TRIPPE INVESTMENTS PTY LTD and ORS v HENDERSON INVESTMENTS PTY LTD & ORS

COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA

NADER A.CJ, KEARNEY AND ANGEL JJ.

29 June and 2 October 1990 at Darwin

PRACTICE AND PROCEDURE - Appeal - meaning of "a judgment given" - s.51(1) Supreme Court Act

PRACTICE AND PROCEDURE - Judgment - when judgment 'given'

PRACTICE AND PROCEDURE - Judgment - meaning of "material date" - meaning of "entry of judgment" - meaning of "authentication of judgment" - Rule 60 and 85.01 Supreme Court Rules

STATUTORY INTERPRETATION - words and phrases - 'a judgment given' - s.5(1) Supreme Court Act

WORDS AND PHRASES - meaning of 'a judgment given' - Supreme Court Act s.51(1)

Cases referred to:

Antoniadis v Ramsay Surgical Ltd [1972] V.R. 323
Blackmore v Flexhide Pty Ltd [1979] 1 N.S.W.L.R. 103
Collins v Godhino and Willard [1989] 1 N.T.J. 307
Dickinson v Petroleum Conversion Corp. 338 U.S. 507 (1950)
Driclad Pty Ltd v Federal Commissioner of Taxation (1969-70) 121 C.L.R. 45
Erasmus v Jackson, 15 April 1979, Supreme Court of N.S.W. (unreported)
Holtby v Hodgson (1890) 24 Q.B.D. 103
Onslow v Inland Revenue (1890) 25 Q.B.D. 465
S & Y Investments (No.2) Pty Ltd (in liquidation) v Commercial Union Assurance Co of Australia Ltd (1985) 35 N.T.R. 19
R v Ireland (1971-72) 126 C.L.R. 321
Stumore v Campbell & Co (1892) 1 Q.B. 314
Turner v Manier (No.1) [1958] V.R. 350

Statutes and Rules referred to:

Supreme Court Act (NT) s.51(1)
Supreme Court Rules (NT): 60, 85.01, 85.12

Counsel for the appellants:	T. Riley QC/B. Cooney
Solicitor for the appellants:	Mildrens
Counsel for the respondents:	G. Hiley QC/N. Henwood
Solicitor for the respondents:	Cridlands

kea90128

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP23 of 1989

ON APPEAL from the Supreme Court of the Northern Territory of Australia

No. 945 of 1986

BETWEEN:

TRIPPE INVESTMENTS PTY LTD
First Appellant

and:

AUGUSTUS SCHWARTZE TRIPPE
Second Appellant

and:

JINDARE STATION PTY LTD
Third Appellant

AND:

HENDERSON INVESTMENTS PTY LTD
First Respondent

and:

BULLO RIVER PTY LIMITED
Second Respondent

and:

SARAH HENDERSON
Third Respondent

CORAM: NADER A.CJ, KEARNEY AND ANGEL JJ.

REASONS FOR JUDGMENT

(Delivered the 2nd day of October 1990)

NADER AC.J. AND ANGEL J.:

The court has before it two applications; the first is by the respondents to strike out this appeal as incompetent for being out of time, and the second, by the appellants, is to extend the time within which to appeal if that course proves necessary.

On 21 July 1989, Martin J., having reserved judgment in the action, published a 35 page document headed "Reasons for Judgment (delivered 21 July 1989)". At the conclusion of his Reasons, Martin J. said:

> "I refuse the remedies sought by the plaintiffs. The defendants are not entitled to any damages. There will be declarations along the lines sought by the defendants in their further amended defence. I will hear counsel as to the precise terms of those declarations and as to any other machinery orders which ought to be made to enable the delivery of the remainder of the 1985 shortfall to be made to the plaintiffs by the defendant.
>
> I will hear counsel as to costs.",

and stood the proceedings over for short minutes to be brought in and for argument on costs.

