CITATION:	*Nilsen (NT) Pty Ltd v Delta Electrics NT Pty Ltd* [2020] NTCA 3
PARTIES:	NILSEN (NT) PTY LTD (ACN 115 074 989) v DELTA ELECTRICS NT PTY LTD (ACN 094 187 050)
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	No. AP 1 of 2020 (21932025)
DELIVERED:	24 February 2020
HEARING DATES:	On the papers
JUDGMENT OF:	Mildren AJ

REPRESENTATION:

Counsel:

Applicant:	R Perkins
Respondent	B Raumteen

Solicitors:

Applicant:	Powell & Co Legal
Respondent	Maher Raumteen Solicitors

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

Nilsen (NT) Pty Ltd v Delta Electrics NT Pty Ltd [2020] NTCA 3
No. AP 1 of 2020 (21932025)

BETWEEN:

NILSEN (NT) PTY LTD
(ACN 115 074 989)

Applicant

AND:

DELTA ELECTRICS NT PTY LTD
(ACN 094 187 050)

Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 24 February 2020)

[1] This is an application for leave to appeal from an interlocutory judgment of Coulehan AJ given on 19 December 2019 whereby his Honour ordered that the defendant's Defence and Counter-claim be struck out.

[2] Leave to appeal is required by s 53(1) of the *Supreme Court Act 1978* (NT). Rule 85.06(2) requires that the Court of Appeal must determine the application on the written arguments and in the absence of the parties. Rule 85.06(3) provides that the Court of Appeal is not required to give any reasons for its determination.

Notwithstanding that rule, I consider that it is desirable that reasons be given in this case.

[3] In *Kaltukatjara Community Council Aboriginal Corporation ICN 200 v Brumby & Ors*[1] Barr J said, in relation to leave applications from an interlocutory judgment:

> In order to obtain leave to appeal from a discretionary judgment, it must be shown that the judgment appealed from is either wrong, or at least attended with sufficient doubt so as to warrant the granting of leave. Further, if the judgment sought to be appealed is a discretionary judgment in a matter of practice and procedure, then, notwithstanding that error may be shown, leave may still be refused unless it can be shown that substantial injustice will be done by leaving the erroneous decision unreversed.

[4] The plaintiff, (the respondent in these proceedings) has claimed that there were five contracts entered into between the parties:

1. An agreement to supply four (4) 1.5MW generators for the Palmerston Regional Hospital project in accordance with certain specifications and subject to certain terms in writing. The plaintiff has pleaded that the contract was entered into either as the result of an email dated 11 October 2016, or alternatively as the result of an email and purchase order dated 12 October 2016.

2. An agreement to vary the agreement referred to in paragraph 1 above relating to the supply and installation of 16 Cyclone Lockdown Brackets.

3. An agreement in writing to supply and install two (2) T70 underground fuel tanks and associated pipe works, presumably in association with the Palmerston Regional Hospital project. The plaintiff has pleaded that the agreement was

[1] [2018] NTCA 9 at [4].

constituted by an email dated 21 February 2017 attaching a purchase order dated 31 January 2017.

4. A variation to the agreement referred to in paragraph 3 above relating to the relocation of the fuel pumps.

5. A variation to the agreement referred to in paragraph 3 above relating to the addition of a gland plate to be added to the fuel system.

[5] In respect of the contracts referred to in paragraph [4] above, it was pleaded that save for certain matters where the plaintiff acknowledges that the defendant is entitled to a set-off for certain items which did not satisfy the requirements of the Generator Supply Agreement, the plaintiff has otherwise completed the works and is entitled to payment totalling $474,003.78 including GST, and interest, or in the alternative an award in quantum meruit and interest thereon.

[6] The defendant's Defence denied that there was any contract entered into for the supply of the generators until it issued a purchase order to the plaintiff dated 12 October 2016, which it alleged was subject to the defendant's purchase order terms and conditions. An area of dispute, so far as the contract terms are concerned, is the extent to which the plaintiff's terms and conditions applied to form part of the contract terms, to the extent that they were not inconsistent with the defendant's "purchase orders and conditions". This is relevant to a claim by the plaintiff for interest on unpaid invoices by the defendant.

[7] The defendant admits that the generators were built and supplied to the project, but claims that they were not properly loaded and installed, as pleaded in paragraph 11 of

the Statement of Claim. No particulars are given but it may be that this item is no longer in dispute given that the plaintiff acknowledged the defendant's entitlement to a set-off for failure to perform site testing. In paragraph 13 of the Defence, the defendant claims that there are four items which remain unresolved in relation to the Generator works. No further particulars are given. There are also particulars given in paragraph 24 of the Defence, but these items are not referenced to any particular contract term or specification. Subsequently, the defendant provided particulars in the form of a Scott Schedule which it claims provides the relevant particulars.

[8] The defendant claims that the Cyclone Lock-Down Brackets were not a variation but were within the original scope of works.

[9] So far as the Tanks Works Agreement is concerned, there is no dispute that such an agreement was entered into, but the defendant denies that it was subject to the plaintiff's terms and conditions. The defendant also denies that payment was required to be made in instalments referred to as "milestone payments" and says that all payments and deductions fall under clause 3 of the contract Terms and claims that the plaintiff has not completed the contract. Particulars of this allegation are allegedly contained in the Scott Schedule. Further, the defendant claims that it has rectified several of the defects and omissions and claims a set-off: see the Scott Schedule.

