MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Jayden Andrew Oppermann t/a J & K O's Construction v Trott & Anor* [2023] QMC 8
PARTIES:	**JAYDEN ANDREW OPPERMANN TRADING AS J & K O'S CONSTRUCTION (ABN 73 048 184 234)** (Plaintiff) **V** **JEFF MALCOLM TROTT** (First Defendant) & **SUE JANE TROTT** (Second Defendant)
FILE NO/S:	M2154/22
DIVISION:	Magistrates Courts
PROCEEDING:	Application
ORIGINATING COURT:	Magistrates Court
DELIVERED ON:	29/06/2023
DELIVERED AT:	Brisbane
HEARING DATE:	24/03/2023
MAGISTRATE:	Magistrate Pinder
ORDER:	(1) The Defendants Application is dismissed (2) I will hear the parties as to Costs and Directions orders
CATCHWORDS:	Procedure – Rules of Court – Application to strike out pleadings – Application for further Particulars *Uniform Civil Procedure Rules 1999* (QLD) r 161, 162, and 171
COUNSEL:	T. Ambrose for Plaintiff S. Gibson for first and second Defendants
SOLICITORS:	Borker Mezz Lawyers for Plaintiff

Hallewell Law for first and second Defendants

[1] The plaintiff carried on the business of building and construction and undertook the renovation of a house owned by the defendants. The plaintiff brings suit against the defendants claiming monies due and owing on a quantum meruit basis for building works in the sum of $116,636.79.

The plaintiff's application

[2] The plaintiff applied for orders (in the alternative)-

1) That paragraphs 6 and 7 of the statement of claim be struck out – pursuant to r. 171 of the *Uniform Civil Procedure Rules 1999* (QLD) (**UCPR)**

2) That paragraphs 6 and 7 of the statement of claim be struck out – pursuant to r. 162 UCPR.

3) That the plaintiff provide further and better particulars of paragraphs 6, 7, and 10 of the statement of claim, per the defendants request for further and better particulars dated 20 December 2022 – pursuant to r. 161 UCPR.

4) Consequential cost orders – that the plaintiff pay the defendants' costs on either an indemnity or standard basis

[3] The application was opposed by the respondent plaintiff.

The defendants' material

[4] The applicant defendant read and relied on

- Application filed 1 March 2023
- Affidavit KR Woolston filed 1 March 2023
- Affidavit KR Woolston filed 14 March 2023

[5] Both the plaintiff and defendants relied on the pleadings, namely

- Statement of claim filed 4 November 2022
- Defence filed 30 November 2022
- Request for further and better particulars dated 20 December 2022
- Further and better particulars dated 22 December 2022

[6] Both counsel for the applicant defendants and the respondent plaintiff assisted the court by providing written outlines of argument. Those written outlines were supplemented by brief oral submissions.

Strike out application

[7] The applicant defendants apply in the alternative to strike out paragraphs 6 and 7 of the statement of claim either pursuant to

- R. 171 UCPR or
- R. 162 UCPR

[8] The applicant defendants' written outline and oral submissions did not address the strike out application pursuant to r. 162 UCPR.

[9] R.162 – striking out particulars – is expressed in similar terms to r. 171 and engages similar considerations.

[10] The applicant defendants' counsel in oral submissions clarified that the strike out application was really confined to an application to strike out pleadings pursuant to r. 171. On that basis, further consideration of the application to strike out particulars pursuant to r. 162 is unnecessary.

[11] R. 171 of the UCPR provides:

> (1) This rule applies if a pleading or part of a pleading-
>
> (a) Discloses no reasonable cause of action or defence; or
>
> (b) Has a tendency to prejudice or delay the fair trial of the proceeding;
>
> (c) Is unnecessary or scandalous;
>
> (d) Is frivolous or vexatious; or
>
> (e) Is otherwise an abuse of process of the court?
>
> (2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order costs of the application to be paid by a party calculated on the indemnity basis.

