MacDonnell Shire Council v Miller & Ors [2009] NTSC 46

PARTIES:	MACDONNELL SHIRE COUNCIL v DEBBIE MILLER AND TONY FRANCIS PALMER AND MARIE ELANA ELLIS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	NO 2 OF 2009 (20913798)
DELIVERED:	15 SEPTEMBER 2009
HEARING DATES:	5 AUGUST 2009
JUDGMENT OF:	MILDREN J

CATCHWORDS:

TRUSTS – TRUSTEES – INTERLOCUTORY APPLICATIONS – RECOVERY OF FUNDS

Amendment of Statement of Claim – application for joinder – whether amendments bad in law – test to be applied – leave granted to plaintiff to file and serve amended Statement of Claim

Application for permanent stay of proceedings – whether an abuse of process – whether proceedings capable of succeeding – whether proceedings are “embarrassing and scandalous” – application refused – application for stay pending outcome of High Court action granted

Application concerning control of funds – injunction granted restraining paying of monies from trust

Application concerning discovery and giving of accounts adjourned sine die

Gee, Steven, *Commercial Injunctions* (5th ed, 2004); Kerr, William Willamson, *Kerr on Fraud and Mistake* (7th ed, 1986)

Law of Property Act2000 (NT), s 208(1); *Local Government Act 2008* (NT), s 257, s 257(3); *Supreme Court Rules*, O 13.02(1)(b), O 63.18

Commonwealth v Verwayen (1990) 170 CLR 394; *Gaye (No 1) Pty Ltd v Rowlands Quarries (Katherine) Pty Ltd* (unreported, NTSC, Angel J, 11 July 1997); *Woodhead Australia (SA) Pty Ltd v Paspalis Group of Companies* (1991) 103 FLR 122; applied

Williams v Spautz (1992) 174 CLR 509; discussed

Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; *Barton v The Deputy Commissioner of Taxation of the Commonwealth of Australia* (1974) 131 CLR 370; *Castanho v Brown & Root (UK) Ltd [1980] 3 All ER 72 ; Cogent Nominees v Anthony* [2003] NSWSC 804; *Dubois v Hodgson* [1999] NSWSC 1065; *Henry v Henry* (1996) 185 CLR 571; *In the Marriage of Prince (1984) 54 ALR 467; Otter Gold NL v Barcon (NT) Pty Ltd & Sankey* (2000) 10 NTLR 189; *Patrick v Tenon Limited (formerly Fletcher Challenge Forests Ltd)* (2008) 250 ALR 582; *Re O'Mullane (decd)* [1955] VLR 217; *The Atlantic Star v Bona Spes [1974] AC 436 ; Thomas v Thomas [2000] SASC 408; Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; referred to

REPRESENTATION:

Counsel:

Plaintiff:	A Wyvill
First Defendant:	P Slattery QC
Second & Third Defendants:	P McIntyre and A Tokley

Solicitors:

Plaintiff:	Povey Stirk
First Defendant:	Cridlands MB Lawyers
Second & Third Defendants:	Midena Lawyers

Judgment category classification:	B
Judgment ID Number:	mil09450
Number of pages:	16

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

MacDonnell Shire Council v Miller & Ors [2009] NTSC 46
No. 2 of 2009 (20913798)

BETWEEN:

MACDONNELL SHIRE COUNCIL
Plaintiff

AND:

DEBBIE MILLER
First Defendant

AND:

TONY FRANCIS PALMER
Second Defendant

AND:

MARIE ELANA ELLIS
Third Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 15 September 2009)

Basic background facts

[1] This litigation is concerned with an action by the plaintiff to recover funds transferred by the Amoonguna Community Inc (Amoonguna) to the first defendant as trustee. The basis of the plaintiff's claim is that by virtue of amendments passed to the *Local Government Act* in 2008, Amoonguna was dissolved and its assets were transferred to the plaintiff.

[2] The plaintiff asserts that the trust created prior to 1 July 2008 when the Act dissolved Amoonguna and transferred its assets and liabilities to it was an express, or alternatively a resulting trust, that the sole beneficial owner of the trust property prior to 1 July 2008 was Amoonguna and that by reason of the amendments made to the *Local Government Act* in 2008, it became the sole beneficiary and beneficial owner of the trust property after 1 July 2008.

