

CITATION: *Michael Tsangaris v Inner Red Shell Pty Limited & Theophanis Katapodis* [2005] NTMC 017

PARTIES: MICHAEL TSANGARIS

v

INNER RED SHELL PTY LIMITED
ACN 068 986 363
&
THEOPHANIS KATAPODIS

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20104985

DELIVERED ON: 18 March 2005

DELIVERED AT: Darwin

HEARING DATE(s): 18 February 2005

JUDGMENT OF: Mr Wallace SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Plaintiff: A McLaren
Defendant: Mr Dearn

Solicitors:

Plaintiff: Asha McLaren
Defendant: Brian Johns

Judgment category classification: B
Judgment ID number: [2005] NTMC 017
Number of paragraphs: 22

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

No. 20104985

BETWEEN:

MICHAEL TSANGARIS
Plaintiff

AND:

INNER RED SHELL PTY LIMITED
First Defendant

AND

THEOPHANIS KATAPODIS
Second Defendant

REASONS FOR DECISION
PART 2

(Delivered 18 March 2005)

Mr WALLACE SM:

1. On 4 March 2005 I published Reasons for Decision in two questions then before me in this case. I had not then had the time to consider the third question. These Reasons may be regarded as a continuation of the Reasons of 4 March.

The Defendant's Application to Strike Out

2. This application was filed on 14 July 2004. It sought:

“1. That the plaintiff's claim herein be struck out, or alternately dismissed with costs.

2. Alternatively that the plaintiff provide further and better particulars as per the defendants' request therefore [sic] made by the defendants' solicitors' letter dated 18 June 2004 to the plaintiffs solicitor."
3. The supporting affidavit by Mr Johns annexed a copy of that letter and also of an order made by Ms Fong Lim on 19 May 2004 ordering, among other things, that:
 - "1. The Parties file and serve Affidavits of Documents incorporating the further and better discovery as set out below within 28 days. For the Plaintiff items 1, 3 and 6 of the Defendant's request for Discovery.....
 2. The Affidavits of Documents are to contain explanations as required pursuant to Rule 16.02 (1)(c) and set out the reasonable enquiries made to find those documents."
4. The "letter dated 18 June 2004 to the Plaintiff's solicitors" read:

"I hereby request on behalf of the defendants that the plaintiff provide the usual particulars of paragraphs 11, 15 (d) – (f) inclusive, 16, 18, 19, 26 (a) and (b), and 29 (h) of the further amended Statement of Claim.

I request these particulars be provided within 14 days of the date of this letter, failing which my clients will take such action as they may be advised.

Further, I note that your client has not complied with the Order of the Court of 19/5/04, and reserve my clients' rights entirely in relation to this non-compliance"
5. Mr Johns's affidavit cited the plaintiff's failure to comply with the Order of 19 May 2004, and also the plaintiff's failure to comply with the request for further and better particulars as reasons for seeking to have the plaintiff's claim struck out.
6. It is uncontested that the plaintiff initially failed to comply with the Order of 19 May 2004. His sole gesture in the direction of compliance was that on 4 July 2004 Ms McLaren filed a document headed "Further List of

Documents” over her own signature. That this was not filed within 28 days of the Order does not seem to be the aspect of the plaintiff’s failure which riles the defendants. They are more concerned – and understandably so – that it is not an affidavit of the plaintiff.

