

CITATION: *Tsangaris v Inner Red Shell Pty Ltd and Katapodis [2002] NTMC 043*

PARTIES: MICHAEL TSANGARIS

v

INNER RED SHELL PTY LTD
AND
THEO KATAPODIS

TITLE OF COURT: LOCAL COURT AT DARWIN

JURISDICTION: LOCAL COURT

FILE NO(s): 20104985

DELIVERED ON: 15 NOVEMBER 2002

DELIVERED AT: DARWIN

HEARING DATE(s): 14 OCTOBER 2002

DECISION OF: D LOADMAN, SM

CATCHWORDS:

APPLICATION TO STRIKE OUT AMENDED STATEMENT OF CLAIM -
INVOCATION OF LOCAL COURT RULE 28.01 AND 28.02 IN AID OF
APPLICATION – ADMISSIBILITY AND WEIGHT OF CONTENTS OF
AFFIDAVIT WHEN DEPONENT NOT CROSS-EXAMINED

Local Court Act NT

REPRESENTATION:

Counsel:

Plaintiff: A McLaren
Defendant: J Dearn

Solicitors:

Plaintiff: A McLaren
Defendant: Brian Johns

Judgment category classification: B
Judgment ID number: NTMC [2002] 043
Number of paragraphs: 41

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

No. 20104985

BETWEEN:

MICHAEL TSANGARIS
Plaintiff

AND:

INNER RED SHELL PTY LTD
ACN 068 986 363
1ST Defendant

THEOPHANIS KATAPODIS
2ND Defendant

DECISION

(Delivered 15 November 2002)

Mr David LOADMAN SM:

Preliminary

1. On 5 April 2002 the 1st and 2nd defendants applied to the Court to strike out “each of the plaintiff’s claims as set out in clause 14 of the plaintiff’s amended statement of claim”. The application did not specify whether it was made pursuant to Local Court Rule 28.01 or Local Court Rule 28.02.

28.01 Stay or judgment in proceeding

- (1) Where a proceeding generally or a claim in a proceeding –
 - (a) does not disclose a cause of action;
 - (b) is scandalous, frivolous or vexatious; or
 - (c) is an abuse of the process of the Court,

the Court may stay the proceeding generally or in relation to a claim or give judgment in the proceeding generally or in relation to a claim.

- (2) Where a defence to a claim in a proceeding –
- (a) does not disclose an answer;
 - (b) is scandalous, frivolous or vexatious; or
 - (c) is an abuse of the process of the Court,

the Court may give judgment in the proceeding generally or in relation to the claim.

- (3) In this rule –

- (a) a claim in a proceeding includes a counterclaim and a claim by third party notice; and
- (b) a defence includes a defence to a counterclaim and a defence to a claim by third party notice.

28.02 Striking out pleading

Where a pleading –

- (a) does not disclose a cause of action or defence;
- (b) is scandalous, frivolous or vexatious;
- (c) may prejudice, embarrass or delay the fair hearing of the proceeding;
- or (d) is otherwise an abuse of the process of the Court,

the Court may order that the whole or part of the pleading be struck out or amended.

2. During argument leave was given to treat that application as an application pursuant to the provisions of LCR 28.01 since obviously it was supported by various affidavits filed by or on behalf of the 1st and 2nd defendants in support of the application.
3. On 11 October 2002 the 1st and 2nd defendants made a further application to strike out “the plaintiff’s claim”.
4. This Court will treat the various applications the subject of either the notice of application of 5 April 2002 or the application filed 11 October 2002 as being an application (a) pursuant to LCR 28.01; (b) alternatively to LCR 28.02; (c) further alternatively LCR 10.04; (d) further alternatively LCR 16.08.

10.04 Failure to give particulars

- (1) If a party fails to comply with a notice requiring further and better particulars, the party who served the notice may apply for an order –

- (a) if the party in default is a plaintiff or other party claiming relief – striking out the claim; or
- (b) if the party in default is a defendant or other party against whom relief is claimed – permitting the party applying for the order to proceed as if a notice of defence had not been filed.

(2) A party must file and serve an application under subrule (1) not later than 28 days before the date fixed for the hearing of the proceeding.

