CITATION:	*Jenkins v J AN R Jenkins Pty Ltd and Jenkins [2019] NTLC008*
PARTIES:	Ryan David Charles Jenkins V J AN R Jenkins Pty Ltd and Jon Russell Jenkins
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
CLAIM NOs:	21842463
DELIVERED ON:	15 May 2019
DELIVERED AT:	DARWIN
HEARING DATE:	10 May 2019
JUDGMENT OF:	Judge Neill

CATCHWORDS:

Interpretation of a Deed; effect of request purportedly made pursuant to terms of Deed if made for ulterior purpose.

Virk Pty Ltd (In Liquidation) v Yum! Restaurants Australia Pty Ltd [2017] FCAFC 190

Supreme Court Rules r63.27

REPRESENTATION:

Counsel:

Plaintiff:	W. Piper
Defendant:	M. Littlejohn

Solicitors:

Plaintiff:	Piper Ellis Lawyers
Defendant:	Cozen Johansen Lawyers

Judgment category classification:	B
Judgment ID number:	008
Number of paragraphs:	39

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

No. 21842463

BETWEEN

Ryan David Charles Jenkins

Plaintiff

AND

J AN R Jenkins Pty Ltd

First Defendant

Jon Russell Jenkins

Second Defendant

REASONS FOR JUDGMENT

Delivered 15 May 2019

JUDGE JOHN NEILL

Introduction

1. ‘The Plaintiff Ryan Jenkins is the son of the Second Defendant Jon Jenkins.

2. The Second Defendant is the sole Director and shareholder of the First Defendant Corporation J AN R Jenkins Pty Ltd (“the company”).

3. The Plaintiff previously had an interest in and involvement with the management of the company but that has come to an end. The Plaintiff, the Second Defendant and the company entered into a Deed of Settlement and Release dated 13 February 2018 (“the Deed”) to evidence the agreement between the three parties as to the Plaintiff’s entitlements and the end of his interest in the company.

4. The Deed provided for a lump sum payment to the Plaintiff and additionally for an ongoing payment to him by the company of $3,200 every 28 days, continuing for 208

weeks, with the first payment becoming due and payable 28 days after 13 February 2018 – that is on 13 March 2018 ("the consultancy fee").

5. The Deed provided that the Plaintiff would provide "consultancy services" to the company for up to 3 hours per week "as required".

6. No request for any consultancy services was made by the company to the Plaintiff until 24 August 2018. No payments of the consultancy fee were made to the Plaintiff until the first one on 13 June 2018. A second payment was made on 24 August 2018. There have been no payments of the consultancy fee by the company to the Plaintiff after 24 August 2018.

The Issues

7. The Plaintiff commenced these proceedings against the company and the Second Defendant to enforce payment of the past consultancy fees and to seek a declaration of his entitlement to payments of future consultancy fees in accordance with the Deed.

8. The company and the Second Defendant have defended the proceedings on the basis that by letter dated 24 August 2018 the company required the Plaintiff to provide consultancy services in accordance with the Deed and the Plaintiff has failed to provide those services.

9. The proceedings were heard before me on 10 May 2019. At the outset the company and the Second Defendant conceded that the company should have paid the consultancy fees in accordance with the Deed up to the first request for consultancy services made on 24 August 2018. It is common ground that six payments of the consultancy fee should have been made by 24 August 2018 and that only two payments were made by that date and therefore the company admits its indebtedness to the Plaintiff for four outstanding payments totalling $12,800. The company and the Second Defendant continue to dispute the company's obligation to make any further payments of the consultancy fee until the Plaintiff provides consultancy services as requested by the company.

10. The Deed is attachment A to the affidavit of the Plaintiff affirmed 8 April 2019 which is exhibit P1 in these proceedings. Clause 1. b. of the Deed provides as follows:

> "*In addition the company will pay to Ryan the amount of $3,200 (including any GST and superannuation payments) every 28 days as consultancy fees on a retainer basis, commencing 28 days from the date of execution of this Deed and continuing for 208 weeks ("the Consultancy Fees)". Consultancy*

services to be provided by Ryan will be provided for up to three (3) hours per week as required. For the avoidance of any doubt, if no request is made for consultancy services, the Consultancy Fee will remain payable by the company upon the same terms as set out in this Deed".

11. By letter dated 24 August 2014 lawyers for the company and the Second Defendant wrote to lawyers for the Plaintiff and amongst other things informed the Plaintiff of the company's instructions for him to provide consultancy services – attachment C to exhibit P1. The precise terms as set out in that letter are as follow:

> "*We are hereby instructed to direct that your client provide consultancy services to the company as follows: 1. Training of staff, modelling best case for moving forward and remaining viable, checking on management practices to ensure we are compliant with all Government departments, modelling any possible building improvements to make staff and client interaction and services more efficient. Weekly meeting with current manager and licensee to discuss any possible shortfalls. 2. All such duties are to be carried out on the trading premises of the Company at 146 Paterson Street, Tennant Creek in the Northern Territory of Australia. 3. All such duties are to be carried out on Tuesdays between 9 am and 12 noon every week during the year*".

