Northern Territory of Australia v GRD Kirfield Ltd & Anor [2003] NTCA 01

PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v GRD KIRFIELD LTD (ACN 069 557 053) and GRD CIVIL CONSTRUCTIONS PTY LTD (ACN 009N645 345) ta GRD JV
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP18 of 2002 (20207191)
DELIVERED:	13 February 2003
HEARING DATES:	9 December 2002
JUDGMENT OF:	Mildren, Thomas & Riley JJ

REPRESENTATION:

Counsel:

Appellant:	S Southwood QC
Respondent:	J Kelly

Solicitors:

Appellant:	Cridlands
Respondent:	Hunt & Hunt

Judgment category classification:	B
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v GRD Kirfield & Anor [2003] NTCA 01
No. AP18 of 2002 (20207191)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

GRD KIRFIELD LTD (ACN 069557053) and GRD CIVIL CONSTRUCTIONS PTY LTD (ACN 009645345) t/a GRD JV
Respondent

CORAM: MILDREN, THOMAS & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 13 February 2003)

MILDREN J

[1] I have had the benefit of reading in draft the judgments of Thomas and Riley JJ. I agree with their Honours and with the orders proposed by Thomas J and have nothing further to add.

THOMAS J

[2] This is an application for leave to appeal from a decision of the judge at first instance delivered on 19 September 2002.

[3] The Minutes of Order, made by the judge, were dated 16 October 2002. This order provided as follows. Subject to the undertaking as to maintenance of confidentiality of discovered documents given by the plaintiffs' legal advisors through the plaintiffs' counsel, the court made the following orders:

> "1. The defendant provide discovery to the plaintiffs' solicitors within 28 days of documents in the following categories which are or have been in the possession custody or control of the defendant:
>
> (i) the tender submitted by Henry Walker Eltin Contracting Pty Ltd ('HWE') for Stage 2A of the East Arm Port Facility ('the works');
>
> (ii) documents constituting a contract between the defendant and HWE for the performance of the works;
>
> (iii) documents relating to the assessment of the plaintiffs' and HWE's tenders;
>
> (iv) documents relating to any variations in the contract between HWE and the defendant relating to the method of construction, material or the fill for the earthworks for the works ('the earthworks').
>
> (v) documents relating to any variations in the method of construction, materials or fill for the earthworks from those specified in the Request for Tender for the works; and
>
> (vi) documents relating to the assessment of any alterations or proposed alterations in the method of construction, materials or fill for the earthworks from those specified in the Request for Tender for the works.
>
> 2. The inspection of discovered documents containing commercially sensitive information from any other tenderers including HWE be limited to the lawyers for the plaintiff and any independent expert engaged by the plaintiffs' lawyers for that purpose.
>
> 3. The parties have liberty to apply generally.
>
> 4. The application be certified for counsel.

5. The question of costs of and incidental to the application be reserved."

[4] At the commencement of proceedings before the Court of Appeal, the Court granted the appellant an extension of time to file an application for leave to appeal. The Court then advised that the application for leave to appeal and the appeal would be heard together.

[5] The background to this matter is set out by counsel for the appellant, Mr Southwood QC, at the commencement of the appellant's written submissions as follows:

"1. Background

1.1. The respondents, in joint venture, were a tenderer for the contract to construct the Stage 2A extensions of the East Arm Port facility at Darwin. This comprised construction of a railway access bund to the wharf and a container terminal hard-stand area. The works involved dredging, placement of earthworks to construct the bund and hard-stand, and incidental finishing works.

1.2. The appellant first sought expressions of interest from potential contractors in early 2001. The respondents were short-listed as a potential tenderer after evaluation of the expressions of interest.

1.3. On 4 May 2001 the appellant issued a request for tenders ("RFT") to the short-listed contractors. Initially the closing date for tenders was 4 May 2001, however this date was subsequently extended to 6 June 2001 by addenda to the RFT.

1.4. The RFT was for a "construct only" contract and contained detailed specifications of the work to be performed. In accordance with NT Government procurement policy, the RFT also made provision for alternative tenders; that is, alternative methods of construction to achieve the same end result.

1.5. At the time of issue of the RFT, the appellant had not finalised concepts for alternative works. This was done after issue of the RFT by the addenda to the RFT and alternative tenders

were invited in accordance with designs specified in the addenda.

1.6. On 6 June 2001 the respondents submitted two tenders. The first - "the conforming tender" - was for construction of the works in accordance with the detailed specifications in the contract. The second - "the 6 June alternative" - was for construction of the works in accordance with the alternative method described in the addenda to the RFT.

1.7. On or about 10 July 2001 the respondents met with the appellant's tender assessment panel and made an oral and written presentation in support of their tender. On that occasion, the respondents delivered to the appellant a revised alternative tender - "the 10 July alternative". This alternative was essentially in accordance with the design specified in the RFT (i.e. the conforming tender), save for two departures: first, the respondents proposed using dredged sand in place of part of the fill (which was otherwise specified to be quarried fill); secondly, the respondents proposed using reinforced concrete mats to protect the earthworks in lieu of the specified rock armour.

1.8. The 10 July alternative submitted a different design geometry to the 6 June alternative. There were also differences in quantity of fill and rates per cubic metre of fill.

1.9. It is the appellant's contention that the 10 July alternative amounted to a completely new tender which was received out of time and was, therefore, not open for consideration: see clause 1.1.5 of the RFT.

1.10. Ultimately, the tender assessment panel rejected all of the respondent's tenders and awarded the contract to Henry Walker Eltin Pty Ltd ("HWE") on the basis of a conforming tender; that is, one which tendered to construct the works as specified in the RFT.

1.11. After award of the contract to HWE, an issue arose as to whether or not there would be sufficient quarried fill available to complete the earthworks required under the contract. The appellant obtained engineering advice on the use of marine sand in lieu of some quarried fill. That engineering advice came into the possession of the respondents.

1.12. The respondents contended at first instance that the obtaining of that engineering advice at that latter time, rather than at the time of the assessment of tenders, indicates prima facie that the appellant failed properly to assess the respondents' alternative tender. The respondents contended that this might

amount to a breach of a tender process contract, however the respondents said they required further information by way of preliminary discovery before making a decision whether or not to pursue a claim.

1.13. The respondents therefore applied pursuant to rule 32.05 for discovery of documents going to the question of whether or not there had been a breach of the alleged tender process contract. At first instance, Angel J allowed the application, holding that there was an arguable case that there is a tender process contract and that there was a breach.

1.14. The appellant contends that his Honour erred on the grounds set out in the notice of appeal."

[6] In the Notice of Appeal filed 6 December 2002, the appellant appeals from the whole of the judgment given on 19 September 2002 at Darwin on the following grounds:

2. The learned Judge erred in failing to consider and determine as a preliminary step to the exercise of the discretion pursuant to rule 32.05 whether or not the respondents had sufficient documents to determine whether or not a process contract existed between the parties.

3. The learned Judge erred in failing to consider and determine whether or not a process contract existed in law on the basis of the facts placed before the Court.

4. The learned Judge erred in failing to consider and determine whether the appellant were bound to fail in any cause of action based on a process contract on the ground of the appellant's own breach of the alleged contract by late submission of the tender upon which the respondents relied.

Rule 85.12 of the Supreme Court Rules applies pursuant to the order made by Angel J on 19 September 2002 that the time for appeal was to run from the date of filing of signed minutes of order.

and the Orders sought:

5. The respondents' application on originating motion be dismissed.

6. The respondents pay the appellant's costs of this appeal and below.

[7] The appellant's essential submission is that the order for discovery in favour of the respondents (plaintiffs) should not have been made because the respondents (plaintiffs) did not have a cause of action and that was plain on the face of the documents before the court.

[8] The application for discovery was made pursuant to Rule 32.05 which provides as follows:

> "32.05 Discovery from prospective defendant
>
> Where –
>
> (a) there is reasonable cause to believe that the applicant has or may have the right to obtain relief in the Court from a person whose description he has ascertained;
>
> (b) after making all reasonable inquiries, the applicant has not sufficient information to enable him to decide whether to commence a proceeding in the Court to obtain that relief; and
>
> (c) there is reasonable cause to believe that the person has or is likely to have or has had or is likely to have had in his possession a document relating to the question whether the applicant has the right to obtain the relief and that inspection of the document by the applicant would assist him to make the decision,
>
> the Court may order that the person shall make discovery to the applicant of a document of the kind described in paragraph (c)."

[9] The submission by counsel for the appellant is that under the terms of the Request for Tender "Tenders received after the stated time and date for closing of Tenders are not admitted for consideration". This is the wording contained in Clause 1.1.5 in the document titled "Request for Tender" Exhibit DR1 to the affidavit of David Michael Rolland sworn 20 June 2002

(AB p 52). Pursuant to addendum No. 3 to the tender, the closing date for tenders was extended to 6 June 2001 (Exhibit DR2 to the aforesaid affidavit of David Michael Rolland).

[10] A copy of the tender document submitted by the respondents is Exhibit DR3 to the aforesaid affidavit of David Michael Rolland. The price for the alternative tender submitted by the plaintiffs on 6 June 2001 was $28,557,698.00.

[11] Exhibit DR4 to the aforesaid affidavit of David Michael Rolland is a document titled "Presentation" dated 10 July 2001. This document contains a revised price of $35,835,431.00. This document which was a revised alternative tender was submitted by the respondents at the time of the presentation to the tender assessment panel on 10 July 2001.

[12] The presentation document Exhibit DR4 dated 10 July 2001 differs from the tender document Exhibit DR3 in a number of ways in addition to the total cost. These matters are referred to in the affidavit of David Michael Rolland and include differences in quantity of fill and rates per cubic metre of fill.

[13] In his affidavit David Michael Rolland states at par 14 (AB 56-57):

> "14. The alternative tender submitted by the plaintiffs on 10 July 2001 appeared to withdraw the alternative of 6 June 2001 and to change the design and quantities yet again. Rather than pursuing the pancake method alternative tender, the alternative of 10 July 2001 appeared to adopt a hybrid design by which some of the specified quarried fill in the bund core was replaced by marine sand in a

> pancake style, but the design geometry of the bund in cross-section remained basically in accordance with the conforming tender design. By way of illustration, I refer to the drawing behind tab 2 in the plaintiffs' written presentation of 10 July 2001."

and at par 17 (AB 58-59):

> "17. The tender assessment panel gave full consideration to the alternative tenders submitted by the plaintiffs and decided that they should be rejected because of the uncertainties involved in it, specifically the uncertainties as to quantity of fill, specifications for the proposed marine sand fill, the need for compaction of the marine sand, the methods of placement and compaction of the fill and the structural adequacy of the proposed concrete mattresses. In summary, the panel was concerned that there was too much risk involved to justify the minimal reduction in price that would be achieved over the conforming tenders. For this reason, it became unnecessary for the panel to resolve the issue of the late receipt of the plaintiffs' revised pricing schedules and their presentation document. Had the panel needed to consider that question, my personal view was that the alternative tender of 10 July 2001 should have been rejected as it was received out of time and it was a different design to the alternative of 6 June 2001, such that it could not be treated merely as a correction to the tender which was received within time."

[14] It is also relevant to refer to par 10 of this affidavit which states as follows (AB 55):

> "10. For the reason that the plaintiffs' revised price was received after the close of the tender period and after tenders had been opened, and because it was supported by a volume of material which should have been but was not included in the original tender, the tender assessment panel had serious concerns as to whether the panel could properly receive the documents and the revised price. However, the panel agreed to set aside those concerns temporarily to consider the technical aspects of the tender prior to determining whether or not its late receipt would be an issue."

[15] Counsel for the appellant submitted a document titled "Applicants' Comparison of 6 June alternative to 10 July alternative tenders". This

document outlines the differences in the two alternative tenders. This includes differences in the geometry of the railway bund. A difference in the quantity of earthworks in the rail bund. Differences in the rates charged for certain items and differences in the construction timetable.

[16] I am satisfied the document referred to as a "Presentation" dated 10 July 2001 prepared by the respondents was a very different proposal to the earlier alternative tender. In addition to this it was out of time. The appellant was not obliged to consider it. There was no process contract or indeed any form of contract between the appellant and the respondents.

[17] The primary judge in his decision on 19 September 2002, said (tp 54):

> "Mr Ward, for the defendants, sought to distinguish those cases and referred extensively to the tender documents in the present case. However, it seems to me that there is clearly a case to be tried on the question of whether a process contract was constituted or not. It is not for me, I think, on this application, to decide whether or not there was a contract. It is for me to simply satisfy myself, relevantly, that this is not a case frivolously brought. And I am so satisfied, that there is reasonable cause to believe that the present plaintiff may have a claim or the right to obtain relief from the court by way of damages for breach of contract."

[18] I accept the submission of counsel for the appellant that on the uncontradicted documentary evidence before the court this was an error. There was uncontradicted evidence before his Honour that two alternative tenders were lodged and that the one on which the respondents relied was received out of time.

[19] In *Bradley v Eagle Star Insurance Co* [1989] 1 AER 961 Lord Brandon of Oakbrook at 963 - 964:

> "… that being so, the appellant's proposed action against the respondents could not succeed, and it would therefore serve no useful purpose to make the order for pre-action discovery …

See also *Civil and Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd* (1991) 1 NTLR 43 at 53.

[20] In *Dey v Victorian Railways Commissioners* (1948 - 1949) 78 CLR 62 Latham CJ at 84:

> "The question remains whether an order should have been made for the dismissal of the action against the widow. No evidence could affect the decision upon this point. The relevant facts are indisputable, as the learned judge said. But it is argued that if a case involves any question of difficulty the summary procedure of dismissing an action as vexatious should not be applied. In the present case there is nothing frivolous about the action, but if a court is of opinion that the plaintiff cannot succeed there is every reason for protecting a defendant from vexation by the continuance of proceedings which must be useless and futile. …"

and also at pp 84 - 85:

> "… In Victoria applications for the dismissal of the action are not dealt with by a master, and they can be and are fully argued. If, as a result of argument, the court reaches a clear decision which could not be altered by any evidence which could be adduced at the trial, then it is proper in the interests of both parties to dismiss the action instead of allowing the parties to incur completely useless expense."

[21] Similarly in this case the documentary evidence which was referred to extensively at trial establishes that the respondents had no cause of action

because no contract had been entered into by the parties. To allow the respondents discovery in these circumstances would be a needless expense.

[22] Counsel for the respondents, Ms Kelly, submits that it was neither necessary nor appropriate for the learned judge at first instance to consider whether the respondent had sufficient documents to determine whether or not a process contract existed. The respondents submit they sought discovery not as to whether or not a process contract existed but whether or not it had been breached.

[23] I have come to the conclusion that as the documentary evidence shows no contract existed then it would be a futile and an unnecessary expense to order discovery to establish whether a non-existent contract had been breached.

[24] The respondents' argument is that it was not appropriate for the trial judge in the course of an application for discovery pursuant to Rule 32.05 to decide whether the respondents had a cause of action. The respondent relies on par 32 *United Energy Ltd v Risk Management Pty Ltd* [1998] VSC 133 (13 November 1998):

> "It is clear from the wording of the rule that the applicant does not have to show that he does have a good cause of action before he can obtain his order, and indeed to require him to do so would defeat the very object of the rule."

I note also par 33:

> "On the other hand, an applicant would have to show more than a mere hunch, a hope or a suspicion that he may have a good cause of action."

[25] I accept the submission on behalf of the respondents that an applicant for discovery under Rule 32.05 simply has to show that there is reasonable cause to believe that it has or may have a right to obtain relief.

[26] However, in this case the uncontradicted documentary evidence before the trial judge, which was also before this Court, is that the respondents did not have a contract with the appellant and did not have a cause of action.

[27] The respondents submit that:

> "The decision appealed against involves the exercise of a discretion on a matter of procedure. For leave to be granted, 'the order appealed from must be seen to be clearly wrong, or at least attended with sufficient doubt as to whether it is right or wrong and some substantial injustice must be shown as a consequence of the order'. [*Rogerson v Law Society (NT)* [1993] 88 NTR 1 at p5; *Niemann v Electronic Industries Ltd* [1978] VR 431; *Nationwide News Pty Ltd v Bradshaw* (1986) 41 NTR 1."

[28] I consider the appellant has demonstrated a clear error and that there would be an injustice in requiring the appellant to be put to the unnecessary time and expense of providing discovery.

[29] The respondents further contend that there is no likelihood of substantial injustice to the appellant as the result of the decision to allow discovery.

[30] This latter submission is based on an argument that the obligation imposed on the appellant to provide discovery is not onerous given the size and resources of the appellant.

[31] These arguments cannot be persuasive in a situation where the appellant has established there is no cause of action against them.

[32] I would grant leave to appeal, allow the appeal and make the orders sought by the appellant.

RILEY J

[33] This matter concerns an order of the Supreme Court requiring that the appellant provide discovery to the respondent's solicitors pursuant to O 32.05 of the Supreme Court Rules. That rule permits the Court to order discovery from a prospective defendant if:

> "(c) There is reasonable cause to believe that the person has or is likely to have or has had or is likely to have had in his possession a document relating to the question whether the applicant has the right to obtain the relief and that inspection of the document by the applicant would assist him to make the decision."

[34] The history of the matter is set out in the reasons for decision of Thomas J. The issue for this Court is whether the order for discovery should not have been made because the respondent did not have a relevant cause of action that could succeed as against the appellant.

[35] In my view, the application for discovery should have been dismissed. The basis upon which the respondent claimed that it had reasonable cause to believe that it might have the right to obtain relief in the Court was that the terms of a so called "process contract" (as to which see *Blackpool Aeroclub v Blackpool Borough Council* (1990) 3 All ER 25 at 30-31; *Pratt Contractors v Palmerston North City Council* (1995) 1 NZLR 469 at 479-480) had been breached. A prerequisite to any finding of breach was, necessarily, a finding that there had been a process contract in existence at a relevant time. If there was no such contract, then discovery directed towards a possible breach should not be ordered.

[36] The respondent submits that there was in existence a process contract constituted by the appellant issuing a "request for tender" in May 2001 and the respondent submitting a conforming tender within the time specified in the offer. The respondent submits that it is not necessary or appropriate for the Court to make findings as to the existence or non-existence of such a contract provided the respondent has shown that there is reasonable cause to believe that it has, or may have, a right to obtain relief.

[37] The difficulty for the respondent is that, if there was a process contract, it related to the request for tender issued in May 2001 and the acceptance thereof by the respondent submitting a conforming tender. However the possible breach that the respondent wishes to explore relates to a subsequent non-conforming tender submitted by the respondent after the tender period had closed. The tender period closed on 6 June 2001 and the subsequent

tender was submitted on 10 July 2001. It cannot be successfully argued that any process contract entered into between the appellant and the respondent has application in respect of the non-conforming tender because the tender period had closed. There is no basis for suggesting that, if a process contract was entered into in May 2001, it could have application to the non-conforming tender. The operational period of any such contract had expired. In the circumstances that prevailed there could have been no other process contract entered into between the parties subsequent to the close of tenders. In all the circumstances, there could not be a process contract to which the possible breach identified by the respondents could relate.

[38] I agree with Thomas J that the order should not have been made and I agree with the orders she proposes.

_____