Outback Civil Pty Ltd v Francis [2011] NTCA 3

PARTIES:	OUTBACK CIVIL PTY LTD AND JAMES PERCIVAL KERR v DARREN DONALD FRANCIS
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 7 of 2010 (20817787)
DELIVERED:	13 MAY 2011
HEARING DATES:	6 APRIL 2011
JUDGMENT OF:	MILDREN, SOUTHWOOD & BLOKLAND JJ
APPEAL FROM:	MASTER LUPPINO

CATCHWORDS:

PRACTICE AND PROCEDURE – Procedure under Rules of Court – summary judgment – appeal against order granting summary judgment – whether plaintiff's case so untenable it cannot possibly succeed – appeal dismissed

Motor Accidents (Compensation) Act, s 4(1)(a)(ii), s 5(1)(a)
Motor Vehicles Act, s 35, s 43, s 137

Spencer v The Commonwealth (2010) 241 CLR 118; applied

Ceneavenue Pty Ltd v Martin (2008) 106 SASR 1; *Darwin City Council v* McDonnell (1998) 8 NTLR 106; followed

Webster v Lampard (1993) 177 CLR 598; referred to

REPRESENTATION:

Counsel:

Appellant:	W Roper
Respondent:	D McConnel

Solicitors:

Appellant:	Priestleys Lawyers
Respondent:	De Silva Hebron

Judgment category classification:	C
Number of pages:	8

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

Outback Civil Pty Ltd v Francis [2010] NTCA 3
No AP 7 of 2010 (20817787)

BETWEEN:

OUTBACK CIVIL PTY LTD
First Appellant

AND

JAMES PERCIVAL KERR
Second Appellant

AND:

DARREN DONALD FRANCIS
Respondent

CORAM: MILDREN, SOUTHWOOD & BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 13 May 2011)

THE COURT:

Introduction

[1] This is an appeal from a decision of the Master who dismissed an application for summary judgment by the appellants who were the defendants in the action. After hearing submissions, we dismissed the appeal. We said that we would provide reasons at a later time. These are our reasons.

[2] The action is brought by the respondent plaintiff against the appellants for personal injuries and consequential losses arising out of an accident which occurred at Garden Point on Melville Island on 30 June 2005. The respondent claims that the accident was caused by the negligence of the appellants.

Pleadings in the Court below

[3] It is alleged in the Statement of Claim that the accident occurred when the respondent was directed by the second appellant Kerr to unload a front-end loader from a truck and trailer. The respondent alleges that, at the time of the accident, the method adopted of unloading the front-end loader was under the direction of Kerr, who was at the time the driver of the truck. The method adopted was that the respondent was required by Kerr to unhitch the trailer. Kerr would then lurch the truck forward so as to cause the forks of the front-end loader to tip off the back of the truck and onto the ground. It was during the course of this operation that the respondent claims to have been injured, because the truck lurched forward as a result of Kerr's negligence before the respondent was clear of the trailer. It is alleged that Kerr was a director and agent of the appellant Outback Civil Pty Ltd.

[4] The appellants claim that the truck was on a long-term lease from Outback Civil Pty Ltd to another entity, Integrity Pty Ltd trading as U-Cart Concreting (Integrity). It is asserted by the appellants that at the time of the accident, Integrity held a motor vehicle traders licence in respect of trader's

plate no D1446 and that this plate had been placed on the truck on 29 June 2005 by Kerr prior to the delivery of the truck to the site of the accident.

[5] In those circumstances, it was the appellants' contention that an action for damages for personal injuries did not lie against the appellants, because of the provisions of s 5(1)(a) of the *Motor Accidents (Compensation) Act* (the Act) as those provisions were in force at the time of the accident. At the time of the alleged accident, s 5(1)(a) of the Act abrogated common law actions by residents of the Territory in respect of injuries that were the result of an occurrence arising out of the use of a Territory motor vehicle in respect of which a compensation contribution under Part V or s 137 of the *Motor Vehicles Act* has been paid. The appellants contend that the respondent sustained his injuries as a result of an occurrence arising out of the use of a Territory motor vehicle in respect of which a compensation contribution had been paid. Outback Civil Pty Ltd's truck was such a motor vehicle because it had a trader's plate attached to it.

Hearing before the Master

[6] At the hearing before the Master, it was accepted by the counsel for appellants that for the purposes of the application it was not disputed that the accident occurred in a place in the Territory other than a public street. However, counsel for the respondent, in his written outline of argument, submitted the relevant accident was not "an accident" as defined in s 4(1)(a)(ii) of the Act even if it did have a trader's plate affixed to it at the

relevant time. Further, the respondent did not concede that it did have a trader's plate affixed to it at the relevant time.

[7] The first question, which is one of construction of the relevant legislation including certain provisions of the *Motor Vehicles Act* and the *Territory Insurance Office Act* was not finally decided by the Master although he did indicate that he was favourably disposed to the appellants' argument that the mere fixing of the trader's plate, had that occurred, would have had the effect contended by the counsel for the appellants. On this issue, although the Master had before him the written outline of counsel for the respondent, counsel for the respondent was not called upon because the Master took the view that he was not satisfied that the respondent's case on the facts was hopeless.

