Milatos & Anor v Clayton Utz & Anor [2005] NTSC 57

PARTIES:	GEORGE MILATOS and COLLEEN MARY MILATOS v CLAYTON UTZ and NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	194/02 (20219346) & 83/03 (20308935)
DELIVERED:	28 September 2005
HEARING DATES:	21 September 2005
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Plaintiffs:	M Williams SC and R Scruby
First Defendant:	P Maher
Second Defendant:	M Grant

Solicitors:

Plaintiffs:	Geoff James
First Defendant:	Paul Maher
Second Defendant:	Solicitor for the Northern Territory

Judgment category classification:	C
Judgment ID Number:	tho200507
Number of pages:	21

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Milatos & Anor v Clayton Utz & Anor [2005] NTSC 57
No. 194/02 (20219346) & 83/03 (20308935)

BETWEEN:

GEORGE MILATOS
First Plaintiff

COLLEEN MARY MILATOS
Second Plaintiff

AND:

CLAYTON UTZ
First Defendant

NORTHERN TERRITORY OF AUSTRALIA
Second Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 28 September 2005)

[1] This is an application on summons filed by the second defendant seeking the following orders:

1. The whole or part of the consolidated statement of claim dated 12 January 2005 be struck out.

2. Costs.

[2] The application is made pursuant to Order 23.02 of the Supreme Court Rules which provides as follows:

> "Where an endorsement of claim on a writ or originating motion or a pleading or a part of an endorsement of claim or pleading –
>
> (a) does not disclose a cause of action or defence;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) may prejudice, embarrass or delay the fair trial of the proceeding; or
>
> (d) is otherwise an abuse of the process of the Court,
>
> the Court may order that the whole or part of the endorsement or pleading be struck out or amended."

[3] A brief history of this matter as between the plaintiffs and the second defendant is as follows.

[4] On 12 June 2003, the plaintiffs filed and served their writ against the Northern Territory with their list of discoverable documents. The plaintiffs had, in December 2002, filed and served their writ against Clayton Utz together with their list of discoverable documents.

[5] On 14 October 2003, the second defendant filed and served its defence. Fourteen days later, on 28 October 2003, the Northern Territory served its list of discoverable documents and gave the plaintiffs inspection.

[6] There followed numerous other interlocutory proceedings and appearances before the Registrar, the Master and the Court.

[7] On 1 December 2004, the parties appeared before the Acting Master. The Acting Master with the consent of the plaintiffs and the first and second defendants, made the following orders:

> "1. Proceedings No. 194 of 2002 (20219346) and No. 83 of 2003 (20308935) be consolidated.
>
> 2. The first and second plaintiffs are to file and serve a consolidated statement of claim by 24 December 2004.
>
> 3. The first and second defendants have leave to file and serve amended defences to the consolidated statement of claim by 14 February 2005.
>
> 4. The first and second defendants have leave to file and serve contribution proceedings by 28 February 2005."

[8] On 12 January 2005, the plaintiffs filed and served their consolidated statement of claim.

[9] On 21 February 2005, the parties appeared before the Registrar who made the following orders:

> "1. The second defendant is to file and serve a request for particulars of the statement of claim on the plaintiff within 7 days.
>
> 2. The plaintiff is to respond within 7 days thereafter.
>
> 3. Both defendants are to file and serve a defence within 21 days.
>
> 4. By consent this matter has been referred to the Chief Justice for directions."

[10] On 28 February 2005, the Solicitor for the Northern Territory, wrote a letter to solicitors for the plaintiff. This letter was tendered on the second

defendant's application to strike out all or part of the consolidated statement of claim (Exhibit D1).

[11] This letter raised a number of issues including the second defendant's concern with the consolidated statement of claim as follows:

> "It is our respectful submission that the current pleading is prolix and embarrassing."

[12] The letter then goes into detail about these concerns and the precise paragraphs in the statement of claim which the second defendant asserted were excessively prolix and repetitive. In this letter the solicitors for the second defendant also asserted that they could not discern precisely what specie of breach was being alleged against it and pointed to specific paragraphs in the statement of claim as examples both of this and matters which the solicitor referred to as "technical embarrassment". The letter states that the Solicitor for the Northern Territory enclosed a request for particulars in accordance with the Registrar's order.

