Shorrlong Pty Ltd trading as Centre Plumbing and Northern Territory Housing Commission [1999] NTSC 140

PARTIES:	SHORRLONG PTY LTD. TRADING AS CENTRE PLUMBING and NORTHERN TERRITORY HOUSING COMMISSION
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	15 OF 1996 (960614)
DELIVERED:	10 December 1999
HEARING DATES:	3 December 1999
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Contract – repudiation – breach – claim for damages.

Contract – fundamental implied term – allegations of fraud – inability to particularise fraud.

Contract – allegation of fraud by defendant - lack of particulars from defendant – application to order discovery before providing particulars – discretion of Court – existing anterior relationship and specificity of at least one instant of fraud provided – whether party embarking upon fishing expedition.

Contract – termination justified even when grounds unknown at time of termination – whether expressive or prejudicial to party to allow discovery before particulars.

Legislation:

Supreme Court Rules: 13.10(i); 13.10(2); 13.10(3)(a); 29.07; 37(1).

Cases:

1. *Zirenberg v Labouchere* (1893) 2 QB183, discussed.
2. *Lyons and Another v Kern Konstructions (Townsville) Pty Ltd and Another* (1983) 47 ALR 114, discussed.
3. *W A Pines Pty Ltd v Bannerman* (1980) 30 ALR 559, discussed.
4. *Whyte v Ahrens* (1884) 26 Ch.D 717, referred.
5. *Leitch v Abbott* (1886) 31 Ch.D 374, referred.
6. *Sachs v Speilman* (1887) 37 Ch.D 295, referred.
7. *Waynes Merthyr Company Ltd v D Radford & Co* (1896) 1 Ch.D 29, applied.
8. *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1955) 72 WN (NSW) 250, referred.
9. *R v Robertson* (1983) 21 NTR 11, mentioned.
10. *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359, applied.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Goodall
Defendant:	Ms Kelly

Solicitors:

Plaintiff:	Bowden Collier & Deane
Defendant:	Povey Stirk

Judgment category classification:	A
Judgment ID Number:	Mil99211
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Shorrlong Pty Ltd trading as Centre Plumbing and Northern Territory Housing Commission [1999] NTSC 140
No. 15 of 1996 (960614)

BETWEEN:

SHORRLONG PTY LTD TRADING AS CENTRE PLUMBING
Plaintiff

AND:

NORTHERN TERRITORY HOUSING COMMISSION
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 10 December 1999)

[1] This is an action for damages for breach of contract. The plaintiff claims that in 1992, the plaintiff entered into an agreement in writing with the defendant to supply labour and materials for the maintenance of various dwellings in Alice Springs for a period of twelve months. The contract was extended for various periods, with the last extension expiring on 31 December 1995. On 30 March 1995 the defendant, through its agent, gave written notice to the plaintiff purporting to cancel the agreement. The plaintiff alleges that the defendant acted in breach of the contract and repudiated the contract wrongfully. After receiving the letter of 30 March

1995, the plaintiff alleges that it accepted the defendant's repudiation and elected to pursue a claim for damages.

[2] The defendant denies that it acted in breach of the contract and maintains that, for various reasons particularised in paragraph 2 of the Further Amended Defence, it was justified in terminating the contract.

[3] By paragraph 3 of the Further Amended Defence, the defendant alleges that further, and in the alternative to paragraph 2, the plaintiff by its conduct breached a "fundamental implied term" of the contract as a result of which the defendant was entitled to treat the contract as having been repudiated by the plaintiff, thereby enabling it to terminate the contract, which it did. In support of this contention, the defendant alleges that the plaintiff, in respect of a particular maintenance job which the defendant required the plaintiff to perform at a site at 2 Ewart Place, Gillen under the contract, falsely certified that the work was finished when it was not; made claims for work and materials at the site which it had not done or supplied, or well in excess of that done or supplied, and made claims for the hire of equipment which it had not hired, or in excess of the actual hiring. The "fundamental implied term" is expressed to be that the contractor would;

(a) act honestly in its dealings with the defendant,

(b) act in good faith in the performance of the contract,

(c) not make claims for work it had not done pursuant to the contract, and

(d) not make claims for payment for equipment it had not hired for the purposes of the contract

It is not suggested that paragraph 3 is inadequately particularised.

