Pucciarmati v Walker Nominees Pty Ltd [2002] NTSC 13

PARTIES:	**PUCCIARMATI, Roberto**
	v
	WALKER NOMINEES PTY LTD (In Liquidation) ACN 009 632 311
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LA 20 of 2001
DELIVERED:	26 February 2002
HEARING DATES:	20 December 2001
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

LIMITATION OF ACTIONS

Appeal - extension of time, s 19(3) Local Court Act and s44(1) Limitation Act.

Collins v Deflaw Pty Ltd (2000) NTSC 64, applied.
Marjory Patterson v Northern Territory and Patterson (2001) NTSC 93, applied.

CONTRACT

Breach of contract, counterclaim, set-off.

PROCEDURE

Costs - security for costs, recovery of costs.

PROCEDURE

Courts power to order judgment be a set-off, counterclaim and set-off.

CORPORATIONS

Voluntary administration, security of costs and recovery of costs when plaintiff in voluntary administration.

Supreme Court Rules 1987 (NT), r 62.02(1)(b)
Churchills Ltd v Pilcher (1940) 57 WN (NSW) 109, referred to.
KP Cable Investments Pty Ltd v Meltglow Pty Limited & Ors (1995) 13 ACLC 437, referred to.
BPM Pty Ltd v HPM Pty Ltd (1996) 14 ACLC 857, referred to.

PROCEDURE

Counterclaim and set-off.

Bank of New South Wales v Preston (1984) 20 VLR 1, referred to.
Port of Melbourne Authority v Anshun Proprietary Limited (1981) 147 CLR 589, distinguished
Bryant v Commonwealth Bank of Australia (1995) 130 ALR 129, distinguished.

PROCEDURE

Counterclaim and set-off – possibility of inconsistent judgments.

Port of Melbourne Authority v Anshun Proprietary Limited (1981) 147 CLR 589, referred to.

Local Court Rules 1998 (NT), r 9.04, r 22.07(2), r 33.02 and r 33.03
Local Court Rules 1998 (NT) Pt 9, definition of counterclaim and set-off

Howarth v Adey (1996) 2 VR 535 at p 542; *Bloch v Bloch and Anor* (1981) 37 ALR 55 at p 58; *D Galambos and Son Pty Ltd v McIntyre* (1974) 5 ACTR 10; *McLean v Burns Philip Trustee Co P/L* (1985) 2 NSWLR 623, referred to.

REPRESENTATION:

Counsel:

Appellant:	J Waters QC
Respondent:	P Barr

Solicitors:

Appellant:	Caroline Scicluna & Assoc
Respondent:	Markus Spazzapan

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Pucciarmati v Walker Nominees Pty Ltd [2002] NTSC 13
No. LA 20 of 2001

BETWEEN:

ROBERTO PUCCIARMATI
Appellant

AND:

WALKER NOMINEES PTY LTD (In Liquidation) ACN 009 632 311
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 26 February 2002)

[1] Appeal against judgment of the Chief Magistrate of the Local Court sitting at Darwin in which the appellant was found to be indebted to the respondent for $53,060.08 plus interest and order for costs. The relevant ground of appeal lies in his Worship's dismissal of the defendant's applications for adjournment of the trial date.

[2] In *Howarth v Adey* (1996) 2 VR 535 at p 542, Winnecke P, speaking in the context of an appeal against a trial Judge's refusal to permit an amendment to pleadings, said:

> "In this case the appellant's appeal is on the basis that a miscarriage of justice has occurred because of an erroneous ruling which has

> been made in the course of the trial. The appeal is thus one against the verdict of the jury and judgment given upon it. Because the verdict and judgment are adverse to the interests of the appellant, such an appeal is one of right."

[3] It appears from the judgment of Wilson J in *Bloch v Bloch and Anor* (1981) 37 ALR 55 at p 58 that one of the grounds of appeal against the judgment in that case was the refusal of the trial Judge to grant a further adjournment such that the appellant was occasioned serious injustice.

