SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**The Owners – Units Plan 239 v Australian Capital Territory**
Citation:	**[2016] ACTSC 81**
Hearing Date:	30 March 2016
Decision Date:	29 April 2016
Before:	Mossop AsJ
Decision:	See [36]
Catchwords:	PRACTICE AND PROCEDURE – Application to strike out parts of defence under rule 425 – extent of pleading required for the purposes of s 110 of the *Civil Law (Wrongs) Act 2003* (ACT) – extent of inquiry into facts relating to contributory negligence upon a strike out application – application dismissed
Legislation Cited:	*Civil Law (Wrongs) Act 2003* (ACT), s 110 *Civil Liability Act 2002* (NSW), s 42 *Court Procedures Rules 2006* (ACT), rr 425, 1701(2)
Cases Cited:	*Bolas v Calvary Health Care Ltd* [2016] ACTSC 58 *Roads and Maritime Services v Grant* [2015] NSWCA 138 *Harris v Commissioner for Social Housing* (2013) 8 ACTLR 98 *Bathurst Regional Council v Thompson* (2012) 191 LGERA 182 *Port Stephens Council v Theodorakakis* [2006] NSWCA 70
Parties:	The Owners – Units Plan 239 (First Plaintiff) Kay Pether and Neil Pether (Second Plaintiff) Frank J Jakubowski and Anne Juliet Whyte (Third Plaintiff) Vincent Woolcock and Niki Savva (Fourth Plaintiff) Stephen James Larkham and Jacqueline Larkham (Fifth Plaintiff) Australian Capital Territory (Defendant)
Representation:	**Counsel** Ms R Graycar (Plaintiffs) Mr J Sexton SC, Ms V Thomas (Defendant) **Solicitors** McCulloch & Buggy (Plaintiffs) ACT Government Solicitor (Defendant)
File Number:	SC 876 of 2011

MOSSOP AsJ:

The application

1. These proceedings involve a claim by an owners corporation and various unit owners against the Australian Capital Territory. The cause of action relied upon is negligence. The plaintiffs asserted that, as a consequence of negligence on the part of the Territory in managing land adjoining their property, a fire occurred on the Territory's land and spread to their property causing damage.

2. The plaintiffs have applied to strike out certain paragraphs of the defendant's defence. At the hearing of the application, leave was granted to amend the application so as to extend the scope of the paragraphs which were sought to be struck out. As amended, the paragraphs which were sought to be struck out were paragraphs [12](ii)- (iii) and paragraphs [16](vii) and (ix). Those paragraphs are paragraphs in which the defendant made allegations relevant to a claim of contributory negligence and by which it raised matters relevant to the operation of s 110 of the *Civil Law (Wrongs) Act 2003* (ACT) (CLW Act).

The pleadings

3. Paragraph 10 of the plaintiffs' claim alleges that the defendant owed each of the plaintiffs a duty of care. Following paragraph 10, particulars are provided of the facts and circumstances giving rise to the duty of care.

4. Paragraph (xii) of those particulars provides:

> The Plaintiffs were vulnerable to the risk of harm from the Defendant's failure to maintain the Site so as to minimise the risk of fire spreading in circumstances where the Plaintiffs had no control over the Site.

5. The defendant's answering pleading in its defence is as follows:

> 12. Regarding paragraphs 10 (xii) of the Statement of Claim, the defendant:
>
> i. denies that the plaintiffs were vulnerable to the risk of harm from fire spreading from the Site in circumstances where they were able to take reasonable precautions to protect their property from fire, for example:
>
> a) replace their brushbox boundary fences with non-combustible fencing material, for example Colourbond metal sheet fencing;
>
> b) replace other combustible items (for example wooden pergolas, Balinese-style brush material shade umbrellas, and plastic type roofing over pergolas) that were connected to or close to their brushbox boundary fences with less or non-combustible materials;
>
> c) clear vegetation and other combustible on their land away from their brushbox boundary fences;
>
> d) clear vegetation and other combustible items on their land away from their houses;
>
> e) install reasonable fire protection measures, for example non-combustible or fire resistant roofing to pergolas protruding over the brush box fencing; and
>
> f) clear vegetation on the Site that was adjoining their brushbox boundary fences;

ii. says that the plaintiffs' [sic] knew or ought to have known that their property was at risk of fire and knew or ought to have known that they should have taken reasonable precautions to protect their property from fire and so minimise that risk.

