

CITATION: *Karlovsy v Q-Built Constructions* [2006] NTMC 093

PARTIES: MERVYN KARLOVSKY
v
Q- BUILT CONSTRUCTIONS

TITLE OF COURT: Local Court
JURISDICTION: Local Court
FILE NO(s): 20518719
DELIVERED ON: 4th December 2006
DELIVERED AT: Darwin
HEARING DATE(s): 27th November 2006
JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Practice and Procedure – Strike out pleading – abuse of process- Rule 28.02 Local Court Rules
Remmington v Scoles [1987] CA 1

REPRESENTATION:

Counsel:

Plaintiff: Mr Maher
1st Defendant: Ms Kelly
2nd & 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 093
Number of paragraphs: 23

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

No. 20518719

BETWEEN:

Mervyn Karlovsky
Plaintiff

AND:

Q Built Constructions Pty Ltd
1st Defendant

George Day and Jennifer Margaret Day
2nd Defendant & 3rd Defendant

REASONS FOR JUDGMENT

(Delivered 4th December 2006)

Judicial Registrar Fong Lim:

1. The Plaintiff made application for summary judgement against the first defendant and application to strike out pleadings pursuant to Rules 28.01 and 28.02 of the Local Court Rules. The first defendant made a cross application for summary judgement against the 2nd and 3rd Defendant however at the commencement of the hearing of these applications the parties advised that the Plaintiff's application for summary judgement pursuant to rule 28.01 and the First Defendant's application were to be adjourned without a future date pending the court's decision on the application to strike out paragraphs 5,6 & 7 of the Plaintiff's application. The representative of the 2nd & 3rd Defendant was then excused with costs reserved.
2. The Plaintiff made application in the following terms pursuant to Rule 28.02 of the Local Court Rules:

“Subparagraph 4.4, the first two sentences of paragraph 9, paragraph 10 and paragraph 13 of the first defendant’s defence, and the whole of the first defendant’s counterclaim be struck out.

The first Defendant have leave to file and serve an amended defence within 14 days,

The first Defendant or alternatively the defendants pay the Plaintiff’s costs of this application”

3. The paragraphs in the Defence subject of the application read as follows:

“4.4 The Plaintiff engaged a design consultant, Hydrotech Pipeline Design, to assist it to undertake the supply of subcontract works compliant with the relevant Australian Standards and requirements of the statutory authorities and thereby fit for their purpose of incorporation into the works of the defendant under the Head Contract and permitting an Occupancy Permit for the works under the Head Contract to issue;

.....

9. The first defendant denies the allegations contained in the first sentence of paragraph 9 of the Particulars of claim.....

10. The first defendant admits the receipt of the tax invoice described in paragraph 10 of the Particulars of claim but denies the plaintiff was entitled to be paid the invoice sum or any amount at all under the subcontract or at law in respect of the plaintiff’s work required to bring the subcontract and additional works into compliance with the requirements of NT fire service.

.....

13. The first defendant denies that it is indebted to the plaintiff or that the plaintiff is entitled to the relief sought against it, or to any relief at all. Alternatively the first defendant repeats the matters pleaded in its counterclaim as a set off to any debt as may otherwise have accrued due to the plaintiff under the Subcontract or at law”

4. The counterclaim is based on the premise that the plaintiff engaged the design consultant and damages arose out of the faulty design.
5. A brief outline of the facts are that the Plaintiff was the plumbing subcontractor for the development of a shopping precinct by the first defendant on land owned by the second and third defendants. There was a problem with the original design of the fire prevention services to the

development which required the Plaintiff to do extra work to bring those services up to the required standard. The crux of all of the issues between the parties is who was responsible for the design and who contracted with Hydrotech Pipeline design to draw the plans. The Plaintiff states that it was either the first defendant or the second and third defendant who engaged the services of Mr Petrie (the principal of Hydrotech Pipeline Design). The first defendant claims in its Defence that it was the Plaintiff who contracted with Hydrotech and in its contribution notice to the second and third defendant it claims it was they who contracted with Hydrotech. The second and third defendant claim that it was the Plaintiff's responsibility to provide design and install the service.

