

CITATION: *McT Design & Construction Pty Ltd v Arirki Aboriginal Corporation* [2025] NTLC 5

PARTIES: *McT Design & Construction Pty Ltd*

V

Arirki Aboriginal Corporation

TITLE OF COURT: LOCAL COURT

JURISDICTION: CIVIL

FILE NO(s): 2023-03019-LC

DELIVERED ON: 20 January 2025

DELIVERED AT: Darwin

HEARING DATE(s): 12 and 18 December 2024

DECISION OF: Judge Greg Macdonald

CATCHWORDS:

CIVIL PROCEDURE - Applications - Leave to amend pleadings – Jurisdiction – Local Court – Transfer to Supreme Court

Local Court Act 2015 s 13

Local Court (Civil Procedure) Act 1989 ss 15, 18

Local Court (Civil Jurisdiction) Rules 1998 rr 1.11, 3.08, 5.11, 5.15, 7.04(2)

Aon Risk Services Limited v Australian National University [2009] HCA 27

Collins v Deflaw Pty Ltd [2000] NTSC 64

Commonwealth v Verwayen (1990) 170 CLR 394

Goldsmith Pty Ltd v GPT Re Ltd & Ors [2020] NTSC 64

Re Monger Ex Parte Cross [2004] WASCA 176

Walton Stores v Maher [1988] HCA 7

REPRESENTATION:

Counsel:

Plaintiff/Respondent: Mr B Piper

Defendant/Applicant: Mr D Alderman

Solicitors:

Plaintiff/Respondent: Piper Grimster Jones
Lawyers

Defendant/Applicant: Cozens Johansen
Lawyers

Decision category classification:	B
Decision ID number:	5
Number of paragraphs:	22

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

No. 2023-03019-LC

BETWEEN:

McT Design & Construction Pty Ltd

Plaintiff/Respondent

AND:

Arirrki Aboriginal Corporation

Defendant/Applicant

REASONS FOR DECISION

(Delivered 13 January 2025)

JUDGE Macdonald

1. On 13 January 2025 brief *extempore* reasons were given for granting an application to amend a counterclaim filed in this proceeding, and transfer the proceeding to the Supreme Court. These are the written reasons.
2. On 24 August 2023 McT Design & Construction Pty Ltd (the Respondent) commenced proceedings against the Arirrki Aboriginal Corporation (the Applicant) by way of statement of claim (Claim) filed in the Local Court. The Claim followed the Respondent carrying out upgrade works for the Applicant to a dock on the Adelaide River used by it in the conduct of its jumping crocodile tours (Upgrade Works). The Claim sought damages for breach of contract in the sum of \$70,375. In the alternative, the Respondent sought compensation by way of *quantum meruit*.
3. On 26 September 2023 the Applicant filed a notice of defence and counterclaim (Counterclaim). The Counterclaim denied liability for the Claim and alleged loss and damage suffered by the Applicant in the total sum of \$559,594.87.¹ That amount was made up of \$199,594.87 which had been expended following the Upgrade Works in “*stabilisation works of the riverbank*”, and a further \$200,000 in anticipated future stabilisation works, plus a further \$160,000 in order to purchase the Crown land on which the dock Upgrade Works were situated.²

¹ Pled in terms of breach of contract and breach of duty of care (negligence).

² It appears the allegation is that the upgrade works were incorrectly effected on Crown land. Paragraph [10] of the Counterclaim, noting that item subsequently claimed by paragraph [17c.] of the second counterclaim filed 24 June 2024 has reduced to \$30,000, such that it might be concluded that the true Counterclaim was \$429,594.87.

