

CITATION: *Delta Electrics NT Pty Ltd v Nilsen (NT) Pty Ltd* [2019] NTSC 88

PARTIES: DELTA ELECTRICS NT PTY LTD

v

NILSEN (NT) PTY LTD

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory jurisdiction

FILE NO: 94 of 2019 (21932025)

DELIVERED: 19 December 2019

HEARING DATE: 6 November 2019

JUDGMENT OF: Coulehan AJ

CATCHWORDS:

Civil Procedure - Pleadings - Pleading material facts.

Civil Procedure - Pleadings - Use of Scott Schedule.

Civil Procedure - Pleadings - Striking out - Tendency to cause embarrassment.

Supreme Court Rules, O. 23.02 and 23.04(2)

Banque Commerciale S.A, En Liquidation v Akhill Holdings Limited [1990] 169 CLR 279.

Northern Territory of Australia v John Holland Pty Ltd and Others [2008] NTLR 58.

H 1976 Nominees Pty Ltd v Galli and Another [1979] 40 FLR 242.

Trade Practices Commission v David Jones (Australia) Pty Ltd [1985] 7
FCR 109.

Wickham Point Development Pty Ltd v Commonwealth of Australia [2018]
NTSC 7.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Roper
Defendant:	Mr Fenwick Elliott

Solicitors:

Plaintiff:	Maher Raumteen Solicitors
Defendant:	Powell & Co Legal
Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Delta Electrics NT Pty Ltd v Nilsen (NT) Pty Ltd
[2019] NTSC 88

No. 94 of 2019 (21932025)

BETWEEN:

DELTA ELECTRICS NT PTY LTD
Plaintiff

AND:

NILSEN (NT) PTY LTD
Defendant

CORAM: COULEHAN AJ

REASONS FOR JUDGMENT

(Delivered 19 December 2019)

- [1] This proceeding arises out of a contract to supply standby generators for the Palmerston Regional Hospital Project. The Plaintiff claims the sum of \$474,003.78.
- [2] The Plaintiff has applied by interlocutory summons for an order that the Defence in this proceeding be struck out in whole, or in part, and for consequential orders. The application is made pursuant to O. 23.02 of the *Supreme Court Rules*. It is provided in O.23.04(2) that on an application under rule 23.02¹ no evidence shall be admissible on the

¹ *Supreme Court Rules*, O. 23.02 and 23.04(2)

question whether a pleading offends against that rule. The Plaintiff alleges that the Defence is deficient in a number of respects.

- [3] The relevant pleading principles were summarised by Angel J in *Northern Territory of Australia v John Holland Pty Ltd and Others* [2008] NTLR 58², at paragraphs 8 - 13. In particular, at paragraph 11 his Honour said:

"A defendant is entitled to have a plaintiff tied down to a clearly pleaded case so as not to be able to spring a new case on the defendant at trial. A plaintiff must plead its case with clarity sufficient to preclude conjecture as to what the case being made against a defendant might be. The defining of the issues in litigation is required from an early stage because discovery and other interlocutory procedures and steps necessary to deal with an opposing case must be conducted within a known framework. Apart from questions of procedural fairness, properly pleaded cases set the arena for the eventual trial and interlocutory processes preceding trial and assist the Court by ensuring that the task of managing interlocutory processes and of supervising the conduct of the trial itself are conducted in circumstances where the nature and ambit of the dispute between the parties is clear and the issues for decision are defined. The general rule is that relief is confined to that available on the pleadings. This is the basic

² *Northern Territory of Australia v John Holland Pty Ltd and Others* [2008] NTLR 58.

requirement of procedural fairness: *Banque Commerciale SA (En Liquidation) v Akhill Holdings Ltd* [1990]³."

- [4] His Honour was referring to the pleading of a plaintiff's case, but the same applies to the pleading of a defence. At paragraph 13 his Honour also observed that it is not permissible to plead conclusions which are unsupported by pleaded material facts (see *H.1976 Nominees Pty Ltd v Galli and Another*⁴).
- [5] It has been suggested that in some cases there be a flexible approach to the application of the rules of pleading. Technical objections raised as to form may not be so enthusiastically received, and the distinction between material facts and particulars may not be strictly adhered to. It has also been suggested that the sufficiency of a pleading may now be considered in the context of case management regimes, which require an exchange of information so that there is less chance of surprise (see *Wickham Point Development v The Commonwealth*)⁵.
- [6] The Plaintiff has raised a number of objections to matters pleaded in the defence and counterclaim. These objections are, for the most part, technically correct. While some of the defects in the defence are relatively minor and may, in the spirit of the considerations outlined in *Wickham*, be overlooked, there are a number of paragraphs that fail to inform the Plaintiff as to the case it has to meet. In particular, there has

³ [1990] 169 CLR 279.

⁴ [1979] 40 FLR 242, 246

⁵ [2018] NTSC 7, [12] - [22]

been a consistent failure to plead material facts and provide adequate particulars in relation to the terms of the contract, the alleged defects and nonconformities with the contractual requirements, and the basis for the Defendant's claim that it is entitled to set off the costs associated with the defects and nonconformities against sums otherwise payable to the Plaintiff. A few examples sufficiently demonstrate the difficulties faced by the Plaintiff in understanding the Defendant's case.

[7] In paragraph 7 of the Defence reference is made to alleged conditions of acceptance of the Plaintiff's offer by email. What the consultant's expectations were and what was meant by the client's acceptance is not explained. Nor is it alleged that the conditions were not met. It was submitted on behalf of the Defendant that the conditions pleaded were expressed in the email as stated and that the condition was met the next day as evidenced by the purchase order. It is not apparent from the matters pleaded that this was the case.

