Territory Insurance Office v Kouimanis Enterprises Pty Ltd & Anor
[2002] NTSC 68

PARTIES:	TERRITORY INSURANCE OFFICE v KOUIMANIS ENTERPRSES PTY LTD (Trading as Territory Motor Trimmers) AND: KOUIMANIS, David
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	105 of 2000 (20012584)
DELIVERED:	20 December 2002
HEARING DATES:	14 November 2002
JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Counsel:

Applicant:	J Reeves QC
Respondent:	J Tomlinson

Solicitors:

Applicant:	Ward Keller Lawyers
Respondent:	De Silva Hebron

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Territory Insurance Office v Kouimanis Enterprises Pty Ltd & Anor
[2002] NTSC 68
No. 105 of 2000

BETWEEN:

TERRITORY INSURANCE OFFICE
Applicant

AND:

KOUIMANIS ENTERPRISES PTY LTD
(Trading as Territory Motor Trimmers)
First Respondent

AND:

DAVID KOUIMANIS
Second Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 20 December 2002)

[1] Appeal from order of the Master setting aside subpoenas. It gives rise to two important issues. The first concerns the operation of the present r 77.05 which reenacted the provisions relating to an appeal from the Master. The second concerns whether in the particular circumstances of this case subpoenas issued by a party and directed to persons who are not parties to produce documents ought to have been set aside.

[2] The matter comes before the Court, in form, as an application for leave to appeal envisaged by r 77.05, it being accepted that the judgment or order of the Master was interlocutory. The Rule in its present form was introduced in October 2000 as follows:

> "(1) Except as otherwise provided by these Rules or an Act, a person affected by a judgment given or order made under this chapter by the Master or a Registrar may appeal to –
>
> (a) in the case of a final judgment or order – a judge; or
>
> (b) in the case of an interlocutory judgment or order – a judge but only with the leave of a judge.
>
> (2) An appeal under this Rule is an appeal in the strict sense."

[3] The original Rule provided that a person affected by a judgment given or order made by the Master may appeal to a Judge and prescribed that the appeal shall be by rehearing de novo. It enabled reliance to be made on the evidence before the Master and by special leave of the Judge upon evidence not before the Master.

[4] Since I accept the submissions made by Mr Reeves QC, I will refer to the Territory Insurance Office as appellant rather than applicant as called in the papers. Section 31 of the Supreme Court Act gives a party a right to appeal from a judgment (which includes an order) of the Master exercising the jurisdiction of the Court. It cannot be doubted that the Master was exercising that jurisdiction, see s 15(d) and s 25 of the Supreme Court Act and O 77 of the Supreme Court Rules as they were. There is no limitation

on the right of appeal expressed in s 31. Compare the requirement for leave to appeal an interlocutory decision of a Judge to the Court of Appeal pursuant to s 53 of the Supreme Court Act. The right of appeal has been held to be a substantive right, not a matter of procedure (*Colonial Sugar Refining Co v Irving* (1905) AC 369 at 372 and *Worrell v Commercial Banking Company of Sydney* (1917) 24 CLR 28 at p 31). I accept that Rules of Court can not vary or alter such a substantive right. Although the rule-making power is broad, it does not authorise the making of rules which vary or depart from and create inconsistency with s 31, *Harrington v Lowe* (1996) 190 CLR 311 at 324 – 325. Rules must deal with procedural issues and not limit the substantive rights given by legislation.

[5] However, in my view the Rule is not invalid, as submitted by the appellant. It simply has no application in these circumstances. It is expressly made subject to "an Act" and must therefore be read with s 31 of the Supreme Court Act. It may be that it has no work to do, but that does not affect its validity in the present circumstances. The repeal of the earlier Rule, however, was effected by r 4 of the amendment and stands.

[6] Notwithstanding that the intimation that an argument as to the effect of the Rules was only made at the commencement of the hearing of the matter, the position of the respondents was that they did not really wish to make any submissions in respect of any of the issues before the Court.

[7] There is now no rule governing the practice and procedure in relation to an appeal from a judgment or order of the Master under the Rules. In those circumstances the Court is to determine what procedure is to be adopted and I direct that the procedure as provided for by the repealed Rules be adopted in this case (r 1.11). Given the importance of the appeal, special leave is given to the filing and use of an Affidavit of Sinclair Whitbourne sworn 17 October 2002.

[8] On the material available to me, some of which was known to the Master, as recorded in his reasons, it appears that:

- the respondents made a claim for damages for breach of a contract of insurance upon the basis that the appellant had failed to indemnify them for loss of property and income as a result of a fire in June 1998;
- pleadings have closed;
- discovery between the parties has been completed;
- the matter is ready to be set down for trial;
- non party discovery had been sought by the appellant from the Northern Territory Commissioner for Police and completed in late 2001;
- directions have been made for the parties to exchange expert evidence and any proposed interrogatories;

- the solicitors for the appellant issued and served the subpoenas for production of documents which were not returnable on a day fixed for trial or any other hearing;

- the documents had been produced to the Registrar;

- the persons named in the subpoenas consented to the documents produced being inspected and copied;

- the respondents did not oppose the documents being inspected and copied subject to a right of first inspection any claim to privilege.

