SUPREME COURT OF QUEENSLAND

CITATION:	*Sproats & Anor v North Queensland Training Services Pty Ltd* [2019] QCA 102
PARTIES:	**LAWRENCE J SPROATS** **JENNIFER E GINGER** **(applicants)** **v** **NORTH QUEENSLAND TRAINING SERVICES PTY LTD** **ACN 156 512 408** **(respondent)**
FILE NO/S:	Appeal No 11658 of 2018 DC No 190 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Townsville – Unreported, 28 September 2018 (Lynham DCJ)
DELIVERED ON:	28 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2019
JUDGES:	Holmes CJ and Fraser and Philippides JJA
ORDERS:	**1. The application for leave to appeal is refused.** **2. The applicants are to pay the respondent's costs of the application.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – FORM OF PLEADING – STRIKING OUT – where the applicants sought leave to appeal from a decision of a District Court judge not to strike out the respondent's first amended defence and counterclaim – where the District Court judge struck out 12 paragraphs of the pleading – where the applicants contend that the whole of the pleading should have been struck out – whether the court is satisfied that there is a reasonable argument that the primary judgment contains an error that requires correcting – whether an appeal is necessary to correct a substantial injustice to the applicant COSTS – APPEALS AS TO COSTS – OTHER MATTERS – where the District Court judge ordered that the parties' costs of the application in the District Court be their costs in the proceeding – where the costs order was made without submissions from the parties – where it remains open to the

	parties to apply to have the order set aside – whether the applicant has suffered any substantial injustice
	Australian Consumer Law (Queensland) *Competition and Consumer Act* 2010 (Cth), sch 2 *District Court of Queensland Act* 1967 (Qld), s 118(3) *Uniform Civil Procedure Rules* 1999 (Qld), r 5, r 149(1)(a), r 149(1)(b), r 171, r 444
	Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd & Ors [2011] QCA 252, considered *Fuller v Toms* [2010] QCA 283, considered *House v the King* (1936) 55 CLR 499; [1936] HCA 40, cited *Pickering v McArthur* [2005] QCA 294, cited *Robertson v Hollings & Ors* [2009] QCA 303, considered
COUNSEL:	D Forbes for the applicants K Barlow QC for the respondent
SOLICITORS:	Connolly Suthers for the applicants Stevenson McNamara for the respondent

[1] **HOLMES CJ:** The applicants, Mr Sproats and Ms Ginger, seek leave to appeal, pursuant to s 118(3) of the *District Court of Queensland Act* 1967, against a decision of a District Court judge refusing to strike out the first amended defence and counterclaim filed by the respondent, North Queensland Training Services Pty Ltd. His Honour struck out 12 paragraphs of the pleading, but the applicants contend that the whole should have been struck out.

[2] To obtain leave to appeal under s 118(3) usually requires the applicant to satisfy the court that there is a reasonable argument that the primary judgment contains an error which requires correction and that the appeal is necessary to correct a substantial injustice to the applicant; see, for example, *Pickering v McArthur*.[1] As the court observed in *Pickering v McArthur*, it is difficult to establish substantial injustice in relation to the exercise of a discretion on a matter of pleading

> "… especially where the discretion in question was exercised so as to permit the continuation of proceedings towards a hearing on the merits."[2]

[3] The proposed notice of appeal asserts that the primary judge erred in: failing to find that the amended defence and counterclaim as a whole were liable to prejudice a fair trial of the proceeding, as "difficult to comprehend ambiguous and internally inconsistent", and failing to strike it out under r 171 of the *Uniform Civil Procedure Rules* 1999 because of that tendency; dealing with the application by reference to individual paragraphs rather than dealing with it as a whole, so as to identify a lack of coherence; failing to find that as a whole it contravened the requirement for brevity in r 149(1) and conflicted with the purposes of the *Uniform Civil Procedure Rules* as expressed in r 5; and making orders as to costs without hearing from the applicants, thus denying them procedural fairness. Those grounds are precisely replicated as the reasons justifying a grant of leave, with the addition of the bald

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1 *Pickering v McArthur* [2005] QCA 294.
2 At [3].

assertion that a substantial injustice will occur if leave is not granted. The solicitor for the applicants seeks to add a reason in his affidavit, that leave to appeal is necessary to avoid any trial becoming unduly "complicated" and "disjointed".

