Deckana Pty Ltd v NT of Australia [2006] NTCA 2

PARTIES:	LA 24 of 97 23/6/97 DECKANA PTY LTD AS TRUSTEE OF THE A & P MACFARLANE FAMILY TRUST AND: THE NORTHERN TERRITORY GOVERNMENT 150 of 2002 (20214844) DECKANA PTY LTD AND: THE COMMONWEALTH BANK OF AUSTRALIA 139 of 2003 AS, PA AND P MACFARLANE AND: NT SALT SUPPLY PTY LTD 140 of 2004 (20423782) AS, PA & P MACFARLANE AND: DECKANA PTY LTD RECEIVER AND MANAGER APPOINTED FOR THE COMMONWEALTH BANK (FERGUSON, NOURSE AND COATES)

TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 1 of 2005 (20428830)
PUBLISHED:	6 March 2006
HEARING DATE:	24 February 2005
DELIVERED:	24 February 2005
JUDGMENT OF:	Southwood J

CATCHWORDS:

PRACTICE AND PROCEDURE – Application to strike out appeal – appeal from interlocutory judgment of Supreme Court – jurisdiction of Court of Appeal constituted by a single judge – appeal struck out – appeal incompetent – abuse of process

Adam P Brown Male Fashions v Phillip Morris Incorporated (1981) 148 CLR 170; *Australian Workers' Union and Others v Bowen* (1946) 72 CLR 575; *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 8 NSWLR 105; *Bienstein v Bienstein* (2003) 195 ALR 225; *Da Costa v Cockburn Salvage and Trading Pty Ltd* (1970) 124 CLR 192 at 201 – 2; *Deckana Pty Ltd v Commonwealth Bank of Australia* (NTCA No AP 7 of 2003, unreported 15 January 2004 per Mildren J); *South Australian Land Mortgage and Agency Co Ltd v R* (1922) 30 CLR at 553; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 108; applied

Bilioara Pty Ltd v Leisure Investments Pty Ltd [2001] NTCA 2; not followed

Grofam Pty Ltd v ANZ Banking Group Ltd (1993) 117 ALR 669; *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 24 ALR 513; referred to

Corporations Act, s 427(1) (b)
Interpretation Act, s 18
Lands Acquisition Act, s 42, s 50(1), s 71, s 84, s 86
Law of Property Act (NT), s 89
Northern Territory (Self-Government) Act (Cth) s 6, s 50
Supreme Court Act, s 14(1)(a), s 51, s 52(2)(b), s 52(3)(b), s 52(5), s 53
Supreme Court Rules, 1.13, 2.01(1), 2.4, 82.02, 84.13, 84.16(1) & (2), 84.25, 85.03

REPRESENTATION:

Counsel:

Appellants:	No appearance
First Respondent:	P. Timney
Second, Fourth, Fifth and Sixth Respondents:	C. Ford
Third Respondent:	No appearance

Solicitors:

Appellant:	No appearance
First Respondent:	Solicitor for the Northern Territory
Second, Fourth, Fifth and Sixth Respondents:	Cridlands
Third Respondent:	No appearance

Judgment category classification:	C
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Deckana Pty Ltd v NT of Australia [2006] NTCA 2
No. AP 1 of 2005 (20428830)

BETWEEN:

LA 24 of 97 23/6/97
DECKANA PTY LTD
Appellant

And:

THE NORTHERN TERRITORY OF AUSTRALIA
Respondent

150 of 2002 (20214844)
THE RETIRED TRUSTEE DECKANA PTY LTD
Appellant

And:

THE COMMONWEALTH BANK OF AUSTRALIA
Respondent

139 of 2003
AS, PA AND P MACFARLANE
Appellants

And:

NT SALT SUPPLY PTY LTD
Respondent

140 of 2004 (20423782)
AS, PA & P MACFARLANE
Appellants

And:

DECKANA PTY LTD RECEIVER AND MANAGER APPOINTED FOR THE COMMONWEALTH BANK (FERGUSON, NOURSE AND COATES)
Respondents

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Published 6 March 2006)

Introduction

[1] On 24 February 2005, while sitting as a single judge of the Court of Appeal, I dismissed an appeal from the decision Riley J delivered 19 January 2005 in Supreme Court proceeding No 161 of 2004. At the time I dismissed the appeal I stated that I would publish my reasons at a later date. I now do so.

The issues

[2] The following questions arose for consideration by the Court of Appeal. First, did the Court of Appeal of the Northern Territory constituted by a single judge have jurisdiction to hear the interlocutory applications filed by the respondents and to dismiss the appeal on the grounds, inter alia, that the appeal was incompetent? Secondly, was the decision of Riley J an interlocutory decision? Thirdly, if the decision of Riley J was an interlocutory decision, was the appeal to the Court of Appeal incompetent because the appellants could not maintain the appeal without first obtaining leave to appeal from the Court of Appeal constituted by no less than three judges? Fourthly, was the appeal, at least insofar as it relates to Deckana

Pty Ltd, incompetent because the appeal was filed by a natural person on behalf of a company without leave being obtained from the Court of Appeal for that person to act on behalf of the company? Fifthly, was the filing of the notice of appeal an abuse of process?

