

CITATION: *Rapid Metal Developments (Australia) Pty Ltd v Nicholas Skalatos*
[2005] NTMC 004

PARTIES: RAPID METAL DEVELOPMENTS
(AUSTRALIA) PTY LTD

V

NICHOLAS SKALATOS

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20216541

DELIVERED ON: 24th January 2005

DELIVERED AT: Darwin

HEARING DATE(s): 17th January 2005

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Practice and Procedure – amendment of pleadings – withdrawal of admissions

Local Court Rules 3.08 & 5.15

State of Queensland v JL Holdings [1996] 189 CLR 146

Enron Aust Finance (in Liq)v Integral Energy Aust [2002] NSWSC 817

Cropper v Smith [1884] 26 Ch 700

Clough & rogers v Frog [1974] 48 ALJR 481

The Commonwealth v Verwayen [1990] 170 CLR 457

Moore v TWT [1991] 10 FLR 350

Maureen Jessie Heatley v James Sullivan [2005] NTMC 001

REPRESENTATION:

Counsel:

Plaintiff: Ms McLaren

Defendant: Mr Cureton

Solicitors:

Plaintiff: Asha McLaren

Defendant: Minter Ellison

Judgment category classification: C

Judgment ID number: [2005] NTMC 004

Number of paragraphs: 24

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

No. 20216541

BETWEEN:

Rapid Metal Developments (Australia) Pty
Ltd
Plaintiff

AND:

Nicholas Skarlatos
Defendant

REASONS FOR JUDGMENT

(Delivered 24th January 2005)

Judicial Registrar Fong Lim:

1. The Defendant applied to amend his Defence in the form attached to his affidavit of the 26th November 2004. The Plaintiff opposes the application on the basis that the Defendant should not be allowed to replead just because he has changed his mind what his defence might be, the Plaintiff complains that the proposed Amended Defence includes defences not before pleaded. The Defendant accepts that some of the proposed amendments introduce new defences however argues that most of the amendments are just a further particularisation of the denials already contained in the present Amended Defence. A further complaint by the Plaintiff is that the proposed Amended Defence withdraws admissions previously made. The Defendant argues any withdrawal of admission is to clarify the real issues between the parties.
2. The Court can allow the amendment of pleadings pursuant to two rules in the Local Court Rules:

3.08 General power of amendment

(1) To –

(a) determine the real question in issue between the parties to a proceeding;

(b) correct a defect or error in a proceeding; or

(c) avoid a multiplicity of proceedings,

the Court may at any stage order that –

(d) a document (including a statement of claim) be amended; or

(e) a party have leave to amend a document.

(2) An amendment under this rule may be made without the leave of the Court if all the parties to a proceeding consent to the amendment.

5.15 Amendments and orders as to form, filing and service

(1) Such amendments are to be made to the pleadings as are necessary for determining the real questions at issue between the parties.

(2) At any stage of a proceeding, the Court may –

(a) allow a party to amend his or her pleadings in a manner and on terms the Court considers appropriate;

(b) order that the pleadings be in a particular form; or

(c) make orders in respect of the filing and service of pleadings.

3. It is clear from the rules that an amendment to pleadings can be made at any time during a proceedings by consent or by leave of the court. There are no restrictions or guidelines for the Court of what amendments are allowable and what are not. This differs from the Supreme Court Rules which provides some limitation on the amendment of pleading in rule 25.02(5) which states the following in relation to the withdrawal of a Defence:

(4) At any time the plaintiff may withdraw a defence to a counterclaim or a part of it and a defendant may withdraw his defence or a part of it.

(5) Subrule (5) does not enable a party to withdraw an admission, or any other matter operating for the benefit of another party, without the consent of that party or the leave of the Court.

4. There is no equivalent rule in the Local Court Rules. It has been left to the general discretion of the Court as to when it allows amendments to pleadings.
5. It is important at this stage to set out a chronology of steps taken in this matter so far to show the history of the progress of this litigation.