The pleadings and the judgment at first instance

[4] The applicants sued the respondent for monies said to be owed pursuant to two agreements: the first, to supply accommodation and food, and the second, to provide transport services, to a number of students of training courses allegedly provided by the respondent at the applicants' hotel. The effect of the pleading was that there had been an agreement in respect of each of those matters entered in July 2015; that the respective services had been provided, the food and accommodation at an agreed daily rate and the transport services at the Commonwealth Government's "ABSTUDY" rate; and that they had only in part been paid for, leaving a balance of some $120,000.00 outstanding. Schedules containing the names of the relevant students, details of the transport provided and the debt alleged to be owed in each case were annexed.

[5] The respondent filed a defence and counterclaim which was the subject of an application that it be struck out in its entirety, or alternatively that particular paragraphs be struck out. By agreement the application was adjourned, with an order that the respondents file an amended pleading. The applicants then renewed the application in respect of the amended defence and counterclaim. Counsel provided the learned primary judge with an outline of submissions when the matter first came on for hearing, and on its renewal handed up an amended outline, while also relying for detail on the contents of a r 444 letter. (The r 444 letter was eight pages long and contained 79 paragraphs alleging different complaints, although while the application was adjourned, 20 of those had been removed in their entirety because the relevant issues were resolved, while others were pursued only in part.)

[6] Unfortunately, only the original outline of submissions is before this court; the amended outline of submissions is not in the appeal record. One has to discern what the complaints were from the r 444 letter, the transcript and the judgment. In oral submissions, counsel for the applicants asserted that if all the many defective paragraphs were struck out, the document left would be meaningless. For that reason, he submitted, the entire pleading should be struck out. He then proceeded to give, in fairly extensive detail, examples of the alleged defects.

[7] Given the submission that the amended defence and counterclaim as a whole was so unsatisfactory as to require its striking-out in full, it is necessary to review the entire document. The first two paragraphs of the defence admitted and pleaded formal matters, including that the respondent was a registered training organisation for the purposes of Commonwealth legislation. Paragraph 3 alleged that the applicants conducted a business which provided Vocational Educational Training (VET) for indigenous students and also provided accommodation to those students at their hotel. They were directors and shareholders in a company which provided transportation services for those students.

[8] Neither the applicants' business nor the company, it was pleaded, were registered training organisations; they thus could not seek direct funding from the Commonwealth's ABSTUDY program or its Away from Base (AFB) scheme (which provided reimbursement for travel funding and accommodation) or the Certificate 3

Guarantee subsidy (C3G) provided by the Queensland Government. The applicants were responsible for selecting students who were eligible for ABSTUDY and C3G and ought to have been aware that payments for accommodation and training at their premises were dependent upon students' eligibility for ABSTUDY, while their entitlement to transportation reimbursement depended on their being eligible for ABSTUDY and C3G. Paragraph 4 of the defence identified the Government departments and agencies which provided those subsidies and reimbursements.

[9] In paragraph 5, the respondent denied entering into the agreement to supply accommodation, food and, as the basis of that denial, alleged that it had made a training agreement with the applicants under which they were to deliver VET courses to students eligible for ABSTUDY and C3G funding, using the respondent's status as a registered training organisation to obtain that funding. The training agreement was said to have been made partly orally, at various meetings, partly in writing in the form of a Memorandum of Understanding, and partly by conduct which was particularised by a series of acts (most of which looked more like things done pursuant to an agreement than forming part of one). The terms of the training agreement were set out at length, but they included that the applicants were to ensure that students were eligible for ABSTUDY and C3G funding. The primary judge declined to strike out any of these parts of the pleading, observing that it was an explanation of the denial which was reasonable for the respondent to provide.

