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South Australian Industrial Relations Court Decisions

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← Moore → v ← Adelaide Brighton Cement Ltd → [2003] SAIRC 29 (15 May 2003)

Last Updated: 16 September 2003

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INDUSTRIAL RELATIONS COURT (SA)

← MOORE →, Ashleigh

v

← ADELAIDE BRIGHTON CEMENT LTD →

JURISDICTION: Prosecution

FILE NO/S: AMC-02-6445

HEARING DATES: 7 May 2003

JUDGMENT OF: Industrial Magistrate M Ardlie

DELIVERED ON: 15 May 2003

CATCHWORDS:

Request for further and better particulars - Whether paragraphs three, five and six of particulars of Complaint and Summons adequately particularised - S 22A [Summary Procedure Act 1921](#) - Supply of particulars only to the extent necessary for giving reasonable information - Held - Order for further particularisation of the term used in paragraph three "were under the control and direction of the defendant" - Remaining paragraphs sufficiently particularised - [S 4\(2\)](#), 19(1) [Occupational Health Safety and Welfare Act 1986](#).

Complete Scaffold v Adelaide Brighton Cement & Anor [\[2001\] SASC 199](#) (18 June 2001)

Sims v Wran (1984) 1 NSWLR 317

REPRESENTATION:

Counsel:

Complainant: Mr J Powell

Defendant: Mr R Manuel

Solicitors:

Complainant: Crown Solicitor's Office

Defendant: EMA Legal

1 By Application For Directions dated 15 April 2003 the defendant seeks further and better particulars in respect of the Complaint and Summons dated 24 April 2002.

2 The Complaint and Summons states that the defendant,  **Adelaide Brighton Cement Ltd** ,

"... on the 13 day of May 2000, at Birkenhead in the said State, being an employer, failed to ensure so far as was reasonably practicable that its employee, namely Colin Hutchins, was, whilst at work, safe from injury and risk to health and, in particular:

a) failed to provide and maintain so far as was reasonably practicable a safe system of work; and

b) failed to provide such information instruction training and supervision as were reasonably necessary to ensure that the employee was safe from injury and risks to health.

Contrary to [section 19\(1\)](#) of the [Occupational Health Safety and Welfare Act, 1986](#)."

3 The Complaint and Summons thereafter sets out particulars contained in paragraphs numbered one through to six.

4 I was made aware of correspondence that existed between the Crown Solicitor's Office and EMA Legal, solicitors for the defendant, regarding the provision of further and better particulars requested by the defendant's solicitors.

5 Exhibit D1 was tendered, being a letter from the Crown Solicitor's Office to EMA Legal dated 29 April 2003 which referred to par 3, 5 and 6 of the Complaint and purported to provide further and better particulars as had been requested.

6 Mr Manuel, who appeared for the defendant, indicated that the provision of the further particulars did not go far enough.

7 The focus of the argument was confined to par 3, 5 and 6 of the particulars.

8 Par 3 of the particulars states:-

"On 13 May 2000 the defendant engaged the services of Macweld Industries Pty Ltd to provide the labour necessary to assist with replacing the broken cable ("the repair operation"). Peter Herzog and Colin Hutchins, riggers, were employed by Macweld Industries Pty Ltd, and were instructed by Macweld Industries Pty Ltd to attend the Accolade II to assist with the repair operation. At all material times Peter Herzog and Colin Hutchins were under the control and direction of the defendant."

9 In Exhibit D1 the Crown Solicitor's Office in relation to par 3 states:-

"We refer to our response of 4 April 2003 in relation to this paragraph. It is our view that the complaint is adequately particularised here."

10 The Crown Solicitor's Office by letter dated 4 April 2003 responded to EMA Legal's request for further and better particulars dated 14 November 2002. The request and the response is as follows:-

