CITATION: *Karlovsky v QBuilt Constructions & Day & Day* [2006] NTMC 070

PARTIES:	MERVYN KARLOVSKY v QBUILT CONSTRUCTIONS AND GEORGE DAY AND JENNIFER DAY
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20518719
DELIVERED ON:	16th August 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	9th August 2006
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Practice and Procedure – Pleadings – purpose of pleadings– particulars – nexus between breach and damage

John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd and anor[1996]13 BCL 262

Opat Decorating Service (Vic) Pty Ltd v Jennings Group Ltd and anor[1994] unreported judgement of Justice Byrne 16th September 2004

British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd[1994] BLR 26

REPRESENTATION:

Counsel:

Plaintiff:	No Appearance
1st Defendant:	Mr Cureton
2nd and 3rd Defendant:	Mr Morris

Solicitors:

Plaintiff:	Paul Maher
1st Defendant:	Minter Ellison
2nd Defendant:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2006] NTMC 070
Number of paragraphs:	35

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

No. 20518719

BETWEEN:

MERVYN KARLOVSKY
Plaintiff

AND:

Q BUILT CONSTRUCTIONS
1st Defendant

GEORGE RONALD DAY
2nd Defendant

JENNIFER MARGARET DAY
3rd Defendant

REASONS FOR JUDGMENT

(Delivered 16th August 2006)

Judicial Registrar Fong Lim:

1. The First Defendant has applied to the court for an order that parts of the Second and Third Defendant's defence to its contribution notice be struck out on the basis that they are vague, uncertain and embarrassing. The Plaintiff was not involved in the application and did not appear.

2. The First Defendant handed up written submissions which contained a brief history of the dealings between the parties and for the sake of clarity I repeat that history here.

3. The second and third defendants were the owners of the land which now has the Berrimah Retail Centre located upon it.

4. The second and third defendants contacted with the first defendant to construct the premises that now comprise the Berrimah Retail Centre.

5. The Plaintiff was a subcontractor of the first defendant engaged to provide pluming and fire services installations in the construction of the Berrimah Retail Centre.

6. The plaintiff has not been paid for some work executed to bring the fire services into conformity with the requirements of the Northern Territory Fire Services; and has claimed payment against the first defendant for that work, required to enable the premises to achieve certification and the issue of an occupancy certificate under the Building Act. The plaintiff registered a workmen's lien in respect of the claimed sum, and joined the second and third defendants in its enforcement proceeding before this honourable Court.

7. The first defendant has sought contribution from the second and third defendants for the plaintiff's work as a variation under the head contract, and to recover money outstanding to it under the head contract.

8. The second and third defendants have cross claimed in the contribution proceedings for the damages against the first defendant for delays in the completion of the project and the defective work. It is that cross claim that is the subject of this application.

9. The first defendant claims that paragraphs (a), 6, 7 and 11 of the second and third defendant's cross claim be struck out. There has been a request for particulars from the first the defendant to the second and third defendants which has been responded to but not to the first defendant's satisfaction.

10. The first defendant submits that the second and third defendant's cross claim is a global claim which must be particularised properly to enable the first defendant to know what claim it is meeting.

11. The clauses referred to in the application read as follows:

"(a) Damages suffered by the second defendant as a result of errors and delays by the first defendant in carry out and finalising constructions works pursuant to a Contract between the parties dated June 2004…….

6. Performance of the construction works by the first defendant pursuant to the Contract was delayed substantially from time to time. Inter alia, there were issues with the installation of the electrical and mechanical works on site.

7. As a result of the delay by the first defendant in the performance of its works pursuant to the Contract, the second and third defendant have suffered loss and damage.
……

11.As a result of the loss and damage suffered by the second and third defendants as referred to above, the second and third defendants have overpaid the first defendant with respect to the first defendant's entitlement to be paid the contract price pursuant to the Contract.

