

The Darwin Football Club & Anor v AFL Northern Territory Ltd
[2003] NTSC 76

PARTIES: THE DARWIN FOOTBALL CLUB

AND

AH MAT, Francis Henry

v

AFL NORTHERN TERRITORY LTD

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO: 43/2003 (20304010)

DELIVERED: 27 June 2003

HEARING DATES: 10 and 11 June 2003

JUDGMENT OF: MARTIN CJ

REPRESENTATION:

Counsel:

First Plaintiff: S Southwood QC

Second Plaintiff: S Southwood QC

Defendant: J Reeves QC

Solicitors:

First Plaintiff: Michael Chin

Second Plaintiff: Michael Chin

Defendant: De Silva Hebron

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

The Darwin Football Club & Anor v AFL Northern Territory Ltd
[2003] NTSC 76
No. 43/2003 (20304010)

BETWEEN:

THE DARWIN FOOTBALL CLUB
First Plaintiff

AND:

FRANCIS HENRY AH MAT
Second Plaintiff

AND:

AFL NORTHERN TERRITORY LTD
Defendant

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 27 June 2003)

- [1] This action commenced on 14 March 2003 and was listed for hearing over four days commencing on 10 June 2003 as a matter to be dealt with urgently. That was done because the actions of the defendant complained of by the plaintiffs would significantly deprive the second plaintiff, Mr Ah Mat, from carrying out his duties as President of the first plaintiff (“the club”), particularly as they related to the Australian Rules football season due to commence in Darwin in October this year. By 6 May 2003 pleadings had been completed (after amendment) in accordance with directions made by

me, with a statement of claim, defence and counterclaim and reply. Lists of documents had been exchanged.

- [2] During the course of 10 June the court was occupied considering an application to amend the statement of claim, consequent requests for particulars and responses. On 11 June the plaintiffs filed an amended statement of claim representing a consolidation of the amendments sought and particulars given. The defendant did not oppose the amendment, but foreshadowed an application for relief pursuant to r 23.01 or r 23.02. I think it unlikely that the court would have permitted the defendant to make such an application at that stage of the proceedings had it not been for the fact that it was then faced with a new statement of claim.
- [3] Under r 23.01 the court is invited to strike out the claim or give judgment on the ground that the plaintiffs are bound to fail, even if all the allegations contained in the statement of claim are proved, because no cause of action is disclosed. Where the defect can be cured by amendment, leave to that end may be given. Rule 23.02 principally applies where a party wishes to impeach the sufficiency of the pleading, leading to an order being made that it be struck out or amended. Reference may be had to documents referred to in the pleadings.
- [4] Dealing with r 23.01, the Court of Appeal in *NAALAS Incorporated v Bradley and Northern Territory of Australia* (2000) 10 NTLR 103 at par 9 said:

“Rule 23.01 is a rule which has counterparts in many jurisdictions and there are many authoritative pronouncements of what an applicant under it must show in order to obtain judgment.”

Reference is made to a decision of Kearney J where his Honour said:

“Order 23 is intended as a means for dealing with actions which are absolutely hopeless, those so obviously frivolous or unsustainable or untenable that it is plain and beyond rational debate that they cannot succeed. The power under O 23 is to be exercised by courts with great caution; an applicant bears a heavy burden. If the plaintiff shows an arguable case, one which is not unworthy of serious discussion and of evidence being led, a case not hopeless beyond argument, an application under O 23 should be dismissed.” (See *Wilson v Union Insurance Company* (1992) 112 FLR 166 at p 181).

- [5] For the purposes of this application, the defendant has to accept that the facts alleged against it are true although, no doubt if the matter were to come to trial, it would be contesting some of them.
- [6] The contents of the statement of claim may be summarised as follows:
- Paragraphs 1 – 6 relate to the status of the parties.
 - Paragraphs 7 – 8 refer to the Constitution of the defendant and the Licence Agreement entered into between the club and the defendant.
 - Paragraph 9 goes to circumstances of an incident on 22 October 2002 involving a Northern Territory News photographer, the second defendant and his son, as they were walking to attend a football tribunal hearing.

