

CGKRJK Pty Ltd ATF the C Keating Family Trust & Ors v Port & Ors
[2014] NTSC 24

PARTIES: CGKRJK Pty Ltd (ACN 126 406 166) as
Trustee for the C Keating Family Trust

and

BGW (NT) Pty Ltd (ACN 126 396 996)
as Trustee for the B Walkley Family
Trust

and

Keating, Christopher Gerard

and

Walkley, Brendan Gerrard

v

Port, Daymon Leslie

and

Wild & Willing Pty Ltd
(ACN 166 386 170)

and

Willing, Russell Stuart

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: 134 of 2013 (21357446)

DELIVERED: 26 JUNE 2014

HEARING DATES: 30 DECEMBER 2013

JUDGMENT OF: KELLY J

REPRESENTATION:

Counsel:

Plaintiffs: A Wyvill SC
First Defendant: A Young
Second & Third Defendants: J Tippett QC

Solicitors:

Plaintiffs: De Silva Hebron
First Defendant: Hunt & Hunt
Second & Third Defendants: Vincent M Close

Judgment category classification: C

Judgment ID Number: KEL14003

Number of pages: 5

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

CGKRJK Pty Ltd ATF the C Keating Family Trust & Ors v Port & Ors
[2014] NTSC 24
No. 134 of 2013 (21357446)

BETWEEN:

CGKRJK PTY LTD (ACN 126 406 166)
AS TRUSTEE FOR THE C KEATING
FAMILY TRUST
First Plaintiff

AND

BGW (NT) PTY LTD (ACN 126 396 996)
AS TRUSTEE FOR THE B WALKLEY
FAMILY TRUST
Second Plaintiff

AND

CHRISTOPHER GERARD KEATING
Third Plaintiff

AND

BRENDAN GERRARD WALKLEY
Fourth Plaintiff

AND

DAYMON LESLIE PORT
First Defendant

AND

**WILD & WILLING PTY LTD (ACN 166
386 170)**

Second Defendant

AND

RUSSELL STUART WILLING

Third Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 26 June 2014)

- [1] On 19 December 2013, the plaintiffs filed a Writ seeking an interim injunction restraining the defendants from taking any steps to progress an application to the NT Licensing Commission to substitute new premises with the current premises the subject of liquor licence no. 80903666. The final relief sought was a permanent injunction restraining the defendants from proceeding with the substitution application, a mandatory injunction requiring the second defendant to withdraw its substitution application, and a mandatory injunction requiring the second defendant to re-transfer the licence to the first defendant.
- [2] The application for an interim injunction was heard before me on 30 December 2013. I dismissed the application and reserved my decision regarding costs.

- [3] I dismissed the application on the basis the plaintiffs did not demonstrate any legal or equitable right to have the liquor licence remain attached to or as an asset of the premises, that is they could not demonstrate any equitable or legal entitlement to the final relief sought. In summary, I did not find that the plaintiffs established a factual basis for either of the two ways in which they asserted that there is a serious question to be tried concerning any alleged legal or equitable entitlement by the plaintiffs to have the liquor licence remain with the premises.
- [4] The second and third defendants seek an order that the plaintiffs pay their costs of and incidental to the injunction application on an indemnity basis.
- [5] The basis of the defendants' application is that the plaintiffs persisted in what should, on proper consideration, be seen to be a hopeless case, relying on *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch) (No 2)*.¹ This must mean something more than that the party against whom a costs order is sought was unsuccessful, or indemnity costs would be the rule rather than the exception.
- [6] The court's discretion to make an order for costs is absolute and unfettered but must be exercised judicially. Ordinarily, costs follow the event and are taxed on a standard basis. There must be special circumstances to justify a departure from the normal practice. Indemnity

¹ (1993) 46 IR 301 at 303

costs may be awarded if the action was commenced or has been continued in wilful disregard of the known facts or clearly established law.²

[7] I do not consider that to be the case here. In particular, one of the major bases for the conclusion that there was no serious question to be tried was that the contract for the sale of the business from the first defendant to the second defendant does not provide that the second defendant is to operate the business from the Premises: Recital D of the contract states that the second defendant will not require possession of the Premises as it will operate from the New Premises (as defined in the contract). Moreover, I commented in my reasons for refusing the injunction that, had the facts been as asserted (or perhaps only as feared) by the plaintiffs, then it may have been that there was a serious question to be tried as to whether the second (and perhaps the third) defendants had committed the tort of inducing a breach of the existing lease by the first defendant.

[8] The plaintiffs were not provided with a copy of the relevant contract before they commenced these proceedings. Indeed, it appears that they only received the defendants' affidavits and had access to the subpoenaed documents on the morning of the hearing. In those circumstances, I do not think it can be said that the plaintiffs commenced or continued proceedings in wilful disregard of known facts or settled law, or that they should have appreciated that their case was plainly hopeless.

² *Fountain Select Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397

[9] The defendants' application for indemnity costs is refused. There will be an order that the plaintiffs pay the defendants' costs of and incidental to the application for an injunction, such costs to be agreed or taxed on the standard basis.