PARTIES:	DJM DEVELOPMENTS PTY LTD
	v
	ELSTON & GILCHRIST
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	SUPREME COURT
FILE NO:	14 of 1995
DELIVERED:	Darwin 13 December 1995
HEARING DATES:	1 September 1995
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Contract - Breach - Damages - Question of whether alleged damages to the company were caused by the solicitors breach - Onus of proof

Heywood v Wellers (1976) 1 All ER 300, considered.

Contract - Breach - Objection by company that initial proceedings brought without proper authority - Ratification by the company by adoption of solicitors acts

Danish Mercantile Co Limited v Beaumont [1951] Ch 680, applied.
Re Manias; Ex parte Edsill Pty Ltd (1986) 15 FCR 1, applied.

Costs - Appeals as to costs - Negligence by solicitor - Finding of breach of contract by trial Judge - Company argued solicitor not entitled to costs - Construction of contract - Question of whether outcome but for breach would have been different

Heywood v Wellers (1976) 1 All ER 300, considered.

Costs - Security for costs - Company argued order for security would stifle proceedings - Question of whether company impecunious - Finding of fact by trial Judge

Bell Wholesale Co Pty Ltd v Gates Export Corporation (1984) 52 ALR 176, considered.

REPRESENTATION:

Counsel:

Plaintiff: Mr B Cassells
Defendant: Mr T Riley QC (Senior)
Mr R Davies (Junior)

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 14 of 1995

BETWEEN:

DJM DEVELOPMENTS PTY LTD
Appellant

AND:

ELSTON & GILCHRIST
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 13 December 1995)

These are reasons for judgment upon the hearing of an appeal by the appellant and a cross appeal by the respondent arising from a decision of Mr Lowndes SM constituting the Local Court sitting at Darwin given on 20 December 1994. For ease of reference hereafter, I will refer to the appellant as "the company" and the respondent as the "solicitors". Reference will also be made to Mr and Mrs Antonino who were at the relevant times directors and shareholders of the company. An appeal from the Local Court is only available on a question of law (*Local Court Act* s19).

BACKGROUND

The company commenced arbitration proceedings against the Northern Territory of Australia, and pursuant to s47 of the *Commercial Arbitration Act*, the Territory sought that the company give security for the Territory's costs in those proceedings. As found by Asche CJ., in his reasons for judgment on that application delivered on 15 March 1991:

1. The company and the Territory entered into a contract in relation to the construction of certain sub-divisional works at Tennant Creek, and the Territory cancelled it purporting to act under provisions in that contract.

2. The company disputed the Territory's right to cancel a contract and referred the dispute to arbitration. An arbitrator was appointed.

3. The company delivered points of claim. The Territory delivered points of defence and instituted a counterclaim. One point taken by the company was that the Territory was not entitled to cancel the contract pursuant to the provisions relied upon. The Territory by its defence, while denying that it was not so entitled, also raised the broader issue as to the company's performance of the contract.

4. The evidence in support of the application for security of costs included an estimate of the Territory's costs to be incurred, if the arbitration proceeded, in the sum of $105,825.

5. The solicitor for the Territory, having ascertained that the company had no real property in the Territory and no motor vehicles, wrote to the solicitors for the company enquiring as to the financial position of the company and asking whether Mr Antonino would be prepared to provide a personal guarantee in respect of any obligation of the company to pay costs in connection with the arbitration. Two letters to that effect failed to elicit a reply.

6. There were no assets of the company to which the Territory could have recourse if it obtained an order for costs against it. There was no evidence to suggest that there were other resources available to the company.

7. There was no evidence going to the financial position of either of the directors.

In considering other matters going to the exercise of his discretion, his Honour rejected an argument that the matter involved a relatively short matter of law; rejected

a proposition that there had been some obstruction or campaign by the Territory against the company which worked to its disadvantage and noted that some of the arguments put on the company's behalf went to issues which arose in the arbitration and which he declined to assess.

