Palmer & Anor v MacDonnell Shire Council [2011] NTCA 2

PARTIES:	PALMER, Tony Francis AND: ELLIS, Marie Elana v MACDONNELL SHIRE COUNCIL
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 9 of 2010 (20913798)
DELIVERED:	20 April 2011
HEARING DATE:	8 February 2011
JUDGMENT OF:	RILEY CJ, BLOKLAND and BARR JJ
APPEALED FROM:	MILDREN J

CATCHWORDS:

EQUITY – Application for leave to appeal – protection of trust property – where respondent established a prima facie proprietary interest in trust fund – discretion to release trust funds for payment of applicants' legal fees – held that principles relating to *Mareva* injunctions not determinative.

EQUITY – Application for leave to appeal – protection of trust property – discretion to release money in trust funds for payment of legal fees for constitutional case – no public policy limiting court's discretion.

PROCEDURE – Application for leave to appeal – interlocutory decision of a single judge – principles to be applied – necessary to show that decision is

either wrong or attended with sufficient doubt to warrant granting of leave – application dismissed.

CAL No 14 Pty Ltd v Motor Accidents Insuance Board (2009) 239 CLR 390; *Iskandar v Merpati Nusantera Airline (No 2)* (2006) NTCA 3; (206) NTLR 22 - followed

His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand and Anor v The Macedonian Orthodox Community Church St Petka Incorporated and Anor [2006] NSWCA 277 – applied

Australian Broadcasting Corporation v O'Neill (2006) 277 CLR 57; *Cardile and Ors v LED Builders* [1999] HCA 18; (1999) 198 CLR 380; *Carl-Zeiss-Stiftung v Herbert Smith & Co (No 2)* [1968] 2 All ER 1233; *Carl-Zeiss-Stuftung v Herbert Smith & Co and Anor (No 2)* CA [1969] 2 Ch 276; *Cogent Nominees v Anthony* [2003] NSWSC 804; *Farah Constructions v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89; *United Mizrahi Bank Ltd v Doherty* (1998) 1 WLR 435 - considered

REPRESENTATION:

Counsel:

First and Second Applicants:	D Bennett QC, P Mclntyre & A Tokley
Respondent:	A Wyvill SC, T Anderson

Solicitors:

First and Second Applicants:	Midena Lawyers
Respondent:	Povey Stirk

Judgment category classification:	B
Judgment ID Number:	Bar1105
Number of pages:	24

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

Palmer & Anor v MacDonnell Shire Council [2011] NTCA 2
No. AP 9 of 2010 (20913798)

BETWEEN:

TONY FRANCIS PALMER
First Applicant

AND:

MARIE ELANA ELLIS
Second Applicant

AND:

MACDONNELL SHIRE COUNCIL
Respondent

CORAM: RILEY CJ, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 20 April 2011)

RILEY CJ:

[1] I agree with Barr J.

BLOKLAND J

[2] I agree with the reasons given in the judgment of Barr J and agree the application should be dismissed.

BARR J:

Introduction

[3] This is an application for leave to appeal a discretionary judgment of a single judge refusing the applicants access to trust monies for the payment of legal fees for their intended court challenge to legislation enacted in 2007 and 2008 to effect local government reforms in the Northern Territory.

[4] The circumstances in which the various issues have arisen are explained in detail in the judgment of Mildren J at first instance, and I need refer to them only to the extent necessary to indicate the conclusions reached by me.

Background

[5] Amoonguna Community Inc was an association incorporated as such in 1975 under the *Associations Incorporation Ordinance 1963* (NT). The objects set out in its constitution permitted it to be, in effect, the local council for the small community of Amoonguna, near Alice Springs in central Australia. The more obvious 'local council' objects included maintaining and managing essential services and public utilities at Amoonguna, and maintaining and operating a workshop for the repair and maintenance of what were called "Council vehicles and machinery". The objects also extended to some functions beyond the usual functions of local government entities, for example: "To facilitate the provision of education, employment, housing, health and other services for members" and "To encourage the maintenance and development of traditional and cultural activities".

[6] Membership of Amoonguna Community Inc was expressed to be open to all Aboriginal persons aged 18 years and over normally resident at Amoonguna Community and traditional owners of land within the Amoonguna Land Trust, irrespective of where such traditional owners might actually reside.

[7] The constitution provided that the income and property of the Association, however derived, should be applied solely towards the promotion of the objects and purposes of the Association and that no portion should be paid or transferred, directly or indirectly, to any member of the Association.[1] Consistent with this, the constitution also provided that in the event of winding up, any surplus assets remaining after payment of the Association's liabilities should be transferred to a body with similar objects or a charitable institution.[2]

[8] In 1996, Amoonguna Community Inc was given the functions and powers of a community government council under the provisions of the *Local Government Act*, and so could apply for and receive funding for the purposes of local government.

