Northern Territory of Australia v John Holland Pty Ltd & Ors [2008] NTSC 4

PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v JOHN HOLLAND PTY LTD (formerly known as John Holland Construction & Engineering Pty Ltd) and GS (NT) PTY LTD (formerly known as Godfrey Spowers (NT) Pty Ltd) and ACER FORESTER (DARWIN) PTY LTD and ACER FORESTER PTY LTD (formerly known as Acer Forester Alice Springs Pty Ltd) and HOLMES FIRE AND SAFETY LTD and GRANT O'CALLAGHAN PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO:	SC 84 of 2005 (20516282)
DELIVERED:	25 JANUARY 2008
HEARING DATES:	17–19 DECEMBER 2007
JUDGMENT OF:	ANGEL J

CATCHWORDS:

PRACTICE AND PROCEDURE – Supreme Court practice and procedure – NT – pleadings – purpose – Statement of Claim – application to strike out – whether oppressive – whether may prejudice embarrass or delay fair trial – whether discloses cause of action against sixth defendant – material facts – breach of contract – breach of duty – no facts as to how breaches said to have occurred – damages – no facts constituting causal relationship between breach and loss – building contract – proprietor/subcontractor – whether duty of care – no allegation of reliance or assumption of responsibility by subcontractor – no allegation of vulnerability of proprietor – Statement of Claim struck out

Statute:
Supreme Court Rules, O 13.02(1)(a), O 23.02(a), (c) and (d)

References:
Bullen and Leake and Jacob's *Precedents of Pleading* 12th Edition 1975
Keating on Construction Contracts 8th Edition 2006

Citations:
Applied:
Banque Commerciale SA, En Liquidation v Akhil Holdings Pty Ltd (1990) 169 CLR 279
Davy v Garrett (1878) 7 Ch D 473
H 1976 Nominees Pty Ltd v Galli (1979) 30 ALR 18
Milatos v Clayton Utz [2005] NTSC 57
Perpetual Trustees Australia Ltd v Onesteel Trading Pty Ltd [2007] VSC 370
TPC v David Jones (Australia) Pty Ltd (1985) 7 FCR 109
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515
Wunda Joinery Pty Ltd (in Liquidation) v Wunda Projects Australia Pty Ltd [2007] SASC 301

Referred to:
Bruce v Odhams Press Ltd [1936] 1KB 697
John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd (1996) 8 VR 681
Perre v Apand Pty Ltd (1999) 198 CLR 180

REPRESENTATION:

Counsel:

Plaintiff:	I H Bailey SC with J Bartos
First Defendant:	J Bond SC with A Pomerenke
Second Defendant:	N/A
Third & Fourth Defendants:	N/A
Fifth Defendant:	P Maher
Sixth Defendant:	S Brown

Solicitors:

Plaintiff:	Solicitor for the Northern Territory
First Defendant:	Minter Ellison
Second Defendant:	N/A
Third & Fourth Defendants:	N/A
Fifth Defendant:	P Maher
Sixth Defendant:	De Silva Hebron

Judgment category classification:	B
Judgment ID Number:	Ang200801
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v John Holland Pty Ltd &Ors [2008] NTSC 4
No. SC 84 of 2005 (20516282)

BETWEEN:

THE NORTHERN TERRITORY OF AUSTRALIA
Plaintiff

AND:

JOHN HOLLAND PTY LTD (formerly known as John Holland Construction & Engineering Pty Ltd)
First Defendant

AND:

GS (NT) PTY LTD (formerly known as Godfrey Spowers (NT) Pty Ltd)
Second Defendant

AND:

ACER FORESTER (DARWIN) PTY LTD
Third Defendant

AND:

ACER FORESTER PTY LTD (formerly known as Acer Forester Alice Springs Pty Ltd)
Fourth Defendant

AND:

HOLMES FIRE AND SAFETY LTD
Fifth Defendant

AND:

GRANT O'CALLAGHAN PTY LTD
Sixth Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 25 January 2008)

Introduction

[1] Pursuant to Supreme Court Rules O 23.02(c) and (d) the first defendant seeks to strike out the whole of the plaintiff's Statement of Claim on the ground that it may prejudice, embarrass or delay the fair trial of the proceeding or is otherwise an abuse of the process of the Court. The sixth defendant also seeks to strike out the Statement of Claim, on the grounds that it does not disclose a cause of action against the sixth defendant and that it will prejudice, embarrass or delay the fair trial of the proceeding as between the plaintiff and the sixth defendant.

[2] The plaintiff and first defendant each brought applications with respect to the inspection and gathering of evidence in relation to the Alice Springs Hospital. Subsequent to the hearing of those applications, upon another application of the first defendant I made an order preventing the plaintiff from proceeding with any remedial work without giving prior written notice to the first defendant and permitting the first defendant to inspect the site of any proposed works. Given the currency of that order it is unnecessary to consider the plaintiff's and first defendant's earlier applications at the present time.

Background

[3] In November 1998 the plaintiff and first defendant entered into a contract pursuant to which the first defendant agreed to manage the design and construction of certain redevelopment works at the Alice Springs Hospital. As was contemplated by the terms of that contract the works were substantially performed by consultants and subcontractors contracted to the first defendant. The other five defendants in the litigation were consultants and subcontractors allegedly engaged by or on behalf of the first defendant.

[4] The plaintiff says the second defendant was a provider of architectural services, the third and fourth defendants were providers of building and engineering certification services engaged by the second defendant, the fifth defendant was a provider of fire engineering and design services engaged by the second defendant and the sixth defendant was a provider of building and engineering certification services engaged by the second defendant or the third and fourth defendants.

[5] The contract between the plaintiff and first defendant was a management contract for the design and construction of redevelopment works. A major part of the plaintiff's claim consists of numerous construction claims against the first defendant. The majority of the alleged construction defects relate to alleged breaches of fire safety standards.

[6] The plaintiff further alleges defects in the fire engineering design and the design of fire safety services, mechanical services, electrical services,

hydraulic services and medical gases services. The claims with respect to alleged defective design are against the first defendant for breach of contract and against the second to sixth defendants for negligence. Those defendants are said to have been retained by or under the direction of the first defendant and involved in the design process. The alleged defective design is said to be non compliance with relevant contractual, statutory and regulatory provisions of fire engineering design and the design of the electrical, mechanical and hydraulic services, fire sprinklers and medical gases system.

[7] The plaintiff says the first defendant is responsible for the respective defaults of all other defendants.

The Relevant Pleading Principles

[8] The proper purposes of pleadings are stated in Bullen and Leake and Jacob's *Precedents of Pleading* 12th Edition 1975 at pp 7 – 8. They are as follows:

(a) to define with clarity the issues which are in dispute between the parties and fall to be decided by the court;

(b) to require each party to give fair and proper notice to the other of the case to be met to enable the opponent to frame and prepare the opponent's own case for trial;

(c) to inform the court what are the precise matters in issue between the parties which alone the court may determine, since

they set the limits of the action which may not be extended without due amendment properly made, and

(d) not only to provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, but also to constitute a permanent record of the issues and questions raised in the action and decided therein so as to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them.

[9] The general rules of pleading are contained in Order 13 Supreme Court Rules. O 13.02(1)(a) provides:

> "A pleading shall … contain in a summary form a statement of all the materials facts on which the party relies but not the evidence by which those facts are to be proved."

