THE AGREEMENT AND THE PLEADINGS: THE FOUNDATIONS OF SUCCESSFUL COMMERCIAL LITIGATION

Address to NQLA Conference 16 May 2014 Cairns
By The Honourable Justice Henry

Introduction

[1] It is an intriguing feature of the law, in all its ever-growing breadth and complexity, that the more one practices the law, the more one appreciates the importance of elementary legal principles.

[2] It is illustrated in a scenario familiar to you all; a scenario repeated daily throughout countless solicitors' offices and barristers' chambers. The junior practitioner is baffled by a legal problem and seeks the advice of a more experienced lawyer. The junior lawyer explains the problem and what does the senior lawyer respond? "Well, let's bring it back to first principles." "Take a step back and start with the basics." "Let's look it at from the core elements." The precise words vary but the theme remains the same: identify the basic legal principles relevant to the problem and those principles will provide the foundation for your solution.

[3] In litigation the importance of identifying the elementary legal foundation of the case is equalled by the importance of shaping, structuring and building the case to be proved upon a factually certain foundation. Proof of every cause of action requires proof of the elements of that action and thus proof of the material facts to be relied upon to make out those elements. In litigation there are inevitably choices to be made in selecting from multiple causes of action and in selecting the facts that will be relied upon as material to proof of a particular cause of action. Those choices, those selections, determine what the factual foundation of the case will be. The more certain the foundation or core facts are, the better the prospects of success.

[4] In practice there is a cyclical process at work when the time comes to plead a case. The identification of the proper elementary legal foundation of the case and the identification of the proper factual foundation of the case are intertwined processes. The cause of action selected and the material facts to be pleaded in support of the elements of that cause of action inevitably depends on the facts. Equally though, the identification of the facts which are to be relied upon as the factual foundation of the case depends upon the elements of the cause of action selected and the material facts to be pleaded in support of it. A cyclical consideration of the best combination of prospective legal and factual foundations for the case gradually identifies the case to be pleaded.

[5] In *A Practical Guide To Drafting Pleadings* Shelley Dunstone acknowledges the significance of this cyclical process in investigating the facts and progressively reviewing the potential legal foundation for the case. She warns the practitioner against labelling the case too soon, saying:

> "You may have already formed a view as to what causes of action are available to your client. In your mind you have probably labelled the case as "goods sold and delivered" or "misrepresentation" or "personal injury negligence" or "occupiers liability" or "breach of

> trust". Labelling the case helps us to impose some sort of order from the "mess" of information which we have to work with.
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> Once we have identified an available cause of action, it is tempting to assume that we have found the "answer", but we should keep our minds open to other possibilities. …
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> While we are conducting our investigation we should be mindful of this tendency, and ask ourselves:
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> - What am I *not* noticing because it does not fit the framework I have chosen?
> - Am I forcing anything to fit the framework?
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> The initial choice of cause of action should be regarded simply as a hypothesis. This hypothesis helps us to give initial advice and to make some investigations, but it is no basis for launching a client into litigation. …
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> Having formed a hypothesis as to the cause of action available to our client, we should test that hypothesis to see if the information will support it."[1]

[6] My focus today is upon that stage of the litigation process when the pleader in contract and commercial litigation tries to draw together the proper legal and factual foundations and pleads the statement of claim. You might think in the field of contract and commercial litigation, where an agreement is invariably alleged, that the substance of the agreement would simplify the choices to be made in how the case is to be pleaded. I counsel caution however. The authorities are littered with the carcasses of pleadings struck out because of elementary failures to properly identify how the agreement founds the case to be pleaded. Those authorities, some examples of which I will canvass this morning, show that even in this field, pleaders must pay close attention to properly identifying the elementary legal and factual foundation of their case.