16.08 Failure to give discovery or allow inspection

- (1) Where a party fails to give discovery or to allow inspection of documents in accordance with this Part, the Court may –
- (a) order the party to give discovery or allow inspection;
 - (b) if the party is a plaintiff or other party claiming relief – strike out the claim; or
 - (c) if the party is a defendant or other party against whom relief is claimed – make an order permitting the party claiming the relief to proceed as if a notice of defence had not been filed.

(2) Where a party applies for an order under subrule (1) and the other party claims that the document is privileged from production or objects to production on another ground, the Court may inspect the document to decide the validity of the claim or objection.

(3) An application for an order under this rule is to be filed and served not later than 28 days before the date fixed for the hearing of the proceeding.

Pleadings

5. The relevant pleadings before the Court comprise:
- An amended statement of claim dated 19 July 2001 (this was in substitution of a claim in respect of which complaint had been successfully made by or on behalf of 1st and 2nd defendants);
 - A defence and counterclaim (which stands as the defence and counterclaim although it was filed in response to the original statement of claim of 26 March 2001) dated 17 August 2001;
 - A replication apparently filed on 3 October 2001 which in fact does not bear a date;

- Requests for and further and better particulars provided in relation to same by on the one hand the plaintiff of the first and second defendant and on the other hand by the 1st and 2nd defendant of the plaintiff.
6. For reason of the course action taken by Court in relation to the applications referred to, it is not currently necessary to focus on issues relating to further and better particulars or for alleged deficient discovery and for that reason there is no descent into an analysis of same.
 7. Insofar as there is an application before the Court pursuant to the provisions of LCR 28.01, that application is supported by a number of affidavits, namely
 - an affidavit sworn by Kristin Ann Bannerman (“Bannerman’s affidavit”);
 - an affidavit sworn by Theophanis Katapodis (“Katapodis’ affidavit”);
 - an affidavit sworn on 26 April 2002 by Eustathios Skliros (“E Skliros’ affidavit”)
 - an affidavit sworn on 28 April 2002 by Leonidas Skliros (“L Skliros’ affidavit”)
 - an affidavit sworn on 4 April 2002 by Leo Cleanthous, a public accountant and tax agent (“Cleanthous’ affidavit”).
 8. Bannerman’s affidavit in summary asserts that the 2nd defendant was at all material times the owner of 4 Bridelia Court Rosebery Heights, the property referred to in prayers 14C and D of the amended statement of claim (“the property”). Further that the property was sold and pursuant to the sale there was settlement of the contract on 14 December 2001. There is no contesting affidavit filed by or on behalf of the plaintiff. There was no requirement by the plaintiff that the deponent to this affidavit attend for the purposes of

cross-examination. As a consequence this Court accepts the facts as set out in that affidavit.

9. The deponent to Katapodis' affidavit was required by facsimile communication delivered on behalf of the plaintiff to the solicitors on record for the defendants to attend for cross-examination. At the time the application was made he was apparently available to be cross-examined but was not cross-examined, partly because the Court could not accommodate the parties with the provision of the time necessary for that exercise. Although initially the Court expressed the view that cross-examination of the 2nd defendant on an application made pursuant to LCR 28.01 was not appropriate, the plaintiff's practitioner has filed an authority in the form of an extract from a text "*Australian Civil Procedure*" (Cairns) which expresses the following proposition (in relation to affidavit evidence on interlocutory applications):-

"This is subject, of course to the deponent being cross-examined if necessary"

There is expression as to the Court's power which exists upon the occasion of a deponent having been ordered to attend not in fact attending. The same authority propounds:-

"When a deponent does not attend the Court decides whether his affidavit is to be admitted and the weight which ought to be given to it. This is discretionary and the nature of the proceedings and the contents of the affidavit are important factors."

In respect of the contents of Katapodis' affidavit this Court will treat same as it would have if he had not attended Court in response to the request he do so.

10. Paragraphs 2 to 5 inclusive of Katapodis' affidavit relate expressly or by reference to annexures to the financial position of the 1st defendant in respect of all periods relevant to the plaintiff's claim. The plaintiff has

filed no material which suggests that these particulars are in any way incorrect. It has not, for instance, filed an affidavit by an accountant asserting that the facts set out in Katapodis' affidavit are without foundation, are erroneous, false or otherwise to be impeached.

