Pandolfi v Carlsund [2012] NTSC 36

PARTIES:	PANDOLFI, Stephen v CARLSUND, Carl
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING ORIGINAL JURISDICTION
FILE NO:	No 78 of 2009 (20918100)
FORWARDED TO PARTIES:	5 June 2012
HEARING DATES:	2 March 2012
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

PROCEDURE – Anti Suit Injunction – Inherent Power of the Court – Preventing Commencement of Action on Same Subject Matter – Relief Granted

Motor Accidents (Compensations) Act (1979) s 5(6),
Supreme Court Act s 69

CSR Ltd v Cigna Insurance Australia Ltd (1997) 189 CLR 345; applied

DL & JE Graetz v NTHG Pty Ltd [2002] NTCA; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; followed

Anglo Australian Foods v Von Planto and Others (1988) 20 FCR 34; *Harding v Wealands* [2006] UKHL 32; *Imbree v McNeilly* (2008) 236 CLR 510; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; referred to

REPRESENTATION:

Counsel:

Applicant/Defendant:	Mr Livesey QC, Ms Osborne
Respondent/Plaintiff:	N/A

Solicitors:

Applicant/Defendant:	Hunt and Hunt Lawyers
Respondent/Plaintiff:	N/A

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

Pandolfi v Carlsund [2012] NTSC 36
No. 78 of 2009 (20918100)

BETWEEN:

STEPHEN PANDOLFI
Applicant

AND:

CARL CARLSUND
Respondent

CORAM: BLOKLAND J

REASONS FOR RULING

(Delivered 5 June 2012)

Introduction

[1] Orders were made on 2 March 2012 restraining the plaintiff from commencing or continuing proceedings in the United Kingdom for damages arising out of a motor vehicle accident that occurred in 2006 in the Northern Territory.[1] The substantive proceedings were filed in this Court on 27 May 2009.

[2] Brief oral reasons were given at the time of making the orders. Given the orders were made after the plaintiff's original Northern Territory (local) solicitors had withdrawn from the record but prior to engaging his current

[1] The formal orders of 2 March 2012 now filed contain the full text of Orders (1) – (5) which were made.

solicitors,[2] it is appropriate to publish reasons. These reasons are intended to be read co-extensively with the oral reasons previously given.

Background

[3] Some history is required to appreciate why the orders were made. The filed and served material I accepted included the following: [3]

- Proceedings were commenced in this Court on 27 May 2009 on the filing of a writ endorsed with both a Statement of Claim (Part 2) and a Statement that the place of trial sought was Darwin (Part 3).

- The substantive proceedings seek damages in respect of injuries sustained in an accident allegedly as a result of the defendant's negligence. The date of the accident is 31 May 2006.

- Since the proceedings were commenced, both parties have been engaged, at some stages deeply engaged, in the interlocutory processes of this Court.

- The defendant's solicitor believes the matter would be ready for trial this year.

- The plaintiff resides in the United Kingdom and has been receiving medical care.

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[2] Since the application was heard, the plaintiff has engaged new solicitors, Priestleys Lawyers. Ms Sibley of counsel has appeared at later case management mentions.

[3] The primary evidence relied on was contained in the affidavit of Stewart James Boland, sworn 14 December 2011.

- On 16 September 2010 the plaintiff's local solicitor advised the Registrar of this Court that after conference with Senior Counsel "an issue" had been raised and some time was required to resolve that issue.

- The Registrar of this Court was told at a directions hearing on 8 February 2011 by the plaintiff's then Counsel that the plaintiff had engaged solicitors in the United Kingdom. An issue was raised about whether the plaintiff was a person under a disability for the purposes of Order 15 of the *Supreme Court Rules*. Solicitors in the United Kingdom have continued to be engaged since that time.

- The Registrar made orders that any application to appoint a litigation guardian under Order 15 of the *Supreme Court Rules* be made within four weeks; no application has ever been made.

- Various interlocutory processes were undertaken including agreements in relation to the cost of an assessment and the filing and serving of amended pleadings.

- On 5 December 2011 the then local solicitors for the plaintiff advised for the first time that the plaintiff would soon make an application for an extension of time to commence proceedings in the United Kingdom. A settlement conference that had been listed in this Court for 8 December 2011 was consequently adjourned, with costs reserved.

- The application for these orders was filed on 14 December 2011. An undertaking was made by the plaintiff not to commence proceedings in the United Kingdom, initially until close of business on 24 January 2012 or until the matter could be conveniently heard.[4]

- Prior to the matter being heard on 2 March 2012, (this was an agreed mutually convenient time), the previous local solicitors ceased to act for the plaintiff.