[13] On 2 March 2005, the parties appeared before Martin CJ. Solicitors for the plaintiff applied by summons for orders fixing a trial date and assigning supervision of the case to a judge. Martin CJ ordered that Thomas J supervise the case and that the trial be fixed for 21 November 2005 with five weeks set aside. I note that at the time the matter was fixed for trial, the pleadings had not concluded. Neither the first or second defendants had filed a defence. The concerns raised by the second defendant about the

consolidated statement of claim had not been resolved. There had been no reply to the second defendant's request for particulars.

[14] On 29 March 2005, the second defendant lodged with the Court a summons seeking orders that the whole, or part, of the consolidated statement of claim be struck out.

[15] On 22 April 2005, the plaintiffs declined to answer the second defendant's request for particulars.

[16] On 4 May 2005, the first defendant filed and served its defence.

[17] On 23 May 2005, the second defendant filed two summonses, one seeking an order that the whole, or part, of the consolidated statement of claim dated 12 January 2005, be struck out and also seeking an order for costs. The second summons dated 23 May 2005 sought orders:

> "1. The proceeding be dismissed.
>
> 2. Alternatively, the plaintiffs comply with the order of 21 February 2005 to answer the second defendant's request for particulars within 7 days.
>
> 3. Costs."

[18] On 26 May 2005, the two summonses came before a judge in the interlocutory list. The two applications were listed for hearing before Thomas J on 6 June 2005.

[19] On 6 June 2005, the applications on summons filed by the second defendant on 23 May 2005, came before the Court for hearing.

[20] Mr James, on behalf of the plaintiffs, sought an adjournment of the hearing of the second defendant's applications to enable the plaintiffs to be represented by senior counsel. The matter was adjourned to 10.00 am on 28 July 2005.

[21] On 28 July 2005, an application to vacate the trial date scheduled for November 2005 was made by Mr Maurice QC on behalf of the first defendant. The essential reason for this was the first defendant's application to join a third party. The application to vacate the trial dates was opposed by counsel for the plaintiffs.

[22] Following submissions from counsel for each of the parties, the Court made the following orders:

1. The first defendant was granted leave to file and serve a third party notice.

2. The trial dates scheduled for November 2005 were vacated.

3. One week of the trial dates being the week commencing 5 December 2005 was reserved to deal with any pre-trial matters the parties may wish to raise.

4. The matter was adjourned to 16 August 2005 for further directions.

[23] On 16 August 2005, an order was made that the first defendant be granted leave to file and serve a contribution notice on the second defendant within seven days. The second defendant's application on summons filed on

23 May 2005, to strike out the whole, or part, of the consolidated statement of claim filed on January 2005, was listed for hearing on 24 August 2005. The question of costs arising from the first defendant's application to adjourn the trial dates was also adjourned to the same date.

[24] The hearing date of 24 August 2005 was vacated as Thomas J was required to sit in the Court of Criminal Appeal to conclude an appeal that had commenced earlier that week. The matter was adjourned to a date suitable to the Court and to counsel, that date being 21 September 2005.

[25] On 21 September 2005, the second defendant's application to strike out the whole, or part, of the consolidated statement of claim filed on 12 January 2005, came before this Court for hearing.

[26] On 13 September 2005, the plaintiffs had filed a summons seeking the following orders:

> "1. That as between the Plaintiffs and the Second Defendant the Consent Order made on 1 December 2004, by consent of the Plaintiffs, the First Defendant and the Second Defendant, be rescinded; and
>
> 2. That as between the Plaintiffs and the Second Defendant the pleadings on the record of the Court in Proceeding No. 83 of 2003 be reinstated as and for the pleadings between the Plaintiffs and the Second Defendant."