- Paragraph 10 refers to a complaint being made by the photographer to the defendant about conduct of the second plaintiff which the second plaintiff denies.
- Paragraphs 11, 13, 14, 15 and 16 refer to correspondence between the first plaintiff and the defendant relating to the complaint. Much of the contents of those letters are pleaded and the letters themselves have been entered as evidence in these proceedings. Reference will be made to some of them later in so far as is necessary to do so for these purposes.
- Paragraph 12 is a denial by the plaintiffs of the allegations made by the Northern Territory News staff.
- Paragraphs 17 – 22 relate to a meeting between representatives of the first plaintiff and the defendant on 21 November 2002. The meeting was called by the defendant, by letter of 20 November, the express purpose of the meeting being to discuss the complaint and ascertain whether or not the club was in breach of cl 4(c) of the Licence Agreement. It went on to assert that if the club was found to be in breach, the defendant wished to hear from it as to why it should not impose restrictions on it as provided for in cl 6 of the Licence Agreement. The defendant said it relied upon powers given under cl 6 and cl 14.5 of the Constitution and cl 3 of the Licence Agreement. It was not proposed that the meeting be a hearing, but the defendant wished to ascertain the truth of the matter by speaking to the persons involved.

- It is alleged that the defendant breached the principles of natural justice and procedural fairness at that meeting in that it:
 - (a) excluded the solicitor for the plaintiffs from the meeting;
 - (b) allowed evidence to be presented by those who made the complaint, but did not allow the plaintiffs to ask questions of them, and
 - (c) did not permit the plaintiffs to present witnesses or tender evidence in relation to the complaint.
- Paragraphs 23 – 29 relate to an exchange of correspondence between the defendant and the club after the meeting. For reasons which it gave the defendant, by its letter of 24 November, it suggested certain restrictions be imposed on the club under cl 6 of the Licence Agreement and the club was invited to comment. It responded by asserting, for reasons it gave, that the foreshadowed restrictions would be ultra vires of the powers of the defendant. It demanded that the defendant withdraw the proposed restrictions. On 29 November the defendant joined issue and gave notice that it intended to meet the next day to pass a resolution to implement the restrictions. The club was invited to comment prior to that meeting
- Paragraph 30 alleges that the plaintiffs were given insufficient time to comment or object to the proposed resolution;
- Paragraphs 31 - 32 refer to a letter of 1 December 2002 by which the defendant advised the club that it had completed its enquiry into the

complaint and considered the incident breached the Licence Agreement, and resolved to apply a penalty:

- “(a) The Darwin Football Club is required to ensure that Frank Ah Mat shall not participate or attend at the NTFL meaning the Premier Football Competition conducted by the AFLNT known as the Northern Territory Football League or that competition described by a different name, or participate in or attend any AFLNT or NTFL sponsored function, meeting and/or fixture for a period of two years;
 - (b) The AFLNT upon receipt of a request in writing to the Darwin Football Club, after a period of 12 months has elapsed from the date of the resolution, shall review the restriction placed on Frank Ah Mat;
 - (c) The AFLNT in considering whether to exercise its discretion to review the penalty of two years shall take into account matters including:
 - (i) whether Frank Ah Mat has attended an anger management programme as agreed between the Darwin Football Club and AFLNT;
 - (ii) whether Frank Ah Mat has made a full and public apology to Ms Katrina (sic) Malone and the Northern Territory News.”
- Paragraph 33 alleges that in conducting the investigation and purporting to impose the penalty, the defendant acted beyond the powers conferred on it under the Constitution. Particulars are that:

“The Constitution of the AFLNT limits the company’s powers of investigation, determination and imposition of fines or sanctions to breaches of the Constitution, the Rules, the Regulations and the By-laws.”

- Paragraph 34 alleges that the defendant acted in breach of cl 3, cl 6, cl 10(a) and (b)(i) of the Licence Agreement and for a collateral purpose, namely, to wrongly penalise the second defendant. The conduct relied upon as constituting the breach is that pleaded in par 11 – letter from the defendant to the club seeking clarification of the complaint; par 14-16 – letters concerning the meeting between the defendant and the first plaintiffs; par 18-25 – the conduct of the defendant at the meeting, including alleged breaches of principles of natural justice and procedural fairness, and the outcome of the meeting as relayed by the letter of the defendant to the club of 24 November, and of the meeting, deliberations, determinations and resolutions of the defendant.
- Paragraph 34A alleges, alternatively, the Licence Agreement contained implied terms that in making any determination or passing any resolution as contemplated by cl 3 of the Licence Agreement, the defendant would act reasonably and not make any such determination or resolution which has the effect of imposing a restriction on Darwin Football Club's participation in the NTFL unless it is necessary to meet the reasonable objectives and protect the legitimate interests of the AFLNT and, further, prior to determining that there had been a breach of cl 4(c) of the Licence Agreement and making such a determination or resolution which has the effect of imposing restrictions on the first plaintiff, it should accord to it procedural fairness.