[7] My thesis is that carefully identifying those basic foundations in pleading the case will heighten the litigant's prospects of success. To establish this thesis I propose, largely, to prove it in the negative. That is, I will demonstrate that the failure of a pleader to identify the appropriate legal and factual foundations of a case will result in an unpersuasive statement of claim, confusion, the unnecessary cost of challenging pleadings, an absence of structure in guiding eventual proof of the case and, ultimately, diminished prospects of success.

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1 Dunstone S, *A Practical Guide to Drafting Pleadings*, LBC 1997 68-69.

The rules of pleading

[8] Before embarking on our tour of pleading catastrophes in contract and commercial litigation it may assist to briefly remind ourselves of some of the rules of pleading of relevance to pleading a statement of claim.

[9] It has often been said effective pleadings should define the issues in dispute between the parties and put each party on notice of the case that he or she will have to meet at trial. These principles underpin the rules of pleading as now articulated in the *Uniform Civil Procedure Rules.*

[10] Rules of relevance to pleading a statement of claim in contract or commercial litigation include:

(a) Each pleading must be as brief as the nature of the case permits – r 149(1).

(b) Each pleading must contain a statement of all the material facts relied upon but not the evidence by which they will be proved – r 149(1)(b).

(c) Where a conclusion of law is pleaded the material facts in support of the conclusion must be pleaded – r 149(2).

(d) A pleading which discloses no reasonable cause of action may be struck out – r 171(1)(a).

(e) Some matters of law, including breach of contract, misrepresentation, performance, release, wilful default and every type of damage claimed must be specifically pleaded, along with facts from which they are claimed to be inferred – r 150(1)(2).

(f) Unless precise words are material a pleading may state the effect of rather the entirety of spoken words or a document – r 152.

(g) If damages are claimed the nature and amount of the damages must be pleaded – r 155(1).

Identify the material facts upon which the cause of action relies

[11] Building upon that refresher it is helpful to emphasise the importance at the outset of identifying the material facts upon which a cause of action is to rely.

[12] In reading a statement of claim the court's interest inevitably goes to what causes of action are pleaded and what material facts are to be relied upon in support of each cause of action. The frequency with which the courts encounter statements of claim that fail to clearly plead those matters is at first blush surprising given how fundamental they are to the potential success of any action. A fairer view may be that the incidence of that failing is likely to be higher amongst those cases which proceed to a contest in court and the failing may itself be an explanation for why a case may not have settled earlier.

[13] In *Mio Art Pty Ltd v Macequest Pty Ltd & Ors*[2] Justice Jackson was presented with such a case in the context of a strike out application. The proceedings involved a complex dispute between two share holdings factions of a company, KHD. The company owned land on which a development project was undertaken.

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2 (2013) 95 ACSR 583.

[14] The plaintiffs' third further amended statement of claim was over 290 paragraphs long. It alleged oppression, breach of covenant, breach of contract, the tort of inducing breach of contract, breach of fiduciary duty, inducing breach of fiduciary duty, knowing participation in breach of fiduciary duty and involvement in contravention of directors' duties.

[15] The pleading adopted a narrative style involving a recitation of facts followed by paragraphs containing allegations of loss or damage. The allegation paragraphs adopted this formula:

> "By reason of the matters pleaded in paragraphs [1]-[260] KHD has suffered loss and damage."

[16] The failure of the statement of claim to properly identify the material facts upon which the plaintiff founded its claims against the defendant resulted in the entire claim being struck out with leave to amend it refused. That outcome could have been avoided had the pleader taken the time to articulate, in respect of the scattered array of causes of action, which facts, of the morass of facts pleaded, were material to which of the many causes of action pleaded. Had the pleader engaged in the elementary threshold discipline of separately identifying the factual foundation for each different cause of action the number of causes of action would have been culled, the pleading would have been briefer and more coherent and the case may have lived on.

