

PARTIES: LEXCRAY PTY LTD
v
NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction

FILE NO: AP22 of 1999

DELIVERED: 19 April 2000

HEARING DATES: 3 April 2000

JUDGMENT OF: THOMAS J

CATCHWORDS:

APPEAL – SECURITY FOR COSTS – ONUS OF PROOF –

Plaintiff is a corporation – when security for costs should be ordered – respondent bears the onus – establishing reason to believe insufficient assets in the Northern Territory to pay costs if ordered to do so – must be a reason for that belief – position of appellant at time in future when any order for costs may be made – respondent not established grounds for making order of security for costs – discretion not necessary – must be something exceptional about circumstances before an order for costs is made – application for security of costs is reasonable.

Supreme Court Rules (NT), r 62.02(1)(b), r 85.13

Mohammad Ayyoush v Darsiah Samin & Fatima Adjrun (unreported) Northern Territory Supreme Court, 18 May 1994, Kearney J, applied

Millingimbi Educational and Cultural Association Inc v Davies & Ors (unreported) Northern Territory Supreme Court, 12 October 1990, Kearney J, applied

Commercial Union Assurance Company of Australia Ltd v Ferrcom P/L & Anor (1991) 22 NSWLR 389, considered

Southern Cross Exploration v Fire & All Risks Insurance Co Ltd & Ors (1985) 1 NSWLR 114, considered

Southern Cross Exploration NL & Others v Fire & All Risks Insurance Co Ltd & Ors (1986) 4 NSWLR 491, considered

Beach Petroleum NL & Anor v Johnson & Ors; Jingellic Minerals NL & Anor v King & Ors 1992 10 ACLC 525, applied

TTE Pty Ltd v Ken Day Pty Ltd (1992) 2 NTLR 143, applied

REPRESENTATION:

Counsel:

Appellant: A Lindsay
Respondent: S Southwood

Solicitors:

Appellant: Cridlands
Respondent: Solicitor for the Northern Territory

Judgment category classification: C
Judgment ID Number: tho20005
Number of pages: 9

IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lexcray Pty Ltd v Northern Territory of Australia [2000] NTSC 24
No. AP22 of 1999

BETWEEN:

LEXCRAY PTY LTD

Appellant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**

Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 19 April 2000)

[1] This is an application by the respondent for the following orders:

1. Pursuant to r 62.02(1)(b) and (f) and r 85.13 the appellant provide the sum of \$224, 000 security for the costs of the respondent.
2. Until such security is given the appeal be stayed.
3. The appellant pay the respondent's costs of and incidental to this application.
4. Such further orders as the court deems appropriate.

- [2] The evidence relevant to this application is contained in the affidavit of Philip John Timney sworn 22 March 2000 and the affidavit of Clair Dorothy Miller sworn 22 March 2000 filed on behalf of the respondent and affidavits of Alan Lindsay sworn 30 March 2000 and affidavit of Josephine Christmas sworn 30 March 2000 filed on behalf of the appellant.
- [3] The appeal is listed for hearing commencing on 5 June 2000 and allocated 15 days.
- [4] Rule 62 02 deals with when to give security for costs. Subsection 1(b) and (f) reads as follows:

“ (1) Where –
(b) the plaintiff is a corporation or (not being a plaintiff who sues in a representative capacity) sues not for his own benefit but for the benefit of another person and there is reason to believe that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so;

.....

(f) under an Act or the Corporations Law the Court may require security for costs,

the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against the defendant be stayed until the security is given.”

- [5] Rule 85.13 states:

“Unless the Court of Appeal or a Judge otherwise directs, no security for the costs of an appeal to the Court of Appeal is required.”

