IN THE SUPREME COURT OF QUEENSLAND No. 657 of 1986

CIVIL JURISDICTION

BEFORE MR. JUSTICE MOYNIHAN

BRISBANE, 19 May 1989

BETWEEN:

J.R. WYLLIE & SONS PTY. LTD. Plaintiff

-and-

J. SCOTT BUILDERS PTY. LTD. First Defendant

-and-

GHD-PLANNER WEST PTY. LTD. Second Defendant

JUDGMENT

HIS HONOUR: For the reasons which I now publish, I refuse leave to deliver a fresh edition of the pleading.

When you look at the last paragraph you will see it talks about “first edition of the pleading” and “first” is meant to be “fresh”.

I thought that there ought to be a stay as against the defendant who succeeded, in other words, the second defendant in respect of the proceedings. My impression was that the position of the first defendant was more or less in limbo pending the resolution of the matters in respect of the second defendant. So I have not proposed any orders

in respect of the position of that defendant, and having regard to the outcome I thought you would probably be looking at the costs of the application as between the plaintiff and the second defendant.

MR. DOYLE: Yes, it could be difficult to resist that, and that would be the costs of the action.

HIS HONOUR: I suppose the formal orders are then: that I refuse leave to deliver a fresh statement of claim; I stay the action as against the second defendant; and I order the plaintiff pay the second defendant's costs of and incidental to the action and to the proceedings leading to the orders which I now make, to be taxed.

What I will do, Mr. Bowden, in relation to costs, I will reserve them.

IN THE SUPREME COURT OF QUEENSLAND No. 657 of 1986

COMMERICAL CAUSES JURISDICTION

BEFORE MR. JUSTICE MOYNIHAN

BRISBANE, 7 JUNE 1989

BETWEEN:

J.R. WYLLIE & SONS PTY. LTD. Plaintiff

-and-

J. SCOTT BUILDERS PTY. LTD. First Defendant

-and-

G.H.D.PLANNER WEST PTY. LTD. Second Defendant

JUDGMENT

HIS HONOUR: For reasons which I published, I would refuse the plaintiff leave to deliver what I have described as the fresh edition of the statement of claim to the first defendant. That would seem to carry the consequence that the plaintiff pay the first defendant's costs to be taxed in the proceedings before me in respect of the delivery of the proposed fresh edition of the pleadings unless there is something that doesn't occur to me that you would want to urge on me.

Those will be the orders, and I publish my reasons.

IN THE SUPREME COURT OF QUEENSLAND No. 657 of 1986

TOWNSVILLE

COMMERCIAL CAUSES JURISDICTION

BEFORE Mr. Justice Moynihan

BETWEEN:

J.R. WYLLIE & SONS PTY. LTD. Plaintiff

AND:

J. SCOTT BUILDERS PTY. LTD. First Defendant

AND:

G.H.D. - PLANNER WEST PTY. LTD. Second Defendant

JUDGMENT - MOYNIHAN J.

Delivered the 19th day of May, 1989

Counsel: S.L. Doyle for Plaintiff
R.N. Chesterman Q.C. and L.D. Bowden for First Defendant
C.E.K. Hampson Q.C. and S.M. Burke for Second Defendant

Solicitors: Messrs. Henderson Trout for Plaintiff
Kinsey, Bennett & Gill for First Defendant
Messrs. Morris Fletcher & Cross for Second Defendant

Hearing dates: 6 July, 1988

IN THE SUPREME COURT OF QUEENSLAND No. 657 of 1986

TOWNSVILLE

BETWEEN:

J.R. WYLLIE & SONS PTY. LTD. Plaintiff

AND:

J. SCOTT BUILDERS PTY. LTD. First Defendant

AND:

G.H.D. - PLANNER WEST PTY. LTD. Second Defendant

JUDGMENT - MOYNIHAN J.

Delivered the 19th day of May, 1989

This is a case on the Commercial Causes “B” List Building and Engineering Cases. Since the institution of the proceedings on 11 December, 1986 the plaintiff's endeavours to formulate a case against the second defendant have passed through some half dozen or so editions of a statement of claim. On 2 September, 1987 I struck out certain paragraphs which went to the heart of the case the plaintiff sought to plead against the second defendant in the then current edition of the statement of claim. I gave leave however for the delivery of a further amended

statement of claim. On 6 April, 1988 I ordered that the further amended pleading delivered pursuant to that leave be struck out on the ground that it did not disclose a cause of action against the second defendant, that it was frivolous, vexatious and that it tended to embarrass or delay the fair trial of the action. I concluded, that the pleading was an abuse of the process of the court. I did not give leave at that stage for the delivery of a further pleading there being no application in that respect before me.

