WOODHEAD AUSTRALIA (SA) PTY LTD v THE PASPALIS GROUP OF COMPANIES AND RIDER HUNT & PARTNERS PTY LTD

Supreme Court of the Northern Territory of Australia

Asche CJ

2,9, 13 November 1990 and 1 February 1991 at Darwin

PRACTICE AND PROCEDURE - Application pursuant to R.36.03 - amendment to Statement of Claim after pleadings closed - R.36.01 - nature of discretion of judge at the interlocutory stage - role of the trial judge should not be usurped - whether amendments raise an "arguable case" - limitations of power to amend

APPEAL - Appeal from decision of Master - R.36.03 leave to amend Statement of Claim - RR.1.10 & 36.01 - where amendment allowed "for purpose of determining the real question between the parties" - whether Master erred in law in allowing amendment without giving defendants opportunity to argue its terms

APPEAL - Appeal from decision of Master - R.77.05(7) - a rehearing de novo

EQUITABLE ESTOPPEL - Broad and flexible criteria as established in Sabemo's case and Texas Bank case

Case followed:

Lovell v Lovell (1950) 81 CLR 513

Case applied:

Abela v Giew (1964) 81 WN (Pt 1)(NSW) 344
Brimson v Rocla Concrete Pipes Ltd [1982] 2 NSWLR 937
Commonwealth Dairy Produce Equalisation Committee Ltd v McCabe (1938) 38 SR NSW 397
Council of the City of Blacktown v Huxedurp (unrep 24/10/89): Leslie - Equity & Commercial Practice Vol 1 A80:20
Diamond Downs Pty Ltd v Culina (unrep 7/8/85) Leslie - Equity & Commercial Practice Vol 1 A80:30
Stephenson Blake & Co v Grant Legras & Co (1917) 86 LJ Ch 439

Windsor Refrigerator Co Ltd & Anor v Branch Nominees Ltd & Ors [1961]1 All ER 277

Cases referred to:

Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce International Bank Ltd [1981] 1 All ER 923
Clarapede & Co v Commercial Union Assocation (1883) 32 WR 262
Cropper v Smith (1884) 26 Ch D 7
Ketteman & Ors v Hansel Properties Ltd [1988] 1 All ER 38
Sabemo Pty Ltd v North Sydney Municipal Council (1977) 2 NSWLR 880
Stackbridge v Lupton (unrep): Leslie - Equity & Commercial Practice Vol 1 A80:20
Sumner v William Henderson & Sons Ltd [1963] 2 All ER 712
Tildesley v Harper (1878) 10 Ch D 393
Waltons Stores (Interstate) Limited v Maher (1988) 164 CLR 387

Counsel for the Plaintiff:	J.B. Waters
Solicitors for the Plaintiff:	Cridlands
Counsel for the Defendants:	G. Hiley QC
Solicitors for the Defendants:	Phillip & Mitaros

jasc91002

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 715 of 1988

BETWEEN:

WOODHEAD AUSTRALIA (SOUTH AUSTRALIA) PTY LTD
Plaintiff

AND:

THE PASPALIS GROUP OF COMPANIES
Defendant

AND:

RIDER HUNT & PARTNERS PTY LTD
Third Party

CORAM: ASCHE CJ

REASONS FOR JUDGMENT
(Delivered 1st February 1991)

This matter has become confused. It has gone off the procedural rails. I think it is my duty to put it back on the rails. I have told counsel that, and, as I understand it, they do not object to my doing this somewhat informally. That is to say I will treat certain submissions as being applications although not formally made. What I do will, I hope, save time and expense of certain procedural steps which I think counsel would concede are not now strictly necessary in view of concessions made in argument.

I do not believe either party will be prejudiced in this approach. In the course of my ruling I will set out the main point at issue between the parties, so that, if it is the wish of either party to appeal, that party may do so uninhibited by procedural points, and the Court of Appeal will have the issue clearly before it. More than that I cannot do.

I set out first the background of the proceedings.

