Thurlow & Innocenzi v The Architects Studio Pty Ltd [2006] NTCA 8

PARTIES:	**THURLOW, Andrew and INNOCENZI Suzanne** v **THE ARCHITECTS STUDIO PTY LTD (ACN 074 200758)**
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 6 of 2006 (20307071)
DELIVERED:	22 September 2006
HEARING DATES:	12 September 2006
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & SOUTHWOOD JJ
APPEAL FROM:	*Thurlow & Innocenzi v The Architects Studio [2005] NTMC 044*

CATCHWORDS:

APPEAL – PRACTICE AND PROCEDURE – procedural fairness – pleadings – breach of contract –breach not pleaded –breach relied upon - whether party at liberty to pursue case outside pleadings – functions of a pleading

Banque Commerciale SA in liquidation v Akhil Holdings Ltd (1990) 169 CLR 279; *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373; *Multigrip Distribution Services Pty Ltd v TNT Australia Pty Ltd* (1996) ATPR 41–522, applied

REPRESENTATION:

Counsel:

Appellants:	S Gearin
Respondent:	J Kelly

Solicitors:

Appellant:	Withnalls
Respondent:	Cridlands

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

Thurlow & Innocenzi v The Architects Studio Pty Ltd
[2006] NTCA 8
No. AP 6 of 2006 (20307071)

BETWEEN:

THURLOW, Andrew
First Appellant

AND:

INNOCENZI, Suzanne
Second Appellant

AND:

THE ARCHITECTS STUDIO PTY LTD (ACN 074 200 758)
Respondent

CORAM: Martin (BR) CJ, Mildren and Southwood JJ

REASONS FOR JUDGMENT

(Delivered 22 September 2006)

Martin (BR) CJ:

[1] I agree that the appeal should be dismissed for the reasons given by Southwood J.

Mildren J

[2] I concur with the reasons of Southwood J.

Southwood J

Introduction

[3] This is an appeal from a judgment of Angel J delivered on 28 March 2006 whereby his Honour upheld the respondent's appeal from the Local Court. The primary question in the appeal is did the hearing in the Local Court miscarry because the appellants impermissibly expanded their case beyond their pleadings?

[4] In my opinion the hearing in the Local Court miscarried and the appeal to the Court of Appeal should be dismissed. I agree with Angel J that the presiding magistrate decided the proceeding in the Local Court on the basis of a breach of contract that was not pleaded by the appellants and which the respondent did not have a fair opportunity to meet. The respondent was denied procedural fairness in circumstances where the appellants were bound by their pleading.

Pleadings

[5] In *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373 at 379 – 380 Mildren J correctly stated that:

> The first function [of pleadings] is to define the issues between the parties. The second is to control the admission of evidence at trial. Williams, *Supreme Court Practice in Victoria*, 1987, observes at p 85:
>
> > "Recording the issues which the court decides is a function of pleadings. It would seem to follow, therefore, that the court should decide only the issues that the pleadings disclose and further, that if an issue arises for the first time at trial, the

court ought not to decide the issue unless it is incorporated in the pleadings."

In a footnote to this passage, the learned author says:

> "Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment': *Blay v Pollard and Morris* [1930] 1 KB 628 at 634, per Scrutton LJ. 'A court of appeal will not treat reliance on (pleadings and particulars), which are, after all, the backbone of the litigation, as pedantry or mere formalism': *Pulham v Dare* (1982) VR 648 at 653, per Brooking J, referring to *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218 at 241; [1955] 3 All ER 864 at 871, per Lord Radcliffe. See also *Re Brisbane Meat Agencies Pty Ltd (in liq)* [1963] Qd R 525 at 530. The principle that the parties are obliged to develop, by the effect of their own allegations, the questions for decision, should not be abandoned in order to permit mutual allegations to be left at large and unpleaded: *Official Receiver v. Feldman* [1972] 4 SASR 246. Notwithstanding the wide power to permit pleadings to be amended, it has been said that they continue to play an essential part in civil litigation and to 'shrug off a criticism as "a mere pleading point" is therefore bad in law and bad practice': *Farrell v Secretary of State* (1980) 1 All ER 166 at 173, per Lord Edmund-Davies."

