Greg Meyer Paving Pty Ltd v Can-Recycling (SA) Pty Ltd and Greg Meyer Paving Pty Ltd v Marine Stores Pty Limited [2013] NTSC 16

PARTIES:	
	GREG MEYER PAVING PTY LTD
	Plaintiff
	v
	CAN-RECYCLING (SA) PTY LTD
	Defendant
FILE NO:	6 of 2013 (21302653)
AND:	GREG MEYER PAVING PTY LTD
	Plaintiff
	v
	MARINE STORES PTY LIMITED
	Defendant
FILE NO:	10 of 2013 (21305341)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
DELIVERED:	4 April 2013
HEARING DATES:	6 MARCH 2013
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

PRACTICE AND PROCEDURE – Expedited hearings – Principles applicable – Public importance and hardship grounds – Requirement for applicant to have acted expeditiously up to the time of application.

COSTS – Costs in interlocutory proceedings – Usual costs order – Discretion to award costs – Factors influencing discretion to award costs – Usual order for costs where a supervening event renders proceedings academic – Application of that principle in relation to interlocutory proceedings.

Supreme Court Rules Order 63.18
Environment Protection (Beverage Containers and Plastic Bags) Act s 20

Coca-Cola Amatil (Aust) Pty Ltd v Northern Territory of Australia [2013] FCA 154
NT Pubco & Anor v DNPW Pty Ltd & Ors [2012] NTSC 51
Parap Hotel Pty Ltd & Ors v Northern Territory Planning Authority & Ors (1993) 112 FLR 336
JT Stratford & Son Limited v Lindley (No.2) [1969] 1 WLR 1547
Australian Securities Commission v Aust-Home Investments Limited & Ors (1993) 44 FCR 194
Re the Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia, Ex-parte Lai Qin (1997) 186 CLR 622
United Super Pty Ltd & Ors v Randazzo Investments Pty Ltd & Ors [2010] NTSC 31
One.Tel Limited v Commissioner of Taxation [2000] 101 FCR 548
TTE Pty Ltd & Anor v Ken Day Pty Ltd (1990) 2 NTLR 143
Otter Gold NL v Barcon NT Pty Ltd & Ors (2000) 10 NTLR 189
Yow v NT Gymnastic Association (1991) 1 NTLR 180
Millingimbi Education and Cultural Association Inc. v Davies, Northern Territory Supreme Court, Kearney J, 12 October 1990
Hopkins v QBE Insurance Ltd (1992) 2 NTLR 147
Aon Risk Services Australia Ltd v Australian National University (2009) 83 ALJR 951
Elders Rural Finance Ltd v Smith & Ors (1995) 38 NSWLR 395
Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd (1989) 18 NSWLR 33

Xiang Rong Investment Pty Ltd v Ku-ring-gai Municipal Council [2012] NSWLEC 44

REPRESENTATION:

Counsel:

Plaintiff:	Mr Roper
Defendant (Marine Stores Pty Ltd):	Mr Robertson SC with Mr Crawley
Defendant (Can-Recycling (SA) Pty Ltd):	Ms Detmold

Solicitors:

Plaintiff:	Withnalls Lawyers
Defendant (Marine Stores Pty Ltd):	De Silva Hebron
Defendant (Can-Recycling (SA) Pty Ltd):	Cridlands MB

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

Greg Meyer Paving Pty Ltd v Can-Recycling (SA) Pty Ltd and Greg Meyer Paving Pty Ltd v Marine Stores Pty Limited [2013] NTSC 16
No. 6 of 2013 (21302653) and 10 of 2013 (21305341)

BETWEEN:

Greg Meyer Paving Pty Ltd

Plaintiff

AND:

Can-Recycling (SA) Pty Ltd

Defendant

AND BETWEEN:

Greg Meyer Paving Pty Ltd
Plaintiff

AND:

Marine Stores Pty Limited

Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 4 April 2013)

[1] The Plaintiff has applied for an expedited hearing in both of these matters. The facts are common to both matters. The basis for the expedited hearing

was the same in both cases and therefore both applications were heard together.