[10] Material facts are those necessary to formulate a complete cause of action. The Statement of Claim must state with sufficient clarity the case that must be met. Material allegations of fact are not to be expressed in terms of great generality. They must inform the defendants of the case they must meet and set it out with particularity sufficient to enable any eventual trial to be conducted fairly to all parties. As James LJ said in *Davy v Garrett* (1878) 7 Ch D 473 at 486:

> "… a defendant may claim *ex debito justitiae* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it …"

[11] A defendant is entitled to have a plaintiff tied down to a clearly pleaded case so as not to be able to spring a new case on the defendant at trial. A plaintiff must plead its case with clarity sufficient to preclude conjecture as to what the case being made against a defendant might be. The defining of the issues in litigation is required from an early stage because discovery and other interlocutory procedures and steps necessary to deal with an opposing case must be conducted within a known framework. Apart from questions of procedural fairness, properly pleaded cases set the arena for the eventual trial and interlocutory processes preceding trial and assist the court by ensuring that the task of managing interlocutory processes and of supervising the conduct of the trial itself are conducted in circumstances where the nature and ambit of the dispute between the parties is clear and the issues for decision are defined. The general rule is that relief is confined to that available on the pleadings. This is a basic requirement of procedural fairness: *Banque Commerciale SA, En Liquidation v Akhil Holdings Pty Ltd* (1990) 169 CLR 279 at 286.

[12] In a claim for breach of contract the material facts which must be pleaded include:

(1) the term of the contract alleged to have been breached;

(2) the nature of the breach alleged;

(3) the particular means by which the breach is alleged to have occurred;

(4) the details of any special or consequential damage claimed, and

(5) the facts which establish the necessary causal link between breach and damage.

[13] If a plaintiff alleges that a defendant is in breach of a contractual obligation, the term imposing the obligation must be set out or described. The breach must be alleged and the allegation of breach must be such as to identify the means by which the breach is alleged to have occurred. It is impermissible simply to repeat the language of a statutory, regulatory or contractual provision which creates an obligation allegedly breached and then baldly assert a breach of that provision. It is not permissible to plead conclusions which are unsupported by pleaded material facts, see, eg. *H 1976 Nominees Pty Ltd v Galli* (1979) 30 ALR 181 at 186; *TPC v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109 at 114; *Perpetual Trustees Australia Ltd v Onesteel Trading Pty Ltd* [2007] VSC 370 at [24].

The First Defendant's Application

[14] The first defendant's complaints about the Statement of Claim can be summarised as follows:

(a) A failure to plead the means by which the first defendant is alleged to have breached its contract with the plaintiff.

(b) A failure to plead the means by which the breaches of duty of the other defendants were alleged to have occurred and for which the plaintiff seeks to hold the first defendant responsible.

(c) A failure to plead the facts which establish the necessary causal link between breach and damage.

(d) The allegations of breach and damage are, the first defendant says, "hopelessly vague and general".

[15] The first defendant further complains of particulars that "fail to remedy the impermissibly vague and general allegations in the Statement of Claim", particulars that "comprise an inadequately organised mass of evidence which obfuscates rather than clarifies the plaintiff's case", and particulars which are "oppressive and pointless".

The Allegations of Breach

[16] Without exception the plaintiff's allegations of breach by the first defendant which appear in the body of the Statement of Claim merely assert a breach based on the terms of the alleged obligation it had been owed. They are pleas of conclusion which offer no clue as to the particular means by which the breaches are alleged to have occurred. This is not a permissible means of pleading: *TPC v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109 at 114, per Fisher J. The essential allegation of the necessary material fact as to the means by which each breach is alleged to have occurred does not appear in an appropriate form either in the body of the Statement of Claim or in any of

the served particulars. As was submitted by learned counsel for the first defendant, whilst the orthodox view is that there is a clear distinction between pleadings and particulars such that particulars are not to be used in order to fill material gaps in a demurrable Statement of Claim, *Bruce v Odhams Press Ltd* [1936] 1KB 697 at 711 – 713, *H 1976 Nominees Pty Ltd v Galli* (1979) 30 ALR 181 at 186 – 187, in complicated building cases such as the present, it may be permissible to set out in particulars or in schedules matters which in other circumstances might more properly be included in the body of a pleading and to require the opposing party to respond to those particulars or schedules. See eg. *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 8 VR 681 at 686 [8]. A Scott Schedule is a time honoured method of requiring a defendant to plead point by point, that is, individually to itemised complaints.

