

*Otter Gold NL v Barcon P/L & Sankey* [2000] NTSC 65

PARTIES: OTTER GOLD NL  
v  
BARCON (NT) PTY LTD and  
RICHARD ALAN SANKEY

TITLE OF COURT: SUPREME COURT OF THE NORTHERN  
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN  
TERRITORY exercising Territory jurisdiction

FILE NO: 22/1999 (9904783)

DELIVERED: 15 August 2000

HEARING DATES: 6 July 2000

JUDGMENT OF: THOMAS J

**CATCHWORDS:**

APPEAL – APPEAL FROM MASTER

Appeal – appeal from Master – Master refused order – application to strike out plaintiff’s claim – pleads fiduciary duty – applicants’ appeal dismissed

*Supreme Court Rules 1987* (NT), r 23.02 and 77.05.

*Southwell v Specialised Engineering services Pty Ltd* (1990) 70 NTR 6, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; referred to.

*Adam P. Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, *Webster v Lampard* (1993) 177 CLR 598; cited.

**REPRESENTATION:**

*Counsel:*

Plaintiff: S. Street SC and T. Young  
First & Second Defendants: R. Bruxner

*Solicitors:*

Plaintiff: Ward Keller  
First & Second Defendants: Brian L. Johns

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IN SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Otter Gold NL v Barcon P/L & Sankey* [2000] NTSC 65  
No. 22/99 (9904783)

BETWEEN:

**OTTER GOLD NL**  
Plaintiff

AND:

**BARCON (NT) PTY LTD**  
First Defendant

and:

**RICHARD ALAN SANKEY**  
Second Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 15 August 2000)

- [1] This is an appeal by the first and second defendants who are the applicants from a decision of Master Coulehan who refused by order dated 1 June 2000 an application by the defendants to strike out certain paragraphs of the plaintiff's amended Statement of Claim and to strike out the plaintiff's claim Rule 23.02 of the *Supreme Court Rules 1987* (NT). The Ground of Appeal in the Notice of Appeal dated 7 June 2000 read as follows:

“That Master erred in holding that the plaintiff's amended statement of claim remedied the defects in the plaintiff's original statement of

claim filed herein as held by the Master in his decision given 23 March 2000 striking out paragraphs 13 to 27 inclusive and paragraphs 1(b), (c) and (d), and 2 in the prayer for relief thereof pursuant to Order 23.02.”

- [2] On the application by Mr Bruxner, counsel for the first and second defendants, and with the consent of Mr Street SC, counsel for the plaintiff, this ground of appeal was abandoned and the following ground substituted.

“That the Master erred in failing to make the orders sought by the defendant.”

- [3] Because the amendment was by consent, the Court did not deal with the issue as to whether the appeal was in the appropriate form.

- [4] The applicant seeks the following orders:

1. That the plaintiff’s claim as against the second defendant be struck out.
2. That paragraphs 23 to 44 inclusive of the plaintiff’s statement of claim be struck out pursuant to Order 23.02.
3. That the plaintiff pay the defendant’s costs of the application before the Master and of this appeal.

- [5] The basis of the defendants’ appeal from the decision of the Master relating to paragraphs 23 – 29 (and therefore 30 – 33) of the Amended Statement of Claim is that:

[6] The plaintiff alleges a failure to record the expenses alleged by the plaintiff and tied to the plaintiff's consent and knowledge. The defendants maintained that what is alleged is not a breach of fiduciary duty and the Master erred in accepting in paragraph 5 of his reasons for decision dated 1 June 2000, that "the failure to record" could amount to a breach of fiduciary duty.

[7] In paragraph 5 of his reasons for decision dated 1 June 2000, the Master stated:

"If, as alleged, the details recorded in the statement of costs were relied upon by the plaintiff in making payment, it is not illegitimate to plead that the first defendant had the power to control the record and to affect the interests of the plaintiff to its detriment. The failure to record is relevant, it may be argued, because had the plaintiff been aware of the benefit to the first defendant, it may have reduced any payment to the first defendant to the extent of the benefit."

