DL & JE Graetz Pty Ltd & Anor v NTHG Pty Ltd & Anor [2002] NTSC 40

PARTIES:	D L & J E GRAETZ PTY LTD and VYN EAST PTY LTD and NTHG PTY LTD and PHILLIP JOHN NEWMAN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	CIVIL
FILE NO:	No. 27 of 2001 (20101352)
DELIVERED:	7 JUNE 2002
HEARING DATES:	23, 29 MAY & 7 JUNE 2002
JUDGMENT OF:	ANGEL J

CATCHWORDS:

INJUNCTION - INTERLOCUTORY – consistency between final relief sought and interlocutory injunction sought - interlocutory injunction to restrain appointment of receiver over purchased business assets while proceedings for rescission of sale pending – question whether interlocutory remedy sought for purposes unconnected with protection or enforcement of defendants' claim – basis of jurisdiction to grant interlocutory injunction - serious question to be tried – balance of convenience

Federal Court of Australia Act 1976 Cth, s 23

Supreme Court Act NT, s 14, s 69

Politano & Ors v CAN 060442926 Pty Ltd [1998] 572 FCA (unreported FCA, 29 May 1998), *Fletcher v Foodlink* (1995) 60 FCR 262, not followed

Australian Broadcasting Corporation v Lenah Game Meats (2002) 185 ALR 1, *Kitts v Moore* [1895] 1 QB 253, *American Cyanamid v Ethicon* [1975] AC 396, *National Australia Bank Limited v Zollo* (1995) 64 SASR 63, *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161, *Glandore Pty Ltd v Elders Finance & Investment Co Ltd* (1984) 4 FCR 130, *Harvey v McWatters* (1948) 49 SR (NSW) 173, followed

Blomfield v Ayre (1845) 8 Beav. 250; 50 ER 99, *Goodman v Kine* (1845) 8 Beav. 379; 50 ER 149, *Collison v Warren* [1901] 1 Ch 812, *Garden Cottage Ltd v Milk Board* [1984] AC 130, considered

REPRESENTATION:

Counsel:

Plaintiffs:	Ms J Kelly
Defendants:	J Dearn

Solicitors:

Plaintiffs:	Hunt & Hunt
Defendants:	T Crane

Judgment category classification:	B
Judgment ID Number:	ang200206
Number of pages:	12

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

DL & JE Graetz Pty Ltd & Anor v NTHG Pty Ltd & Anor [2002] NTSC 40
(No. 27 of 2001 (20101352))

BETWEEN:

D L and J E GRAETZ PTY LTD
First Plaintiff

AND:

VYN EAST PTY LTD
Second Plaintiff

AND:

NTHG PTY LTD
First Defendant

AND:

PHILLIP JOHN NEWMAN
Second Defendant

EX TEMPORE REASONS FOR JUDGMENT

(Delivered 7 June 2002)

ANGEL J*:*

[1] This application is by the defendants for an interlocutory injunction to restrain the plaintiffs, or one of them, from appointing a receiver and manager over the business assets of the first defendant pursuant to an equitable charge granted by the first defendant over the business in favour of the plaintiffs.

[2] The security was part of a transaction of sale by the plaintiffs to the first defendant of the subject business. At settlement, the first defendant paid part of the purchase price and payment of the balance of the purchase price was secured by equitable charge over the assets of the business in favour of the plaintiffs.

[3] In the present proceedings, the plaintiffs sue, in part, for the price of stock in trade sold and delivered to the first defendant and, in part, the balance of the purchase price of the business payable pursuant to the terms of the equitable charge. The plaintiffs, unless restrained by injunction from doing so, having given notice of default, seek to appoint a receiver out of court over the assets of the defendants' business.

[4] The defendants by way of defence to the plaintiffs' claims impugn the whole transaction of sale including the equitable charge on the ground of fraudulent misrepresentation, and seek, by way of counterclaim, rescission of the entire transaction, together with damages and other relief.

[5] The plaintiffs deny the defendants' allegations and the matter is for trial. In the meantime, the defendants continue to carry on the business and wish to do so free of the appointment of a receiver out of court over the business, the business being their only means of income.

