Construction Enterprises Pty Ltd v Lafarge Plasterboard Pty Ltd [2002] NTSC 21

PARTIES:	CONSTRUCTION ENTERPRISES PTY LTD v LAFARGE PLASTERBOARD PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	INTERLOCUTORY APPLICATION
FILE NUMBER:	195/01 (20118535)
DELIVERED:	14 March 2002
HEARING DATE:	18 February 2002
REASONS OF:	MASTER COULEHAN

CATCHWORDS:

PRACTICE – Northern Territory – costs - order 63.21 - Supreme Court Rules - Solicitors liability for costs of a party - warranty of authority

PRACTICE – Northern Territory – Corporations Law section 1335(2) - Corporations Law Rules rule 1.3 - application of Supreme Court Rules

CASES FOLLOWED

Australia Forest Managers v Bramley 136 ALR 431, *Caboolture Park v White Industries* 45 FCR 224, *De Sousa v Minister for Immigration* 114 ALR 708, *Ridehalgh v Horsefield* (1994) Ch 205, *Re Wridgemont Display Homes* 39 FCR 193, *Yonge v Toynbee* (1910) 1 KB 215

CASES REFERRED TO

Grose v Bank of NSW (1911) 11 SR (NSW) 24, *The Bullfinch Surprise Gold Mining Co. v Butler* 35 ALT 99, *UTSA v Ultra Tune* (1999) 1 VLR 204

REPRESENTATION

Counsel:

Plaintiff	Mr Dearn
Defendant	Mr Southwood QC

Solicitors:

Plaintiff	Davis Norman
Defendant	Morgan Buckley
Judgment ID number	mas02
Number of pages	7

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
No. 195/01 (20118535)

Between:

CONSTRUCTION ENTERPRISES PTY LTD

Plaintiff

and

LAFARGE PLASTERBOARD PTY LTD

Defendant

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 14 March 2002)

1. The plaintiff commenced this proceeding, an application to set aside a statutory demand pursuant to section 459G of the Corporations Law, on 28 November 2001. The statutory demand relied upon a judgement, obtained in default of defence, in the sum of $203,434.07. An application had been made to the Court to have the judgement set aside.

2. On 13 December 2001 the plaintiff was wound up by order of the Supreme Court of NSW.

3. On 21 December 2001 the judgement debt was varied to the sum of $199,046.27. This application was adjourned to 17 January 2002 and on 18 January the decision was reserved.

4. On 23 January 2002, the defendant's solicitor became aware that the plaintiff had been wound up. Correspondence with the liquidator revealed that he had no knowledge of this proceeding and he had not instructed the plaintiff's solicitor, Mr. Davis, to act on behalf of the company.

5. On 24 January 2002, it was ordered that the statutory demand be varied and costs were reserved.

6. The defendant seeks costs against Mr. Davis personally. The grounds are that he continued to pursue this application, without authority, after the plaintiff was wound up, and that he pursued the application notwithstanding that a variation of the statutory demand was the most likely result.

7. Section 1335(2) of the Corporations Law provides:

> "The costs of any proceeding before a court under this Act is to be borne by such party to the proceeding as the court, in its discretion, directs."

8. The defendant relied on O.63.21 of the Supreme Court Rules which provides for the costs liability of a legal practitioner. This proceeding is under the Corporations Law and the Corporations Law Rules, but Rule 1.3 of the Corporations Law Rules provides that the provisions of Chapter 1 of the Supreme Court Rules apply, so far as they are not inconsistent with the Corporations Law Rules. No such inconsistency appears.

9. The wording of section 1335(2) constrains orders for costs against persons who are not parties (see ***Re Wridgemont Display Homes*** 39 FCR 193 and ***Australian Forest Managers v Bramley*** 136 ALR 431, cf. ***U.T.S.A. v Ultra Tune*** (1999) 1 VLR 204), but there is no conflict between section 1335(2) and O.63.21, which relates to the conduct of practitioners (see ***Myers v Elman*** (1940) A.C.282 and ***Caboolture Park v White Industries*** 45 FCR 224).

10. The relevant parts of O.63.21 read as follows:

> "(1) Where a solicitor for a party, whether personally or through a servant or agent, has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay or negligence or by other misconduct or default, the Court may order that –
>
> …….
>
> (d) the solicitor pay all or any of the costs payable by a party other than his client."