- In par 34B a further plea and alternative plea is raised that in the circumstances pleaded in the statement of claim the defendant had breached the terms of the Licence Agreement referred to in par 34A(a). Particulars are given alleging that there had been no breach by the club of the Licence Agreement, the restrictions sought to be imposed upon it were grossly disproportionate to the alleged misconduct, there was no unacceptable conduct engaged in by the second plaintiff and some matters referred to in letters from the defendant to the club could not be relied upon by the defendant as a ground for making the resolution on 30 November as those matters were not instances of breaches of the Licence Agreement by the club, and, in any event the matters referred to were resolved by agreement between the parties (prior to the incident giving rise to the present proceedings). It is also asserted in those particulars that there was no misconduct, intimidation or aggression engaged in by members of the committee of the club at the meeting with the defendant on 21 November, as stated in a letter from the defendant to the first plaintiff consequent upon the meeting; it is also asserted that contrary to an allegation made in that letter, the solicitor for the club had not admitted any intimidation or threats to the photographer; the purported restrictions imposed upon the club were not necessary to meet the reasonable objectives and protect the legitimate interests of the defendant and there was no evidence before the defendant that the first plaintiff had failed to use its best endeavours to ensure that it and each

of its officers, players, employees and other club personnel (whether paid or unpaid) do not alone, jointly or severally, engage in any unbecoming conduct or behaviour which in the AFLNT's opinion is prejudicial, likely to be prejudicial to the interests or reputation of the AFL, AFLNT, the NTFL or the playing of Australian football.

- Paragraph 34C alleges that the defendant breached the terms of the Licence Agreement in failure to abide by the principles of natural justice or procedural fairness as previously pleaded.
- Finally, by par 35 it is pleaded that if the defendant was entitled pursuant to the Licence Agreement to act as it had done, it had breached the agreement by purporting to impose penalties on the plaintiffs which are so disproportionate to the alleged misconduct of Frank Ah Mat and which are so unreasonable that no reasonable person would impose such penalties for the alleged misconduct.

[7] The plaintiffs claim by way of relief:

- (1) a declaration that the defendant has breached the Licence Agreement;
- (2) specific performance of the Licence Agreement;
- (3) - - -
- (4) a declaration that the defendant failed to accord the club procedural fairness;

- (5) a declaration that the defendant failed to act reasonably and in good faith and its Board had acted in breach of their obligations under the AFLNT Constitution and contrary to s 181 of the Corporations Act;
- (6) a declaration that the defendant failed to act reasonably in breach of its obligations under the Licence Agreement and the obligation implied by law that parties to a contract must act reasonably;
- (7) a declaration that the defendant, in imposing the penalty set out in its letter dated 1 December 2002, acted beyond the powers conferred on the defendant under the AFLNT Constitution;
- (8) a declaration that the defendant, in imposing the penalty set out in its letter dated 1 December 2002, acted in breach of the Licence Agreement and in breach of contract;
- (9) a declaration that the penalty imposed by the defendant on the plaintiffs is so disproportionate to the alleged misconduct and is so unreasonable that no reasonable person would impose it;
- (10) - - -
- (11) costs.

[8] It is now necessary to turn to the Constitution of the defendant and the Licence Agreement between the defendant and the club. The Constitution is that of the corporation under the Corporations Act which relevantly provides:

- Clause 3 - the objects for which the company is established include (a) to administer, develop, promote, control, manage and encourage the game of Australian football in the Northern Territory and (l) to do all such other lawful things as are incidental or conducive to the attainment of the above objects or which may be calculated to advance directly or indirectly the interests of the company.
- Clause 6 - provides for the company's powers and how they may be exercised including at 6.1(b) a power to investigate and determine any matters, charges or reports relating to the conduct of any club or any player or official of any affiliate or club or any other person within the purview of any rules regulations or by-laws of the company and (e) to impose fines or sanctions by way of suspension, expulsion or otherwise, for any breach of its Constitution or any rules, regulations or by-laws of the company or the AFL by any club, affiliate or player or official of any club or affiliate or any other person within the purview of any rules, regulations or by-laws of the company.
- By Clause 14.1 - subject to the corporations law and any other provisions of the Constitution, the business of the company shall be managed by the Board which may (b) exercise all such powers of the company and not by the corporations law or by the Constitution required to be exercised by the company in general meeting or by the directors (the Board is constituted by seven directors appointed pursuant to cl 13.1).

