CITATION:	*Windbox Pty Ltd v Daguragu Aboriginal Land Trust & Ors (No 2)* [2019] NTSC 96
PARTIES:	WINDBOX PTY LTD (ACN 007 419 641) v DAGURAGU ABORIGINAL LAND TRUST and CENTRAL LAND COUNCIL and JACT PASTORAL PTY LTD and LESLIE, Zebb Raymond and ROWBOTTOM, Kylie Danielle
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	11 of 2018 (21840850)
DELIVERED:	23 August 2019
HEARING DATE:	22 August 2019
JUDGMENT OF:	Hiley J

CATCHWORDS:

JUDGMENTS AND ORDERS – amending, varying and setting aside – consent orders – SCR 59.06(2) requires all parties to appear and consent – certainty and finality – duty of court to completely and finally determine all matters in controversy between parties

Cameron v Cole (1944) 68 CLR 571, *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, *Mango Boulevard P/L v Spencer & Ors* [2010] QCA 207, *Stead v State Government Insurance Commission* [1986] 161 CLR 141, referred to

Rules of Professional Conduct and Practice 2005 r 17.40
Supreme Court Act 1979 s 19
Supreme Court Rules 1987 r 25.02, r 36.03, r 59.06(2), r 63.29, r 63.04(4), r 77.01(2)(b)

REPRESENTATION:

Counsel:

Plaintiff:	A Harris QC, M Barnett and S Heidenreich
1st & 2nd Defendants:	C Young
3rd, 4th & 5th Defendants:	A Wyvill SC and H Baddeley

Solicitors:

Plaintiff:	Gardiner and Associates / Povey Stirk
1st & 2nd Defendants:	Central Land Council
3rd, 4th & 5th Defendants:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	Hil1909
Number of pages:	13

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Windbox Pty Ltd v Daguragu Aboriginal Land Trust & Ors (No 2)
[2019] NTSC 96
No. 11 of 2018 (21840850)

BETWEEN:

WINDBOX PTY LTD (ACN 007 419 641)
Plaintiff

AND:

DAGURAGU ABORIGINAL LAND TRUST
First Defendant

AND:

CENTRAL LAND COUNCIL
Second Defendant

AND:

JACT PASTORAL PTY LTD
Third Defendant

AND:

ZEBB RAYMOND LESLIE
Fourth Defendant

AND:

KYLIE DANIELLE ROWBOTTOM
Fifth Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered *ex tempore* on 23 August 2019)

Introduction

[1] By summons dated 13 August 2019 the JACT parties have applied to have set aside a consent order made by Associate Judge Luppino on 17 July 2019 that "the proceedings brought by the plaintiff against the first and second defendants" (**the CLC parties**) be dismissed. The JACT parties were not parties to that consent order and had no prior notice of it being applied for and no opportunity to contend that it should not be made.

[2] The order was made by the Associate Judge, apparently under SCR 77.01(2)(b), after a written consent order signed by those parties was filed, presumably under SCR 59.06(2).

[3] Although these points were not taken by the JACT parties there must be some doubts about the validity of the consent order:

(a) I would think that the references in SCR 59.06(2) to *the* parties and to *each of the parties* mean that <u>all</u> parties in the proceeding must consent, not just some of the parties. Otherwise the word *the* would be otiose.

(b) Secondly the Associate Judge only has jurisdiction to make such an order if *all parties affected appear and consent* or provide their written consent. I would have thought that the JACT parties fell within the description of being a party *affected*.

[4] The main focus of JACT's submissions was that it should have been told by the plaintiff and/or the CLC parties of their intention to seek the consent orders before they were sought and obtained. Mr Wyvill SC contended that the plaintiff and the CLC parties were in breach of:

(a) orders made by this court, by consent, on 14 June 2019, in particular order 2.2; and

(b) rule 17.40 of the Northern Territory Rules of Professional Conduct and Practice.