Particulars

a) The plaintiffs knew or ought to have known that bushfires burned into the suburbs of Canberra in December 2001 and again in January 2003 that caused loss and damage to houses and property.

b) The defendant informed the plaintiffs through media releases and distribution of printed publications that the suburbs of Canberra particularly areas of Canberra that adjoin areas of open nature reserve which included units 2, 3, 4 and 5 in Units Plan 239, were at risk of fire during summer.

c) The defendant informed the plaintiffs through media releases and distribution of printed publications of actions they should take to minimise the risk of fire during summer, including removing flammable materials away from the house, installing fencing made from non-combustible materials such as metal or brick and the actions described in paragraph 12 (i)(a) to (e) above.

d) The plaintiff's strata manager, Mr Bowditch, informed the plaintiffs that their property was at risk of fire during summer.

iii. Says that the plaintiffs, by reason of their failure to take the reasonable precautions identified in paragraph 12 i (a)-(f), were guilty of contributory negligence.

6. The pleading in (iii) refers only to paragraph [12](i). However, the application before me was argued on the basis that paragraph [12](ii) and the particulars provided to paragraph [12](ii) were particulars relevant to the claim of contributory negligence. In other words, the application was argued on the basis that paragraph [12](ii) was picked up as a pleading for the purposes of the claim of contributory negligence in paragraph [12](iii).

7. Paragraph [13] of the claim is the allegation of breach of duty. The plaintiffs alleged that the defendant, prior to the date of the fire, failed to properly maintain the site so as to minimise the risk of fire on the site spreading to the plaintiffs' premises. Particulars of negligence are provided as follows:

(xvii) Failure to create a bare earth graded fire break trail of approximately 3 to 5 metres in width between the grass area perimeter of the Site and the Premises;

(xviii) Failure to provide a means of access to the area along the perimeter of the Site adjoining the Premises so that such perimeter could be adequately mown;

(xix) Failure to have proper or any regard to the proximity of the Site to the Premises;

(xx) Failure to have proper regard to the fact that the perimeter of the Site was in some places bounded by brush fences;

(xxi) Failure to remove or prune pine trees close to the perimeter of the Site adjoining the Premises;

(xxii) Failure to clear the Site regularly or at all of fuel loading vegetation, including blackberry bushes, bramble bushes and long grass which was in some instances up to two metres in height;

(xxiii) Failure to mow the Site regularly and in particular the areas on the perimeter adjoining the Premises;

(xxiv) Failure to spray the blackberry and bramble bushes on the Site with poison regularly or at all;

(xxv) Failure to remove blackberry bushes that had been sprayed and poisoned and were dead on the Site, and which in some cases were about two to three metres wide;

(xxvi) Failure to enable access for emergency workers to the Site in the event of fire;

(xxvii) Failure to reduce the fuel load on the Site adequately or at all;

(xxviii) Failure to secure the Site adequately or at all, so as to prevent trespassers from entering the Site and starting fires;

(xix) Failure to conduct any or any appropriate fire and fuelled management on the Site so as to minimise the risk of harm to the Plaintiffs;

(xxx) Failure to adopt adequate or any passive perimeter fire protection measures to prevent or delay fire passage onto the Premises from the Site, including limiting the impact of radiant heat, preventing direct contact by flames and protection against ember attack; and

(xxxi) Failure to implement any adequate fire and fuel management plan for the Site in light of the Defendant's knowledge and expertise with previous and recent fires in Canberra.

8. In answer to this pleading the defendant pleads in paragraph [16]:

16. Regarding paragraph 13 of the Statement of Claim, the defendant:

i. denies that it breached any duty of care owed to the plaintiffs as alleged;

ii. denies that it did not take reasonable steps to maintain the Site so as to minimise the risk of fire;

…

vii. says that it took all reasonable steps to maintain the part of the Site pleaded at paragraph 3(iii) above, having regard to the financial and other resources reasonably available to it for exercising its functions and the broad range of its land maintenance activities throughout the Australian Capital Territory;

…

ix. says that it took the actions pleaded at paragraphs 13(xix)-(xxvii) and (xxix)-(xxxi) on the part of the Site pleaded at paragraph 3(iii) above, having regard to the financial and other resources reasonably available to it for exercising its functions and the broad range of its land maintenance activities throughout the Australian Capital Territory;

…

Relevant rules

9. The plaintiffs made it clear that they were not seeking summary judgment, but instead were seeking to have those portions of the defendant's defence struck out. The relevant rule in the *Court Procedures Rules 2006* (ACT) (CPR) is r 425 which is as follows:

425 Pleadings—striking out

(1) The court may, at any stage of a proceeding, order that a pleading or part of a pleading be struck out if the pleading—

(a) discloses no reasonable cause of action or defence appropriate to the nature of the pleading; or

(b) may tend to prejudice, embarrass or delay the fair trial of the proceeding; or

(c) is frivolous, scandalous, unnecessary or vexatious; or

(d) is otherwise an abuse of the process of the court.

