A Judge's viewpoint: The role of pleading

By The Honourable Justice Brian Tamberlin

THE 2008 JUDGE'S SERIES

PRACTICAL LITIGATION IN THE SUPREME COURT AND THE FEDERAL COURT (WEDNESDAY 20 FEBRUARY 2008)

Legal Principles - Pleadings

The rules relating to pleadings and particulars are set out in Orders 11, 12 and 13 of the Federal Court Rules.

The basic requirement is that a pleading must comprise a statement, in summary form, of the material facts on which the party relies, but not the evidence by which those facts are to be proved.

A pleading must be as brief as the nature of the case allows, however, it must also be framed as precisely as possible on the basis of the available material or it may not be possible for the other side to properly plead their case in response. In Woodbridge Foam Corporation v AFCO Automotive Foam Components Pty Ltd, the Court rejected the suggestion that the Federal Court nowadays adopts a more relaxed attitude to the rules relating to pleadings to encourage the parties to get on with their dispute and resolve any problems that may arise between themselves. The Judge said that a "sloppy" approach to pleadings will not be accepted if the consequence is to undermine or compromise the principal function of informing the other side of the case sought to be made out.

A pleading must disclose a reasonable cause of action against the respondent and state all material facts which are necessary to establish that cause of action and the relief sought. "Material facts" is not synonymous with "all the circumstances". "Material facts" are those essential facts which are relied on as establishing all the essential elements of the cause of action. These facts must be pleaded with a sufficient degree of specificity to convey to the other party the case that party has to meet by evidence and submissions, and it must also be apparent on the face of the document that the facts pleaded, if proved, are sufficient to establish the cause of action relied on. Under Order 11 rule 16, a pleading which discloses no reasonable cause of action or has a tendency to cause prejudice, embarrassment or delay or is otherwise an abuse of process, may be struck out in whole or in part.

Function of Pleadings

If one now stands back from the particular rules and requirements as to pleadings and looks at the overall progress of a case with the benefit of hindsight, the importance of a properly formulated and drafted pleading becomes apparent.

At the earliest stage of proceedings, lawyers are involved in the gathering of information from the client as to what happened. There is then, hopefully, an advice prepared by the lawyers as to the existence or form of an action that can be brought to assert the client's rights or to defend a process. The drafting of this advice requires an examination of the law and the ingredients necessary to constitute the cause of action or defence and to assert those rights.

Precise formulation of the applicant's rights in the initiating document is of central importance. This is because the pleading is the source from which many other consequences flow in the life of the litigation from filing at first instance through to final resolution in the High Court. The pleading will be used as the reference point for the seeking of particulars, the administering of interrogatories (which is virtually extinct, thank heavens), the obtaining of discovery, the issue of subpoenas, the calling of evidence, the relevance and admissibility of evidence, the closing arguments, the judgments and the availability of arguments on appeal. At all of these points, the following questions arise: "Was this issue pleaded?" and "How was this issue pleaded?" The question is not the loose one whether the argument could possibly be raised on the evidence at the conclusion of a hearing but whether the issue has been pleaded.

The general rule is that the judgment is confined to those issues available on the pleadings. This rule exists for a variety of reasons.

Firstly, a properly drafted pleading ensures the basic requirement of procedural fairness, namely, that ambush at trial is avoided and a party should have the opportunity of knowing the case against him or her and being able to take steps to meet it, in a timely manner.

Secondly, it defines the issues for decision and thereby enables the relevance and admissibility of evidence to be determined at the trial. Disputes over evidence, particularly as to relevance, are determined by the pleadings, and it is necessary to ensure that the evidence relates to the pleadings. Final submissions for the parties are determined by the pleadings as originally framed or as finally formulated after amendment at trial. Usually, counsel will not be allowed to address on matter which has not been pleaded and the Court should ignore such submissions in many circumstances because there is a potential for unfairness. In addition, pleadings can be used in cross-examination of a party to

point up inconsistencies in cases propounded from time to time during the preparation and conduct of the trial, sometimes on changing instructions from the client. The Court will usually assume that pleadings are formulated on instructions from the party.

Thirdly, by narrowing the dispute to definite issues, a properly drafted pleading will diminish the expense and delay involved in court proceedings. An important financial consequence both for the Court and for the parties is that, if pleadings are imprecise or open-ended, the range of documents on discovery which may arguably be relevant to the proceedings will be greatly expanded. The costs of discovery can be enormous in substantial commercial and public law litigation and these can be cut down by precise pleadings. The more documents discovered, the longer the trial tends to take. The broader the discovery, the greater the number of applications for amendments to the pleadings with consequent roll-on effects. This can result in unnecessary oppression to the weaker party. Often the costs of the interlocutory process can exceed the hearing costs.

