

CITATION:

Whittaker v Pettersson & Ors [2024] NTSC 10

PARTIES:

WHITTAKER, Charles Nicholson

v

PETTERSSON, Eva

and

MUIR, Annette

and

PETTERSSON, Elizabeth

and

ALDERSON, Jessie

and

RAWLINSON, Margaret

and

LAWSON, Violet

and

BALMORE, Valerie

and

MANGARNBARR, Nida

and

THOMPSON, Claire

and

DJIGARDABA ENTERPRISE
ABORIGINAL CORPORATION
(ICN 4023)

and

GAGUDJU ASSOCIATION INCORPORATED
(ABN 12 021 024 389)

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 2024-00487-SC

DELIVERED: 1 March 2024

HEARING DATE: 1 March 2024

JUDGMENT OF: Grant CJ

REPRESENTATION:

Counsel:

Plaintiff: C Ford with D McDonald
Defendant: K Anderson

Solicitors:

Plaintiffs: De Silva Hebron
Defendant: Bowden McCormack, Lawyers + Advisers

Judgment category classification: C

Judgment ID Number: GRA2401

Number of pages: 15

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

Whittaker v Pettersson & Ors [2024] NTSC 10
No. 2024-00487-SC

**CHARLES NICHOLSON
WHITTAKER**

Plaintiff

v

EVA PETTERSSON

First Defendant

AND:

ANNETTE MUIR

Second Defendant

AND:

ELIZABETH PETTERSSON

Third Defendant

AND:

JESSIE ALDERSON

Fourth Defendant

AND:

MARGARET RAWLINSON

Fifth Defendant

AND:

VIOLET LAWSON

Sixth Defendant

AND:

VALERIE BALMORE

Seventh Defendant

AND:

NIDA MANGARNBARR
Eighth Defendant

AND:

CLAIRE THOMPSON
Ninth Defendant

AND:

**DJIGARDABA ENTERPRISE
ABORIGINAL CORPORATION
(ICN 4023)**
Tenth Defendant

AND:

**GAGUDJU ASSOCIATION
INCORPORATED
(ABN 12 021 024 389)**
Eleventh Defendant

CORAM: GRANT CJ

EDITED REASONS FOR JUDGMENT
(Delivered *ex tempore* on 1 March 2024)

- [1] This is an application for interlocutory injunctive relief. The historical background to this matter is set out in the reasons for decision in *Hunter & Ors v Gagudju Association Inc* [2021] NTSC 34. So far as is relevant for these purposes, that background includes that the eleventh defendant was incorporated in 1980 for the benefit of Aboriginal people living in and around Kakadu National Park. For much of its existence, the principal operations and income streams of the eleventh

defendant involved the Crocodile Motel and Puma service station in Jabiru Township, and the nearby Cooinda Lodge ('the Lodge').

[2] The motel and service station properties were held under subleases granted by the Jabiru Town Development Authority, which in turn held a lease over the township granted by the Director of National Parks. The lease over the Jabiru Township expired on 30 June 2021, whereupon the land and the fixtures on that land reverted to the Director of National Parks. At that point in time, the Jabiru town land was granted as Aboriginal land pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). A township lease was granted to an entity established by the traditional owners of the land for that purpose, which subsequently granted exclusive possession to the motel and service station properties to entities other than the eleventh defendant. Those traditional owners are only one of the 14 clan groups currently represented in the eleventh defendant's membership.

[3] Turning then to the Lodge, tenure of the land has been held by the eleventh defendant under a lease granted by the Commonwealth in 1995. That leasehold interest expires on 3 June 2024. On or about 25 March 2022, the land on which the Lodge is situated was granted as Aboriginal Land under the *Aboriginal Land Rights (Northern Territory) Act* as a consequence of the settlement of a land claim over that area. Following the expiry of the eleventh defendant's existing leasehold interest on 3 June 2024, it will be a matter for the traditional

owners of that land whether any further leasehold interest over the land on which the Lodge is located will be granted, and, if so, to whom.

Again, the traditional owners of the land on which the Lodge is situated are also only one of the 14 clan groups represented in the eleventh defendant's membership, but a different group to the traditional owners of the township of Jabiru.