Whether a plaintiff's claim is made bonafide and has reasonable prospects of success is a matter which can be taken into account in the exercise of discretion, but it has been held in many cases that assessing the plaintiff's prospect of success is not really a practical test in any case of reasonable complexity. This appeared to his Honour to have been such a case. Furthermore, his Honour was not satisfied that the application for security was being used oppressively to frustrate a genuine claim (see *Williams Civil Procedure Victoria*, pp5577-5578).

His Honour also noted the possible recourse which the Territory may have to some $30,000 held by it as security in relation to the contract, and rejected an argument that there was any delay on the part of the Territory which would cause the discretion to be exercised in favour of the company. In the result, he ordered that the company give security in the sum of $100,000 in cash "or such other security of like value to the satisfaction of the Master" and that it be given or lodged before a certain date. His Honour rejected an argument put by counsel for the company that the company's

reference to arbitration involved a short point, and that the Territory's counterclaim put it in the position of being the true plaintiff. The scope of the arguments raised by counsel instructed by the solicitor for the company is amply demonstrated by his Honour's reasons.

As to an argument put that since the company would be unable to provide any security, any order in that regard would effectively stifle the proceedings, his Honour said:

> "The answer to that is that that is sometimes a corollary to any order, but that has not prevented courts from making such orders in the past, and I doubt that it will prevent them from making such orders in the future."

The solicitor for the company sought instructions from the company to lodge an appeal, but such instructions were not forthcoming. He nevertheless filed a Notice of Appeal "in order to protect the interests of 'the company'". He informed the company of the progress of the appeal. The company thereafter terminated its retainer of the solicitor.

Mr Antonino took over the conduct of the appeal and was given leave to appear on behalf of the company upon the hearing. The Court of Appeal did not disturb the discretion exercised at first instance to order the company to provide security for costs. It held, amongst other things, that it is well established that if a company wishes to rely upon the argument that an order for security will frustrate the

litigation, it must establish that those who stand behind it are also without means, and referred to *Bell Wholesale Co Pty Ltd v Gates Export Corporation* (1984) 52 ALR 176 particularly at 179, 180.

However, the Court undertook an examination of the material before his Honour and came to the view that it did not justify him in finding that the Territory's costs of defending the applicant's claim would be $105,825. It noted that the company's case, both before his Honour and on appeal, contained an assertion that the costs which would be incurred by the Territory in defending the company's claim in the arbitration proceedings would be much less than the $105,825 estimated by the Territory's solicitor. The Court ordered that security be given in the sum of $39,000 in cash, or such other security of like value to the satisfaction of the Master, by instalments upon specified dates.

PROCEEDINGS IN THE LOCAL COURT

The solicitors sued in the Local Court for their costs of acting for the company in the arbitration, in resisting the application for security of costs and instituting the appeal, together with their disbursements in respect of all of those matters. Acting as agent for the company, Mr Antonino filed a defence. At para7 it is asserted that:

> "It was clear from the transcript by Asche CJ that the solicitor had poorly prepared the case and the

> Barrister had taken minimal briefing minutes before entering the room. Elston and Gilchrist lost the case not because of lack of facts but because of NEGLIGENCE."

(Emphasis added by Mr Antonino. The "transcript" referred to is the published reasons for the decision. There is no transcript of the argument).

At para10 he says:

> "As the facts stand Elston and Gilchrist failed to give DJM the benefit of legal knowledge expected of average lawyers therefore, DJM has no obligation to pay for a service the company did not receive."

That allegation smacks of a defence based upon breach of contract. No complaint was made as to the performance of the solicitors in relation to the arbitration proceedings nor in regard to the appeal (except in so far as they had no express instructions). The purpose of a defence is to avoid the relief sought by the plaintiff, that is, in this case, its claim for costs. It was by way of confession and avoidance with reference only to the application for security for costs. The company also counter claimed. It asserted that after the company had successfully appealed against the order for security for costs a settlement of the arbitration was arrived at whereunder it received $30,000. It contended that had it not been ordered to provide security for costs in the first instance, it would have achieved total success against the Territory; it would have been in a much stronger bargaining position to obtain the $70,000 which it

claimed. It therefore claimed to have lost the difference of $40,000, and sought that amount against the solicitors by way of damages plus $12,000 "being the company expenses for the involvement in the case of affidavit and appeal". (The "case of affidavit" refers to the resistance to the application for security for costs). No order for costs have been made against the company in either Court.