[3] In my opinion, for the reasons given below, the answers to the first, second, third and fifth questions were yes. The answer to the fourth question was that the appeal on behalf of Deckana Pty Ltd was incompetent because it was not established that Anthony Stuart MacFarlane (AS MacFarlane) had authority to file and conduct an appeal of behalf of Deckana Pty Ltd. Accordingly I dismissed the appeal.

Background

[4] On 16 December 2004 AS MacFarlane (Mr MacFarlane) filed the originating motion in proceeding No 161 of 2004 in the Supreme Court. He filed the originating motion on behalf of himself, as a self represented litigant, and as the agent for Deckana Pty Ltd and PA MacFarlane and P Macfarlane. The relief claimed was procedural in nature. The orders sought were that Supreme Court proceedings Nos LA 24 of 97, 150 of 2002, 139 of 2003 and 140 of 2004, in which the appellants were variously named as parties, be transferred from the Supreme Court to the High Court of Australia. The reasons for asking that the four proceedings be transferred to the High Court of Australia were that Mr MacFarlane believed that he could not get a fair hearing in the Supreme Court of the Northern Territory and he wished to

avoid appeals to the Court of Appeal because the Court of Appeal was also constituted by judges of the Supreme Court who are residents of the Northern Territory.

[5] On 19 January 2005 Riley J dismissed the originating motion in proceeding No 161 of 2004. He ordered Mr MacFarlane to personally pay the costs of the Commonwealth Bank of Australia on an indemnity basis. His Honour found that the proceeding was misconceived and bound to fail. There was nothing to transfer from the Supreme Court to the High Court of Australia. Three of the proceedings sought to be transferred to the High Court of Australia by the appellants were at an end and were not subject to appeal. Proceeding No LA 24 of 1997 between Deckana Pty Ltd and the Northern Territory of Australia had been stayed and Mr MacFarlane's leave to act on behalf of the company in the proceeding had been withdrawn. Riley J also doubted that the Supreme Court had power to transfer the four proceedings to the High Court of Australia.

[6] On 9 February 2005 Mr MacFarlane filed appeal No AP 1 of 2005 in the Court of Appeal. The appellants appealed from the whole of the decision of Riley J made on 19 January 2005. The relief sought in the notice of appeal was that Supreme Court proceedings Nos LA 24 of 97, 150 of 2002, 139 of 2003, 140 of 2004 and 161 of 2004 be transferred from the jurisdiction of the Supreme Court into the "Federal Jurisdiction" whereby, "the Commonwealth Government can protect the dispossessed from the snide dealing of the States and Territories by the returning of the (pastoral) lease

and other items; (or, in the alternative) to ensure that the acquisition is on Just Terms by the provision of funds as in *London City Council v Tobin and Minister for Environment v Florence* 45 LGRA 127 and 149".

[7] On 17 February 2005 the Commonwealth Bank of Australia and Messrs Ferguson, Norse and Coates filed an interlocutory application in the appeal seeking the following orders:

1. The appeal is dismissed as incompetent.
2. Alternatively, the appeal be dismissed as frivolous, vexatious and an abuse of process or as not disclosing a ground of appeal and having no prospects of success.
3. The appellants pay the respondents' costs of and incidental to this appeal on an indemnity basis;
4. The appellants pay the respondents' costs of and incidental to the application on an indemnity basis.

[8] No affidavit was filed in support of the application.

[9] On 21 February 2005 the Northern Territory of Australia filed an interlocutory application in the appeal seeking the same relief as that sought by the other respondents in their application dated 17 February 2005. An affidavit sworn by Mr Phillip Timney on 22 February 2005 was filed in support of the interlocutory application filed by the Northern Territory of Australia.

[10] Both interlocutory applications were served on the appellants before they were heard by me in the Court of Appeal.

[11] No interlocutory application was filed by NT Salt Supply Pty Ltd, the other company that is named as a respondent in the notice of appeal. The company had not been served with the notice of appeal. As far as I am aware the company has never been served with the notice of appeal.

[12] The respondents' applications were heard by me on 24 February 2005. Mr Ford appeared for the Commonwealth Bank and Messrs Ferguson, Norse and Coates. Mr Timney appeared for the Northern Territory. There was no appearance by any of the appellants. Nor was there an appearance on behalf of NT Salt Supply Pty Ltd.

[13] After hearing submissions that were made by Mr Ford and Mr Timney in support of the interlocutory applications dated 17 February 2005 and 21 February 2005, I dismissed the appeal against all respondents as incompetent or, alternatively, as frivolous, vexatious and an abuse of process, as not disclosing a ground of appeal and as having no prospects of success. I ordered the appellant to pay the respondents' costs of and incidental to the appeal and of and incidental to the interlocutory applications on an indemnity basis.

Anthony Stuart MacFarlane

[14] For most of his life Mr MacFarlane has been a cattleman in the Northern Territory. Until the cattle station was sold by the Commonwealth Bank of

Australia under a power of sale granted by a mortgage, he ran Bloodwood Downs Station. The cattle station is located 45 kilometres south of Mataranka in the Northern Territory. Bloodwood Downs Station is comprised of a pastoral lease of 577 square kilometres 74 hectares and 4000 square metres, buildings, machinery and other improvements and cattle. Mr MacFarlane operated Bloodwood Downs Station under a family trust. The Cattle Station was owned by Deckana Pty Ltd, as trustee for the A and P Macfarlane Family Trust.

