Joondanna Investments Pty Ltd v City of Palmerston & Anor
[2014] NTSC 42

PARTIES:	JOONDANNA INVESTMENTS PTY LTD v CITY OF PALMERSTON AND NESFALL PTY LIMITED
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	46 of 2014 (21426859)
DELIVERED:	2 OCTOBER 2014
HEARING DATES:	10 SEPTEMBER 2014
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Application for a separate trial of a preliminary point – Preliminary point is *locus standi* – Principles applicable to applications for separate trials of issues – Principles relevant to determine standing – Whether a Plaintiff has a "special interest" in the subject matter of the litigation.

Vliestra v Ranger & Anor [2005] NTSC 6;
Dunstan v Simmie & Co Pty Ltd [1978] VR 669;

Carlo Nobili SpA Rubinetterie v Militaire Nominees Pty Ltd [2004] WASC 47;
Tepko Pty Ltd v Water Board (2001) 206 CLR 1;
Australian Conservation Foundation Inc v Commonwealth of Australia (1980) 146 CLR 493;
Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247;
Onus & Anor v Alcoa of Australia Ltd (1981) 149 CLR 27;
Shop Distributive & Allied Employees Association v Minister for Industrial Affairs (SA) (1995) 183 CLR 552;

Supreme Court Rules, rr 23.01, 47.04
Local Government Act, ss 164-167

REPRESENTATION:

Counsel:

Plaintiff:	A. Wyvill SC and L. Nguyen
First Defendant:	M. Crawley
Second Defendant:	T. Hale SC and N. Christrup

Solicitors:

Plaintiff:	Roussos Legal Advisory
First Defendant:	Cridlands MB Lawyers
Second Defendant:	Paul Maher & Associates

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

Joondanna Investments Pty Ltd v City of Palmerston & Anor
[2014] NTSC 42
No. 46 of 2014 (21426859)

BETWEEN:

Joondanna Pty Ltd
Plaintiff

AND:

City of Palmerston
First Defendant

AND:

Nesfall Pty Limited
Second Defendant

CORAM: MASTER LUPPINO

REASONS FOR JUDGMENT

(Delivered 2 October 2014)

[1] The Second Defendant is the developer of a large retail shopping complex to be constructed on land in Palmerston. The Plaintiff is the owner of an existing shopping centre near the site of the Second Defendant's development. The First Defendant is the municipal authority for the area which includes both the site of the Second Defendant's development and the Plaintiff's shopping centre. The First Defendant has granted various rates concessions to the Second Defendant pursuant to Part 11.8 of the Local Government Act.

[2] The Plaintiff's Originating Motion challenges the validity of the rates concessions and seeks consequent declarations. The application currently before the Court is the Second Defendant's summons seeking an order pursuant to Rule 47.04 of the *Supreme Court Rules* ("the Rules") that the Plaintiff's standing to bring the proceedings be dealt with as a preliminary separate trial. Alternative relief of an order staying or striking out the proceedings pursuant to Rule 23.01 of the Rules is also sought although that was not argued at the hearing on 10 September 2014. The First Defendant supports the Second Defendant's application.

[3] The principles applicable to the question of whether or not a separate preliminary trial should be ordered are relatively well settled. The Court has a general discretion to make an order. The discretion, like all judicial discretions, must be exercised properly and that requires that regard must be had to all relevant factors and it must be exercised for sufficient reason.

[4] In *Vliestra v Ranger*,[1] Southwood J, after referring with approval to the decision of the Full Court of the Supreme Court of Victoria in *Dunstan v Simmie & Co Pty Ltd*,[2] confirmed that as a general rule it is only appropriate to order the separate determination of a preliminary issue where the determination of the issue in favour of a party will either put an end to the action or, where there is a clear line of demarcation between issues and the

1 [2005] NTSC 6
2 [1978] VR 669

determination of one issue in isolation from the other issues is likely to save inconvenience and expense.

