

Henderson & Ors v Purairclean Pty Ltd & Anor [No 3] [2013] NTSC 73

PARTIES: HENDERSON, Kenneth Herbert

AND

HENDERSON, Gaelene

AND

HENDER KG PTY LTD
(ACN 136 537 507)

v

PURAIRCLEAN PTY LTD
(ACN 141 491 170)

AND

JAYMAK AUSTRALIA PTY LTD
(ACN 110 994 744)

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 41 of 2012 (21217736)

DELIVERED: 7 November 2013

HEARING DATE: 7 November 2013

JUDGMENT OF: RILEY CJ

CATCHWORDS:

PRACTICE AND PROCEDURE — Stay of execution — Balance of convenience — Appeal would not be nugatory if stay refused.

REPRESENTATION:

Counsel:

Plaintiff:	W Roper
Defendant:	J Whittington

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	Griffins Lawyers

Judgment category classification:	C
Judgment ID Number:	Ril1319
Number of pages:	6

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

Henderson & Ors v Purairclean Pty Ltd & Anor [No 3] [2013] NTSC 73
41 of 2012 (21217736)

BETWEEN:

KENNETH HERBERT HENDERSON
First Appellant

AND:

GAELENE HENDERSON
Second Appellant

AND:

HENDER KG PTY LTD
(ACN 136 537 507)
Third Appellant

AND:

PURAIRCLEAN PTY LTD
(ACN 141 491 170)
First Respondent

AND:

JAYMAK AUSTRALIA PTY LTD
(ACN 110 994 744)
Second Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

EX TEMPORE

(Delivered 7 November 2013)

- [1] These proceedings arise out of a dispute regarding two franchise agreements entered into between the parties. The matter came on for hearing before me and, on 21 June 2013, I delivered reasons for decision.
- [2] The authenticated orders of the court based upon those reasons were dated 19 July 2013 and provided, inter alia, that:
- (a) there be judgment for the first respondent against the appellants for an amount of \$83,901.23 plus GST of \$320.51; and
 - (b) that the restraint of trade expressed in the Purairclean Franchise Agreement be valid for a period of 12 months.
- [3] The parties were unable to agree on an appropriate costs order and further argument took place. On 17 July 2013 I ruled that the respondents were entitled to costs of the proceedings assessed on an indemnity basis.
- [4] The appellants have lodged an appeal in which error is asserted. They seek orders that the appeal be allowed and that:
- (a) the award of \$83,901.23 plus GST of \$320.51 be set aside and, in lieu thereof, there be judgment against the appellants for an amount of \$51,881.81;
 - (b) the restraint of trade clause in the Purairclean Franchise Agreement be set aside as void and/or voidable and unenforceable as against the appellants; and

(c) that the costs order be set aside and the respondents pay the appellants costs at first instance on such basis and for such periods as the Court of Appeal considers appropriate.

[5] The appeal has been listed for hearing before the Court of Appeal on 3 and 4 February 2014.

[6] The respondents have proceeded to enforce the judgment and, in so doing, issued bankruptcy notices against the first and second appellants on 26 September 2013. Those notices have been served. An application has been made to the Federal Court to set aside the notices and extend the time for compliance. That application has been listed for hearing on 18 November 2013.

[7] The appellants now seek a stay of execution in relation to the Supreme Court proceedings.

[8] I have been referred to various authorities regarding such applications. The following propositions relevant for present purposes have been identified:

(a) It is not in dispute that a successful litigant is ordinarily entitled to the fruits of their victory and should not lightly be deprived of them.

(b) It is not in dispute that the prospects of success on appeal should not, on an application for a stay, be considered extensively. It is sufficient that arguable grounds of appeal exist. In this case it is not contended that the grounds of appeal are not arguable.

- (c) The discretion to be exercised is a wide one and, in the Northern Territory, it is not necessary for an applicant to demonstrate that there are special or exceptional circumstances justifying the grant of a stay.
- (d) It is sufficient for the applicant to demonstrate a reason or an appropriate case for the exercise of the discretion in his favour. The onus rests upon the applicant. It is necessary to consider and take into account all the circumstances of the case.
- (e) Generally, a stay will be granted where there is a real risk that the integrity of a controversy, or the subject matter of the appeal, would otherwise be rendered nugatory. This would be so if there is a real risk that it would not be possible for a successful appellant to be restored substantially to its former position if the judgment against the applicant is executed.

[9] In the present case it was submitted that if the appellants are ultimately successful in the appeal they cannot be restored to their original position. It was submitted that there is a real risk that, absent a stay, the subject matter of the appeal will be rendered nugatory. The appeal may not be able to proceed by virtue of the bankruptcy proceedings. Further it was submitted that if the judgment sum is paid there is a real risk that the first defendant will not be in a position to repay the amount in dispute.

[10] In determining whether to grant a stay in this matter it is informative to consider what the impact of a successful appeal would be.

- [11] In the event of a successful appeal the existing declaration that there was an effective restraint of trade clause relating to the Purairclean Franchise Agreement for the period 29 February 2012 to 1 March 2013 would be set aside and a declaration that the restraint of trade clause was unenforceable would replace it. Given that the operative period for the restraint of trade clause has expired, any such declaration would have impact only in relation to past events. It is not relevant to the application for a stay.
- [12] Further, in the event of a wholly successful appeal, the issue of costs of the proceedings at first instance may have to be reconsidered in light of the rulings of the Court of Appeal. The present order is that the costs be paid by the appellants but those costs have not been assessed at this time and are therefore not presently due and owing. That issue is not relevant to the present application for a stay.
- [13] In the Supreme Court proceedings the appellants were found to be jointly and severally liable to pay to Purairclean the sum of \$83,901.23 plus GST of \$320.51. It is apparent from the notice of appeal that the appellants acknowledge a liability to Purairclean in the amount of \$51,888.81. No offer to pay that amount either to Purairclean or into Court has been made. The capacity of the appellants to pay the amount acknowledged to be owing or, if the appeal is unsuccessful, the whole of the judgment debt has not been addressed in the affidavit material.

[14] It would seem that the purpose of the stay is to protect the appellants against the possible loss of the difference between the two figures, a sum of \$32,332.93. The appellants seek to achieve that protection notwithstanding a failure to pay to Purairclean the greater sum which is acknowledged to be owed.

[15] A further basis for the granting of a stay is said to be the prospect that a declaration of bankruptcy may mean that the appeal cannot proceed. There are two immediate responses to this proposition. The first is that the appellants pay the judgment amount and thereby defeat the bankruptcy proceedings. In the event that there is a concern that the amount may not be recovered on successful completion of the appeal proceedings, the appellants may seek to pay the judgment amount into court pending the outcome. The second is that in the event of a declaration of bankruptcy it will be a matter for the trustee in bankruptcy to determine whether to prosecute the appeal.

[16] In my opinion a stay should not be granted. The appellants have not made a full and frank disclosure in relation to their financial resources. They admitted liability to the respondents in the sum of \$51,881.81 but have made no payment. They have not proposed to pay the difference into court. Further, the appeal proceedings would not be rendered nugatory in the event of bankruptcy as the trustee in bankruptcy may pursue the proceedings.