[8] In paragraph 11 of the Statement of Claim it is alleged that the generators were supplied. In paragraph 16 of the Defence this is admitted, but it is alleged that the generators were not properly load tested and not properly installed which resulted in defects and omissions in the works. There are no material facts or particulars as to the relevant contractual terms, the alleged deficiencies in the load testing and installation, or the alleged defects and omissions.

[9] In paragraph 13 of the Statement of Claim it is alleged that the Plaintiff issued invoices to the Defendant. In paragraph 18 of the Defence the rendering of the invoices was admitted, but it was alleged that one of the invoices had not been paid due to ongoing defects and omissions in the installation and completion of the works. The particulars refer to ten issues raised by the defendant, four of which were said to remain unresolved, and it is alleged that the Defendant had retained monies against the Plaintiff for its failure to complete the contract. There are no material facts pleaded as to what constituted the defects and omissions or the four unresolved items, and the amounts retained have not been identified.

[10] In paragraph 20 of the defence it is alleged that the Plaintiff failed to complete the contract and that there were several defects and omissions that remained outstanding. It is further alleged that the Defendant had rectified several of the defects and omissions and has set off the monies payable to the Plaintiff for the costs and damages incurred. The defects and omissions and their monetary values have not been identified and there are no material facts pleaded in support of the alleged right to a set off.

[11] In paragraph 28 of the defence it is alleged that the Plaintiff has caused loss and damage to the Defendant by reason of its failure to execute the Generator Works in accordance with the contract requirements. It was stated that the defendant would give particulars of such loss and

damage by way of Scott Schedule and set off such loss and damage against any sum otherwise due to the Plaintiff. There are no material facts or particulars that identify the contractual requirements, the manner in which the Plaintiff is alleged to have failed to comply with them or the sums sought by way of set off.

[12] In paragraph 26 of the Statement of Claim the Plaintiff alleges that it issued invoices in relation to the Tank Works Agreement. In paragraph 32 of the Defence the Defendant admits that the invoices were rendered and says that they remained unpaid because the Plaintiff had not completed the works. The Defendant has not pleaded material facts as to what was required to complete the works and in what respect the work was not completed.

[13] In paragraph 33 of the Defence the Defendant alleges, further as to paragraph 26, the Plaintiff failed to complete the contract and that there were several defects and omissions that remain outstanding. The Defendant said that it would particularise such defects in its Scott Schedule. It was added that the Defendant had rectified several of the defects and omissions and has set off against monies payable to the Plaintiff the cost and damages incurred by Nilsen. There are no material facts alleged or particulars provided as to these defects and omissions, or as to the right of set off, and the sums claimed have not been identified.

[14] In paragraphs 39 and 40 the Defendant pleads its Counterclaim. This reads as follows:

“39. The Defendant repeats its Defence.

40. Nilsen claims by way of damages for breach of contract, alternatively by way of indemnity, each of the matters in respect of which Nilsen claims set-off in its defence, together with interest thereon pursuant to statute.”

[15] As to paragraph 40, the Defendant has failed to plead any material facts as to the alleged breach of contract, or any basis for a claim for indemnity, and there are no particulars provided as to the quantum of the claim.

[16] The Defendant filed a Scott Schedule in Court in the course of the hearing of this application. It was apparently served on the Plaintiff's solicitors two days before the hearing of this application. There has been no order made by the Court as its filing or its use. It was submitted on behalf of the Defendant that it was a pleading by way of "voluntary particularisation".

[17] The Scott Schedule is headed "Summary of Counterclaim Costs". It lists 17 items alleging failures to meet the contract and/or the Specification Requirements. There are columns headed Descriptions of Issue and Comments, the Loss Suffered and the Loss Claimed. The

matters set out in these columns are expressed in narrative form and contain information as to the contract and specification requirements, the failure to meet these requirements and the costs claimed. There has been no attempt to relate the various allegations as to defects and nonconformities made in the defence and counterclaim with the claims made in the Scott Schedule.

[18] According to Counsel for the Defendant, when the Defence was prepared there were remedial matters ongoing and the Defendant took a "sensible and pragmatic view" and pleaded the case in general terms. It was stated that the Defendant did not seek to amend the Defence to plead in accordance with the rules because that would involve pleading twice, and this was a case for a Scott Schedule, which provided all the necessary details. It was further submitted that it had always been accepted that a Scott Schedule formed part of the pleadings in a case. If the Defence contained any shortcomings they are made good by taking into account the Scott Schedule.

[19] Counsel for the Defendant provided written submissions as to the use of Scott Schedules in building cases. There is no doubt that a Scott Schedule may be of use in such cases. In *John Holland*, Angel J suggested that in complicated building cases a Scott Schedule may be used to set out matters in particulars or in schedules that may more properly be included in the body of the pleading (paragraph 16). His Honour also said that the Court is entitled to have a single

comprehensive document incorporating a schedule or schedules, if convenient, from which the party's case can be readily understood (paragraph 26).

[20] This Court has no rules or practice directions providing for the use of Scott Schedules and no order has been made as to the provision of a Scott Schedule in this proceeding. What the Defendant is seeking to do, without the agreement of the Plaintiff or the sanction of the Court, is to provide its defence and counterclaim in two documents, which are difficult to reconcile. What is required is a coherent defence and counterclaim, which the Defendant has failed to provide.

[21] The defects in the pleading have been canvassed above. The pleading is embarrassing because it does not sufficiently inform the Plaintiff of the case it has to meet. The defects are pervasive and the pleading should be redrawn to provide a coherent defence to the Plaintiffs claim (see *Trade Practices Commission v David Jones (Australia) Pty Ltd*)⁶. It will be ordered that the defence and counterclaim be struck out.

⁶ [1985] 7 FCR 109, 115)