The hearing of the action resumed on 23 November 1989. On that occasion draft minutes were presented to Martin J. and discussed between counsel and his Honour. A dispute over some $9000 was discussed and left unresolved. As to that, counsel for the appellants said (transcript p.709):

> "I think both of us (ie counsel for the parties) can, hopefully, get back to the drawing board and reach a resolution of the matter. So can I ask that the claim for the $9000 be deferred with liberty to apply?"

Counsel for the respondents consenting, his Honour agreed to that course. His Honour also said:

> "Yes. I'm just thinking, if there were any questions of appeal, at what stage there's been a judgment. I don't know if they're likely to arise and I don't seek any indications, but where you've got a decision but no formal orders have been made - I propose to make some now - I don't know, I just mention that."
>
> MR HILEY (counsel for the respondents): I suppose, unless my learned friend's got anything to say, our contention would be that appeals run from the date of the decision being made, so that you would look at various times when a decision is made and you've already made a decision on some things and another decisions (sic) might be made - - -
>
> HIS HONOUR: Yes. All right. I just mentioned that because we don't seem to be yet at the stage where we've finalised the matter completely.
>
> In this matter I delivered the reasons for judgment on 21 July 1989. At that time I refused the remedies which were sought by the plaintiff and held the defendants were not entitled to any damages and indicated that there would be declarations along the lines sought by the defendants in their further amended defence but there were obviously then questions of detail to be worked out and I therefore said I would hear counsel as to the precise terms of the

declarations and as to any other machinery orders which ought to be made to enable the delivery of certain cattle to be made to the plaintiffs by the defendants. I also indicated I would hear counsel for costs.

The matter came back before me this morning and counsel for the defendant has provided me with draft minutes of order as to the terms of the declarations to be made. Those proposed orders are not consented to but, on the other hand, they are not objected to.

I am looking at those draft orders and, with the assistance of counsel, I am satisfied that the appropriate ones could be made and there will therefore be orders in the terms of paragraph 1 of the draft minutes initialled by me, dated today and placed upon the court file.

There is also provision in paragraph 2 of the draft orders for the parties to be at liberty to apply with respect to order 1, and I also make orders in those terms, trusting that it won't be necessary to come back; however, should there be a need to do so, there will be liberty to apply in the terms of draft order 2.

The defendants seek judgment against the plaintiffs in the sum of $9220. I have heard some argument in respect of that matter; it was adverted to me in my reasons for judgment. The parties have asked that they be given further time to consider their positions in respect of that matter and I will allow that and accordingly the application for judgment by the defendants against the plaintiffs for that sum of money will be adjourned to a date to be fixed.

I've also heard both counsel as to the question of costs. I've had some extensive submissions, and I think in the interests of justice I should take time to consider that matter, particularly bearing in mind the circumstances of the case and the fact that the plaintiffs were not successful, but in some matters which have agitated the trial, neither were the defendants, so I'll consider that matter."

The court was then adjourned.

The draft minutes of order dealt with by his Honour on that occasion provided:

"1. There be a declaration that:-

(i) the defendants are entitled to perform the obligations under the deed made between them and the plaintiffs and dated the 2nd day of March 1985 by delivery to the plaintiffs of the balance of the cattle provided for in clause 3 (1) (a) and in annexure A to the deed not previously delivered namely, 132 shorthorn cows and 79 Brahman cross heifers, such delivery to be effected at Bullo River Station in the Northern Territory of Australia during the months of May, June and July 1990 but, in any event, not later than 31 July 1990 and in all other respects in the manner prescribed in clause 3 (2) of the deed;

(iii) upon such delivery of the cattle referred to in Order 1 (i) hereof the defendants shall have satisfied payment of the debt referred to in clause 2 (2) of the said deed;

2. By consent, the parties be at liberty to apply with respect to Order 1 (i) hereof, upon not less than 24 hours written notice to the other party, in relation to the implementation thereof."

On 20 December 1989, the appellants lodged a notice of appeal.