[9] On 16 October 2007, as part of local government reforms which took place in the Northern Territory in 2007 and 2008, the respondent Shire Council was constituted to be the *prospective* shire council for an area resulting from the amalgamation of 11 local government areas, which at that time were each separately administered by community government councils. Those

1 Constitution of Amoonguna Community Incorporated, cl 7.
2 Constitution, cl 33.

councils, of which Amoonguna Community Inc was one, were referred to as "constituent councils".[3]

[10] Also on 16 October 2007, Amoonguna Community Inc underwent a change of legal status as a result of Ministerial action amending its constitution.[4] It ceased to be an incorporated association and became a community government council, named Amoonguna Community Incorporated. The assets and liabilities of the former incorporated association became the assets and liabilities of the new community government council.[5]

[11] On 1 July 2008 the respondent Shire Council became the shire council for the area for which it had been constituted. The constituent councils which had previously administered their respective parts of that area (including Amoonguna Community Incorporated) were dissolved and ceased to exist, and all property rights, liabilities and obligations (including contractual rights, liabilities and obligations) became the property rights, liabilities and obligations of the respondent Shire Council.[6]

[12] In December 2007, prior to the local government reforms coming into full effect, various persons connected with Amoonguna Community Inc resolved to establish a fund to enable Amoonguna to challenge the validity of the reforms. On 7 March 2008 and 22 April 2008, two sums totalling $90,000

---

3 See "Re-structuring Order No. 14" made by the Minister in stated reliance on section 28A(1) of the *Local Government Act.*

4 Section 114D of the *Local Government Amendment Act 2007* (NT) empowered the Minister before the "date of transition" to amend "a local governing association's constitution as the Minister considers necessary or desirable in view of the association's impending conversion into a community government council on the date of transition."

5 Section 114F Local Government Amendment Act 2007 (NT).

6 Local Government Act 2008 (NT) s 262.

were transferred into an account (which I shall refer to as "the trust account"[7]) in the name of Amoonguna's bookkeeper, Debbie Miller. Two amounts totalling $33,518 were transferred on 17 June 2008. Subsequently an application for interlocutory injunctions was made by Amoonguna Community Inc in a High Court proceeding challenging the validity of the local government reforms, but that application was refused on 24 June 2008 by a single judge of the High Court. After that refusal, but prior to 1 July 2008, a further amount of $566,988.52 was transferred into the trust account. Prior to 1 July 2008, an amount of $169,358.33 was paid by Ms Miller to lawyers representing Amoonguna Community Inc in the High Court proceeding.

[13] On 24 August 2009, the High Court remitted the High Court proceeding (to which further parties had been joined) to the Northern Territory Supreme Court. The remitted proceeding is proceeding 135 of 2009.

[14] On 15 September 2009, in proceeding 2 of 2009 commenced by the respondent (as plaintiff) against Ms Miller and the two present applicants, the respondent alleged that the sole beneficial owner of the funds in the trust account prior to 1 July 2008 was Amoonguna Community Incorporated (the community government council) and that by reason of the amendments made to the *Local Government Act* in 2008, the respondent had become the sole

[7] Such reference is neutral as to the validity of the claimed trust, a matter which Mildren J referred to at Reasons par [22].

beneficiary and beneficial owner of those funds after 1 July 2008.[8] The respondent's case was based on its asserted proprietary claim, that is, it claimed to be the beneficial owner of trust property comprising the funds in the trust account.

[15] Mildren J was satisfied that the respondent (the plaintiff before his Honour) had established that it had a prima facie case sufficient to justify the granting of an interlocutory injunction; further that the balance of convenience heavily favoured the respondent.[9] His Honour granted an interlocutory injunction restraining Ms Miller from paying any monies out of the account "except as may be approved by the Court or a Judge or by these orders".

[16] The present application for leave to appeal arose from a subsequent unsuccessful application to Mildren J by the applicants (defendants below) seeking the court's approval, as contemplated by the earlier injunction order, for Ms Miller to pay out monies from the trust account for the reasonable legal costs, including counsels' fees and out-of-pocket expenses, incurred or to be incurred in respect of the remitted proceeding.

[17] Mildren J wrestled with unsatisfactory evidence as to the amount standing to the credit of the trust account at the time of hearing in June 2010, and concluded that the amount should have been somewhere between $532,000

---

8 *MacDonnell Shire Council v Miller & Ors* [2009] NTSC 46 at [2].

