NORTHERN TERRITORY FUELS PTY LTD v DIANO NOMINEES PTY LTD AND DIANO

Supreme Court of the Northern Territory of Australia

Kearney J.

11, 19 and 21 November; 15 December 1986, at Alice Springs

Injunction - interlocutory injunction - principles to be applied - whether serious question to be tried - where balance of convenience lies.

Injunction - ex parte interlocutory injunction - obligation of applicant to disclose all material matters - effect of breach of obligation.

Cases considered:

Beecham Group Ltd v Bristol Laboratories Pty Ltd (1967-68) 118 C.L.R. 618

Cases applied:

The Australian Coarse Grain Pool Pty Ltd v The Barley Marketing Board of Queensland (1982) 57 A.L.J.R. 525

Counsel for the plaintiff	:	J. Kilby
Solicitors for the plaintiff	:	Poveys
Counsel for the defendants	:	S. Stone
Solicitors for the defendants	:	Stone & Stone

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. 824 of 1986
No. 833 of 1986

BETWEEN:

NORTHERN TERRITORY FUELS PTY. LTD.

- Plaintiff

AND:

DIANO NOMINEES PTY LTD

- First Defendant

AND:

DINO JOSEPH DIANO

- Second Defendant

CORAM: KEARNEY J.

REASONS FOR DECISION
(delivered 15 December 1986)

By originating summons filed on 5 November the plaintiff sought an injunction until further order restraining the defendants from moving certain equipment belonging to the plaintiff and installed in premises owned by the first defendant on the Stuart Highway from where it is presently installed. By a document styled "ex parte interlocutory summons" filed on 5 November and returnable in

Darwin next day the plaintiff sought relief along the same lines as that sought in the originating summons, but clearly as a measure of interlocutory relief, quia timet.

The application was heard ex parte before Nader J. in Darwin on 6 November. His Honour granted the relief sought as an interim measure upon various conditions including the issue of a writ claiming damages for breach of contract, and adjourned the application for further hearing at Alice Springs on 11 November. On that day the parties appeared before me; by consent the hearing was adjourned until Wednesday 19 November upon the defendants' undertaking to take no action to remove the equipment in the meantime.

On Wednesday 19 November the application was fully argued. Mr. Kilby sought an interlocutory injunction until the joint hearing of this action and the action instituted by writ of summons No. 833 of 1986, issued as a result of the order of 6 November.

On 21 November I ruled that the interim injunction granted by Nader J., which still remained in force, be dissolved forthwith. I refused the plaintiff's application of 5 November for an interlocutory injunction. I said that I would publish reasons in due course; I now do so.

Mr. Kilby moved on the affidavit of 3 November of Mr. Boland, general manager for the plaintiff, and the materials exhibited thereto. Mr. Boland deposed that in February 1983 the parties entered into a 5-year agreement (Exhibit "A") whereby the plaintiff lent to the defendants from 1 June 1983 certain bowsers and tanks which it installed at the defendants' premises. It is clear that the defendants were constructing a service station. The equipment was for the dispensing of petrol and diesel fuel; the defendants bound themselves to use the equipment to dispense only the product supplied by the plaintiff. The February agreement was replaced by an agreement to similar effect dated 1 June 1983, to take effect from that day for a period of 10 years.

Mr. Boland deposed that in breach of the February agreement the defendants leased the service station, including the plaintiff's equipment, on 24 May 1983 to a Mr. Owen, without requiring Mr. Owen to comply with the defendants' obligations under the equipment loan agreement. In particular, Mr. Owen was not required to use the equipment to dispense only fuel supplied by the plaintiff. Mr. Owen conducts the "Teppa Hill Fuel Stop" on the premises, as a service station.

There is also in evidence as Exhibit P1 a 10-year agreement between the parties dated 6 September 1983, taking effect on 1 June 1983, whereby the defendants agreed to buy unspecified annual quantities of petroleum products from the plaintiff, at the plaintiff's usual list prices less allowances at rates specified. In fact, this agreement is clearly not intended to operate according to its tenor, but for the purpose of calculating the "third party rebate" referred to below.

Mr. Boland testified that from 1983 to date the plaintiff had been supplying Mr. Owen with petroleum products pursuant to an agreement it had entered into with him. The plaintiff had not supplied fuel to the defendants under the agreement Exhibit P1 since 1983, though Mr. Boland contended that it had done so "indirectly". It appears that when fuel is supplied to the lessee of a property, the plaintiff pays a certain sum to the lessor as owner of the freehold, these sums being called "third party rebates", the amount varying according to the total amount of fuel taken by the lessee, who also gets a rebate; Mr. Boland said this was a "very common" practice.