(2) The court may receive evidence on the hearing of an application for an order under this rule.

(3) If the court makes an order under this rule, it may also make any other order it considers appropriate, including, for example—

(a) if the court makes an order under subrule (1) (a)—an order staying or dismissing the proceeding or entering judgment; and

(b) an order about the future conduct of the proceeding.

10. The application was not brought as an application for further and better particulars and, as a consequence, the plaintiffs did not invoke rr 434 and 435 of the CPR which are as follows:

434 Pleadings—application for better particulars

(1) A party may apply to the court for an order for better particulars of the opposite party's pleading.

(2) The court may make any order under this rule it considers appropriate, including, for example, an order about the future conduct of the proceeding.

(3) Unless the court otherwise orders, the making of an application under this rule does not extend the time for pleading.

(4) Particulars required under an order under this rule must repeat the relevant part of the order so the particulars are self-explanatory.

435 Pleadings—failure to comply with better particulars order

If a party does not comply with an order made under rule 434 (Pleadings—application for better particulars), the court may make the order, including give the judgment, it considers appropriate.

11. The plaintiffs contended that the relevant parts of the defence so far as they were particularised failed to disclose a cause of action.

Grounds identified in the plaintiffs' application in proceedings

12. The plaintiffs' application in proceedings dated 27 November 2015 identified the grounds of the application as follows:

1. The defence of contributory negligence pleaded in paragraphs 12ii (b) and 12ii (c) has no reasonable prospect of being established, having regard to the defendant's failure to provide any particulars capable of supporting such a defence.

2. The defence pleaded in paragraphs 16vii and 16 ix, based upon Chapter 8 of the *Civil Law (Wrongs) Act 2002* (**resources defence**), has no reasonable prospect of being established, having regard to the defendants failure to provide any particulars capable of supporting such a defence.

Plaintiffs' submissions

13. The plaintiffs' submissions were that the pleading was defective because:

    (a) In so far as s 110 of the CLW Act was invoked, the pleading was inadequate because it failed to properly identify the material facts relied upon; and

    (b) In so far as contributory negligence was pleaded, the material provided by way of particulars, when analysed, demonstrated that the claim could not succeed because:

        (i) the defendants had not received the communications relied upon;

        (ii) the communications themselves never required the removal of previously approved brushwood fencing and replacement with non-combustible fencing.

14. The plaintiffs contended that the pleading in paragraph [13] was clearly intending to incorporate the language of s 110. The plaintiffs contended that where s 110 was relied upon, the operation of the provision needed to be fully pleaded and particularised. The plaintiffs relied upon the New South Wales authorities relating to the operation of s 42 of the *Civil Liability Act 2002* (NSW), in particular, *Roads and Maritime Services v Grant* [2015] NSWCA 138 at [13]-[14], *Port Stephens Council v Theodorakakis* [2006] NSWCA 70 at [15]-[16] (*Theodorakakis*), *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360 (*Refrigerated Roadways*), *Bathurst Regional Council v Thompson* (2012) 191 LGERA 182 at [46]-[47].

15. The plaintiffs' submissions then analysed the response to their request for further and better particulars and identified the material being provided by the defendant as:

    (a) a record of Territory assets managed by ACT Property Group as at August 2005;

    (b) a record of the ACT Property Group cost groups recording the amounts spent in the 2004/2005 and 2005/2006 financial years; and

    (c) a record of Territory expenditure at the Canberra Brickworks between 2002 and 2006.

16. The plaintiffs contended that if reliance was to be placed upon the immunity in s 110(b) then it was necessary to specifically plead the specific activity of the defendant and the "general allocation of resources" to that activity. The plaintiffs contended that no such particulars had been provided.

