

Theories Pty Ltd v Holt & Anor [2014] NTSC 40

PARTIES: Theories Pty Ltd
(ACN 076 092 281)

v

Holt, Myles Edward

and

Holt, Myles Edward as
Trustee for Holt Discretionary
Trust

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
APPELLATE JURISDICTION

FILE NO: LA (2 of 2014) 21203165

DELIVERED: 5 SEPTEMBER 2014

HEARING DATES: 17 JULY 2014

JUDGMENT OF: BLOKLAND J

APPEAL FROM: LOCAL COURT (Darwin)

CATCHWORDS:

APPEAL – Pleadings – Local Court interlocutory decision – Application for leave to appeal against refusal to grant leave to file Amended Particulars to Further Amended Notice of Defence – Application to amend particulars made at conclusion of substantive hearing – Prejudice to the first and second respondent – Decision of Magistrate not attended with sufficient doubt – Not in the interests of justice to grant leave – Leave refused.

Local Court Rules 1998 (NT).
Supreme Court Rules 2013 (NT).

Angell v PNorth Consultants Pty Ltd [2007] NTCA 03; *Banque Commerciale SA EN Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279; *Dare v Pulham* (1982) 44 ALR 117; *Leotta v Public Transport Commission (New South Wales)* (1976) 9 ALR 437; *Nationwide News Proprietary Limited (t/as) Centralian Advocate v Bradshaw* (1986) 41 NTR1; *Northern Territory of Australia and Anor v Roberts* [2009] NTCA 05; *Theories Pty Ltd v Holt and Anor* [2012] NTSC 91, applied.

REPRESENTATION:

Counsel:

Applicant:	G Clift
Respondent:	M Crawley

Solicitors:

Applicant:	MSP Legal
Respondent:	Bowden McCormack

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

Theories Pty Ltd v Holt & Anor [2014] NTSC 40
No. 21203165

BETWEEN:

THEORIES PTY LTD
Applicant

AND:

DR MYLES EDWARD HOLT
First Respondent

AND:

**DR MYLES EDWARD HOLT AS
TRUSTEE FOR HOLT
DISCRETIONARY TRUST**
Second Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 5 September 2014)

Application for leave to appeal

- [1] I decline to grant leave to appeal the interlocutory decision of Morris SM made on the 12 May 2014 refusing the applicant/defendant's application for leave to file Amended Particulars to its Further Amended Notice of Defence, to the Further Amended Statement of Claim.

- [2] Theories Pty Ltd (the applicant) is the defendant in the Local Court proceedings commenced by the Statement of Claim filed on 24 January 2012. The first respondent (Dr Holt) is the first plaintiff in those proceedings; the second plaintiff/respondent is Dr Myles Edward Holt as trustee for Holt Discretionary Trust. For ease of reference, I will refer to the plaintiffs/respondents as “Dr Holt”. The substantive hearing took place in the Local Court between 1 April and 4 April 2014. On 4 April 2014 the proceedings were adjourned for final submissions to 12 May 2014.
- [3] The application to file Amended Particulars to the Further Amended Notice of Defence was made after the substantive hearing had concluded, during oral submissions on 12 May 2014, when both counsel were to speak to their written submissions. The application to amend was brought pursuant to Rule 5.15 of the *Local Court Rules*. Rule 5.15 provides as follows:
- (1) Such amendments are to be made to the pleadings as are necessary for determining the real questions at issue between the parties.
 - (2) At any stage of a proceeding, the Court may –
 - (a) allow a party to amend his or her pleadings in a manner and on terms the Court considers appropriate;
 - (b) order that the pleadings be in a particular form; or
 - (c) make orders in respect of the filing and service of pleadings
- [4] The orders made by Morris SM were interlocutory in nature. Given the orders were not “final orders”, s 19(3) of the *Local Court Act* provides that

an appeal may be made to the Supreme Court in respect of the orders, with leave of the Supreme Court.

[5] As the orders made by Morris SM were in the exercise of a discretion with respect to a matter of practice or procedure, the applicant must first show that the correctness of the orders is sufficiently doubtful so as to justify the granting of leave and secondly that the interests of justice make it desirable to grant leave.¹ Clearly the Local Court has power to grant leave pursuant to the *Local Court Rules*. That power may be exercised even after all of the evidence has been given and after the cases for both parties have been concluded.² Amendments to pleadings, including particulars should readily be made in order for the pleadings to conform to the evidence adduced at trial,³ however, the power to amend pleadings cannot be used in a manner that causes significant prejudice to any party. The timing of the application to amend in this matter, brought the issue of prejudice to Dr Holt into sharp relief.