[6] In the meantime they deny liability to pay any further monies to the plaintiff. If the equitable charge stands, the defendants are in default and the plaintiffs would be entitled to appoint a receiver. If on the other hand

the transaction is successfully impugned on the grounds put forward by the defendants, no such right would exist and the purchase price of the business would not be payable.

[7] As in the case of *Politano* & Ors v ACN *060442926 Pty Ltd* [1998] 572 FCA 29 May 1998, an unreported decision of Lindgren J, the choice to be made as to the regime pending trial is between, on the one hand, allowing the defendants to continue and carry on the business whilst making no payments to the plaintiffs, and, on the other hand, allowing the plaintiffs to appoint a receiver and manager over the business thereby depriving the defendants of their only source of income.

[8] Relying on *Fletcher v Foodlink* (1995) 60 FCR 262, and *Politano*, previously referred to, the plaintiffs submitted to me that there was no serious question to be tried. It was said, consistent with those authorities, that the injunction sought would go beyond granting an interlocutory remedy appropriate to the protection or enforcement of any of the rights which were the subject matter in issue in the action, that is, for purposes wholly unconnected with either the protection or enforcement of any of the defendants' claims for relief.

[9] In both *Politano* and *Fletcher*, the Federal Court considered s 23 *Federal Court Act*. It appears each case approached similar factual circumstances from different directions, *Politano* in terms of "a serious question to be tried" and *Fletcher* in terms of "jurisdiction of the Federal Court". It was

submitted that those cases were a bar to the present application and authority for the proposition that there had to be, necessarily, consistency between the final relief sought and the interlocutory injunction sought. Each of those cases stressed that the party seeking the injunction disowned proprietary rights over the business over which the receiver was to be appointed. Each of those cases treated the appointment of a receiver over the subject business as immaterially different from ownership of the business. Drummond J said in *Fletcher*, at 265:

> "They do not seek in the action to enforce any rights with respect to the premises. Rather do they seek an order which will establish that they have neither obligations nor rights with respect to those premises. The interlocutory injunction against the second respondent is sought to enable the applicants to make use of the premises only until trial, in the hope that they will thereby be able to generate funds sufficient to run the action: at the same time they assert a right to have the agreement, which alone gives them the right of user of the premises, set aside from its inception. In my opinion, to grant an interlocutory injunction for the purpose frankly identified as that for which it is sought, would be to go beyond granting an interlocutory remedy appropriate to the protection or enforcement of any of the rights or subject matter in issue in this action."

Lindgren J said in *Politano*, at 12-14:

> "..there are more fundamental reasons why, in my view, the applicants have failed to show a serious question to be tried. The common reference to a "serious question for be tried" is an abbreviated form of reference to a serious question to be tried as to the granting of a form of final relief, the substance of which, in the relevant respect would be rendered nugatory by the course of action threatened and sought to be prevented. So, for example… if an owner of a business gave a charge over it as security for the indebtedness of another and on some ground sought to have the charge declared void ab initio, an interlocutory injunction against a threatened appointment of a receiver would be in the aid of final relief, that is ridding the business of the charge and restoration of the

> unencumbered possession and enjoyment of the business which was obtained before the charge was granted. In such cases, the substance of the final relief sought, in the relevant respect, is that the applicant will have unchallenged ownership and possession of the property…
>
> It is not inconsistent with the substance of the final relief sought, in the relevant respect, that the first respondent appoint a receiver. The substance of that final relief, in that respect, is the handing back of the business. The declarations sought would require that the applicants give back the business to the first respondent…
>
> Another way of making the present point is to say that the legal results contended for by both parties entail a handing back of the business, the position of the first respondent being that this results from its enforcement of the contractual arrangement, and that of the applicants that it results from their right to be rid of the contractual arrangement. While the appointment of a receiver is inconsistent with the form of the final relief sought by the applicants, it is consistent with its substance in the relevant respect."

I am, with respect, unable to agree with that reasoning. The appointment of a receiver over another's property is in substance different from treating the property as one's own. Moreover rescission involves restitutio of the purchase price paid as well as of the business.

[10] I have reached the conclusion, with respect, that *Fletcher* and *Politano* are of doubtful authority and should not be followed.