[17] Justice Jackson's observations in *Mio Art* on the need to clearly and separately identify the material facts relied upon in support of each cause of action are typically instructive:

> "When a "narrative" style of pleading is adopted, and there are numerous causes of action raised by the pleading, there can be real difficulty in ascertaining the material facts constituting a particular cause of action. The difficulty is increased where the narrative is longer …
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> The "material fact" model of pleading was a reform of the rules of court bought into effect under the *Judicature Act* 1876 (Qld) for the administration in the one court of the rules of common law and equity. Brevity was the intent, in contrast to the prolix pleadings of common law and particularly equity beforehand. Perhaps the drift of history has caused a loss of focus as to the importance of the purpose of the reform. That said, a lengthy pleading is not necessarily a vice. Where it is prepared with great precision and isolates the issues, there is no cause for complaint.
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> But where a pleading alleges a lengthy historical account of facts that occurred over an extensive period of a commercial relationship, then particular specific causes of action are pleaded on the basis that the reader is invited to find the relevant material facts for any cause of action in all that has gone before, the price for the death of that hero, brevity, is not paid in the valuable coin of precision. Instead, the reader is invited on a would-be treasure hunt, with the unlikely satisfaction that after looking in every nook and cranny, and trying every combination possible, there will be an Archimedean "Eureka" moment.

> Where a pleader has fallen into this error, there is a remedy. It is to require that the pleading identify the material facts for each cause of action. …
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> At the risk of stating the obvious, it is as well to record just what a material fact is. In its primary meaning, a material fact is a fact that the plaintiff must prove to succeed in a claim for relief upon a cause of action. The conceptual power of the material fact model of pleading is not recognised often enough. There is a trend to treat this most fundamental of procedural rules as something which is best overtaken by detailed factual and legal submissions. I could not disagree more strongly with that view and I am glad to say that the pleading rules have not been altered to countenance it. There is a place for detailed factual and legal submissions, but it is not as replacement for the identification of the material facts.
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> The cases have long recognised the negative proposition that if any one material fact is omitted, the pleading of a cause of action is bad. I prefer to look at it from a positive side. If a plaintiff proves all the material facts, it must succeed on the cause of action. Thus the case is reduced to its factual skeleton in law. By adhering to the concept of a material fact in the practice of pleadings, the courts serve the purposes of efficiency and cost-saving which inform the procedural rules. The only issues joined are upon material facts. The only evidence led proves or disproves the material facts. The decision in the case is not affected by the irrelevant and the decision-maker is not distracted from the material facts."[3]

[18] There is nothing for the pleader to fear in having to identify the material facts for each cause of action. It provides an elementary prompt to the pleader to ensure at the outset that the pleaded material facts meet the elements of the associated cause of action.

[19] The fundamental nature of the need for the material facts pleaded to meet the elements of the cause of action advanced was emphasised by White J in *Mohareb v Lambert and Rehbein (SEQ) Pty Ltd &* Ors.[4] Her Honour observed:

> "As a perusal of the annotations to r 149 of the UCPR reveals, the function of pleadings is to state with sufficient clarity the case that must be identified and, if possible narrowed, and allow the issues to be met. The reason for this, so that an opposite party has a clear understanding of the case against him or her and the issues are defined. A difficulty which beginner pleaders commonly experience is distinguishing between evidence and material facts for it is the latter alone which must be pleaded. …
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> Because it is necessary that all elements of a cause of action must be encompassed in the material facts for that cause of action it is essential that the pleader understands what is required to succeed, prima facie, in a plaintiffs action against a defendant or defendants.

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3 Per Jackson J in *Mio Art Pty Ltd v Macequest Pty Ltd & Ors* (2013) 95 ACSR 583, 597-598.

4 [2009] QSC 324, [13]-[14].

> Unless this fundamental matter is grasped then it is unlikely that a pleading can meet the requirements of rr 149 and 150."

Identify the correct cause of action

[20] I turn next to an illustration of the fundamental importance of identifying the correct cause of action from the outset.

