

CITATION: *Phuc Cong Dinh and Le Lieu Thi v NT Construction Accounting Service Pty Ltd* [2004] NTMC 084

PARTIES: PHUC CONG DINH AND LE LIEU THI
v
NT CONSTRUCTION ACCOUNTING
SERVICE PTY LTD

TITLE OF COURT: Local Court

JURISDICTION: Civil

FILE NO(s): 20401213

DELIVERED ON: 23 November 2004

DELIVERED AT: Darwin

HEARING DATE(s): 26 October 2004

JUDGMENT OF: Jenny Blokland SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellant: Ms McLaren
Respondent: Mr Aldermen

Solicitors:

Appellant: Ms McLaren
Respondent: Mr Crane

Judgment category classification: C
Judgment ID number: [2004] NTMC 084
Number of paragraphs: 14

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

No. 20401213

BETWEEN:

PHUC CONG DINH AND LE LIEU THI
Appellants

AND:

**NT CONSTRUCTION ACCOUNTING
SERVICE PTY LTD**
Respondent

REASONS FOR DECISION

(Delivered 23 November 2004)

Ms JENNY BLOKLAND SM:

1. This is effectively an application by the first and second defendants to set aside a judgement entered in default of defence in the sum of \$55,186.72 (being a debt of \$52,980 plus costs \$1,693.80 plus \$512.57 interest). Judgement was entered on 18 February 2004. The defendant applied to set aside the judgement, that application was heard and dismissed by Judicial Registrar Monaghan on 14 April 2004. The Judicial Registrar dismissed the application on the part of the first defendant on the grounds that she had insufficient evidence that he had an arguable or prima-facie defence. The application of the second defendant was struck out on the grounds of her failure to attend. In her decision in relation to costs the learned Judicial Registrar said "I dealt with the matter and dismissed it with advice to Mr Dinh by me that he should get a lawyer to help him with a further application or appeal of the decision". Mr Dinh has instructed Ms McLaren

who has appeared before me and it is the decision of 14 April 2004 that is the subject of this appeal.

2. The statement of claim filed on 14 January 2004 alleges the defendants did not pay the balance of moneys owing to the plaintiff company as detailed in an invoice of 28 August 2001. That invoice (that is filed before me), is on the plaintiff's letterhead and reads as follows: "NT Construction Accounting Services Pty Ltd ABN 63 009-604-639 trading as Peter Cavanagh Public Accountant and Tax Agent". The Tax invoice reads "Sale of Bowen Mangoes from the Finnes River farm, the Langton Road farm and the Whitewood Road farm. Verbally agreed price of all Bowen Mangoes \$220,000. An increase in price will be determined by the size of the fruit picked". The "Total Amount Payable" is noted at \$220,000. There are also some hand written notes that appear to note the progress of payments and also note a "bounced cheque". The Statement of Claim states: ... "The plaintiff claims against the defendants the sum of \$52,980.35 being the balance owing by the defendants to the plaintiff for the sale and purchase to the defendants of mangoes on or about 28 August 2001". The "Particulars" set out relate to the various sums, including amounts paid, credit for packing charges and balance outstanding are all noted.
3. Filed with the original application to set aside was an affidavit of the first defendant Phuc Cong Dinh, obviously drafted without advice stating:

"On the 10th of February 2004 I visited Peter Cavanagh the plaintiff at his house to see it could pay of the debt in. Also I told him that I ownd (sic) the amount that he claimed on the Statement of Claim. And if that was O.K. then could he drop the coute (sic) against me. He stated that should be OK and that he would get in touch with his solicitor Brain (sic) Johns to draw the contract and for me to sign it. I spoke to Brain (sic) Johns about this at his office and he told me that. He would draw up a contrac (sic) and get back to me. I have not heard from either".
4. I note Mr Brian John's affidavit sworn 8 April 2004 states that in an attendance with the first defendant, the first defendant agreed the money

was owing; that the debt and proposed certain instalments: (see paragraph 3 Affidavit of Brian Johns). The affidavit further notes that Mr Johns informed the first defendant that he would take instructions from the plaintiff and write to him. (See para 5). That discussion took place on the 12 February 2004. Annexed to Mr John's affidavit is a letter of 20 February 2004 from Mr Johns to the first defendant enclosing the Judgement entered in the interim (being 18 February 2004). The letter also proposed an instalment plan in lieu of enforcing the judgement.

