Woodleigh Nominees Pty Ltd v CBFC Leasing Pty Ltd [1999] NTSC 74

PARTIES:	WOODLEIGH NOMINEES PTY LTD (ACN 050 120 057)
	v
	CBFC LEASING PTY LTD (ACN 008 520 965)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	69 of 1994 (9607863)
DELIVERED:	25 June 1999
HEARING DATES:	24 June 1998
JUDGMENT OF:	KEARNEY J

CATCHWORDS:

PROCEDURE – SUPREME COURT PROCEDURE

Proposed amended statement of claim – written agreement between parties – claim that defendant had made representation which went to nature of agreement – effect of characterizing the representation as one of law, not of material fact – nature of relief open when representation of false material fact induces entry into agreement – requirement that applicant provide broad outline of evidence to support late amendment introducing new cause of action – whether claim is properly characterized as new cause of action or as particulars of cause of action already pleaded – whether facts previously pleaded amount to admissions.

Limitation Act (NT), ss 12(1), 44(4), 48A
Hire Purchase Act (NT), ss 5, 17(1), 17(3) and 48A

Supreme Court Rules (NT), rr 14.03, 14.08(1)(a), 36.01(6), 36.03(a) and (b)
Renowden v McMullin [1969] VR 744, applied.
Weldon v Neal (1887) 19 QBD 394, referred to.
Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd (1988) ATPR 40-853, followed.
Coleman v Gordon M Jenkins & Associates Pty Ltd (1989) ATPR 40-960, referred to.
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353, followed.
Kay's Leasing Corporation Pty Ltd v Fletcher [1965] ALR 673, followed.
*Olds Discount Co Ltd v Playfair Ltd [*1938] 3 ALL ER 275, followed.
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99, referred to.
Australian Tramway Employees' Association v Prahran & Malvern Tramways Trust (1918) 25 CLR 394, referred to.
Whangarei Harbour Board v Nelson [1930] NZLR 554, referred to.
Hubbuck & Sons Ltd v Wilkinson Heywood & Clark Ltd [1899] 1 QB 86, considered.
Perkins v Nationwide News Pty Ltd (1992) 106 FLR 368, followed.

PROCEDURE – SUPREME COURT PROCEDURE

Claim under Trade Practices Act 1974 (Cth) specified in endorsement on writ – consequence for claim when statement of claim pleads no cause of action under the Act – position of plaintiff seeking later to plead that cause of action by amendment – when the cause of action becomes complete – whether new characterizing under the Act of legal consequences of material facts earlier pleaded attracts s82(2) of the Act – significance of utility of declaration when considering whether that remedy should be granted – whether estoppel arises on application to plead new cause of action.

Trade Practices Act 1974 (Cth), ss 52(1), 82(1) and (2)
Queensland Mines Ltd v Northern Land Council (1990) 68 NTR 1, referred to.
Wardley Australia Ltd v The State of Western Australia (1992) 175 CLR 514, considered.
Jobbins v Capel Court Corporation Ltd (1989) 25 FLR 226, referred to.
Commonwealth of Australia v Verwayen (1990) 95 ALR 321, referred to.
State Bank Case Ruling (unreported, Supreme Court (SA), Olsson J, 27 March 1997), referred to.
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70, followed.

REPRESENTATION:

Counsel:

Plaintiffs:	F.J. Davis
Defendant:	J.E. Lunn

Solicitors:

Plaintiffs:	F.J. Davis & Associates
Defendant:	De Silva Hebron

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Kea99010

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

Woodleigh Nominees Pty Ltd v CBFC Leasing Pty Ltd [1999] NTSC 68
No. 69 of 1994 (9607863)

BETWEEN:

WOODLEIGH NOMINEES PTY LTD
(ACN 050 120 057)
Plaintiff

AND:

CBFC LEASING PTY LTD
(ACN 008 520 965)
Defendant

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 25 June 1999)

Background

[1] By summons of 5 May 1998 the defendant applied to have the then plaintiffs' action dismissed under r23.01(1)(a) as not disclosing a cause of action or, alternatively, to have their statement of claim of 25 November 1994 (which had been prepared by one of the plaintiffs) struck out under r23.02(a), for the same reason. By summons of 8 May the then plaintiffs

sought leave to file and serve an amended statement of claim dated 6 April 1998. They had in fact filed that document in the Court registry on 7 April, without obtaining leave. Since a defence had been filed by the defendant on 9 February1995 it followed that pursuant to r14.08(1)(a) pleadings had formally closed on 23 February 1995; as r36.03(a) therefore did not apply, and the defendant did not consent, leave under r36.03(b) was required to file and serve an amended statement of claim.

[2] When these applications of 5 and 8 May came on for hearing before Angel J on 15 May, Mr Davis of counsel for the plaintiffs informed his Honour that by the proposed amended statement of claim of 6 April he had sought to clarify the plaintiffs' claim. His Honour eventually refused to give the plaintiffs leave to file and serve that document as an amended statement of claim, on the basis that it appeared to be fundamentally flawed; for example, it appeared to plead a wrong cause of action, par 20 lacked sufficient specificity and detail to be pleaded to, and in par 30(d) it sought by way of relief not rectification but a declaration which could not lawfully be made. However, his Honour gave the plaintiffs as a "last go", and ultimately by consent, leave to file and serve an amended statement of claim by 17 June. The summonses of 5 May and 8 May were then adjourned to 24 June for further hearing, should such amended statement of claim itself give rise to dispute.

