Iskander & Anor v Merparti Nusantara Airlines [2006] NTCA 3

PARTIES:	ISKANDER, Freddie and NATRABU (AUST) TOURS & TRAVEL PTY LTD (ACN 009 632 491) v MERPARTI NUSANTARA AIRLINES (ACN 072 764 204)
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No AP 8 of 2005 (9626979)
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JUDGMENT OF:	MILDREN J

CATCHWORDS:

PROCEDURE – Costs – Security for costs – application for leave to appeal – inherent jurisdiction – relevant factors

COURT OF APPEAL – appeal from interlocutory order – application for leave – relevant procedure

Williams, *Civil Procedure Victoria*

Judicature Acts 1873-1875 (Imp); *Supreme Court Act* s 14(1)(b); s 51(1); s 51(2); s 52(3)(a); s 52(3)(b); s 52(3)(b); s 53; s 54; *Supreme Court Rules* O 62; O 62.02(1)(b); O 84.12(2); O 84.12(2); O 85.04(1); O 85.04(2); O 85.06; O 85.07; O 85.13; Part 2 of Order 85

Nationwide News Pty Ltd (t/as) Centralian Advocate and Ors v Bradshaw & Anor (1986) 41 NTR 1; *Scott v Northern Territory and Ors* (2005) 15 NTLR 158; applied

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589; distinguished

Hughes v Gales (1995) 14 WAR 434; *J H Billington Ltd v Billington* [1907] 2 KB 106; *National Mutual Life Association of Australasia Ltd and Ors v Grosvenor Hill (Qld) (formerly Hillier, Parker (Qld) Pty Ltd) and Anor* (2001) 183 ALR 700; *Thunderdome Racetiming and Scoring Pty Ltd and Anor v Dorian Industries Pty Ltd and Anor* (1992) 36 FCR 297; followed

Bahr v Nicolay and Ors (1987) 163 CLR 492; *Bell v Bay-Jesperson* (2004) 2 Qd R 235; *Cowell v Taylor* (1885) 31 Ch D 34; *Harpur v Ariadne Australia Ltd* (1984) 2 Qd R 523; *House v The King* (1936) 55 CLR 499; *Lewis v Strickland and Anor* (unreported [2004] QCA 134); *Lexray Pty Ltd v Northern Territory of Australia (No 2)* (2001) 10 NTLR 150; *Natcraft Pty Ltd v Det Norske Veritas* (unreported Court of Appeal Qld [2002] QCA 241, BC200204104); *Ogawa v The University of Melbourne* (unreported) [2004] FCA 491; *Renehan v Leeuwin Ocean Adventure Foundation Ltd and Anor* [2005] NTSC 22; *Rogerson v Law Society of the Northern Territory* (1993) 88 NTR 1; *Smail v Burton* [1975] VR 776; *St Helen's Area Landcare and Coastcare Group Inc v Break O'Day Council* (unreported [2005] TASSC 46); referred to

REPRESENTATION:

Counsel:

First Applicant:	F Davis
Respondent:	J Reeves QC

Solicitors:

First Applicant:	Davis Norman
Respondent:	Cridlands

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

Iskander & Anor v Merparti Nusantara Airlines [2006] NTCA 3
No. AP 8 of 2005 (9626979)

BETWEEN:

FREDDIE ISKANDER

First Applicant

NATRABU (AUST) TOURS & TRAVEL PTY LTD (ACN 009 632 491)

Second Applicant

AND:

MERPARTI NUSANTARA AIRLINES (ACN 072 764 204)

Respondent

CORAM: MILDRENJ

REASONS FOR JUDGMENT

(Delivered 22 March 2006)

Mildren J:

[1] This is an application by the respondent that the applicant Freddie Iskander (Mr Iskander), give security for the costs of the respondent "of the application for leave to appeal and the appeal in the sum of $30,000, or such other sum as the court orders" and for an order that Mr Iskander's "proceedings" be stayed until the security is given.

