Bilioara Pty Ltd v Leisure Investments Pty Ltd [2002] NTSC 44

PARTIES:	BILIOARA PTY LTD
	v
	LEISURE INVESTMENTS PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	NO 14 of 2000 (20003251)
DELIVERED:	19 July 2002
HEARING DATES:	13 June 2002
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Applicant:	Mr P Bick QC, Mr T Young
Respondent:	Mr J Reeves QC, Mr D Winter

Solicitors:

Applicant:	Ward Keller
Respondent:	Hunt and Hunt

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

Bilioara Pty Ltd v Leisure Investments Pty Ltd [2002] NTSC 44
No. AP 14 of 2000 (20003251)

BETWEEN:

BILIOARA PTY LTD
Applicant

AND:

LEISURE INVESTMENTS PTY LTD
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 19 July 2002)

MILDREN J:

[1] This application is brought by the applicant, the defendant in the proceedings, against the respondent plaintiff. The relief sought in the summons is for an order correcting certain references in an order made by me on 19 July 2001 under Order 36.07 of the *Supreme Court Rules* (commonly known as the "slip" rule).

[2] On 19 July 2001, I ordered that the hearing and determination of the amount of the purchase price of a certain partnership to be paid by the respondent to the applicant be referred to the Master pursuant to Order 77.02(1)(j) and Order 77.01(2)(b) of the Rules. The applicant seeks an amendment to that

order by the deletion of the references to Order 77.01(1)(j) and 77.01(2)(b) and by substituting therefore a reference to Order 77.01(1)(d). Alternatively, the applicant seeks a declaration that the hearing and determination conducted by the Master pursuant to the order I made on 19 July 2001 was valid.

[3] On 29 May 1990, the parties entered into a Partnership Deed in relation to a tourist resort. In 1999 the respondent purported to dissolve the partnership and exercise an option to purchase the applicant's share in the partnership in accordance with the provisions of the Deed. The principal issue between the parties was whether that option had been validly exercised. This depended upon whether the partnership had been validly dissolved by the relevant notice of dissolution of the partnership. The trial of the action was heard by Thomas J. On 27 November 2000, her Honour published reasons for judgment and after hearing formal submissions, made certain declarations and orders including a declaration that the option to purchase had been validly given. Clause 15 of the Deed provided that in those circumstances, the value to be placed upon the partnership and its assets was to be determined in a particular manner as set out in the Deed. This involved a valuation being done by a chartered accountant. Her Honour also made certain orders designed to facilitate the determination of the amount of the purchase price. She ordered that a chartered accountant, a Mr Garraway, prepare a valuation and calculate the purchase price in accordance with the

Schedule to the Deed. One of the orders made by Her Honour was as follows:

> 8. In the event that either party disagrees with Mr Garraway's calculation of the purchase price the purchase price shall be determined by the Court. Such party shall make application to the Court no later than 14 days after delivery of the calculation by Mr Garraway.

[4] An appeal against the judgment of Her Honour was dismissed by the Court of Appeal on 6 September 2001: *Bilioara v Leisure Investments* [2001] NTCA 8.

[5] By summons dated 13 July 2001, the applicant indicated that it disputed the calculation of the purchase price made by Mr Garraway and wished that matter to be referred to the Master for hearing and determination. That matter came before me on 19 July 2001. After hearing counsel, I made an order referring that matter to the Master for hearing and determination, as well as a number of other machinery orders. That order was authenticated on 19 July 2001.

[6] The matter of the calculation of the purchase price was heard by Master Coulehan who found that the amount of the purchase price was $6,498,258.00. The Master's decision was delivered on 7 February 2002.

[7] On 6 March 2002, the respondent lodged an appeal from my order of 19 July 2001. No application for an extension of time within which to appeal, or seeking leave to appeal, had been made; nor had any application been made

as at the date of my hearing of the present summons on 13 June 2002, nor had leave to appeal been given. The grounds set out in the notice of appeal challenge my power to make the order referring the hearing and determination of the purchase price to the Master. The respondent maintains that, absent consent of the parties, that matter could not be referred to the Master and, in any event, the respondent maintains that even if I did have power to refer anything to the Master, all I could have done was to refer to the Master an appeal by the applicant against the valuation of Mr Garraway pursuant to clause 15(a) of the Partnership Deed.

[8] In addition, the respondent has appealed the Master's decision.

[9] The summons I am now dealing with was filed on 16 May 2002. However, I note that on 1 May 2002 Angel J dealt with three summonses filed by the parties, two of which were summonses of the present applicant said to have been filed on 19 and 27 March 2002 respectively. On 1 May, his Honour made an order that the present applicant's application to correct my order of 19 July 2001 under the slip rule be referred to me. I have not been able to find a summons filed on 19 March 2002. There is a summons of 20 March 2002, but neither that summons nor the summons of 27 March 2002 seeks the orders presently sought by the applicant. The applicant appears not to have pursued that application, but has made this application as a fresh application. The applicant says that the order I made which is now sought to be corrected, was made by consent of the parties and that I should correct the order I made to reflect that fact under the slip rule. The respondent says

that there was no slip and that the order was not made by consent of the parties. It is common ground that unless the order was made by consent, I should not have made the order in the circumstances of this case.

