Privy Council Appeal No. 18 of 1990

(1) Wharf Properties Limited and
(2) The Wharf (Holdings) Limited *Appellants*

v.

Eric Cumine Associates, Architects, Engineers & Surveyors (A firm) *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY 1991

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Oliver of Aylmerton**]*

This is an appeal from a decision of the Court of Appeal of Hong Kong pursuant to special leave granted on 19th December 1989. At the hearing of the petition for special leave it was thought that the appeal raised a point of general significance in building cases not only in Hong Kong but in the United Kingdom, having regard particularly to the impact which it was suggested that it might have upon two decisions of the High Court in England relating to the ascertainment of damages in cases in which there are allegations of delay in the performance of contractual obligations (see *J. Crosby and Sons v. Portland Urban District Council* (1967) 5 B.L.R. 121; *London Borough of Merton v. Stanley Hugh Leach Limited* (1985) 32 B.L.R. 51). As the argument has progressed, however, it has become apparent that the case, whilst of obvious importance to the parties because of the sums involved, raises no question of any general importance, so that, in the event, their Lordships' Board has been, exceptionally, concerned with a pure point of pleading peculiar to the particular dispute in which the parties are engaged.

The appeal arises from a long-standing dispute between the parties following the completion in 1982 of a large residential and commercial development on the

Hong Kong waterfront known as Harbour City which was undertaken by the appellants (conveniently referred to together as "Wharf") and for which the respondents ("ECA") were engaged as architects and surveyors. The action, in which Wharf claims damages against ECA and others concerned with the development, alleging negligence and breach of contract, was commenced in November 1983. One aspect of it, which was a claim against ECA alone for damages for negligence in the preparation and execution of the design of the development, was directed to be pleaded and tried separately and has been the subject matter of a recent decision of their Lordships' Board (Privy Council Appeal No. 45 of 1989; judgment delivered 14th January 1991). The instant appeal concerns a different aspect of the dispute and originally involved claims not only against ECA but against 17 other defendants, of whom one was a firm of consulting engineers and the remainder were contractors or sub-contractors involved in the execution of the development. It is far from clear how Wharf framed its claims against those defendants who were sub-contractors only and with whom, therefore, they had no direct contractual relationship. As will appear, their Lordships have not been concerned with the original statement of claim but it seems that the claims against sub-contractors must there have been laid in tort. These resulted in cross-claims by the sub-contractor defendants. In the event the claims by and against the consulting engineers, the fourth defendant (John Lok and Partners Limited ("Lok")), who were the main contractors, and all the sub-contractor defendants were compromised. The dispute between Wharf and the third defendant, the piling contractor, was referred to arbitration. This left ECA as the only defendant in the action in which Wharf now seek to recover, *inter alia*, the sums which they have paid by way of compromise to Lok and to the sub-contractors.

Following the compromise, the proceedings were reconstituted as an action between Wharf and ECA as sole defendant and on 11th March 1987 an amended substituted statement of claim was served by Wharf setting out their claims. It is with this pleading alone that their Lordships have been concerned and before proceeding further with the history of the litigation it will be convenient to refer to some of the critical paragraphs of the pleading and its supporting schedules and to make some general observations upon the issues which arise.

The amended substituted statement of claim, which is hereafter referred to simply as "the statement of claim", is a document of immense length and complication, which, at the time when the matter came before the Court of Appeal in December 1988, extended to over 400 pages excluding the supporting schedules. The claim has since been slimmed down to embrace only phase 1 of the Harbour City development, but even in

its attenuated form the pleading before their Lordships covers 155 pages, is divided into 22 sections and supported by schedules running to a further 330 odd pages. The difficulty of connecting allegations in the main pleading with the confusing welter of documents in the schedules, which involves constant reference to two, and sometimes three, different documents at the same time is further compounded by the division of the pleading into what are described as "sections" - a word which is also used in the pleading itself to describe particular portions of the development. Whilst their Lordships are mindful of the difficulty in a case of this magnitude of keeping the pleadings within reasonable bounds, it nevertheless has still to be borne in mind that the purpose of a pleading is to indicate with clarity to the adverse party, and to the court, the case that the pleader is seeking to make. It is ECA's complaint that the pleading, as it stands, not only does not do this but in fact discloses no reasonable cause of action.

