Branir Pty Ltd v Wallco Pastoral Company Pty Ltd [2006] NTSC 70

PARTIES:	BRANIR PTY LTD (ACN: 067 718 876) v WALLCO PASTORAL COMPANY PTY LTD (ACN: 077 798 139)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING ORIGINAL CIVIL JURISDICTION
FILE NO:	No 103 of 2006 (20621982)
DELIVERED:	20 September 2006
HEARING DATES:	7 September 2006
JUDGMENT OF:	MILDREN J

CATCHWORDS:

PRACTICE AND PROCEDURE – application for stay – whether subsequent proceeding relating to same cause of action vexatious – proceedings involve same parties and subject matter – application to remove caveat brought by originating motion after writ for specific performance issued.

Legislation:
Law of Property Act 2000 s 4, s 62
Land Title Act s 4, s 137, s 138, s 139, s 140, s 140(1), s 140(2), s 142, s 142(5), s 142(6), s 142(7), s 143, s 145, s 146
Supreme Court Rules O 9.12, O 23.01(1)

Applied:
Harvie v Stevens [2004] NSWSC 1217

Followed:
Royal Bank of Scotland Ltd v Citrusdal Investments Ltd [1971] WLR 1469

Referred to:
Boyd v Halstead, ex parte Halstead (1985) 2 Qd.R 249
Caloundra Boatyard Pty Ltd and Anor v The Almonta and Anor (1968) SASR 325
City Building Contractors (Hiring) Pty Ltd v Roadcon Pty Ltd (Action Nos 278 and 244 of 1987 in this Court)
Culture International Pty Ltd v Scoles (1991) 32 FCR 275 at 279
Hamilton v Oades (1989) 166 CLR 486
Henry v Henry (1995) 185 CLR 571; (1996) 135 ALR 564
Henry v Lewis (1882) 23 Ch.D 397
Lidden and Anor v Composite Buyers Ltd and Ors (1996) 139 ALR 549
Moore and Ors v Inglis (1976) 50 ALJR 589
Schouten v Govard Pty Ltd; Govard Pty Ltd v Schouten and Anor [2003] QSC 259

REPRESENTATION:

Counsel:

Plaintiff:	M Maurice QC with C Ford
Defendant:	J Reeves QC with S Porter

Solicitors:

Plaintiff:	Cridlands
Defendant:	De Hilva Hebron

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

Branir Pty Ltd v Wallco Pastoral Company Pty Ltd [2006] NTSC 70
No. 103 of 2006 (20621982)

BETWEEN:

BRANIR PTY LTD
(ACN: 061 718 876)
Plaintiff

AND:

WALLCO PASTORAL COMPANY PTY LTD (ACN: 077 798 139)
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 20 September 2006)

[1] This is an application by the defendant to stay the proceedings brought by the plaintiff in this matter on the grounds that they are vexatious and oppressive. After hearing submissions from counsel by both parties, I dismissed the application and said that I would provide reasons at a later time. These are those reasons.

Background facts

[2] On 21 August 2006, Wallco Pastoral Company Pty Ltd (hereinafter called "Wallco") lodged a lapsing caveat over a pastoral lease held by Branir Pty Ltd (hereinafter called "Branir") claiming an estate or interest in equity as

purchaser pursuant to an agreement made on or about 15 July 2006 as varied. Branir's pastoral lease is all that land being NT Portions 851 and 908 described in Perpetual Pastoral Lease No 01074 contained in Certificate of Title Register Book Volume 696 Folio 211 and known as "Murranji Station". On 28 August 2006, Wallco issued a writ in action No 99 of 2006 in this Court (20621791) seeking specific performance of an agreement made on 15 July 2006 to sell the land pursuant to a written memorandum or Note of Sale signed for and on behalf of the defendant. On 31 August 2006, Branir commenced these proceedings against Wallco by originating motion between parties seeking the removal of the said caveat.

[3] The central issue in the proceedings commenced by Branir is whether Wallco, which bears the onus of proof (*Harvie v Stevens* [2004] NSWSC 1217 at [17]), has an arguable right to maintain the caveat. The central issue in the proceedings commenced by Wallco is whether the memorandum of 15 July 2006 evidences a binding agreement as required by s 62 of the Law of Property Act 2000, which provides:

> "No proceeding may be commenced on a contract (wherever made) for the sale or other disposition of land unless the contract on which the proceeding is commenced, or some memorandum or note of the contract, is in writing and signed by the party to be charged or by a person lawfully authorised by the party."