The slip rule

[10] The circumstances under which an order can be reopened have been canvassed by many authorities. They vary according to whether the order was a final judgment or an interlocutory order and whether or not the order has been authenticated or "perfected". In this case, the order was clearly interlocutory and not final in any sense and it has been authenticated. Although the order was interlocutory, it was intended to govern the mode of trial of the issue in question and therefore it could not be reopened except by consent of the parties or by way of appeal once the order was authenticated, unless the slip rule could be invoked. It was not contended otherwise in this case.

[11] The principles which the courts apply in determining whether or not to correct any order under the slip rule are well established. But, as McHugh JA (as he then was) said in *Storey & Keers Pty Ltd v Johnstone* (1987) 9 NSWLR 446 at 449:

> ... although the principle of the slip rule is clear enough in conception, its application in practice has often proved difficult. The dividing line between a mistake or error which is the result of an accidental slip or omission and a mistake or error which is the product of a deliberate decision has often been difficult to draw.

[12] It is necessary to turn to the circumstances under which the order was made to see if what was done was the result of a mistake or omission, or the product of a deliberate decision. There is no doubt that the position of counsel for the applicant at the time of the hearing of the application was that it wished the matter to be referred to, and decided by, the Master. The initial position of counsel for the respondent was that the matter should be determined by a Judge.

[13] It is also clear that I thought I had the power to refer the matter to the Master, notwithstanding the respondent's opposition to that course, and that I thought that this was a matter which properly was able to be dealt with by him. I referred counsel to s 25(a) of the *Supreme Court Act*:

> The Rules may –
>
> (a) empower the Master to exercise the jurisdiction of the Court …

[14] I also referred counsel to O 77.01(1)(b)(ix):

> Subject to this Order, the Master … may –
>
> (b) hear and determine an application and exercise powers and authorities under the following statutory provisions:
>
> … (ix) the *Partnership Act.*

And to O 77.01(j):

> (j) hear and determine a matter referred to the Master by the Court of Appeal or a Judge.

[15] It is also clear that both counsel and I had overlooked O 77.02(1) which provides:

> (1) Subject to rules 12.12, 22.06(1)(d) and 77.01(1)(b)(d), (e) and (f) the trial of a proceeding shall not be held before the Master and the Master shall not give a judgment or make an order at the trial of a proceeding.

[16] Both parties now agree that the only relevant exception in O 77.02(1) is rule 77.01(1)(d) which enables the Master to conduct the trial of the proceeding if all parties consent. I am prepared to assume, without deciding, that this is correct.

[17] However, it is also clear that I was concerned whether I ought properly to refer the matter to the Master. I said (transcript of 19 June 2001, at p 5):

> HIS HONOUR: Mr Silvester, is there any particular reason, other than the matters that you've put to me that would make it better for the parties' outcome if the matter was referred to a judge rather than –
>
> MR SILVESTER: Well ---
>
> HIS HONOUR: I mean, you've addressed some difficulties and I think those difficulties can be overcome but is there any other reason why it ought to be dealt with by a judge? I note that this is a part-heard matter before Thomas J, in affect.
>
> MR SILVESTER: It's a ---
>
> HIS HONOUR: She hasn't finally disposed of the action.
>
> MR SILVESTER: Well, for two reasons that might be the case. One is the Court of Appeal may remit aspects of it to

Her Honour to decide further but the other is that Her Honour's role has really completed, I think, because unless you would say that the determination by the court should go back before Her Honour but in principle there's no reason why that should happen. It's not – the determination of the value is not in issue, the actual value and the sums involved, is not an issue that was ever before Her Honour ---

HIS HONOUR: I'm just wondering, though, whether it mightn't be better for her to decide the question raised by this summons rather than me to butt into it.

MR SILVESTER: Well, my submission would be that that's not necessary, your Honour ...

[18] Although the transcript does not show this, at the time of the hearing of the summons, I was well aware that Thomas J was presiding over a criminal trial which had no expectation of being completed within a short period of time.

[19] Counsel for the applicant then addressed me on why the applicant wanted the matter to be dealt with by a judge, following which he said (at p 6):

MR SILVESTER: My submission would be that if Your Honour would make these orders, the question of the date of a hearing and before which judge, of course becomes another matter. In my submission a reference to a judge, given the advanced state of these proceedings and the matters I put to you, would be the most appropriate matter. (sic).

The parties are comfortable, otherwise with the timetable and I have a – I would be – perhaps I'll foreshadow it at this stage, but we'd be seeking an expedited hearing before a judge and in that regard, I've got an affidavit to file.

HIS HONOUR: Yes, well, you might be seeking it but whether you'll get it is another matter. I mean, there are great practical difficulties in that. You've got [a] much better chance of an expedited hearing before the Master.