The history of the proceeding

[6] The history of the proceeding is as follows. The respondent is a firm of architects that was retained by the appellants in or about January 2001 to design and supervise the construction of a home for the appellants on land that they owned at Bayview, a suburb of Darwin. A dispute arose between the appellants and the respondent about the respondent's performance of the contract and the appellants commenced a proceeding in the Local Court seeking damages for breach of contract and for negligence.

[7] In paragraphs 2 and 3 of their final pleading, which was the amended statement of claim dated 7 February 2005, the appellants pleaded a contract between the parties in the following terms:

> "2. In or about mid December 2000 the plaintiffs contracted with the defendant for the provision of architectural services at lot 6163 Bradhurst Street, Bayview in the Northern Territory of Australia ("the premises").
>
> Particulars of Contract
>
> (a) For the defendant to design a home within the plaintiffs' budget expressed to be $250,000;
>
> (b) For the defendant to provide the architectural services to the plaintiffs for the fee $18,750;
>
> (c) For the defendant to prepare the initial schematic design and to document and supervise design to completion of construction within 35 weeks;
>
> (d) For the defendant to engage consultants on behalf of the plaintiffs to:
>
> (i) Undertake structural design documentation;
> (ii) Obtain building certification; and
> (iii) Obtain plumbing certification.
>
> (e) To provide a specialist consultant for a budget estimate before proceeding to documentation stage;
>
> (f) To ensure the home was designed within the covenants for lot 6163 Bradhurst Street, Bayview;
>
> (g) It was an express term of the contract that the defendant prepare the documentation and supervise construction to ensure meeting the requirements of the Northern Territory of Australia's First Home Owner's Grant and Quick Start grant concessions;

Particulars of concessions

(i) First Home Owners Grant $7,000.00
(ii) Quick Start NT home being built grant $5,000.00

(h) To call in tenders in a timely fashion and in such a way as to provide a reasonable time frame to allow proposed tenderers sufficient time to properly prepare tenders.

(i) An implied term to give business efficacy to the contract that the defendant report to the plaintiffs regularly and seek instructions for any design changes and for the plaintiffs to be kept informed of progress and given copies of design documentation;

(j) An implied term that the defendant would exercise all reasonable care skill and diligence in carrying out professional duties as an architect in or about the supervision of the professional services for schematic design to completion of construction.

3. On or about 09 January 2001, the plaintiffs accepted the terms and conditions of contract for the defendant to provide architectural services."

[8] The respondent requested particulars of paragraph 2(a) of the amended statement of claim as follows:

"Say what facts and circumstances are relied on by the Plaintiff to allege that a term of the contract was to design a home within a budget expressed to be $250,000.00."

[9] The appellants replied as follows:

"Not a proper request for particulars – seeking evidence. The plaintiff relies upon the written communication forwarded via facsimile 28 December 2000 – document 1.5 in the defendant's discovery and document 1.6 dated 09 January 2001 being the defendant's response confirming the wish list achievable within the budget of $250,000.00."

[10] The two documents 1.5 and 1.6 became Exhibits P1 and P2 at the hearing in the Local Court.

[11] Exhibit P1 is a facsimile that was sent by Ms Suzanne Innocenzi on behalf of the appellants to the respondent on 28 December 2000. In the Local Court and in the appeal below the document was referred to as the appellants' "wish list". The document was in the following terms:

> To: Peter Fletcher
> Fr: Suzanne Innocenzi & Andrew Thurlow
> Re: "Wish list" for our house
> Fax: 8941 3907
>
> Hi Peter
>
> Following is the list you asked us to put together for our house.
>
> • 3 bedrooms – one with ensuite (this isn't hugely important)
> • 1 guest room – separate from our rooms (I was thinking maybe a separate bungalow?)
> • 1 main bathroom
> • 1 kitchen – not huge
> • 1 playroom for children
> • 1 lounge room for adults
> • 1 study/office – we don't like "study nooks", it needs to be a separate room
> • Laundry
> • Downstairs toilet
> • Separate "quiet room" where we can read. Maybe this can be incorporated into the study.
>
> Peter, we'd like the house to be quite open and airy, but it's important that the "private" rooms such as bedrooms and main bathroom are away from "public" spaces such as lounge room, kitchen etc.
>
> We'd also like rooms that open onto verandas since we'd spend a lot of time outside.