[12] The applicant defendants contend that the statement of claim in its current form is defective and paragraphs 6 and 7, framing the plaintiff's claim on a quantum meruit basis, fail to particularise the "request" and "the scope of works"

[13] The plaintiff responds contending that the pleaded claim in the statement of claim is uncontroversial and compliant, but in any event any further particulars of the claimed defects will be addressed through disclosure and the usual case management in a building claim.

Discussion – strike out application

R. 171 has been considered on a number of occasions by the Supreme Court.

[14] In *Royalene Pty Ltd v The Registrar of Titles and Mistilis* (2007) QSC 059 the court said in respect of r. 171 at paragraph 6

> The focus of argument was principally on UCPR 171(1)(a) which is concerned with pleadings that disclose no reasonable cause of action or defence. UCPR 171(3) provides that on the hearing of an application to strike out part of a pleading, the court is not limited to receiving evidence about the pleading. Even to the extent that that may involve a relaxation of the approach that applied under the former rules, there is still good reason to regard the applicable principle to be that the discretion to strike out should only be exercised where the defence raised is obviously untenable. Conversely it should not be exercised except in clear cases. (*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 130; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 84 and 91). That is especially so where the case is pleaded as a circumstantial one and the inference to be drawn from evidence critical to determining liability is not common ground and the evidence is untested.

[15] The discretion to be exercised pursuant to r. 171 was considered again by the court in *Salvatore Coco v Ord Minette Ltd* (2012) QCS 324 where the court said commencing at paragraph 17 as follows

> [17] The application to strike out the entirety of the statement of claim calls up whether the defects, which I have just mentioned, are sufficient to warrant an order in the exercise of discretion that the whole pleading be struck out. The discretion is informed by a number of relevant principles and factors. I do not propose to essay the law for the purposes of deciding this application. However, it is an important function of pleadings that they limit the scope of and inform the issues which must be litigated at the trial so that the trial can proceed in the most efficient way. In a case of this kind, the overriding duty of a party in UCPR 5 does not lessen the importance of accurate pleadings – if anything it increases them.
> [18] Secondly, the exercise of discretion under UCPR 171 varies according to which of the relevant paragraphs of that rule is in play. For example, if the court determines that a statement of claim discloses no reasonable cause of action it is determining that the facts pleaded are not capable in law of giving rise to the relief sought. Cases such as General Steel Industries Inc v Commissioner for Railways $(NSW)_{23}$ show that even lengthy argument may be necessary to dispose of what is ultimately a question of law. This is not an application of that kind.
>
> [19] On the other hand, where the problem is one of inadequate or inaccurate pleading which has a tendency to prejudice or delay a fair trial, or the pleading contains unnecessary or scandalous allegations or frivolous or vexatious allegations, or is otherwise an abuse of the process of the court, there tends to be a more general discretion. Nevertheless, the case law recognises that a pleading may be so

> defective notwithstanding earnest attempts by the pleader that —it will be an act of mercy to strike it out.[24] That is so, even though it is for the party pleading to formulate its case and the court's role is primarily to consider whether a reasonable cause of action is disclosed, and to facilitate the just and expeditious resolution of the real issues rather than to dictate to a party a rigid manner in which a case should be pleaded. In summary, the courts are slow to interfere and ordinarily act only where there is some substantial objection or some real embarrassment.

[16] Similarly, the Court of Appeal decision of *Robert Bax and Associates v Cavenham Pty Ltd* (2011) QCA53 when the Court said in respect of the rule at paragraph 16

> Rule 171 closely resembles the language of former O 22 r 32 Rules of the Supreme Court 1991 (Qld) which enabled a judge to strike out or amend any matter in the pleading which tended "to prejudice, embarrass, or delay, the fair trial of the action". The word "embarrass" has not been retained. Nonetheless any pleading which is difficult to follow or objectively ambiguous or creates difficulty for the opposite party insofar as the pleading contains inconsistencies, is liable to strike out because it can be said to have a tendency to prejudice or delay the fair trial of the proceeding rather than "embarrass" the opposite party

[17] Those considerations of r. 171 follow the principles enunciated in the decision in *Butler v Crowley and Galvin Solicitors* (1999) QSC 6 where the Honourable Justice Muir said commencing at paragraph 4