Rule 85.12 of the Supreme Court Rules provides:

"TIME FOR FILING AND SERVICE OF NOTICE OF APPEAL

(1) A notice of appeal shall be filed and served -

(a) subject to paragraph (b), within 28 days after -

(i) the material date; or

(ii) the date on which leave to appeal was granted;

(b) before such date as is fixed for that purpose by the presiding Judge granting leave to appeal; or

(c) within such further time as is allowed by a Judge upon application filed within the period referred to in paragraph (a) or before the date, if any, fixed under paragraph (b).

(2) Notwithstanding anything in sub-rule (1), a Judge, for special reasons, may at any time give leave to file and serve a notice of appeal."

Rule 85.01 of the Supreme Court Rules defines "material date". It provides:

""material date", in relation to an appeal or an application for leave to appeal, means -

(a) in the case of a judgment in a proceeding entered or to be entered pursuant to a direction or leave for entry - the date of direction or leave;

(b) in the case of any other judgment in a proceeding - the date of entry;

(c) in the case of an order in a proceeding - the date on which the order is made;

(d) in the case of a verdict in a proceeding - the date on which the verdict is given; and

(e) in the case of any other decision - the date on which the decision is pronounced or given; ..."

The respondents submitted that on 21 July 1989, his Honour made "decisions", and that time runs from that

date by reason of (e). The appellants contended that they are seeking to appeal from a judgment, that the judgment has not been entered and time only runs from the date of entry under (b). The respondents particularly relied on the judgment of Martin J. in Collins v Godhino and Willard [1989] 1 N.T.J. 307, where his Honour held that "entry" referred to in paragraph (b) was confined to matters such as entry of default judgments and did not relate to judgments given in pending proceedings. The appellants, on the other hand, relied on the unreported decision of Wootten J. in Erasmus v Jackson delivered 15 April 1975, Supreme Court of New South Wales, Equity Division. That case, decided upon the New South Wales Rules which are the precursor to the new Northern Territory Rules, is cited in Ritchie, Supreme Court Procedure (N.S.W.) at p.3076 para 51.1.1 for the following proposition:

> "In cases where a judge delivers his reasons for judgment and stands the proceedings over for short minutes to be brought in and for any argument on costs etc, the material date is the date of the judge pronouncing the orders contained in the short minutes ..."

The appellants contended that time runs from 23 November 1989, or alternatively from 19 February 1990 when his Honour made his order in respect of costs; or alternatively, that time has yet to run because a judgment has never been entered. The respondents contended that

either time runs from 21 July 1989, or alternatively, by reason of the $9000 issue remaining live, has yet to run and therefore the appeal is incompetent either as being outside the 28 day limit running from 21 July 1989, or alternatively as being premature.

A right of appeal arises from s.51 of the Supreme Court Act (NT) which provides:

> "(1) Where the jurisdiction of the Court in a proceeding or a part of a proceeding was exercised otherwise than by the Full Court the Master or a referee, a party to that proceeding may, subject to this Act, appeal to the Court from a judgment given in that proceeding or part, as the case may be."

The appeal is from "a judgment given" in a proceeding or a part of a proceeding. The "giving" of a judgment or the "pronouncing" of a judgment is quite distinct from the "passing of a judgment, the "entering" of a judgment or, under the new Rules, the "authenticating" of a judgment: see Holtby v Hodgso (1890) 24 Q.B.D. 103 at 107, Turner v Manier (No.1) [1958] V.R. 350, and Antoniadis v Ramsay Surgical Ltd [1972] V.R. 323. It is also quite distinct from the giving or delivering of reasons for judgment: Blackmore v Flexhide Pty Ltd [1979] 1 N.S.W.L.R 103. The learned Judge, having delivered his reasons for judgment and having stood the proceedings over for minutes to brought in and for argument on costs, it cannot be said that judgment was given or pronounced until those matters were