MR SILVESTER: Yes.

HIS HONOUR: I only mean that because of the state of the lists.

MR SILVESTER: Yes.

HIS HONOUR: How long would the matter go for?

MR SILVESTER: I think if it was a full contest between valuers, it might go for three or four days. I think at this point, Your Honour, I wonder if I could ask you to just temporarily stand the matter down while I seek some further instructions?

[20] I granted Mr Silvester the adjournment he sought. When the matter resumed, the following was said:

MR SILVESTER: Thank you, Your Honour, I've had the opportunity now to take some instructions and I thank Your Honour for the time. Your Honour, my clients will be content with a reference to the Master as Your Honour has proposed in the light of the intimations you've given us ... the order ... would require that the reference by Your Honour to the Master and confirmation that the reference is for him to exercise the jurisdiction of the court to hear and determine the matter under Order 77.

[21] After confirming with counsel for the appellant that he was happy with an order referring the matter to the Master for hearing and determination, I then said:

> If I can just have your assistance, gentlemen in the drafting of that order. I'll prepare a draft and perhaps if you could let me know what you think.

[22] The draft I proposed referred to Order 77(1)(b)(ix) and/or Order 77(2)(j) of the Rules. Both references were plainly wrong – it should have been Order 77.01(1)(b)(ix) and Order 77.01(1)(j). That was corrected by Mr Silvester who suggested that Order 77.01(2)(b) might assist as well. That Rule provides:

> Subject to this Order, the Master may exercise power conferred on the Court or a Judge –
>
> (b) to give judgment or make an order in a proceeding if all parties affected appear and consent ...

[23] I said:

> HIS HONOUR: Well its by consent now, isn't it?
>
> MR SILVESTER: Yes, the power to hear and determine comes under 77.01(1)(j) but the power to give judgment or make orders comes under 77.01(2)(b).

[24] It is clear that I had not finally decided what I would do at the time Mr Silvester asked for the adjournment. I was still considering the possibility of referring the matter to Thomas J and I had not finally decided whether, if I made any order, it would be an order referring the issue to a Judge or to the Master. It is clear that in the end I made the order only because I believed that the order was consented to. In those circumstances the order I

made should have referred not to O 77.01(1)(j) and O 77.01(2)(b), but to O 77.01(1)(d).

[25] In my opinion there was an accidental slip or omission made in the drafting of the order. If the matter had been drawn to my attention at the time I have no doubt I would have corrected it at once. Mr Reeves QC submitted that the transcript did not reflect any actual consent to the order given by Mr Silvester. His submission was that when Mr Silvester said that his clients were content with a reference to the Master as I had proposed, he was not indicating consent. I am unable to accept that submission. It is plain that I believed that I was making a consent order and that I specifically asked Mr Silvester if that was so. I was not disabused, but was referred to a Rule in the Order which applies only where there is consent of the parties. I have no doubt that the respondent consented to the order.

[26] The question then remains whether I should now exercise my discretion to correct the order. This raises the question of whether something has since intervened which would render it inexpedient or inequitable to do so. Mr Reeves QC argued that if I corrected the order it would deprive or pre-empt the respondent's appeal from the order I made. As I have pointed out, the order was not a final order. An appeal against the order requires leave under s 53 of the *Supreme Court Act*. No application for leave has been made. It is open to the respondent to seek leave to appeal against any order that I now make. If I am wrong about that and no leave is required, the respondent will be in no worse position than it already is. The respondent can appeal

against this order. It is difficult to see then how the making of the order will cause any injustice to the respondent. The appeal against the Master's order is unaffected.

[27] It is not necessary to consider the other relief sought in the summons except the application for indemnity costs. It was submitted by Mr Bick QC that I ought to award indemnity costs to the applicant "because we clearly outlined all our submissions in correspondence some time ago." In *Vivanet Pty Ltd v Power* [2001] NTSC 66 at [15], I said that in order for the Court to depart from the general rule and order that costs be taxed on an indemnity basis, the discretion, whilst unfettered, must nevertheless be exercised judicially and generally this means showing special circumstances. What special circumstances apply here? The applicant submitted that the respondent gave its consent to the order and willingly participated in the process before the Master. It did nothing about challenging the Master's jurisdiction until after judgment. It was warned that, if necessary, this application would be made and the reasons for it and that indemnity costs would be sought. There is nothing in my opinion to show that the respondent's position in defending the summons warranted an award of indemnity costs: c.f. *Fountain Selected Meat (Sales) Pty Ltd v International Products Merchants Pty Ltd & Others* (1988) 81 ALR 397 at 401 per Woodward J; *Rosniak v Government Insurance Office* (1997) 41 NWSLR 608 at 616.

Formal Orders

[28] 1. There will be an order in terms of paragraph 1 of the summons.

2. The respondent is to pay the applicant's costs of and incidental to the hearing of the summons to be taxed.

3. I certify fit for two counsel.

4. The relief sought in the remainder of the summons is adjourned *sine die*.