[11] The Supreme Court of the Northern Territory inherited its general jurisdiction from the Court of Chancery, s 14 *Supreme Court Act* (NT). It has power to grant interlocutory injunctions, see s 69 which relevantly provides:

> "s 69 (1) The Court may grant an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do.

(2) Such an order may be made either unconditionally or on such terms and conditions as the Court thinks just.

(3) ….. ."

[12] I have no doubt this court has jurisdiction to grant the interlocutory injunction sought. The basis of that jurisdiction might be expressed in a number of different ways. It might be expressed in terms that the defendants seeking rescission of the transaction whereby they acquired the business, and having rescinded, hold the business as caretaker for the plaintiffs and an interlocutory injunction lies in aid of the defendants' possessory title to the business pending trial.

[13] It might also be expressed in terms that the parties, having joined issue, an interlocutory injunction lies to preserve the status quo, that is, the defendants' running the business as a going concern, free of the appointment of a receiver out of court.

[14] Alternatively, it might be expressed thus: an interlocutory injunction lies in order to protect the subject matter of the action, that is, the business as a going concern, pending resolution in the proceedings, as to whether the plaintiffs or the defendants, after trial, will ultimately be bestowed with it.

[15] Another way of expressing it is to say the defendants, having invoked the equitable remedy of rescission as final relief, interlocutory injunctive relief is obtainable ancillary to that principal equitable relief.

[16] I think the latter is the true principle, supported as it is, by Spry "Equitable Remedies" 6th edition at 447–448 in a passage with which I respectfully agree, viz:

> "Ordinarily an interlocutory injunction is sought after proceedings have been commenced for a perpetual injunction. It should not be thought, however, that an interlocutory injunction cannot be obtained as relief that is ancillary to other equitable proceedings also. In proceedings for the administration of a trust or for the obtaining of an order of specific performance, or for any other form of equitable relief, it may appear that unless an injunction issues at once it will not be sufficiently certain that the court will ultimately be able to do justice between the parties."

Compare, per Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats* (2002) 185 ALR 1 at 5, 6.

[17] The general principle is supported by *Kitts v Moore* [1895] 1 QB 253 where there was held to be jurisdiction to interfere by injunction on equitable grounds to restrain a party from proceeding to arbitration where an action had been brought impeaching the instrument giving rise to the agreement to arbitrate. There an equitable injunction was granted in the absence of any claimed proprietary right.

[18] The submission based on the Federal Court cases is also, I think, inconsistent with the case law to the effect that an interlocutory injunction can be sought although no final injunctive relief is sought in the prayer for relief. See eg. *Blomfield v Ayre* (1845) 8 Beav. 250; 50 ER 99 and *Goodman v Kine* (1845) 8 Beav. 379; 50 ER 149.

[19] It seems to me it is also inconsistent with the authorities to the effect that a defendant, even before filing a defence or counterclaim, can seek interlocutory injunctive relief in a plaintiff's proceedings. See, eg. *Collison v Warren* [1901] 1 Ch 812.

[20] See also, generally, Spry, 6th edition, "Equitable Remedies", at 507:

> "…it must be remembered that the long established practice of granting, where appropriate, an injunction before initiating process has been taken out follows naturally from the ordinary application of equitable principles and that in any court now having equitable jurisdiction it is a practice that will be followed unless there is a clear indication, by statute of in rules of court, that it has been abrogated."

[21] It seems to me that in proceedings impugning a security on equitable grounds, whether for fraud or mistake or surprise, or for some other equitable reason, if it appears that unless an injunction is granted it would not be sufficiently certain that the court would, after trial, ultimately be able to do justice between the parties, an interlocutory injunction on terms may be granted to secure that justice will be done between the parties after trial. Depending on the circumstances, of course, an interlocutory injunction may or may not be appropriate pending trial.

[22] I hold that I have jurisdiction to grant the injunction sought, *Fletcher* and *Politano* notwithstanding.

[23] The next question is whether there is a serious question to be tried. This question relates to the issues of final relief. In the present case, the

principal grounds of the defence are alleged fraudulent misrepresentations in relation to the scope of the business, the ability to make retail sales, and the nature and security of tenure of the subject leasehold, including the area of the business premises.