The plaintiff is a company carrying on business as architects. The defendants are a group of companies who negotiated with the plaintiff to provide certain concept designs for a project which the defendants had in mind to build a shop or office tower complex in the Mall, Darwin. The plaintiff did work on the project. Ultimately the project was abandoned. The plaintiff claims that, although some initial work was done by it on a "no fee" basis, ultimately there was a contract in which it was appointed architect of the project. The plaintiff claims that it was either an express term of the contract to pay the plaintiff for work done or it was an implied term on the basis of a quantum meruit. No monies were paid to the plaintiff. It issued a Writ and Statement of Claim seeking damages for a specific sum of $214,404 or alternatively reasonable remuneration on a quantum meruit.

The defendants filed a defence denying that any agreement to pay the plaintiff anything had ever come into being expressly or impliedly between them and the plaintiff. They also issued a third party notice claiming that if the third party had made representations to the plaintiff purporting to be on behalf of the defendants the third party had no authority to do so. The third party is not concerned in the present proceedings.

Subsequently the plaintiff was minded to amend its Statement of Claim. It wished to plead an alternative claim in the nature of quasi-contract or equitable estoppel. Such a claim would arise, if at all, only if the court found that there was no express or implied agreement between the parties that the plaintiff would be paid. Mr Waters, who appears for the plaintiff, tells me that reliance will be placed on cases such as Sabemo Pty Ltd v North Sydney Municipal Council (1977) 2 NSWLR 880 ("Sabemo"), and Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 1 All ER 923 ("Texas Bank"). I will consider those cases later.

The pleadings had closed. The defendants did not consent to the amendment, at least in the form it was then put to them. The plaintiff, therefore, in accordance with r. 36.03 had to seek leave to amend. The application came before the Master. The amendment sought before the Master was to add a new paragraph 15 after paragraphs 13 and 14

which had alleged respectively the express or implied contracts relied on. Paragraph 15 was in these terms:

> "In the alternative to paragraphs 13 and 14 hereof the Plaintiff claims damages upon the basis that if (and it is denied) there was no agreement between the Plaintiff and the Defendant, as alleged above, then the Defendant well knew that the Plaintiff was carrying out detailed professional work upon the project for commercial purposes in good faith, and further was induced to incur expense other than for a fair business risk, and the Plaintiff is entitled to damages by way of restitution.
>
> PARTICULARS
>
> (a) The Plaintiff relies upon the facts comprised in paragraphs 6, 7, 8, 10, 11, 12, 15 and 16 hereof."

Before the Master, Sabemo's case (supra) was relied on by the plaintiff, and the Master referred to the headnote of that case at 881:

> "Where, as here, two parties proceed upon a project on the joint assumption that a contract will be entered into between them, and the first party does work beneficial for the project, and thus in the interests of both parties, which work the first party would not be expected, in other circumstances, to do gratuitously, the first party will be entitled by operation of law and notwithstanding that the parties did not intend, expressly or impliedly, that such obligation should arise, to compensation or restitution from the second party if the latter unilaterally abandons the project for reasons pertaining only to himself, and not arising out of a disagreement as to the terms of the proposed contract between the parties."

The Master acceded to the defendants' submission that paragraph 15 did not bring the plaintiff's case within Sabemo, because it neglected to allege all the elements referred to in that headnote. Nor did the particulars given cure that alleged defect. The Master, however, referred to r.36.01 that the court may order or allow an amendment "for the purpose of determining the real question between the parties", and he referred to a number of well-known cases that leave will normally be given to effect that purpose (e.g. Cropper v Smith (1884) 26 Ch D 7)) at 710 per Bowen LJ. : Commonwealth Dairy Produce Equalisation Committee Ltd v McCabe (1938) 38 SR NSW 397 at 400 per Jordan CJ.). He remarked:

> "I accept the defendants' argument as to the inadequacy of the plea and the particulars that purport to support it. It is obvious, however, that the plaintiff may, on the facts, have an alternative claim".

The Master then referred to r. 1.10 which directs the court to "endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined."

The Master therefore refused the amendment in the form proposed by the plaintiff but ordered:

> "The plaintiff have leave notwithstanding to amend the Statement of Claim to plead specifically such facts and provide such particulars as it wishes to

> rely on as establishing, as an alternative to the claim already pleaded, a claim on a quantum meruit."

