

CITATION: *Dwyer v Noden* [2006] NTMC 020

PARTIES:

LESLEY DUNCAN DWYER

v

SALLY JANE NODEN

TITLE OF COURT: LOCAL COURT

JURISDICTION: LOCAL COURT

FILE NO(s): 20500647

DELIVERED ON: 3 March 2006

DELIVERED AT: Darwin

HEARING DATE(s): 27th February and 1st March 2006

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Practice and Procedure – indemnity costs – offers of compromise – notice of discontinuance – abuse of process

Vivanet v Power [2001] NTSC 66 per Mildren J

Gilham v Browning [1998] 2 All ER 68

Castanho v Brown & Root (UK) Ltd [1980] 3 All ER 72

REPRESENTATION:

Counsel:

Plaintiffs: Mr Cahill
Defendant: Ms Hamilton

Solicitors:

Plaintiff: Peter Cahill and Associates
Defendant: Cridlands

Judgment category classification: C
Judgment ID number: [2006] NTMC 020
Number of paragraphs: 30

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

No. 20500647

BETWEEN:

LESLEY DUNCAN DWYER
Plaintiffs

AND:

SALLY JANE NODEN
Defendant

REASONS FOR JUDGMENT

(Delivered 3 March 2006)

Judicial Registrar Fong Lim:

1. On the 7th of January 2005 the Plaintiff originally commenced proceedings in his name and the name of the company, Noden Dwyer Nominees Pty Ltd (“the company”), against the Defendant. The Defendant’s solicitors challenged the Plaintiffs’ statement of claim on four separate occasions and the Plaintiffs were given opportunities by the Court to replead their action. One of the amendments made was to remove the company from the proceedings.
2. The cause of action pleaded by the Plaintiff has changed in character throughout the proceedings from a claim by the company against the Defendant for a breach of her duty as a director of that company and a claim based in the sale of shares between Mr Dwyer and the Defendant with some claim for misrepresentation. After the third amendment of the statement of claim the Plaintiff’s claim then became a claim by Mr Dwyer only (the company having been removed in a previous amendment) for a loan repayment of a directors loan and for the specific performance of a contract

for the purchase of shares in the company as well as some claim for damage to the plaintiff regarding directors guarantees for the company.

3. The Defendant applied to have the third amended statement of claim struck out on the basis that it did not disclose a cause of action. This court decided that application on the 7th of December 2005 and judgment was granted in favour of the Defendant on the Plaintiff's claim that the Defendant was responsible to him for a loan which was in fact repayable by the company and the Defendant was granted a further opportunity to replead his action in relation to the contract for sale of shares. The Defendant then chose to discontinue his action on the 14th of December 2005.
4. The Defendant now applies to the court to exercise its discretion and award costs on an indemnity basis to the Defendant.
5. It is not disputed by the Plaintiff that by operation of Rule 5:18 of the Local Court Rules he is to pay the Defendant's costs of this action however takes issue with the claim for indemnity costs.
6. The Defendant claims indemnity costs on three bases:
 - (a) the Plaintiff's conduct during the proceedings
 - (b) the Plaintiff's rejection of the offer of compromise
 - (c) the Plaintiff's proceeding was hopeless.
7. The Plaintiff's solicitor took issue with the first ground arguing that there was nothing in the material that indicated that argument was going to be put forward. Given the material put before the court in support of this argument was a matter of court record the Defendant was heard on that ground and the Plaintiff given a week's adjournment to prepare his arguments in answer to that application.
8. The court's power to award costs on an indemnity basis is of course conferred by the operation of the Local Court Act and rules (see rule 38.03(1) of the Local court rules and Rule 63.29 (1) of the Supreme Court

Rules) however the discretion to award costs on the indemnity basis is unfettered. When a party is awarded costs it is the accepted rule that those costs are paid on a standard basis unless the court otherwise orders.