[9] The Licence Agreement is in writing and executed by each of the defendant and the club. Relevantly, the defendant thereby granted to the first plaintiff a licence to field a team in the NTFL which was to continue unless terminated in accordance with the provisions of the agreement. By cl 3, the first plaintiff was obliged to (b) use its best endeavours to ensure that each of its officers, employees, players and volunteers in all respects comply with and observe the Constitution of AFTNT, any rules, regulations, by-laws and policies of AFLNT from time to time in force and all determinations and

resolutions which have been or may after the date of the agreement be made or passed by AFLNT.

[10] There are other obligations of the club as set out in cl 4 of the Licence Agreement including that it would use its best endeavours to ensure that it and each of its officers, players, employees and other club personnel (whether paid or unpaid); (iii) do not alone, jointly or severally, engage in any unbecoming conduct or behaviour which, in AFL Northern Territory's opinion, is prejudicial or likely to be prejudicial to the interests or reputation of the AFL, AFL Northern Territory, the NTFL or the playing of Australian football.”

[11] Clause 6 of the Licence Agreement provides that the club acknowledges and agrees that:

(a) the provisions of the agreement and documents referred to in cl 3 (the Constitution, rules, regulations, by-laws and policies, determinations and resolutions) impose or may impose restrictions on the club in relation to matters connected to its participation in the NTFL; and

(b) such restrictions are necessary and reasonable to meet the reasonable objectives and protect the legitimate interests of AFL Northern Territory and that such restrictions do no more than is necessary and reasonable to achieve such objectives and protect such interests.

[12] It will be noted that although the defendant has asserted two different bases as the foundation for its legal authority or power to act as it did, the plaintiffs have rejected one, that is, those contained in the Constitution (statement of claim, par 33). The plaintiffs allege that the defendant acted in breach of the Licence Agreement, but I can not identify anywhere in the statement of claim a reference to the provisions of the Licence Agreement which the plaintiffs say confer legal authority on the defendant. The provisions of the Licence Agreement upon which the plaintiffs rely operate to place obligations on the club, but do not create legal authority, or regulate any legal authority, by which the defendant may impose the obligation. The fact that the defendant may have asserted on one occasion that it was acting pursuant to powers under the Licence Agreement, does not prove the correctness of that assertion and it remains upon the plaintiffs to allege wherein lies the foundation for it, if any.

[13] I think that the pleas in the statement of claim are largely misdirected because of the shifting ground conveyed by the defendant to the plaintiffs in its letters regarding the source of the jurisdiction upon which it relied. By its letter of 20 November 2002 in which it called the meeting to discuss the complaint and to ascertain whether the club had breached cl 4(c) of the Licence Agreement and indicated its possible cause of action, it expressly informed the club that the Board was not treating the matter under its by-laws but rather relying upon the power it had been given and cl 6 and cl 14.5 of the Constitution and cl 3 of the Licence Agreement. Those provisions are

set out above. By the same letter it disavowed that there was to be a “hearing” but rather a discussion to ascertain the truth. The club said it responded to the invitation by attending at the meeting. It is not pleaded that it then protested that the defendant had no such legal authority under its Constitution.

[14] The resolution passed by the Board after the meeting, conveyed in its letter of 1 December 2002, met with a response that the Constitution limited the powers of the defendant so that they could not act as they had and proposed to do. The defendant responded by saying, contrary to its earlier assertion, that it had not relied upon the Constitution but had at all times relied upon the provisions of the Licence Agreement. It asserted that cl 3 empowered it to pass the resolutions with which the club must comply.

[15] It is the plaintiffs who bring the action. They appear to have accepted the defendant’s assertion that it was exercising power under the Licence Agreement without undertaking any critical examination of that proposition or, if they did, they fail to identify in the statement of claim what they allege is the source of power exercised by the defendant, but which they say was improperly exercised. After conclusion of the hearing I invited submissions from the plaintiffs directed to this issue. The reply from counsel for the plaintiffs was that they did not submit that the Licence Agreement conferred any power on the defendant.

[16] Order that the statement of claim be struck out.