The counter claim was distinct from the defence. On the one hand the company sought to avoid payment of the costs claimed by the solicitors, and on the other, to recover damages which it asserted it had suffered as a result of the default of those solicitors.

The material in the pleadings filed on behalf of the company included allegations that the solicitors failed to answer a letter from the solicitor for the Territory and inform him that the directors were not in a position to provide security on behalf of the company, failed to take instructions from Mr and Mrs Antonino as to their personal means with a view to showing that they had none which could be offered by way of security and failed to challenge the quantum of costs for which security was sought. The company's pleadings also raised issues which would appear to fall within the class of matters argued before Asche CJ. which his Honour regarded as better left to the arbitrator.

At trial the only witnesses were Mr Morris for the solicitors and Mr Antonino for the company.

HIS WORSHIP'S REASONS

At the beginning of his reasons for decision, his Worship noted that the defendant claimed it was not liable to pay the solicitors costs relating to the application for security for costs, and that it had also counter claimed against the solicitors for damages arising out of the plaintiff's negligence. He then goes on "The defendant in effect seeks to set off that claim against the whole of the plaintiff's claim". That is not necessarily a consequence arising from these pleadings.

As to the facts, his Worship found:

> "(1) that Mr Morris did not seek clear instructions from Mr & Mrs Antonino in relation to correspondence from Mr Biggs concerning the provision of a guarantee;
>
> (2) that Mr Morris did not enquire as to the financial standing of Mr and Mrs Antonino;
>
> (3) that Mr Morris did not discuss with Mr and Mrs Antonino the relevance of their possible impecuniosity to the application for security for costs; and
>
> (4) that Mr Morris did not raise with Mr and Mrs Antonino the pros and cons of putting to the Court their impecuniosity by way of opposition to the application for security for costs."

His Worship proceeded:

"In my opinion Mr Morris' failure:

(1) to take clear instructions in relation to the correspondence received from the applicant's solicitors,

(2) to take instructions in relation to the possible impecuniosity of the directors for the purposes of opposing the application for security for costs,

(3) to explain to the directors the relevance of the impecuniosity of directors to applications for security for costs,

(4) to take clear instructions from the directors, after carefully advising them, as to whether their impecuniosity, if it existed, should be put to the Court in opposition to the application for security for costs, and

(5) to convey those instructions to counsel appearing at the hearing of the application,

demonstrated a lack of care on the part of Mr Morris in the preparation of the proposed opposition to the application for security for costs, and amounted to mismanagement of so much of the conduct of a legal proceeding as is usually and ordinarily allotted to his branch of the profession. In other words, Mr Morris failed in his duty as a solicitor to obtain proper instructions in relation to the preparation of a matter for hearing. I am satisfied that in failing to obtain proper instructions Mr Morris failed to meet the standard of care expected and required of a reasonably prudent solicitor exercising due care and skill."

Notwithstanding those findings, at the conclusion of his reasons his Worship expressed himself satisfied that the plaintiff had established its entitlement to costs, except in relation to the institution of the appeal.

"However, a mere finding along those lines is not sufficient to establish a cause of action for negligence. There must be material injury resulting to the claimant, and a reasonably proximate connection between the resulting injury and the negligent conduct. The resultant injury relied upon by the defendant is its

liability to pay the plaintiff legal costs in relation to the application for security and the other consequential losses referred to in the counterclaim."

In the balance of his judgment his Worship considered whether or not the negligence of the plaintiff was the proximate cause of any damage suffered by the defendant and decided it was not.