[15] Although various persons and other entities are named as appellants in the notice of appeal, Mr MacFarlane appears to be solely responsible for filing the appeal. The notice of appeal is in his handwriting and is signed by him, as is the affidavit in support. There was nothing before the court that established he had instructions or the authority from any of the other parties named as appellants to file or conduct the appeal on their behalf.

[16] Mr MacFarlane personally appears to be responsible for all of the litigation that is the subject of this appeal including the proceeding No 161 of 2004 that was dismissed by Riley J on 19 January 2005. The genesis of much of the litigation appears to be Mr MacFarlane's feeling about the Northern Territory of Australia's acquisition of a corridor of land through Bloodwood Downs Station for the Darwin to Adelaide Railway.

[17] Mr MacFarlane did not have the authority or instructions to maintain proceeding No 161 of 2004 on behalf of Deckana Pty Ltd in respect of either

proceeding No LA 24 of 1997 or proceeding No 150 of 2002. He said so when he appeared before Riley J on 19 January 2005. On 9 April 1999 Angel J ordered that the leave granted by Olney J for Mr MacFarlane to represent the company in proceeding No LA 24 of 1997 is withdrawn. Rule 1.13 of the Supreme Court Rules states that except where otherwise provided by or under an Act or Chapter 1 of the Supreme Court Rules a corporation, whether or not a party, shall not take a step in a proceeding except by a solicitor.

[18] At the time I heard the respondents' interlocutory applications, the Commonwealth Bank of Australia had placed Deckana Pty Ltd in receivership. The respondents, Geoffrey Wayne Norse and David John Coates, were jointly and severally the receiver and manager of Deckana Pty Ltd. On 13 January 2003 pursuant to s 427(1)(b) of the Corporations Act the Commonwealth Bank of Australia appointed Robert Anthony Ferguson and Geoffrey Wayne Norse of Deloitte Touche Tohmatsu jointly and severally as receiver and manager of the whole of the property of Deckana Pty Ltd under powers contained in an instrument dated 11 June 1999. On 8 April 2004 the Commonwealth Bank of Australia appointed David John Coates and Geoffrey Wayne Norse jointly and severally as the receiver and manager of Deckana Pty Ltd.

The four proceedings that the appellants asked to be transferred to the High Court

[19] The state of the four proceedings that the appellants asked to have transferred from the Supreme Court to the High Court of Australia is as follows.

Proceeding No LA 24 of 1997

[20] A corridor of land through Bloodwood Downs Station was needed by the Northern Territory of Australia for the construction of the Darwin to Adelaide Railway Line. As a result on 18 June 1997 the Minister for Land Planning and Environment executed a notice of acquisition pursuant to s 42 of the Lands Acquisition Act compulsorily acquiring a corridor of land across Bloodwood Downs Pastoral Lease, the property of Deckana Pty Ltd. On 23 June 1997 the notice of acquisition was published in the Northern Territory Government Gazette. On 21 July 1997 pursuant to s 50(1) of the Lands Acquisition Act the Minister for Lands Planning and Environment made an offer of compensation to Deckana Pty Ltd for the acquisition of the corridor of land across Bloodwood Downs Pastoral Lease in the sum of $145,000. On 28 July 1997 Deckana Pty Ltd served a notice of dispute pursuant to s 68 of the Lands Acquisition Act on the Northern Territory of Australia. On 11 August 1997 pursuant to s 71 of the Lands Acquisition Act, the Minister referred the matter to the Lands Acquisition Tribunal to determine the compensation payable. On 3 December 1997 the Lands Acquisition Tribunal published its determination. The tribunal determined

that the amount of compensation to be paid to Deckana Pty Ltd was the sum of $162,000.

[21] On 23 December 1997 Mr Martin Hardy, the solicitor for Deckana Pty Ltd, filed a notice of appeal on behalf of Deckana Pty Ltd in the Supreme Court. The respondent to the appeal was the Northern Territory of Australia. The appeal was from the whole of the decision of the Lands Acquisition Tribunal. On 13 August 1998 Mr Hardy ceased to act for Deckana Pty Ltd. On 3 September 1998 Justice Olney granted leave to Deckana Pty Ltd to be represented by Mr Anthony MacFarlane. The order was backdated to the time when Mr Hardy ceased to act for the company.

[22] On 9 April 1999 after Mr MacFarlane had made a number of interlocutory applications that were found not to be in the interests of Deckana Pty Ltd, Angel J ordered that the leave granted to Mr MacFarlane by Justice Olney to represent the company is withdrawn. His Honour also stayed the proceeding until further order.

[23] On 26 June 2003 Mr MacFarlane filed an application on behalf of Deckana Pty Ltd in the Court of Appeal seeking leave to appeal the decision of Angel J delivered on 9 April 1999. On 8 December 2003 the application for leave to appeal was refused by the Court of Appeal.

