SUPREME COURT OF QUEENSLAND

CITATION:	*Reynolds v Aluma-Lite Products Pty Ltd* [2007] QSC 097
PARTIES:	**ROSS MACKENZIE MAX REYNOLDS AND MARGO LOGAN REYNOLDS** (plaintiff) **v** **ALUMA-LITE PRODUCTS PTY LTD** ACN 009 843 832 (defendant)
FILE NO/S:	7589/97
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	1 May 2007
DELIVERED AT:	Brisbane
HEARING DATE:	23 January 2007, further submissions received 6 February 2007 and 7 February 2007
JUDGE:	McMurdo J
ORDER:	**1. The defendant's application filed on 31 October 2006 is dismissed** **2. Costs be each party's costs in the proceedings**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – where defendant mortgagee goes into possession of land – where plaintiff claims for return of property in detinue –where seven years after commencing proceedings plaintiff amends statement of claim - where that and further amended statement of claims were struck out – whether current statement of claim should be struck out as being not described with sufficient particularity *Uniform Civil Procedure Rules* 1999 (Qld), r 157
COUNSEL:	KC Fleming QC for the plaintiff KF Boulton for the respondent
SOLICITORS:	MacDonnells Solicitors for the plaintiff Ellison Moschella & Co for the defendant

[1] **McMURDO J:** This is an application to strike out that part of the plaintiffs' claim in which they seek damages for the wrongful detention of chattels. They say that

the value of the items is $189,364.69 and also that the defendant's retention of those items caused them to suffer further losses by not being able to use them in a business. Those consequential losses are now pleaded to be $320,307.84 per annum "from 7 October 1996 until the trial of this action and into the future."[1] The defendant applies to strike out these allegations upon the basis that the plaintiffs have not given proper particulars of the chattels.

[2] To understand the defendant's complaint it is necessary to discuss the history of this litigation and specifically this detinue claim. In 1994 the plaintiffs were the registered proprietors of a grazing property near Warwick. They borrowed money from the defendant which they secured by a mortgage over their real property, a bill of sale over certain items of farm equipment, a stock mortgage and a crop lien. By the following year they were in default and the defendant commenced proceedings against them to recover its debt. Judgment was given in its favour on 14 March 1996. That included an order for the recovery of possession of the mortgaged property.

[3] The present defendant as mortgagee went into possession of the land on 5 October 1996. Undoubtedly there then were chattels on the land, some of which were subject to its bill of sale and others which were not. Within a few weeks, the Sheriff was in possession of some chattels which were not subject to the bill of sale but which he had seized under a warrant to enforce the mortgagee's judgment.

[4] By the time these present proceedings were commenced on 15 July 1997 (in the Federal Court), the present defendant as mortgagee had sold most of the real property. The statement of claim filed on that date complained of the sale of the real property, pleading that the mortgagee had not been entitled to sell and further that it had sold at an undervalue. There was also a claim in detinue. To explain what that claim did and did not involve it is necessary to set out certain paragraphs from the pleading:

> "7. On or about 5th October, 1996, there were grain, cattle, horses and equipment, furniture and chattels not subject to the securities referred to in paragraphs 3 to 6 herein located on the property.
>
> **Particulars**
>
> (a) 200 tonnes of grain in the silos that was harvested prior to 3rd May, 1995 and was not subject of the crop lien;
>
> (b) 350 head of cattle plus 3 horses, of which 275 head were removed by the Plaintiffs and RWL Wilson Pty Ltd as stock mortgagee leaving 75 head of cattle and 3 horses remaining on the property;
>
> (c) Various pieces of machinery used for farming, harvesting and earthmoving.

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1 Further amended statement of claim para 23(b)

…

15. Further, despite repeated requests the Plaintiffs have failed to return the grain, cattle, horses, equipment, furniture and chattels referred to in paragraph 7.

