Ventry v Sunkird Investments Pty Ltd [2000] NTSC 30

PARTIES:	PHILIP JAMES VENTRY
	v
	SUNKIRD INVESTMENTS PTY LTD (ACN 009 603 650)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	LA19/1999 (9920728)
DELIVERED:	17 May 2000
HEARING DATES:	13 March 2000
JUDGMENT OF:	THOMAS J

CATCHWORDS:

LANDLORD AND TENANT - TERMINATION OF THE TENANCY - NOTICE TO QUIT - APPEAL

Appeal from Local Court at Darwin - magistrate found notice to quit was valid as to form - original application dismissed because no appearance on behalf of applicant - second application based on same notice to quit - order for dismissal did not finally determine litigation - proceedings not procedurally defective - fresh appliaction within 60 day time limit - no necessity to serve a further notice to quit - notice to quit shall be in writing and signed by the lessor, or his agent authorized in writing - process server filled in date to vacate premises on notice to quit - magistrate's finding that notice to quit was valid as to form was correct - appeal dismissed

Tenancy Act 1979 (NT), s 42A, 45, 46 (2)(a) and 48; *Local Court Act 1989* (NT), s 19(2), (3) and s 20 (5);
Nationwide News v Bradshaw (1986) 41 NTR 1, applied.

REPRESENTATION:

Counsel:

Appellant:	F Davis
Respondent:	S Southwood

Solicitors:

Appellant:	Davis Norman Solicitors
Respondent:	Morgan Buckley
Judgment category classification:	C
Judgment ID Number:	tho20006
Number of pages:	13

IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ventry v Sunkird Investments Pty Ltd [2000] NTSC 30
LA19/1999 (9920728)

BETWEEN:

PHILIP JAMES VENTRY
Appellant

AND:

SUNKIRD INVESTMENTS PTY LTD
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 17 May 2000)

[1] This is an appeal from Mr John Lowndes a stipendiary magistrate sitting in the Local Court in Darwin.

[2] The appeal is from a decision of the learned stipendiary magistrate delivered on 23 December 1999 in which he found that he was satisfied on the balance of probabilities that the Notice to Quit served by the process server on 14 July 1999 was valid as to form. The appellant also seeks leave to appeal from certain rulings made by the learned stipendiary magistrate on 11 October 1999.

[3] The appellant seeks the following orders:

"1. That the decision of the learned Magistrate be set aside.

2. That the Application be remitted to the Local Court for determination according to law.

3. The Respondent pay the Appellant's costs of and incidental to this Appeal.

4. That the Appellant be granted Leave pursuant to Rule 83.22(1) if necessary to proceed with grounds 1, 2 and 3 of the Amended Notice of Appeal and s 19(2) and (3) of the Local Court Act and s 44 Limitation Act.

5. That the Appellant be granted leave to file and serve this Amended Notice of Appeal."

[4] The grounds of appeal are as follows:

"1. The learned Magistrate erred in ruling that the Respondent's application to the Local Court number 9920728 was competent.

2. The learned Magistrate erred in ruling that:

(a) The Order of Mr. Loadman S.M. dated 25 August 1999 dismissing the application by the Respondent in application of the Local Court number 9918960 pursuant to Rule 30.05(4) and Rule 38.02(a)(ii) of the Local Court Rules was not a bar to the issue of application 9920728.

(b) The Respondent being the Applicant in application 9918960 was not required to apply to the Court for a rehearing Rule 33.03 of the Local Court Rules.

3. The learned Magistrate erred in ruling that the Respondent was entitled in proceedings 9920728 to rely upon the Notice to Quit being the foundation of Application 9918960.

4. The learned Magistrate erred in ruling that the Notice to Quit relied upon in Application 9920728 complied with the provisions of Sections 42A and 45 of the Tenancy Act.

5. The learned Magistrate erred in ruling that the Lease between the Appellant and the Respondent had in law been terminated.