An application to extend time

[3] These summonses came on for hearing before me on 24 June. Mr Davis informed me that the plaintiffs had failed to file and serve an amended statement of claim until 23 June; this was 6 days outside the time limit fixed in the consent order of 15 May. An explanation for that delay was proffered in the affidavit of 23 June of the then fourth plaintiff, Mr Geoffrey Casey. Mr Davis orally applied to have the time to comply with the consent order of 15 May, extended from 17 June to 23 June. Mr Lunn of counsel for the defendant did not object to the extension, provided that the document of 23 June was to be treated as the plaintiffs' final formulation of their claims. On that basis, I granted the plaintiffs' application to extend time to 23 June.

Preliminary matters

[4] Mr Lunn then proceeded to argue the defendant's application of 5 May, and to oppose the plaintiffs' application of 8 May. That is to say, he sought to have the action dismissed or, alternatively, the plaintiffs' statement of claim of 25 November 1994 struck out; and that leave to file and serve their proposed amended statement of claim of 23 June be refused. (By consent, the summons of 5 May was treated as including reference to the proposed amended statement of claim).

[5] Mr Davis stated that the original statement of claim of 25 November 1994, and the proposed amended statement of claim filed on 7 April 1998, would not be sought to be relied on by the plaintiffs, if the plaintiff obtained the

leave sought in its summons of 8 May. Mr Lunn stated however that for present purposes the defendant would seek to rely on what he contended were certain admissions by the plaintiffs in those documents.

[6] Mr Lunn noted that only the first plaintiff, Woodleigh Nominees Pty Ltd, was named as plaintiff in the proposed amended statement of claim. In the Writ that company is said to be the trustee of the Casey Family Trust; the second, third and fourth plaintiffs named in the Writ are said to be directors of the company and beneficiaries of the Trust. Mr Lunn submitted that it now appeared that the second, third and fourth plaintiffs named in the Writ of 21 April 1994 and in all proceedings thereafter, no longer wished to pursue their claims as plaintiffs; they sought no relief in the amended statement of claim. Mr Davis confirmed that these plaintiffs did not intend to proceed further in the action. I note that in that case they should have applied to be removed as parties under r9.06(a), or sought leave to discontinue the proceedings under r25.02(b) so far as they were concerned. That may be treated as having occurred. In any event, it was common ground that the sole remaining plaintiff in the action is to be the former first plaintiff, the company. Mr Lunn had no objection to the other plaintiffs ceasing to be parties to the action, but he applied for the action, so far as it concerned them, to be dismissed with costs. I think the appropriate order is that they be struck out of the proceedings, as plaintiffs; I order accordingly. I note that a plaintiff withdrawing under 0.25 must pay the costs of the

defendant, to the time of withdrawal; see rr25.05 and 63.11(5). That approach to costs is appropriate here.

Mr Lunn sought to have those costs taxed on a solicitor-and-client basis since 19 January 1998. This was because on that day the plaintiffs had been requested by the defendant's solicitors to discontinue their action, for the reasons spelled out in a letter of that date, where the question of future costs was specifically raised. Mr Lunn also noted that in what had been the proposed amended statement of claim filed on 7 April, now overtaken by the proposed amended statement of claim, the former second, third and fourth plaintiffs were still endeavouring to spell out their claims. I consider that the former second, third and fourth plaintiffs must pay the defendant's costs of defending the action against their claims, up to 24 June 1998. That assessment would be for the Taxing Master. Those costs should be taxed on an indemnity basis from 19 January - 24 June 1998. I so order.

The defendant's submissions

General

[7] Mr Lunn noted that in the endorsement on the Writ of 21 April 1994 the then plaintiffs made 3 claims: first, that the defendant had engaged in misleading or deceptive conduct contrary to s52(1) of the *Trade Practices Act* 1974 (Cth) (herein "the *Act*") or, alternatively, contrary to the *Consumer Affairs and Fair Trading Act (NT)*, on or about 22 April 1991; second, further or alternatively, it had made an unauthorised and illegal seizure of

goods (a concentrator and engines) the subject of 2 hire-purchase agreements, on 22 April 1991; and third, further or alternatively, on 22 April 1991 in breach of contract it had seized those goods from the plaintiffs. Mr Lunn noted that in each claim the date specified was 22 April 1991, a period of 3 years less 1 day before the issue of the Writ on 21 April 1994. I note that the Writ was drawn up and filed by Mr Geoffrey Casey, the then fourth plaintiff, in person.

[8] As to the "2 hire-purchase agreements" referred to in par [7] Mr Lunn said that the plaintiff had signed 2 documents, in July and September 1988 respectively. He submitted that these documents on their face were clearly Lease agreements, not hire-purchase agreements; they related to equipment to be used by the plaintiff in its goldmining enterprise. I accept that; see par [18]. The plaintiff did not put in issue the apparent character of the documents; it relied on certain alleged representations by the defendant as specified in pars [14] and [15], and their effect on the true (as opposed to the apparent) character of the documents as perceived by the plaintiff.

