A Judge's Viewpoint: the Role of Pleading

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The 2012 Judges' Series
Practical Litigation in the Supreme Court and the Federal Court
(Wednesday 16 June 2012)

Legal Principles - Pleadings

The new *Federal Court Rules 2011* (Cth) commenced on 1 August 2011. The rules relating to pleadings and particulars are set out in Parts 15 and 16 of the *Federal Court Rules*.

The new rules on pleadings accommodate the objectives of Pt VB of the *Federal Court of Australia Act 1976* (Cth). One innovation is in r 16.02(1)(c). This requires a pleading to identify the issues that the party wants the Court to resolve. Often in the past, prolix pleadings have obscured, not illuminated, the real issues in the litigation.

The basic requirement is that a pleading must comprise of 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.[1]

A pleading must be as brief as the nature of the case allows,[2] 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.[3] In *Woodbridge Foam Corporation v AFCO Automotive Foam Components Pty Ltd*,[4] Finkelstein J 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

1 *Federal Court Rules*, r 16.02(1)(d).

2 *Federal Court Rules*, r 16.02(1)(b).

3 *Shelton v National Roads and Motorists Association Ltd* [1994] FCA 1393 at [18] per Tamberlin J.

4 (2002) 58 IPR 56, [2002] FCA 883 at [3]-[5].

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.

It may be that the jurisprudence around r 16.02(1) will develop to synthesise pleadings and focus them more on issues. The requirements of r 16.02(1)(d) to state the material facts on which the party relies to give the opposing party fair notice of the case, to be made against it, reflect the judicature system of fact pleading. Under that system a pleader must assert or identify a legal category of action or suit that the facts asserted might illustrate, involve or demonstrate on which the particular relief claimed is based or to which it is relevant.[5] What r 16.02(1) now requires goes further. *First*, as I have noted, the pleading must state the material facts;[6] *secondly*, it must state the provisions of any statute relied on,[7] *thirdly*, it must identify the issues that the party wants to Court to resolve[8] and *last* it must state the specific relief sought or claimed.[9]

A pleading must disclose a reasonable cause of action or defence against the other party and state all material facts which are necessary to establish that cause of action and the relief sought.[10] The expression "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.[11] 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.[12] Under r 16.21, a pleading which discloses no reasonable cause of action or has a tendency to cause prejudice,

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5 See *Agar v Hyde* (2000) 201 CLR 552 and 577-578 [64] per Gaudron, McHugh, Gummow and Hayne JJ citing Berwick CJ in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 473).

6 rr 16.02(1)(d) and 16.21(1).

7 r 16.02(1)(e).

8 r 16.02(1)(c).

9 r 16.02(1)(f).

10 rr 16.02(1)(d), 16.21(1)(e); see too *Dart v Norwich Union Life Australia Limited* [2002] FCA 168 at [31] per Beaumont, Finn and Sundberg JJ.

11 *Australian Automotive Repairers Association (Political Action Committee) Inc v NRMA Insurance Limited* [2002] FCA 1568 at [13] per Lindgren J.

12 r 16.02(1) see too *The Bega Co-operative Society Limited v The Milk Authority of the Australian Capital Territory* [1992] FCA 261 at 15-16 per Neaves J.

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), the obtaining of an order for discovery if the Court is satisfied this is required[13], the issue of subpoenas, the calling of evidence, the relevance and admissibility of evidence, the closing arguments, the reasons for 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. And r 16.02(1)(c) reinforces the centrality of proper pleading to identify the real issues in dispute.

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

13 rr 20.11 –20.13.

First, 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.[14]

Secondly, it defines and identifies the issues for decision. That process 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. 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 a matter which has not been pleaded and the Court will ignore such submissions in many circumstances because there is a potential for unfairness. Nonetheless, there will be occasions where evidence is admitted without objection at a trial and raises fresh issues. In those instances the Court may decide the case on a basis that resolves the real controversy between the parties, including fresh issues that arose at the trial without objection even though these were outside the pleadings.[15] 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 and appropriately succinct 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, and an order for discovery is made, the range of documents discoverable 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

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14 See, for example, *Dare v Pulham* (1982) 148 CLR 658 at 664 per the Court; *Banque Commerciale SA en liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287 per Mason CJ and Gaudron J; *McKellar v ContainerTerminal Management Services Pty Ltd* (1999) 165 ALR 409 at 417 per Weinberg J.

15 *Vale v Sutherland* (2009) 237 CLR 638 at 651 [41] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

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 made on the ground of the basic unfairness caused because the other side may well have failed to adduce relevant and critical evidence which bears on the proposed new matter or may 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, and the identification of the real issues requiring resolution 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, the elements of the cause or causes of action relied on and what the real dispute is.

Particulars

It is important not to confuse "pleadings" with "particulars". The functions of the two are distinct. Division 16.4 of the *Federal Court Rules* deals with particulars. 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.[16] Particulars, when given in the pleadings advert to essential facts which fill out the broad allegation in the pleading.

16 *Charlie Carter Pty Ltd v The Shop, Distributive and Allied Employees Association of Western Australia* (1987) 13 FCR 413 at 419 per French J.

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.[17] In *Australian Automotive Repairers Association (Political Action Committee) Inc v NRMA Insurance Limited*,[18] 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 could request the provision of further particulars. Sometimes a respondent will seek particulars in correspondence in addition to those in the pleading itself before entering a defence or filing a cross-claim. However, if the cause of action is properly pleaded, this should not be necessary.

The degree of precision required for 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. Rule 16.41(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 16.42 to 16.44 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), damages or exemplary damages. The Court has the power under r 16.45 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*,[19] a statement of the nature of the case on which he relies.[20]

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17 *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712-713 per Scott LJ.

18 [2002] FCA 1568 at [17] per Lindgren J.

19 [2003] FCA 656.

20 *Federal Court Rules*, r 16.45(1)(b).