Mary River Cattle Station Pty Ltd v Northern Territory of Australia
[2002] NTSC 11

PARTIES:	MARY RIVER CATTLE STATION 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:	178 of 1998
DELIVERED:	11 February 2002
HEARING DATES:	19 December 2001
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

PROCEDURE

Costs – security for costs – consent orders – contract– plaintiff failed to provide security for costs – application to discharge order – change of circumstances.

REPRESENTATION:

Counsel:

Plaintiff:	J Dearn
Defendant:	M Grant

Solicitors:

Plaintiff:	Hunt and Hunt
Defendant:	Solicitor for the NT

Judgment category classification:	B
Judgment ID Number:	mar0205
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Mar0205

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

Mary River Cattle Station Pty Ltd v Northern Territory of Australia
[2002] NTSC 11
No. 178 of 1998

BETWEEN:

MARY RIVER CATTLE STATION PTY LTD
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 11 February 2002)

[1] The plaintiff's proceedings in action 576 of 1990 were dismissed for want of prosecution on 15 June 1998 (r 24.905). On 9 September 1998 it applied on originating motion in action No 176 of 1998 to have that order set aside (r 24.06). That application was consented to by the defendant upon terms as to payment of costs and security for costs by the plaintiff.

[2] The order made by consent on 17 December 1998 required the plaintiff to provide to the defendant security for the defendant's future costs in the sum of $150,000. That sum was to be paid into Court. The proceedings in the

original action were stayed until that was done (r 62.02). That has not been done.

[3] The defendant now applies to have the original proceedings struck out by reason of that failure. The plaintiff, in response, seeks to have the consent order in relation to security for costs set aside and for leave to proceed.

[4] Just why the applications on the part of the plaintiff were made in separate proceedings is unclear. It seems to me that recourse could have been had to r 62.05.

[5] The plaintiff's claim, expressed in the amended statement of claim of 10 February 1992, is that between December 1989 and May 1991 the defendant entered upon its land and removed its cattle and killed them unlawfully and without its consent. The plaintiff ran a pastoral business. The defendant denies those allegations pleading an agreement in writing of 27 November 1989 relating to destocking of the land under what is known as the BTEC programme, and claiming to have acted in accordance with its terms.

[6] Part of the argument on the plaintiff's application went to the question of whether the consent orders evidenced a real contract between the parties (per Lord Demming MR in *Siebe Gorman & Co Limited v Pneupac Limited* (1982) 1 WLR 185 at p 189). The authorities, referred to by the Master of the Rolls as evidencing a real contract, show that the consent order in each case arose out of a contract between the parties and for the purpose of enabling the contract to be carried into effect. This is not such a case.

Orders made "during the course of the proceedings and concerning their conduct" create difficulty in finding a truly binding contract, per Kiefel J in *J L Holdings v Queensland & Anor* (1996) 71 FCR 545 at 547. There are no clear records indicating an intention to oust the Court's jurisdiction (per Woodward and Foster JJ in *R D Werner &Co Inc v Bailey Aluminum Products Pty Ltd* (1988) 18 FCR 389 at 393).

[7] I consider that neither the circumstances in which the consent orders were made, nor their terms, render them incapable of being varied by the Court.

[8] The plaintiff asserts that at the time the order for security for costs was made, it expected that it would be able to comply with it. It arose from an offer it had made to the defendant. It is now submitted that a material change of circumstances entitles the company to have the order set aside (*Gordano Building Contractors v Burgess & Anor* (1988) 1 WLR 890).

[9] When the consent order was made Mr Teelow, the directing mind of the plaintiff, says he had reason to think that the value of the plaintiff's assets substantially exceeded its liabilities. His evidence was that he was endeavouring to sell the assets for $4.5m and having discussions with a potential purchaser. He says, further, that there were other interested parties. No particulars were given of any of those prospective sales, nor any supporting evidence. He asserted that after payment of liabilities there would have been a surplus of $2m, part of which would have been used to meet the order.

[10] There were valuations upon which he relied in coming to his view as to the plaintiff's net worth, but they have not been tested. Consultants have prepared a report placing very substantial value on the forestry potential on the property in excess of the pastoral value. That was never tested either. Mr Teelow estimated that his personal mining interests were worth $1m. They comprised mineral holdings within the boundaries of the pastoral lease. It appears that Mr Teelow acted upon the basis of the prospects of sale, valuations and beliefs.

[11] He knew, however, that the defendant did not accept the value placed upon the pastoral lease by him. It had a valuation at $950,000, far less than that which he was putting forward. That valuation has not been tested either, but he had notice of it.

[12] It seems to me that if Mr Teelow's beliefs as to the net value of the plaintiff's assets was realistic, then there was no reason to offer to consent to the order for security for costs, nor, having done so, why the plaintiff should not have been able to raise the funds.