[2] The Plaintiff is an 'approved collection depot' under the *Environment Protection (Beverage Containers and Plastic Bags) Act* ('the Act') and trades as Territory Can Man. Each Defendant is a 'CDS co-ordinator' as defined in the Act. The Act had the worthy object of establishing a scheme to control the environmental pollution resulting from discarded empty beverage containers. The scheme operated by imposing a deposit on beverage containers when the beverage was purchased which was refunded when the empty container was returned to an approved collection depot. The collection depot in turn delivers those containers, after sorting and the like, to the CDS co-ordinator and is paid a fee determined in accordance with section 20(2) of the Act. That fee is the amount of the deposit refunded to the consumer by the approved collection depot plus a sum representing the other costs specified in that sub-section.

[3] The scheme when introduced was inconsistent with the *Mutual Recognition Act 1992* (Cth) but a temporary exemption for a period of 12 months was in place. On 4 March 2013 the decision in *Coca-Cola Amatil (Aust) Pty Ltd v Northern Territory of Australia*[1] ('*Coca-Cola Amatil*') was delivered. The effect of that decision is that, absent legislative intervention or a successful appeal, the scheme ended upon the expiration of the temporary exemption. The effect of that on the current proceedings is that, subject to resolution of

[1] [2013] FCA 154

any disputes in respect of payments up to the relevant date, there can be no issue or dispute beyond that date. Therefore the Plaintiff's applications for expedition have become unnecessary. All that is left is the question of the costs of the applications.

[4] The Defendant in each matter seeks costs against the Plaintiff. The Plaintiff submits that each party should bear their own costs based on the application of the principle that where a supervening event renders proceedings academic, the usual order is that each party bear their own costs.

[5] I summarised the authorities dealing with this principle in *NT Pubco & Anor v DNPW Pty Ltd & Ors.*[2] In one of the authorities discussed there, *Parap Hotel Pty Ltd & Ors v Northern Territory Planning Authority & Ors*,[3] (*'Parap Hotel'*) Mildren J confirmed that courts will not try a purely academic question simply to determine costs. His Honour confirmed that the general rule in such cases was that each party would bear their own costs. His Honour recognised that there are exceptions to the general rule and he identified that one exception was if it could be shown that the result would not have been in doubt without having to decide any facts and contentions, such as if it could be shown that a party would have been entitled to summary judgment on the undisputed facts known to the court at the time.[4]

[2] [2012] NTSC 51 at 41-51
[3] (1993) 112 FLR 336
[4] See also *JT Stratford & Son Limited v Lindley (No.2)* [1969] 1 WLR 1547

[6] Other exceptions, which may be relevant to the current case, are said to be if a party did not act reasonably in commencing the proceedings or if the opposing party did not act reasonably in defending them,[5] where conduct of the respondent prior to the commencement of proceedings precipitated the litigation,[6] where the proceedings come to an end as a result of a total capitulation or surrender by one party.[7]

[7] I think that in interlocutory proceedings there is more scope for a matter to fall within the exception identified by Mildren J in *Parap Hotel*. This is due to the fundamental difference between an interlocutory application and the final determination of a matter. The exception referred to was predicated on the ability of the court to decide the case based on the undisputed facts known to the court at that time. Where the application of the principle arises in cases of hearings for final determination, that will necessarily occur before any evidence is led. In interlocutory proceedings the converse is likely to be true as the evidence is in the form of affidavits and in most cases there is no cross-examination of witnesses. The evidence on an interlocutory hearing is usually led in its entirety once those affidavits have been filed. The current case is typical in that respect as all of the affidavits relied on were filed before the occurrence of the supervening event. There is therefore scope for a court to be able to reach a conclusion regarding the

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[5] *Australian Securities Commission v Aust-Home Investments Limited & Ors* (1993) 44 FCR 194 and *Re the Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia, Ex-parte Lai Qin* (1997) 186 CLR 622

[6] *Australian Securities Commission v Aust-Home Investments Limited & Ors* (1993) 44 FCR 194

[7] *United Super Pty Ltd & Ors v Randazzo Investments Pty Ltd & Ors* [2010] NTSC 31 and *One.Tel Limited v Commissioner of Taxation* [2000] 101 FCR 548

decision on an interlocutory application as at the occurrence of the supervening event because all the evidence has been presented. The same cannot usually be said in respect of a hearing for the final determination of a matter.

[8] Having said that the starting point in all applications for costs in interlocutory proceedings is Rule 63.18 of the *Supreme Court Rules* which provides:-

> **63.18 Interlocutory application**
>
> Each party shall bear his own costs of an interlocutory or other application in a proceeding, whether made on or without notice, unless the court otherwise orders.

