

Sunners v Northern Territory of Australia & Anor [1999] NTSC 76

PARTIES: SUNNERS, Neil Fred Barry and SUNNERS,
Desley Anne

v

NORTHERN TERRITORY OF AUSTRALIA

AND

SMITH, Ian

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY EXERCISING TERRITORY
JURISDICTION

FILE NO: 240 of 1998

DELIVERED: 30 July 1999

HEARING DATES: 18 June 1999

JUDGMENT OF: MARTIN CJ.

REPRESENTATION:

Counsel:

Plaintiffs: Mr Lex Silvester
1st Defendant: Mr Michael Grant

Solicitors:

Plaintiffs: Noonans
1st Defendant: Ward Keller

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SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA

Sunners v Northern Territory of Australia & Anor [1999] NTSC 76
No 240 of 1998

BETWEEN:

NEIL FRED BARRY SUNNERS and
DESLEY ANNE SUNNERS
Plaintiffs

AND:

NORTHERN TERRITORY OF
AUSTRALIA
First Defendant

AND:

IAN SMITH
Second Defendant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 30 July 1999)

[1] *The Proceedings*

These proceedings commenced by Originating Motion, presumably upon the basis that there was unlikely to be any substantial dispute of fact, and for that reason it was appropriate that there be no pleadings or discovery (r 4.06). However, there is annexed to the Originating Motion what is called

an “Endorsement of Claim” in which there is set out in considerable detail what amounts to a Statement of Claim such as would normally be endorsed upon a writ. The plaintiffs (Sunners) claim that with all relevant approvals of the defendants, and to their satisfaction, they constructed a lake on their land and later reduced the height of the dam wall after negotiations with the defendants. They provide details of an agreement which they allege was made between them and the defendants which, having been carried out, creates an estoppel against the defendants from proceeding to enforce the execution of certain works in relation to the dam. They also claim that a statutory notice given to them was unlawful and contrary to power.

- [2] They claim that if they are required to execute the works which the defendants seek to have done they will suffer significant loss and damage. Further, and in the alternative, they raise claims of negligence against the defendants. They seek injunctive relief for restraining the defendants from acting pursuant to the permits and notices given in relation to the dam.
- [3] In proceeding No 165 of 1998 the plaintiffs here are defendants in an action brought by Mr and Mrs Cavanagh against them based upon alleged nuisance arising from flooding onto the property of Mrs and Mrs Cavanagh, which it is said has arisen or been aggravated by the construction of the dam and associated works. In these proceedings the plaintiffs claim a declaration that the works which are sought to be undertaken will not ameliorate or otherwise assist the wet season flooding, and declarations that in the 1997/98 wet season, in particular, the plaintiffs works were not responsible

for certain flooding. Alternatively they seek damages and equitable compensation.

- [4] The originating process is a hybrid and it does not seem to me that the Originating Motion was the appropriate way to commence the proceedings, but I invite the parties to consider the position and regularise this aspect of the matter as quickly as can be. Reference might be made to r 5.04 and r 5.05 and the power of the Court under r 4.07. The plaintiffs' application for discovery against the defendants can then be considered.

- [5] *The Interim Injunction*

Upon a summons on the Originating Motion coming before Thomas J on 17 December 1998, on urgency, an interim injunction order was made, until further order, restraining the defendants: (a) from proceeding to take action under the *Water Act* 1992 (NT) relating to a certain permit; (b) entering upon the Sunners' land for any purpose similar to, or related to the works described in the permit, and (c) issuing any further direction to the Sunners requiring works on and or associated works without the leave of the Court. Leave has not been sought. Leave was granted to the parties to bring the matter back before the court on 48 hours notice.

- [6] The defendants were then represented at court, but as the transcript shows, they had had little notice of the hearing of the application and counsel had no detailed instructions. He could say little. Sunners evidence was that the defendants were then about to enter their land pursuant to a purported

statutory power to carry out certain work relating to a dam which Sunners had failed to undertake when given statutory notice by the second defendant. Sunners' attacked the validity of the direction given for various reasons and said that, in any event, because of an agreement reached between them and the defendants, the defendants were estopped from relying upon those directions.

[7] During the course of those proceedings, counsel for the defendants said:

“There is a lot of history giving rise to this matter and it is not unrelated to some other Supreme Court proceedings in which Mr Sunners is involved with his neighbour, arising out of the erection of the dam wall and some flooding which occurred last wet season”.