4. The Claim and Counterclaim (the Proceeding) then progressed through various directions hearings at which orders were made. Firstly, for a conciliation conference on 29 November 2023 at which time the Proceeding did not resolve, then programming directions for the filing of expert evidence by the end of April 2024 and a prehearing conference in May 2024. That conference ultimately occurred on 21 June 2024 with directions that the Applicant had leave to file and serve an Amended Counterclaim forthwith, and the Respondent to file and serve an Amended Defence to Counterclaim within 14 days thereafter. Significantly, a direction was also made that *“Any Application to transfer the matter to the Supreme Court, if any, is to be made before 23 July 2024”*. In the absence of such Application, case management statements were to be filed and served by the parties prior to a further prehearing conference listed for 29 July 2024.
5. Three days later, on 24 June 2024, the Applicant filed and served an amended notice of counterclaim (Amended Counterclaim). However, no Application was then made to transfer the Proceeding to the Supreme Court. Neither party appeared at the prehearing conference on 29 July 2024, such that it was adjourned to 26 August 2024. Case management statements were filed by the parties several days prior to that prehearing conference.³ On 26 August 2024 the court ordered that *“By consent, the matter is listed for a first listed hearing for 4 days in the NT Local Court in Darwin commencing on 24 February 2025”*.
6. The Amended Counterclaim filed 24 June 2024 sought \$205,617 in respect of *“repairs and rejuvenation of”* the riverbank on which the Upgrade Works had been effected, together with \$105,152 for the *“construction of the cantilevered dock and gangway”* (and \$16,962 for the relevant engineering design, which amount was pleaded but not included in the total enumerated in paragraph [17] of the Amended Counterclaim), plus \$30,000 to purchase the Crown land referred to. That was a total counterclaim of \$357,731.⁴
7. In contrast to the Counterclaim of 26 September 2023, the Amended Counterclaim inexplicably made no claim for any anticipated future expenditure for either *“stabilisation works of the riverbank”* or *“repairs and rejuvenation of the bank”*, which descriptions I take to be largely synonymous.⁵ Nonetheless, on 9 December 2024 the Applicant made application for leave to

³ Those statements generally proposed that the matter was fit for listing for hearing, with the only direction sought by either party being that the *“Defendant to complete discovery within 7 days”*. Although generally explicable by the clear intent apparent from the court’s direction of 21 June 2024 that *“Any Application to transfer the matter to the Supreme Court, if any, is to be made before 23 July 2024”*, there was no reference or request by either party to any further steps which might be taken. For example, by the written consent of the parties to dealing with all issues and quantum alleged in the proceeding, or that the court amend the Counterclaim to bring it within the jurisdiction of the court, or that the relief claimed by the Counterclaim in excess of the court’s jurisdiction be expressly abandoned by the Defendant, or that the claim be amended or struck out. Paragraphs [16] to [21] below refer. See also *Goldsmith Pty Ltd v GPT Re Ltd & Ors* [2020] NTSC 64 at [29] to [31].

⁴ Rather than the \$340,769 enumerated in paragraph [17].

⁵ Given the inclusion of the \$200,000 claim for *“stabilisation works on the other side of the dock in the future”* by paragraph [7](iii) of the Counterclaim filed 26 September 2023 and the Application made 9 December 2024, it may be the absence in the Amended Counterclaim of any claim for future remediation works was an oversight.

amend the “*repairs and rejuvenation*” component of the Amended Counterclaim to \$411,218, and to transfer the proceeding to the Supreme Court.⁶

8. That Application was first returned on 12 December 2024, supported by Affidavits of the Applicant’s solicitor sworn 9 December 2024 and the Applicant’s CEO sworn 11 December 2024, with some submissions being made by the parties on that date. Due to the legal issues involved, the Application was adjourned for the parties to further consider and submit on Superior Court authority relevant to the exercise of the court’s discretion, with the next listing ultimately being 18 December 2024. The Respondent then provided evidence in the form of an Affidavit of its solicitor sworn 18 December 2024, together with written submissions in supplementation of those made 12 December 2024.⁷
9. The basis for the Application for both leave to amend the Amended Counterclaim and to transfer the proceeding to the Supreme Court was, from the Applicant’s solicitor, that “*Recently I received instructions that the defendant has or is about to incur further expenses in relation to the repair and rejuvenation of the riverbank for a further sum of \$211,140*”, and the Applicant’s CEO that “*Early in November 2024 I observed that the bank was no longer eroding from the area that had already been worked on by having boulders and dirt placed on the bank. I observed however that the bank in the area where the plaintiff had placed the dock it had designed and built for the defendant had suffered some major erosion*” and “*I engaged the services of Mr Flux, a geotechnical expert, and received advices that the defendant needed to carry out further repair and rejuvenation of the riverbank in the area under the dock and gangway where the serious erosion was occurring*”. Lastly, “*As a result of the advice received I have arranged for the defendant to engage others to carry out the work advised by Mr Flux. The cost of the defendant so far for this extra work will be a further sum of \$211,140.*”
10. Those matters were then summarised by the statement “*The defendant’s claim against the plaintiff at the hearing of this matter for the repair and rejuvenation of the riverbank will now be, at the least, \$416,757*”.
11. Given the chronology of the directions made by the Local Court in this matter, together with allegations made in the Counterclaim of September 2023 and Amended Counterclaim of June 2024, and dates recorded on documentation annexed to the two Affidavits in support, in my view there are inadequacies in potentially important information on Affidavit. That includes in relation to the content and timing of instructions sought from the Applicant and received by its solicitors, and those aspects in communications between the Applicant and entities engaged to carry out remedial works.⁸