17. In relation to the contributory negligence defence, the plaintiffs contended that:

    (a) nothing is pleaded that would allege that the plaintiffs ever received any of the warnings or material alleged in the defence to have been disseminated; and

    (b) the terms of the documents provided in support of the defendant's claims show that at no time did the documents ever direct any resident of the ACT to replace an existing brushwood fence with a non-combustible fence.

18. The plaintiffs relied upon witness statements to the effect that particular plaintiffs had not received the communications. They also relied upon the precise terms of the

documents which had been identified by the defendant as constituting the communications relied upon.

Defendant's submissions

19. In relation to the pleading of s 110, the defendant contended that the provision is not a defence per se, but rather a provision which specifies principles must be applied in determining questions of both duty and breach. Proof of the matters in s 110 are not sufficient of themselves to defeat a claim against a public or other authority. The defendant contended that in so far as procedural fairness requires that reliance upon the section be pleaded, it had done so sufficiently. In any event, it contended that the matters pleaded are in any event relevant to provisions such as ss 43(1)(c), 43(2)(c) and 44(a) of the CLW Act.

20. In relation to contributory negligence, the defendant contended that whether or not the plaintiffs knew or ought to have known of the communications will have to be determined after cross-examination of the plaintiffs, when the disputed factual issue as to whether or not each plaintiff did receive the communication will be determined. The defendant contended that the plaintiffs had misstated what is alleged by the defendant. It contended that it has not alleged that they were, in terms, advised to replace the fences, but rather that because of the risk of fire they should take precautions including installing fences made from non-combustible material. The defendant contended that close analysis of the particularised publications reveal that they were clearly capable of supporting the allegation of contributory negligence.

Consideration

The limited nature of an application under r 425

21. While the plaintiffs accepted that the application was brought under r 425, the submissions made by the plaintiffs appeared to misconceive the scope of that rule and attempted to give it a broader operation than it in fact has. In order to succeed on the application, the plaintiffs would need to establish that, assuming the pleaded facts were established, the matters pleaded could not give rise to a defence or that the pleading was so confusing it could be said to be embarrassing. If contending that the pleading could not give rise to a defence, then that could be:

    (a) because the matters were properly pleaded, but could not as a matter of law amount to a defence; or

    (b) because even though the defendant might in fact have a reasonable defence, the pleading was such that because of the inadequacy of the pleading any such defence was not disclosed.

22. In relation to the s 110 point, the plaintiffs targeted the latter proposition. In relation to the contributory negligence point, the plaintiffs appeared to be targeting the former but failed to recognise that for the purposes of r 425 (as opposed to a summary judgment application) it is necessary to assume the correctness of the facts alleged by the defendant.

The operation of s 110

23. It is important to emphasise that in addition to pleading a statutory provision which might provide a defence, or pleading a matter which might otherwise provide a defence

(r 406), the fundamental obligation to plead material facts must not be forgotten. Thus where a statutory provision is to be relied upon, it is necessary to plead the material facts that engage the provision in the circumstances of the case. That applies to routinely pleaded provisions such as those in limitation acts (see *Bolas v Calvary Health Care Ltd* [2016] ACTSC 58 at [21]-[29]) as well as provisions like s 110 (see *Roads and Maritime Services v Grant* [2015] NSWCA 138 at [14]-[18]).

24. While the terms of s 110 suggest that it applies whether pleaded or not (see *Harris v Commissioner for Social Housing* (2013) 8 ACTLR 98 at [148]), there are fundamental qualifications on the circumstances in which the Court is required to consider its operation. First, there must be evidence upon which the considerations in the section can operate: *Bathurst Regional Council v Thompson* at [45]-[50]. Second, procedural fairness will generally require specific pleading of the operation of the provision, including the material facts which inform its operation in the circumstances of the case: *Theodorakakis* at [15]-[16].

The pleading in this case

25. The pleading in paragraph [16] is in response to paragraph [13] of the claim and hence, for the purposes of the application of s 110, relates to whether there was a breach of duty rather than whether a duty existed.

26. It is not at all clear why paragraphs [16](vii) and [16](ix) repeat the same formula but [16](vii) is an answer to the whole of paragraph [13] and [16](ix) is an answer to all of paragraph [13] except paragraphs (xvii), (xviii) and (xxviii).