9. The exercise of the court's discretion must as always be exercised judicially and when deciding whether to issue costs on an indemnity basis the court should be satisfied that there are special circumstances to justify and order for costs on an indemnity basis Vivanet v Power [2001] NTSC 66 per Mildren J.
10. Special circumstances can only be assessed by considering the factual circumstances relating to each individual case.
11. **Offer of compromise.**- The Defendant filed and served an offer of compromise on the 21st of April 2005 the terms of that offer being that the Defendant pay to the Plaintiff the sum of \$2500.00 in full and final satisfaction of the Plaintiff's claim. The offer was not accepted and the Defendant now claims that Rule 20.07(3) entitles her to costs on the indemnity basis as the Plaintiff has received less than that offer.
12. Rule 20.07(3) provides:

20.07 Costs consequences of failure to accept

(1) This rule applies to an offer of compromise that has not been accepted at the time of judgment.

(2) If –

(a) a defendant does not accept an offer of compromise made by a plaintiff; and

(b) the plaintiff obtains a judgment on the claim to which the offer relates that is equal to or more than the offer made,

the plaintiff is entitled to an order that the defendant must pay the plaintiff's costs in respect of the claim from the date of service of the offer, to be taxed or agreed on an indemnity basis, unless the Court orders otherwise.

(3) If –

(a) a plaintiff does not accept an offer of compromise made by a defendant; and

(b) the plaintiff obtains a judgment on the claim to which the offer relates that is equal to or less than the offer made,

unless the Court orders otherwise –

(c) the plaintiff is entitled to an order that the defendant must pay the plaintiff's costs in respect of the claim to and including the day on which the offer was served, to be taxed or agreed on a standard basis; and

(d) the defendant is entitled to an order that the plaintiff must pay the defendant's costs in respect of the claim after the offer was served, to be taxed or agreed on an indemnity basis.

13. The Plaintiff argues that this rule does not apply to this matter as the operation of the rule is only triggered by judgment being entered in favour of the Plaintiff for less than the offer. In this matter there has been no judgment entered and therefore rule 20.07 cannot apply.
14. The Defendant argues that the definition of judgment in the rules is broad enough to encompass a discontinuance. Judgment is defined in rule 1.09 as “a decision, determination or order whether final or otherwise”. It is my view that a judgment clearly requires the court to make a determination or order and a notice of discontinuance does not require the court to make any order. I therefore agree with the Plaintiff that rule 20.07 has no effect in the situation where a Plaintiff has discontinued his action. The remedy provided to the Defendant in those circumstances is that the Plaintiff pay the Defendant’s costs of the whole proceedings on a standard basis.
15. I accept that there had been part judgement awarded in the Defendant’s favour however that did not address the whole of the Plaintiff’s claim and it is therefore impossible to assess what the Plaintiff could have achieved in the action on a judgment if the matter had not been discontinued.

16. **Plaintiff's behaviour and special circumstances.**

The Defendant further submits that the behaviour of the Plaintiff in this proceedings amounted to special circumstances upon which the Court should be satisfied that it should order costs on an indemnity basis.

17. The chronology of Plaintiff's behaviour was put to the court as follows:

(a) the Plaintiff has filed 4 statements of claim all of which were subject to applications by the Defendant to strike out for failure to disclose a cause of action or lack of particularity. The Plaintiff was given opportunity to replead those statements of claim on each occasion.

(b) the Plaintiff's solicitor's failure to replead the statement of claim on invitation by the solicitors for the Defendant and therefore the Defendant took interlocutory applications for that purpose.

(c) on the 30th November 2005 the Defendant was successful in obtaining judgment against the Plaintiff for part of the claim and further orders were made for the repleading of the balance of the Plaintiff's claim or else the Plaintiff's claim would be struck out.

(d) on the 14th of December 2005 the Plaintiff filed and served the Notice of Discontinuance

(e) on the 2nd of February 2006 the Plaintiff issued fresh proceedings on the same issues between the parties in the Magistrate's courts in Bendigo.

18. It is the Defendant's submission that the Plaintiff clearly filed a Notice of Discontinuance to avoid further adverse orders against him by this court. The Defendant also claims the Plaintiff is clearly hoping to get a more favourable hearing on his pleadings in the court in Bendigo.

19. The Defendant also argues that the filing of the Notice of Discontinuance to avoid the jurisdiction of this court is tantamount to an abuse of process and as such is a special circumstance upon which this court can base an order for costs on an indemnity basis. The Defendant supports this argument by reference to *Gilham v Browning* [1998]2 All ER 68, *Castanho v Brown &*

Root (UK) Ltd [1980]All ER 72 and Packer v Meagher [1984] 3 NSWLR 486.

