PARTIES:	Steelcon Constructions Pty Ltd v Besser Industries (N.T.) Pty Ltd and Ors
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Interlocutory Application
FILE NO.:	31 of 1995
DELIVERED:	2 November 1995
REASONS OF:	Master Coulehan

CATCHWORDS:

STATUTES - Northern Territory - Workmens Liens Act - s10 - registration of lien - whether contract price accrued due - whether registration required within 28 days.

STATUTES - Northern Territory - Workmens Liens Act s7(2) - sub-contractors charge - whether money payable under a contract.

PRACTICE - Northern Territory - interlocutory application to dismiss or strike out - whether real question of law or fact to be tried.

PRACTICE - Northern Territory - O13.10 Supreme Court Rules - whether pleading contains necessary particulars.

Cases followed:

Dey v Victorian Railway Commissioner 78 CLR 62
General Steel Industries v Commisioner for Railways 12 CLR 125
Jennings Constructions Ltd v Burgundy Royale Investments Pty Ltd 162 C.L.R. 153
Leichhardt Development Co. Ltd v Pipeline Properties Pty Ltd 62 NTR 1
Malady Enterprises Pty Ltd v Colstar Pty Ltd & Ors (SC (NT) - 5 March 1991)

Cases referred to:

Marriott Industries Pty Ltd v Mercantile Credits Ltd (1991) 160 SALSJS 288

Representation:

Counsel:

Plaintiff	Mr Cureton
Defendant	Mr McCormack

Solicitors:

Plaintiff	Messrs Philip & Mitaros
Defendant	Halfpennys

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

31 of 1995

BETWEEN:
STEELCON CONSTRUCTIONS PTY LTD
Plaintiff
and
BESSER INDUSTRIES (NT) PTY LTD
First Defendant
and
J. DE VRIES
Second Defendant
and
NORTHERN TERRITORY OF AUSTRALIA
Third Defendant

MASTER COULEHAN: REASONS FOR DECISION
(Delivered 2 November 1995)

The plaintiff's claim arises out of an agreement to develop land comprised in a crown lease. It claims damages and other relief arising out of alleged breaches of contract and negligence.

The first defendant seeks to have parts of the plaintiff's claim dismissed or struck out. It is convenient to deal with each part separately.

1. The workmens lien

The plaintiff alleges that the sum of $599,286 is the contract price "accrued due" within the meaning of s5 of the **Workmens Liens Act 1893** ("the Act"). This sum comprises two progress claims.

It is not specifically pleaded when these payments became accrued due, however, in paragraph 32 of the amended statement of claim it is pleaded that the payments should have been certified within 21 days and were due for payment no later than 2 February 1995.

It is argued on behalf of the first defendant that the moneys were not "accrued due". The contract provides for certification of progress payments by the Superintendent (clause 42) and this was not done. It is asserted that certification is a condition precedent to payment.

Under clause 42 of the conditions of contract there is no provision for payment without certification. There was no argument directed towards the remedies, if any, the contractor may have in the event of the failure of the Superintendent to issue a certificate. Clause 45 provides for settlement of disputes.

While it appears that the contract requires certification as a condition precedent to payment, the plaintiff has alleged breaches of contract on the part of the first defendant in relation to the failure of the second defendant to determine and certify the value of the works. This raises issues which may not be resolved with sufficient certainty for the purposes of this application.

For a lien to become "available" it must be registered within 28 days of its having become "due" for the purposes of s.10.

The plaintiff pleads service of notice of demand under s10 on 23 June 1995 and alleges that the amount claimed became due and payable on service of the notice, the lien

being registered on 26 June 1995.

It has been authoritatively decided in the Northern Territory that notice under s10(2)(a) is not required before the contract price may be said to have become due within the meaning of s10(1). (See **Leichhardt Development Co. Ltd v Pipeline Properties Pty Ltd 62 NTR 1** cf. **Marriott Industries Pty Ltd v Mercantile Credits Ltd (1991) 160 SALSJS 288).**

The plaintiff argues that notice of demand under s10(2)(a) is required where there is uncertainty as to whether the contract has become payable. However, in **Malady Enterprises Pty Ltd v Colstar Pty Ltd and Ors**, an unreported decision of Gray A.J. delivered 5 March 1991, it was held, following Leichhardt Development, that the time limit for registration provided by s10(1) could not be delayed for an indefinite period by allowing notice to be given when the 28 day period had expired. At page 6 his Honour said:

> **"In a case where notice under s10(2)(a) has been given, it will always be open to the defendant to contend and prove that the registration is out of time because it has not been effected within 28 days of the date upon which the price became payable under the contract, that being the date upon which the lien arose under s5."**

As pleaded, the contract price became due more than 28 days prior to the registration of the lien which was therefore not "available" within the meaning of s10(1). It follows that the claim for a lien under the Act is defective.

It was also argued on behalf of the first defendant that the claim to enforce the lien was invalidated by s48, the Territory having a reversionary interest in the crown

lease. However, it was held in **Jennings Constructions Ltd v Burgundy Royale Investments Pty Ltd 162 C.L.R. 153, 162** that "... **The actual question is whether the land 'against' which the Liens Act creates or gives a right or remedy is land vested in Her Majesty"** and that the reference to "land" in s48 was to an estate or interest affected by the lien. The lien only appears to affect the interest of the first defendant and s48 does not apply.