If you have any questions please call me at home on 8985 4965.

We look forward to seeing what you come up with.

Suzanne".

[12] In paragraph 14 of the amended statement of claim the appellants alleged breaches of contract as follows:

"14. The defendant breached the contract for provision of architectural services to the plaintiffs.

PARTICULARS OF BREACH OF CONTRACT

• Failing to prepare a schematic design and/or design documentation in accordance with the express budget restrictions detailed by the plaintiffs;

• Failing to prepare plans, specifications and documentation in accordance with the budgetary restrictions of the plaintiffs;

• Failing to adequately prepare revised schematic design and/or plans including documentation for the house upon receipt of the revised costing plan by the Rawlinsons Group Pty Ltd in the sum of $315,643.00;

• Failing to seek tenders for the construction of the premises within a reasonable time;

• Failing to inform the plaintiffs regularly and seek instructions as to design modifications to meet the plaintiff's budgetary restrictions;

• Failing to obtain tenders for the scope of works specification and for completion to commence in accordance with the restrictions and requirements of the Northern Territory Government First Home Owners Grant and the Quick Start NT New Home Being Built Grant."

[13] The appellants did not plead that the respondent had contracted to design a house incorporating all of the features of the appellant's "wish list" and that the respondent had breached the contract between the parties by failing to incorporate all of those features in the house that it designed. It was not until after the appellants had closed their case in the Local Court and counsel for the appellants was cross examining Mr McNamara, an architect employed by the respondent, that it was suggested for the first time that the contract between the parties required the house designs prepared by the respondent to incorporate all of the features in the "wish list".

[14] Counsel for the respondent objected to Mr McNamara being cross examined about the issue of whether the contract between the parties required the house designs prepared by the respondent to include all of the features of the "wish list". The basis of the objection was that such a case had not been pleaded by the appellants; it was not the case that the respondent had come along to meet; and the respondent's case would have been put differently if the respondent had been put on notice of such a case. Counsel for the appellants' response to the objection based on the pleadings was not to apply to amend the amended statement of claim but to argue that the issue was raised by the respondent's defence to the further amended statement of claim. After hearing argument as to the objection, the presiding magistrate cautiously allowed the issue to be explored by counsel for the appellants in cross examination of Mr McNamara.

[15] During final submissions in the Local Court counsel for the appellants continued to argue that it was a term of the contract that the respondent was required to design a house containing all the features on the "wish list". Counsel for the respondent reiterated that the respondent had only come to court prepared to meet the case that had been pleaded by the appellant and proceeded to confine the submissions she made on behalf of the respondent to the allegations of breach of contract pleaded in the amended statement of claim.

[16] The presiding Magistrate found that the respondent had breached the terms of the contract between the parties and her Honour awarded $21,557.62 in damages to the appellants. Her Honour found that the respondent completely failed to design a house within the broad specifications of the contract (the "wish list") that was capable of being constructed for $250,000 inclusive of GST. Consequently the appellants paid certain fees and expenses to the respondent for plans and services which were of no value to them.

[17] After hearing the appeal at first instance Angel J found that the presiding magistrate erred in making the findings referred to above because the appellants did not plead that it was a term of the contract that the respondent design a house containing all the features on the "wish list". His Honour found that the appellants' case that the "wish list" was a term of the contract in the sense that the respondent had contracted to design a house incorporating all of the features of the "wish list" and that the appellants had

breached it by failing to incorporate all of those features was first introduced by the appellants during the cross examination of Mr McNamara. This was after the close of the appellants' case and over the objection of counsel for the respondent. The case outside the pleadings was again pursued by counsel for the appellants during final submissions in the Local Court. His Honour held that the hearing in the Local Court had miscarried because the respondent was denied procedural fairness: *Banque Commerciale SA in liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286 – 287, Mason CJ and *Gaudron J; Multigrip Distribution Services Pty Ltd v TNT Australia Pty Ltd* (1996) ATPR 41–522.

