CITATION: *BDO Chartered Accountants & Advisers v Diamand & Zikos Investments Pty Ltd & Ors* [2006] NTMC 067

PARTIES:	BDO CHARTERED ACCOUNTANTS & ADVISERS v DIAMAND & ZIKOS INVESTMENTS PTY LTD CTD (NT) PTY LTD DIAMAND & ZIKOS HOLDINGS PTY LTD DIAMAND & ZIKOS NOMINEES PTY LTD FIMVOSS PTY LTD WATERVIEW (NT) PTY LTD
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court Act
FILE NO(s):	20607364
DELIVERED ON:	15 August 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	2 August 2006
JUDGMENT OF:	Mr V Luppino

CATCHWORDS:

Practice and Procedure – Commencement of proceedings in a firm name – No enabling rule in the Local Court Rules – Procedure wanting – Whether Rule 1.12 of the Local Court Rules provides for automatic application of the Supreme Court Rules where procedure is wanting – Whether prior leave is required.

Local Court Act (NT) s 15
Local Court Rules rr 1.12, 2.03, 7.02, 12.05
Supreme Court Rules Order 17.01

Berowra Holdings Pty Ltd v Gordan [2006] HCA 32; Mann v The Northern Territory News (No. 3), Court of Appeal of the Northern Territory, 6 May 1988; O'Brien v Northern Territory of Australia [2003] NTCA 4; Beugelaar v City of Springvale (1969) VR 3; About Holdings Pty Ltd v Bellbird Enterprises Pty Ltd (1996) 17 WAR 309; Collins v Deflaw Pty Ltd (2000) 157 FLR 121; Secombs (A Firm) v Sadler Design Pty Ltd [1999] VSC 79; Truckpower Automotive Engineering Pty Ltd v Goulopoulos Shiels, Supreme Court of Victoria, 18 October 1996.

REPRESENTATION:

Counsel:

Plaintiffs:	Mr Oliver
Defendants:	Mr Clift

Solicitors:

Plaintiffs:	Minter Ellison
Defendants:	De Silva Hebron

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 067
Number of paragraphs:	26

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

No. 20607364

BETWEEN:

BDO CHARTERED ACCOUNTANTS & ADVISERS

Plaintiffs

AND:

DIAMAND & ZIKOS INVESTMENTS PTY LTD
CTD (NT) PTY LTD
DIAMAND & ZIKOS HOLDINGS PTY LTD
DIAMAND & ZIKOS NOMINEES PTY LTD
FIMVOSS PTY LTD
WATERVIEW (NT) PTY LTD

Defendants

REASONS FOR DECISION

(Delivered 15 August 2006)

Mr V LUPPINO SM:

1. This is an application by the defendants seeking an order under section 15(1)(c) of the Local Court Act ("the Act") for the strike out of the plaintiffs' proceedings.

2. The application relates to proceedings commenced in this Court where the plaintiffs are described by a business name and not under the individual names of the proprietors of the business name. Paragraph 1 of the Statement of Claim pleads as follows:-

"The plaintiff is and was at all material times:

(a) a partnership comprising Carmelo Sciacca, Marco Cardellini and Paul Maher, trading under the business name of BDO Chartered Accountants & Advisers, a business name registered in the Northern Territory of Australia and capable of suing and being sued pursuant to section 27 of the Business Names Act (NT); and

(b) in the business of providing accounting services."

The evidence reveals that Paul Maher is not a proprietor of the business name. The reference to Paul Maher should to refer to P Maher Pty Ltd. Despite that discrepancy, that is not directly relevant for the purposes of the current application.

3. The Statement of Claim was filed on 8 March 2006. The defendants filed a Defence on 27 April 2006. Anomalously in light of the present application, the defendants therein admitted the matters pleaded in paragraph 1 of the Statement of Claim.

