Cockatoo Tropical Orchards Pty Ltd v Tipperary Group of Stations [1999] NTSC 84

PARTIES:	COCKATOO TROPICAL ORCHARDS PTY LTD v TIPPERARY GROUP OF STATIONS A JOINT VENTURE BETWEEN TOVEHEAD PTY LTD AND BRANIR PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	110 of 1997
DELIVERED:	17 August 1999
HEARING DATES:	15 and 22 July 1999
JUDGMENT OF:	Riley J

REPRESENTATION:

Counsel:

Plaintiff:	P. Barr
Defendant:	N. Henwood

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	Cridlands

Judgment category classification:	C
Judgment ID Number:	ril99024
Number of pages:	7

ril99024

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

Cockatoo Tropical Orchards Pty Ltd v Tipperary Group of Stations [1999] NTSC 84

No. 110 of 1997

BETWEEN:

COCKATOO TROPICAL ORCHARDS PTY LTD
Plaintiff

AND:

TIPPERARY GROUP OF STATIONS A JOINT VENTURE BETWEEN TOVEHEAD PTY LTD AND BRANIR PTY LTD
Respondent

CORAM: RILEY J

REASONS FOR DECISION

(Delivered 17 August 1999)

[1] This is an application for an interim injunction. The plaintiff and the defendant have suffered a deteriorating relationship over a period of years and their differences are now the subject of proceedings which are likely to lead to a hearing in the first half of next year.

[2] In the meantime the plaintiff continues to manage mango trees which grow on the defendant's land at Tipperary Station.

[3] The matter of immediate concern to the parties arises out of an agreement reached between them in 1995. For present purposes the parties accept that the terms of that agreement are set out in two sentences extracted from letters passing between them dated 7 March 1995 and 24 March 1995. The sentences are as follows:

> "Use of the shed adjacent the furniture store as a temporary storage area and packing facility is granted subject to the Station not requiring the shed for other purposes."
>
> "That the Tipperary Group of Stations will always provide a suitable shed for storage and picking/packing facilities during this contract period."

[4] The plaintiff says that the defendant complied with its obligations arising out of that part of the agreement during the years 1995 to 1998 by providing room in the shed identified in the correspondence and which is shown in Exhibit P3. However it says that in the last year or so the defendant has sought to exclude it from that shed and has not provided it with any alternative "suitable" accommodation.

[5] The plaintiff now seeks injunctive relief in the following terms:

> "Until 31 December 1999 or further order the defendant be restrained from interfering with the plaintiff's access to and use of the two right hand bays of the shed and the sealed loading bay in front situated adjacent to the furniture store at Tipperary Station".

[6] The evidence reveals that in September 1998 the defendant advised the plaintiff that it required use of the shed "in order to house farming equipment". The plaintiff suggested that the issue should be addressed at

the end of the 1998 mango season. In November 1998 the defendant again raised the issue indicating that "only part of the shed is required and what remains of [the plaintiff's] equipment can continue to be accommodated in that shed". Alternative, but unidentified, storage facilities were offered to the plaintiff.

[7] In December 1998 the plaintiff wrote to the defendant noting that:

(1) The defendant was denying the plaintiff access to the shed. Whilst permitting the plaintiff to remove equipment from the shed the defendant did not allow the plaintiff to return that equipment to the shed.

(2) The shed had been locked without the plaintiff having been offered or having accepted an alternative suitable shed.

[8] It seems that nothing of significance then occurred until July 1999. In an affidavit sworn in July 1999 the plaintiff indicated that it had been offered an alternative shed but that the shed was unsuitable.

[9] The defendant says that its obligation is to provide a "suitable shed" and that it has offered one.

[10] The defendant submits that the application is premature as the time has not yet arrived when it can be said that suitable accommodation has not been offered. It says that an offer has been made and it has only learnt, in the

course of these proceedings, that the identified shed is not thought by the plaintiff to be suitable.

[11] The defendant also says that for this Court to order the provision of "suitable" accommodation is to make an order so uncertain in its terms that it ought not to be contemplated. In addition it submitted that the application for relief should be rejected on the basis that the plaintiff is guilty of laches. Finally it says the balance of convenience does not favour the granting of relief.

[12] It seems the level of use of such a shed by the plaintiff fluctuates in the course of the year. For much of the year a shed is required for limited storage purposes. However at harvest a shed becomes an important centre for the harvesting operations. At that time the area required is at its greatest. The timing of the harvest is not a fixed event. However the expectation for this year is that it will occur in the relatively near future and continue for some six to sixteen weeks depending upon the available fruit.

[13] The plaintiff has not had a great need for access to the shed over recent months but now, as the harvest approaches, the need becomes greater. Hence the application for relief at this time.

[14] In summary the position for present purposes is that the defendant has an obligation to provide to the plaintiff a suitable shed. Up until 1998 it did so in the form of the shed that is the subject of the proceedings. The defendant has since 1998 progressively denied the plaintiff access to the shed and it

has done this by locking the premises and only allowing the plaintiff to remove items but not return them. In this way the situation has, over a period of time, gradually progressed to the point where it must be said that unless a suitable shed is now provided the defendant will have failed in its obligation to "always provide a suitable shed for storage and picking/packing facilities." On the basis of the information now before me it seems, on a prima facie basis, the defendant has breached, or is about to breach, its contractual obligations to the plaintiff.

[15] If the failure is allowed to continue this will lead to the point where the plaintiff will not be able to undertake its harvesting obligations as effectively as it otherwise would. This will result in losses that will, in some cases, be difficult to identify, establish and recover.

[16] I do not regard the offer of alternative accommodation as an offer of a "suitable" shed and I will address that shortly. It may be that the defendant does have other "suitable" accommodation that it can offer but it has not yet done so and the accommodation has not been identified. Therefore, at present, the defendant has reduced the access to suitable accommodation previously provided and has not replaced it with any other accommodation that satisfies the description.

[17] On the basis of the information before me I regard the alternative accommodation presently offered as unsuitable for the reasons spelled out in the affidavit of Jim Delis sworn 4 August 1999 and contained in par 6

(excluding 6(a)), 7, 8, 9, 10, 11 and 14 which were effectively unchallenged by the defendant. The defendant has identified no other suitable shed. It may be that the matter may be resolved by the identification of another shed. However during the hearing before me no alternative accommodation was identified by the defendant.

[18] There is a serious question to be tried being whether the conduct of the defendant is such as has led to, or will lead to, a breach of its contractual obligations to the plaintiff.

[19] To my mind the balance of convenience clearly lies with the plaintiff. The defendant provided no evidence of the prejudice that would flow to it if the relief is granted. The need for the accommodation with the impending harvest is clear. The need is now, in the lead up to harvest, and the defendant has not satisfied that need. The plaintiff should not have to wait until it is too late for the problem to be rectified before it obtains relief.

[20] I have expressed concerns as to the form of the order. It appears that the parties are at loggerheads and unable to co-operate with each other. However with a small amount of goodwill and common sense no difficulties should arise. If a problem does arise the matter can be addressed by the Court on short notice.

[21] On the plaintiff giving the usual undertaking as to damages I order that from 23 August 1999 until 31 December 1999 or further order the defendant be restrained from interfering with the plaintiff's access to and use of the two

right hand bays of the shed and the sealed loading bay in front situated adjacent to the furniture store at Tipperary Station.

_____