DL & JE Graetz P/L & Anor v NTHG P/L & Anor [2002] NTCA 6

PARTIES:	DL & JE GRAETZ PTY LTD (ACN 009 607 523) and VYNEAST PTY LTD (ACN 009 616 771) AND NTHG PTY LTD (ACN 084 203 841) and PHILLIP JOHN NEWMAN
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	AP11 of 2002 (20101352)
DELIVERED:	27 September 2002
HEARING DATES:	6 August 2002
JUDGMENT OF:	MARTIN CJ, THOMAS and RILEY JJ

CATCHWORDS:

APPEAL – Court of Appeal – appeal against order of primary judge granting the respondents' application for an interlocutory injunction – whether the primary judge erred in holding that the basis of the jurisdiction to order the injunction was to preserve the status quo without reference to the purpose for which the status quo was to be preserved or the final relief sought – whether the injunctive relief sought is for a purpose that is wholly unconnected with either the protection or enforcement of any of the claims for relief – leave to appeal granted – appeal allowed – injunction discharged.

Trade Practices Act 1974 (Cth) s 82 and s 87

Jacksons v Sterling Industries Limited (1987) 162 CLR 612; *Politano & Ors v ACN 060442926 Pty Ltd & Ors* [1998] 572 FCA; *Fletcher & Anor v Foodlink Ltd & Ors* (1995) 60 FCR 262; *Patrick Stevedores Operations No 2 Pty Ltd & Ors v Maritime Union of Australia & Ors* (1998) 153 ALR 643; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1; *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228; *Brown v Smitt* (1924) 34 CLR 160; *Alati v Kruger* (1995) 94 CLR 216, applied.
National Australia Bank Ltd v Zollo & Anor (1995) 64 SASR 63, distinguished.

REPRESENTATION:

Counsel:

1st & 2nd Appellant:	J. Kelly SC & I. Morris
1st & 2nd Respondent:	J. Dearn SC & T. Crane

Solicitors:

1st & 2nd Appellant:	Hunt & Hunt
1st & 2nd Respondent:	Anthony Crane

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

Graetz & Anor v NTHG P/L & Anor [2002] NTCA 6
No. AP11 of 2002 (20101352)

BETWEEN:

DL & JE GRAETZ PTY LTD
(ACN 009 607 523)
First Appellant
and
VYNEAST PTY LTD
(ACN 009 646 771)
Second Appellant

AND:

NTHG PTY LTD
(ACN 084 203 841)
First Respondent
and
PHILLIP JOHN NEWMAN
Second Respondent

CORAM: MARTIN CJ, THOMAS and RILEY JJ

REASONS FOR JUDGMENT

(Delivered 27 September 2002)

MARTIN CJ

[1] I have had the benefit of the draft judgments prepared by Thomas and Riley JJ. I agree with the orders which they propose for the reasons which they have respectively given.

THOMAS J

[2] This is an appeal from a decision of the primary judge made on 7 June 2002, to grant the respondent's application for an interlocutory injunction. The order as authenticated by the Registrar on 12 June 2002 is in the following terms.

"Counsel for the defendants giving the usual undertaking as to damages and in the terms as set out as in the defendant's letter of 23 May 2002, the Court orders that:

1. Until further order of this Court, the first plaintiff is restrained from appointing a Receiver to the first defendant or of acting in any way prejudicial to the interests of the first defendant…."

[3] The essence of the appeal is that the interlocutory injunction was granted without reference to the relief finally available.

[4] The appellant's substantial argument is that his Honour erred in holding as he did in paragraphs 13 and 14 of his written Reasons for Decision that the basis of the jurisdiction to order the injunction was to preserve the status quo, without reference to the purpose for which the status quo was to be preserved or the final relief sought.

[5] The appellants in their Statement of Claim and the respondents in their defence admit that by contract of sale dated 19 October 1998 between the first appellant and the first respondent there was an agreement to sell the

tyre retailing, service and repair business known as "Gove Tyre Service" operating in Nhulunbuy in the Northern Territory of Australia for one hundred and sixty six thousand dollars ($166,000.00) plus the value of the stock in trade of the business.

[6] In addition the value of the stock in trade was sold by the first appellant to the first respondent for an agreed price of $224,000. There was an agreement as to how the first respondent would pay the first appellant the value of the stock. There was a term of the contract that the first appellant would provide to the first respondent a loan by way of vendor finance in the sum of $200,000. The contract provided the manner in which this loan was to be repaid including the interest on the loan.