Background

[2] The applicants commenced proceedings in the Supreme Court against the respondent on 13 December 1996. Mr Iskander claimed the sum of $552,240.00 for salary allegedly owed to him as the result of a contract of employment as the respondent's manager made on 1 January 1987. He claimed that no salary had been paid to him for the entire period from 1 January 1987 to 1 January 1996.

[3] The second applicant, Natrabu (Aust) Tours & Travel Pty Ltd (Natrabu) claimed that on 1 July 1987 the respondent appointed it exclusively as its general sales agent for the whole of Australia on certain terms. Natrabu sought various remedies against the respondent including damages for breach of contract, damages pursuant to s 46, s 51AA, s 52 and s 82 of the Trade Practices Act, equitable damages and equitable relief and monies allegedly owing for "establishment costs".

[4] On 14 February 1997, the applicants amended their statement of claims. The provisions of the amended statement of claim so far as Mr Iskander's claim is concerned did not alter the nature of the claim, although it was more comprehensively particularised. There were extensive amendments made concerning Natrabu's claims, but it is not necessary to discuss them as the present application concerns only Mr Iskander's claim. Suffice it to say that of the two claims, Mr Iskander's claim is relatively simple and straight forward, whereas Natrabu's claims are evidentially, factually and legally complex. Mr Iskander, I note (more for the sake of completeness than

anything else), claims to be the principal director and shareholder in Natrabu. The respondent, by its defence and counterclaim, denied that Mr Iskander was employed as its manager and in so far as the claim related to a period prior to 13 December 1993, pleaded that the action was statute barred. The respondent also brought a counterclaim against Natrabu which the respondent claimed breached the terms of a sales agency agreement in writing dated 20 September 1995.

[5] Mr Iskander did not file a Reply to the Defence and Counterclaim. In particular the pleadings did not assert that the respondent had acknowledged the debt so that the action prior to 13 December 1993 was not statute barred.

[6] The action, after what Thomas J described as "a lengthy and tortured history" in her reasons for making an order dismissing the proceedings, was finally set down for trial to be heard on 12 September 2005. The matter had, by then, been listed since 21 January 2005 following a listing conference before the Registrar. On 7 July 2005 leave was granted to the respondent's solicitors to cease to act on behalf of the respondent. On 24 August 2005 the respondent applied for an adjournment of the trial. That application was refused on 2 September 2005. Subsequently, the trial date was altered to commence on 19 September. On 15 September the respondent brought an application to dismiss the proceedings for want of prosecution. That application was successful and on 6 October 2005 Thomas J ordered that the proceedings be dismissed. It is not entirely clear from the reasons for judgment whether or not Thomas J intended to dismiss the counterclaim but

the order made clearly has had that effect. So much was conceded by Mr Reeves QC, senior counsel for the respondent.

[7] On 3 November 2005 the applicants lodged an application for leave to appeal from Thomas J's order. That application was accompanied by an affidavit made purportedly pursuant to O 85.04(1) (sic) of the Supreme Court Rules. At the same time the applicants filed what appears to be a draft Notice of Appeal. I will return to this subject later.

[8] By summons filed on 8 November 2005, the respondent made an application to the Court of Appeal for an order that the applicants give security for the costs of the application for leave to appeal and for the appeal. That application was heard by Thomas J who ordered that Natrabu give security for costs in the sum of $43,725.00 and that "proceedings be stayed until security is given". However, it is common ground that no application for security was proceeded with against Mr Iskander and that the application, so far as it concerned Mr Iskander, was abandoned. The parties have chosen to construe Thomas J's orders as referring only to the application for leave to appeal and the appeal by Natrabu, notwithstanding the apparent width of the order. That is a reasonable construction to be given to the order because it is elementary that an order staying an appeal can only be made against a party against whom the order is sought. The applicants were not claiming that the respondent was jointly liable to them but were seeking to pursue their several claims against the respondent in the same proceeding. If the applicants had claimed that the respondent were jointly liable to them, the

court would not have made an order for security unless the order was directed to both applicants/appellants: see *Harpur v Ariadne Australia Ltd* (1984) 2 Qd R 523 at 531. This is another reason for thinking that her Honour's order was intended to apply to Natrabu only. I consider that on the true construction of her Honour's order, the order applied only to Natrabu and did not operate against Mr Iskander and his application/appeal.