4. In summary form the defendants' argument is that:-

1. An action commenced by a non juristic personality is a nullity;

2. A business name is not a juristic person and does not have capacity to sue or be sued;

3. In the absence of some procedural rule or statutory authority, only natural or juristic persons may be parties to legal proceedings;

4. A nullity cannot be cured by amendment;

5. Parties cannot waive or agree to cure a nullity;

6. Although Order 17.01 of the Supreme Court Rules makes provision for parties in the Supreme Court to sue or be sued in a business name, there is no equivalent rule in this Court;

7. Rule 1.12 of the Local Court Rules ("the Rules") does not apply automatically and requires either formal adoption of Order 17 of the Supreme Court Rules, such as by a practice direction, or by a separate application preceding the commencement of proceedings for an appropriate order.

5. Order 17.01 of the Supreme Court Rules provides as follows:

> 17.01 Partners
>
> (1) Where 2 or more persons carry on business as partners in the Territory, a proceeding may be commenced by or against them in the name of the firm (if any) of which they were partners when the cause of action accrued.

6. Various provisions of the Rules are relevant to the application and those rules are set out hereunder, namely:-

> 1.12 Procedure wanting or in doubt
>
> (1) Where the manner or form of the procedure –
>
> (a) for commencing or taking a step in a proceeding; or
>
> (b) by which the jurisdiction, power or authority of the Court is to be exercised,
>
> is not prescribed by these Rules or by or under an Act, the Court may adopt and apply with the necessary changes the relevant procedures, rules and forms observed and used in the Supreme Court.
>
> (2) An act done in accordance with an order made or direction given in pursuance of subrule (1) is regular and sufficient.
>
> (3) An application for directions relating to the commencement of a proceeding is not to name a person as defendant.

2.03 Application to set aside

Where a party applies to the Court to set aside a proceeding or a step taken, document used or order made in a proceeding on the ground of a failure to comply with these Rules, the Court may do so only if the party applies –

(a) within a reasonable time after the party becomes aware of the failure; and

(b) before the party takes a further step in the proceeding (other than filing a notice of defence) after becoming aware of the failure.

7.02 Form and content

(1) *Omitted*.

(2) A statement of claim is to –

(a) *Omitted*;

(b) if the plaintiff sues in a representative capacity – state the capacity in which the plaintiff sues;

(c)-(f) *Omitted*.

(3)-(4) *Omitted*.

12.05 Removal, addition or substitution of party

At any stage of a proceeding, the Court may order that –

(a) a person who is not a proper or necessary party (whether or not the person was a party originally) cease to be a party;

(b) any of the following persons be added as a party:

(i) a person who ought to have been joined as a party;

(ii)-(iii) *Omitted.*

(c) *Omitted*.

7. I agree with Mr Clift's submission that proceedings commenced by a non-existent party are a nullity and that absent some appropriate statutory provision or procedural rule, the Court does not have jurisdiction to entertain the proceedings per *Berowra Holdings Pty Ltd v Gordan* [2006] HCA 32 and *Mann v The Northern Territory News (No. 3),* Court of Appeal

of the Northern Territory, delivered 6 May 1988. I also agree that the Court does have jurisdiction pursuant to section 15 of the Act to determine the question of jurisdiction. Absent that provision the Court has implied powers to determine the question of jurisdiction per *O'Brien v Northern Territory of Australia* [2003] NTCA 4 and the cases referred to therein.

8. Although a number of arguments were advanced on behalf of the plaintiffs relating to the validity of the proceedings, in light of the authorities which establish the principle that proceedings commenced by non juristic persons are a nullity, the bulk of those arguments must be rejected. I will however deal briefly with each of those arguments. The first argument relates to Rule 2.03 which requires that any application to set aside proceedings is to be made within a reasonable time and before the party seeking the order takes a further step in the proceedings. Mr Oliver suggested that as the defendants have taken a step namely, the filing of a Defence (which ironically admitted paragraph 1 of the Statement of Claim), the Court should not entertain the application.

9. The second argument related to the *"representative capacity"* referred to in paragraph 7.02(2)(b) of the Rules. Mr Oliver pointed out that the term *"representative"* is not defined in the Rules and relying on the definition of that term in Butterworths, Australian Legal Dictionary, he submitted that *"representative"* applied equally to a partnership.

