MacDonnell Shire Council v Miller [2010] NTSC 39

PARTIES:	MACDONNELL SHIRE COUNCIL v DEBBIE MILLER AND TONY FRANCIS PALMER AND MARIE ELANA ELLIS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AS 2 OF 2009 (20913798)
DELIVERED:	30 JULY 2010
HEARING DATES:	8 JUNE 2010
JUDGMENT OF:	MILDREN J

CATCHWORDS:

EQUITY – Association dissolved by Act of Legislative Assembly – assets and liabilities transferred to new Shire – trust previously created by Association for purposes of meeting legal costs to challenge validity of legislation – no formal written deed trust – interlocutory injunction granted restraining disbursement of funds – payment sought to meet legal costs from trust fund – Court has power to release funds from trust – should Court use discretion to release funds – general principle that defendants not be permitted to use monies of the plaintiff for their own legal costs – no security offered – whether applicant has a prima facie case that legislation invalid – application for funding refused

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), s 19(1), s 19(2), s 19(7)
Association Incorporation Act 1993 (NT), s 25AZE, s 25AZF, s 25AZH
Local Government Act 1993 (NT), Part 2A, s 28A, s 28A, s 28B, s 28C, s 28D, s 260, Schedule 3
Local Government Act 2006, s 257(3), s 257(4), s 262(1)(a), s 262(1)(b), s 262(1)(c), s 262(3), s 262(4)
Local Government Act 2008, Part 2.3, s 257, s 257(3), s 257(4), s 262
Local Government Amendment Act 2007 (NT), Part 5, Division 4, s 114D, s 114E, s 114F, s 114G, s 269
Northern Territory (Self-Government) Regulations, Reg 4(2)(b)
Northern Territory National Emergency Response Act 2007 (Cth), s 31(1)(a), s 34, Schedule 1, Part 1, Clause 4
Racial Discrimination Act
Self-Government Act, s 35
The Trustee Act, s 50A

Steven Gee QC, Commercial Injunctions, 5th ed, Sweet & Maxwell

Cogent Nominees v Anthony [2003] NSWSC 804; *United Mizrahi Bank Ltd v Doherty* (1998) 1 WLR 435; followed

Australian Mutual Provident Society v Goulden (1986) 160 CLR 330; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380; *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276; *Fitzgerald v Williams* [1996] Q 13 657; *Frigo v Culhaci* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Sheller JA & Sheppard AJA, 17 July 1998); *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia & New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2006] NSWCA 277; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612**;** *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1; *Sundt Wrigley & Co Ltd v Wrigley*, unreported, 23 June 1993, UKCA 685/93; *Wurridjal v The Commonwealth* (2009) 237 CLR 309; referred to

REPRESENTATION:

Counsel:

Plaintiff:	A Wyvill SC
Second & Third Defendants:	D Bennett QC, P McIntyre & A Tokley

Solicitors:

Plaintiff:	Povey Stirk
Second & Third Defendants:	Midena Lawyers

Judgment category classification:	A
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

MacDonnell Shire Council v Miller [2010] NTSC 39
No AS 2 of 2009 (20913798)

BETWEEN:

MACDONNELL SHIRE COUNCIL
Plaintiff

AND:

DEBBIE MILLER
First Defendant

AND

TONY FRANCIS PALMER
Second Defendant

AND

MARIE ELANA ELLIS
Third Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 30 July 2010)

[1] This is an application by the second and third defendants for approval to be given to the first defendant to pay out, from time to time and until further order, monies from an account held by the first defendant and referred to as the Amoonguna Litigation Trust, for the reasonable legal costs, including junior and senior counsel's fees and out of pocket expenses of the plaintiff,

incurred and to be incurred in respect of proceedings known as *Amoonguna Community Inc & Ors v Northern Territory of Australia & Anor* (action number 135 of 2009 (20930144)) and in respect of the second and third defendants, expenses incurred and to be incurred in respect of the these proceedings, upon presentation, from time to time, of apparently properly issued invoices by their respective solicitors on the record.

[2] In the alternative, the second and third defendants seek directions pursuant to s 50A of *The Trustee Act* so as to permit the first defendant to meet the same costs and disbursements as are referred to in paragraph [1] above.

[3] Counsel for the second and third defendants, Mr Bennett QC, read the following affidavits in support of the application without objection:

1. Affidavit of Mr B I Midena, sworn 29 May 2009 (except for paragraphs 18 and 19);

2. Affidavit of Mr B I Midena, sworn 15 June 2009;

3. Affidavit of Mr B I Midena, sworn 17 June 2009;

4. Affidavit of Mr B I Midena, sworn 5 February 2010 (except for paragraphs 13-16 and 21);

5. Affidavit of Mr B I Midena, sworn 8 June 2010; and

6. Affidavit of Marie Elana Ellis, sworn 12 February 2010 (on the basis that paragraphs 9 and 10 are to be understood as the deponent's understanding; paragraph 11 was not read).

