Cavanagh v Sunners [1999] NTSC 75

PARTIES:	CAVANAGH, Peter William and CAVANAGH, Sheelagh Teresa v SUNNERS, Neil Fred Barry and SUNNERS, Desley Anne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	165 of 1998
DELIVERED:	30 July 1999
HEARING DATES:	18 June 1999
JUDGMENT OF:	MARTIN CJ.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Michael Spargo
Defendant:	Mr Lex Silvester

Solicitors:

Plaintiff:	Peter McQueen
Defendant:	Noonans

Judgment category classification:	
Judgment ID Number:	mar99021
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mar99021
SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA

Cavanagh v Sunners [1999] NTSC 75
No 165 of 1998

BETWEEN:

PETER WILLIAM CAVANAGH
First Plaintiff

AND:

SHEELAGH TERESA CAVANAGH
Second Plaintiff

AND:

NEIL FRED BARRY SUNNERS
First Defendant

AND:

DESLEY ANNE SUNNERS
Second Defendant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 30 July 1999)

[1] The plaintiffs in this action, commenced by writ on 20 August 1998, claim damages alleged to have been caused by nuisance arising from a "back up of surface water" on the plaintiffs' land during the 1997/98 wet season from a dam constructed by the defendants on their land. It is claimed that the back up of water arose because part of the dam wall was too high to permit the

wet season surface water from running off naturally from the plaintiffs land, a drain relocated or constructed as part of the works was too shallow to allow sufficient run off, and earth fill removed to create the dam was so placed as to increase surface water run off from the defendants land to the plaintiffs land. It was claimed that as a result of the obstruction of the natural run off of surface water from their land "a greater part of the plaintiffs land was inundated for a longer period of time during the 1997/98 wet season, thus causing damage", including the loss of 60 mango trees.

[2] In addition to the claim for damages the plaintiffs seek mandatory injunctions to compel the defendants to lower the level of the dam wall and the earth fill to permit proper run off.

[3] *Non-Party Discovery*

On 1 October 1998 Angel J. ordered a non-party, the Northern Territory of Australia, to make discovery to the plaintiff of certain documents specified in the order. The documents appear to relate to the works carried out on the defendants' land. The order was made prior to the delivery of any defence, and it required the non-party to make an affidavit of documents complying with the requirements of ch 1 of the Rules (see O 43), file the affidavit and serve a copy on the plaintiffs (see the definition "make discovery of documents" in r 1.09). The procedure for discovery by parties as set out in O 20 do not apply. The discovery was to be made within 28 days after the order.

[4] On 5 November a defence was filed admitting the defendants carried out the work, but asserting that all the works were carried out, "strictly in accordance with the development approvals granted by the Northern Territory Planning Authority and the Controller of Water Resources". It is also asserted that any problems experienced by the plaintiffs was caused by record rainfalls in that particular wet season. The plaintiffs claim is otherwise simply denied.

[5] On 12 November the non-party filed a list of documents not verified on oath. The time for filing and serving the affidavit of documents of the non-party was extended for 14 days from 15 April 1999 by the Master. An application for further and better discovery was adjourned until 29 April. All parties to the proceedings and the non-party were represented before the Master on that occasion, but there is no transcript of what then transpired. The material available indicates that the Master did no more than extend the time for compliance with the order made by Angel J and stood over the application for further and better discovery initiated by the plaintiffs consequent upon an inspection of the documents detailed in the list. Although only a Judge may make an order for discovery against a non-party, there is no such restriction upon the making of an order extending time for compliance (r 3.02).

[6] The solicitor for the non-party and the solicitor for the plaintiffs seem to have been somewhat at cross purposes when they came before the Master again on 29 April. The solicitor for the non-party sought an "adjournment

of the matter for 28 days", as he had not been in a position to prepare a draft affidavit for his client. He said that was not due to the client's fault. Taken in context "the matter" must have been the order to file and serve the affidavit of discovery by that day, and what was sought, in effect, was an extension of time for compliance.

[7] The solicitor for the plaintiffs said that he opposed any "further adjournment of the application", meaning the application for further and better discovery. The Master made it clear that since there was no evidence before him as to why the order for discovery had not been complied with within the extended time allowed, he did not intend to extend the time further. He left the question of the remedy for breach in the hands of the solicitor for the plaintiff. He adjourned the application, meaning the application for further and better discovery until 27 May.

[8] In the meantime, the plaintiffs applied for an order declaring the non-party to be in contempt upon the grounds of its failure to comply with the orders for discovery. That was listed for hearing on 20 May, upon which date an affidavit of discovery was filed on behalf of the non-party and the application for an order for contempt adjourned to enable the plaintiffs to consider the material in that affidavit.