I am satisfied that the claim for enforcement of the workmens lien is untenable (see **Dey v Victorian Railways Commissioner 78 C.L.R. 62, 91** and **General Steel Industries Inc. v Commissioner for Railways 112 C.L.R. 125, 129 130)** and should be struck out.

It may be open to the plaintiff to amend its statement of claim to plead an arguable claim to enforce the workmens lien. It is therefore not appropriate that this part of its claim be dismissed.

2. The Charge.

The plaintiff alleges that the third defendant contracted with the first defendant for work to be done in respect of the land the subject of the development agreement and that the plaintiff is a subcontractor of the first defendant in respect of that work. The plaintiff claims to have a charge on money payable to the first defendant under s7(2) of the Act. S7(2) and (3) of the Act read as follows:-

> **"(2) A sub-contractor shall have a charge on any money payable to the contractor or sub-contractor with whom he shall have contracted for that portion of the contract price payable to the first-mentioned sub-contractor in respect of work done or**

> **materials furnished or manufactured for the purposes of the contract of such contractor or secondly mentioned sub-contractor.**
>
> **"(3) A charge under this section shall attach only to money payable under the contract for the purposes of which work or materials have been done, supplied or manufactured...."**

The charge is alleged to have become due on the service of a notice pursuant to s10(2)(a) on 23 June 1995.

It is pleaded in paragraphs 5 and 6 of the amended statement of claim that the first defendant is the holder of a leasehold interest in the land the subject of the development works from the third defendant, the first defendant being bound by a condition of the lease to comply with a development agreement entered into with the third defendant.

A copy of the development agreement has been annexed to the affidavit of Glen Weston Raphael sworn on 15 September 1995. This provides for a security deposit to ensure due performance of the works and compliance with the agreement and, in the event that a certificate of practical completion is granted under clause 44 prior to completion of all necessary work, a works bond to ensure performance of uncompleted works.

These appear to be the only provisions which would require payment of money by the third defendant to the first defendant. There is no "contract price" within the definition of s2 of the Act payable to the first defendant.

However, this may not be required by s7(2). It may be argued that as defined by s2, the development agreement is an agreement to procure work to be done and is a "contract", and that the first defendant is a "contractor"

and the plaintiff a “sub-contractor”.

Under s7(2) a sub-contractor has a charge on “… **any money payable to the contractor ...”**, the only limitation being s7(3) which requires that the charge only attaches to “... **money payable under the contract for the purposes of which the work or materials have been done, supplied or manufactured ...”.**

I consider that there is a question to be tried on this issue.

3. The prolongation claim.

Paragraphs 51, 52, 61 and 73 of the amended statement of claim raise claims for additional costs arising from delays in completion of the contract works.

The delays, the certification of an extension from 18 November 1994 to 9 December 1994 and the claim for a declaration that the date for practical completion be extended to 16 December 1994, are pleaded in paragraphs 37-50 (inclusive).

In paragraph 51 the plaintiff seeks a declaration that its additional costs of the extension called “prolongation costs” be included in the contract sum accrued due.

The particulars to paragraph 51 allege a period of 28 days from 18 November 1994 to 19 December 1994. There follows a list of plant and equipment used to execute the works and a daily stand by rate, a daily rate for overheads comprising office and staff costs and a daily rate for the project supervisor.

The first defendant contends that the plaintiff has not pleaded any causal connection between the delay and each item of cost and has not made clear the basis for the loss claimed on each item.

O.13.10(1) and (2) of the Supreme Court Rules provide:-

> **“(1) A pleading shall contain the necessary particulars of a fact or matter pleaded.**
>
> **“(2) Without limiting subrule (1), particulars shall be given if they are necessary to enable the opposite party to plead or to define the question for trial or to avoid surprise at the trail.”**

It is convenient to deal with each item separately.

51.2 Plant and equipment

The plaintiff has claimed a daily rate for items of plant and equipment used to execute the works. The purpose for which the items were required is not stated. Nor is it stated how the daily rate for each item is comprised. If it is a market rate it is not stated whether they may have been otherwise utilized.

51.3 Overheads

This is a claim for a percentage of the cost of the plaintiff’s office and staff based on turnover. What work they may have performed relevant to the contract the subject of the proceeding is not stated.

51.4 Supervision

This is a claim for the daily costs of the project supervisor. It is not clear what he was required to supervise during the period and as to how the sum claimed is comprised.

51.6 Subcontractor’s prolongation costs
This has been claimed as a lump sum, without any indication as to its relevance to the delay or how it is comprised.

For the same reasons the necessary particulars have not been provided in paragraphs 61.2.2, 61.2.3, 61.2.4, 61.2.5, 73.2.1, 73.2.2, 73.23.3 or 73.2.4.

Notwithstanding the failure to provide necessary particulars, I do not consider it appropriate to strike out the allegations upon which the particulars are based. It is sufficient that the plaintiff provide further particulars.

Orders

It is ordered that

1. The plaintiff’s claim comprised in paragraphs 96-99 (inclusive), 105, 106, insofar as it refers to the lien, and paragraphs 22 and 23 of the relief sought in the amended statement of claim be struck out.

2. The application contained in paragraph 1(b) of the summons be dismissed.

3. The plaintiff provide further and better particulars of paragraphs 51.2, 51.3, 51.4, 51.6, 61.2.2, 61.2.3, 61.2.4, 61.2.5, 73.2.1, 73.2.2, 73.2.3 and 73.2.4 and 73.2.4 of the amended statement of claim.