[21] It sometimes occurs that an apparently binding agreement contains an error. In such cases attempts are sometimes made to place a construction on other events so as to give rise to some other contract on some other occasion rather than squarely confronting the real problem – the need to rectify the contract that was actually entered into. *JM Kelly (Project Builders) Pty Ltd v Toga Development No. 31 Pty Ltd (No. 4)*[5] was such a case.

[22] In that matter the plaintiff's pleadings purported to set up a case that the binding contract between the parties in respect of a $65M development project was not the formal contract which had been executed but rather was evidenced by agreements arising from a tender and design management process which later ensued. In the alternative it was pleaded the defendant had made representations in the course of that management process about the scope of works the plaintiff was required to complete. It was alleged the plaintiff had relied to its detriment on those representations, giving rise to claims under the *Trade Practices Act* and for common law relief.

[23] The action had been on foot for numerous years and had been the subject of various rulings in response to the plaintiff's initial lawyers' attempts to justify the case as pleaded. Ultimately new lawyers conceded the case as pleaded was untenable and applied to amend the statement of claim so as to pursue a claim for rectification of the formal instrument of agreement. The rectification sought was based on a common mistake by the parties that the formal agreement contained a scope of works which emanated from the management process or alternatively a unilateral mistake on the plaintiff's part to the same effect in circumstances where the defendant knew of that mistake. The plaintiff also sought to pursue an alternative claim on a quantum meruit for the value of the work performed over and above the price under the formal agreement. Significantly, few amendments needed to be made to the statements of material facts in the pleading in order to accommodate this recasting of the case. That appears to have been an influential consideration in Justice Daubney determining the amendment should be allowed.

[24] A remarkable feature of the *JM Kelly* case is that in earlier case reviews and interlocutory applications the notion the plaintiff's case ought to have been cast as one for rectification was expressly canvassed. That the problem was so publicly identified yet still the plaintiff clung to the pleading may seem surprising. However experience suggests that practitioners often cling too long to ill-conceived pleadings trying to cure fundamental problems with tinkering amendments rather squarely confronting and enduring the short term cost and embarrassment of completely re-pleading the case.

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5 [2010] QSC 111.

[25] Errors in pleading frequently arise in consequence of proceedings being issued prematurely without proper investigation or consideration of the case to be advanced. The advantage to be gained by prematurely issuing proceedings is almost inevitably outweighed by the lingering disadvantageous impact of a case which has been defectively pleaded at the outset. Where there has been foundational error at the outset its impact will only be compounded by stubborn adherence to it once the error becomes apparent.

[26] A lesson to be taken from the *JM Kelly* case is that where a foundational error has been made it is preferable to correct the error and re-cast the case consistently with its proper foundation rather than relying on an unrealistic contortion of the facts in order to try to accommodate an incorrectly identified legal foundation for the case.

Identify the substance of the agreement

[27] I turn next to the elementary need to properly identify the substance of the agreement.

[28] In *Horton & Anor v Keeley & Ors*[6] the Court of Appeal declined leave to appeal the decision of a District Court judge to allow the plaintiffs to amend their statement of claim. The case involves a remarkable oversight by the plaintiff as to the legal character of the agreement upon which the claim depended.

[29] The relief claimed by Mr and Mrs Keeley and a company, Marine Warehouse Pty Ltd, was damages for breach of contract and or misrepresentation in relation to the sale of that company's marine business. The defendants, Robert and Desley Horton, had owned 74% of the shares in Marine Warehouse Pty Ltd. The Hortons, the company and the Keeley's executed an agreement for the transfer of the shares to the Keeleys. The alleged breach of contract effectively involved a failure to pay the agreed consideration. The alleged misrepresentation went to a failure to disclose aspects of the company's business bearing upon the correct value of that business.

