Jovista Pty Ltd v Pegasus Gold Australia Pty Ltd & Ors
Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd
[1999] NTSCFC 87

PARTIES:	JOVISTA PTY LTD (ACN 009 171 420) v PEGASUS GOLD AUSTRALIA PTY LTD (ACN 009 028 924) AND ORS AND: HENRY WALKER CONTRACTING PTY LTD (ACN 009 625 138) v PEGASUS GOLD AUSTRALIA PTY LTD (ACN 009 628 924)
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	136 of 1997 (9714637); 1 of 1998 (9800216); 134 of 1998 (9813215)
DELIVERED:	25 August 1999
HEARING DATES:	17 June 1999
JUDGMENT OF:	MARTIN CJ, KEARNEY, MILDREN, THOMAS & BAILEY JJ

REPRESENTATION:

Counsel:

Plaintiff: (proceedings Nos 1 and 134 of 1998)	P.G. Maher
Plaintiff: (proceedings no 136 of 1997):	D.C. Masters
Defendant:	M.J. McK. Grove

Solicitors:

Plaintiff: (proceedings Nos 1 and 134 of 1998):	James Noonan
Plaintiff (proceedings no 136 of 1997):	Cridlands
Defendant:	Ward Keller

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

Jovista Pty Ltd v Pegasus Gold Australia Pty Ltd & Ors
No. 136 of 1997 (9714637)
Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd
No. 1 of 1998 (9800216); No. 134 of 1998 (9813215)
[1999] NTSC 87

No. 136 of 1997 (9714637) BETWEEN

JOVISTA PTY LTD
(ACN 009 171 420)
Plaintiff

AND:

PEGASUS GOLD AUSTRALIA PTY LTD (ACN 009 628 924)
First Defendant

AND

BATEHAM PROJECT ENGINEERING PTY LTD (ACN 056 741 596)
Second Defendant

AND

KINHILL PACIFIC PTY LTD
(ACN 101 241 620)
Third Defendant

AND

KILBORN ENGINEERING PACIFIC PTY LTD (ACN 009 864 353)
Fourth Defendant

No. 1 of 1998 (9800216);
No. 134 of 1998 (9813215)

BETWEEN:

HENRY WALKER CONTRACTING PTY LTD (ACN 009 625 138)
Plaintiff

AND

PEGASUS GOLD AUSTRALIA PTY LTD (ACN 009 628 924)
Defendant

CORAM: MARTIN CJ, KEARNEY, MILDREN, THOMAS & BAILEY JJ

REASONS FOR DECISION

(Delivered 25 August 1999)

MARTIN CJ:

[1] I agree with the judgment of Kearney J.

KEARNEY J:

The application for costs

[2] On 17 June 1999 the Court determined the 4 questions in these proceedings which had been referred to it under s 21 of the *Supreme Court Act*. It found that one question did not require to be answered, and answered the other 3 adversely to the answers sought by Pegasus Gold Australia Pty Ltd ('the defendant'); see pars [6], [34] and [66] of the judgment of 17 June, and the orders pronounced by the Court that day.

[3] When giving judgment the Court ordered, provisionally, that the defendant pay the other parties' costs of the references. It gave the parties leave to

make written submissions by 1 July as to the substance or form of the order for costs. It indicated that on receipt of those submissions it would decide whether to reconvene to hear oral submissions. Written submissions on costs were duly received from the defendant and from one of the plaintiffs, Jovista Pty Ltd; no submissions were received from the other plaintiff, Henry Walker Contracting Pty Ltd. I do not consider that it is necessary to hear oral argument.

The background to the references

[4] On 25 August 1998 the defendant applied for summary judgment under r 23.01 in proceedings Nos. 1 and 134 of 1998, insofar as the plaintiff in those proceedings (Henry Walker Contracting Pty Ltd) sought to enforce its liens. The application was argued before Angel J. In his reasons for decision of 26 November 1998 his Honour noted that the defendant had attacked the validity of the liens on eight different grounds. One was that the plaintiff had failed to register its liens within the time required by s 10 of the *Workmen's Liens Act* ('the *Act*'). His Honour set out the questions to which this ground gave rise, referred to the state of the authorities in relation to s 10, and indicated that he had "reservations" about some of the reasoning of the majority of the Court of Appeal in *Leichhardt Development Co. Ltd v Pipeline Properties Pty Ltd* (1989) 62 NTR1. His Honour considered that that reasoning should be reviewed, and accordingly referred "the s 10 issue" to this Court. In doing so his Honour observed at p21:-

