JMT Builders Pty Ltd v. Ryan & Ors
[2016] NTSC 6

PARTIES:	JMT BUILDERS PTY LTD v TRACY JANE RYAN AND GRANT GEOFFREY RYAN AND GTNT DEVELOPMENTS PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	119 of 2015 (21555675)
DELIVERED:	25 January 2016
HEARING DATES:	14 January 2016
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Abuse of Process – Inherent jurisdiction of the Court to prevent abuse of its process – Categories of abuse are not closed – Principles relevant to determination of whether proceedings are an abuse of process – Proceedings issued after settlement of a dispute and before a default and only to have proceedings on foot in the

event of a default – No genuine dispute – Lack of a genuine dispute renders proceedings an abuse of process.

MacDonnell Shire Council v Miller & Ors [2009] NTSC 46.
Williams v Spautz (1992) 174 CLR 509.
Metropolitan Bank v Pooley (1885) LR10 App Cas 210.
Batistatos v Roads and Traffic Authority of New South Wales (2006) 226 CLR 256.
Rogers v The Queen (1994) 181 CLR 251.
Sea Culture International Pty Ltd v Scoles [1991] FCA 523.

Supreme Court Rules rr23.01, 48.04

Abuse Of Process And Judicial Stays Of Criminal Proceedings, Choo, A., 2nd Ed, Oxford University Press.

REPRESENTATION:

Counsel:

Plaintiff:	Mr W Roper
Defendant:	Mr R Perkins

Solicitors:

Plaintiff:	Bowden McCormack
Defendant:	Powell & Co Legal

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

JMT Builders Pty Ltd v. Ryan & Ors
[2016] NTSC 6

No. 119 of 2015 (21555675)

BETWEEN:

JMT BUILDERS PTY LTD

Plaintiff

AND:

TRACY JANE RYAN
First Defendant

AND:

GRANT GEOFFREY RYAN
Second Defendant

AND:

GTNT DEVELOPMENTS PTY LTD
Third Defendant

CORAM: MASTER LUPPINO

REASONS

(Delivered 25 January 2016)

[1] By Writ and Statement of Claim filed 10 November 2015 the Plaintiff claimed against the Defendants inter alia for damages for breach of a certain building contract entered into between the parties.

[2] The Defendants entered an Appearance on 11 November 2015.

[3] On 12 November 2015 a notice pursuant to order 48.04 of the *Supreme Court Rules* issued which set an initial directions hearing for 24 November 2015.

[4] Also on 12 November 2015, the Plaintiff's solicitors wrote to the Court, with the concurrence of the solicitors for the Defendants and advised that the Writ in this matter had been filed pursuant to a Deed of Settlement entered into between the parties. A copy of the Deed was provided. It is apparent from that Deed that the dispute between the parties as pleaded in the Statement of Claim has been fully settled and the correspondence confirmed that. The Deed also provided that:-

1. The Plaintiff would file the Writ and Statement of Claim (a form of which was annexed to the Deed) and that the Defendants would then file an Appearance;

2. The Defendants would pay the settlement amount by monthly payments over a period of 45 months;

3. The Defendants were to execute a form of consent judgment for the settlement amount and the Plaintiff could enforce the consent judgment in the event of default by the Defendants in complying with the repayment plan;

The Deed does not make provision for, nor permit, the Plaintiff to sue on the initial dispute in the event of default by the Defendants. Rather the Plaintiff

is left only to sue for the balance of the settlement sum then outstanding as the Deed specifically bars all actions other than enforcement of the consent judgment.

[5] At the initial directions hearing, I indicated that I considered the proceedings to be an abuse of process as there was no genuine dispute between the parties. I directed the parties to provide written submissions and adjourned further consideration to a mention on 14 January 2016.