[3] Alternatively the plaintiff asserts that the dispositions made to the trust are voidable by reason of s 208(1) of the *Law of Property Act* as a fraudulent disposition made as an attempt to avoid, defeat or inhibit the plaintiff's prospective rights and interests in the funds.

[4] The second and third defendants have been joined because they claim to have standing to defend these proceedings. They have commenced an action in the High Court to challenge the validity of the relevant provisions of the *Local Government Act 2008*, as representatives of the membership of Amoonguna. They claim that even if the legislation is valid, the trust fund was lawfully established to enable the payment of legal costs so that litigation could be commenced and pursued on behalf of Amoonguna. They also claim that the plaintiff has no interest in the trust fund, or alternatively that the plaintiff would be bound by law to permit the fulfilment of the terms of the trust because it not only succeeded to Amoonguna's assets but also to its liabilities. In similar vein, the first defendant submits that the whole of the trust fund has been made over for the specific purposes of meeting the legal costs of challenging the validity of the legislation and for

bringing, if necessary, a claim for compensation under the Act if it is found to be valid and that the plaintiff's claim is therefore unsustainable.

Applications before the Court

[5] Interlocutory applications have been made to the Court for the following orders:

(1) The plaintiff seeks:

(a) leave to amend the Statement of Claim;

(b) subject to the plaintiff giving the usual undertaking as to damages,

(i) that subject to (ii) below, the first defendant be restrained from paying out any monies out of the trust fund;

(ii) that the first defendant pay the trust funds into the plaintiff's solicitors' trust account to be held by them until further order;

(c) that the first defendant provide to the plaintiff's solicitors copies of all documents which evidence the receipt or payment of funds from the trust fund; and

(d) that the first defendant file and serve on the plaintiffs solicitors an affidavit deposing to the payments made from the trust fund since 25 June 2008.

(2) The second and third defendants seek an order that they be joined as defendants in these proceedings.

(3) The defendants seek orders:

(a) staying the action pending resolution of the proceedings in the High Court; alternatively,

(b) if necessary, for an order transferring the action to the Court to which the High Court has remitted the action commenced in the High Court.

Application to amend the Statement of Claim and application for Joinder

[6] The proposed amendments to the Statement of Claim seek declaratory relief only against the second and third defendants. Curiously, a significant portion of the second and third defendants written submissions went to justify their standing to intervene (as defendants) in the action. However, this was never in contention by the other parties and, in my opinion, did not need to be debated as I had already made an order joining the second and third defendants as defendants to the action on 11 June 2009.

[7] The defendants claim that the Amended Statement of Claim "should be struck out" as it does not plead material facts capable of disclosing a prima facie case. In my opinion, for the reasons which follow, the proposed Amended Statement of Claim does properly plead the claim which it wishes to bring against the defendants in so far as the claim is based upon an express or resulting trust the sole beneficiary of which is the plaintiff; however, the alternative claim based on s 208(1) of the *Law of Property Act*

is not properly pleaded, cannot be cured by further amendment and leave must be refused to amend in respect of that alleged cause of action.

[8] The contentions of counsel for the first defendant, Mr Slattery QC, were a little confusing. They begin with repeating earlier submissions and adopting the submissions of the second and third defendants, then develop into an argument that the plaintiffs claim against the first defendant cannot achieve the status of a prima facie case; and end with a submission that "there is no purpose served in pressing the application for striking out of pleadings: although the pleadings may survive a strikeout application, they cannot sustain a prima facie case on an injunction application".

[9] One test to be applied is whether or not the amendments are so obviously bad in law that it would be futile to allow the amendment. But in granting leave to amend the Court is concerned with the raising of issues and not with their merits.[1] Raising a claim which may appear not to have much chance of success is not a sufficient reason to refuse leave to amend. Provided that the case is arguable, whether it ought to succeed or not is a question for the judge at trial.[2] I am not required to examine all of the material relied upon unless I am satisfied that there is some reasonable chance that the application by the plaintiff will fail.[3]

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[1] *Commonwealth v Verwayen* (1990) 170 CLR 394 at 456 per Dawson J.
[2] *Commonwealth v Verwayen* (1990) 170 CLR 394 at 456 per Dawson J; *Woodhead Australia (SA) Pty Ltd v Paspalis Group of Companies* (1991) 103 FLR 122 per Asche CJ.
[3] *Gaye (No 1) Pty Ltd v Rowlands Quarries (Katherine) Pty Ltd* (unreported, NTSC, Angel J, 11 July 1997) at 9.