[7] The first appellant issued a writ on 29 January 2001 claiming inter alia, payment of the sum of $215,000 in respect of the loan and interest during the term of the loan, payment of money pursuant to the consignment stock agreement and other payments.

[8] The respondent entered a defence and counter claim to the action claiming that the appellant had induced the respondents to enter into a contract on the basis of false and misleading statements and representations to the respondents.

[9] The respondents seek rescission of all the agreements and the guarantee, including rescission of the contract and stock agreement, damages at law and equity pursuant to s 82 and s 87 of the Trade Practices Act and interest.

[10] It is relevant that the respondents do not seek to continue the business rather it is their contention that all contracts between the appellants and the respondents be rescinded. In his affidavit sworn 21 May 2002, Anthony Crane, solicitor for the respondent, deposes to the reason for the respondents opposing the appointment of a receiver being that the receiver could take action which would destroy or seriously damage the capacity of the respondents properly to contest the claimed debt.

[11] On 29 May 2002, the respondents made application to his Honour the primary judge to amend the respondents' counterclaim. Counsel for the respondent, Mr Dearn argued that the respondent needed "to seek leave to amend in a way that addresses the need for there to be some final relief that coincides with the relief presently being sought" (tp 7).

[12] Counsel for the respondent had prepared a Minute of Proposed Further Amended Defence which included the defendants application for relief which reads as follows:

> "AND THE DEFENDANTS SEEK RELIEF AND ALTERNATIVELY FOR:
>
> 1. A declaration that the First Plaintiff is estopped from reliance upon the Charge and an order restraining a receiver being appointed to the assets of the First Defendant.
> 2. A declaration that the First Defendant has an interest in the business.
> 3. Damages at law and equity and pursuant to ss 82 and 87 of the TPA.
> 4. Equitable relief as otherwise appropriate including restitution.
> 5. Rescission of all or one or other of the agreements, the Charge and/or the Guarantee and an indemnity and in accordance with Order 2 above.

6. An order for rescission of the Contract and/or the Consignment Stock Agreement and/or the Battery Sale Agreement pursuant to s 87(2) of the TPA and such other ancillary relief as to the Court seems fit.

7. An order that the Contract and/or the Consignment Stock Agreement and/or the Battery Sale agreement are, unenforceable against the First Defendant pursuant to s 87(2) of the TPA and ancillary relief as the Court seems fit.

8. An order for rescission of the Guarantee pursuant to s 87(2) of the TPA.

9. An order that the Guarantee is unenforceable against the Second Defendant pursuant to s 87(2) of the TPA and ancillary relief as the Court seems fit.

10. Interest on all damages awarded.

11. Costs."

[13] The application to amend the defence was opposed by counsel for the appellants essentially because the application to amend is inconsistent with the primary relief sought. Ms Kelly, counsel for the appellants, argued that the respondents cannot say "I want rescission of the agreement for the purchase of the business, which would get the business away from me and I also want an order restraining a receiver being appointed over the business". His Honour reserved his decision.

[14] In his Reasons for Judgment delivered on 7 June 2002, his Honour did not make a ruling with respect to the application to amend the respondents' defence.

[15] At the hearing of the appeal, Mr Dearn, counsel for the respondents, after being given an opportunity to consider the respondents' position, submitted the respondents' wished to proceed and deal with the appeal on the basis of

the Reasons for Judgment delivered on 7 June 2002 without obtaining a ruling from his Honour with respect to the proposed amendment to the respondents' defence.

[16] The law with respect to the Court's power to grant an injunction is that the power to grant an injunction must be exercised for the purpose for which it exists (*Jacksons v Sterling Industries Limited* (1987) 162 CLR 612 Deane J 622 at 625). The power of a court to grant an interlocutory injunction is grounded in the power to prevent an abuse or frustration of the court's processes, to ensure that the court is not disabled from granting final relief if an entitlement to that relief is eventually established.