The effect is, as Mr. Kilby pointed out, that the plaintiff pays the defendants for the privilege of installing equipment for dispensing fuel, on the defendants'

land. The plaintiff's benefit is that it has an outlet for its fuel. What underlies the present action is that Mr. Owen was not bound by his lease to use the installed equipment to dispense only the plaintiff's fuel.

Mr. Kilby contends that the plaintiff never consented to the lease of the equipment by the defendants to Mr. Owen. I cannot accept that. Mr. Owen took over in May 1983. In June 1983 the plaintiffs entered into a 10-year equipment lease agreement with the defendants, and in September 1983 it entered into the "third party rebate" agreement with the defendants. The plaintiff had a direct agreement with Mr. Owen for the supply of fuel. It is obvious that the plaintiff well knew what was what and had entered into arrangements accordingly; its dissatisfaction arose when Mr. Owen came to realize that he was not bound to dispense only the plaintiff's fuel through the bowsers. The second defendant deposes to this effect in his affidavit of 18 November 1986, but it is obvious from the evidence of Mr. Boland that the plaintiff had acquiesced in the lease to Mr Owen.

Mr. Boland deposed that on 23 April 1986 the plaintiff discovered that its installed equipment was being used to store and supply products supplied by a competitor. The second defendant deposes that it was he who informed the

plaintiff what Mr. Owen was doing, his concern being the resulting reduction in the "third party rebate"; this is evidenced by his telegrams of 29 April and 22 May. In any event it is clear that the second defendant considered that the plaintiff was in breach of some contractual agreement, gave notice on 15 August that it was determined, and asked the plaintiff to remove its equipment; this agreement may have related to the installation of unleaded tanks.

On 31 October the second defendant informed the plaintiff that if it did not remove the equipment by 5.00pm on 3 November, the second defendant would "take steps to remove them myself". The plaintiff replied on the same day, contending that it had "current and effective agreements still in force" with the defendants and warning the second defendant that "you will be in serious breach of our agreement if you remove the equipment yourself".

On 3 November the second defendant informed the plaintiff's solicitors, Poveys, as follows:-

> "Please be advised that Diano Nominees will give an undertaking that no action will be taken until legal advice has been given by Mr Stone of Loftus and Cameron, due back at his office next week."

It is a fact that this communication came to the hands of Poveys in Alice Springs on 3 November some 2 hours after that firm had sent other documents to Darwin by facsimile transmission to obtain urgent injunctive relief to prevent the second defendant carrying out his threat of 31 October. It was not disclosed to the Court in Darwin when Poveys at 3pm on 6 November appeared and secured an interim injunction for the plaintiff. Mr. Kilby offered some explanation as to why the second defendant's communication of 3 November was not disclosed to the Court; it was said to be equivocal in a sense; as it did not emanate from the defendants' solicitors, Mr. Kilby felt that it would not be proper to approach the second defendant direct for an unequivocal undertaking. Whatever merit there be in those explanations they afford no excuse for not putting the communication before the Court when the plaintiff applied ex parte on 6 November to obtain the interim injunction. The communication clearly had an immediate and necessary connexion with the relief sought. There is an obligation on a plaintiff, applying ex parte, to disclose to the Court all material matters of which the plaintiff is aware which tend in favour of the absent defendants; here it omitted to put an important fact before the Court. The communication of 3 November was clearly material in that it was a matter which the Court would have taken into account when exercising its discretion. It was not, and did not have to be, decisive in

that respect; it was relevant and of some weight, and so should have been disclosed. The plaintiff's failure to meet its obligations on 6 November in this respect may have had an important effect on the present application; the rule of public policy, where a plaintiff fails on an ex parte application to make sufficient disclosure and an interlocutory injunction issues, is that the injunction will ordinarily be dissolved without consideration of the merits as soon as the failure has been discovered. However, in this case, the ex parte application has been replaced by an inter partes application and fully argued; that is, the present application for an interlocutory injunction is in substance made de novo and on notice. The failure of the plaintiff on 6 November to act uberrimae fidei is sufficiently met by an order that it pay the costs of that application, and that the interim injunction be dissolved.