[5] In that case his Honour, adopting McKechnie J in *Carlo Nobili SpA Rubinetterie v Militaire Nominees Pty Ltd*,[3] summarised the criteria which are commonly considered by a Court prior to the exercise of the discretion to order the trial of a separate question. Of those listed by his Honour, those with application in the current matter are:-

1. A separate trial of issues is only appropriate in clear and simple cases;
2. Separate trials of issues should only be embarked on when the utility, economy and fairness is beyond question;
3. The fact that the separate trial may determine the litigation is relevant;
4. Separate trials of issues may be appropriate where it is likely to save expense and inconvenience;
5. There is a focus in the Rules of the Supreme Court on the expedition of determination of matters before the Court and separate trials of issues may advance the expedition;
6. Separate trials may be productive of delay, extra expense and uncertainty of outcome, which they are intended to avoid. Saving some time is often illusory when the parties have the necessity of making full preparation and factual matters relevant to one issue are relevant to others which overlap; and
7. There is potential for further appeals.

[6] The final criterion is an important one in this case given it appears that there will likely be appeals on the standing issue and irrespective of whether or not the trial is split. This factor was considered by the High Court in *Tepko*

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3 [2004] WASC 47

Pty Ltd v Water Board,[4] where Kirby and Callinan JJ expressed concern that litigation of single issue trials may delay the final determination of a case where the decision on the single issue trial is appealed. They also warned of the waste that may occur where issues overlap. Their Honours said:-

> "The attractions of trials of issues rather than of cases in their totality, are often more chimerical than real. Common experience demonstrates that savings in time and expense are often illusory, particularly when the parties have, as here, had the necessity of making full preparation and the factual matters relevant to one issue are relevant to others, and they all overlap.
>
> … there is an additional potential for further appeals to which the course of the trial on separate issues may give rise. Indeed, that could occur here were this appeal to be allowed and a retrial had in which the remaining issues of causation and damages were decided. Single-issue trials should, in our opinion, only be embarked upon when their utility, economy and fairness to the parties are beyond question."[5]

[7] With that background although I am limited in the extent that I can go into the merits of the standing argument, some discussion of the law applicable to the standing issue is necessary to properly determine the application. It is common ground that whether a plaintiff has standing depends on whether that plaintiff has a "*special interest*" in the subject matter: *Australian Conservation Foundation Inc v Commonwealth of Australia*[6] ("*Australian Conservation Foundation*") and *Bateman's Bay Local Aboriginal Land*

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4 [2001] 206 CLR 1
5 [2001] 206 CLR 1 at 55
6 (1980) 146 CLR 493

Council v The Aboriginal Community Benefit Fund Pty Ltd ("*Bateman's Bay*").[7]

[8] The Plaintiff's supporting affidavit[8] evidences that the basis of the challenge to the validity of the rates concessions involves only the determination of whether there is a breach of the relevant provisions of the *Local Government Act*.[9] The proceedings therefore do not seek to enforce a private right and are properly characterised as proceedings to enforce public law. This is relevant because, as was said in *Australian Conservation Foundation*:-

> "It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to prevent the violation of a public right or to enforce the performance of a public duty…..A private citizen who has no special interest is incapable of bringing proceedings for that purpose, unless, of course, he is permitted by statute to do so."[10]

[9] In the same case Mason J said:-

> "… a plaintiff will in general have a locus standi when he can show actual or apprehended injury or damage to his property or proprietary rights, to his business or to his economic interests…and perhaps to his social and political interests. …as I said in *Robinson v Western Australia* [(1977) 138 CLR at 327-328]: 'The cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another.'"[11]

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7 (1998) 194 CLR 247
8 Paragraphs 30(a), (b), (d) and (e) of the Affidavit of Peter La Pira sworn 15 August 2014
9 Sections 164-167
10 (1980) 146 CLR 493, at 526
11 (1980) 146 CLR 493, at 547-548

[10] In *Onus & Anor v Alcoa of Australia Ltd* ("*Onus*"),[12] in respect of the requirement for a plaintiff to have a special interest, Gibbs CJ, after referring with approval to the statement of the principle in *Australian Conservation Foundation*, said:-

> "The rule is obviously a flexible one since, as was pointed out in that case, the question what is a sufficient interest will vary according to the nature of the subject matter of the litigation."[13]

[11] Mr Hale, counsel for the Second Defendant, argues that a separate trial on standing should be ordered for a number of reasons. Firstly, that a separate trial will determine the question of standing once and for all and, if the Second Defendant is successful, it will lead necessarily to a dismissal of the proceedings. The latter point is self-evidently correct and looked at in isolation is a strong point in the Second Defendant's favour. However regard also needs to be had to the impact of any appeals and I consider the relevance of this below.

