Theories Pty Ltd v Holt & Anor [2012] NTSC 91

PARTIES:	THEORIES PTY LTD v HOLT, Dr Myles Edward and: HOLT, Dr Myles Edward as trustee for HOLT DISCRETIONARY TRUST
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 9 of 2012 (21203165)
DELIVERED:	22 November 2012
HEARING DATES:	26 October and 2 November 2012
JUDGMENT OF:	BARR J

CATCHWORDS:

LOCAL COURT – APPEAL – PLEADING – Application for leave to appeal – magistrate dismissed applicant's appeal against an order by judicial registrar granting leave to respondents to file and serve amended statement of claim in Local Court proceedings – principles relevant to grant of leave to appeal to Supreme Court – whether amended statement of claim deficient or defective – grant of leave to appeal – appeal allowed in part

EQUITY – REMEDIES – ACCOUNT – WHETHER ACCOUNT CAN BE CLAIMED – Whether respondent plaintiff entitled to an account – applicant defendant argues plaintiff not entitled because defendant not an "accounting

party" – argument rejected – on the facts pleaded, defendant provided a weekly accounting in respect of gross weekly payments and adjustments – plaintiff does not know the extent of entitlements unless and until defendant accounts to him

Local Court Rules r 4.04
Local Court Act s 19(3)

Northern Territory of Australia v Roberts [2009] NTCA 5; *Rapid Metal Developments (Australia) Pty Ltd v Rosato* (1971) Qd R 82, considered

McIntosh v Great Western Railway Co. (1850) 2 Mac & G 74; 42 ER 29, applied

REPRESENTATION:

Counsel:

Applicant:	G Clift
First and Second Respondents:	M Crawley

Solicitors:

Applicant:	MSP Legal
First Respondent:	Bowden McCormack
Second Respondent:	Bowden McCormack

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Theories Pty Ltd v Holt & Anor [2012] NTSC 91
No. LA 9 of 2012 (21203165)

BETWEEN:

THEORIES PTY LTD
Applicant

AND:

DR MYLES EDWARD HOLT
First Respondent

AND:

DR MYLES EDWARD HOLT as trustee for HOLD DISCRETIONARY TRUST
Second Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 22 November 2012)

Application for leave to appeal

[1] I propose to grant leave to appeal and allow the appeal in part. I now set out my reasons.

[2] The applicant is the defendant in Local Court proceedings commenced by Statement of Claim filed 24 January 2012. Under the Local Court Rules, a "Statement of Claim" is the name of the initiating document filed by a

plaintiff, and the pleading endorsed on that document is called the "Particulars of Claim".

[3] The applicant defendant made criticisms of the respondent plaintiff's Particulars of Claim by letter dated 22 March 2012, and the plaintiff made a court application in the Local Court proceedings for leave to file an amended Statement of Claim with amended Particulars of Claim endorsed. The proposed amendments were quite substantial.

[4] The applicant remained critical of the respondent's pleading. By written submissions to the Local Court dated 8 August 2012, the applicant opposed the proposed amendments on the basis that the proposed amended pleading contained a number of paragraphs which the applicant contended were irrelevant, "hopelessly vague" (as distinct from just vague), embarrassing (in the pleading sense), lacking in clarity, nonsensical, confusing, and containing a "plea of conclusion". The applicant levelled criticisms at 11 of 15 paragraphs of the proposed amended pleading, although it did not level all the above criticisms at all 11 paragraphs.

[5] On 8 August 2012, and notwithstanding the opposition of the applicant, Judicial Registrar Johnson made an order that the respondent have leave to file and serve the Amended Statement of Claim, as applied for.

[6] The applicant then appealed the decision of the Judicial Registrar to a magistrate pursuant to rule 4.04 (1) Local Court Rules. The applicant

sought orders setting aside the orders made by the Judicial Registrar permitting the filing and service of the Amended Statement of Claim.