[4] By paragraph 4.2 of the Further Amended Defence, the defendant alleges, further and in the alternative to paragraphs 2 and 3 of the Further Amended Defence, that during the whole of the time the contract was in force, the plaintiff committed breaches of the contract by:

a. making claims to the defendant pursuant to the contract for payment for work which it had not done;

b. making claims to the defendant pursuant to the contract for payment for materials which it had not supplied;

c. making claims to the defendant pursuant to the contract for payment for equipment which it had not hired;

d. further and in the alternative, carried out work allegedly for the purposes of the contract which was not reasonably necessary, and made claims to the defendant pursuant to the contract for payment for such work;

e. further and in the alternative, supplied materials allegedly for the purposes of the contract which was (sic) not reasonably necessary, and made claims to the defendant pursuant to the contract for payment of such materials;

f. further and in the alternative, hired equipment allegedly for the purposes of the contract which was not reasonably necessary, and made claims to the defendant pursuant to the contract for payment for such equipment hire.

[5] Paragraph 4.2 of the Further Amended Defence as originally pleaded was as follows:

4.2 The plaintiff also committed other breaches of express terms of the contract and of the implied term of the contract referred to in paragraph 3 above.

PARTICULARS

a. During the last nine months in which the contract was in force:

i. the plaintiff submitted invoices to the defendant claiming payment for work allegedly done, materials allegedly supplied and plant allegedly hired by the plaintiff pursuant to the contract of an average of $68,222.00 per month;

ii. the average amount charged per invoice was $201.00; and

iii. approximately 76.8% of the maintenance orders given to the plaintiff were changed by the plaintiff adding extras to the orders.

b. After the contract was terminated, the defendant engaged an alternative contractor to perform the maintenance work the subject of the contract at the same rates as specified in the contract.

c. In the period of 5 months after the Contract was terminated:

i. the alternative contractor submitted invoices to the defendant for work done, materials supplied and plant hired for the purposes of the maintenance work the subject of the Contract on an average of $36,200.00 per month;

ii. the average amount charged per invoice was $91.00;

iii. approximately 26.8% of the maintenance orders given to the alternative contractor were charged by the alternative contractor adding extras to the orders.

d. There was no material difference between the average monthly amount and type of maintenance work required in the period

referred to in paragraph a. and the period referred to in paragraph c.

e. Further particulars of breaches of the contract by the plaintiff will be provided after discovery.

[6] On 18 August 1999, Master Coulehan ordered that paragraph 4.2 as it originally stood be struck out, with liberty to replead. The present form of paragraph 4.2 is the result of the liberty so granted. The learned Master said:

> [Paragraph] 4.2 needs to be recast so that the material facts are pleaded and coherent particulars provided. I understand that there may be difficulty in providing particular[s] sufficient to satisfy the requirements of the rules, however the defendant must provide the best particulars available. It will then become a question for argument as to whether or not those particulars are sufficient.

[7] The defendant appealed from the Master's decision. Such an appeal is presently a hearing *de novo* to be determined by a single Judge. When the appeal came on for hearing before me on 20 October 1999, the appeal was dismissed by consent and I extended the time to file and serve the Further Amended Defence for a further seven days. At that stage, the parties anticipated that paragraph 4.2 would be pleaded in its present form. The plaintiff's objection was that there were no particulars given; the defendant claimed it was in no position to give particulars until after further discovery was obtained. At that stage, there was some discussion about the possibility of the parties using expert accountants' assistance to peruse the relevant documents from which particulars could be provided, but no orders were

made as to discovery or particulars and that question was adjourned to be considered at a later time.

[8] The plaintiff's argument is that the Court should order particulars to be given before making any further order for discovery. Although Mr Goodall, counsel for the plaintiff, conceded that the Court has a discretion to order discovery before the giving of particulars, he submitted that clause 4.2 was tantamount to a broad allegation of fraud unsupported by particulars. Miss Kelly for the defendant did not dispute this. It is common ground that the ordinary rule is that a party who pleads fraud must provide full particulars: see *Supreme Court Rules* rr13.10(1), (2) and (3)(a). Mr Goodall's submission was that the defendant had not demonstrated that it had a reasonable basis for the allegations in clause 4.2, and that, therefore, the defendant should be ordered to provide particulars, with the consequence, I presume, that if they were not provided, the plaintiff would apply to have paragraph 4.2 struck out.