Finally, a properly drafted pleading informs the Court of the issues involved in the case and dictates the issues that the Court may consider in both its original and appellate jurisdictions. When the Court comes to give judgment, the starting point for approaching and defining the issues is the pleadings. The pleadings can permeate the whole course of a piece of litigation, and particularly the appellate process. When an application is sought for leave to appeal or when an appeal is filed, the Court may take the view that, where an issue has not been pleaded in the hearing below, it therefore cannot be raised on appeal, even though it may have had some merit had it been properly pleaded. This refusal is often on the ground of the basic unfairness because the other side may well have failed to adduce relevant and critical evidence which bears on the proposed new matter or to have refrained from pursuing a line of attack in cross-examination.

The pleadings represent the essential structure of the litigation to which reference by both the Court and the parties is made. Therefore, the need for clear, direct and unambiguous allegations and defences cannot be over stressed. This can only be achieved by giving careful thought at the earliest stage of the proceeding to the essential elements of the case and the element of the cause or causes of action relied on.

Particulars

It is important not to confuse "pleadings" with "particulars", as the functions of the two are distinct. The function of particulars is to fill in the picture of the applicant's cause of action with information sufficiently detailed to put the respondent on notice as to the case to be met and to enable preparation for trial. Strictly speaking, particulars may not be used to fill minor gaps in a pleading which ought to have been filled by appropriate statements of the various material facts together constituting the cause of action. Particulars, when given in the pleadings advert to essential facts which fill out the broad allegation in the pleading.

In practice, however, there is an overlap between pleadings and particulars and it can be difficult to distinguish between a "material fact" and a "particular" piece of information which it is reasonable to give the defendant in order to set out the case he has to meet. In Australian Automotive Repairers Association (Political Action Committee) Inc v NRMA Insurance Limited, Lindgren J stated that a less strict view may now be taken of the distinction between particulars and pleadings. That is, the particulars contained in a statement of claim may be taken into account for the purpose of determining whether the statement of claim amounts to a statement of all the material facts. However, this more relaxed view does not countenance the omission of material facts from the statement of claim regarded as a whole. It is no answer to a claim that a pleading is inadequate to state that the respondent is to request the provision of further particulars. Sometimes a respondent will add particulars by letter in addition to those in the pleading itself before entering a defence or filing a cross-claim. If the cause of action is properly pleaded, this should not be necessary.

The degree of particularity of particulars will depend on the particular circumstances. The Federal Court Rules do not give detailed guidance as to the way in which pleadings must be particularised. Order 12 rule 1 provides that a party shall state in the pleading or in a document filed and served with it the necessary particulars of any claim, defence or other matter pleaded by him or her. Rules 2 to 4 then go on to provide for specific matters of which a party must give particulars, such as fraud, any "condition of mind" (deliberate act, malice, recklessness) or exemplary, special or aggravated damages. The Court has the power under Rule 5 to order a party to file and serve on any other party particulars of any claim, defence or other matter or, alternatively, as was ordered in Microsoft Corporation v Intertrust Technologies Corporation, a statement of the nature of the case on which he relies.

Amendments and Case Management

Under the Individual Docket System, each matter is assigned

Continued page 41

to a particular Judge who case manages it from its initiation through to the final hearing. Therefore, as a practical matter, it can be assumed that it will be the Judge who will be sitting on the trial who will determine the interlocutory applications, applications for amendments and other skirmishes that arise in the course of getting the matter prepared for hearing. This process has led to an increased number of settlements in Federal Court matters because there is no weaving between judges who may be unfamiliar with the previous conduct of the preparation for trial. In those circumstances, it is not sensible for parties to be seen to be constantly making applications for amendments and adjustments to the pleadings or to be suffering a series of interlocutory losses. Of course, in many instances, because of the disclosures on discovery or matters raised in the evidence and the limited knowledge of one or more parties of the true circumstances, it will be just and appropriate to amend the pleadings perhaps on a number of occasions. I have had cases with up to six further amended Statements of Claim and Applications. If the pleadings are soundly based from the beginning, the necessity for repeated applications will be substantially diminished.

It is far better to amend pleadings well before hearing to ensure that no prejudice is caused which would require an adjournment. What it comes down to is this – where a party makes numerous applications to amend its pleadings, the time will come when the Court will be reluctant to grant any further amendments and the defective pleading may be struck out or the matter will be heard on the pleading without amendment.

