PARTIES:	CONCRETE CONSTRUCTIONS GROUP LIMITED (ACN 008 390 074) v LIVERIS PTY LTD (ACN 009 608 324)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	TERRITORY JURISDICTION
FILE NO:	242/1996 (9626758)
DELIVERED:	21 August 1997
HEARING DATES:	30 July 1997
DECISION OF:	Bailey J

REPRESENTATION:

Counsel:

Plaintiff:	Mr J Reeves
Defendants:	Mr A Wyvill

Solicitors:

Plaintiff:	Cridlands
Defendants:	Clayton Utz

Judgment category classification:	C
Judgment ID Number:	BAI97023
Number of pages:	11

BAI97023

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

No. 242/1996
(9626758)

BETWEEN:

CONCRETE CONSTRUCTIONS GROUP LIMITED
(ACN 008 390 074)
Plaintiff

AND:

LIVERIS PTY LTD
(ACN 009 608 324)
First Defendant

AND

ANDREW LIVERIS
Second Defendant

CORAM: BAILEY J

REASONS FOR DECISION

(Delivered 21 August 1997)

Background

The plaintiff is a building company which contracted with Gaymark Investments Pty Ltd and Darwin Central Nominees Pty Ltd, as principals, ("the Owners") to construct

a retail and hotel building on Lot 6517 Town of Darwin ("Darwin Central", located at the corner of Knuckey Street and Smith Street).

The first defendant is an architectural company of which the second defendant, an architect, is a director. The defendants designed Darwin Central and pursuant to the contract between the plaintiff and the owners the defendants acted as the superintendent for the construction of the building.

The plaintiff's claim against the defendants falls under three general areas:

(a) negligent design of Darwin Central;

(b) breach of duty of care as the superintendent; and

(c) misleading and deceptive conduct contrary to section 52 of the *Trade Practices Act* (Commonwealth).

The claim under the *Trade Practices Act* is put forward in the alternative to the 'negligent design' and 'breach of duty of care' claims to the extent that no additional facts are put forward to support the claim under the *Trade Practices Act.*

In its original form, the present application (by summons of 24 March 1997) was to strike out various specified paragraphs and sub-paragraphs of the plaintiff's (amended) statement of claim or in the alternative for the plaintiff to provide various specified particulars previously the subject of a request for further and better particulars. On 9 April 1997, I heard extensive submissions from Mr Wyvill on behalf of the defendants in support of the application. However, it was not possible for Mr Reeves on behalf of the plaintiff to complete his submissions upon that day.

Since the application was left part-heard on 9 April 1997, there have been various applications by the parties. It is unnecessary to set out a full history of the proceedings for present purposes. However, it is important to record that the plaintiff sought, and was granted, leave to file in Court a further amended statement of claim on 30 July 1997. Previously, the defendants had filed a new summons on 4 July 1997 in relation to an earlier amended statement of claim (dated 24 June 1997) which, minor matters aside, was in substantially similar terms to the statement of claim filed on 30 July 1997. On 30 July 1997, submissions proceeded upon the basis that the defendants' summons of 4 July 1997 was taken to refer to the further amended statement of claim filed on 30 July 1997.

The defendants' summons seeks that:

1. the further amended statement of claim dated 30 July 1997 be struck out; and
2. alternatively, paragraphs (7), 11, 12, 17, 18, 19, 19A, 20, 21 and (22) of the further amended statement of claim be struck out.

In addition, costs and such further orders as the Court saw fit were sought.

In relation to paragraphs 7 and 22 of the further amended statement of claim, I note that Mr Wyvill did not press that paragraph 7 be struck out, while the reference to paragraph 22 is a typographical error (there being no paragraph 22 in the statement of claim). I also note that if the defendants were to succeed in having paragraphs 11, 12, 17, 18, 19, 19A, 20 and 21 struck out, the effect would be the same, in practical terms, as having the entire statement of claim struck out (as such paragraphs cover the overall substance of the plaintiff's three areas of claim).

Nature of the Application

In my view, it is important to stress the nature of the defendants' application. In this regard, I emphasise that the defendants' summons is directed at the further amended statement of claim filed in Court on 30 July 1997. In contrast to the previous summons dated 24 March 1997 directed to an earlier statement of claim, there has been no defence filed, nor any request by the defendants for further and better particulars.

The defendants' application is made pursuant to Order 23 rules 2(a) and (c) of the Supreme Court Rules which are in the following terms:

> "23.02 STRIKING OUT PLEADING
>
> Where an endorsement of claim on a writ or originating motion or a pleading or a part of an endorsement of claim or pleading –
>
> (a) does not disclose a cause of action or defence;
> (b) .....
> (c) may prejudice, embarrass or delay the fair trial of the proceeding; or
> (d) .....
>
> the Court may order that the whole or part of the endorsement or pleading be struck out or amended."

