Henderson & Ors v Purairclain Pty Ltd & Anor (No 2) [2013] NTSC 36

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:	17 July 2013
HEARING DATES:	On the papers
JUDGMENT OF:	RILEY CJ

CATCHWORDS:

COSTS — Agreement — Franchise agreement provided franchisee would indemnify franchisor for legal costs incurred — Discretion exercised according to agreement.

COSTS — *Calderbank v Calderbank* settlement offer — Judgment more favourable than *Calderbank* offer.

CIVIL PROCEDURE — *Practice Direction 6 of 2009* — Compliance — Effect on costs order.

Practice Direction 6 of 2009
Supreme Court Act 1979 (NT) s 84
Supreme Court Rules (NT) r 63.03

REPRESENTATION:

Counsel:

Plaintiff:	W Roper
Defendant:	M R Burnett

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	Haarsma Lawyers

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Henderson & Ors v Purairclean & Anor (No 2) [2013] NTSC 36
No 41 of 2012 (21217736)

BETWEEN:

KENNETH HERBERT HENDERSON
First Plaintiff

AND:

GAELENE HENDERSON
Second Plaintiff

AND:

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

AND:

PURAIRCLEAN PTY LTD
(ACN 141 491 170)
First Defendant

AND:

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

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 17 July 2013)

[1] Reasons for decision in this matter were published on 21 June 2013.[1] The parties were invited to make submissions as to the precise calculation of the awards of damage in accordance with the reasons and also to make submissions in relation to the issues of costs and interest. The written submissions are now to hand.

The counterclaim of the first defendant

[2] The plaintiffs submit that they should be jointly and severally liable to pay the first defendant $80,535.86 in respect of the first defendant's successful counterclaim together with interest on that sum in the amount of $1101.35. The first defendant submits that the figures should be $82,177 and $1751 respectively.

[3] The difference between the calculations as to damages arises from the fact that a further management fee fell due on 15 June 2013 and, the first defendant claims, should be treated as part of the past losses rather than future losses which have been discounted. There is also a change in the applicable discount rate from 2.8% to 2.6%. There is a minor consequential difference in interest payable.

[4] It is the submission of the plaintiffs that the first defendant should not be entitled to 'effectively reopen their arguments as to quantum merely because the payment fell due between the time of the trial and delivery of the judgment'. I disagree. The submissions were premised on the basis of a

[1] *Henderson v Purairclean* [2013] NTSC 29.

judgment being delivered at the time of the submission being made. There can be no doubt that both parties understood that the judgment would not be delivered immediately and that matters would be assessed as at the date judgment was to be delivered.

[5] I accept the figures in relation to damages as provided by the first defendant.

[6] In relation to interest, in a later submission, the first defendant purported to accept the plaintiffs' earlier calculation in the amount of $1724.23. The plaintiffs subsequently submitted that the offer to settle upon that figure did not remain open. I note that the information available is not sufficient to enable me to determine whether an offer to settle the issue remained open even though alternative calculations were put forward by the plaintiffs. I would have to hear evidence and embark upon a further hearing at unnecessary expense to the parties. Interest is in the discretion of the Court.[2] The calculation of $1724.23 was based upon Federal Court rates. I regard those rates as reasonable. In all the circumstances, and bearing in mind the difference is minor in the context of these proceedings, I allow interest at the suggested figure of $1724.23.

[7] There is a challenge to the entitlement to interest in light of the provisions of cl 27 of *Practice Direction 6 of 2009* ('PD6') which I will address below.

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[2] *Supreme Court Act 1979* (NT) s 84.

The counterclaim of the second defendant

[8] The parties agree that the plaintiffs should be jointly and severally liable to pay to the second defendant the sum of $1787.12. The second defendant has purported to accept the plaintiffs' calculation of interest at the sum of $131.20. Although the plaintiffs say that the offer of $131.20 was withdrawn at the same time and in the circumstances discussed at [6] above, for the same reasons I allow interest of $131.20. Again there is a dispute as to the entitlement to interest in light of the provisions of cl 27 of PD6. I will address this below.

The Jaymak restraint of trade clause

[9] The parties agree that there should be a declaration that the restraint of trade expressed in cl 24 of the Jaymak Franchise Agreement (as defined in the claim) is valid for the period 18 June 2012 to 18 June 2013.

The Purairclean restraint of trade clause

[10] The parties agree that there should be a declaration that the restraint of trade expressed in cl 24 of the Purairclean Franchise Agreement (as defined in the claim) is valid for the period 29 February 2012 to 1 March 2013.