He made orders for consequential amendments of the Defence and Reply.

The defendants appealed from the Master's order allowing the further amendment. The grounds of the appeal were that the Master erred in law in allowing the further amendment without giving the defendants the opportunity to argue the terms of it.

It is that appeal which is notionally before me. But later events have really superseded it.

After the Master's decision the plaintiff's solicitor supplied to the defendants' solicitor a "Further Amended Statement of Claim". That consisted of paragraph 15 in the same terms as before but with a further ten paragraphs (26 - 35) added. Those ten paragraphs, as Mr Hiley QC for the defendants concedes, contain sufficient particulars to bring the case within the principles set out in the headnote to Sabemo already referred to.

The defendants' solicitor then wrote to the plaintiff's solicitor stating, "We are prepared to consent to the amendment of the Statement of Claim by the inclusion

of those paragraphs (26 - 35) with the following minor alterations". Then follow the suggested alterations, which do not appear to be of a substantial nature. No mention is made of paragraph 15 but the letter concludes with this passage:

> "Would you kindly advise whether you are prepared to make the above minor amendments to enable the first paragraphs to go in by consent".

Since no objection is made to paragraph 15 I think the plaintiff would be justified in concluding that the defendants would accept the amended Statement of Claim with some alterations, without taking the matter further.

However, before me, Mr Hiley maintained the objection to paragraph 15. Mr Waters then produced a further document which, if accepted by the court, will result in some further amendments. I will refer to this set of amendments as "the third amendments", making it plain that I consider "the first amendments" to be those before the Master, and "the second amendments" to be those sent to the defendants' solicitor after the Master's ruling. In the second amendments paragraph 26 commenced with the words: "In the alternative to paragraphs 10, 11, 12, 13 and 14 thereof the plaintiff says" ... Then follow, in that paragraph and the subsequent paragraphs up to 35, various allegations of fact which, inter alia, may well bring the plaintiff's case within the Sabemo principles.

The third amendments do not involve any substantial rewording. The significant change is to paragraph 26 which now commences with the words: "In addition to the facts alleged in paragraphs 3, 4, 5, 6, 7, 8, 10 & 11 hereof, the plaintiff says, by way of particulars to the claim set forth in paragraph 15 hereof" ... (Emphasis added). Then follow the facts as previously alleged in paragraphs 26 - 35, but this time set out as sub-paragraphs (a) - (i). The other change is that, to the particulars already alleged in paragraph 15, appear the words "and the particulars of facts comprised in paragraph 26 hereof".

Mr Hiley maintains his primary objection that paragraph 15 does not disclose a cause of action in law or equity.

This is where the matter now stands. So I must first, as I foreshadowed, tidy up the procedure before me. It seems clear this is no longer an appeal from the Master. He did not have before him the second and third amendments which are before me. So I am really dealing with a different case. The original ground of appeal, that the Master did not give the defendants an opportunity to object to any further amendments, is not really argued before me now and I do not think properly could be in view of the concession of the defendants' solicitor in his letter after the second amendments had been delivered to him. Had he wished to rely on the appeal he should have rejected the

second amendments out of hand and told the plaintiff's solicitor that he was premature. I hasten to say that I do not criticise him at all for what he did. He took a sensible and, if I may say so, praiseworthy approach which would normally have resulted in a saving of time and costs.

In any event, if I had acceded to the ground of appeal relied on (and I make no final decision since it was not really argued before me - and note Stackbridge v Lupton (unrep) referred to in Leslie - Equity and Commercial Practice Vol 1 A 80 : 20 which indicates that the form of the Master's Order might be sustainable) the result would have been a referral back to the Master with a direction that he dismiss the original application and make no further order about amendments but await a further application by the plaintiff upon notice to the defendants. In the present stage this case has reached, that would be a considerable and unnecessary waste of time.

I suppose in the broad sense I could still treat this as an appeal from the Master in the sense that any appeal from the Master is a rehearing de novo (r. 77.05(7)); but that seems now to have an air of unreality about it particularly in view of the ground of appeal relied on.