[27] At the commencement of the hearing of the second defendant's application to strike out the consolidated statement of claim, or part of it, the plaintiffs sought to have their summons heard prior to the second defendant's application. Mr Williams SC, counsel for the plaintiff, made submissions on

the plaintiffs' summons seeking the orders as requested above. He also sought an order that this Court exercise its discretion and refuse to entertain the second defendant's application to strike out the consolidated statement of claim. Both these applications were opposed by Mr Grant, counsel for second defendant, and Mr Maher, counsel for first defendant.

[28] After hearing submissions from each of the three counsel, this Court refused the plaintiffs' application to rescind the consent orders made on 1 December 2004, that the proceedings be consolidated. The Court also refused to exercise a discretion to decline to hear the second defendant's application to strike out the whole or part of the consolidated statement of claim filed on 12 January 2005.

[29] The Court indicated that it would be appropriate to proceed with the hearing of the second defendant's application, to strike out the whole, or part, of the consolidated statement of claim, before ruling on the second order sought in the plaintiffs' summons filed on 13 September 2005.

[30] The principles to be applied in considering the second defendant's application to strike out the consolidated statement of claim in whole, or in part, is set out in a decision of the Federal Court to which counsel for the plaintiffs and the second defendant each referred. This is a decision of O'Loughlin J in *Australian Competition and Consumer Commission v Pauls Ltd* [1999] FCA 1750 delivered 21 December 1999 par [10]:

> "The power to strike out pleadings or portions of pleadings is discretionary and should be employed sparingly and only in a clear case (Brambles Holdings Ltd v Trade Practices Commission (1979) 28 ALR 191 at 193). The modern system of pleading requires only that the material facts on which a party's claim is based be stated; the claim is not expected to be formulated as an elegant model of legal purity: Carr v McDonald's Australia Ltd (1994) 63 FCR 358 at 367 and there is now a tendency against taking a pedantic approach to a pleading: Coshott v Kam Tou Mak (Wilcox J, 3 March 1998, unreported)."

[31] In this matter, O'Loughlin J was considering a notice on motion in which Pauls Ltd sought an order, primarily that the whole of the further amended statement of claim be struck out, on the grounds that it contravenes O11 R3 of the Rules of the Federal Court, in that it is not as brief as the nature of the case admits. Specifically, Pauls Ltd complained that numerous provisions of the further amended statement of claim were repetitive. In the alternative, Pauls Ltd sought orders that nominated paragraphs of the further amended statement of claim be struck out pursuant to O11 R16, on the grounds that they disclose no reasonable cause of action, that they have the tendency to cause prejudice, embarrassment or delay, and that they constitute an abuse of process.

[32] O'Loughlin J reviewed the authorities and set these out in the course of his reasons for judgment. I set out part of his reference to those authorities. At paragraph 8 of his reasons for judgment, O'Loughlin J stated:

> "There are cases of respectable antiquity that extol the virtues of brevity in pleadings. In Davy v Garrett (1877) 7 ChD 473, Baggallay LJ said at 486:

> ‘The complaint is that the statement of claim is prolix and embarrassing. The word 'prolix' may be used to denote two different things; it may refer to the too lengthy statement of necessary facts, or to the statement of facts unnecessary to be stated. Where the only thing complained of is the statement at unnecessary length of things necessary to be stated, OXIX, rule appears sufficiently to meet the case … . Here I think that the statement of claim is embarrassing, both for the offensive length at which the statements of necessary facts are set out, and from the statement of unnecessary fact.’

And, at p486, Thesiger LJ remarked:

> ‘I also am of the opinion that this statement of claim ought to be struck out. It offends against the rules both by needless prolixity and by stating evidence. The case as put in the argument on behalf of the Plaintiffs rested on a few simple facts which might have been pleaded very shortly. They might be set out in a few words, instead of which we have a statement of claim of forty-five pages … .’

A few years later in Hill v Hart Davis (1884) 26 ChD 470, Cotton LJ said at 472:

> ‘I agree that although the rules contain no provision for taking a document off the files for prolixity, yet it is the duty of the Court to see that its files are not made the instruments of oppression, and that without any provision in the rules the Court has the power, and it is its duty, to order oppressive documents to be taken off the file, even though this should result in their being burnt.’

