

Collins v Deflaw Pty Ltd [2000] NTSC 64

PARTIES: COLLINS, Vince
v
DEFLAW PTY LTD (ACN 054 442 447)

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO: LA14 of 1999

DELIVERED: 4 August 2000

HEARING DATES: 10 February and 11 May 2000

JUDGMENT OF: MARTIN CJ

CATCHWORDS:

Appeal – general principles – practice and procedure – whether order final or interlocutory – whether there is a right of appeal – whether leave is required – whether time limits could be extended

Local Court Act 1989 (NT), s 15(1)(c), s 18 and s 18(2)&(3)

Local Court Rules, r 9.02

Limitation Act 1981 (NT), s 8 and s 44(1)

Trade Practices Act 1974, s 82

Supreme Court Rules, r 83.23(1) and r 83.03

Halbury's Laws of Australia – Limitation of Actions

Williams Civil Procedure, Victoria, par 64.01.440

Jurisdiction, practice and procedure – claim for damages beyond jurisdictional limit of Local Court – whether “proceedings” be transferred

Local Court Act 1989 (NT), s 3, s 14, s 15, s 15(1)(c) and s 18

Local Court Rules, r 1.12, r 2.01 and r 3.08

Supreme Court Rules, r 10.06(1)

Sunderland v Glover (1914) 1 KB 393, distinguished.

REPRESENTATION:

Counsel:

Appellant: C McDonald QC

Respondent: D Francis

Solicitors:

Appellant: De Silva Hebron

Respondent: David Francis & Associates

Judgment category classification: B

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Mar20023

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

Collins v Deflaw Pty Ltd [2000] NTSC 64
No. LA 14 of 1999

BETWEEN:

VINCE COLLINS
Appellant

AND:

DEFLAW PTY LTD
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 4 August 2000)

- [1] Appeal against certain orders made in the Local Court sitting at Darwin in proceedings in which the respondent is plaintiff, and the appellant, defendant. Preliminary questions arose as to whether there is a right of appeal against the orders, whether leave is required and whether time limits could be extended, but I will leave consideration of those issues for the time being as the background is important both to those questions and the merits of the case.
- [2] In summary, the proceedings were commenced in May 1998 wherein the respondent claimed legal professional fees and disbursements from the appellant in the sum of \$6,355 in relation to negotiations with the Northern

Territory relating to the grant of a licence to the appellant to harvest and process certain timber. The account covered services rendered during a period 1994 and 1995.

- [3] The defence filed was that the respondent had agreed to forego the fees if a joint venture was formed, including Mr Francis, a legal practitioner and director of the respondent, to profitably exploit the licence, but although the joint venture was formed, it had not at that stage been profitable. In its reply to the defence the respondent alleged that the appellant had failed to assist those involved in the proposed joint venture and raised issues, inter alia, going to the terms of the agreement, breach by the appellant of the agreement and estoppel. Particulars were sought by both sides and provided, a process which concluded in about early 1999. The matter came under the Rules of the Local Court relating to case management. It was a case which even upon the pleadings at that stage was likely to involve contested evidence of fact and complex questions of law.
- [4] In May 1999, the appellant applied for leave to file a foreshadowed counterclaim with apologies for lateness. Foreshadowed, in the sense that in earlier discontinued proceedings relating to the same claim, the then unrepresented appellant had endorsed upon his defence “I will counterclaim but I am still assessing damages”. That intention had also been conveyed by the solicitors for the appellant prior to the filing of the counterclaim. The respondent expressly indicated that there was no objection. It is provided in r 9.02 of the *Local Court Rules* that a defendant who counterclaims must do

so in the Notice of Defence unless the Court orders otherwise. It is to contain a concise statement of the nature of the defendant's claim; particulars as to the defendant's claim; and a statement of the amount, relief or remedy sought. The prospect of the filing of a counterclaim had been raised between the parties much earlier.

- [5] As to the relief sought, the document merely indicated that the counterclaim was for "Damages pursuant to s 82 of the *Trade Practices Act*". No amount was specified. As to the nature of the counterclaim, it was alleged that commencing in about December 1995, the respondent acted so as to procure the licence for a company contrary to the interests of the appellant and had engaged in conduct which was misleading and deceptive in breach of s 52 of the *Trade Practices Act*. The appellant asserted that he had lost rights he expected to obtain and sought damages. The respondent expressly consented to the filing of the counterclaim in that form.
- [6] The respondent filed a defence to the counterclaim in May 1999. No objection was made of the fact that the quantum of the damages sought had not been specified. However, particulars of loss had been requested. The respondent complains that the consent to the filing of the counterclaim was on the basis that it presumed that the amount claimed would be within the jurisdictional limit of the Local Court, and when it transpired that the amount claimed was significantly greater than that limit, attempts were made by the respondent to have the consent withdrawn so that an application to file the counterclaim could be opposed. The application was not

considered. In the view I take of this aspect of the matter, it is not necessary to consider whether or not it was open to withdraw the consent in those circumstances, but I note that the respondent had taken further steps in the proceedings after giving that consent and before raising the question of having it withdrawn (r 2.03 *Local Court Rules*).