[9] The next preliminary matter to observe is that no appeal lies as of right against Thomas J's order dismissing the action for want of prosecution. It is now well established that such an order is interlocutory only: *National Mutual Life Association of Australasia Ltd and Ors v Grosvenor Hill (Qld) (formerly Hillier, Parker (Qld) Pty Ltd) and Anor* (2001) 183 ALR 700 at 703 (paras [8] and [9]); *Hughes v Gales* (1995) 14 WAR 434 at 437-438. Therefore, leave to appeal is required: Supreme Court Act, s 53.

Jurisdiction

[10] The jurisdiction of a single judge to make an order of the Court of Appeal requiring security for costs is to be found in s 52(3)(a) or s 52(3)(b) of the Supreme Court Act. Order 85.13 of the Supreme Court Rules provides:

> "Unless the Court of Appeal or a Judge otherwise directs, no security for the costs of an appeal to the Court of Appeal is required."

[11] There is, however, no corresponding rule relating to applications for leave to appeal. Counsel for the respondent, Mr Reeves QC, submitted that, notwithstanding the absence of such a rule, the Court could order security

for costs in the exercise of its inherent jurisdiction. That the Supreme Court has an inherent jurisdiction to order security for costs cannot be doubted. Superior courts of common law have an inherent jurisdiction to order security for costs: see *J H Billington Ltd v Billington* [1907] 2 KB 106; *Harpur v Ariadne Australia Ltd* (supra) at 526; *Thunderdome Racetiming and Scoring Pty Ltd and Anor v Dorian Industries Pty Ltd and Anor* (1992) 36 FCR 297 at 304-305. The Supreme Court of the Northern Territory has the same jurisdiction as the Supreme Court of South Australia had as at 1st January 1911: Supreme Court Act s 14(1)(b). That jurisdiction included the jurisdiction of the common law courts as they existed prior to the Judicature Acts 1873-1875 (Imp): *Scott v Northern Territory and Ors* (2005) 15 NTLR 158 at 166-167. In *Bell v Bay-Jesperson* (2004) 2 Qd R 235, the Court of Appeal of Queensland held that security for costs could be ordered in the case of an application for leave to appeal. The argument which found favour in that case was that the Court of Appeal derived its power from the Full Court and the Supreme Court of Queensland included the Full Court. In the Northern Territory, the Court of Appeal is the Supreme Court exercising its appellate jurisdiction: see Supreme Court Act s 51(2).

[12] Nevertheless, the jurisdiction is very sparingly exercised in the case of leave applications. In *J H Billington Ltd v Billington* (supra) at 110, Lord Alverstone CJ (with whom Darling and Phillimore JJ agreed) said that the Court would be "slow to order security for costs on an appeal from a Master or a judge in chambers and would only do so in a very exceptional case". In

Bell v Bay-Jesperson (supra) it was held that notwithstanding that there was no rule of the Court of Appeal relating to the giving of security of costs in an application for leave, as that Court had inherited the Supreme Court's jurisdiction, the equivalent of our O 62 applied. However, O 62 is very limited in its operation and plainly the respondent is unable to bring itself within its terms. Hence the respondent seeks to rely upon the Court's inherent jurisdiction. In *Bahr v Nicolay and Ors* (1987) 163 CLR 492, Toohey J rejected an application for security for the costs of an application for special leave to the High Court in the absence of proof that the application was an abuse of process. In that case his Honour held that it was inappropriate to express a view on the likely outcome of the application for special leave. In *Bell v Bay-Jesperson* (supra) at 242, the Queensland Court of Appeal did order security principally because the applicant had no merits or prospects of success. In the matter of the application by the respondent against Natrabu, Thomas J in making the order in that case, relied upon O 62.02(1)(b) which was applicable in that case because Natrabu is a corporation; but that rule does not apply here.