[9] On 3 June, further evidence was received in respect of the contempt application and submission heard. The application for the declaration was further adjourned until 18 June to enable the non-party to produce further

evidence regarding the delay in compliance with the orders. An affidavit in that regard was sworn on 17 June.

[10] It was directed that the whole of these proceedings be brought within the operation of O 48 under my control and both the parties and the non-party were invited to bring forward any applications they may have in the proceedings to be dealt with on 18 June. On that date, the non-party applied for orders extending the time for compliance with the Master's order regarding discovery and to set aside that order. Consideration of the plaintiffs contempt application, the non-party's application and the plaintiffs application for further and better discovery were adjourned to a date to be fixed to enable the solicitors for the plaintiffs to take instructions as to whether the order for discovery had been complied with and whether further details provided met the request for further and better discovery. Those matters have yet to be finalised.

[11] Counsel then appearing for the defendants said that his understanding was that at the time the order for discovery against the non-party was made, on the application of the plaintiffs, it was agreed that copies of the discovered documents would be made available to his clients. A copy of the list of documents filed by the non-party in November 1998 had been supplied, but not the later material. He sought an undertaking from counsel for the non-party that he be supplied with a copy of all lists of discoverable documents and given the opportunity to inspect the documents. Counsel for the non-

party indicated that subject to instructions and the question of cost, he thought that that could be done. No order was made.

[12] *Defendants application to strike out the plaintiffs' claim and request for particulars*

To the history of the pleadings set out above, there should be added a note that on 18 March 1999 the plaintiffs were granted leave, by consent, to file an amended Statement of Claim. A copy of the proposed amended Statement of Claim was annexed to an affidavit in support of the application. No such amended Statement of Claim has been filed and the time for doing so has expired and the order has ceased to have effect (r 36.02). Counsel for the plaintiffs indicated to the Court on 20 June that his clients did not seek to rely upon that proposed amended Statement of Claim. The defendants had on foot an application for orders that the plaintiffs claim be struck out for want of prosecution, or alternatively that they provide further and better particulars which had been set out in a long letter of 5 November 1998, being a request raised in respect of the original Statement of Claim, after the response to earlier requests were said to have been unsatisfactory. I note at this stage that some of the particulars sought go to the identification of the mango trees alleged to have been damaged and the defendants linked particularisation in that regard with a request for inspection of the trees, a matter to which I will return a little later.

[13] The request for particulars was followed up during November and December. The only response was the draft of the proposed amended

Statement of Claim delivered on 10 December, but upon which the plaintiffs no longer seek to rely. The request for particulars was again raised by letter of 4 March 1999.

[14] There was no evidence on behalf of the plaintiffs in respect of the application for particulars, and they have not sought to argue that any of the requests should be disallowed. What they say is that as it now appears the non-party has made a full discovery they will be putting their house in order and if given leave will provide the amended Statement of Claim including the proper particulars within 28 days.

[15] In all the circumstances I do not think it just that the plaintiffs claim be struck out for want of prosecution. However, the plaintiffs must now promptly formulate their claim and provide proper particulars. They have been given ample notice from the defendants as to the problems the defendants say they have had in meeting the original Statement of Claim, both as to matters of substance and in relation to particularisation.

[16] I do not think it is appropriate to grant leave without notice having been given to the defendants and the Court of the precise terms of the amendment sought. Subject to what follows, the plaintiffs should prepare a draft of the proposed amended Statement of Claim and particulars. A draft is to be delivered to the solicitors for the defendants and filed within 28 days. A summons will not be necessary, nor will any affidavit be required. At the time of service and filing the plaintiffs are to obtain a date upon which the

application for leave to amend can be heard. Further consideration of the defendant's summons of 15 June is adjourned sine die.

[17] *Defendants' application for access and inspection*

At the heart of these proceedings is a claim by the plaintiffs that the construction of the works upon the defendants land in the dry season of 1997 led to a back up of water upon the plaintiffs land during the following wet season, and that that back up of water has caused damage to the land and the loss of 60 mango trees.

