# Common Law Division
# Supreme Court
## New South Wales

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| Case Name: | Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater (No 3) |
| Medium Neutral Citation: | [2015] NSWSC 838 |
| Hearing Date(s): | 23 July 2015 |
| Date of Orders: | 24 July 2015 |
| Date of Decision: | 24 July 2015 |
| Jurisdiction: | Common law |
| Before: | Beech-Jones J |
| Decision: | Plaintiff granted leave to file a Further Amended Statement of Claim. |
| Catchwords: | CLASS ACTION – flood – alleged negligent operation of dams – pleadings – application for leave to file further amended statement of claim – manner of pleading breach – necessary to only plead act or omission – previous direction not to plead deficient thought processes or methodologies – cross references in particulars to experts' reports – identifying real case to be met – certain alleged breaches said to be of no causative consequence – alleged disparity between definition of class and pleaded cause of action. |
| Legislation Cited: | |
| Cases Cited: | - *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* [1990] HCA 11; 169 CLR 279<br>- *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater* [2014] NSWSC 1565 |
| Texts Cited: | |
| Category: | Interlocutory application |
| Parties: | Rodriguez & Sons Pty Ltd (Plaintiff)<br>Queensland Bulk Water Supply Authority |

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| | *(t/as Seqwater)* – First Defendant<br>Sun Water Limited – Second Defendant<br>State of Queensland – Third Defendant |
| Representation: | Counsel:<br>S.G. Finch SC, N.J. Owens, R.A. Yezerski – Plaintiff<br>B. O'Donnell QC, D. Klineberg – First Defendant<br>D. Williams SC, James Neal – Second Defendant<br>G.A. Thompson QC, J.M. Horton QC, E. Morzone – Third Defendant<br><br>Solicitors:<br>Maurice Blackburn Pty Ltd – Plaintiff<br>King & Wood Mallesons – First Defendant<br>Norton Rose Fulbright – Second Defendant<br>Crown Solicitor – Third Defendant |
| File Number(s): | 2014/200854 |
| Publication Restriction: | |

**EX TEMPORE JUDGMENT** *(revised from transcript)* – re plaintiff's notice of motion, see transcript p 66

1 On 17 July 2015 the plaintiff filed a notice of motion seeking leave to file a Further Amended Statement of Claim ("FASOC"). The motion was returnable before me on 23 July 2015. Leave to amend was opposed by the first defendant, Queensland Bulk Water Authority (trading as Seqwater) ("Seqwater") and the third defendant, the State of Queensland ("Queensland"). The second defendant, Sun Water Limited ("Sun Water") did not oppose the grant of leave.

2 After hearing argument on 23 July 2015 I indicated that I would grant leave to amend and provide my reasons for doing so the next day. These are my reasons.

3 The nature of the proceedings and the structure of an earlier version of the statement of claim was outlined by Garling J in *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater* [2014] NSWSC 1565 at [1] to [27] (*Rodriguez (No 1)*). In *Rodriguez (No 1)* Garling J ordered that

the then version of the Statement of Claim be struck out but granted leave to re-plead, which was exercised.

4 At the outset it is important to identify one of the objections to the pleading that was upheld by Garling J. In *Rodriguez (No 1)* at [14] his Honour identified two categories of breach of duty that were pleaded, namely:

> "The first is a category which relates to the integers to which reference may have been had by the flood engineers for the purpose of forming various opinions or which formed the basis upon which judgments were made, and the second category being allegations of the failure to take identified action or else omissions to act reasonably."

5 In relation to the first category of breaches his Honour directed that any new pleading not include allegations of that character because they are (at [63]):

> "… allegations which relate to the thinking processes and the processes contributing to a judgment, if one was made, or perhaps the absence of a judgment, which were the steps on the way to either conduct which is criticised or the omission to act which is criticised."

6 Thus the breaches that were permitted to be pleaded concerned action or inaction in the direct management of the two dams. Deficient thought processes, including the adoption or the failure to adopt particular methodologies, were matters his Honour directed not be pleaded as breaches. Of themselves such matters do not amount to a breach because, although they may explain why a breach occurred and why the relevant breach amounted to a departure from the applicable standard, in the absence of any express allegation concerning action or inaction in the direct management of the two dams, they do not have any consequence.

7 In February 2015 the plaintiff filed an Amended Statement of Claim (the "ASOC") which appears to have generally conformed with *Rodriguez (No 1)*. Parts of the ASOC cross-referred to an expert report obtained by the plaintiff from Dr Ronald Christensen dated 19 February 2015. In general terms, his report addresses what the plaintiff contends was the negligent operation of Wivenhoe and Somerset Dams by the defendants during the period December 2010 to January 2011.

