CITATION: Scarcella v Northern Feed & Cube [2012] NTMC 002

PARTIES:	F & A SCARCELLA PTY LTD
	V
	NORTHERN FEED & CUBE PTY LTD
TITLE OF COURT:	Local Court
JURISDICTION:	Interlocutory
FILE NO(s):	21019468
DELIVERED ON:	20 January 2012
DELIVERED AT:	Darwin
HEARING DATE(s):	16 January 2012
JUDGMENT OF:	J Johnson JR

CATCHWORDS:

COSTS – Rules 38.03 and 38.04 of the *Local Court Rules*

REPRESENTATION:

Counsel:

Plaintiff:	Mr Liveris
Defendant:	Mr Roper

Solicitors:

Plaintiff:	William Roberts Lawyers
Defendant:	De Silva Hebron

Judgment category classification:	C
Judgment ID number:	[2012] NTMC 002
Number of paragraphs:	32

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

No. 21019468

BETWEEN:

F & A SCARCELLA PTY LTD
Plaintiff

AND:

NORTHERN FEED & CUBE PTY LTD
Defendant

REASONS FOR JUDGMENT

(Delivered 20 January 2011)

Mr J JOHNSON JR:

1. This is an application by the plaintiff for costs in the proceeding pursuant to Rule 38.03 of the *Local Court Rules*.

History of the Proceeding

2. The proceeding was commenced by Statement of Claim filed in the Small Claims jurisdiction of the Court on 9 June 2010. A number of amendments followed culminating in a Further, Further Amended Statement of Claim being filed on 14 June 2011 to remove the then first defendant from the proceeding. In the intervening period the proceeding was transferred to the jurisdiction of the Local Court pursuant to section 23 of the *Small Claims Act*.[1]

3. The cause of action was in negligence. The plaintiff sought liquidated damages of $9,953.60 for the cost of repairs to its vehicle, a Prime Mover

[1] This occurred on 13 April 2011.

referred to as "EILLEN", allegedly caused by the negligence of an employed driver of the defendant in a collision. Up until 12 December 2011 when the plaintiff was given leave to file a further Amended Statement of Claim, its pleading asserted the date of that collision to be "On or about 19 October 2008".

4. In the period between 9 June 2010 and 12 December 2011 the litigation was littered with interlocutory applications, failure to comply with Court orders, vacated hearings dates and a generally adversarial approach to the proceeding. I will refer to that history further in these reasons.

5. Central to the history was that, as it transpired, the collision the subject of the claim actually occurred on 20 October 2008. Why the plaintiff misstated the actual date of the collision by one day is not entirely clear to me but it resulted in the defendant filing a Defence which plead a bald denial that any collision occurred and that the defendant "did not have a vehicle at or near the Winnellie Hotel on or about 19 October 2008".[2]

6. The plaintiff's solicitors wrote to the defendant's solicitors on two separate occasions[3] asking that they be provided with evidence of the assertions made in its Defence. It is useful, to give context to this litigation, to recite the relevant parts of each of those letters. The first was dated 23 February 2011 and the relevant parts were:

> Further, we note that before any consent to change of jurisdiction is given it would be useful if your client would provide us with the evidence that they have repeatedly asserted proves that the truck EILEEN was in Katherine at the time of the collision.
>
> Once we are in receipt of this evidence, and assuming this evidence supports your client's assertion, we would then be in a position to

[2] Par 5 of the defendant's Notice of Defence filed 25 August 2010.

[3] Attachment "DDS5" and "DDS6" to the affidavit of David Robert John De Silva sworn 13 January 2012.

assess the ongoing reasonableness and prospects of our client's claim and respond to your request regarding jurisdiction

7. The second letter was dated 2 March 2011 and the relevant parts were:

> If your client is serious about avoiding unnecessary costs then this evidence should be made available to us as early as possible and if it is as compelling as we are told it is, then our client would then have to consider it very carefully in the context of their ongoing claim.
>
> It is for that reason alone, in a small matter such as this, it is entirely appropriate that we be given this evidence now, and once again seek that your client provide same at the earliest opportunity.
>
> It is our position that it is only once we are in possession of this evidence that we would then be in a position to assess the ongoing reasonableness and prospects of our client's claim and respond to your request regarding jurisdiction.