[4] Mr Bennett tendered the following:

1. A copy of an Advice dated 13 February 1983 by Bryan Alan Beaumont QC (Ext P1).

2. A Memorandum of Advice, dated 11 May 1987, by the late A R Castan QC (Ext P2).

3. A bundle of documents relating to an application for legal assistance by the second and third defendants (Ext P3).

[5] Counsel for the plaintiff, Mr Wyvill QC, read the following affidavits upon which he relied in opposition to the application:

1. Affidavit of Ms P Major, sworn 2 June 2009;

2. Affidavit of Mr G J Stirk, sworn 2 February 2009;

3. Affidavit of Mr G J Stirk, sworn 7 June 2010;

4. Affidavit of Mr B I Midena, sworn 29 May 2009 (paras 13, 15; BIM-B documents 1, 3, 6, 7, 14; BIM-C documents 1-9);

5. Affidavit of Mr B R Byerley, sworn 30 July 2009 (paras 4-6);

6. Affidavit of Ms D A Miller, sworn 5 June 2009 (paras 3-7, 12);

7. Affidavit of Ms D A Miller, sworn 5 June 2009 (paras 3, 5-6)

8. Affidavit of Mr B I Midena, sworn 5 February 2010 (paras1,12)

No 135 of 2009

9. Plaintiff's summons of 17 June 2009

10. Affidavit of Mr B R Byerley, sworn 16 June 2008 (paras 1, 2, 47, 51)

11. Affidavit of Ms E M Robinson, sworn 20 June 2008.

Background Facts

[6] On 22 July 1975, Amoonguna Community Inc (Amoonguna) was incorporated as an association under the *Associations Incorporation Ordinance 1963* (NT). The objects and purposes of the Association, as set out in paragraph 4 of its constitution, as follows:

> **4. Objects and purposes of the Association**
>
> 4.1 The objects for which the Association is formed are:
>
> (a) To employ skilled persons to train and assist members to carry out the objects of the Association.
>
> (b) To foster the development of a co-operative and harmonious community at Amoonguna.
>
> (c) To promote the welfare and development of Amoonguna community.
>
> (d) To facilitate the provision of education, employment, housing, health and other services for members.

(e) To maintain and manage essential services and public utilities at Amoonguna.

(f) To maintain and operate a workshop for the repair and maintenance of Council vehicles and machinery.

(g) To encourage the maintenance and development of traditional and activities .

(h) To promote recreational activities and facilities.

(i) To employ part-time or full-time any person or persons, company or organisation to assist the Association in the carrying out of its objects.

(j) To apply for, receive and administer any grant or loan made to the Association under any State or Federal legislation or from individual or private organisations.

4.2 In addition to the basic objects of the Association, the objects and purposes of the Association shall be deemed to include the doing of all such other lawful things as are incidental or conducive to the attainment of the basic objects of the Association.

[7] Rule 7 of the constitution provides that the income and property of the Association is to be applied solely towards the objects and purposes of the Association; and no part thereof shall be transferred directly or indirectly by way of dividend, bonus or otherwise, to any member. Rule 33 provides that in the event of a winding up all surplus assets are to be transferred to a body with similar objects or to a charitable institution. Rule 6 limited membership of the Association to Aboriginal persons aged 18 or more who normally reside at Amoonguna Community or who are traditional owners of land within the Amoonguna Land Trust.

[8] Amoonguna Aboriginal Land Trust (the Land Trust) was established by the relevant Minister of the Commonwealth under s 4 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the *Land Rights Act*) to own the land set out in Schedule 1 of the Act pursuant to the provisions of the *Land Rights Act*. The land and the community are situated near Alice Springs. The Land Trust is itself a body corporate and became the registered owner of certain of the land on 7 March 2002. The Land Trust was the grantee of the town site of Amoonguna Community under a deed of grant held in escrow by the Central Land Council until 3 November 2008 when it became the registered owner of the whole of the land.

[9] Under s 25AZH of the *Association Incorporation Act* (NT),[1] the relevant Minister could by notice in the Gazette, confer upon an incorporated association certain functions and powers of a community government council under the provisions of the *Local Government Act*.[2] By notice in the Gazette dated 14 February 1996, the Minister declared Amoonguna Community Inc to be identified as such a Community Government Council approved for receipt of funding for the purposes of local government. As at the June 2006 national census, the Australian Bureau of Statistics recorded that the usual population of Amoonguna was 276 persons. In late 2007, Amoonguna Community Inc informed the NT Grants Commission that the population was 362 persons.

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1 This Act comprised the *Associations Incorporation Ordinance 1963* (NT) as amended by various Ordinances and Acts between 1969 and 1997. The Act was repealed and replaced by the *Associations Act* (NT) in 2003.

2 See also s 25AZE and s 25AZF of the *Association Incorporation Act* (NT). The *Local Government Act* comprised the *Local Government Act 1993* and various amendments thereafter until its repeal in 2008.

[10] In 2006, the Northern Territory government announced reforms to local government in the Northern Territory. Each small community, most with populations of less than 1,000 people, had its own separate council administration. This was seen as inefficient and it was proposed to amalgamate the old community government councils into several much larger local government bodies, to be called Shire Councils. This was to be achieved by a legislative reform package to take place over the ensuing year or so.

