

CITATION: *Duong v Nguyen & Anor* [2005] NTMC 038

PARTIES: CHIEU VAN DUONG  
v  
VAN HAC NGUYEN  
&  
THI YEN LINH TO

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20415611

DELIVERED ON: 27 June 2005

DELIVERED AT: Darwin

HEARING DATE(s): 24 April 2005

JUDGMENT OF: Mr Hugh Bradley CM

**CATCHWORDS:**

LOCAL COURT – JURISDICTION – INTERLOCUTORY INJUNCTION

*Local Court Act* 1989 (NT) s 4, s 6 and s 14 considered

*Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210

*Cardile v L.E.D. Builders Pty Ltd* (1999) 198 CLR 380

*Williams v Minister for the Environment and Heritage* (2003) 199 ALR 352

*Jackson v Sterling Industries Ltd* (1987) 162 CLR

*Mareva Compania Naviera SA v International Bulk Carriers SA* [1980] 1 All ER 213

*Mitrovic v Koren* [1971] VR 479

*Z. Limited v A – Z and AA – LL* [1982] QB 558

**REPRESENTATION:**

*Counsel:*

Plaintiff: Ms A McLaren  
Defendant: Mr R Johnson

*Solicitors:*

Plaintiff:

A McLaren

Defendant:

Darwin Community Legal Services

Judgment category classification:

A

Judgment ID number:

[2005] NTMC 038

Number of paragraphs:

25

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

No. 20415611

BETWEEN:

**CHIEU VAN DUONG**  
Plaintiff

AND:

**VAN HAC NGUYEN**  
1<sup>st</sup> Defendant

&

**THI YEN LINH TO**  
2<sup>nd</sup> Defendant

REASONS FOR JUDGMENT

(Delivered 27 June 2005)

Mr BRADLEY CM:

1. In this matter the plaintiff Chieu Van Duong is suing the first and the second defendants for \$17,000 said to be monies loaned by the plaintiff to the defendants jointly or jointly and separately. At this stage of the proceedings the plaintiff is seeking an interlocutory injunction in the nature of a mareva injunction to prevent the sale of an asset jointly owned by the two defendants namely Unit 1 Lot 785 Town of Palmerston being the land contained in Volume 634 Folio 771 Unit Plan 98/048.
2. The first and the second defendant are married or have lived in a de-facto relationship. The proceedings are defended by the first defendant on the basis that documentation evidencing his agreement to the loan contains a simulated or forged copy of his signature. The second defendant has separated from the first defendant and to the best of the court's knowledge

appears to have left Darwin and perhaps the Northern Territory. On the basis of the second defendant's absence substituted service was allowed and a judgement has been signed in favour of the plaintiff against the second defendant in the sum of \$18, 320.90.

3. The land the subject of the application is, on the evidence available to me worth somewhere between \$100,000 and \$150,000 namely an amount which is in excess of the usual jurisdiction of this court, namely \$100.00. The first and second defendants are joint tenants of the land and the land is subject to a mortgage to the St George Bank. Arguably therefore it seems that there are three separate interests in the land. Firstly there is the interest of the mortgagee and then separate but joint interests of the first and second defendants. If it were to be relevant each one of those interests is likely and I so find to be worth less than \$100,000 and therefore within the jurisdiction of the court.
4. The jurisdiction of the court is set out in the *Local Court Act* 1989 (the Act). Relevantly, it is a court of record and s 6 of the Act provides that the court is a court of law and equity and that the both shall be administered in all proceedings within its jurisdiction. Section 14 provides relevantly:

“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.....”

5. The first defendant has refused to consent to jurisdiction for the purpose of this application and the attitude of the second defendant is not known. The court therefore cannot rely on the consent provisions contained in s 14(1)(d).
6. The plaintiff argues that notwithstanding the jurisdictional limit of the court the application for an Interim Injunction is an ancillary order only and thus not subject to the normal provisions limiting the jurisdiction of the court. The first defendant argues that the jurisdiction granted to the court under s 14(1)(b) includes an application for interlocutory relief. The parties have not been able to provide and I am unable to locate any specific authority on the point. The first defendant argues further that even if ancillary orders of the type sought namely an injunction over the whole of the property is within the jurisdiction of the court it ought not to be granted because the plaintiff’s claim against the first defendant is without merit and that the rights of the first defendant should not be affected by such an injunction.
7. The argument that the plaintiff’s claim against the first defendant is without merit is based on an apparent expert’s opinion (annexed to affidavit) to the effect that the signature purporting to be that of the first defendant on the loan documentation is a forgery. Notwithstanding this, the pleadings disclose that the plaintiff pursues its claim against the first defendant on the basis of an implied agency or on the basis that the first defendant ratified or adopted the loan by an independent act on 7<sup>th</sup> January 2004. Whilst on the material before me there is some evidence to suggest that the first defendant’s signature has been forged there is no evidence one way or