[10] The defence then proceeded, in paragraph 5(a)(vi), to plead a list of matters said to have been agreed between the applicants and the respondent over a six month period, without, as the primary judge noted, making it clear whether this was also part of the earlier pleaded agreement or a new set of agreements. The same paragraph was replicated in the counterclaim. The primary judge struck it out, together with another subparagraph, 5(c), which pleaded the content of correspondence, and in any event had not been made relevant by any other part of the pleading.

[11] Paragraph 6 of the defence denied an allegation in the statement of claim that the respondent had agreed to pay the applicants a specified nightly rate per student for food and accommodation. As the basis of the denial, it pleaded that the entitlement for food and accommodation arose through eligibility for ABSTUDY and the AFB scheme, and depended on the applicants' making sure the students were eligible for ABSTUDY and completed claims without mistakes. The pleading, rather wordily, set out the applicants' alleged responsibilities, and the respondent's lack of them, in this regard, and the basis on which AFB claims had been refused, alleging that the applicants' loss was caused by their failure to vet students for eligibility and ensure that claims were completed on time. The primary judge declined to strike the paragraph out, accepting that it was an explanation for the denial.

[12] Paragraphs 7-10 contained denials that the respondent provided courses at the applicants' hotel, was indebted to the applicants for food and accommodation charges, had made payment to the applicants in respect of those charges or owed money to the applicants, or that the applicants were entitled to claim the relief they sought. There were non-admissions as to whether the applicants had provided the food and accommodation or as to what amounts might be owed to it. The r 444 letter had complained of a lack of clarity, unresponsiveness and typographical errors. The primary judge did not consider any of the pleading to be impermissible.

[13] Paragraph 11 denied any transportation agreement, alleged that the applicants were responsible for the transport costs and also alleged that the respondent had made those claims which were permissible under ABSTUDY. The primary judge regarded it as providing an explanation for a denial of allegations in the statement of claim, but struck out one part of the paragraph which set out the content of correspondence.

[14] Paragraph 11A, which admitted that ABSTUDY transportation rates varied, and paragraphs 12 to 14, which denied indebtedness, were not the subject of any serious contention, although there was a complaint of a typographical error and a specious complaint that the respondent had referred to the applicants' own conduct as occasioning their loss, without specifying the conduct. In fact, the conduct had been set out in preceding paragraphs.

[15] Paragraph 15 claimed a set-off, by way of damages for breaches of contract and breaches of the *Australian Consumer Law* "as set out in the Counterclaim". There was a complaint that the paragraph failed to identify how the losses had occurred, but in fact the respondent did in the counterclaim set out various ways in which, as a result of those breaches, it had been prevented from carrying on its own training activities and unnecessarily expended resources. The primary judge described the paragraph as "more fulsome than necessary", but did not strike it out. Paragraph 16 was merely an abandonment of any set-off in excess of $750,000.

[16] The amended counterclaim began at paragraph 17, which, with paragraph 18, pleaded formal matters. Paragraphs 19 to 21 replicated paragraphs 2 to 4 of the defence and were struck out as unnecessary. No objection was taken to paragraph 22, which concerned the respondent's registered training organisation licence. Paragraphs 23 to 30 and paragraph 32 set out the history of the dealings between the applicants and the respondent, the respondent's actions in seeking approval to deliver training courses and the courses for which it was approved to receive AFB funding. The objections made to them were relatively trivial, concerning failures to give sufficient particulars and typographical errors, and have not been revived in this Court.