[4] Accordingly, it is not necessary to rule as to whether leave to appeal is required in relation to the separate appeals regarding his Worship's dismissal of the applications for adjournment nor, if leave was required, is there power to make an order extending the time within which it could be lodged (see s 19(3) Local Court Act). However, given the submissions made in respect of that issue, I should say that research shows it has been decided in two Territory cases, *Collins v Deflaw Pty Ltd* (2000) NTSC 64 where I decided that the Limitations Act 1981 (NT) provisions did not apply because an application for leave to appeal was not a "proceeding" within the meaning of that Act. In *Marjory Patterson v Northern Territory and Patterson* (2001) NTSC 93 Mildren J held that upon the true construction of s 19(3) the time limits must be strictly complied with. His Honour noted that there was a specific provision for an extension of time to lodge an appeal under the Act, but not for lodgment of an application for leave to appeal.

[5] The respondent ("plaintiff") commenced proceedings in the Local Court on 14 January 2000 to recover $53,060 from the appellant ("defendant") for services rendered pursuant to a contract. The contract related to the picking up, packing and freighting of the defendant's mangoes to southern markets.

[6] The defendant did not allege that the plaintiff had failed to pick up, pack and freight the mangoes for which it had charged him, nor did he dispute the rates at which the charges were made. However, by his pleading, he denied that the plaintiff was entitled to the amount claimed because of alleged breaches of the contract by it. The breaches alleged went to the failure of the plaintiff to properly handle and pack the mangos. Further, he sought $77,948 by way of what was called a "counterclaim" which he said represented his damage arising from the beach of contract. The amount was calculated by reference to the difference between the price he received for the mangoes at market and the price he would have received absent the plaintiff's breach.

[7] By its defence to the counterclaim, the plaintiff denied the breaches alleged.

[8] The Local Court Rules as to counterclaim are to be found in Pt 9. By definition "counterclaim" includes a set-off. A defendant who counterclaims must do so in the Notice of Defence unless the Court otherwise orders, and the counterclaim is to be heard at the hearing of the proceedings unless the Court orders otherwise. Pursuant to r 9.04 a defendant may continue a counterclaim despite judgment being given for the

plaintiff in the proceedings. Rules 33.02 and 33.03, allow the Court to proceed with the hearing and be given judgment if a party is absent when the hearing of a proceeding is called on, but that party may apply to have the order set aside and the proceedings reheard.

[9] A set-off is a monetary cross claim which is also a defence to the claim made in the action. A counterclaim, however, may embrace any cause of action against a plaintiff. But a set-off may be pleaded as a counterclaim, although every counterclaim may not be pleaded as a set-off. A claim and counterclaim are each regarded as a separate action, hence the rule that if the action for the plaintiff is stayed, discontinued or dismissed, the defender may nevertheless proceed with the counterclaim. If plaintiff and defendant are each successful for a sum of money, it was the practice to enter one judgment for the balance. The plaintiff's claim was effectively barred if the set-off exceeded it. However, if the plaintiff's claim is defeated and the set-off or counterclaim successful, then there would be judgment for the defendant for the whole of its entitlement (see generally Williams Commentary on the Victorian Supreme Court Rules, par 13.14 et sec and Meagher, Gummow and Lehane, Equity Doctrines and Remedies, 3rd Edition, ch 37 and *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10, p 26 and p 27.

[10] The claim and counterclaim in this case are plainly connected. Strictly speaking the defendant is seeking a set-off against the plaintiff's claim with a counter claim for any balance due in his favour. Usually the claim,

defence and counterclaim are heard together and judgment given in favour of a party to whom monies are payable at the end of the day.

[11] In September 2000 the matter was provisionally set down for hearing to commence on 12 March 2001. The condition upon which the date was fixed was subject to dispute between the solicitors for each party, but it does not now seem to have any relevance. On 13 September that hearing date was confirmed over objection from the defendant that counsel would not be available. That decision is not here called in question.

[12] On 22 February 2001 the defendant filed another application to have the hearing date vacated. On 5 March 2001 the learned Magistrate in the Local Court acceded to that application with the plaintiff's costs thrown away to be paid by the defendant. It was also then ordered that the defendant serve any experts report on which it intended to rely within four weeks and that the plaintiff serve any such report within four weeks after receiving that served by the defendant.

[13] On 2 May 2001 the action was set down for hearing to commence on 8 October 2001. On 5 September the defendant filed a further application to have the hearing adjourned.