⁶ Which included a further \$205,601 for further or future remedial works to be undertaken. That figure suffers from some dyscalculia and, on the basis of Annexure DA1 to the Affidavit of 9 December 2024, should be \$402,218. If so, the amount sought to be added to the Counterclaim is \$196,601 and the total claim is \$512,370. It is unclear why figures exclusive of GST have been pleaded, particularly in respect of Invoices already paid.

⁷ No counter-application seeking a stay, or strike-out of the excess beyond \$250,000, or any other order of analogous outcome was sought. Estoppel or waiver was raised.

⁸ The Annexures to both Affidavits on behalf of the Applicant refer to a number of dates on which relevant communications occurred and Purchase Orders were raised, but do not include any recent Invoices or record

12. Anticipated future expenditure in remediation of what the Applicant alleged was actionable formed part of the Counterclaim from 26 September 2023. From that point onwards the extent of the Local Court's jurisdiction was an issue requiring consideration, including in light of the procedures legislated for the Local Court. Had the Respondent's Application to transfer been made in late 2023 or by no later than 23 July 2024, determination would have been unproblematic.⁹ The court's directions of 21 June and 26 August 2024, coupled with the Applicant's inaction, have confounded an otherwise straightforward course. Noting that the first limb of the Application here is to amend the Amended Counterclaim to increase damages by a further \$196,601¹⁰, and that it is not generally part of the court's function at this stage to assess or gainsay the quantum or strength or otherwise of a claim or counterclaim in the exercise of the court's discretion.¹¹
13. The Respondent opposes the Application, specifically in terms of waiver or estoppel, with that opposition being well founded. The Applicant's conduct in the matter included what the High Court referred to as an "... *Application which was made late in the day, was inadequately explained, [and if granted would necessitate] the vacation of or adjournment of the date set down for trial*".¹² Added to that are considerations of the "*irreparable element of unfair prejudice*" to the Respondent in delays of the proceeding, the inefficiencies inflicted on the public resource of the courts by avoidable adjournments, and the need for maintenance of public confidence in the administration of justice, including the courts capacity to finally determine disputes efficiently and economically.¹³
14. Principles in the Western Australian decision of *Re Monger* and the High Court's decisions in *Verwayen* and *Walton Stores v Maher*, and particularly *Aon Risk Services v ANU*, all now present challenges which attend the Application.¹⁴ There are also the Supreme Court decisions in *Collins v Deflaw* and *Goldsmith Pty Ltd v GPT Re Ltd & Ors*.¹⁵
15. The Applicants Counterclaim is now and again asserted to be in excess of \$500,000, being more than twice the jurisdiction of the Local Court. That the amount counterclaimed by the Applicant

of payment. Aspects of that information render precise meaning of the term "*recently*" in the Affidavits to be, at the least, uncertain.

⁹ The Counterclaim filed 26 September 2023 denied liability for the Claim and alleged loss and damage in the total sum of \$559,594.

¹⁰ Noting the miscalculation referred to in the Affidavit of 9 December 2024, but that GST might also properly form part of the loss asserted.

¹¹ *Collins v Deflaw Pty Ltd* [2000] NTSC 64 at [11].

¹² *Aon Risk Services Limited v Australian National University* [2009] HCA 27 at [4], noting that no "*new*" claims are raised and there was no evidence of any deliberate tactical decision underpinning the Application. That is despite the inexplicability of the Amended Counterclaim failing to plead any claim for future anticipated expenditure in circumstances where the Counterclaim had done so, and notwithstanding that the Application should properly have been made soon after the filing of the Counterclaim, or by 23 July 2024 at the latest.

¹³ *Aon Risk Services Limited v Australian National University* (supra) at [5].

¹⁴ *Re Monger Ex Parte Cross* [2004] WASCA 176, *Commonwealth v Verwayen* (1990) 170 CLR 394, *Walton Stores v Maher* [1988] HCA 7 and *Aon Risk Services Limited v Australian National University* (supra).