Section 1 of the statement of claim sets out the fact that the claims against the other defendants have been compromised, describes the development and identifies the parties. Section 2 recites the engagement of ECA as architects and pleads the general and particular obligations of ECA arising from the RIBA Conditions of Engagement. Sections 3, 4 and 5 relate respectively to the contracts between Wharf and the second and third defendants and Lok.

A general outline of the nature of the claim - and it is only a general outline - is contained in section 6 and it is necessary to consider this in a little more detail. It begins by setting out the dates by which the third defendants, who were engaged to carry out the excavation and the foundation works, should have completed their work under their contract with Wharf and goes on to allege first, that ECA knew that Wharf wished Lok to start work as soon as possible and, secondly, that if the third defendants had fulfilled their contract properly Lok would have started work by 14th June 1978 and would have completed the work by 1st July 1980. It is then alleged (sub-paragraph 5) that, apart from certain permissible delays due to weather and changes in design, Lok's work on the various stages of their contract should have been completed by particular dates in 1979 and 1980 in the absence of delay due to negligence or breach of contract by ECA. It then sets out (in sub-paragraph 6) what are alleged to be the actual periods of delay in completion of the works at the various stages.

So far, it will be noted, there is no distinct allegation connecting the delay pleaded in sub-paragraph 6 with any default of ECA apart from the somewhat tenuous link established by the words "should have been ... in the absence of delay caused by negligence" in

sub-paragraph 5. The essential link between the delays so far pleaded and default on the part of ECA is provided, albeit in a singularly uninformative manner, by sub-paragraph 7 which commences with the allegation that "the aforesaid delays were caused by ... breach of contract on the part of the first defendants in that ..." (There is in each of the sections that follow an allegation of negligence as well as breach of contract but the claims in negligence were abandoned before the Court of Appeal and can be ignored for present purposes). There follows a list of 15 separate matters in respect of which it is alleged that ECA failed to fulfil their contractual obligations, each of which is identified by reference to a subsequent section of the statement of claim in which, by inference, the particulars of the breach and the delay attributable to it are to be found. Since all the sections 7 to 21 which follow are, for material purposes, in the same form, it is necessary to consider only one as typifying the remainder. Paragraph 6.7 (1), (2) and (3) alleges that ECA:-

> "(1) ... failed properly to manage, control, co-ordinate, supervise or administer the Third Defendants' contract and works (see Section 7)
>
> (2) ... failed to provide information and instructions in respect of the Third Defendants' contract and works accurately, properly, timeously, sufficiently or at all (see Section 7)
>
> (3) ... caused or permitted the Third Defendants' work to be delayed (see Section 7)."

Thus the reader is told that the 6 separate periods of delay already pleaded in section 6.6 are to be ascribed to the 15 separate breaches of contract described in this sub-paragraph and the promise implicit in the words "(see Section 7)" is that when he refers to section 7 he is going to be told (*inter alia*) in what respects, for instance, ECA failed to administer the third defendants' contract, what, for instance, would have been a "timeous" provision of information and wherein ECA failed to fulfil it, the extent to which Wharf alleges that the third defendants' work was delayed, and how the breaches alleged connect with the periods of delay previously pleaded.

Sub-paragraphs 8 to 10 of section 6 go on to allege ECA's knowledge that Wharf wanted to let the parts of the development as they were completed and that as a result of "the aforesaid delays" Wharf had sustained a loss of rent amounting to HK$199,910,544.

Thus section 6 is not, as it were, free standing. To summarise it, ECA are told that a period of delay, involving a loss of rent and being the aggregate of 6 separate periods ascribed to particular portions of the development, is alleged to be due to 15 separate

breaches of contract, which are to be identified and particularised in the following sections 7 to 21 inclusive, where there will be revealed the connection between the breaches and "the aforesaid delays".

ECA's complaint before the judge and before the Court of Appeal is that these following sections simply do not live up to their promise of disclosing what Wharf's case against ECA really is and that their attempts to ascertain this critical information by means of further particulars have been unsuccessful in uncovering what is the essential link between the various heads of breach which the pleading has promised to elaborate and the damages claimed. Thus, it is submitted - and this submission was accepted by the Court of Appeal - either the pleading discloses no reasonable cause of action or it is so embarrassing as to warrant its being struck out as being abusive.

