

PARTIES: THE PROPRIETORS – UNITS PLAN
No. 95/38

v

JINIESS PTY LTD
and
SINCLAIR KNIGHT MERZ PTY LTD
and
SLEEMAN DUNKLEY TREACY PTY
LTD
and
PHILIP CHUN & ASSOCIATES
and
JOHN GLYNATSI

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 245 of 1998 (9827956)

DELIVERED: 8 July 1999

HEARING DATES: 1 July 1999

JUDGMENT OF: RILEY J

REPRESENTATION:

Counsel:

Plaintiff:	M. Grant
First and Fifth Defendants:	P. McIntyre
Second and Third Defendant:	M. Day
Fourth Defendant:	D. Dreier

Solicitors:

Plaintiff:	Clayton Utz
First Defendant:	Ward Keller
Second and Third Defendant:	Hunt & Hunt
Fourth Defendant:	Cridlands
Fifth Defendant	David Winter

Judgment category classification:	C
Judgment ID Number:	ril99016
Number of pages:	10

ri199016

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

Proprietors-Unit Plan No.95/38 v Jiniess Pty Ltd & Ors [1999] NTSC 64A
No. 245 of 1998 (9827956)

BETWEEN:

**THE PROPRIETORS – UNIT PLAN
NO.95/38**
Plaintiff

AND:

JINIESS PTY LTD
First Defendant

SINCLAIR KNIGHT MERZ PTY LTD
Second Defendant

**SLEEMAN DUNKLEY TREACY PTY
LTD**
Third Defendant

PHILIP CHUN & ASSOCIATES
Fourth Defendant

JOHN GLYNATSI
Fifth Defendant

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 8 July 1999)

- [1] On 1 July 1999 I made an order that John Glynatsis be joined as the fifth defendant to these proceedings and I undertook to provide reasons for so doing. I now provide those reasons.

[2] Mr Glynatsis is alleged to have been a director of the first defendant, Jiniess Pty Ltd, and a person who had, at all relevant times, the care, control and management of the daily operations of the first defendant. It is the claim of the plaintiff that the first defendant developed and constructed some residential and commercial units at Lot 6389 Marina Boulevard, Cullen Bay. It is pleaded that the first defendant was negligent in designing, developing and constructing the building and that the building was not designed or constructed in compliance with the Building Regulations applicable to the structure. Further, in relation to the first defendant, it is pleaded:

“16. Further and alternatively the first defendant’s registration of the Unit Plan was subject to and conditional upon the fourth defendant issuing a permit to occupy as particularised in paragraph 38 below (‘Permit to Occupy’) in respect of the Building. The fourth defendant’s issue of the Permit to Occupy was subject to and issued in reliance upon the following representations:

- (a) a representation made by the first defendant as applicant for a building permit that the building works would be undertaken in accordance with the relevant Northern Territory Acts and Regulations.
- (b) A declaration made by the first defendant pursuant to s 70 of the *Building Act* (the ‘Builder’s Declaration’) and the first defendant’s representation incorporated therein that its building works were completed in accordance with the relevant building approval certification.

Particulars

Builders declaration dated 9 May 1995.

17. The first defendant’s conduct in:

- (a) making the representation pleaded in paragraph 16;

- (b) permitting the fourth defendant to proceed, in reliance upon those representations to issue a Permit to Occupy; and
- (c) using the Permit to Occupy to enable the Unit Plan to be lodged for registration with the Registrar-General;

was misleading and deceptive conduct, or was conduct likely to mislead and deceive contrary to s 52 of the *Trade Practices Act* (“*TPA*”) or alternatively s 42 of the *Consumer Affairs and Fair Trading Act* (“*CAFTA*”) in that the first defendant’s building works comprising the building:

- (a) were not completed in accordance with the building approvals certifications;
- (b) further and alternatively were not undertaken in accordance with the requirements of the *Building Act*, *Building Regulations*, applicable *Building Code* and the relevant standards called up thereunder.”