[11] In 2007, the *Local Government Amendment Act 2007* (NT) inserted a new Part 2A into the *Local Government Act 1993* (NT), comprising ss 28A to 28D. Under these provisions the Minister could, amongst other things, establish a body corporate as the prospective council for a Shire and appoint persons as managers thereof by the making of a "restructuring order" notified in the Gazette. On 16 October 2007, the Minister made Restructuring Order No 14 under s 28A, the effect of which was to create, inter alia, the MacDonnell Shire Council as the prospective shire council for an area including the area administered by the Amoonguna Community Inc (as well as eight other Shire Councils for other areas). On the same date, the Minister made appointments of Shire Managers for each prospective Shire Council.

[12] The *Local Government Amendment Act 2007* (NT) also contained a new Part 5, Division 4 (s 114D to s 114G), the object of which was to provide for the conversion of local governing associations into community government

councils. Section 114D empowered the Minister before the "date of transition" to amend "a local governing association's constitution as the Minister considers necessary or desirable in view of the association's impending conversion into a community government council on the date of transition".

[13] On 16 October 2007, the minister gave notice of the date of transition for the Amoonguna Community Inc and on the same date amended the Association's constitution. In consequence, Amoonguna Community Inc ceased to be an association incorporated under the *Associations Act* (NT) and became, without change of name or corporate identity, a community government council for the community government area described in its new constitution, under the name Amoonguna Community Incorporated. Without going into unnecessary details, under the new constitution, the former committee continued on as the Councillors and the former chairperson continued on as President of the council until elections were held. The constitution provided for compulsory adult suffrage of all residents on the electoral roll for the community government area (regardless of race or status).

[14] The assets and liabilities of the Amoonguna Community Inc remained the assets and liabilities of the reconstituted Amoonguna Community Incorporated.[3]

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[3] *Local Government Amendment Act 2007* (NT), s 114F.

[15] The *Local Government Amendment Act 2007* inserted s 269 into the Act which provided for just terms compensation if the amending provisions or any instrument giving effect to those provisions resulted in an acquisition of property.

[16] In 2007, the *Northern Territory National Emergency Response Act 2007* (Cth) (the *Response Act*) came into force. As at 30 June 2007, Amoonguna Community Incorporated held leasehold property and housing valued at $2,580,040. However, it did not have title to the land on which these assets were constructed; that rested with the relevant Land Trust. Under the *Response Act*, the Land Trust's land became subject to a leasehold interest in favour of the Commonwealth of Australia for a term of five years.[4] The constitutional validity of the *Response Act* has been upheld by the High Court in *Wurridjal v The Commonwealth*.[5] Under s 34 of the *Response Act*, any unregistered lease which existed prior to the date of the Commonwealth's lease continues in force as a lease granted by the Commonwealth. The status of the leasehold or other interests in the land held by Amoonguna is unclear. In its Further Amended Statement of Claim in action 135 of 2009, para 16, it pleads that it has by "express oral agreement and necessary implication" enjoyed a right to use and occupy the land for the benefit of the Traditional Owners until such time as the Traditional Owners altered, changed or revoked its consensual use,

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4 *Northern Territory National Emergency Response Act 2007* (Cth), s 31(1)(a) and Schedule 1, Part 1, Clause 4.

5 (2009) 237 CLR 309.

notwithstanding the lack of consent of the Commonwealth Minister or the direction in writing of the Amoonguna Aboriginal Land Trust of the Central Land Council as described in s 19 of the *Land Rights Act*.[6] Presumably, the alleged right to use and occupy the land is a tenancy at will which does not require the consent of the Minister,[7] but there is no pleading that there was a direction in writing by the Land Council or a decision of any formal kind by the Land Trust. In any event, s 71 rights under the *Land Rights Act* are not affected by the *Response Act*.[8]

[17] In 2008, the Northern Territory passed the *Local Government Act 2008*. Section 257 of that Act commenced on 23 May 2008. It provides for just terms compensation if "a person" acquires property by operation of "the relevant legislation" (which is defined to mean the *Local Government Act 2008* or the amendments made to the *Local Government Amendment Act 2007*).

[18] Section 257 also provides a power in this Court to annul the dissolution of a body corporate which has been dissolved by the provisions of the *Local Government Act 2008,* to enable it to make a claim for compensation and to "make any further provision that may be necessary or appropriate to secure the continued existence of the body corporate or to facilitate its claim for

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6 *Land Rights Act*, s 19(1), s 19(2).

7 *Land Rights Act*, s 19(7).

8 *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

compensation under this section".[9] However, the Court cannot restore the body corporate's powers of local government.[10]

[19] The remaining sections of the *Local Government Act 2006* came into force on 1 July 2008 (the new Act). As a consequence, the following occurred:

- The MacDonnell Shire Council became a shire council for the area for which it was constituted.[11]

- The constituent councils for local government subsumed into the shire were dissolved.[12] This included Amoonguna.