[30] The Keeleys pleaded they had agreed to purchase "the shareholding and business of the company". The fundamental error in so pleading the case was that there was no agreement to sell the company's business at all. Rather the terms of the agreement only involved the sale of shares in the company that ran the business. A secondary error flowing from that primary error went to the irrelevance of the evidence of the value of the business as distinct from the value of shares in the company. In short the statement of claim built a case on the flawed legal foundation that in buying shares the Keeleys were buying a business run by the company. This bespeaks a common lay misapprehension of the legal standing of a company but it seems unlikely the lawyer who pleaded the case did not appreciate a company's legal standing is separate from the legal standing of those who hold the majority of shares in it. The more likely explanation is that there was at the outset a careless failure to properly identify the true substance of the agreement.

[31] The *Horton v Keeley* case highlights the importance of properly considering the true effect of the contract upon which is intended to ground litigation. The pleading should reflect the true substance of the agreement, not the emphatically held but quite possibly erroneous views of clients as to what they understood was agreed.

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6 [2013] QCA 161.

[32] In that particular matter the plaintiffs were fortunate that the learned District Court judge allowed the amendment, particularly given the decision to do so occurred on day three of the trial, after the close of the plaintiff's case and occasioned an adjournment of the trial. There were sound discretionary reasons for that course to be taken, particularly given that the nature and scale of the loss claimed had remained substantially unchanged throughout the trial. Nonetheless it was an exceptional course. Relying on the mercy of the judge after running a misconceived case to closure will not ordinarily be a winning strategy.

Identify the parties to whom the contract relates

[33] Another area of potential threshold error is the correct identification of the parties bound by the contract. To provide some relief from my tales of error I mention a case in which this threshold was navigated successfully, namely *ACN 096278483 Pty Ltd v Vercorp Pty Ltd & Hegira Limited.*[7]

[34] In that matter Hegira Limited entered into four separate contracts to sell four lots of vacant land on Bribie Island to Barrier Developments Pty Ltd. Each contract conferred a seller's option to re-purchase the lot if the buyer did not complete construction of an approved dwelling within time. Barrier Developments Pty Ltd nominated ACN 096278483 Pty Ltd to take the title acquired. Hegira transferred the land to ACN under the contract but ACN did not comply with the building covenants and Hegira purported to exercise the options to re-purchase the land from ACN. ACN denied it was contractually bound to sell the land back. The trial Judge ordered specific performance of some of the contracts.

[35] An issue on appeal was whether ACN was contractually bound by the relevant provisions of the contracts. The learned trial Judge concluded that ACN was bound by the relevant contracts. ACN challenged the trial Judge's reasoning, contending that "very clear language" or "compelling language" was on the authorities required to justify departure from the ordinary position that in the case of a contract for the sale of land between a vendor and a purchaser "or nominee" the nominee merely takes title to the land but does not otherwise stand in the place of the purchaser.

[36] The Court of Appeal concluded that the factual circumstances provided compelling justification for concluding ACN had contracted to be bound as purchaser upon taking a transfer of title as Barrier Developments' nominee. The concluded contracts identified "the buyer" as Barrier Development Pty Ltd "and or nominee". The community development covenants said to have been breached defined "buyer" as being the person who "buys" the allotment from the developer. ACN argued at trial that it was not bound by the contract but was a mere transferee of title of the properties. However the revised version of an annexure to the contracts, which was apparently properly executed, included the words "or nominee" in the expression "Barrier Developments/or nominee (as buyer)".

[37] In upholding the trial Judge's view of the matter the Court of Appeal noted that the parties' mutual aim in respect of each contract was to regulate construction on the land after settlement by the transferee and such provisions would be unworkable if they were unenforceable against the nominee of Barrier Developments Pty Ltd.

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7 [2011] QCA 189.

[38] In that case the plaintiff had to some extent jeopardised his prospect of success by admitting a defence allegation that the contracts between Hegira and Barrier Developments were executed by Barrier Developments as "buyer". While it was argued without success that evidence on the topic had gone beyond the pleadings the difficulty presenting itself would have been more easily avoided had the case as pleaded more clearly articulated the status of ACN as a contracting party.