20. In Gilham v Browning (supra) the Defendant, Browning, filed a notice of discontinuance of their counterclaim in the court at first instance and that notice came after they were denied the right to call some evidence in support of the counterclaim. The Plaintiff applied to set aside the Notice of Discontinuance and that application was granted the Defendant then offered no evidence in support of their counterclaim which was then dismissed. The Defendant then recommenced proceedings against the Plaintiff two months later for the same matter as had been included in the counterclaim. The defendant appealed to the Court of Appeal – Civil division arguing that the County court judge had no power to disallow the Notice of Discontinuance. The Court of Appeal found that, following the House of Lords Castanho v Brown & Root (UK) Ltd [1980]All ER 72 the judge in the first instance was correct in setting aside the notice of discontinuance as an abuse of process because the defendant had sought to escape the original counterclaim because they had an adverse finding which made their counterclaim evidentially impossible. By recommencing in the High Court the defendant sought to have his claim heard without the adverse finding of the court on the admissibility of the evidence.
21. The Defendant in the present matter submits that the Plaintiff has by filing its notice of discontinuance sought to avoid the unfavourable interlocutory orders particularly the order of the 30th November 2005 and that intention is made clear by the fact that the Plaintiff has recommenced proceedings in the Bendigo court for virtually the same action as he had originally pleaded in this jurisdiction.
22. The Complaint filed in the Magistrate's court in Victoria at Bendigo was annexed to the affidavit of Ms Hamilton and it is clear that it is pleading exactly the same action as originally plead in the amended statement of

claim which was subject to my order of the 30th of November 2005. The Complaint also adds a further ground for cause of action in paragraphs 11-18 and attempting to plead a breach of the Fair Trading Act although it does not actually plead that there has been a breach of the sections of that Act. What is significant is that the Plaintiff has chosen to claim again through the Bendigo court the amount claimed as loan repayments from the company over which this court has already granted judgement to the Defendant on the 30th November 2005.

23. Given the above it is my view that the Plaintiff by filing the Notice of discontinuance and recommencing his proceedings in Victoria in virtually the same terms as he had in this jurisdiction is guilty of an abuse of process and that abuse of process should be taken into account when this court decides if it should issue costs on an indemnity basis.
24. It is my further view that the Plaintiff has been unable to properly plead a cause of action against the Defendant because of one of two reasons either his solicitor is not skilled enough to properly plead his action or he has no action at all. It has always been this courts view that there may have been an agreement between the parties for the sale of the shares between the Plaintiff and the Defendant however the Plaintiff seemed unable to plead that agreement in any particularity. The Plaintiff also insisted on relying on consideration which can be no consideration, eg promise to ensure a company repay it's loan to the Defendant.
25. The fact is that the Plaintiff caused the Defendant to waste her time and money defending an action which in this courts view was at least in part hopeless and in part continually badly pleaded. At this point I note the Plaintiff's submission that the Plaintiff is subject to costs orders regarding those interlocutory applications and those orders cannot be revisited by the court and I accept that argument. However the court can take into account the fact that the Plaintiff had several attempts to plead his case correctly and

failed and it was only when he faced further adverse orders he decided to abandon his action in this jurisdiction.

26. The Plaintiff is clearly not abandoning his claim against the Defendant he is clearly forum shopping and in this court's view, in the circumstances of this case, is abusing the courts process by taking that action.
27. The Plaintiff's action to avoid this court's jurisdiction is reprehensible. The Defendant now has to incur further costs defending an action in a jurisdiction which by its physical location more inconvenient and clearly more costly for the Defendant. The Defendant has to answer a claim upon which she has already received judgement in this jurisdiction.
28. Given all of the above it is this court's view that the Plaintiff's actions throughout this litigation has created special circumstances upon which it is appropriate for an order of costs on an indemnity basis ought to issue.
29. The Plaintiff should also note that if this court had the power to stay an action in another jurisdiction it would do so until such time that the Plaintiff had paid the Defendant's costs of this action however this court does not have that power.
30. Accordingly my order in relation to the Defendant's application are:
 - 30.1 The Plaintiff pay the Defendant's costs of the proceedings including the costs of this application on an indemnity basis save and except those costs already ordered in the Defendant's favour on a standard basis.

Dated this 3rd day of March 2006

Tanya Fong Lim
JUDICIAL REGISTRAR