[17] Paragraph 31 pleaded the same list of matters which the primary judge had struck out where it appeared in paragraph 5(a)(vi) of the defence; these were the matters said to have been agreed between the applicants and the respondent over a six month period. Paragraphs 33 and 34 set out the Memorandum of Understanding and the respondent's intended reliance on it. Paragraphs 36 to 44 concerned the making and payment of claims for C3G funding and an audit conducted by the relevant Queensland Government department. Paragraphs 45 and 48 dealt with the consequence of that audit for the respondent: it had (it alleged) to refund monies paid by the Government and to cease its training activities at a correctional centre. Paragraph 46 complained of the applicants' non-return of some material to the respondent. Paragraph 47 alleged that the applicants had carried on other training at the time. None of these paragraphs seems to have been the subject of any serious contention.

[18] Paragraphs 49 to 53 replicated the pleading in paragraph 5 of the defence, of the making of the training agreement and its terms. The primary judge struck those paragraphs out as unnecessary, with leave to re-plead them by repeating and relying on the pleading in the defence, with the exception of paragraph 53, which was to be re-pleaded setting out those terms of the training agreement said later in the counterclaim to have been breached.

[19] Paragraphs 54 to 65 pleaded common law misrepresentation and false and/or misleading representations and misleading and/or deceptive conduct contrary to the *Australian Consumer Law* and the *Australian Consumer Law (Queensland)*. In each instance of misrepresentation it was alleged that the applicants had represented that they were aware of the relevant eligibility requirements, that their training staff had the necessary qualifications, that they could accommodate all the students, and that they would train only C3-5 eligible students; that each of those representations was false to the knowledge of the applicants; and that the respondent had relied on them and had suffered loss and damage. None of those paragraphs, according to the learned primary judge's judgment, was a subject of argument.

[20] Paragraph 66 alleged breaches of the terms of the training agreement, not all of which had been pleaded. That was the reason for his Honour's requirement that paragraph 53 be re-pleaded to set out the relevant terms, and paragraph 66 was correspondingly struck out with liberty to re-plead. Paragraph 67 alleged the loss and damage said to have been suffered in consequence of the breaches of contract. Paragraphs 68 to 70 alleged negligent misstatement causing economic loss, relying on identical particulars to those in the earlier paragraphs alleging misrepresentation.

[21] Paragraphs 71 and 72 set out how the respondent claimed to have suffered loss as a result of the misrepresentations and its reliance on them. Paragraph 73 made a general claim for damages under the *Australian Consumer Law* and the *Australian Consumer Law (Queensland)*. Paragraph 74 set out particulars of loss under the misrepresentation-type claims and the breach of contract claim respectively; the latter in part repeated the former. The prayer for relief claimed damages in both respects. The primary judge found there was no duplication, since these were alternatives.

[22] Having reached those conclusions, the primary judge made the order for striking out of the relevant paragraphs, with liberty to re-plead. He noted that relatively few of the paragraphs objected to had been struck out and ordered that the costs of the application be each party's costs in the proceeding.

The applicants' submissions

[23] The applicants relied generally on r 5 of the *Uniform Civil Procedure Rules*, which identifies the Rules' purpose as

> "… to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense"[3]

and prescribes their application

> "… with the objective of avoiding undue delay, expense and technicality and facilitating the [Rules'] purpose …".[4]

More particularly, the applicants relied on r 149, which requires pleadings to be "as brief as the nature of the case permits"[5] and requires that they state all material facts relied on but not the evidence by which they are to be proved;[6] and r 171, which

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3 Rule 5(1).
4 Rule 5(2).
5 Rule 149(1)(a).
6 Rule 149(1) (b).

gives the court discretion to strike out all or part of a pleading which "has a tendency to prejudice or delay the fair trial of the proceeding …".[7]

[24] In written submissions, the applicants took the odd approach of making complaints and seeking orders in relation to, not only the first amended defence and counterclaim which was before the primary judge, but the second amended defence and counterclaim which was produced in response to his Honour's orders; proposing, it seems, that this court embark on the exercise of an applications judge and review that document. That, of course, was misconceived.