In order to test this submission it is necessary at the outset to attempt some analysis of the specific breaches alleged in the following sections and their pleaded consequences, but since it is common ground that all the sections follow the same pattern (so that, if one is defective, all are defective) this can be done by selecting section 7 as the typical example. Unhappily the section is not entirely self-contained and can be understood only by reference to the schedules and other sections which are referred to in it and, in particular, sections 8 and 22.

It has already been mentioned that the claims of Lok and the sub-contractors were compromised and since, as becomes clear from section 7, the compromise forms an integral part of Wharf's claim for damages, it is necessary to consider this first before coming to the terms of section 7 itself. It is pleaded in section 8.20 to 28 (inclusive) as part of an allegation that ECA, by mishandling the compromise, deprived Wharf of a defence of accord and satisfaction which they would otherwise have had against claims made against them by Lok. What is said, for relevant purposes, is that, following a meeting in August 1980, it was agreed that Wharf would pay Lok a sum of HK$22,000,000 "in full and final settlement of all claims made or which might be made by or through [Lok] and of all claims which were certifiable by [ECA] ... in respect of the delayed handover of various parts of the site" with certain exclusions. That sum, it is alleged, was paid.

In additional to the payment of the HK$22,000,000 pleaded in section 8, section 22.2 pleads payment of a further sum of HK$10,000,000 in October 1981 "in respect of claims then being made by [Lok]".

Turning now to section 7, it is divided initially into 4 sub-paragraphs each of which contains a different and separate breach of contract. Thus section 7.1 alleges

misadvice in relation to letting the contract with the third defendants, who are alleged to be incompetent. Section 7.2 alleges that ECA failed "timeously" to complete the designs and procure execution of the design of the third defendants' work. Section 7.3 alleges delay in negotiating statutory approvals with the Building Ordinance Office. Section 7.4 alleges failure properly to manage, supervise, control or administer the third defendants' contract and this allegation is fleshed out by some particulars the great majority of which relate to failure to give advice or to exercise powers "timeously". Since the pleading nowhere states what a "timeous" performance would have been this amounts to no more than saying that ECA were late by some unspecified margin in doing what it was their contractual obligation to do at some unspecified prior point of time.

Having thus set out the nature of the complaints of breach of contract, the pleadings go on to state the consequences and these are to be found in section 7.5 which is expressed as follows:-

> "By reason of the First Defendants' aforesaid ... breach of contract the Fourth Defendants and the Nominated Sub-contractors were enabled, and entitled to and did claim that their works had been delayed, and disrupted and that they had been put to substantial additional expense and in the event the First Plaintiff became and were liable for the same."

This paragraph tells the reader nothing beyond this that, because of the (unspecified) delay on the part of ECA, Lok and its sub-contractors were entitled to claim that their works had been delayed and that they had been put to extra expense for which, in some unspecified manner, Wharf had become liable. How that liability arose is left to be inferred, but so far as concerns liability for loss to sub-contractors it can only be as a result of some obligation to indemnify Lok which is nowhere pleaded. Section 7.6 then goes on to recite the several discrete delays which were claimed by Lok in respect of each section of the works and there is ascribed to them an aggregate figure of HK$31,957,311. Section 7.8 pleads that nominated sub-contractors claimed "certain amounts" and goes on to state that "part of such claims were due to and caused by the delays consequent upon the matters referred to above". The actual amounts claimed by the sub-contractors are set out in a schedule and amount to HK$107,116,024. How the amounts claimed were calculated and what part was consequent upon "the matters referred to above" remains wrapped in mystery.

With this introduction Wharf's actual claim against ECA, under this section is then advanced in section 7.10 which requires to be set out verbatim:-

"The First Plaintiffs have suffered loss and damage by reason of the First Defendants' aforesaid ... breach of contract:

(1) such part of the sums of $22,000,000 and $10,000,000 referred to in paragraphs 22.1 and 22.2 below as were and are attributable to the claims made by the Fourth Defendants in respect of the matters herein referred to;

(2) in the sum of $31,957,311 aforesaid or such part thereof as is attributable hereto subject only to the overall sum for which the Fourth Defendants' claims have been compromised and set out in paragraph 22.5 below.