At 473, Bowen LJ added:

> ‘Every Court must have the power to protect its own records from being abused. I prefer not to define what constitutes oppression or vexation. It is better to determine in each case whether the circumstances are such as to come within a perfectly intelligible expression.’”

[33] O’Loughlin J ultimately made orders striking out the further amended statement of claim and granted leave to file and serve a fresh pleading.

[34] I turn now to the specific complaints by Mr Grant, on behalf of the second defendant, to the plaintiffs' consolidated statement of claim filed 12 January 2005.

[35] The claim made by the plaintiff relates to the development the plaintiffs undertook of land at Lake Bennett. The plaintiffs claim they were never advised that this needed the consent of the easement holders prior to the subdivision of the land. The essence of the claim is that legislation required the consent of easement holders before registration of title. The plaintiffs assert that Clayton Utz, who are the first defendant, failed to advise the plaintiffs of the statutory requirements. The claim against the second defendant is that there was a negligent misrepresentation by officers of the Northern Territory Government who failed to advise them that the consent of the easement holders was required and who subsequently failed to correct the misrepresentation.

[36] The consolidated statement of claim runs to 79 pages and some 233 paragraphs with numerous subparagraphs.

[37] The basis of the challenge to the statement of claim made on behalf of the second defendant are:

1) The statement of claim is prolix and includes some necessary facts at inordinate length together with other material that is irrelevant. It would necessitate a similarly lengthy defence which is unnecessary and potentially confusing.

2) The statement of claim causes embarrassment to the second defendant in that it is difficult to discern the exact allegation of a breach. Is it negligent misstatement that was untrue, or is it also claimed that there was a duty on the officers of the second defendant to provide professional advice to the plaintiffs?

3) The cross referencing round up at the conclusion of the statement of claim makes the document convoluted and only serves to confuse.

[38] Paragraphs 1 to 13 of the plaintiffs' consolidated statement of claim, filed on 12 January 2005, sets out the background to the claim. It does contain unnecessary detail, for example, in paragraphs 2, 7 and 8. However, counsel for the second defendant, whilst observing the matters could be more precisely set out, does not submit there is a particular difficulty with these paragraphs. I would leave that as a matter for the plaintiffs.

[39] Paragraphs 14-19 are appropriate pleadings.

[40] Paragraph 23, in particular 23.1, asserts that Mr Timney ought properly to have given certain information. It is not clear on the pleading whether this is an allegation of a positive duty to give advice or just a negligent misstatement. I accept this can give rise to confusion as to the plaintiffs cause of action. It can affect the issue of contribution between the first and second defendants, as the first defendant is the solicitor whom the plaintiffs retained to give professional advice.

[41] Other subparagraphs of paragraph 23 are a repetition of the matters pleaded in paragraphs 14-19 and would appear to be prolix and unnecessary.

[42] Paragraphs 24-56 contain a great deal of repetition and unnecessary detail. These paragraphs are in respect of the claim against the first defendant, however, the comments made by Mr Grant, counsel for second defendant, would be worth bearing in mind in the re-drafting of the statement of claim.

[43] Paragraphs 57-60 do not make it clear whether this is an allegation of a failure by Mr Timney to correct his earlier statement or a failure to advise, as in a professional duty to advise. If it is the second, then that does need to be clearly pleaded and does not need unnecessary chronology.

[44] Dealing with paragraphs 67-82, the essential pleading is contained in paragraphs 71-75, although in rather lengthy form. The other paragraphs do not take the matter further and contain unnecessary repetition. Again, these paragraphs, in particular 78 and 79, do not make it clear whether or not there is an assertion that Mr Gronow had a positive duty to advise the plaintiffs as distinct from giving them incorrect information.

[45] Paragraphs 83–128 are the pleadings in respect of the first defendant. Mr Grant, for the second defendant, did not suggest that these paragraphs impact on the second defendant. However, I agree with his comment that they are repetitive and contain unnecessary detail in a statement of claim. There has been a fundamental failure to distinguish between pleading and evidence.