[25] The complaint in relation to the primary judge's decision was that his Honour had not dealt with the application to strike out the defence and counterclaim in its entirety, but had confined himself to dealing with its defects on a paragraph by paragraph basis. Counsel submitted that the whole of the pleading should have been struck out because it was prolix. The example was given of the pleading in paragraph 5 of the training agreement said to have been made between the respondent and the applicants, which the applicants asserted was unnecessary. The repetition of particulars in paragraphs 54 to 65 and 68 to 70, alleging various forms of misrepresentation, misleading and deceptive conduct and negligent misstatement, were similarly said to have been unnecessary.

[26] It was asserted that the pleading in the counterclaim was incoherent, because having pleaded in each instance misrepresentation, or misleading conduct or negligent misstatement, as the case might be, the respondent in each instance then made the allegation that, as a consequence, it had suffered loss and damage, without making the necessary connection between the relevant misrepresentation, misstatement or conduct and that loss or damage. A particular complaint was that the allegation that the applicants knew representations were false amounted to a plea of the tort of deceit. In addition, the primary judge had made costs orders without asking the parties for their submissions.

[27] Counsel for the applicants relied particularly on three decisions of this court, *Fuller v Toms*;[8] *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd & Ors*;[9] and *Robertson v Hollings & Ors*.[10] In *Fuller v Toms*, the appeal was from a primary judge's refusal of leave to file an amended defence and counterclaim in a defamation action. Fraser JA, with whom the other members of the court agreed, described the 93-page pleading as excessively lengthy, beyond anything which could reasonably be regarded as necessary to meet the case. The first 15 pages identified the evidence on which the appellant proposed to rely. The pleading was

> "… repetitious, it was burdened with unnecessary adjectival and adverbial flourishes, and such facts as were alleged were often inextricably bound up with editorial comment, argument, and references to evidence".[11]

Fraser JA concluded that the primary judge had correctly characterised the pleading as inconsistent with r 149(1)(a) and (b). While the appellant was unrepresented, and thus suffered from some disadvantage, that could not justify permitting the pleading to stand, which would be contrary to the central purpose of the *Uniform Civil*

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7 Rule 171(1)(b).
8 [2010] QCA 283.
9 [2011] QCA 252.
10 [2009] QCA 303.
11 [2010] QCA 283 at [18].

Procedure Rules, expressed in r 5. The applicants relied on the case as illustrative of the application of the same rules on which they relied.

[28] The applicants submitted that the present case was on all fours with that in *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd*; as in that case, there would be an injustice if the applicants were required to plead to the defence and counterclaim, make disclosure in accordance with it, and proceed to trial on the basis of it. *Barr Rock* concerned, as this case does, an application for leave to appeal against a District Court judge's decision refusing an application to strike out paragraphs in a counterclaim. Philippides JA, who delivered the leading judgment in that case, observed that a party who had to contend with a pleading which did not coherently articulate the case against it was denied procedural fairness. They suffered the injustice of additional expense and inconvenience in preparing for trial in relation to irrelevant issues which could significantly lengthen the proceeding's duration. But the significant matter which warranted the granting of leave in that case was the primary judge's erroneous reliance on statements in *Spencer v Commonwealth*[12] in relation to the power summarily to end proceedings, under the misapprehension that they applied also to striking-out under r 171(1)(b)(e).

[29] The third case, *Robertson v Hollings*, concerned a self-represented appellant whose pleading had been struck out at first instance and in respect of whose notice of appeal a further strike-out application had been made in this Court. The appellant abandoned her original grounds of appeal and purported to deliver an amended notice of appeal. The Court observed that to allow those amendments would be pointless and that while it was unfortunate for the appellant that she was not represented, she could nonetheless not be permitted to proceed "unconstrained by the rules".[13] The amended statement of claim which was the subject of the appeal itself did not meet the

> "irreducible minimum requirements of fairness and rationality".[14]

Discussion

[30] In the present case, the primary judge began his judgment by setting out r 171 and r 149, relied on by the applicants, and reviewed authorities in relation to them. There was no suggestion that his Honour made any error as to the principles to be applied in relation to striking out; the complaint was that he had not applied them correctly in exercising his discretion as he did. His Honour noted that the application was for the alternatives of striking out the entirety of the pleading or parts of it; so there is no doubt that he appreciated that the applicants' primary argument was for striking out in full. It was necessary for the judge to consider each paragraph which the applicants purported to identify as defective because, firstly, the applicants relied on the extraordinarily detailed r 444 letter, and secondly, their argument was, in essence, that it was the accumulation of those defects and the consequences of their being struck out which would render the pleading as a whole unintelligible.

