Bryjed P/L v Golden Prawn Holdings P/L & Anor [2005] NTSC 65

PARTIES:	BRYJED PTY LTD (ACN 009 638 297) v GOLDEN PRAWN HOLDINGS PTY LTD (ACN 106 571 028) and NORMAN JAMES SMITH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	12/05 (20502664)
DELIVERED:	10 October 2005
HEARING DATES:	7 July and 9 August 2005
JUDGMENT OF:	THOMAS J

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellant:	TS Lee
1st & 2nd Respondents:	C Ford

Solicitors:

Appellant:	TS Lee & Associates
1st & 2nd Respondents:	Cridlands

Judgment category classification:	C
Judgment ID Number:	tho200510
Number of pages:	17

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

Bryjed P/L v Golden Prawn Holdings P/L & Anor [2005] NTSC 65
No. 12/05 (20502664)

BETWEEN:

BRYJED PTY LTD
Appellant

AND:

GOLDEN PRAWN HOLDINGS P/L
First Respondent

NORMAN JAMES SMITH
Second Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 10 October 2005)

[1] In this matter, two applications were listed before the Court.

[2] Mr Thong Sum Lee, on behalf of the appellant, brought an application to extend time to file an appeal from a decision of the Master. On 5 May 2005, the Master delivered written reasons for his decision ordering the plaintiff to provide security for the defendants' costs in the sum of $115,000.

[3] The application to seek an extension of time to lodge a notice of appeal was filed on 22 June 2005. The proposed notice of appeal was annexed to an affidavit of Mr Lee sworn 22 June 2005 in support of the application.

[4] Mr Cameron Ford, on behalf of the first and second respondents, stated that he proposed to argue that the application to extend time to lodge a notice of appeal be dismissed on the basis that the notice of appeal does not disclose any arguable grounds of appeal.

[5] Mr Ford acknowledged that on 9 June 2005, when this matter had previously been before the Court, counsel for the respondents had indicated that the respondents would consent to an extension of time to file a notice of appeal if a notice of appeal was filed within 14 days.

[6] Mr Ford submitted that this concession was predicated upon a valid notice of appeal being filed. He further submitted that the notice of appeal that had been filed, did not disclose any arguable grounds of appeal. Mr Ford stated that if the Court ruled he was bound by the earlier indication of a consent to the extension of time for leave to appeal, he had a further application to make on behalf of the respondents. The application the respondents would then want to pursue, was an application to strike out the notice of appeal. These two applications came before the Court for hearing on 7 July 2005.

[7] Mr Lee commenced with his application for an extension of time in which to file a notice of appeal. The application is opposed by Mr Ford on the basis that the proposed notice of appeal does not disclose any valid grounds of appeal.

[8] In his written outline of submissions on behalf of the appellant dated 7 June 2005, Mr Lee has set out the following matters as being undisputed facts:

- "The Applicant is the registered proprietor of the Crown Lease in Perpetuity Number 539251 and has conducted and operated prawn farming on the property located at Section 1864 Channel Island Road, Wickham in the Northern Territory of Australia since about 28 June 1996 ('the leased premises').

- The Respondents entered into a registered sublease of Crown Lease in Perpetuity Number 539251 dated 17 October 2004 with the Applicant for a term of three years commencing on 31 August 2003 and expiring on 31 August 2006 ('the sub-lease').

- The Respondents continued on with the prawn farming business.

- The Respondents abandoned the leased premises in about September 2004.

- Subsequently, the Respondents were in default of the terms of the sub-lease, resulting in financial losses to the Applicant in excess of $436,000.00.

- The key financial assets of the Applicant consist of:

  a) the leased premises, valued at two million dollars ($2,000,000,000.00) (sic) in 17 October 2003 and

  b) a 1998 XKR8 Jaguar, registration number XKR98, valued at one hundred thousand dollars ($100,000.00) in 16 September 2003."

[9] The appellant's essential argument is that the security for costs should not be granted for the following reasons:

1. The appellant's lack of means had been brought about by the respondents' wrongful conduct, in that they defaulted in the terms of the registered sub-lease number 539251 dated 17 October 2003.

2. The inability of its sole shareholder to comply with an order to provide security would effectively frustrate the litigation.