6. The learned Magistrate erred in ruling that a person other than the Respondent was empowered to insert the date on which the Appellant was required to Quit the Premises.

7. The learned Magistrate erred in admitting into evidence the statements of Michael Charles CONNOR and acting on such evidence in the absence of a complete copy of the Notice to Quit relied upon by the Respondent."

[5] Leave to appeal in this matter is required under s 19(2) and (3) of the *Local Court Act* (NT) 1989 with respect to orders made by the learned stipendiary magistrate on 11 October 1999. These relate to grounds (1), (2) and (3) of the grounds of appeal.

[6] The background to this matter is as follows.

[7] On 17 August 1999, solicitors on behalf of the respondent (lessor) filed at the Local Court an application (Form 30A) under s 48 of the *Tenancy Act* (NT) 1979 for a Warrant of Possession authorising an officer of the court or a member of the Police Force to evict the lessee from Lot 4920, Town of Nightcliff comprised in Certificate of Title Volume 421 Folio 072. Being premises known as Alawa Gym situated at Shop 2, 55 Alawa Crescent, Alawa NT 0810. On this form of application the applicant also stated:

"1. I am the lessor.
2. I gave the lessee notice to quit on 14 July 1999.
3. The notice required the lessee to quit the premises by 22 July 1999.
4. The date in paragraph 3 is less than 60 days ago.
5. A copy of the notice to quit is attached to this application."

[8] The application was listed before the Local Court at Darwin at 2.00pm on 25 August 1999. The matter came before Mr Loadman SM on this date. There

was no appearance by the applicant and the application was dismissed. The order made by Mr Loadman is Exhibit 1.

[9] I accept the matters set out in the affidavit of Ms Kate Mitchell Stevenson sworn 13 March 2000 as to why the application was dismissed by Mr Loadman on 25 August 1999. I accept the reasons as deposed to by Ms Stevenson as to why there was no appearance on 25 August 1999 on behalf of the applicant. There was no determination on the merits of the application, it was dismissed because there was no appearance on behalf of the applicant.

[10] On 10 September 1999, solicitors for the applicant filed a further application for a Warrant of Possession in respect of the same premises. The application annexed the same Notice to Quit which was served on Phillip James Ventry on 14 July 1999. The second application for Warrant of Possession came before Mr Lowndes SM for hearing on 22 September 1999, 24 September 1999, 11 October 1999, 23 November 1999, 10 December 1999 and 23 December 1999.

[11] The second application for a Warrant of Possession was based on the same Notice to Quit which was the basis for the application listed on 25 August 1999 which had been dismissed because of the failure of the applicant to appear. The second application was made within the period of 60 days as required under s 48 of the *Tenancy Act*.

[12] Copy of the Notice to Quit is Exhibit 3 in these proceedings and is addressed to the tenant in the following terms:

> "TO: PHILIP JAMES VENTRY
>
> TAKE NOTICE that you are required to quit the premises forming a part of Lots 4920 and 4921, Town of Nightcliff, comprised in Certificate of Title Volume 421 Folio 072 ("the premises") which you occupy as Lessee from Sunkird Investments Pty Ltd (ACN 009 603 650) ("the Lessor") pursuant to a written lease ("the Lease") on or before _____ whereupon your lease shall be terminated."

[13] Further, the Notice to Quit advises the tenant that if he fails to quit the premises the lessor may apply for a Warrant of Possession to eject him from the premises. The Notice to Quit then sets out the grounds for issuing the Notice to Quit and provides particulars which essentially related to non-payment of rent.

[14] The notice is based on s 46(2)(a) of the *Tenancy Act* in that the lessee breached or failed to comply with a covenant condition or provision of the lease such that the lessor was justified as treating the lease as at an end.

[15] The breach as alleged in the Notice to Quit was failure to pay rent details of which are contained in the Notice to Quit.