[3] The amended statement of claim, as it applies to the fifth defendant, pleads:

“20. Further and alternatively, the fifth defendant was a person involved in the above pleaded contravention of s 52 of the *TPA* or alternatively s 42 of *CAFTA* in that he aided, abetted, counselled or procured the contravention or alternatively was directly or indirectly knowingly concerned as a party to that contravention.

Particulars

- (a) The fifth defendant as director and member of the first defendant had at all relevant times the care, control and management of the daily operations of the first defendant’s business, including the building works comprised in the building.
- (b) The fifth defendant personally executed the application for permit to build and the Builder’s Declaration and thereby made the above described representation for the first defendant.

21. The plaintiff seeks an order for damages pursuant to s 82 of the *TPA* or alternatively s 91 of *CAFTA* from the first defendant and further and alternatively the fifth defendant for the loss and damages suffered by the plaintiff by reason of the above pleaded contravention.”

[4] Thereafter in the amended statement of claim it is alleged that “remedial works” were undertaken at a later time in relation to the project. Again it is alleged that the first defendant conducted itself in a manner which was contrary to the provisions of s 52 of the *TPA* and s 42 of *CAFTA*. The following was then pleaded in relation to the fifth defendant:

“54. Further and alternatively, the fifth defendant was a person involved in the above pleaded contravention of s 52 of the *TPA* or alternatively s 42 of *CAFTA* in that he aided, abetted, counselled or procured the contravention or alternatively was directly or indirectly knowingly concerned as a party to that contravention.

Particulars

- (a) The fifth defendant as director and member of the first defendant had at all relevant times the care, control and management of the daily operations of the first defendant’s business, including the execution of the remedial works.
- (b) The fifth defendant personally executed the application for permit to build and thereby made the above described representation for the first defendant.

55. The plaintiff seeks an order for damages pursuant to s 82 of the *TPA* or alternatively s 91 of *CAFTA* from the first defendant and further and alternatively the fifth defendant for the loss and damages suffered by the plaintiff by reason of the above pleaded contravention.”

[5] Rule 9.06 of the *Supreme Court Rules* provides that the Court may order that persons be added as a party to proceedings where:

- “(i) a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated on; or
- (ii) a person between whom and a party to the proceeding there may exist a question arising out of, or relating to or connected with, a claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding.”

[6] Mr McIntyre, who appeared on behalf of the fifth defendant, Mr Glynatsis, based his opposition to the joinder on the submission that no cause of action had been pleaded against the fifth defendant. He said this was so because:

- (1) The causes of action pleaded against the fifth defendant were based upon the *Trade Practices Act* and the *Consumer Affairs and Fair Trading Act* and, as no time had been pleaded for the occasioning of the loss and damage claimed by the plaintiff, the cause of action was incomplete.
- (2) Insofar as there was any identification of the time that the loss and damage was suffered it was said to have been a date earlier than three years prior to the commencement of proceedings and the proceedings therefore contravened s 82 of the *TPA* and s 91 of *CAFTA*.
- (3) That no relevant material facts have been pleaded to support the contention that the fifth defendant “aided, abetted counselled or procured the contravention” or that he was knowingly concerned therein.

[7] In relation to the first contention Mr McIntyre referred to s 82 of the *TPA* which is in the following terms:

- “(1.) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action

against that other person or against any person involved in the contravention.

- (2.) An action under subsection (1) may be commenced at any time within three years after the date on which the cause of action accrued.”

Section 91 of *CAFTA* is in similar terms relating to relevant causes of action arising under that legislation.

- [8] It was the contention of Mr McIntyre that the effect of these provisions was that the commencement of the proceeding within three years after the date on which the cause of action accrued was an essential element of the right of action and therefore the date on which it was alleged that the cause of action accrued had to be pleaded. In my opinion this misconceives the nature and purpose of s 82(2).
- [9] This matter was dealt with before a Full Court of the Federal Court in *State of Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245 where the Court (Spender, Gummow and Lee JJ) said (259):

“However, it is necessary when dealing with s 82 to bear in mind its double operation, to which we have referred above, as dealing both with right and remedy. In our view, in stating that an action under subsection (1) may be commenced at any time within the three year time limit specified in s 82(2), that latter provision is to be regarded as having a procedural character. That is to say, s 82(2) is a condition of the remedy rather than an element in the right and a prerequisite to jurisdiction which cannot be waived. It follows that it is for a defendant to assert non-compliance, rather than for a plaintiff to assert compliance with s 82(2) as an element of the cause of action.”