EMA Legal	Crown Solicitor's Office
Particulars - Paragraph 3	
i. State precisely what is meant by the term "engaged the services".	i. This is self explanatory in the complaint.
ii. If it is alleged that the engagement was evidenced by writing, identify the document or documents relied upon.	
iii. If it is alleged that the engagement was partly oral and partly in writing; a) Identify the document or documents relied upon. b) In so far as it was oral, when, where, and between whom the oral engagement occurred and the purport of the conversation or conversations giving rise to the engagement.	iii. The engagement was partly oral and partly in writing. The oral conversations are set out in the statements of Mertzanidis and McMahon (copies of which have been provided) and the documents are CH1D (copies of which have been provided).
iv. If the engagement was wholly oral provide the particulars sought in iii (b) above.	
v. In respect of the instructions by Macweld Industries Pty Ltd given to Peter Hertzog and Colin Hutchins state: a) Who gave the set instructions. b) When were the instructions given. c) The manner in which the instructions were given; and A. if in writing, identify the document or documents relied upon. B. If oral, the purport of each conversation giving rise to the said instruction.	v. Mertzanidis - see his statement.
vi. State each circumstance, matter or fact upon which it is relied for the allegation that Peter Hertzog and Colin Hutchins "were under the control and direction of the defendant".	vi. This is a matter of evidence. You have been provided with the statements and/or records of interview of Mertzanidis, Duncanson and McMahon, and document in CH 1, 4, 17, 37 and 43.
Particulars - Paragraph 5(c)	

<p>Given that the charge is confined solely to allegations concerning the defendant's "employee", namely Colin Hutchins:</p>	<p>i. "Persons" is only mentioned in paragraph 5(c) and is not intended to extend the applicability of the duty to anyone other than Colin Hutchins.</p>
<p>i. Identify "the persons" referred to in each of these paragraphs and the basis upon which it is alleged that the defendant's duty extended to such persons.</p>	
<p>ii. State each circumstance, matter or fact upon which it is relied to say that the positioning of such persons, wherever they might be, exposed Mr Hutchins to injury and risk to health.</p>	
<p>iii. Describe precisely what is meant by the term "suitable barrier".</p>	<p>ii. Even though this is a matter of evidence, you have been provided with the report upon which this allegation is based (Stephen Canny).</p>

<p>Particulars - Paragraph 6(a)</p>	<p>Even though these are matters of evidence, you have been provided with the report upon which these allegations are based (Stephen Canny).</p>
<p>i. Provide a precise description of what is meant by the term "relevant weights".</p>	
<p>ii. Provide a precise description of what is meant by the term "the points to be supported".</p>	
<p>iii. Provide a precise description of what is meant by the term "negating forces" in respect of the repair operation.</p>	
<p>iv. Provide a precise description of the calculations required in the repair operation in respect of:</p> <p>a) "relevant weights"</p> <p>b) "the points to be supported"</p> <p>c) "negating forces".</p>	
<p>Particulars - Paragraph 6 (b)</p>	
<p>i. Provide a precise description of what is meant by the term "rigging required for the repair operation".</p>	
<p>ii. Provide a precise description of what is meant by "safe implementation of the supporting/lifting gear to be used" including the identification of the supporting/lifting gear referred to.</p>	

11 Counsel for the defendant, Mr Manuel, provided an outline of argument and also made oral submissions regarding the request for further and better particulars. Dealing firstly with par 3 the defendant's complaint concerns the complainant's assertion that the phrase "engaged the services" is self-explanatory. It was argued that this response, does not properly particularise the matters which need to be established for the purpose of bringing the relationship under [s 4\(2\)](#) of the Act.

12 The defendant further argued that it is essential to particularise the alleged level of control on the part of the defendant in relation to the application of [s 4\(2\)](#).

13 It was argued that particulars need to be provided to say specifically how the persons were under the control of the defendant.

14 [S 4 \(2\)](#) of the Act states:-

"For the purposes of this Act, where a person ("the contractor") is engaged to perform work for another person ("the principal") in the course of a trade or business carried on by the principal, the contractor, and any person employed or engaged by the contractor to carry out or to assist in carrying out the work, shall be deemed to be employed by the principal but the principal's duties under this Act in relation to them extend only to matters over which the principal has control or would have control but for some agreement to the contrary between the principal and the contractor."

15 The complainant's response in relation to the request for further and better particulars in par 3 dealt firstly with the issue of control and direction and indicated that those words were really superfluous to the purposes of the Complaint. That what the complainant will need to establish is that there was an employer employee relationship and from that relationship certain things flow, one of them in particular being the duty imposed under [s 19](#) of the Act. [S 4\(2\)](#) deems the situation to be an employer employee relationship. The complainant has given particulars as to how the engagement of the services came about. That the complainant's position is that the employees came to be under the control and direction of the defendant by virtue of the fact that the defendant was either the actual employer or the deemed employer.

