

PARTIES: Territory Rural Housing (NT)
Pty Ltd v Carine Nominees Pty
Ltd

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

JURISDICTION: Interlocutory Application

FILE NO.: 103 of 1994

DELIVERED: 9 March 1995

REASONS OF: Master Coulehan

CATCHWORDS:

Practice & procedure - security for costs - 062
Supreme Court Rules - S1335 Corporations Law -
whether plaintiff is plaintiff in substance -
whether persons who may benefit are able to
provide security - provision of personal
guarantees

Cases referred to:

Willey v Synan 54 CLR 175
John Arnold's Surf Shop Pty Ltd (in
liquidation) v Heller Factors Pty Ltd 22 SASR
20
Summerglen Pty Ltd v Steppes Pty Ltd -
unreported decision of Mildren J dated 25
November 1993.
Territory Broadcasting Pty Ltd v Darwin
Broadcasters Pty Ltd 106 FLR 66

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

103 of 1994

BETWEEN:

TERRITORY RURAL HOUSING
(N.T.) PTY LTD
Plaintiff

and

CARINE NOMINEES PTY LTD
Defendant

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 9 March 1995)

The plaintiff claims damages for breach of contract arising out of an agreement to develop land owned by the defendant at Katherine.

It alleges that it carried out certain works and applied for approval to sub-divide but the defendant terminated in breach of the agreement.

The ground relied on in the notice of termination was an alleged failure to do all things necessary to obtain the approval of the Northern Territory Planning Authority to the plan of sub-division.

The defendant seeks an order for security for costs in the sum of \$20,728-00 based on the defendant's lack of assets in the Northern Territory and its failure to file an annual return. It relies on Order 62 Supreme Court Rules and S.1335 of the Corporations Law.

In response the plaintiff has produced a draft statement of its financial affairs as at 30 June 1994. This shows a total shareholders equity of \$46,772-50. Trade debtors include the sum of \$75,035-05 which is in dispute in this proceeding.

More recent information reveals that the plaintiff's bank account is overdrawn and it has no work in progress.

There is reason to believe that the plaintiff will be unable to pay the defendant's costs, if so ordered.

The plaintiff argues that it is not, in substance, the plaintiff, being forced into this position by the actions of the defendant (see Willey v Synan 54 CLR 175 and John Arnold's Surf Shop Pty Ltd (in liquidation) v Heller Factors Pty Ltd 22 SASR 20).

I do not consider that this case is different from any other case alleging breach of contract.

The plaintiff is not defending itself against "self help" measures adopted by the defendant as in the cases cited. (See also Summerglen Pty Ltd v Steppes Pty Ltd, an unreported decision of Mildren J dated 25 November 1993).

As to the strength of the plaintiff's case, argument was directed to the validity of the termination on the basis of failure to obtain approval, although the defendant has pleaded additional failures to comply with terms of the agreement. I have formed the opinion that the

case has merit, but I am unable to reach any conclusion as to its prospects of success.

If the plaintiff does succeed, the damages it may reasonably expect would make a difference to its financial situation. The evidence is that the termination of the contract has had a significant effect on the viability of the plaintiff. It is not clear that it is the only cause of the plaintiff's decline.

The question arises as to whether an order for security for costs would have the effect of frustrating the plaintiff's claim. The identity of those who may benefit from a successful outcome is relevant.

The evidence does not reveal the names of the shareholders, although there is evidence that suggests the directors would not have sufficient funds to pay the sum sought by way of security. It is not clear who would benefit and whether they are unable to provide security. Counsel for the plaintiff says that it was intended that full disclosure be made and has requested an opportunity to provide further evidence if required. I will grant an adjournment for 7 days to allow this matter to be canvassed.

I note that if it appears that the persons who may benefit are unable to provide security for costs, it may be appropriate that they be required to provide personal guarantees in lieu. (See **Territory Broadcasting Pty Ltd v Darwin Broadcasters Pty Ltd** 106 FLR 66).