¹⁵ *Collins v Deflaw* (supra) and *Goldsmith Pty Ltd v GPT Re Ltd & Ors* (supra).

is now liquidated or crystallised is of definite relevance, as is the relative recency with which that has fully occurred.

16. Sections 15 and 18 of the *Local Court (Civil Procedure) Act 1989*, concerning claims beyond jurisdiction and transfer of proceedings to the Supreme Court, are relevant. Section 13 of the *Local Court Act 2015* is also relevant. Although not Acts of Parliament, I also consider Rules 1.11, 3.08, 5.11, 5.15 and 7.04(2) of the *Local Court (Civil Jurisdiction) Rules 1998* (Rules) must have some application in determination of the Application. That includes that “*in exercising a power under the rules, the court must endeavour to ensure all questions in a proceeding are effectively, completely, promptly and economically determined*” (emphasis added).¹⁶
17. The Application does advance the first two of those criteria, but runs counter to the second two.
18. Rule 3.08 concerning the power to amend, and the grant of leave to do so, directs the court’s attention to determination of “*the real question in issue between the parties*”, correcting defects or errors, and “*avoiding a multiplicity of proceedings*”.
19. Section 13(1) of the *Local Court Act* expressly empowers the court to deal with a claim for damages in excess of its jurisdiction provided the parties have given their *written* consent to the court’s dealing. Section 15 of the *Local Court (Civil Procedure) Act* provides that where a claim is beyond the jurisdiction of the court, it may amend the claim to bring it within jurisdiction, or order the proceeding be stayed pending an application under s 18, or strike out the claim.¹⁷ I take the procedure provided by s 15 of that Act to be applicable where the consensual course provided by s 13 of the *Local Court Act* has not been availed of.
20. The decisions of *Re Monger* and *Verwayen* deal with waiver of statutory defences, with *Walton Stores v Maher* concerning oral representations in dealings in an interest in land. The issue in the Application concerns a counterclaim rather than a defence.¹⁸ More relevantly, the claim (including the increase which the Applicant seeks to raise by amendment) is now in liquidated or crystallised form. It is noted that *Goldsmith* confirms the court’s function is to consider whether it is “*appropriate*” to transfer a matter beyond its jurisdiction to the Supreme Court, rather than blithely accept a party’s assertion.¹⁹ That position is fortified by the specific legislated provisions referred to, including the *Local Court (Civil Jurisdiction) Rules*.

¹⁶ Rule 1.11 of the *Local Court (Civil Jurisdiction) Rules 1998*.

¹⁷ It is acknowledged that the measures provided by s 15 are vested in the court, and might be exercised of its own motion following appropriate opportunity being afforded to the parties or relevant party to adopt one of the alternative courses provided for by the applicable legislation. Section 17 of the *Local Court (Civil Procedure) Act* also empowers the court to give directions for the “*conducive to the effective, complete, prompt and economical determination of the proceedings*”, and Order 3.08 confers a general power of amendment on the court.

¹⁸ Noting and despite the significance of the distinction between ‘sword’ and ‘shield’ in traditional application of the principle.

¹⁹ The decision in *Goldsmith* (supra) strongly qualifies the broader propositions set down in *Collins v Deflaw* (supra).

21. No evidence of any steps taken towards written consent of the parties under s 13 of the *Local Court Act* is before the court. No stay, or amendment, or abandonment, or strike out was sought or ordered under s 15 of the *Local Court (Civil Procedure) Act* or as available through application of the Rules.²⁰ It is also relevant that proceeding with the hearing on 24 February 2025 would reduce the Applicant's Counterclaim to less than half of its asserted quantum, and could well result in a second or further proceeding.
22. In all the circumstances, I consider it appropriate to grant the application and transfer the proceeding to the Supreme Court.
- (i) The Application is granted.
 - (ii) A Further Amended Counterclaim is to be filed within 7 days.
 - (iii) The Proceeding is to be transferred to the Supreme Court, and is discontinued to that extent.
 - (iv) The Applicant (Defendant) is to pay the Respondents (Plaintiff) costs thrown away as a result of the Application and order to transfer, to be agreed or taxed at 100% of the Supreme Court Scale.
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²⁰ Albeit I consider the one month directed in June 2024 to be a reasonable period within which to make application.