- All the property rights, liabilities and obligations (including contractual rights, liabilities and obligations) of the constituent councils (including Amoonguna) became the property rights, liabilities and obligations of the Shire Council.[13]

- The Shire Councils continued under the control and management of the managers of the relevant shires until the first general election of the new Shires.[14]

- The *Local Government Act 1993* as amended was repealed.[15]

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9 s 257(3).
10 s 257(4).
11 s 262(1)(a) and s 262(1)(b).
12 s 262(1)(c).
13 s 262(1)(c).
14 s 262(3) and s 262(4).
15 s 260 and Schedule 3.

[20] In anticipation of the new Act coming into force, Amoonguna decided it wanted to create a trust "for the purposes of meeting legal costs for the proposed claims in relation to the validity of amendments to the *Local Government Act* and related matters (the Amoonguna Litigation Trust) and in December 2007, the first defendant, Ms Miller, agreed to act as the trustee. Ms Miller was Amoonguna's bookkeeper.

[21] At Amoonguna's Annual General Meeting and Council Meeting held on 28 December 2007, a motion was carried to "approve the transfer of all untied Council funds into the Book-Keeper's (Debbie Miller) trust account to cover legal fees, employees' entitlements, provision of contractual liabilities" (sic).

[22] There is no evidence of any formal written trust deed setting out the terms of the alleged trust, although there is some correspondence which the defendants assert is evidence of the existence of the trust.[16]

[23] On 7 March 2008 and 22 April 2008, two sums totalling $90,000 were paid into Ms Miller's trust account by Amoonguna.

[24] On 22 May 2008, Amoonguna commenced proceedings in the High Court of Australia against the Northern territory of Australia in action No D3 of 2008 (the High Court action) claiming that the relevant provisions of the *Local Government Amendment Act 2007* which dealt with the restructuring of Amoonguna, the amendment of its constitution, the conversion of

[16] Affidavit of B I Midena, sworn 29 May 2009, para 15, documents 1, 2 and 3 in the annexure "BIM-C", thereto.

Amoonguna into a community government council, the Minister's restructuring order and s 269 of that Act were invalid; and seeking injunctions designed to prevent Amoonguna being abolished and its assets and liabilities transferred to the plaintiff. An application for interlocutory injunctions was heard by Hayne J on 24 June 2008. The principle grounds argued in support of the application were that the relevant legislation was arguably invalid because it conflicted with the provisions of the *Response Act* and that the provisions for compensation on just terms were such as to deprive the compensation that may thus be achieved of the characteristics of just terms. A subsidiary argument based on inconsistency with the *Racial Discrimination Act* was also raised. His Honour refused the application because the balance of convenience favoured refusal of the relief sought. Whilst not expressing any concluded view of Amoonguna's ultimate prospects of success, his Honour commented that it was not plain to him that the legislation was invalid as Amoonguna contended.

[25] Subsequently, the High Court made orders joining other parties to the High Court action and remitting the High Court action to be tried in this Court. This action has now become action number 135 of 2009 (20930144) in this Court.

[26] On 17 June 2008, two amounts totalling $33,518 were transferred to Ms Miller's trust account. After the dismissal of the interlocutory applications, Amoonguna transferred a further $566,988.52 to her account.

Prior to 1 July 2008, an amount of $169,358.33 was paid by Ms Miller to lawyers representing Amoonguna in the High Court action.

[27] On 1 July 2008, Amoonguna ceased to exist by virtue of s 262 of the *Local Government Act 2008*.

[28] On 21April 2009, the plaintiff commenced this action seeking payment to it of the funds held by Ms Miller in the Amoonguna Litigation Trust. The defendants, Palmer and Ellis, who are respectively the former President of Amoonguna and a member of Amoonguna's council, were later joined to represent the interests of Amoonguna. The Defence filed by Palmer and Ellis raises the same constitutional issues as were raised in the High Court action.

[29] The High Court remitted the High Court action to this Court on 24 August 2009. However, I was not made aware of this order until some time after September 2009.

[30] On 15 September 2009, I granted an interlocutory injunction restraining Ms Miller from paying any monies out of the Amoonguna Litigation Trust, except as may be approved by the Court or Judge and, subject to the plaintiff filing and serving an Amended Statement of Claim, I granted a stay of the action pending the decision of the High Court as to which Court, if any, the trial of the issues in the High Court action is remitted.

[31] So far as the funds remaining in the Amoonguna Litigation Trust are concerned, it is not clear exactly how much money presently remains in that account. On one view of the evidence, the amount could be either $590,199.94 or $531,047.77.[17] On this view, there are outstanding fees due to Amoonguna's lawyers which have not been paid and, in addition, fees incurred which have not yet been invoiced.

[32] It is surprising to me that the applicants were not frank as to the precise amounts paid out or remaining unpaid or yet to be invoiced. There is a suggestion by the respondent (not supported by any clear evidence) that the outstanding unpaid fees are in the order of $169,000. No information is available as to the value of the fees not yet rendered. According to Mr Midena's affidavit sworn 5 February 2010:[18]

> The legal costs of the Plaintiffs in the Principal Proceedings[19] and of the Second and Third Defendants in these proceedings are presently estimated to exceed $500,000, plus expert witness' fees, logistical costs and other disbursements.

