

**Tru Floor Service P/L, Paul Anderw Fletcher, Vickie Anne Fletcher, Complex Airconditioning P/L, AP Delaney & Co P/L, Kiewa Valley Engineering P/L, C&C Przibella P/L, Torney & Allen P/L and Exvon P/L v David John Jenkins and Vivienne Ellen Jenkins [2006] FCA 119**

**JUDGMENT : Sundberg J** : Federal Court of Australia, Victoria District Registry, Melbourne. 20<sup>th</sup> February 2006

**THE COURT ORDERS THAT:**

1. The plaintiffs have leave to file and serve an amended statement of claim in the form handed to the Court on 17 February 2006 as affected by the matters referred to in paragraph 6 of the Reasons herein.
2. The plaintiffs have leave to file and serve a reply in the form handed to the Court on 17 February 2006.
3. The defendants file and serve their contentions of fact and law and any further amended defence on or before 24 February 2006.
4. The plaintiffs pay the defendants' costs of the applications made on 17 February 2006.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**REASONS FOR JUDGMENT**

- 1 At a mention of this proceeding on Friday last the plaintiffs orally sought leave to amend their statement of claim and file a reply. The context in which it is necessary to deal with these applications is that
  - the proceeding is set down for hearing on 27 February for three weeks
  - on 2 October 2003 it was ordered that any reply to the amended defence be filed on or before 30 January 2004
  - there is no sworn material in support of the applications, and in particular no explanation for the delay in filing a reply or wishing to amend the statement of claim so late in the piece; counsel informed me it was due to counsels' tardiness
  - an earlier hearing date had been vacated, and the present hearing date had been arranged with considerable difficulty in order to accommodate the parties, in particular the plaintiffs
  - the proceeding is of some antiquity, having been filed in September 2001.
- 2 Mr McNamara, for the defendants, conceded that there was not a great deal he could say in opposition to the application to file a reply, apart from stressing the lateness of the application. The estoppel sought to be raised in the reply does not take his clients by surprise, having been flagged on earlier occasions. The position is the same with the raising of matters arising out of the *Building and Construction Industry Security of Payment Act 1999* (NSW). The quantum meruit fall back position in relation to debt claims may require some evidence from the defendants. But Mr Delany, for the plaintiffs, said that in the circumstances there would be no objection to the late production of any such evidence.
- 3 The proposed amended statement of claim incorporates by reference material in the reply. According to Mr Delany, it was in the course of drafting the reply that it was seen that certain parts of the original statement of claim were in need of amendment in order to remove inconsistency.
- 4 The position is that if leave be given to amend the statement of claim, there is no real opposition to the grant of leave to file the reply. However the defendants strongly opposed many of the proposed amendments to the statement of claim.
- 5 Two amendments were not opposed: those affecting pars 7 and 8, and those adjusting the money sums in various paragraphs.
- 6 Mr Delany undertook to remedy four matters arising out of criticisms by Mr McNamara and observations from the bench. They were
  - restoring the intervals between which debts were said to have been incurred. For example, par 15(d) originally read: "*In relation to the project known as Uncle Bens from approximately October 2000 to 22 December 2000 debts were incurred in the sum of \$.....*"  
The amendment sought would cause the sub-paragraph to read: "*In relation to the project known as Uncle Bens from approximately 15 August 2000 debts were incurred in the sum of \$.....*"
  - inserting an end point in paragraphs not sought to be amended which are in the form of the Uncle Bens sub-paragraph
  - identifying in Uncle Bens type paragraphs the dates that relate to a contract or purchase order as opposed to the invoices referred to in the Particulars. Thus, in its original form, the period referred to in the Uncle Ben sub-paragraph corresponds with the invoices referred to in the Particulars. If the amendment were made, alleging debts incurred after 15 August 2000, the Particulars will still refer to invoices dated 30 October and 22 December 2000. As I understand the position, the "from" date in this and many other paragraphs is the date of the contract of question or in some cases a purchase order
  - identifying which of the amounts claimed relate to variations.
- 7 It is now convenient to note the proposed amendments to which objection is taken. The first is that apart from the open-ended period during which debts are alleged to have been incurred (which is referred to above, and can be cured by restoring or inserting intervals), two of the changed dates are significant to the second defendant, Mrs Jenkins. There is a dispute as to whether she was a director after 22 September 2000. The date on which debts were incurred is said to be particularly important in this connection. It was conceded by Mr Delany that the effect of two of the proposed amendments is to alter dates to the potential detriment of Mrs Jenkins. However they relate to debts totalling about \$6000, which is a very small amount in the overall proceeding.
- 8 The second objection relates to amendments to the Particulars of various contract whether in writing, oral or to be implied. Thus the Particulars to par 15(b) originally read: "*The building West End Plaza contract was in writing.*"  
The proposed amendment, so far as now relevant, reads "*The building West End Plaza contract was partly oral and partly in writing. Insofar as it was oral, particulars are given in paragraph 1 (b)(iii)(y) and the particulars thereto of the Reply. Insofar as it was in writing, particulars are given in paragraphs 1 (b)(i)(ii) and (v) and the particulars thereto of the Reply.*"  
Objection is taken to these changes. Other paragraphs to which similar changes are proposed are 15(c), 18(b) and (c), 19(c), 21, 22(a) and (c). In some of these cases the proposed amended particulars also refer to documents which are exhibits to affidavits filed in the proceeding.