[12] Mr Hale's second reason is that if the Second Defendant is successful on standing in a preliminary trial, there will be cost savings in that the parties are spared the cost of preparing for and conducting the trial on the substantive issues. Likewise the Court is spared the time and use of judicial resources in determining the substantive issues. The converse however is that costs to the parties and inefficient utilisation of Court resources will

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12 (1981) 149 CLR 27
13 (1981) 149 CLR 27, at 36

likely occur if the Second Defendant is unsuccessful on standing in a preliminary trial and that may all be aggravated by any appeals.

[13] The third reason overlaps with the second and that is that if the entire matter is heard together, although the trial Judge will still have to decide standing first and if standing is denied the trial Judge will then not likely contingently determine the substantive issues. Accordingly the time utilised in preparing and arguing the substantive issues will have been wasted.

[14] Mr Hale also put emphasis on the nature of the preliminary point as a relevant factor, namely that it concerns whether the Plaintiff even has an entitlement to bring the proceedings. He raised this in reply and submitted that standing should be dealt with as a preliminary point as it was such a fundamental issue. It is indirectly a consideration on the first of his three reasons he put but other than that I cannot agree that the nature of the preliminary point in this case has any greater significance. Other than indirectly, as a relevant consideration it is not one of the considerations set out in *Carlo Nobili SpA Rubinetterie v Militaire Nominees Pty Ltd,*[14] nor do I think that it needs to be.

[15] As to the requirements of the "*special interest*", relevant to the current application, Mr Hale argues that the facts relevant to the standing issue are within a very narrow compass. If the only relevant facts are as he identified them, then in my view it is most likely that those facts would be agreed as

14 [2004] WASC 47

they do not appear controversial. At different times during the course of the hearing both counsel commented that relevant facts were unlikely to be controversial. The identified facts would not be difficult to establish in any case.

[16] Mr Wyvill, counsel for the Plaintiff submits that if the Plaintiff fails on the standing issue and the proceedings are dismissed as a result, the likely appeal will delay the final determination of the matter. On the other hand if the entire matter is heard and the Court determines standing in the Second Defendant's favour, then although the Court might not proceed to rule on the merits of the substantive issue, the entire case will have been heard at first instance and on appeal the Court of Appeal could rule on the entire matter. Mr Wyvill argues that this is preferable as the most efficient outcome having regard to possible appeals. He argues that determining standing separately and on a preliminary basis might result in two separate appeal processes being pursued in the one matter.[15] I agree that would be undesirable, however this needs to be considered along with the other possible scenarios which I discuss later in these reasons.

[17] There is little agreement as to the extent of the overlap between the standing issues and the validity and other issues.[16] Mr Hale asserts that there is a clear division between the standing issue and all other issues. Mr Wyvill disagrees and says that an understanding of the financial impact on the

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15 In *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, the High Court encountered a like problem and had to resolve that by imposing a condition of special leave.

16 The Plaintiff also seeks an extension of time

Plaintiff is critical to making a decision about standing and therefore there is an overlap between those issues. In support he relied on *Shop Distributive & Allied Employees Association v Minister for Industrial Affairs (SA)*[17] where it was held that the existence of a "*special interest*" can depend on the peculiar facts of a case. The special interest which the Plaintiff says gives it the necessary standing is that the rates concessions unfairly discriminate between the Plaintiff and the Second Defendant as the Plaintiff is one of the few ratepayers who conduct activities similar to, or on the same scale as, those proposed by the Second Defendant. The Plaintiff asserts that it will suffer a loss (no details however were given of the nature of the loss) by reason of the unfair competitive advantage which the concessions give to the Second Defendant.

[18] Moreover the Plaintiff says that expert evidence may be required to establish the advantage and that evidence relative to the financial impact of the concessions on the Plaintiff and related matters will be required. This being a matter of submission and essentially opinion, I am unable to objectively test this assertion on the current application. It remains to be seen what actual evidence is lead at the ultimate hearing.

[19] Despite asserting a need for evidence to the extent claimed, Mr Wyvill nonetheless submitted that as the validity issue is a succinct point turning on interpretation and legal argument, the time that will be required for that process in respect of the standing issue will add little to the time required to

17 (1995) 183 CLR 552

hear the entire matter. Mr Hale challenges that and points out that the limitation issue would take time and the validity issue would also take time given the nature and extent of the arguments flagged by Mr Wyvill. Again this is a matter of submission and opinion and, other than noting the apparent contradictions in Mr Wyvill's submission, and although I prefer Mr Hale's assessment of the time required relative to each issue, I am also unable to objectively test this assertion on the current application. Notwithstanding that, the potential for overlap still exists and this remains an important and relevant consideration.