[33] That estimate apparently included costs and disbursements (unspecified) for Amoonguna to seek reinstatement and compensation. It is not clear whether the estimate includes outstanding or yet to be invoiced legal costs.

[34] Subsequently, counsel for the applicants submitted a list of legal fees and disbursements rendered to 7 June 2009. This list indicates:

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17 Plus interest, presumably, in each case.

18 Para 27.

19 i.e. the remitted action.

1. The total amount of legal fees invoiced to that date is $312,106.56.

2. The total amount remaining unpaid is $55,083.64.

3. The total amount expended by the Trust was $70,728.75.

4. Amoonguna paid $186,294.17 before the Trust was established.

5. These costs do not include the costs of Ms Miller.

6. These costs relate to the constitutional challenge, whether in these proceedings or in the High Court action.

[35] Assuming this information is accurate, the amounts standing to the Trust fund is in the order of:

Amounts paid into the Trust Fund (para 24 & 27)[20]	$ 689,606.52
Less amounts paid out	$ 70,728.75
	$ 618,877.77
	(Plus, presumably, accumulated interest)

[36] The difficulty with this information is that it does not accord with the evidence of Ms Miller's solicitors that the current balance of the funds is $531,049.77.[21]

[37] Doing the best I can, it seems that the amount held in the trust fund is somewhere between $532,000 and $619,000 (in round figures), plus,

[20] Affidavit of Ms Miller, para 7.

[21] Cridland's email of 9 June 2009.

presumably, accumulated interest, which might amount to possibly another $50,000, assuming a rate of five per cent per annum, less bank fees and charges.

[38] Counsel for the applicants, Mr Bennett QC, submitted that there was no reason to suppose that the funds in the Amoonguna Litigation Trust would be insufficient to dispose of the litigation, so far as it concerns disposal of the constitutional question, but he conceded that a large part of the funds would be consumed. I was told that the hearing to decide the constitutional question alone would take two weeks. It is common ground that this question would have to be determined first. Whether the challenge succeeded or failed, this would dispose of both actions, apart from the compensation claim.

Availability of funds from other sources

[39] The applicants have unsuccessfully sought funding from three other sources, the Northern Territory government, the Central Land Council and the Commonwealth. The Northern Territory has refused funding, although it has indicated that it would favourably consider funding for the compensation claim. The Central Land Council has indicated that it has no funds available to support the challenge. The application to the Commonwealth and the results of that application have been tendered as Ext P3. The application had attached to it an estimate of the costs required, but this document was not included in Ext P3. The application was initially refused by letter dated 15 July 2009, on various grounds, but principally

because the constitutional challenge related to Territory legislation rather than Commonwealth legislation. On 15 September 2009, the applicants sought a review of that decision. By letter dated 24 December 2009, the Commonwealth confirmed its previous decision, i.e. no funding would be provided, principally on the same ground. The likely merits of the constitutional challenge were not considered.

[40] Affidavits have been filed by each of the applicants indicating their own resources. They are persons of modest means. The community itself is small and being an Aboriginal community, I would not expect that it could raise enough funds to assist the applicants in any meaningful way.

[41] I am satisfied that if access to the Amoonguna Litigation Trust for funding is not made, the applicants' constitutional challenge is unlikely to proceed to a hearing.

Relevant legal principles

[42] The power to order the release of funds from the Trust to pay for legal costs was not disputed. However, there is a dispute between the parties as to the relevant principles upon which the Court would exercise this power.

[43] Counsel for the applicants submitted that the relevant considerations were matters of public policy and that the applicant had to show an arguable case, in the sense that there was a serious question to be tried. I was referred to

Carl Zeiss Stiftung v Herbert Smith & Co (No 2).[22] In that case, the plaintiffs claimed to be the original Carl Zeiss Stiftung Foundation in East Germany and brought a passing off action against another institution called "Carl Zeiss Stiftung", a company formed in West Germany after the occupation by the Soviet Union of East Germany. Subsequently, the plaintiff amended its Statement of Claim to assert that the assets of the West German company were its property or held in trust for them. The defendants were the solicitors for the West German company, which operated in the United Kingdom. The West German company paid the defendants their legal fees in defending the action which had not yet come to trial. The East German company then brought an action against the solicitors for an account on the basis that the monies used to pay their fees were its property. A preliminary issue to be determined was whether the solicitors would be accountable to the plaintiffs for their fees. The preliminary issue was decided by Pennycuick J, who held that a claim of this kind was contrary to public policy because it obstructed the course of justice. Upon appeal, the Court of Appeal dismissed the appeal on the ground that the solicitors had acted honestly and without notice of any trust and that knowledge of a trust was not to be implied merely because it was claimed against their client that the monies were held in trust for the plaintiffs. Danckwerts LJ said:[23]

> This is sufficient to dispose of this appeal, and it is not really necessary to decide the question on which the learned judge based

[22] [1969] 2 Ch 276.

[23] *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 at 293.