[39] This topic of correctly identifying the contracting parties prompts a reminder that in cases where multiple parties are sued it is important to give proper consideration to the foundation of the case as against each defendant. The foundation will not necessarily be the same. I digress from contract to illustrate my point by reference to an old negligence case.

[40] In *Esso Petroleum Co Ltd v Southport Corporation*[8] an oil tanker owned by Esso encountered rough weather difficulty but the ship's master, McMeekin, continued on and the ship ran aground. Oil was jettisoned to lighten the ship thereby contaminating foreshore and a lake owned by Southport. Significant clean up expenses were incurred. Southport sued Esso and McMeekin. It alleged McMeekin had been negligent in the navigation, management and control of the oil tanker and that Esso was vicariously liable for the negligence of McMeekin.

[41] The court concluded that McMeekin was not negligent. Southport contended Esso had an obligation to show what steps it had taken before the journey to ensure the tanker was sea worthy and was itself negligent. The House of Lords found the pleadings imposed no such obligation upon Esso. The only allegation of negligence in the statement of claim was made against McMeekin. The only pathway to liability in respect of Esso was through a positive finding of McMeekin's negligence. In the absence of that finding Esso was not liable. If Southport wanted to pursue a separate pathway to establish the liability of Esso it should have pleaded it.

Identify the point at which agreement was reached

[42] Returning to contract, another danger area in identifying the foundation of the case can be identifying the point at which a commercial agreement has been reached. In *Brambles Holdings Ltd v Bathurst City Council*[9] Hayden JA observed:

> "While the process by which many contracts are arrived at is reducible to an analysis turning on the making of an offer, the rejection of the offer by a counter offer and so on until the last counter offer is accepted, that analysis is neither sufficient to explain all cases nor necessary to explain all cases. Offer and acceptance analysis does not work well in various circumstances..."

[43] A similar sentiment was earlier expressed by Lord Denning MR in *Port Sudan Cotton Co. v Govindaswamy Chettiar & Sons*:[10]

> "…I do not much like the analysis in the text-books of inquiring whether there was an offer and acceptance, or a counter offer, and so forth. I prefer to examine the whole of the documents in the case and

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8 [1956] AC 218.
9 (2001) 53 NSWLR 153, [71].
10 [1977] 2 Lloyd's Rep 5, 10.

> decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agree to be bound by those terms from that time onwards."

[44] The underlying difficulty heralded by those passages was enlarged on by McHugh JA in *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd*[11]:

> "It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of 'offer', 'acceptance', 'consideration', and 'intention to create a legal relationship' which are the bench marks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship. …
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> Moreover, in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' subsequent conduct becomes sufficiently specific to give rise to legal rights and duties. In a dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship is first formed."

[45] These passages were cited in *Alborn & Ors v Stephens & Ors*[12] in the course of the Court of Appeal concluding joint venturers had not entered into an agreement by the time at which the learned primary Judge concluded they had.

[46] In that case co-venturers had agreed to carry on the business of acquiring and operating franchised Subway stores. The learned primary Judge concluded the parties had entered into an agreement under which one of them was to remain the beneficial owner of one of the venture's particular businesses at Clontarf. The evidence demonstrated a chronologically diverse array of documentary communication in respect of that particular business. There were also various discussions about the disposition of more than one of the venture's stores. The Court of Appeal concluded the learned trial Judge had erred in finding a binding agreement had been reached between the co-venturers in respect of the disposition of the relevant businesses.

[47] Muir JA observed the diary note upon which the learned trial Judge had relied in identifying the stage at which agreement had been reached was a "slender peg" to support such a finding. The diary note agreed merely upon a price in respect of each store but did not deal with any of the associated array of issues that necessarily required resolution in order to arrive at an agreement. For instance there was no mention of the ability to take into account, in satisfaction of the purchase price, liabilities in respect of the businesses to be assumed by the parties. For example, if

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11 (1998) 5 BPR 11.110, 11.117-11.118.