[6] Amendments of this kind are regularly permitted, provided fresh issues based on different causes of action are not raised.⁴ Clearly a court is unlikely to exercise a discretion to grant amendments of this kind based on evidence that would be a departure from the pleaded cause of action, or that would give rise to a new issue in respect of which no notice was given. The

¹ *Nationwide News Proprietary Limited (t/as) Centralian Advocate v Bradshaw* (1986) 41 NTR1; *Angell v PNorth Consultants Pty Ltd* [2007] NTCA 03; *Northern Territory of Australia and Anor v Roberts* [2009] NTCA 05; *Theories Pty Ltd v Holt and Anor* [2012] NTSC 91.

² *Leotta v Public Transport Commission (New South Wales)* (1976) 9 ALR 437.

³ *Banque Commerciale SA EN Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279.

⁴ *Leotta v Public Transport Commission (New South Wales)* (1976) 9 ALR 437 at 446.

principles of fair trial and prevention of prejudice must also be considered. The majority in *Leotta v Public Transport Commission* noted there was no complaint by the defendant in that case, to the effect that the amendment, the subject of those proceedings, would require further evidence in response.⁵ That is not the case here. In my opinion the overall context of this case, is a relevant consideration in assessing whether certain parts of the evidence can genuinely be said to be further alleged misrepresentations that should be added as particulars. The alleged misrepresentations are said by the applicant to justify, in large part, the termination of the contract. Not every alleged untruthful statement by Dr Holt, that was the subject of some cross-examination, could be said on the evidence to have induced the applicant's witness, Dr Vrodos to reduce the hours worked by the plaintiff. The bulk of those matters appeared to be relevant to credit. Credit matters may well in turn affect the court's conclusion with respect to whether Dr Holt had misrepresented the true state of his affairs to the applicant, however, in my opinion it could not be said that each alleged credit matter raised in evidence was capable of supporting a fact in issue, namely a misrepresentation relied on by the applicant.

- [7] Morris SM clearly accepted the principle that particulars may be amended after the evidence at trial is closed, referring to *Dare v Pulham*,⁶ however,

⁵ (1976) 9 ALR 437 at 447.

⁶ (1982) 44 ALR 117.

she accepted that Dr Holt would be prejudiced if she had allowed the application to amend the particulars after the close of the evidence.⁷

Background Relevant to the Hearing in the Local Court

- [8] In very broad terms, Dr Holt claimed remuneration for work he alleged he had done as a dentist and had not been paid for. He also claimed four weeks' notice, in the sense of having lost the opportunity of working for those four weeks; he claimed he was entitled to that work and to be paid. His claim was for loss of income for that period. The action was not in the nature of an action based on an employment contract.
- [9] The applicant denied the claim and asserted a set-off, suggesting that as a result of alleged misconduct on the part of Dr Holt, the contract could be summarily terminated and Dr Holt was not entitled to the value of the lost opportunity of working for the four weeks. It is not necessary here to detail the formula calculated to determine the sum said to be owed by Dr Holt. This litigation has a significant history of pleading complexity. The applicant was partially successful in obtaining leave to appeal against a previous Magistrate's decision concerning a matter of procedure (striking out certain Amended Particulars of the Statement of Claim). Barr J's decision allowing the appeal in part, provides further background including details of calculations that need not to be reproduced here.⁸

⁷ Transcript of proceedings, Local Court, 12 May 2014 at 10.

⁸ *Theories Pty Ltd v Holt and Anor* [2012] NTSC 91.