[16] On 11 October 1999 the learned stipendiary magistrate ruled that this Notice to Quit could be relied on with respect to the second application for a Warrant of Possession. He requested further submissions as to whether the Notice to Quit itself was valid.

[17] I agree with the conclusion of the learned stipendiary magistrate and with his reasons that the order for dismissal made by Mr Loadman SM on 25 August 1999 does not operate as a bar to further proceedings being instituted. Section 20(5) *Local Court Act* provides as follows:

> "(5) If an applicant under this section fails to appear at the time fixed for the hearing of the application and the application is struck out, the applicant may re-apply only if the applicant first obtains the leave of the Court."

[18] The order for dismissal made by Mr Loadman did not finally determine the litigation. I agree with the statement made by the learned stipendiary magistrate that the order dismissing the application "would not as a matter of law support a defence of res judicata".

[19] The learned stipendiary magistrate stated in the course of his Reasons for Ruling:

> "In my opinion, when a proceeding has been dismissed, it is not necessary for the affected party to apply for a re-hearing in order to proceed with further litigation against the other party in relation to the same subject matter. It is my opinion that the Local Court Rules envisage two procedures which run concurrently, and that a party who has suffered an order for dismissal in effect has a choice, that is, either to seek a re-hearing, having first applied to set aside the order for dismissal or, alternatively, a party can start afresh."
>
> In my opinion it would be incorrect to construe the rules as providing only on regime, that is, that a party must apply for a re-hearing to get litigation back on track."

[20] With respect I agree with his Worship's analysis of the Local Court Rules and with his conclusion that an order for dismissal on the basis of want of

prosecution or non-appearance does not operate as a bar to further proceedings being instituted.

[21] The learned stipendiary magistrate correctly ruled that the proceedings were not procedurally defective.

[22] Section 20(5) of the *Local Court Act* is a facilitative provision which enables a party to apply for a rehearing where there is an adequate explanation for a failure to appear rather than to be required to issue proceedings afresh. It does not preclude a party from taking out further proceedings.

[23] The learned stipendiary magistrate ruled that the Notice to Quit served on 14 July 1999 could be relied upon in the fresh application.

[24] The effect of the Notice to Quit served on 14 July 1999 is it terminated the tenancy. The fresh application for a warrant of ejectment was still within the 60 days time limit provided for under s 48 of the *Tenancy Act*. I am not persuaded there is any necessity to serve a further Notice to Quit in these circumstances.

[25] I consider the learned stipendiary magistrate correctly ruled that the same Notice to Quit could be relied upon with respect to the second application for a warrant of ejectment.

[26] With respect to grounds (1), (2) and (3) of the grounds of appeal I would refuse the application for leave to appeal. The rulings made by the learned

stipendiary magistrate on 11 October 1999 which are the subject of the application for leave to appeal are in my opinion clearly correct. I apply the principle expressed by O'Leary J in *Nationwide News v Bradshaw* (1986) 41 NTR 1 at 8:

> "The legislation having provided that there should be no appeal from an interlocutory judgment, except by leave of the court, the prima facie presumption is against appeals from interlocutory judgments, and in favour of the correctness of the decision in question, that is, that there has been proper exercise of his discretion by the primary judge. As a general rule, therefore, the court will not interfere. If leave to appeal is to be granted, some prima facie case must be made out, short of hearing the appeal itself, for interfering with the exercise of his discretion by the primary judge. And so, if it appears prima facie on the application for leave that the order from which it is sought to appeal is clearly wrong, that the exercise of discretion by the primary judge has clearly miscarried in the sense that 'it has, or must have, been substantially affected by wrongful application of principle, or misunderstanding or erroneous assessment of factual material': *Coulton v Holcombe* (1986) 65 ALR 656 per Deane J, at 663, leave will generally be given. So also, even if it does not appear prima facie that the order made by the primary judge was clearly wrong, but it does appear that some injustice will result from it, the court will also generally give leave to appeal. That does not mean, though, that in either case the court will, in the exercise of its discretion, give leave to appeal. There may be other good reasons for not interfering with the order made: see *Duncombe v Porter* (1953) 90 CLR 295 per Dixon CJ at 303. On the other hand, if, on the hearing of the application for leave, the court forms a clear opinion that the appeal could not succeed, leave to appeal will generally be refused. …."