10. Both arguments however overlook the primary issue namely, that a person commencing proceedings, whether in a representative capacity or not, must be a natural or juristic person. In my view Rule 7.02(2)(b) of the Rules does not alter the position. Whether a person commences proceedings in a representative capacity or not, that person must be natural or juristic. An interpretation to the contrary would have the effect that subordinate legislation i.e., the Rules would overrule the substantive law.

11. The plaintiffs' third argument was based on estoppel namely, that as the defendants had admitted paragraph 1 of the Statement of Claim in their Defence, they were estopped from now denying the plaintiffs' capacity or entitlement to sue under the business name. However I think that is untenable. As Mr Clift pointed out, correctly in my view, a party cannot waive a nullity per *Beugelaar v City of Springvale* (1969) VR 3 and *About Holdings Pty Ltd v Bellbird Enterprises Pty Ltd* (1996) 17 WAR 309. Proceedings that are a nullity in the context described are a nullity *ab initio* per *Mann v The Territory News (No. 3)*. As a result anything that occurs thereafter cannot be cured either by consent or amendment and it therefore logically follows that it cannot be the subject of an estoppel.

12. The last argument advanced by the plaintiffs is the application of Order 17 of the Supreme Court Rules, specifically Order 17.01. Mr Oliver submitted that the purpose of the rule was to cater for the possibility of numerous partners and to avoid multiplicity, for example, to avoid the significant inconvenience that could result where numerous multiple partners such as a national legal or accounting practice were to sue or be sued. I do note however that there are only three proprietors of the relevant business name in these proceedings. If that were to be the only purpose for the rule then that could be accommodated with a direction that an abbreviated name or description be utilised under Rule 3.05(5).

13. Mr Clift on the other hand, said that the purpose of a rule such as Order 17 was as set out in *Mann v The Northern Territory News (No. 3)* where at page 17, Kearney J said:

> "The reason for this rule, which was introduced after the Business Names Act came into force, is that while a plaintiff knows whom to sue if the defendant carries on business under his own name, if he carries on business under a name not his own, a plaintiff may know him only by that business name. In the later situation, it is considered proper to allow the plaintiff to sue the defendant by the business name by which the defendant has chosen to be publicly known."

14. It is convenient for me to quickly deal with one of Mr Clift's arguments. He said that given the purpose of the rule, given that a plaintiff should know its own identity, the situation has to be addressed differently where a business name is used for a plaintiff as opposed to a defendant. I cannot accept this. Irrespective of the genesis of the rule, the wording of Order 17 is not constrained only to the use of a business name by a defendant. It applies equally to enable the use of a business name by a plaintiff. That however would be a relevant consideration when a Court is considering an application for approval to commence proceedings in a business name.

15. Mr Oliver argued that as there is nothing contained in the Rules or any legislation providing for the same matters as Order 17, that absence therefore means that the procedure is "wanting" within the meaning of Rule 1.12. Mr Oliver argued that Order 17 of the Supreme Court Rules covered the situation of the plaintiffs suing in the business name (again subject to the amendment required due to the erroneous naming of one of the proprietors) and that by operation of Rule 1.12 of the Rules, Order 17 of the Supreme Court Rules applies automatically. Mr Oliver submitted that it was anomalous to require a non juristic person to seek an order in advance to sue in its business name. However the Rules contemplate that the application would be made in the names of the proprietors, not under the business name. Therefore it would not be made by a non juristic entity. Although Mr Oliver accepted that there could be a practice direction issued under Rule 1.12 of the Rules formally adopting Order 17 of the Supreme Court Rules, he argued that that does not need to be the case. He submitted that there was nothing in the wording which suggests that there is any pre-requisite to the application of Order 17 of the Supreme Court Rules. He said that Rule 1.12 is a facilitative procedural rule and should be given the broad interpretation he put.

16. *Collins v Deflaw Pty Ltd* (2000) 157 FLR 121 deals with Rule 1.12. In that case Martin CJ expressed doubt as to whether it was open to a Magistrate to

apply that rule in the circumstances of that case. Other than expressing that doubt the decision takes the matter no further. Although the Magistrate in that case had apparently applied the rule without any prior application, it is not clear whether that was the reason why his Honour expressed doubts about whether the rule had been validly applied.