[17] In dismissing an application for interlocutory relief, Lindgren J said in *Politano and Ors v ACN 060 442 926 Pty Ltd and Ors* (1998) unreported decision of the Federal Court of Australia New South Wales District Registry NG 416 of 1998:

> "In the event I need not explore these evidentiary issues further because there are more fundamental reasons why, in my view, the applicants have failed to show a serious question to be tried. The common reference to 'a serious question to be tried' is an abbreviated form of reference to a serious question to be tried as to the granting of a form of final relief, the substance of which, in the relevant respect, would be rendered nugatory by the course of action threatened and sought to be prevented. So, for example, if a vendor has purported to terminate or rescind a contract for the sale of land and is threatening to re-sell the land to another, the original purchaser, seeking final relief in the form of an order for specific performance of the contract, may seek an interlocutory injunction restraining the vendor from re-selling pending the final hearing. Similarly, if an owner of a business gave a charge over it as security for the indebtedness of another and on some ground sought to have the charge declared void ab initio, an interlocutory injunction against

a threatened appointment of a receiver would be in aid of the final relief, that is, ridding the business of the charge and restoration of the unencumbered possession and enjoyment of the business which obtained before the charge was granted. In such cases, the substance of the final relief sought, in the relevant respect, is that the applicant will have unchallenged ownership and possession of property.

By their application in the present case the applicants seek the following substantive relief:

'1. A declaration pursuant to s 87 of the Trade Practices Act 1974 that the agreements annexed to the affidavit of Bruno Politano sworn 29 April 1998 and filed herein ('Mr Politano's affidavit') are void and of no effect.

2. A declaration pursuant to s 87 Trade Practices Act 1974 that the deed of charge of the undertaking of the second applicant identified in the certificate which is annexure H to Mr Politano's affidavit is void.

3. Such consequent orders as are necessary in light of the declarations set out in para 1 and para 2 above.

4. Damages pursuant to s 82 of the Trade Practices Act 1974 as against the first, second and third respondents.

5. Alternatively, orders for the payment of monetary compensation by the first, second and third respondents pursuant to s 87 of the Trade Practices Act 1974.

6. Damages pursuant to s 68 of the Fair Trading Act 1987 (NSW) as against the second, third and fourth respondents.

7. Alternatively, order for the payment of monetary compensation by the second, third and fourth respondents pursuant to s 72 of the Fair Trading Act 1987 (NSW).'

It was not, and could not be, suggested that the agreements and the Fixed and Floating Charge do not stand or fall together. Indeed, para 13 of the applicants' Points of Claim assert that the applicants entered into all the agreements executed by them, including the Agreement for Sale and the 'Company charge dated 15 August 1997 number 605713', in reliance on the representation.

It is not inconsistent with the substance of the final relief sought, in the relevant respect, that the first respondent appoint a receiver. The substance of that final relief, in that respect, is the handing back of the business. The declarations sought would require that the applicants hand the business back to the first respondent. This is, in fact, what the applicants offered to do in their solicitors' letter dated 16 February 1998, the relevant extract from which was set out earlier. Another way of making the present point is to say that the

> legal results contended for by both parties entail a handing back of the business, the position of the first respondent being that this results from its enforcement of the contractual arrangement, and that of the applicants that it results from their right to be rid of the contractual arrangement. While the appointment of a receiver is inconsistent with the form of the final relief sought by the applicants, it is consistent with its substance in the relevant respect. It would be consistent with its form as well if the first respondent was seeking similar relief to that sought by the applicants based upon misleading and deceptive conduct of the applicants. But it is with the substance in the relevant respect of the final relief sought that I must be concerned."

[18] In *Fletcher & Anor v Foodlink Ltd & Ors* (1995) 60 FCR 262 Drummond J refused an application for interlocutory injunction and stated at p 265:

> "Here, the applicants claim against the second respondent an order avoiding the operating agreement ab initio, under s 87 of the Act. The avoidance claim is made in conjunction with a claim for damages for the losses they suffered as a result of entering into that agreement. They do not seek in the action to enforce any rights with respect to the premises. Rather do they seek an order which will establish that they have neither obligations nor rights with respect to those premises. The interlocutory injunction against the second respondent is sought to enable the applicants to make use of the premises only until trial, in the hope that they will thereby be able to generate funds sufficient to run the action: at the same time they assert a right to have the agreement, which alone gives them the right of user of the premises, set aside from its inception. In my opinion, to grant an interlocutory injunction for the purpose frankly identified as that for which it is sought, would be to go beyond granting an interlocutory remedy appropriate to the protection or enforcement of any of the rights or subject matter in issue in this action."

