The Darwin Football Club & Anor v AFL Northern Territory Ltd
[2003] NTSC 100

PARTIES:	THE DARWIN FOOTBALL CLUB INC AND AH MAT, Francis Henry v AFL NORTHERN TERRITORY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	43/2003 (20304010)
DELIVERED:	12 September 2003
HEARING DATE:	1 September 2003
JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Counsel:

First Plaintiff:	M Chin
Second Plaintiff	M Chin
Defendant:	J Reeves QC

Solicitors:

First Plaintiff:	Michael Chin
Second Plaintiff:	Michael Chin
Defendant:	De Silva Hebron

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

The Darwin Football Club & Anor v AFL Northern Territory Ltd
[2003] NTSC 100
No. 43/2003 (20304010)

BETWEEN:

THE DARWIN FOOTBALL CLUB INC
First Plaintiff

AND:

FRANCIS HENRY AH MAT
Second Plaintiff

AND:

AFL NORTHERN TERRITORY LTD
Defendant

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 12 September 2003)

[1] The defendant applies for its costs consequent upon an order striking out the statement of claim upon its application. The relevant background circumstances appear from my reasons for making that order delivered on 27 June (in the second last line of para [6] of those reasons the words "second defendant" should read "second plaintiff").

[2] Briefly:

- At the commencement of the hearing the plaintiffs sought to amend the statement of claim. There was some argument about that and the defendant sought particulars. That issue was dealt with out of court.

- The next day the plaintiff again sought to amend. The defendant did not then oppose that application but foreshadowed an application to strike out the statement of claim so amended. The plaintiffs were given leave to amend.

- The application to strike out was successful and leave was given to the plaintiffs to file and deliver a fresh statement of claim.

[3] The plaintiffs' original statement of claim pleaded, inter alia, that the defendant had failed to accord them procedural fairness or natural justice (procedural fairness) in the course of action taken by it affecting their claimed rights. The defendant pleaded that it had not failed to do that.

[4] The plaintiffs had not pleaded the facts to found the proposition that the defendant was obliged to abide by the principles of procedural fairness in the exercise of the power affecting those rights. Such identification is necessary so that, whether the power exists and if so the circumstances in which it might be exercised and the conditions, if any, attaching to the exercise of the power can be determined.

[5] Upon the hearing of this application for costs, the plaintiffs drew the Court's attention to a letter dated 6 June from the solicitors for the defendant to their solicitors advising that at the commencement of the hearing on 10 June leave would be sought to amend the defence, inter alia, by denying that the principles of procedural fairness applied.

[6] In my opinion the proposed defence amendment concerning the application of the principle of procedural fairness to the circumstances of the case should not have caused any great concern to the plaintiffs. Since they had alleged numerous breaches of those principles they must have had in mind the power the exercise of which gave rise to the obligation, although it had not been pleaded.

[7] It was necessary for the defendant to specifically plead that denial since the plaintiff might otherwise be taken by surprise (r 13.07(1)(b) and see r 13.02(2)(a)).

[8] An amendment to the statement of claim was not called for because of the proposed amendment of the defence. The amendment to the statement of claim went far beyond the procedural fairness issue. The plaintiff did not oppose the proposed defence amendment upon the ground that they were prejudiced in any way. They did not seek an adjournment.

[9] A party who amends a pleading by leave shall pay the costs of and occasioned by the amendment (r 63.11(7)(b)). No order for taxation is required (r 63.10(d)). I see no reason why an order should be made to vary

the rule in this case (r 63.11(9)). Rule 63.04(3)(b) provides that those costs shall not be taxed until the conclusion of the proceedings. Rule 63.04 does not apply since there is no interlocutory order for costs. The plaintiffs must pay those costs in accordance with the rules.

