

CITATION: *Barnyard Trading Pty Ltd v Paul Cong Dinh* [2007] NTMC 088

PARTIES: BARNYARD TRADING PTY LTD

v

PAUL CONG DINH

TITLE OF COURT: LOCAL COURT

JURISDICTION: Civil

FILE NO(s): 20629155

DELIVERED ON: 12 December 2007

DELIVERED AT: Darwin

HEARING DATE(s): 18 October 2007

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

Local Court Rules – Costs – Indemnity Costs

REPRESENTATION:

Counsel:

Plaintiff: Ms Truman

Defendant: Mr Lee

Solicitors:

Plaintiff: Priestleys

Defendant: TS Lee & Associates

Judgment category classification: C

Judgment ID number: [2007] NTMC 088

Number of paragraphs: 11

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

No. 20629155

[2007] NTMC 088

BETWEEN:

BARNYARD TRADING PTY LTD
Plaintiff

AND:

PAUL CONG DINH
Defendant

REASONS FOR DECISION

(Delivered 12 December 2007)

Ms Sue Oliver SM:

1. On 18 October 2007 by consent, judgement was entered for the plaintiff in the sum of \$15,246.03 plus interest at the rate of \$9.11 per day from 2 October 2006 to 18 October 2007 inclusive. The matter was listed for hearing that day and the consent judgement was entered in Court and did not proceed to hearing. The parties argued the question of costs, with the plaintiff claiming for an award of costs on an indemnity basis, together with an order that the matter be certified fit for Counsel. The decision on costs was reserved.
2. The plaintiff filed a statement of claim in this matter on 14 November 2006. The claim was a relatively simple one based on an agreement between the plaintiff and the defendant for the supply of goods by the plaintiff to the defendant on credit. The plaintiff alleged that in breach of their agreement, the defendant had failed to pay the invoices sent to the defendant in respect of goods supplied by the plaintiff. The plaintiff also claimed interest on the unpaid monies pursuant to the same agreement. In summary, the amount of

the plaintiff's claim was for \$13,860.03 (the debt), \$1,386 (recovery costs), \$163.98 (interest), together with further interest accruing at the rate of \$9.11 per day from 2 October 2006, \$801.90 (costs in this claim) and further costs. The judgement amount entered by consent (\$15,246.03) can be seen to be the amount claimed in the statement of claim as the debt and recovery costs. The interest rate claimed can also be seen to be the interest rate entered as part of the consent judgement.

3. On 12 December 2006, the defendant entered a notice of defence. The crux of the defence was that the defendant did not read and write English competently and therefore did not read the terms and conditions of the agreement and could not agree to its terms and that certain of the invoices, the subject of the plaintiff's claim, were not given to the defendant, despite his requests.
4. Following the conciliation conference on 24 January 2007, the defendant was ordered to file and serve an amended defence within 14 days and mutual discovery within the same time period was ordered. An amended defence was filed on 6 February 2007 but simply reiterated the essence of the defence which was that the defendant could not have agreed to the terms and conditions of the agreement because of his inability to read and write English competently and that despite requests, he had not received the copies of the tax invoices that he had demanded. On 23 February 2007, the plaintiff filed its list of documents, in particular copies of tax invoices sent to the defendant. On 26 February 2007, the defendant likewise filed his list of documents. As with the plaintiff's list, tax invoices are noted, in the defendant's case, being primarily original tax invoices, but including a list of copy invoices received from the plaintiff's solicitors.
5. As Ms Truman, Counsel for the plaintiff pointed out, of the 15 invoices which formed the plaintiff's claim, 14 of these are referred to in the defendant's list of documents being documents numbered 14, 13 and 29.