[17] Paragraph 22(a) of the Statement of Claim provides:

> "In breach of the contractual warranties referred to in paragraph 14 hereof:
>
> (a) John Holland did not comply with the requirements of the Construction Stage and did not construct the Works in accordance with the Approved Construction Documents, to the extent that those documents complied with the Contract, the BCA (the Building Code of Australia), all legislative requirements and applicable standards:
>
> (i) in a proper and workmanlike manner and so that the Works are fit for their purpose; and
>
> (ii) using material of the nature described in the Contract or failing any specific description then of the best quality

> available which are in any event of merchantable quality and fit for their intended purpose."

In my opinion that plea is impermissibly vague and is not in accordance with the rules of pleading.

[18] Paragraph 28(a)(ii) of the Statement of Claim provides:

> "John Holland did not … properly examine and carefully check the Design Brief and the Sketch Design and ensure that, unless otherwise agreed, they complied with the requirements of the Project Outline."

[19] As was submitted by the first defendant paragraph 28(a)(ii) of the Statement of Claim gives no clue as to what constituted the relevant requirement of the Project Outline, the respect in which it is alleged that the Design Brief and Sketch Design failed to comply with the relevant requirements of the Project Outline, the respects in which it is alleged that the examination conducted by John Holland fell short of that which would have been "proper", or the respects in which it is alleged that the checking performed by John Holland fell short of that which would have been "careful". In other words the plea does not specify matters fundamental to the allegation of breach, that is, the means by which the breach is alleged to have occurred. The pleading does not identify standards which specified work failed to meet.

[20] Paragraph 28(a)(iii) of the Statement of Claim alleges:

> "John Holland did not … properly examine and carefully check the Design Criteria and the Performance Specification and further ensure that the Sketch Design complied with the Design Criteria and was suitable for the purposes stated in the Performance Specification."

[21] This allegation omits to specify which parts of the Design Criteria are relied upon by the plaintiff, which of the purposes stated in the Performance Specification are relied upon by the plaintiff, the respects in which it is alleged that the Sketch Design failed to comply with the relevant Design Criteria, the respects in which it is alleged that the Sketch Design was not suitable for the relevant purposes stated in the Performance Specification, the respects in which it is alleged that the examination conducted by John Holland fell short of that which would have been "proper" or the respects in which it is alleged that the checking performed by John Holland fell short of that which would have been "careful". Here, too, the material facts as to the means by which the breach is alleged to have occurred have not been pleaded.

[22] In my opinion the first defendant has made good its submission that the Statement of Claim is defective and in breach of the rules of pleading in so far as it alleges breaches by the defendants of contractual and other duties without additionally pleading how each alleged breach is said to have occurred.

[23] In paragraph 24 of the Statement of Claim the plaintiff says that by reason of the construction breaches the plaintiff has suffered loss and damage which it particularises as the cost of rectifying the defects consequent upon the construction breaches. It claims rectification costs "which have and will continue to be incurred". The plaintiff says particulars of loss and damage will be provided prior to trial. To date there has been no attempt to state the

amount of loss or damage claimed for those defects where the costs have already been incurred.

[24] There is no plea linking the cost of rectifying particular defects to individual breaches. The plea is objectionable. The plaintiff is required to plead the amount claimed in respect of rectification of each defect whether by estimate or otherwise and the facts which establish the causal connection between each alleged breach and the quantum of damage claimed in respect of it. See generally, *Keating on Construction Contracts* 8th Edition 2006 at 644 – 650.