5. The first defendant, Mr Dinh Phuc Cong, swore a further affidavit of 26 May 2004 stating (amongst other things) that he received the original notice of demand dated 23 July 2003 from Palmerston Debt Collectors; he sought the assistance of his friend Mr Hans Miterhuber (a licensed Bailiff) to speak to Palmerston Debt Collectors; that being of Vietnamese origin he is not conversant in English and does not know how to read or write English and was unable to respond appropriately; that through searches made on his behalf he ascertained the business of Palmerston Debt Collectors was run by Peter Cavanagh; that Peter Cavanagh visited him and was abusive; that concerning a dispute on whether Peter Cavanagh owed the first defendant money, there was agreement that Peter Cavanagh would check the invoices and check whether either party owed money to the other. The first defendant states he did not hear anything further about this matter until the Statement of Claim was served on him. He reiterates he has had no dealings with the plaintiff's company, but only Mr Peter Cavanagh.
6. The first defendant also swears that he saw Peter Cavanagh on 10 February 2004 and was referred to Mr Cavanagh's lawyer, Mr Brian Johns. The plaintiff says he spoke to Mr Johns the next day and requested him to "cancel" the court case if he agreed to pay Peter Cavanagh and that he (the second defendant), said "no". He says "Mr Johns promised to call me after he has taken instructions from Peter Cavanagh". He further states that as he "did not hear anything from either Mr Johns or Peter Cavanagh or anybody

else regarding this matter I honestly believed that they had agreed to my request to drop the case against me. So I did not take any further action in the matter.

7. The first defendant does give further details concerning a possible defence of the matter involving what he says were the provision of services on the part of both defendants. He argues that Peter Cavanagh owes himself and the second defendant money. At this stage I will not go into the detail of that matter as given the way the application has been argued, those matters are more relevant to the second stage of the application.
8. Both Counsel agreed the matter should be heard in two parts. In this judgement I am dealing with whether or not the judgement was *irregular*.
9. Ms McLaren argued firstly that the plaintiff, NT Construction Accounting Services Pty Ltd (ABN 63 009 604 639) do not possess *locus standi* to bring the claim. Part of her argument is supplemented by her own affidavit of 12 October 2004. Ms McLaren conducted certain searches concerning the properties that sourced the mangoes being Whitewood Road, Langton Road and Finnes River. Those searches revealed only Finnes River is owned by the plaintiff; that Whitewood Road is owned by Peter William Cavanagh and Sheelagh Teresa Cavanagh and that Langton Road is owned by Peter William Cavanagh and Sheelagh Terese Cavanagh. Ms McLaren argues the plaintiff has no right to take out proceedings in relation to the provision of mangoes and that pursuant to Order 9.3.1 Supreme Court Rules, all of those entities should have been joined as parties as mandated by the Supreme Court Rules. She reminded me that any failure to comply with Court Rules will render a judgement liable to being set aside and that this cannot be corrected now by amendment. I note also Order 2 of the Local Court Rules on the same subject that is not expressed in mandatory terms. Ms McLaren argues the plaintiff cannot sue on behalf of the other two alleged parties.

10. I naturally accept that the proper parties must be joined but in my view this case is properly characterised as a breach of contract case where the essentials are pleaded appropriately in the Statement of Claim. The invoice discloses in my view that the proper party is the plaintiff. The plaintiff may well represent undisclosed principals but in the context of this case, (a contract for the supply of mangoes), there is no breach of the rules for failing to disclose the source of the mangoes or joining the source as a party. I would not find the judgement irregular on that basis.
11. Ms McLaren has also argued breach of good faith. I have summarised what the parties have said in their affidavits about this matter. It is common ground there was a discussion between Mr Johns and the first defendant. It is reasonable to infer from that material that the second defendant could have been under a belief that no further action would be taken until he was contacted. The question is whether judgement entered in the interim amounts to a breach of good faith sufficient to set aside the judgement for irregularity.
12. I have read the cases referred to me by Counsel and the matters referred in *Williams, Civil Procedure Victoria* (paras 21.07.65,70). What has occurred in this matter is disapproved of in the cases. It has some similarities with the practise of “slapping on judgements” (this area is discussed briefly by His Honour Justice Kearney in *James Albert Hogg v Isherwood-Hicks Pty Ltd*, unreported, SC (NT), 25 June 1992 and *Bee v Bush and Darwin City Council*, unreported, SC (NT) 7 July 1994). In my view however the cases deal with this form of conduct by taking it into account on the question of the defendant’s reasons for not taking a step prior to judgement being entered in conjunction with consideration of the merits. In this case it would appear to go a substantial way to explain why no step was taken, however, my reading of the cases does not indicate that this would render the judgement irregular and liable to be set aside *ex debito justitiae*. I have now had the opportunity to read *DCT v Abberwood Pty Ltd* (1990) 19 NSW

LR 530. Although with respect I would of course accept the reasoning applied, the facts giving rise to the decision are so significantly different that it is rightly distinguished. This is a situation where, unless there is a defence on the merits, there would be no useful purpose served by setting aside the judgement: *Gamble v Killingworth & McLean Publishing Co.P ty Ltd* [1970] VR 161 at 168. Although I note there is material filed relevant to the question of merits, I am yet to hear that argument.

13. In conclusion I find the judgement was entered regularly and I will set the matter down for further argument at a date to be fixed. I will make these reasons available to the parties by collection at the court on 23 November 2004 and I will request the Listing Registrar liaise over a further date when I will hear further on whether the judgement should be set aside on different grounds.
14. I note that I have taken the unusual step of allowing cross-examination of the applicant in part due to the apparent disparity between his earlier affidavit and the later claims made by him.

Dated this 23rd day of November 2004.

J Blokland
STIPENDIARY MAGISTRATE