[13] Mr Reeves QC submitted that the principles which apply on an application for security for costs of an appeal are the same as in the case for an application for security for the costs of an application for leave. I accept that the same factors are relevant, but very different weight will be attached to some of them. In my opinion, it requires a much stronger case where the application is only for leave, as the authorities to which I have referred

suggest. One of the principle reasons for the difference is that in the case of an appeal as of right the impecunious appellant had already had his day in court, the matter has been fully considered on the merits by a judge whose judgment is presumed to be correct and if the appellant does not have the ability to pay the respondent's costs, that is said to be a "powerful" or "persuasive" factor requiring the giving of security "so as to prevent an impecunious appellant from dragging his opponent from one Court to another": see *Cowell v Taylor* (1885) 31 Ch D 34 at 38 per Bowen LJ; *Smail v Burton* [1975] VR 776; *St Helen's Area Landcare and Coastcare Group Inc v Break O'Day Council* (unreported [2005] TASSC 46 at [24]); *Natcraft Pty Ltd v Det Norske Veritas* (unreported Court of Appeal Qld [2002] QCA 241; BC200204104 at [9]); *Lewis v Strickland and Anor* (unreported [2004] QCA 134).However, in a case such as this, the applicant has not had his day in court and he has not had a decision by a judge on the merits.

[14] Secondly, one of the purposes of the requirement for leave from an interlocutory order is to save expense by cutting down appeals from interlocutory orders as much as possible. The very fact that the applicant requires leave should operate to afford significant protection to the respondent from possible unrecoverable costs which might be incurred if there had been an appeal as of right.

[15] I say "should operate" because it seems to me that a practice has developed in the registry of preparing appeal books as if leave had already been given or an order made that the application for leave and the appeal shall be heard

together. That practice is not authorised by the Act, the rules or by any practice direction. Unless an order has been made by the Court of Judge pursuant to O 84.12(2), the leave application must proceed both in the registry and in the Court in accordance with the rules relating to leave applications.

[16] In my opinion, it is wrong for the Registrar or an applicant to assume that the Court will grant leave under O 84.12(2) at the hearing of the leave application. The Court will not be disposed to surrender to a *fait accomplis*, particularly if that course is opposed by the respondent: see *Nationwide News Pty Ltd (t/as) Centralian Advocate and Ors v Bradshaw & Anor* (1986) 41 NTR 1 esp at 18-19 per Asche J. It is important to remember that in cases requiring leave, the nature of the hearing is different from the hearing of an appeal. First, leave applications are almost always from a discretionary judgment. Thus what must usually be shown is that the judgment appealed from is either wrong or at least attended with sufficient doubt so as to warrant the granting of leave (the principles to be applied in such cases are discussed in many authorities, but most notably in *House v The King* (1936) 55 CLR 499. Secondly, notwithstanding that error is 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: see generally *Nationwide News Pty Ltd (t/as) Centralian Advocate and Ors v Bradshaw and Anor* (supra); *c.f. Rogerson v Law Society of the*

Northern Territory (1993) 88 NTR 1. This is obviously a very different exercise from what is required where there is an appeal as of right to the Court of Appeal under s 51(1) of the Supreme Court Act following a hearing on the merits. In the latter case the Court of Appeal is entitled to draw inferences of fact from the evidence and in its discretion may receive further evidence: see s 54 of the Act and see the discussion in *Lexray Pty Ltd v Northern Territory of Australia (No 2)* (2001) 10 NTLR 150 at 156-158.

[17] It is in the light of this distinction that the procedure set out in Part 2 of Order 85 must be considered. In leave applications, there are no appeal books. The applicant is required to support his application by an affidavit in accordance with O 85.04(2). Inevitably the applicant will need to exhibit to his affidavit the judgment to be appealed from and a sealed copy of the order to be appealed from; and in some cases it may be necessary to add copies of any relevant affidavits considered by the Master or Judge to be appealed from and possibly even part or the whole of the transcript of proceedings in the Court below. Order 85.06 permits the respondent to file an affidavit in response. Order 85.07 requires the Registrar to set the application down for hearing. Apart from O 84.12(2) it is always open to a party to apply to a single Judge under s 52(3)(b) of the Supreme Court Act for directions if need be, but not to a registrar or Master. The hearing of the application should be brought on before the Court at the earliest possible opportunity. Enough copies of the affidavits should be filed so that each Judge will have a copy. Finally, I mention for what it is worth that it is not

the usual practice in Victoria to give reasons for granting or refusing leave: see Williams, *Civil Procedure Victoria*, para [I 64.01.460]. It may be apprehended that a similar practice will emerge in this jurisdiction.