7. The plaintiff did nothing to remedy his failure until 8 December 2004 when an affidavit by him, which may comply with the Order (except in the matter of timeliness) was filed. At that point a mistake was made in the Registry, and it seems that all three sealed copies of the affidavit were returned to Ms McLaren. One should have gone onto the court file, and another to Mr Johns’s court box by way of service. Neither I nor Mr Johns, knew of this mistake until the existence of the affidavit came to light when the present applications were mentioned before me on 9/12/04. One could argue that, in a perfect world, Ms McLaren should have noticed that the documents returned to her after sealing were more numerous than she had any reason to expect, but it seems to me that no solicitor would be expected to scrutinise very closely her own documents returned in those circumstances. Assuming that the affidavit does in its contents comply with the requirements of the Order, and late though it may have been, it is clear to me that this is not a matter over which a claim should be struck out. I came to that conclusion without having any regard to the explanation for the affidavit’s lateness given by Ms McLaren – typically enough, from the bar table and unsupported by evidence – that the plaintiff was in Greece for a part – much of? most of? – the period between the making of the Order and his eventual (possible) compliance with it. Communications being what they are these days, it is fortunate for the plaintiff that he does not need to rely on his absence for some sort of excuse.
8. When the applications came before me on 9/12/04 it emerged that “the letter dated 18 June 2004 to the plaintiff’s solicitor” had not contained the parties’ last words on the subject. Ms McLaren had written to Mr Johns on 12 August 2004, and Mr Johns had faxed a reply on 18 August 2004. I do not

believe I have seen the text of Ms McLaren's letter, nor do I believe that it matters, since its contents can be guessed at sufficiently from Mr John's reply:

"I refer to your letter dated 12 August 2004.

I do not believe it is necessary for me to spell out what is meant by "the usual particulars" since it is abundantly obvious from the paragraphs referred to what particulars are required.

Nevertheless, for the purpose of my request, the following particulars are requested.

Para. 11 – With respect to the alleged promise, when was it made, to whom was it made, how was it made, and if orally, state the substance of words used.

Para.15(d) – How and when did the alleged failure occur, and what was the proper profit it is alleged ought to have been made.

Para. 15(e) – What profits is it alleged were not shared, and when and how did the failure to share occur.

Para. 15(f) – What contracts are referred to, when were they entered into, with which parties, and what prices are alleged to be fair and reasonable market price.

Para. 16 – What profits are referred to, and when did the alleged failure to account and alleged failure to pay occur.

Para. 18 – When did the alleged refusal occur.

Para. 19 – What losses are referred to, and how did they occur. How and by what means is it alleged the defendants 'pretended', when is it alleged the pretence occurred, and what is the substance of the pretence. When and how did the defendants or either of them fail and neglect to be true just and faithful to the plaintiff, and when and how did either defendant fail to carry on the business of the partnership to the greatest advantage.

Para. 26(a) – What are the relative strengths alleged.

Para. 26(b) – When and how did the first defendant exert any and if so what undue influence or pressures or use unfair tactics.

Para. 29(h) – State how the amount of \$75,000.00 is made up, and identify any documents upon which such amount is calculated”.

9. In order to make these requests comprehensible, it is necessary to reproduce the relevant parts of the Further Amended Statement of Claim (“FASOC”):

- “7. It was a further express term of the agreement set forth in paragraph 3 above that each of the parties should contribute their own manual labour towards the construction projects for the partnership; and that the Plaintiff would use his knowledge, expertise and services to advise the Second Defendant on a proper price to quote for the construction of any houses built for clients and the proper manner in which such constructions should be carried out, and that the Second Defendant would not substantially deviate from such advice in quoting for the construction of houses for clients or in determining the manner in which such constructions should be carried out.
8. The agreement set forth in paragraph 3 above was subsequently varied by a further express oral agreement between the Plaintiff and the Second Defendant on his own behalf and on behalf of the First Defendant made in or about February 1998 that in consideration that the Second Defendant would use his position as sole director and shareholder of the First Defendant to make the Plaintiff a 49% shareholder in the First Defendant and make him a co-director of the First Defendant the Plaintiff and the Second Defendant would be permitted to conduct the business of their partnership through and/or in the name of the First Defendant.
9. In giving the promises and making the agreements with the Plaintiff as set forth in paragraph 8 above the Second Defendant was or alternatively pretended and purported to be acting as the agent of the First Defendant. The Second Defendant further promised and represented to the Plaintiff that he had the power and ability as sole shareholder and director of the First Defendant to make the Plaintiff a 49% shareholder in the First Defendant and to make him a co-director of the First Defendant.
10. Relying upon the promises and representations of the Second Defendant as set forth in paragraph 8 above the Plaintiff agreed that the business of the partnership would be conducted through and/or in the name of the First Defendant and thereby acted to his detriment as more fully set forth herein; and the

First and Second Defendants are thereby estopped from denying the existence of the agreement and variation of the agreement as set forth above.