[24] On 10 February 2004 Mr MacFarlane on behalf of Deckana Pty Ltd filed an application for special leave to appeal to the High Court of Australia. On

15 October 2004 the High Court dismissed the application for special leave to appeal with costs.

[25] On 16 December 2004 Mr MacFarlane filed the originating summons in Supreme Court proceeding No 161 of 2004 asking to have, inter alia, proceeding No LA 24 of 1997 "transferred out of the Northern Territory Court System into the Federal Jurisdiction which is the High Court." This application was dismissed by Riley J on 19 January 2005. In my opinion his Honour made the correct decision. The filing of the originating motion was an attempt by Mr MacFarlane to take a step in a proceeding that had been stayed and in which the leave that was granted to him to represent Deckana Pty Ltd had been withdrawn.

Proceeding No 150 of 2002

[26] On 3 October 2002 the Commonwealth Bank of Australia filed an originating motion in Supreme Court proceeding No 150 of 2002 seeking that it have immediate possession of Bloodwood Downs Station pursuant to s 89 of the Law of Property Act (NT) and pursuant to a memorandum of mortgage 426111. The memorandum of mortgage secured a fixed rate term advance dated 11 June 1999 and an overdraft facility dated 3 November 2000 that had been granted to Deckana Pty Ltd as Trustee of the MacFarlane Family Trust.

[27] On 9 August 2002 due to Deckana Pty Ltd's failure to pay instalments under the term advance and its inability to draw further on the overdraft facility

Robert Anthony Ferguson, the Commonwealth Bank of Australia's appointed agent, caused a notice of exercise of power of sale to be served on Deckana Pty Ltd. On 21 August 2002 the default in moneys due and payable had not been remedied and Geoffrey Wayne Norse signed a further notice of exercise of power of sale.

[28] On 4 December 2002 the Master of the Supreme Court made an order that the Commonwealth Bank of Australia have immediate possession of the pastoral lease held by Deckana Pty Ltd. On 9 December 2002 a warrant of possession was issued to the sheriff.

[29] On 13 January 2003 Deckana Pty Ltd filed a notice of appeal in the Supreme Court seeking to appeal the Master's decision. The notice of appeal also included a claim for a stay of the order of the Master pending the outcome of the appeal. On 13 January 2003 Martin CJ ordered that the application for a stay of execution of the order of the Master dated 4 December 2002 is refused.

[30] On 26 June 2003 Deckana Pty Ltd filed: an application in the Court of Appeal of the Northern Territory seeking leave to appeal the decision of Martin CJ refusing the application for a stay of the order the Master made on 4 December 2002; and, a notice of appeal. On 26 August 2003 Deckana filed an amended notice of appeal in the Court of Appeal. On 2 January 2004 the Commonwealth Bank of Australia filed an interlocutory application in the Court of Appeal seeking an order that the appeal including the

application for leave to appeal be dismissed as incompetent. On 15 January 2004 Mildren J, who sat as the Court of Appeal, dismissed the application for leave to appeal from the decision of Martin CJ and the appeal from his decision as incompetent.

[31] On 11 July 2003 the Commonwealth Bank of Australia completed the sale of Bloodwood Downs Station including the pastoral lease and it held a surplus in excess of the debt that was secured by the mortgage as a result of the sale. Bloodwood Downs Station was sold at Auction to NT Salt Supply Pty Ltd.

[32] On 12 January 2004 the Commonwealth Bank of Australia filed an interlocutory application seeking an order that the appeal from the Master's decision of 4 December 2002 be dismissed for want of prosecution. On 15 January 2004 Mildren J made an order that the appeal from the Master's decision of 4 December 2002 be and stand dismissed unless: the appellant engages a solicitor who files a notice that he is acting for the appellant within 14 days from the date of this order; and, the appellant's solicitor files and serves an application for directions for the hearing of the appeal within 14 days of service of this order. On 10 February 2004 in default of compliance with the order of Mildren J of 15 January 2004 the appeal from the Master's decision of 4 December 2002 was dismissed with costs on an indemnity basis.

[33] On 16 December 2004 Mr MacFarlane filed the originating motion in Supreme Court proceeding No 161 of 2004 seeking to have proceeding

No 150 of 2002 transferred to the High Court. The application was dismissed by Riley J on 19 January 2005. In my opinion the decision of Riley J was correct if for no other reason than the proceeding was at an end. There was no pending proceeding or appeal that could be transferred to any other jurisdiction. The order of the Master of 4 December 2002 that the Commonwealth Bank of Australia have immediate possession of the pastoral leases held by Deckana Pty Ltd has been enforced and the pastoral lease held by Deckana Pty Ltd has been sold to NT Salt Supply Pty Ltd.

Proceeding No 139 of 2003

[34] On 11 July 2003 NT Salt Supply Pty Ltd purchased Bloodwood Downs Station at an auction held by the agents of the Commonwealth Bank of Australia. NT Salt Supply Pty Ltd became the registered proprietor of the pastoral lease on 15 July 2003.