[11] The parties also agree that there should be a declaration that the plaintiffs contravened cl 24 of the Purairclean Franchise Agreement by operating the business of K & G Henderson Pty Ltd and conducting the residential air-conditioning business during the period in which the clause was operative.

Cost of the proceedings — indemnity costs

[12] The defendants seek orders that the plaintiffs are jointly and severally liable to pay the defendants' costs of and incidental to the proceedings on an indemnity basis or, alternatively, on a party–party basis. The plaintiffs oppose such orders and submit that the defendants should be jointly and severally liable to pay the plaintiffs' costs of and incidental to the proceedings from 28 February 2013 on an indemnity basis as taxed and/or agreed and that there should be no other orders as to costs in the proceedings.

[13] There is no dispute that the defendants were largely successful in the proceedings and that the usual order is that costs should follow the event. Those costs would normally be awarded on a party–party basis. Costs are, of course, in the discretion of the Court.[3]

[14] Whilst acknowledging that any agreement between the parties cannot oust the jurisdiction of the Court in relation to the awarding of costs, it was submitted on behalf of the defendants that the provisions in the Jaymak Franchise Agreement and the Purairclean Franchise Agreement providing for indemnity costs should be given effect. The agreements each provide for the payment of indemnity costs 'arising directly or indirectly from any breach of this Agreement by the Franchisee'. They also provide that the franchisee must reimburse the franchisor for 'legal costs and expenses' incurred by the franchisor arising from any breach of the agreement by the principal or the

[3] *Supreme Court Rules* (NT) r 63.03.

franchisee, 'including any dispute resolution procedure or actions connected to such breach'.

[15] The approach to issues of this kind is discussed in *Law of Costs* as follows:[4]

> The effect of a clause purporting to entitle a litigant to costs quantified on other than the party and party basis must be understood. As superior courts are vested with a discretion to award costs, the parties cannot oust that discretion by contract. A court that uncritically gives effect to such a term fetters its own discretion. Yet the bulk of authority supports the proposition that, assuming the agreement in question is valid and enforceable, the court ordinarily exercises its costs discretion to give effect to the contractual right. It has been observed, to this end, that 'it is because contracts are concerned with the allocation of risk that it is appropriate for the court to give effect to the contractual arrangement between the parties'.

[16] In the present case I see no reason why I should not give effect to the agreement reached between the parties and award costs on an indemnity basis.

Costs of proceedings — the plaintiffs' submissions

[17] The plaintiffs submitted that the costs order proposed by the plaintiffs was appropriate because of:

(a) the defendants' conduct in pursuing proceedings in South Australia when proceedings were already on foot in the Northern Territory;

(b) the defendants' failure to comply with PD6;

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[4] G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) at 485 [15.41] (citations omitted).

(c) the defendants' failure to participate in the mediation process in good faith; and

(d) the defendants' failure to accept offers of settlement made on behalf of the plaintiffs in circumstances where the result ultimately obtained by the defendants was less favourable to them.

[18] In my opinion none of the submissions can be sustained and they do not lead to a conclusion that the plaintiffs should have the costs of the proceedings.

[19] The proceedings were commenced by the plaintiffs in the Supreme Court of the Northern Territory seeking declarations as to the creation and ownership of the cleaning tray, the cleaning process and the pump and also as to the efficacy of the restraint of trade provisions found in the franchise agreements. While those proceedings were underway, the defendants commenced proceedings in South Australia seeking damages under the two franchise agreements. Ultimately the South Australian proceedings were stayed pending resolution of the proceedings in this Court and the issues raised in the South Australian proceedings were thereafter pursued and resolved in this Court.

[20] It was the submission of the plaintiffs that the defendants' conduct in commencing and maintaining the South Australian proceedings was oppressive and/or an abuse of process. I do not accept this submission. The proceedings, when commenced, related to quite separate issues from those initially the subject of proceedings in the Northern Territory. They were

commenced in appropriate courts in South Australia. The defendants were entitled, if not obliged, to commence the proceedings in South Australia pursuant to the respective franchise agreements, which stipulated South Australian courts as having exclusive jurisdiction over disputes arising under the agreements. Contrary to the submission of the plaintiffs, the South Australian proceedings were not 'futile'. As the Northern Territory proceedings evolved it became apparent that all issues should be resolved in the one court. Assessed at the relevant time, on the balance of convenience, it was appropriate to pursue the Northern Territory proceedings. In any event, the content of the South Australian proceedings was taken up in the Northern Territory without significant duplication of effort and without resultant delay.