- The plaintiff had the assistance of local solicitors since about May 2009. The original local solicitors were successful in obtaining leave to withdraw from acting for the plaintiff on 1 March 2012.[5] The reason given for the plaintiff's original local solicitors seeking leave to withdraw was that the plaintiff's solicitors in the United Kingdom had been retained to advise the plaintiff on whether the local solicitors had acted negligently in failing to advise the plaintiff to commence proceedings on his behalf in the United Kingdom rather than the Northern Territory.[6]

Principles Relevant to the Relief Sought – an *anti suit injunction*

[4] Since at least the decision *CSR Ltd v Cigna Insurance Australia Ltd*,[7] it is clear the inherent or implied powers of an Australian court to protect the integrity of its processes extend to the grant of an anti-suit injunction. The

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4 A description of this part of the process is set out in the affidavit of Stewart James Boland sworn 28 February 2012.
5 Order of Master Luppino 1 March 2012.
6 Affidavit Josine Wynberg, 21 February 2012.
7 (1997) 189 CLR 345.

remedy is discretionary, directed against the relevant party in person and exercisable when the ends of justice require it.

[5] The equitable jurisdiction in some circumstances may provide an alternative basis enabling the grant of relief to similar effect,[8] however equity is not relied on by the applicant/defendant. *CSR Ltd v Cigna* confirms an injunction may be granted by a court in its equitable jurisdiction to restrain proceedings in another court if the bringing of those proceedings involves *unconscionable conduct*, or is *vexatious* or *oppressive*.

[6] As proceedings have not yet commenced in another jurisdiction, a full consideration of *forum non conveniens* is not required, (beyond considering whether this Court is a clearly inappropriate forum).[9] Similarly, traditional cautionary approaches to the interests of comity do not arise. Comity may in some cases be of marginal weight in the overall exercise of the discretion to grant relief, however here there is no issue about confidence in a foreign court or jurisdiction but rather the focus is on the effect of the conduct of a party attempting to run two sets of proceedings arising from the same substratum of facts. Comity would seem to be a barely relevant consideration in the exercise of the discretion to grant relief. In any event, in circumstances where the defendant may be required to answer the same case of negligence in two separate proceedings, (having defended one action for three years in this Court), there should in my view be protection afforded

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8 *CSR Ltd v Cigna* (above) at 390, 392.
9 *CSR Ltd v Cigna* (above) at 398.

from the vexation and oppression necessarily inherent in defending both proceedings.

[7] In *CSR Ltd v Cigna*[10] the inherent power to grant an anti-suit injunction was said to be capable of being exercised when the administration of justice demands or when necessary for the protection of the court's own proceedings or processes.

[8] Given the interest this Court has in protecting its own processes, it is in my view appropriate the relief was sought in exercise of this Court's inherent or implied powers. No other Court has an interest in the proceedings. Any proceedings in another Court now taken on the same subject matter in complete correspondence with the relief sought here, would tend to interfere with the proceedings pending in this Court. There are parallels with the power of a Court to exercise the discretion to stay proceedings for abuse of process, however the unusual context of the possibility of two sets of proceedings in two different courts requires particular considerations not always present in abuse of process applications. In *CRS Ltd v Cigna* the availability of anti-suit injunctions was described as a *counterpart* power to abuse of process to *protect* the integrity of the Courts processes once set in motion. [11]

[9] If the plaintiff were to now commence proceedings in another Court, the parties would practically be maintaining parallel proceedings. The costs,

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10 At 392.
11 At 391.

delay and inconvenience can readily be appreciated. In any 'race for judgement'[12] that might transpire between two Courts in this matter, this Court is in any event in a preferable position given the proceedings have been pending for three years. It is noted the plaintiff would need to first seek an extension of time in the United Kingdom.

[10] I am confident the inherent power of this Court authorises the grant of the orders sought. Additionally s 69 *Supreme Court Act* provides a general legislative basis for granting injunctive relief. Further, the granting of such an order in my view does not go beyond what is reasonable protection or enforcement of the jurisdiction invoked.[13] The order is necessary to enable the Court to effectively exercise its jurisdiction.

Particular Considerations on Whether to Grant the Anti-Suit Injunction

[11] It is apparent that what underpins the plaintiff's previously stated desire to commence proceedings in the United Kingdom is advice that ultimately proceedings in the United Kingdom may be more beneficial to him in terms of recovering a higher level of damages.

[12] As mentioned, a full consideration of *forum non conveniens* is not required, however before granting the relief sought this Court should first consider whether it is an appropriate forum in the sense of *Voth v Manildra Flour*

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[12] An unfortunate vernacular term noted to describe the consequences for circumstances such as these.

[13] As explained by Riley J (as he then was) in *DL & JE Graetz v NTHG Pty Ltd* [2002] NTCA at [40] – [45].

Mills Pty Ltd.[14] Since *Voth*, it is not necessary to consider which court is the 'clearly more appropriate forum' but rather to determine, in this instance, whether this Court is a 'clearly inappropriate forum' before granting the order sought.

[13] It surely cannot be said that this Court is a clearly inappropriate forum. Liability in negligence, contributory negligence and damages are in issue. The defence pleadings disclose the defendant will plead there was no breach of the standard of care applicable to a driver affected by alcohol. In submissions it has been confirmed the 'no breach of duty'[15] defence will be an issue.