[19] In *Patrick Stevedores Operations No 2 Pty Ltd and Ors v Maritime Union of Australia and Ors* (1998) 153 ALR 643 Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ at 658 – 659:

> "One limitation on the powers of the Federal Court to grant interlocutory injunctions is that those powers must be exercised for

the purpose for which they are conferred. In a later passage of the judgment of Deane J in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623, his Honour said a power to prevent the abuse or frustration of the court's process should be accepted 'as an established part of the armoury of a court of law and equity' and that 'the power to grant such relief in relation to a matter in which the Federal Court has jurisdiction is comprehended by the express grant to that court by s 23 of the Federal Court of Australia Act'. But, his Honour observed, orders must be framed 'so as to come within the limits set by the purpose which [the order] can properly be intended to serve.' The Mareva injunction is the paradigm example or an order to prevent the frustration of a court's process but other examples may be found. The moulding of an interlocutory injunction must depend upon the circumstances of each case. As Brennan J observed in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 621:

> A judicial power to make an interlocutory order in the nature of a Mareva injunction may be exercised according to the exigencies of the case and, the schemes which a debtor may devise for divesting himself of assets being legion, novelty of form is no objection to the validity of such an order.

The general principle which informs the exercise of the power to grant interlocutory relief is that the court may make such orders, at least against the parties to the proceeding against whom final relief might be granted, as are needed to ensure the effective exercise of the jurisdiction invoked. The Federal Court had jurisdiction to make interlocutory orders to prevent frustration of its process in the present proceeding."

[20] In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 Gleeson CJ at 5:

> "… For present purposes, what is most significant is that the justice and convenience of granting an interlocutory injunction, in a case such as the present, is to be found in the purpose for which the power exists.
>
> The corollary of the proposition stated by Sir Frederick Jordan is that a plaintiff seeking an interlocutory injunction must be able to show sufficient colour of right to the final relief, in aid of which interlocutory relief is sought. …"

[21] In the case before this Court the respondents claim no entitlement to the business as a going concern but only the right to be relieved of the business, and damages.

[22] I agree with the submissions made by Ms Kelly on behalf of the appellants that his Honour the primary judge, erred in holding as he did at par 13 and par 14 of his Reasons for Judgment:

> "[13] It might also be expressed in terms that the parties, having joined issue, an interlocutory injunction lies to preserve the status quo, that is, the defendants' running the business as a going concern, free of the appointment of a receiver out of court.
>
> [14] Alternatively, it might be expressed thus: an interlocutory injunction lies in order to protect the subject matter of the action, that is, the business as a going concern, pending resolution in the proceedings, as to whether the plaintiffs or the defendants, after trial, will ultimately be bestowed with it."

[23] I accept the submission on behalf of the appellants that the subject matter of the action is the accounting of monies not the preservation of the business.

[24] On the pleadings the appellants are seeking repayment of monies under the contract of sale for the business. The defendants claim they entered into the contract for sale on the basis of a misrepresentation and claim rescission of the contract. The respondents are not claiming to be owners of the business. If the respondents are ultimately successful in the substantive action they would obtain an order rescinding the contract for sale and would have to return the business to the appellants and account for the stock they received, and the profits made in the business.

[25] I accept there is a substantial injustice if the appellant is prevented from appointing a receiver and the possibility of the business reaching the point where the security would not be sufficient to meet the charge.

[26] From the pleadings in the substantive action it would appear the respondent is not claiming any entitlement to the business. Accordingly, to seek an injunction to restrain the appellants from taking the business is for a purpose wholly unconnected with the final relief the court is being asked to give.

[27] I accept the submission on behalf of the appellants that in seeking the injunction the respondents are effectively forcing the appellants to continue the loan to the respondents in order to finance the respondents' litigation.

[28] I agree that this is not the purpose of granting injunctive relief and that in doing so there was an error in the exercise of his Honour's discretion.

[29] I have concluded that the appellant has discharged the onus upon it to demonstrate there has been an error in the exercise of a discretionary judgment (*Australian Broadcasting Commission v Parish* (1980) 29 ALR 228 at 232).

[30] Accordingly, I would grant leave to appeal. I would allow the appeal and discharge the injunction granted on 7 June 2002.

[31] I order the respondents to pay the appellants' costs of the appeal and the application.