Each application for an amendment must be determined on its own merits. Although weight must be given to the importance of efficient case management, in State of Queensland v J L Holdings Pty Ltd, Dawson, Gaudron and McHugh JJ pointed out that case management is not an end in itself and that no principle of case management can be allowed to displace the ultimate aim of the attainment of justice. But this was an exceptional case.

In J L Holdings, an application was made by the respondents, prior to the fixing of any hearing dates, for leave to amend a defence. Justice Kiefel refused leave because she felt that there was a risk that the hearing date, which was ultimately fixed for six months in the future, might be jeopardised and prejudice caused to the applicant.

This decision (which was upheld on appeal by the Full Court of the Federal Court) was overturned by the High Court on the basis that the consideration of case management should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, and thus precluding the determination of an issue between the parties.

In NSI Dental Pty Ltd v The University of Melbourne, the Court applied the principles in J L Holdings and granted leave for the applicant to amend their particulars of invalidity by introducing a new claim that there was no patentable invention because the invention lacked an inventive step. This is a major issue which can require months of preparation to meet. This application was made less than four weeks before the hearing (which was listed for two weeks) was due to commence.

The respondents objected to the application on the basis that it would cause irremediable prejudice, namely, they would have to locate new witnesses with relevant expertise and carry out extensive investigations. After hearing submissions and evidence, I found that this prejudice was not irreparable. The problem could be avoided if the hearing was adjourned and any disadvantages suffered by the respondents did not outweigh the desirability of having all the important relevant issues resolved in this matter. I also found that the facts were sufficiently special to warrant the award of costs to the respondents on an indemnity basis as a consequence of the late amendment.

Cases in which amendments may not be appropriate are those in which amendments are made at a very late stage in the proceedings and even sometimes during the course of the trial or during an adjournment at the end of the trial. The Court will lean against late stage amendments where costs will not provide an adequate remedy. The Court recognises that, apart from purely financial consequences, late amendments can augment distress and worsen the financial position of the parties (usually the weaker party) involved in the litigation. In Nine Films and Television Pty Limited v Ninox Television Limited [2005] FCA 854, the Court dismissed a motion by the first respondent for leave to amend its cross-claim. The reasons for this were: firstly, that the hearing was less than four days away and the proposed amended cross-claim was served effectively only two weeks prior to the hearing; secondly, the amended cross-claim introduced a substantial new claim based on unconscionable conduct in equity and under the *Trade Practices Act;* thirdly, a consequence of allowing the amendments to the cross-claim would have been that the hearing dates would have needed to be vacated; fourthly, discovery of documents did not extend to a number of matters sought to be

raised in the amended cross-claim; fifthly, the case was listed for hearing on an urgent basis; finally, no satisfactory explanation was given by Ninox for the delay in seeking the amendments.

Case Study – Unit 11 Pty Ltd v Sharpe Partners & John Lamb

Striking out where the pleading was insufficient to establish a cause of action.

The sole business of the applicant, Unit 11, was to invest trust monies and its strategy was to invest these monies in the staging of theatrical productions and other high risk investments. The day to day management of Unit 11 was under the control of a solicitor, Gregory Flood. There were two other directors of Unit 11 but they relied upon Flood's recommendations. One of Unit 11's investments was a Melbourne production of "Sunset Boulevard", a high risk, high return, speculative investment. During the 1997 and 1998 audits, Flood falsely represented to Unit 11's auditor, the second respondent, John Lamb, that litigation had been commenced against the producers of "Sunset Boulevard" for misleading and deceptive conduct. Other documentation indicated that litigation had not been commenced. The Statement of Claim alleged that Lamb was under a duty to have regard to that other documentation, which would have disclosed that he had been misled by Flood, and to disclose this misleading representation to the other directors of Unit 11."Sunset Boulevard" subsequently failed and Unit 11 suffered loss. The Statement of Claim alleges that, if Lamb had complied with his duties and revealed Flood's misrepresentation to the other directors, Unit 11 would have stopped investing in productions recommended by Flood and would have avoided this loss.

The argument turned on the pleading question whether causation for the damage had been sufficiently pleaded. Lamb sought to strike out the Statement of Claim on the basis that it did not allege facts which would permit a finding that Lamb's breach of duty was causative of the production losses suffered by Unit 11.