[7] The applicant's appeal was heard by Dr Lowndes SM on 27 August 2012 as a hearing de novo pursuant to rule 4.04(2)(c) Local Court Rules. On 6 September 2012 the learned magistrate amended one paragraph of the proposed amended Statement of Claim[1] but otherwise dismissed the applicant's appeal. Therefore the grant of leave by the Judicial Registrar remained in place for the Amended Statement of Claim which remained largely intact.

[8] The applicant seeks leave to appeal from that decision of the learned magistrate. Leave to appeal is required under s 19(3) *Local Court Act* because the order of the Local Court was not a final order in the proceeding before it. The principles upon which this Court will act in deciding whether or not to grant leave are the same as those applying to applications for leave to appeal from interlocutory judgments, as discussed in *Northern Territory of Australia v Roberts*.[2] In brief, the correctness of the judgment appealed from must be sufficiently doubtful to justify the granting of leave and, where the appeal is from an interlocutory judgment involving the exercise of a discretion in a matter of practice or procedure, the interests of justice must make it desirable to grant leave.

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1 striking out the words "further or in the alternative" from paragraph 15.2.
2 *Northern Territory of Australia v Roberts* [2009] NTCA 5 at [2].

The plaintiff's (respondent's) case in the Local Court

[9] Based on the "Amended Particulars of Claim" pleading considered by the Judicial Registrar, the case of the plaintiff (one plaintiff acting in alleged different capacities) is relatively straightforward. It is alleged that in April 2010 Dr Holt agreed with the defendant that he would work as a dentist in the defendant's dental practice, and that for his services he would be paid in accordance with a formula calculated by reference to an agreed percentage of gross weekly receipts for work carried out by him. Various agreed adjustments were to be included in the calculations required under the formula. In essence, Dr Holt was to be paid 40% of adjusted gross receipts, less superannuation contributions. It is further alleged that, in February 2011, Dr Holt became employed by the defendant in his capacity as trustee of the Holt Discretionary Trust, but otherwise on the same terms and conditions previously agreed.

[10] I refrain from making any comment as to the taxation implications of substituting Dr Holt, in his capacity as trustee, for Dr Holt, in his personal capacity, into what was in substance a contract of employment. I note that in a further refined version of the proposed Amended Statement of Claim it is alleged that the substitution in February 2011 was a novation of the original contract.[3]

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[3] See document #8 on the Supreme Court file headed "PROPOSED FURTHER AMENDED STATEMENT OF CLAIM", marked "A" and dated 2 November 2012, paragraph 8. 'Novation' is a transaction by which, with the consent of the parties concerned, a new contract is substituted for one that has already been made.

[11] On the plaintiff's case, the contract was terminated on or about 5 May 2011 without four weeks' notice being given as required under the contract. Consequently, Dr Holt claims damages amounting to four weeks' loss of income. Dr Holt also claims an entitlement to an account in respect of all monies paid to the dental practice for services provided by him (in whatever capacity), to enable the net amount due to him to be calculated by application of the formula referred to.

Arguments on application for leave to appeal

[12] Counsel for the applicant contends that the Amended Statement of Claim permitted by the Judicial Registrar and not set aside by the learned magistrate was deficient or defective in two significant several ways. First, the references in the pleading to (1) "the Trust" becoming a substituted party to the contract of employment and to (2) "the Trust" claiming relief, are contrary to law in that a trust is not a legal entity and cannot be a party to litigation or for that matter a party to a contract. Second, the remedy of an accounting is not available because the defendant dental practice is not "an accounting party", and/or the plaintiff has not pleaded the facts entitling him to an accounting.

Consideration of the issues

[13] In my opinion, the applicant's first contention is correct. The pleading in relation to the involvement of the Trust is bad, for the reasons argued by counsel for the applicant. Moreover, as a practical matter, it is not necessary for Dr Holt to plead the involvement of the trust to be able to

ascertain the monies due to him (in whatever capacity) and then sue for recovery.