[8] He also said, in the course of brief submissions in relation to the works proposed to be undertaken by his client, that:

“There is a danger of flooding to adjoining properties being caused by the present dam wall and so there is the possibility that some damages may flow from the inability of my client to construct these works”.

[9] Counsel for Sunners informed her Honour that he was fully instructed and was ready to meet any application by the defendants, he could come back to court on “any day” that the defendants sought to “reconvene the court and have the matter agitated”. Counsel for the defendants noted that within a few weeks the monsoon would break and there would be no interest in bringing the matter back to court before the wet finished.

- [10] The affidavit upon which the defendants propose to rely in support of an application that the injunction be discharged was filed in early June of this year. They wish to have dates fixed so that that aspect of the matter could be disposed of prior to the onset of the next wet season.
- [11] Sunners say that it would be months before it would be appropriate to hear the application. Their argument in that regard seems to spring from the idea that there is involved in the injunction proceedings questions going to the merits of the dam and the works. On their case as disclosed in the material before Thomas J that is not so. The remedies they sought, detailed above, go to the power of the defendants to do what they threatened to do by way of entry onto Sunners land and to execute works thereon; whether they are estopped from doing so because of their dealings with the plaintiffs or whether they have acted ultra vires in any respect. Those are issues having nothing to do with the effect which the construction of the dam and the works have had.
- [12] Sunners' position has changed significantly from the position put forward when they attained the interim relief, in that they then said they could be ready on any day. It may be that Sunners wish to supplement their original material in the light of the contents of the defendants' affidavit. They have now had about six weeks to consider their position.
- [13] I am entitled to know that in the ordinary course, the wet season heavy rains will start again in a few months. It is important in my view that the question

of the powers of the defendants in relation to the dam and associated works be resolved.

[14] The defendants' application to discharge the injunction should be listed as soon as possible.

[15] *Application by the plaintiffs in Action No 165 of 1988 to be added as defendants in these proceedings*

Mr and Mrs Cavanagh (Cavanagh) seek to be joined as defendants. They rely on r 9.06(b)(ii), claiming to be persons between whom and any party to the proceedings, there may exist a question arising out of or relating to or connected with any claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceedings.

[16] On the assumption that the proposed amended Statement of Claim in the other proceeding will not depart materially from that originally pleaded, the claim made by Cavanagh against Sunners arise from alleged back up of surface water on Cavanagh's land from a dam constructed by Sunners on their land during the 1997/98 wet season. It is claimed that the back up of water arose because part of a dam built on Sunners' land was too high to permit the wet season surface water from running naturally off Cavanagh's land; a drain relocated or reconstructed as part of the works was too shallow to allow sufficient run off and earth fill removed to create the dam was so placed as to increase the surface water run off from the Sunners' land onto Cavanagh's land. It was claimed that as a result a greater part of

Cavanagh's land was inundated for a longer period of time during the 1997/98 wet season and caused damage. In those proceedings Cavanagh also claims as against Sunners mandatory injunctions to compel them to lower the level of the dam wall and the earth fill to permit proper run off. The nature of these proceedings and the relief sought by Sunners against the defendants is set out at the beginning of these reasons. The defendants seek to enter upon the plaintiffs' land for the purposes of lowering the dam wall. The plaintiffs seek to restrain them from doing so upon grounds that they are estopped from taking such action, and because the notices and so forth to found the right of entry are invalid.

[17] The affidavit sworn in support of the application asserts that the two proceedings involve the same subject matter, namely "the dam wall and other works concerning excess water" on the plaintiffs property.

[18] It is alleged by Cavanagh that as the defendants had not filed any affidavit in response to Sunners' application for the interim injunction, and that that may indicate that they are not seriously interested in contesting the proceedings. An affidavit had in fact been sworn on 25 May, but not filed on behalf of the defendants until after Mr Cavanagh had sworn his affidavit. It is then complained that the response of the Northern Territory in the other proceedings, to an order against it as a non-party for discovery had not been complied with. More material is now discovered in those proceedings, some of it delivered on the day of Mr Cavanagh swore his affidavit. Mr Cavanagh then conjectures on his oath that the defendants "appear to have a capacity

to act in a way which may fetter their powers under the Water Act” but gives no particulars or any facts to support that contention. Then it is said that if Sunners are successful, or if the defendants consent to orders fettering their powers, that that may prejudice Cavanagh’s ability to “prosecute, enforce or settle” those other proceedings.