[27] I have formed the view that the appeal on grounds (1), (2) and (3) could not succeed and for those reasons the application for leave to appeal is refused and the appeal on grounds (1), (2) and (3) dismissed.

[28] With respect to grounds (4), (5), (6) and (7) the learned stipendiary magistrate delivered Reasons for Decision on these matters on 23 December

1999 and leave to appeal is not required as the notice of appeal was filed within time.

[29] The substance of the appeal relates to whether the Notice to Quit is invalid because the date the premises were to be vacated was inserted by a process server. There is no dispute that the person who signed the Notice to Quit, Mr Michael Vlamos, held a power of attorney from the lessor and was entitled to sign the Notice to Quit.

[30] Section 42A of the *Tenancy Act* provides as follows:

> "A notice to quit given by a lessor shall be in writing and signed by the lessor, or his agent authorized in writing."

[31] Counsel for the appellant Mr Davis, argues that the process server was not authorised in writing to insert dates into the Notice to Quit and accordingly the Notice to Quit is invalid.

[32] The Notice to Quit which was served on Mr Ventry was not produced. I understand from the submissions made by Mr Davis for the appellant that either he did not receive this Notice to Quit from Mr Ventry or Mr Davis is unable to find this document in his office. Mr Davis stated that he had made a search of his office and could not find either a dated or undated copy of the Notice to Quit. Mr Davis did obtain a copy of the Notice to Quit which contained no date.

[33] In his Reasons for Decision dated 23 December 1999, his Worship has found as a fact that prior to service the process server inserted into the Notice to

Quit both the date of the Notice to Quit and the date on which the tenant was required to vacate the premises.

[34] The Notice to Quit which was served on the tenant was not before the Local Court and is not before this Court. However, the issue is whether by inserting the dates as he did the process server invalidated the Notice to Quit. Section 42A of the *Tenancy Act* should be read with s 45 of the *Tenancy Act* which provides as follows:

> "A notice to quit which does not comply with the provisions of this Part does not operate so as to terminate the tenancy in respect of which the notice was given."

[35] The evidence in this matter is set out in the affidavit of Ms Kate Stevenson sworn 15 September 1999 and affidavit of Ms Kate Stevenson sworn 13 March 2000.

[36] The Notice to Quit had been served by the process server on the tenant on 14 July 1999. The affidavit of service sworn by Mr Michael Charles Connor is annexed to the affidavit of Ms Stevenson sworn on 15 September 1999 (Exhibit 2). Copy of the Notice to Quit served on the tenant was marked Exhibit 3. The affidavit of service sworn by Mr Connor omitting formal parts states as follows:

> "I, Michael Charles Connor a Licensed Bailiff of 6/46 Sergison Circuit, Rapid Creek in the Northern Territory of Australia, MAKE OATH AND SAY as follows:
>
> 1. On the 14th July 1999 at 3:00 pm I served Phil Ventry with a sealed copy of a *Notice to Quit*.

2. This document was served personally upon Phil Ventry outside the Alawa Gym, Alawa Crescent, Alawa in the Northern Territory of Australia.

3. At the time of the said service I asked the person I was serving "are you Phil Ventry"? The person I addressed replied "yes I am". I then handed the *Notice to Quit* to him.

Annexed hereto and marked with the letter "A" is a true copy of the said *Notice to Quit*."

[37] Mr Connor gave evidence before the learned stipendiary magistrate on 24 September 1999 that he is a licensed private bailiff process server. Mr Connor gave evidence (t/p 4) on 24 September 1999 that he had inserted the date of 22 July 1999 as the date the tenant was to vacate the premises and that was 8 days after the service of the Notice to Quit. He gave evidence that when he identified Mr Ventry on 14 July 1999 he filled in the date he was to vacate the premises on the Notice to Quit and handed the Notice to Quit to Mr Ventry.