[9] Miss Kelly for the defendant submitted that the defendant did have a reasonable basis for pleading fraud, but because the plaintiff and not the defendant knows the facts, and the defendant cannot at this stage give meaningful particulars, the plaintiff should be required to provide discovery first.

[10] The relevant principles to be applied are as follows. The general rule is that a party who pleads fraud must provide particulars; those particulars will

govern what is or is not discoverable. Consequently, the general rule is that discovery will not be ordered in respect of an issue in a pleading if the issue is not fully particularised. However, the Court retains a discretion to order otherwise (see r29.07), although it has been said that the discretion will be exercised in the absence of some relationship between the parties to the action only in exceptional cases: *Zirenberg v Labouchere* (1893) 2 QB 183 at 188 per Lord Esher, MR; *Lyons and Another v Kern Konstructions (Townsville) Pty Ltd and Another* (1983) 47 ALR 114 at 128-129 per Fitzgerald J; *W A Pines Pty Ltd v Bannerman* (1980) 30 ALR 559 at 567 per Brennan J. In cases where fraud is alleged, if the party alleging fraud is able to provide one or more specific instances, and there is an anterior relationship between the parties which entitles one party to obtain information from the other, the discretion may be exercised to order discovery before particulars, if the party seeking discovery is unable to provide particulars: see *Whyte v Ahrens* (1884) 26 Ch.D 717; *Leitch v Abbott* (1886) 31 Ch.D 374; *Sachs v Speilman* (1887) 37 Ch.D 295. But in my view, there is no reason in principle to limit the granting of relief only to such cases. The true rule is that expressed by Chitty J in *Waynes Merthyr Company Ltd v D Radford & Co* (1896) 1 Ch.D 29 at 35;

> There is no hard and fast rule as to the class of case in which particulars should precede discovery, or discovery be ordered before particulars; but the judge must exercise a reasonable discretion in every case after carefully looking at all the facts, and taking into account any special circumstances.

This principle, it seems to me, is consistent with r34(1) which empowers the Court:

> At any stage of a proceeding [the Court may] give directions for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination.

On the other hand, the Court will not order discovery before particulars if the party seeking the order is embarking on a fishing expedition: *W A Pines Pty Ltd v Bannerman, supra.*

[11] In this case, the defendant is able to, and has already, fully particularised one instance of what it is generally complaining in paragraph 4.2 in paragraphs 2 and 3 of the Further Amended Defence. The defendant had previously pleaded facts in the original form of paragraph 4.2 which, so it was submitted, gave rise to a real suspicion that over the last nine months of the contract, there is a real basis for believing the matters complained of in paragraph 4.2 are true. These allegations are, of course, denied by the plaintiff. Miss Kelly for the defendant submitted that as the true facts are only within the plaintiff's knowledge, no further particulars can now be given without discovery. She relied upon the decisions in *Whyte v Ahrens (supra); Leitch v Abbott (supra), Sachs v Speilman (supra)* and *Waynes Merthyr Company Ltd v D Radford & Co (supra)*. Here there was a special relationship between the parties created by the contract which admittedly existed between them. It was submitted that the fact that one instance of fraudulent conduct had been able to be fully particularised, together with the

evidence which the defendant had at its disposal, and which formed the basis of the original form in which paragraph 4.2 appeared, showed that this was not a fishing expedition.

[12] As to what is "fishing", Owen J said, in *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1955) 72 WN (NSW) 250 at 254:

> A "fishing expedition", in the sense in which the phrase has been used in the law, means, as I understand it, that a person who has no evidence that fish of a particular kind are in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not.

See also *R v Robertson and Another: Ex parte McAulay* (1983) 21 NTR 11 at 18 per O'Leary J, as he was then. Miss Kelly's submission was that the authorities upon which she relied supported her contention that the material before the Court rebutted any suggestion of "fishing" as, to adopt Chitty J's words in *Waynes Merthyr Company Ltd v D Radford & Co (supra)* at p36, there was a "substantial foundation" for the defendant's allegations.