9 *MacDonnell Shire Council v Miller & Ors* [2009] NTSC 46 at [17]: "The balance of convenience heavily favours the plaintiff. It claims that the monies belong to it and it would be wrong to permit the second and third defendants to have unsupervised access to the funds, except in the circumstances envisaged in par [16] above."

and $619,000 (in round figures), plus accumulated interest of approximately $50,000, less bank fees and charges.[10]

[18] The evidence and statements made by the applicants' senior counsel to Mildren J were to the effect that "a large part of the funds" held in the trust account would be consumed in legal fees, past and future, in the legal challenge to the local government reforms.[11] Yet, as his Honour found, the legal challenge was "unlikely to proceed to hearing" if the applicants did not have access to the funds held in the trust account.[12]

[19] His Honour was referred by counsel for the applicants to *Mareva* injunction cases, in which courts had permitted defendants to utilize funds or assets, otherwise frozen, to meet legal fees and living expenses. However, his Honour distinguished the *Mareva* injunction cases on the basis that such injunctions or orders are typically granted to prevent defendants from dissipating their own assets, rather than to prevent the dissipation of assets which a plaintiff may claim are the plaintiff's own property.[13]

[20] After careful consideration, his Honour decided that the principles in the line of authority stemming from the decision of the Chancery Division of the

---

10 *MacDonnell Shire Council v Miller* [2010] NTSC 39 ("Reasons") at [37].
11 Reasons par [38].
12 Reasons par [41].
13 Reasons par [47] - [48].

English High Court in *United Mizrahi Bank Ltd v Doherty*[14] were applicable to the circumstances of the application before him and that, accordingly, he had to "carry out the difficult balancing act" suggested by those cases in deciding whether or not to grant the relief sought by the applicants. He proceeded to review the merits of the applicants' case in terms of whether there was a prima facie case or a serious issue to be tried as to the constitutionality of the relevant legislation.[15]

[21] His Honour acknowledged "some force" in the submission of Mr Bennett QC, senior counsel for the applicants, that a statutory scheme which has the effect of dissolving an association and compulsorily acquiring all of its assets so that it has no funds left to challenge the validity of the scheme must be unconstitutional. However, his Honour noted in that context that the remedy of compensation was available and that Amoonguna could be restored as an association and, once restored, its assets transferred to another association having like objects and membership. Further, with autonomy restored, it could continue on, amend its constitution as it saw fit, and carry out at least its non-government objects.[16]

[22] Mildren J ultimately decided to refuse the application, for these reasons:-

---

[14] *United Mizrahi Bank Ltd v Doherty* (1998) 1 WLR 435 at 439, citing an unreported decision of the UK Court of Appeal in *Sundt Wrigley & Co Ltd v Wrigley*, 23 June 1933. In terms of the line of authority "stemming from" the *United Mizrahi Bank* decision, his Honour referred to *Cogent Nominees v Anthony* [2003] NSWSC 804, per Austin J; and *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand and Anor v The Macedonian Orthodox Community Church St Petka Incorporated and Anor* [2006] NSWCA 277.

[15] On the application for leave to appeal, there was no issue as to any distinction, in the facts of the present case, between 'prima facie case' and 'serious issue to be tried', as discussed in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, at [65] per Gummow and Hayne JJ.

[16] Reasons par [18]; par [61].

> "The plaintiff has established a prima facie case to the funds which may well be trust funds. If the applications are successful, the funds are likely to be largely, albeit possibly not entirely, spent on financing the litigation. The plaintiff's claim to the funds is a proprietary claim and a stronger case is required to release the funds than would be the case if the funds belonged to the applicants. It is clearly not their money, although it may belong to Amoonguna. No security is offered to repay the money if the challenge is unsuccessful. As to the claim that the legislation is invalid, at this stage of what are interlocutory proceedings, I am unable to say that that claim is doomed to failure, but the claim does not appear to be very strong. The applicants have another remedy open to them under the provisions of the legislation for compensation and it is also possible for Amoonguna to be reconstituted to enable it to make its claim. It is still open for funding for the claim for compensation to be obtained from the Northern Territory government."[17]

Application for leave to appeal – preliminary observations

[23] In general, in an application for leave to appeal from a discretionary judgment, it must be shown that the judgment appealed from is either wrong, or at least attended with sufficient doubt so as to warrant the granting of leave. Further, notwithstanding that error may be shown, leave may still be refused unless it can be shown that no substantial injustice will be done by leaving the erroneous decision unreversed. Alternatively, leave may be given, notwithstanding that error is not shown, if injustice would flow from it.[18]

[24] It should be borne in mind that Mildren J was exercising a discretion as to whether or not he should allow monies held in the trust account, over which the respondent had a prima facie proprietary claim, to be substantially if not

---

[17] Reasons at [65].