12 [2009] QCA 384.

the liabilities exceeded the purchase price there would be no obligation for the price to be paid. The matter was remitted to the learned primary Judge for continued hearing.

[48] It is sobering to appreciate that even judges may struggle with the important fundamental question of when a binding agreement was arrived at.

Identify the process required of the parties by the contract

[49] Contracts sometimes make provision for how a dispute between the parties ought be dealt with. Such provisions warrant close consideration at the outset so that a remedy is not pursued inconsistently with the agreement of the parties. Provisions about valuations provide an example.

[50] In *Vale Belvedere Pty Ltd v BD Coal Pty Ltd & Anor*[13] the parties, Vale, BD Coal and another company, BC, were participants in a joint venture. Vale held a 51% interest in the venture and exercised an option under the joint venture agreement to acquire 24.5% interests of each of BD Coal and BC at "fair market value". The agreement made specific provision for the determination of "fair market value", the price at which each of BD Coal's and BC's "venture interest" was to be transferred to Vale.

[51] "Fair market value" was defined at some length in the agreement, although its essential touchstone was "the amount that a willing but not anxious buyer would pay, and a willing but not anxious seller would accept". The procedure for determining "fair market value" set out in the agreement contemplated the participants would each appoint a valuer and within stipulated time-frames provide a copy of their valuer's determination. In the event the valuers' determinations were within 10% of each other the "fair market value" would be set as the average thereof. If not the participants would jointly appoint a valuer to determine fair market value, which could not be less than the lowest of the individual valuations. The agreement required the jointly appointed valuer to undertake an assessment of the values determined by each individual valuer and to make its own determination. The jointly appointed valuer's valuation would be deemed to be "fair market value". The agreement provided that its method of determination of "fair market value" was final and binding on the parties except in the case of manifest error.

[52] The parties agree it was not necessary for each of BD Coal and BC to appoint a valuer and that only BD Coal would do so. Vale and BD Coal each produced valuation reports and they were not within 10% of each other. Vale resisted the appointment of a joint valuer, alleging the occasion for such an appointment had not arisen because BD Coal's report by RBC did not determine fair market value as defined by the agreement.

[53] Vale sought declarations that the RBC report was not a determination of "fair market value" in accordance with or for the purposes of the joint venture agreement and that BD Coal had not provided a valuation report as required. BD Coal pleaded Vale's case was an impermissible attack upon the merits of the RBC valuation. The learned primary judge considered the amended statement of claim did not mount a viable challenge to the RBC valuation on grounds other than partiality. He held the

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13 [2012] QCA 77.

pleading did not disclose any cause of action and should be struck out. The Court of Appeal dismissed Vale's appeal against that outcome.

[54] A further difficulty with Vale's case was that, in any event, manifest error was the only basis for avoiding the determination of fair market value under the agreement. The determination by RBC being greater than 10% of the valuation procured by Vale, RBC's determination did not become a determination of fair market value under the agreement. Fraser JA, in agreeing with this construction by the learned primary Judge, considered a different construction was not warranted by the unlikely prospect that it would not be possible to detect whether manifest error in an individual valuation report when considered by a jointly appointed valuer influenced the latter's valuation.

[55] The appellant placed heavy reliance upon the observations of McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*:[14]

> "In my opinion the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied. …It will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside on the ground of the valuer's mistake or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is 'final and binding on the parties'. By referring the decision to a valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision. …While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. ...In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? ...The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract."

[56] Fraser JA noted the contract with which McHugh JA had been concerned did not identify the circumstances in which a valuation would not be effective. Fraser JA emphasised that here the agreement did do that. He considered the primary judge was right to conclude that to decide whether the expert determination was one by which the parties had agreed to be bound it was necessary not only to assess what the parties agreed the expert should do but also what the parties agreed should be the consequence, if anything, of the expert not doing everything they agreed the expert would do.