[10] It is the position of the appellant that it issued proceedings to protect its rights and entitlements under the registered sublease. The appellant submits that the respondents are the aggressors. It is the appellant's claim that the respondents defaulted in the terms of the sublease, this in effect forced the appellant into legal proceedings, not merely to enforce its claim, but to prevent its claim from being extinguished. The appellant asserts that the first attack by the respondents came with the default of payment of rent in the sum of $200,000 plus GST and secondly, with the respondents abandonment of the leased premises, thereby devaluing the property – see *Amalgamated Mining Services Pty Ltd v Warman International Ltd & Anor* (1988) 88 ALR 63.

[11] In his reasons for decision, the Master noted that the assertions by the plaintiff (appellant) as to its financial situation and how it arose are not supported by evidence. The Master also noted that Mr Trezise had not explained his financial embarrassment and had provided no direct evidence as to his financial resources or lack of them. The Master concluded that "on the basis of the evidence it is not possible to say with any certainty that an order for security would stultify this proceeding".

[12] I accept the submission made by Mr Lee that the exercise of the Court's power to order security for costs is not mandatory but is discretionary having regard to the circumstances of the case – see *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609 at 625-627.

[13] The application for an extension of time to appeal is from a decision of the Master delivered on 5 May 2005. On that date, the Master made an order that:

> "The plaintiff should provide security for the defendants costs in the sum of $115,000.00 by paying that sum into Court, or providing some other form of security acceptable to the Registrar, within two months. The proceeding will be stayed until the security is provided. There will be liberty to apply."

[14] An extension of time is required because a notice of appeal was not filed and served within the time limited by Rule 85.12(1)(a) which provides as follows:

> "(1) A notice of appeal shall be filed and served –
>
> (a) subject to paragraph (b), within 28 days after –
>
> (i) the material date; or
>
> (ii) the date on which leave to appeal was granted;"

The right of appeal is a substantive right, not a matter of procedure – see *Territory Insurance Office v Kouimanis Enterprises Pty Ltd; sub nom* (2002) 12 NTLR 210 at 213.

[15] The application for an extension of time in which to file and serve a notice of appeal was accompanied by a notice of appeal filed on the same date. The notice of appeal provides as follows:

> "1. The Appellant appeals from the whole of the judgment of the Master, Mr. Coulehan given on 5 May 2005 at Darwin.
>
> **GROUNDS**:

The Master erred in deciding that the Appellant should provide security for the Respondents' costs in the sum of $115,000.00 by paying that sum into Court, or providing some other form of security acceptable to the Registrar, within two months on the following grounds:

2. The decision was against the evidence, in that:

(a) the Master erred in determinations of fact, as there was no evidence, and/or no credible evidence, upon which to base those findings of fact;

(b) the Master took into account and considered irrelevant matters in making determinations of fact.

(c) the Master erred in failing to take into account, and/or, ignored the weight of the independent and/or uncontested evidence; and

(d) the Master erred in determinations of fact by making those considerations based upon other findings of fact that were wrong, when:

(i) The Master found that 'There is no expert evidence as to the value of the lease, although the sub-lease contained an option to purchase in the sum of $2,000,000.00, later varied to $1,900,000.00.'

(ii) The Master found that 'In particular, it will be alleged that it was represented that the plaintiff would obtain operating licences for the prawn farm, but there was no valid licence, and there were many costly matters to be attended to before a licence would be granted. Copies of licences have been produced on behalf of the plaintiff, but they do not relate to the relevant period. The first defendant claims to have lost approximately $1,000,000.00, which will be the subject of a counter-claim.'

(iii) The Master found that 'His financial embarrassment is not explained and he has provided no direct evidence as to his financial resources or lack of them. On the basis of the evidence, it is not possible to say with any certainty that an order for security would stultify this proceeding.'

(iv) The Master found that 'Mr Trezise deposes that the reason for the plaintiff's impecuniosity is the failure

of the first defendant to perform its obligations under the sub-lease, in particular, the non-payment of rent, the sale of the plant and equipment, and leaving the prawn farm in a state of disrepair.'

(v) The Master found that 'The proposed counterclaim appears to arise out of the same circumstances. It would be unfair to the plaintiff to order a stay of the claim while the counterclaim may continue, but the defendant has indicated that the counterclaim will not be pursued if the plaintiff's claim is stayed.'

(vi) The Master found that 'The plaintiff has not made any submissions as to the merits of this assessment, when the question was raised it was merely submitted that the defendant should have provided a copy of its costs agreement with its solicitors. The relevance of this was not explained.'

(vii) The Master found that 'The defendants have established the grounds for the exercise of the Courts jurisdiction to order security for costs … but the impecuniosity of the plaintiff is a significant factor in the exercise of the discretion …. On the evidence, the defendants have a strong case for security for costs, which could only be denied on an arbitrary basis.'

