

Iskandar & Anor v Merpati Nusantara Airline [2005] NTSC 85

PARTIES: FREDDIE ISKANDAR and
NATRABU (AUST) TOURS & TRAVEL PTY
LTD

v

MERPATI NUSANTARA AIRLINE

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NO: AP8 of 2005 (9626979)

DELIVERED: 22 December 2005

HEARING DATES: 1 December 2005

JUDGMENT OF: THOMAS J

REPRESENTATION:

Counsel:

Appellant: F Davis
Respondent: J Reeves QC

Solicitors:

Appellant: Davis Norman
Respondent: Cridlands

Judgment category classification: C

Judgment ID Number: tho200513

Number of pages: 5

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

Iskandar & Anor v Merpati Nusantara Airline [2005] NTSC 85
No. AP8 of 2005 (9626979)

BETWEEN:

FREDDIE ISKANDAR
First Plaintiff/Applicant

**NATRABU (AUST) TOURS & TRAVEL
PTY LTD**
Second Plaintiff/Applicant

AND:

MERPATI NUSANTARA AIRLINE
Defendant/Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 22 December 2005)

- [1] This is an application by the defendant/respondent that the second plaintiff/applicant provide security for costs with respect to an appeal lodged by the first and second plaintiff against the decision to dismiss the proceedings.
- [2] Order 62.02(1)(b) of the Supreme Court Rules provides as follows:

“62.02 When to give security

(1) Where –

.....

(b) the plaintiff is a corporation or (not being a plaintiff who sues in a representative capacity) sues not for his own benefit but for the benefit of another person and there is reason to believe that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so;

.....

the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against the defendant be stayed until the security is given.”

[3] By summons returnable on 1 December 2005 the respondent seeks the following orders.

1. The applicants give security for the costs of the respondent of the application for leave to appeal and the appeal.
2. The proceeding as against the respondent be stayed until the security is given.
3. The applicants pay the respondent’s costs of this application.
4. Such further or other orders as the Court sees fit.

[4] It was conceded by Mr Reeves QC counsel for the respondent that the application for security for costs can only be made with respect to the second applicant. It is not disputed that the second applicant is a corporation for the purpose of Rule 62.02(1)(b).

- [5] The respondent has discharged the onus upon them to establish that the second applicant has insufficient assets in the Territory to pay the costs of the respondent.
- [6] The affidavit of Cameron Ford sworn 8 November 2005, deposes to the fact that neither the first or second applicant are the registered proprietor of land in the Northern Territory. A search of the records of the Australian Securities and Investment Commission records show that the second applicant has been issued with 100 shares valued at \$1 each, meaning the company's value is \$100.
- [7] Counsel for the second applicant does not seek to dispute these facts. There was nothing put before this Court to establish that the second applicant does have assets in the Northern Territory. There is reason for the Court to believe that the applicant is impecunious and has insufficient assets to pay the costs of the respondent. I must then turn to consider the nature of the discretionary power – see *Millingimbi Educational and Cultural Association Inc v Stephen Davis; The Museums and Art Galleries Board and Northern Territory of Australia*, SC 259 of 1987; SC 775 of 1989 per Kearney J delivered 12 October 1990.
- [8] The four factors to be considered in the exercise of that discretion are set out in a decision of French J in *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 512-513. 1) Whether the order will

frustrate the plaintiffs' claim; 2) The merits of the claim; 3) The cause of the plaintiffs' impecuniosity; and 4) Delay. I deal now with those factors in

1. **Whether the order will frustrate the plaintiffs claim:** In the case before the Court there is no credible evidence that an order for security for costs will frustrate the plaintiffs' claim.
2. **The merits of the claim:** I accept the plaintiff/applicant has lodged a bona fide appeal. I am not able to assess the merits of such appeal but accept for the purpose of the exercise of a discretion as to security for costs that I cannot make a finding that it has no reasonable prospects of success. I am however, satisfied that the respondent has a defence which is bona fide with a reasonable prospect of success.
3. **The cause of the plaintiffs impecuniosity:** The plaintiffs claim the defendant is the source of their impecuniosity. In his submissions to the Court, Mr Davis, on behalf of the applicants, argues that the applicants contend they paid debts of the respondent in excess of \$1,000,000. This assertion is contested by the respondent. It is the applicants position that their financial position is directly related to the conduct of the respondent. Again that is an assertion made without adequate evidence to support the assertion.
4. **Delay:** The respondent has been prompt in making its application for security for costs.

None of these factors taken alone is a reason to make an order for security for costs. Taking into account all the circumstances of the case, I consider that on balance it would be appropriate to make an order for security for costs. I consider that the respondent is entitled to an order for security for costs against the second applicant.

[9] In his affidavit sworn 8 November 2005, Cameron Ford deposes as to the estimated costs based on the hearing of the appeal taking two days. The appeal has not yet been allocated a hearing date. From the submissions put it would appear that the appeal should only occupy one day of hearing, I consider the preparation time claimed is justified but that the costs of the actual hearing should be limited to one day of hearing. Accordingly, I assess costs as follows:

Senior Counsel:	1 day hearing	\$ 4,200
	4 days preparation	\$ 16,800
Junior Counsel:	1 day hearing	\$ 1,650
	5 day preparation	\$ 8,250
Solicitor:	1 day hearing	\$ 1,770
	4 days preparation	\$ 7,080
	Sub Total	\$ 39,750
	GST	\$ 3,975
	TOTAL	\$ 43,725

[10] I order that the second applicant pay security for costs in the sum of \$43,725.