[46] Mr Maher, who represented the first defendant, stated that while the first defendant has filed a defence to the consolidated statement of claim filed 12 January 2005, this does not mean the first defendant considers the consolidated statement of claim to be an appropriate document. It is Mr Maher's submission, on behalf of the first defendant, that the consolidated statement of claim is in fact an unsatisfactory document. He advised that he endorsed the criticisms made by Mr Grant on the whole of the consolidated statement of claim.

[47] Paragraphs 129-156 contain allegations of a failure to correct a previous misrepresentation. Again, it contains material that is unnecessarily repetitious and mixes evidence with pleadings.

[48] Paragraphs 177-204 make continual reference back to earlier paragraphs in the pleading and contain a great deal of repetition and matters that should not properly be included in a statement of claim.

[49] Paragraph 230 does not make it clear if there is a claim that Mr Timney and Mr Gronow had a professional duty to advise the plaintiffs.

[50] Paragraphs 231 and 232 refer back to paragraphs that contain the essence of the plaintiffs' claim. They do not appear to take the matter any further.

[51] Paragraph 233 is a confusing form of pleading.

[52] Mr Williams SC, on behalf of the plaintiffs, submitted that the Court as a matter of discretion, should refuse to strike out some or all of the

consolidated statement of claim, because in October 2003 the second defendant pleaded without complaint to a document that was substantially the same.

[53] I accept Mr Williams' SC submission that the Court's power under Orders 23.02 and 23.04(2) of the Supreme Court Rules, which give the Court power to strike out the statement of claim, is discretionary. It is a power given to the Court which "should be employed sparingly and only in a clear case" *Australian Competition and Consumer Commission v Pauls Ltd* (supra).

[54] The first statement of claim filed by the plaintiffs against the second defendant is dated 12 June 2003. The amended statement of claim was filed on 27 June 2003. This amended statement of claim was not subject to any objection. The plaintiffs assert it pleaded essentially the same matters as are now set out in the consolidated statement of claim. The second defendant filed a defence to the first statement of claim on 14 October 2003. The second defendant did not request particulars nor did it make any complaint as to the plaintiffs' pleadings in the statement of claim.

[55] Mr Williams SC points to the fact that the proceedings were consolidated by consent and at the request of both defendants. The consolidated statement of claim, it is asserted, is a composite document comprising the allegations against the first defendant and the second defendant in the two previous unconsolidated proceedings.

[56] Mr Williams SC also points to the lengthy and expensive discovery process that has already taken place. It was argued that this process should not have been embarked upon and completed, unless the second defendant understood the case that was put against it.

[57] The plaintiffs have served a lengthy economic loss report and a further four lengthy affidavits.

[58] Mr Williams SC submits that if there was any substance in the second defendant's complaints about the consolidated statement of claim, filed on 12 January 2005, they would have been made in relation to the previous pleadings.

[59] Secondly, it is put that the pleadings are now at an advanced stage, that the defendant should not be allowed to succeed on such an application at this late stage of the proceedings.

[60] I do not consider it relevant that the second defendant filed a defence to the plaintiffs amended statement of claim dated 27 June 2003 and did not raise objection at that time to the plaintiffs' amended statement of claim. The second defendant is entitled to make an application to strike out the consolidated statement of claim and have that dealt with on its merits. There may be many reasons why the second defendant filed a defence to the plaintiffs' earlier amended statement of claim. It does not follow that they accepted the statement of claim as a satisfactory document or that the statement of claim complied with proper pleading principals.

[61] The second defendant has not as yet filed a defence to the consolidated statement of claim. The second defendant did seek particulars of the consolidated statement of claim which the plaintiffs have declined to answer. In seeking particulars of the consolidated statement of claim, solicitors for the second defendant were endeavouring to find an alternative to this present application.

[62] The discovery process and other steps taken in the proceeding will not be set at nought if the consolidated statement of claim is struck out. In fact the results of work already undertaken with respect to the discovery process can be utilised once the proceedings are placed on a proper footing with a properly pleaded statement of claim.

[63] The next argument advanced by Mr Williams SC is that the consolidated statement of claim is not prolix, embarrassing or lacking in particularity.