11. The Second Defendant further promised that he would pay from his own personal resources the wages and other expenses of workers employed by him to carry out the Second Defendant's share of his obligation to provide manual labour pursuant to the agreement herein as varied.
12. Pursuant to the premises the following building and construction work was carried out by the partnership and/or company business:
 - (a) House at 1 Australia Crescent Durack Lot 6525 Volume 583, Folio 148, Town of Palmerston, for Eustathios Skliros and Papandi Zohra Skliros;
 - (b) House at 2 Bridelia Court Rosebery heights Lot 5058 Volume 483, Folio 78, Town of Palmerston, for Leonidas Skliros and Karen Anne O'Shea;
 - (c) Seven (7) free-standing motel-type units at Sundowner Caravan Park, 790 Vanderlin Drive, Berrimah, Portion 2845 Volume 630 Folio 18 for Katapodis Nominees Pty Ltd.
13. Further pursuant to the premises the partnership and/or the company business also purchased land and constructed a dwelling house at 4 Bridelia Court Rosebury Heights Lot 5060 Volume 597 Folio 134 Town of Palmerston ("the property") paying a deposit from funds of the partnership and/or company business.
14. The Plaintiff, the First Defendant and the Second Defendant agreed that the partnership and/or company business would construct a house on the property for sale for profit, using funds of the partnership and/or company business and with the Plaintiff and the Second Defendant providing labour services in the manner aforesaid.
15. In default of his promises on his own behalf and on behalf of the First Defendant as hereinbefore set forth and in default of his obligations as a partner and/or co-director of the company business, the Second Defendant failed—

- (a) to allot to the Plaintiff any shares in the First Defendant;
- (b) to use his best endeavours to ensure that the Plaintiff became a director of the First Defendant;
- (c) to sell the property and/or to share the profits of any such sale equally with the Plaintiff;
- (d) to ensure that the partnership and/or company business equally with the Plaintiff; and
- (e) entered into contracts through the First Defendant to construct buildings for relatives or enterprises of the Second Defendant as more fully set out and described in paragraph 11 above at prices below a fair and reasonable market price and against the advice of the Plaintiff

with the result that the said constructions did not produce such profits as ought properly to have been made.

16. In further breach of the agreement as set forth above the First Defendant by its agent the Second Defendant on his own behalf failed to pay to the Plaintiff any amount in respect of mesne profits or any other profits arising out of the partnership and/or company business as aforesaid and failed further to account to the Plaintiff for the profits and losses, assets and liabilities of the partnership and/or company business.
17. In further breach on his agreement as set forth above and in breach of his obligation to act fairly and honestly in all partnership and/or company business transactions the Second Defendant gained a private advantage by retaining the property described in paragraph 12 above and by not placing it on the market when it ought to have been and/or failing to divide the proceeds which properly ought to have been made on any sale thereof equally with the Plaintiff.
18. In further breach of his agreement as set forth above and in breach of his obligations to act fairly and honestly towards the Plaintiff in all partnership and/or company business the First Defendant by its agent the Second Defendant, and the Second Defendant on his own behalf refused to allow or permit the Plaintiff to gain access to or inspect the accounts and records of the partnership and/or company business.

