

*Territory Pastoral Company Pty Ltd & Others v Elders Ltd* [2009] NTSC 69

**PARTIES:** TERRITORY PASTORAL COMPANY PTY LTD & S J MEASEY & D J THOMSON TRADING AS CERES DOWNS PARTNERSHIP (ABN 71 367 643 257)

v

ELDERS LTD (ACN 004 045 121)

**TITLE OF COURT:** SUPREME COURT OF THE NORTHERN TERRITORY

**JURISDICTION:** SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION

**FILE NO:** 130 of 2007 (20733021)

**DELIVERED:** 10 December 2009

**HEARING DATES:** 19 November 2009

**JUDGMENT OF:** MASTER LUPPINO

**CATCHWORDS:**

Joinder or substitution of parties – Assignment of rights of the proceedings to another party – whether joinder or substitution is appropriate.

*Law of Property Act* s 182; *Supreme Court Rules* O 9.02, 9.06, 9.09, 13.09

*APT Finance Pty Ltd v Bajada* [2008] WASCA 73

**REPRESENTATION:**

*Counsel:*

Plaintiff:

Mr Anderson

Defendant: Mr Liveris

*Solicitors:*

Plaintiff: Cridlands MB

Defendant: Clayton Utz

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

*Territory Pastoral Company Pty Ltd & Others v Elders Ltd* [2009] NTSC  
No 130 of 2007 (20733021)

BETWEEN:

**TERRITORY PASTORAL COMPANY  
PTY LTD & S J MEASEY & D J  
THOMSON TRADING AS CERES  
DOWNS PARTNERSHIP (ABN 71 367  
643 257)**  
Plaintiff

AND:

**ELDERS LTD (ACN 004 045 121)**  
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 10 December 2009)

- [1] In this matter a generally endorsed Writ issued on 5 December 2007. Remarkably, a Statement of Claim has not yet been filed.
- [2] The current application is by Interlocutory Summons filed by the Plaintiffs on 9 July 2009 seeking an order adding another plaintiff to the proceeding, namely Hot Springs Pastoral Company Pty Ltd (“HS”).
- [3] The endorsement to the Writ shows that the claim is based on a contract allegedly made between the Plaintiffs and the Defendant in November 2004 for the supply of a specific seed. The seed was to be used for the purposes

of growing pasture. In turn the crop was intended to be used partly for sale as hay and partly for livestock feed. The Plaintiffs allege that the seed supplied was not the specified seed and that loss flows as a result.

- [4] By various agreements made on 22 June 2007 the current Plaintiffs purported to sell the assets of their business to HS, a related company, with effect on and from 1 July 2007. Although this is after the cause of action accrued, it precedes the issue of the Writ. The current Plaintiffs claim that it was intended that the rights the subject of these proceedings were to be included in that sale. However, the relevant documentation apparently does not specifically include these rights. As notice of the assignment in compliance with section 182 of the *Law of Property Act* was not given, in any event the assignment was equitable only. Notice of the purported assignment was not given until 13 July 2009, i.e., shortly after the filing of the current Interlocutory Summons.
- [5] To complicate the matter further and no doubt due to the uncertainty of the effect of the preceding assignment, on 14 October 2009 the current Plaintiffs entered into a Deed of Assignment with HS whereby they assigned the rights the subject of these proceedings to HS. That Deed recited the intended assignment in June 2007. That Deed was executed after the filing of the current Interlocutory Summons. Notice of that assignment was given on 19 October 2009 and therefore that assignment appears to have been perfected.

[6] The current Interlocutory Summons was initially brought pursuant to Rule 9.02(1) of the *Supreme Court Rules*. The Plaintiffs have sought leave to amend the Summons to additionally rely on Rules 9.06 and 9.09. The Defendant does not object to that amendment and the matter was argued on that basis.

[7] Those Rules provide as follows:

### **9.02 Permissive joinder of parties**

(1) Two or more persons may be joined as plaintiffs or defendants in a proceeding –

(a) where –

- (i) if separate proceedings were brought by or against each of them, a common question of law or fact would arise in all the proceedings; and
- (ii) all rights to relief claimed in the proceeding (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions; or

(b) subject to subrule (2), where the Court, before or after the joinder, gives leave to do so.