(3) such part of the loss of rent referred to in Section 6 as is attributable hereto

(4) such sum as the First Defendants (sic) became liable to pay to the Nominated Sub-Contractors, whether through the Fourth Defendants or otherwise, by reason of such delay, being such proportion of the sum of HK$107,116,024 referred to on page 2 of part 19 of Schedule B as is attributable hereto subject only to the overall sum for which the claims of the Nominated Sub-Contractors have been compromised as set out in paragraph 22.5 below.."

Now this, as it stands, is plainly an insufficient pleading, for there is no way in which ECA are able to ascertain with any precision what the case is that is being made against them. All the allegations of breach of contract against ECA are allegations of breach of their contractual duties not in relation to Lok's contract or the contracts with sub-contractors but in relation to the letting and supervision of the third defendants' contract. Because of those breaches it is said that Lok and the nominated sub-contractors were enabled and entitled to claim that their works were delayed. But no attempt is made to correlate the claims made by Lok, whether well or ill-founded, with the particular pleaded breaches by ECA. For example, one allegation is that ECA "caused or permitted there to be an excessive number of variations in the design of the third defendants' work so as to disrupt their progress". What variations are alleged to be excessive, what disruption they caused and what contribution (if any) that disruption made to Lok's claim and how they contributed remain unspecified. Section 7.6 alleges that Lok claimed (whether rightly or wrongly) that 5 separate periods of delay attributable respectively to 5 sections of the work had occurred resulting in costs of an aggregate figure of HK$31,957,311 "as appears from page 1 of part 7 of Schedule B hereto". However, when that schedule is consulted, it consists simply of a

list of what are described as "extra costs due to late site possessions and widespread disruptions of programme, excluding those of matters already dealt with in agreement dated 15th October 1980" (i.e. the compromise agreement). These ascribe figures to headings such as "prolongation costs", "fluctuation of overheads", "pre-start overheads" and so on (amounting in the whole to HK$31,957,311) but without any attempt to relate them either to the sections of the works specified in the pleading or to the breaches of contract alleged.

The position with regard to the sub-contractors' claims is even more confusing. All that ECA are told is that the nominated sub-contractors have claimed amounts set out in the schedule (which shows sums claimed to a total of HK$107,116,024) "part" of which were "due to ... delays consequent upon the matters referred to above" (that is the 19 odd breaches of contract alleged in paragraphs 1 to 4 of the section).

These paragraphs are then used to form the foundation - and they are the only foundation - for the claims made in paragraph 10 of the section for "such parts" of the various sums therein specified as are "attributable" to the breaches previously alleged. This claim is advanced not only without any specification of the causal connection between the breaches and the sums claimed but without any facts pleaded which will enable ECA to ascertain what parts of these sums are being alleged to be attributable to the breaches alleged. It will be necessary later on to consider whether the Court of Appeal was right in concluding that the pleading disclosed no reasonable cause of action at all but on any analysis it was, in their Lordships' view, hopelessly embarrassing as it stood.

In these circumstances, it is not in the least surprising that ECA sought further particulars of the allegations and it is out of the way that ECA's request was or purported to be complied with that this appeal arises. On 5th August 1986 some 357 further particulars were requested, but it is necessary for present purposes to refer to two only.

Request No. 34, under section 7.2, sought particulars "of the variations which are alleged to have been excessive in a Scott schedule in the form of Schedule B". (This was a schedule which was required to contain 9 columns enumerating each item, identifying the original instructions and their dates, identifying the nature of the variations and the dates of changes made, stating both the consequences to the progress of Phase 1 and the financial consequences to Wharf. The schedule also provides blank columns for the defendants' and judge's comments.)

Request No. 44 was in these terms:-

"(a) State, in relation to the Fourth defendants and each relevant Nominated Sub-Contractor

(i) the amount of delay to each of sections I to V (inclusive) respectively; and

(ii) the amount of loss and expense, for which the plaintiffs maintain that they are or were liable in consequence of the matters complained of against the First Defendants.