- [7] On 31 May 1999, in the context of a case management conference, the appellant first raised the possibility that the quantum of the counterclaim might exceed the jurisdictional limit of the Local Court, \$100,000 (*Local Court Act* 1989 s 3 and s 14). The conference resumed on 15 June when the appellant's counsel informed the court that the losses were being put at in excess of \$300,000, but further information was awaited. Asked by his Worship as to whether the appellant was prepared to forego the excess, the response was "No, definitely not". Mr Francis, for the respondent, immediately indicated that if that was the quantum, the appellant should institute proceedings in the Supreme Court and the Local Court should proceed to hear the plaintiff's claim. The appellant then indicated that it was intended to apply to the Local Court to transfer the whole of the proceedings to this Court.
- [8] It is plain that both parties were aware that the appellant could face adverse consequences because of the limitation provisions of the *Trade Practices Act*. The limit within which proceedings must be instituted under that Act is three years and there are no provisions for extension of that time. Just when the time commenced to run against the appellant has not been determined,

but by mounting his claim against the respondent by way of a counterclaim in the Local Court, his action is deemed to have been commenced on the same date as the respondent's action (*Limitation Act* 1981 (NT) s 8).

Commencing later in the Supreme Court, however, would carry consequences brought about by the operation of the limitation provisions to the date upon which those proceedings were commenced.

- [9] His Worship expressed himself to be particularly concerned about two things. First, he considered that the appellant was delaying the hearing, and second, that if the proceedings were to be transferred to this Court, then the pleadings had to be in order with proper particulars. He was concerned that this Court might be critical of him if that were not so. I do not think that his Worship had need to be concerned on that score. True it is that this Court has had occasion to criticise the state of pleadings upon which Magistrates have occasionally proceeded to trial, especially in the Work Health Court, but that was in the context of appeals from determinations after trial. This is not such a case. If there was an obligation on the learned Magistrate to transfer the proceedings, then that should have been done whatever the stage of the proceedings or the state of the pleadings. Insistence upon perfect pleadings and particulars was an irrelevant consideration which pervaded much of what followed as disclosed through a further 200 pages of transcript. His Worship was also acting outside the jurisdiction of the Local Court.

[10] The concentration of all concerned should have been directed to the law regarding the jurisdictional limit of the Local Court, which jurisdiction is limited by the *Local Court Act*. Where the cause of action is for damages, it has jurisdiction if the amount claimed is within that jurisdictional limit of \$100,000. The Act contemplates the proceedings may be wholly or partly beyond the jurisdiction of the Court and s 15 provides the remedy. The claim may be amended so as to bring it within jurisdiction (no doubt the claimant could apply for an order or consent to such an amendment), or the claim may be struck out. But the Court also has jurisdiction to order that the proceedings be stayed pending the making of an application under s 18 for an order that the proceedings be transferred to this Court. The Local Court has jurisdiction where proceedings are wholly or partly beyond its jurisdiction only to the extent provided for in the statute.

[11] There is no barrier to the institution of proceedings in the Local Court, whether by way of claim or counterclaim, in which a remedy or an amount is sought which is beyond that Court's jurisdiction. It has no jurisdiction to entertain such proceedings, but it has jurisdiction to exercise the powers contained in s 15 and s 18. I do not accept the respondent's argument based upon s 14 that the Local Court has jurisdiction in respect of a claim beyond the limit until just prior to the hearing. Just because the Court has power to hear and determine a claim within its jurisdictional limit, does not mean that it has jurisdiction to hear and determine all interlocutory matters up until the hearing of a claim beyond its jurisdictional limit. In my opinion the Local

Court has no discretion when it is faced with a claim beyond its jurisdiction where there is no amendment to bring it within jurisdiction, and it is not a proper case for the claim to be struck out (see for example s 15(2)).

[12] The amount of damages claimed by the appellant was not specified in the counterclaim. Oral application was made at various stages of the proceedings before his Worship to amend the counterclaim by including the amount (see r 2.01 and r 3.08). Those applications were never dealt with, the argument going off in other directions. However, it is clear that his Worship accepted that for the purposes of the application before him, the counterclaim was for an amount in excess of the jurisdictional limit. It appears that his concern about particulars led him not to accept the proposed amendment.

[13] I do not think it was appropriate for the appellant to be put to proof of the amount of his claim (an exercise undertaken at one stage) nor that he should have been obliged to provide particulars. Once it was made clear that the amount claimed was in excess of the jurisdictional limit, the application for transfer should have been dealt with on that basis alone (*Sunderland v Glover* (1914) 1 KB 393 is distinguishable on the legislation there under consideration). His Worship's reasons for refusing the application to transfer the proceedings are based upon discretionary considerations which I do not think were relevant in these circumstances.