8 The necessity to file a FASOC was foreshadowed at a directions hearing before me on 23 April 2015. It was explained that Dr Christensen was preparing a supplementary report because apparently there had been some difficulty in him interrogating the so-called "Real time flood model" that was in use at the dams in the period December 2010 to January 2011. Dr Christensen's supplementary report was served on 3 July 2015.

9 The proposed FASOC was served on the parties some time thereafter. It included particulars which referred to Dr Christensen's supplementary report. That said, at least some of the objections to the grant of leave to amend travel beyond the concerns raised by the amendments arising out of Dr Christensen's supplementary report.

**Queensland's objections**

10 It is convenient to address Queensland's objections first. Queensland had six objections to the grant of leave.

11 First, Queensland contends the proposed FASOC fails to sufficiently identify the alleged acts and admissions of the only flood engineer in respect of whom it is said to be vicariously liable, namely Mr Ruffini.

12 The structure of the pleading is to allege breaches by a team of engineers, that includes Mr Ruffini, in respect of nine discrete periods between 16 December 2010 and 10 January 2011 inclusive. For each period the pleading identifies the times that the relevant flood engineers were on duty. It pleads that a reasonably prudent engineer would have taken certain steps (see, for example, [307]). It also pleads that, as a consequence, at the end of the relevant period a reasonably prudent flood engineer would have kept the water level for each dam to a particular height (see for example [307(b)]). The proposed FASOC pleads that the flood engineers breached the relevant duty of care by failing to take those steps (see for example [308(a)]), and, in the alternative, failing to reduce the water levels in the dams to a particular height (see for example [308(b)]).

13 Other than in respect of the discrete period that is pleaded, the proposed FASOC does not contend that any flood engineer was in breach of duty by failing to take action at a point in time when they were not reporting for work. Accordingly, Queensland contends that the proposed FASOC fails to identify with sufficient particularity what Mr Ruffini should have done in view of the conditions that confronted him when he commenced his relevant shift during the relevant period.

14 Senior counsel for the plaintiff, Mr Finch SC, contended that in circumstances where a team of engineers were tasked with a specific obligation it is sufficient for the plaintiff to identify what was required of the group, and to allege that collectively and individually they failed to take the requisite steps.

15 It is trite to observe that the function of pleadings is to state, with sufficient clarity, the case that must be met (see *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* [1990] HCA 11; 169 CLR 279, at 286). In that respect the pleading is adequate. In effect, it contends that from the time he commenced the relevant shift Mr Ruffini was obligated to take the particular steps that are identified and to reduce the water levels to the nominated heights. The fact that he worked as part of the team and that he only started work after the relevant period commenced may present difficulties for the plaintiff in demonstrating that he individually failed in the duty of care that was said to be owed to him. However, those matters do not represent the difficulty for Queensland in knowing the case it has to meet in respect of Mr Ruffini's conduct.

16 Second, Queensland contends that so much of the pleaded breaches by the flood engineers that alleges that they failed to comply with the "Flood Mitigation Manual" applicable to the two dams is deficient. This complaint is best illustrated by considering [267] of the proposed Further Amended Statement of Claim which provides, inter alia:

> "267 Further, by reason of the matters pleaded at paragraphs 248-355 and 265, a reasonably prudent flood engineer responsible for Flood Operations at Somerset Dam and Wivenhoe Dam on 7 January 2011:

a) would have complied with the Flood Mitigation Manual;

b) would have commenced releases at Somerset Dam and Wivenhoe Dam as soon as possible, and in any event, earlier than 3.00 pm;

c) would have implemented and maintained Strategy W3 at Wivenhoe Dam;

d) would have implemented Strategy S2 at Somerset Dam until approximately 7.00 pm and then adopted Strategy S3;

e) would have caused Somerset Dam to release water at rates approximating the rate of inflow;

f) would have caused Wivenhoe Dam to release water at rates exceeding the rate of inflow; …"

17 The particulars to this paragraph confirm that the actions specified in (b) to (f) are the actions that are said to be required to comply with the Flood Mitigation Manual. The particulars cross refer to parts of the manual. They also cross refer to parts of Dr Christensen's original and supplementary reports. Due to a mistake the references to Dr Christensen's original reports were omitted but that will be corrected in the version of the proposed FASOC that is to be filed. There are numerous other instances of allegations of breach in this form littered throughout the pleading.