[14] The solicitor for the defendant informed his Worship upon the hearing of the application that it was totally her fault that a date for hearing unsuitable to her client had been set. She had no instructions, and only later found that the date was unsuitable. Her affidavit in support of the application

disclosed that on 18 June the defendant left a message with her assistant that the dates set aside were unsuitable, but the solicitor did not inform the solicitor for the plaintiff of the problem until 31 August when consent was sought to the application. The delay was admitted by the defendant's solicitor to have been due to her other commitments. I pause to add that no where is there any evidence from the defendant going to his inability to attend the hearing on the dates fixed. That assertion is only put forward by his solicitor based upon a note said to have been taken by her assistant of a telephone conversation she had with the defendant. Evidence such as that is not admissible even within r 22.07(2) of the Local Court Rules. Objection should have been taken.

[15] In considering that application for adjournment his Worship took the view that the trial had already been adjourned once on the defendant's application. It is obvious from the reasons that his Worship thought that the inconvenience to the defendant ought not to outweigh the plaintiff's right to have the matter decided at the time set aside. His Worship also remarked upon what seemed to him to be the doubtful value of a report filed by the defendant, purporting to be an expert's report. It did not seem to his Worship to go to the matters raised in the counterclaim. That and associated reasons led his Worship to decline the application for the adjournment, but he considered that means were available whereby the defendant could bring on the counterclaim on another day (see r 9.04 and r 32.02 and r 32.03 referred to above).

[16] On 8 October another application for an adjournment was made by the defendant. Senior counsel, then appearing for the defendant, informed the Court that an appeal had been lodged in respect of the dismissal of the earlier adjournment application and of that relating to security for costs. Further grounds were advanced for the adjournment, including the disclosure during the course of the earlier proceedings of an offer of compromise between the parties, and the need for an application to be made to the Supreme Court for an order for leave to pursue the counterclaim. No such application had been made nor so far as I am aware has any been made since that time.

[17] During the course of submissions on that occasion, senior counsel for the defendant said "there is no real contest as to the immediate entitlement to the plaintiff" to the amount claimed, the case was really about the performance of the contract and it was the subject of the counterclaim. He accepted that the counterclaim and plaintiff's claim could be split, but said that in that case the defendant would lose what was called a right and entitlement to an order for security for costs. The defendant's concern as to the prospect of his losing the right to make an application for security for costs permeated much of what was put by counsel on his behalf. He conceded that the defendant was not then in a position to deliver a copy of any expert report on which it proposed to rely and, as might be expected, made submissions to his Worship on the general principles relating to

adjournment urging, in particular, that case management considerations should not be permitted to rule so as to create an injustice.

[18] The defendant knew that the plaintiff was then in liquidation and reference was made to what was called a necessity to apply to the Court for leave to proceed with the counterclaim. It was put that the defendant was required to obtain leave, and unless leave was obtained, the defendant could not proceed with the counterclaim. That matter has not been pursued. It seems to me that leave is required to proceed with the counterclaim, but once given it is not necessary to obtain leave for each step thereafter (Corporations Law s 471B, *McLean v Burns Philp Trustee Co P/L* (1985) 2 NSWLR 623).

[19] Another ground advanced for the adjournment on that occasion was that after taking into account his Worship's comments regarding the so called expert's report, filed by the defendant, an expert had been located with appropriate qualifications and that a report from that person was expected to be available by 8 October. It was not, but senior counsel said that it would be available "very soon", but it could only be used upon obtaining the appropriate extension of time, and an adjournment was necessary for that purpose. It seems to me that that did not necessarily follow. The plaintiff's expert may well have been in a position to consider the proposed new report and deal with it without delay if it was delivered promptly.

[20] No evidence was called in support of the application for an adjournment on that occasion, whether relating to the defendant's inability to attend the

hearing because of business commitments or otherwise. It was suggested by counsel that the defendant's difficulties in attending would be over by mid November and the matter could be set down at any time after that. In closing, senior counsel for the defendant took up what his Worship had said on 19 September and agreed that judgment could be entered in favour of the plaintiff with costs, subject to a stay of execution being ordered so that the counterclaim could be litigated at a later date.

[21] Counsel for the plaintiff indicated that an application for leave to proceed made by the defendant would meet with the plaintiff's consent. He offered to render any assistance which might enable such an application to be brought to this Court even on that day. He noted that the plaintiff's claim was virtually conceded and that the real issue before the Court was the prosecution of the defendant's counterclaim. As to the publication before his Worship of the compromise offer, he pointed out that counsel then representing each of the parties had earlier indicated to his Worship that there was no objection to his continuing to hear the matter. He reminded the Court that the matter being set down for hearing some months before, the defendant had had ample time within which to obtain the services of an expert and file and serve a report accordingly. The plaintiff opposed any application which might be made for stay of execution on any judgment entered in favour of the plaintiff on its claim. The plaintiff was ready to proceed both with its claim and in relation to the counterclaim.