[18] Iskandar v Merpati Nusantera Airline (No. 2) (2006) NTCA 3; (2006) 16 NTLR 22 at [16]; see also Northern Territory of Australia v Roberts [2009] NTCA 5 at [2].

entirely consumed in court proceedings, the outcome of which was uncertain. As his Honour reflected at Reasons par [46]:-

> "If the cost of defending the proceedings is likely to dissipate the whole or a substantial part of the funds in dispute, it seems to me that the balancing act will generally be exercised by refusing the application, particularly if there are no other assets which are not the subject of the proprietary claim which could be used as security should the plaintiffs claim ultimately succeed."

Application for leave to appeal – applicants' case

[25] The applicants' attack on the decision of Mildren J is directed at the "difficult balancing act" in which his Honour engaged. The applicants argue that a proper exercise of the discretion left no scope for such a balancing exercise. The applicants' case is put on two separate grounds, each of which is said to exclude the legitimacy of his Honour's approach: (1) public policy and constitutional principle; and (2) general principles relating to *Mareva* injunctions or orders.

[26] The applicants' case is that his Honour had, in effect, no discretion other than to release the monies in the trust account to the applicants for payment of legal fees.

[27] It is convenient to deal first with the applicants' arguments based on what were said to be the general principles relating to *Mareva* injunctions and orders.

Mareva principles

[28] Mr Tokley, junior counsel for the applicants, argued that the injunction granted on 15 September 2009 was an interlocutory injunction of a *Mareva* type. I interpose here that junior counsel's attempt to characterize the injunction in this way is inconsistent with the proprietary claim asserted by the respondent in respect of which the injunction was granted by Mildren J in the earlier proceedings.[19]

[29] On the contended basis that the injunction granted on 15 September 2009 was a *Mareva* injunction or order, Mr Tokley then argues that the balancing test in non-*Mareva* cases applied by the court in *United Mizrahi Bank v Doherty* is not good law in Australia, and should not have been followed by Mildren J. He contends that his Honour should have applied the decision of the High Court in *Cardile and Ors v LED Builders*[20] which, he says, represents the law in Australia in relation to this issue.

[30] Mr Tokley finally argues that his Honour was bound to release to the defendants sufficient funds to enable them to pay legal fees. There was no discretion: all monies had to be released for payment of legal fees because no other funds were available to Amoonguna to enable it to defend itself.

[31] The applicants' argument must be rejected. It relies on the flawed proposition that the injunction granted on 15 September 2009 was a *Mareva* injunction or order. It was not.

---

[19] See the summary of the claim and decision in paragraphs [14] and [15] above.
[20] [1999] HCA 18; (1999) 198 CLR 380.

[32] Moreover, as the High Court explained in *Cardile and Ors v LED Builders*, the making of an asset preservation order has an entirely different juridical base from an injunction to protect property in which an applicant has at least a prima facie case for claiming a propriety interest.[21] The applicants' reliance on *Cardile* is therefore misconceived. It is true that the majority in *Cardile* approved a form of freezing order against Mr and Mrs Cardile preventing them from disposing of or spending their money and other assets other than for specified purposes which included payment of the reasonable legal expenses of defending the proceedings.[22] However, the issue as to whether or not money to pay legal fees should have been excluded from the operation of the freezing order was not argued on appeal to the High Court, as the grounds of appeal demonstrate.[23] The case is the leading Australian authority on the making of asset preservation orders against third parties: the principle established in *Cardile*, per the majority at [57], was a principle to guide the courts "in determining whether to grant *Mareva* relief in a case … where the activities of third parties are the object sought to be restrained".

[33] It is therefore difficult to see how *Cardile* could be said to have established a principle of law which bound Mildren J in the facts of the present case.

[34] The respondent contends that the law in Australia relevant to the present case was correctly stated by the New South Wales Court of Appeal in

---

[21] [1999] HCA 18; (1999) 198 CLR 380 at 399 - 401, par [41] and par [42] per Gaudron, McHugh, Gummow and Callinan JJ.
[22] (1999) 198 CLR 380 at 410 at [75].
[23] (1999) 198 CLR 380 at 391 at [16].