There was no appeal from the decisions to which I have referred. That there were editions of the statement of claim in addition to those dealt with in the applications to which I have referred is explicable by those editions having been produced after complaint by the second defendant to the plaintiff and without application to the court.

The question which now arises is whether the plaintiff ought be permitted yet another chance, in the form of a proposed further edition of the statement of claim identified by reference to it bearing the date 24 June, 1988 which it seeks to have leave to deliver, to see if it can make out a case against the second defendant.

The circumstances giving rise to the plaintiff's endeavours to formulate a case against the second defendant, broadly speaking, are these. The Townsville Hospitals' Board accepted the first defendant's tender to carry out work at the Board's Townsville Hospital and entered into a contract with the first defendant to that end. The plaintiff was a nominated subcontractor pursuant to this head contract and in turn entered into a subcontract with the first defendant in respect of the replacement of “piped services” in Block A of the Hospital.

The second defendant is a consulting engineer and project manager. For present purposes it may be accepted that it prepared the schedule of rates and certain at least of the relevant drawings relating to the work which became

the subject of the subcontract between the plaintiff and the first defendant. It will be appreciated that there is no contractual relationship between the plaintiff and the second defendant.

In an early edition of the statement of claim, delivered on 11 March, 1987, the plaintiff had alleged that due to defects in the preparation of the contractual documents, Bill of Quantities, drawings and specifications it was:—

(a) required to perform specified additional works;

(b) entitled to be paid additional sums by way of extension of time cost and rise and fall.

It then asserted that although the additional work was "claimable under cl. 36 of the subcontract", due to the negligence of the second defendant the amount of $306,797.30 was recoverable from the second defendant in respect of it.

In the pleading struck out on 2 September, 1987 the plaintiff had alleged that the second defendant was negligent in omitting from the tender bill of quantities, drawings and specifications, which it will be appreciated were not prepared for the plaintiff, details of the full extent of the work required to be performed under the subcontract ultimately entered into between the plaintiff and the first defendant.

The plaintiff quantified its claim on this occasion by totalling up the original contract sum of $424,180.00, "variations requested by the builder" of $39,337.00, "additional items" of $256,210.00, what are called "extension of time costs" and "preparation of as installed drawings and final claim" at $20,435.00 and $25,312.00 respectively and "rise and fall" totalling $61,040.00. Deducted from the total of these amounts ($826,516.00) was the sum of $522,534.00 which the plaintiff had received, leaving a balance of $303,982.00.

In the pleading struck out on 6 April, 1988, the plaintiff contended that the “additional work” of the earlier pleadings was all variations which it was required to perform pursuant to cl. 36 of its subcontract. Essentially the same list as that appearing under the heading “additional items” in earlier editions of the pleading appeared as “variations that should have been approved” which apparently ought to have been done “on the basis of a lump sum contract”. Thus, the plaintiff alleged that it was entitled to be paid, for work listed in a schedule, the sum of $262,442.16 because that was a proper assessment “in accordance with a lump sum contract”. The complaint was that the second defendant incorrectly assessed the value of this “variation” by valuing the work in accordance with a “schedule of rates” contract.

The latest pleading has resurrected a claim for essentially the same loss, particularly in relation to the central figure relating to additional work, as was sought to be recovered in the various earlier editions of the pleadings. Put in another way an examination of the various editions of the statement of claim seems to support a conclusion that a feature common to all is that the plaintiff was seeking to recover against the second defendant the difference between the cost to it of the work performed under its contract with the first defendant and the amount the plaintiff was actually paid for it - on the basis that the second defendant must somehow be liable for this sum.

The proposed new edition of the statement of claim contains allegations against the first defendant the following of which are relevant for present purposes. The pleading calls the contract between the first defendant and the Townsville Hospitals' Board the “Head Contract” and the subcontract between the plaintiff and the first defendant the “Agreement”, with the work to be done under the Agreement called the “Work”. Paragraphs 6 to 10 of the proposed pleading allege to the effect that the first defendant had the plaintiff perform work in addition to

that originally contracted for from time to time but has refused to pay for it. There does not however seem to be any express plea of compliance with the “extras clause” of the subcontract or of an architect's certificate or of a distinct contract to do the work the subject of the claim. Be that as it may there was no obligation for the plaintiff to perform work other than in accordance with its subcontract and it thereupon became entitled in terms of the subcontract as against the first defendant.