Submissions of the Appellants

[8] Essentially, the appellants maintain that, in the light of the fact that there was positive evidence from Kerr that he in fact affixed the traders plate to the vehicle and evidence from the respondent that he was unable to say whether the traders plate was affixed to it or not, in those circumstances there was an onus on the respondent to positively persuade the Court that there was something about the matter that required the matter to proceed further. Mr Roper pointed out that Kerr was in court and available for cross-examination.

[9] But, as Mr McConnel pointed out in his outline of submissions, the Court should not conduct a mini-trial for the purpose of determining a summary judgment application.[1]

[10] Mr Roper submitted that there appeared to be different tests applied by the authorities in determining summary judgment applications and that to the extent that there is any real difference between them, there was no reason to hold a defendant to a higher standard. In his submission, the correct test should be whether or not there was a real question to be tried regardless of whether the application was made by the plaintiff or the defendant. In our opinion, this is not an appropriate occasion to consider this question. In *Spencer v The Commonwealth*,[2] the majority judgment re-iterated that the test to be applied, when the application is made by a defendant, is whether the plaintiff's case is so clearly untenable that it cannot possibly succeed. In our opinion, that is the appropriate test which must be applied in this case. In our opinion, the Master applied the correct test.

[11] Mr Roper submitted that on the facts of this case, the respondent's action was bound to fail because there was no basis for finding that Kerr's evidence that he had affixed the trader's plates to the truck might not be accepted at trial.

---

1 *Ceneavenue Pty Ltd v Martin* (2008) 106 SASR 1 at 6 para [11]; 21-23 paras [82]-[84].
2 (2010) 241 CLR 118 at 139-140 [53]-[55] per Hayne, Crennan, Kiefel and Bell JJ.

[12] Mr Roper relied upon *Webster v Lampard*.[3] In that case, a claim for damages had been brought against a police officer arising out of his role in the eviction of the respondents from certain premises by the landlord. The police officer relied upon certain statutory defences which precluded actions being brought against police officers for acts done in pursuance of or in the execution of any public duty or authority. The appellants, Mr and Mrs Webster, who were the tenants in question, had sworn affidavits the effect of which the High Court said showed that the respondent's conduct as a police officer was both extraordinary and without legal justification or excuse and that in those circumstances unless the evidence of the Websters was inherently incredible, an assumption had to be made for the purposes of the application for summary judgment that the evidence would ultimately be accepted if the matter were to proceed to trial in the ordinary course. However, in our opinion that does not necessarily mean that the respondent must positively tender affidavit evidence which directly contradicted Kerr's assertion. In our opinion, it is sufficient if the respondent is able to demonstrate that there is evidence which, if accepted, would throw doubt upon the veracity or reliability of Kerr's evidence at trial. The appellants bear the legal burden of establishing the defence raised by s 5(1)(a) of the *Motor Accidents (Compensation) Act*.[4]

[13] Counsel for the respondent in his written submissions before the Master submitted that notwithstanding that the respondent was unable to positively

---

[3] (1993) 177 CLR 598.
[4] *Darwin City Council v McDonnell* (198) 8 NTLR 106.

assert one way or the other whether the trader's plates had been affixed to the vehicle, there was sufficient reason to doubt that the evidence of Kerr would be accepted at trial. Amongst other things, there was evidence that the trader's plate had been used from time to time and there was evidence that trucks being used at the construction site were driven both with and without a trader's plate being placed on them. Kerr's recollection of affixing the trader's plate was questionable on the basis that he did not recall doing so until more than a year after the accident. There was subsequent correspondence between the solicitors extending over a lengthy period during which the solicitors for the appellants sought to persuade the solicitors for the respondent to drop the action at no time during which was this point raised. It was on this basis that the Master took the view that the respondent had established a sufficient basis to dispute the question of whether the plate had been attached to the vehicle at the relevant time and in those circumstances, summary judgment was inappropriate. As the Master said,

> There is some basis upon which the evidence (of Kerr) might be rejected, a legitimate basis, a real basis, and the onus lies on (Kerr) to prove that fact.

Conclusion

[14] We think the decision of the learned Master was correct. Kerr's evidence is not supported by any independent evidence. In particular, s 43 of the *Motor Vehicles Act* requires a record to be kept in accordance with the approved form of the use of trader's plates. No such record has been produced.

Because there is evidence that the plate was used on other vehicles on similar occasions, this provides a basis for suggesting that Kerr's recollection was mistaken. It is suspicious to say the least that the trader's plate was owned by Integrity, which on the appellants' case had leased the vehicle from Outback Civil Pty Ltd. The circumstances suggest the distinct possibility that Kerr was using the trader's plate in a dishonest fashion which might go to shake his credit. There is no evidence that either of those entities had lawfully used the trader's plates in accordance with s 35 of the *Motor Vehicles Act,* and evidence which suggested that the plate was not being lawfully used is also a factor which might go to Kerr's credit as a witness. There were other matters of a similar nature discussed during the hearing of the appeal between the Court and Mr Roper which might also reflect on Kerr's credit. It is not disputed that the truck was otherwise unregistered.

[15] Further, it is our view that it is far from clear that even if the trader's plate had been affixed to the vehicle at the relevant time, the truck was a Territory motor vehicle "in respect of which a compensation contribution under Part V or s 137 of the *Motor Vehicles Act* has been paid" as required by the definition of "accident" in s 4(1)(a)(ii) of the Act. This is a complex question of law which has not been the subject of any judicial ruling. It is arguable that, in the circumstances, s 5(1)(a) of the Act did not apply so as to defeat the respondent's claim.