18 Queensland complains that, despite the particulars, it is not possible to relate the sections of the Flood Mitigation Manual to the conduct identified in subparagraphs (b) to (f) of [267]. I have briefly reviewed the provisions of the Flood Mitigation Manual that are particularised. I will not refer to the manual in any detail, especially as its scope and effect are likely to be live issues at any trial. It suffices to state that the document does not appear to be prescriptive. It appears to require that relevant judgments be formed and expertise be applied.

19 To the extent that I can ascertain on this application, Dr Christensen's view is that, considered in the content of the circumstances facing the two dams at the relevant point, the Flood Mitigation Manual mandated the actions specified in (b) to (f). In particular, he appears to conclude that the prevailing conditions mandated the adoption of particular strategies that are outlined in the manual.

20 In my view, that is an allegation of sufficient clarity that it meets the test for a viable pleading. This aspect of the pleading fulfils its relevant purpose. Dr Christensen's report appears to identify why the plaintiff says the manual required those steps to be undertaken. While his description may or may not be clear and, more importantly, may or may not be wrong, in my view that is ultimately irrelevant to a complaint about the adequacy of a pleading in this respect.

21 Queensland's third objection concerns the cross referencing between the particulars of various breaches alleged in the proposed FASOC and parts of Dr Christensen's report. For example, [267(b)] of the proposed FASOC alleges that, by reason of various matters pleaded elsewhere, by the end of 7 January 2011 a reasonably prudent flood engineer would have reduced the water levels in Lake Somerset and Lake Wivenhoe to certain identified levels.

22 The particulars to the paragraph cross refer to parts of Dr Christensen's reports. The parts of Dr Christensen's reports that are identified are said by Queensland, in its written submissions, to "contain numerous assertions by him that the conduct of the flood engineers was contrary to conduct of a reasonably competent flood operations engineer in respects which go far beyond the narrow allegation that the breach was a failure to achieve the damn levels pleaded in paragraph 267B(a)-(g)".

23 In support of this objection Senior Counsel for Queensland, Mr GM Thompson QC, pointed to numerous criticisms of the flood engineers by Dr Christensen including, for example, that they "wrongly computed run off hydrographs" and that they failed to use "1 day to 8 day forecasts to guide the flood operations". Senior Counsel for Seqwater, Mr B O'Donnell QC, made a similar complaint, although it was pitched at a broader level. He noted that a central theme of Dr Christensen's criticisms of the flood engineers is they failed to conduct flood mitigation operations by having regard to rain forecasts and that they failed to calibrate the real time flood model by reference to up to date data concerning rainfall losses, that being rainfall that was absorbed in the ground and did not lead to inflow into the two dams.

24 These contentions seek to re-agitate the matter decided by Garling J in *Rodriguez (No 1)* that I have already described. In substance they complain that the plaintiff has not pleaded breaches of duty concerning the various thought processes and methodology that Dr Christensen states the flood engineers should have applied. A number of similar matters were pleaded in the original Statement of Claim but they were not pleaded in the Amended Statement of Claim and they are not pleaded in the proposed FASOC because Garling J directed that they not be.

25 If Garling J's approach was reversed then the result would be an elision between alleging what should have been or should not have been done with the reasons why action should or should not have been taken. It is only the former that needs to be pleaded. The latter does not. If it were otherwise then almost the entirety of the expert's report would need to be extracted into the proposed FASOC. Both the rules of pleading and the objectives of the *Civil Procedure Act* 2005 require that such an approach be rejected.

26 The fourth matter raised by Queensland is illustrated by considering subparagraphs 228B(a) and (b) of the proposed FASOC which provide:

> "a) having first commenced reasonably prudent Flood Operations on 16 December 2010 (by taking the actions pleaded in paragraph 160 above), and having continued reasonably prudent Flood Operations since that time, would have reduced the water level in Lake Somerset to no higher than approximately EL 96.18 m AHD, and would have reduced the water level in Lake Wivenhoe to no higher than approximately EL 64.21 m AHD; or, alternatively,
>
> b) having first commenced reasonably prudent Flood Operations on 2 January 2011 (by taking the actions pleaded in paragraph 211 above), and having continued reasonably Flood Operations since that time, would have reduced the water level in Lake Somerset to no higher than approximately EL 96.20 m AHD, and would have reduced the water level in Lake Wivenhoe to no higher than approximately EL 64.18 m AHD …"

27 Mr Thompson QC pointed to the difference in the height levels of the two dams in 228B(a) which assumes reasonably prudential flood operations commenced on 16 December 2010 and continued thereafter and compared them with the height levels of the two dams pleaded in 228B(b) which assumed that reasonably prudent flood operations commenced on 2 January

2011 and continued thereafter. The difference is two centimetres in the case of Lake Somerset and three centimetres in the case of Lake Wivenhoe. These figures are said to reflect the calculations undertaken by Dr Christensen. Mr Thompson QC also submitted that, based on Dr Christensen's modelling, it appears that this differential would have been eliminated by conducting just one further hour of prudent flood operations.