- [4] In anticipation of the expiry of the leases in Jabiru and Cooinda, the eleventh defendant's Constitution was amended to provide that on winding up, the surplus assets of the association could be transferred to another non-profit body with similar objects or purposes. That amendment was to enable the transfer of surplus assets if necessary, including cash reserves, to Aboriginal organisations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), which are qualified to receive Commonwealth grants and funding.

- [5] In or about March 2020, the management organs of the eleventh defendant had been told by the traditional owners of the Jabiru land that it would not be granted any continuing tenure over the land on which the service station and motel were located following the expiry of the existing subleases. It was on that basis that in June 2021 the eleventh defendant sold its interest in the service station business to a body incorporated to represent the traditional owners of the Jabiru

land, and in or about May 2022 sold its interest in the motel business to Indigenous Business Australia.

[6] At or about that same time, a majority of the traditional owners of the land on which the Lodge is situated had informed the management organs of the eleventh defendant that it would not be provided with continuing tenure to the relevant land beyond 3 June 2024. If correct, the consequence of that advice is that from that time the eleventh defendant will not hold the sole remaining asset from which it derives income. The eleventh defendant subsequently entered into negotiations for the sale of its interest in the Lodge business to the tenth defendant, which is an entity which purports to represent the majority of the traditional owners of the Cooinda land. Those negotiations were conducted on the understanding that because of the tenth defendant's status as a vehicle for the relevant traditional owners, it would be likely to obtain the grant of a lease over the land on which the Lodge business was conducted.

[7] On 21 January 2021, the eleventh defendant resolved to sell its interest in the Lodge business to the tenth defendant for \$2.2 million. Those members of the eleventh defendant's committee who were also members of the tenth defendant declared conflicts of interest and refrained from voting on the motion for sale. That offer was rejected by the tenth defendant, and the tenth and eleventh defendants subsequently agreed a purchase price of \$1.2 million for the eleventh

defendant's share of the Lodge business. The eleventh defendant says that purchase price fell above the valuation range which had been provided by a private valuation company using an accepted business valuation methodology based on three years of net annual profits discounted by 35 to 50 percent to take account of negative contingencies. On 16 February 2024, the tenth and eleventh defendants entered into a sale agreement on those terms.

[8] Those negotiations and the agreement for sale all took place against a background in which it was considered by the eleventh defendant that its interest in the Lodge business was a depreciating asset that would reduce to nil at the expiration of its leasehold interest. The determination to sell the Lodge business was also made on the basis that the management organs of the eleventh defendant anticipated that in the absence of the income streams which had been provided by the motel, service station and Lodge, it would be proceeding to wind up or dissolve and distribute its assets in accordance with the legislative framework.

[9] In accordance with that anticipation, a special general meeting has been called for 6 March 2024 at which the committee of the eleventh defendant will seek to pass a resolution determining that in pursuance of s 54 of the *Associations Act 2003* (NT) all remaining cash funds after satisfaction of the association's debts and liabilities will be transferred to a number of other bodies incorporated on behalf of the

constituent clans, whereupon the association will be taken to be dissolved by operation of the statute. That resolution assumes that all real and business property owned by the eleventh defendant, including the interest in the Lodge business, will have been liquidated before the transfer is made and the dissolution takes effect.

[10] On 29 February 2024, the plaintiff filed an Amended Originating Motion seeking orders:

- (a) restraining the first to ninth defendants from completing the sale of any interest in the Lodge by the eleventh defendant to the tenth defendant;
- (b) restraining the first to ninth defendants from conducting a special general meeting of the eleventh defendant on 6 March 2024;
- (c) restraining the first to eighth defendants from acting as the committee of the eleventh defendant except for the purpose of calling a special general meeting to elect a new committee;
- (d) restraining the first to eighth defendants from standing for election or appointment as members of the committee of the eleventh defendant;
- (e) restraining the ninth defendant from acting as the chief executive officer of the eleventh defendant;
- (f) appointing a named person as receiver and manager of the eleventh defendant; and

(g) that the plaintiff be authorised to institute proceedings in the name and on behalf of the eleventh defendant to recover damages from the first to ninth defendants for loss caused to it by reason of the sale of its interests in the Puma service station and the Crocodile Motel in Jabiru Township in June 2021 and May 2022 respectively.