3. The Master was wrong in law as his determination placed all the liability upon the plaintiff for the security of costs without considering all the other relevant circumstances of the case.

4. The Master's decision was primarily and fundamentally based upon the plaintiff's impecuniosity and the Master misdirected himself as to the weight and credit when cogent evidence was before the Court to prove that the defendants' breach of the sub-lease was the sole cause of the impecuniosity of the plaintiff.

5. The Master misdirected himself as to the facts and failed to grasp the fact that the impecuniosity of the plaintiff could have been avoided if the defendants did not breach the fundamental terms of the sub-lease.

6. The Master's decision was in all the circumstances was unsafe and unsound.

NOTICE OF CONTENTION

TAKE NOTICE that the Appellant craves leave to introduce new evidence by way of the affidavit of Murray Arthur Riley in support of its appeal.

ORDERS SOUGHT:

1. That the whole of the judgment of the Master delivered on 5 May 2005 at Darwin be set aside.

2. That the costs of interlocutory application before the Master be paid by the respondents.

3. That the costs of this appeal be paid by the respondents."

[16] In this matter, a statement of claim has been filed. There have been no defences filed.

[17] The issue before the Master was a claim on behalf of the defendants seeking an order that the plaintiff provide security for their costs relying on Order 62 of the Supreme Court Rules and s 1335 of the Corporations Act. The grounds for the claim being, that the plaintiff is a corporation and the respondents/defendants have reason to believe the appellant/plaintiff has insufficient assets in the Territory to pay the costs of the defendants, if ordered to do so.

[18] The substantial claim is for damages arising out of alleged breaches of a sublease between the appellant and the first respondent. The appellant alleges the first respondent is in breach of its obligations to pay the rent which, together with interest, amounts to approximately $468,000. The sublease relates to land at Channel Island referred to as the "prawn farm". It is a condition of the sublease that it will only be used for aquaculture and ancillary purposes.

[19] In his reasons for decision the Master canvassed the evidence. He concluded that the assets of the appellant/plaintiff will be insufficient to pay the costs of the defendants/respondents if so ordered. At par 9 of his reasons for decision the Master stated:

> "The defendants have established the grounds for the exercise of the Courts jurisdiction to order security for costs. The Court has an unfettered discretion, without any predisposition, to make such an order, but the impecuniosity of the plaintiff is a significant factor in the exercise of the discretion (see *Watkins v Ranger Uranium* 35 NTR 27, 33-34 and *Ariss v Express Interiors* [1996] 2 VR 507, 514). There are well known factors which may be considered (see *Bryan E Fencott and Associates v Eretta* (1987) 16 FCR 497, 512-5 and *Milingimbi Educational and Cultural Association v Davis* (1990) NTSC 35, paragraph 15), some of which have been canvassed above. On the evidence, the defendants have a strong case for security for costs, which could only be denied on an arbitrary basis. I have considered whether the security should be given in stages, but the evidence does not disclose any basis on which such an order could be made, and it may not assist the plaintiff if the full amount cannot be raised over the course of the proceeding."

[20] An appeal from the Master is an appeal in the strict sense – Supreme Court Rules R77.05(2). This rule provides as follows: "An appeal under this rule is an appeal in the strict sense." This appeal is from an interlocutory decision, on practice and procedure, which was discretionary.

[21] An order granting security for costs is discretionary – *Classic Ceramic Importers v Ceramica Antiga SA* (1994) 12 ACLC 549.

[22] There is a strong presumption in favour of the correctness of a discretionary decision – *Australian Coal & Shade Employees Federation v Commonwealth* (1953) 94 CLR 621 per Kitto J at 627.

[23] I adopt the submission made by Mr Ford that in summary the appellant must show:

1. a wrong principle was applied, or
2. irrelevant matters were considered, or
3. relevant matters were not considered, or
4. an unreasonable or plainly unjust result.

See *Davies v Pagett* (1986) 10 FCR 226 at 227.

[24] The notice of appeal contains a number of grounds commencing with Ground 2. Ground 2(a), (b) and (c) are general statements and do not address the specific complaint as to the Master's decision. Ground 2(d) states: "the Master erred in determinations of fact by making those considerations based upon other findings of fact that were wrong". The appellant then lists seven areas where the appellant asserts the Master was wrong. These have been set out in the notice of appeal, details of which are included in these reasons for judgment.