[18] It is apparent that the parties are very distrustful of each other. In September last the defendants sought early access for themselves and their representatives to go upon the plaintiffs land for the purposes of inspecting mango trees. They threatened an application to obtain an order if the plaintiffs did not advise a time and date for the inspection by 14 October. In his reply, prior to that date, the solicitor for the defendants indicated that "limited access" would be permitted subject to the name and qualifications of the representatives being disclosed. Instructions would then be sought. Under no circumstances were the defendants themselves to be permitted to enter upon the land. The defendants declined to provide the information and insisted that they be given access. In a letter of 29 October they noted an admission that the plaintiffs were in the process of cutting down dead mango trees, which might be the subject of the proceedings, and referred to the possibility that evidence was being removed (it is also obvious that if the

trees in question, or any of them, were the trees in relation to which the claim was made, the defendants' representatives would have no opportunity to inspect them). The allegation was denied by the solicitor for the plaintiffs asserting that what he had said was that his clients were anxious for the inspection to occur so that they could begin removing the dead trees prior to the onset of the wet season. He then made plain that the request for identification of the representatives was necessary because the plaintiff was conducting horticultural experiments which he wished to remain confidential. Mr Sunners would not be permitted on the land; there was no need for him to inspect.

[19] The defendants do not seek to put forward any particular reason why they needed to go onto the land to inspect the trees, but on 5 November they raised a further basis for requiring access, that is, for the purpose of "taking levels to establish ground surface heights in the locations particularised by you". It was then alleged that trees had been recently cut down. If access was not agreed to by 4pm the following Monday, it was said that an application would be made to strike out the plaintiffs claim. And so the argument raged, the defendants insisting they and their unidentified representatives be given access and the plaintiffs resisting on the grounds of the need to protect the experiments and asserting that under no circumstances would the defendants or any member of their family be permitted on the land.

[20] In November, the defendants said that Mr Sunners reasonably required access so that he could "take his own levels and conduct his expert" on the land. The plaintiff then agreed to Mr Sunners coming on to the land in company with the expert provided he was accompanied by the defendants farm manager and certain other conditions were agreed to, particularly as to time and place. According to the defendants the plaintiffs' delay led to the expert no longer being available until January of this year. The plaintiff's response was to seek the defendant's concurrence to the removal of the dead trees by the end of December. I note that that would have effectively put an end to the opportunity for the plaintiff's expert to inspect them if the expert was not to be available until January. There does not appear to be any reply to that, but after further exchanges of correspondence and negotiations over the telephone, arrangements for the inspection of the land were included in late January. It is unclear whether any of the dead trees, the subject of the damaged claimed had by then been removed.

[21] The question of Mr Sunners' access to the plaintiffs' land to take levels to establish contours on the property remains outstanding. The only evidence as to Mr Sunners qualifications is his own conclusion that he is "experienced in the use of laser levels". I am quite unable to say whether the nature of his experience with laser levels equips him properly for the task which he wishes to have undertaken. He wishes to do it himself to save expense. In my view a Court ought not to compel a property owner to allow another access to the property, unless the person is qualified to carry out the

objective as quickly and efficiently as possible and so as to cause the least disruption to the owner.

[22] Rule 37.01 enables the Court to make orders for inspection of any property including as to entry upon land in order to make observations of the property. Any such order may be accompanied by a direction or subject to a term or conditions (r1.10(1)(b)). The taking of levels is to establish facts relating to the contours of the land arrived at after the application of accepted techniques and the use of scientific instruments. It seems to me that that type of information would not ordinarily be open to question. However, given the relationships between parties, it is just not possible to think that the levels as determined by the defendants are likely to be accepted by the plaintiffs. The papers indicate that ascertaining the levels on the plaintiffs' property would not be the only levels which may need to be ascertained for the purposes of these proceedings.

[23] The defendants say that the task of taking levels cannot be undertaken until certain particulars which they have sought have been supplied. They will not be available until the plaintiffs have been granted leave to amend the Statement of Claim.

[24] As some of these observations do not arise from the submissions of the parties I will hear them further when the necessary particulars have been supplied. At that time I suggest the defendants come prepared with the

name of a suitably qualified person to carry out the work, which name has been previously submitted to the plaintiffs for their consideration.

[25] The application also seeks orders enabling access for the purposes of taking photographs, mapping the property and improvements thereon, including trees, and enabling the preparation of expert engineers reports in these proceedings and in action No 240 of 1998. These issues were not much agitated before me and I will hear the parties further when the issue of access to take levels is revisited. The orders sought are far too broad as they stand. In my opinion, there should be greater precision, but that may not be able to be achieved until the Statement of Claim is amended and the particulars given. The person for whom access is sought must be clarified. If Mr Sunners maintains his application that he be granted access, then valid reasons will need to be identified. I note that the plaintiffs are not presently parties to the other action and r37.01(3) may need to be considered in that regard.

[26] Liberty to apply generally.