Metropolitan Petar's case.[24] Metropolitan Petar there successfully sought leave to appeal from an interlocutory decision involving the exercise of discretion by a single judge partially restraining the use of trust property for the payment of legal costs. The judge's dilemma in that case was very similar to that faced by Mildren J, as appears from pars [19] - [21] of the decision of the Court of Appeal:-

> "[19] …the question as to whether the Association should be restrained from using the non-Schedule A property[25] is of particular importance in the proceedings. If the injunction is not extended to that property, then, on the evidence before his Honour, it is inevitable that the non-Schedule A property will be used up entirely for the payment of legal costs.
>
> [20] In that case, should Metropolitan Petar be successful in establishing that the non-Schedule A property is subject to the declared trust, then (subject to the possibility of recovery from other persons involved in the payment or receipt of trust property) the litigation in so far as it relates to that property will be futile and trust property would have been used to fund an unsuccessful defence. On the other hand, if the Association is not entitled to have recourse to the non-Schedule A property for the payment of legal fees, then there is a real question as to its ability to continue to fund its defence of the proceedings."

[35] The Court of Appeal accepted the argument of Metropolitan Petar that, in considering the application in respect of the non-Schedule A property, the judge at first instance had wrongly applied *Mareva* relief principles. The Court concluded as follows:-

---

[24] *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand and Anor v The Macedonian Orthodox Community Church St Petka Incorporated and Anor* [2006] NSWCA 277.

[25] The "non-Schedule A property" comprised real property, monies in bank accounts, and holy objects held by the defendant, property which Metropolitan Petar asserted was held on trust for the Macedonian Orthodox Church. Metropolitan Petar established that there was a serious question to be tried as to the trust alleged.

> "[61] In our view, his Honour wrongly approached the question of principle by comparing the position, insofar as the injunction related to non-Schedule A assets, to the principles that apply to the grant of Mareva relief. The context here is whether the non-Schedule A property is trust property, held on the declared trust. It is not a case where a party is seeking to prevent the abuse or frustration of the Court's process by an asset preservation order preventing another party from dissipating *its* assets prior to the Court's determination of the dispute."[26]

[36] The Court of Appeal specifically endorsed the need for a balancing exercise to resolve the dilemma in that case,[27] and went on to hold that, where there was a prima facie case that the non-Schedule A property was trust property, the Court should be attentive to protection of such property.[28]

[37] The need to be attentive to the protection of trust property was enlivened in the present case because the respondent had established in earlier proceedings a prima facie case that it was the beneficial owner of the funds in the trust account. The proper exercise of the court's discretion required Mildren J to consider (as he did) the risk of injustice to the respondent in having its own monies used against it by the opposing parties in the litigation.

[38] The principles enunciated and applied by the New South Wales Court of Appeal in *Metropolitan Petar's* case are clearly relevant to the facts of the present case and should be applied.

---

[26] Italic emphasis part of Court of Appeal decision.
[27] [2006] NSWCA 277 at [84].
[28] [2006] NSWCA 277 at [85].

[39] It was also argued by the respondents that where an intermediate appellate court of one State has made a decision upon the common law of Australia, an intermediate appellate court of another State must follow that decision unless it concludes, giving reasons, that the case was exceptional or that the decision was plainly wrong.[29] That proposition is correct. The principle also applies to equitable doctrines and remedies, part of the non-statutory law of Australia, as the High Court decision in *Farah Constructions v Say-Dee Pty Ltd*[30] makes clear. The principle applies in the present case.

[40] I conclude in relation to this ground that the principles relating to *Mareva* injunctions or orders were not determinative of the issues decided by Mildren J and that his Honour did not err in the exercise of his discretion by carrying out the balancing exercise he carried out.

Public policy and constitutional principle

[41] Mr Bennett QC argues that there is a principle of public policy, based on common sense and justice, that in circumstances where a plaintiff claims that everything that the defendant owns is the plaintiff's, the defendant must be entitled to make use of the contested assets to resist that claim. Once the assessment had been made that the constitutional challenge was arguable in the sense that it had some merit and was not obviously hopeless, the said principle of public policy required that Mildren J permit the applicants

---

[29] Citing *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 412 [51].

[30] [2007] HCA 22; 230 CLR 89 at 151-2 [135]. The case concerned fiduciary duties arising from a joint venture to re-develop land and involved consideration of the first (and second) limbs of *Barnes v Addy*. The High Court in *Farah Constructions* rejected the NSW Court of Appeal's attempt to abandon the notice test for the first limb of *Barnes v Addy* or to recognize a new restitutionary remedy.

sufficient monies to bring the constitutional challenge. The Judge therefore had no discretion other than to make an order permitting the applicants all of the monies or sufficient thereof to permit the constitutional challenge to be brought. The principle is said to be an overarching principle which directly affected interlocutory relief in the case.