[10] What about the costs in relation to the successful application to strike out the amended statement of claim? Given the provisions of r 63.18 it must first be decided whether the application was interlocutory. I consider it was. The order made on the application did not conclude the rights of the parties see *Carr v Finance Corporation of Australia Limited* (1981) 147 CLR 246 per Gibbs CJ at p 248 and Mason J at p 253. Accordingly, the rule requires each party to pay its own costs unless the court otherwise orders. If the court so orders then they shall not be taxed until the conclusion of proceedings (r 63.04(3)(a)) unless the court orders that all or part of those costs ought to be taxed at an earlier stage (r 63.04(4)).

[11] The plaintiffs rely on my observations in *TTE Pty Ltd & Anor v Ken Day Pty Ltd* (1990) 2 NTLR 143. The issue of whether an order for costs should be made did not arise in that case. The order in that regard was by consent. The question then before the court was whether an order should be made for payment prior to the conclusion of the proceedings. The applications made by the defendant on the first day of hearing were to amend pleadings, to join other parties and in relation to other matters all of which had led to the trial dates being abandoned. As I indicated at p 145 my remarks were largely obiter dicta but the circumstances of that matter were that the plaintiff could

not have reasonably anticipated applications of that type and thus have anticipated having to bear the costs as part of the ordinary course of events in a contested litigation. Kearney J in *Yow v Northern Territory Gymnastics Association Inc* (1991) 1 NTLR 180 confirmed his agreement with the general observations I had made as he had earlier indicated in *Millingimbi Educational and Cultural Association v Davies* (unreported 12 October 1990). See also the remarks of Thomas J in *Otter Gold NL v Barcon (NT) Pty Ltd & Sankey* (2000) 10 NTLR 189.

[12] In *TTE Pty Ltd & Anor v Ken Day Pty Ltd* I said that the policy behind the rules seemed to acknowledge the probability that in ordinary cases it is more likely than not that each side would obtain interlocutory orders. Mildren J expanded on that notion in *Markorp Pty Ltd v King (as Liquidator of Murray Constructions Pty Ltd) and Others* (1992) 106 FLR 286 where he said p 293:

> "The purpose of subr (3) is not specified, but presumably it was designed to reduce the administrative burden of having to tax orders for costs made in interlocutory matters, which may in the end become unnecessary, as well as to obviate the need for the payment of costs by one party, and the repayment of costs by the same party, who may well have had both favourable and unfavourable cost orders made as a result of interlocutory proceedings over the lifetime of the action. Although interlocutory orders for costs may involve relatively large sums of money, in the vast majority of cases, the amounts involved are relatively small, and it seems to me that subr (3) is primarily directed towards cost orders involving relatively small sums of money. However, that is not to say that an order to tax might not be made in respect of a relatively small sum in an appropriate case. In this case, the amounts involved would not be small and are not as likely to be set off against future cost orders that may be made in the plaintiff's favour on interlocutory applications."

[13] Given that there were no other interlocutory orders sought at the commencement of this hearing, I take it that both parties were content to proceed subject to the pleading issues which arose at that time. Cost offsets would accordingly not be expected in this case.

[14] What is in contention here is the costs associated with the defendant's successful application to strike out the amended statement of claim. The point upon which the defendant succeeded could have been raised at any time after delivery of the statement of claim. The plaintiffs' proposed amendments to the statement of claim cannot be relied upon by the defendant as precipitating the application. Had the strike out application been made earlier it is unlikely that there would have been any costs thrown away. The plaintiffs would have had time to amend and the matter could have proceeded to trial as planned. I note also that there had been no notification to the plaintiffs by the defendant prior to the application made in court drawing attention to the defect and enabling the plaintiff to attend to it by way of amendment without the need to have a contest. In my reasons on the application to strike out I also noted that the defendant had shifted its position as to the source of power upon which it relied prior to the issue of the writ.

[15] In all the circumstances I consider the plaintiffs should pay the defendant's costs of the application to strike out the statement of claim but not including any costs thrown away. I do not propose to make any order pursuant to r 63.04(4).

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