19. In further breach of his obligations to act fairly and honestly towards the Plaintiff in all partnership and/or company business the First Defendant by its agent the Second Defendant, and the Second Defendant on his own behalf caused the partnership and/or company business to incur a loss or alternatively pretended to the Plaintiff that such a loss had occurred; and failed to carry on the business of the partnership and/or company business to the greatest advantage of the partnership and/or the company and failed and neglected to be true, just and faithful to the Plaintiff.”

And:

- “23. The First and/or Second Defendants have neglected and refused to pay to the Plaintiff a sum equivalent to the amount by which the Plaintiff’s work as aforesaid has caused the Defendants or either of them to be unjustly enriched and/or have neglected and refused to pay to the Plaintiff a proper sum for his work on a quantum meruit basis.
24. And for a further claim in the further alternative against the First Defendant is and was at all times material to the matters set forth herein a corporation within the meaning of the (Commonwealth) Trade Practices Act (“the Act”).
25. The First Defendant, in trade or commerce, in connection with the acquisition of goods or services from the Plaintiff, engaged in conduct that was, in all the circumstances, unconscionable within the meaning of Section 51AC of the Act.

PARTICULARS OF ACQUISITION OF GOODS OR SERVICES

- (a) The First Defendant, by its agent the Second Defendant, promised the Plaintiff that in consideration that the Plaintiff would be made a shareholder and director of the First Defendant a 49% shareholder in the First Defendant and make him a co-director of the First Defendant the Plaintiff and the Second Defendant would be permitted to conduct the business of their partnership through and/or in the name of the First Defendant or alternatively that the Plaintiff would perform work for and on behalf of the First Defendant as more fully set forth in the preceding paragraphs hereof.
- (b) The Plaintiff performed for and for the benefit of the First Defendant and at the request of the First and/or

Second Defendant the work more fully set forth in the preceding Paragraphs and is thereby entitled to be paid a reasonable sum as the consideration therefore.

- (c) The First Defendant has not paid to the Plaintiff all that amount which represents a reasonable sum to be paid in exchange for the work of the Plaintiff as aforesaid and the First Defendant has thereby been unjustly enriched and the Plaintiff is entitled to be paid a proper sum for his work on a quantum meruit basis.
- (d) The First Defendant has neglected and refused to pay to the Plaintiff a sum equivalent to the amount by which the Plaintiff's work as aforesaid had caused the Defendants or either of them to be unjustly enriched and/or have neglected and refused to pay to the Plaintiff a proper sum for his work on a quantum meruit basis.

26. The said actions of the First Defendant constitute in the circumstances unconscionable conduct within the meaning of the provisions of the Act as aforesaid having regard to:

- (a) The relative strengths of the bargaining positions of the First Defendant and the Plaintiff;
- (b) The fact that the First Defendant by its agent the Second Defendant exerted undue influence or pressure on the Plaintiff or alternatively used unfair tactics against him in relation to the acquisition of possible acquisition of goods and services of the Plaintiff to the First Defendant in that by its actions as more fully set forth herein the First Defendant persuaded the Plaintiff to perform work and render services to the First Defendant and/or to the Second Defendant for no reward, or no proper reward, to the Plaintiff and/or deliberately ensured in the manner set forth herein that the Plaintiff would receive no return or share of profits in the building enterprise as more fully set forth herein."

10. Mr Johns's fax may have gone astray. Ms McLaren's protestations of ignorance of it on 9/12/04 struck me as persuasive. I then ordered her to answer it on or before close of business on Christmas Eve. On 22/12/04 she did, as follows:

- “1. Particulars to para 11 of the amended statement of claim:
 - (i) The promise was made orally by the second defendant to the plaintiff.
 - (ii) That the second defendant had a back problem which was being aggravated by performing manual labour at the building site at lot 6525 town of Palmerston.
 - (iii) That the second defendant had a law degree and the manual work was degrading and not fitting of his standing.
 - (iv) That the second defendant would employ the services of another person, who will perform his share of the building labour the expense of which was to be borne by the second defendant personally.
 - (v) That the second defendant would continue to perform the services described in paragraph 3 (a-h) under the heading “services” to be performed by the second defendant of the amended statement of claim.
2. The plaintiff says that the allegations set out in paragraphs 15 (d) and (e) of the amended statement of claim took place throughout the partnership.
3. The plaintiff says that paragraph 15 (f) is sufficiently particularized and that the acts and omissions complained against the second defendant are within his knowledge as the second defendant entered into building contracts through out the duration of the partnership.
4. The plaintiff says that paragraph 16 of the amended statement of claim is sufficiently particularized. The alleged breach occurred during the partnership and is still continuing.
5. The plaintiff says that the alleged refusal set out in paragraphs 18 occurred after the partnership was terminated.
6. The request relating to paragraph 19 is too broad and is not as framed a request for particulars.
7. With respect to paragraph 26 (a) and (b) the plaintiff says that this is not a request for particulars.

8. The details of the claim in paragraph 29 (h) is as follows:
 - a. The plaintiff has worked for 70 weeks on the aforesaid building projects.
 - b. The wages that the plaintiff was commercially entitled to receive is \$1500.00 per week.
 - c. Wages payable by the defendants for 70 weeks to the plaintiff at the rate of \$1500.00 per week = \$105,000.00.
 - d. Wages paid by the defendants to the plaintiff during the said period = \$24,081.00.
 - e. \$105,000.00 minus \$24,081.00 = \$80,919.00.

The plaintiff puts the defendants on notice that \$80,919.00 is the correct figure and that he will amend the claim to reflect this.”

11. In the argument before me on 18 February 2005, Mr Dearn, Counsel for the defendants, who was persisting with the application after receiving Ms McLaren’s Further and Better Particulars, (“the Response”) was particularly exercised by the Response’s inadequacy in answer to the Request so far as it pertained to paragraphs 15 and 19 of the FASOC.
12. Thus in relation to the Request concerning paragraphs 15 (d) and 15 (c), the Response touches on the “when and how” half of the Request, but does not respond at all in respect of the questions asking, What profits ought to have been made? And, What profits were not shared? As to the latter question, given that the plaintiff is seeking an accounting and professes to have had no access to the books of the business when it was operating, and effectively no documents in his possession, all the evidence that the plaintiff admits to knowing of goes to establish that there were no profits, and that there was a loss (whether the plaintiff and Ms McLaren understand this is another matter). As to the former question, that would appear to me to be a matter that could properly be particularised. Just as pertinently, it appears to be a

matter which would necessarily entail expert evidence for its proof. I shall be returning to the subject of expert evidence.

13. In relation to the Request concerning paragraph 15 (f) of the FASOC, the Response seems at first glance to be particularly cheeky – it could be paraphrased as “You know what you did” - which is not exactly what one is looking for in answer to a request for further and better particulars. However, it may equally well be read not as insolent but as helpless – “I don’t know” – similarly not the sort of answer one is looking for, but also not the sort of answer, if true, that should cause distress to the defendants. I note that, again this paragraph (3) of the response simply does not advert to part of the question on the Request, namely, “what prices are alleged to be fair and reasonable market prices”. Again, this is an item that could be particularised, and proof of it would seem to entail the use of expert evidence.
14. The Request did not ask, in relation to paragraph 15 (f) of the FASOC any particulars of what might be an allegation of fraud against the second defendant “.....construct buildings for relatives or enterprises of the Second Defendant.....at prices below a fair and reasonable market price and against the advice of the Plaintiff.....” The Request did ask for particulars in relation to paragraph 19 of the FASCO where the implication of fraud is stronger, “.....caused the partnershipto incur a less or alternatively pretended to the Plaintiff that such a loss had occurred....and failed and neglected to be true just and faithful to the Plaintiff.” (My emphasis.)
15. The Response is that “The request to paragraph 19 is too broad and is not formed as a request for particulars”. Mr Dearn addressed to the effect that this response was entirely unsatisfactory, all of a piece with what he described as an ongoing history of the Plaintiff’s non-compliance with his procedural obligations during the long history of the matter. I generally agree. I shall disassemble the questions asked in the Request.