finalised. It is true that on 21 July 1989, his Honour said he refused the remedies sought by the appellants and that the respondents were not entitled to damages. It is also true that the draft minutes presented to his Honour and dealt with by him on 23 November 1989 did not mention those matters. However, having regard to what took place on 23 November 1989, and in particular his Honour's remarks on that occasion referred to above, it is apparent that his Honour did not intend to finalise anything on the former occasion. The fact the draft minutes did not cover the dismissal of the appellants' claims and the respondents' monetary counter claim was, perhaps, an oversight. It seems to us that on 21 July 1989, his Honour did no more than state what he then intended to be the result, ie what he did was provisional only. But having stood the action over, it was open to him to return on 23 November 1989 with a different view: Blackmore v Flexhide Pty Ltd, supra, at 104, and it was only when his Honour pronounced the orders in terms of the minutes, ie on 23 November 1989, that judgment was formally and finally pronounced or given in respect of all parts of the proceedings other than the unresolved dispute over the $9000.

The limits of the expression "entry of judgment", which is not defined by the Rules, is by no means clear. Rule 60 appears to indicate that "entry of judgment" and "authentication of judgment" are not synonymous, cf. Williams, Supreme Court Civil Procedure, Butterworths, 1987, at 294, para 20.20. Whether "entry of judgment" is to be confined to an administrative act

by the Registry, consequent upon the unilateral act of a party, eg entering judgment in default of appearance, or in default of, say, a self-executing order duly authenticated pursuant to order 60.01(2) (cf. S & Y Investments (No.2) Pty Ltd (in liquidation) v Commercial Union Assurance Co of Australia Ltd (1985) 35 N.T.R. 19) as Martin J. held in Collins v Godhino, supra; or whether entry of judgment may include a judicial act as contemplated by Sholl J. in Turner v Manier (No.1), supra, (see esp. pp.352 and 353); or whether definitions (a) and (b) of "material date" cover the field in the sense that they cover all judgments howsoever given, pronounced, passed, entered, or authenticated, as appear to be the view of Wootten J. in Erasmus v Jackson, supra, is unnecessary to decide. Entry of judgment in the present case, whatever it means, could have been no earlier than the pronouncement or giving of judgment and the appellants' notice of appeal was lodged within 28 days of pronouncement of judgment.

It follows that the appeal is within time and that the respondents' application to strike it out as incompetent shou be dismissed. In the circumstances, the appellants' applicat for an extension of time should also be dismissed. The appellants should have their costs of both applications.

KEARNEY J:

I have had the benefit of reading the joint opinion of Nader ACJ and Angel J in which the matters in issue are set out.

The judgment of 21 July 1989

I consider that on 21 July 1989 Martin J not only gave reasons for his decision but, as is usual, concluded by pronouncing the judgment (set out at p.2 hereof) which flowed from those reasons. As Barwick CJ pointed out in R v Ireland (1971-72) 126 CLR 321 at p.330:-

> "In a proper use of terms, the only judgment given by a court is the order it makes."

In this context a "judgment" is "the operative judicial act"; see Driclad Pty Ltd v Federal Commissioner of Taxation (1969-70) 121 CLR 45 at 64, per Barwick CJ and Kitto J.

The parties had sought various types of relief in the action, the appellants by their claim and the respondents by their counter-claim. In his judgment his Honour commenced with the following order:-

"I refuse the remedies sought by the plaintiffs."

To understand this order, it must be noted that it was common ground that the first and second respondents owed the first and second appellants $455,000 under a Deed of March 1985. This debt was to be paid by the respondents to the appellants by the delivery over a period of years of certain cattle, valued at so much per head. In their further amended Statement of Claim of 14 April 1989 the appellants sought a declaration that the respondents still owed them $112,180.20, an order that that sum be paid to them, damages of $40,995, interest and costs. All of that relief - the whole of the appellants' claim in their action - was refused in the judgment of 21 July 1989. The respondents had denied that they were liable to pay the debt and damages claimed.