[14] On the issue of contributory negligence, s 5(6) *Motor Accidents (Compensation) Act* (1979)[16] affects in some part, quantum of damages, (depending on findings made at trial), as it provides that, if a person was not wearing a seat belt at the time of the accident, damages are to be reduced by 25%. It is likely given the approach in *Harding v Wealands*[17] that if the plaintiff were successful in an action in the United Kingdom, he would not be subject to the s 5(6) *Motor Accidents (Compensation) Act* restriction. In *Harding v Wealands* the House of Lords found comparable limitations in the New South Wales *Motor Accidents Compensation Act*, were procedural and inapplicable in an English court. The law in Australia, (in the context of a

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14 (1990) 171 CLR 538.

15 *Imbree v McNeilly* (2008) 236 CLR 510 confirms the availability of the defence.

16 These proceedings are governed by s 5(6) *Motor Accidents (Compensation) Act* in its form prior to amending Act No 4 of 2007 that substantially amended common law rights.

17 [2006] UKHL 32.

federation and the need to give full faith and credit to the laws of different states), has lead to the conclusion that such provisions are substantive.[18] That the proceedings and damages may be regulated in part by statute or indeed by some aspect of the common law does not bear on whether the plaintiff can obtain complete relief. The plaintiff may, in this jurisdiction pursue an action for damages based on negligence.

[15] That there may be personal or juridical advantages to the plaintiff in now commencing an action in the United Kingdom does not however mean the Northern Territory is an inappropriate jurisdiction. Relevant connection issues strongly support the appropriateness of this jurisdiction. It is the clearly appropriate forum given:

- The accident giving rise to the proceedings occurred in the Northern Territory.

- The Solicitor for the defendant attests to witnesses based in Australia including (10 witnesses regarding the events leading to and surrounding the accident); expert engineering evidence and pharmacological evidence.

- The plaintiff chose to issue proceedings in the Northern Territory nominating the place of trial as Darwin.

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18 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

[16] It is acknowledged the plaintiff resides in the United Kingdom and no doubt has witnesses, including medical witnesses who will be important to his case. Presumably the plaintiff will give evidence. There will be costs associated with distance and travel. It is possible, but I am not in possession of the full health status of the plaintiff that he may have difficulty travelling due to his health. These difficulties and any potential prejudice are capable of amelioration through either taking evidence by use of video-link or on commission in England. These procedures are regularly invoked in this Court.[19] The practical and financial difficulties of proceeding in the United Kingdom may well be greater than proceeding in Australia, if proceedings were to commence in the United Kingdom.

[17] A significant factor persuading me to make the orders sought was the need to protect the processes of the Court in the light of all litigants who may have cases pending as well as future litigants. It is fundamental to the integrity of the Court's processes that litigation regularly commenced and pursued in good faith remains in the Court to its conclusion. A competent jurisdiction regularly invoked provides a prima facie right to have the proceeding continued.[20]

[18] It was my conclusion there was a serious question to be tried; the balance of convenience favoured the making of the Order and unquestionably damages was not an appropriate remedy.

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[19] At a subsequent mention of this matter Ms Sibley of counsel has suggested these procedures may be required.

[20] *Anglo-Australian Foods Ltd v Von Planto and Others* (1988) 20 FCR 34.

[19] By being represented throughout the substantive proceedings and being aware of the application to prevent the commencement or maintenance of proceedings in the United Kingdom the plaintiff has had ample opportunity to consider his position and respond to the application. The plaintiff and his legal advisors were on notice for three months prior to the hearing of the application, having agreed to an undertaking after the application was filed and served on 14 December 2011. That undertaking would have expired at the close of business on 2 March 2012.

[20] Clearly the ongoing uncertainty about whether proceedings over the same subject matter would be issued in another jurisdiction is intolerable, not only for the parties here but for the broader interests of justice and bearing in mind the need to provide some basic certainty to all litigants. The potential of two sets of proceedings fits the classical formulation "vexatious and oppressive". The plaintiff cannot be prejudiced when the plaintiff has issued in and participated in the processes of this Court for the past three years. It would be overstating any perceived personal or juridical disadvantage flowing to the plaintiff as prejudice.

[21] I was not at all persuaded that in these circumstances it was proper to "stay" the application for a further three months as suggested by the plaintiff's solicitors in the United Kingdom in a letter to this Court.[21] The letter indicates those solicitors are retained by the plaintiff only in respect of a negligence claim against the plaintiff's previous local solicitors. The letter

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[21] Hilary Meredith, 6 February 2012.

states "For the avoidance of doubt ... [we] have nothing to do with the Australian proceedings". In those circumstances it was inappropriate to place any significant weight on the attitude of the plaintiff's solicitors in the United Kingdom.

[22] Solicitors for the indemnifier of the plaintiff's previous local solicitors requested by letter that the defendant consent to an adjournment. These suggested adjournments of an application that had already been adjourned for three months fail to recognise the duty of the Court to protect its regular processes beyond the immediate interests of the parties to this action. I concluded it would be quite wrong to leave the parties with the level of uncertainty implied in further adjourning the application.

[23] Hence, orders were made restraining the plaintiff from commencing or continuing proceedings in the United Kingdom.

[24] These reasons will be forwarded to the current legal representatives of the parties and published in due course.

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