[4] "Land" is defined by s 4 of the Act to include an interest in land.

[5] The contention of Mr Reeves QC for Wallco is that Branir's application to remove the caveat should have been made in the proceedings commenced by Wallco.

[6] It is necessary to refer briefly to the provisions of the Land Title Act relating to caveats. Section 137 of the Land Title Act defines the requirements of a valid caveat. It is not necessary to refer to those provisions as it is not in contention that the formal requirements appear to have been complied with. Section 138 provides that a caveat may be lodged by any person claiming an interest in a "lot". The word "lot" is defined by s 4. It is not suggested that the land in question was not a "lot". Section 139 provides that the Registrar-General must give written notice of lodgement of a caveat to each person whose interest or whose right to registration of an instrument is affected by the caveat. Section 140 provides that a caveat lodged under the Act prevents registration of another instrument affecting the lot over which the caveat is lodged from the date and time endorsed by the Registrar-General on the caveat. Section 140(2) provides that sub-section (1) has effect for a caveat until the caveat lapses or is cancelled, rejected, removed or withdrawn.

[7] Section 142 provides that subject to certain exceptions (none of which apply here) a caveat lapses at certain times specified in sub-section (5) or (7).

[8] Section 142(5) provides:

> "(5) Except as provided in subsection (6), the caveat lapses –

(a) 14 days after notice is served on the caveator under subsection (3); or

(b) 3 months after the caveat is lodged under section 138,

whichever is earlier."

[9] Sub-sections 142(6) and 142(7) provide:

"(6) Despite subsection (5), the caveat does not lapse –

(a) if an appropriate proceeding has been started by the caveator and the Registrar-General has been notified of the proceeding; or

(b) if the caveator, or the authorised agent of the caveator, notifies the Registrar-General within 14 days of being served with the notice under subsection (3) that he or she does not want the caveat to lapse and that he or she has started, or will start, a proceeding to establish the interest claimed under the caveat.

(7) If a caveator, or the authorised agent of the caveator, notifies the Registrar-General under subsection (6)(b) that he or she will start a proceeding, the caveat lapses 3 months after the notice under subsection (3) was served on the caveator if the caveator does not, within that time, provide the Registrar-General with evidence that the proceedings have been started."

[10] Section 143 provides:

"(1) A caveatee may at any time apply to the Supreme Court for an order that a caveat be removed.

(2) The Supreme Court may make the order whether or not the caveator has been served with the application, and may make the order on the terms it considers appropriate."

[11] Section 145 provides:

> "If a caveat lapses or is withdrawn, cancelled or removed from a lot, the person who was the caveator may lodge another caveat for the lot on the same, or substantially the same, grounds only with the Supreme Court's leave."

[12] Section 146 of the Land Title Act provides that a person who lodges or continues a caveat without reasonable cause must compensate anyone else who suffers loss or damage as a result and the compensation may include, in a judgment for compensation, a component for exemplary damages.

[13] Mr Reeves QC referred the Court to a number of authorities which he said support the principle that it is vexatious and oppressive for a party to commence proceedings against another party where that other party has already commenced proceedings in the Court and where the issues to be tried in both proceedings are identical or substantially the same.

[14] Mr Reeves QC first referred me to *Henry v Henry* (1995) 185 CLR 571; (1996) 135 ALR 564. In that case a husband and wife were married in Germany in 1977 and lived outside Australia, principally in Monaco, thereafter. Late in 1992 and early in 1993, the husband and wife commenced separate divorce proceedings in Monaco. The husband's proceedings were struck out in February 1993, but the wife's continued. In October 1993, the husband abandoned his residence in Monaco and returned to Australia. He then commenced proceedings for the dissolution of marriage in the Family Court of Australia. The wife applied to have the Australian proceedings

stayed on the grounds of lack of domicile and forum non conveniens. That application was rejected by the Family Court and the issue of forum non conveniens was raised in the appeal to the High Court.