[9] The purpose of the rule is to encourage resolution of interlocutory issues by agreement and without recourse to the courts thereby avoiding unnecessary applications.[8] The issue is to be decided in the exercise of the Court's discretion which is unfettered save that it must be exercised properly and judicially. What the Court is concerned about in considering whether a costs order pursuant to Rule 63.18 should be made is whether the parties acted reasonably. This can include considerations as to the merit of an application or of a party resisting an application.[9] In the exercise of the discretion, in

[8] *TTE Pty Ltd & Anor v Ken Day Pty Ltd* (1990) 2 NTLR 143
[9] See generally *Otter Gold NL v Barcon NT Pty Ltd & Ors* (2000) 10 NTLR 189, *Yow v NT Gymnastic Association* (1991) 1 NTLR 180, *Millingimbi Education and Cultural Association Inc. v Davies* Northern Territory Supreme Court, Kearney J, 12 October 1990.

general if an application is without real merit, the successful party should be awarded costs.[10]

[10] Mr Robertson, counsel for Marine Stores Pty Ltd, supported by Ms Detmold, counsel for Can-Recycling (SA) Pty Ltd, argued that the cases where the proceedings have been rendered academic should be distinguished where costs are sought for an interlocutory application. I do not entirely agree as the decision on costs turns on the reasonableness of the application. The existence of a supervening event is a relevant factor to consider when determining reasonableness, albeit that in some circumstances it may not be determinative. One such circumstance would be if, despite the supervening event, the application was destined to fail.

[11] A consideration of the authorities on expedited hearings will help to put the respective arguments into context. I was not referred to any Northern Territory authorities on point, nor was I able to find any through my own research. It is not surprising that all the authorities involve interstate jurisdictions. I think that is due to the significant difference with the civil jurisdiction in the Northern Territory compared with other Australian jurisdictions which sees the issue arise more often in the busier jurisdictions. The number of cases in the Court's civil list at any one time is relatively small and there is no backlog of cases awaiting trial as exists in other jurisdictions. This state of affairs was recognised by Mildren J in

[10] *TTE Pty Ltd & Anor v Ken Day Pty Ltd* (1990) 2 NTLR 143 and *Hopkins v QBE Insurance Ltd* (1992) 2 NTLR 147

United Super Pty Ltd v Randazzo Investments Pty Ltd[11] when his Honour dealt with the application of the High Court decision in *Aon Risk Services Australia Ltd v Australian National University*[12] in the Northern Territory. The wait between the time a matter is ready for trial and referred to a civil sitting and the commencement of the trial is usually less than three months. For that reason the authorities dealing with expedited hearings from other jurisdictions need to be looked at with some caution, especially where they turn on the displacement effect.[13]

[12] In general courts will always endeavour to expedite matters where appropriate.[14] *Elders Rural Finance Ltd v Smith & Ors,*[15] set out a number of instances where the Court would normally accommodate an expedited hearing. That case dealt with expedited appeals but the principles have equal application to the current case. Of those instances, those relevant here and which the Plaintiff relies on, were, firstly where '*a party may lose its livelihood, business or home or suffer irreparable loss or extraordinary hardship*'.[16] Secondly, '*where there would be serious detriment to good public administration or to the interest of members of the public not concerned in the instant appeal*'.[17]

[11] [2009] NTSC 50
[12] (2009) 83 ALJR 951
[13] *Elders Rural Finance Limited v Smith & Ors* (1995) 38 NSWLR 395 at 400
[14] *Elders Rural Finance Limited v Smith & Ors* (1995) 38 NSWLR 395
[15] (1995) 38 NSWLR 395
[16] (1995) 38 NSWLR 395 at 401
[17] (1995) 38 NSWLR 395 at 401

[13] *Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd*[18] also set out factors which are taken into account in expedition applications.[19] Of those specified, the factors relevant to the current case are:-

(1) Whether '*special factors*' exists.

(2) Whether the applicant has proceeded expeditiously up to the date of hearing of the application for the expedited hearing.

The special factors, again limited to those which have application to the current case, were said to be:-

(1) matters of public importance;

(2) that the applicant is suffering hardship not caused through his own fault;

(3) where there are large sums involved.

[14] Although large sums are not involved here, but for the supervening event the determination in this case would have had ramifications for the scheme. The sums involved in the context of the ongoing operation of the scheme would have been significant. Therefore I do not consider that the absence of a dispute over a large sum is decisive.