[14] The refusal to transfer meant that the Local Court could not entertain the counterclaim unless the amount claimed was amended to bring it within the jurisdictional limit. The appellant declined to follow that course, and on 8 October his Worship struck out the counterclaim upon the basis that because the application to transfer had been refused, and the amount claimed was beyond the jurisdictional limit, it must be struck out. It appears that the order on that ground was of his Worship's own motion, although the respondent's counsel did not try and dissuade him from that course. The respondent had an application on foot to strike out the counterclaim on other grounds which was not dealt with.

[15] In the course of argument, it was suggested that the counterclaim could be transferred to this Court, leaving the respondent's action and the defence to it to be litigated in the Local Court. The issues between the parties in the action and counterclaim are so intermingled that that was not a course which should have been permitted in the proper exercise of the discretion available. It would have led to an unnecessary duplication of proceedings on much the same issues and the possibility of conflicting outcomes.

[16] The jurisdiction of the Local Court to strike out a counterclaim is limited by the statute to an order that it be struck out coupled with an award of costs as if it had jurisdiction and the claim were dismissed (s 15(1)(c)). However, relying on r 1.12 of the *Local Court Rules*, the learned Magistrate adopted and applied rules observed in the Supreme Court. I am uncertain as to whether it was open to his Worship to do that bearing in mind the restraint

upon the exercise of jurisdiction in s 15(1)(c). But, nevertheless, relying upon *Supreme Court* r 10.06(1), there was added to the order that the counterclaim be struck out that that was to be without prejudice to the appellant's litigating the counterclaim in this Court. That was an adaptation of the Supreme Court Rule which provides that a counterclaim may be struck out without prejudice to the right of the defendant to assert the claim in a separate proceeding. Whether it was open to his Worship to make such an order must be in considerable doubt, but assuming that he did have such power, then the problem then is that the Supreme Court rule having been adopted in Local Court proceedings, it must be read in the context of the *Local Court Act* and *Rules*.

- [17] The word "proceeding" in the *Local Court Act* is defined as meaning a proceeding in the Local Court and it follows, in my view, that if the power to permit the assertion of a claim in separate proceedings was properly exercised, it could only be to allow separate proceedings in the Local Court. Apart from anything else then, his Worship's decision to strike out the counterclaim being based upon preservation of the appellant's right to assert a counterclaim in this Court, was a mistake of law which would invalidate the order. If his Worship was of the view that he had no power to preserve the appellant's right to mount a claim against the respondent as envisaged by the counterclaim, then he may not have determined to strike out the counterclaim in the Local Court.

- [18] In my opinion his Worship erred in law in refusing the application to transfer the proceedings to this Court and in striking out the counterclaim. But can this Court provide any remedy? Appeals to this Court are governed by s 18 of the *Local Court Act*. An appeal lies from a final order within 28 days or with leave after that period. The circumstances in which leave may be granted are prescribed in s 18 (2). In respect of an order, other than a final order, an appeal lies within 14 days with leave (s 18(3)). There is no provision to extend that period.
- [19] Was either order a final order? I think not. Neither order finally disposed of the dispute between the parties. The action and defence remained on foot. Another application could be made to transfer the proceedings. The appellant could bring the cause of action on the counterclaim as a claim in this Court and whether the limitation point has any substance is not presently to the point (see generally *Hall v Nominal Defendant* (1966) 117 CLR 423 and the instances of interlocutory and final orders given in Williams Civil Procedure, Victoria, paras 64.01.440 et seq). Section 15(1)(c) implicitly acknowledges that a striking out of a counterclaim does not amount to a dismissal.
- [20] The order refusing the transfer was made on 24 September 1999 and that striking out of the counterclaim on 5 October 1999. A Notice of Appeal was filed on 5 November 1999 out of the time limited for appeals against orders other than final orders. There is no provision in the Act for extending time for such appeals. The appellant contends, however, that s 44(1) of the

Limitation Act enables this Court to extend the time for making the application for leave to appeal. No authority was cited for that proposition, reliance being placed upon the wording of the statute. The subsection enables the Court to extend time prescribed by any other Act for instituting an action; doing an act, or taking a step in an action; or doing an act or taking a step with a view to instituting an action. The word “action” is defined as including any proceedings in a court of competent jurisdiction. The submission is that an application for leave to appeal is a proceeding within the meaning of the definition and that accordingly there is power to extend the time. I do not accept that argument. Limitation legislation applies to the institution of proceedings to litigate causes of action and in my opinion the definition should be so constrained (see Halsburys Laws of Australia – Limitation of Actions).

[21] It was also sought to show that O 83.23 of the *Supreme Court Rules* relating to leave to appeal applied so that compliance within the time limit fixed by subr (1), that is, 28 days, could be dispensed with. I think not. The rule only applies in relation to appeals to the extent that no other procedure is provided under the *Local Court Act*, r 83.03. The word “procedure” denotes the mode of proceedings by which a legal right is enforced as distinguished from the law which gives the right (per Lush LJ in *Poyser v Minors* 7 QBD 333). Here there is no right to apply to extend the time.

[22] The appeals must be dismissed.