28 Mr Thompson QC contended that these height differences were so minimal that "the defendants ought not to be put to the expense of having to address allegations of breach in December 2010 which on the plaintiff's pleading and its experts' reports have no causative consequence". Mr Finch SC contended that the circumstance that the negligence alleged on 16 December 2010 and following may, ultimately, prove to be of marginal causative significance is not something that justifies striking out parts of the pleading. He said that this is particularly so when the operations of the dam through December 2010 would still have to be considered at any hearing. He also contended that, whether these differences prove to be minimal in relation to causation issues, will not be known until the hydrological evidence being prepared by the plaintiff is made available to the defendants, a matter I will return to.

29 There is considerable force in Mr Thompson QC's contention, but at this point there is no basis for striking out so much of the pleading that concerns the alleged breaches said to have occurred on 16 December 2010 and thereafter until 2 January 2011. The Court would have to have a very high degree of confidence that those allegations are, in effect, a waste of time before it could strike them out. At least in the absence of considering the hydrological evidence and bearing in mind that, it does seem likely that the Court would nevertheless have to consider what happened and what it is said should have happened in December 2010, I am not, at this point, so satisfied.

30 The fifth matter raised by Queensland concerns a temporal disparity between the allegations of breach in [339B] of the proposed FASOC and the particulars to the paragraph. Paragraph 339B pleads that "by the end of 10 January 2011" a reasonably prudent flood engineer would have kept the water levels

in Lake Somerset and Lake Wivenhoe to specified levels. However, the particulars to [339B] cross refer to parts of Dr Christensen's report that refer to events and actions after 10 January 2011.

31 Mr Finch SC accepted that this is apt to confuse and stated that amended particulars would be provided which address this disconformity. The granting of leave to file the FASOC is conditioned on this being addressed. One part of Queensland's written submissions on this point is that the phrase "significantly reduced" in [339(b)] of the proposed FASOC is not particularised. Seqwater made the same complaint which I will address below.

32 Queensland's sixth point is that the particulars for the proposed FASOC refer to the supplementary report of Dr Christensen which, in turn, cross refers to his first report. It is said that this leaves the defendants to "speculate as to what is alleged against them". I do not accept that complaint. The nature of the alleged conduct and omissions are clearly pleaded. Dr Christensen's report has provided the reasoning why their conduct was alleged or the failure to take the omitted step was negligent. It is the pleading which represents the case that is to be made against the defendants. Dr Christensen provides the reasoning as to why the relevant act or omission was said to be a departure from the relevant standard.

**Seqwater's objections**

33 Senior counsel for Seqwater, Mr O'Donnell QC, raised four objections to the filing of the proposed FASOC. The first has already been addressed (at [20] to [24]). The second concerns an alleged disparity between Dr Christensen's reports and [328] to [339] of the proposed FASOC which, in effect, plead that the flood engineers released too much water in the period 11 January 2015. These parts of the proposed FASOC include [339(b)] which alleges that a reasonably prudent flood engineer "would have significantly reduced releases" from Somerset Dam into Lake Wivenhoe.

34 As I understand Dr Christensen's reports, he states that a reasonably prudent flood engineer would have released 411 cubic metres per second on 10 January 2015 until 12 noon of that day and then reduced the outflow to 220 cubic metres per second until 2pm on 11 January 2015 when it should have ceased altogether. The allegation in [339(b)] of the proposed FASOC that the amount of outflow should have been substantially reduced should be understood accordingly. Otherwise I am not persuaded that there is any disparity between the rest of the pleading and Dr Christensen's report on this issue, even assuming that that was a basis for attacking the pleading.

35 Third, Mr O'Donnell QC pointed to those parts of the proposed FASOC which referred to a "reasonably prudent flood engineer" having commenced "reasonably prudent flood operations on 16 December 2010" which is defined by reference to the action pleaded in [160] and then "having continued reasonably prudent flood operations since that time". Mr O'Donnell QC submitted that the pleading does not identify what those "reasonably prudent flood operations since that time" were.