[25] Even though a case may contain factual matters of considerable complexity that does not affect a plaintiff's responsibility to commence an action with a Statement of Claim that complies with proper pleading principles: *Milatos v Clayton Utz* [2005] NTSC 57 at [66]. As Thomas J said at [70], "a court has the power to protect its own record from being oppressive".

[26] The court is entitled to have a single comprehensive document (incorporating a schedule or schedules if convenient) from which the plaintiff's case can be readily understood: *Wunda Joinery Pty Ltd (in Liquidation) v Wunda Projects Australia Pty Ltd* [2007] SASC 301 at [8]. The present Statement of Claim is not a single comprehensive document from which the plaintiff's case can be readily understood. In its present form it lacks material allegations regarding both breaches of duty, contractual and otherwise, and causation of damage.

[27] I agree with the first defendant's submission that overall the Statement of Claim is oppressive on account of its cross referencing between paragraphs and the need to analyse the different sources of obligation referred to in the delivered particulars, that is, to divine particular obligations from the contract, from the Building Code of Australia and from "all legislative requirements and applicable standards".

[28] In my judgment the Statement of Claim is oppressive and should be struck out.

The Sixth Defendant's Application

[29] The sixth defendant seeks to strike out paragraphs 63 – 72 of the Statement of Claim. The application is made on the ground that the pleading does not disclose a cause of action against the sixth defendant or alternatively will prejudice, embarrass or delay a fair trial of the proceeding.

[30] The Statement of Claim alleges that the sixth defendant was engaged by the second, third or fourth defendant to assist with and coordinate the building certification process. The Statement of Claim alleges that the sixth defendant was negligent in a number of respects in carrying out its alleged role and that as a result of those breaches the plaintiff suffered loss and damage in obtaining and implementing a compliant fire engineering design and that the plaintiff incurred costs rectifying the works in accordance with the design.

[31] As a general rule a subcontractor will not be liable in tort to a proprietor or head contractor with whom it has no contract. Such a rule is not absolute but facts must be pleaded which will support the allegation that a duty of care is owed, particularly where the claim is for pure economic loss. No such facts have been pleaded against the sixth defendant in the present case. No case of reliance or assumption of responsibility is pleaded. The plaintiff could expect to have recourse in contract against the first defendant in respect of deficiencies in construction or design, not against the sixth defendant in the absence of known reliance upon the sixth defendant or assumption of responsibility on the part of the sixth defendant or vulnerability, a matter to which I now turn.

[32] In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530 [23], 533 [31] Gleeson CJ, Gummow, Hayne and Heydon JJ referred to matters which must be established to disclose a cause of action where a claim is made for pure economic loss arising out of negligence. See, also per McHugh J at 548 – 549 [80], per Kirby J at 575 [168] and per Callinan J at 592 [222]. The court confirmed that damages for pure economic loss are not recoverable if all that is shown is that the defendant's want of reasonable care was a cause of the loss and the loss was reasonably foreseeable. The court held, as had previously been held in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, that vulnerability of the plaintiff had emerged as a necessary requirement. "Vulnerability" in this context is to be understood as a reference to the plaintiff's inability to protect itself from the consequence of

a defendant's want of reasonable care either entirely or at least in a way which would cast the consequences of loss on the defendant.

[33] I agree with counsel for the sixth defendant that the Statement of Claim should be struck out against the sixth defendant as not disclosing a cause of action. The pleading must disclose the facts upon which it is alleged the duty of care would arise. Here a necessary ingredient was the vulnerability of the plaintiff in the relevant sense. The facts alleged in the Statement of Claim do not allege that the plaintiff was, in any relevant sense, vulnerable to the economic consequences of any negligence of the sixth defendant.

Orders

[34] Neither defendant seeks judgment or opposes the plaintiff being granted liberty to replead its case.

[35] There will be the following orders:

1. The Statement of Claim is struck out.

2. Liberty to the plaintiff to file and serve a fresh Statement of Claim.

[36] I shall hear the parties as to costs and any further orders or matters.

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