- [6] The respondent bears the onus of establishing that there is reason to believe that the appellant has insufficient assets in the Northern Territory to pay the costs of the respondent if the respondent succeeds on the appeal (see *Mohammad Ayyoush v Darsiah Samin & Fatima Adjrun* matter No. 204 of 1993, decision of Kearney J delivered 18 May 1994).
- [7] The appellant in these proceedings is a corporation within the meaning of r 62.02(1)(b). From the affidavit of Philip John Timney sworn 22 March 2000 para 7 (a) the appellant was incorporated in Queensland on 7 October 1983, (c) the appellant is a limited liability company with a paid up capital of \$3.00 representing three \$1.00 shares.
- [8] I adopt with respect the statement of principle expressed by Kearney J in *Millingimbi Educational and Cultural Association Incorporated v Davies & Ors* No. 259 of 1987 (unreported) delivered on 12 October 1990 at p 9:
- “The exercise of the power under Rule 62.02(1)(b) requires as a pre-condition that the Court believes ‘that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant(s) if ordered to do so’, and that there is a reason for that belief. I consider that the necessary reason must be founded on credible evidence. ...”
- [9] Mr Southwood, counsel for the respondent, argues that because of the failure of the appellant to fully lay out its financial position any doubt or ambiguity should be resolved in favour of the respondent (*Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd & Anor* (1991) 22 NSWLR 389, *Southern Cross Exploration v Fire & All Risks Insurance Co*

Ltd and Others (1985) 1 NSWLR 114 at 117, *Southern Cross Exploration NL & Others v Fire & All Risks Insurance Co Ltd & Others* (1986) 4 NSWLR 491).

[10] In his affidavit sworn 22 March 2000, Philip Timney analyses the Financial Statement and Taxation Return for Lexcray for the year ended 1999. His comments on these documents are as follows (para 15):

“I have reviewed the 7 March 2000 facsimile and the Financial Statement and Taxation Return for Lexcray for the year ended 1999 and make the following comments:

- (i) Lexcray appears to have net liquid assets as at 30 June 1999 of \$30,016 and 2,000 head of cattle ready for sale.
- (ii) Lexcray may potentially transfer ownership of its realisable assets (eg livestock) to its related company – Australian Livestock and Land Pty Ltd (“AL&L”) by way of a loan between the two companies for which no funds would be readily converted to cash or repaid.
- (iii) AL&L currently owes \$483, 641.
- (iv) Lexcray’s net flow of funds from operations for the year ended 30 June 1999 was \$318,593.
- (v) Lexcray’s non-current net financing debt has increased from \$339, 286 as at 30 June 1998 to \$653,443 as at 30 June 1999.
- (vi) Sundry debtors have increased from \$0 as at 30 June 1998 to \$161,448 as at 30 June 1999.
- (vii) The extent to which capital expenditure has been deferred (“Lexcray has further decreased expenditure on external wages and has frozen development work for the time being” see 7 March facsimile) may impact on the profitable operations of the business in the future.”

[11] Mr Timney then expresses his concern as to whether Lexcray will have sufficient funds to satisfy an order for costs made against it in this appeal.

- [12] The affidavit of Clair Dorothy Miller sworn 22 March 2000. Ms Miller is a senior associate employed by Mallesons Stephen Jaques and was employed by the Northern Territory of Australia as a senior solicitor in the Attorney-General's Department having the care and conduct of the trial and the subsequent appeal.
- [13] Ms Miller deposes to the fact that the trial of the proceeding was heard over 35 days. Having reviewed the professional fees and disbursements incurred in defending the proceeding, Ms Miller estimates that the party/party costs of the respondent for the trial to be approximately \$800,000. Ms Miller believes the appellant's party/party costs would be equal to or exceed the party/party costs of the respondent. In paragraph 12 of her affidavit, Ms Miller itemises the respondent's costs of the application for security for costs and the costs of the appeal involving a 15 day hearing on a party/party basis which total \$224,730.
- [14] The submission on behalf of the respondent is that these costs would exceed the appellant's assets. Details of the appellant's assets are included in the affidavit of Josephine Christmas sworn 30 March 2000. Ms Christmas has been the accountant for the appellant since 1981.
- [15] In this affidavit Ms Christmas deposes, amongst other matters, to the fact that Australian Livestock and Land Pty Ltd is a wholly owned subsidiary of Lexcray Pty Ltd. All of the issued shares in Australian Livestock and Land Pty Ltd are owned by Lexcray Pty Ltd. Ms Miller states that the assets of

the appellant consist of land, namely property known as Nutwood Downs with fixed improvements, machinery and cattle.