### **9.06 Additional, removal, substitution of party**

At any stage of a proceeding the Court may order that –

(a) a person who is not a proper or necessary party, whether or not he was one originally, cease to be a party;

(b) any of the following persons be added as a party:

- (i) a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated on; or
  - (ii) a person between whom and a party to the proceeding there may exist a question arising out of, or relating to or connected with, a claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding; or
- (c) a person to whom paragraph (b) applies be substituted for one to whom paragraph (a) applies.

### **9.09 Change of party on death, bankruptcy**

- (1) Where a party to a proceeding dies but the cause of action survives, or where a party becomes bankrupt, the proceeding shall not abate by reason of the death or bankruptcy but may be carried on in accordance with subrule (2).
- (2) Where at any stage of a proceeding the interest or liability of a party is assigned or transmitted to or devolves on another person, the Court may order that the other person be added as a party to the proceeding or made a party in substitution for the original party and that the proceeding be carried on as so constituted.

[8] What is a question for the purposes of the phrase “questions in the proceeding” contained in Rule 9.06(b)(i) is determined by reference to the definition of “question” in Rule 1.09(1) which provides:-

**“question”** means a question, issue or matter for determination by the Court, whether of fact or law or of fact and law, raised by the pleadings or otherwise at any stage of a proceeding by the Court, by a party or by a person, not a party, who has a sufficient interest.

[9] The Plaintiffs' case is that joinder of HS, as opposed to the substitution of HS, is required until the validity of the assignments of the current Plaintiffs' right in the proceedings to HS is determined. There are two possible assignments in play here, namely the claimed intended assignment when the assets of the business were transferred to HS referred to in paragraph 4 above and that effected pursuant to the Deed referred to in paragraph 5 above. Mr Anderson for the Plaintiffs submits that joinder, as opposed to substitution, is both necessary and appropriate to ensure that the dispute between the parties (and I include HS in that reference for the moment) is fully litigated. Mr Anderson submits that this can legitimately be done by pleading the assignments in the alternative pursuant to Rule 13.09.

[10] Applied to the current proceedings, if the Plaintiffs' case is that the Deed is valid and perfected then the entire cause of action succeeds to HS to the exclusion of the current Plaintiffs. Mr Anderson said that the Plaintiffs only wish to plead the assignments in the alternative in the event of a challenge to the validity of either of the assignments. In that case, the proceedings could still be maintained by the current Plaintiffs. That appears to sit well with the situations envisaged by Rule 9.06.

[11] I was referred to the case of *APT Finance Pty Ltd v Bajada*,<sup>1</sup> an unreported decision of the Court of Appeal of Western Australia delivered 31 March 2008. On sufficiently similar facts and applying similar Rules of Court, the Court of Appeal there held:

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<sup>1</sup> [2008] WASCA 73.

1. *(The Western Australian equivalent of Rule 9.06)* is a remedial provision and should be given the widest beneficial interpretation;
2. *(The Western Australian equivalent of Rule 9.06)* is designed to avoid unnecessary technicality so as to enable the parties to litigate the real issues between them in an expeditious, effective and cost effective way;
3. Where there is an equitable assignment, the assignor (the current plaintiffs in this case) is a necessary and proper party to the action;
4. Following the perfection of the assignment, the assignee (HS in this case) is the proper plaintiff in the action and any legal action must be in the name of the assignee and not the assignor;
5. Where there is a completed assignment after legal proceedings have been commenced the most appropriate course is for the assignee to apply under *(the Western Australian equivalent of Rule 9.09)* to be substituted as a plaintiff in the action;
6. Despite that the application may more appropriately be made under *(the Western Australian equivalent of Rule 9.09)* that did

not mean that it could not have been made under (*the Western Australian equivalent of Rule 9.06*);

[12] The Defendant's position is that joinder is not appropriate and only substitution should be permitted. If I understand the argument of Mr Liveris for the Defendant, the Defendant relies on the Plaintiffs' claim that, either by way of equitable assignment as of 1 July 2007 or by the Deed, the current Plaintiffs have assigned their interest in the subject matter of the proceedings to HS. I think that premise is essentially correct. However the Defendant apparently refuses to admit the effect of either of the alternatively claimed assignments or the perfection of those assignments. While there remains some doubt as to whether the assignments referred to in paragraph 4 above had the effect of an assignment, those matters remain in issue.

[13] Further, Mr Liveris argues that if joinder was allowed then two different entities at separate points in time would be permitted to sue on the same cause of action. Although not advancing any authority, the Defendant submits that such a position is contrary to law and untenable. He says that it cannot be the case that both the current Plaintiffs and HS may have incurred damages at different points in time based on the same cause of action. He submits that there is only one cause of action and if, as the current Plaintiffs allege, that has been wholly assigned, then only the new plaintiff is entitled to be named in the proceedings.