> his decision, namely, that a claim of this kind against solicitors having the conduct of the action is contrary to public policy in the sense that it obstructs the course of justice. But it must not be taken that I am expressing any disapproval of the decision of Pennycuick J on this point. There is a good deal to be said for this contention. If it is not correct, it puts a heavy burden on solicitors, and I was not much impressed by the suggestions of counsel for the plaintiff as to the way in which solicitors can protect themselves. It would be a burden on persons seeking legal assistance as well as on the solicitors. But it may be that this point is part of the general protection of agents which we have been considering.

[44] Sachs LJ seemed to be unsympathetic to the point.[24] Edmund Davies LJ said he did not consider it.[25] A copy of the judgment of Pennycuick J is not available.

[45] Counsel for the respondent, Mr Wyvill SC, submitted that the correct principle to be applied is that the Court has a discretion to release funds which may belong to the respondent to defend the proceedings brought by the respondent if the applicant can demonstrate a strong probability that the funds are the applicant's and if the applicant can demonstrate that the applicant has no other source of funds. In the exercise of that discretion, it was submitted that the Court must balance the injustice of not permitting access to the funds against the loss to the other party of funds which they claim belong to them, the general principle being that a defendant should not be permitted to use the plaintiff's money for his own legal costs.[26]

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[24] *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 at 299-300.

[25] *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 at 304.

[26] Steven Gee QC, *Commercial Injunctions*, 5th ed, Sweet & Maxwell at 630-631.

[46] Mr Wyvill SC referred me to *United Mizrahi Bank Ltd v Doherty*,[27] where the relevant English authorities were discussed. These were all cases where the plaintiff had obtained an injunction based upon a proprietary claim, as in this case, rather than based upon a remedy in damages as in the more usual Mareva injunction type of case. The Court held that where the plaintiff's proprietary claim was so strong that the Court could decide that it was well-founded at an interlocutory stage, the application by the defendant to finance his defence to the action out of the claimed funds would be refused; otherwise a difficult "balancing act" was required to be undertaken by the Court.[28] If the Court decided to grant the application, it may require terms, usually in the form of security, to safeguard the plaintiff's claim to the disputed funds.[29] If the cost of defending the proceedings is likely to dissipate the whole or a substantial part of the funds in dispute, it seems to me that the balancing act will generally be exercised by refusing the application, particularly if there are no other assets which are not the subject of the proprietary claim which could be used as security should the plaintiff's claim ultimately succeed.

[47] Counsel also referred me to a number of authorities which dealt with applications to release funds from assets frozen under a Mareva injunction for the purposes of paying for the defendant's legal costs to defend the action. The principal distinction between those cases and the type of case

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[27] (1998) 1 WLR 435.

[28] *United Mizrahi Bank Ltd v Doherty* (1998) 1 WLR 435 at 439, citing an unreported decision of the Court of Appeal in *Sundt Wrigley & Co Ltd v Wrigley*, 23 June 1993. See also *Fitzgerald v Williams* [1996] Q 657 at 669.

[29] *United Mizrahi Bank Ltd v Doherty* (1998) 1 WLR 435 at 439-440.

I am now dealing with is that a Mareva injunction is typically awarded to prevent the defendant from dissipating its own assets, rather than an injunction to prevent the dissipation of assets which the plaintiff claims belongs to it. In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*,[30] the majority judgment of the High Court approved a passage from *Jackson v Sterling Industries Ltd*,[31] where Wilson and Dawson JJ said:

> It exists not to create additional rights but to enable a court to protect its process from abuse in relation to the enforcement of its orders. It is neither a species of anticipatory execution nor does it give a form of security for any judgment which may ultimately be awarded.

[48] In such cases, it is common for provision to be made for the defendant to have access to his or her own assets for living expenses, payment of debts and legal expenses. Ideally, such provision should be made at the outset, but if not, it should be engrafted onto the order at the earliest outset.[32] In *Cogent Nominees v Anthony*,[33] Austin J, following the *United Mizrahi Bank* case, refused an application to allow the appellants to have access to funds over which they had no proprietary claim to fund their legal expenses.

[49] I was referred by both parties to the complex circumstances which were considered by the New South Wales Court of Appeal in the *Metropolitan*

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30 (1998) 195 CLR 1 at 44-45 per Brennan CJ, McHugh, Gummow, Kirby & Hayne JJ.

31 (1987) 162 CLR 612 at 619.

32 *Frigo v Culhaci* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Sheller JA & Sheppard AJA, 17 July 1998). See also the orders made in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 410.

33 [2003] NSWSC 804.