[9] The original statement of claim of 25 November 1994, also filed by Mr Geoffrey Casey, did *not* specifically plead a cause of action under the *Act*, although it referred to the *Act* in par (3); see par [40]. No relief was sought in that statement of claim pursuant to the *Act*; no mention was made of deceptive or misleading conduct by the defendant, or of *the Consumer Affairs and Fair Trading Act*. The declaratory relief there sought related wholly to alleged breaches of the *Hire-Purchase Act*; the damages sought

were said to flow from breaches of the 1988 agreements and the *Hire-Purchase Act*.

In this respect, the original statement of claim did not accord with the first claim in the endorsement on the Writ which related to a claim under the *Act*; see par [7]. As to the significance of that fact, I note that a statement of claim may alter, modify or extend a claim in the endorsement on a Writ; see r14.03. After a statement of claim is served, the causes of action on which a plaintiff sues are to be ascertained *exclusively* by reference to that statement of claim, without any further regard to the endorsement, which is entirely superseded by it. To the extent that a cause of action in an endorsement on a Writ is not included in the subsequent statement of claim, it must be treated as abandoned or discontinued; it is not sleeping, but dead. See generally *Renowden v McMullin* [1969] VR 744 at 750-751, affirmed by the High Court at (1970) 123 CLR 584 at 609-610.

Time under s12(1) of the *Limitation* Act, where applicable, continues to run in respect of a claim in the endorsement not included in the subsequent statement of claim; similarly, where applicable, time under s82(2) of the *Act* continues to run in those circumstances. A plaintiff who subsequently seeks to reintroduce such a 'dead' cause of action by amending its statement of claim, is in the same position as a plaintiff who seeks to raise that cause of action at that time, for the first time; see *Renowden v McMullin* [1969] VR 744 at 753.

I consider that on and from 25 November 1994 the plaintiffs are to be treated as having abandoned the cause of action under the *Act,* referred to in par [7]; and the plaintiff in later attempting to reintroduce that cause of action in its proposed amended statement of claim – see pars [12] and [28]-[39] – is to be treated as raising it there *for the first time*. This point was not specifically adverted to in these terms by counsel; the significance is that the plaintiff is to be treated as seeking for the first time in 1998 to rely on a cause of action under the *Act*. On any view of the date on which a cause of action accrued under the *Act* in this case, 1998 appears to lie well beyond the absolute 3-year time-barrier imposed by s82(2) of the *Act*; see par [13].

[10] Setting aside the situation where an absolute time-barrier on claims exists, it was formerly the settled rule of practice that a cause of action, once abandoned, would not be allowed to be re-introduced later by an amendment to the statement of claim, except in "very peculiar circumstances" if, at the time it was sought to re-introduce it, an action commenced in respect of that cause of action would be time-barred; see *Renowden v McMullin* [1969] VR 744 at 754, and in the High Court at 611-613. That was the approach when the rule in *Weldon v Neal* (1887) 19 QBD 394, applied. The position in that respect since 1981 is, however, regulated by s48A of the *Limitation Act* and (since 1987) by r36.01(6): such an amendment may be allowed if the plaintiff satisfies the Court that the defendant would not thereby "be prejudiced in the conduct of his … defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise". The plaintiff did

not adduce any material directed to this aspect, in its summons of 8 May 1998.

[11] The causes of action pleaded in the original statement of claim of 25 November 1994 (apart from that for breach of contract) turned on the characterization therein of the 1988 agreements as hire-purchase agreements, not Lease agreements, and on consequent breaches of the *Hire-Purchase Act* in various respects by the defendant when it repossessed the goods the subject of the agreements, in April 1991. It is desirable, in view of Mr Lunn's submission in par [22], to set out what was pleaded in pars (10)-(12) of the original statement of claim in relation to the nature of the agreements:-

> "(10.) At all material times it was intended and understood by the Plaintiffs [that] the purpose for which the contracts [of 27 July and 22 September 1988] were entered into was for the express purpose of mining, and would upon payment of the purchase price, interest and charges result in the ultimate ownership of the said concentrator and diesel engines passing to the First Plaintiff.
>
> (11.) The knowledge and belief referred to in paragraph 10 was derived from advice received by the Plaintiffs from a Mr M Bettenzoli a representative of the Defendant.
>
> (12.) The said contracts were Hire-Purchase contracts."

[12] Mr Lunn noted that in the proposed amended statement of claim the plaintiff made 2 claims: the first, in pars (3)-(11), was a claim for breach of statutory duty by the defendant under the *Hire-Purchase Act*; the second, in pars (12)-

(19), was a claim based on false and misleading conduct by the defendant under s52(1) of the *Act*.

[13] He noted that the 2 contracts of July and September 1988 were made more than 3 years before the Writ issued on 21 April 1994. Accordingly, he submitted that with reference to the claims under the *Act*, the Writ issued on 21 April 1994 was well outside "3 years after the date on which the cause of action [under the *Act*] accrued", the 3 years being the time limit fixed by s82(2) of the *Act*, for instituting such proceedings. That time limit is absolute; it cannot be extended; see *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1988) ATPR 40-853 at 49, 196 per Pincus J. The validity of this submission that the s52(1) claim is barred by s82(2), depends upon whether the cause of action under the *Act* became complete on entry into the contracts in 1988, or only at a later time, such as the repossession on 22 April 1991. I doubt if it was complete in 1988, but it becomes unnecessary to decide the point; see par [9], and below.