It is then alleged by the proposed new pleading that:—

“11. It was an express term of the Head Contract that:—

’If it is shown to the satisfaction of the Superintendent that the Priced Bill of Quantities is in error in that it -

(a) contains an incorrect quantity in relation to any item included therein ...; or

(c) omits an item which should have been included therein;

then

... upon application in writing to the Superintendent by the Contractor; ..... the contract sum shall ... be adjusted by such amount as is required to correct the error ...’

12. It was an express term of the Agreement that -

‘If it is shown the Priced Bill of Quantities:

(i) contains an incorrect quantity in relation to any item included therein ...; or

(iii) omits any item which should have been included therein;

(A) ... if the Sub-Contractor ... makes application to the Contractor for the Contract Sum to be adjusted the Contractor shall ... take such steps as are available to him under provisions of the Head Contract to seek an adjustment of the Contract Sum stated in the Head Contract and should such adjustment or any part thereof be allowed the Contract Sum under this Contract shall be adjusted accordingly in a corresponding and appropriate manner;'

13(a) Certain of the quantities shown on the Priced Bill of Quantities are incorrect. Particulars of such inaccuracies are shown in "Schedule B" hereto. (Note there is no plea as to the satisfaction of the superintendent).

(b) The Plaintiff allows the First Defendant a credit in the amount of $30,626.82 for various quantities overstated in the Priced Bill of Quantities.

14. The Plaintiff has by letter dated 10 December 1984 made application to the First Defendant for the Contract Sum to be adjusted.

15. In breach of the term referred to in paragraph 12 hereof the First Defendant has failed to make application in writing to the Superintendent named under the Head Contract for an adjustment to the contract sum payable thereunder.

16. As a result of the said breach the Plaintiff has suffered loss and damage in the sum of $359,561.25 being the aggregate of the sums set out in the last column of the Schedule B hereto less the credit shown in paragraph 13(b) hereof.

17. In the alternative in or about the period 15 November 1983 to 20 December 1983 the First Defendant in the course of the its said business provided to the Plaintiff for the purposes of

preparing its tender for the Works, copies of, inter alia, the following:—

(a) Schedule of Rates relating to the Work showing various quantities of items to be provided and to be removed;

(b) Drawings Nos 2012 - 1 to 16.

18. By the said documents the First Defendant represented to the Plaintiff as follows:—"

The alleged representations are then pleaded before it is alleged that the first defendant made them "knowing and intending they would be relied on by the plaintiff in assessing its tender price". It is then pleaded:—

"20. If, as is asserted by the First Defendant, upon the proper construction of the Agreement:—

(a) the Plaintiff was obliged to perform the Work and provide the materials referred to in paragraph 6(B) hereof; and

(b) the Plaintiff is unable to recover from the First Defendant the value of the work and materials referred to in paragraph 6(B) hereof,

the said representations were false in that ... (particulars of the alleged falsity then follow)."

Thus far there is, to my mind, much to be said for a view that the subcontract (the Agreement) provides the mechanism whereby the plaintiff is entitled to recoup from the first defendant costs incurred as a result of any errors in the Bill of Quantities. In this context the subcontract contemplated that the scope of work might not be accurately determined at the time of tendering and a system was implemented to deal with it. This was by provision for a method of payment involving:—

(a) a schedule of rates basis; or

(b) the operation of the variation clause of the contract.

In any event whether the work carried out by the plaintiff came within the variation clause or whether an adjustment of the contract price has been given is a matter for it and the first defendant and bears no relation to the second defendant. Moreover the plaintiff cannot be entitled to be paid twice for the same work.

In the context of the pleading which I have set out the case against the second defendant is then pleaded as follows:—

"34. Further and in the alternative, the Second Defendant in the course of its said business prepared:—

(a) the Schedule of Rates relating to the Work;

(b) Drawings Nos 2012 - 1 to 16.

35. By the said documents the Second Defendant represented in the terms set out in paragraph 18 hereof, which representations are false in the circumstances and as set out in paragraph 20 hereof.

36. At the time of preparing the said documents the Second Defendant knew or ought to have known, and intended that:—

(a) they would be given to proposed tenderers for the Work;

(b) a proposed tenderer would rely upon the accuracy of the said representations in preparing his tender price.