CHRONOLOGY

Date	Step taken
6.11.02	Statement of Claim filed
17.12.02	Defendant served with Statement of Claim
29.1.03	Judgment in Default of Defence obtained
12.3.03	Defendant files a Defence at this stage Defendant unrepresented
25.6.03	Withnall Maley file Notice of Acting
27.6.03	Withnall Maley files a Defence
7.7.03	Application filed to set aside default judgment of 29.1.03
16.7.03	Application adjourned to allow Defendant to further particularise intended Defence
11.8.03	Application to set aside judgement adjourned part heard for further evidence
17.9.03	Default Judgment set aside on basis that judgement was irregularly entered because the claim was not properly

	pleaded as a liquidated debt – decision of Judicial Registrar
30.9.03	Application to set aside the Judicial Registrar’s order setting aside the default judgement
10.10.03	Application to set aside adjourned for hearing on 17.10.03
17.10.03	Application adjourned for hearing 9.12.03
31.12.03	Decision of Blokland SM dismissing application to set aside decision of Judicial Registrar confirming an Amended Statement of Claim should be filed
7.4.04	Amended Statement of Claim filed
19.5.04	Amended Defence to Amended Statement of Claim filed by Withnall Maley
29.7.04	Conciliation Conference
5.10.04	Withnall Maley cease to act
14.10.04	Defendant purports to file further amended Defence
20.10.04	Minter Ellison files notice of action
26.11.04	Application to file Further Amended Defence

6. This matter has obviously had a long history however it is clear from the chronology that about 7 months of that delay has not been caused by the Defendant rather by the Plaintiff’s attempts to maintain a default judgement that had been irregularly entered.
7. The Defendant explains his attempt to file a further Amended Defence without the leave of the court in his affidavit in support of this application.

Apparently he was not aware that his former solicitors had filed the Amended Defence.

8. The Plaintiff's claim is based in contract. It says that it entered into a contract of the hire and sale of equipment with the Defendant and that contract was based on a quote with certain terms attached regarding transport and interest. It is agreed between the parties that the Plaintiff and Defendant had a commercial relationship prior to the dealings subject of this litigation. The Plaintiff claims it provided to the Defendant certain goods and services for which the Plaintiff has yet to receive full payment. The Plaintiff also claims interest applicable pursuant to the terms of the trading account between the parties.

9. The Defendant's amended Defence filed on the 19th of May 2004 (which is his Defence as it stands) admits that there was a trade arrangement between the parties but denies that the terms of the trading account were material to these proceedings and pleaded the arrangement subject of the proceedings were "a separate contract" (see paragraph 2 of the amended Defence). The Defendant admitted the contract on the basis of the quote numbered 4221/0852(a) (paragraph 4 of the amended Defence), and denies the terms of the contract as set out in paragraph 8 of the Statement of Claim. In paragraph 8 the Defendant admits some of the invoices claimed by the Plaintiff for the hire of goods (in paragraph 8(b)) and denies others. In relation to the invoices claimed for the purchase of goods the Defendant admits the purchase (see paragraph 8(c) in both the Statement of Claim and the Defence). In relation to claim for the cost of transport of the goods the Defendant admits that the invoices were issued but denies that the goods were not transport or received (paragraph 8 (d)). The Defendant also denies the Plaintiff's claim that he failed to return some goods and therefore denies liability for them (see paragraph 8 (e)). The Defendant then denies any claim for interest and the right of the Plaintiff to claim interest.