GROUNDS OF APPEAL

The amended grounds of appeal are as follows:

"1. The Learned Magistrate erred in disallowing the Appellant from calling an expert witness in contract administration to prove that the counterclaim by the Northern Territory involved in an arbitration with the Appellant could be challenged.

2. The Learned Magistrate erred in failing to find that the Respondent was negligent when it acted for the Appellant by concentrating the defence to the security for costs application on the impecuniosity of the Appellant and by not considering the issue of impecuniosity of the Directors of the company.

3. The Learned Magistrate erred in failing to consider the reasons of the Full Court of the Supreme Court comprising Justices Angel, Mildren and Morling and the implication from their judgment that the bona fides of the case of the Appellant and the prospects of success were established before it.

4. The Learned Magistrate erred at page 11 of his decision in being unable to determine the bona fides of the litigation and its prospects of success because he did not have transcript of the proceedings before the Chief Justice especially when it was implicit from the reasons of the Chief Justice that those issues were not raised before him and in finding that he was unable to determine what effect proof of impecuniosity would have had on the Chief Justice exercise of discretion.

5. The Learned Magistrate erred in being unable to find that the Respondent had been negligent in failing

to properly brief counsel to argue the weaknesses of the Northern Territory Government's counterclaim and the excessive nature of the Northern Territory Government's estimated costs given the Respondent's evidence that:-

(a) a meeting to discuss the case with the barrister had not been held; and

(b) they had spoken to the barrister by telephone twice only.

6. In reliance upon the contents of paragraphs 4 and 5 above, the Learned Magistrate erred in failing to find that the Respondent was negligent in failing to properly prepare the Appellant's case for the security for costs application.

7. The Learned Magistrate erred when during the course of the Learned Magistrate stated on 19 March 1993: "it may well be that Mr Antonino or his company can claim some expenses for conducting the appeal which in many ways vindicated what the Defendant thought should have been the appropriate result in the first instance" and subsequently failing to apply that reasoning in his decision.

8. The Learned Magistrate erred in being unable to find actionable negligence on the part of the Respondent by failing to consider the retainer of the Respondent which was to advise the Appellant properly and completely on all issues to do with the arbitration including the application for security for costs which the Respondent failed to do.

9. The Learned Magistrate erred in failing to find on the evidence that the retainer between the Appellant and the Respondent was a complete contract and accordingly the Respondent's negligence amounted to a total failure of consideration on its part.

9A. The Learned Magistrate erred in failing to find in the alternative to 9, that the Respondents could not claim their fees in respect of the security application and/or the lodging of the appeal.

10. The Learned Magistrate erred in finding on all the evidence presented to him that the Appellant failed to establish its Directors were impecunious at the relevant time.

11. The Learned Magistrate erred in finding that the Appellant's bank's refusal to approve an increase in overdraft facilities pertaining to the period

of November to December 1990 and not at the date of application for security for costs (March 1991) was of importance when the former period was when the Respondent was first put on notice by the Northern Territory Government as to the issue of impecuniosity of the Directors of the Appellant.

12. The Learned Magistrate erred in finding that the letter (exhibit D9) from the Appellant's bank only referred to Mr Antonino and not Mrs Antonino.

13. The Learned Magistrate erred in failing to properly consider exhibit 15 which was tendered in support of the Defendant's counterclaim and was not tendered to show the impecuniosity of the Directors of the Appellant on the application for security for costs.

14. The Learned Magistrate at page 10 of his decision when he said "In my opinion, if a respondent company to an application for security for costs were able to demonstrate that there were no persons behind the litigation which sufficiently means, that the litigation was bona fide and carried considerable prospects of success, the application for security for costs would in all probability be successfully resisted. Under those circumstances, the Court would probably decline to order security for costs" and he erred thereafter by being unable to find on the evidence that on the balance of probabilities the Appellant should have succeeded in defending the security for costs application had it been properly advised by the Respondent.

15. The Learned Magistrate erred in finding that the Respondent had established its entitlements to costs on the evidence."