So I propose to treat these proceedings, as both counsel have treated them, as an application before me pursuant to r. 36.03 that the plaintiff have leave to amend its Statement of Claim in the form of the third amendments.

Because of the operation of r. 36.03, a party can amend once without leave before close of pleadings; and it is then for the other party, if it so wishes, to apply to have struck out those passages in the pleadings he submits are not proper. If pleadings are closed then it is for the party seeking the amendment to put the machinery in motion and apply for leave to amend and convince the court the amendments are permissible. Essentially the same question is raised, namely the boundaries of pleading, although no doubt the onus depends upon which party wants the pleadings in or which party wants them out. I bear in mind therefore that the onus in this case is on the plaintiff to establish that these amendments should be allowed; but, having said that, I doubt whether the question of onus is of any great import in a matter such as this.

In either case the court is concerned with the same question, namely whether or not to deprive a party of a claim or defence before the case is heard, before the facts are fully adduced and explored and before the trial judge has had the opportunity to see the case as a whole.

It seems to me that in interlocutory proceedings a court should be very cautious about how far it confines a party's freedom of movement in the future. That is not to say that it should countenance prolix, unnecessary or vexatious amendments or amendments which are an abuse of the processes of the court; and it should refuse an amendment

which is, to use the words of Taylor J. in Abela v Giew (1964) 81 WN (Pt 1) (NSW) 344 at 345, "obviously futile".

Mr Hiley in fact does submit that paragraph 15 comes within the category of "obviously futile". But before dealing with that submission I deal with the broader submission he makes. As I understand him, Mr Hiley submits that it is the duty of the court on interlocutory proceedings such as this, where leave to amend is sought and opposed, to find positively and at this stage, whether or not the facts alleged support the cause of action relied on and to refuse leave if they do not.

Now I will go this far with Mr Hiley: if the proposed amendment sets up a cause of action which clearly cannot be supported by the facts alleged the amendment should be refused. But if the facts alleged set up at least an arguable case for the cause of action relied on, should the judge, on interlocutory proceedings, have that case argued before him and determine the result? I think not. Otherwise he usurps the function of the trial judge. Provided the case is arguable, it is not his function to interfere. Even if the judge on the interlocutory proceedings feels the facts pleaded are most unlikely to support the case put forward, how can he tell what significance those facts may have in the ultimate picture? To paraphrase the remarks of Kitto J. in Lovell v Lovell (1950) 81 CLR 513 at 533 (and certainly in a different

context) the judge who does not see and hear the witnesses is deprived of those advantages "sometimes broad and sometimes subtle" of the judge who hears and tries the case. Until the facts are established in their proper context the exercise a judge is being asked to do on an interlocutory application such as this smacks a little too much of the hypothetical. In Stephenson Blake & Co v Grant Legras & Co (1917) 86 LJ Ch 439 Warrington L.J. said:

> "The function of the Court is not to decide abstract questions of law but to decide questions of law when arising between the parties as a result of a certain state of facts."

In Windsor Refrigerator Co Ltd & Anor v Branch Nominees Ltd & Ors [1961] 1 All ER 277 at 283 Lord Evershed M.R. said:

> "I repeat what I said at the beginning, that the course which this matter has taken emphasises as clearly as any case in my experience the extreme unwisdom - save in very exceptional cases - of adopting the procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the short cut so attempted inevitably turns out the longest way round."

To this observation Harman L.J. concurred "with particular heartiness". He added at 283:

> "It is highly undesirable that the court should be constrained to tie itself in so many knots and in the end merely say: 'Well, if this was thus, then that was so'".

Those remarks were adopted by Sellers L.J. in Sumner v William Henderson & Sons Ltd [1963] 2 All ER 712 at 713 where his Lordship observed:

> "In the present case no facts have been agreed and what the outcome of the evidence will be is most uncertain. It does not seem to us in the interests of either party that a hypothetical decision should be reached now."

