

Hansen v Northern Land Council [1999] NTSC 115

PARTIES: PETER JULIAN HANSEN
v
NORTHERN LAND COUNCIL

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction

FILE NO: 143 of 1993 (9315757)

DELIVERED: 28 October 1999

HEARING DATE: 21 October 1999

JUDGMENT OF: THOMAS J

CATCHWORDS:

Practice and procedure – judgments and orders – stay of execution – relevant principles applicable.

Supreme Court Act 1979 (NT), s 57

Supreme Court Rules 1987 (NT), r 84.14

Enterprise Gold Mines NL v Mineral Horizons NL (No 1) (1988) 91 FLR 403, followed.

Mengel v Northern Territory of Australia [No 2] (1993) 113 FLR 160, referred to.

Alexander v Cambridge Credit Corporation Ltd (Receivers Appointed) (1985) 2 NSWLR 685, referred to.

Enterprise Gold Mines NL v Mineral Horizons NL (No 2) (1988) 52 NTR 13, referred to.

REPRESENTATION:

Counsel:

Plaintiff: S. Southwood

Defendant: J. Kelly

Solicitors:

Plaintiff Geoff James

Defendant: Northern Land Council

Judgment category classification: C

Judgment ID Number: tho99016

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hansen v Northern Land Council [1999] NTSC 115
No. 143 of 1993

BETWEEN:

PETER JULIAN HANSEN
Plaintiff

AND:

NORTHERN LAND COUNCIL
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 28 October 1999)

- [1] This is an application by the defendant to stay a judgment of Angel J pending an appeal to the Court of Appeal.
- [2] On 12 July 1999, Angel J gave judgment in this proceeding in favour of the plaintiff. His Honour's judgment did not quantify the damages payable to the plaintiff.
- [3] By consent on 4 August 1999, his Honour Justice Angel referred the quantification of damages to the Master.
- [4] On 9 August 1999, the Northern Land Council filed a Notice of Appeal against the judgment of his Honour Justice Angel. A copy of the Notice of

Appeal is annexure A to the affidavit of Robert Angus Gosford sworn 5 October 1999.

[5] On 31 August 1999, the appeal book index was settled by the Registrar and the appeal was listed for hearing on 7, 8 and 9 December 1999.

[6] On 15 September 1999, the Master made an order quantifying the damages payable pursuant to the judgment in the amount of \$295,000. The Master made a further order staying execution of the judgment until 7 October 1999.

[7] The defendant's application for a stay of execution is opposed by the plaintiff.

[8] Section 57 of the *Supreme Court Act* provides as follows:

“(1) Where an appeal to the Court under section 51(1) has been instituted, the Court of Appeal or the Court may –

- (a) order, on such conditions, if any, as it thinks fit, a stay of the whole or any part of a proceeding under the judgment appealed from; and
- (b) by order, on such conditions, if any, as it thinks fit, suspend the operation of a judgment to which the appeal, in whole or in part, relates.

(2) Subsection (1) does not affect the operation of any provision made by or under any other law in force in the Territory or by the Rules for or in relation to the stay of a proceeding.

(3) Except as expressly provided by this section or by the Rules or any other law in force in the Territory, the institution of an appeal does not operate as a stay of execution.”

[9] The *Supreme Court Rules* – Rule 84.14 states:

“(1) Subject to any other law in force in the Territory, an appeal shall not –

(a) operate as a stay of execution or of proceedings under the judgment from which it was made;

...

except so far as the court below directs.”

[10] The principles applicable on the question whether a stay should be granted in this case are set out in *Enterprise Gold Mines NL v Mineral Horizons NL (No 1)* (1988) 91 FLR 403 at 410:

“... the principles applicable upon this application are as follows. To succeed, the applicant must make out a case which warrants the discretion to stay being exercised in its favour. The court has a general discretion on the question of granting a stay and the terms on which it will be granted. In exercising its discretion the court will consider the balance of convenience and what is fair and just as between the parties. If it is established, for example, that there is a real risk that the appeal will be nugatory without a stay, in the sense that there is a real risk that it will not be possible for a successful appellant to be restored substantially to its former position if the judgment of the warden’s court is executed, a stay will normally be granted: see *Scarborough v Lew’s Junction Stores Pty Ltd* [1963] VR 129 at 130. The court will not speculate on the applicant’s prospects of success in its appeal, unless it appears not to have an arguable case. The terms of any stay must fairly take account of the interests of both parties.”

[11] In exercising the discretion this Court has, I have concluded that the “balance of convenience and what is fair and just between the parties” is to grant the stay at least until the scheduled date of the commencement of the hearing of the appeal which is 7 December 1999 (see *Mengel v Northern Territory of Australia* [No 2] (1993) 113 FLR 160).

[12] The reason for this conclusion is that the defendant has an appeal listed to commence hearing in a little over one months time. Whilst I am not able to assess the merits of the appeal or its prospects of success it appears to be a bona fide appeal in the sense that the expedition with which it has proceeded and proximity of hearing date of the appeal indicate it is not merely an appeal lodged as a delaying tactic or to avoid the payment of a debt (*Alexander v Cambridge Credit Corporation Ltd (Receivers Appointed)* (1985) 2 NSWLR 685 at 695, *Enterprise Gold Mines NL v Mineral Horizons NL (No 2)* (1988) 52 NTR 13).

[13] The defendant argued that there is a real risk that the appellant will be unable to recover the full amount it would have to pay under the judgment if the appeal succeeds. There is evidence the plaintiff has substantial financial encumbrances and prima facie does not have the assets or income to repay the judgment amount if the appellant is successful. However, I consider in this particular case that the decisive factors in favour of granting the stay are those already addressed.

[14] Accordingly, I have not come to any final conclusion as to the financial position of the plaintiff in the sense that failure to grant the stay could result in the appellants not being able to recover their money if successful.

[15] I will hear submissions as to any conditions to be imposed on the order for a stay of proceedings.