16. At all material times:

    (a) The Plaintiffs were the owners of the items referred to in paragraph 7 herein ("items");

    (b) The plaintiffs were entitled to immediate possession of the items;

    (c) The Plaintiffs had made a lawful demand upon the Defendant for the return of the items;

    (d) Despite repeated requests the Defendant failed to return the said items to the Plaintiffs.

17. By reason of the Defendant's detention of the items the Plaintiffs have suffered loss and damage, particulars whereof are as follows:

    (a) The value of the items;

    (b) Further, by reason of the defendant's failure to return the items of machinery used for farming, harvesting and earthmoving referred to in paragraph 7(c), the Plaintiffs have been unable to earn a living as a harvesting – earthmoving contractor and have suffered loss and damage."

[5] It is that claim as pleaded in 1997, in relation to the 'pieces of machinery' referred to in paragraph 7(c), which the plaintiffs say they wish to prosecute. By now it has become a claim of the order of more than $3,000,000. As originally pleaded, the claim attempted no identification of the chattels. Nor did it identify the "lawful demand", or if it be different "the repeated requests", which the defendant is said to have disregarded.

[6] The proceedings were then transferred to this Court. By 1998 the defendant had sold all of the mortgaged real property save for one parcel. On that remaining land were some chattels claimed by the defendant under its bill of sale and others to which it made no claim. Indeed it wanted them removed from the land so that it could sell it with vacant possession. A company controlled by a Mr Wilson[2] also held a bill of sale over some of the plaintiffs' personal property and Mr Wilson was complaining to the defendant that he was unable to recover the items the subject of that security. The plaintiffs, through their then solicitors, were involved in that dispute between Mr Wilson and the defendant, arguing that Mr Wilson should be able to enforce his company's security and that the defendant was wrongly retaining

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2 RWL Wilson Pty Ltd which was referred to in paragraph 7(b) of the Statement of Claim

possession of the items subject to it. Yet the defendant, through its solicitors, was apparently making no claim to the items claimed by Mr Wilson; instead its complaint was that they had not been removed by Mr Wilson.

[7] In August 1998 the defendant applied for an order that certain items, to which the defendant made no claim, be sold and the proceeds paid into court. Those items were identified within the defendant's application and according to a valuation tendered by the defendant they were worth about $41,000. Mr Wilson's company was made a respondent. That application was resolved by a consent order. Apparently the items claimed by Mr Wilson and some other items were then removed from the land before it was sold in 1998.

[8] For some years after that very little happened in these proceedings. The plaintiffs were without funds and could not prosecute their action. The defendant had sold all of the real property and no doubt took the view that there was no point in seeking to recover the balance of its debt if the plaintiffs had no apparent means.

[9] In August 2003 the defendant applied to strike out the proceedings for want of prosecution. I refused that application. As I then said, one important consideration was that, as the plaintiffs asserted and the defendant seemed not to dispute, the case was almost ready for trial. I noted that the defendant was unable to identify any particular prejudice from the plaintiff's delay. There was then no argument which related to the claim in detinue. I accept that this was because the defendant had assumed that the plaintiffs' 1997 pleading that the defendant had possession of some of their chattels had been resolved by the consent order in 1998. There appears to have been no complaint between 1998 and 2004 that there were other chattels which the plaintiffs would say had been wrongly detained.

[10] The plaintiffs filed an amended statement of claim in August 2004. It revived the detinue claim and pleaded it with a particularity which was in stark contrast with the original pleading. Paragraph 7(c) was amended (and renumbered) to read as follows:

> "(d) Various pieces of machinery used for farming, harvesting and earthmoving <u>and other chattels, as particularised in Annexure "A" to this statement of claim ("the chattels").</u>"

Annexure "A" was a formidable list spanning some 56 pages and listing over 1,500 items. It was a very detailed specification to the extent that it claimed "bolts & nuts" of precise numbers in particular sizes. On its face it was the product of a painstaking consideration of what items might have been on any of the mortgaged properties but not returned to the plaintiffs. For example, in relation to paint and painting equipment, the plaintiffs were able to assert that there were three (not four or five) paint rollers each of a value of $22.54 and that there were 12 metres of sandpaper of a total value of $52.08.