> [4] In my view, it would be unjust to permit a trial of action on the basis of the allegations in the statement of claim. The defendant could not hope to identify with any reasonable precision the case it is called on the meet. It would also be put in the position of having to prepare to meet innumerable allegations which are irrelevant to allegations of breach of duty and loss of damage… the duration of any trial of the action and, in consequence, its cost, would be unnecessarily increased and the prospects of due determination of relevant issues decreased. The defendant would be prejudiced by being unable to sensibly formulate an offer of settlement…"

[18] The plaintiffs cause of action is on a quantum meruit.

[19] The plaintiff correctly identifies the principles in respect of an action brought on that basis as articulated in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221. There the High Court held that a right of a builder to recover on a quantum meruit does not depend upon the existence of an implied term in contract but on a claim to restitution independent of contract. Further "the ordinary common law right of a builder to recover, in an action founded on restitution or unjust enrichment, reasonable renumeration for work done and accepted under a contract which is unenforceable by him."

[20] The plaintiff's pleaded case in the statement of claim is consistent and properly founded on that right of action.

[21] In considering the plaintiffs pleaded cause of action in the statement of claim, the requirements of a statement of claim provided in r. 149 (1) UCPR must be considered.

[22] R. 149(1) of the UCPR requires that 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) *be 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.*

[23] The correct approach to pleading material facts was summarised by Jackson J in *Mio Art Pty Ltd v Macequest Pty Ltd* (2013) QSC 211 where his Honour said;

> *[65] ...If a plaintiff proves all the material facts, it must succeed on the cause of action. Thus the case is reduced to its factual skeleton in law. By adhering to the concept of a material fact in the practice of pleadings, the courts serve the purposes of efficiency and cost-saving which inform the procedural rules. The only issues joined are upon material facts. The only evidence led proves or disproves the material facts. The decision in the case is not affected by the irrelevant and the decision maker is not distracted from the material facts.*
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> …
>
> *[71] Informed by those considerations, the search in paragraphs [1] to [24] for the precise material facts that constitute the specific breaches of the covenant or contract is objectionable pleading.* ***In my view, even if it does not offend the requirements that the pleading "must… be as brief as the nature of the case permits [and] not [contain] the evidence by which the facts are to be proved." For brevity, I will call such a problem the "narrative defect"…***
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> ***[72] The narrative defect obscures the articulation of exactly what constitutes the relevant breaches of covenant or contract.***

[24] That approach was endorsed by Freeburn J in the decision of *Earthtec Pty Ltd v Livingstone Shire Council* (2023) QSC 22 where his Honour observed;

> *[33] A statement of claim serves to identify the material facts that support the claims made in the claim…*
>
> *[34] The requirements of brevity, and the requirement to state the material facts rather than the evidence, serve an important purpose. The objective is for the case to be reduced to its 'factual skeleton'. Thus, if a statement of claim pleads material that does not comprise material facts, the defendant is required to respond with the result that unnecessary fronts are opened in the battle between the litigants…*

[25] His Honour continued:

> *[45] The requirement in UCPR 149(1)(c), that a party identify any matter that may take their opponent by surprise, may sometimes justify pleadings that go beyond the material facts that are strictly necessary for the claim or the ground of defence. In that sense the 'no surprise' requirement in UCPR 149(1)(c) operates as an exception to the requirement in UCPR 149(1)(b) that the pleading 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.*
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> …
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> *[47]* ***The 'no surprise' exception does not require a pleader to guarantee that the opposing party will encounter nothing unexpected at the trial.*** *Trials are full of the unexpected. The 'no surprise' exception requires that a pleading contain all that is reasonably and fairly necessary to ensure that the opposing party is not met at the trial by an unexpected turn in the case which that party, acting in good faith and reasonably, is unable to meet because of a natural failure to prepare to meet it having regard to the content of the pleading. Whether a pleading does or does not comply with this requirement is a matter for the assessment and judgment of the judge who must decide the question ahead of the trial, like all pre-trial rulings.*
>
> *[48] The 'no surprise' exception does not give a pleader an open licence to plead immaterial facts or to plead evidence.* ***The intention is merely to provide for exceptional cases where there is a genuine apprehension of surprise. To give the 'no surprise' exception a wider function would undermine the requirement of UCPR 149(1)(b) to plead all the material facts on which the party relies but not the evidence by which the facts are to be proved.***
>
> *[49] The effect of UCPR 149(1)(b) is to confine the pleading to material facts and to exclude matters of evidence from the pleading.* ***Where there is no reasonable prospect of surprise only the material facts ought to be pleaded. That is because pleadings which trespass into evidence endanger proper definition of the issues and risks the creation of false issues. As it happens, in modern civil litigation the element of surprise is largely diminished by the common practice of having the parties, usually in advance of the trial, file and serve affidavits or statements or even summaries of their evidence-in-chief.***

