CITATION: *McDonald v Cassidy* [2003] NTMC 002

PARTIES: ROBERT ANDREW MCDONALD

v

NICHOLAS CASSIDY

TITLE OF COURT: LOCAL COURT AT DARWIN

JURISDICTION: TENANCY ACT

FILE NO(s): 20200647

DELIVERED ON: 06 JANUARY 2003

DELIVERED AT: DARWIN

HEARING DATE(s): 10 DECEMBER 2002

DECISION OF: D LOADMAN SM

CATCHWORDS:

APPLICATION FOR WARRANT OF POSSESSION – APPLICATION WITHDRAWN – COSTS OF PROCEEDING

REPRESENTATION:

Counsel:

Applicant: David Alderman

Respondent: Vanessa Farmer

Solicitors:

Applicant: Tony Crane

Respondent: Withnall Maley

Judgment category classification: B

Judgment ID number: [2003] NTMC 002

Number of paragraphs: 43

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

No. 20200647

BETWEEN:

ROBERT ANDREW MCDONALD
Applicant

AND:

NICHOLAS CASSIDY
Respondent

DECISION

(Delivered 06 January 2003)

Mr David LOADMAN SM:

1. Following upon the delivery of the decision in this proceeding on the 20 February 2002 there were intermittent appearances on behalf of the parties, said to have ever occurred only because of the inability of the parties to have their choice of adjourning the matter to a date to be fixed adopted by the Court because of the vagaries of the computer system relating to the courts administration.

2. In the event on the last occasion namely the 29 November 2002, the matter of "costs in question concerning section 18 of the *Local Court Act*" were adjourned.

3. Only one affidavit was filed in relation to this aspect of the matter. That affidavit was sworn by Robert Andrew McDonald, the plaintiff in the proceeding on the 05 December 2002. ["Plaintiff's December 2002 Affidavit"]

4. No opposing affidavit was filed by or on behalf of the Respondent.

5. Prior to examining the contents of the plaintiff's December 2002 affidavit, the Court records that the plaintiff's application for leave to withdraw the proceeding was not contested. Accordingly it will be a formal order in due course that the proceeding was withdrawn with leave and by consent.

6. There was left in issue however, the question as to what was appropriate by way of an Order regarding the costs of the proceeding.

7. A short history is necessary for the purposes of comprehending the decision. The case concerned a matter relating to an application in terms of section 51 of the *Tenancy Act,* for termination of an alleged lease of a dwelling house located at 8 Sawyer Street, Jingili (the premises). In the decision handed down by this Court on 20 February 2002 ("the February decision"), paragraph 11 expressed a finding that the *Tenancy Act* continued to apply to the rights of the parties, notwithstanding that the commencement date of the *Residential Tenancies Act* was 01 March 2000. This was because the provisions of section 160(2) of the *Residential Tenancies Act*. That section provided that in respect of a lease such as the lease contended as the genesis of the cause of action in the proceeding, the *Tenancy Act,* continued to apply as if the *Residential Tenancies Act* had not commenced operation. That clearly is a finding upon which is hinged the outcome of the costs application. The Court's finding was that the actual "Notice to Quit" may have been invalid for reasons set out in paragraph 18 of the February decision. There was no resolutive finding by this Court on that issue.

8. The February decision then proceeded to address matters on the hypothesis that the relevant "Notice to Quit" was valid. What had not been revealed by the plaintiff in the proceeding was that there had purportedly been a sale of the fee simple estate by the plaintiff to the defendant. Nevertheless, when that became apparent and contrary to submissions made by Counsel for the plaintiff, it was in the February decision found (paragraph 24) that the "equitable right" which arose, if there was a sale of the premises, may either

constitute a defence to the current proceeding or be the subject of a counter-claim in the current proceeding. *Waltons Stores (interstate) LTD v Maher* (1988) 164 CLR 387 FC 88/005.

9. In the February decision (paragraph 25) the Court did not accept the submission by Counsel for the plaintiff that the equitable right reposing in the defendant could not constitute a defence or attack upon a title registered under the Torrens Title system.