Now I am well aware that the remarks I have quoted were made by these eminent judges in cases where the application was to have a separate trial of a question before the full hearing. See r. 47.04. Nevertheless they seem relevant to the situation here where that is, in effect, what I am being asked to do. Mr Hiley counters that by submitting that there is nothing hypothetical in his request. He invites me to accept all the facts pleaded in paragraph 26 as they appear in the third amendments and determine whether paragraph 15 with those particulars, raises a case in law or equity. But all I can say, for reasons which I later give, is that they raise at least an arguable case. I do not take the matter further to determine whether that arguable case is a good one. Even accepting all the facts pleaded I am in no position to

assess their significance in the ultimate picture. To take but one example, paragraph 26 speaks of discussions between the plaintiff's representatives and persons said to be representing the defendants wherein it is said the plaintiff was directed to proceed to do a number of things to further the project. Accepting this to be the position, how relevant was each discussion, and how did it advance the plaintiff's case on the issue it now seeks to raise? Without more precise evidence of these matters and without seeing and hearing the witnesses, and putting the conversations into context, I could not be in a position to predict success or failure of the case for the plaintiff.

I have not been cited any authority to suggest that, once I determine there is at least an arguable case, I should nevertheless go on and determine whether that case should succeed or fail. The authorities are all the other way.

One commences with the directive in r. 36.01(1) that the court may at any stage order a document to be amended "for the purpose of determining the real question in controversy between the parties". Then there is a sufficiency of authority that, to ensure this end, the court should take a liberal approach to amendments. The Master has referred to Tildesley v Harper (1878) 10 Ch D 393 at 396 (per Bramwell LJ.): Clarapede & Co v Commercial Union Association (1883) 32 WR 262 at 263 (per Brett MR) : Abela

v Giew (1964) 81 WN (Pt I) (NSW) 344 at 345 (per Taylor J.): Commonwealth Dairy Produce Equalisation Committee Ltd v McCabe (1938) 38 SR (NSW) 397 at 400 (per Jordan CJ.). I will mention particularly the last two of those cases since they refer to the introduction of new claims by amendment. In Abela v Giew (supra) Taylor J. says:

> "If a party satisfies the court that he genuinely desires to amend his pleadings so as to modify or alter an existing claim or defence or to introduce a new claim or defence he should be permitted to do so subject to proper terms unless the proposed amendment is obviously futile or would cause substantial injustice which cannot be compensated for."

In the Commonwealth Dairy case Jordan C.J. says:

> "When it is sought by amendment to raise new claims in a case in which it would be inconvenient to litigate them, and no injustice will be caused if they are left to be disposed of in other proceedings, there is no reason why the amendment should not be refused. If, however, it is sought to raise a new issue, as to which there is a genuine desire that it should be litigated, and this is involved with the determination of something necessarily falling to be determined in the action, an amendment should always be allowed for the purpose unless it is impossible to do so without causing substantial injustice to the other party. Especially is this the position when, if the amendment is not allowed, the party will be debarred from raising the issue at all."

See also Ketteman & Ors v Hansel Properties Ltd [1988] 1 All ER 38 at 56 (per Lord Brandon).

The breadth of the power to amend and also the limitations on the power to amend are referred to by Young J. in Council of the City of Blacktown v Huxedurp (unrep 24.10.89) referred to in Leslie's - Equity and Commercial Practice - Vol I - A80 : 20. His Honour says:

> "It is clear that under the modern system amendments are liberally granted. However, there are three important exceptions to that: (1) the amendment is so lacking in foundation that it would not avail the amending party anything; (2) the opposing party will be prejudiced in such a way which cannot be compensated by costs and (3) that the party seeking the amendment has deliberately framed his or her case in a particular way and the opponent may have conducted the case differently had the new issues been previously raised."

To the three exceptions set out by Young J. one could no doubt add a fourth, that the amendment sought was in such prolix or vexatious terms that the court should not allow it to be pleaded in that way. This would only arise in obvious cases since it is not the court's duty to settle the pleadings for the parties.

The second and third exceptions mentioned by Young J. do not apply here. The first exception - that the amendment is so lacking in foundation that it would not avail the amending party anything - seems to carry with it the corollary that provided there appears to be some foundation (i.e. an arguable case) it is not for the court on interlocutory proceedings to test how strong that foundation is.