It is apparent that the rationale of Order 23 rule 2 is limited to cases where the pleadings are defective in some manner, i.e. the statement of claim itself is defective. In particular, Order 23 rule 2 is not intended to encompass cases where, after examining the evidence, the Court comes to the conclusion that the plaintiff's **case**, as opposed to his **pleading**, is hopeless. No evidence is admissible on the question whether an endorsement of claim or pleading offends against Order 23 rule 2 (see Order 23 rule 4(2)).

If a defendant wishes to attack a plaintiff's **case** itself, rather than the plaintiff's statement of claim, he may apply under Order 23 rule 1 which provides:

> "23.01 STAY OR JUDGMENT IN PROCEEDING
>
> (1) Where a proceeding generally or a claim in a proceeding –
>
> (a) does not disclose a cause of action;
> (b) is scandalous, frivolous or vexatious; or
> (c) is an abuse of the process of the Court,
>
> the Court may stay the proceeding generally or in relation to a claim or give judgment in the proceeding generally or in relation to a claim."

It is clear that Order 23 rule 1 is sufficiently wide for the Court to stay or dismiss the whole of part(s) of a plaintiff's statement of claim. It is also to be noted that the power of the Court under Order 23 rule 1 is **not** to strike out the whole or part of a statement of claim, but to **stay** or **dismiss** the whole or part of a statement of claim. Evidence by affidavit is admissible upon an application under Order 23 rule 1 and the Court has a further discretion to admit oral evidence (see Order 23 rule 4(1)).

Order 23 rule 1 and rule 2 are not, of course, the only avenues for a defendant who wishes to argue that the plaintiff does not have a case which the Court should allow him to take to trial. The Court has an inherent power to stay or dismiss proceedings which amount to an abuse of the Court's process and pursuant to Order 47 rule 4, the Court also has the power to order that any question in a proceeding is to be tried separately and may make orders for stating a case and the question for decision.

On behalf of the defendants, Mr Wyvill, in the course of submissions, made it clear that the defendants' attack was directed at the allegedly defective nature of the

plaintiff's statement of claim rather than the plaintiff's case itself. As a starting point, this suggests that the defendants' choice of Order 23 rule 2 as an appropriate vehicle for their submissions was correct. However, I consider that considerable doubt came to be cast upon that proposition as Mr Wyvill developed his argument.

The length and complexity of the defendants' submissions was such as to raise the question of whether an application under Order 47 rule 4 would have been appropriate in all the circumstances.

The procedure available under Order 47 rule 4 replaces the old demurrer procedure and as the UK Court of Appeal observed in *Hubbuck & Sons Ltd v Wilkinson Heywood & Clark Ltd* [1899] 1 QB 86 at 91, it "is appropriate to cases requiring argument and careful consideration". The Court of Appeal made it clear that provisions such as Order 23 rule 2 are not appropriate where the validity of a statement of claim is clearly arguable. At p91, the Court of Appeal observed that:

> "(this) second and more summary procedure is 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...".

Similarly, Dixon J in *Dey v Victorian Railway Commissioners* (1948-1949) 78 CLR 62 at 91 observed that the rule "... is not to be used in cases of doubt or difficulty or where the pleading raises a debatable question of law."

The same approach to provisions such as Order 23 rule 2 has been adopted on numerous occasions. See, for example:

(a) Murray CJ in *William Charlick Ltd v Smith* [1922] SASR 364 at 367: "The power .... is not to be exercised except in a plain and obvious case.";

(b) Burnside J in *Packhard v Transport Trading & Agency Co. Ltd and Weir* (1912) 14 WALR 191 at 195: "It is obvious from the decisions that the rule is intended to apply only to cases which are really not arguable.";

(c) Pickford LJ in *Mayor & ors of City of London v Horner* (1914) 111 LTR 512 at 514: "In order that allegations should be struck out .... it seems to me that their irrelevancy must be quite clear, and, so to speak, apparent at the first glance.";

(d) Pring J in *Woods v Wilson* (1902) 19 WN (NSW) 147 at 148: "This pleading is novel, and is not framed on any precedent. I think it would be wrong for me to strike out the replication unless it is plain beyond all doubt that it is bad in law."; and

(e) Stephen J in *Hill v Scott* (1892) 8 WN (NSW) 98 at 99: "....this plea is palpably and unmistakably bad, and I therefore think that I am justified in striking it out....".