Particulars

Original contract value	$2949000.00
Plus Approved variations	
Q Built Inv NT172	$2261.28
Q Built Inv NT200	$30685.37
Q Built Inv NT203	$35881.37
Variation as per letter 12th June 2005	($279229.76)
Revised Contract Value	$2738597.89
Retention withheld	$73749.74
Payment Entitlement to date	$2662848.15
Less paid to Date	$2931014.57
Amount of Overpayment	$266166.42"

12. The first defendant formally requested further particulars of the counterclaim to which the second and third defendant replied by referring the first defendant to correspondence previously passed between the parties and to clause 18 of the Head contract.

13. The first defendant is not satisfied with the particulars provided because it submits that the reference to correspondence does not rectify the deficiencies in the pleading.

14. The second and third defendant submit that the correspondence referred to makes their claim quite clear as does the reference to clause 18 of the head

contract. It is the second and third defendant's submission that the purpose of pleadings is to ensure that the parties know what claims they are answering and through the correspondence referred to in the particulars the first defendant is well aware of the basis of the second and third defendant's claim.

15. The first defendant submits that the letters referred to are not precise enough to be properly included in pleadings as the wording of the letters themselves refer to "estimates" and "until costs can be ascertained" nor does that correspondence give enough detail to plead a causal nexus between the damages claimed and the possible breaches of the first defendant.

16. The first defendant argues that it is entitled to know with certainty what delays were caused by the first defendant and what part of the damages claimed relate to which delays. The first defendant argues it is also entitled to know how those damages relate to the first defendant's default. The first defendant argues it is entitled to know what is the causal link between the breach claimed and the damages claimed.

17. The first defendant referred the court to the authorities of *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd and anor[1996]13 BCL 262* and *Opat Decorating Service (Vic) Pty Ltd v Jennings Group Ltd and anor[1994] unreported judgement of Justice Byrne 16th September 2004* to support the proposition that should a party plead a global claim for damages the court should be careful to ensure that the pleading has shown a causal nexus between the breach and the damages claimed.

18. In *John Hollands case (supra* his honour Justice Byrne was at pains to point out that the pleading of a global claim should be examined carefully by the court with suspicion but that did not mean the claim is necessarily bad. At page 270 of his honour's decision he states:

> "In my opinion the Court should approach a total cost claim with a great deal of caution, even distrust. I would not, however elevate this suspicion to the level of concluding that such a claim should be treated as a prima facie bad."

19. His honour then goes on to say:

> "Nevertheless the point of logical weakness inherent in such claims, the causal nexus between the wrongful acts or omissions f the defendant and the loss of the plaintiff must bee addressed. I put to one side the straightforward case where each aspect of the nexus is apparent from the nature of the breach and loss as alleged. In such a case the objectives of the pleading may be achieved by a short statement of the facts giving rise to the causal nexus. If it is necessary for the given case for this to be supported by particulars, this should be done. But, in other cases, each aspect of the nexus must be fully set out in the pleading unless its probable existence is demonstrated by evidence or argument and further, it is demonstrated that it is impossible or impractical for it to be spelt out further in the pleading."

20. The second and third defendants argued that the counterclaim is a simple claim and that is that the first defendant's delays have caused the second and third defendants to suffer loss in the form of lost rental from tenants, and further the first defendant's defective workmanship has also caused damage of extra costs as set out in correspondence between the parties.

21. The second and third defendant also referred to the authority of *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd[1994] BLR 26* in which Saville J criticized the modern practice of requesting particulars at page 34 his honour says:

> "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party to properly prepare to answer it. To my mind it seems that in recent years there has been tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other side and is able properly to deal

> with it. Pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing. Each case must of course be looked at in light of its own subject matter and circumstances."

22. While I could not agree more with his honour's sentiments in disputes such as the present matter, a building dispute, out of necessity the pleadings must provide enough detail to allow the parties to properly prepare and that includes the collection of documents for discovery relating to any claim for default and delay. At the very least periods of delay should be identified and the damages claimed linked to those periods. Without that particularity in the pleadings in these matters the hearing of the matter it more than likely going to become a confused battle of reference to documentation and unnecessary lengthy evidence regarding dates and figures because it is not clear exactly how damages are linked to the default.