[18] A third reason for distinguishing appeals from applications for leave to appeal when considering an application for security for costs is that the respondent is not bound to appear at the leave application. As Toohey J pointed out in *Bahr v Nicolay [No 1]* (supra) at 494:

> "A respondent may decide in particular circumstances, including the financial position of the applicant, not to appear and so avoid incurring costs. It will still be incumbent on the applicant to satisfy the Court that a grant of …leave is appropriate…"

Should an order for security be made?

[19] The respondent's application is based on a number of considerations. First, it is submitted that Mr Iskander is impecunious. This is not in doubt, but as I have endeavoured to point out, it is not as significant a factor in leave applications, although it is very often a matter necessary to be established if the application is to succeed.

[20] Secondly, it was submitted that Mr Iskander is a foreign national with no property in Australia. It is not in doubt that he is a citizen of Indonesia, but he is not a foreign resident. The evidence suggests, to the contrary, that he is a permanent resident of the Northern Territory. There is no evidence that he owns property in Indonesia. The cases to which I was referred show that security will be ordered where a person, resident abroad has no assets in the

jurisdiction, but has assets or at least access to assets abroad: see for example *Ogawa v The University of Melbourne* (unreported) [2004] FCA 491. This is not the case here.

[21] Next it was shown that since the commencement of the action in 1995, Mr Iskander had divested himself of all real property in the jurisdiction in which he has an interest. The evidence shows that Mr Iskander held a joint interest with his wife in a property at 6 Halls Street, Alawa or Millner which was sold on 23 November 1995 to a Laurel Heather Warren for $136,000. Mr Iskander's evidence is that the proceeds of this sale were used to purchase a property at 22 Sabine Road, Millner. The evidence is that this latter property was transferred to Mr Iskander's son-in-law and daughter on 1 November 1999 for $215,000. The evidence is that Mr and Mrs Iskander still live at that address with his son-in-law and daughter. There is evidence also that on 9 December 2005, Mr Iskander's daughter became the sole owner of that property. Thirdly there is evidence that Mr Iskander owned a property at 8 Muckaninnie Court, Moulden which he sold to a company on 1 September 1997 for $62,500. Mr Iskander's evidence is that he used $47,000 of those proceeds to pay for his barrister's and solicitor's costs and the balance of $15,500 was spent on his daughter's wedding. Mr Iskander claims to have paid $200,000 for legal expenses in all in respect of the actions and a further $27,000 for travelling expenses to Jakarta to attend meetings with the respondent and to have financial records prepared. It does not emerge from the evidence that Mr Iskander has dissipated assets to hide

them from the respondent in the event that the action failed. There is nothing to suggest that Mr Iskander has attempted to hide assets to avoid a possible costs order against him in the event that his application for leave is unsuccessful.

[22] Next it was submitted that Mr Iskander has been dilatory in the conduct of the application to date. I accept that the application has been dilatory. It has now been listed before the Court for hearing on Monday 3 July. The dilatoriness is not entirely the applicant's fault. It has been contributed to by the failure of the Registrar to deal with the application in accordance with the Rules. That failure has been contributed to by the practice which seems to have developed and which is not authorised by the Rules as I have endeavoured to explain.