The order of 21 July 1989 refusing the remedies sought by the appellants meant that the appellants had wholly lost and the respondents had wholly succeeded in relation to the claims brought by the appellants in their action. Those claims thereafter were dead in the water; they had been finally disposed of. In substance, the order refusing the remedies sought by the plaintiffs was an order that there be judgment for the defendants on the plaintiffs' claims.

By their further amended counterclaim the respondents, inter alia, sought a declaration that they were still entitled to deliver cattle to the appellants to satisfy their debt; they also claimed damages, interest and costs. On 21 July 1989 it was also adjudged that the respondents' counterclaim for damages failed, but that there would "be declarations along the lines" they sought in their counterclaim. In general, a counterclaim in its nature is an independent proceeding brought by the defendant against the plaintiff; for convenience it is tried with the plaintiff's claim. So it was here. The fact that a defendant has succeeded in the action as regards the plaintiff's claims has no bearing on the prosecution of the defendant's counterclaim; see Rule 10.08.

It can be seen that the details which remained to be worked out after the judgment of 21 July 1989 did not relate in any way to the appellants' claims; they had been finally dealt with by the order set out above. The details to be worked out related to the precise terms of the declarations which the respondents had obtained under the judgment on their counterclaim of 21 July 1989. It was those details to which draft minutes of orders were subsequently solely directed. That is why there was no mention at the resumed hearing on 23 November of the remedies the appellants had sought. That issue had already been finally determined and the court was concerned on

23 November only with the details of the respondents' counterclaim. His Honour's remarks set out at pp.3 and 4 are directed, insofar as they query "at what stage there's been a judgment" to the respondents' counterclaim; the counterclaim had been the subject of a judgment in general terms on 21 July. The Notice of Appeal of 20 December 1989 attacks the refusal of 21 July 1989 to grant the remedies sought by the appellants; that is, it is directed to the order of 21 July 1989 which refused in toto the relief sought by the appellants in the action they brought.

I consider that in relation to the remedies sought by the appellants in their action, there was on 21 July 1989 a pronouncement of final judgment in the clearest of terms. The respondents' counterclaim was then dealt with, in accordance with Rule 10.08. For the purposes of s.51(1) of the Supreme Court Act the judgment of 21 July 1989 on the appellants' claims in their action constituted a "judgment given in that proceeding". It is only from such a judgment that appeal lies; see s.51(1).

Here there was a lis contestatio, and on 21 July 1989 a adjudication between the parties on the merits, including the final determination of the issue raised by the appellants - the rights they alleged they possessed. I also consider that the observation of Lord Selborne L.C. in Re Faithfull; ex parte Moore (1885) 14 QBD 627 at p.632 applies to the judgment of 21 July 1989:-

"It would be a matter of great importance if, whenever a judgment contains directions which have to be worked out afterwards, the judgment is not final in so far as it contains an absolute order for the immediate payment of money."

In summary, in my view, on 21 July 1989 there was a final judgment in which the appellants' claims were wholly rejected; the respondents' separate claims raised by counterclaim were not finally determined. As Blackstone put it: "Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for" - 3 Bl. Com. 398. Literally, that is what occurred on 21 July 1989. A failure to apprehend the essentially independent nature of a counterclaim (see for example Rule 10.06(a)) appears to lie at the root of some of the subsequent confusion resulting in the appeal being lodged out of time. For all purposes, except execution, a claim and a counterclaim are two independent actions; see Stumore v Campbell & Co (1892) 1 Q.B. 314 at p.317, per Lord Esher M.R.