[10] The defendants' arguments that the claim must fail depend largely upon the view which they have submitted ought to be taken about the nature of the trust. Mr Slattery QC submitted that the trust as created was for the purpose of providing a fund to indemnify the second and third defendants as a class in respect of the whole of the legal costs liability incurred in the High Court proceedings and the whole trust is made over for that purpose. Reference was made to *Re O'Mullane (decd)*[4] and *Dubois v Hodgson*,[5] but neither of those decisions so plainly make the plaintiff's claims untenable. Moreover, there is no trust deed so that the nature and terms of the trust are very much open to question which, in my opinion, cannot be properly decided at this time.

[11] Mr Slattery QC submitted that the alternative case based on s 208(1) of the *Law of Property Act* could not succeed because there was no debtor/creditor relationship arising either at the time of the transfer of the funds to the trust or subsequently. Mr Wyvill referred me to the observations of Stephen J in *Barton v The Deputy Commissioner of Taxation of the Commonwealth of Australia*[6] in support of his argument that there need not be an existing indebtedness if the debtor believes in some impending indebtedness and the intent is to defraud, defeat or delay future creditors. However, the difficulty is that there is no pleading that the plaintiff and Amoonguna had at any time, whether past, present or prospective a relationship of debtor and

[4] [1955] VLR 217.
[5] [1999] NSWSC 1065.
[6] (1974) 131 CLR 370 at 374.

creditor, nor that the rights which the plaintiff acquired created such a relationship. It is not pleaded that there was an intent to defraud, defeat or delay any creditor or the existing or future body of the creditors of Amoonguna. In my opinion the alternative claim based on s 208(1) of the *Law of Property Act* is bad and cannot be cured by amendment for the reason that the *Local Government Act* did not create a relationship of debtor and creditor between the plaintiff and Amoonguna, whether immediately or prospectively. Indeed, as Amoonguna was dissolved as from 1 July 2008, such a relationship is an impossibility. Mr Wyvill submitted that "creditor" should be given a broad meaning, quoting Kerr,[7] but the learned author there refers to any person having a claim against the grantor or settler by virtue of which he is or may become entitled to rank as a creditor, but that is not this case. In these circumstances, the paragraphs of the Statement of Claim and the draft Amended Statement of Claim relating to the alternative claim based on s 208(1) will be struck out, but otherwise the plaintiff will have liberty to amend the Statement of Claim in accordance with the proposed Amended Statement of Claim, such Amended Statement of Claim to be filed and served within 14 days.

Application by the second and third defendants for a permanent stay

[12] Counsel for the second and third defendants, Messrs McIntyre and Tokley, submitted that the present action should be permanently stayed as an abuse of process (based on the tort of collateral abuse of process). Reliance was

[7] William Willamson Kerr, *Kerr on Fraud and Mistake* (7th ed, 1986) at 378-379.

placed upon the decision in *Williams v Spautz*.[8] As that decision demonstrates, the Court has an inherent jurisdiction to stay proceedings which are an abuse of process. This power extends to the prevention of an abuse of process resulting in oppression even if the moving party has a prima facie case. Proceedings are brought for an improper purpose and are therefore an abuse of process where the purpose is not to prosecute them to conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond that which the law offers. However, the existence of an ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the action is successful. Further, the improper purpose must be the predominant purpose. The onus of satisfying the Court that there is an abuse of process lies on the party alleging it. The onus is a heavy one and the power to grant a permanent stay is to be exercised only in the most exceptional circumstances.

[13] The argument which the second and third defendants advance is that the plaintiff has commenced proceedings prima facie incapable of success; embarrassing and scandalous; and which attempt to improperly raise allegations of fraudulent conduct in order to prevent the second and third defendants as the alleged beneficiaries of the trust of their financial capacity to pursue the High Court proceedings. I am far from satisfied that the ulterior purpose in bringing this action is not to recover the money which

[8] (1992) 174 CLR 509.

the plaintiff claims belongs to it, but to prevent the defendants from challenging the constitutional validity of the *Local Government Act*. This application is therefore refused.