37. In the premises the Second Defendant owed to the Plaintiff a duty of care not to make any negligent

misstatements about matters material to the Plaintiff's tender.”

A number of matters may be remarked upon about these paragraphs. The schedule of rates and the drawings were prepared by the second defendant apparently for the Hospitals' Board which called tenders supplying (by making available) for that purpose the specifications and drawings which identified the work to be done and priced. The first defendant's tender was accepted by the Hospitals' Board and the plaintiff contracted with the first defendant to carry out work and be paid for it in accord with its subcontract.

The proposed pleading goes on:—

“38. Acting on the faith of the said representations and induced thereby the Plaintiff:—

(a) on or about the 20 December 1983 submitted a tender for the figure of $424,180.00;

(b) entered into and executed the Agreement.

39. In breach of the said duty the Second Defendant was guilty of negligence in making the said representations (they each being matters material to the Plaintiff's tender), particulars of which are as follows:—

(A) As to the Schedule of Rates -

(a) Failing to make any of any adequate inspection of the site of the Works to determine what work areas were restricted;

(b) Failing to take any or any adequate steps to measure or calculate the accuracy of the quantities shown in the Schedule;

(c) Failing to take any of any adequate steps to ensure that the Work could be performed in accordance with the Drawings;

(d) Failing to take any or any adequate steps to ensure that the Drawings recorded the whole of the Works to be performed by the Plaintiff.

(B) As to the Drawings -

(a) Failing to take any or any adequate steps to inspect the site of the Work for the location of columns, beams and other services;

(b) Failing to take any or any adequate steps to ensure that the Drawings accurately showed the existence of columns, beams, existing and proposed services;

(c) Failing to take any of any adequate steps to ensure that the Work could be performed in accordance with the Drawings;

(d) Failing to take any or any adequate steps to ensure that the Drawings recorded the whole of the Works to be performed by the Plaintiff.

40. The Second Defendant's conduct in making those representations was misleading or deceptive, or likely to mislead or deceive within the meaning of Section 52 of the Trade Practices Act.

41. As a result of the Second Defendant's negligence and conduct the Plaintiff has suffered loss and damage, in the amount of $372,193.21 calculated as set out in paragraph 23, in that -

(a) it entered into the Agreement for a price of $372,193.21 (after adjustment for rise and fall) less than it would have been prepared to perform the Work if it included that set out in paragraph 6(B) hereof;

(b) it has been put to expense in performing the Work set out in paragraph 6(B) hereof."

I should mention that the pleading is the first which has made reference to the Trade Practices Act jurisdiction in respect of which was conferred on this court as from 1 September, 1987.

One difficulty which seems to me to arise is the basis on which it is said the second defendant caused the plaintiff to suffer any loss. It may be that the plaintiff's claim amounts to saying that the first defendant has not paid the plaintiff because of the defects complained of in the tender documents originating with the second defendant. In so far as the plaintiff says it has a right to payment by the first defendant by way of adjustment of the contract sum (paragraphs 11 and 12) pursuant to clause 5(C) of the subcontract and the builder has failed to make the application for adjustment. The allegation is the same although a differently worded claim as sought in the previously pleadings under clause 36 of the subcontract. On this view of it the plaintiffs claim against the second defendant may amount to no more than that it has somehow contributed to its being kept out of money payable by the first defendant. On the other hand in so far as the plaintiff undertook work which its subcontract required it to undertake its entitlement is dealt with in terms of the subcontract. In so far as it undertook work in addition to its subcontractual obligations that is a matter between it and the party for which, or for whose benefit it undertook the work. There was no obligation on the plaintiff to do more than it became contractually obliged to do.

Another difficulty inherit in the case sought to be made against the second defendant, from the point of view of the connection between what it did and the plaintiff, emerges by asking; had the plaintiff tendered a higher price but not won the contract would it have suffered any loss? No. Had the plaintiff tendered a higher price and won

contract would there have been a loss. No, save in so far as the first defendant refused to pay for work done under the contract.

In summary the proposed new edition of the plaintiff's statement of claim against the second defendant seems to me to continue to be as plagued by the kind of difficulties which plagued its predecessors.

The considerations being those I have canvassed I would refuse leave to deliver a fresh edition of the pleading and stay the action at least as against the second defendant with, subject to submissions, consequential orders as to costs.