**15/08; [2008] VSCA 1**

**SUPREME COURT OF VICTORIA — COURT OF APPEAL**

# *HERCULES v MAGISTRATES' COURT of VICTORIA & ORS*

**Maxwell P and Redlich JA**

**24 January 2008**

**CIVIL PROCEEDINGS – PRACTICE AND PROCEDURE – PROCEEDINGS ISSUED CLAIMING DAMAGES FOR BREACH OF CONTRACT – DEFENCE FILED WITH EXTENSIVE PARTICULARS – APPLICATION BY PLAINTIFF FOR DEFENCE TO BE STRUCK OUT – APPLICATION REFUSED BUT ORDER BY MAGISTRATE FOR DEFENDANT TO FILE AND SERVE AMENDED PARTICULARS OF DEFENCE – COSTS ORDER AGAINST APPLICANT – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1999, r9.02(3).**

**1. Where a defendant denies a fact in the statement of claim, reasons for denying the fact must be given. What is required will vary according to the nature of the allegation which is denied. It may be impossible to give reasons where, for example, what is denied is an act of alleged negligence. The denial itself conveys that the defendant says it was not negligent. Likewise, in the case of an allegation of breach of contract, the denial is sufficient to convey the defendant's position, which is that it did not breach the contract or that it positively complied with the contract. In both cases, it is difficult to see what other 'reasons' might be given for such a denial.**

**2. The particulars to be given will only be such as the defendant is reasonably capable of giving, having regard to the allegation pleaded and denied. It would be a drastic step to strike out a defence for want of particulars on the first occasion without affording the pleader an opportunity to make good the deficiency.**

**3. Where a defence notice contained extensive particulars of the denials, but there were some denials not particularised, a Magistrate was not in error in refusing an application to strike out the defence filed. It was open to the Magistrate to order that the defendant file and serve amended particulars of defence and to order that the applicant pay the defendant's costs.**

**MAXWELL P and REDLICH JA:**

1. There is before the Court an application by summons dated 21 November 2007 seeking leave to appeal from a decision of a judge of the Trial Division given 8 November 2007. For reasons which follow, leave to appeal should be refused.

2. Mr Hercules, the applicant for leave who appears for himself, has filed submissions challenging the validity of the appearance dated 8 November 2007, filed in this Court on behalf of the third defendant, Allied Personnel Pty Ltd, which is the respondent to the application for leave. Because of the conclusion we have reached on the substantive point, it is unnecessary for us to decide whether there is any question for investigation about what otherwise appears on its face to be a perfectly valid appearance.

3. Mr Hercules issued proceedings in the Magistrates' Court of Victoria against Allied Personnel seeking damages for breach of contract, breach of warranty, breach of ss52 and 53 of the *Trade Practices Act* and certain other causes of action including unconscionable conduct. He filed a lengthy statement of claim.

4. The defendant, Allied Personnel, filed a defence dated 6 August 2007. Mr Hercules made application to the Magistrates' Court for an order that the defence be struck out, or alternatively that certain paragraphs of the defence be struck out.

5. Mr Hercules' complaint was that the defence did not comply with the requirements of sub-rule 9.02(3) of the rules of the Magistrates' Court of Victoria, which relevantly states that:

> "A defendant who states that a fact stated in the statement of claim is denied must (a) give the reasons for denying the fact."

6. Mr Hercules points out, as appears to be the case, that this sub-rule, requiring reasons for a denial in a defence, is unique. The learned authors of Williams – *Civil Procedure* say as much. Mr Hercules informs the Court that, in his experience, the rule is rarely complied with in Magistrates' Court proceedings.

7. In fact, the defence filed in this case is notable for the very extensive particulars which it contains. A number of paragraphs and sub-paragraphs plead bare denials but then set out quite lengthy particulars of those denials. In the County Court and the Supreme Court, particulars of a denial are not required. A bare denial is a sufficient pleading unless there are additional facts or matters on which the defendant proposes to rely, of which notice must be given.[1]

8. Whereas the defence is impressively particularised, the statement of claim by contrast is hardly particularised at all. It lacks particulars in respect of matters which under the Supreme Court Rules would need to be particularised, including an alleged agreement, alleged terms of the agreement, and alleged warranties and representations. Nothing for present purposes turns on those omissions, however.

9. The Magistrate refused Mr Hercules' strike out application and ordered instead that the defendant file and serve amended particulars of defence within 21 days. The magistrate ordered that Mr Hercules pay the costs of the day. It was that order – that is to say, the refusal to strike out – which Mr Hercules appealed to the Supreme Court by originating motion, and it was that originating motion which the learned judge on 8 November 2007 dismissed with costs.