(b) State the amount of any loss of rent which the Plaintiffs maintain that they have sustained in consequence of the said matters."

Wharf having failed to serve these particulars, a summons was issued on 14th February 1987 by ECA seeking an order for their delivery. Wharf did not at that stage contest that the pleading was inadequate without the particulars sought. They consented to give particulars although there was a contest as to the form that those particulars should take. On 11th March 1987 Mortimer J. made an order for the delivery of the particulars sought on or before 6th May 1987 by means of a number of Scott schedules in the form proposed by ECA.

On 14th May 1987 Wharf served what purported to be particulars in compliance with the order. They did not in fact comply with the order at all nor, indeed, can they be said even to merit the description of "particulars". So far as request 34 is concerned the answer served amounted to no more than a statement that Wharf would inform ECA at the trial which variation they considered to be excessive. The answer was as follows:-

"It is the plaintiffs' case that the volume of variation was excessive. It will be necessary at trial to consider all variation instructed in order to establish which of them were unnecessary or ought not to have been ordered. In the meantime the plaintiffs have set out in Scott Schedule form the variations on which they rely to make their case. It will be noted that the defendants' proposed Schedule B has been adapted to reflect the fact that information as to the original instruction (if any) is not known at this stage. The consequences of the excessive number of variations were delay and disruption to the works and claims against the plaintiffs as to which the best information presently available is set out in reply to request No. 44 below. The columns concerned with consequences are therefore unnecessary and have been deleted."

The Scott schedule referred to consists of no more than a 3 column list of 65 items setting out variations by reference to the source documents and the issue date but without any indication of which are alleged to be excessive or unnecessary, what effect each is alleged to have had on the progress of Phase 1 or what (if any) financial consequences are alleged to have ensued. The ingenuous statement that "it will be necessary at trial to consider all variation instructed in order to establish which of them are unnecessary" may, indeed, be said to be the very negation of the purpose of particulars for it discloses nothing that is not already in the pleading, that is to say, that some unidentified variations were excessive.

Nor does the answer to request No. 44 confer any further enlightenment. It is, in fact, not an answer to the request at all but a lengthy statement of why Wharf, having agreed to give the particulars sought, claims that it is now not able to do so. The answer is as follows:-

> "It is the plaintiffs' case that the cumulative delay to the Works and the totality of losses as pleaded were the responsibility of the first defendants. Due to the complexity of the project, the inter-relationship of the very large number of delaying and disruptive factors pleaded and their inevitable 'knock on' effects and the necessarily overlapping nature of the many allegations made (see, for example, as to supervision the replies to requests 121, 125 and 133 below) it is not possible at this stage to identify and isolate individual delays in the manner requested. In the case of the delays pleaded here, they affected the whole of the contract works and therefore delayed the overall completion of the contract. In preparation for trial it is intended that a critical path network or similar reconstruction of the delays which occurred will be prepared using for this purpose all documents disclosed. Further particularisation will therefore have to await the outcome of discovery and the completion of this exercise; particularisation in the manner required by the Request is a matter of evidence. Particulars of loss of rent are given in section 6, and Schedule B of the Substituted Statement of claim. Further particulars of loss and expense attributable to each delay established by this means cannot in any event be supplied as there is no basis upon which those losses can be accurately ascribed to individual events or periods of delay even once these are established."

On 30th March 1988, the action having by this time been on foot for some $4\frac{1}{2}$ years without Wharf's case having been fully pleaded, ECA issued a summons claiming an order that sections 1 to 22 of the statement of claim should be struck out on the ground that the pleadings disclosed no reasonable cause of

action and/or were otherwise an abuse of the process of the court, alternatively, for an order that those sections be struck out unless full and proper particulars as requested were served within 14 days. On 21st May 1988 Wharf issued a cross-summons for an order, in the event of the particulars sought being ordered, that ECA give discovery of "all design flow information relevant to the aforementioned requests" within 21 days.

Both summonses came before Mortimer J. on 30th and 31st May 1988. On 1st June 1988 he delivered a reasoned judgment refusing both ECA's claim to strike out and Wharf's cross-claim for discovery. He made no order under the alternative claim for an "unless" order.