8. I should note here that it was not until 16 May 2011, after much interlocutory skirmishing, that the parties were ordered by the Court to provide mutual discovery within 14 days. The plaintiff did not file its List of Documents until 13 July 2011 and the defendant, 5 August 2011.

9. So, and whatever else may be said about the plaintiff's conduct in this proceeding generally, I think it may fairly be said that by at least the end of February 2011 it was concerned that the defendant may have evidence sufficient to defeat its claim. Prudently in my view, it therefore asked the defendant to provide that evidence to found a reassessment of its prospects in "such a small matter as this". Depending on the force of that evidence, the plaintiff was effectively saying that it may lead to a discontinuance of the claim and avoidance of any further costs to the parties.

10. For its part, the defendant obstinately refused all such requests and I must admit that, in all the circumstances, it is difficult for me to discern why. It does not appear to me that any interest is served by continuing to withhold evidence asserted to be sufficient to defeat the plaintiff's claim ab initio. The defendant argues that no Rule of Court or common law principle mandates the discovery of such evidence prior to trial. I have not had the opportunity to properly research that assertion but, even allowing that to be the case, what then is the next step, other than to continue to incur costs to both parties in the lead up to the hearing when, presumably, the misstatement of the date of the collision by one day would be made out.

11. More important, I would have thought, are the ethical and other duties that practitioners have to their clients and to this Court.

Discovery

12. When the defendant filed its discovery on 5 August 2011 its List of Documents disclosed the following material in its possession, custody or power:

    1. Copy of NT Weighing Services Docket No. 003875 - 19 October 2008

    2. Copy of Northern Feed & Cube daily truck record – 19 October 2008

    3. Copy of Photographs – 3 November 2010

    4. Copy of Photographs – 29 March 2011

    5. Copy of Photographs – 9 May 2011

13. As may be seen, the defendant chose through its discovery obligations to disclose a 'daily truck record' entry which showed that on 19 October

2008 the truck EILLEN was indeed in Katherine. What it did not do was discover any associated daily truck record entry going to the whereabouts of EILLEN on 20 October 2008, or indeed, any other date "on or about 19 October 2008".

14. This state of affairs continued until 31 August 2011 when the defendant wrote to the plaintiff seeking "further and better particulars in respect of paragraph 5 of the further amended statement of claim".[4] The plaintiff's reaction to this request is not disclosed to me but, when it filed its discovery on 13 July 2011 it did include affidavits from the driver of EILLEN and another witness to effect that the collision occurred on 19 October 2008. In any event, on 26 September 2011 the plaintiff responded by letter to confirm their then instructions that the collision did in fact occur in Darwin on 20 October 2011.[5] Not long thereafter, on 10 November 2011, the plaintiff filed an application to further amend its Statement of Claim to reflect the revised date of collision. When that application came on for hearing before me on 12 December 2011 and was successful, the defendant sought and received its costs of the amendment and immediately consented to judgement being entered against it.

15. In my opinion, it was not enough for the defendant to discover only the vehicle log entry for 19 October 2008 because the log for 20 October 2008 was in its control and would have "helped to explain the controversy between the parties":[6]

[4] Annexure "NN" to the affidavit of Laura Kate Reisz sworn 12 January 2012.

[5] Annexure "OO" to the affidavit of Laura Kate Reisz sworn 12 January 2012.

[6] *Australian Civil Procedure*, B C Cairns, Ninth Edition, Lawbook Co. 2011, at [10.100] with references omitted.

> Discovery relates to what is in issue in a proceeding, or where the rules so stipulate, on the pleadings[7] as the High Court explained in *Mulley v Manifold* (1959) 103 CLR 341.The court considered that as discovery is for obtaining a proper examination of the issues, a party is entitled to discovery only of documents that relate to the issues. Despite this, the court ruled that a document is relevant if it may, not must, either advance a party's own case or the opponent's case, or alternatively would lead to a course of inquiry which would do so. Accordingly the scope of discovery is determined by a liberal construction of the pleadings. In [case] the court affirmed that a document is discoverable if it throws light on the case. In that context "case" has a wider meaning than "issue" as gleaned from a narrow reading of the pleadings. A document is relevant for discovery purposes if it helps to explain the controversy between the parties.