I note that a cause of action under s82(1) of the *Act* becomes complete when a plaintiff suffers loss or damage as a result of a defendant's conduct in breach of one of the specified provisions of the *Act*; see *Coleman v Gordon M Jenkins & Associates Pty Ltd* (1989) ATPR 40-960 at 50, 476. I do not consider that the plaintiff suffered such loss or damage in 1988. However, the course of this litigation means that this cause of action under the *Act* is to be treated as not having been pleaded until the proposed amended

statement of claim in 1998; see par [9]. Accordingly, it appears to be statute-barred in any event under s82(2) of the *Act*.

The plaintiff's first claim – breaches of the Hire-Purchase Act

[14] As noted in par [12] the proposed amended statement of claim in pars (3)-(11) pleaded a breach of statutory duty under the *Hire-Purchase Act*. In pars (3) and (4) it pleaded that Mr Bettenzoli, as agent of the defendant, in July and September 1988 had made representations to the then plaintiffs, to induce the plaintiff to enter into the "written agreement[s] to lease", to the effect that if it paid the number of months of "rent" therein specified and the specified "Residual Value at Termination" and complied with the other terms of the Leases, "the plaintiff thereby would own" the concentrator and engines. In par (5) it is pleaded that it was in reliance on those representations that the plaintiff executed the Leases and made use of the goods. Mr Lunn noted that these alleged representations of 1988 had been made more than 3 years before the Writ issued on 21 April 1994. I note two aspects. First, it does not appear that in terms of the elements of a hire-purchase agreement as set out in par [16], pars (3) and (4) are clearly seeking to plead that the representation alleged was that the plaintiff had an "option to purchase". Second, the representation alleged is one of law, as to the proper construction of the Lease agreements; in general, a representation of law does not operate to affect an agreement, though the effect of *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 369-376 on this general principle is not yet clear.

[15] In par (6) of the proposed amended statement of claim the plaintiff pleaded that the effect of the defendant's representations in par [14], and the plaintiff's reliance on them, was "to constitute both the said Leases [of 1988] as Hire-Purchase contracts within the meaning of the *Hire-Purchase Act*". This pleading is the foundation for the claim for breach of statutory duty. I note that on 15 May 1998 Angel J indicated in the course of argument that the effect of a representation such as that in par [14] did not lead to a declaration that the Lease was a hire-purchase agreement but, if anything, to a right to rectification of the agreement; the plaintiff in par (20)[a] still seeks a declaration that the "Lease agreements were hire-purchase agreements". No relief by way of rectification is sought. In pars (8) and (9) the plaintiff pleaded that the subsequent seizure and sale of the concentrator and engines by the defendant "on or about 22 April 1991" was (in light of par (6)) in breach of s17(1) of the *Hire-Purchase Act*, in that the defendant had not, before seizure, given the required Third Schedule notice to the plaintiff; and the defendant was also in breach of s17(3) of that *Act*, in that it had not, after seizure, given the required Fourth Schedule notice to the plaintiff.

[16] As to the pleading in par (6) set out in par [15], Mr Lunn referred to the definition of "hire-purchase agreement" in s5 of the *Hire-Purchase Act*, in force in 1988; as far as relevant it provides:-

> "'hire-purchase agreement' includes a letting of goods with an option to purchase and an agreement for the purchase of goods by

> instalments (whether such agreement describes such instalments as rent or hire or otherwise), but does not include any agreement –
>
> (a) whereby the property in the goods comprised in the agreement passes at the time of the agreement or upon or at any time before delivery of the goods; ….”

He submitted that nothing in pars (3) or (4) of the proposed amended statement of claim relating to Mr Bettenzoli’s alleged representations of 1988, set out in par [14], pleaded the matters which the plaintiff must plead and establish to bring the 1988 agreements within the definition in s5. At most, pars (3) and (4) pleaded that the representation was that if the plaintiff paid all of the respective monthly instalments of “rent”, together with the respective amounts specified as “Residual Value [of the goods] at Termination”, and otherwise complied with the terms of the Leases, the plaintiff “thereby would own” the goods. I accept that submission. It is perfectly correct that if those conditions were met, the plaintiff would become the owner of the goods, because it would have bought them. The Leases gave no option to the plaintiff to purchase the goods, and contained no provision for their purchase by the plaintiff by instalments; there is no effective pleading that the representation alleged extended to either of these matters.

The fact that the plaintiff might buy the goods by the means specified, does not mean that the 1988 agreements were hire-purchase agreements; cf s5(3), and the majority opinion in *Kay’s Leasing Corporation Pty Ltd v Fletcher* [1965] ALR 673. If the plaintiff ultimately bought the goods when they

were offered for sale at the conclusion of the hiring, as provided for in the agreement, the property in the goods would pass to the plaintiff by virtue of the new sale agreement between it and the defendant, and *not* by virtue of the 1988 agreements.

In hire-purchase transactions the forms used by the parties are of paramount importance; see *Olds Discount Co Ltd v Playfair Ltd* [1938] 3 A11 ER 275 at 280. It is accordingly necessary, when pleading representations of the type relied on in pars (3) and (4) of the proposed amended statement of claim, to ensure that the material facts alleged extend to all matters within the definition of "hire-purchase agreement" in s5 of that *Act*. I consider that the pleading does not do so.