Consideration of the Proposed Amendment to Paragraph 18.3 (iii)

- [10] The applicant argued these amendments were sought so as to mirror the evidence adduced at trial concerning the content of oral representations pleaded; that is, to mirror the evidence regarding the alleged falsity of the oral representations, and the inducement operative on the applicant to agree to a reduction of work to be undertaken by Dr Holt, in a belief that the representations were true.
- [11] Evidence was led about the content of conversations relevant to that representation. It was submitted the amendment was necessary to deal with misrepresentations that came out in evidence, to the effect that Dr Holt was not attending to “personal matters” but was engaging in other activities beyond working in Singapore (“working in Singapore” was pleaded in the Further Amended Notice of Defence).
- [12] The proposed amendment includes additional detail that alleges Dr Holt represented his inability to provide dental services for four days per week (Monday to Thursday) and on rostered Saturdays, was because he needed to take long weekends for a few weeks in order to travel to be with family and friends. The proposed amendment then alleges Dr Holt did not travel to be with family but instead travelled to Singapore. It was submitted that on the evidence of Dr Vrodos, he was induced to alter the terms of the contract based on his understanding that Dr Holt needed to be close to family and

friends in Australia: not to travel overseas every other weekend in order to be in Singapore.

[13] While pleadings may be amended to reflect the evidence, in this case of misrepresentation, matters that were approached broadly as credit issues throughout the hearing should not in my opinion be permitted to be elevated to substantive issues. It changes the character of the hearing. I have no difficulty understanding why her Honour found that prejudice would be occasioned to Dr Holt if the amendments were permitted. The decision of Morris SM is not attended with sufficient doubt to justify granting leave.

[14] Dr Holt gave evidence about a cancelled engagement and relationship breakdown around February 2011. He gave evidence of the impact this had on him personally. He spoke of his approach to Dr Vrodos; the illness of his mother; and spending time on the Gold Coast seeking counselling and being in Singapore with his best friend. He gave evidence of socialising and meeting another dentist in Singapore and being offered a position in his practice. He said he had no plans at that time to move to Singapore but subsequently did move there and commenced working for a Dr Cooney.⁹ Dr Holt agreed in evidence that he had made a request for reduced hours of Dr Vrodos in relation to his relationship and personal problems. He said he believed he gave detail of those problems to Dr Vrodos. He said he informed Dr Vrodos that he needed time off to reduce his hours so he could

⁹ Transcript of proceedings, Local Court, 1 April 2014 at 25 - 28.

travel and be with a support network which he did not have in Darwin at the time.¹⁰

[15] Dr Vrodos gave evidence that he spoke to Dr Holt about problems in the practice; that Dr Holt said he was having some personal issues and gave details of what they were; that he needed some Mondays off and that he had told him to take some time off and deal with the problems. Dr Vrodos said Dr Holt had said he could not deal with full-time dentistry at that time and he wanted to have an extra-long weekend so he could receive psychological help and be with his family in Melbourne. Dr Vrodos said that he (Dr Vrodos) didn't want to continue discussing this with Dr Holt. "I did not want to stick around. I appreciated the guy's pain. I was awkward". Dr Vrodos said Dr Holt indicated this arrangement would be short term. Dr Vrodos said he agreed Dr Holt could take some Mondays off so that he could get help for a difficult personal problem. He said they only talked about Mondays. Saturdays came up later. Dr Vrodos said that he arranged an email be sent to Dr Holt suggesting he take a couple of weeks off and the reply from Dr Holt was to the effect that he preferred to be busy.¹¹

[16] Dr Holt agreed in evidence it was his intention to keep Dr Vrodos updated and the arrangement that he previously reached with Dr Vrodos continued until the contract was terminated. Dr Holt disagreed that the original

¹⁰ Transcript of proceedings, Local Court, 1 April 2014 at 57 - 58.

¹¹ Transcript of proceedings, Local Court, 3 April 2014 at 205 - 207.

representations were not true.¹² Dr Holt was also asked about whether by reference to a document in relation to a gym, he was in fact in Auckland at a relevant time, allegedly contradicting other evidence.

[17] Dr Vrodos gave evidence that he felt Dr Holt had deceived him because he told him he needed to get away to attend a psychologist and be with family and friends and could not work for four days per week. Dr Vrodos said as far as he was aware, Dr Holt was either travelling to Victoria or later to Brisbane. He did not agree that it mattered where Dr Holt's family and friends were. In answering questions about whether he thought it was deceitful what Dr Holt said about where he was going, or who he was seeing, or what he was doing, Dr Vrodos answered all of Dr Holt's responses were deceitful. He said it showed deceit. He said he would have been happier if Dr Holt was seeing a psychologist in Singapore. Part of the deceit he felt was that he thought Dr Holt was working in Singapore. My interpretation of this part of Dr Vrodos' evidence is that Dr Holt was dismissed because he was, or Dr Vrodos thought he was, working in Singapore.