23. In my view the fact that the second and third defendant's had to adduce evidence to answer the application is a telling sign that the pleadings needed further explanation. Even the correspondence produced and referred to in the further and better particulars by the second and third defendant do not disclose all of the material facts to support the cause of action. I accept that the pleadings show that there is an arguable cause of action for damages however I also accept as pleaded it is not possible for the first defendant to properly answer the claims regarding delays and damages arising from those delays nor is it possible for the first defendant to answer a claim for damages arising from the defects claimed because the second and third defendant have not apportioned any value to those defects.

24. The second and third defendant plead that some of the causes of delay were "inter alia" "issues with the installation of the electrical and mechanical works" that wording indicates that there may have been other reasons for delays which have not been pleaded.

25. The reference to the letters of the 10th May 2005 and the 12th of June 2005 is not sufficient to connect any delay pleaded (details which are sketchy) to the loss of rental or the cost of the work set out in the letter of the 12th of June 2005.

26. The second and third defendants argued that the claim for damages for delay is pursuant to clause 18 of the contract, that is the claim is one for liquidated damages under that clause. That clause reads:

> "In the event that the Works do not reach practical completion (as defined by Clause 16) within the time required by Clause 5, as adjusted under Clause 6, the builder will pay or allow the Owner by way of liquidated and ascertained damages the amount set out in schedule 2(c) for the period that passes from the time when practical completion under the contract should have been reached until the Works are brought to practical completion."

27. Schedule 2(c) of the contract sets the liquidated damages at "$6800 per week (unless otherwise stated)".

28. The second and third defendants have not pleaded material facts such as when the date of practical completion had been agreed at (with any agreed adjustments), nor have they pleaded the amount of liquidated damages as provided for by Schedule 2(c) or why that amount is not applicable. They have not pleaded the material facts which establish their obligation to their "tenants" to provide occupation at a certain date and therefore linking the alleged delays caused by the first defendant to the damages they have claimed.

29. The first defendant counsel submitted that on his reading of the pleadings he thought that the counterclaim for the damages was outside of a claim pursuant to clause 18 and I can see why he may have come to that conclusion. The pleadings (and particulars) as they stand are not clear. For example it is not for the first defendant to guess when the second and third

defendants' obligations to various tenants were created in relation to the promised completion date.

30. In relation to the claim for "damages" for defects and the retention of the retention fund the second and third defendant have not pleaded that they are relying on clause 19 of the contract nor have they pleaded that in breach of that clause that they are now seeking to recover the cost of making good such items.

31. In building disputes it is very important for the efficiency of the litigation and for the clarity of issues before the court that the pleadings set out with sufficient particularity the basis for their claim and how they have calculated their figures.

32. I reiterate that it is my view that the second and third defendants' pleadings and particulars of those pleadings do indicate that there is an arguable cause of action against the first plaintiff. However I am of the further view that the first defendant is entitled to know exactly what case it is facing whether it be a claim under clause 18 of the contract or a claim for damages outside that clause, how those damages are incurred and the how the value has been calculated with respect to the claim for lost rent and the claim for defects.

33. In light of the above it is my view that it is appropriate at this point in time to strike out clauses (a) 6, 7, and 11 of the counterclaim and to give the second and third defendants the opportunity to replead.

34. I also note that the second and third defendant's counterclaim is well beyond the jurisdiction of this court and that they will have to make a decision whether they want to forgo any amount over the jurisdiction or make an application to transfer the matter to the Supreme Court.

35. Accordingly my orders are as follows:

35.1 Clauses (a) 6, 7 and 11 of the second and third defendants' counterclaim are struck out.

35.2 The second and third defendant have leave to file and serve an amended counterclaim within 14 days

35.3 The first defendant to file and serve defence to amended counterclaim within 14 days of service of the amended counterclaim.

35.4 Costs of this application are reserved.

35.5 The second and third defendants to notify the first defendant and the plaintiff of its intention to forgo any claim over the jurisdiction of this court or the file and serve any application to transfer the matter to the Supreme court within 14 days.

Dated this 16th day of August 2006

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Tanya Fong Lim
JUDICIAL REGISTRAR