Further, the remedy for a representation by way of a false statement of material fact made in order to induce entry into a contract, and having that effect, is (apart from providing a defence to proceedings for breach of contract or specific performance) rescission of the contract; it also yields a remedy of damages in tort, unless the representation is neither fraudulent nor negligent. In appropriate cases, rectification is an appropriate remedy. Neither rescission, tort damages, nor rectification were sought here; see par [47].

[17] The significance of the difference between the parties as to whether the 1988 agreements were lease agreements or hire-purchase agreements lay in the statutory obligation (referred to in par [15]) in relation to hire-purchase

agreements to give notice both before and after seizure, under s17(1) and (3) of the *Hire-Purchase Act*. The claim that the seizure in April 1991 was in breach of the *Hire-Purchase Act* is made in pars (9) and (10) of the proposed amended statement of claim, and is the basis of the claim for damages for breach of statutory duty in pars (11) and (20)[c].

[18] The documents in question of 23 September 1988 and 27 July 1988, annexed to Ms Porter's affidavit of 17 October 1995, are each headed "Lease Agreement". They purport to lease the respective goods at a rental and for a period specified. Clause 2 provides:

> "2. The Company [that is, the defendant] has acquired or will acquire the goods (as the case may be) for the sole purpose of this lease and nothing herein contained shall confer on the Lessee [that is, the plaintiff] and the Lessee warrants that he has not (apart from these presents) any right or property or interest in the goods other than as bailee only."

There is nothing in the other provisions of the Lease Agreements which purports to confer on the plaintiff any right or property or interest in the goods. Clause 9 provides, inter-alia, that in default of paying the monthly rental the defendant may "without notice so far as the law allows determine this lease … and … thereupon retake possession of the goods …".

[19] It is against this background that the plaintiff claims as relief in par 20[a] of the proposed amended statement of claim a declaration that the "Lease Agreements" were in fact hire-purchase agreements, and come within the legislative ambit of the *Hire-Purchase Act*; as to this relief, see the comment

in pars [15] and [16]. The plaintiff also seeks in par 20[b] a declaration that seizure (and subsequent sale) of the goods in April 1991 was in breach of s17(1) and (3) of that Act; and in par 20[c] damages for those breaches of statutory duty.

[20] As to the relief referred to in par [19] I note that remedy by way of declaration is available in a wide variety of situations. It may be used to obtain the construction of a contract; see, for example, *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99. A declaration may be sought that a defendant is in breach of contract; see, for example, *Australian Tramway Employees' Association v Prahran & Malvern Tramways Trust* (1918) 25 CLR 394. A declaration may also be sought as to whether there exists in law a lease (as opposed to a licence) between the contending parties; see, for example, *Whangarei Harbour Board v Nelson* [1930] NZLR 554. I consider that relief by way of declaration is a remedy open to be sought in this case in pars (20)[b], [d] and [e], but not in par (20)[a].

[21] Mr Lunn submitted that the proposed amended statement of claim was as defective as the original statement of claim of November 1994, as regards this claim for breach of statutory duty; therefore the original statement of claim should be struck out, and leave should be refused to file and serve the proposed amended statement of claim, because it was "plain and obvious" that the facts respectively pleaded in those documents were insufficient to entitle the plaintiffs to the relief they sought. He relied for this approach on

Hubbuck & Sons Ltd v Wilkinson Heywood & Clark Ltd [1899] 1 QB 86. That case involved an application to strike out a statement of claim on the ground that it disclosed no reasonable cause of action. Lindley MR said at 91 that the summary procedure of striking out a statement of claim under the then equivalent of r23.02(a) was-

> "only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks … summary procedure … is only intended to have recourse in plain and obvious cases."

[22] Mr Lunn submitted that the facts pleaded in pars (3) and (4) of the proposed amended statement of claim had not been pleaded before, and they alleged positive representations by the defendant. He submitted that to permit these facts to be first pleaded as a cause of action by amendment in 1998, so long after the time limit for doing so had expired, meant that the defendant would "be prejudiced in the conduct of his … defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise", in terms of s48A of the Limitation Act and r36.01(6).

I note that usually where a new cause of action is first sought to be relied upon by a late amendment, the question of any resulting prejudice to the defendant needs to be addressed by the plaintiff seeking leave to do so; it should provide "a broad outline of the evidence by which [the new cause of action] is to be proved", as Miles CJ put it in *Perkins v Nationwide News Pty Ltd* (1992) 106 FLR 368 at 372. That has not been done here.

I note that in such a case the burden lies on the plaintiff to show that the amendment would not cause an injustice to the defendant which would outweigh the plaintiff's need to amend. I also note that where the only 'prejudice' of the late amendment is to deprive the defendant of a Limitation defence, that does not amount to 'prejudice' within the meaning of that term in s48A and r36.01(6); the relevant 'prejudice' for the purpose of those provisions is prejudice in the defendant's "conduct of his defence".