[10] The defendant denied that there was a variation in relation to the relocation of the pumps. In effect it claims that the plaintiff failed to comply with the specifications and that it had to take over rectification of these works (paragraph [37]) and that it had certain works completed by a third party (paragraph 35(5)). There are details of what is claimed in the Scott Schedule.

[11] Although in various places a set-off is claimed, there is no separate pleading for a set-off and how it is capable of being claimed.

[12] The Counter-claim merely repeats the Defence and claims damages for breach of contract, or alternatively by way of indemnity. It is not clear what items are subject to a claim for indemnity or what is the contractual right for an indemnity relied upon.

The decision of the Supreme Court

[13] In summary, his Honour found:

1. Whilst a number of the objections raised by the plaintiff were for the most part technically correct, some of the defects are relatively minor and may be overlooked, but there are a number of paragraphs that fail to inform the plaintiff as to the case it has to meet. This is because there has been a consistent failure to plead material facts and to provide adequate particulars in relation to the terms of the contract, the alleged defects and non-conformity with the contractual requirements, and the basis upon which the defendant's claim that it is entitled to set-off costs associated with the defects and non-conformities against sums otherwise payable to the plaintiff. [para 6]

2. His Honour then dealt specifically with various paragraphs of the Defence which fell into this category, referring to paragraphs 7, 16, 18, 20, 28, 32, and 33: see paragraphs [7] – [13]. There is no doubt that his Honour was quite correct in his criticisms of those paragraphs.

3. As to the Counter-claim, his Honour said that the defendant has failed to plead any material facts as to the alleged breach of contract, or any basis for a claim for

indemnity and there are no particulars of the quantum of the claim: see paragraphs [14] and [15].

4. His Honour then referred to the Scott Schedule and observed that "the matters set out in these columns are expressed in narrative form and contain information as to the contract and specification requirements, the failure to meet these requirements and the costs claimed", but that "there has been no attempt to relate the various allegations as to defects and nonconformities made in the defence and counterclaim with the claims made in the Scott Schedule". Again, I think his Honour is quite correct.

5. His Honour then dealt with the use to which the defendant sought to put by the Scott Schedule, the fact that Scott Schedules may be of use in building cases, the submission made that any shortcomings in the pleadings were made good by taking into account the Scott Schedule, and noted that what the defendant was trying to do, without the agreement of the plaintiff or the sanction of the Court, is to provide its Defence and Counter-claim in two documents which are difficult to reconcile: see paragraphs [16] – [22]. I agree.

6. His Honour concluded that the pleading is embarrassing because it does not sufficiently inform the plaintiff of the case it has to meet; that the defects are pervasive; and that the pleading should be redrawn to provide a coherent defence to the plaintiff's claim. His Honour then ordered that the Defence and Counter-claim be struck out.

The application for leave

[14] The proposed grounds of appeal are that:

1. The learned Judge failed to take any or any proper account of the matters pleaded in the Scott Schedule.

2. In relation to paragraph 7 of the judgment, being the only criticism of the Defence not addressed by the Scott Schedule, the Judge failed to place any or any sufficient weight on the considerations that:

    i. the terms of the Defendant's email of 11 October 2016 were fully and accurately pleaded; or

    ii. the plea was in any event one of factual matrix only, not determinative of any issue of contention between the parties.

3. In summary, this ground raised a complaint that the learned Judge failed to take account of the more flexible approach to pleading issues in accordance with the reasons in *Wickham Point Pty Ltd v Commonwealth of Australia* [2018] NTSC 7.

4. The sanction of striking out the pleading is disproportionate, where the criticisms of the Defence are, at their highest, technical and not substantive, falling far short of criticisms properly justifying the draconian sanction of striking out.

[15] In support of the reasons why leave should be given it is put that:

1. Unless overturned, the judgment would "stand in contradistinction of the very sensible modern guidance" in *Wickham Point*, which would "stand as a charter

for the sort of *pointless* pleadings battles which have plagued the courts in the past".

2. The judgment is wholly unjust to the defendant because the defendant would have to cut and paste the Scott Schedule into the Defence for no purpose, and leave the defendant open to further attack by the plaintiff.

3. It adds insult to injury that the plaintiff is now seeking a costs order.

[16] What the applicant fails to realise is that cutting and pasting the Scott Schedule into the existing Defence will solve nothing. It is very difficult to reconcile the Defence to the Scott Schedule as the learned Judge pointed out. The pleading in this case is so deficient, for the reasons given by the learned Judge, that while the Scott Schedule does illuminate the areas of dispute to some degree, it is a painstaking exercise and in any event deficient in providing the particulars that the plaintiff is entitled to, even making allowance for the approach to pleading issues recognised in the *Wickham Point* case. The pleading is deficient in not laying the groundwork for a proper plea in set-off, and the Counter-claim is meaningless, as presently pleaded.

[17] In my opinion, the applicant has not shown that the learned Judge's decision is arguably tainted with error, and nor has it been shown that any significant injustice would flow to the applicant if leave were to be refused.