[31] His Honour undertook that consideration, and found that the defects were not as comprehensive as the applicants suggested. Having reached his conclusion about

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12 (2010) 241 CLR 118.

13 At [11].

14 At [13].

the paragraphs which ought to be struck out and allowing them to be re-pleaded, he concluded his reasons by saying

> "Otherwise the application is dismissed";

clearly rejecting the proposition that the entire pleading should be struck out.

[32] It was, as the primary judge said, reasonable for the respondent to plead the basis for denial of the applicants' allegation that it had entered a particular agreement by pleading that the agreement made between the parties was of a different nature. It was similarly open to his Honour to conclude that other pleaded bases for denial, as to the arrangements between the parties and the applicants' responsibilities, while perhaps more wordy than strictly necessary, ought not be struck out. Where the various forms of misrepresentation and misleading conduct and misstatement were alleged, the repetition of particulars was not ideal, but it was a permissible form of pleading what were separate causes of action. The respondent did, in fact, identify in general terms losses suffered from alleged misrepresentations; no doubt that aspect could have been the subject of a request for further particulars. It is not apparent that the point taken here about the allegation of knowing falsity amounting to the tort of deceit was made below; it does not appear in the transcript or the r 444 letter. But if the respondent did overstate its case, that could, one would think, only be to the applicants' advantage.

[33] Another judge might have been more stringent in his or her exercise of the strike-out discretion, but the applicants have not shown that his Honour actually erred in refusing to strike out any particular part of the pleading. Indeed that was not, to be fair, their case here. What they argued was that, having reached conclusions about the unsatisfactory portions of the document, the primary judge should have considered it as a whole and should have struck it out in its entirety as prolix and incoherent. But the respondent's case, both in the defence and the counterclaim, was intelligible: it was that there was a different set of arrangements from that being contended for by the applicants and that the latter had not met their obligations under those arrangements. No one could call the pleading elegant, and it could certainly have been considerably streamlined. However, it was not unmanageably lengthy, and it should not have left the applicants in any real doubt about the case they had to meet.

[34] This case is distinguishable on its facts from the three decisions on which the applicants relied, which involved an entirely different degree of non-compliance with the *Rules*; and such statements of principle as appear in those cases contain do not point to any error by the primary judge. The applicants do not have any real prospect of showing that his Honour was under any misapprehension as to the task to be performed, or that his exercise of discretion was unreasonable or subject to some other form of *House v the King* error.[15] Nor have they shown that to continue to trial on the basis of the pleadings, with the paragraphs identified by the primary judge struck out and re-pleaded, would cause them any injustice. I would not give leave to appeal.

[35] There remains the question of the costs order, which was made without submissions from the parties. Since it was made in their absence, it was open to either party – and still is – to apply under r 667(2) to have it set aside. In any event, the order itself, making each party's costs costs in the proceedings, does not seem to be

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[15] (1936) 55 CLR 499.

inherently unfair, so as to raise any concern of substantial injustice should it be left undisturbed. I would refuse leave to appeal that order also.

Orders

1. The application for leave to appeal is refused.
2. The applicants are to pay the respondent's costs of the application.

[36] **FRASER JA:** I agree with the reasons for judgment of Holmes CJ and the orders proposed by her Honour.

[37] **PHILIPPIDES JA:** I agree with the reasons of Holmes CJ and the orders proposed by her Honour.