RILEY J

[32] On 19 October 1998 the first appellant ("Graetz") entered into a contract of sale with the first respondent ("NTHG") for the sale of the business known as Gove Tyre Service to NTHG. The purchase price was expressed to be the sum of $166,000 plus the value of the stock in trade. Following a stocktake the value of the stock in trade was agreed to be $224,000 and it was further agreed that this amount would be paid as to $134,000 pursuant to the contract and, as to the balance of $90,000, in accordance with an agreed formula upon sale of the stock. This latter agreement was recorded in a document described as the consignment stock agreement. Settlement took place on 2 November 1998.

[33] The contract of sale recorded that Graetz would provide vendor finance to NTHG in the sum of $200,000. The loan was to be repaid in full on the expiration of two years from the date of settlement. In the meantime NTHG was to make interest only payments of $1250 per calendar month.

[34] In proceedings commenced on 29 January 2002 Graetz alleged that NTHG had failed to pay the sum of $200,000 as required and had not paid interest as required. It also alleged that NTHG had failed to make payments due in relation to the sale of stock pursuant to the terms of the consignment stock agreement. In the proceedings Graetz claimed the sum of $215,000 in respect of the loan and $58,594.61 in respect of the stock. Ongoing interest was also claimed. Graetz claimed against the second respondent,

Mr Newman, as the guarantor of the obligations of NTHG under a deed of guarantee and indemnity. The relief sought by Graetz is the payment of money said to be owing pursuant to the contractual arrangements entered into with NTHG.

[35] NTHG and Mr Newman deny liability and by way of defence and counterclaim rely upon an allegation that NTHG was induced to enter into the contractual arrangement through false and misleading statements as to the business made by or on behalf of Graetz. The relief sought by NTHG includes "an order for rescission of the contract and the consignment stock agreement", restitution and damages. The plaintiffs do not seek possession of, or any entitlement to, the business presently conducted by NTHG. The defendants do not seek to retain any interest in that business. In addition to the claim for damages the defendants seek to be released from the contractual obligations entered into in relation to the business and to be restored to the position they previously occupied.

[36] As part of the arrangements entered into in respect of the sale, and in order to secure the amounts owing to Graetz pursuant to the sale agreement and the consignment stock agreement, NTHG granted to Graetz a fixed and floating charge over the whole of its assets and undertaking. A notice of demand pursuant to that charge was served upon NTHG on 20 May 2002. The notice foreshadowed the appointment of a receiver and manager under the terms of the charge in the event of non-compliance with the notice. The amount demanded was not paid. By summons dated 21 May 2002 NTHG

and Mr Newman sought an injunction restraining Graetz from appointing a receiver to NTHG or from "acting in any way prejudicial to the interests of (NTHG) pursuant to a Fixed and Floating Equitable charge between (Graetz) and (NTHG) dated 19 October 1998".

[37] The injunctive relief sought by NTHG was not said to be necessary to enable NTHG to obtain a full vindication of its rights against Graetz. Indeed the purpose of NTHG in seeking the injunctive relief, as identified in the affidavit material, was to ensure the continued flow of funds to enable NTHG "to finance its dispute with the Plaintiffs". Whilst that may be relevant to the issue of where the balance of convenience lies (see *National Australia Bank Ltd v Zollo & Anor* (1995) 64 SASR 63) it is unconnected with the protection or enforcement of the claims for relief of NTHG.

[38] The matter came before the Supreme Court and on 7 June 2002 an order was made granting an interlocutory injunction to restrain the appointment of a receiver pursuant to the security. Graetz now seeks leave to appeal against that decision. The application for leave and the appeal were heard together.

[39] The principal submission of the applicants was that the learned trial Judge misdirected himself as to the correct principles to be applied. It was submitted that in restraining the appointment of a receiver his Honour provided relief wholly unconnected with the final relief sought in the proceedings. It was submitted that to do so was to exceed the power of the Court to provide interlocutory injunctive relief.

Injunctive Relief

[40] By virtue of s 69 of the Supreme Court Act the Court may grant an injunction "in all cases in which it appears to the Court to be just or convenient so to do."