[38] These premises are commercial premises being the Alawa Gym in Alawa Crescent, Alawa. In relation to the termination of such a lease, the relevant provisions of the *Tenancy Act* is s 46. The respondent's agent, Mr Vlamos, signed the Notice to Quit which provides as follows:

"TO: PHILIP JAMES VENTRY

TAKE NOTICE that you are required to quit the premises forming a part of Lots 4920 and 4921, Town of Nightcliff, comprised in Certificate of Title Volume 421 Folio 072 ("the premises") which you occupy as Lessee from Sunkird Investments Pty Ltd (ACN 009 603 650) ("the Lessor") pursuant to a written lease ("the Lease") on or before _____ whereupon your lease shall be terminated."

[39] Mr Connor inserted 22 July 1999 as being the date on or before which the lease was terminated, which gave the seven days from the date of service as required under s 46 of the *Tenancy Act* read with the lease which provided for seven days notice.

[40] The function performed by the process server of filling in the date on the Notice to Quit is not inconsistent with s 42A

[41] His Worship concluded that s 42A did not require that a Notice to Quit given by a duly authorised agent must have been personally drawn and completed by the lessor's agent. His Worship reasoned:

> "There is nothing in Section 42A that requires a notice to quit to be personally drawn and completed by the lessor where the notice is given by the lessor. Similarly, the section does not require that a notice to quit, given by a duly authorised agent, must have been personally drawn and completed by the lessor's agent. The terms of Section 42A are such as to permit the notice to quit to be drawn and completed by whosoever the lessor or his or her duly authorised agent chooses. The only requirements are that (1) the notice be in writing and signed by either the lessor or his or her agent and (2) by necessary implication that at the time the notice is served on a lessee it is complete in all material respects."

[42] I consider that his Worships was correct in this reasoning and in his conclusion. His Worship then addressed the issue of secondary evidence and stated as follows:

> "Evidence was taken from the process server as to his completion of the notice to quit prior to him serving it on the lessee. That evidence, which was in the nature of secondary evidence, was taken without proper foundation being laid for its reception. That procedural defect was brought to the attention of the parties who were then invited to make submissions.

> In the meantime, the lessor's solicitor served the solicitor with a notice to produce. Neither the lessee nor his solicitor were able to produce the notice to quit which the lessor says was served on the lessee by the process server.
>
> In effect, I allowed the lessor's solicitor to reopen the appellant's case, with the result that the appellant was now able to rely upon the notice to quit, which in turn provided a proper foundation for the evidence of the process server which had earlier been taken. Mr Davis, the solicitor for the lessee, did not actively object to this course. Nor did he require the process server to be recalled for further cross-examination.
>
> It was my opinion that the lessor's solicitor should be allowed to reopen her case on the basis that the only objection to the evidence given by the process server was of a technical nature, and the problem with the process server's evidence had been identified by the court, rather than the parties, and only after the evidence had been taken."

[43] I consider the learned stipendiary magistrate correctly established the basis for receiving secondary evidence of the Notice to Quit. His Worship relied on the evidence of Mr Connor, the process server, to be satisfied on the balance of probabilities that the Notice to Quit was served on 14 July 1999. His Worship also accepted the evidence of Mr Connor that Mr Connor had inserted the date of 22 July 1999 being the date the tenant was to vacate the premises and after inserting this date handed the Notice to Quit to Mr Ventry. This is a finding of fact for which there is no basis to disturb.

[44] The learned stipendiary magistrate concluded by finding the Notice to Quit was valid as to form. I consider this was the correction conclusion.

[45] The appellant has failed to establish grounds (4), (5), (6) or (7) of the grounds of appeal. Accordingly, the appeal is dismissed.