10. Mr Dearn asserted that in the absence of any "express right to occupy" the respondent "had no right of occupation at all". Although more extensively canvassed in paragraph 27 of the February decision it was observed by the Court that if there was no right of occupation at all, there couldn't be any basis upon which the relief sought by the plaintiff could be entertained.

11. Further in the February decision there was a contemplation of the doctrine of "merger" and further the doctrine of "surrender".

12. At paragraph 32 of the February decision the Court concluded that, "the resolution of the matter necessitates the adduction of oral evidence and the proper civil process attendant upon civil cases in an appropriate jurisdiction...". Further in paragraph 33 the Court adopted and set out the dictum of a majority of a High Court bench in the case referred to, as authority for the proposition that, disposition of issues such as those that were before the Court were inappropriate to be disposed of at an interlocutory level. That was in paragraph 35 the finding of the Court in the February decision.

13. The February decision next descended to the issue of the Courts jurisdiction. The premises possessed a sale value of "at least two hundred and twenty thousand dollars" (the Local Court jurisdiction limit being one hundred thousand dollars). It was the Courts finding in the February decision that the Court lacked jurisdiction and referred the parties to the provisions of

section 18 of the *Local Court Act* concerning transfer of proceedings in such circumstances, to the Supreme Court of the Northern Territory for disposition. The Court left open issues concerning employment of section 18 of the *Local Court Act* and the issue of costs.

14. By virtue of the proceeding being withdrawn by leave, questions arising out of employment of section 18 of the *Local Court Act* become academic.

15. Amazingly having regard to the absence of formality and the difficulties occasioned by documents and oral communications said to have been related to the sale of the premises which was the genesis for the proceeding in the first instance, the parties entered into a new contract for the sale of the premises, that seems to be as flawed as the first.

16. McDonald's December 2002 affidavit sets out in paragraph 4 what occurred prior to delivery of the February decision, but after the conclusion of argument in respect of which the Courts decision was reserved on 23 January 2002. It is apposite to set out paragraphs 4, 5 and 6 in full:-

4. "After the court adjourned to await the decision of Mr Loadman the Defendant approached me in the precincts of the court and said words or words to the effect of "Bob, I want to do a deal to settle all this so we stay out of court and avoid more costs." I said words to the Defendant words or words to the effect of "OK, the courts are costing too much money, we can settle it out of court if you agree to buy the house. I'll give you a 6 month settlement time. In that time you either buy the place or fix the property and get everything coded and legal so that I can sell the property to someone else." The Defendant said words or words to the effect of "I'll organise a contract to buy the house." Then I left the court building and I saw the Defendant leave the court building. Neither of our legal advisers were present for our conversation.

5. On Friday 1 February 2002 the Defendant and another person came to my property at Howard Springs near Darwin.

6. The Defendant and the other person sat down at the table with me. The Defendant said to me words or words to the effect of "Bob this is the agreement I have had done to settle all the house problems", and the Defendant handed to me a document but without any signatures thereon a true copy of which, except for the signatures on the copy I annex, is annexed to this my affidavit and marked "A".

17. Annexure A referred to in paragraph 6 above is in the following terms :-

(see next page)

THIS IS THE ANNEXURE MARKED "A" REFERRED TO IN THE AFFIDAVIT OF Robert McDonald
SIGNED AND SWORN AT Palmerston
THE 5th DAY OF December 2002
BEFORE ME [signature]

DJ Walton
Auxiliary 4198
NT POLICE
Commissioner of Oaths
Ph: (08) 8922 3344

PROPERTY:	8 Sawyer Street, Jingili NT Lot 3236 Town of Darwin NT
VENDOR:	Robert Andrew McDONALD
PURCHASER:	Nicholas CASSIDY & D. CASEY
PURCHASER PRICE:	$220,000
DEPOSIT PAID:	$51,800

TERMS OF AGREEMENT:

Purchaser to pay a further $28,200 to Vendor by 31 July 2002.

Vendor agrees to give an undertaking to NBA that he continues to service existing borrowings of $140,000 and agrees to guarantee any borrowings in relation to this property by Purchasers.