[11] This was an extraordinary pleading for its detail and also for its lateness. It purported to be a more detailed plea of the detinue case, pleaded some seven years earlier when the proceedings were commenced and when there had been no particularisation of the items whatsoever. In paragraph 19 of this 2004 pleading, the defendants asserted that the value of all of these items was $778,331.59.

[12] The defendant applied to strike out that 2004 detinue claim, upon the basis that it was made too late and that with the passage of time, and with the defendant having sold the properties some six or seven years earlier, it was simply impossible for the defendant to meet the case.

[13] The application came before Fryberg J, who held that everything within that Annexure "A" involved a new claim. He held that none of the items within that list were within the original statement of claim. He further held that they were new claims made outside the relevant limitation period so that the amendment required leave.[3] He said that if leave had been sought he would have refused it, so consistently with that, the amendments should be struck out. Fryberg J said:[4]

> "I do not think that the mortgagors have adequately explained why these claims were not made an earlier time. Making them now has a considerable capacity to delay the hearing of the action and almost inevitably will mean that the mortgagee will be prejudiced by reason of its inability to garner evidence about the matters alleged. There is simply no reason shown why these claims could not have been made at an appropriate time. Making them now is likely to add enormously to the cost of the action, to delay it, to leave both sides in the hands of lawyers incurring additional cost for a lot longer and be contrary to the interests of justice. I do not think leave would be given if an application for leave were made. In my view, the amendments should be struck out. More precisely, I think it will be adequate for the terms of this order to be that the paras 7(b) and so much of 7(d) as was amended on 3 August be struck out."

[14] The result was that the detinue claim was reduced to its original terms, in which no item or the demand for it had been identified. The defendant could have been forgiven for believing that this was the end of the detinue claim, given the delivery of chattels pursuant to the consent order in 1998.

[15] However the plaintiffs filed another statement of claim on 10 January 2005. Paragraph 7(d) of this pleading was as follows:

> "(d) Various pieces of machinery used for farming, harvesting and earthmoving
>
> Particulars
>
> Refer Annexure "A"."

Annexure "A" was a one page document listing chattels by a more general description than the previous pleading. But whatever doubt might have existed as to the correlation between this list and the list which Fryberg J had struck out was dispelled by the allegation in this pleading (paragraph 19) that these items were worth (again) $778,331.59. Clearly then they were the same items the subject of the amendment which Fryberg J had struck out.

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3 *UCPR* r 376

4 Ex-tempore judgment, 16 December 2004

[16] The case came before the court again in May 2005 in relation to this and other issues. When the defendant complained that the plaintiffs had delivered a pleading in disregard of the order of Fryberg J, Moynihan SJA held that there were so many other problems with this pleading that it should be struck out in its entirety and he so ordered. He further ordered that the plaintiffs would have to obtain leave to file another statement of claim.

[17] About a week later the plaintiffs served a draft statement of claim. This version made the claim for detinue in relation to very many items set out in an Annexure "B", which consisted of 27 pages listing some 1,442 items said to have a total value of $755,774.84. The plaintiffs applied for leave to file that statement of claim. That came before Wilson J on 13 July 2005. The defendant argued that the pleading largely repeated what had been struck out by Fryberg J. Her Honour said that on a "cursory glance" of the present pleading, the first 1,348 items were repetitions of those which had been struck out and the others were "new". She acknowledged the possibility that within that second group there were items which were within the part which Fryberg J had struck out. Her order was that the plaintiffs have leave to file a further amended statement of claim as proposed, but subject to the condition that the annexure referred to in the detinue claim "may not contain items that were in Annexure "A" to the pleading filed on 3 August 2004 and considered by Justice Fryberg."