[42] Mr Bennett relies on the decision of Pennycuick J in *Carl-Zeiss-Stiftung v Herbert Smith & Co (No. 2)*[31] as establishing the principle of public policy on which the applicants rely. I therefore turn to consider that case.

[43] Following World War II, there were two companies, each called Carl-Zeiss-Stiftung. One carried on business in East Germany and the other carried on business in West Germany. The plaintiff, the Carl-Zeiss-Stiftung of East Germany, brought an action against the Carl-Zeiss-Stiftung of West Germany claiming that all the property and assets of the West German company belonged to the plaintiff. There were also claims for passing off and infringement of trademarks. Relevantly, the plaintiff brought a further action against the firms of solicitors who acted or had acted for the West German company, claiming that all monies received by them from the West German company for fees and disbursements belonged to the plaintiff and that the solicitors were accountable as constructive trustees.

[31] [1968] 2 All ER 1233.

[44] The Court of Appeal ordered a trial on the preliminary question whether the solicitors were liable for monies which they received from their clients honestly on account of their fees and disbursements.[32]

[45] The preliminary question was heard by Pennycuick J, who concluded that a claim of the kind made was contrary to public policy in that it obstructed the course of justice. His Honour said:-

> "The prospect of this personal liability would be a grave deterrent to a responsible solicitor undertaking the conduct of such an action at all, for, unless his client had enough resources apart from the subject matter of the action, the conduct of the action would represent a gamble on his client's success, a highly undesirable state of affairs. If he did undertake the defence, the fact that he was at risk in regard to this liability might, and in many circumstances almost inevitably would, tend to influence and hamper him at various stages in the action, for example, on the question whether expense should be incurred in obtaining evidence from a particular expert witness. He might even find that his interest was in conflict with his duty to his client, for example, in connexion with some suggested compromise. There can I think be no doubt that such a claim would represent a very serious obstruction in the course of justice."[33]

[46] The Court of Appeal dismissed the plaintiff's subsequent appeal, not on the basis of the public policy principle identified by Pennycuick J, but on the basis that a solicitor acting honestly for a client was not to be imputed with knowledge of a trust merely because, in acting for the client, he knew that it was claimed against his client that there was such a trust. Mere notice of a claim asserted by a third party was held to be insufficient.[34]

---

[32] *Carl-Zeiss-Stiftung v Herbert Smith & Co and Anor* [1968] 2 All ER 1002.
[33] *Carl-Zeiss-Stiftung v Herbert Smith & Co and anor* (No 2) [1968] 2 All ER 1233 at 1236F.
[34] *Carl-Zeiss-Stiftung v Herbert Smith & Co and an*or (No 2) CA [1969] 2 Ch 276 at 304 per Edmund Davies LJ.

[47] As Mildren J explained,[35] the Court of Appeal did not decide the correctness or otherwise of the public policy ground on which Pennycuick J had found for the solicitors at first instance. Although Danckwerts LJ considered that there was "a good deal to be said" for the contention, Sachs LJ was unsympathetic to the point and Edmund Davies LJ refrained from considering it.

[48] Mr Bennett QC nonetheless argues that the reasoning of Pennycuick J is persuasive and correct, and should be followed by this Court.

[49] Whether or not the public policy ground identified by Pennycuick J is part of the law of Australia (and it is not necessary for this Court to decide that issue), it was not a principle which bound Mildren J in deciding whether or not to grant an interlocutory injunction and whether or not, at the interlocutory stage, to vary the injunction previously granted so as to permit a party access to contested funds. The issue decided by Pennycuick J was not between the two Carl-Zeiss-Stiftung companies contesting beneficial ownership of the assets and funds, but between one of those companies and the solicitors acting for the other. The plaintiff Carl-Zeiss-Stiftung company was not seeking an interlocutory injunction or related relief. The decision of Pennycuick J did not apply to, did not exclude and otherwise did not purport to be determinative of any application for an interlocutory injunction. On the contrary, as is made clear in the following passage, Pennycuick J acknowledged that an application for an interlocutory

[35] Reasons [43] – [44].

injunction to prevent a party utilizing contested assets was compatible with the public policy principle he identified:-

> "The contrary factor urged on behalf of the East German company is that, if such a claim is not available against the defendant's solicitor, then, should the action succeed, the unsuccessful defence will have been financed out of the plaintiff's money. This is a serious consideration, but it should be borne in mind (i) that in simple circumstances (unlike the present) the plaintiff, on making out a sufficient prima facie case, could obtain an injunction restraining the defendant from dealing with the subject matter of the action pending its determination; and (ii) that the defendant himself would, so far as I can see, certainly be accountable to the plaintiff for trust money applied by the defendant in the defence of the action. It is only where the former remedy is not available or has not been sought, and further where the defendant is unable to meet his personal liability, that the claim against the defendant's solicitors would become of substantial importance."[36] [underline emphasis added]

[50] I conclude that there was no overarching principle of public policy to be derived from *Carl-Zeiss-Stiftung* which constrained or limited the exercise of Mildren J's discretion so as to require the making of an order permitting the applicants access to the contested funds for the purpose of their constitutional challenge.

