

PARTIES: NT CREDIT SOCIETY LTD
v
TERRITORY INSURANCE OFFICE
TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY
JURISDICTION: Interlocutory Application
FILE NO: 184/95 (9518583)
DELIVERED: 13 February 1997
HEARING DATES: 31 January 1997
JUDGMENT OF: The Master

CATCHWORDS:

PRACTICE - Northern Territory - r 23.02 Supreme Court Rules -
Summary Judgment Application
PRACTICE - Northern Territory - r 13.02(1)(a) Supreme Court Rules -
pleading - failure to plead material facts
PRACTICE - Northern Territory - r 29.07 Supreme Court Rules - time for
discovery and interrogatories - discretion to order prior to resolution of
pleading issues.

CASES REFERRED TO

ANZ Banking Group v David (1991) 1 NTLR 93
Civil and Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd (1991) 1 NTLR 43
Fancourt v Mercantile Credits Ltd 154 CLR 87
Lyons v Kern Konstructions (Townsville) Pty Ltd (1983) 70 FLR 135
Tomazos v Tomazos (1993) 115 FLR 215
W.A. Pines Pty Ltd v Bannerman (1980) 41 FLR 175

REPRESENTATION:

Counsel:

Appellant: Mr Wyvill
Respondent: Mr Southwood

Solicitors:

Appellant: Ward Keller
Respondent: Cridlands

Judgment category classification:

Judgment ID Number:

Number of pages: 5

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

184/95 (9518583)

BETWEEN

NT CREDIT SOCIETY LIMITED

Plaintiff

and

TERRITORY INSURANCE OFFICE

Defendant

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 13 February 1997)

The defendant has counterclaimed for damages for breach of contract arising out of an agreement called "the Co-operative Agreement", alleging that...

"12. It was a term of the Co-operative Agreement, expressed in Clause 4.8 therein, that neither party would, subsequent to the termination of the Co-operative Agreement approach a client, customer or member of the other who was not then a client, customer or member of that party for any business-related purpose where it had only become aware of the name of such client, customer or member through information supplied by or obtained from the other.

13. The Co-operative Agreement was terminated as at 30 August 1993 by letter from the Plaintiff to the Defendant dated 18 August 1993.

14. In breach of the said term the Plaintiff did so approach customers of the Defendant for business-related purposes.

PARTICULARS

On or about 31 August 1993 the Plaintiff wrote and sent letters to several persons who were customers of the Defendant seeking to persuade them to cancel or not renew their insurance cover with the Defendant and to take up fresh insurance about to be offered by CIC Insurances Limited pursuant to a

fresh arrangement being negotiated between CIC Insurances Limited and the Plaintiff.

15. By reason of the said breach the Defendant has suffered loss and damage full particulars of which will be supplied prior to the hearing.”

The plaintiff complains that this pleading is defective because it fails to allege that the persons approached were not , at the time of the approach , a client, customer or member of the plaintiff, and that the plaintiff only become aware of their names through information supplied by or obtained from the defendant.

It is necessary for the defendant to plead all the material facts upon which it relies (see O. 13.02 (1) (a)). It may be that the reference in paragraph 14 to the plaintiff’s approach was intended to encapsulate all the elements pleaded in paragraph 12, however , this is not clear , the reference to business related purposes being otiose if this was intended. In any event , the particulars provided are insufficient to support the allegation of breach.

Ordinarily, it would be possible to remedy the defect by way of an amendment to plead all the facts relied upon or, possibly, the provision of additional particulars. However , the plaintiff has introduced evidence which , it says, entitles it to summary judgment.

The plaintiff relies on an affidavit sworn by D.G. Whalan on 26 November 1996 annexed to which is a statutory declaration declared on 7 September 1993. Mr Whalan is the General Manager of the plaintiff.

In the statutory declaration he declares that on 2 September 1993 he mailed a copy of the letter attached to the statutory declaration to “any member of the Credit Society, who, as at 26 August held a Redicover Periodic Payment authority.”

In his affidavit he deposes that the pro-forma letter was sent to members of the plaintiff on whose behalf the plaintiff held a “Redicover” periodic payment authority as at 26 August 1993 and that it is his belief that the letter annexed to the statutory declaration sets out the text of the letter referred to by the defendant in paragraph 14 of the counterclaim.

He also deposes that identification of the members sent the letter was based on information obtained solely from the plaintiff’s own records and that the plaintiff did not rely on any information supplied by or obtained from the defendant.

On the basis of this evidence it appears clear that, if the defendant is relying on this letter, it would not be able to establish a cause of action for breach of contract as pleaded because the persons to whom the letters were sent were members of the plaintiff and the plaintiff had not become aware of their names only through information supplied by or obtained from the defendant.

It is argued on behalf of the defendant that the plaintiff’s evidence is not sufficient to establish the basis for summary judgement, it not being explicitly

stated that no other letters of a similar nature were sent out by or on behalf of the plaintiff.

However, the defendant has made no attempt to contradict the assertion by Mr Whalan that it was his belief that the letter referred to in his affidavit and statutory declaration was the letter referred to in paragraph 14 of the counterclaim. Although paragraph 14 refers to “letters”, it is clear that the plaintiff’s evidence is directed to those letters.

The defendant has sought an adjournment of the plaintiff’s application for summary judgment on the counterclaim pending discovery and inspection of the plaintiff’s documents.

The Court has a discretion to require discovery and inspection prior to the resolution of pleadings issues , however , this is not usually allowed to enable a party to ascertain whether or not he has a claim or defence [see O.29.07 , **W.A. Pines Pty. Ltd. v Bannerman (1980) 41 FLR 175, Lyons v Kern Konstructions (Townsville) Pty. Ltd. (1983) 70 FLR 135 and Tomazos vTomazos (1993) 115 FLR 215] .**

The defendant has introduced evidence to the effect that it is examining its records and conducting investigations regarding the plaintiff’s claim and the counterclaim and will require discovery and may need to interrogate to deal with the issues in dispute and defend the application to strike out the counterclaim. It is also suggested that the circumstances surrounding the

letters referred to in paragraph 14 of the counterclaim indicate collusion on the part of the plaintiff.

The nature and relevance of the alleged collusion was not fully explained and I am unable to conclude that there was anything untoward on the part of the plaintiff relevant to the issues raised in this application.

It was not argued, and I have not been able to ascertain, that there was an anterior relationship between the parties which would entitle the defendant to information from the plaintiff, as suggested by Brennan J in **W.A. Pines Pty. Ltd. v Bannerman** at page 181. Nor has the defendant established grounds for suspicion that it may have a good case which may be assisted by discovery. In these circumstances it is not appropriate that this application be delayed pending discovery and inspection of documents.

I am satisfied that there is no real question to be tried on the defendant's counterclaim and that there is no other reason for such a trial. (See **Fancourt v Mercantile Credits Ltd** 154 CLR 87, 99, **Civil and Civic Pty Ltd v Pioneer Concrete (N.T.) Pty Ltd** (1991) 1 NTLR 43 and **ANZ Banking Group v David** (1991) 1 NTLR 93. There will be judgment for the plaintiff on the counterclaim.