Relevant background

[5] On 14 June 2019 the Court was informed that the proceedings as between the plaintiff and the first and second defendants had been settled and that a deed of settlement was being prepared. The court was not informed of what if any orders and relief might be sought from the court in relation to what parts of the plaintiff's claims. However I did assume that amendments would be made, probably to the statement of claim, to clearly identify the remaining issues and the factual allegations underlying them.

[6] The parties agreed to consent orders which included Order 2 etc. I thought that the main aim of those was to enable the plaintiff and the JACT parties to clearly identify those issues which they wish to be litigated notwithstanding the CLC settlement. I had assumed that all parties would be notified of each other's proposals as to how the matter

should proceed – for example changes to the pleadings, written submissions already filed or even orders made to reflect the settlement.

[7] Notwithstanding this assumption on my part the consent order was filed and subsequently made without any prior notice to the JACT parties.

[8] Counsel for JCAT contended that this was in breach of the orders that I made on 14 June 2019 and also in breach of professional conduct rule 17.40. For the purposes of these brief ex tempore reasons it is not necessary for me to dwell further on those contentions, except to say they have significant merit.

[9] Whatever the merits of those contentions I consider that the consent orders were obtained by the plaintiff and the first and second defendants without according necessary procedural fairness to the JCAT parties. I consider that by being deprived of the opportunity to make submissions against the making of the consent orders, the JACT parties have been deprived "of the possibility of a successful outcome", to use the language of their Honours in *Hossain v Minister for Immigration and Border Protection.*[1]

[10] For that reason alone the consent order should be set aside and the JACT parties given the opportunity to argue against the making of a

---

1 (2018) 264 CLR 123 at [30] referring to *Stead v State Government Insurance Commission* [1986] 161 CLR 141 at 147. See too *Cameron v Cole* (1944) 68 CLR 571 at 589.

similar consent order. Having said that I do not consider that a similar order should be made at this stage.

[11] In short I accept the contentions made by the JACT parties, particularly at para 15 of their submissions of 6 August 2019 – in particular at 15.4 & 15.5.

[12] The evidence is complete. Detailed written submissions on all issues have already been made by the plaintiff and by the JACT parties. Those issues are ready for determination – subject to any further submissions that CLC might want to make.

Submissions

[13] Counsel for the plaintiff and for the CLC parties contended that the consent order created a res judicata as between them, and that the JACT parties would later be able to assert issue estoppel or Anshun estoppel in the event that they later choose to bring one or more claims that relied upon the fact that the grazing licences granted to JACT were valid.[2] The most obvious claim would be a claim to enforce the undertaking as to damages given by the plaintiff when it obtained the interlocutory injunction.

[14] In their submissions of 6 August 2019 counsel for the JACT parties contended that:

---

2 See for example Plaintiff's Further Written Submissions in Reply 15 August 2019 [5] – [6] & [8].

3. It is clear that this dismissal is not intended to be a dismissal "on the merits" which would give rise to a res judicata or an issue estoppel in respect of the dismissed claims.[3] Hence, in its submissions, Windbox "does not admit that any of its claims against the [CLC/Land Trust] were not properly brought, or were otherwise without reasonable foundation or reasonable prospects of success, or that it did not have a *prima facie* entitlement to relief, or that the interlocutory injunction was wrongly granted".[4] Similarly, Windbox/CLC/Land Trust submit that, as a result of the consent orders, the JACT Defendants are no longer entitled to ask the Court to rule at this trial on Windbox' claims that the licence agreements granted by the CLC/Land Trust to JACT are invalid and of no effect. It appears clear that Windbox/CLC/Land Trusts' intention is that these claims – which have been and remain pleaded against JACT - would then be left unresolved, to be raised again against JACT by one or more of these parties at some time in the future, including if JACT calls upon Windbox's undertaking as to damages.