[18] On 1 August 2005 the plaintiffs filed a statement of claim which they said complied with that order. It claimed in detinue in relation to items within its Annexure "B" which was a five page document listing some 243 items said to have a total value of $192,033.03. The defendant objected to this again saying that much of this list consisted of items struck out by Fryberg J. The defendant applied to strike them out and the application again came before Wilson J. On that occasion the plaintiffs' counsel conceded that there had been a few items of that kind, but relied upon an affidavit from the plaintiff Mr Reynolds to the effect that most of the items in this pleading were different chattels from any of those within what had been struck out by Fryberg J. Wilson J decided that this dispute could not be determined in the Applications List and that it should be decided by the trial judge. On 31 October 2005, her Honour gave the plaintiffs leave to amend the statement of claim to remove those few items conceded by the plaintiffs but otherwise declined to strike out the pleading.

[19] The result was the current pleading which was filed on 3 November 2005, which pleads the wrongful detention of some 241 items in an annexure of five pages and having a total value of $189,364.69. There remains the claim for consequential loss in which the plaintiffs say that because of the alleged failure to return those chattels, "the plaintiffs have been unable to earn a living as a harvesting – earthmoving contractor", that they have suffered loss and damage of some hundreds of thousands of dollars every year from October 1996 and that they will do so "into the future".

[20] The plaintiffs' position then is that none of these 241 items was within the extensive and apparently comprehensive list in their 2004 pleading. The present pleading complains of, amongst other things, nuts and bolts apparently corresponding with what was struck out by Fryberg J. But the plaintiffs say that they were different nuts and bolts. In all of this, there has been no explanation by the plaintiffs as to why they overlooked so many items in preparing the extensive list in the 2004 pleading.

[21] The suspicion that the items are much the same as claimed in 2004 is increased by the successive claims for lost income from the use of the relevant chattels. The 2004 pleading did not quantify that consequential loss claim. Nor was it quantified in the January 2005 pleading. In the (draft) pleading of May 2005 the consequential loss was claimed to be $800,769.60. This was detailed in a schedule listing 62 items, against each of which was a calculation of the gross income per year lost from the unavailability of the item. In the pleading of 1 August 2005, in which the items were reduced to a value of $192,033.03, there was a claim for consequential loss of $319,827.84. This was again according to a schedule listing 62 items. The description of these 62, and the gross income per year said to have been lost by the unavailability of each, was the same as that in the previous pleading. The difference was that the plaintiffs were now allowing for the expenses involved in the use of an item so that they were claiming losses in the nature of net profits. In the current statement of claim there are the same 62 items in the list in which consequential losses of $320,307.84 are claimed. There is very little difference between the content of this schedule and that of its predecessor.

[22] So a comparison of these consequential loss claims indicates that the plaintiffs are claiming that they lost income from the unavailability of the items presently the subject of their claim in almost precisely the same amounts as the lost income which they had claimed from the unavailability of the items which had been pleaded in 2004. But whatever grounds there may be for suspecting that the plaintiffs are simply repleading what Fryberg J disallowed, the present application does not ask me to decide that matter. Rather it complains that the particulars of the current list are not sufficient to enable the defendant to prepare its response. No doubt the defendant has considered that it should not reargue here what Wilson J said should be decided by the trial judge.

[23] The defendant sought further particulars of that list of items. When that application came before me last year I assumed that the plaintiffs had extensive records from which they would seek to prove the presence of the items on the properties, because they had been able to specify them with such precision. I thought that if the plaintiffs identified those documents the defendant's difficulty could be largely overcome. So I ordered that the plaintiffs identify, in relation to each item, any document upon which the plaintiffs intend to rely to prove the item was on the property on or after 5 October 1996 as they allege in paragraph 7(c) of the pleading. I adjourned the application for that to be done. The matter returned on 5 December 2006 by which time the plaintiffs had purported to comply with that direction by the production of a very extensive compilation of documents. Most of the documents are photographs. The defendant then complained that this purported identification of the documentary evidence was effectively useless. But the plaintiffs said, in effect, that the defendant's representatives simply had not understood what was provided to them. I directed the solicitors to confer about that. That came to nothing and the application to strike out these paragraphs came back on for hearing.

