

*Bateman Project Engineering Pty Ltd & Ors v Pegasus Gold Australia Pty Ltd
(Administrators Appointed)* [1999] NTSC 15

PARTIES: BATEMAN PROJECT ENGINEERING PTY LTD
AND
KINHILL PACIFIC PTY LTD
AND
KILBORN ENGINEERING PACIFIC PTY LTD
v
PEGASUS GOLD AUSTRALIA PTY LTD
(ADMINISTRATORS APPOINTED)

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO: 306 of 1997; 21 of 1998; 81 of 1998

DELIVERED: 25 February 1999

HEARING DATES: 18 December 1998

JUDGMENT OF: MARTIN CJ.

CATCHWORDS:

PROCEDURE – SUPREME COURT PROCEDURE

Application to disallow amendments to Statement of Claim – liens claimed on indorsement on writ – whether liens abandoned because not specifically pleaded in Statement of Claim – no evidence of abandonment of liens.

Workman's Liens Act 1983 (NT)

Do Carmo v Ford Excavations Pty Ltd (1984) 154 CLR 245, considered

Harries v Ashford (1950) 1 All ER 427, considered

Renowden v McMullin (1970) 123 CLR 584, distinguished.

REPRESENTATION:

Counsel:

Applicant:	Mr Cripps QC
Instructed by:	Mr O'Brien
Respondent:	Mr Martin QC
Instructed by:	Mr D Alderman

Solicitors:

Applicant:	Hunt & Hunt
Respondent:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	mar99001
Number of pages:	8

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

*Bateman Project Engineering Pty Ltd & Ors v Pegasus Gold Australia
Pty Ltd (Administrators Appointed)* [1999] NTSC 15
Nos. 306 of 1997, 21 of 1998 and 81 of 1998

BETWEEN:

**BATEMAN PROJECT ENGINEERING
PTY LTD**

First Plaintiff

AND:

KINHILL PACIFIC PTY LTD

Second Plaintiff

AND:

**KILBORN ENGINEERING PACIFIC
PTY LTD**

Third Plaintiff

AND:

**PEGASUS GOLD AUSTRALIA PTY
LTD (ADMINISTRATORS
APPOINTED)**

Defendant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 25 February 1999)

- [1] This is an application by the defendant that certain amendments made by the plaintiffs to their consolidated Statement of Claim, as of right pursuant to r36.03 of the *Supreme Court Rules*, be disallowed pursuant to the power contained in r36.04.

- [2] By indorsement on the writ, each of the plaintiffs claimed against the defendant, (a) a contract price said to be due and payable by the defendant on certain written contracts for the supply of work and furnishing material by the plaintiffs, with the assent of the defendant, to a certain mining lease held by the defendant, and (b) for the enforcement of workmen's liens registered against the lease by the plaintiffs pursuant to the *Workmen's Liens Act* (1983) NT.
- [3] The consolidated Statement of Claim pleaded that at all material times the defendant was the registered lessee of the mining lease and had undertaken the development of construction of a mine there; there are pleas relating to the supply by the plaintiffs to the defendant of services and material in respect of developments at the lease; the total cost is put at \$3,092,349.68. It is claimed that the defendant failed to pay that sum or any part of it when demanded by the plaintiffs. The Statement of Claim concludes by claiming that the plaintiffs had lodged and served on the defendant notices of workmen's liens pursuant to the *Workmen's Liens Act* for the total price, and particulars of the liens are given.
- [4] The relief sought was for payment of the contract price only. No relief was sought such as envisaged in the indorsement on the writ for enforcement of the liens. The uncontested evidence of the solicitor who prepared the Statement of Claim is that the failure to claim enforcement of the liens was an oversight on his part and not pursuant to any instructions he had received.

[5] It could be argued that the original Statement of Claim does not sufficiently plead all of the facts upon which the plaintiffs would need to rely in support of a claim for enforcement of the liens. But I do not regard any deficiencies in that regard as being irremediable by amendment in the ordinary course permitted by the rules. That the plaintiffs were seeking to have the liens enforced notwithstanding that that relief was not especially claimed, was clear to the defendant. Its defence asserts that the plaintiffs did not have valid and enforceable liens, that they were not contractors as defined in the Act, that they had not performed work as defined in the Act, that they have not done work on the lease or fixture thereon, and that they had not supplied materials used or intended to be used in or about the work done or intended to be done at the lease or any fixture. In the alternative, it is pleaded that if any amount is due from the defendant to the plaintiffs, then the plaintiffs did not register the liens before the expiration of 28 days from the date on which the amount, the subject of each liens, became due. *Workmen's Liens Act* s10(1) is specifically referred to. As a further alternative, the defendant pleads that such a lien is only available on the estate or interest in land of the owner or occupier, and that the mineral lease does not create an estate or interest in land. Reference to those matters raised in the defence satisfy me that the defendant was in no doubt that the plaintiffs intended to seek relief by way of enforcement of the liens.

[6] The consolidated Statement of Claim was served on the solicitors for the defendant on 26 June 1998, the defence was filed on 10 July, and it was only

on 23 July that the solicitor for the defendant wrote to the solicitors for the plaintiffs noting that there was no prayer for relief in the consolidated Statement of Claim regarding enforcement of the liens and went on: “I would be pleased if you confirm that by reason of filing and service of the consolidated Statement of Claim your clients have abandoned and/or discontinued their claims for enforcement of the alleged liens”. The response on 30 July asserted that the plaintiffs had not abandoned and/or discontinued the claims for enforcement of the liens as suggested.