[23] Mr Lunn proceeded to detail the prejudice which he submitted the introduction of the claim in pars (3) and (4) of the proposed amended statement of claim would cause to the defendant "in the conduct of [its] … defence". Thus it no longer had the opportunity it earlier had, to obtain documents from the Westpac Bank and AGC – see pars (13) and (14) of the original statement of claim - which would bear upon whether the plaintiff's later applications in May and September 1989 for finance to those institutions showed the concentrator and engines as owned by the plaintiff, or leased by it, or subject to a hire-purchase agreement. This loss of opportunity arose was because the usual 7-year period before records were destroyed by financial institutions, had expired before 1998. Similarly, the defendant had now lost the opportunity to obtain from those institutions any information disclosed to them by the plaintiff relating to its alleged consequential damages. The defendant could not obtain the plaintiff's then-current financial records. Mr Lunn submitted that information of the type outlined above could be critical when cross-examining the then plaintiffs,

but now had been lost to the defendant. Further, since one of the then plaintiffs, Carol Elizabeth Casey, was now deceased, the opportunity for cross-examining her on the alleged representations by Mr Bettenzoli, no longer existed.

[24] Mr Lunn further submitted that it was relevant when considering the exercise of the discretionary power to allow pars (3) and (4) of the proposed amended statement of claim now to be pleaded, to take account of the court's own responsibilities under Order 48, in relation to case-flow management. In this connection he submitted that the plaintiff had been dilatory in pursuing its case, and this diminished the prospect of a fair trial. For example, the defendant had decided on the basis of the contents of the original statement of claim of November 1994 not to interrogate the plaintiffs or to make further enquiry of them; now it was unable effectively to do so, in light of the new claims, since Mrs Casey was now deceased.

[25] As to the matters of prejudice raised by Mr Lunn in pars [22]-[24], and his first submission in par [22], I do not consider that it can fairly be said that the topic dealt with in pars (3) and (4) of the proposed amended statement of claim, had not been raised in the original statement of claim; see pars (10)-(12) thereof, set out in par [9]. I consider that in essence the facts pleaded in pars (3) and (4) of the proposed amended statement of claim constitute further particulars of the facts originally pleaded in November 1994, as set out in par [9]. The pleading of further particulars of an existing pleading was never prohibited, even in the days of *Weldon v Neal* (supra); they do not

represent a *new* cause of action. These particulars are not such as to have occasioned the prejudice on which Mr Lunn sought to rely, in terms of s48A of the *Limitation Act* and r36.01(6).

[26] Mr Lunn referred to matters pleaded in pars (14) and (17)-(21) of the original statement of claim of November 1994 which are no longer pleaded in the proposed amended statement of claim; he submitted that they might amount to admissions by the plaintiff. I reject that; see par [41]. Similarly, he submitted that matters pleaded in the proposed amended statement of claim filed on 7 April 1998 – parts of pars (14), (17), (19), (29) and (30), and pars (18), (23), (24) and (28) – could be treated as admissions by the plaintiff as to the time when its cause of action arose. I reject that; see par [41].

[27] Mr Lunn submitted that the claims now sought to be made in pars (3)-(11) of the proposed amended statement of claim are out of time. In that connection, and on that assumption, he noted that the plaintiff had sought no extension of time to make those claims, as required by s44(4) of the *Limitation Act*. I do not consider that those claims are properly characterized as new claims; see par [25].

The plaintiff's second claim – false and misleading conduct

[28] Mr Lunn noted that pars (12)-(19) of the proposed amended statement of claim pleaded further or alternatively to the claim in pars (3)-(11), false and misleading conduct by the defendant in terms of s52(1) of the *Act*. This

claim expressly incorporated the pleading in pars (3) and (4), relating to the alleged representations by Mr Bettenzoli. In par (13) the plaintiff set out the reasons it had been unable to pay the monthly instalments under the 1988 Leases. It pleaded in par (13)[c] that it had notified the defendant of those reasons "in early 1991". Mr Lunn submitted that the facts pleaded in pars (15)-(17) and (19) of the original statement of claim of November 1994, which he submitted were factual admissions by the plaintiff against interest on which the defendant relied, showed that this notification had clearly been made *before* the goods were repossessed on 22 April 1991. I do not consider that the defendant can rely upon those pleadings as admissions – see par [41]. However, it is clear from the context that the reference to "in early 1991" in par (13)[c] is to a date prior to 22 April 1991.

[29] In par (13)[d] the plaintiff pleads that "in early 1991" it had requested from the defendant a suspension of its obligation to pay monthly rental "until abatement of the northern monsoon weather conditions enabled it to recommence" its mining operations. In par (13)[e] the plaintiff pleads that the defendant had agreed to suspend that obligation; and, in par (13)[f], that in so agreeing the defendant was "acting in trade and commerce" in terms of s52(1) of the *Act*.

[30] As to the matters in par [29], Mr Lunn submitted that since the agreement referred to in par (13)[e] had been made *before* 22 April 1991, but was sought to be pleaded *for the first time* in 1998, it was also outside the 3 year time limit in s82(2) for relying upon a cause of action. In support, he

referred to the facts pleaded in pars (15), (17) and (19)-(21), and (23) of the original statement of claim of November 1994, which dealt in some detail with the general topic to which the pleadings in pars (13)[a]-[e] and 16[b] were directed. I note that in par (16) of the original statement of claim the plaintiffs pleaded that following communication by the then fourth plaintiff with the defendant, "the representative of the Defendant agreed not to press for payment of arrears until weather conditions permitted a return to full production" at the mine. It is pleaded in par (19) of that document that after an attempted repossession by the defendant of the goods on 18 April 1991, the then third plaintiff (now deceased) reminded the defendant of that agreement.