[20] In answer to the Plaintiff's submissions in respect of the special interest, Mr Hale argued that as the subject matter of the proceedings as identified in the Court documents is the validity of the rates concessions, questions about competition cannot be said to be related to the subject matter of the proceedings. He sought to distinguish *Bateman's Bay* as that case involved the establishment of a funeral fund which competed with the party claiming standing. I am not convinced that such a distinction is valid or that the principles should be limited to cases of direct competition in that way. The statements of principles discussed above, particularly *Shop Distributive & Allied Employees Association v Minister for Industrial Affairs (SA)*[18] do not support only such a narrow reading. A wider reading is also consistent with the passage from *Australian Conservation Foundation* cited at paragraph 9 above and also *Bateman's Bay* particularly the passage:-

[18] (1995) 183 CLR 552

> "…the circumstances that the plaintiff conducts commercial activities in competition with those which it seeks to restrain is not necessarily insufficient to provide it with a sufficient interest in the subject matter of the action."[19]

[21] The requirement is that a plaintiff's interest must be related to the relief claimed in the proceedings.[20] I am satisfied that the competition issues between the Plaintiff and the Second Defendant identified by Mr Wyvill are questions related to the relief the Plaintiff seeks in its Originating Motion.

[22] Additionally, as I raised with Mr Hale in the course of argument, the financial impact of the rates concessions on all ratepayers is a possible alternative basis to claim standing in any case. As I understand the process, a municipal corporation sets rates according to the amount that it must raise to meet its expected commitments. If so then any reduction of rates for any one ratepayer necessarily impacts on all other ratepayers in that the rates payable by those other ratepayers will have to increase to make up the shortfall due to the concessions. If evidence supports this contention this may of itself be an arguable basis on which the required special interest may be claimed.

[23] To the extent that the relative amount of time necessary to deal with each of the issues raised on the Originating Motion impacts on the application before the Court, it appears to be the case that the large part of the case time will be taken up by the standing issue. Counsel have estimated that the

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19 (1998) 194 CLR 247 at 266, paragraph 48

20 See *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 266 where the plurality approved of the statement by Aickin J to this effect in *Australian Conservation Foundation*.

whole matter will require two days to hear and that the standing argument would take up the large part of that time and possibly more than one day. Although there is a difference of opinion between counsel as to the relative time required to deal with each of those issues, curiously there does not appear to be any appreciable difference in the total time required to entirely hear the Originating Motion.

[24] Giving due consideration to the relevant factors in accordance with the foregoing, the apparent inevitability of appeals (and whether or not standing is heard as a preliminary point and irrespective of the decision on standing), I think is the most pertinent consideration. There are numerous possible permutations of appeals depending on any orders for bifurcation and the result on the standing issue. For example, if the hearing is split as sought, and the Plaintiff is successful on the standing issue then, if the Second Defendant appeals the decision on standing, then either the hearing on the substantive issues is delayed pending the outcome of that appeal or, if the hearing on the substantive issues proceeds concurrently, there is the risk of that becoming a waste if the Second Defendant were to then be successful on the standing appeal. Another possible scenario is that if the hearing of the issues is split and the Second Defendant is successful on the standing issue then, if the Plaintiff successfully appealed the standing decision, then the overall finalisation of the matter is delayed.

[25] Competing, and equally valid submissions have been made in respect of the possible appeal scenarios. The onus is on the Second Defendant to persuade

the Court that bifurcation is appropriate and the authorities set the standard at a high level. The strongest point in favour of the Second Defendant is that if the entire matter is heard together, the trial Judge will still have to decide standing first and if standing is denied, the trial judge will then not likely to contingently determine the substantive issues. Accordingly the time utilised in preparing and arguing the substantive issues will have been wasted. The strength of this point is diluted by the likely appeals and the various scenarios that could unfold. I am satisfied that the course which will best avoid multiplicity of hearings and therefore achieve the earliest determination of the substantive issues is for all issues to be heard together.

[26] I therefore order that the Second Defendant's application to hear standing as a preliminary point be dismissed. I will hear the parties as to costs and in respect of the stay sought in the Second Defendant's Summons.

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