[35] On 29 August 2003 the Retired Trustee for the A & P MacFarlane Family Trust, Deckana Pty Ltd, and AS, PA & P MacFarlane, as Trustee for the A & P MacFarlane Family Trust, and A S MacFarlane commenced proceedings against NT Salt Supply Pty Ltd by way of originating motion filed in the Supreme Court being proceeding No 139 of 2003. The plaintiffs sought four orders. First, that the Minister remove NT Salt Supply Pty Ltd off the property, Bloodwood Downs Station, and the plaintiff have immediate possession until compensation is finalised regarding Deckana Pty Ltd on just terms as it thinks fit. Second, that NT Salt Supply Pty Ltd, not brand, sell

or dispose of any assets that were on the pastoral lease 942, known as Bloodwood Downs, as at 21 August 2002 and anything ordered to be returned to this property that has been mortgaged in lieu of the Government providing security for costs and/or costs of compulsory acquisition that is still not settled by the Minister. Third, that NT Salt Supply Pty Ltd not alter or tamper with the property the subject of a compensation claim listed before the Court of Appeal on 8 December 2003 and which appeal also involves the ownership rights of the Commonwealth Bank of Australia under mortgage. Fourth, such other orders as the court deems fit that could include the forfeit or surrender or removal of NT Salt Supply Pty Ltd from the pastoral lease through illegal use of the plaintiffs' assets to comply with covenants of the lease not surrendered by the plaintiffs.

[36] On 3 September 2003 NT Salt Supply Pty Ltd filed an interlocutory summons seeking that there be judgment for the defendant. On 1 October 2003 Thomas J gave judgment for the defendant. Her Honour's reasons for judgment in favour of the defendant were as follows. First, contrary to r 5.11(2) of the Supreme Court Rules the originating motion and summons were not signed by PA and P Macfarlane who were named as parties to the proceeding. Second, the originating motion did not disclose a cause of action against the NT Salt Supply Pty Ltd. NT Salt Supply Pty Ltd had become the registered proprietor of Bloodwood Downs Station, being pastoral lease 942 together with certain stock and equipment. Deckana Pty Ltd's claim for compensation against the Northern Territory of Australia did

not give rise to a cause of action against NT Salt Supply Pty Ltd. Thomas J found the real source of Mr MacFarlane's concerns was the fact that he has not been able to resolve his claim for compensation with respect to the acquisition of land by the Northern Territory of Australia. The decision has not been appealed. The proceeding stands with judgment entered for NT Salt Supply Pty Ltd.

[37] On 16 December 2004 Mr MacFarlane filed the originating motion in Supreme Court proceeding No 161 of 2004 seeking to have proceeding No 139 of 2003 transferred to the High Court of Australia. The application was dismissed by Riley J on 19 January 2005. In my opinion the decision of Riley J was correct if for no other reason than that the proceeding was at an end. There was no pending proceeding which could be transferred to any other jurisdiction.

Proceeding No 140 of 2004

[38] On 18 October 2004 AS, PA and P MacFarlane, as Trustee of the A and P MacFarlane Family Trust, commenced proceeding No 140 of 2004 by originating motion filed in the Supreme Court. Named as defendants in the proceeding were Stuart Reid, as the manager and receiver for the Commonwealth Bank of Australia of Deckana Pty Ltd, and the Northern Territory of Australia. The relief claimed in the originating motion was as follows: that Stuart Reid pay the plaintiffs the sum of $1,216,000 being the market value of Bloodwood Downs Station; a declaration that the Northern

Territory of Australia could not consent to a transfer of the pastoral lease to any party other then the plaintiffs; an order that AS MacFarlane be joined as a party to proceeding No LA 24 of 1997; and, a declaration as to the amount of compensation payable by the Northern Territory of Australia. On 4 November proceeding No 140 of 2004 was struck out by the Chief Justice. The proceeding against Stuart Reid was struck out on the basis that he was not the receiver and manager of Deckana Pty Ltd and no cause of action against him was disclosed. Each of the other claims was found to be without any substance whatsoever and it was plain that Mr MacFarlane should not be joined as a party to proceeding No LA 24 of 1997. No appeal was filed by the plaintiffs and the proceeding remains struck out.

[39] On 16 December 2004 Mr MacFarlane filed the originating motion in Supreme Court proceeding No 161 of 2004 seeking to have proceeding No 140 of 2004 transferred to the High Court of Australia. The application was dismissed by Riley J on 19 January 2005. In my opinion the decision of Riley J was correct if for no other reason than that the proceeding was at an end. There was no pending proceeding which could be transferred to any other jurisdiction.

The jurisdiction of the Court of Appeal of the Northern Territory constituted by a single judge

[40] A party's right of appeal from a single judge of the Supreme Court and the exercise of the appellate jurisdiction of the Supreme Court are governed by

s 51, s 52 and s 53 of the Supreme Court Act. Section 51 of the Supreme Court Act provides as follows:

> (1) Where the jurisdiction of the Court in a proceeding or a part of a proceeding was exercised otherwise than by the Full Court, the Master or a referee, a party to that proceeding may, subject to this Act, appeal to the Court from a judgment given in that proceeding or part, as the case may be.
>
> (2) The Court, when exercising its appellate jurisdiction under subsection (1), may be known as the Court of Appeal of the Northern Territory of Australia.