another testing the allegation in the Statement of Claim that the first defendant acknowledged the debt. For this reason I find that there is still a real question to be tried on the basis of the pleadings and material before me.

8. The next issue therefore before me is whether or not the grant of an injunction in the form sought would be in excess of jurisdiction. This problem arises for the court in a number of areas such as the present and particularly perhaps in areas involving leasehold interests where there is a competition between the value of the real estate involved and/or the value of the particular dispute or the total value of the lease payments due under the documentation. The problem also arises in relation to property claims in relation to de facto relationships. Is it the interest claimed that must be within jurisdiction or the total value of the property in respect of which the claim is made that is relevant for the purposes of determining the jurisdiction of the court?
9. In my opinion the proper basis to approach the issue of jurisdiction is to first be satisfied that the principle course of action is within jurisdiction and then to approach the question of whether the orders sought are ancillary to that jurisdiction or more properly the assumption of a fresh claim requiring jurisdictional issues to be resolved. Clearly the initial claim for \$17,000 is within jurisdiction. The plaintiff argues, as indicated above, that the order is merely ancillary while the defendant says there are fresh jurisdictional issues to be satisfied.
10. The plaintiff argues that this injunction, whilst in the nature of a *mareva* injunction, is nevertheless an interlocutory injunction in character and my attention has been drawn to *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 where at page 256 it was said

“A right to an interlocutory injunction is not a cause of action it cannot stand on its own. It is dependant upon there being a pre-

existing cause of action against a defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction”.

11. That the nature of a mareva order is an adjunct to an action and not a substitute for final relief was also recognized in the leading Australian authority of *Cardile v L.E.D. Builders Pty Ltd* (1999) 198 CLR 380.
12. The Local Court is a court of record and of law and equity (see s 4 and s 6 of the Act). The argument therefore runs and I accept that this court must have the necessary power to prevent “its processes from being frustrated and an available form of proceeding from being rendered nugatory” – *Williams v Minister for the Environment and Heritage* (2003) 199 ALR 352 at p 356.
13. Clearly if I find that the invoking of the jurisdiction of the court to grant an injunction is ancillary then the jurisdictional issue does not arise and the matter of the merits of the application for the injunction can be considered.
14. The first defendant has argued that where the equitable jurisdiction of the court is being invoked there must be a fresh issue of jurisdiction – s 14(1)(b). He says that “the value of the property embargo under such an order cannot be severed into two “part-values”, namely, that part of the value which would cover the plaintiff’s alleged debt and the balance of the value not required to satisfy the alleged debt. If the property is to be enjoined (sic) then it is the whole value of the property which is to be enjoined and this is the “relief” which the plaintiff is seeking, nothing less”. Accordingly it was submitted that the relief and the value of the relief was outside the jurisdictional limit of the court.

15. It is clear in my view that the court has the capacity to effect rights in relation to property worth many times its jurisdiction. Clear examples of this include the jurisdiction to determine tenancies and resolve disputes between for example unit title holders. Perhaps the most relevant example is the power of the court to issue process for the sale of land for the satisfaction of a judgment debt. The whole of a property worth more than the nominal jurisdiction of the court may be sold to satisfy a debt. In my view therefore the invocation of the court's equitable powers to grant an injunction for the purposes of protecting against the defendants alleged intention to sell to prevent recovery is properly classified as ancillary jurisdiction rather than original jurisdiction. Its purpose is to protect the plaintiff's rights he may have ultimately to issue a warrant for the sale of the land. Whether or not in all the circumstances the plaintiff is entitled to an injunction at all and over the whole of the property will depend on other matters but I am satisfied that the court has the jurisdiction and power to do so.
16. This is an appeal from a Judicial Registrar's decision to the effect that the court is without jurisdiction to make an injunction over a property valued at more than \$100,000. That has been unsuccessful. An appeal of this nature is an appeal de novo (Rule 4.04) and so it is appropriate that I continue to consider the issues relevant to the grant of the requested injunction.
17. The principles surrounding the issue of an interlocutory injunction in the nature of a mareva order are well known. The mareva order takes its name from the decision of the English Court of Appeal presided over by Lord Denning MR in *Mareva Compania Naviera SA v International Bulk Carriers SA* [1980] 1 All ER 213. The purpose and policy of the order was recognized in Australia in *Jackson v Sterling Industries Ltd* (1987) 162 CLR p 612. The matter has most recently been considered at length by the High Court in *Cardile's* case (supra).