[22] His Worship proceeded immediately to indicate that the application to vacate the hearing was dismissed. He noted the history of the proceedings including the earlier adjournment. As the real issue between the parties lay in the counterclaim, he said that there would be no loss to the defendant as a result of his decision, but justice required that the plaintiff be entitled to pursue its claim on the date set aside. The defendant could pursue its counterclaim at that time if it wished and was ready to do so. His Worship held that it would be incorrect for him to set aside the hearing simply because an appeal against the earlier decision was pending. With reference to authority he held that in the circumstances of this case he considered he should not deprive the plaintiff of the opportunity to proceed.

[23] He offered to adjourn until ten o'clock the following morning to enable the defendant to consider its position and noted that the proceedings were on foot in the course of the liquidation of the plaintiff which involved as well the rights of the creditors of the company. In the course of further discussion with senior counsel for the defendant, his Worship noted that he was not able to proceed to hear the counterclaim in any event as leave to proceed had not been given. Senior counsel for the defendant noted in the course of exchange with his Worship that he was confronted with the fact that his client may not be entitled to security of costs because if judgment was decided on the plaintiff's claim, there would no longer be a company suing him.

[24] On 9 October senior counsel appearing on behalf of the defendant said that the claim and counterclaim should be heard together, but indicated to the Court that there was nothing which he could do to further assist the Court and withdrew. The plaintiff proceeded to call evidence in support of the claim by verifying on oath the contract and the particulars. Further evidence was taken going to the question of interest. His Worship proceeded to give judgment in favour of the plaintiff for the amount claimed, interest of $5,802.18 and costs at 100% of the Supreme Court scale on an indemnity basis from the date of the rejected offer to compromise. His Worship went on to order that in the absence of any appearance by the defendant the counterclaim be dismissed through want of prosecution with liberty to apply.

[25] His Worship endeavoured to be fair to both parties to ensure as best he could that neither suffered any injustice. He refused the application for the adjournment, having in mind that the plaintiff could proceed with the claim and the defendant could come back later with his counterclaim. Counsel for the parties did not attempt to dissuade his Worship from that view. The defence to the claim arising from the alleged breach of contract was not highlighted in submissions.

[26] As already noted, the Local Court Rules allow a defendant to continue a counterclaim despite judgment being given for the plaintiff. But that does not really avail this defendant. Assuming the defendant successfully prosecuted the counterclaim, then the Court has power to order that the

judgments be set-off against each other so as to avoid injustice (*Bank of New South Wales v Preston* (1984) 20 VLR 1.

[27] I do not think that this case falls for determination in accordance with the principles affirmed in *Port of Melbourne Authority v Anshun Proprietary Limited* (1981) 147 CLR 589 and *Bryant v Commonwealth Bank of Australia* (1995) 130 ALR 129. Here the defendant brought forward and pleaded his case both as a defence and by way of counterclaim. But the way in which his Worship sought to resolve the competing interest between the parties has led to the possibility of there being inconsistent judgments, one for the plaintiff for performance of its contract and the other for the defendant for the plaintiff's failure to perform its contract.

[28] Judgment for the defendant on the counterclaim would conflict with the judgment on the plaintiff's claim (*Anshun* at p 603). Even if the defendant was given leave to proceed on the counterclaim, bearing in mind the argument as to inconsistent judgments, he faces a judgment in favour of the plaintiff in a cause of action from which he has been effectively debarred from mounting his pleaded defence.

[29] I consider that, if for no other reason, his Worship erred in the exercise of his discretion in dismissing the application for adjournment for the reason that in doing so he erred in law, that is, that by proceeding as he proposed neither party would suffer loss. References throughout argument to the counterclaim and security for costs masked the defence issue. If the

attention of the learned Magistrate had been drawn to the considerations developed and advanced upon the appeal, he may well not have proceeded as he did. The appeal against the judgment in favour of the plaintiff must be allowed, the judgment set aside and the matter remitted to the Local Court for retrial.