36 Apparently, this complaint has not been raised in correspondence between the parties. When Mr Finch SC addressed the point he identified other parts of the proposed FASOC which identify the conduct that it is alleged a reasonably prudent flood engineer should have taken on each and every day after 16 December 2010. It seems clear that this is the conduct being referred to. In any event, any uncertainty about this can be resolved in correspondence. It is not a matter that warrants refusal of leave to amend.

37 Fourth, Mr O'Donnell QC contended that there is a disparity between the definition of the class and the pleaded case. Paragraph 6 of the proposed FASOC defines the members of the class. Subparagraphs 6(a), (b) and (c) identifies one criterion for membership of the class as being some form of connection to land that suffered "inundation by floodwater".

38 Paragraph 346 of the proposed FASOC alleges that the negligence of the defendants caused flooding of land downstream of Wivenhoe Dam that would

not otherwise have occurred but for the flood engineers' alleged negligence or "greater flooding downstream".

39 Mr O'Donnell QC submitted that there will be a potentially very large class of persons who have the relevant connection with land that was inundated by water, but whose level of flooding was unconnected to the defendants' alleged negligence. Hence he contends that the class is in effect too widely defined having regard to the cause of action that is pleaded.

40 There is no strict rule of pleading that governs the means of identifying a class for the purposes of Part 10 of the *Civil Procedure Act* 2005. There is certainly no strict requirement that the class be defined by reference to only those persons who in fact have the cause of actions pleaded in the relevant statement of claim. Instead, these issues are governed by case management considerations and the objectives of the *Civil Procedure Act* including Part 10 itself.

41 If the definition of class meant that the number of members was vastly disproportionate to those who prima facie appear to have a cause of action, then that may be a basis for the Court to intervene. In such an extreme case, the Court would act so that a large group of people would not be needlessly notified of a class action and bound by its outcome when they had no possible interest in it.

42 However, in this case the class is also defined by reference to the relevant members having entered into a funding agreement with the litigation funder or their insurer having done so. Prima facie, persons who also have that characteristic should be at least allowed the opportunity to participate in these proceedings. To require the class to be defined by reference to only those persons with the requisite connection to land which was inundated by reason of the defendants' negligence, or which suffered greater flooding as a result of that negligence, would impose an impossible burden on them in making a choice to opt out or to stay in the proceedings. They would in effect be required to make their own causal inquiry rather than allowing the plaintiff to

carry the burden of conducting that inquiry in this Court on their behalf. That is the very purpose of class actions. I reject this challenge.

**Hydrolic expert evidence**

43 I have already referred to certain hydrolic expert evidence that the plaintiff proposes to adduce. It is necessary to say something further about that evidence.

44 At the time I heard submissions concerning whether the plaintiff would be granted leave to file the FASOC, the plaintiff also sought an extension until 28 August 2015 to file and serve its expert hydrolic evidence. I have indicated the extension will be granted.

45 From the bar table I have been advised that the plaintiff's representatives have retained an expert who has constructed a model that incorporates detailed topological mapping of the greater Brisbane area, as well as information concerning water flow into that area during December to January 2011 apparently from all sources. This model is said to be capable of taking as an input hypothetical outflows from the Wivenhoe Dam system and reconstructing what the level of flooding would have been for every ten square metres in the Brisbane area.

46 The Court has been informed that the model runs on a very specialised computer system and that each hypothetical iteration of what the flood might have looked like takes five days to produce. It is by the use of this material that I understand the plaintiff proposes to prove its case on causation. The delay in the production of the material is said to have arisen because of some confusion in converting some data concerning the height of the terrain in the Brisbane River basin.

47 In *Rodriguez (No 1)* Garling J fixed the hearing of these proceedings to commence on 18 July 2016. His Honour did not identify which of the common questions would be litigated at that hearing. Not surprisingly, the defendants have all raised concern about meeting that hearing date in light of the delays

in the production of the hydrological evidence. Nevertheless, I have not and do not propose at this point to vacate the hearing date as the material has not been served. I simply record that I have raised with the parties the possibility of the hearing proceeding on issues other than causation as one means of allowing the defendants sufficient time to evaluate the modelling while still allowing the matter to progress. This issue can be revisited in September 2015 when the proceedings are next listed.

**Orders**

48 I will shortly make orders that give effect to these reasons and the other directions I indicated to the parties on 23 July 2015.

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