Vendor agrees to allow Purchasers to complete any renovations and agrees to allow Purchasers the right to sell property, provided the total sum to Vendor is paid upon sale ($220,000).

AGREEMENT DATED: 1 February 2002
Darwin NT

VENDOR: [signature] WITNESS: [signature]
Commissioner of Oaths NT

PURCHASERS: [signature] WITNESS: [signature]

.... WITNESS: ....

18. It is painfully obvious that the sale agreement 01 February 2002 set out above: - (a) makes no reference to the determination of the prior agreement

relating to the sale of the property. (b) makes no reference whatsoever to the proceedings before the Court which were obviously still in existence and in respect of which the decision of this Court was reserved and (c) is totally silent on the issue of the costs incurred or notionally to be incurred in the proceeding.

19. In respect of costs: -

a) The plaintiff seeks an Order that each party pay its own costs. Which in practicable terms is indistinguishable from an Order that there be “no Order as to costs”.

b) The defendant contends that the plaintiff should pay his costs

20. The basis upon which the plaintiff makes the application is also two fold. Firstly, Mr Alderman says that the arrangement set out in paragraph 4, 5, and 6 of the plaintiff’s December 2002 amounts to an accord and satisfaction in relation to the matters the subject of the current proceeding. He says that the accord is constituted by the oral discussion to terminate the litigation which was on foot at the time of the discussions set out in the affidavit referred to. He says that the consideration for the accord was the agreement to do that which would “get rid of the issues between the parties and the litigation”. The satisfaction he says comprises entering into the promise to novate the agreement relating to the sale of the land.

21. On the basis that there is an accord and satisfaction which does not relate to any transfer of interest in the land there is no issue in relation to the need for writing, he contends.

22. In the alternative the Court infers, and in any event Mr Alderman says, that this Court has found, that in so far as there is a landlord and tenant relationship subsisting at all, notionally or actually, it must be a relationship which is governed by the provisions of the *Tenancy Act*.

23. In those circumstances he says that the commencement date of the *Residential Tenancies Act* namely the 01 March 2000 is irrelevant. He says consequently that the plaintiff had no choice, but to file the proceedings in the Local Court, regardless of the value of the property because of the provisions of section 48 of the *Tenancy Act.* That he submits, compels any would be litigant to avail himself of the jurisdiction of the Local Court and that jurisdiction only.

24. In relation to costs incurred subsequent to the argument relating to the matters that are subject of the February decision, he says that such "subsequently incurred costs" should not be looked at as any kind of indicator or justification for any costs award at all. He says that had the parties been able to adjourn the matter sine die, a course apparently precluded by IT technology applicable to this jurisdiction, that would have been the course followed by both parties.

25. Counsel for the defendant, Ms Farmer, firstly asserted that the proceedings should have been referred to the Commissioner pursuant to section 126 of the *Residential Tenancies Act*. That cannot be so in light of this Courts finding that the *Tenancy Act* and not the *Residential Tenancies* Act governed any right, notional or actual arising from a landlord and tenant relationship.

26. She says the fact that the plaintiff failed to disclose details relating to the sale agreement is conduct which in itself should justify this Court making an award of costs in favor of the defendant against the plaintiff.

27. Other submissions relating to the application of section 30A of the *Local Court Act* cannot avail the defendant.

28. She did not discreetly address Mr Alderman's contentions in relation to the accord and satisfaction submission.

29. In so far as any award of costs is concerned she conceded that the criteria expressed in *Local Court Rules* 38.04 should be answered as follows: -

(i) It was a complicated matter factually and legally and should be classed therefore as a complex piece of legislation. Self evidently she said the fact that it could not be resolved at an interlocutory level is a primary indicator of that being so.

(ii) Not applicable

(iii) She says the application was lodged by the plaintiff on the 11 January 2002: mentioned on 16 January 2002: supported by an initial affidavit sworn 22 January 2002 and argued on 23 January 2002. That lead to the inevitable conclusion that the proceeding was conducted with exemplary efficiency.

(iv) Not applicable

(v) The only issue was that there was commencement of proceedings fundamentally in the wrong jurisdiction. That after the 01 March 2000 proceedings such as the those instituted could only be instituted under the *Residential Tenancies Act*. This Court repeats that it rejects that submission for the reasons already set out.