[41] The jurisdiction of the Court to grant interlocutory relief by way of injunction extends to such orders as are necessary to enable the Court to effectively exercise its jurisdiction. However it does not extend "to the creation and enforcement of rights in addition to those for the protection or enforcement of which the jurisdiction of the Court is invoked": *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 619 per Wilson and Dawson JJ. In that case Brennan J said that the relief which the Court is authorised to provide does not extend beyond the grant of remedies appropriate to the protection and enforcement of the right or subject matter in issue. The power to grant the injunction "does not support the making of an order which goes beyond what is in reasonable protection of a legal or equitable right which the court may enforce by judgment" [at 621].

[42] In *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Union of Australia [No.3]* (1998) 72 ALJR 873 the High Court considered the power of the Federal Court to grant interlocutory injunctions. In a joint judgment Brennan CJ and McHugh, Gummow, Kirby and Hayne JJ noted (at 885) that "[o]ne limitation on the powers of the Federal Court to grant interlocutory

injunctions is that those powers must be exercised for the purpose for which they are conferred." Their Honours went on to say:

> "The general principle which informs the exercise of the power to grant interlocutory relief is that the court may make such orders, at least against the parties to the proceeding against whom final relief might be granted, as are needed to ensure the effective exercise of the jurisdiction invoked. The Federal Court had jurisdiction to make interlocutory orders to prevent frustration of its process in the present proceeding."

[43] The interlocutory relief must be in aid of the final relief sought and if the purpose of the injunctive relief is to preserve the status quo, it must do so in aid of the final relief sought. As was observed by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 76 ALJR 1 (at 5):

> "There could be no justification, in principle, for granting an interlocutory injunction here other than to preserve the subject matter of the dispute, and to maintain the status quo pending the determination of the rights of the parties. If the respondent cannot show a sufficient colour of right of the kind sought to be vindicated by final relief, the foundation of the claim for interlocutory relief disappears."

[44] In that case Gummow and Hayne JJ stated (at 23):

> "The conferral upon the Supreme Court by statute of the power to grant interlocutory injunctions in cases in which it appears to the Court to be just or convenient to do so is not at large. Here, the statute did not confer on the Court power to make an order on the application of Lenah other than in protection of some legal or equitable right of Lenah which the Court might enforce by final judgment. It becomes necessary then to consider the submission by Lenah, that in any event, there is such a right which is the subject of the tort dealing with invasions of privacy."

[45] Gaudron J agreed with the judgment of Gummow and Hayne JJ. She went on to add (at 13-14):

> "Leaving those matters to one side, however, an injunction is a curial remedy. Because it is a remedy, it is axiomatic that it can only issue to protect an equitable or legal right or, which is often the same thing, to prevent an equitable or legal wrong. So to say, is simply to emphasise that the function of courts is to do justice according to law."

The Present Case

[46] It is then necessary to consider whether the injunctive relief sought in the present matter was needed to ensure the protection of some legal or equitable right of NTHG that the Court might enforce by final judgment in these proceedings.

[47] The learned trial Judge held that he had jurisdiction to grant the relief sought and proceeded to do so. He stated that the basis of the jurisdiction may be expressed in a number of different ways:

> "[12] … It might be expressed in terms that the defendants seeking rescission of the transaction whereby they acquired the business, and having rescinded, hold the business as caretaker for the plaintiffs and an interlocutory injunction lies in aid of the defendants' possessory title to the business pending trial.
>
> [13] It might also be expressed in terms that the parties, having joined issue, an interlocutory injunction lies to preserve the

status quo, that is, the defendants' running the business as a going concern, free of the appointment of a receiver out of court.

[14] Alternatively, it might be expressed thus: an interlocutory injunction lies in order to protect the subject matter of the action, that is, the business as a going concern, pending resolution in the proceedings, as to whether the plaintiffs or the defendants, after trial, will ultimately be bestowed with it.

[15] Another way of expressing it is to say the defendants, having invoked the equitable remedy of rescission as final relief, interlocutory injunctive relief is obtainable ancillary to that principal equitable relief."

[48] The submission made on behalf of Graetz was to the effect that none of these bases was applicable in this matter. It was submitted that "the defendants have disclaimed any entitlement to ownership or possession of the business as against the plaintiffs". As neither party claimed to be entitled to the business as a going concern and each was seeking the payment of monies only, no equitable or legal right in relation to the business was available to be protected in these proceedings.