[16] Mr Lindsay, counsel for the appellant, has prepared a list of the appellant's assets and liabilities and sourced the figures to the information provided in respective paragraphs of the affidavit of Ms Christmas sworn 30 March 2000 and the affidavit of Ms Miller sworn 22 March 2000. I have reproduced that summary below:

“Appellant’s Assets and Liabilities

Assets

Lexcray Pty Ltd

- Leasehold, fixed improvements \$2,000,000.00¹
- Cattle \$2,866,000.00²
- Calvings \$400,000.00³
- Machinery \$350,000.00⁴

Australian Livestock and Land Pty Ltd

- Cattle \$440,000.00⁵
- Machinery \$70,773.00⁶

\$6,126,773.00

¹ Keim, Christmas, para 37

² Keim, Christmas, para 38

³ Christmas, para 40

⁴ Keim, Christmas, para 40

⁵ Christmas, para 38

⁶ At cost, Christmas, Annexure C

Liabilities (including contingent liabilities)

Lexcray Pty Ltd

- PIBA \$1,500,000.00⁷
- Shareholder loans \$771,355.00⁸
- ADMA and NT Loans \$8,561.00⁹
- NT estimated adjusted costs of appeal \$200,000.00¹⁰
- NT estimated costs of trial \$800,000.00¹¹

Australian Livestock and Land Pty Ltd

- Shareholder loans \$101,577.00¹²

\$3,381,493.00

Excess of Assets over liabilities

- At least \$2,745,280.00

⁷ Christmas, para 42(a)

⁸ Christmas, para 42(b)

⁹ Christmas, annexure D

¹⁰ Miller, para 12

¹¹ Miller, para 8

¹² Christmas, para 42(c)”

[17] There are a number of other matters set out in the affidavit of Ms Christmas which are relevant to note.

[18] In para 42(a) Ms Christmas deposes to the fact that the \$1.5 million shown on the table of liabilities being loan from the Primary Industries Bank of Australia includes money borrowed from Primary Industries Bank of Australia after 30 June 1999 to pay for the costs of the trial.

[19] In para 48 Ms Christmas deposes to the fact that the 2000 animals available for immediate sale will bring approximately \$1.1 million. The appellant intends to use that money to reduce its debt to the Primary Industries Bank of Australia, meet running expenses and pay its costs of the appeal.

[20] The respondent is relying on evidence in the appellant’s taxation return and financial statements for the year 1999. Whilst this may reflect certain cash flow problems it is not reflective of the market value of the assets if sold.

[21] Ms Christmas deposes to the fact that the appellant owns about 15,000 cattle, 2000 available for immediate sale which is anticipated to realise \$1.1 million and also makes reference to the sale of other cattle in the future.

[22] In *Beach Petroleum NL and Anor v Johnson & Ors; Jingellic Minerals NL & Anor v King & Ors* 1992 10 ACLC 525, von Doussa J was dealing with an application for security for costs under s 1335 of the *Corporations Law* at 526:

“... The Court is required to form an opinion about what the financial position of the plaintiff will be at the time of judgment and immediately thereafter. The financial position of the plaintiff at the time when the application is made will be an important guide, but is not the sole consideration. ...”

[23] I accept the submission that I can have regard to the position of the appellant at the time in the future when any order for cost against the appellant may be made.

[24] The respondent bears the onus of establishing that there is reason to believe that the appellant has insufficient assets in the Territory to pay the costs of the respondent if ordered to do so.

[25] On all the evidence including the information provided by the appellant as to the appellant’s assets both now and at the time when the appellant may be called upon to pay the respondent’s costs, I am not satisfied there is reason to believe that the appellant has insufficient assets in the Territory to pay the respondent’s costs if ordered to do so.

[26] Accordingly, I am satisfied the respondent has not established the grounds under r 62.02(1)(b) for the making of an order for security for costs. It is therefore not necessary for me to consider whether or not in the exercise of a discretion such order should be made or refused.

[27] For these reasons the application is dismissed.

[28] With respect to the costs of this application for security of costs the principles set out in *TTE Pty Ltd v Ken Day Pty Ltd* (1992) 2 NTLR 143 decision of Martin J delivered on 29 May 1990, applies equally to interlocutory proceedings in appeals as to trials, there must be something exceptional about the circumstances of the application before an order for costs is made (see *Mohammad Ayyoush and Darsiah Samin and Fatima Adjrun* (supra)).

[29] In the circumstances of this case, the grounds of the application for security of costs were reasonable.

[30] I make no orders in respect of the costs of this application.