> "I am of course mindful of the fact that the plaintiff, in the end, did not press for me to refer the matter to the Full Court and that *the defendant opposed that course altogether*, but I am nevertheless of the opinion that it is the appropriate course to adopt. The present conflicting state of the cases, not only as to the decisions but as to the reasoning grounding those decisions, calls for an authoritative statement of the true construction and operation of the puzzling provisions of the *Workmen's Liens Act*. In so saying, I do not overlook the difficulty of the task. I am, of course, empowered to refer the issue on my own initiative pursuant to s21 of the *Supreme Court Act* 1979 (NT). I shall hear the parties as to the terms of the reference." (emphasis added)

[5] His Honour then adjourned the hearing of the defendant's summons to a date to be fixed. Questions were settled and formally referred on 5 February 1999. Similar issues involving s10 having arisen in proceedings No. 136 of 1997, Bailey J by consent referred identical questions to this Court on 19 March.

The defendant's submissions on costs

[6] The defendant submitted as follows. The order for costs should not accord with the provisional order of 17 June. Instead it should be one of the following:-

(a) that there be 'no order as to costs'. In terms of r 63.02, this means that each party would bear its own costs of the reference;

(b) that the respective plaintiffs' costs of the references be 'costs in the proceeding'. In terms of r 63.02, this means that if a plaintiff succeeds in its substantive action it is entitled to recover, as part of its costs of that action, its costs of the reference; and if the plaintiff

loses in that action, it does not have to pay the defendant's costs of the reference; or

(c) that the defendant pay a percentage only of the respective plaintiffs' costs of the references. I note that a 'fractional' award of costs is usually made where there were separate issues, on some of which a successful party has failed.

[7] The defendant noted that under r 63.03(1) the costs of a proceeding are in the discretion of the Court. However, it relied on r 63.03(2) which provides as far as material:-

> "(2) Where in the opinion of the … the Court the strict application of this Order (other than this subrule) would *result in an anomaly*, the … Court may … *make such order* in relation to costs, *as … it thinks equitable in the circumstances* …." (emphasis added)

[8] The defendant submitted that one of the alternative orders which it had proposed would be 'equitable in the circumstances', because of the following special circumstances:-

(a) the authorities on the proper construction of s 10 of the *Act* were conflicting. The defendant had relied generally on South Australian authorities in support of its submissions, while the plaintiffs had relied on Northern Territory authorities which were overruled by the decision on the reference. (I note that this reverses the true approach of the parties). The defendant's application for summary judgment had been neither frivolous nor vexatious; it reasonably believed that

it had a good basis for its application. It would be anomalous if the defendant, relying on previous authority in the Territory, should be required to pay the costs of having this Court ascertain what the law was; and

(b) the purpose of the reference was to resolve the confused state of the authorities; it had been made on the initiative of the Court, not the parties. As the defendant put it –

> "… due to the conflict in authority, the Court (rather than the parties) saw the need for clarity and therefore ordered that a reference be held."

Accordingly, it was just and reasonable that there be 'no order as to costs'.

[9] The defendant acknowledged that usually a successful litigant is allowed its costs, but submitted that the special circumstances in (a) and (b) above warranted such an order not being made in this case.

The submissions on costs of the plaintiff Jovista Pty Ltd

[10] The plaintiff's submissions were as follows. On 17 June the Court had stated that "the defendant was unsuccessful in its application to dismiss the plaintiff's claim and must pay the plaintiffs' costs of the application".

I note that this is incorrect; the Court did not say that. This Court has never been seized of the defendant's application of 21 August 1998. It dealt only with part of that proceeding, in the form of certain questions of law referred to it. It is concerned only with the costs of the reference of those questions,

a proceeding to which the defendant's application of 21 August 1998 gave rise. The plaintiff proceeded to make submissions that it should recover its costs of the defendant's application of 21 August 1998.

Conclusions

[11] I consider with respect that the plaintiff's submissions are misdirected; submissions as to the costs of the defendant's application of 21 August 1998 should be made to Angel J, who heard it. At present, the hearing of that application stands adjourned. The better view is, I think, that the costs of the references and the costs of the application of 21 August 1998 are distinct matters.

[12] As to the defendant's submissions, I do not consider that an order that the defendant pay the plaintiffs' costs of the references would result in an "anomaly", or that one of the alternative costs orders purposed by the defendant would be "equitable in the circumstances". The conflict in the authorities was known to the defendant at the time of its application of 21 August; it chose to pursue its application on the basis of one line of authority, ultimately held to be incorrect. There is nothing novel in that. The fact that the reference to this Court in proceedings Nos. 1 and 134 of 1998 was a 'Court initiative' is irrelevant on the issue of costs. I consider that the appropriate order for the costs of the references is the order provisionally made on 17 June, and I would confirm that order.

MILDREN J:

[13] I agree.

THOMAS J:

[14] I agree.

BAILEY J:

[15] I agree.

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