[24] It is unnecessary to extensively describe this compilation of documents. In no case does any document directly evidence the presence of the item on the mortgaged properties in October 1996, or otherwise. In particular none of the photographs demonstrates that. Instead the plaintiffs will seek to use the photographs in an indirect way as their counsel explained. For example, in seeking to prove that certain accessories for a plough were present, the plaintiffs will tender a photograph,

not of those things, but of the plough itself, to which they will add their own oral evidence that the plough had those accessories. So ultimately the case will be proved or otherwise by the plaintiffs' oral testimony.

[25] The present application to strike out paragraph 7(c) (as it is now renumbered) and its annexure is made upon the basis that the plaintiffs have not complied with UCPR r 157, which requires a party to include in a pleading particulars necessary to define the issues for and prevent surprise at the trial, to enable the opposite party to plead and to support a matter which is specifically pleaded under r 150. Rule 150 is relevant here only insofar as it requires the plaintiffs to plead "every type of damage claimed".

[26] The defendant argues that in order to defend this claim it "needs to be able to identify the particular chattels and to obtain valuation evidence in relation to them." It says that from what has been provided by the plaintiffs, it cannot obtain valuation evidence simply because not enough is known of the items. There are no photographs or other documents describing them, apart from their description within the list. The plaintiffs are under the same difficulty, despite their confidence that they will be able to prove the current values of these items. In their pleading they assert a value for each item but it appears that they have asserted a replacement cost rather than the present value of what was on the property in 1996. That is apparent from evidence that they have approached a valuer who has said that he would be able to value the items.

[27] I accept that the defendant is significantly disadvantaged in meeting this detinue case. But that is not because the claim is now without sufficient particulars of the items. The items are described in clear and precise terms. The defendant should be under no misunderstanding as to what is now said to have been on the property when the defendant went into possession. The defendant's real difficulty comes from the claim being made so late. There was no specification of any item until 2004. And accepting for the present, as the plaintiffs maintain, that none of the items the subject of this pleading was within the 2004 list, it follows that the defendant was not told that it was being sued for the wrongful retention of these particular items until 2005.

[28] The basis upon which the present application to strike out is made, which is that the items are not described with sufficient particularity, is not established. Accordingly the defendant's application must be dismissed.

[29] However the issues relating to this detinue claim are yet to be properly defined. The plaintiffs need to plead the current value of these items. They may need to replead also the claim for consequential loss because, as I have discussed, the present pleading appears to be the same as that made for what the plaintiffs say is a discrete group of chattels. Further, it appears that the parties have not focused upon the nature of the claim, which is one in detinue. The claim involves much more than the proof of what personal property of the plaintiffs was left upon the real properties on 5 October 1996. It involves the consideration of what items, if any, were wrongfully detained by the defendant. Did the plaintiffs demand the delivery up of *these* items? Within the letter from the plaintiffs' solicitors to the defendant's solicitors dated 22 April 1997, which is the demand relied upon for this claim, was there a demand for these items? Were the items in the possession of the defendant as at that date, or were they in the possession of the Sheriff or someone else by

then? The inevitable issues relating to this detinue claim are yet to be properly formulated. When they have been, it will be appropriate to consider whether any of them should be tried in a preliminary way, because of the expense which would be involved in the proof of the claim, item by item, from the oral testimony of the plaintiffs. At present however the order will simply be that the defendant's application filed on 31 October 2006 is dismissed. In the particular circumstances which I have set out, it is not appropriate that costs simply follow the event. The application was made because of the difficulties faced by the defendant in meeting this claim so long after the relevant dealings. A fairer outcome is that they be each party's costs in the proceedings.