I do not consider that the matters pleaded in par [29] can be fairly said to be pleaded for the first time in the proposed amended statement of claim, that is, apart from the pleading in par (13)[f]. The other matters are further particulars of the claims in relation to those matters first pleaded in November 1994. However, par (13)[f] in the proposed amended statement of claim, while not materially changing the facts originally pleaded in November 1994, seeks to describe in a new way the legal consequences attaching to those facts, by reference to the *Act*. That is in breach of s82(2) of the *Act,* and cannot be done.

[31] Mr Lunn submitted that the plaintiff could not ignore the admissions of fact it had made in its original statement of claim of November 1994, when now making claims under the amended statement of claim. I reject this; see par

[41]. He submitted that this meant that on any view of the facts relied on, the plaintiffs were out of time under s82(2), when they issued the Writ on 21 April 1994.

[32] Mr Lunn submitted that any claims under s87 of the *Act* would also be statute-barred, since time would run from when the plaintiffs entered into the agreements of 1988; I consider that it is unnecessary to deal with this submission, since no such claims have been made.

[33] He noted that there was no claim that the plaintiffs suffered any continuing detriment. He submitted that there was no utility in any of the declarations sought, and for that reason alone they should not be permitted to be sought to be made. I note that it is clear that a court may refuse to exercise its discretion to grant a declaration, if it will be of little practical value to the plaintiffs; see *Queensland Mines Ltd v Northern Land Council* (1990) 68 NTR1 at 7-8.

[34] Mr Lunn submitted that the declarations sought were of no utility unless they established the plaintiff's ownership of the goods. He noted in this connection that the plaintiff did not allege that it had paid the instalments due under the agreements, or the terminal payments due thereunder, or that it was entitled to ownership of the goods. I do not consider that the declarations sought in par (20) would lack utility for this reason. The essence of the plaintiff's claim in pars (3)-(11) is the defendant's alleged breaches of the *Hire-Purchase Act* when proceeding to repossess the goods;

it is not concerned with their ownership, but with the liability in tort to which breach of the duty is said to give rise. The essence of the plaintiff's claim in pars (12)-(19) is that because the defendant had agreed to suspend the plaintiff's rental obligations until the monsoon abated, the plaintiff had made no attempt (as pleaded in par (15)) to make other financial arrangements to meet that obligation; and the subsequent seizure of the goods by the defendant in breach of that agreement to suspend the plaintiff's financial obligations meant that the plaintiff "was rendered unable to conduct its mine" (par (19)). That claim also is not concerned with the ownership of the goods, but with the liability to which this alleged false and misleading conduct gave rise under this *Act*.

[35] Mr Lunn noted that the claim for damages pursuant to s82 of the *Act*, in par (20)[f], had not been particularized in any way, and no material fact had been pleaded which would enable the Court to ascertain the damage sustained. I note that in this type of case particulars of damages should have been provided.

[36] As to the *time* the plaintiff's cause of action arose, Mr Lunn submitted that the alleged representations by Mr Bettenzoli as pleaded in pars (3) and (4) of the proposed amended statement of claim, went to ownership of the goods; accepting for the purposes of this argument the truth of those allegations as to ownership, he submitted that the loss the plaintiff had thereby sustained was failure to obtain those rights of ownership, and that this loss had occurred at the time of execution of the documents in 1988.

The cause of action was then complete, and was time-barred by 1994 when the Writ issued. He relied as to the time when loss arose on *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514 at 528, where the majority was discussing the decision of the Full Court of the Federal Court in *Jobbins v Capel Court Corporation Ltd* (1989) 25 FLR 226. The Full Court considered that actual loss was sustained at the time of entering into an agreement induced by a false, negligent or misleading representation. I note that the High Court expressed some difficulty with that approach; see 529. It is unnecessary to deal with this submission.

[37] He submitted that the statement of claim of November 1994 should be struck out as disclosing no cause of action; and that for the same reason the amended statement of claim should not be allowed to be filed and served.

[38] He submitted that the plaintiff was estopped from attempting to change its pleading via the proposed amended statement of claim because of the detriment such changes would occasion the defendant, as adumbrated in pars [22]-[24]. He relied on *Commonwealth of Australia v Verwayen* (1990) 95 ALR 321, submitting that it would be an unconscionable departure from the assumption engendered by the plaintiff in the defendant that the issue between them was limited to whether or not the 1988 agreements were Lease agreements or hire-purchase agreements; the defendant would suffer the detriment outlined in pars [23] and [24] if that assumption were not adhered to by the plaintiff. Further, the possibility of such an estoppel was a factor relevant to the exercise of the discretionary power, when deciding whether

or not to allow the proposed amended statement of claim to be filed and served. I do not consider that the plaintiff is estopped for the reasons suggested; I dealt in par [25] with the detriment suggested in pars [23] and [24].