[14] Alternatively, the second and third defendants have sought a stay pending the decision in the High Court action. If the action in the High Court is successful, the plaintiff's claim in this action must fail. The evidence before me is that the High Court action will be remitted to another Court, possibly the Federal Court of the Australia or this Court for trial. In those proceedings the interests of the plaintiff will be represented by the Solicitor-General of the Northern Territory. I am not in any doubt that it would be most undesirable to litigate the issues in this action until the constitutional question is resolved. In my opinion, the principles enunciated in such cases as *Voth v Manildra Flour Mills Pty Ltd;*[9] *Henry v Henry*[10] and *Patrick v Tenon Limited (formerly Fletcher Challenge Forests Ltd)*[11] do not apply in this case so as to warrant a permanent stay of the action. If the High Court were to find that the legislation was invalid, a permanent stay would deprive the plaintiff of being able to seek a remedy. However, a temporary stay or an adjournment to await the outcome of the High Court proceedings is an entirely different matter.[12] But the High Court action, I am told, will not be tried in the High Court but remitted as I have said before. In those

[9] (1990) 171 CLR 538.
[10] (1996) 185 CLR 571.
[11] (2008) 250 ALR 582.
[12] See *In the Marriage of Prince* (1984) 54 ALR 467; *The Atlantic Star v Bona Spes* [1974] AC 436 at 468; *Castanho v Brown & Root (UK) Ltd* [1980] 3 All ER 72 at 91-92; *Thomas v Thomas* [2000] SASC 408.

circumstances, I am of the view that the proper course will be to wait and see to which Court that action is remitted and then consider whether this action should be transferred to that Court as well. In the meantime, I do not consider that any further steps should be taken in this action. A final decision as to whether or not to grant a stay pending the resolution of the constitutional question is best left for another day and possibly another court. The order that I make is that, subject to filing and serving the amended Statement of Claim previously referred to in [7] above, this action is adjourned and a stay is granted pending the decision of the High Court concerning which Court the High Court action is to be remitted.

Applications concerning control of the funds

[15] The plaintiff seeks a restraining order in relation to the expenditure of money from the fund and an order that the funds held by the first defendant be paid into Court pending the outcome of the litigation or alternatively be paid into the plaintiff's solicitors trust account. This is resisted by the defendants who complain that such orders would effectively prevent the second and third defendants from pursuing the constitutional challenge or other remedies available to it to seek compensation under the *Local Government Act*, s 257 and for that purpose seek an order from this Court annulling the dissolution of Amoonguna vide s 257(3).

[16] However, the plaintiff submitted that the proper course is for the second and third defendants to apply to the Court for an order permitting them to have access to the funds for those purposes, upon proof by proper evidence that

there are no other funds available, that the defendants have an arguable case for denying the plaintiff's entitlement to the money and upon such terms as the Court sees fit to impose safeguards for the claimant.[13] I am of the opinion that the plaintiff's contention is correct.

[17] However, I am far from persuaded that it is necessary for the funds to be either paid into Court or paid into the plaintiff's solicitors' trust account. There is now no allegation against the first defendant affecting her competence to hold the monies as a trustee such as would, in effect, warrant her removal. There is no suggestion that the first defendant has not properly invested the fund or has improperly disposed of the fund, or is otherwise not competent to administer the fund. As presently advised, I am of the opinion that an interlocutory injunction in the same terms as previously granted would be a sufficient remedy. In my opinion, the plaintiff has established that it has a prima facie case sufficient to justify the granting of an interlocutory injunction.[14] 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 paragraph [16] above.

[13] See the discussion in Steven Gee, *Commercial Injunctions* (5th ed, 2004) at 630-631; *Cogent Nominees v Anthony* [2003] NSWSC 804.
[14] See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

Applications concerning discovery and the giving of accounts

[18] I consider that these applications should be deferred until it is clear what is happening with the High Court action. These applications will be adjourned sine die.

Defendants' applications for costs

[19] The applications made by the second and third defendants were only partly successful. The usual rule in this jurisdiction is that costs are not awarded in interlocutory applications.[15] I do not consider that there are any circumstances warranting departure from the usual order that the second and third defendants bear their own costs of these applications.