[18] (1989) 18 NSWLR 33
[19] See also *Xiang Rong Investment Pty Ltd v Ku-ring-gai Municipal Council* [2012] NSWLEC 44

[15] It is however generally recognised that a party seeking an expedited hearing, which by its very nature involves the grant of an indulgence from the court, will have acted expeditiously. Where a party has not proceeded expeditiously the application for expedition will normally be declined. Any hardship that exists in such circumstances will often be caused by the delay. I think that is directly relevant here in respect of the obtaining of an expert's report by the Plaintiff which is discussed below.

[16] Both Defendants argue that the telling factor here should be that the Plaintiff's application was doomed to fail and was without merit. They also submit that the case falls within the category of a total surrender or capitulation. Costs are invariably ordered in both of those instances.[20] Even though such orders in those circumstances are the orders usually made, nonetheless that does not mandate the making of those orders and that does not limit the discretion of the Court.

[17] Relevantly to the question of the reasonableness of the application, Mr Roper, counsel for the Plaintiff, confirmed that the applications were based both on the public importance of the continuing operation of the Plaintiff's depot as well as the hardship arising due to the losses suffered by the Plaintiff. The Plaintiff claims that the losses arise by reason of the insufficiency of the payments to it by the Defendants pursuant to section 20 of the Act which resulted in the closure of its collection depot. The

[20] *United Super Pty Ltd & Ors v Randazzo Investments Pty Ltd & Ors* [2010] NTSC 31 and *One.Tel Limited v Commissioner of Taxation* [2000] 101 FCR 548; *TTE Pty Ltd & Anor v Ken Day Pty Ltd* (1990) 2 NTLR 143; *Hopkins v QBE Insurance Ltd* (1992) 2 NTLR 147

consequence of that was asserted to be that the public was deprived of a facility to obtain the refunds paid on container deposits on an ongoing basis. That then ties in to the public importance factor.

[18] The precise orders sought by the Plaintiff in both summonses were:-

1. That the within proceedings be expedited to hearing.
2. That the Court set the matter for hearing no earlier than 1 April 2013 but no later than 15 May 2013.

[19] I am uncertain as to the significance of the dates in order 2. Civil sittings in this Court are in the main conducted in five periods of approximately one month's duration spread approximately equally throughout the calendar year. As at the date of filing of the applications, the next civil sittings were the April sittings running from 8 April 2013 to 3 May 2013. The civil sittings following the April sittings are the June sittings which run from 3 June 2013 through to 28 June 2013.

[20] At the time of filing of the Plaintiff's applications no further hearings were able to be listed in the April sittings. Further, a listing for hearing within the range of dates nominated in order 2 of the Plaintiff's summonses was unlikely on the then state of the Court calendar. Hearing dates in the June sittings however were readily available.

[21] The availability of dates for hearing in the June sittings means that with appropriate case management, these matters could have been listed for hearing to commence as early as 3 June 2013 or for completion by 28 June

2013 in the ordinary course of events. Therefore if orders in accordance with those specified in order 2 of the summonses had been made, that would have expedited the hearing of those matters by between approximately two and six weeks.

[22] I think that this must be factored into consideration when determining the reasonableness of the Plaintiff's application. The reasonableness of the applications needs to be assessed in the context of the orders sought by the Plaintiff in the summonses and against the likelihood that, without any order for expedition, the matters may still have been heard within the June sittings. The Plaintiff needs to satisfy me the level of expedition sought was justified and could have been achieved without compromising the ability of the Defendants to be ready for trial. By the time this application was heard both matters were on track to be listed for trial in the June sittings notwithstanding that the Defendant Can-Recycling (SA) Pty Ltd later flagged that it would require an extension of up to approximately eight weeks to obtain its expert report.

[23] Any delay consequent on an extension for that purpose however is neutral as an order for expedition would not have been granted if its effect was to be that the Defendants would not have been ready for trial, albeit on an accelerated timeframe. The time reasonably required by the Defendants to obtain necessary expert evidence would always be allowed. In fairness, Mr Roper rightly acknowledged this and confirmed that the Plaintiff did not

seek an order for an expedited hearing which would have adversely impacted on the ability of the Defendants to obtain the evidence they required.