[25] With respect to each of the seven matters of complaint, the appellant does not put forward anything to support the contention that the Master was wrong. For example:

(i) The Master said there was no expert evidence as to the value of the lease. Mr Lee does not point to any expert evidence that was before the Master. There is no reason to find this statement to be an error.

(ii) The appellant does not point to any evidence that was before the Master as evidence of a valid licence being held during the relevant period. The licences that were exhibited did not cover the relevant period.

(iii) The appellant has not pointed to the evidence that was before the Master to explain the financial embarrassment claimed by Mr Trezise, or to demonstrate that the Master's finding that there was no such evidence, is wrong.

[26] With respect to (iv), (v) and (vi) the appellant does not point to any evidence before the Master that shows these findings to be incorrect.

(vi) The Master did not make a finding that the impecuniosity of the plaintiff was the only factor he took into account. He canvassed the other matters to be taken into account in the course of his reasons for decision and noted that the plaintiff bore an onus which had not been discharged.

[27] With respect to Grounds 3-6 (inclusive) of the notice of appeal, the appellant has not identified the basis for the submission that the Master was wrong. On the reading of the Master's reasons for decision, he has considered circumstances other than the impecuniosity of the plaintiff. There is no support for the assertions that the Master misdirected himself as to the law or the facts.

[28] Mr Lee sought to put forward further affidavit material on this appeal.

[29] This being an appeal in the strict sense, it is not a rehearing of the matter.

[30] There are clear guidelines as to the limited circumstances in which this Court can receive fresh evidence on an appeal of this nature.

[31] There is no rule in the Supreme Court Rules which deals with the reception of fresh evidence on an appeal from the Master. There is a rule that deals with the reception of fresh evidence in an appeal from a single judge to the Court of Appeal R84.23 which provides as follows:

> " (1) This rule applies, unless the Court otherwise directs, to an application to the Court to receive evidence in a proceeding on an appeal additional to evidence in the Supreme Court.
>
> (2) An application under this rule shall be made by motion on the hearing of the appeal without filing or serving any form of application.
>
> (3) The grounds of an application to which this rule applies shall be stated in an affidavit.
>
> (4) Evidence necessary to establish the grounds of an application to which this rule applies, and the evidence which the applicant wishes the Court to receive, shall be given by affidavit.
>
> (5) An applicant shall file the affidavit required under this rule not later than 21 days before the hearing of the appeal.
>
> (6) The evidence of a party to an appeal, other than the applicant, shall, unless the Court or a Judge otherwise orders, be given by affidavit filed not later than 14 days before the hearing of the appeal.
>
> (7) A party to an appeal shall, not later than the time limited for him to file an affidavit under this rule –
>
> (a) lodge as many copies of the affidavit as the Registrar directs; and

(b) serve 2 copies of the affidavit on each other party to the appeal."

[32] The reception of fresh evidence on appeal is dealt with in Williams, Civil Practice and Procedure Victoria I 64.01.120, 550 and 560. It is only in exceptional circumstances that fresh evidence will be admitted on appeal. There are four important matters an appellant who wishes to adduce fresh evidence must address:

1. Describe clearly what evidence is sought to be introduced.

2. That the evidence was not in the possession of the appellant at the time of the original trial.

3. That the appellant could not, by reasonable diligence, have obtained the evidence before the trial; and

4. That, if given at the trial it would have produced the opposite result.

[33] Mr Lee on behalf of the appellant, sought to rely on other affidavit material prepared since the decision of the Master delivered on 5 May 2005 in addition to the affidavit of Mr Riley affirmed 27 June 2005. These include affidavits of Thong Sum Lee sworn 1 June 2005 and 22 June 2005, affidavit of Ronald Thomas Trezise sworn 8 June 2005.

[34] The appellant has not satisfied the criteria for introducing new evidence as set out in Williams, Civil Practice and Procedure Victoria I 64.01.120, 550 and 560 as set out above in these reasons for judgment at par [32].

[35] I have come to the conclusion that the appellant has not established a basis for the Court to receive this fresh evidence.

[36] Mr Lee did not draw to the attention of this Court any evidence in the affidavit of Ronald Trezise, sworn 8 June 2005, that was not available to the appellant prior to the hearing before the Master. Mr Lee states that the appellant was not able to make contact with Mr Riley until after the decision of the Master was delivered. There is no evidence about efforts made to contact Mr Riley or why he was unavailable. There was a bald assertion from the Bar Table that Mr Riley did not return a call to his mobile number. This is not sufficient to establish a basis for the tender of the affidavit of Murray Riley sworn 27 June 2005.