[10] The case went on appeal to the High Court and was reported as *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514. The observation referred to above was not rejected in the High Court and the majority of the court agreed in a general sense with the approach adopted by the Full Court of the Federal Court below. Further, in the majority judgment of Mason CJ, Dawson, Gaudron and McHugh JJ their Honours said (533):

“We should, however, state in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question.”

Similar comments can be made in relation to the present matter.

[11] In my opinion, in the circumstances of this matter, it is necessary for the plaintiff to plead that loss and damage was suffered but it is not necessary to plead that the loss and damage was suffered at a particular time or within the period referred to in s 82(2) of the *TPA* or s 91 of the *CAFTA*.

[12] Mr McIntyre further submitted that, on the basis of the information available from the statement of claim, the period of three years had passed since the latest date “from which, on the pleading, it can be intelligently asserted that the cause of action accrued”. Therefore, he submitted, s 82(2) of the *TPA* and s 91 of *CAFTA* barred any proceeding. I note that this is not necessarily so. The time at which the cause of action arose is a matter to be determined in light of all of the evidence. In the circumstances of this matter it cannot

be said that it is a clear case that the cause of action arose on a certain date and there cannot be a “confident” answer to the limitation question.

[13] I also reject the submission made by Mr McIntyre that the pleading does not incorporate the “material facts” upon which it is asserted that the fifth defendant was directly or indirectly knowingly concerned in the conduct complained of. I have set out above the relevant paragraphs of the amended statement of claim.

[14] Mr Grant, for the plaintiff, referred me to s 82 of the *TPA* and emphasised that it provided for recovery of loss and damage where there is conduct contrary to the provisions of Part IV or V of the Act “against any person involved in the contravention”. What is meant by “involved in” is resolved by reference to s 75B of the Act which provides that, for a person to be “involved in a contravention” of a relevant provision of the Act, it is sufficient that the person “has aided, abetted, counselled or procured the contravention” or “has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention”. See also s 87 of *CAFTA*.

[15] The basis upon which the plaintiff alleges that the fifth defendant was involved in the contravention by the first defendant is spelled out in par 20 and par 54 of the amended statement of claim and that basis is that the fifth defendant was the controlling mind of the first defendant and at all times had the daily care, control and management of the first defendant. It is also said that the fifth defendant signed the documents which are the subject of

the complaints. It may be that the fifth defendant is entitled to further and better particulars of the allegations but that is a matter to be considered if an appropriate application is made. In the meantime the claim as presently pleaded identifies the basis of a sustainable cause of action against the fifth defendant.

[16] In the circumstances of this matter there exist questions between the plaintiff and the fifth defendant which arise out of, relate to and are connected with the claims in the proceeding between the plaintiff and the other defendants and, in my opinion, it is just and convenient to determine those questions in this proceeding. In the circumstances the objections to joinder made on behalf of the fifth defendant are, in my opinion, without merit.

[17] There was one further matter referred to by Mr McIntyre which, as I understood his submissions, was not pressed following the submissions made by Mr Grant. The initial submission was that the fifth defendant should not be joined because, to do so, would result in the fifth defendant losing a valid defence to the proceeding ie that the proceeding was out of time by virtue of the operation of s 82(2) of the *TPA* and s 91 of *CAFTA*. The short answer to that proposition is to be found in O 9 r 11(3)(a) of the *Supreme Court Rules* which provides that where a party is added as a defendant to a proceeding “the proceeding against the new defendant commences on the amendment of the filed originating process”. In other

words the new defendant is not deemed to have been a party to the proceeding from the commencement of that proceeding.

[18] For the above reasons I rejected the objections of Mr McIntyre to the joinder of John Glynatsis as the fifth defendant in these proceedings and I allowed the application of the plaintiff.