[51] Mr Bennett QC also argues in written submissions that constitutional cases are different; in effect, that a party which seeks access to contested funds to pursue a constitutional case is in a stronger position legally to compel the exercise of the court's discretion in that party's favour than a party who wishes to pursue some more 'ordinary' cause of action:-

---

[36] *Carl-Zeiss-Stiftung v Herbert Smith & Co and Anor (No 2)* [1968] 2 All ER 1233 at 1236 I – 1237 A. The respondent relied on a passage at 1238 H.

> "In constitutional cases, a legislature in the Australian Federation cannot impede or circumvent constitutional challenge to its actions. To take all of the defendant's property by statute and to refuse the defendant the ability to use that property (ex hypothesi the only available property) to challenge the constitutionality of that statute offends that principle: *Antill Ranger v NSW* (1956) 94 CLR 177; *Bank of NSW v the Commonwealth* (1948) 76 CLR 1 at 349. Cf. *Sportodds Pty Ltd v NSW* (2003) 133 FCR 63 (parliamentary privilege legislation cannot prevent the use of parliamentary material in the course of a constitutional challenge to legislation)."

[52] None of the cases cited in the applicants' written submissions is directly on point, but each is said to apply by analogy. Mr Bennett QC relied on the criticism by Dixon J (as he then was) in the *Bank Nationalisation Case* of the use of a "circuitous device" to indirectly acquire the substance of a proprietary interest otherwise than on just terms. With reference to *Antill Ranger*, Mr Bennett QC argued that a state legislature cannot give an invalid law (invalid in that case because it imposed transport charges in contravention of s 92 of the Constitution on vehicles operated for the purposes of interstate trade) retrospective valid effect by barring recovery of the unlawfully imposed charges. In *Sportodds* the Full Court of the Federal Court approved the judgment of Kirby J in *Egan v Willis*[37] and permitted a plaintiff to refer to the Parliamentary Debates for the purpose of showing that the Parliament intended an "illegitimate" objective. Mr Bennett QC points out that Parliament is not lawfully able to stymie investigation into the invalidity of legislation.

[37] (1998) 195 CLR 424 at 492 – 493.

[53] The composite argument drawn from these diverse references is that Parliament cannot take away all the assets of a party so as to prevent a constitutional challenge.

[54] As mentioned in par [21] above, Mildren J saw some force in what was in effect the same submission. His Honour clearly took those matters into consideration. However, even where litigation involves a constitutional challenge, there is no principle which constrains or limits the exercise of the court's discretion such as to *require* an order permitting access to contested funds. Consequently, his Honour did not err in refusing the application in the circumstances of this case.

Prospects of success of constitutional challenge

[55] I turn finally to the applicants' argument that Mildren J underestimated the prospects of success of their intended constitutional challenge.

[56] His Honour carefully reviewed the applicants' arguments that the amendments were unconstitutional at Reasons [51] to [56], extracted below with case references deleted:-

> [51] I turn now to consider whether the applicants have established a prima facie case or, at least, a serious question to be tried, that the relevant legislation is unconstitutional. The principle argument of Mr Bennett QC was that the scheme of the legislation was inconsistent with the scheme of the *Land Rights Act*. It was put that the purpose of the *Land Rights Act* was that the land, which is Aboriginal land, is to be held by the Land Trust for the traditional owners to enable a form of control by the Aboriginal community over their land. Mr Bennett QC referred to *Australian Mutual Provident Society v Goulden*, where the test for validity of State legislation, said to be inconsistent with Federal legislation, was whether it

"would alter, impair or detract from" the scheme of regulation established by the latter. How the Territory legislation "altered, impaired or detracted from" the *Land Rights Act* was not made clear to me. For example, the *Local Government Act 2008* specifically exempts land held by a land trust from the payment of rates. The role, functions and objectives of councils set out in Part 2.3 of that Act do not strike me as being inconsistent with the *Land Rights Act*. Mr Bennett QC relied upon the opinions of Mr Beaumont QC and Mr Castan QC, which I have referred to previously. Those opinions were written many years ago. They related to a previous *Local Government Act*, since repealed. Mr Beaumont QC concluded that the relevant legislation was invalid because it sought to substitute its own plan of land management for the Commonwealth scheme of Aboriginal land ownership and management. Mr Castan QC said that "a tier of authority, having power to grant rights to persons over Aboriginal land, or alternatively to refuse permits to proposals put forward by the Land Council, after due consultation and consent, as provided by the *Land Rights Act*, is to create a structure inherently incapable of operating concurrently with the *Land Rights Act*". Land management, so far as I can see, is not the focus of the *Local Government Act*.