The commencement of the time for appeal

Under Rule 85.12(1)(a)(i) the time limit of 28 days for filing a Notice of Appeal runs from the "material date", as

defined in Rule 85.01. Unfortunately, this definition (set out on p.6) is derived from Part 51 Rule 1(1) of the Supreme Court Rules 1970 (NSW), and does not sit well with the nomenclature and approach of the rest of our Supreme Court Rules. In particular, the reference to "the date of entry" of judgment in para (b) cannot apply to a judgment following the trial of an action, since there is no provision in the Supreme Court Act or the Rules for the "entry" of such a judgment, and judgments are not in fact entered in any roll or book. The "authentication" of the judgment under Order 60 is clearly not the "entry" of the judgment. It may be noted that Rule 60.01(1) contemplates that an appeal may be instituted from a judgment prior to its authentication. As a concept, "entry of judgment" had meaning under Order 42 of the repealed Rules of the Supreme Court, read with Order 38 Rule 18 in relation to judgment after trial; it no longer has meaning in relation to such judgments. A judgment must be authenticated under Order 60 in order that it may be of record; until then it may not be res judicata. See generally the judgment of Martin J in Collins v Godhino (supra) on this aspect.

In New South Wales the concept of "entry of judgment" remains meaningful in relation to judgments after trial. Section 91(1) of the Supreme Court Act (NSW), which now has no counterpart in the Territory, provides-

> "The Court shall, at or after the trial or otherwise as the nature of the case requires, direct judgment to be entered as it thinks fit, and judgment shall thereupon be entered accordingly in the registry." (emphasis mine)

The Rules follow through this approach; see Part 41 Rules 10-14. The "material date" in relation to judgments after trial is usually determined under para (a) of the definition. That is to say, by the law of New South Wales the material date for the purpose of appealing the judgment of 21 July 1989 would have been determined in accordance with para (a), assuming the mandatory requirements of s.91(1) of the Act had been obeyed.

I respectfully agree with the opinion of Martin J in Collins v Godhino (supra) that in the circumstances the better construction of the definition of "material date" in Rule 85.01 is that para (e) -

> "- - provides for the fixing of time for appeal in all circumstances where an appeal lies and the time for filing and service is not provided for in the preceding paragraphs."

Erasmus v Jackson (supra) is distinguishable since in New South Wales the legal regime provided for entry of a judgment given after trial. A judgment is a "decision"

obtained in an action; see Onslow v Inland Revenue (1890) 25 QBD 465 at p.466, per Lord Esher M.R.

I do not consider that a judgment given following the trial of an action falls within any of the preceding paragraphs of the definition of "material date" in Rule 85.01. It follows, in my view, that insofar as an appeal was sought to be brought against the judgment of 21 July 1989 dismissing the plaintiff's claim, para (e) of the definition of "material date" applies; the Notice of Appeal had to be filed and served within 28 days after 21 July 1989, that being the date of the judgment given in accordance with Rule 59.02(1).

Extension of time

This requirement was not complied with. As it stands, the appeal was not instituted within the time allowed. The appellants seek to have time extended under Rule 85.12(2), to the extent necessary to ensure that their Notice of Appeal is within time. Under Rule 85.12(2) they have to show "special reasons" why time should be extended. I have considered the respective submissions of the appellants and the respondents on this question; it is sufficient to say that on weighing the relevant matters I consider that the appellants have made out sufficient grounds, in the somewhat unusual circumstances of this case, to justify the

departure they seek from the normal 28-day time limit. The appellants have been the "victims of this jungle of doubt" created by the definition in the Rules of "material date", as Black J. put it in Dickinson v Petroleum Conversion Corp 338 U.S. 507 (1950). I consider that as a matter of discretion leave should be given to extend the time for filing and serving the Notice of Appeal, to 20 December 1989.

Accordingly, I would first grant the appellants' application to extend time to 20 December 1989. That means that the appeal instituted on that day would now be within time, and accordingly the respondents' application to strike it out as incompetent should be dismissed. The appellants should have their costs of both applications.

I add that I consider it is desirable that the Rules Committee consider amending the definition of "material date", if that concept is thought to have some continuing utility. For a simple appellate provision see, for example, Rule 64.03(1) of the Supreme Court Rules (Vic.).