[19] Cavanagh is concerned that the resolution of the issues between the parties in these proceedings may be such that their property will not be protected against further inundation arising from the construction of the dam on the plaintiffs property. Their claim in Action No 165 is for damages for such an event, but they also seek relief by way of mandatory injunctions to have modifications made to the dam to permit proper run off of wet season surface water from the property.

[20] But, what is the question which may exist arising out of these proceedings which it is suggested is just and convenient to be determined as between Cavanagh and the other parties, as well as between the parties themselves. Cavanagh has an interest in the outcome, in that Sunners are seeking to restrain the defendants from exercising statutory powers which, it is suggested, might achieve the result which Cavanagh seeks in the other proceedings. An interest in the outcome of the proceedings does not necessarily give rise to such a question. In a sense they stand with the defendants in resisting Sunners action. Sunners and the defendants oppose the application.

[21] Cavanagh has demonstrated a suspicion that the defendants will not properly resist Sunners' claim or may settle on terms which will be disadvantageous to them. But those considerations do not come within the test to be applied. More closely related to the rule is the proposition put by counsel that Cavanagh wants Sunners to allow the defendants to carry out the work from which they are presently restrained, whereas Sunners want to continue the restraint. The applicants fear that if the work is not done they will suffer further damage arising from the same source. They refer particularly to the relief sought by Sunners by way of a declaration that certain works which they have been directed to undertake will not ameliorate or otherwise assist wet season flooding, and, further, that in the 1997/98 wet season, Sunners' works were not responsible for the flooding which Cavanagh says was the cause of their loss. In the submission of counsel for Cavanagh those matters go to the "heart of the Cavanagh/Sunners dispute".

[22] Sunners may be right when they say, in opposition to the application, that Cavanagh has no interest in the legal issues to be determined between the parties. The outcome depends on what passed between the parties and the validity of the defendants' actions and proposed actions. It is not suggested that Cavanagh has any evidence relevant to those matters, and Sunners seek no relief against them. Counsel for the defendants submits that the questions in these proceedings do not go to the merits of the dam. That may be so, but the rule is not of narrow application, it applies when there may exist a question arising out of or relating to or connected with any claim.

The claim in these proceedings is that the defendants have given approval to the plaintiffs to construct the dam and associated works, and they have proceeded in accordance with that authority. Part of the plaintiffs' defence in the action taken by the applicants is based upon the same considerations.

[23] Prima facie, a plaintiff is entitled to choose the person against whom to proceed and to formulate the relief claimed. Under this rule, however, a person who is not a party may be added as defendant against the wishes of the plaintiff, even though there be no separate issue arising in these proceedings, and no relief is claimed against the applicants.

[24] Few cases have been referred to in argument which expressly deal with the particular subrule or its equivalent in circumstances where a person seeks to be joined as a defendant (see generally Williams – Civil Procedure Victoria par 9.06.15). In *Penang Mining Co Limited v Chong Sam* (1969) 2 Malayan LJ 52, it was suggested that it may be appropriate to order a person as a party under the equivalent English rule if his rights against or liabilities to a party in the proceedings in respect of the subject matter of the proceedings will be directly affected by an order which may be made in the proceedings. The relevant part of the opinion of the Privy Council is set out in *News Limited v Australian Rugby League Limited* (1996) 64 FLR 410 at 524; 193 ALR 197 at 298. The emphasis in that opinion and in the judgment in the Federal Court is upon the rights and liabilities of third parties being directly affected.

- [25] It seems to me that only if Cavanagh is joined as a defendant in these proceedings they may be bound by the outcome in their claim against Sunners (*Wilson v Lowery* (1993) 4 NTLR 79 at 87. If they are not joined, their rights would so be affected in that way.
- [26] The rights of Cavanagh against Sunners in the other action are open to question. At this stage an application to amend the Statement of Claim and particulars are awaited. The defence of authority raised by Sunners in those proceedings may or may not succeed.
- [27] It may be that a better case can be made out by Cavanagh later when the issues in the proceedings in which they are plaintiffs have been clearly defined. It may be that if a decision is made to dispose of this matter before the other, they could be joined with conditions, for example, that they be permitted to make submissions, but be bound by the result in their claims against Sunners. Other courses may be open. What is “just and convenient” may change as the two sets of proceedings advance.
- [28] The application is best left until the other proceedings are further advanced. The application is adjourned to a date to be fixed.
- [29] Liberty to apply generally.
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