[64] I have dealt in some detail with the complaints raised by counsel on behalf of the second defendant. For the reasons already stated, I find that the consolidated statement of claim is prolix in that there is a considerable amount of repetition, unnecessary statement of facts and mixes pleading with evidence. It is embarrassing and lacking in particularity in that it does not make clear whether or not there is a claim that officers in the Northern Territory Government had a professional duty to advise the plaintiffs.

[65] Apart from that aspect, the essence of the plaintiffs' claim would appear to be that there was a negligent misrepresentation by officers of the Northern

Territory Government who subsequently failed to correct this misrepresentation.

[66] I accept the factual matters are of considerable complexity. This however, does not affect the plaintiffs' responsibility to commence the action with a statement of claim that complies with proper pleading principles. It is not a reason to rely upon a statement of claim that is prolix, embarrassing or creates confusion by the amount of repetition that it contains.

[67] The second defendant is entitled to know clearly and succinctly what is the claim against it.

[68] Mr Williams SC, on behalf of the plaintiffs, queries the power in the Rules of the Supreme Court of the Northern Territory, to strike out pleadings on the basis of prolixity.

[69] I accept the word "prolix" does not appear in Rule 23.02. I consider the words in 23.02(c) "may prejudice, embarrass or delay the fair trial of the proceeding" are sufficiently wide to encompass prolixity. Prolix pleadings can prejudice, embarrass or delay the fair trial of the proceedings.

[70] The decision of O'Loughlin J in *Australian Competition and Consumer Commission v Pauls Ltd* (supra) on which both the defendants and the plaintiffs reply makes it clear that a court has the power to protect its own record from being oppressive.

[71] A statement of claim is embarrassing if it does not disclose a cause of action. The consolidated statement of claim, in this action, does disclose as against the second defendant, negligent misrepresentation and a failure to correct such misrepresentation. There are however paragraphs, of which paragraph 23 is an example, which are capable of being read as a claim that officers of the Northern Territory Government had a professional duty to advise the plaintiffs as distinct from a claim for negligent misrepresentation. The statement of claim should make it clear whether or not there is such a claim.

[72] Mr Williams SC made further submissions with respect to the Supreme Court Rules relating to orders for particulars. At this stage, the second defendant is not seeking an order for particulars. It is not necessary to deal with this issue.

[73] Having considered all the submissions put forward on this application, I have concluded that the defects in the consolidated statement of claim filed on 12 January 2005, can not be rectified by simply striking out certain paragraphs. The statement of claim does not comply with the proper principles of pleading. I agree with the submission made by Mr Grant that the whole of the consolidated statement of claim should be struck out and the plaintiffs prepare a fresh consolidated statement of claim.

[74] Accordingly, I make the order that the consolidated statement of claim filed on 12 January 2005 be struck out.

[75] I have previously ruled that I would not grant the plaintiffs' application to rescind the order of the Master consolidating these proceedings.

[76] Mr Williams SC requested that if the Court found there was any substance in the complaints of the second defendant, the Court should order that the previous statements of claim and defences stand as pleadings.

[77] Mr Maher, on behalf of the first defendant, submitted that the first defendant could accept this as a way of proceeding with the matters although such a course would not be the first defendant's preferred choice. Essentially, Mr Maher, on behalf of the first defendant, supported the application by the second defendant to strike out the consolidated statement of claim.

[78] Mr Grant, on behalf of the second defendant, opposes reverting to the previous statement of claim and defence and submits there would be a similar application to strike out the plaintiffs' amended statement of claim with respect to the second defendant.

[79] I have now heard and ruled on the second defendant's application to strike out the consolidated statement of claim dated 12 January 2005. I have made an order that the consolidated statement of claim dated 12 January 2005 be struck out. I do not consider it would be either expedient or appropriate to order that the previous statements of claim stand as pleadings. A perusal of these documents indicates they suffer from similar problems to those that are the subject of complaint with respect to the consolidated statement of claim.

[80] I consider the appropriate and most expeditious way to proceed would be to grant leave to file and serve a further consolidated statement of claim and to then give directions as to how the matter should proceed thereafter.

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