[49] In its submissions both before the learned trial Judge and before this Court Graetz relied upon two cases decided in the Federal Court of Australia being

Politano & Ors v ACN 060 442 926 Pty Ltd & Ors (1998) 572 FCA and *Fletcher & Anor v Foodlink Ltd & Ors* (1995) 60 FCR 262. In each of those cases it was held that there was no jurisdiction under s 23 of the Federal Court of Australia Act to grant an interlocutory injunction in the circumstances that prevailed. Those cases do not depart from the principles set out in the cases to which reference has been made above. They are examples of the application of those principles to the particular circumstances of the matters then before the Court. The question to be resolved in each case, as with the present case, was whether the granting of the interlocutory relief sought would go beyond granting an interlocutory remedy appropriate to the protection or enforcement of the legal or equitable rights which are the subject matter in issue in the proceedings. In terms of the matter now before the Court the issue is whether the injunctive relief sought against Graetz is "for a purpose that is wholly unconnected with either the protection or enforcement of any of their claims for relief": *Fletcher & Anor v Foodlink Ltd & Ors* (supra at 266).

[50] NTHG seeks to rescind the transaction. If it is successful in this endeavour it will have neither rights nor obligations in relation to the business. The rights and obligations concerning the business will rest with the vendor Graetz. Given that Graetz is the entity seeking the appointment of the receiver it will not matter whether, at the time of rescission, the actual business is being controlled by NTHG or by a receiver. Any duty or obligation imposed upon NTHG to care for the business in the interim will

be fulfilled if the business is placed in the hands of a receiver at the instigation of Graetz. NTHG submitted that its right to rescission may depend upon the preservation of the business so that the parties can be returned, or substantially returned, to the status quo prior to the contract: *Brown v Smitt* (1924) 34 CLR 160. If the business cannot be handed back, it was submitted, then restitution will not be available to NTHG. However, in this case where, at the time NTHG claimed rescission, restitution was possible and NTHG provided Graetz with the opportunity to take the business back, NTHG would be entitled to rescission even though, by the time of judgment, restitution may no longer be possible. This will be so provided NTHG has not acted "unconscientiously" during the pendency of the action: *Alati v Kruger* (1955) 94 CLR 216. In the present case it is Graetz itself that has sought to place the business in the hands of a receiver notwithstanding the claim of NTHG for rescission. NTHG will not be excluded from rescission if, by its own conduct, Graetz has prevented NTHG from making restitution.

[51] In the event that NTHG is successful it would be entitled to rescission. It would also be entitled to damages and other relief. As a consequence of its success the agreements that support the contract of sale and the consignment stock agreement would fall. This would include the fixed and floating charge pursuant to which Graetz wishes to proceed and the deed of guarantee and indemnity that imposes obligations on Mr Newman. In the event that Graetz is successful NTHG will be obliged to make payments to

it. In either event there will be no relief that directly impacts upon the business.

[52] As has been noted the granting of relief to preserve the status quo is limited to circumstances where that is necessary in aid of the final relief sought. Such is not the case in this matter. The preservation of the business in the hands of NTHG does not go to any item of final relief available in these proceedings. Similarly it does not protect the subject matter of the proceeding. Whilst the sale of the business may have given rise to the proceedings the business is not the subject matter of these proceedings. No order is sought in relation to the business. The claims of each party are ultimately as to the payment of money. In any event the appointment of a receiver to the business and the sale of the business by the receiver would not affect the outcome of the proceedings or the ability of the Court to effectively exercise the jurisdiction of the Court that has been invoked by the parties. If Graetz is successful it will be entitled to payment of the purchase price and the appointment of a receiver. It will proceed as it now seeks to proceed. If NTHG is successful it will have no right or obligation in relation to the business. It will be entitled to damages. Neither the rights nor the obligations of either party would be affected in any way by the grant or the refusal of the injunctive relief sought by NTHG. The grant or refusal of the injunctive relief will not frustrate the granting of final relief. It will not impinge upon the ability of the Court to do justice between the parties.

[53] The injunctive relief sought by and granted to NTHG was, in my view, wholly unconnected with either the protection or enforcement of any of the claims for relief. In those circumstances the granting of the injunctive relief in this case was beyond power.

[54] Leave to appeal is granted, the appeal is allowed and the injunction granted on 7 June 2002 is discharged. The respondents are to pay the appellants' costs of the appeal and of the application.

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