- [7] The amendment to the consolidated Statement of Claim added to the relief sought a declaration that the plaintiffs had liens on the estate or interests of the defendant’s in the mineral lease in respect of work done upon the lease and materials supplied and further, and in the alternative, an order enforcing them and such other orders as the Court deemed fit.
- [8] Relying upon what was said by the majority in *Renowden v McMullin* (1970) 123 CLR 584, the defendant argued that as a matter of law the relief referred to in the indorsement on the writ in relation to enforcement of the liens having been dropped from the relief sought in the Statement of Claim it was thereby abandoned. The argument proceeds that the relief having been abandoned it cannot be reinstated by way of amendment because s15 of the *Workmen’s Liens Act* provides that every lease shall cease unless an action be brought against the owner for enforcement of it within 14 days of registration. Accordingly, the amendment should be disallowed as it seeks to add a cause of action or relief in respect of a cause of action which has

ceased. For that proposition the defendant relies upon the judgment of Rice J. in *Blythe, Green & Jordain (Trading) Pty Ltd v Sienna Pty Ltd* (1986) 82 FLR 291. It will only be necessary to turn to that authority if the primary contention made on behalf of the defendant is made out.

- [9] The background to the question between the parties in *Renowden v McMullin* was that the writ contained indorsements, one of which was a claim “for breach of contract in auditing the trust books of the plaintiff in the years 1958 to 1961 inclusive in accordance with the requirements of the Legal Profession Practice Acts and the Rules made thereunder and/or in advising the plaintiff generally in respect thereto”. Another indorsement claimed that the defendants had negligently breached a statutory duty said to have been owed by the defendants to them under those Acts and Rules. The Statement of Claim departed from the indorsement on the writ by omitting all claims based on contract, and also any claim relating to the year 1961, and adding a claim of negligence. The plaintiff then sought leave to amend the Statement of Claim by introducing claims in contract which, in the opinion of Owen J., had been sufficiently covered by the indorsement on the writ, but which had not been charged in the Statement of Claim. Furthermore, at the date of the summons for leave to amend, the claims based upon contract, had a writ then be issued, would have been barred by the *Limitation of Actions Act* of Victoria.

- [10] *Renowden v McMullin* is distinguishable. A cause of action had been omitted from a Statement of Claim which was covered by the writ, that is,

the facts and material to be proved to entitle the plaintiffs to succeed. In *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 245 Wilson J. said that the concept of a “cause of action” seemed to be clear. “It is simply the fact or combination of facts which give rise to a right to sue”. In my opinion it cannot be seriously argued that in this case the plaintiffs had not sufficiently pleaded a cause of action such as to give rise to a claim for relief by way of enforcement of the liens.

[11] The authorities referred to by Owen J. at p609 include extracts from Odgers on Pleading and Practice 19th Ed, (1966) at p171 “... If a plaintiff in his Statement of Claim omits all mention of a cause of action or a claim for relief which is stated in his writ, he will be deemed to have abandoned it”. Reference is also made to Odgers at p179 where the pleader is warned that he should “remember that a Statement of Claim supersedes the writ; hence if some special form of relief be claimed on the writ, and not in the Statement of Claim, it will be taken that so much of that claim is abandoned (*Harries v Ashford* (1950) 1 All ER 427)”. Reference was also made to like statements in Bullen and Leake, Precedents of Pleading, 9th Ed at p33 citing *Cargill v Bower* (1878) 10 Ch D 502 at 508 and *Lewis v Durnford* (1907) 24 TLR 64.

[12] At p610 his Honour sets out the facts in relation to *Harries v Ashford*. Briefly, Mr Harries was killed in an accident in which his wife suffered personal injury. A writ was issued in which the then widow and another person, described in the writ as the administratrices of Mr Harries’ estate and the widow in her personal capacity, were joined as plaintiffs, the

administratrices claiming damages under the *Fatal Accidents Acts* (UK) in respect of the death, and the widow claiming damages under the same Acts as well as for her personal injuries. A Statement of Claim delivered much later limited the claim under the *Fatal Accidents Acts* to that made by the administratrices, omitting the widow's claim to recover under those Acts and limiting her claim to damages for personal injuries. After a delay of another few years, the plaintiffs applied to strike out the name of the administratrices from the action on the ground that they had not been properly joined, and to amend the Statement of Claim by adding a claim by the widow under the *Fatal Accidents Acts*. The amendment to enable the widow to claim under the Acts was not allowed, the judgment proceeding on the basis that since the Statement of Claim had omitted the widow's claim in that regard a cause of action must be taken to have been abandoned. It is unclear whether the Statement of Claim did or did not plead any cause of action in respect of the widow's claim under the Acts, or whether the relief claimed thereunder simply dropped it. I am inclined to think that it was the former since the widow's claim was based upon the statute and that is in itself a cause of action (*O'Grady v Botany Wools (Australia)* (1964) 64 SR (NSW) 359 at 366 and per Rogers J. in *ANZ Banking Group Limited v Larcos* (1987) 13 NSWLR 286 at 392).

[13] The other authority referred to in the texts is *Lewis v Durnford* (1907) 24 T.L.R. 64. At p603 of *Renowden v McMullin*, Barwick CJ. and McTiernan J. explained that in that case the writ:

“indorsed a claim for a penalty for breach of contract of service, and an injunction to restrain breach of contract. The Statement of Claim sought only an injunction. The indorsed remedies were in fact inconsistent, though the indorsement for that reason was not irregular. The plaintiff had actually elected between the remedies, as clearly he was entitled to do”.

This is not such a case. The indorsements were not inconsistent. The plaintiffs made no election.

[14] In my opinion the argument advanced by senior counsel for the defendant, and the authorities relied upon, do not support the proposition that the plaintiffs had abandoned their claim for relief for enforcement of the liens.

[15] The application is dismissed.