[18] Many of the issues that Dr Holt was cross-examined on were clearly relevant to credit. There may be different interpretations and conclusions drawn from his evidence however, these matters are peripheral to the case pleaded in the Further Amended Notice of Defence. The matters raised in evidence do not appear to be material to the operative misrepresentation. In my

¹² Transcript of proceedings, Local Court, 1 April 2014 at 63 - 65.

opinion, if the amendment were allowed it would elevate issues that can only be seen as matters relevant to credit, not to matters of substance.

[19] Morris SM was correct; the first respondent would have been substantially prejudiced if the list of alleged discreditable parts of conversations on the part of Dr Holt were to be elevated to operative misrepresentations at the end of the trial. I agree with the submission that Dr Holt could have made different forensic decisions such as calling evidence from his therapist and/or his mother if the representations were facts in issue. Clearly Dr Holt's case was directed to the issues pleaded at the outset of the trial, primarily, that Dr Holt used his extended weekends to work in Singapore. Evidence was adduced by Dr Holt to attempt to persuade the court that this was not the case.¹³

[20] Paragraph 18.3 is also sought to be amended to include alleged representations in a letter from Dr Holt to Dr Vrodos on 22 March 2011.¹⁴ The letter is to the effect that Dr Holt wanted to let Dr Vrodos know how things stood at that time. The letter states that Dr Holt had been getting out of Darwin every weekend to be with friends and family which has helped "keep [him] sane," but "to cap it all off my mum [Dr Holt's mother] just got diagnosed with breast cancer and things just keep piling up". He informed Dr Vrodos that he started seeing a therapist in Brisbane on Saturdays and would not be able to work on Saturdays "for the next couple of months".

¹³ Exhibit 12 (Passport); Exhibit 5 (Application to work in Singapore); Exhibit 6 (Contract with employer in Singapore commencing 13 June 2011).

¹⁴ Exhibit 14.

The letter states that he is “committed to doing as many hours as possible at Palmerston because I think stopping completely would be a bad move”. The letter also states he is totally committed to staying in Darwin, sharing a house and looking at changing his work schedule. He asked whether “coming on board full-time is possible when the new clinic opens”. Those parts of the letter were alleged to be misrepresentations. It was submitted the evidence indicated that rather than travelling to Brisbane in March, April and May, Dr Holt travelled to Singapore, Indonesia, Victoria and Adelaide. The proposed amendments allege the applicant was induced by those misrepresentations. The applicant acknowledges that inclusion of particulars from the letter of 22 March 2011 expands on the original alleged misrepresentations and expands the scope from oral representations to oral and written representations. Counsel informed this court that the letter was admitted into evidence without objection and, it was submitted that it would not have had any relevance other than in connection with the originally pleaded misrepresentation. It was submitted that the amendment was therefore justified as it clarified that alleged misrepresentations contained in the letter of 22 March 2011 which were relied on.

- [21] It is not in dispute that the letter of 22 March 2011 had been in the applicant’s possession since on or about 22 March 2011. If the contents of that letter were in any way alleged to be misrepresentations that were acted on by the applicant, there was ample opportunity to plead the case in that manner, but more significantly, given the timing of the application to

amend, clearly prejudice is occasioned by Dr Holt who could have investigated the possibility of calling witnesses as to the truth or otherwise of the alleged representations. The matters contained in the letter that may well be relevant to credit, change the case significantly from the original case that was run.

[22] In its current rolled-up form, the proposed amended particulars would be virtually incapable of being properly responded to.

[23] Oral misrepresentations alleged against Dr Holt to the effect that Dr Holt requested a reduction in work to three days per week because of personal matters, were pleaded in the Further Amended Notice of Defence. It would not be in the interests of justice to permit amendments that change the character of the hearing in such a way as to force Dr Holt to call further evidence at the later time.

Consideration of Proposed Amendment to Paragraph 19 (i)

[24] This proposed addition to the particulars was sought on the basis that it mirrored the evidence adduced regarding the Saturdays and Mondays Dr Holt did not work prior to the termination of the contract and in breach of that contract. It was also said that the proposed particulars would make it clear that the applicant relied on seeking damages, arising post the termination date of the contract. The termination occurred at the instance of the applicant on 5 May 2011.