Petar case.[34] The submission of Mr Bennett QC is that the circumstances in that case are distinguishable on the basis that the funds were allegedly held upon a declared trust. The MacDonnell Shire Council has in these proceedings, claimed that the funds were held upon trust for Amoonguna prior to its dissolution and, as the plaintiff has, by operation of the statutes acquired all of the assets of Amoonguna, are now held upon trust for it. I have already held that the plaintiff has a prima facie case when I granted the original injunction. True is it that the nature of the trust in that case is different, but, in my opinion, this does not alter the fact that if, as the plaintiff asserts, the property is held on trust for it, the use of the funds would amount to a breach of trust. Further, on the facts before me, as there is no security offered, if the funds were so used, there is a real risk that, if the plaintiff's claim succeeded, the plaintiff would have no real prospects of the loss being made good. In the *Metropolitan Petar* case, the Court held that the balancing exercise favoured restraining the use of the funds to pay past legal costs. I note in this respect, that the payment of past costs would have, in that case, exhausted the funds available to defend the litigation.

[50] I consider that the principles in the line of authority stemming from the *United Mizrahi Bank* case are applicable to the circumstances of this case and that I have to carry out the difficult balancing act in deciding whether or not to grant the relief sought.

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[34] *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia & New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2006] NSWCA 277.

[51] I turn now to consider whether the applicants have established a prima facie case or, at least, a serious question to be tried, that the relevant legislation is unconstitutional. The principle argument of Mr Bennett QC was that the scheme of the legislation was inconsistent with the scheme of the *Land Rights Act*. It was put that the purpose of the *Land Rights Act* was that the land, which is Aboriginal land, is to be held by the Land Trust for the traditional owners to enable a form of control by the Aboriginal community over their land. Mr Bennett QC referred to *Australian Mutual Provident Society v Goulden*,[35] where the test for validity of State legislation, said to be inconsistent with Federal legislation, was whether it "would alter, impair or detract from" the scheme of regulation established by the latter. How the Territory legislation "altered, impaired or detracted from" the *Land Rights Act* was not made clear to me. For example, the *Local Government Act 2008* specifically exempts land held by a land trust from the payment of rates.[36] The role, functions and objectives of councils set out in Part 2.3 of that Act do not strike me as being inconsistent with the *Land Rights Act*. Mr Bennett QC relied upon the opinions of Mr Beaumont QC and Mr Castan QC, which I have referred to previously. Those opinions were written many years ago. They related to a previous *Local Government Act*, since repealed.

Mr Beaumont QC concluded that the relevant legislation was invalid because it sought to substitute its own plan of land management for the Commonwealth scheme of Aboriginal land ownership and management.

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[35] (1986) 160 CLR 330 at 337.

[36] s 145(2)(a).

Mr Castan QC said that "a tier of authority, having power to grant rights to persons over Aboriginal land, or alternatively to refuse permits to proposals put forward by the Land Council, after due consultation and consent, as provided by the *Land Rights Act*, is to create a structure inherently incapable of operating concurrently with the *Land Rights Act*". Land management, so far as I can see, is not the focus of the *Local Government Act*.

[52] The other arguments, which the applicants wish to run, do not strike me as having significant merit. I do not say that any of these arguments are doomed to fail, but it is far from clear to me that they have significant prospects of success.

[53] The first of these arguments claims that the *Local Government Act 2007* was contrary to the *Racial Discrimination Act*. The reason advanced was that by altering Amoonguna's membership to include non-Aboriginal residents of Amoonguna, when its constitution required all members to be Aborigines, it somehow violated that Act. What provision of the Act it was said to violate was not explained and it is not apparent to me on a reading of the Act.

[54] The next argument is that s 269 of the 2007 Act did not provide for just terms. Like Hayne J, I am unable to see why this is so. Further, it is not clear to me that the *Local Government Act 2007* acquired any of Amoonguna's property. In any event, just terms have been provided for, retrospectively as well as prospectively, by s 257 of the *Local Government Act 2008*. Mr Bennett QC somewhat scathingly referred to this provision as

an "historic wrecks" provision. By this, I take him to refer to the powers of this Court to order, under s 257(3), the annulment of the dissolution of Amoonguna "and to make any further provision that may be necessary or appropriate to secure the continued existence of the body corporate or to facilitate its claim for compensation…" As the note to s 257 makes clear, the Court might, by its order, convert the body corporate into an association under the *Associations Act*. The Court could and no doubt should ensure that the new Association would continue to exist for the benefit of its former members. It is not readily apparent to me that these provisions are ineffective in providing just terms compensation.

[55] Finally, I was referred to Reg 4(2)(b) of the *Northern Territory (Self-Government) Regulations*, which provides that Ministers of the Territory do not have executive authority under s 35 of the *Self-Government Act* in relation to rights in respect of Aboriginal land and the *Aboriginal Land Rights (Northern Territory) Act 1976*. It was put that the Minister's restructuring order was invalid because the Minister had no executive authority to make that order. Again, it is not readily apparent to me that this is likely to be so.

[56] It was submitted by Mr Wyvill SC that, whatever may be the outcome of the litigation, it will not result in the restoration of local government powers to Amoonguna. The purpose of the litigation, according to the applicant's submission for Commonwealth funding, was to "re-establish our capacity for self-determination and management of our land and community – and our

assets". It is not apparent to me that the establishment of the plaintiff Shire will interfere in any way with the rights of the Land Council and the Land Trust to manage its own land, except perhaps to the extent that the plaintiff Council will be able to negotiate a sub-lease of Aboriginal land with the Commonwealth under the *Response Act*. Whatever powers of local government Amoonguna enjoyed are not restorable if the legislation is invalid, unless further valid legislation conferring local government powers is enacted by either the Commonwealth or the Territory. Whether that would occur or not is entirely speculative.

