

PARTIES: Commonwealth of Australia v  
Wilkins Klemm & Morrison Pty Ltd

TITLE OF COURT: In the Supreme Court of the  
Northern Territory of Australia

JURISDICTION: Interlocutory Application

FILE NO.: 739 of 1989

DELIVERED: 21 October 1994

REASONS OF: Master Coulehan

CATCHWORDS:

Practice & procedure - application to amend defence -  
O.36.01(1) Supreme Court Rules - injustice - order for costs  
- estoppels - case flow management

Practice & procedure - O.13.12 - denials and non-admissions  
to be specific

Practice & procedure - O.13.10(1) and (2) - lack of  
particularity

Cases referred to:

Clough & Rogers v Frog 48 ALJR 481

Commonwealth v Verwayen 170 CLR 394

Gardso v Thomas Borthwick & Sons (Australasia) Ltd  
(1990) 2 Qd. R 36

North Australian Aboriginal Legal Aid Service v Liddle -  
NT Court of Appeal - (unreported) 8 September 1994

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

No. 739 of 1989

BETWEEN:

COMMONWEALTH OF AUSTRALIA

Plaintiff

and

WILKINS, KLEMM

& MORRISON PTY LTD

Defendant

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 21 October 1994)

This proceeding was commenced by writ on 20 November 1989. The plaintiff claims damages for breach of contract, or alternatively, negligence.

The plaintiff alleges that around November 1985 the defendant, a firm of architects, provided faulty documentation for the construction of certain buildings at the Tindal R.A.A.F. Base.

The defence was filed and served on 16 April 1991.

Since that time the parties have been engaged in the discovery process and the preparation of a Scott Schedule.

The defendant now seeks to file and serve a substituted defence. It is necessary to deal with those parts of the substituted defence to which the plaintiff has objected.

Paragraph 3

Objection is taken to this paragraph insofar as it pleads to paragraph 5 of the statement of claim which reads, omitting particulars, as follows:-

**"5. The Original Documents supplied by the defendant to the plaintiff were defective in that they contained errors and mistakes and did not comply with accepted engineering practice and published Australian Standards."**

Paragraph 3 of the substituted defence reads:-

**"With respect to paragraphs 4 and 5 of the Plaintiff's Statement of Claim, the Defendant admits that it supplied the Original Documents to the Plaintiff but says that the Original Documents were in compliance with the Agreement."**

It was argued that this pleading does not deal with the allegations in paragraph 5 of the statement of claim.

O.13.12 requires that denials or non-admissions be specific. The pleading is evasive because it does not meet the allegation that the documents were defective.

However, the allegation that the documents were defective is denied in paragraphs 8 and 9 of the substituted defence.

Reliance may also be placed on paragraph 11 of the substituted defence which reads:-

**"Save as aforesaid, the Defendant denies each and every allegation in the plaintiff's statement of claim."**

This form of pleading is acceptable as a traverse (see Warner v Sampson (1959) 1 Q.B. 297, 310 and Odin Central Service v Interstruct (1992) 7 W.A.R. 57.)

Paragraph 4

This paragraph pleads to paragraph 6 of the statement of claim which reads:-

**"By letter dated 23 March 1987 from the plaintiff to the defendant the plaintiff required the defendant to conform with clauses 16.3 and 16.7 of the Standard Conditions and to give certification pursuant to clause 3.3.5 of the Consultant Brief."**

Paragraph 4 of the substituted defence reads:-

**"With respect to paragraph 6 of the Plaintiff's Statement of Claim, the Defendant admits the receipt of the letter therein referred to but does not admit the effect under the Agreement as alleged by the Plaintiff."**

This pleading is evasive because it does not answer the allegations as to the contents of the letter. It is also confusing because paragraph 6 of the statement of claim does not appear to allege any "effect" under the Agreement.

Paragraph 5

It is pleaded in paragraph 7 of the statement of claim as follows:-

**"7. No certificates or calculations as referred to in paragraph 6 hereof were supplied to the plaintiff by the defendant for the original documents."**

The defence to this allegation is a general statement of non-admission (paragraph 5 of the substituted defence) which is not sufficient (O.13.12). Reference to paragraph 11 of the substituted defence does not assist because it is evasive not to meet the allegation by making it clear whether any certificates or calculation were provided.