[20] The first defendant has sought an order for costs because the plaintiff originally pleaded a case against the first defendant based on fraud and/or unjust enrichment which counsel for the first defendant asserts have now been abandoned. The case originally pleaded, in so far as it relied on an allegation of fraud did not plead reliance on s 208(1) of the *Law of Property Act*,[16] did not plead facts sufficient to make out an arguable case and did not specifically assert any wrongdoing by the first defendant such as to make her a party to any fraud. Mr Wyvill submitted that neither claim had been abandoned. So far as the claim in fraud is concerned, it is now clear that what was intended was that the transaction was voidable under s 208(1) of the *Law of Property Act*, but that contention, for the reasons I have already

[15] See *Supreme Court* Rules, O 63.18.
[16] Such a plea was necessary to comply with O 13.02(1)(b) of the *Supreme Court Rules*.

given, cannot be justified. So far as the claim based on unjust enrichment is concerned, Mr Wyvill submitted that the restitutory claim was now confined to an account from the trustee and was not now a broader restitutory claim. I am unable to see how this assists his argument.

[21] The principles upon which an order for costs will be made in an interlocutory application were discussed by Thomas J in *Otter Gold NL v Barcon (NT) Pty Ltd & Sankey*.[17] In general, some good reason must be shown to depart from the general rule that each side is to bear its own costs. The submission of Mr Slattery QC was that the first defendant had no choice but to defend these allegations; she was (before the second and third defendants were joined) the sole defendant and apparently serious allegations were being made which might reflect on her. I think it is very plain that until I made an order joining the second and third defendants, the first defendant was put in the position of having to defend the trust fund of which she was the trustee. The fact that allegations of fraud and unjust enrichment and breach of trust for which damages were sought none of which was property particularised also exposed to her a significant potential personal liability. I think these amount to circumstances sufficient to justify a departure from the general rule. The first defendant was at that stage never in a position to submit to the jurisdiction of the Court and leave it to the plaintiff and the second and third defendants to argue the merits and is still not able to do so. Although by the time of the hearing on 5 August

[17] (2000) 10 NTLR 189.

2009 the position of the first defendant had changed, there is still on foot a claim for damages for breach of trust in respect of payments made by her out of the trust fund since 1 July 2008. That submission depends for its success, at least in part, on the allegation of fraud against creditors vide the *Law of Property Act*.[18] However, there was nothing exceptional warranting a departure from the general rule by that time.

[22] In the circumstances, I think that the first defendant is entitled to an order that the plaintiff pay her costs to be taxed on an indemnity basis in respect of the initial hearings on 11 and 15 June 2009. However, I do not think that there should be any order as to costs in respect of the hearing on 5 August 2009.

Formal Orders

[23] I make the following orders:

1. Paragraph 5 of the Statement of Claim is struck out.

2. Leave is granted to the plaintiff to file and serve an amended Statement of Claim in the terms of the Draft Amended Statement of Claim annexed to the plaintiff's summons of 4 August 2009, except for those paragraphs of the Draft Amended Statement of Claim which allege an alternative case based upon s 208(1) of the *Law of Property Act*, such amended Statement of Claim to be filed and served within 14 days.

[18] See s 208(1).

3. Upon the plaintiff by its counsel giving the usual undertaking as to damages the first defendant is restrained and an injunction is hereby granted until further order restraining the first defendant from paying out any monies out of the Amoonguna Litigation Trust as referred to in paragraph 4A of the Draft Amended Statement of Claim except as may be approved by the Court or a Judge or by these orders.

4. The application for a permanent stay of the action is refused.

5. Subject to filing and serving the amended Statement of Claim referred to in order 2 and if necessary taxing the costs ordered to be paid under order 8 hereof this action is adjourned and a stay is granted pending the decision of the High Court of Australia in action No D3 of 2008 as to which Court, if any, the trial of issues in that case is remitted to, or in the event that the defendant in that action demurs, until the High Court has delivered judgment.

6. The plaintiff's application that the trust funds be paid into Court or into the trust account of the plaintiff's solicitors is refused.

7. The plaintiff's application against the first defendant for discovery and filing an affidavit deposing to the payments made from the said trust fund since 25 June 2006 is adjourned sine die.

8. The plaintiff is to pay the first defendant's costs of the hearings on 11 and 18 June 2009 to be taxed on an indemnity basis and I certify fit for counsel.

9. Subject to order 8, each party is to bear its own costs of the applications and orders.