- 9 In some cases (eg pars 16(d) and 20(b)) Particulars are for the first time proposed of the contracts relied on, as opposed to invoices.
- 10 Mr Delany submitted that the defendants could not be taken by surprise by these proposed amendments, since the proposed particulars in some cases reflect the contents of the Particulars in their amended defence. Further, he submits that as the defendants have in great detail in their amended defence given details of the contracts they allege were entered into and their terms, it is appropriate for the plaintiffs to indicate the extent to which they agree or disagree with the defendant's contentions, thus in many cases narrowing the differences between the parties' positions. That is what they have done in the proposed reply, and the presently relevant amendments to the statement of claim are intended to ensure that there is no disconformity between their two pleadings.
- 11 I have been seriously troubled by the late stage at which the proposed amendments and the reply have been put forward, and by the absence of any evidence explaining the delay. I accept Mr McNamara's trenchant criticisms of the plaintiffs' conduct in this respect. However, as I have attempted to explain, I am satisfied that the inconvenience to the defendants resulting from the amendments to the statement of claim is not as real as has been asserted. It is important that the plaintiffs put the case they want to put rather than the case propounded in a pleading they now see as in some respects inaccurate. Further, in substance, the effect of the amendments is, as Mr Delany says, to make the statement of claim accord with the evidence that has been on file since 2004. Further, the unfortunate history of the case should be taken into account. If, as the defendants propose, the hearing date is vacated, a new date will not be available this year. That will be the second time the date has been vacated. It is not desirable that a case that began in 2001 should be delayed any further.
- 12 I will grant the plaintiffs leave to file and serve an amended statement of claim in the form handed to the Court on 17 February 2006 taking into account the matters referred to in [6]. I will also grant them leave to file and serve the proposed reply forthwith. They must pay the defendant's costs of the applications.
- 13 The catalyst for the applications was a letter from my Associate to the parties noting that they had not complied with my orders of 7 October 2005 for the filing and service of written contentions of fact and law. Now that I have dealt with the applications, I should set a date by which the defendants must file their contentions and complete any repleading that they think necessary as a result of my disposition of the applications. In light of the plaintiffs' conduct and the fact that the trial of the proceeding is due to commence a week from today, I will order that the defendants file their contentions and any further amended defence on or before Friday, 24 February 2006.

J Delany SC instructed by James G Sloan  
M McNamara instructed by Pryles & Co