[30] Another issue has arisen concerning the conduct of the proceedings. By letter of 3 April 2001 the defendant's solicitor informed the plaintiff's solicitor, for reasons then given, she was concerned as to the prospects of recovery of costs should he be successful in the action, and he invited the plaintiff "to comment on its financial status". The reply of 3 May 2001 disclosed that the plaintiff had been "placed into voluntary administration" which had been extended to 7 June. It was asserted that the plaintiff's assets exceeded its liabilities.

[31] On 25 May the defendant advised the administrator under the scheme that consideration was being given to an application for security for costs and sought "any information concerning the company's current financial position". On 6 June the plaintiff was placed in liquidation. That fact was not conveyed to the defendant until a letter from the liquidator on 4September 2001 when he declined to provide the information which had been sought from the administrator in May. By then it was clear that the plaintiff's liabilities probably exceeded its assets. No explanation was provided as to the apparent turnaround in its financial circumstances from 3 May.

[32] In her letter of 3 April to the solicitors for the plaintiff, in which the issue of the plaintiff's financial position was first raised, the solicitor sought a reply within seven days "failing which we are instructed to seek an order for security for costs". The reply asserted that the plaintiff had assets in excess of liabilities, but given the foreshadowed application, nevertheless sought to be advised as the amount of costs sought as security in itemised form. The solicitor for the plaintiff said that he would endeavour to forward details of the plaintiff's financial position once received from the administrators. The defendant did not supply the particulars sought and the plaintiff did not supply the details of its financial position. The application for security was not made until some months after 3 April.

[33] The plaintiff was entitled to know the amount for which security was being sought. That was not provided until the application was made in September. The solicitor for the defendant submitted to his Worship that although she had instructions to apply for an order for security for costs in April, there was no evidence to support such an application in the absence of disclosure by the plaintiff. The requirement of r 62.02(1)(b) is that there be "reason to believe that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so". It is upon the defendant, therefore, to produce evidence to give the Court the necessary reason, but a prima facie case is sufficient, *Churchills Ltd v Pilcher* (1940) 57 WN (NSW) 109. Being in liquidation affords that evidence and the burden is then thrust

upon the plaintiff showing that it will be able to pay (Williams Civil Procedure Victoria, par 62.02.70).

[34] It seems to me that the defendant should have been more alert to the implication arising from the appointment of the administrators on 2 March 2001. Such an appointment usually follows where the Directors of the company believe that it is insolvent or is likely to become insolvent. An application to seek security for costs should be brought promptly, *KP Cable Investments Pty Ltd v Meltglow Pty Limited & Ors* (1995) 13 ACLC 437.

[35] It has been held that an application that a corporation give security for costs is not within the Corporations Law such that the application cannot be made without the leave of the Court, *BPM Pty Ltd v HPM Pty Ltd* (1996) 14 ACLC 857.

[36] Putting to one side for the moment the counterclaim as pleaded, there is nothing in the material to indicate that the defendant would be put to any significant costs in relation to the plaintiff's proof of its claim. It is the defendant's case which raises questions of implied terms and conditions and breach of them by the plaintiff leading to the claim for damages by way of counterclaim. In those circumstances the defendant is the "plaintiff" for the purposes of the rules relating to security for costs, r 31.01 Local Court Rules definition of "plaintiff", see Williams, par 62.01.30 and par 62.01.60.

[37] In refusing the application for security for costs, his Worship referred to the history of the matter, noted that the trial was set to commence on 8 October,

suspected that the parties had already spent more than fifty percent of their legal expenses in relation to the trial (there would appear not to have been any foundation for that consideration) and noted that the plaintiff already had an order that the defendant pay its costs in respect of the previous adjournment and costs thrown away on that occasion. His Worship made an error in asserting that the defendant had known since 1 April that the company was "in liquidation and the issue of security for costs was first raised". The company was not then in liquidation, but I do not consider that the error was significant. He also expressed the view that the application for security "carries with it the colour of an extra reason for an adjournment" and in the exercise of his discretion declined the order. That order is also in question here.

[38] His Worship's reasons for refusing the order for security for costs were attacked in the course of argument in this Court. It seems to me that wherever the merits lie in that argument his Worship's decision must prevail. A relevant fact which could properly have been taken into account and led to a refusal of the order was not apparently taken into account. If it had been it probably would have led to the same result. The appeal against his Worship's order dismissing the application for security for costs is dismissed.