ECA appealed to the Court of Appeal, which, on 23rd December 1988, ordered that, save for sub-sections 2 and 3 of section 22.7 (which relate to alleged negligence in relation to a surety bond and to damages for increased excavation work), the statement of claim be struck out as disclosing no cause of action. What is described as the judgment of the court was delivered by Power J.A. but in fact Penlington J.A. also delivered a judgment agreeing with Power J.A. but adding, as an additional ground, that the action should be struck out as an abuse of the process of the court. It is from this order of the Court of Appeal that Wharf now appeals to their Lordships' Board.

In reaching the conclusion that the statement of claim disclosed no reasonable cause of action the Court of Appeal accepted what is palpably true, that the mere allegation of a contract and of its breach discloses, technically, a cause of action in the sense that, if the breach is proved, the plaintiff would be entitled to nominal damages. They rightly declined, however, to accept that it would be realistic to regard the issue between the parties in this massive litigation as turning upon the establishment of a mere technical breach of contract having no financial consequences in the way of special damage. That would be to deny entirely the underlying purpose of the litigation which was to recover substantial special damage allegedly sustained as a consequence of ECA's failure to fulfil its contractual obligations.

The Court then went on to consider whether, the action being one in which the real cause of action rested upon the establishment of an essential link between the action or inaction alleged on the part of ECA and the damage which was claimed by way of relief, the statement of claim pleaded all the "material facts" relied upon by Wharf for their claim as provided by Order 18, rule 7(1) of the Rules of the Supreme Court. They referred to the judgment of Scott L.J. in *Bruce v. Odhams Press Limited* [1936] 1 All E.R. 287 in which he observed (at page 294) that the word

"material" in the rule means "necessary for the purpose of formulating a complete cause of action" and that if any one "material" statement is omitted, the statement of claim is bad. ECA's contention was that the substantial cause of action, the right to recover for damage sustained, depended upon establishing, first, a breach of contract, secondly (in a case where, as here, the breaches alleged consisted of negligence in the performance of contractual duties) that there had occurred an immediate intervening event alleged to have been occasioned by the breach and, thirdly, that the damage claimed was the financial consequence of that intervening event. In this case the intervening event alleged in each case was "delay" but (as has already been observed) there was simply no correlation between the delays to be ascribed respectively to the several breaches pleaded and the overall delay pleaded nor (except in the case of the loss of rent claimed) between the overall delay and the financial loss claimed. Thus, the court concluded, the statement of claim, in omitting to plead in relation to each breach alleged, the essential link between the breach and the financial consequences, omitted "material facts" and ought to be struck out. Power J.A. observed that "in a pleading such as the present one where substantial special damages are sought they must be supported by material facts sufficient when proved to establish the respondents' entitlement thereto".

Their Lordships have not felt able to follow the Court of Appeal all the way in this conclusion. Certainly there are portions of the pleading which ought quite properly to be struck out as failing to establish any relationship at all between what is alleged and the damages claimed and which could not be cured even by the delivery of the particulars claimed. For instance, the basis of liability to sub-contractors and the basis of the compromise said to have arisen from that liability- not to mention the reasonableness of the compromise (which would be a necessary pre-requisite of recovery) - are nowhere mentioned. But their Lordships do not feel able to say that the statement of claim discloses no reasonable cause of action so as to warrant its being struck out under the provisions of Order 18, rule 19(1)(a). It has been observed on many occasions that the power to strike out a pleading as disclosing no reasonable cause of action is one that should be reserved for "plain and obvious" cases. '"Reasonable cause of action' means a cause of action with some chance of success when (as required by rule 19(2)) only the allegations in the pleading are considered" (per Lord Pearson in *Drummond-Jackson v. British Medical Association* [1970] 1 All E.R. 1094 at page 1101).

If, for instance, one takes section 6.5, 6.6., 6.7 and 6.10 in conjunction and if Wharf were to succeed at the trial in proving every single instance of breach of contract alleged and that those breaches cumulatively

gave rise to the delays pleaded in paragraph 6.6, they might reasonably establish their claim to the damage pleaded in paragraph 6.10. This may seem a very unlikely event and, as Mr. Thomas for ECA has pointed out, the cumulative delay is, on analysis, no more than the sum total of all the unparticularised and unattributed delays pleaded in section 7. Nevertheless, it is at least theoretically possible and their Lordships feel bound to accept the view of Mortimer J. that the extraordinary evidential difficulties which the pleading may pose for Wharf if the action were to go to trial on the pleading as it stands do not provide a sufficient ground for saying that it discloses no reasonable cause of action. It is worth mentioning that the statement of Scott L.J. in *Bruce v. Odhams Press Limited, supra,* which the Court of Appeal prayed in aid was made in the course of the judgment in which, whilst admitting a grey area between that which went to cause of action and that which went merely to particulars, he was at pains to point out the essential distinction between a pleading which is demurrable and one which is embarrassing because it fails to put the defendant on his guard and tell him what he has to meet when the case comes to trial.

If the matter ended there, therefore, their Lordships might (subject to what is said below) feel bound to allow the appeal and to allow the action to proceed, remitting the matter to the Supreme Court of Hong Kong for such further directions as might be appropriate. But the matter does not end there. It has to be borne in mind that Order 18, rule 19(1) embraces not only failure to disclose a cause of action but also matters which may prejudice, embarrass or delay the fair trial of the action or otherwise constitute an abuse of the process of the court. Penlington J.A., whilst agreeing with Power J.A., went further. He adverted to the answer given by Wharf to request no. 34 and the frank assertion that it was being left to the court at the trial to determine what variations were "excessive" and what effect that had. "That approach", he commented, "is enough, in my view, to make this speculative litigation which would throw an enormous and quite unfair burden on the defendants and should not be allowed to continue". In the particular circumstances of the case the court should, he said, intervene to prevent an abuse of its process.

There was certainly ample material from which this conclusion could be drawn. As has already been observed, the pleading is hopelessly embarrassing as it stands and their Lordships are wholly unpersuaded by Mr. Butcher's submission that the two cases of *J. Crosby and Sons v. Portland Urban District Council* and *London Borough of Merton v. Stanley Hugh Leach Limited, supra,* provide any basis for saying that an unparticularised pleading in this form ought to be permitted to stand. Those cases establish no more

than this, that in cases where the full extent of extra costs incurred through delay depend upon a complex interaction between the consequences of various events, so that it may be difficult to make an accurate apportionment of the total extra costs, it may be proper for an arbitrator to make individual financial awards in respect of claims which can conveniently be dealt with in isolation and a supplementary award in respect of the financial consequences of the remainder as a composite whole. This has, however, no bearing upon the obligation of a plaintiff to plead his case with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial. ECA are concerned at this stage not so much with quantification of the financial consequences - the point with which the two cases referred to were concerned - but with the specification of the factual consequences of the breaches pleaded in terms of periods of delay. The failure even to attempt to specify any discernible nexus between the wrong alleged and the consequent delay provides, to use Mr. Thomas' phrase, "no agenda" for the trial.

Two things have been submitted before their Lordships. It is said, first, that discovery has now been completed - indeed had been completed shortly before the hearing before the Court of Appeal - and it is submitted that their Lordships' Board should now set aside the order of the Court of Appeal and grant Wharf a further opportunity to comply with the order for particulars made by Mortimer J. nearly four years ago. Secondly, it is said, in any event, that Mortimer J. having, in his discretion, declined to make any further order, the Court of Appeal should not have interfered with the judge's discretion unless it could be shown (as Wharf submit it was not) that the discretion was exercised on some wrong principle or was plainly wrong.

Their Lordships will consider these two submissions in reverse order. The latter is a double-edged weapon for if, in fact, Mortimer J. was plainly wrong in refusing to make any order, then the discretion was at large and their Lordships ought, by the same token, to decline to interfere with the Court of Appeal's discretion unless that exercise is similarly open to attack. In approaching Mortimer J.'s decision, the history of this matter has to be borne in mind. In the course of his judgment he observed that, at the hearing at which the particulars were ordered, he had declined to make an order for discovery. It had been accepted that the particulars ought to be given and an unequivocal order, setting out the form that the particulars were to take, had been made. It had not been complied with and the so-called "particulars" served made it perfectly plain that it had deliberately not been complied with - going so far, indeed, as to state that the particulars which the judge himself had, after full argument, adjudged to

be necessary were "unnecessary and had been deleted". Faced with the breach of the order which was avowed and contumacious, Mortimer J. was asked, if he was not prepared to strike out the pleading, at least to make an "unless" order for the particulars to be served within fourteen days. His decision, insofar as it rested (if it did) upon an opinion that the order had been adequately complied with, was plainly wrong and, in their Lordships' view, a refusal to make any order at all in the face of a clear breach of his previous order was equally plainly wrong. If Wharf were of the view that they had made an error in consenting to serve the particulars ordered, their proper remedy was not to flout the order but to apply back to the court for an indulgence. They did not do so but rested either upon the untenable submission that the order had been complied with or upon the assertion that it might be complied with in the future to such extent as they felt appropriate after discovery. In their Lordships' judgment, the Court of Appeal rightly considered that it was able to exercise its own discretion in the matter.

As to Wharf's request that their Lordships should now grant an indulgence, this cannot be considered in isolation from Penlington J.A.'s view that the pleading was such as to embarrass the fair trial of the action or was otherwise an abuse. The correctness of that view cannot, in turn, be considered in isolation from the history of the litigation. It has to be borne in mind that, when the matter came before the Court of Appeal, this claim in professional negligence had been hanging over the heads of the partners in ECA for over five years. During this period, the senior partner of the firm, Mr. Cumine, has become permanently incapacitated and their Lordships have been told by counsel, on instructions, that ECA's senior engineer, who was closely associated with the foundation contractors, has now become seriously ill and been admitted to hospital. Against the imperative need to bring the action to trial with the minimum of delay, the Court of Appeal was faced with a history of prevarication which, clearly, was not due to incompetence. At the date of the first summons before Mortimer J., when the action had already been on foot for some three and a half years, Wharf's attitude was to concede the inadequacy of the pleaded case and to agree that the particulars requested would be given by the date subsequently ordered. Two months later, when the "particulars" were served, it was being said that the claim could not be formulated before discovery. Before the Court of Appeal it appears that that contention had hardened into a contention that, on authority, the particulars need not be given at all, alternatively that it was impossible to give them before trial or alternatively they would be given, but only at the trial. In these circumstances, their Lordships find unsurprising the conclusion reached by Penlington J.A. that the process of the court was being abused.

The assertion that the particulars simply cannot be given is repeated by necessary implication in paragraph 2 of the petition for special leave and that petition was itself argued on the footing that the two cases referred to absolved Wharf from necessity of giving them at all. It is only when this appeal is actually before their Lordships' Board, some seven years after these proceedings first began, that it is now suggested that if only further opportunity is given, the order will finally be complied with and the case properly pleaded - a suggestion nowhere raised in Wharf's printed case. It is said, although this is disputed, that such a suggestion was advanced before the Court of Appeal. It is not referred to in the judgments and their Lordships would, in any event, be very hesitant before permitting their decision to be influenced by a matter as to which there is an irreconcilable difference of recollection between counsel. But, in any event, questions of procedure in actions before the courts of Hong Kong are essentially domestic questions which are appropriate to be decided by those courts. Their Lordships would be extremely reluctant to reverse the decision of a local court regarding the application of local rules of court and the regulation of a trial taking place before it, at any rate in the absence of compelling reasons such as clear error of law or manifest injustice or impropriety. It is for the plaintiff in an action to formulate his claim in an intelligible form and it does not lie in his mouth to assert that it is impossible for him to formulate it and that it should, therefore, be allowed to continue unspecified in the hope that, when it comes to trial, he may be able to reconstitute his case and make good what he then feels able to plead and substantiate. There was, in their Lordships' judgment, ample material to justify the Court of Appeal in taking the course which it did of striking out the statement of claim on the alternative ground relied upon by Penlington J.A.- draconian though that may seem - and their Lordships would not therefore regard it as appropriate to interfere with that court's order. Nor would their Lordships think it right to grant an indulgence in response to a request which, according to whose recollection is correct, was either not made to or was refused by that court.

In these circumstances, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs before the Board.