[14] The effect of the applicant's argument being successful is that a number of paragraphs in the Amended Statement of Claim are bad and should be struck out. However, in anticipation of the argument being decided against his client, counsel for the respondent has filed a proposed "Further Amended Statement of Claim" with "Further Amended Particulars of Claim" endorsed as a pleading. The amended pleading makes it clear that the trust is not a party and is not alleged to be a separate legal entity; rather the respondent plaintiff sues in his alleged separate capacity as trustee to recover monies for work carried out in that capacity after the date of the alleged novation in February 2011.

[15] I should mention that although I find for the applicant on its first contention, the issues argued on appeal relating to "the Trust" were not raised in the Local Court before the learned magistrate.

[16] I now turn to the applicant's second contention.

[17] Mr Clift of counsel contends that, as a starting point, the respondent plaintiff must plead the receipt of gross weekly payments by the dental practice, because it is only in relation to such gross weekly payments that the formula for the remuneration of Dr Holt can be applied and the net amount due to him calculated. Although the respondent plaintiff pleads that the defendant's office manager provided him in May 2011 with a record of

all monies then outstanding to the defendant's dental practice for services provided by the plaintiff (the outstanding monies totalled almost $80,000), the plaintiff does not plead the subsequent payment of any of those monies by the plaintiff's patients to the defendant.

[18] The plaintiff's counsel contends that the plaintiff cannot plead payment of any monies because he does not have evidence as to the amounts (if any) paid. The defendant has not yet provided discovery and has not yet disclosed monies received. It is a hypothetical possibility (although most unlikely) that no amount has been received of the amount of almost $80,000 outstanding as at May 2011. For this reason, counsel for the plaintiff informs the court that he would be reluctant to plead the fact of receipt when, strictly speaking, he does not know.

[19] It is not in the interests of justice that the determination of the respondent plaintiff's claims be delayed because of distracting arguments relating to the facts which must be pleaded as conditions precedent to an account. The issues raised for determination by the plaintiff are reasonably clear, as explained by me in par [9] and par [11] above. The applicant defendant's solicitors understand the case their client has to meet. In my opinion the plaintiff has pleaded sufficient facts to justify his entitlement to an account, even though the pleading may still be somewhat ragged.

[20] The pleading of the Further Amended Particulars of Claim (paragraphs 13, 14, 15 and the prayer for relief) requires the defendant to plead, inter alia,

the total amount of the gross weekly payments received by the defendant's dental practice for work carried out by the plaintiff in respect of which the defendant has not yet accounted to the plaintiff. If no monies have been received, then the defendant should plead that fact if it intends to plead, as a consequence, that it has no obligation to account.

[21] Further as to the applicant's second contention, I reject Mr Clift's submission that the remedy of an accounting is not available because the defendant's dental practice is not an "accounting party". In my view the defendant is an "accounting party", because (as pleaded in paragraph 7(i) of the Amended Particulars of Claim) it assumed responsibility for and provided a weekly statement of the amount of gross weekly payments and the deductions to be made from the total of such payments under the terms of the contract. It even generated a weekly tax invoice directed to itself requiring payment of the amount it calculated to be due (each week) to Dr Holt.

[22] I also consider that the relationship between the defendant's dental practice and Dr Holt was one "in consequence of which a balance will certainly lie on one side or the other",[4] based on the matters pleaded in paragraph 13 of the Amended Particulars Statement of Claim. It is almost certain that if monies owed to the dental practice for work carried out by Dr Holt as at May 2011 amounted to $79,800, some of that money would have been paid over the past 18 months.

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[4] *Rapid Metal Developments (Australia) Pty Ltd v Rosato* (1971) Qd R 82 at 89.9.

[23] I also accept the relevance of the somewhat analogous decision in *McIntosh v Great Western Railway Co.*[5] That decision is referred to and helpfully summarised in Meagher, Gummow and Lehane[6] as follows, at [25-020]:-

> "… there were those cases where not to order an account would abort the plaintiff's rights; these were cases where the plaintiff would have had a legal right to be paid money from the defendant if only the defendant had not prevented the plaintiff's rights accruing. Thus, in *McIntosh v Great Western Railway Co*, an account was ordered on a bill by a contractor, who had executed works for a railway company, seeking an account of what was due to him for work and materials, when it was admitted that there had been no final settlement of accounts under the contracts; an account was ordered of whether anything, and if so how much, remained due to the contractor in all the circumstances. …".