4. This would cause real prejudice to the JACT Defendants. The JACT Defendants have always maintained that, regardless of what may have occurred in the dealings between the CLC/Land Trust and Windbox, JACT obtained an indefeasible title under its licence agreements by reason s 19(6) of the ALRA. The JACT Defendants have made it clear (see, e.g., [88] of their closing submissions dated 27 May 2019 and at the hearings on 13 and 14 June 2019) that once its indefeasible title is confirmed by the Court in these proceedings the JACT Defendants will call upon Windbox's undertaking as to damages.[5]

5. However, in spite of all the resources which have been devoted over the last 10 months to Windbox's claims that challenge the indefeasibility of JACT's title and in spite of the fact that Windbox has closed its case on these claims, it appears to be the position of Windbox/CLC/Land Trust that

---

3 It appears that the consequences of the "dismissal" of a claim depends on the circumstances in which the claim is dismissed: *Mango Boulevard P/L v Spencer & Ors* [2010] QCA 207 at [54]-[56]. The JACT Defendants' reference to "dismissal" in [88] of their final submissions is a reference to a dismissal which does give rise to res judicata/issue estoppel as is clear from the balance of the paragraph.

4 Windbox's written submissions dated 19 July 2019 at [11.2].

5 It may be necessary in this respect for JACT also to make claim against CLC/Land Trust for the same losses which no doubt the CLC/Land Trust would seek to pass on to Windbox under the undertaking.

the Court should make - and, indeed, has made - an order these claims be hived off at the eleventh hour and not finally determined at this trial but left unresolved such that all of these issues can be re-litigated at some point in the future, from the beginning and perhaps before another judge.

6. Further, in these circumstances, no doubt Windbox reserves the right to claim to be entitled to apply, again, to amend its pleadings, perhaps in respects already ruled against it, because – it might well argue – interlocutory decisions do not give rise to an issue estoppel and the circumstances would then be sufficiently different not to make a further application abusive. It may even claim to be entitled to deliver entirely new pleadings "in defence" to JACT's claim to an indefeasible title in support of a claim to recover from Windbox the benefits it lost under its licences as a result of Windbox's injunction.

[15] I agree with these concerns, in particular the uncertainty as to whether and to what extent the consent order would create an estoppel. Further, because the terms of the settlement are not known to anyone apart from the plaintiff and the CLC parties, it is impossible to know how particular issues have been determined, if at all. For example, it is not known whether the plaintiff has now accepted that the grazing licences were validly granted or whether, as the plaintiff's submissions suggest, this is still a live issue.

[16] I also consider important the prejudice and additional expense that the JACT parties would incur if they had to re-litigate these kinds of issues, and the fact that those issues are ripe for judicial determination all evidence and written submissions having been completed, with the exception of any additional written submissions which the CLC parties might wish to make.

[17] I also agree with the JACT parties' contentions in paragraph 15 of their submissions of 6 August 2019. This includes the reference to s 19 of the *Supreme Court Act 1979* which requires the Court to *completely and finally* determine as far as possible *all matters in controversy between the parties* and to avoid *multiplicity of proceedings concerning any of those matters*.

[18] In my opinion issues such as the validity and effect of the grazing licences between the time when the interlocutory injunction was made and the time when they were terminated are important issues which can be and should be readily determined at this stage of these proceedings.

[19] In the course of oral submissions Mr Wyvill SC submitted that the determination of the validity issue was important for two reasons: one to bring about finality; the second to provide certainty. He also queried what advantage the plaintiff and the CLC parties would derive from the consent order that they would not already have under the settlement deed between them.

[20] In relation to finality Mr Wyvill SC also referred to contentions made on behalf of the plaintiff on 14 March 2019 concerning its continued rights to use and occupy the land and its challenge to JACT's asserted interests in the land the subject of the grazing licences.[6] See too his

6 Plaintiff Response to Defendants Submissions on the status of the Injunction after 1 May 2019 [6], [8] and [9].

contentions in [3] of JACT's written submissions of 6 August 2019 reproduced in [14] above.

[21] In relation to certainty counsel referred to the possibility of issues such as the validity issue having to be determined at some later stage and possibly by another judge.

[22] In their written submissions of 19 July 2019 counsel for the plaintiff submitted that the only issues requiring final determination at this stage are the claims against the JACT parties in relation to the alleged breaches of statutory duties. The plaintiff's claim for injunctive relief against the JACT parties is no longer required now that the grazing licences have been terminated.