[39] He submitted in the alternative to the application under r23.01(a) that the action should be dismissed either under r23.01(1)(c) or under the Court's inherent jurisdiction, because the plaintiff in seeking to rely on the proposed amended statement of claim was thereby seeking to raise vital new factual allegations, and new causes of action, to save its earlier defective pleading, and was doing so some 10 years after the event complained of. He relied in this regard on observations by Olsson J in *State Bank Case Ruling* (unreported, Supreme Court (SA), 27 March 1997), at pars [17]-[20].

The plaintiff's submissions

[40] Mr Davis referred to par (3) of the original statement of claim, which describes the defendant as a corporation "engaged in trade or commerce within the meaning of those terms as used in Part V" of the *Act*. I note that that pleading stands alone in that document; no claim under the *Act* was sought to be pleaded, and the *Act* received no further mention in the document; see par [9]. It cannot be suggested that the original statement of claim pleaded any claim under the *Act*; that was sought to be introduced for the first time in the proposed amended statement of claim in 1998, after being specified in the endorsement on the Writ on 21 April 1994, and in law

abandoned when not mentioned in the original statement of claim in November 1994.

[41] Mr Davis submitted that it was an untenable proposition that a pleading by a party could be relied upon by the other party, as an admission of fact. I accept that, at least where the pleading was not on oath. In general, a statement of claim does not serve an evidentiary purpose. It identifies and communicates the extent of the plaintiff's claim. Although the plaintiff is bound by the material facts there pleaded, in the sense that it must confine its evidence at trial to those facts, it does not admit by its pleading that the facts pleaded are true and correct; see *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 85-6 and 98.

[42] Mr Davis referred to the contents of par (11) of the proposed amended statement of claim filed on 7 April 1998; however, I pay no attention to that document, since the plaintiff was refused leave to file and serve it.

[43] He submitted, as to the detriment alleged in par [24], that the defendant had always had the opportunity to interrogate the plaintiffs, and had chosen not to do so. I accept that; the topic in question had been sufficiently raised in the original statement of claim of November 1994.

[44] As to when the plaintiff's cause of action arose, and time commenced to run, Mr Davis submitted that on the assumption that the plaintiff was induced by the defendant to believe that the Lease agreements were in fact hire-purchase agreements – a matter asserted by the plaintiff and to be

determined at trial – time started to run from 22 April 1991, the day on which the defendant seized possession of the goods, and thereby caused the plaintiff to suffer the loss for which it complains. Its cause of action was not complete until that time. For present purposes, it is unnecessary to deal with that submission.

[45] Mr Davis referred to the many documents exhibited to the affidavit of Susan Porter of 17 October 1995, filed by the defendant; many of those documents were well before the issue of the Writ on 21 April 1994. He submitted that this showed that the defendant was well aware of the matters in dispute with the plaintiff, particularly as the plaintiff had already been to the Bank Ombudsman. That appears to be the case, but it is not presently relevant.

[46] Mr Davis referred to the detriment alleged in pars [23] and [24], submitting that it could not be presently determined whether that detriment existed. I accept that; see also par [25].

[47] He submitted that, apart from the cause of action pleaded under the *Act*, the plaintiff's claim was maintainable on the basis of a "contractual tort", in the sense that the plaintiff contends that it was induced to enter the 1988 contracts as a result of the defendant's misrepresentations. As to that, I note that the proposed amended statement of claim contains only claims based on breach of statutory duty, and on false and misleading conduct, and seeks orders related only to those claims. It does *not* plead an action in tort on the basis that it was induced to enter into disadvantageous contracts in 1988 by

the defendant's fraudulent or negligent misrepresentations, or claim for damages arising therefrom; see par [16].

Conclusions

[48] I have expressed my views on various matters while discussing the submissions, so I may express my conclusions shortly.

[49] As to the plaintiff's summons of 8 May 1998, I refuse to grant leave to file and serve the proposed amended statement of claim of 23 June 1998, for the following reasons. The claim for breach of statutory duty in pars (3)-(11) thereof is not maintainable, because the representation by the defendant which lies at the heart of that claim is not a representation of a material fact, but a representation of law; see par [14]. It is not an operative misrepresentation, in terms of the law. The claim based on the defendant's alleged false and misleading conduct, in pars (12)-(19), is statute-barred under s82(2) of the *Act*; see pars [9] and [13].

[50] As to the defendant's summons of 5 May 1998, the plaintiff's statement of claim of 25 November 1994 is struck out, except in so far as it alleges a breach of contract, because the alleged misrepresentation which lay at the heart of the claim based on breaches of the *Hire Purchase Act* is the same inoperative misrepresentation referred to in par [49]. In the result, pars (3), (10)-(14) and (22) are struck out; so is the relief specified as items (i)-(iii), and the words "and the contravention of the N.T. Hire Purchase Act", in item (B).

[51] Par [50] deals with what was the alternative relief sought by the defendant in its summons of 5 May 1998. Consideration of the matters urged in support of the application under r23.02(a) shows that the plaintiff's action is in large measure obviously unsustainable. The plaintiff has now had ample opportunity to fully expound the basis of its claims, which is now clear, apart from its claim for breach of contract. There remains that claim, contained in the endorsement, and pleaded to some degree in the original statement of claim. That has not been addressed before me. Particulars of that claim must be provided by the plaintiff to the defendant within twenty-eight (28) days.

[52] The defendant must have its costs of the summonses of 5 and 8 May 1998.

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