669 at 676, where his Honour said that, in point of principle, a party cannot be asked to admit a conclusion depending upon a legal standard. That, perhaps, is not so applicable under the regime established here by the *Uniform Civil Procedure Rules* 1999 (Qld), but Keane JA went on to say that if the admission of the matter of law is accorded probative value, its probative value may vary. It may or may not be sufficient to support a conclusion on matters such as an entitlement to property; whether it is sufficient will depend on the circumstances of the case.

[12] That suggests that there was utility in seeking the declaration at this stage, rather than at some later stage of the proceedings, and it seems to me to be a reasonable argument on the part of the plaintiff that it should not be required to pay the costs of the application. By the same token, it again seems to me that there is utility from the plaintiff's point of view in the resolution of this issue at an early stage, as that may assist the plaintiff in respect of its conduct of the proceeding as well.

[13] Each party had sought that the other party pay the costs of the application. In these circumstances, however, it seems to me that the better solution to the problem is to instead order that the costs be costs in the cause, having regard to the utility I perceive to both sides in the resolution of this matter at this stage.

Orders

[14] The order of the court is that:

1. That part of paragraph 15(a) of the further amended defence alleging that the plaintiff's claim is an apportionable claim be determined on the basis that;

    (a) the plaintiff's claim against the defendant, made by the statement of claim filed 20 December 2012, is an apportionable claim for the purpose of part 2 of chapter 2 of the Civil Liability Act 2003 (Qld);

2. Each party's costs are to be costs in the cause.