At first instance, Merkel J held that the statement of claim should be struck out on the ground that the pleaded causative connection was untenable as a matter of law. Justice Merkel said that the steps relied upon by the applicant to establish causation, as set out in the pleading, were so speculative and conjectural that they did not go any further than establishing that the respondents' breaches might have provided the occasion for the loss suffered, in the sense that "but for" the breach the loss might not have been suffered. They did not justify the next step and constitute a tenable claim that the breaches were causative, in the requisite legal sense, of the losses. The losses claimed by the applicant resulted from high risk commercial investments, made by Unit 11 with knowledge and acceptable that they were high risk investments, which ultimately provided to be unsuccessful. The production was not alleged to have been unprofitable as a result of the impugned conduct of the respondents.

This decision was appealed by the applicant and was heard by the Full Court, constituted by Justices Lee, Dowsett and myself, on 17 and 18 November 2005. Judgment is currently reserved.

Case Study – Shelton v National Roads and Motorists Association Ltd

This case concerned the convening of Annual and Special General Meetings by the NRMA in 2002 and 2003, in order to pass resolutions to amend the NRMA's constitution and to remove certain directors.

The applicant, Mr Shelton, filed an Amended Statement of Claim and Third Amended Application on 21 May 2004. The orders and declarations sought by Mr Shelton called for a wide-ranging intrusion into the affairs of the NRMA. Mr Shelton sought declarations that resolutions passed at the NRMA's 2002 AGM were invalid, as they contravened 203D of the *Corporations Act 2001* (Cth), which sets out the requirements for the removal of a director of public company from office, and NRMA's constitution. Mr Shelton also sought orders in relation to the make-up of the current NRMA Board, the persons who should henceforth be restrained from occupying positions as directors of the NRMA and the manner in which the 2005 election should be conducted. Mr Shelton also sought declarations that the conduct of the NRMA in relation to the 2003 AGM and SGMs and the 2003 election was oppressive to, unfairly prejudicial to, and discriminatory against, the applicant and members of the NRMA. Finally, Mr Shelton sought a declaration that the constitution adopted by special resolution in 2003 is invalid.

The respondents sought an order that the amended pleadings be struck out because they disclosed no reasonable cause of action and had a tendency to cause prejudice, embarrassment or delay in the proceedings. In the alternative, the respondents sought orders that the proceeding be stayed or dismissed generally because no reasonable cause of action was disclosed and the proceeding was frivolous or vexatious.

In that case, I noted that the applicant sought far-reaching, general and imprecise relief. A pleading will need to be framed with precision, clarity and conciseness before the Court would declare invalid a decision of members to overturn or drastically modify the constitution of an organisation which had been in operation for over a year. The pleading was a mess. I determined that this requirement had not been

Continued page 43

met and that the matter had been so inadequately pleaded that the entire Amended Statement of Claim should be struck out. However, I formed the view that the case indicated on the material was not so deficient that the applicant should be denied a further opportunity to re-plead its case.

The pleading was cast in generalised, uninformative language and, despite its prolixity and mass of irrelevant detail, failed to plead the essential and material facts to make out the elements of the cause of action. For example, there was

Continued page 47

Law firms, prepare to defend your choice of default fund

By Andrew Proebstl, legalsuper's Chief Executive

Considering most super funds experienced lower returns last financial year, many employers, including Northern Territory law firms, may receive enquiries from employees concerned about the performance of their default super fund.

Tough questions like these give employers a timely reminder of the importance of having a robust default super fund selection process in place – one that follows due process and that has at its heart the best interests of employees.

The responsibility for getting the process right is also heightened by the fact that, despite three years living with Choice of Fund legislation, 90 per cent of employees continue to have their super paid into their employer's default fund.

While unfavourable financial markets impact on all investors, the compulsory nature of super can prompt many fund members to pay closer attention to their employer's default fund performance than perhaps other investments.

According to fund research agency, SuperRatings, for the 11 months to the end of May 2008, the median return for the top 50 super funds* was minus 2.29 per cent.

If the default super fund performed worse than other funds many employers may also receive comments about this variation. Again according to SuperRatings, 12.02 per cent separated the best (plus 1.26 per cent) and worst (minus 10.76 per cent) of the 50 largest super funds* for the 11 months to 31 May 2008. This is a $12,020 difference for $100,000 invested over 12 months.

How to establish a robust default super fund selection process

Five steps employers can take to ensure their default fund selection process achieves best practice are outlined below.

1. Employers whose default fund selection process has been transparent and objective will be in a stronger position to defend their choice of default fund to employees.

Transparency results from consulting closely with employees and involving them in the default fund selection process. Also, once a default super fund has been chosen, employers are well advised to clearly inform their employees why that particular fund was chosen.

2. If a commercial relationship exists between a law firm and the default fund, employees are likely to also expect to see greater rigour in the selection process to mitigate the perception of a conflict of interest.