[8] With respect to paragraphs 34 to 44 the applicants complain that the authorisation that is pleaded is in strange language and does not indicate the parameters of the authorisation. The applicants assert that there is no allegation that the purpose of the authorisation was to facilitate acquisitions by the first defendant solely for the plaintiff's own benefit accordingly because it is not confined to the plaintiff's benefit then the allegation is fatally flawed.

[9] The applicants further assert that because removal of the fiduciary duty allegations will mean that there is no claim against the second defendant, the proceeding as against the second defendant should be struck out.

[10] Appeals under the provisions of Rule 77.05(1) of the *Supreme Court Rules* are by way of a re-hearing de novo.

[11] The principle with respect to appeals from the Master is set out in the decision of *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6 Kearney J at 8.

“The appeal is a complete rehearing: the party who was the applicant before the Master begins; the appeal is determined on the evidence placed before the Judge and is unfettered by the Master’s decision, though such weight may be given to his decision as appears proper.”

[12] The order made by the Master was on a matter of practice and procedure involving the exercise of judicial discretion. An appellate court should exercise particular caution in reviewing matters of practice and procedure (*Adam P. Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170).

[13] The nature of a fiduciary duty was dealt with in the decision of *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96 – 97 Mason J:

“... The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions ‘for’, ‘on behalf of’, and ‘in the interests of’ signify that the fiduciary acts in a ‘representative’ character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed: ...”

[14] In reading the Amended Statement of Claim filed pursuant to leave granted by Master Coulehan on 23 March 2000, paragraph 23 pleads an agency, paragraph 24 pleads a power by reason of the position of agency, paragraph 25 pleads the special opportunity to exercise the power to the detriment of the plaintiff, paragraph 26 pleads the specific fiduciary duty in respect of the specific power identified and states as follows:

“In the premises, the first defendant owed the plaintiff a fiduciary duty in exercising the power to record in the Statements of Cost the arrangement and provision of goods, services and labour at the cost of the plaintiff to act honestly and a fiduciary duty not to profit from the exercise of the power to record in Statements of Cost the arrangement and provision of goods, services and labour at the cost of the plaintiff.”

[15] Paragraphs 23 – 26 asserts certain material facts, the vulnerability of the plaintiff in relation to the power and asserts the specific fiduciary duty is not framed as being established by reliance upon the allegation of agency.

[16] Paragraph 27 alleges an exercise of the power. Paragraph 28 alleges a profit by the first defendant from the exercise of such power without the knowledge or consent of the plaintiff. Paragraph 29 alleges a breach of the fiduciary duty to act honestly in the exercise of the power and not to profit from the exercise of the power.

[17] I agree with the conclusion by the Master that it is arguable that the allegations pleaded, if proved, may establish a fiduciary duty on the part of the first defendant.

[18] I do not accept the argument for the first defendant that the allegation of a breach of fiduciary duty is confined to a failure to record.

[19] With respect to paragraph 34 – 44 of the Amended Statement of Claim, the plaintiff pleads an alternative cause of action being an authorisation in respect of which the first defendant acted as an agent. The pleadings are to the effect that the first defendant was under a duty to act honestly and was in breach of a duty not to profit from the exercise of such power at the cost of the plaintiff.

[20] As Master Coulehan states in his reasons for decision the defendants' argument that the pleading does not deal with the other allegation in the Statement of Claim that the first defendant had the right to acquire goods, services and labour for its own benefit is a circumstance which may ultimately defeat the allegation of fiduciary duty but this is not sufficiently certain to justify the striking out of the pleading.

[21] I agree with the conclusion by Master Coulehan that it is a matter that should more properly be resolved after a trial of the issue.

[22] There is a heavy onus to warrant exercise of the power under Order 23.02 (*Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99; *Webster v Lampard* (1993) 177 CLR 598 at 602 – 603).

[23] I am not persuaded that the paragraphs in the Statement of Claim which the applicants seek to strike out should be so struck out.

[24] The application made by the first defendant must fail. The application on behalf of the second defendant depends on the success of the first defendant. The first defendant having failed in the application the second defendant must also fail.

[25] I make the following orders:

1. The applicants' appeal against the decision and orders of the Master dated 1 June 2000 be dismissed.
2. The parties have leave to apply on the question of costs.

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