In the context of a construction case, Byrne J in *Opat Decorating Service (Vic) Pty Ltd v Jennings Group Ltd etc,* (Unreported, Supreme Court of Victoria, delivered 16 September 1994) has suggested the correct approach to an application under Order 23, rule 2 is as follows:

> "...I am permitted to look at the terms of the pleading only. This includes requests for particulars and the particulars provided by the plaintiff in response to those requests. The power is, of course, subject to my overriding discretion to refuse to

> strike out an offending part, a discretion which has as its starting point the requirement that pleadings and particulars be sufficient to enable the defendants to know what it is they have to meet and the trial judge to conduct a trial which is fair to all parties. Insofar as it is contended that a particular paragraph or paragraphs does not disclose a course of action, I am not determining a demurrer. A plaintiff will be stopped from putting a claim forward only where assuming the facts pleaded have been established, the claim is so manifestly hopeless that a trial would be a futility. In cases of doubt I should refuse to exercise the power."

I respectfully agree that this represents the correct approach to applications of the present nature.

The Defendants' and Plaintiff's submissions

Mr Wyvill, for the defendants, summarised his submissions in a written outline as follows:

> "Generally, this pleading:
>
> (a) does not plead necessary material facts, including as to the nexus between the breach of duty and the alleged damage;
>
> (b) is devoid of particularity;
>
> (c) contains inconsistencies, multiple 'rolled-up' and generalised claims, and nonsensical claims
>
> and therefore breaches Order 23 rules 2(a) and (c)."

Mr Wyvill developed his submissions by suggesting with a good deal of particularity what he claimed it is necessary for the plaintiff to plead with regard to the three areas of the plaintiff's claim (i.e. negligent design; breach of superintendent's duty of care; and the claim under section 52 of the *Trade Practices Act*).

On behalf of the plaintiff, Mr Reeves' answer to such criticisms is in substance to submit that Mr Wyvill seeks to elevate form over substance. Pedantry is a word that springs to mind – albeit Mr Reeves was perhaps too polite to employ it. He also submits that, to a very real extent, Mr Wyvill by his submissions and suggestions (for improvement of the plaintiff's statement of claim) has misconstrued the very nature of the plaintiff's claims for negligent design and breach of the superintendent's duty of care. Mr Reeves also stresses that there has been no request for further and better particulars of the further amended statement of claim dated 30 July 1997; and in this regard, correctly, also emphasises that in an application of the present nature the Court is to proceed upon the assumption that the plaintiff can prove the entire case it has put forward in its claims.

Conclusions

The present application presents this Court with a dilema. A detailed consideration of Mr Wyvill's extensive submissions and the comprehensive response of Mr Reeves would require me to address difficult questions of law. Many of such questions arise in the context of a rapidly developing area of the law: actions in tort by a builder against an architect (in contrast to those in contract between a builder and an owner), while not unknown, cannot be characterised as commonplace. Mr Wyvill, perhaps in seeking to allay my concerns as to whether an application under Order 23 rule 2 is an appropriate vehicle for resolving the issues, concedes the validity of the plaintiff's claims and limits his attack to their form.

I have examined the plaintiff's statement of claim with a good deal of care in the light of the submissions. I am quite unable to say, assuming the facts pleaded are

established in due course, that the three areas of claim are "so manifestly hopeless that a trial would be a futility" (per Byrne J in *Opat Decorating Service (Vic.) Pty Ltd v Jennings Group Ltd etc*, supra).

I am also firmly of the view that: "... it is enough to say that in this case there is something to argue which has not yet been fully argued" (per McMillan J in *Packhard v Transport, Trading and Agency Co Ltd and Weir*, supra, at p195). I will only add that it should be understood clearly that I am expressing no opinion at all as to the merits of the further amended statement of claim. At this stage of the proceedings, I would not wish to say anything which would or could prejudice a fair trial upon the claims which the plaintiff chooses to make against the defendants.

It may well be that some, even many, of the issues raised in the present application will need to be determined by this Court at a later stage of the proceedings when both the facts and legal issues are better clarified. The present application is advanced on the basis of an inappropriate vehicle (Order 23 rule 2) and is, in any event, premature in the absence of any request for further and better particulars.. There is no doubt that the present statement of claim is not a work of perfection – but as it stands, I am satisfied that it contains all the essential elements of a properly drawn statement of claim.

For the above reasons, the defendants' application is dismissed.

Order 63 rule 18 provides that each party shall bear his own costs of an interlocutory application "unless the Court otherwise orders". Having regard both to the

inappropriate and premature nature of the present application, I consider that this is a matter where departure should be made from the usual rule. Accordingly, I order that the defendants are to pay the costs of the present application.