[41] Section 52 of the Supreme Court Act provides as follows:

> (1) Subject to this Act, the appellate jurisdiction of the Court under section 51(1) shall be exercised by the Court constituted by not less than 3 Judges.
>
> (2) One Judge sitting in Court may exercise the appellate jurisdiction of the Court under section 51(1) –
>
> (a) to direct the entry of any judgment by consent or make any order by consent;
>
> (b) to dismiss an appeal for want of prosecution or for other prescribed cause; or
>
> (c) to dismiss an appeal on the application of the appellant.
>
> (3) The appellate jurisdiction of the Court under section 51(1) may, subject to section 53, be exercised by a Judge –
>
> (a) as provided by this Act, by the Rules or by any other law in force in the Territory; and
>
> (b) in all matters of practice and procedure.
>
> (4) [Omitted]
>
> (5) A party to an appeal may apply as of right to the Court of Appeal constituted by not less than 3 Judges to discharge or vary a judgment or direction of the Court of Appeal constituted otherwise, but

may not otherwise appeal to the Court from a judgment of the Court of Appeal.

[42] Section 53 of the Supreme Court Act provides as follows:

> A party to a proceeding may not appeal under section 51(1) from an interlocutory judgment except by leave of the Court of Appeal constituted by not less than 3 Judges.

[43] A party to a Supreme Court proceeding has an appeal as of right from all judgments, other than interlocutory judgments, of a single judge of the Supreme Court. A party may not appeal an interlocutory judgment except by leave of the Court of Appeal constituted by no less than three judges.

[44] Save for the jurisdiction granted by s 52(2) and s 52(3) of the Supreme Court Act, the appellate jurisdiction that is conferred on the Supreme Court of the Northern Territory by s 51(1) of the Supreme Court Act is to be exercised by no less than three judges of the Supreme Court. A single judge sitting in the Court of Appeal may exercise the appellate jurisdiction of the Court of Appeal under s 51(1) of the Supreme Court Act to: direct the entry of any judgment by consent or make any order by consent; dismiss an appeal for want of prosecution or for other prescribed cause; to dismiss an appeal on the application of the appellant; as otherwise provided by the Act, the Rules or any other law in force in the Territory; and in all matters of practice and procedure.

[45] The respondents' applications to strike out the notice of appeal because it is incompetent or is frivolous and vexatious are matters of practice and

procedure: *Adam P Brown Male Fashions v Phillip Morris Incorporated* (1981) 148 CLR 170 at 176. The applications are concerned with the administration of the Court's process, the conduct of the parties and the process by which the substantive issues are to be finally resolved. The applications deal with the conduct of the litigation itself not the substantive rights which were the subject of the various proceedings in the Supreme Court.

[46] As the applications to dismiss the appeal as incompetent or as frivolous and vexatious is a matter of practice and procedure, it would appear that under s 52(3)(b) of the Supreme Court Act the Court of Appeal constituted by a single judge has jurisdiction to hear and determine them. However, because s 52(2)(b) makes specific provision for one judge of the Court of Appeal to dismiss an appeal, s 52(3)(b) of the Supreme Court Act is potentially inconsistent with s 52(2)(b) of the Supreme Court Act. Where a power is granted both in general terms and in specific terms and the specific power is limited, it is a principle of statutory construction that the general power cannot be exercised to do that which is the subject of the specific power: *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 24 ALR 513; *Grofam Pty Ltd v ANZ Banking Group Ltd* (1993) 117 ALR 669 at 674. However, the principle is only a guide to interpreting such provisions. It is necessary to determine the intended interrelationship between the provisions by having regard to the text of the provisions, the purpose that the

provisions are intended to serve, the context in which they appear, and the statute read as a whole.

[47] In my opinion s 52(3)(b) of the Supreme Court Act is not inconsistent with s 52(2)(b). Both subsections are facultative. The appellate jurisdiction granted to a single judge by s 52(3)(b) is not expressed to be subject to the scope of the appellate jurisdiction granted by s 52(2)(b). The purpose of the provisions is, as a matter of efficiency and economy, to reasonably permit a single judge to deal with matters going to the conduct of an appeal and the administration of the appellate process. The parties are not prejudiced if a wide construction is given to s 52 (3)(b) of the Supreme Court Act as a party to an appeal has an appeal as of right to the Court of Appeal constituted by no less than three judges to discharge or vary a judgment or direction of the Court of Appeal constituted by a single judge: s 52(5) of the Supreme Court Act. Nor is the appellate process undermined by giving s 52(3)(b) such a construction. The substantive rights of the parties to an appeal are to be determined by the Court of Appeal constituted by no less than three judges.