[9] There are four subpoenas; two are directed to accountants, one to a property consultant and one to a conveyancing agent. That directed to the property consultant seeks valuations prepared during 1988 relating to the damaged premises; those directed to the accountants seek documents relating to the financial affairs of the respondents for a period from 1990 to June 2002 in one case and 1994 to the same date in the other. That relating to the conveyancing agent seeks documents relating to the sale of the damaged premises in October 1988. The documents appear to go to issues in the case namely, the quantum of damages claimed and, possibly, to liability.

[10] The Master was of the opinion that the appellant was attempting to use the subpoena process to effect non party discovery. In his view there was no justification for the use of a subpoena process at this stage of the

proceedings, particularly as there is a specific alternative procedure available.

[11] In this jurisdiction that issue first appears to have arisen in *Mamone v Gagliardi* (2000) 10 NTLR 121. I there set aside subpoenas directed to a medical practitioner, a hospital and a retirement home to produce medical records relating to a deceased testator whom it was alleged was lacking in testamentary capacity.

[12] It was my view that in the circumstances of that case the use of the subpoena process was an abuse of it. No date had been set for trial, the date for response to the subpoena was fixed for the convenience of the solicitor who came from out of the Territory, questions arose under s 12(2) of the Evidence Act, the documents required to be produced were not limited to any issue in the proceedings, and the obvious purpose of the subpoena was to find out if there was anything disclosed which might assist the party making the allegation. The documents were not sought for evidence, but to discover whether there was a case.

[13] In *Giblin v Beach* (2001) NTSC 67 Bailey J dealt with an appeal from the Master's orders that an inspection of documents produced on subpoena be refused and that the subpoenas be set aside. The Master had apparently relied upon my finding in *Mamone v Gagliardi* that the subpoenas were not returnable for a date fixed for hearing. His Honour agreed that the case before him was very different to that before me in that there was no issue as

to whether the documents were relevant records, the proceedings were at an advanced stage and in no sense were the subpoenas being used as a "fishing expedition".

[14] At par 23 his Honour said that the express terms of r 43.02(1) do not confine the return date of subpoenas to a date fixed for trial or hearing. I agree. The Rule permits the order to require production at the trial or at any stage of the proceeding, however, the date fixed must be consonant with the appropriate use of a subpoena process.

[15] "The role of the subpoena in the administration of justice is crucial" per Byrne J in *Commissioner Water Resources v Leighton Contractors Pty Ltd* (1990) 96 ALR 242 at 245 and see the following discussion. But the cases identify instances where the issue of a subpoena amounts to an abuse of process in which case they made be set aside. For example, *National Employers Mutual General Acceptance Association v Waind and Hill* (1978) 1 NSWLR 372 at 381-382. As to the impermissible use of a subpoena as, for example, a fishing expedition, *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564. That is, where the subpoena is designed not to obtain evidence to support the case, but to discover whether there is a case at all, or to discover the other side's evidence.

[16] It is sometimes thought that a subpoena to a non party is being used for the impermissible purpose of discovery. The clear distinction between discovery and subpoenas is disclosed in the Rules relating to each. For

example, the order relating to discovery (O 32), including non party discovery, is placed amongst those relating to matters preparatory for trial (O 29 to O 39), whereas O 42, subpoenas, was placed amongst those relating to evidence (O 40 to O 44).

[17] Some cases in relation to subpoenas were decided by courts in which their were no rules permitting discovery from non parties at the time, for example, *Lucas Industries v Hewitt* (1978) 18 ALR 555 and *Greyhound Australia Limited v Deluxe Coach Lines Pty Ltd* (1986) 67 ALR 63 and appear to have been based on its considerations of convenience or inconvenience arising from that factor.

[18] Noting the difference in the Rules of the Supreme Court of Queensland and of this Court, *Leighton Contractors Pty Ltd v Western Metals Resources Limited* (2000) QSC 27, is nevertheless instructive and McKenzie J at p 265 said that a subpoena should not be used for the purpose of obtaining "disclosure", which was an abuse of process. In such a case the subpoena would be liable to be set aside. I agree. But, that abuse must appear from all the circumstances surrounding the issue of the subpoena. The Master found that it did in this case on the material before him.

[19] In addition to the matters referred to in par 8, it is clear that the appellant was aware of the nature and type of documents held by each of the parties, the subject of the subpoenas, and they are apparently relevant to issues between the parties.

[20] Absent sufficient material to make out a case that the subpoenas have been used for an impermissible purpose, it is convenient and may save the parties expense to permit access to documents for which no privilege is claimed.

[21] I order that:

The decision from the Master be set aside.

The appellants have leave to inspect the documents produced on the subpoenas subject to the respondents first exercising that right and any claim for privilege being made.

Costs be costs in the cause.