Employers could consider engaging independent consultants to manage their selection process where this is the case.

3. Employers should conduct reference checks of super funds being considered to ensure the veracity of their representations.

4. Employers might also consider executing service level agreements with their default fund, covering such things as the regularity and content of member communication, member-education initiatives and other ancillary services provided by the fund.

This enables employers to evaluate and explain their default fund's performance in the context of a wider range of services.

5. A formal periodic review of the incumbent default fund is also prudent, say, every three years.

This will confirm the chosen default fund remains the most appropriate for employees. Also, while super fund investment performance was lower last year, super is a long-term form of savings and performance for the vast majority of members and should most appropriately be evaluated over the longer term. Additionally, a proper evaluation of default super fund will involve a holistic consideration of fund performance in other areas valued by employees such as financial advice, seminars, and accurate low-hassle administration.

Conclusion

With super now the second largest financial asset of Australian households, employers' choice of default super fund is a significant component of employee wealth.

Employers are well-advised to revisit their choice of default super fund, especially in the context of current negative investment performance.

* The 'balanced' investment option.

In Eden Construction Pty Ltd v State of NSW [2008] FCA 376 (20 March 2008) Lindgren J concluded a person considering accepting a tender was under no obligation to inform a party tendering that it had received adverse information about that party.

Intellectual property

Ownership of invention by university employee

In University of WA v Gray (No 2) [2008] FCA 489 (17 April 2008) French J concluded there was no implied term in the contract of employment of an academic that any invention made in the course of his employment would be the property of the university.

Industrial law

Injunctions – Interim and interlocutory injunctions

In Police Federation of Australia v Nixon [2008] FCA 467 (18 April 2008) Ryan J considered how the presumption created by s809(1) of the Workplace Relations Act as to the reason why conduct was occurring was to be applied and whether there was any difference between an interim and an interlocutory injunction.

Federal Court

Orders – Whether order on part of claim final

In Jefferson Ford Pty Ltd v Ford Motor Company [2008] FCAFC 60 (15 April 2008) a Full Court concluded that orders disposing of part of a claim were final and an appeal lay from them as of right.

Full Court of the Federal Court sitting dates for 2009

The Acting Chief Justice has approved the dates for the sitting of the Full Court in 2009.

Subject to there being sufficient business, sittings of a Full Court of the Federal Court of Australia during 2009 will be held in all capital cities within the periods indicated below:

- 9 February – 6 March 2009
- 4-29 May 2009
- 3-26 August 2009
- 2-27 November 2009

Any urgent matter may be transferred to a place of sitting other than that at which the matter was heard at first instance.

If the circumstances require it, a Full Court may sit to hear appeals on dates other than those listed.

If you have any queries, please contact me on (02) 9230 8336.

A Judge's viewpoint: The role of pleading...cont.

an allegation that the NRMA had an "overall plan" of conduct dating back to early 2002.

However, no material facts were given that inform the Court as to when, where, how, by whom and in what terms the "overall plan" was formulated or implemented. The Amended Statement of Claim consisted of a series of random alleged actions said to have been taken from time to time with a particular purpose by the NRMA Board, and the general conclusion, by reference to a multitude of paragraphs, was drawn that this was pursuant to some comprehensive "overall plan" formulated before the first meeting and being maintained throughout the period, with the replacement directors over this time being inducted and in order to entrench control in the existing Board.

The nature of the connection between the directors, the understanding on which the majority are said to act in unison were not stated and the specific meetings, events or tactics were not particularised. Nor was there any allegation to support a finding that members of the NRMA had suffered any disadvantage, disability or unfair burden according to ordinary standards of reasonableness and fair-dealing.

There was an allegation that the NRMA made misrepresentations in the course of its publicity claim leading up to the 2003 AGM. That pleading read like an emotive address rather than a setting out of any conduct or facts capable of judicial determination. For example, times, substance, places and victims of the misrepresentations were not specified. Nor were any details given of how the members would have voted in the absence of these representations.

Another useful example of elaborate but fouled up pleadings is Aquashelf Sales and Rentals Pty Ltd v CSR Limited (1998) FCA 1752.

Conclusion

Keep in mind that the pleading is the foundation of your case at trial and on appeal. Give the proposed case a great deal of thought before drafting the pleading to make sure what causes of action you can responsibly allege and will be likely to be able to prove. Make sure all the necessary elements of each cause of action are alleged. Make sure, so far as possible, at the pleading stage that you are all able to prove what you allege. Keep the pleading understandable, clear and short, then leave it. Stand back. Look at it again and come back to it and revise it if necessary.