(With all these submissions Mr Alderman concurs)

30. She contends nevertheless, that 100 per cent of the scale set out in the appendix to rule 63 of the *Supreme Court Rules* as the defendant's costs should be paid by the plaintiff.

31. These arguments distilled to arguments that survive the courts rejection of others amount to the need to examine: - (a) Mr Alderman's arguments in respect of Accord and Satisfaction or (b) the defendant's arguments, namely the argument relating to non-disclosure of material matters.

32. To address this last argument first; as pointed out in paragraph 31 of the February decision, annexures A and C to the respondent's affidavit sworn 22 January 2002 were never revealed to this Court by the plaintiff.

33. Each of these pieces of evidence should unequivocally have been revealed by the plaintiff as part of his case. However, although the award of costs is discretionary, that discretion must both be exercised judicially and in conformity with the *Local Court Rules*. Objectively the failure to disclose these two documents did not in this Courts perception, ultimately have any effect on the outcome of the February decision. Indeed ultimately it could not have affected any decision on the merits of the matter and at most warrants criticism of the plaintiff for being less than frank. That tailored concealment has had no ultimate effect on the outcome of the litigation nor has it protracted it or in any other way affected it. The decision on costs is not predicated on equitable principles namely “an absence of clean hands”.

34. What the thrust of Mr Alderman’s submissions amounts to is, there was a contract of termination. The issue of “accord and satisfaction” is dealt with in “The Law of Contract” (D W Greig and JLR Davis 1987) (“Davis”)

35. At page 1183 under the heading “What constitutes accord and satisfaction” Davis makes the following statement “The contract by which any cause of action is settled-be it for a minor or a substantial breach of contract, or for damages caused by another’s tort-goes under the technical term of “accord and satisfaction”.

36. Further Davis continues “As Scrutton L.J. said, in *British Russian Gazette and Trade Outlook Ltd v. Associated Newspapers Ltd* [1993] 2 K.B. 616 at 643-644:

> “Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.”

37. It is in this Courts finding the case that, there is an accord such as was contended for and that it is "executed" (to be contrasted with a situation where the accord is only executory).

38. Davis on that basis makes the following statement "If, on the other hand, the accord is executed-the consideration, be it promise or act, has been provided-the creditor can in general no longer rely on the original cause of action, since he has agreed, by the binding accord, to forego that original cause of action and replace it with the satisfaction provided (although, as will be seen below, p.1186, even a binding accord and satisfaction may not be an unconditional discharge of the original cause of action)".

39. However it is not in this Court's finding necessary to examine the exception referred to in the portion in parenthesis set out above. It is this Court's finding that there is an executed accord. There is consideration. There is satisfaction. The plaintiff can no longer rely on the original cause of action which was the foundation of this proceeding.

40. It must follow on that basis, that if it is not possible to rely on the original cause of action, there can be no "living" issue concerning the incidence of costs.

41. To exhaust the matter however, were there to be any flaw in the reasoning supporting the decision which this Court has arrived at in relation to costs on the question of the accord and satisfaction argument, the remaining issue is the compulsion reposing on the plaintiff to bring the proceeding in the Local Court jurisdiction by virtue of section 48 of *Tenancy Act*. This Court finds, as it must of course, that the proceeding being governed by the *Tenancy Act* as found in its February 2002 decision dictates that the *Tenancy Act* was the dictator of what action it was incumbent on the plaintiff to take. On that basis the plaintiff had no choice. In other States perhaps in circumstances such as these that latter issue might have entitled one or both

of the parties to an "Appeals Costs Fund Certificate". That is not an option in this jurisdiction or in the Northern Territory at all.

42. In the circumstances it is this Courts decision that the appropriate Order in respect of the issue of costs is to formally order "No Order as to costs".

43. The formal Orders are:

    (a) Pursuant to leave granted to the Plaintiff the proceedings is withdrawn.

    (b) There will be no Order as to the costs of this proceeding..

Dated: 06 January 2003

DAVID LOADMAN
STIPENDIARY MAGISTRATE