6. The Plaintiff's submission is that the First Defendant's defence as pleaded in paragraphs 4.4., 9, 10 and 13 and the counterclaim should be struck out on the basis that they are an abuse of process. The Plaintiff claims that those paragraphs represent an abuse of process because the first defendant doesn't really believe the allegations contained in those paragraphs. The Plaintiff further submits that if those paragraphs in the defence fail then the flow on is that the counterclaim must also be struck out because it is pleaded on the premise that the Plaintiff was responsible for the design of the fire service.
7. Williams on Civil Procedure at paragraph I 23.01.5 sets the basis of Rule 23 of the Supreme Court Rules , which is in the same terms as Rule 28.02:

“an application under [r 23.02](#) it is assumed that the adversary does have an arguable claim or defence. The objection is to the manner of expression of the claim or defence in the indorsement of claim or pleading: the indorsement or pleading does not disclose the cause of action or defence or its contents are such that it is scandalous, frivolous or vexatious, or may prejudice, embarrass or delay the fair trial of the proceeding, or is otherwise an abuse of process. The party objecting does not ask that the proceeding be brought to an end; the party seeks an order that the offending indorsement be struck out or amended, and that the party pleading present the claim or defence in the proper way”

8. When considering an application pursuant to Rule 28.02 the court should not consider any evidence as the purpose of that rule is to consider the pleadings

on their face. However when considering whether the pleadings constitute an abuse of process evidence surrounding that pleading must be provided to the court to allow it to make an informed decision. The Plaintiff tendered the affidavit of Paul Maher of the 25th of October 2006 and the affidavit of Brian Petrie of the 24th November 2006 in support of his application. The First Defendant chose not to tender any evidence. It should be noted at this point that the director of the First Defendant who was involved in this project has since died and the remaining director has no personal knowledge of the arrangements regarding the installation of the fire services to the development.

9. It is the First Defendant's contention that it is perfectly proper for the First Defendant to make a positive allegation against the Plaintiff and then to make a totally contradictory allegation against the 2nd & 3rd Defendant in its contribution notice that is the nature of the proceedings. The First Defendant argues that the pleadings reflect the position the First Defendant is in knowing that it was not responsible for design of the fire services pursuant to the Head contract but also knowing that if it makes the positive allegation against the 2nd and 3rd Defendant in the defence it will have no real defence to the Plaintiff's action because the 2nd and 3rd Defendant had a contractual relationship with the First Defendant not the Plaintiff.
10. Mr Maher's submission is that even though the First Defendant may have believed that the Plaintiff may have been responsible for the design when it first pleaded the defence it cannot possibly believe that to be the case now since Mr Petrie's documents have been discovered and his affidavit produced. Mr Maher further submits that the First Defendant's solicitors letter of the 27th of September 2006 to the solicitors for the Second and Third Defendant confirms the view that the First Defendant does not believe that the Plaintiff was in anyway responsible for the design work.

11. The letter is annexure PGM3 to Mr Maher's affidavit and the relevant paragraph reads as follows:

“ On the evidence provided by Hydrotech Pipeline Designs together with the terms of the Articles of Agreement, the email from Q Built Construction to Ron Day dated the 27 October 2004 (a copy attached) it is clear that your client retained the design obligation for the Berrimah Retail Centre.”