11. In paragraph 6 of Katapodis' affidavit, he asserts that in fact the nature of the relationship between the plaintiff and any of the defendants was that of an employee of the 1st defendant in specified circumstances. He further asserts that the nature of the relationship between the plaintiff and the 2nd defendant was similarly a contract of employment. There is no affidavit filed by or on behalf of the plaintiff contesting the veracity of these allegations.
12. In paragraph 7 of Katapodis' affidavit, he refers to the fact that the entire revenue or turnover during the relevant period of time was derived from 3 specified property ventures. It is to be observed that the property is only one of those properties.
13. The remaining paragraphs of Katapodis' affidavit, namely paragraph 8 to 11 inclusive, relate to financial data in respect of which it is alleged that from 1 April 1998 the plaintiff had access to. Further that the 1st defendant has not traded since 30 June 1999 and its shares possess no value whatsoever.
14. In paragraph 12 of Katapodis' affidavit, it is asserted that ventures concerned resulted in a loss of between \$5000 and \$6000. In paragraph 13, he swears to the fact that any monies borrowed in relation to the property were applied exclusively in relation to that property.
15. In paragraph 14 of Katapodis' affidavit, he asserts in corroboration of the evidence referred to earlier, that neither the 1st defendant or himself made any profits in any

“business ventures, investments or trading activities involving the plaintiff during the financial years ending 30 June 1998, 30 June 1999, or 30 June 2000”.

The plaintiff has filed no affidavit material contesting the accuracy of those facts.

16. E Skliros’ affidavit refers to the construction at 1 Australis Crescent Durack and in essence complains of obstruction, negligence or dereliction of duty by the plaintiff concerning the construction in question.
17. L Skliros’ affidavit refers to a construction at Lot 5058 Bridelia Court Rosebery Heights. The tenor of the allegations is the same as that of the E Skliros’ affidavit. In relation to neither of these affidavits has there been filed on behalf of the plaintiff any controverting material.
18. In Cleanthous’ affidavit, he deposes to being retained in relation to the preparation of the relevant financial documents relating to the 1st defendant for the financial years ending 30 June 1998 and 30 June 1999. He refers to the preparation of various documents by him as a consequence of the material given to him and the instructions supplied to him. In paragraph 9 of Cleanthous’ affidavit, he states that the company has (in something of a clumsy way) not traded since 30 June 1999. In paragraph 10, he asserts that he has never been instructed or informed by the 2nd defendant or any other person that the 1st defendant acted or traded as an agent for partners of a partnership. That presumably is because of the construction placed upon the contents of paragraph 4 of the Amended Statement of Claim.
19. Significantly in paragraph 11 of Cleanthous’ affidavit in regard to the hypothetical position of the 1st defendant in fact acting as an agent for a partnership, he deposes to the fact that there would nevertheless have been a net operating loss of \$62685. The Court interpolates to point out that in such circumstances of the fiction, the plaintiff would have been obliged to contribute pursuant to his own further and better particulars, half of the loss.

20. In paragraph 12 of Cleanthous' affidavit, he refers to matters concerning group certificates for wages paid to the plaintiff which of course can only relate to the plaintiff being an employee. No affidavit material was filed on behalf of the plaintiff contesting any of these assertions.
21. Whilst as a matter of law this Court must accept the validity of authority proffered by the plaintiff and referred to at paragraph 9 of this decision, in summary, the only deponent to any affidavit required to attend for cross-examination by or on behalf of the plaintiff was the second defendant, who had to travel from Greece for that purpose. No other deponent was required to attend for cross-examination. No material was filed contesting or putting in issue the allegations made by the other deponents. Even without the evidence set out in Katapodis' affidavit, the facts deposed to in particular by Mr Cleanthous are telling if not conclusive. That being the case and the Katapodis' affidavit merely being corroborative of allegations in other affidavits filed, the fact of the non cross-examination of the 2nd defendant will not, in this Court's finding, result in that evidence being disregarded. In all the circumstances the contents of all the affidavits referred to will be regarded as evidence and full weight will be given to the contents of such affidavits including the Katapodis' affidavit.
22. Firstly looking at the Amended Statement of Claim, from the point of view of the powers conferred on this Court by LCR 28.02 alone, the allegations in the amended statement of claim can be summarised in the following way (relevantly):-
- In February 1998 the plaintiff and the 2nd defendant entered into an oral partnership agreement to carry on the business of building construction. (The affidavit of the 2nd defendant of course is contrary to this being the case. He asserts there was merely a contract of employment.)
 - It is alleged (in paragraph 4 of the Amended Statement of Claim) that in the same month February 1998:-

