

CITATION: *Dogangun v Northern Territory of Australia and Bruce Porter and Paul Faustmann* [2013] NTMC 012

ILYAS DOGANGUN

V

PARTIES

NORTHERN TERRITORY OF AUSTRALIA

And

BRUCE PORTER

And

PAUL FAUSTMANN

TITLE OF COURT:

LOCAL COURT

JURISDICTION:

Civil

FILE NO(s):

21209782

DELIVERED ON:

3 May 2013

DELIVERED AT:

Darwin

HEARING DATE(s):

12 April 2013

JUDGMENT OF:

Dr Lowndes SM

**CATCHWORDS:**

LOCAL COURT- LEAVE TO DISCONTINUE PROCEEDINGS- STATUS OF PARTIAL DECISION

Rule 5.18(1) Local Court Rules

*Covell Matthews and Partners v French Wools Ltd* [1978] 2 ALL ER 800 applied

*Ah Toy v Registrar of Companies* (1985) FCR 280 applied

**REPRESENTATION:**

*Counsel:*

Plaintiff: Mr Kumar

Defendant: Mr Symthe

*Solicitors:*

Plaintiff: Ward Keller

Defendant: Solicitor for the Northern Territory

Judgment category classification: B

Judgment ID number:

Number of paragraphs: 25

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

No. 21209782

BETWEEN:

**ILYAS DOGANGUN**  
Plaintiff

AND

**NORTHERN TERRITORY OF AUSTRALIA**  
First Defendant

And

**BRUCE PORTER**  
Second Defendant

And

**PAUL FAUSTMANN**  
Third Defendant

REASONS FOR JUDGMENT

(Delivered 3 May 2013)

Dr John Allan Lowndes SM:

**THE NATURE OF THE CLAIM AND THE DEFENCE**

1. The plaintiff commenced proceedings in the Local Court against the first defendant and the second and third defendants for trespass and damages.
2. The plaintiff alleged that on 9 January 2011 the second and third defendants unlawfully entered his premises and thereby committed a trespass, in respect of which damages are claimed. The plaintiff claimed that the first defendant is vicariously liable for the unlawful conduct of the second and third defendants.
3. The second and third defendants denied that they unlawfully entered the premises and committed a trespass, and asserted that they lawfully entered the premises, as they had a statutory right to enter and remain on the premises pursuant to s126(2) of the *Police Administration Act*. The

defendants further asserted that pursuant to s 148B(2) of the Act the defendants are not civilly liable for an act done or omitted to be done by them because all such acts or omissions were done in good faith in the performance or purported performance of their duties as members of the Northern Territory Police Force.

### **THE COURSE OF THE PROCEEDINGS**

4. The matter proceeded to a hearing during which evidence was given by a number of witnesses. Following the conclusion of the evidence and the hearing of submissions, the matter was adjourned for decision.
5. During the course of preparing its reasons for decision the Court invited the parties to make further submissions in relation to a particular point of law—namely the nature of the test for determining whether or not something is done in good faith for the purposes of s 148B(2) of the *Police Administration Act*.
6. In order to assist the parties in making those further submissions the Court agreed to provide the parties with a draft of its findings of fact in relation to the purported exercise of the statutory power conferred by s 126(2) of the Act by the second and third defendants. The point of law, in respect of which further submissions were invited, was inextricably linked to those factual findings.
7. The parties were directed to provide submissions on the point of law by a fixed date. In the meantime, the parties were provided with the draft findings of fact, which were intended by the Court to form part of the Court's final reasons for decision, once an order or judgment had been given. The draft factual findings were placed on the Court file.
8. In the meantime, the parties reached a settlement in relation to the proceedings, as a consequence of which the plaintiff sought the leave of the Court to discontinue the proceedings.

## LEAVE TO DISCONTINUE THE PROCEEDINGS

9. The issue is whether the Court should accede to the plaintiff's request and grant leave to the plaintiff to discontinue the proceedings.
10. Rule 5.18(1) of the Local Court Rules provides that a party may discontinue a Statement of Claim at any time prior to the date proceedings are fixed for hearing, without the leave of the Court. It is clear that the plaintiff can only discontinue the present proceedings with the leave of the Court because not only had the hearing of the matter commenced, but it had concluded – and indeed the Court had arrived at findings of fact in relation to a particular aspect of the proceedings.
11. As pointed out in the defendant's written submissions dated 15 March 2013 at [6] discontinuance is an act of the plaintiff, not of the Court: see *Williams Civil Procedure Victoria* [25.02.0].
12. I respectfully agree with and adopt the following submission made on behalf of the defendants:

The effect of the filing of the notice [of discontinuance], although not expressed in the rules, terminates the action but preserves the plaintiff's right to commence another action based on the same complaint. No judgment results from a discontinuance.<sup>1</sup>

13. Although the Local Court Rules are silent as to the matters that should be taken into account when considering the granting of leave to discontinue proceedings, the following passage in *Williams Civil Procedure* provides guidance:

Leave is required on the principle that once a proceeding has reached a certain stage the plaintiff should not be permitted to abandon the proceeding in order to avoid a contest except upon terms determined by the court: see *Fox v Star Newspaper Co Ltd* [1898] 1 QB 636. However, as it is not desirable that a plaintiff should be compelled to litigate against

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<sup>1</sup> See [6] of the defendant's written submissions dated 15 March 2013.

his will, the court will normally allow a plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. In granting leave to discontinue the court will be careful to ensure that the defendant does not lose any advantage which he has gained in the litigation: *Covell Matthews & Partners v French Wools Ltd* [1978] 2 ALL ER800.<sup>2</sup>

14. Equally helpful is the following extract from the judgment of Lockhard J in *SCI Operations v Trade Practices Commission & Ors* (1984) 53 ALR 283 at 332:

...nor does the paragraph impose any fetter upon the exercise by the court of its discretion. It is for the court in the exercise of its discretion in each case to decide whether leave to discontinue should be granted and, if so, on what terms. The court must consider all the relevant circumstances, including any injustice that may be sustained by any party if leave to discontinue is granted or refused as the case may be.

15. It is clear that where a plaintiff has lost the ability to discontinue proceedings as of right – which is the case in the present proceedings – the granting of leave to discontinue is within the discretion of the court. There appear to be three guiding principles controlling and structuring the exercise of this discretion:

1. A plaintiff should not be compelled to proceed unwillingly;
2. Would a discontinuance prejudice the opposing party;<sup>3</sup>
3. Would a discontinuance deprive the other party of a benefit or gain obtained during the course of the litigation.<sup>4</sup>

16. However, in considering these three guiding principles it is necessary to consider what, if any effect, the factual findings provided to the parties should have on the exercise of the Court's discretion.

17. The starting point is the status of those factual findings.

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<sup>2</sup> This passage was helpfully referred to in the defendant's submissions at [7].

<sup>3</sup> Leave is usually granted where a discontinuance would not prejudice the other party.

<sup>4</sup> See *Covell Matthews & Partners v French Wools Pty Ltd* [1977] 1 WLR 876.

18. The findings of fact made by the Court and published to the parties were not a final order, decision or judgment of the Court, nor a binding determination.<sup>5</sup> The findings related to only one issue (albeit a primary issue) raised in the proceedings and formed “reasons for part of a decision which the Court was intending to deliver once an order or judgment had been given”. The findings have no greater status than a “partial decision” or “partial findings”.<sup>6</sup> The findings do not – and cannot – amount to a formal order or judgment of the Court.
19. As stated in *Ah Toy v Registrar of Companies* (1985) 1985 FCR 280 at 286:

...reasons for judgment are not of themselves judgments... a judgment must be binding upon the parties and definitive of their legal rights and ...a judgment is the formal order whereby a court disposes of the matters before it.
20. Applying the principle that reasons for judgment are not of themselves judgments, the factual findings made by the Court (reasons for a partial decision) do not even qualify as reasons for judgment because they did not purport to underpin – and explain or justify- a final order or judgment of the Court, that was binding upon the parties and definitive of their legal rights and that disposed of the proceedings before the Court.
21. Against that backdrop I consider that it is appropriate to grant the plaintiff leave to discontinue these proceedings.
22. First, there is a public interest in promoting settlement of litigation – “obviously the earlier the better, but settlement can occur any time up until formal judgment”.<sup>7</sup> The factual findings of the Court neither amounted to a formal judgment of the Court nor reasons for judgment.
23. Secondly, a plaintiff should not be compelled to proceed unwillingly.

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<sup>5</sup> See [10] and [11] of the defendant’s written submissions dated 15 March 2013.

<sup>6</sup> See [15] of the submissions.

<sup>7</sup> See [26] (iii) of the submissions.

24. Thirdly, given the nature of the findings of fact made by the Court it is difficult to see how a discontinuance of the proceedings by the plaintiff would prejudice the defendant, or deprive the defendant of a benefit or gain obtained during the course of the litigation.
25. Accordingly, the Court grants leave to the plaintiff to discontinue these proceedings.

Dated this 3 day of May 2013

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**Dr John Allan Lowndes**  
STIPENDIARY MAGISTRATE