10. No occasion arises for any detailed exploration of what was intended by the requirement that reasons be given for a denial. We did not hear extensive argument on the question. Clearly, what is required will vary according to the nature of the allegation which is denied. It may be impossible to give reasons where, for example, what is denied is an act of alleged negligence. The denial itself conveys that the defendant says it was not negligent. Likewise, in the case of an allegation of breach of contract, the denial is sufficient to convey the defendant's position, which is that it did not breach the contract or that it positively complied with the contract. In both cases, it is difficult to see what other 'reasons' might be given for such a denial.

11. Where explanatory reasons are required to be given, and can meaningfully be given, the intention of the rule is presumably that they should be provided in the form of particulars. By this means the plaintiff, whose allegation has been denied, is informed more fully than a bare denial might do of the case which the defendant will make. That is of course the function of pleadings and, specifically, the function of particulars.[2] As already noted, that is the approach which was adopted in the defence in the present case, where extensive particulars of a number of denials are given. Mr Hercules' complaint was that there were other denials in the defence which were not so particularised, that is, no 'reasons' for the respective denials were given. Accepting that the defendant was obliged by the rule to give the reasons for each denial of a statement of fact, Mr Hercules had a legitimate objection to make. There is no qualification in the rule and it is expressed in mandatory terms. But, as with the rule in this Court requiring particulars to be given,[3] the particulars to be given will only be such as the defendant is reasonably capable of giving, having regard to the allegation pleaded and denied.

12. The only question that needs to be decided today is whether there is any arguable error in the magistrate's decision to order an amended defence. In our view there is no error. It would be a drastic step indeed to strike out a defence on the first occasion when objection is taken. To strike out a defence for want of particulars without affording the pleader an opportunity to make good the deficiency is unheard of. The magistrate's decision refusing the strike out application and instead ordering an amended defence was clearly correct.

13. Mr Hercules referred to the long line of cases which have emphasised the reluctance of appeal courts, and courts on judicial review, to intervene in matters of practice and procedure.[4] A pleading issue is a quintessential matter of practice and procedure and is properly to be regarded as under the control of the court in which the proceeding is being conducted. The circumstances in which an appeal court would be likely to intervene in a decision about particulars of a pleading must be quite exceptional. This is not such a case.

14. Mr Hercules also argues that he should have leave to appeal in respect of the order made by the magistrate that he pay the costs of that day fixed in the sum of $564. He argues that, although he lost his application to strike out the defence, his position about mediation by a court registrar was vindicated and – although the order does not mention this – he also succeeded in having time extended to deliver interrogatories.

15. For similar reasons to those we have already given, we see no basis which would warrant a grant of leave to appeal against the exercise of the magistrate's costs discretion. As with pleadings, decisions as to costs are matters which are under the control of the court where the proceedings are being conducted. It is in the interests of all those concerned in the justice system that appellate courts exercise restraint before presuming to intrude into an area – like costs – where the judgment is best made by the decision-maker at the time, who is well-placed to assess in whose favour and to what extent that discretion should be exercised.

16. The substantive application before the Magistrates' Court on that day was to have the defence struck out. There was no alternative claim for further particulars. Mr Hercules did, as he concedes, fail on the strike-out application. In our view, there is nothing to suggest that the order for costs made even arguably fell outside the scope of the discretion properly exercised.

17. For these reasons we refuse leave to appeal in respect of the costs part of the order also. We are not persuaded, however, that costs should be ordered on an indemnity basis. While we think there is real force in the argument that the prospects of success of the proceeding in the Supreme Court were poor, we are ultimately not persuaded that there was conduct of the kind which – in *Fountain Selected Meats*,[5] for example – is said to warrant indemnity costs. In so saying we are conscious that there is cost and inconvenience for a defendant in being taken off to a court of review. Our order will be simply that the applicant, Mr Hercules, pay the third defendant's costs of and incidental to the application for leave to appeal.

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[1] *Supreme Court Rules* 13.07(1).
[2] See generally, Williams, *Civil Procedure Victoria*, [13.10.5].
[3] Rule 13.10.
[4] See Williams, [64.01.255].
[5] [1988] FCA 202; (1988) 81 ALR 397.

**APPEARANCES:** For the applicant Hercules: In person. For the respondent Allied Personnel Pty Ltd: TP Mitchell, counsel. Lewis Holdway, solicitors.

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