“the 2nd defendant orally agreed with the plaintiff to
(a) conduct the business through the 1st defendant;
(b) provide him with 49% of the shares in the 1st defendant;
(c) make the plaintiff a co-director of the 1st defendant

(b) and (c) were to be effected within a reasonably short period of time.”

23. Obviously Mr Cleanthous has approached a hypothetical situation based upon those facts comprising, it would seem, some sort of agency arrangement in terms of which the partnership between the 2nd defendant and the plaintiff was effectively to be conducted through the agency of the 1st defendant. As a matter of fact there is no allegation that the 1st defendant was a party to the arrangement alleged in the Amended Statement of Claim; the arrangement perceived by Mr Cleanthous, or any other arrangement. As a matter of law in such circumstances there is no contractual arrangement asserted to exist or to have ever have existed between the 1st defendant, the plaintiff, the 2nd defendant or any other legal or actual persona.
24. There is no allegation of any description which asserts a cause of action against the 1st defendant on any basis whatsoever.
25. Paragraph 14 of the Amended Statement of Claim is a claim for relief. As a matter of law the Court observes that it would not be within power of any Court to accede to the prayers set out in A and B of Paragraph 14

“14. The Plaintiff claims from the second defendant:

A. Specific performance granting the plaintiff 49% shares in the first defendant with effect from February 1999;

B. Specific performance granting the plaintiff directorship of the first defendant with effect from February 1999”.

Nevertheless if the position was hypothetically possible it could not be the case that the relief could be granted for the simple reason that there is no cause of action of any description whatsoever pleaded against the 1st defendant. There is no need therefore to dwell on the matter relating to the 1st defendant further. Crisply the Amended Statement of Claim pleads no

cause of action at all against the 1st defendant and consequently this Court is empowered to act in accordance with LCR 28.02 or LCR 28.01.

26. In light of this Court's acceptance of the affidavit evidence, the Court finds that pursuant to LCR 28.01 the Amended Statement of Claim does not disclose any cause of action against the 1st defendant and judgment in due course will be entered against the plaintiff by and on behalf of the 1st defendant.
27. In passing although it was never the subject of argument or submission, the Court also refers to the fact that there is no quantification of the plaintiff's claim whatsoever. Section 14 of the *Local Court Act* is definitive in respect of the jurisdiction of a matter before the Local Court.

14. Jurisdiction

- (1) Subject to subsections (3) and (7), the Court has jurisdiction to hear and determine –
 - (a) a cause of action for damages or a debt, or a liquidated demand, if the amount claimed is within the jurisdictional limit;
 - (b) a claim for equitable relief if the value of the relief sought is within the jurisdictional limit;
 - (c) a claim concerning the ownership or possession of property if the value of the right to ownership or possession is within the jurisdictional limit;
 - (d) with the consent in writing of the parties –
 - (i) a cause of action for damages or a debt, or a liquidated demand, irrespective of the amount claimed;
 - (ii) a claim for equitable relief, irrespective of the value of the relief sought; and
 - (iii) a claim concerning the ownership or possession of property, irrespective of the value of the property; or
 - (e) any other matter or cause of action if it is given jurisdiction to do so by or under an Act other than this Act.
- (2) In subsection (1) "cause of action for damages" includes an action in tort.
- (3) The Court does not in relation to a cause of action have jurisdiction to grant relief or a remedy in the nature of certiorari, mandamus, prohibition or quo warranto.
- (4) Where the Rules provide a procedure for determining in a proceeding whether the amount claimed or the value of the relief sought is within the jurisdictional limit of the Court the jurisdictional limit shall be determined in accordance with that procedure.