[13] No sale of the property took place, no afforestation implemented, and no mining conducted. The evidence now shows that on 10 June 1999, six months after the order was made, a receiver and manager was appointed under a Registered Debenture Charge held by the plaintiff's bank. Mr Teelow says the receiver sold the "station", by which I take him to refer

to the whole of the plaintiff's assets, in November 1999 for $1.5m. On the information available it appears that the company may still have liabilities.

[14] The plaintiff's first argument is that there have been changed circumstances justifying the order it seeks. The difficulty I see in accepting that submission is that the circumstances existing at the time the order was made have never been established. True it is that Mr Teelow deposed to the circumstances in which he came to believe that there would be compliance with the order, but I do not think that his state of mind is relevant. It is the objective circumstances which count. By consenting to the order the company has indicated to the Court that it expected to be able to meet it. The defendant granted an indulgence in return by way of the order to which it consented. The defendant has not inhibited the progress of the suit since the consent orders were made.

[15] The plaintiff's consent to the orders brought about the stultifying of its pursuit of its claim. Such a consideration is one which may be taken into account by a court in the exercise of its discretion in deciding whether or not to make an order for the giving of security for costs. But that did not arise here. The Court is not now dealing with an application for such an order, it is being asked to discharge one. I understand, however, that the plaintiff is putting that unless the order is discharged, it will not be able to proceed. Indeed, there is a prospect that if it does not succeed its claim will be dismissed.

[16] The plaintiff next asserts that the alleged unlawful killing of cattle by the defendant caused it irremediable loss being the value of the cattle and consequential damage arising from loss of progeny. Mr Teelow puts the original loss at $1.2m for 2,615 head of stock. No attempt has been made to formulate the damages claimed in respect of the consequential loss.

[17] If there was such a loss, then it occurred long before the consent order was made. I also note that Mr Teelow alleges that the receiver failed to investigate the plaintiff's financial position, made no attempt to evaluate the plaintiff's prospects of being able to trade out of its poor financial position and sold the station for $1.5m, about half its real value. There is no evidence as to the true state of the plaintiff's financial position except by Mr Teelow's affidavits. No balance sheets, profit and loss accounts or other standard financial records have been produced, Mr Teelow says they were destroyed by fire at the homestead at the station in 1998.

[18] When asked for particulars of the dates upon which the alleged unlawful activity was said to have occurred, the plaintiff's solicitors, by letter of 13 April 1993, specified a number of days between June and August 1990. The defendant's evidence is that the plaintiff was paid $553,860 on various dates between July and September 1990 pursuant to the agreement discharging its liability to the plaintiff in that regard. That would seem to put an end to the plaintiff's claim as particularised. However, the plaintiff now says, through Mr Teelow, that its solicitors were mistaken about those dates. It does not condescend, however, to provide fresh particulars, and

accordingly it having resiled from the particulars given, it has not answered the request for particulars made in 1993.

[19] Opportunity has been available to correct what was said to be the solicitors' error. The response made by the defendant to the particulars which were given show they are vital. Without them no assessment can be made as to the merits of the action, even if such an assessment was called for in this case (*Impex Pty Ltd v Crowner Products* (1994) 13 ACSR 440 per Pincus J at 441 with whom McPherson J agreed, p 444).

[20] Apart from Mr Teelow none of those who stand behind the plaintiff have any assets. He asserts that he had recent discussions with a mining company with respect to his mining tenements. The evidence as to the possible outcome of those discussions, if successful, is vague and provides no proper foundation for considering an offer which he made to provide security on behalf of the plaintiff.

[21] Mr Teelow complains that it was because of the defendant's wrongful acts that the plaintiff was unable to fund his solicitors' costs in the action. It commenced in September 1990. The records show that those solicitors were appearing at directions hearings until November 1997. There is no evidence as to the purpose for which the funds received from the defendant were employed.

[22] Although the defendant may have caused loss to the plaintiff, that remains to be shown and I am unable to find that it is responsible for the plaintiff's

present financial position. On Mr Teelow's evidence, it seems to me that that arose from a number of circumstances and it is not clear that it is down to the plaintiff primarily or at all. No prima facie case has been made out against the defendant.

[23] The plaintiff has not made out a case to warrant the discharge of the order. It is in a worse financial position than it was when the order was made. Its application is dismissed.

[24] I now turn to the defendant's application that the plaintiff's claim be dismissed.

[25] The plaintiff has failed to provide the security which it agreed to give and there is no prospect of it being provided from any source. It has had ample time to comply with the order. The defendant is plainly prejudiced by the action, even if it is stayed, and is entitled to have it dismissed (O 62.04).

[26] As Hely J pointed out in *Truth About Motorways v Macquarie Infrastructure* (2001) FCA 1603 at [28] unreported:

> "It is a serious thing to terminate proceedings where there has not been a hearing on the merits, however, there is a public interest in the conduct of judicial proceedings in conformity with orders made by the Court."

That consideration stands apart from the interests of the defendant.

[27] The plaintiff's claim in action No 576 of 1990 is dismissed. It is ordered to pay the defendant's costs in that action and in the proceedings numbered 178 of 1998.