[15] At 185 CLR 590-591; 135 ALR 579 in the joint judgment of Dawson, Gaudron, McHugh and Gummow JJ, their Honours said:

> "Parallel proceedings in another country with respect to the same issue may be compared with multiple proceedings with respect to the same subject matter in different courts in Australia. In *Union Steamship Co of New Zealand Ltd v The Caradale*, Dixon J observed of that latter situation that "[t]he inconvenience and embarrassment of allowing two independent actions involving the same question of liability to proceed contemporaneously in different courts needs no elaboration." From the parties' point of view, there is no less - perhaps, considerably more - inconvenience and embarrassment if the same issue is to be fought in the courts of different countries according to different regimes, very likely permitting of entirely different outcomes.
>
> It is prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue."

[16] However, as can be seen, their Honours were referring to multiple proceedings being brought in different Courts.

[17] I was next referred to *Moore and Ors v Inglis* (1976) 50 ALJR 589. That was a case where the plaintiff having commenced proceedings in the Supreme Court of the Australian Capital Territory for damages for conspiracy and defamation, brought proceedings in the High Court of Australia in its original jurisdiction against the same defendants as well as other defendants seeking declarations or injunctions but not damages. Most of the facts or

incidents pleaded in the statement of claim in the action brought in the High Court were the same as those pleaded in the statement of claim in the Supreme Court of the Australian Capital Territory. In making an order staying the action in the High Court as vexatious and oppressive and an abuse of the process of the Court, Mason J said at 591-592:

> "The principal issue is whether, in the light of all the circumstances which I have outlined, the commencement by the plaintiff of the proceedings in this court should be held to be vexatious and oppressive or to be an abuse of the process of the court within the meaning of O.63, r.2. In *McHenry v Lewis* (1882) 22 Ch.D 397 at p 408 Bowen LJ referred to "the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end". After quoting this passage, Sir Gorell Barnes P in *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141 at 150, went on to say: "For instance, in this country, where two actions are brought by the same person against the same person in different courts governed by the same procedure, and where the judgments are followed by the same remedies, it is prima facie vexatious to bring two actions where one will lie." In *Slough Estates Ltd v Slough Borough Council* [1968] Ch 299 at 314–5, Ungoed-Thomas J said that "it is prima facie vexatious and oppressive to sue concurrently in two British courts" and went on to quote Lord Esher MR's dissenting judgment in *The Christiansborg* (1885) 10 P.D. 141 at 148, where his Lordship said: "Where both actions are in England in the same tribunals – because if they are in tribunals where the proceedings are not identical or the remedies are not equally effective the law would apply which is applicable to foreign countries – prima facie it is vexatious, and therefore it would lie on the party who brings the second action to show that it was not so.""

[18] That again was a case involving the commencement of proceedings in two different Courts. Similar principles were expressed in *Boyd v Halstead, ex parte Halstead* (1985) 2 Qd.R 249 at 255 per McPherson J. To similar effect is *Henry v Lewis* (1882) 23 Ch.D 397 at 400 per Jessel MR and at 408 per

Bowen LJ; and *Royal Bank of Scotland Ltd v Citrusdal Investments Ltd* [1971] WLR 1469.

[19] Neither Mr Reeves QC nor Mr Maurice QC, who appeared for Branir, was able to direct me to any case where the same principle had been applied to the two proceedings brought in the same Court. There is, however, the decision of Finn J in *Lidden and Anor v Composite Buyers Ltd and Ors* (1996) 139 ALR 549, where his Honour said, at 559:

> "It is the case that, where proceedings have been started in one court, it is an abuse of process to duplicate proceedings in another court when a complete remedy is available in the first court. It likewise seems the case that where proceedings are pending in a court, a separate action in the same court should at least by (sic) stayed where both actions involve the same parties and the same subject matter and where the hearing of the first will effectively dispose of the need for the hearing of the second."

[20] To similar effect is *Caloundra Boatyard Pty Ltd and Anor v The Almonta and Anor* (1968) SASR 325 at 327 per Bray CJ. I therefore consider that the prima facie rule which applies to actions in different courts also applies where the proceedings are brought in the same court.

[21] In this Court there are two rules which are relevant. The first is O 23.01(1) which provides that where a proceeding generally or a claim in a proceeding is scandalous, frivolous or vexatious or an abuse of the process of the Court, the Court may stay the proceeding generally or in relation to a claim or give judgment in the proceeding generally or in relation to a claim.