[52] The other arguments, which the applicants wish to run, do not strike me as having significant merit. I do not say that any of these arguments are doomed to fail, but it is far from clear to me that they have significant prospects of success.

[53] The first of these arguments claims that the *Local Government Act 2007* was contrary to the *Racial Discrimination Act*. The reason advanced was that by altering Amoonguna's membership to include non-Aboriginal residents of Amoonguna, when its constitution required all members to be Aborigines, it somehow violated that Act. What provision of the Act it was said to violate was not explained and it is not apparent to me on a reading of the Act.

[54] The next argument is that s 269 of the 2007 Act did not provide for just terms. Like Hayne J, I am unable to see why this is so. Further, it is not clear to me that the *Local Government Act 2007* acquired any of Amoonguna's property. In any event, just terms have been provided for, retrospectively as well as prospectively, by s 257 of the *Local Government Act 2008*. Mr Bennett QC somewhat scathingly referred to this provision as an "historic wrecks"

provision.[38] By this, I take him to refer to the powers of this Court to order, under s 257(3), the annulment of the dissolution of Amoonguna "and to make any further provision that may be necessary or appropriate to secure the continued existence of the body corporate or to facilitate its claim for compensation..." As the note to s 257 makes clear, the Court might, by its order, convert the body corporate into an association under the *Associations Act*. The Court could and no doubt should ensure that the new Association would continue to exist for the benefit of its former members. It is not readily apparent to me that these provisions are ineffective in providing just terms compensation.

[55] Finally, I was referred to Reg 4(2)(b) of the *Northern Territory (Self-Government) Regulations*, which provides that Ministers of the Territory do not have executive authority under s 35 of the *Self-Government Act* in relation to rights in respect of Aboriginal land and the *Aboriginal Land Rights (Northern Territory) Act 1976*. It was put that the Minister's restructuring order was invalid because the Minister had no executive authority to make that order. Again, it is not readily apparent to me that this is likely to be so.

[56] It was submitted by Mr Wyvill SC that, whatever may be the outcome of the litigation, it will not result in the restoration of local government powers to Amoonguna. The purpose of the litigation, according to the applicant's submission for Commonwealth funding, was to "re-establish our capacity for self-determination and management of our land and community – and our assets". It is not apparent to me that the establishment of the plaintiff Shire will interfere in any way with the rights of the Land Council and the Land Trust to manage its own land, except perhaps to the extent that the plaintiff Council will be able to negotiate a sub-lease of Aboriginal land with the Commonwealth under the *Response Act*. Whatever powers of local government Amoonguna enjoyed are not restorable if the legislation is invalid, unless further valid legislation conferring local government powers is enacted by either the Commonwealth or the Territory. Whether that would occur or not is entirely speculative."

---

[38] The reference was to the just terms provision in s 21(1) *Historic Shipwrecks Act 1976* (Cth), which reads: "If the operation of this Act or the doing of any act by the Minister in pursuance of this Act results in the acquisition of property from a person, being an acquisition of property within the meaning of paragraph 51(xxxi) of the Constitution, the Commonwealth is liable to pay to that person such compensation as is determined by agreement between the Commonwealth and that person or, in the absence of agreement, by action brought by that person against the Commonwealth in the Supreme Court of a State or Territory."

[57] Assessment of the prospects of success of the various grounds of the proposed constitutional challenge was not straightforward, and it would have been inappropriate for Mildren J to reach or express any concluded view on those prospects. Similarly, it would be inappropriate for this Court to do so now, given that this Court is not exercising its own discretion. In my view, however, the grounds on which the constitutional challenge is proposed to be argued are not straightforward, and the likelihood of success not immediately obvious. The applicants' assertion that Mildren J underestimated their prospects of success is no more than an assertion; the applicants have not demonstrated any error on the part of his Honour.

Conclusion

[58] The applicants have not established that the decision of Mildren J was wrong or attended with sufficient doubt so as to warrant the granting of leave to appeal. Moreover, the applicants have not established a risk of injustice to them sufficient to justify recourse to the contested funds.

[59] The application should be dismissed.