11. ***Ridehalgh v Horsefield*** (1994) Ch. 205, 232 provides some guidance as to the meaning of the terms "improper", "unreasonable" and "negligent". In that case the Court of Appeal made it clear that a practitioner does not act improperly, unreasonably or negligently merely because he pursues a claim or defence that is bound to fail, something more is required (pages 233-234, and see also ***De Sousa v Minister for Immigration*** 114 ALR 708,712).

12. Mr. Davis had been informed by the defendant's solicitor, prior to the hearing of the application to set aside the statutory demand, that the most likely result was that the statutory demand would be varied, and he was

referred to ***Equuscorp v Perpetual Trustees*** (1998) 16 ACLC 12, an authority that supported that proposition. However, the variation of the judgement debt was not the only ground advanced for setting aside the statutory demand, it was also argued that the demand had not been properly executed.

13. The submissions made by Mr Davis as to the validity of the statutory demand were not obviously futile, and needed some consideration. In my opinion it was not improper, unreasonable or negligent to have made them, nor was there any misconduct or default. There is no basis for an order for costs on this ground.

14. It was not developed in argument, but appears to have been assumed, that Mr. Davis's authority to act on behalf of the plaintiff terminated when the plaintiff was wound up. The effect of the winding up was to put the affairs of the plaintiff in the hands of the liquidator, and he did not instruct Mr. Davis to act. It follows that Mr. Davis had no authority to act for the plaintiff after it was wound up.

15. Mr. Davis's evidence is that he was not aware that the plaintiff had been wound up until he was so advised by the defendant's solicitor, that is, after the application had been heard. The defendant argues that Mr. Davis should have been aware that the company was in financial difficulties because of the circumstances, particularly its failure to pay the debt, and should have carried out inquiries. This is a standard of perfection beyond that which may ordinarily be expected of a reasonably competent solicitor.

16. In ***Yonge v Toynbee*** (1910) 1 K.B. 215, a solicitor was held to be liable for the costs of the other party following the termination of his authority to act,

although he had no knowledge that his authority had been terminated. This decision was followed in Australia in ***The Bullfinch Surprise Gold Mining Co. v Butler*** 35 A.L.T 99, in which case the solicitor had no authority from the outset. These decisions are based on breach of warranty of authority, and the principle involved does not sit well with the provisions of O.63.21.

17. Rule 2.4A(3) of the Corporations Law Rules provides that in an application under section 459G, the plaintiff must file or tender a record of a search conducted of the records of the plaintiff held by the Commission. There was no evidence that such a search was conducted and there has been no explanation for the failure to comply. It is probable that Mr. Davis was not aware of the requirement.

18. Had the search been conducted before 14 December 2001, Mr. Davis would have had a reasonable excuse for pursuing the application because he would not have known of the existence of the winding up order. If the search had been conducted after that date, he should have become aware of the winding up, and, ought not to have pursued the application. The defendant made no complaint as to the failure to comply with rule 2.4A(3) at the hearing of the application and I do not consider that the failure to comply is sufficiently culpable to justify an order for costs under 0.63.21.

19. It remains to consider whether Mr Davis may be liable for costs for breach of warranty of authority. In ***Yonge v Toynbee*** the solicitor had entered an appearance and conducted the defence of a client on instructions given to him before the client had been certified of unsound mind. It was suggested that it made no difference that earlier acts, in a series of acts, were within authority, if there were later acts which were unauthorised. (see Swinfen Eady J. at page 232).

20. Further, "… in the conduct of litigation the court places much reliance upon solicitors, who are its officers; it issues writs at their instance, and accepts appearances for defendants which they enter, as a matter of course, and without questioning their authority; the other parties to the litigation also act upon the same footing, without questioning or investigating the authority of the solicitor on the opposite side; and much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one …" (per Swinfen Eady J. at page 233).

21. The measure of damages was said to be the plaintiff's costs thrown away in the action. It was ordered, on a summary basis, that the solicitor pay the costs of the plaintiff incurred while the proceeding remained on foot. It was not argued that ***Yonge v Toynbee*** was not applicable and it is not possible to distinguish it (cf. ***Grose v Bank*** of NSW (1911) 11 SR (NSW) 24).

22. It will be ordered that Mr. Davis personally pay the costs payable by the defendant incurred in this proceeding after 13 December 2001.