[11] As an adjunct to the relief sought in the substantive proceedings, the plaintiff has also brought an application for interlocutory injunctive relief seeking orders in terms of the first four paragraphs of the Amended Originating Motion. That is, to restrain the sale of the eleventh defendant's interest in the Lodge; to restrain the conduct of the special general meeting on 6 March 2024; to restrain the first to eighth defendants from acting in the management of the eleventh defendant; and to restrain those same defendants from standing for further election or appointment to the committee.

[12] In the substantive proceedings the plaintiff relies on a number of grounds of challenge. They are that the resolution to sell the Lodge business was made without a lawful quorum; that the eleventh defendant's committee has been acting invalidly because it has not held a general meeting and committee election since November 2019 contrary to the constitutional requirement that meetings and elections be held on an annual basis; that the sale price for the Lodge is substantially undervalued; and that the majority of the eleventh

defendant's committee are conflicted by their parallel membership of the tenth defendant.

[13] The principles which govern the grant of an interlocutory injunction are not in dispute. The applicant must establish a serious issue to be tried or a *prima facie* case as to the interest claimed, and the balance of convenience must favour the grant of the injunction. It is unnecessary for the plaintiff to establish a probability of ultimate success in the substantive proceedings. Rather, the plaintiffs must show a sufficient likelihood of success to justify in the circumstances the preservation of the *status quo* pending trial of the substantive issues. The strength of the likelihood required will depend on the nature of the rights the plaintiff asserts and the practical consequences likely to flow from a refusal to grant the injunction. However, even if the plaintiff establishes a serious issue to be tried or a *prima facie* case, the court must also be satisfied, first, that the grant of an injunction is necessary to preserve the *status quo*, and, secondly, that damages would not be an adequate remedy.

[14] I do not consider that there is any serious issue to be tried in relation to the failure to hold meetings and elections on an annual basis. The eleventh defendant has been granted successive extensions pursuant to s 5 of the *Associations Act*, and I am able to infer from the relevant paragraphs of and annexures to the Thomson affidavit that those extensions have been continuing since in or about 2019.

[15] I am also not satisfied that there is a serious question to be tried concerning whether the resolution to sell the Lodge business was made without a lawful quorum. The Constitution required a quorum of five members. Of the nine members present at the meeting, seven members disqualified themselves from voting on the motion for sale because of the conflict arising from their membership of the prospective purchaser. The authorities referred to by the plaintiff no doubt establish that an unqualified person cannot be relied upon to constitute a quorum, but the reference to an unqualified person in that context would seem to be a person without an entitlement to participate in the meeting at all. Those authorities no doubt also establish that a person who has withdrawn themselves from a meeting so as to remove the quorum cannot thereafter rely upon that loss of quorum to claim invalidity. However, they do not seem to go so far as the plaintiff suggests. As the defendants submit, it would seem to be a strange result if a person with voting rights abstaining due to conflict thereby renders the resolution invalid for want of a quorum. The result in these circumstances would be managerial gridlock.

[16] The obverse of that particular finding is that there is also no serious question to be tried concerning whether the resolutions for the sale of the Lodge, or the sale of the service station and motel, were invalidated by conflict on the part of various committee members. The evidence establishes that members who did have a conflict by reason of their

parallel membership of interested organisations abstained from voting on the relevant resolution. It is also the case that those resolutions were adopted or passed following a relatively extensive series of consultations with the membership. There may be some basis for a claim of a more generalised oppression of the minority, but the basis for that claim is not advanced in this application.