[57] Considerable money was doubtless expended by Vale in this litigation. However its pleading was doomed from the outset because it was selective as to the words in the agreement upon which it relied and failed to acknowledge the overall meaning of all paragraphs dealing with the process of determining fair market value. It is another lesson in the folly of not properly considering and confronting the meaning of the words of the agreement at the outset. On any application of basic principles of

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[14] (1985) 1 NSWLR 314, 335-336.

interpretation such an exercise would inevitably have demonstrated that Vale's prospects of success were objectively poor. In fairness, such an exercise may well have occurred. Where significant money is involved clients might sometimes be tempted by a long shot.

Identify the damage suffered

[58] My final example relates to the need for the pleading to identify the damage suffered. Rule 150(1)(b) requires that every type of damage claimed must be specifically pleaded. Moreover r 155(1)(2) requires a pleading to state the nature and the amount of the damages claimed and include the nature of the loss or damage suffered, the exact circumstances in which the loss or damage was suffered and the basis on which the amount claimed has been worked out or estimated.

[59] In *Meredith v Palmcam Pty Ltd*[15] the Court of Appeal observed:

> "Expecting a plaintiff to comply with these quite specific provisions is in our respectful opinion not a matter of mere pedantry".

[60] In *Brinsmead & Ors v Property Solutions (Australia) Pty Ltd*[16] the loss and damage pleaded was described as the difference between the consideration payable by the defendant pursuant to a share sale agreement and the market value of the shares the subject of that agreement. However the amount of the damages claimed was not particularised. Rather it was pleaded "particulars of the said difference will be provided prior to trial". There was an application to strike out those paragraphs on the basis they were not pleaded adequately. The apparent breach of r 150 and 155 was explained on the basis the plaintiffs were seeking advice from expert valuers that had not yet been provided.

[61] Douglas J accepted that while the nature of the damage suffered had been adequately pleaded the amount had not been and, that being mandatory, he gave directions pursuant to r 371 for the irregularity to be cured by the provision of particulars of the amounts claimed.

Conclusion

[62] I embarked upon this session intent on labouring the elementary and threshold importance of the pleader properly identifying the basic legal and factual foundations of the case to be pleaded. In a sense the desirability of properly thinking through those foundations before pleading the case is akin to the desirability of the advocate formulating a closing address before the trial starts, so that the knowledge of what will be sought to be achieved in the end result guides and informs the conduct of the trial. So too a pleading built on proper legal and factual foundations will guide and inform the progression of the case from its initiation to its conclusion.

[63] My aim this morning was not to instruct specifically how to plead. Without in any way denigrating the value of the instructing of practitioners in the art of pleading it ought be appreciated that there are many different ways the same case can be effectively pleaded. There is some danger in rigid reliance on pleading precedents. It is rightly said they are good servants but bad masters. Over adherence to the

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15 [2001] 1 Qd R 645, 647.

16 [2009] QSC 223.

content of a precedent raises the spectre of the practitioner erroneously shaping the factual foundation of the case to conform with the pleading, when it is the pleading which ought be shaped by the factual foundation of the case and the legal foundation to which it gives rise.

[64] In preparing for this session I came upon a paper by Justice Fryberg[17] in which he suggested that in truth the actual drawing of pleadings is not difficult. His Honour said:

> "Pleadings are usually not hard. It is true that drawing and settling a good pleading is an art, and by definition some people will be better at it than others and some pleadings will be better than others. But there is no reason why anyone should draw bad pleadings."

[65] I respectfully concur. A satisfactory pleading will invariably result if the pleader at the outset identifies the proper legal and factual foundations of the case to be pleaded.

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17 Justice Henry Fryberg, 'Pleadings: a view from the Bench' (Speech delivered at the Australian Insurance Law Association Breakfast, 20 April 2003).