16. It must, of course, be remembered that the plaintiff always pleaded its case on the basis that the collision occurred "On or about 19 October 2008". Against a pleading in those terms the fact that the collision actually occurred on 20 October would not appear to be necessarily fatal to the plaintiff's claim. In my experience indictments in criminal proceedings and Statements of Claim in civil proceedings are often pleaded in chronological terms of "on or about". Subject to appropriate evidence, nothing in that formulation would appear, of itself, suffice to defeat ab initio an action which misstates the date of the causal event by one day.

17. Counsel for the defendant, Mr Roper, urged that the logbook record disclosing the actual date of the collision as 20 October 2008 was a

[7] Compare, generally, Part 16 of the *Local Court Rules* with Order 29 of the *Supreme Court Rules* and, in particular, Rule 29.02(3) and the use of the words "relating to a matter in question between them in the proceeding" in Rule 29.03(2).

"material fact"; not a particular in the pleadings that ought attract a discovery obligation. Putting aside for the moment that the defendant's Defence pleaded a bald denial of any collision having occurred "on or about 19 October 2008",[8] in my opinion it is difficult to escape the conclusion that material disclosing the location of EILLEN on 20 October 2008, given the one day misstatement of time and the "on or about" formulation in which it was pleaded, "relates to what is in issue in the proceeding" whether it be described as a "material fact" or a particular. Appropriate discovery reduces surprise; puts the parties on an equal footing at trial; and helps to define the issues.[9]

18. With all of that in mind it is difficult to understand the defendant's mindset; perhaps they saw it to their advantage to surprise the plaintiff and put it on an unequal footing at trial. Certainly it saw some benefit in telling the plaintiff that it had evidence sufficient to defeat its claim. The plaintiff asked for that evidence to be discovered to it so that it may reassess the prospects of its claim. The defendant refused to provide it. When it did provide discovery it provided only the logbook entry for 19 October 2008. As was said by Fullagar J in *Australian Dairy Corp v Murray Goulburn Co-Op*:[10]

> The availability of interlocutory steps like discovery and interrogation is peculiarly susceptible of abuse by a party to litigation who wishes to postpone a decision, or hopes so to discourage his opponent, by putting him to great trouble and expense and delay, that the latter in resignation will settle for much less than his claim.

[8] See par 5 above.

[9] Cairns (*supra*) at [10.10]

[10] [1990] VR 355

19. In its affidavit evidence the defendant seeks to explain its actions in terms that:[11]

> Prior to the most recent amendment of the Statement of Claim the proceedings have always been conducted by both parties on the basis that the accident occurred on the 19th of October and not the 20th as now alleged. That being the case the Defendant's position has always been that a relatively straight forward defence was open to it, given the clear documentary evidence as to the trucks location at the relevant time. Following the application to amend [its Statement of Claim] it became clear that the Defence would no longer be available and that:
>
> > a. the Defendants would have to rely on evidence of their former employee whose whereabouts were unknown and from whom instructions could not be taken; and
> >
> > b. the outcome of the proceedings would turn upon consideration of the credit of the witnesses various accounts.

20. With respect, that appears to me a somewhat self-serving explanation. Once the plaintiff became aware of the misstated date of collision it sought to amend its Statement of Claim accordingly. The defendant did not consent to that application but once it was granted immediately folded its tent and consented to judgement. The defendant must surely have known the actual date of the collision when it filed its defence on 25 August 2010 but, for reasons unknown to me, continued to vigorously defend the claim.

21. Of course some blame must accrue to the plaintiff for that continued state of affairs. It rested comfortably on the affidavits referred to at par 14 above, and does not appear to have carried out any proper investigation of

[11] Affidavit of David Robert John De Silva sworn 13 January 2012, at par 19.

its claim. That does not however, in my opinion, rationalise the default in discovery by the defendant.

The Calderbank Offer

22. On 18 October 2010 the plaintiff wrote to the defendant offering to resolve the claim in its entirety in the sum of $8,500.00.[12] This letter was expressed to be "Without Prejudice – Save as to Costs" and "in accordance with the principle enunciated in *Calderbank* v *Calderbank*". The offer was termed to expire on 25 October 2010 and it did expire on that date, the defendant having failed to respond to it.