- [17] That leaves the question of whether the sale price for the Lodge is substantially undervalued. That turns on whether there was a reasonable basis for forming the view that there was no realistic prospect of the eleventh defendant securing ongoing tenure over the land on which the Lodge business is operated. There is direct evidence from the chief executive officer of the eleventh defendant that a majority of the traditional owners of the land had advised that the eleventh defendant would not be provided with any further leasehold or other interest over the land. It is not to the point that the tenth defendant would have a commercial advantage over the eleventh defendant by reason of the statutory framework governing the grant of interests in Aboriginal land under the land rights legislation. The fact that the tenth defendant may be in a position to secure a leasehold interest following expiry of the subsisting sublease is to be distinguished from the base value of the business without any security of tenure.

[18] The plaintiff's assertion that the eleventh defendant will be able to secure further tenure if the sale is enjoined is based not on any direct evidence in relation to dealings with the traditional owners in formal meetings, but rather on an expressed belief derived from unspecified discussions and unparticularised knowledge. Despite that, I do not consider it can be said at this particular point in time that there is no serious question to be tried concerning whether it was inevitable that the eleventh defendant would lose its tenure, or whether the valuation of the Lodge business was properly undertaken on the basis that the eleventh defendant's interest in that business was a depreciating asset that would reduce to nil at the expiration of its leasehold interest. The defendants concede that there is a possibility that if the eleventh defendant was still to be conducting the Lodge business at the time of the expiry of the lease on 3 June 2024, there may be some commercial imperative to extend its tenure. Of course, that possibility may be proven illusory after 3 June 2024, and it is quite conceivable that any commercial imperative might be overridden by other considerations.

[19] Of course, the establishment of a *prima facie* case in that respect is not the end of the matter. As I have already stated, the court must also be satisfied that the grant of an injunction is necessary to preserve the *status quo*, and that damages would not be an adequate remedy.

[20] I turn then to consider the specific relief sought. The restraint from conducting the special general meeting is not necessary to maintain the

status quo in any relevant sense. All that resolution does is commit to the adoption of the machinery in s 54 of the *Associations Act* at some later point in time. It does not of itself effect or further the sale of the eleventh defendant's interest in the Lodge business. It provides only for the transfer of all property of the eleventh defendant once that property has been converted to cash. Any member who votes against that transfer at the meeting may apply to the Supreme Court for an order prohibiting the transfer prior to it taking place.

[21] The fact that the meeting is not necessary for the sale of the Lodge business, or that monies cannot be transferred pursuant to the proposed resolution until after the Lodge business is sold, is not a ground for enjoining its conduct. It is also of some relevance that the eleventh defendant has expended significant monies and made relatively extensive travel and other arrangements for the conduct of the meeting.

[22] The restraint sought on the first to eighth defendants' participation in the management of the eleventh defendant is also unnecessary to maintain the *status quo* in any relevant sense. For these purposes, their involvement is relevant only to the machinery necessary for the sale of the Lodge business, and that relevance turns upon whether the eleventh defendant should be enjoined on an interlocutory basis from completing the sale of the Lodge business.

[23] That leaves the question whether the sale should be restrained on an interlocutory basis pending determination of the substantive issues. When considering the balance of conveniences in this case, particular regard must be had to the possible consequences if the relief is granted. Those possible consequences – and, in fact, the likely consequences – are that by the time the substantive issues are resolved the eleventh defendant’s leasehold interest will have expired and will not have been renewed, with the result that the value of the business is lower than the currently negotiated sale price. On a worst-case scenario, the business would be worth nothing.

[24] On the other side of the scale, the possible adverse consequence for the plaintiff is that the tenth defendant will have purchased the business at below market value. There is no reason why damages are not an adequate remedy for both the plaintiff and the eleventh defendant in that event. On the plaintiff’s case, the tenth defendant could not be in any way characterised as a *bona fide* purchaser for value without notice, and could be brought to account for any shortfall found. Moreover, any concern that the proceeds of sale would be distributed to 15 other entities and become practically irrecoverable is a matter which can be addressed through the machinery of s 54 of the *Associations Act* and a prohibition order if necessary.

[25] Having regard to that conclusion, I make the following orders:

1. The application for interlocutory injunctive relief made by summons dated 29 February 2024 is dismissed.
2. The costs of that application will be costs in the cause.
3. The parties have liberty to apply to the Registrar for directions.