Mr. Kilby submitted that the evidence placed before the Court established that the plaintiff had a prima facie case for relief. That an applicant for an interlocutory injunction had to make out a prima facie case, in the sense that if the evidence remained as it was the probability was that the plaintiff would succeed at trial in obtaining relief, appeared to be the law as laid down in Beecham Group Ltd. v Bristol Laboratories Pty. Ltd. (1967-68) 118 C.L.R. 618 at 622-3. The Court stated, at p.622:-

> "How strong the probability needs to be depends, no doubt, upon the nature of the rights he asserts and the practical consequences likely to flow from the order he seeks."

It was emphasized that on an interlocutory application the Court does not undertake a preliminary trial. It is now clear that the proper approach, in considering whether an interlocutory injunction should be granted,

> "... is first to enquire whether there is a serious question to be tried, and then to determine the matter on the balance of convenience."

See The Australian Coarse Grain Pool Pty. Ltd. v The Barley Marketing Board of Queensland (1982) 57 A.L.J.R. 525, per Gibbs C.J.

I do not think there is a serious question to be tried as to whether the defendants are liable in damages to the plaintiff for alleged breach of contracts relating to the purchase of motor spirits from the plaintiff. I am unable to see the connection between that question and the question whether an injunction should be granted.

However the other claim made by the plaintiff is for an injunction preventing the first defendant from

removing the plaintiff's equipment the subject of the loan agreement from the land owned by the first defendant, presumably until the 10-year period of the loan agreement expires in 1993. It is of course open to the plaintiff to seek an injunction restraining the breach of the loan equipment agreement involved in a return of that equipment prior to the lapse of the 10-year period. The grant of such an injunction would in practice amount to an order for the specific performance of the equipment loan agreement. Yet that agreement is not, I consider, an agreement of the type as to which specific performance will often be ordered. In such an agreement, damages for breach are usually an adequate remedy; the plaintiff bears the onus of satisfying the Court that damages would not be an adequate remedy. It may be that the plaintiff could establish that it would be prejudiced in some way if it merely obtained an award of damages. For example, it may seek to show that it would not by such an award be left in all respects in as good a position as if the equipment remained in place; the location may give the equipment a special value. Questions of the extent of any such prejudice to the plaintiff and of hardship and unfairness to the defendants may arise. These are however matters of speculation and no evidence relating to them has been properly placed before me. I am not satisfied that damages would not be a perfectly satisfactory remedy, if the plaintiff succeeds in its actions.

I consider there is no serious question to be tried to which the question of the grant of an interlocutory injunction is relevant.

However, if I am wrong about that, the next question is as to the balance of convenience. The grant of an interlocutory injunction would ensure the preservation of the status quo. However, exactly what the status quo is, is far from clear. It may well be that the grant of an interlocutory injunction would affect the rights of third parties. The plaintiff has not sought to join Mr. Owen in these proceedings though it would appear his interests are involved. From the second defendant's affidavit it appears that on 28 October 1986 Mr. Owen purported to give the plaintiff 1 month's notice of the termination of his supply agreement with the plaintiff. If the interlocutory injunction were granted, the equipment would remain in place until the hearing of the actions. Mr. Owen's lease expires on 30 June 1988; he has a right to renew for a further 5 years. He is not bound to use the equipment to dispense only the plaintiff's product. If he, or his assignee, chooses to dispense therefrom the product of some competitor of the plaintiff, the latter's rights, if any, would sound only in damages against the defendants. If an interlocutory injunction is not granted, and the defendants (having obtained the consent of the lessee) return the equipment to

the plaintiff, again the plaintiff's rights sound in damages.

I note that no argument was addressed directed to the effect, if any, of s.47 of the Trade Practices Act on the tying arrangements between the parties, and I have not considered that aspect, or any aspect of restraint of trade.

I consider that the plaintiff has not established that on the balance of convenience an interlocutory injunction should be granted.

The above are the reasons for refusing the application for an interlocutory injunction on 21 November.

The defendants submitted that as successful parties they should be awarded the costs of the application, and, further, that those costs should be calculated on a solicitor-own client basis. I have considered the helpful written submissions of Mr. Watkins and Mr. Kilby. The plaintiff must of course bear the costs of the ex parte hearing on 6 November, for the reasons set out on pp.6-8 hereof. The plaintiff must pay the defendants' costs of the hearing before me of the plaintiff's application of 5 November, but those costs should be assessed on the normal party-and-party basis. Which items should be properly

included in those costs will be a matter for the Taxing Master to hear and determine in the absence of agreement between the parties.