12. The submission by the Plaintiff is that it is clear from that paragraph that the First Defendant no longer believes that the Plaintiff was responsible for the design work and that the First Defendant holds the Second and Third Defendant responsible.
13. The Plaintiff claims that the First Defendant has made an admission by sending that letter and that admission is contrary to his pleading therefore the pleading should be struck out. The Plaintiff relied on the reasoning of the Court of Appeal in the case of Remington v Scoles [1897] CA 1 in that matter the Defendant had made an admission in another matter and then in the present case simply did not admit those facts. The court made two findings, the Plaintiff could bring evidence to show abuse of process but not to show the truth or untruth of statements made and that the Defendant in that case had no real defence having admitted certain things in another proceeding and his defence should be struck out as an abuse of process.
14. The First Defendant argues that the present case is clearly distinguishable from the facts in Remington v Scoles, the letter is not an admission of fact it is letter stating an interpretation of the evidence to put their case in the strongest possible terms to the Second and Third Defendant which a solicitor is of course bound to do on behalf of their client. I accept that the letter cannot be categorised as an admission of fact however it can certainly be evidence of the view of the evidence of the solicitor for the First Defendant.

15. The First Defendant argues that it cannot be held to what is in that letter because it is not an admission of fact. I accept that the court should be very cautious in regarding correspondence between solicitors for adversaries as admissions of fact. I also accept that adversaries are allowed to put a slant on evidence to put their client in the best possible view nevertheless the fact that the letter was sent in those terms, and it was an open letter to all parties is an indication of the First Defendant's thinking at the time.
16. The Plaintiff further relies on the affidavit of Mr Petrie and the fact that they affidavit was filed by the First Defendant. The Plaintiff argues that by adopting Mr Petrie as their witness the First Defendant has adopted Mr Petrie's assertions made in his affidavit, in particular the statement by Mr Petrie in paragraph 10 of his affidavit as follows:

“ I was not instructed by Mr Karlovsky, Top End Plumbing, Mr Rex Theodore or Q Built Construction Pty Ltd or anyone on behalf of these persons or companies to perform this design work for the Berrimah Retail Centre.”
17. Mr Petrie does not specifically say who he believes he did the work for but by implication his evidence suggests he received his instructions from Ron Day, the Second Defendant.
18. The Plaintiff was at pains to ensure that they were not tendering Mr Petrie's affidavit for the purpose of proving the truth of Mr Petrie's allegations but for the purpose of proving that with Mr Petrie's affidavit in hand the First Defendant could not possibly believe that the Plaintiff was responsible for the design of the fire service.
19. The First Defendant attempted to counter the Plaintiff's argument by pointing out that there was in existence (filed on the court file by the Second and Third Defendant) an affidavit of the third defendant making an allegation that the design work lay with the Plaintiff however as that affidavit was not tendered in the hearing of this application I cannot take

notice of anything that is alleged in that affidavit. The First Defendant argued that I should take notice that certain statements were made by the Second Defendant which refute what Mr Petrie without taking the affidavit into evidence however I cannot accept that submission. If I did take notice of the contents of a document without that document going into evidence I would be going outside of my function as a judicial officer I can only consider the evidence produced to the court or take notice of matters which are indisputable in the public knowledge. I can take notice that an affidavit was filed of Mr Day however I cannot take notice of the content of that affidavit.

20. Given the evidence before the court it is my view that at the time of the original pleading the First Defendant was of the view that either the Plaintiff or the Second or Third Defendant was responsible for the design work and therefore was entitled to plead the fault in the alternative. However as the evidence has been developed it is clear that the First Defendant is now of the view that the Plaintiff was not responsible for the design of the fire services.
21. It is important to note that the Plaintiff has not pressed his claim for summary judgment and suggests that the court allow the First Defendant the opportunity to replead should the court strike out those paragraphs and its counterclaim.
22. In light of the above it is my view that for the First Defendant to continue to maintain its defence in its present terms would be an abuse of process on the basis that the evidence shows the First Defendant does not really believe the Plaintiff was responsible for the design work and therefore should not be allowed.
23. My orders are:

23.1 Subparagraph 4.4, the first two sentences of paragraph 9, paragraph 10 and paragraph 13 of the first defendant’s defence, and the whole of the first defendant’s counterclaim be struck out.

23.2 The first Defendant have leave to file and serve an amended defence within 14 days

23.3 Costs of this application are reserved.

Dated this day of

Tanya Fong Lim
JUDICIAL REGISTRAR