

PARTIES: Katherine Stores Pty Ltd and
B & D Lane Pty Ltd

TITLE OF COURT: In the Supreme Court of the
Northern Territory of Australia

JURISDICTION: Interlocutory Application

FILE NO: 148/93

DELIVERED: 26 April 1996

REASONS OF: Master Coulehan

CATCHWORDS:

CORPORATIONS - Northern Territory - s565 The
Corporations Law - failure to bring proceedings in
name of liquidator

PRACTICE - Northern Territory - amendment -
mistake in name of party - O.36.01 (4) Supreme
Court Rules

PRACTICE - Northern Territory - judgment - O.23.01
Supreme Court Rules

Cases followed:

Bridge Shipping Pty Ltd v Grand Shipping S.A.
173 CLR 231
Central Insurance Co. Ltd v Seacalf Shipping
Corporation (The "Aiolos") (in liquidation) v Murlroam
Pty Ltd (1992) 2 NTLR 102

Cases mentioned:

Kyra Nominees Pty Ltd (in liquidation) v National
Australia Bank Ltd (1986) 4 ACLC 400
Smart v Stuart 83 NTR 1

Representation:

Counsel:

Plaintiff Mr Francis
Defendant Mr Henwood

Solicitors:

Plaintiff David Francis & Associates Pty Ltd
Defendant Cridlands

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

148 OF 1993

BETWEEN:

KATHERINE STORES PTY LTD

(in liquidation)

Plaintiff

and

B. & D. LANE PTY LTD

Defendant

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 26 April 1996)

The plaintiff claims that certain sums paid by it to the defendant were made within 6 months of the winding up of the plaintiff and had the effect of giving the defendant a preference, priority or advantage over other creditors. It claims payment of these sums, presumably pursuant to s565 of *The Corporations Law* read with s122 of the *Bankruptcy Act*.

The defendant seeks judgment pursuant to O.23.01, arguing that the proceedings should have been brought by the liquidator (see *Timor Transport Pty Ltd (in liquidation) v Murlroam Pty Ltd (1992) 2 NTLR 102*).

This has not been pleaded, (see O.13.07(1)(a)), however, the plaintiff did not take this point. It seeks leave to amend by substituting the liquidator pursuant to O.36.01.

The payments are claimed to have been made within the 6 month period prior to 15 October 1990, the date when the liquidator was appointed. It was not disputed that the relevant limitation period has expired.

The basis for the plaintiff's application is a mistake in the name of the plaintiff. The solicitor for the plaintiff deposes that he was instructed by the liquidator to recover the payments and in correspondence to the defendant it was clear that it was the liquidator who was making the claim. It is argued that the subject matter of the claim is the same.

In **Bridge Shipping Pty Ltd v Grand Shipping S.A. 173 CLR 231** the High Court of Australia held that O.36.01(4) should be given a beneficial interpretation, but it was made clear that the mistake must be a mistake in the name of a party. (See also **Smart v Stuart 83 NTR 1**).

The plaintiff has not fully explained how the mistake arose. It is not stated that the solicitor intended to sue in the name of the liquidator or gave this any consideration. It appears that the plaintiff's solicitor intended to sue in the plaintiff's name, the mistake being as to the person who should have been named. This situation is analogous to **Central Insurance Co. Ltd v Seacalf**

Shipping Corporation (The “Aiolos”) (1983) 2 Lloyds Rep. 25, referred to in **Bridge Shipping**.

As to the defendant’s application, Martin J (as he then was) said in **Timor Transport** at page 111:

“It is clear by authority and practice that actions brought under s451 of the Code and its equivalents ought to be taken in the name of the liquidator. After all, it is against him that the preferential payment is declared void.”

The plaintiff sought to make a distinction in the case of companies which go into voluntary liquidation, relying on **Kyra Nominees Pty Ltd (in liquidation) v National Australia Bank Ltd (1986) 4 ACLC 400**. The point was not canvassed in that case and it is not apparent how the distinction may be relevant.

I consider that the proceeding has been brought in the wrong name. The plaintiff has no cause of action against the defendant and no amendment may save the proceeding because of the expiry of the limitation period.

It is ordered that:-

1. The plaintiff’s summons filed 3 April 1996 be dismissed.
2. There be judgment for the defendant in this proceeding.