[6] In its submissions the Plaintiff argues, based on *MacDonnell Shire Council v Miller & Ors*[1] ("*MacDonnell*") that the proceedings are not an abuse of process as the motives behind the commencement of the proceedings are legitimate. The Plaintiff relies on the following passage from the decision of Mildren J in *MacDonnell*, where, after referring to *Williams v Spautz*[2], his Honour said:-

> …the Court has an inherent jurisdiction to stay proceedings which are an abuse of process. This power extends to the prevention of an abuse of process resulting in oppression even if the moving party has a prima facie case. Proceedings are brought for an improper purpose and are therefore an abuse of process where the purpose is not to prosecute them to conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond that which the law offers. However, the existence of an ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the action is successful. Further, the improper purpose must be the predominant purpose. The onus of satisfying the Court that there is an abuse of process lies on the party alleging it. The onus is a heavy one and the power to grant a permanent stay is to be exercised only in the most exceptional circumstances.[3]

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1 [2009] NTSC 46.
2 (1992) 174 CLR 509.
3 [2009] NTSC 46 at para 12.

[7] The claimed legitimate motives, it was submitted are three fold. Firstly, to give effect to a settlement of an existing dispute. The Plaintiff relies also on the fact that the settlement resulted from a mediation undertaken in the course of compliance with the requirements of Practice Direction 6 of 2009 but I am not convinced that anything turns on how the settlement was arrived at. What I think is relevant is that the dispute was settled before the proceedings were commenced.

[8] The Plaintiff's second motive was to avoid the necessity to proceed to the hearing of the dispute. That naturally follows from the settlement of the dispute and I cannot see how this can be a motive for the purposes of the passage from *MacDonnell* relied on when, at the time proceedings were commenced, there was no likelihood of a hearing on the pleaded case, given the settlement.

[9] The third motive was said to be that it provides for orders, specifically a judgment which can be entered and relied upon in the event of default by the Defendants in terms of the terms of settlement.

[10] The Defendants contended that, notwithstanding that they agreed to the terms of settlement and executed the Deed on legal advice, that the proceedings are an abuse of process. This was on the basis that the objective effect of the proceedings was that the Court was being asked to deal with an artificial dispute based on the unchallenged pleadings of only one of the parties and where the Court was being asked to hold the proceedings in

abeyance for a considerable period of time simply to facilitate an order for payment in the event of a default by the Defendants at some future time. The Defendants submit that the proper course for the Plaintiff would have been to commence the proceedings if and when a default in payment occurred to enforce the Deed less any payments made to that time.

[11] The Plaintiff's submissions focus on the ulterior motive category of the principle of abuse of process. Although the power to stay or dismiss proceedings for abuse of process is one which is specifically provided for in the *Supreme Court Rules*,[4] the power of the Court to prevent abuse of its own process is not limited by that rule. It is settled law that a court has inherent jurisdiction to prevent abuse of its own process.[5] There are recognised categories of abuse and the most common are firstly, that the proceedings are brought for an improper purpose or ulterior motive, secondly, that the proceedings use the court's procedures in a way that is unduly oppressive and, lastly, that the proceedings use the use of the court's procedures in a way which tends to bring the administration of justice into disrepute.[6] It is also clear that the categories of abuse are not closed.[7] *MacDonnell* deals specifically with the improper purpose category of abuse of process.

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4 See rule 23.01(2)(c).

5 This dates as far back as *Metropolitan Bank v Pooley* (1885) LR10 App Cas 210, and most recently approved of and confirmed by the High Court in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256.

6 *Rogers v The Queen* (1994) 181 CLR 251.

7 *Williams v Spautz* (1992) 174 CLR 509; *Sea Culture International Pty Ltd v Scholes* [1991] FCA 523.

[12] In *Sea Culture International Pty Ltd v Scholes*,[8] French J, as he then was, after confirming the court's power to prevent misuse of its own process and that the categories of abuse of process are not closed, went on to say:-

> An unmeritorious claim brought merely in order to put pressure on a respondent for commercial or other reasons would no doubt be treated as an abuse. Such a claim might also be attacked as frivolous or vexatious or as disclosing no reasonable cause of action. Those designations are not mutually exclusive. An attempt to litigate in the court a dispute or issue which has been resolved in earlier litigation in this or another court or tribunal may also, according to the circumstances, constitute an abuse of process even if not attracting the doctrines of res judicata or issue estoppel.
> Underlying the power that courts have assumed to stay or dismiss proceedings for abuse of process, is a policy of preventing waste of judicial resources and their use for purposes unrelated to the determination of genuine disputes.