10. The proposed Further Amended Defence at first glance is substantially different to the present Defence. The Defendant argues in fact the proposed Further Amended Defence in most of the amendments is clarifying and particularising the issues between the parties. The Defendant accepts that paragraphs 5 (f) is a plea of a new material fact, that 11(a) specifies different dates as were previously pleaded and 11(f) is a new pleading of estoppel.
11. The Plaintiff claims that the proposed amendment totally changes the nature of the Defendant's defence and purports to withdraw admissions without explanation. The Plaintiff argues that the amendments should not be allowed in the interests of justice considering the delay and cost to the Plaintiff.
12. It is clear from the rules and the law as it has developed that Courts will consider amendments to pleadings at any time (see *State of Queensland v JL Holdings Pty Ltd* [1996] 189 CLR 146 and Rules of Court) the premise is that pleadings should reflect the real issues between the parties so that a matter can be decided on its merits and with all issues properly before the court.
13. Einstein J of the Commercial Division of the NSW Supreme Court summarised the principles which apply when a party applies for leave to amend pleadings in his decision in *Enron Australia Finance (in Liq)v Integral Energy Australia* [2002] NSWSC 817. There was an interlocutory application before His Honour to amend the Plaintiff's statement of claim in two ways, the first was to particularise an issue already before the court and the second was to add a new cause of action, the matter had already been set down for hearing. His Honour referred to the High Court decision in *JL Holdings* case (*supra*) and confirmed that the principles set out in that case followed the well established principle that "justice is paramount in determining such an application" and that each case must be decided on its own facts. His Honour accepted that the court had an unfettered discretion to

decide these applications and further accepted that the following principles applied in exercising that discretion:

“Now, I think it is a well established principle that the object of Courts is to decide the right of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the under division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Court’s do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment has a matter of favour or of grace”

Cropper v Smith (1884) 26 Ch D 700 per Bowen LJ at 710

As the defence, if established, would be a complete answer in the either action, the amendments sought should have been an amount unless it appeared that injustice would thereby have been an occasion to the respondent, there being nothing to suggest fraud or improper concealment of the defence on the part of the appellants. With the exception of the suggestion of prejudice arising in respect of the loss of the possible claim against the nominal defendant, the matters relied upon by the respondent in opposition to the amendments sought go at the most to delay and irregularity only, matters which are relevant to costs by do not constitute injustice to the respondent in the sense in which that expression is used” Clough & Rogers v Frog (1974) 48 ALJR 481 at 482

14. Justice Einstein then allowed the amendments by the Plaintiff.
15. The proposed amendments in the present case are vigorously opposed by the Plaintiff especially where the amendments withdrew admissions. In the some cases amendments have been refused in the past because of they operated as a withdrawal of admission (see Divcon (Aust) Pty Ltd v Devine Shipping Pty Ltd [1996]2 VR 79) however the court would have to be convinced that to disallow the amendments would be in the interest of justice.
16. I have carefully considered the proposed Further Amended Defence it is my view that the amendments contained in paragraphs 2,3,5 (except 5(f)) 6-10

and 11(except 11(f)) are particularisation and clarification of the issues already pleaded. Those paragraphs as previously pleaded were confusing and in some ways contradictory within themselves and required clarification. The withdrawal of admissions in paragraph 8 and the substitution of the Defendant's calculations more clearly sets out the basis of the Defendant's claim that he has paid all he is required to pay. It has always been the Defendant's case that the responsibility for the transport of the goods, the interest charged on the outstanding invoices and the length of the period of hire are at issue.

17. In relation to paragraph 5 (f) it is clear that this is a new allegation made by the Defendant. It was previously admitted by the Defendant that quotation number 4221/0852a was the basis of his contract with the Plaintiff however the proposed Further Amended Defence claims that Defendant countersigned that document because he thought it was in fact 4221/0852. I have not been provided with a copy of both documents but I can only assume the difference between the documents is significant given the vigor with which the amendment is fought. The Plaintiff argues that this defence is clearly an afterthought and only came to the Defendant after it was pointed out to him by his present solicitors. The Plaintiff has pursued this matter on the basis that the contract was based on quotation 4221/0852a and there will be costs thrown away of this amendment if allowed. There is no evidence that the Defendant has deliberately not taken this point and has now changed his mind. The Defendant explains this change by the fact that his present solicitors have advised him of the possible basis of a Defence.
18. The Plaintiff argues the other reason the amendment should not be allowed is that there is no chance of the Defendant succeeding in his defence (see the High Court decision of The Commonwealth of Australia v Verwayen [1990] 170 CLR 395). Plaintiff's counsel referred the court to the law on unilateral mistake in relation to contracts and argued that the defence of mistake is not available to the Defendant because his mistake was not as to