[21] The plaintiffs also submitted that the defendants failed to comply with the requirements of PD6, which is a Practice Direction issued by this Court, the objectives of which are to encourage the exchange of early and full information about prospective legal claims; to enable parties to avoid litigation by agreeing a settlement of claim before the commencement of proceedings; and to support the efficient management of proceedings where litigation cannot be avoided. In these proceedings neither party strictly complied with PD6. This is unfortunate but not wholly the fault of any party. It was an unusual matter. Proceedings were commenced in different jurisdictions. There were attempts to resolve the issues but the parties remained some distance apart. The matter proceeded to trial on an urgent

basis as a consequence of the ill-health of Mrs Henderson. In all the circumstances I do not think it appropriate to visit the possible consequences of failure to comply with PD6 on any party.

[22] It was submitted that the plaintiffs made various offers of settlement, including a *Calderbank* offer, in an attempt to avoid litigation and, in contrast, the defendants failed to do so. In fact the parties engaged in a process of mediation which did not resolve the proceedings. In the course of the mediation various offers were made by the parties but they remained a substantial distance apart at the conclusion of that process. It was submitted by the plaintiffs that the defendants did not engage in the mediation process in good faith or genuinely and realistically. The basis of this submission appears to have been that the defendants did not sufficiently depart from the initial offers made by them at the beginning of the mediation process. Leaving aside the issue of whether they should have done so, it is not correct that they failed to do so. The initial proposal put by the defendants was that the plaintiffs pay the defendants a sum of $300,000 inclusive of costs and interest and that other identified orders be made. The final offer conveyed by the defendants to the mediator was for payment of a sum of $150,000 inclusive of costs and interest. The plaintiffs do not accept that such an offer was conveyed to them by the mediator. Without further investigation involving obtaining evidence from the mediator and from each of the parties I am unable to determine what happened. Neither party sought

to lead evidence from the mediator. I accept the evidence of the defendants that such a proposal was put to the mediator to be conveyed to the plaintiffs.

[23] On the other hand, the plaintiffs made two ‘final’ offers of settlement: the first expressed as being that the plaintiffs would pay to the defendants $80,000 inclusive of costs; and the second, made in the course of the hearing, was that the plaintiffs would pay to the defendants the sum of $50,000 with the issue of costs thereafter to be argued.

[24] As is obvious from contrasting the two offers made by the plaintiffs, and from a consideration of the whole of the information placed before this Court, the costs in these proceedings will be significant. They were significant at the time the offers of settlement were made. Such a conclusion is readily apparent without the need to enter into a detailed costs assessment. When costs are taken into account the awards to the defendants will be substantially greater than the offers of settlement made by the plaintiffs.

[25] Contrary to the submissions of the plaintiffs I am unable to conclude that the refusal by the defendants of any offer was imprudent or unreasonable.

[26] The evidence in relation to the mediation does not reveal that the defendants entered into the process other than in good faith. The submission that the defendants did not participate in the mediation ‘genuinely and realistically’ has not been made out. Further, in my opinion, there was no failure on the part of the defendants to accept reasonable offers made by the plaintiffs

either at the time of mediation or subsequently. As I have noted, the result obtained by the defendants was significantly more favourable than the terms of any of the offers made by the plaintiffs at any time.

[27] I do not accept the submission made on behalf of the plaintiffs that there should be a separate consideration of the costs incurred before the mediation. The proceedings were then underway and, although the claims and counterclaims emerged in a piecemeal and gradual fashion, it was the one set of proceedings through to judgment.

[28] The plaintiffs made the unusual and surprising submission that they were ‘under no illusions as to the difficulties they faced in their arguments’ and, after judgment had been delivered, frankly observed that they ‘well appreciated their battle was an uphill contest’. Notwithstanding those belated acknowledgements, before judgment the plaintiffs did not make any offer approaching the true value of the claims of the defendants. There was no acknowledgement of liability leaving only quantum to be resolved. Each claim and each element of each claim was strenuously fought. The plaintiffs were unsuccessful on almost all issues of real significance.

[29] In my opinion the defendants are entitled to their costs to be assessed on an indemnity basis.

The declaration

[30] The plaintiffs are entitled to authenticated orders reflecting the declaration made in the course of the proceedings, as set out in [7] of the reasons for decision.

GST

[31] In written submissions, the defendants indicated that they had failed to include GST in the calculations originally placed before the Court. The entitlement to GST in relation to the claim of the first defendant was limited because of the ruling made at [88] of the reasons for decision. The only entitlement to GST was for that payable on two thirds of the damages awarded in respect of the period before the termination of the Purairclean Franchise Agreement on 29 February 2012. That sum has been calculated as $320.51. I allow the claim in that amount.

[32] The defendants should submit final orders to be settled by the Court.

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