[24] The judgment of Lord Chancellor Cottenham in *McIntosh v Great Western Railway Co*. referred to the refusal of the railway company to grant certification for works pursuant to which the plaintiff could then claim payment at common law, and concluded as follows:

> "It appears to me, therefore, that this is clearly a case in which the Plaintiff cannot obtain what he is entitled to at law; and that his inability to do so has arisen from the acts of the Defendants, or their agent; and whether such acts arose originally from any fraudulent motive or not, I think that to use them for the purpose of defeating the Plaintiff's remedy would constitute a fraud which this Court will not permit the Defendants to avail themselves of; and that they are, therefore, precluded, according to the statements in the bill, from raising the objections they rely upon to the Plaintiff's equity. …"[7]

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5 *McIntosh v The Great Western Railway Company and others* (1850) 2 Mac & G 74; 42 E.R. 29.

6 Meagher, Gummow and Lehane's "Equity, Doctrines and Remedies", Fourth Edition, Butterworths LexisNexis Australia, 2002.

7 *McIntosh v The Great Western Railway Company and others* (1850) Vol II MacNaghten & Gordon, Volume XLII English Reports re-printed 1978 at [96]

[25] The decision in *McIntosh* is no longer directly relevant because of the subsequent enactment of the Judicature Acts in the nineteenth century. Equity and common law are no longer separately administered by different courts. However, the present case is factually and legally analogous to *McIntosh* because, here also, the defendant 'holds all the cards'. Any monies paid by the plaintiff's patients were paid to the defendant. The defendant thus would have all payment receipt records. The defendant also has the records of the payments made by it to enable relevant adjustments to be made under the formula referred to in par [9]. The plaintiff does not know how much he is entitled to claim unless and until the defendant accounts to him in the way it is alleged to have accounted during the period of the plaintiff's employment.

[26] The applicant has raised some legitimate matters which required the amended pleading to be further amended. However, the applicant did not need to seek leave to appeal on account of those matters, and could have simply responded to those parts of the Amended Particulars of Claim which were defective. It could have pleaded, for example, that "the Trust" was not a legal entity and therefore was not a party to the alleged contract and had no right to bring an action in respect of that contract. The applicant could have pursued the matter at trial if the plaintiff had not by then amended or otherwise conceded. The issue of "the Trust" need not have delayed the defendant pleading its defence to the substantive claims summarised in par [9] and par [11] above.

[27] From this point on, notwithstanding any imperfections in the proposed Further Amended Statement of Claim, the defendant should properly join issue and plead specifically all or any factual matters upon which it relies in its defence.

Conclusion

[28] I have considered not granting leave to appeal. However, notwithstanding my expressed reservations, I have taken into account the extensive argument on the hearing of the application for leave to appeal, and the fact that an amended pleading has been produced as a result of the issues ventilated. Having considered those matters I make the following orders:

1. I give leave to appeal.

2. I allow the appeal in part.

3. I strike out the Amended Particulars of Claim the subject of this application.

4. I give the respondent (plaintiff) leave to file and serve the document entitled “Proposed Further Amended Statement of Claim” with the “Further Amended Particulars of Claim” endorsed, marked with the letter "A" and dated 2 November 2012.

5. I order that the applicant (defendant) file and serve its Notice of Defence to the Further Amended Particulars of Claim within 21 days.

[29] In relation to costs, I indicate my preliminary view that the respondent plaintiff and the applicant defendant should bear their own costs and disbursements (including counsels’ fees) of the application for leave. However, counsel for the applicant indicated at the hearing that he wished to

address on costs, and I will therefore hear the parties' submissions before I make any orders.