[24] This leads to discussion of whether or not the Plaintiff acted expeditiously up to the time of its applications. It took eight months for the Plaintiff's expert report to be obtained. Although Mr Roper stressed that this was not the fault of the Plaintiff or the Plaintiff's solicitors, the point is that the delay was on the Plaintiff's side. Although the report was quite substantial, that it took eight months to prepare having regard to the nature of the report is unacceptable. An interesting measuring stick in that respect is that the Defendants have committed to a timetable of some two to three months, albeit that was subject to extensions in the event of delays in the provision of necessary documents and other material by the Plaintiff. Nonetheless, that is a strong indication that the Plaintiff's report should have been obtained much earlier.

[25] The effect of the lack of expeditious action by the Plaintiff is highlighted by that delay. Quite simply, had the report been obtained in even two months less time, no application for expedition would have been necessary as the case would likely otherwise have been finally heard by the time of filing of the application for expedition. The claims of hardship or public importance need to be tested against that.

[26] I now consider the specific bases of the Plaintiff's application in light of these factors, firstly, with respect to the public importance factor. Central to

this was the closure of the Plaintiff's depot and the effect that was claimed to have had on the capacity for members of the public to obtain a refund of deposits. The Defendants both argued that the affidavits relied upon by the Plaintiff were misleading on this issue. Leaving that to one side for now, what remains relevant is the evidence of the Defendant Can-Recycling (SA) Pty Ltd that there are two other approved collection depots available to the public in the Darwin metropolitan area. One is approximately four kilometres from the Plaintiff's depot and the other is approximately 10 kilometres away. There are also three locations where automated refunds can be obtained and these are between approximately five and 10 kilometres from the Plaintiff's depot. The public could have sought a refund of deposits at those locations.

[27] I accept that a closure of any one depot will reduce the capacity for the public generally to obtain refunds. However, the existence and location of other outlets which remained opened to the public compromises the Plaintiff's claim of the public importance of the case when it is looked at in the context of the extent of expedition sought. At best, it amounts only to an inconvenience, to some members of the public, and for a short period of time.

[28] Returning now to the alleged misleading nature of the affidavits relied on by the Plaintiff, the Defendants submitted that this arises because the Plaintiff's evidence suggests that the Plaintiff had ceased trading altogether. In fact the Plaintiff had only ceased trading with the public and the Plaintiff continued

to service what were described as commercial customers. Mr Roper referred me to parts of the affidavits relied on by the Plaintiff which acknowledged the ongoing trading with commercial customers. These were few and they were indirect. I would have thought that such evidence could have been put with greater clarity. However, whether it is misleading is not pertinent in my view as, had the Plaintiff's applications been based on cessation of public trading alone, in my assessment that would have been sufficient to raise the public importance factor.

[29] As to the financial hardship for the Plaintiff, on this issue I agree with the submissions by counsel for the Defendants that the evidence is insufficient. It amounts to little more than assertions by the Plaintiff that it was trading at a loss. On the Plaintiff's own evidence, the Plaintiff had been trading at a loss for a period and the evidence does not explain how that would be affected by a further delay of between another two and six weeks. There is no evidence to show that a further delay of the length contemplated before the matter could be heard in the ordinary course of events was critical.

[30] Moreover, trading at a loss alone is not sufficient to secure an expedited hearing in my view. Hardship for this purpose connotes something more than trading at a loss and it is there that the evidence is deficient. Clearly the Plaintiff continued trading with commercial customers. The evidence shows significant payments being made to the Plaintiff, presumably in respect of commercial customers, on an ongoing basis. In that respect the Plaintiff discloses nothing as to how that impacts on the claim of hardship.

[31] I think that the inevitability of the failure of the Plaintiff's applications is therefore established. Mr Roper argued that for the Defendants to be successful on their costs application they would have to demonstrate that the Plaintiff's applications could not have succeeded at all and that all that the Plaintiff needed to do demonstrate was that the Plaintiff could have satisfied the Court that some measure of expedition was required. I do not think that is correct. In any case I think the position is that no order for expedition was required, nor was it likely to have been made.

[32] In my view it was not reasonable for the Plaintiff to have sought an expedited hearing for the reasons that I have outlined. The evidence of the Plaintiff is not sufficient to show that expedition leading to a hearing before the June sittings was warranted.

[33] I order the Plaintiff to pay each Defendants costs of the application on the standard basis. I certify the matter fit for counsel. I will hear the parties as to any ancillary orders.