the very nature of the document. It is my view that the Court must be very certain that there is no merit to the pleading before it will be disallowed.(see Wallace SM in Maureen Jessie Heatley v James Sullivan [2005] NTMC 001). I am not convinced that this is the situation in this matter I understand one of the fundamental differences between the two quotations is that one was a contract of hire and the other was a contract of sale that must surely be a fundamental difference.

19. The Plaintiff also referred the court to the authority of Moore v TWT Ltd [1991] 105 FLR 530 in which Higgins J considered the nature of the amendment and confirmed the decision of the Master to disallow the amendment to the Defence. His Honour found that the amendments proposed were so peripheral to the real defence it would not be just to allow them. It is also important to note that the Defendant in Moore's case had deliberately decided not to raise a defence then had changed his mind. I do not believe this is the case in this matter the Defendant here raises the further defences of mistake (paragraph 5(f)) and estoppel (paragraph 11(f)) after advice from a new solicitor not because he has changed his mind as to raising a defence of which he was previously aware.
20. In my view the real issue and controversy between the parties in this matter is the terms of the contract. The Defendant has always maintained that certain terms such as interest were not included in the contract. There is no suggestion that the Defendant had realised the mistake of his countersigning a different quotation prior to advice from his present solicitors therefore this matter is factually far from Moore's case.
21. The parties agree there was a contract it is the terms of that contract that are in dispute. The proposed amendments attempt to crystallise the Defendant's case and if the amendments do that they should be allowed unless there is substantial injustice caused by the amendment. The withdrawal of admissions is a matter for cross examination at the substantive hearing of

the matter. The same argument applies for the addition of the estoppel pleaded in paragraph 11(f). Whilst the Plaintiff will have to get further statement from Mr Cotton about his conversations with the Defendant it is clear from the submissions made by the Counsel for the Plaintiff that they are still in contact with Mr Cotton and that will not be a difficulty.

22. The Plaintiff claims prejudice caused by the proposed amendments. It is suggested there will be a need for further discovery and possibly interrogatories. They also claim that the amendments will cause further delay in a matter which has already taken far too long. The Plaintiff also claims that it is small company that cannot afford further delays in this matter. Counsel for the Plaintiff argues these are matters which should be taken into account and cannot be compensated for by costs.
23. I do not accept the Plaintiff's arguments. There should be no further discovery required arising out of the proposed defence. The document relied upon by the Defendant is already included in the Defendant's list of documents. Interrogatories will only be allowed by leave. A lot of the delay (seven months) prior to the present was caused by the Plaintiff in attempting to maintain an irregularly obtained judgment. The Defendant produced a search of the Plaintiff from the Australian Securities & Investments Commission which showed the Plaintiff as having a share capital of \$2,100,000.00 and classified as a "large proprietary company". There is no evidence that the Defendant's alleged failure to pay the Plaintiff will cause the financial ruin or even hardship to the Plaintiff. It is my view that any prejudice to the Plaintiff can be addressed by the award of costs.

24. My orders today are:

24.1 The Defendant have leave to file and serve a Further Amended Defence in the form annexed "NS4" to the affidavit of Nicholas Skalartos sworn 26th November 2004 within 7 days.

24.2 The Plaintiff to file and serve any reply to the Further Amended Defence within 14 days of service of the Further Amended Defence.

24.3 The Defendant pay the Plaintiff's costs thrown away of the amendment to the Defence.

24.4 The Defendant pay the Plaintiff's costs of and incidental to this application fixed at 50% of the Supreme Court Costs composite scale for a contested interlocutory application.

Dated this 24th day of January 2005

Tanya Fong Lim
JUDICIAL REGISTRAR