[37] The affidavits of Ronald Trezise sworn 8 June 2005 and Thong Sum Lee sworn 1 June 2005 and 22 June 2005, do not take the matter any further than the evidence that was before the Master. The Master stated at paragraph 3 of his reasons for decision:

> "The evidence is that the only asset of the plaintiff in the Territory is the prawn farm. The lease is subject to two mortgages, which secure debts of around $1,300,000. There is no expert evidence as to the value of the lease, although the sub-lease contained an option to purchase in the sum of $2,000,000, later varied to $1,900,000. There is evidence that the lease was auctioned for sale in December 2004, but no bids were received and the property was passed in at auction. Mr Trezise, the sole director and shareholder of the plaintiff, and who appears to identify his fortunes with that of the plaintiff, deposes that the prawn farm is now in such a condition that its value has 'decreased dramatically' and that he is 'financially embarrassed'. There is no evidence that suggests that the plaintiff's financial circumstances will change before this proceeding is resolved. It may

be concluded that the assets of the plaintiff will be insufficient to pay the costs of the defendants if so ordered."

[38] There is no evidence in these affidavits that was not known or available to the appellant prior to the hearing before the Master. I am not persuaded that if these affidavits had been before the Master this would have produced a different result. There has been no basis laid for their tender on this appeal.

[39] In addition to this problem there are large segments of the affidavit of Murray Riley sworn 27 June 2005 that are inadmissible.

[40] In his submissions on appeal, Mr Lee put forward the affidavit of Murray Riley as substantiating the fact that the defendants did hold a valid licence. The Master had found that there was no valid licence during the relevant period and there were many costly matters to be attended to before a licence would be granted. The affidavit of Mr Riley deposes to an aquaculture licence which issued in January. He does not say which year. No copies of any licence are attached to his affidavit.

[41] The relevant period is from August 2003 onward. The Master had before him copies of certain licences annexed to the affidavit of Mr Lee sworn 15 April 2005. The last licence expired on 30 June 2003.

[42] Mr Ford identified a number of objections to matters contained in the affidavit of Murray Arthur Riley affirmed 27 June 2005. These can be referred to under a number of broad categories:

1. Aspects of the affidavit that do not comply with the requirements of hearsay evidence and affidavits on interlocutory applications.

I note that Supreme Court Rule 43.03(2) provides as follows:

> "(2) On an interlocutory application an affidavit may contain a statement of fact based on information and belief if the grounds are set out."

[43] In this affidavit, Mr Riley does not set out the source of his knowledge and belief. Examples of this appear in the paragraphs set out below of Mr Riley's affidavit:

> "(4) It was stated and I believe ….
>
> (5) Prior to the sublease being taken over by defendants … the income received by the defendants.
>
> (6) It was clear from the outset of taking up the position, the defendants knew that 'in general terms'.
>
> (7) What I can say is that anyone with operational knowledge of aquaculture …
>
> (8) I am sure the defendants were aware …
>
> (10) I believe that the continual financial burden …"

2. There are matters set out in paragraphs (9) and (11) which are opinion evidence and the expertise of Mr Riley to give such evidence has not been established.

3. The affidavit contains a number of general statements that are of little, if any, probative value. For example: "At the time of the unexpected pullout of the defendants from the prawn farm in September 2004, …"

[44] There is so much inadmissible material in the affidavit of Mr Riley affirmed 27 June 2005, as to render it of little value in its present form.

[45] On 9 August 2005 I asked for the matter to be re-listed. The purpose of this was to ask Mr Ford for the respondent and Mr Lee for the appellant, if there was any reason why this Court could not proceed to deal with the merits of the appeal itself. I did this because it appeared to me on reading through all the material at the conclusion of the submissions on the two interlocutory applications, that this Court had essentially heard the arguments that would be advanced on appeal. Both Mr Ford and Mr Lee agreed that they had concluded all the submissions they wanted to make and agreed it would be appropriate for me to deal with the appeal itself as well as the interlocutory applications and conclude the appeal on the basis of the submissions already put to the Court.

[46] On the interlocutory applications I would refuse the application for an extension of time to lodge the notice of appeal and/or I would dismiss the notice of appeal as disclosing no valid ground of appeal. Having also heard arguments as to the merits of the appeal, I would order that the appeal be dismissed.

[47] Accordingly, I order that the appeal be dismissed.

[48] I grant leave to apply on the question of costs if the parties are unable to come to agreement on the issue of costs.

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