[24] I do not wish to dilate too much on the affidavit evidence before me, for as Lord Diplock said in *American Cyanamid v Ethicon* [1975] AC 396 at 407:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

[25] I am satisfied that there is a serious question to be tried in the relevant sense, that is, in the *Cyanamid* sense. In *Cyanamid* (at 407) Lord Diplock said "The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.".

[26] I have already referred to the decision of Lindgren J in *Politano* who said:

> "The common reference to a 'serious question to be tried' is an abbreviated form of reference to a serious question to be tried as to the granting of a form of final relief, the substance of which, in the relevant respect would be rendered nugatory by the course of action threatened and sought to be prevented."

With respect, I think this formulation is too narrow. There have been a number of formulations in relation to what constitutes a "serious question to be tried". As Kirby J said in *Australian Broadcasting Corporation v Lenah Game Meats* (2002) 185 ALR 1 at 49:

> "I accept the need for care in providing injunctive relief. However, the cases collected by Callinan J demonstrate that no narrow view has been adopted as to the meaning of the expression "a serious question to be tried".

[27] The next question is balance of convenience. It was submitted that, amongst other things, the alternative remedy of damages was a sufficient remedy. On the question of alternative remedies of damages being sufficient, see generally *Garden Cottage Ltd v Milk Board* [1984] AC 130.

[28] It seems to me damages would not be an adequate remedy. The effect of an out of court appointment of a receiver over the business on the value of the business as a going concern is incalculable. I generally agree, with respect, with the approach of the South Australian Full Court in *National Australia Bank Limited v Zollo* (1995) 64 SASR 63 to this question.

[29] Other relevant matters with respect to the balance of convenience are the defendants' undertakings to damages. In this case, the second defendant is a guarantor of the first defendant. There is evidence before me to the effect that the guarantor, regardless of the first defendant, has assets that exceed the plaintiffs' money claims.

[30] There is the aspect of the undertaking regarding cessation of retail barbecue sales and the dealings with Nabalco which I have already adverted to, and they are offered as a condition of the injunction. It seems to me those undertakings satisfy the plaintiffs' complaints in that regard.

[31] There is the question of the plaintiffs' delay in bringing the application or threatening to appoint a receiver. There is the question of the effect of the appointment of a receiver over the business, which I have already adverted to. There is the question of comparing the hardship to the plaintiffs, if the injunction is granted, with the hardship to the defendants if there is no injunction.

[32] On balance, it seems to me that the matter favours the granting of an injunction. I would not wish it to be thought that I have overlooked what I call the *Inglis* issues. *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161, is High Court authority for the proposition that where a party tries to stop the enforcement of a security, as a condition of the injunction sought that party should pay into court an amount, as security, which the secured party claims is owing. However, there is an exception to *Inglis*. Where the security itself is impugned the court need not order any amount to be paid into court, but may mould an order that ensures adequate protection of the mortgagee and does justice between the parties during the period pending the final hearing (see *Glandore Pty Ltd v Elders Finance & Investment Co Ltd* (1984) 4 FCR 130 at 135-136; *Harvey v McWatters* (1948) 49 SR (NSW) 173).

[33] Counsel for the plaintiffs submitted that the primary consideration, even where the security is impugned, is whether, by a money payment either to the plaintiffs or into court, one can be assured that the plaintiffs are secured

for the balance of the purchase price for the sale of the business with interest.

[34] It seems to me that wide proposition is not supported by the authorities, see, in particular, *National Australia Bank Ltd v Zollo* that I earlier referred to. It seems to me that the balance of convenience in the present case, both to maintain the status quo and to protect the business as a going concern for the purposes of doing justice after the trial between the parties, is in favour of the granting of the injunction. There is no evidence the business is being mismanaged by the defendants. There is evidence the defendants have built the business up since taking it over. The plaintiffs, if ultimately successful, are not in danger of not being paid as matters stand.

[35] There will be an interlocutory injunction to restrain, until further order, the appointment of a receiver pursuant to the security. That injunction will be conditional upon the usual undertaking to damages and the undertakings proffered regarding the cessation of retail barbecue sales from the premises and cessation of the defendants' direct dealings with Nabalco.

[36] At the parties' request, I reserve costs.