[25] The applicant submitted that Dr Holt's reply filed 7 November 2013 in the Local Court stating that the applicant obtained the services of an alternative dentist for the days originally contracted for with Dr Holt at a lesser cost to the applicant, could only be relevant to the question of mitigating the loss and damage. It was submitted that Dr Holt was therefore aware of the extent of the depth of the claim for damages. Evidence was given about the search for an alternative dentist after 5 May 2011 to replace Dr Holt.¹⁵ Paragraph 19 of the particulars of the Further Amended Notice of Defence, cap the damages to 25 lost contracted days. It was submitted that the damages that could be assessed on the evidence basically amounted to around 25 lost contracted days. It was further submitted that the particulars sought to be added, merely reflect the evidence and were anticipated by Dr Holt, as evident in the filed reply.

[26] Dr Holt relied on the original particular to confine damages claimed to those incurred up to and including 5 May 2011. By reference to the Mondays between 14 March 2011 and the date of termination, less public holidays, on behalf of Dr Holt, this has been calculated as six days. It was acknowledged on behalf of Dr Holt that the proposed amendment, would not increase the monetary set off over the total number of days that appear in the pleading, however, it has been pointed out that it would significantly increase the number of days by which damages could be calculated. As the

¹⁵ Transcript of the proceedings, Local Court, 3 - 4 April at: 223 - 224; 254 - 256; 257 - 258; 281.

contract came to an end on 5 May 2011, the existing pleading was limited to loss of days up until the termination of the contract.

[27] At the commencement of the hearing, counsel for Dr Holt said:

“[As] I understand the pleading and the case the defendant is running, I'm sure my learned friend will leap up if I'm wrong. But the loss of a day a week – the loss of the services of a dentist being claimed after the period when the cutback occurred from four days till three until the termination of contract. So it is not prospective. In other words, it's nothing after Dr Holt was terminated from his employment, from his contract”.¹⁶

[28] That statement was not challenged by the applicant. The trial was therefore conducted at least from the perspective of Dr Holt, on the basis that there was no claim for loss of days post the termination of the contract.

[29] In relation to the submission that the filed reply meant Dr Holt was alive to a claim of damages extending beyond the termination date, it may be noted that paragraph 4 of the reply filed 7 November 2011 was in response to paragraph 19 of the Defence filed on 22 January 2013, a claim for loss and damage in the sum of \$86,240.84. This follows paragraph 18 alleging a failure to work for 34 contracted days. In those circumstances, it is also open that the reply represented the suggestion by Dr Holt that his employment had been terminated because a cheaper dentist could be engaged. If the case had been pleaded to extend damages to a time after the termination of the contract, and if Dr Holt was put on notice that prospective loss was being claimed, it would be expected that further investigations

¹⁶ Transcript of proceedings, Local Court, 1 April 2014 at 13 - 14.

would have been made on behalf of Dr Holt beyond simply cross-examination of witnesses on the topic of the employment of a dentist who was paid less than Dr Holt.

[30] I agree with the reasons of Morris SM that Dr Holt would have been prejudiced if this amendment were permitted to proceed at the conclusion of the trial. The hearing has not been conducted on the basis that loss and damage continued beyond the termination of the contract.

[31] In my opinion the decision is not attended with sufficient doubt to justify leave to appeal being granted. In my opinion, it is not in the interests of justice to grant leave to appeal.

[32] At the commencement of this hearing an argument was raised on behalf of Dr Holt that the application for leave was not filed and served within the terms of the Supreme Court Rules. It was submitted leave to appeal must be sought within 7 days of the date of the subject decision and served within a further 7 days.¹⁷ The *Local Court Act* prevails as s 19(3) of the *Local Court Act* sets a period of 14 days in which to appeal orders of this kind, with the leave of the Supreme Court. Although there may be some play in the text as between “appeal” and “leave” to bring the appeal, the overall intention, must be that 14 days is the relevant time. If I am wrong, it is a matter that I would have granted dispensation with compliance with the suggested 7 day limit.

¹⁷ *Supreme Court Rules 2013* (NT), r 83.23(1)(a).

Orders

[33] In relation to the application for leave to appeal from the orders of Ms Morris SM made on 12 May 2014 in the Local Court at Darwin there will be an order that leave is refused.

[34] I will hear counsel on costs.