There is also a cross appeal and the grounds for that are as follows:

"1. That the Learned Magistrate erred in law in finding that the respondent acted without instructions in instituting the appeal against the decision of Asche CJ handed down on 15 March 1991. The respondent contends that at all relevant times it had implied instructions to protect the appellant's interest and that these extended to instituting the Appeal after the adverse and, with respect, incorrect decision had been handed down."

The original grounds of appeal were signed by Mr Antonino. To a large extent, they reflect his continuing difficulty in accepting that the rejection by Asche CJ. of arguments put by counsel instructed by the solicitors on behalf of the company, does not show that counsel was not properly instructed by the solicitors, nor does it demonstrate incompetence on the part of counsel. Further, some of the grounds seek to extract implications from the decisions of Asche CJ. and the Court of Appeal which are just not there. Some involve complaints regarding findings of fact from which no appeal lies; some are incomprehensible. In so far as any particular ground is not specifically dealt with hereafter, it falls within one or more of those categories and fails. The marked amendments to the grounds of appeal were sought by counsel for the company at the commencement of the hearing of the appeal and allowed. The amended notice was signed by the company's then solicitors.

As to the grounds of appeal:

Ground 1

There was no error. The evidence of the expert was irrelevant.

Ground 2

See the express findings of his Worship set out above.

Grounds 4, 10, 12 and 14

These may conveniently be dealt with together. They arise in this way. Having found negligence on the part of the solicitors, his Worship embarked upon a consideration of whether the damages alleged to have been suffered by the company were caused by the breach. In so doing, he firstly undertook an extensive examination of the law relating to applications for security for costs, including the effect which the impecuniosity of those who stand behind an impecunious company could play in the discretionary judgment. Amongst other things, he referred to the citation from *Bell Wholesale Co Pty Ltd v Gates Export Corporation* in the Court of Appeal referred to above.

As to the onus in establishing the connection between breach and loss, he said that the company:

> "must show that had the impecuniosity of the directors been put to the Court, and their impecuniosity established to the satisfaction of the Court, that the Court's discretion would have been exercised in a different way, viz that the Court would have ordered no security for costs, or alternatively, ordered security which could have been met by the defendant".

In that he may have erred. The onus may have been on the solicitors to show that the result would have been the same. That was the approach of Lord Denning MR in *Heywood v Wellers* (1976) 1 All ER 300 at p307. It was a case in which the respondent's solicitors had failed in their duties to their

client to bring before the Court for breach of an injunction, a man who had been molesting her:

> "It was suggested that, even if *Wellers* had done their duty and taken the man to Court, he might still have molested her. But I do not think they can excuse themselves on that ground. After all, it was not put to the test; and it was their fault it was not put to the test. If they had taken him to Court as she wished - and as they ought to have done - it might well have been effective to stop him from molesting her any more. We should assume that it would have been effective to protect her, unless they prove that it would not:".

Wherever the onus lay, his Worship made findings as to the impecuniosity of those standing behind the company, Mr and Mrs Antonino. He detailed the evidence on the subject, which all came from Mr Antonino, and closely analysed it. He said:

> "The evidence does not support a finding that at the time of the application for security for costs the directors of the company were without means in the sense of being unable to provide the respondent company with sufficient money to comply with an appropriate order for security".

That is a finding of fact. There was evidence that Mr and Mrs Antonino owned a matrimonial home and no evidence that they lacked equity in it.

In the light of that finding, counsel for the solicitors submits that the result before Asche CJ. would have been no different. I agree. There would have been no further evidence which could have had an effect on the outcome if the solicitors had taken proper instructions from the company and Mr and Mrs Antonino on the impecuniosity question.

That is enough to lead to an order dismissing the appeal, but I should also deal with some other grounds of appeal in the event that I am wrong in the conclusion to which I have come.