[48] In any event the appellate jurisdiction conferred on a single judge by s 52(2)(b) of the Supreme Court Act extends to the dismissal of an appeal for "other prescribed cause" and incompetence is a prescribed cause for the dismissal of an appeal. Under s 52(2)(b) of the Supreme Court Act it is the "other cause" for dismissal of an appeal that must be prescribed not the appellate jurisdiction of the single judge which has already been conferred on the single judge by the subsection. "Prescribed" in s 52(2)(b) means

prescribed by the Supreme Court Act or by an instrument of a legislative or administrative character made under that the Supreme Court Act: s 18 Interpretation Act. The only other prescribed cause for the dismissal of an appeal is that of incompetence. Rule 84.16(1) & r 84.16(2) of the Supreme Court Rules provide as follows:

> (1) A respondent may apply on summons at any time for an order dismissing an appeal as incompetent.
>
> (2) On the hearing of a summons under subrule (1), the burden of establishing the competency of the appeal is on the appellant.
>
> (3) Where, in an appeal to the Court of Appeal, a respondent does not move under subrule (1) but the appeal nevertheless is dismissed by the Court as incompetent, the respondent shall not, unless the Court otherwise orders, receive any costs of the appeal and the Court of Appeal may order that he pay the appellant's costs of the appeal proving useless or unnecessary.

[49] The effect of r 84.16(1) and r 84.16(2) of the Supreme Court Rules is that a respondent to an appeal may apply by summons (an interlocutory procedure) at any time for an order dismissing an appeal as incompetent and that on the hearing of such an application the burden of establishing the competency of the appeal is on the appellant. Rule 84.16 of the Supreme Court Rules is expressed in similar terms to r 84.13 of the Supreme Court Rules which stipulates the procedure for making an application for the dismissal of an appeal for want of prosecution.

[50] The Court of Appeal constituted by a single judge has jurisdiction under both s 52(2)(b) and s 52(3)(b) of the Supreme Court Act to hear and

determine the respondents' applications that were filed on 17 February 2005 and 21 February 2005. Support for such a construction of the subsections of the Supreme Court Act is found in *Deckana Pty Ltd v Commonwealth Bank of Australia* (NTCA No AP 7 of 2003, unreported 15 January 2004 per Mildren J). In that case Mildren J accepted that a single judge sitting as the Court of Appeal had power to strike out a notice of appeal as incompetent. The grounds of incompetence on which the application to strike out the notice of appeal was made in that case were as follows. First, the appeal was against the refusal of the Supreme Court to grant a stay preventing the sale of a cattle station by the mortgagee of the cattle station. Second, the application for a stay having been refused, the mortgagee had exercised his power of sale. Third, the application for leave to appeal and the notice of appeal were both filed out of time. Although Mildren J's decision was delivered *ex tempore* and it is inconsistent with his earlier decision in *Bilioara Pty Ltd v Leisure Investments Pty Ltd* [2001] NTCA 2, I agree with His Honour's decision.

The nature of the decision of the Supreme Court

[51] The decision of Riley J that is the subject of the appeal was an interlocutory decision. "The usual test for determining whether an order is final or interlocutory is whether the order, as made, finally determines the rights of the parties. The test requires the appellate court to look at the consequences of the order itself and to ask whether it finally determines the rights of the parties in a principal cause pending between them":

Bienstein v Bienstein (2003) 195 ALR 225 at 230. The appellants in this case did not seek a final resolution of any substantive issue in any of the four principal causes between the parties to the appeal. The appellants simply asked that the four proceedings in the Supreme Court be transferred to the jurisdiction of the High Court of Australia. Riley J only determined that three of the four proceedings had been effectively resolved and that none of the four proceedings was capable of being transferred to another jurisdiction. Such a determination did not affect the substantive rights of the parties to the four principal causes in the Supreme Court.

[52] The nature of Riley J's decision is not affected by the fact that the proceeding No 161 of 2004 was a fresh proceeding that was commenced by originating motion nor by the fact that his Honour's decision determined the proceeding before him. The appellants only sought a procedural intervention in each of the four principal causes that were the subject of proceeding No 161 of 2004. Were it possible to make an application to transfer a matter from the Supreme Court to the jurisdiction of the High Court of Australia, then an application for transfer would ordinarily be made by summons filed in each proceeding that a party sought to transfer to the High Court of Australia. The fact that the application for transfer of the proceedings to the jurisdiction of the High Court of Australia was made by an originating motion does not alter the nature of the proceeding or the nature of the decision of the Supreme Court. Proceeding No 161 of 2004

was a procedural application and the decision of Riley J was an interlocutory decision.

Section 53 Supreme Court Act

[53] Section 53 of the Supreme Court Act expressly provides that a party to a proceeding may not appeal from an interlocutory judgment except by leave of the Court of Appeal constituted by not less than three judges. As the appellants had not been granted leave to appeal the decision of Riley J, as no such application was pending or foreshadowed, and as the time for making such an application had expired: r 85.03 of the Supreme Court Rules, the appeal by each of the appellants cannot be maintained. The appeal was incompetent.

The appeal on behalf of Deckana Pty Ltd

[54] It was submitted by Mr Ford on behalf of the Commonwealth Bank of Australia and Messrs Ferguson, Norse and Coates that insofar as the notice of appeal was filed on behalf of Deckana Pty Ltd it was incompetent because a corporation could not take a step in a proceeding except by a solicitor. In support of this proposition Mr Ford relied on r 1.13 of the Supreme Court Rules which provides that except where otherwise provided by or under an Act or this Chapter (Chapter 1), a corporation, whether or not a party, shall not take a step in a proceeding except by a solicitor.