The authorities seem to establish that once there is an arguable case it is not the court's function, in determining whether or not an amendment should be allowed, to try the case raised by the amendment instanter. I think this can be inferred from the general thrust of the cases and in particular from the remarks already quoted of Jordan CJ. in the Commonwealth Dairy case (supra) where he observes that if the new issue raised by the amendment "is involved with the determination of something necessarily falling to be determined in the action" the amendment should be allowed.

In Diamond Downs Pty Ltd v Culina (unrep. 7.8.85) reported in Leslie's Equity & Commercial Practice Vol I at A 80 : 30, Master Gressier was invited to refuse an amendment because it was submitted that evidence was available to show the case was hopeless. He declined the invitation to examine the evidence. He said:

> "I had more difficulty with Mr ...'s next submission, namely, that an amendment would not be allowed if it is obviously futile. In short, Mr ... argued to the effect that the amendment should not be allowed if the case which was to be based upon it was hopeless, and that evidence was available to show that any such case was, in fact, hopeless. I rejected this submission because it seemed to be that I was constrained by the authorities already mentioned to hold that an amendment will generally be allowed unless it is so obviously futile that it would have been struck out if it had appeared in the original defence. It followed, in my view, that I was obliged to consider not whether the first defendants' case based on the proposed amendment was hopeless but whether the proposed amendment, as a pleading, was hopeless."

I would with respect adopt those views. Master Gressier also referred to the case of Brimson v Rocla Concrete Pipes Ltd [1982] 2 NSWLR 937. That was a case where the application was to strike out a pleading rather than to allow an amendment. However I think that the comments of Cross J. at 948 have a general application on the basis that a court should be slow in any interlocutory application to deprive a party of a case not obviously hopeless. His Honour says:

> "The plaintiff's claim may or may not run into considerable difficulties at the trial but I find it impossible to classify as clearly unarguable or demonstrably exucontian. It seems to me that the written and oral submissions of counsel for the plaintiff contain arguments which are not intellectually disrespectable and which just may happen to be correct. ..... to my mind this is not one of those instances where the hopelessness of a plaintiff's case is revealed with such clarity - as precedent and authority require it to be - to justify the court's intervention on a summary application."

Nevertheless Mr Hiley submits that paragraph 15, even in its amended form, is futile or obviously hopeless and, of course, if he is correct in this, that would mean there is no arguable case. Mr Hiley's point is that what is pleaded in paragraph 15 does not come within the principles of the Sabemo case. He concedes that paragraph 26 may bring in those principles but that paragraph is now pleaded as a series of particulars to paragraph 15 rather than a cause of action itself. In that form, he submits, the particulars can clarify but not enlarge the matters set out in paragraph

15. In other words, if an element is not present in paragraph 15 it cannot be brought in by particulars.

Paragraph 15 relies upon these matters:

1. The defendant knew the plaintiff was carrying out detailed professional work upon the project

   (a) for commercial purposes and

   (b) in good faith.

2. The plaintiff was induced (by the defendants?) to incur expense.

3. Such expense was incurred other than for a fair business risk.

4. The plaintiff is therefore entitled to damages by way of compensation or restitution.

Mr Hiley says that if you look at Sabemo what is involved is more than this, and he isolates from the headnote these elements:

1. A project proceeded upon on the joint assumption that a contract will be entered into between them.

2. One party doing work beneficial for the project and in the interests of both parties.

3. Such work being work which the first party would not be expected in other circumstances to do gratuitously.

4. Notwithstanding that the parties did not intend expressly or impliedly that such an obligation should arise.

5. If the second party abandons the project unilaterally.

6. An obligation to compensation or restitution by the second party arises in favour of the first party.

Mr Hiley submits that points 1, 2, 4 and 5 above are not specifically pleaded, the case, if there is a case, under Sabemo is not made out and paragraph 15 is therefore futile in its present form.