[13] On the other hand, as Mr Goodall points out, none of the material relied upon establishes any foundation for the whole period of the contract. To the extent that the defendant seeks discovery beyond the period of the last nine months of the contract, I consider that the defendant is plainly fishing and is not entitled to relief.

[14] As to the remaining period, Mr Goodall drew attention to the fact that the affidavit relied upon by the defendant indicated an ability, in time, to give some particulars by pursuing enquiries with other sources. This may be so, but it is plain from the affidavit that such sources are most unlikely to produce any fruit without a great deal of time, trouble and expense, and then only in relation to some, and not all, of the allegations. I do not think that this much assists the plaintiff.

[15] Next, as Mr Goodall points out, paragraph 4.2 is pleaded in justification for the termination of the contract, whereas the allegations in paragraphs 2 and 3, if made out, would be sufficient; and in any event, the matters referred to in paragraph 4.2 were not relied upon at the time. I do not consider that this assists the plaintiff. If the facts alleged were made out, there would be a strong case for arguing that the contract was rightfully terminated. It is well established that a party to a contract can rely on grounds not known to it at the time of termination to justify its having terminated the contract: see *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359. I do not consider that the fact that the defendant already has grounds which, if made out, would justify its position, should prevent it from pursuing this alternative ground. There is no material before me to suggest that it would be oppressive to do so, or that the expense and difficulty involved to the parties would prejudice the plaintiff's ability to litigate its claim. If the allegations in paragraph 4.2 prove to be unfounded, the plaintiff will have the opportunity to seek a remedy in costs.

[16] Finally, Mr Goodall submitted that there was no evidence before the Court in affidavit form to support any of the allegations in the Further Amended Defence, nor even the assertions relied on in the previous form of paragraph 4.2. This was a somewhat belated objection. The debate until then had proceeded upon the basis that the defendant had evidence of its assertions available to it. Given the responsibility of legal practitioners not to plead fraud without a reasonable basis for the allegations, and the lateness of this objection, I do not consider that I should require the defendant to put this material on oath. I note that there is no material on oath from the plaintiff denying the allegations relied upon.

[17] I consider, in conclusion, that the defendant is entitled to partial relief in the form of discovery of the plaintiff's records relating to the whole of the dealings it had in the purported performance of the contract between the parties during the period of nine months immediately preceding the date upon which the contract was terminated, i.e. 30 March 1995. The defendant, however, seeks an order empowering an engineer and an accountant appointed by the defendant to enter upon the plaintiff's business premises for the purposes of conducting a combined audit of the records of the plaintiff, the defendant to then particularise instances of the conduct referred to in paragraph 4.2, and prepare a list of documents in the possession of the plaintiff and the defendant supporting evidencing or otherwise relevant to those instances. The power to make an order of this kind is said to be based on r 37(1) of the *Supreme Court Rules*. Assuming

that the power exists, I do not consider that such an order should be made. The usual method of inspecting the documents of a party is to obtain discovery and inspection pursuant to Order 29. The normal process requires that the documents are "sifted" by the solicitor for the party required to give discovery, thereby preventing the other party seeing documents not properly discoverable, or for which privilege is claimed. Discovery ought not breach privacy or confidentiality more than is essential for the due administration of justice. The proposal was put forward by the defendant as a means of reducing the expense to the parties, but as the plaintiff objects to this course, and as no proper reason has been shown as to why such a course should be adopted, (such as the type of situation which would justify an *Anton Piller* order) I do not consider that the defendant is entitled to that remedy.

There will be an order (1) that the plaintiff provide discovery of all of its documents relating to the performance or purported performance by it of the contract between the parties during the period 1 July 1994 to 30 March 1995, within two months; (2) that inspection of such documents take place within twenty-one days thereafter; (3) that the defendant is to provide full particulars of paragraph 4.2 of the Further Amended Defence within two months of inspection; (4) the relief sought by the parties is otherwise refused. (5) The action is referred back to the Master for any further directions and orders required, at a date to be fixed by the Master, with liberty to apply on 48 hours notice.