[22] The second is O 9.12 which provides as follows:

"(1) Where 2 or more proceedings are pending in the Court and –

(a) a common question of law or fact arises in both or all of them;

(b) the rights to relief claimed in the proceedings are in respect of or arise out of the same transaction or series of transactions; or

(c) for any other reason it is desirable to make an order under this rule,

the Court may order the proceedings to be consolidated, or to be tried at the same time or one immediately after the other, or may order any of them to be stayed until after the determination of any other of them.

(2) An order for the trial together of 2 or more proceedings or for the trial of one immediately after the other, shall be subject to the discretion of the trial Judge."

[23] However, in this case, Branir has a statutory right to apply to the Court to have the caveat removed. Because the effect of a caveat is to operate similarly to an ex parte injunction, the burden of establishing that the caveat should continue rests upon Wallco. If Branir is successful in this application that will bring the proceedings based upon the originating motion to a conclusion and in the circumstances of this case, it is likely to raise either an issue stoppel or res judicata in the proceedings commenced by Wallco. If Branir is unsuccessful, the Court may nevertheless adjourn the originating motion until after it has heard and determined Wallco's action and it may then decide to order that the caveat be removed if Wallco is unsuccessful.

[24] It is not apparent to me that there is anything prejudicial or unfair to Wallco with the course that Branir is taking. Whilst I accept that possible varieties of abuse of process are only limited by human ingenuity (see *Culture International Pty Ltd v Scoles* (1991) 32 FCR 275 at 279) and injustice in the context of abuse of process is not limited to the purpose for which the proceedings were brought, but includes a consideration of the consequences of the proceedings for the person invoking the court's power, what usually must be shown is that the proceedings are "seriously and unfairly burdensome, prejudicial or damaging" and "productive of serious or unjustified trouble and harassment": see *Hamilton v Oades* (1989) 166 CLR 486 at 502 per Deane and Gaudron JJ.

[25] Mr Reeves QC submitted that the commencement of separate proceedings rather than an application by interlocutory summons in Wallco's proceedings (which he acknowledged would not be an abuse of process) would cause embarrassment to Wallco because Branir would be taking control of the proceedings.

[26] I am unable to accept this submission. Branir's application does not have the effect intended for by Mr Reeves QC. It is in any event the Court which controls the proceedings and not the parties. Furthermore, in its proceedings Wallco does not seek to litigate the question of whether the caveat was properly registered over the property. It is questionable whether Branir's application could properly be brought by interlocutory application in Wallco's action.

[27] Moreover, as Mr Maurice QC pointed out, the procedure adopted by Branir is required by O 4.05(b) of the Supreme Court Rules which provides that a proceeding shall be commenced by originating motion where, by or under an Act, an application is authorised to be made to the Court.

[28] It is plain to me that whichever procedure is adopted, the question of the validity of the caveat will have to be determined first. If the caveat is ordered to be removed because Wallco is unable to establish an arguable case that there was a contract formed between the parties which complied with s 62 of the Law of Property Act, the practical consequence is likely to be that Wallco's action will founder. On the other hand, if the application to remove the caveat is unsuccessful, Wallco's action for specific performance will continue to trial.

[29] There are two other matters that I wish to mention. First, it is not uncommon where a caveat has been lodged for the caveatee to commence proceedings first. In those circumstances, it is not the usual practice for the caveator to attempt to seek specific performance by way of counterclaim to the originating motion. Such a course, I think, is not possible: see O 10.01. The usual practice in my experience is for the caveator to seek specific performance by issue of a writ. Secondly, I note that on at least two other occasions, one in this jurisdiction and another in Queensland, a caveatee applied by originating motion after the caveator had sought specific performance by a writ. The two authorities to which I refer are *Schouten v Govard Pty Ltd; Govard Pty Ltd v Schouten and Anor* [2003] QSC 259 and

City Building Contractors (Hiring) Pty Ltd v Roadcon Pty Ltd (Action Nos 278 and 244 of 1987 in this Court). Whilst in neither of those cases was an application made for a stay, and therefore neither case is authority for the proposition that such proceedings are not vexatious, that is some indication that counsel in those cases did not feel that their clients' positions were embarrassed or vexed by the course then taken.

[30] In all the circumstances, I am satisfied that there is no proper basis for ordering that the proceedings be stayed and that the prima facie rule has been rebutted.

[31] I did raise with the parties whether an order ought to be made under O 9.12 for the consolidation of the two proceedings, but neither party sought an order for consolidation. In the circumstances, I do not consider that an order for consolidation is necessary.