Item 29 are the copies of tax invoices of Barnyard Trading received by the plaintiff's solicitors on 24 January 2007. The further invoice which formed part of the plaintiff's claim is referable to document numbered 13 in the defendant's list of documents being a dishonoured bank cheque from the defendant to the plaintiff referable to the other invoice. Nine of those invoices are listed as original tax invoices in the defendant's list of documents. At the very latest then, the defendant had knowledge and possession of all the tax invoices to which the plaintiff's claim related by 24 January 2007, that is, before the filing of the amended notice of defence. Nevertheless, the matter then proceeded to a listing conference in which it was listed for a two day hearing and then subsequently confirmed for hearing on 7 September 2007. On that date, an order was made that any admission of debt by the defendant was to be filed and served within seven days. On 13 September 2007, the defendant filed what purported to be an admission of debt of the amount of \$13,860.03 and costs of \$801.90. The purported admission of debt did not include the interest or recovery costs claimed by the plaintiff. The defendant sent a cheque in the sum of \$14,661.93 to the plaintiff on 20 September 2007, which cheque was returned by the plaintiff to the defendant on the basis that it did not cover the full amount of the plaintiff's claim and the plaintiff was not prepared to accept it. In effect, what the defendant appears to have been attempting to do is to compromise the plaintiff's claim by the amount stated in the purported admission of debt. In my view, the document filed by the defendant was ineffective to allow judgement to be entered in the amount stated in that document because that amount was not the total amount contained in the plaintiff's statement of claim and was therefore inconsistent with Rule 19.03(1) and Form 19A.

6. The plaintiff's claim for costs on an indemnity basis is based on the plaintiff's offer of compromise. The plaintiff offered to compromise the action by an offer dated 29 January 2007, which was tendered and marked

P3. That offer was not accepted by the defendant. Rule 20.07 provides that the cost consequences of a failure to accept an offer of compromise is that if the plaintiff obtains a judgement 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 a claim from the date of service of the offer to be taxed or agreed on an indemnity basis, unless the Court orders otherwise. The plaintiff's offer of compromise was for the sum of \$15,246.03 plus costs. Judgement for the plaintiff has been entered in excess of this amount, because the consent judgement, to which I have referred, is for that amount, together with interest pursuant to the agreement at the rate of \$9.11 per day from the period 2 October 2006 – 18 October 2007. The plaintiff is therefore entitled to costs on an indemnity basis unless I am of the view that the circumstances warrant a different order.

7. In my view, there is nothing in the conduct of this matter which would warrant a departure from the normal order. The defendant continued to conduct his defence on the basis that not all invoices had been received, when it is clear that by 24 January 2007 at the latest, all relevant invoices were known to the defendant. The alternative aspect of the defence, that is, that the defendant did not understand the terms of the agreement appears to me to have been put on the basis that the defendant did not understand the nature of indemnity costs as an aspect of his agreement, not that he misunderstood the nature of the agreement as a whole, that is that it was an agreement for the plaintiff to supply goods to him on a credit basis and that he would pay for those goods on receipt of the relevant invoice. However, no attempt was made until the day of the hearing.
8. The course of these proceedings does not indicate any genuine attempt to pursue that aspect of the defence, which ultimately was abandoned by the consent judgement being entered.

9. The further aspect of the plaintiff's claim for costs is that I certify the matter as being fit for Counsel.
10. There is nothing of a complex legal nature in the plaintiff's actions. It was a simple and straightforward claim for monies owing in respect of unpaid invoices pursuant to a trading agreement between the parties. The legal question in respect of the defendant's claim not to understand English sufficiently to understand the full terms of the contract would come down on a hearing to a question of fact and was not one which in my view, warranted the expertise of Counsel. That the defendant had raised issues of misrepresentation, unconscionable conduct and breach of the *Consumer Affairs & Fair Trading Act* in his case management statement does not warrant the attendance of counsel at the hearing that was subsequently listed. The defendant had not sought leave to amend his defence and if leave had been granted at the hearing date, the plaintiff would, in my view, have been entitled to an adjournment and costs.
11. The following orders are made:-
 - (a) The defendant pay the plaintiff's costs from the date of service of the plaintiff's offer of compromise to be taxed or agreed on an indemnity basis.
 - (b) The defendant pay the plaintiff's cost up to the date of service of the plaintiff's offer of compromise or a party/party basis fixed at 80% of the Supreme Court scale.

Dated this 12th day of December 2007

Sue Oliver
STIPENDIARY MAGISTRATE