23. I am also told that a further offer to resolve the matter was verbally communicated to the defendant by the plaintiff on 11 November 2010, on that occasion in the amount of $6,000.00 all inclusive. That offer was formally rejected by the defendant in correspondence dated 12 November 2010.[13]

24. In discussing the costs effect of Calderbank offers, Professor Dal Pont says:[14]

> What can be said with certainty is that merely because the rule-based procedure, had it been (properly) followed in the circumstances would have generated a presumptive entitlement to a particular costs outcome does not mean that the same outcome is to automatically apply in consequence of a Calderbank offer. The costs consequences that ultimately flow from the making of Calderbank offers rest entirely within the courts' statutorily conferred costs discretion, which is grounded in considerations of justice.

[12] Annexure "I" to the affidavit of Laura Kate Reisz sworn 12 January 2012.

[13] Annexure "K" to the affidavit of Laura Kate Reisz sworn 12 January 2012.

[14] *Law of Costs*, G E Dal Pont, Second Edition, LexisNexis Butterworths, 2009 at [13.45] with references omitted.

25. Both the Calderbank offer and the verbal offer referred to above indicate that, at least until towards the end of 2010, the plaintiff was minded to attempt some form of resolution to its claim. In contrast, the defendant rejected all such offers; stuck rigidly to the defence of EILLEN not being in Darwin on 19 October 2008; and was content to withhold from the plaintiff evidence of the location of EILLEN on 20 October 2008.

Costs Follow the Event

26. As Counsel for the plaintiff, Mr Liveris, points out, the general rule of practice is that costs follow the event unless the rule is displaced in a particular case.[15]

27. The phrase 'costs follow the event', whether pursuant to court rules or expressive of the general law 'rule' as to the award of costs in civil litigation, means that the party who on the whole succeeds in the action receives the general costs of the action.[16] There are, of course, exceptions to that general rule but it is the starting point for the plaintiff's application before me.

28. The defendant says that the general law 'rule' ought be displaced in this particular case because:

> The Plaintiff's failure to properly articulate its claim has led to the costs of these proceedings in their entirety and it should not be entitled to any order for costs or interest for any period prior to the recent amendment of its claim. As the subject amendment was immediately followed by the entry of a consent judgement, the

[15] Plaintiff's Outline of Submissions, 12 January 2012 at par 16.

[16] Dal Pont (*supra*) at [8.2]

Defendant would respectfully submit that the Plaintiff is not entitled to any award of costs for after that date.[17]

29. I have elsewhere in these reasons made clear my opinion that any failure by the plaintiff "to properly articulate its claim" could have been easily rectified by the defendant properly articulating its discovery.

30. Mr Roper referred me to the decision of Master Luppino in *NT Pubco & Anor v DNPW Pty Ltd (Subject to a Deed of Company Arrangement) & Ors* [2011] NTSC 51. However, upon a careful reading of that decision I can find nothing, with respect, that subverts my overall conclusions in this matter.

Findings

31. After a careful balancing of all the competing factors in this matter, I find that the general law 'rule' as to the award of costs in civil litigation has not been displaced. I will exercise my discretion and order accordingly.

32. I also find that the conduct of the plaintiff in this proceeding was not beyond reproach: it having failed, in my opinion, to progress the litigation in a timely and efficient manner and to conduct appropriate investigations into its claim. For that reason I will exercise my discretion not to order costs on the indemnity basis, as the plaintiff has asked me to do from the expiration of the Calderbank offer on 26 October 2010. Nor will I order interest pursuant to Rule 39.03.

[17] Affidavit of David Robert John De Silva sworn 13 January 2012, at par 22.

Orders:

1. The plaintiff is to have its costs of the proceeding on the standard basis fixed at 80 per cent of the Supreme Court Scale to be agreed or taxed.

2. Certified fit for Counsel.

3. No order as to interest.

4. Liberty to apply on any matters arising.

Dated this 20th day of January 2011

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JULIAN JOHNSON
JUDICIAL REGISTRAR