16 The defendant's counsel, Mr Manuel, by way of rebuttal stated that [s 4\(2\)](#) does provide a deeming provision but relying upon the Supreme Court Decision in "*Complete Scaffolding*" he argued that such deemed employer is only liable for matters over which it had control. So the issue of control remains central and should be particularised.

17 In relation to the request for particulars with respect to par 3, I find that the term "engaged the services" is sufficiently particularised in the particulars that exist in the Complaint and Summons in par 3. Further that the engagement itself has been particularised in the letter dated 4 April 2003 from the Crown Solicitor's Office and the basis for such engagement has been disclosed. I am not prepared to order any further particulars with respect to that part of par 3.

18 I do find in relation to the request contained in EMA Legal's letter of the 14 November 2002 namely:-

"State each circumstance, matter or fact upon which it is relied for the allegation that Peter Hertzog and Colin Hutchins "were under the control and direction of the defendant"....."

does require more particularisation on the part of the complainant.

19 All the complainant has done is to state that this is a matter of evidence and refers to statements and records of interviews and certain documents.

20 The Full Court of the Supreme Court in *Complete Scaffold v Adelaide Brighton Cement & Anor* [[2001](#)] [SASC 199](#) (18 June 2001) per Doyle CJ had this to say about the duties of a deemed employer (par 55 and 56):

"But it has to be borne in mind that as a deemed employer ABC has limited duties under the Act. Mr Henry's injury resulted from a casual act of negligence by a scaffolder who put two planks in place, without making adequate inquiry as to how they would be used, and without considering the risk of

the planks shifting. Mr Henry was injured as a result of carelessness in the course of a matter over which ABC had no control.

Control in s 4(2) of the OHSW Act should be read as referring to actual control, that is to things which the deemed employer is managing or organising. Unless s 4(2) is limited in this way, its reach would be very great."

21 Mr Manuel of counsel for the defendant indicated that the defendant was content with the further information provided by the Crown Solicitor's Office in Exhibit D1 in relation to par 5.

22 Mr Manuel then referred to par 6. Mr Manuel conceded that the phrase "points to be supported" has now been properly particularised.

This left the pursuit of further and better particulars in relation to the following:-

"suitable barrier";

"relevant weights";

"negating forces";

"rigging procedure required for the repair operation";

23 Mr Powell for the complainant argued that [s 22A](#) of the [Summary Procedure Act 1921](#) only supports the supply of particulars to the extent "necessary for giving reasonable information as to the nature of the charge". He submitted that it is not a requirement that the complainant supply what is akin to evidence. It is sufficient to make an assertion on the fact of the complaint that there has been a deficiency to do certain things.

24 In *Sims v Wran* (1984) 1 NSWLR 317 at 321-322 per Hunt J:-

"There is an often a fine line between giving particulars of the case which a party proposes to make and disclosing the evidence by which that case is to be proved. It all depends upon what is necessary to guard the other party against surprise."

25 Particulars are to make the party's case plain so that each side may know what are the issues of fact to be investigated at the hearing.

26 Particulars are supplied so that thereby a party is made aware of the nature of the case he or she is called upon to meet.

27 Dealing with the matters raised by the defendant in relation to par 6 I find as follows:-

The words "suitable barrier" have in my view been sufficiently particularised in Exhibit D1.

The words "relevant weights" have been sufficiently particularised in Exhibit D1.

The words "negating forces" have been sufficiently particularised in Exhibit D1.

The words incorporating the amendment "rigging procedure required for the repair operation" have been sufficiently particularised.

28 As Mr Powell indicated the complainant alleges that the defendant failed to calculate or consider

relevant weights or negating forces and further failed to provide any barrier behind which anyone might stand during the course of the operation. Further there was a failure to provide adequate instruction and training in relation to the rigging procedure required for the repair operation. This should enable the defendant to know what the issues are. I agree with this view held by the complainant.

29 For the reasons I have indicated above I decline to order the complainant to supply further and better particulars in relation to par 6 of the Complaint and Summons in addition to what appears in correspondence and in particular Exhibit D1.

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