[26] The plaintiff has pleaded his quantum meruit basis by particularising both the scope of the works and the calculated value of them in a schedule forming part of the Statement of Claim.

[27] The plaintiff correctly identifies that based on the pleading requirements of a Statement of Claim and consistent with the decisions of *Mio Art Pty Ltd v Macequest Pty Ltd and Earthtec Pty Ltd v Livingstone Shire Council,* the defendants' contention that further particulars are required to be pleaded would result in a lengthy and cumbersome pleading which would offend the general principles identified in that case. The applicant defendants have failed to identify, upon a proper consideration of the plaintiff's pleaded claim in quantum meruit, any defect in the pleading which would engage a consideration of r. 171 UCPR and in particular, the principal basis advanced by the applicant defendants that the pleading "has a tendency to prejudice or delay the fair trial of the proceedings."

[28] The applicant defendants' application to strike out paragraph 6 and 7 of the statement of claim either pursuant to r. 171 or r. 162 must fail and ought be dismissed.

Application – further and better particulars

[29] The applicant defendants apply in the alternative for further and better particulars of paragraphs 6, 7, and 10 of the statement of claim – pursuant to a request further and better particulars dated 20 December 2022.

[30] The plaintiff responded with further and better particulars dated 22 December 2022 and contends that adequate particulars had been provided but in any event the action should proceed in the usual way for a building dispute including the preparation of a Scott schedule following case management directions which will define the issues and appraise the parties of the case that must be met.

[31] R. 161 UCPR relevantly provides

(1) A party may apply to the court for an order for further and better particulars of the opposite party's pleading.

(2) The court may, on an application under subrule (1), make the consequential orders and give the directions for the conduct of the proceeding the court considers appropriate.

…

[32] The oppressive nature of the defendants' request for particulars is reflected in the document itself, which makes 215 requests for particulars.

[33] As the plaintiff identifies, the defendants' requests can be grouped as requests for

(a) What work was performed

(b) When the work was performed

(c) Who performed the work

(d) How were the materials for the work supplied.

[34] The plaintiff's response to the request for particulars is the provision schedule (A) identified and included as part of the plaintiff's pleaded case in the Statement of Claim

[35] The schedule adequately particularises the Plaintiff Claim, subject to the further Disclosure and Case Management in a Building Claim

[36] The particulars as provided both in the formal response dated 21 December 2022 and filed 22 December 2022 and the subsequent tabulated responses of 9 February 2023 are adequate and meet the defendants' requests.

[37] Uncontroversially, and following disclosure by the parties, a building dispute of this type will require case management directions (including directions in respect to the exchange of lay and expert evidence and the preparation of a Scott schedule) to aid in defining the issues, appraising the parties of the case that each must meet and advancing it to an efficient disposition at trial.

[38] The applicant defendants have not demonstrated a defect in the particulars provided nor in a need for further particulars at this time.

[39] The application for further and better particulars therefore must fail and should be dismissed.

Disposition

[40] I order: -

(1) The Defendant Application for strike out and further particulars is Dismissed.

Costs and consequential case management directions.

[41] The parties will be heard as to appropriate orders for costs and further case management directions.