[23] Counsel stressed that this does not mean that the interim injunctive relief obtained by the plaintiff was not properly brought or that it was wrongly granted. Counsel contended that it is not presently necessary for the court to determine that issue or other issues that are no longer in dispute between the plaintiff and the CLC parties. To do so would be to decide matters that are merely hypothetical in nature, a course which courts are reluctant to take. However, that is not to say that such a course cannot be taken in certain circumstances.

[24] Counsel also referred to SCR 25.02 and SCR 36.03 and submitted that there is no requirement for the plaintiff to formally amend its statement of claim or seek leave to withdraw part of a claim. Counsel contended

that it was sufficient that the plaintiff identify those parts of its claim that it did not wish to pursue. That contention seems to be accepted by Mr Wyvill SC on behalf of the JACT parties, but on the assumption that those parts of the claim not pursued are clearly identified.

[25] Counsel also contended that the undertaking as to damages cannot usually be enforced before the final determination of the substantive proceedings. An important reason for this is that "the final determination of [the] proceedings is likely to be highly material to a decision as to whether the undertaking as to damages should be enforced."[7] In my view that is not a reason for the court declining to determine an issue that was live at the time of making the injunction and remained live at least until the termination of the grazing licences, particularly where that issue is ready for determination without the need for further evidence or detailed submissions.

[26] I will also add, although this point was not subject to submissions, the determination of the validity issue at this stage may well be of significant utility in relation to costs. The validity issue was of paramount importance to the JACT parties at all times, at least until the settlement and the termination.

[27] In the course of his oral submissions Mr Harris QC contended that it would be "procedurally grotesque" and unfair to the CLC parties if the

---

7 Quoting from *IceTV v Ross* [2008] NSWSC 898 at [10] – [11].

consent order was set aside. This is because the CLC parties would no longer have the certainty and finality that they have with the consent orders. I reject that contention. I would have thought that the CLC parties would have the protection of terms of settlement which provide them with all of the finality and certainty that they might require until judgment.

[28] In its written submissions counsel for the CLC parties contended that the consent of the JACT parties was not required before the consent order could be made. I disagree, for the reasons I have already given.

[29] The CLC parties also acknowledge that a judgement that the plaintiff fails on the merits of its claims against the CLC parties would prima facie entitle the JACT parties to enforce the undertaking as to damages given by the plaintiff when the interlocutory injunction was granted. Counsel contended that such questions can be raised separately at a later stage as part of a (yet to be made) application for leave to enforce the undertaking. Whilst that may be so, there is no reason for the court not to deal with relevant issues now, particularly at this late stage of the proceedings. In any event would not be necessary for the court to deal with all of the plaintiff's claims against CLC parties.

[30] Counsel pointed out that following their settlement with the plaintiff the court should no longer be required to determine a significant number of issues raised only as against the CLC parties. Counsel

submitted that the CLC parties should no longer be obliged to remain as active parties. I do not see why the CLC parties would be obliged to incur significant additional exposure or costs if the consent order was set aside and not remade. Presumably, under the settlement arrangement, the plaintiff would not be pursuing any of its claims against the CLC parties. The only thing that the CLC parties might wish to do is to file written submissions on those issues which still concern it, if any.

[31] The only issue that readily springs to mind concerns the validity of the grazing licences. Presumably the CLC parties would, consistently with its position throughout the trial, maintain that the grazing licences were valid. They might also choose to simply adopt the submissions on that topic already made on behalf of the JACT parties.

[32] I set aside the consent order made on 17 July 2019.

Costs

[33] Counsel for the JACT parties have sought costs on an indemnity basis (SCR 63.29) payable now (SCR 63.04(4). I assume the main basis for that application is JACT's complaints that the conduct of the plaintiff, and to a lesser extent the CLC parties, in seeking and obtaining the consent order without first informing the JACT parties, was in breach of the court's orders made on 14 June 2019 and in breach of the PCRs.

[34] I will hear counsel in relation to costs.