(i) What losses are referred to?...

The defendants have produced evidence – notably the affidavit of Mr Cleanthous – tending to show that there were losses.

The defendants are entitled to know and the plaintiff is obliged to tell them whether the FASOC is talking about those losses, or losses calculated on some other basis.

(ii)and how did they occur?

This question is in my view too broad.

(iii) How and by what means is it alleged that the defendants ‘pretended’?.

(iv)when is it alleged that pretence occurred.....?

(v)and what is the substance of the pretence.....?

These questions should be answered.

(vi) When and how did the defendants or either of them fail and neglect to be true and just and faithful to the plaintiff....?

(vii)and when and how did either defendant fail to carry on the business of the partnership to the greatest advantage?

16. In my opinion these questions are too broad. (In fact, they appear to me to be not so much a request for particulars, as an enquiry as to the nature of the cause of action being pleaded: the answer to that enquiry is not evident to me.)
17. Taken together the failures of the plaintiff fully to answer the Request do not seem blameworthy enough to justify the extreme course of striking out the claim. In respect of the particulars individuated above as (i), (iii), (iv)

and (v) in paragraph 15 of these Reasons, I order that the plaintiff supply those particulars within 28 days of today.

18. Coming to the defendants' complaints about the Response to the Request concerning paragraph 15 of the FASOC, I conclude that:
 - (a) There being, so far as I can see, no evidence at all to give any reason to suspect that "profits" in this partnership are anything but a delusion, it would appear that any pleading premised upon the reality of the "profits" is hopeless. Be that as it may, I do not believe that the defendants need any more particular knowledge of these "profits" than they already have.
 - (b) In relation to the items I mentioned above as appearing to require expert evidence for their proof - ..."the proper profits it ought to have [made]" in paragraph 15 (d) of the FASOC; ..."prices below a fair and reasonable market price..." in paragraph 15 (f) – to which I add the quantum meruit claim, paragraph 29 (h) – I am uninformed as to whether the plaintiff has ever served statements of expert witnesses as the defendants in compliance with Rule 24. I suspect not, because if that had been done, some of the items in the Request would be otiose.
19. On 12 July 2002 the hearing date then pending, 17 July 2002, was vacated. The claim was then comprised in the Amended Statement of Claim ("ASOC"). The ASOC was different enough from the FASOC that, as far as I can see, none of the matters for expert evidence that I have listed above would apply to ASOC.
20. The next date fixed for hearing was, as far as I can see, 5 days starting on 8 August 2004. That listing was vacated on 19 May 2004, more than 28 days before the date fixed to commence the hearing. So Rule 24.01's time line was not crossed on that occasion. The original claim was filed in May 2001.

The FASOC was filed in May 2003. After nearly two years the plaintiff's case ought to be tolerably assembled. It seems to me that the defendants' complaints in relation to particulars, be they genuine or affected, should be in many respects answered if the defendants could be shown the statements of experts that the plaintiff has had good reason to have put into preparation for last August's hearing and which should have been to hand for months.

21. It seems to me, therefore, that pursuant to the Court's power created by s 12 of the Act, I should give a direction to the plaintiff, thinking it conducive to the effective, complete, prompt and economical determination of the matter, to serve on the defendants solicitors within 28 days copies of the statements of the evidence of all expert witnesses from whom the plaintiff intends to adduce evidence at the trial of this matter. I so direct.
22. I formally dismiss the defendants' application of 14 July 2004 to strike out the plaintiff's claim. Costs of that application should be costs in the cause.

Dated this 18th day of March 2005.

R J WALLACE
STIPENDIARY MAGISTRATE