[14] That argument however runs counter to the specific wording of Rule 9.06 and the apparent intention of Rule 9.09(2) coupled with the ability of a party to plead facts in the alternative. By pleading in the alternative, the effect Mr Liveris complains of i.e., that two different entities are able to sue on the same cause of action at separate points in time, will not occur. If the pleading is not sufficient to show that the claims are in the alternative, then they are liable to be struck out as inconsistent pleadings.

[15] It is curious that both parties rely on the same authority, *APT Finance Pty Ltd v Bajada*,<sup>2</sup> in support of their argument, a situation attributable to the apparent inconsistency of the propositions extracted from that case, specifically propositions 5 and 6 set out in paragraph 10 above. Mr Liveris asserts that the case is authority for the proposition that in the case of a perfected assignment, substitution is appropriate. Although the case is authority that substitution can occur, I do not read it as being authority to the effect that substitution is to occur to the exclusion of joinder. The fact of the comment in proposition 6 must mean that the Court there considered that there could be some situations where joinder was appropriate. In any event the clear wording of Rule 9.06 and to a lesser extent, Rule 9.09(2) reinforces that joinder is not necessarily excluded. There is a material difference in the facts of this case, namely issues of the validity of the assignments and I think that is relevant to the correct approach to be taken.

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<sup>2</sup> [2008] WASCA 73.

[16] Mr Anderson argues that the authorities make no distinction between joinder and substitution and the Rules allow the Court to order whatever is necessary. The Plaintiffs rely on both Rule 9.06 and Rule 9.09(2). Mr Anderson submits that, given the Defendant's failure to admit the assignments, joinder is appropriate to preserve the full enforceability of the remedies flowing from the entire cause of action. That is reinforced by the wording of Rule 9.06. I remind myself that the Rule is designed to avoid unnecessary technicality so as to enable the parties to litigate the real issues between them in an expeditious, effective and cost effective way and therefore is to be given a wide beneficial interpretation.

[17] The Defendant's approach to this application appears anomalous. Although the Defendant's submissions are to the effect that substitution is appropriate, which in turn seems to acknowledge both the validity of the Deed and the perfection of the assignment, nonetheless the defendant refrains from admitting either of the assignments despite ample opportunity to do so in the course of argument. The position is that no assignment has yet been proven and the Defendant is not prepared to make an admission to that effect at this stage of the proceedings. The Defendant is not obliged to make that admission at present as the pleading process is yet to commence. It could only be done informally at the present time. Nevertheless the Plaintiffs need to treat that as a live issue. Whether that remains an issue in this case will be determined during the pleadings process.

[18] An application for joinder or substitution is not the occasion for any detailed consideration of the merits of the claim or any part of it. That extends also to the effect of the assignment as that currently remains a question in the proceedings.

[19] Once the pleadings close and the status of the assignments in the context of the issues in the proceeding is known, it will be open to the parties to then deal with the question of whether the current Plaintiffs should remain as a party to the proceedings. For now, the clearly stated purpose of Rule 9.06 is “*to ensure that all questions in the proceeding are effectually and completely adjudicated on*”. For the reasons aforesaid, the validity of the claimed assignments remains, at this stage, a “question” in the proceeding as that term is defined in Rule 1.09(1), and accordingly this application falls squarely within the scope of Rule 9.06. As I see it, the best way to ensure that all questions in the proceedings are adjudicated on without technicality and efficiently and in a cost effective way is for the assignments to be pleaded in the alternative. That then dictates joinder not substitution.

[20] Rule 9.09(2) can equally support the Plaintiffs’ application. The wording of that Rule, also to be interpreted broadly and beneficially, contemplates either joinder or substitution. It is arguable that the Rule provides for the alternative given that one of the alternatives, to the exclusion of the other, might apply in each of the different instances referred to in that Rule. However each such instance deals with a situation of succession to the cause

of action, as in the case of an assignment and that would suggest that the Rule intends to provide an alternative power for the Court in each instance.

[21] On that basis, I will first give the Plaintiffs the necessary leave to amend the Interlocutory Summons and I order, pursuant to Rule 9.06, that Hot Springs Pastoral Company Pty Ltd be added as the plaintiff to these proceedings.

[22] I will hear the parties as to consequential orders and as to costs.

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