[23] Next it was submitted that the application for leave is not strong. I will not embark on a close examination of Thomas J's reasons for dismissing the proceedings. There is nothing in her Honour's reasons which stands out as glaringly wrong. Although the application to dismiss the proceedings was made at a very late stage – so late in fact that one is inclined to be a little surprised at first blush that the application succeeded – her Honour considered that factor. Her Honour also referred to *John Holland (Constructions) Pty Ltd v Jordin* (1992) 108 FLR 194, a decision of Master Lefevere, which held that "a defendant generally may leave a dormant plaintiff lie and have no fear that his inaction may constitute part of the excuse for the plaintiff's own inaction in prosecuting his claim". It may be

doubted whether that decision is still correct but her Honour correctly noted that the claim was not dormant and the respondent did in fact take steps to prompt the plaintiff along. On the other hand the proposed grounds of appeal as set out in the document filed on 23 February 2006, which I take to be a draft of the notice of appeal, are so vague as to be almost incomprehensible. I note that Part 2 of Order 85 does not require such a document. The proposed grounds of appeal should be set out in the affidavit required by O 85.04(2) and it is sufficient if the grounds are therein stated. In fact, the proposed grounds are more comprehensively and understandably set out in the affidavit of Mr Davis filed on 2 November 2005. The difficulty I have is that Mr Davis did not seek to rely on any of those grounds in response to the respondent's application. However, Mr Davis did press two grounds set out in the draft notice of appeal. First, in relation to ground (b) it was submitted that there were delays by the respondent which contributed to the plaintiff's delays. It is not shown that her Honour failed to take those matters into account. As to the ground relating to the failure of the respondent to progress the counterclaim, the order of the Judge dismissed the whole proceedings including the counterclaim and I was informed by Mr Reeves QC that he had instructions to abandon the counterclaim and so advised her Honour at the time she delivered her reasons, which explains why her Honour dismissed the whole proceedings and not merely the plaintiffs' claims. As to the proposed ground (d), it was put that her Honour failed to recognise that the respondent had acknowledged the debt in 1999.

There is no pleading to that effect and four attempts by Mr Iskander to amend his pleadings to raise that issue have either failed or been abandoned. Having regard to the documents said to evidence the acknowledgment of debt, it is not surprising that Mr Iskander has had difficulty amending his pleading. In conclusion, I accept that Mr Iskander's prospects of obtaining leave are very slight indeed.

[24] Counsel for Mr Iskander, Mr Davis, submitted that the respondent's application must fail because it was estopped from raising the matter again, relying on the principle derived from *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 esp at 598. It is true that the respondent sought to obtain a security for costs order on the previous occasion when it succeeded in obtaining such an order from Natrabu. I have previously set out the relevant facts in para [8] above. However, in *Renehan v Leeuwin Ocean Adventure Foundation Ltd and Anor* [2005] NTSC 22, I held that there can be no issue estoppe l unless the issue decided previously is a final judgment. That disposes of this contention.

[25] Finally it was contended that in any event this application was not made promptly. It is a relevant factor to be considered when the delay in bringing the application is such that significant costs have already been expended on preparing the application for leave. There is no evidence of that. There has been at least one unnecessary directions hearing before the Registrar. Mr Davis claims to have gone to the expense of obtaining a transcript of proceedings before Thomas J (it is not clear to me why this was necessary,

or why the applicant should pay for the transcript if it is the respondent who wanted to rely upon it). There is no basis to refuse relief on that ground.

[26] In conclusion, the application boils down to whether I should order security based on Mr Iskander's lack of means, bearing in mind his very limited prospects of success and the fact that the respondent is not obliged to appear. If I were persuaded that the prospects of obtaining leave were hopeless I would grant the order, because I think it is proper that the respondent oppose the application and I expect it will do so. Mr Davis has not persuaded me, although he had plenty of opportunity to do so, that there is even a slight chance that leave to appeal might be granted. In those circumstances I think it is appropriate to make an order for security for costs.

[27] According to the affidavit material, if the matter were to proceed as a full hearing of the leave application and of the appeal, the respondent is likely to incur costs in the vicinity of $41,910. This assumes a two day hearing. I expect that the leave application would probably take half a day at the most. I consider that security in the sum of $10,000 is sufficient.

Orders

[28] The respondent's application is granted and there will be orders:

1. That Mr Iskander give security for the costs of the respondent of the application for leave to appeal in the sum of $10,000.00.

2. That Mr Iskander's application for leave to appeal be stayed until such security is given.

3. That Mr Iskander pay the respondent's costs of this application to be taxed.