18. In the present case there is clearly a claim for debt against each of the defendants. The two defendants are the sole proprietors of the land sought to be restrained and they could, as alleged in paragraph 28 of the affidavit of the plaintiff, prevent execution by an early sale. There appears to be no other ready means of securing payment of the judgment debt of the second defendant and of the first defendant if the plaintiff is successful at trial.
19. A court should not move hastily to issue *mareva* injunctions and should only do so after the usual undertaking. The *Local Court Rules* specifically provide that such an undertaking should be given (see rule 26.01(3)). The form of the order should also take the most least intrusive means of securing the rights of the plaintiff so that it does not unduly interfere with the rights of the defendants and any relevant third parties.
20. In this case there is a real claim and, so far as the first defendant is concerned, an issue to be determined. Access to the property in question may be the most effective way of ensuring payment of the present judgment and any future judgment and costs as against the first defendant. There is no evidence of hardship to the first defendant if the injunction were to be granted and his case has not been put on this basis. The interests of the St George Bank need also to be considered. Those interests however can, in my view be accommodated by appropriate terms of the order.
21. I am conscious that the plaintiff has judgment against the second defendant and could technically issue a warrant for the sale of her interest in the land. Such a warrant would enable the sale of the interests of the second defendant only and thereby sever the joint interests of the two joint tenants – *Mitrovic v Koren* [1971] VR 479 at p 481. In such circumstances it is unlikely that the Sheriff would find a buyer that would pay anything like the real value of the joint interest; more controversy and difficulty is the likely result of such a sale. It is clear that the discretionary remedies should be exercised in a way which best suits the circumstances and, apart from

ensuring the order is not too broad (*Cardile's* case) the court can be creative in the way it frames an injunction.

22. The amended application dated 14 December 2004 seeks (possibly in the alternative):

“1. An injunction restraining the defendants jointly and severally from selling, disposing, encumbering; or otherwise alienating the property situate at 1/14 Priest Circuit being Unit 1 Lot 785 Town of Palmerston Volume 634 Folio 771 Unit Plan 98/048.

2. That the injunction sought in paragraph 1 above be granted *ex parte* against the second defendant”.

23. I believe an order in the terms of paragraph 1 of the application would be too broad and may unduly affect the interests not only of the defendants but also the mortgagee who would have difficulty in such circumstances enforcing its power of sale if payments of the mortgage were to cease. An order in the form requested in paragraph 2 if given against the second defendant only could have the effect of severance of the joint interests creating the confusion referred to above. In my view it may be appropriate that an order be made limited to effect such of the proceeds of sale as may be sufficient to cover the claim and costs. Such an order once notified to the first defendant and the mortgagee will have the effect of binding the defendant and be persuasive upon the actions of the mortgagee who could be held in contempt if he had acted in a way that permitted the effect of the injunction to be avoided – see *Z. Limited v A – Z and AA – LL* [1982] QB 558.

24. Subject to hearing the submissions of the parties therefore the court is prepared to consider an order not in the form applied for but one which prohibits the settlement of any sale of the land unless the balance of the proceeds of sale or say \$30,000, whichever is the less, is paid into the court to abide the decision of the court on the principal claim and costs. Some provision may need to be made to ensure that no other interest in the land is

established or the amount due under the mortgage is expanded so as to defeat the purpose of the injunction. Liberty will need to be provided to any affected party to apply to the court. At the present time the court does not appear to have the necessary undertaking given by the plaintiff.

25. I will hear from the parties.

Dated this 27th day of June 2005.

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**Hugh B Bradley**  
CHIEF MAGISTRATE