[57] So far as the restoration of Amoonguna's assets are concerned, I should mention briefly what they are. As at 30 June 2008, Amoonguna's net assets allegedly amounted to $4,676,294.00, of which $1,220,583 was cash at the bank. The net current assets totalled $1,084,781 after deducting current liabilities. Since 1996 and possibly earlier, Amoonguna claims to have undertaken various community development works including extending its administration building, refurbishing its town hall, upgrading the town sewerage system, building a community health clinic, a plant and equipment workshop, a sports and recreation centre and an arts centre. It has built a number of new houses, renovated an existing house for use as an aged care facility and built and furnished a small community store.

[58] So far as its community activities are concerned, it established the Amoonguna Construction Team as a locally based building and training team of skilled and trainee workers. It also provided employment for staff

and for local employment through the Community Development Employment Scheme. Amoonguna employed 24 full time staff and seven part time staff, many of whom were long terms employees. It provided a number of community services. These included community housing, health services and a local garden and orchard. The purpose of the applicants' challenge is to prevent assets it has built up and the operation of services it has provided passing to the plaintiff Shire.

[59] According to Amoonguna's accounts, a large part of its operating revenue for 2008 consisted of government grants. These totalled approximately $2,656,101 out of a total of $3,917,666. Of the balance of $1,167,759, Centrelink payments and Medicare income totalled $267,338. Unexpended grants totalled only $36,303.

[60] Mr Wyvill SC submitted that there is no practical advantage in permitting the funds to be used for a constitutional challenge. Clearly a great number of the community activities which Amoonguna had previously managed was financed largely by grants and those grants will probably now be made to the Shire, which will now provide those kind of services. At least some of those services may ultimately require the cooperation and consent of the Amoonguna Land Trust (to the extent that the services require the use of Aboriginal land) if they are to be provided by the Shire. It may be that if Amoonguna receives compensation and is reconstituted it could continue to operate some of those services as well. If the constitutional challenge is successful, the continuation of the provision of all of the services will

depend upon the continuation of government grants, but some may be able to be continued from income generated by Amoonguna's own activities and use of its assets. A successful challenge to the legislation is therefore not likely to be totally fruitless.

[61] Mr Bennett QC submitted that a statutory scheme which has the effect of dissolving Amoonguna and compulsorily acquiring all of its assets so that it had no funds left to challenge the validity of the scheme must be unconstitutional. There is some force in this submission, although no authority was cited to support it. As against that, the remedy of compensation is available and Amoonguna can be restored as an association and, once restored, either its assets can be transferred to another association having like objects and membership, or it could continue on and change its constitution as it saw fit. In a practical sense, Amoonguna can be reconstituted to carry out, at least, its former non-government objects. As mentioned before, the Northern Territory has indicated that it would favourably consider funding to assist Amoonguna to make its compensation claims. If it were to transpire that such funding was refused, it is open to the applicants to make a further application to this Court to release funding for that purpose.

Clean hands and estoppel

[62] Mr Wyvill SC submitted that the Court should refuse the application because it does not come with clean hands. The basis of this submission was that Amoonguna had not revealed to Hayne J that the trust fund had

been established to provide funding for the constitutional challenge and monies had already been expended from the fund. No application was before the High Court for future or past funding of the High Court action. The nature of the trust fund and of Amoonguna's precise assets did not bear on the question to be decided by Hayne J.

[63] A submission was also made that Amoonguna should have made this application in the High Court. I do not see why this should be so. At the time, Hayne J delivered judgment, no injunction restraining the use of the trust fund had been granted. The proper time for making this application was after either the time the Shire applied for its injunction, or at least soon thereafter.

[64] I do not consider that there is any substance to either of these contentions.

Conclusions

[65] I consider that I should exercise my discretion to refuse the application. The plaintiff has established a prima facie case to the funds which may well be trust funds. If the applications are successful, the funds are likely to be largely, albeit possibly not entirely, spent on financing the litigation. The plaintiff's claim to the funds is a proprietary claim and a stronger case is required to release the funds than would be the case if the funds belonged to the applicants. It is clearly not their money, although it may belong to Amoonguna. No security is offered to repay the money if the challenge is unsuccessful. As to the claim that the legislation is invalid, at this stage of

what are interlocutory proceedings, I am unable to say that that claim is doomed to failure, but the claim does not appear to be very strong. The applicants have another remedy open to them under the provisions of the legislation for compensation and it is also possible for Amoonguna to be reconstituted to enable it to make its claim. It is still open for funding for the claim for compensation to be obtained from the Northern Territory government.

[66] The order is that the application for funding is dismissed. I will hear the parties as to costs. I will adjourn the remainder of the matters raised on the summons[37] sine die until the applicants have had an opportunity to consider their position and I grant liberty to apply on 48 hours notice.

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[37] These deal with case-flow management issues.