17. A rule similar to Rule 1.12 of the Rules exists in relation to the Victorian Magistrates Court. The wording of the applicable rule there specifically allowed the Court *"…..at the discretion of the Court…."* to adopt and apply Supreme Court Rules and procedures. Those words in quotations do not appear in Rule 1.12 but I do not consider that that materially affects the interpretation. In two cases in relation to that rule it is not clear whether a preceding application was made or required. See *Secombs (A Firm) v Sadler Design Pty Ltd* [1999] VSC 79 and *Truckpower Automotive Engineering Pty Ltd v Goulopous Shiels*, Supreme Court of Victoria, 18 October 1996). It does not appear to have been raised or addressed as an issue and accordingly I cannot take any guidance from those authorities.

18. The decision turns on the interpretation of Rule 1.12. Contrary to Mr Oliver's submission that there is nothing in Rule 1.12 which is supportive of an application as a prerequisite to the application of the Supreme Court Rules in this Court, Rules 1.12(2) and 1.12(3) envisage that an order is sought as a condition precedent. Specifically, Rule 1.12(3) seems to contemplate that in relation to the commencement of a proceeding, an application for directions will be made.

19. Although neither Rule specifically mandates an order or direction and although there is no specific reference to a direction or order being required as a pre-condition, the use of the words "order" and "direction" in Rules 1.12(2) and 1.12(3) would be otiose if a prior application were not required.

20. Rule 1.12(1) provides that *"…the Court **may** **adopt** and **apply** with necessary changes the relevant procedures, rules and forms observed and used in the*

Supreme Court…" (emphasis added). I have considered various dictionary definitions of the terms "adopt" and "apply" but those definitions are consistent with either of the possible interpretations and therefore I cannot draw any guidance from those definitions.

21. The use of the word *"may"* in Rule 1.12 clearly suggests that some input is required by the Court and that the incorporation of the Supreme Court Rules is not automatic. It is a discretionary matter. Even if technically speaking, procedure is *"wanting"* in the sense that there is no equivalent provision similar to Order 17.01 of the Supreme Court Rules, that does not necessarily mean that the Court will consider the use of the appropriate Supreme Court Rule to be necessary in a particular case. That is emphasised here where the plaintiffs know their own identity (despite the error in paragraph 1(a) of the Statement of Claim) and there are only three individual proprietors of the business name.

22. Moreover Rule 1.12(1)(a) makes specific reference to the commencement of proceedings and as Rule 1.12(3) speaks specifically of an application for directions in relation to the commencement of proceedings, it is at least clear in my view that the intention is that where the procedure is lacking as regards a procedural matter relevant to the commencement of proceedings, a prior application is required.

23. If then a Court has discretion as to the adoption or use of the Supreme Court Rules or as to any changes or modification of those Rules as contemplated by Rule 1.12 then prior approval on application must be required else a party simply issuing proceedings would effectively pre-empt the Court's discretion. It would then be left to a party to unilaterally decide whether the Supreme Court Rules are to apply. Such an interpretation cannot have been intended as it offends against what I consider is a core principal of the judicial process, namely, that the Court, not the parties, exercise a discretion and regulate the Court process.

24. At the end of the day Rule 1.12 must be looked at in its entirety and in the entire context of the Rules. The very specific provisions of Rules 1.12(2) and 1.12(3), particularly the latter in that it refers to an application relating to the commencement of the proceedings, strongly points to the requirement of a prior order as a pre-condition to the application of the rule.

25. The plaintiffs have not made an application for the adoption of Order 17.01 of the Supreme Court Rules for the purposes of these proceedings and that leads inevitably to the conclusion that the proceedings are a nullity and that the Court does not have jurisdiction to entertain the proceedings. There will be an order that the proceedings are stuck out pursuant to section 15(1)(c) of the Act.

26. I will hear the parties as to costs.

Dated this 15th day of August 2006.

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V M LUPPINO
STIPENDIARY MAGISTRATE