As to the original ground 4, it does not appear that the bona fides of the company in instituting the reference to arbitration was an issue. In those circumstances nothing would be inferred against it. As to the prospects of success, the other matter referred to, his Honour did not specifically deal with it, considering it to be but part of the much wider area of dispute raised as a result of the counterclaim by the Territory. That is not to say that counsel for the company did not argue the merits of the company's case before his Honour. It is not implicit that that matter was not raised before his Honour.

Grounds 8, 9 and 9A

The complaint is that notwithstanding the finding of

negligence, his Worship gave judgment in favour of the solicitors for their costs in relation to the arbitration proceedings and the application for security for costs. It is argued that the solicitors were not entitled to any of the costs charged to the company or alternatively, not entitled to those charged in respect of the application for security for costs, because of their negligence, nor for the appeal because it would not have arisen had they not been negligent at first instance. In addition, there was resistance to paying the costs on the appeal upon the ground that there were no instructions to institute that proceeding. It is possible to dissect from the itemised bill of costs those items to do with each of those matters and the disbursements associated with each. The bulk of the bill related to the arbitration. None of these issues were put to his Worship; the only time they were touched upon was in the closing address of counsel for the solicitors who mentioned that the bill was for more than the work undertaken in relation to the security for costs matter which had been the only area of work the subject of complaint. Counsel for the solicitors on the appeal did not object to these grounds of appeal upon the basis they sought to raise new issues, but instead argued that since there had been no finding of breach of contract by his Worship they were irrelevant. For reasons I have already given, I consider that his Worship's findings did amount to a finding of breach of contract in relation to the application for security for costs.

Counsel for the company on this appeal argued that the contract between it and the solicitors was an entire contract, a fundamental portion of it being negligently performed the solicitors were entitled to nothing for their work.

Whether a particular contract is entire or not, depends upon its terms. It is not the case that all contracts between solicitors and their clients fall into that class. That in *Heywood v Wellers* was held to be so (see Lord Denning MR at p306). It depends upon construction. In this case the original instructions were in relation to arbitration of a dispute between the company and the Territory. The solicitors were engaged to act for the company in relation to that, and they were subsequently instructed to act in relation to the Territory's counterclaim in that arbitration. They did so. No complaint is made regarding their performance in respect of those matters. The Territory then applied for security for costs and the solicitors were instructed to oppose that application. Although related to the arbitration, it called for a distinct performance. The company throughout treated it as such, until this appeal when the question of an entire contract was first raised.

There is no reason why the solicitors should not have their costs in relation to the reference to arbitration and in regard to the counterclaim. As to the costs on the application for security for costs, they breached their contract, but the

outcome would probably have been no different had they not. The company did not suffer any loss; their work was not rendered fruitless. There is no justifiable complaint as to what the solicitors and counsel did in those proceedings. The omission was not the source of any cost charges which should be held irrecoverable.

As to the appeal, it was taken on a number of grounds and upon one of them the company was particularly successful. The error giving rise to the appeal was with the Judge at first instance, not the legal representatives of the company. What effect does the fact that the appeal was instituted and carried forward without instructions, until the company made it clear it did not wish the solicitors to act any further, have on the solicitors' costs accrued to that time? It will be recalled that the company continued in the appeal taking advantage of the work done by the solicitors and the disbursements which they had paid. The company adopted and ratified the acts of the solicitors and it can no longer object that the proceedings were brought without proper authority. It must pay the solicitors for their proper fees and outgoings (*Danish Mercantile Co Limited v Beaumont* [1951] Ch 680; *re Manias; Ex parte Edsill Pty Ltd* (1986) 15 FCR 1).

Ground 15

There was no attack before his Worship on the solicitors' proof

as to the quantum of the costs for which the proceedings for recovery were taken. What I think was meant by this particular ground of appeal is that his Worship erred in failing to find in favour of the company in its defence to the solicitors' claim. I have dealt with that.

The appeal is dismissed. The cross appeal is allowed. The company is ordered to pay the whole of the solicitors costs and disbursements the subject of the action in the Local Court and to pay their costs there and in this Court.