[18] Angel J further held that there was no evidence to support the finding that it was a term of the contract the respondent design a home within the appellants' budget of $250,000 or less; there was no evidence that the initial instructions contained in the "wish list" were incorporated into the contract between the parties in the sense that the respondent was contracting to design a house with all of the features in the wish list; and the post contractual conduct of the parties could not be relied upon to establish the terms of contract between the parties. These latter findings are also the subject of the appellants' appeal to the Court of Appeal.

The appellants' argument in the Court of Appeal

[19] At the start of the appeal I raised with Ms Gearin, who appeared as counsel for the appellants, the proposition that if the appellants could not overcome

the pleading point as determined by Angel J the appeal could not be sustained. Ms Gearin's response to this proposition was to rely on ground 7 of the notice of appeal which states as follows:

> "The learned appeal Judge erred in law by finding that two of the findings by the learned magistrate were (erroneously) based on the premise that the appellant had breached the contract by failing to include in the final design all of the features on the wish list when no such finding was made."

[20] Ms Gearin submitted that it had never been the appellants' case that it was a term of the contract between the parties that the "wish list" was a term of the contract in the sense that the respondent had contracted to design a house incorporating all of the features of the "wish list" and that the respondent had breached the contract by failing to incorporate all of those features in the house designs that it produced for the appellants. Ms Gearin also submitted that the presiding magistrate only found that the respondent failed to design a house within the appellants' budget.

[21] I do not accept Ms Gearin's submissions. Having reviewed the transcript of the hearing in the Local Court it is apparent that the appellants' case was that the "wish list" was a term of the contract between the parties in the sense that the respondent had contracted to design a house incorporating all of the features of the "wish list" and that the respondent had breached the contract by failing to incorporate all of those features in the house designs that it produced for the appellants.

[22] The relevant parts of the presiding magistrates Reasons for Decision are as follows:

> 82. The written contract between the parties is that which is set out in Ex P2 … That contract … incorporates the booklet "You and Your Architect" and … Ex P1 "the wish list of spaces" within the framework mentioned in the contract, namely "we have received your "wish list" of spaces which appears to be achievable within a budget which we understand to be $250,000." The acceptance of the concept of the house as expressed in the "wish list" is reaffirmed in the contract in the paragraph beginning: "We understand that you would generally like the house to be open….etc". Initially I was concerned that the "wish list" was merely aspirational however I note that as well as the inclusion of it in P2, from the time of the conclusion of that contract, both parties proceeded and conducted themselves on the basis that the concept for the house was that as initially identified in the "wish list". For example, it was those very "spaces" that were included in the initial sketch plan and later in the schematic design. Although of course the contract was capable of variation by agreement, it was that initial concept that ran through the process. In other words, although I initially had some misgivings, there is no reason why the "wish list", (which is possibly wrongly labelled as such), but effectively incorporates the plaintiff's instructions, should not be considered to be part of the contract between the parties. If, as Ms Kelly rightly points out, the clients' desires and therefore instructions may change throughout the process, there would need to be a variation of the contract, possibly incorporating negotiated consequential cost variations if that is necessary. In my view the instructions incorporated in P1 and P2 are broad enough to be capable of considerable development within the design process. I note Mr McNamara accepted in his evidence that he was required to build the house for the plaintiffs including those items on the wish list. On the balance, in this case, I find the initial instructions contained in P1 were incorporated into the contract. A contract for architectural services would hardly be efficacious without some starting point in the contract of what was actually conceived, at least in general terms, by the parties. I say that with the awareness that there is still a substantial development process that will inevitably occur.
>
> 88. Once the surprisingly high tender results were received, it was Mr McNamara who made changes to the design and had them re-costed by Rawlinsons. The plaintiff was not happy with the suggested changes and she was clear in her evidence that she did not

instruct Mr McNamara to tender on the basis of that plan. I accept her evidence on this. I note in support of her evidence is the opinion of Mr Petrie about the lack of documentation of this stage of the process.