[55] There are a number of difficulties with Mr Ford's argument. First, r 1.13 is found in Chapter 1 of the Supreme Court Rules. Chapter 1 contains rules of

procedure applicable to proceedings commenced in the original jurisdiction of the Supreme Court. Chapter 2 of the Supreme Court Rules contains the rules of procedure applicable to proceedings in the appellate jurisdiction of the Supreme Court. Chapter 2 of the Supreme Court Rules only provides that order 2 and order 46 are applicable to proceedings in the appellate jurisdiction of the Supreme Court: r 82.02 and r 84.25 of the Supreme Court Rules. Second, r 2.01(1) of the Supreme Court Rules states, "A failure to comply with this Chapter (Chapter 1) is an irregularity and does not render a proceeding or a step taken, or a document, judgment or order, in the proceeding a nullity", and r 2.4 states, "The Court may dispense with compliance with a requirement of this Chapter, either before after the occasion for compliance arises." In the circumstances it cannot be said that solely by virtue of r 1.13 of the Supreme Court Rules that the appeal was incompetent: cf *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 8 NSWLR 105.

[56] However, the effect of the summons dated 17 February 2005 and 21 February 2005 was to put Mr MacFarlane's authority to file and conduct the appeal on behalf of Deckana Pty Ltd in issue. The effect of r 84.16(2) is that the onus fell on the appellants to demonstrate that Mr Macfarlane had authority to conduct the appeal on behalf of Deckana Pty Ltd. They did not do so. As a result the appeal on behalf of Deckana Pty Ltd was incompetent. A proceeding brought in the name of a party without proper authority is not duly constituted and may be set aside: *Australian Workers' Union and*

Others v Bowen (1946) 72 CLR 575. In the absence of evidence of actual authority to act for the company no person should be permitted to act for the company: *Bay Marine v Clayton Country Property* (supra) per Mahoney JA at 113.

[57] My reasons in paragraph [55] above should not be taken to contradict Riley J's findings about the operation of r 1.13 of the Supreme Court Rules in proceeding No 161 of 2004. Rule 1.13 of the Supreme Court Rules was applicable to the proceeding before his Honour. On 19 January 2005 Mr MacFarlane did not assert that he had authority to act on behalf of Deckana Pty Ltd in proceeding No 150 of 2002 against the Commonwealth Bank of Australia nor did he seek leave to appear on behalf of Deckana Pty Ltd in the application to transfer proceeding No 150 of 2002 to the High Court of Australia. He told Riley J that he appeared on his own behalf. Further, the application to transfer Supreme Court proceeding No LA 24 of 97 to the High Court of Australia constituted the taking of a step in that proceeding. Such a step was prevented by the stay of that proceeding ordered by Angel J and Mr MacFarlane could not appear on behalf of Deckana Pty Ltd in relation to that proceeding as his leave to appear on behalf of the company in that proceeding had been withdrawn.

Abuse of process

[58] The appellants' appeal constitutes a misuse of the process of the Court of Appeal. The appeal is groundless. It is unsupportable in law. It is

obviously untenable. The notice of appeal identifies no error in the reasons of the Supreme Court for dismissing the application to transfer the four proceedings from the Supreme Court to the High Court of Australia. Apart from an assertion that, other than the High Court of Australia, the Federal Court of Australia has exclusive jurisdiction to determine if the portion of the pastoral lease that was acquired by the Northern Territory of Australia was acquired on just terms, the grounds pleaded in the notice of appeal only set out a befuddled argument that may go to the substantive merits of proceeding No LA 24 of 1997 which has been stayed.

[59] The Northern Territory of Australia has power to acquire property on just terms: s 6 and s 50 Northern Territory (Self Government) Act (Cth). The Supreme Court of the Northern Territory has jurisdiction to determine an appeal from the Lands Acquisition Tribunal: s 84 and s 86 Lands Acquisition Act (NT); and, to determine suits between a person and the Northern Territory of Australia: s 14(1)(a) Supreme Court Act. Significantly Deckana Pty Ltd filed the appeal from the Lands Acquisition Tribunal in proceeding No LA 24 of 1997 in the Supreme Court.

[60] The Supreme Court of the Northern Territory does not have power to transfer the four proceedings in the Supreme Court to the High Court of Australia. No such power is granted to the Supreme Court by any statute and the Supreme Court does not have inherent power to transfer the four proceedings to the High Court of Australia.

[61] Subject to any statutory right of appeal a decision of a superior court of record is final: *South Australian Land Mortgage and Agency Co Ltd v R* (1922) 30 CLR at 553; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 108; *Da Costa v Cockburn Salvage and Trading Pty Ltd* (1970) 124 CLR 192 at 201 - 2. To the extent that any of the four proceedings in the Supreme Court have been finally determined by the Supreme Court the only right of the appellants is to appeal to the Court of Appeal and if the appellants are dissatisfied with the decision of the Court of Appeal to make an application for special leave to appeal to the High Court of Australia. If the proceedings have not been finally determined the appellants are left to pursue in the existing proceedings any procedural or substantive remedies they may be entitled to in accordance with the Rules of the Supreme Court and according to law.

[62] A transfer of the four Supreme Court proceedings of the kind contemplated by the appellants would defeat the appellate process of the Court of Appeal and of the High Court of Australia.