Paragraph 8

This was objected to on the basis that there was evidence to the contrary. No authority was cited in support. I do not consider this a ground for rejecting the amendment.

Paragraph 9

This paragraph reads as follows:-

**"Further, and in the alternative, if the Original Documents were defective as alleged (which is denied) and inspite (sic) of the matter referred to in paragraph 8 above, the Defendant remains liable for the losses suffered by the Plaintiff as a result of the alleged defects (which is also denied), the Defendant says that the actual**

rectification work undertaken by the Plaintiff was excessive and/or unnecessary in order to properly remedy the alleged defects and further was unreasonably delayed which delay increased substantially the costs of undertaking the rectification work and accordingly the Plaintiff has failed to properly mitigate its loss and further or alternatively has negligently contributed to the loss it has suffered."

It was objected that this pleading lacked particularity (O.13.10(1) and (2) ) and did not contain all the material facts upon which the defendant relied (O.12.02(a) ).

There is some merit in this objection. However, the deficiencies may adequately be met by the provision of particulars.

The plaintiff also argues that this defence was not raised in the Scott Schedule. This is not a valid ground for refusal of the amendment although it may be relevant to costs thrown away.

#### Paragraph 10

This paragraph reads:-

**"10. Further and in the alternative, if the Defendant is liable to the Plaintiff in respect of any of its claims, the Defendant says that all of those claims are statute barred by reason of section 12 of the Limitation Act (NT).**

#### **Particulars**

**The Defendant says that the cause of action:**

- (a) in contract concerning the alleged defects in the Original Documents arose when the Original Documents were delivered to the Plaintiff in November of 1985 or alternatively when the defects in the construction of the Avionics Building became physically apparent between August 1986 and October 1986;**
- (c) (sic) in tort concerning the alleged defects in the Original Documents arose when the damage first became apparent or ought to have been apparent in November of 1985 or alternatively when the defects in the construction of the Avionics Building became physically apparent between August 1986 and October 1986."**

It is argued that there is a lack of particularity because the plaintiff's claim relates to four buildings, while only the Avionics Building is pleaded. However, it must be assumed that the defendant only intends to rely on this fact in establishing its defence under the **Limitations Act**. It is a matter for argument whether or not a limitation bar is established.

It is also argued that there was no connection between the defect in the building and the defects in the original documents. However, it is not clear why there should be such a connection.

The plaintiff alleges prejudice arising out of the delay in pleading the **Limitations Act**. Reference was made to the time taken and the expense incurred to date, including the preparation of the Scott schedule which may have to be reviewed if the pleadings are amended.

The power to amend is provided in O.36.01(1). It is well established that the power should be exercised where to do so would not cause injustice (see **Clough & Rogers v Frog 48 ALJR 481**).

In most cases injustice may be cured by an order for costs, although in **Gardso v Thomas Borthwick and Sons (Australasia) Ltd (1990) 2 Qd.R 36** an amendment to plead the statute was refused because the plaintiff had lost his right to claim in another jurisdiction in reliance on the defence not having been raised.

The evidence suggests that the failure to plead the **Limitation Act** was not the result of a decision by the defendant or its advisers. It appears that the issue was not appreciated until recently, although there is no reason why it ought not to have been apparent earlier in the proceeding.

It is argued on behalf of the plaintiff that an estoppel has been created as in **Commonwealth v Verwayen 170 CLR 394**. However, there

has been no unequivocal concession as in Verwayen's case and the plaintiff has not suffered detriment which cannot be remedied by an order for costs.

The plaintiff also referred to case flow management considerations without developing the argument. No doubt it was a reference to the public interest in the efficient conduct of litigation (see North Australian Aboriginal Legal Aid Service Inc. v Liddle, an unreported decision of the Full Court delivered 8 September 1984 at pages 21-26.)

At this stage of the proceeding the delay caused by the amendments would not appear to be of sufficient significance to justify refusal. Different considerations may apply if the proceeding had been set down for trial.

I will adjourn this application to 10 November 1994 to enable the defendant to consider amendments to paragraphs 4 and 5 and to provide particulars in relation to paragraph 9, with liberty to apply.