[13] In my view, the comments made there by his Honour in respect of secondary proceedings following resolution in another court applies equally to the commencement of proceedings which had been resolved by settlement and without any remaining residual issues.

[14] The principles relating to abuse of process are neatly summarised in *Abuse Of Process And Judicial Stays Of Criminal Proceedings*.[9] Although the title refers to criminal proceedings it is clear from the text that the same principles apply in civil proceedings and that the principles applicable in criminal proceedings have their genesis in civil proceedings and numerous authorities confirm the application of those principles in civil cases. In summary form the principles are:-

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8 [1991] FCA 523.
9 Choo, A., 2nd Ed, Oxford University Press.

1. A litigant has the right to have his claim litigated provided it is not inter alia an abuse of process;

2. The court has an inherent power to prevent abuse of its own process by summary order;

3. The jurisdiction to strike out proceedings for abuse of process should be used sparingly and with circumspection;

4. The categories of abuse of process are not closed and recognised categories of abuse of process are:-

   (a) proceedings which involve a deception on the court, or a fictitious or constitute a mere sham;

   (b) where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;

   (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;

   (d) multiple or successive proceedings which cause, or are likely to cause, improper vexation or oppression;

5. What is an abuse of process depends on all the circumstances of the case and whether in a particular case there is abuse will be a question of fact and degree.[10]

The proceedings in the current case can be said to be fictitious, for the purposes of sub-paragraph 4(a) above.

[15] The text also contains reference to an unreported decision[11] which apparently established a new category broadly summarised as the manufacture and conduct of proceedings not for the legitimate ventilation of a genuine legal grievance but rather specifically to torment embarrass or impoverish one's opponent. The second part of that description appears to be a re-statement of the ulterior motive or improper purpose category, however the reference to the lack of a genuine dispute is clearly identified as a possible category and I see no reason why that cannot stand alone.

[16] I do not consider that the current case falls within the ulterior motive/improper purpose category. Even if that were the case then I am of the view that, consistent with *MacDonnell*, it is not a legitimate purpose to commence proceedings where no genuine dispute exists. What Mildren J said in *MacDonnell* was that "*an ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the action is successful*". That does not sit well with proceedings that have been settled and I am far from convinced

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10 *Abuse Of Process And Judicial Stays Of Criminal Proceedings* Choo, A., 2nd Ed, Oxford University Press, at pp 2-5.

11 *Persaud v Evans.*

that Mildren J contemplated the current circumstances when formulating his decision in *MacDonnell*.

[17] Moreover in *MacDonnell* there was clearly a genuine dispute. That is evident not only from the decision on the stay application but also in respect of the substantive proceedings. That dispute was identified as a claim for money. There is nothing to indicate that the dispute before the Court was not genuine and I think that is what distinguishes the current case.

[18] The Deed provides for final resolution of proceedings and does not reserve the right to re-ventilate the initial dispute if there is a default under the terms of settlement. The only remedy left on default is to enforce the settlement.

[19] The Deed contemplates that the Court will keep the current proceedings in abeyance for nearly 4 years in case there is a need to enforce the judgment. The current proceedings are an unnecessary use of court resources to cover a contingency which may never occur and, where a practical option would be available, i.e., to claim on a breach of the Deed if the contingency were to occur.

[20] In my view, this matter is not strictly in the ulterior motive or improper purpose category. The categories are not closed and I think it is clear from the principles derived from the authorities that issuing proceedings where no genuine dispute exists is an abuse of process. As the underlying dispute cannot be re-activated in the event of a breach of the terms of the Deed by

the Defendants the current proceedings are simply an enforcement backup in case of default by Defendants. There is no current dispute. A dispute can only arise in the event that the Defendants default on the repayment plan. That is a contingency only and if that occurs the dispute will not be as currently pleaded in the Statement of Claim as it will then be an action for breach of the Deed.

[21] For the aforesaid reasons I am of the view that the current proceedings are an abuse of process. I will hear from the parties before making final orders.