As to point 1, I consider that may be sufficiently brought in by the plaintiff pleading paragraph 15 "in the alternative to paragraphs 13 and 14" (which allege a contract). Point 5 is I think sufficiently, at least for present purposes, pleaded in paragraph 18 which alleges that the defendant advised the plaintiff that the project would

be abandoned. Points 3 and 4 are certainly not in paragraph 15 although it might be argued that they can be implied from the whole of the pleading or might not need to be pleaded specifically. So that there is at least some argument for bringing the paragraph within Sabemo's case. In other words I fear we are now descending into quibbles. I repeat it is not for the court to draw the pleadings for the parties. Mr Hiley's objections may or may not involve the plaintiff in some difficulties in presenting the case. That is a matter which it will have to face in the future. But it does not mean that paragraph 15 is futile. Furthermore, Mr Waters makes it plain that he does not necessarily rely on Sabemo in toto. He has referred me to Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 1 All ER 923. In that case Goff J. emphasised the protean aspect of equitable estoppel. At 935 his Honour said:

> "Of all doctrines equitable estoppel is surely one of the most flexible".

Later, on the same page, he said:

> "It is no doubt helpful to establish in broad terms the criteria which in certain situations must be fulfilled before an equitable estoppel can be established; but it cannot be right to restrict equitable estoppel to certain defined categories, and indeed some of the categories proposed are not easy to defend."

Encouraged by these words Mr Waters submits that he may still raise a case in paragraph 15 as it stands by relying on the defendants' knowledge that the plaintiff was carrying out professional work for commercial purposes and was induced to incur expense other than for a fair business risk (all of which is pleaded) and the defendants by standing by with full knowledge of this situation allowed it to continue. Whether this brings the case into some form of unconscionable conduct which would allow the plaintiff to succeed is not for me to determine finally. It is sufficient that I consider the case arguable and I so consider it. Mr Waters concedes that the case of Waltons Stores (Interstate) Limited v Maher (1988) 164 CLR 387 may not take him so far but he suggests there are dicta in the judgments there which may tend in that direction. I do not propose to examine this further. However in Sabemo Sheppard J. goes to this extent at 898:

> "It seems to me that the English authorities show .... that it is now recognised that there are cases where an obligation to pay will be imposed (a promise to pay implied) notwithstanding that the parties to a transaction actual or proposed, did not intend expressly or impliedly, that such an obligation should arise. The obligation is imposed by the law in the light of all the circumstances of the case."

Mr Hiley's invitation to me to consider the law in this developing field even to the extent of determining whether Sabemo was rightly decided is one which I reject. It is sufficient that I find an arguable case - which I do.

It is for the judge at trial to determine such matters once he has found the facts on the evidence before him, and given those facts such weight as he feels they are entitled to. I do not propose to determine law in the void.

Nor do I accept that there are some difficulties in the defendants' pleading to the amended Statement of Claim. I cannot see them. They are not precluded from taking the point of law to paragraph 15 and there is no difficulty in doing that. See e.g. Chitty & Jacobs - Queens Bench Forms - 1969 - 20th Ed - p. 266. Nor are they precluded from seeking further and better particulars. Certainly they have suffered some detriment in costs which will be cured by the order I make.

I propose therefore to dismiss the appeal from the Master's Order since that has not really been the issue before me. On the application orally before me for leave to amend the Statement of Claim I will grant leave to amend in the terms of the third amendments which must be properly filed in the court.

On the question of costs it is clear that the defendants must have the costs of this application, particularly since the amendments sought were still being made "in the running" when the matter was before the court, and the defendants had no opportunity to consider whether they could give consent without the cost of court proceedings.

The orders will therefore be:

1. The appeal against the Master's Order is dismissed, but the orders hereinafter made be in substitution for the orders made by the Master.

2. On the application subsequent to the Master's Order to amend there will be leave to the plaintiff to amend the Statement of Claim in the terms of the document handed up during the hearing and annexed to these orders and marked "A".

3. The amended Statement of Claim to be served and filed within 14 days.

4. The defendants have leave to make consequential amendments to their defence within 14 days of the service upon them of the amended Statement of Claim.

5. The Plaintiff have leave to make consequential amendments to its reply and to serve and file the amended reply within 14 days of the receipt of the amended defence.

6. The plaintiff, after all the pleadings are amended as allowed under this order, file a copy of the amended pleadings in accordance with r. 48.04.

7. The plaintiff to pay the defendants' costs of this application including the costs of the earlier application before the Master.