- (5) The Court does not cease to have jurisdiction in respect of a cause of action because –
- (a) part of the cause of action arose outside the Territory, if a material part of it arose in the Territory; or
 - (b) the whole cause of action arose outside the Territory, if the defendant resided in the Territory at the time of being served with the claim.
- (6) An infant may bring a proceeding in the Court for the recovery of money payable to the infant under a contract of service or a contract for services as if the infant were of full age.
- (7) Notwithstanding anything to the contrary in this section, where a person has a claim of a kind referred to in subsection (1) the value of which is not more than \$5,000, he or she is to bring a proceeding not in the Court under this Act but in the Court under the *Small Claims Act*.
- (8) The Court may, on an application made in respect of a claim of a kind referred to in subsection (1), make a binding declaration of the rights of a party or the parties to the claim (whether or not consequential relief is or could be claimed).
- (9) A proceeding in the Court is not open to objection on the ground that a party to the proceeding is seeking a declaratory order of rights.

There is no evidence before the Court on behalf of the plaintiff and indeed no allegation in any paragraph of the Amended Statement of Claim relating to quantification of the monetary claim, the value of the relief sought if equitable or the value of the property, the subject of the prayers for relief.

28. Whilst nothing turns on this issue, in light of the decision in this matter, the Court refers to the reality of the situation which may have in itself precluded the Court from dealing with this matter. However, there is no plea to a lack of jurisdiction and the Court will not focus any further because of the decision it has reached.

Findings (in relation to the 2nd defendant)

29. The actual construction which this Court places upon paragraph 4 of the Amended Statement of Claim is the only construction which, in this Court's perception, accords with either law, fact or commonsense. The alleged contract in paragraph 4 must serve, if accepted on the facts as asserted, to terminate any partnership which allegedly pre-existed it. On that basis, no cause of action is disclosed against the 2nd defendant at all.

30. If the proper construction is that the 1st defendant was the agent of a partnership existing between the 2nd defendant and the plaintiff, then any cause of action which amounts to a breach of the agency mandate must be against the 1st defendant. No such cause of action is pleaded.
31. In the circumstances, both the provisions of LCR 28.02 and LCR 28.01 are satisfied in the sense that the Amended Statement of Claim does not disclose any cause of action against the 2nd defendant either.
32. Clearly there is, at least on the face of it, no room for a setoff to operate in respect of the counterclaim.
33. The counterclaim of course is a claim standing on its own. There is no application to strike the counterclaim out.
34. In light of the affidavit material referred to, highlighted and accepted on behalf of the 1st and 2nd defendants, this Court is satisfied that the provisions of LCR 28.01(1)(a) are satisfied and no cause of action is disclosed against the 2nd defendant. The Court is empowered in those circumstances to enter judgment on behalf of the 2nd defendant against the plaintiff, which it proposes to do.
35. In the light of the Court's findings, there is no need for the Court to address the application insofar as it invokes LCR 10.04 and 16.08 and accordingly it does not do so.
36. Although it is arguably academic it is only necessary for the purposes of clarification to say that of course in consideration of LCR 28.02 (which does not arise) the Court, on an abundance of authority, would not be entitled to refer to any evidence but would have to make its decision on the pleading as it stands.
37. Had the finding based on LCR 28.01(1)(a) not been the made and notwithstanding the fact that pursuant to LCR 28.02 striking out a whole

pleading would be unusual by virtue of the decision in *Opat Decorating Service (Vic) Pty Ltd v Jennings Group Ltd* (SC(Vic) No 9643/1992, 16 September 1994, unreported):-

“A plaintiff will be stopped from putting a claim forward only where, assuming the facts pleaded have been established, the claim is so manifestly hopeless that a trial would be a futility. “

this Court would have in this matter nevertheless have so struck the Amended Statement of Claim out. Such is the categorisation of the cause of action which it is attempted to plead. It is manifestly hopeless.

38. In the circumstances the following orders are made.

Orders

39. Judgment will be entered on behalf of the first defendant against the plaintiff in relation to the claim purportedly set out (since it is not at all) in the Amended Statement of Claim, pursuant to the provisions of LCR 28.01(1)(a).
40. Judgment will be entered on behalf of the 2nd defendant, in terms of LCR 28.01(1)(a) on the same basis.
41. There has not been any ventilation on any issue of costs. In the absence of agreement, the Court will consider questions of costs upon the matter being fixed for argument in the conventional way.

Dated: 15 November 2002

DAVID LOADMAN
STIPENDIARY MAGISTRATE