89. My conclusion is that the defendant failed completely to design a house, within the broad specifications of the contract that was capable of being constructed for $250,000 inclusive of GST. In my view that was the essence of the contract. The first tenders came in at around 60-70% over the budget. The re-tendering which was not authorised by the plaintiffs was still unacceptably high and in any event the final design was not authorised by the plaintiff. I am sure the defendant's architect was well motivated to attempt to change the design at that late stage but that took the house into a completely different direction so that it bore little resemblance to the schematic design or the original concept. I do not accept Mr McNamara's evidence that he stayed with the basic concept. I note Mr Petrie is highly critical of that part of the defendant's work. I do not agree at all that the plaintiffs had accepted the further design by the defendant after the later costing by Rawlinsons (Ex P10). Ms Innocenzi's evidence is that she was most concerned with those plans for reasons she gave in her evidence (T 35-36). It is highly unlikely that in her frame of mind at that time she would have consented to tender. There is a significant difference in agreeing to have the design sent out to tender and simply obtaining a quote. I reject the submission made on behalf of the defendant to the effect that there is no real difference. The tender process is far more advanced and more difficult to negotiate about, particularly as in this case when the design is not agreed. I note that proposition relied on by the defendant is rejected by Mr Petrie.

92. In terms of the plaintiff's Particulars of Claim contained in the Amended Statement of Claim I find that the contract did incorporate the particulars as alleged in paragraph 2(a), namely for the defendant to design a home within the plaintiff's budget expressed to be $250,000. As I have made the finding that the broad specifications are those in P1 and P2 and documented in the first schematic design, it is the failure of the defendant to perform that obligation that constitutes the breach. I note also the response to the further and better particulars 2, paragraph 2, 19 October 2004: "The plaintiff relies upon the written communication forwarded via fax 28 December 2001, document 1.5 in the defendant's discovery, and document 1.6 dated 9 January 2001 being the defendant's response confirming the wish list achievable within the budget of $250,000."

> 95. This is an unusual situation as the plaintiffs have paid certain fees and expenses to the defendant for plans and services that are of no value and no use to them. They could not build the house that they were told could be designed for them. In my view the plaintiffs are entitled to recover the moneys expended by them in these circumstances. They have spent the money pursuant to a contract that they have received nothing for. It is not to the point that some plans and designs have been generated and given to the plaintiffs. Those plans and designs were not developed pursuant to the contract. The plaintiffs should be able to recover the fees they paid to the architects as a matter of compensatory damages for the loss they have incurred. They should also be able to claim the various fees paid to consultants as such loss would have been a readily foreseeable consequence of the breach.

[23] From the above passages it is apparent that the presiding magistrate found that the "wish list" was a term of the contract in the sense that the respondent had contracted to design a house incorporating all of the features of the "wish list" and that the respondent had breached the contract between the parties by failing to incorporate all of those features in the house designs that it produced for the appellants.

Conclusion

[24] In light of the respondent's objection to the appellants' introduction of the issue that the respondent had breached the contract between the parties by failing to incorporate all of the features in the wish list in the house that it designed for the appellants and in light of the appellants' failure to further amend the amended statement of claim to plead such a breach of contract the Local Court was not able to make the ultimate finding that it made as to the breach of the contract between the parties. The appeal should be dismissed

on this ground. The appellants impermissibly expanded their case beyond their pleading.

[25] In view of the above finding it is unnecessary to decide the other issues in this appeal.

Orders

[26] The following orders should be made:

1. The appeal is dismissed.

2. The orders made by the Supreme Court are affirmed.

3. The appellants are to pay the respondent's costs of the appeal.

[27] The proceeding is referred back to the Local Court for adjudication on the appellants' claim for damages for negligence only. Unlike other cases where there has been a failure to accord procedural fairness the contract case is not to be referred back to the Local Court. The appellants are bound by their election not to seek to further amend the amended statement of claim. They persisted with this election during the course of the appeal in the Court of Appeal.