27. The pleading in paragraphs [16](vii) and [16](ix) does not expressly invoke s 110. It should have. However, that alone is not sufficient to warrant the paragraphs being struck out. In so far as the paragraphs plead facts sufficient to trigger the operation of the section, the language of the pleading only picks up the operation of ss 110(a) and (c). That is through the reference to "resources reasonably available to it for exercising its functions" (s 110(a)) and "the broad range of its land maintenance activities throughout the Australian Capital Territory" (s 110(c)). There is no pleading of any facts that would put the plaintiffs on notice of any reliance upon ss 110(b) or (d).

28. The information that has been provided as to the matters to be relied upon in relation to this pleading, namely the documents identified at [14] above and the explanation in the letter that provided them, provides some evidence upon which the considerations in ss 110(a) and 110(c) may operate. The parties have proceeded, for the purposes of this application, on the basis that this correspondence constitutes the particulars for the purposes of these paragraphs even though both the request for particulars and the correspondence from the defendant's solicitor were less than ideally drafted, leaving some uncertainty as to precisely what has been particularised. The documents provide some information as to budgets and activities. They do not, however, descend to any specific matters that the defendant might have sought to prove, for example, the material facts relevant to reliance upon s 110(c) such as the number of other properties where there is an interface between developed and undeveloped land that requires some management of the fire risk.

29. Having regard to the limited particulars provided for the purposes of its pleading, the defendant may be in a position where the evidence it is able to lead at trial is very limited, in turn limiting the extent to which reliance can be placed on the terms of s 110.

That said, it is important to note that a pleading may be insufficient to permit a defendant to run the case that it wishes to run at trial and yet still disclose a defence.

30. The submissions of the plaintiffs appeared to arise out of a concern that the defendant wishes to run an expansive case based on s 110. In my view, the case which may be run is limited by the scope of the pleadings and particulars. That may have the effect that s 110 may only have a limited role to play because of the limited evidence that can be called to inform its operation. However, while the pleading is minimal and the particulars provided limited, that does not render the pleading technically defective so as to warrant it being struck out.

Contributory negligence pleading

31. In relation to the attack on the contributory negligence pleading, I am not satisfied that the pleading is technically defective. The contention that the defence could not succeed because the plaintiffs have prepared witness statements denying knowledge of the communications is not a basis upon which to strike out pleadings. There may well be contested issues of fact and those can be determined after a hearing, including any cross-examination of the plaintiffs. For the purposes of a strike out application, the defendant's allegations are assumed to be true.

32. Further, the fact that the communications do not, in terms, compel or advise persons to replace existing brushwood fences that had been approved by Territory planning authorities does not render the pleading defective. The content of the communications is to provide advice about the necessity for precautions to be taken in relation to the risk of bushfires penetrating urban areas. It is true that the publications are general in nature, and that the content of the documents directly applicable to the circumstances of the plaintiffs is limited. However, it is at least arguable that the existence of those communications was sufficient to indicate to a reasonable person that they should replace the existing brushwood fences or take other steps to reduce the fire risk posed by those fences even though they remained lawful and had previously been approved by the Territory planning authorities.

Conclusion

33. Because I have rejected the plaintiffs' contentions in relation to both the s 110 pleading and the pleading of contributory negligence the application must be dismissed.

34. I indicated at the conclusion of argument that I would make a costs order, but permit any party wishing to be further heard in relation to that order to be so heard. In my view, it is appropriate that costs follow the event and I will order that the plaintiffs pay the defendant's costs of the application in proceedings dated 27 November 2015. However, I will also make an order under r 1701(2) that the costs not be assessed until the proceedings end.

35. The parties appeared to agree that, having regard to the issues involved in the case, it would be necessary to list the matter for hearing of six weeks. I will therefore list matter for hearing commencing on 7 March 2017.

Order

36. The orders of the Court are:

    1. The application in proceedings dated 27 November 2015 is dismissed.

2. The plaintiffs are to pay the defendant's costs of the application, but those costs are not to be assessed until the proceedings end.

3. The proceedings are listed for hearing for six weeks commencing on 6 March 2017.

4. The proceedings are listed for directions (including directions relating to the trial) on 17 June 2016 at 9.30am and the parties must consult with each other and attempt to agree on appropriate directions and send agreed or competing directions to my associate by email by midday on 16 June 2016.

5. Each party has liberty to have the matter relisted for further directions on two days notice by making that request by email to my associate (copied to each other party).

6. Order 2 does not take effect if within seven days from the date of this order either party notifies my associate by email (copied to each other party) that it wishes to be further heard in relation to costs.

I certify that the preceding thirty-six [36] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Associate Justice Mossop.

Associate:

Date: