SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2008/30703

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

19.3.12
DATE

SIGNATURE

In the matter between:

METTLE ARCHITECTS CC Plaintiff

and

LASON TRADING 12 (PTY) LIMITED Defendant

SUMMARY: Exception – Particulars of Claim alleging written contract to render architectural services. Specific clause dealing with calculation of remuneration. Alleged waiver by architect of right to claim fees under the specific clause. Alleged right to a fair and reasonable remuneration.

HELD: Waiver of alleged right not leading to importation to agreement of a right to fair and reasonable remuneration.

J U D G M E N T

WRIGHT AJ

1 The Defendant has raised 7 exceptions to the Plaintiff's particulars of claim. I am told by Mr Beltramo SC who appeared for the Defendant that I can ignore the Fourth and Seventh exceptions as well as a prayer for striking out offending paragraphs.

2 The Plaintiff's particulars of claim contain the allegation that the parties concluded a partly oral and partly written consultancy contract on or about 26 July 2004 pursuant to which the Plaintiff would render architectural services to the Defendant. The written portions of the consultancy contract consist of:

2.1 a one page document setting as a fixed fee the sum of R8m for the Plaintiff's architectural services and listing 11 terms. Term 8 in this document provides that "*Any changes to the issued drawings, as at 1 August 2004, shall constitute a variation and will be paid for by the Client on a percentage value basis as per the Client Architect Agreement*";

2.2 an e-mail dated 26 July 2004 sent by a representative of the Plaintiff to a representative of the Defendant containing 5 terms. One of these terms contains the words "*Payment is per the schedule*"; and

2.3 a lengthy standard form client/architect agreement.

3 The client/architect agreement has the following clauses amongst others:

3.1 a clause 2.0 headed "*Standard Services*" which sets out the standard services to be provided by the architect over five stages;

3.2 a clause 3.0 headed "*Supplementary Services*" and which is to the effect that where the architect is appointed to provide project management services the fee shall be calculated in accordance with Appendix 2. Appendix 2 is not attached to the particulars of claim;

3.3 a clause 5.1 headed "*Fee for Full Services*" stating that the fee is calculated according to the table in Appendix 1. Appendix 1 is part of the client/architect agreement and bases the Plaintiff's fee on a percentage of the cost of the building project of which the Plaintiff's services formed part;

3.4 a clause 5.2.1 headed "*Fee for Partial Standard Services*" to the effect that where the architect renders a partial standard service only, the fee shall be the percentage relevant to each work stage based on the cost of the project and calculated according to Appendix 1;

3.5 a clause 6.1 headed "*Supplementary Services*" to the effect that the fee for supplementary services is calculated on hourly rates according to Appendix 3. Clause 6.1 provides further that where a time based fee is selected, the current rates shall apply. Clause 6.1 contains a proviso that whenever the rates are revised the new rates shall apply to work performed after the

date of publication of such revision. Appendix 3 is annexed to the particulars of claim. Clause 1.0 of Appendix 3 provides that where a time based fee is selected, the rates in clause 2.1 of Appendix 3 shall apply. Clause 2.1 puts the rate at R730,00 per hour for principals with more than ten years experience and at R580,00 per hour for principals with less than ten years experience. It is envisaged by Appendix 3 that the South African Council for the Architectural Profession may amend the rates from time to time;

3.6 a clause 6.2 headed "*Alterations*" and providing that the fee for work that includes alterations is based on the fee calculated on the total project cost according to Appendix 1;

3.7 a clause 11.4 providing that "*This agreement, including any annexures hereto, is the whole contract between the parties and no variation hereof shall have any effect unless reduced to writing and signed by both parties*".

4 The particulars of claim do not allege any oral or tacit terms different to the written terms.

5 The particulars of claim contain an allegation that variations required by the Defendant would not form part of the R8m fee and that the Plaintiff would be remunerated by the Defendant for such variations as per the express provisions of the client/architect agreement. It is alleged further that the Defendant, in breach of its obligations under the consultancy

contract has failed to pay the Plaintiff for variations performed by the Plaintiff on the Defendant's instructions.

6 The Plaintiff pleads over 30 different claims. In alleging its right to each specific claim the Plaintiff has alleged that it waived its right to charge a fee based on the terms of the consultancy contract envisaging as it does a fee calculated as a percentage of total project cost and has instead calculated its fee on a reduced basis either:

6.1 per square meter

6.2 per hour

6.3 per agreement (although the two agreements alleged here are not said to be in writing and signed by the parties) or

6.4 per meeting.

7 The amounts claimed are alleged to be fair and reasonable for the work done.

8 The particulars of claim contain the allegation that for the agreed fee of R8m the Plaintiff would be obliged to provide only standard services as detailed in stages 1 to 4 of the client/architect agreement.

9 The Plaintiff has pleaded that insofar as the consultancy contract was concluded tacitly the conduct relied upon by the Plaintiff consists in:

9.1 The Defendant having requested the Plaintiff to participate in negotiations for the purpose of agreeing a way forward;

9.2 The Defendant having agreed to remunerate the Plaintiff for its further and ongoing participation in the said development; and

9.3 The Plaintiff having committed, with the Defendant's encouragement and knowledge to continue with the supply of professional services in relation to the development.

10 The particulars of claim do not suggest that the consultancy contract was varied as required by clause 11.4 nor do they suggest that the Plaintiff has a claim:

10.1 in unjust enrichment;

10.2 for *quantum meruit*;

10.3 for a reduced contract price:

10.3.1 where the Defendant is utilising incomplete performance by the Plaintiff,

10.3.2 where circumstances exist making it equitable for the Court to exercise its discretion in favour of the Plaintiff and

10.3.3 where it is shown what the reduced contract price should be, that is what it will cost to bring the Plaintiff's performance in order, so that it can be determined by how much the contract price should be reduced. See **BK Tooling (Edms) Bpk v Scope Precision**

Engineering (Edms) Bpk 1979 (1) SA 391 AD at **435A**.

11 All of the exceptions are based on allegations of insufficient averments to sustain a cause of action. Two of the exceptions namely the Third and Sixth exceptions rely also on alleged non-compliance with Uniform Rule 18(4). This sub-rule requires every pleading to contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim with sufficient particularity to enable the opposite party to reply thereto.

The 1st exception

12 This exception is to the effect that the conduct of the parties set out in paragraph 9 of this judgment and pleaded as giving rise to the tacit conclusion of the consultancy contract is insufficient to establish unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to and did in fact conclude the consultancy contract. Alternatively, exception is taken on the ground that the pleaded conduct supports the conclusion of an express agreement.

13 What the Plaintiff has pleaded in the alternative is that the consultancy contract was concluded tacitly. Apart from contracts required by law to be in writing and signed there is no reason in principle why a contract containing written terms cannot be concluded tacitly. As a separate construct a written contract may hold a tacit term.

14 In **Standard Bank of SA Ltd v Ocean Commodities Inc 1983 (1) SA 276 AD** at **292B** Corbett JA as he then was held that "*In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem.*" In **Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd 1984 (3) SA 155 AD** at **165C** the same learned Judge of Appeal held that "*a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence.*" He held that it was not necessary to decide whether the stricter test as set out in **Standard Bank** or the more lenient test in **Joel Melamed** is ultimately the correct one. The 1st exception is brought relying on the stricter test. I need not decide which test correctly reflects our law as this exception fails for another reason.

15 In **First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 (SCA)** at **965D** it was held that an excipient has to show that a pleading is excipiable on every interpretation that can reasonably be attached to it. In my view the facts alleged in paragraph 9 can reasonably be read as giving rise to the tacit conclusion of the consultancy contract. The alleged request by the Defendant that the Plaintiff participate in negotiations may perhaps not reasonably be understood as being other than express. The allegation that the

Defendant agreed to remunerate the Plaintiff and the Plaintiff's alleged commitment to supply services with the Defendants' knowledge can, I think reasonably be read as giving rise to the tacit conclusion of the consultancy contract. The main ground of the 1st exception attacks the three facts pleaded in paragraph 9 cumulatively rather than separately. This finding necessarily disposes of the alternative ground for the exception.

The 2nd and 5th exceptions

16 The Defendant's point here is that:

16.1 The Plaintiff cannot waive its right under the consultancy agreement to be remunerated on a percentage of cost of project basis.

16.2 The method of calculating the remuneration was expressly agreed by the parties.

16.3 Any deviation therefrom constitutes a variation of the agreement prohibited by clause 11.4 of the client/architect agreement.

16.4 There is no allegation of any variation of the agreement as required by clause 11.4.

17 Mr Trisk SC, appearing for the Plaintiff with Mr Joyner argued that once the Plaintiff has waived its right to remuneration based on a percentage of total project cost as provided for in the express provisions of the consultancy contract the law of itself imports to the consultancy contract

a remedy for the Plaintiff along the lines pleaded, that is an entitlement to fair and reasonable remuneration as pleaded in paragraphs 6 and 7 of this judgment. He referred me to the following cases in support of his contention.

18 **Pete's Warehousing & Sales CC v Bowsink Investments CC 2000 (3) SA 833 ECD**. In **Pete's** case a lessee under a written lease pleaded a residual implied term that the lessor was obliged initially to place the leased premises in a condition reasonably fit for the purpose for which they were let. The written lease contained a number of clauses relating to the condition of the premises and the parties' rights and obligations under these clauses. It was held that the alleged implied term could reasonably be read to be part of the lease. It was held in paragraph 13 of the judgment that in the absence of a contrary agreement between lessor and lessee the lessor is under an obligation as per the residual implied term. The present case is different in that the client/architect agreement expressly provides the basis for remuneration.

19 **Van As v Du Preez 1981 (3) SA 760 TPD**. There a written lease stipulated a monthly rental of R300,00 and contained a clause that the agreement could not be varied unless agreed to in writing and signed by the parties. The tenant, in an affidavit opposing summary judgment stated that he and the lessor had orally agreed to a reduced rental, that the lessee had paid the reduced rental and that the lessor had accepted the reduced rental for a period of 13 months. The lessee contended that the oral agreement constituted a waiver by the lessor of his right to

R300,00 per month. It was held, at **p765** that the oral agreement had the effect of varying the written lease and was therefore not binding as it offended the non-variation clause. The lessee escaped summary judgment on the ground that the lessor's acceptance of the reduced rentals amounted to a waiver. In the present case I am faced with the phenomenon of a creditor alleging that it has waived its own right. There is no allegation that the Defendant has waived its rights under the consultancy contract. In my view the Plaintiff is attempting to substitute its own term relating to remuneration for that expressly provided for in the consultancy contract. This it cannot do even if the term would otherwise favour the Defendant in that the Plaintiff is claiming remuneration on a reduced basis.

20 **Inkin v Borehole Drillers 1949 2 SA 366 AD**. In that case the Plaintiff pleaded an agreement to drill a borehole for the Defendant at the Plaintiff's usual rate. In the alternative, the Plaintiff pleaded that if the Court decided that if the drilling done up to a particular date was chargeable as *quantum meruit* the amount claimed was £7 per day. The Defendant excepted to the alternative claim as disclosing no cause of action and as being vague and embarrassing. On the ground of failure to disclose a cause of action the Defendant's point was that the alternative claim lacked an allegation that the Defendant had been enriched by, or had accepted the benefit of the work done by the Plaintiff. The learned Judge hearing the exception described the alternative claim as one based on a contract to do work but which contract did not make provision for the amount of the remuneration and

which relied on an implied obligation to pay reasonable remuneration. He dismissed the exception. In dismissing the appeal Greenberg JA held that the term *quantum meruit* did not have any precise technical significance in our law. He quoted **Stroud's Judicial Dictionary, 2nd edition, Vol 3** at **p1635** as defining *quantum meruit* as "*the reasonable amount to be paid for services rendered or work done, when the price therefore is not fixed by contract.*" He held, at **p372** that there is no warrant for holding that, in our practice, a claim for quantum merit necessarily means one based on the doctrine of enrichment. He held further that the alternative claim rested on allegations that the contract had been performed, a concept foreign to a claim based in unjust enrichment. The Defendant's exception on the ground that the alternative claim was vague and embarrassing was that it was not clear whether the *quantum meruit* claim was based on the doctrine of enrichment or on an implied promise to pay a reasonable fee. The Court held that the wording of the declaration was more consistent with a claim based on an implied promise to pay a reasonable fee. In the present case the consultancy contract expressly provides the basis for remuneration.

21 **Middleton v Carr 1949 2 SA 374 AD.** The Plaintiff there claimed remuneration for managing a farm. At **p385** an alternative claim was pleaded as follows. "*Failing proof of the express contract for remuneration at the rate of £30 per month the Plaintiff is nevertheless entitled to payment at a fair or reasonable rate for the services which he had rendered*". It was held, at **p386** that where the term of an

agreement had failed to fix the remuneration of a party, the question was then whether or not the court could imply a term in fact or in law fixing the remuneration. **Middleton's** case is readily distinguishable from the present case. In the present case express provisions fix the determination of the remuneration. There is no need to import the alleged implied term and to do so would be contrary to the terms of the consultancy contract and more particularly clause 11.4 of the client/architect agreement.

22 **Frame v Palmer 1950 (3) SA 340 CPD**. A contract to alter a house was initially relied on. An amendment at the trial allowed the Plaintiff to plead in the alternative that in the event of the Court holding that the relevant contract was not proved the Court should uphold a claim for fair and reasonable remuneration for work done and which caused the Defendant to be enriched. The point is that the alternative claim was considered in the absence of a contract.

23 **Gorfinkle v Miller 1931 (CPD) 251**. A builder sued an owner under a building contract for extra work done. The builder succeeded on the basis of unjust enrichment in circumstances where the owner knew of and consented to the extra work.

24 **Bank v Grusd 1939 Vol 1 TPD 286**. A builder did extra work. The agreement contained a clause that no extra work be done unless the owner authorised the extra work in writing. The builder succeeded in his claim for the extra work because the owner had stood by and allowed the extra work knowing that he benefited thereby. The learned Judge,

approving the decision in **Gorfinkle**, was motivated by considerations of unjust enrichment and deceit if not fraud on the part of the owner. In **Christie's, The Law of Contract in South Africa, 6th edition** at **p465** the learned authors state that **Bank** is still good law. They do so on the grounds that a party to a contract may not call in aid a non-variation clause where such party acts deceitfully, fraudulently or where public policy demands that such a party should not be allowed to rely on a non-variation clause. In the present case the Plaintiff as creditor has alleged a waiver of its own right and has sought, in the same breath to rely on a right not contained in the consultancy contract. The particulars of claim do not allege that reliance by the Defendant on clause 11.4 would be deceitful, fraudulent or contrary to public policy. The parties seem to have negotiated a commercial deal at arm's length. There is no suggestion in the particulars of claim that the alleged waiver was effected in different circumstances.

25 **Genac Properties Jhb (Pty) Ltd v NBC Administrators CC 1992 (1) SA 566 AD**. At **578A** of this judgment Nicholas AJA held that there was authority in the then Appellate Division for the view that where there is an agreement to do work for remuneration and the amount thereof is not specified the law itself provides that it should be reasonable.

26 All of the above cases are distinguishable from the present case on their facts. In none of these cases did a Plaintiff obtain judgment on the basis that the law imports into an agreement the right suggested in the present case. Having dealt with the cases on which Mr Trisk relied I consider

now a number of other cases which I feel help to answer the question to be decided.

27 In **HNR Properties CC and Another v Standard Bank of SA Ltd 2004 (4) SA 471 SCA** a suretyship in favour of a bank contained a non-variation clause to the same effect as clause 11.4 in the present case. The sureties sought their release and argued that they had been released by the bank because of certain conduct by the bank. A clause in that suretyship provided that the sureties would not be released unless such release was in writing and signed by an authorised representative of the bank. The Court found against the sureties on the facts. In paragraph 19, Scott JA held that "*Courts have in the past, often on dubious grounds attempted to avoid the Shifren principle where its application would result in what has been perceived to be a harsh result. Typically, reliance has been placed on waiver or estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve a violation of the Shifren principle, for example, where it amounts to a pactum de non petendo or an indulgence in relation to previous imperfect performance.*" The learned Judge of Appeal was dealing with a case where debtors were alleging waiver by a creditor in circumstances different to those in the present case where the Plaintiff is not simply alleging a waiver of its own right and leaving it there. Hand in glove with the alleged waiver goes a basis for remuneration foreign to the consultancy contract.

28 In a judgment delivered on 28 September 2011 the Supreme Court of Appeal, in the case of **Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd** at **paragraphs 9 – 13** quoted with approval passages from three judgments.

28.1 In **Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 AD** at **532G – 533A** Corbett JA stated "*The implied term is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term. The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.*"

28.2 In **South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 SCA** at **paragraph 28** Brand JA held that "*Unlike tacit terms, which are based on the inferred intention of the parties, implied terms are imported into contracts by law from without. Although a number of implied terms have evolved in the course of development of our contract law, there is no numerus clausus of implied terms and the courts have the inherent power to develop new implied terms. Our courts' approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognised explicitly that their powers of complementing or restricting the obligations of parties to a contract by implying terms should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith... Once an implied term has been recognised, however, it is incorporated into all contracts, if it is of general application, or into contracts of a specific class, unless it is specifically excluded by the parties... It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and set of facts can serve only as catalysts in the process of legal development.*"

28.3 In **Robin v Guarantee Life Assurance Ltd 1984 (4) SA 558 AD** at **567C – D** Trengove JA held that "*A tacit term cannot be imported into a contract in respect of any matter to which the parties have applied their minds and for which they have made express provision in the contract.*"

29 With regard to the judgment in **South African Forestry** I hold that the concepts of justice, reasonableness, fairness and good faith do not assist the Plaintiff in this case. The particulars of claim suggest no reason why these considerations lead to the importation of the alleged implied term to the consultancy contract.

30 In contending for the right pleaded in paragraphs 6 and 7 of this judgment Mr Trisk, as I understood his argument was relying on an implied term rather than on a tacit term. The implied term relied on cannot stand as it runs counter to the express provisions of the consultancy contract. If Mr Trisk was relying on a tacit term, it too cannot be imported into the consultancy contract for the same reason.

31 In **Group Five Building Ltd v Minister of Community Development 1993 (3) SA 629 AD** at **653F** Nienaber JA held that the imposition of a supposed implied term can never have the effect of editing out an express term. The 2nd and 5th exceptions however do not invoke non-variation other than as coupled to clause 11.4.

32 In **Brisley v Drotsky 2002 (4) SA 1 SCA** Cameron JA as he then was, in a separate concurring judgment re-affirmed, in paragraph 90 the decision in **S.A. Sentrale Ko-Op Graanmaatskappy Bpk v Shifren en**

Andere 1964 (4) SA 760 AD. The learned Judge of Appeal made the important observation, at paragraph 91 that public policy which nullifies agreements offensive in themselves is now rooted in our Constitution and the fundamental values it enshrines. In the present case no Constitutional right of the Plaintiff is alleged by it to have been infringed.

33 Both the 2nd and 5th exceptions contain the allegations that the right allegedly waived by the Plaintiff is not capable of waiver and that the method used to calculate the claims amounts to a variation of the terms of the consultancy contract. According to **Christie** at **p455** it follows from the contractual nature of a waiver of a right acquired under a contract that the intention to waive the right must be communicated to the other party. In **Traub v Barclays National Bank Ltd 1983 (3) SA 619 AD** at **634H** Botha JA held that a creditor's intention not to enforce a right is of no legal effect unless and until there is some expression or manifestation of it which is communicated to the debtor or in some way brought to his knowledge. In **Botha (now Griessel) and Another v Finanscredit (Pty) Ltd 1989 (3) SA 773 AD** at **792A** Hoexter JA stated in passing that "*even in the absence of communication to the party released waiver may, in an appropriate case, be established by proof of an overt act or acts clearly evidencing the creditor's intention to surrender his right against the debtor.*"

34 In **Christie,** at **p455 – 456** the learned authors criticize the decision in **Botha** and draw a distinction between waiver of a right conferred by a contract and waiver of the common law right to rely on a breach of

contract by the other party. It is not necessary for me to attempt to reconcile these apparently contradictory authorities. In **Road Accident Fund v Mothupi 2000 (4) SA 38 SCA** at **paragraphs 15 to 18** Nienaber JA considered the nature of waiver and stated that it was not necessary to consider whether or not the manifestation of an intention to waive must of necessity be communicated to the other side and if so whether by some means or another it must always be accepted or acted upon by the other party.

35 In my view the right allegedly waived by the Plaintiff is capable of being waived. There is no reason in principle why it should not be. Whether in this case the right was waived is properly a question for trial. It does not follow however, that once the right is waived the suggested implied term takes its place. The 2nd and 5th exceptions, insofar as they rely on the allegation that the right is incapable of waiver are misconceived.

36 The 2nd and 5th exceptions are better motivated by their reliance on the allegation that the Plaintiff seeks to vary the terms of the contract other than by the mechanism of clause 11.4. It was not suggested by Mr Trisk that the express remuneration clauses of the consultancy contract operate only for the benefit of the Plaintiff. Clearly the Defendant has an interest in knowing how the fees it will pay are to be calculated. The 2nd and 5th exceptions succeed.

The 3rd and 6th exceptions

37 The Defendant alleges that if the Plaintiff is entitled to waive its rights under the express remuneration terms of the consultancy contract then

the Plaintiff failed to comply with Uniform Rule 18(4) in that there is no allegation:

37.1 As to what the Plaintiff's fee would have been had it charged a percentage based fee;

37.2 When the Plaintiff elected to waive;

37.3 When the Plaintiff conveyed the election to the Defendant;

37.4 When the Defendant accepted the Plaintiff's waiver.

38 In my view none of these alleged missing allegations concern facts necessary for the Plaintiff to prove its waiver. Rather they are facts which might be used to prove the fact of waiver considered necessary by the Plaintiff to sustain the cause of action. See **McKenzie v Farmers' Co-Operative Meat Industries Ltd 1922 AD 16** at **23**. The missing facts are not, in my view material facts upon which the pleader relies for the claims as envisaged by Rule 18(4). A pleading which is excipiable at common law for want of compliance with **McKenzie** is also in breach of Rule 18(4). The aggrieved party would have a choice of remedies, namely to:

38.1 frame an exception on the common law ground; or

38.2 base an exception on non-compliance with Rule 18(4) as was done in the present case; or

38.3 invoke the provisions of Rule 30A which provide a mechanism for ensuring compliance with the Uniform Rules. Compare

Sasol Industries v Electrical Repair Engineering 1992 (4) SA 466 WLD at **469J**.

39 On the grounds alleged in the 3rd and 6th exceptions the particulars of claim are in my view neither excipiable at common law nor do they fall short of the requirements of Rule 18(4). Under Rule 18(6) a party who relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded. The failure to plead the missing allegation of fact complained of in paragraph 37.4 of this judgment namely when the Defendant is alleged to have accepted the Plaintiff's waiver would render the particulars of claim in breach of Rule 18(6) if waiver is a contract as suggested in **Christie**. The 3rd and 6th exceptions do not invoke the provisions of Rule 18(6). Accordingly it is not necessary for me to decide whether or not a failure to comply with Rule 18(6) would render a pleading excipiable for that reason alone.

Costs and leave to amend

40 The Defendant has achieved substantial success. Nearly all of the debate in Court centred around the 2nd and 5th exceptions which go to the heart of the particulars of claim. The Plaintiff may reasonably need time if it is minded to amend.

Order

41

41.1 The 1st, 3rd and 6th exceptions are dismissed.

41.2 The 2nd and 5th exceptions are allowed.

41.3 The Plaintiff is to pay the costs of all the exceptions.

41.4 The Plaintiff is granted leave to amend its particulars of claim within one month of the date of delivery of this judgment.

G C WRIGHT AJ

19 March 2012

JUDGE OF THE HIGH COURT

On behalf of the Plaintiff:	Adv K Trisk SC
	Adv J Joyner
Instructed by:	Andrew Miller & Associates
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On behalf of the Defendant:	Adv P Beltramo SC
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Dates of Hearing:	1 March 2012
Date of Judgment:	19 March 2012