12. The Plaintiff's position is that the company's request in these terms and in these circumstances was not a genuine request for the provision by him of consultancy services and was made for an ulterior purpose unrelated to the furtherance of the operation of the Deed.

13. The Plaintiff's position in the alternative is that because he lives and works on the Gold Coast, both facts being well known to the company and to the Second Defendant, the provision of consultancy services by him in the terms demanded by the company as set out above is neither practicable nor reasonable.

The Evidence

14. The Plaintiff's evidence in chief was his affidavit being exhibit P1 and he was cross-examined on this affidavit. The Second Defendant filed an affidavit sworn 24 April 2019 and this became exhibit D2. The Second Defendant was cross-examined on his affidavit.

15. The Plaintiff gave evidence in cross examination that he has been living and running his own business on the Gold Coast for the past two years or so. Given the family relationship between the Plaintiff and the Second Defendant and the dealings between them resulting in the Deed executed on 13 February 2018, and other

communications between the parties attached to exhibits P1 and D1 I can draw the inference that the Second Defendant was well aware at around 24 August 2018 that the Plaintiff lived and worked on the Gold Coast, and I so find.

16. The Second Defendant gave evidence in cross examination that the trading position of the company had deteriorated since the Deed was executed. He gave evidence that he had made attempts to contact the Plaintiff and persuade him to renegotiate the terms of the Deed so that the Plaintiff would receive less money under the Deed or at least accept a delay in his receipt of money payable under the Deed. He gave evidence that the Plaintiff had not responded to these overtures.

17. The Second Defendant was asked to concede that it would be "completely impracticable" for the Plaintiff to travel to and from the Gold Coast to Tennant Creek once every week as demanded by the company, to provide consultancy services for three hours. The Second Defendant did not concede this. However he acknowledged the very considerable practical difficulties for the Plaintiff in complying with these terms sought to be imposed for the provision of the consultancy services. He acknowledged this by saying he had imposed those terms because he wanted the Plaintiff "back at the table" to renegotiate the Deed to reflect the company's changed trading position. By implication, he believed these terms would be so unacceptable to the Plaintiff that the Plaintiff, hopefully, would come back to him and renegotiate the terms of the Deed. He conceded in further cross-examination that, additionally, he did not pay the Plaintiff the consultancy fees for the purpose of pressuring him to renegotiate the company's payment obligations under the Deed.

18. The Second Defendant conceded in cross-examination that at the time he instructed his lawyers to request the Plaintiff to provide the consultancy services in those terms he did not believe the Plaintiff would in fact travel between the Gold Coast and Tennant Creek every Tuesday.

19. The Second Defendant gave evidence that the company was not insolvent and that it had been and would continue to be able to pay its debts as they fell due. This was not challenged in cross examination and there was no evidence before the Court to the contrary.

20. In re-examination the Second Defendant said that his request of the Plaintiff to provide the consultancy services in the letter of 24 August 2018 was in the interests of the company because the company would benefit from the provision of those sorts of services, and the Plaintiff was capable of providing those services.

Finding

21. I am satisfied on the balance of probabilities that the company's purpose through the Second Defendant in drafting the letter dated 24 August 2018 in those terms was not to obtain the benefit of the Plaintiff's consultancy services in accordance with clause 1.d. of the Deed. Rather, I am satisfied and I find that the Second Defendant knowingly caused that request to be crafted in terms which he believed would not be practicable for the Plaintiff to carry out and therefore would not be acceptable to the Plaintiff. I am satisfied and I find that the company's and the Second Defendant's predominant purpose in taking this step and in choosing thereafter not to make payments of the consultancy fee to the Plaintiff was to pressure the Plaintiff to renegotiate the company's payment obligations under the Deed to something more favourable to the company and the Second Defendant, and less favourable to the Plaintiff.

22. I am satisfied and I find that the request in the terms drafted by the Second Defendant for the company and put to the Plaintiff in the letter of 24 August 2018 for the purpose I have found, was conduct

> "*…for a purpose foreign to the objective of the contractual obligation or power and thus exhibiting a lack of good faith…*" - see *Virk Pty Ltd (In Liquidation) v Yum! Restaurants Australia Pty Ltd* [2017] FCAFC 190 at paragraph 183.

23. For this reason I rule that the Plaintiff was not required pursuant to the Deed to provide any consultancy services to the company in response to the letter dated 24 August 2018.

24. I rule that the company was required pursuant to the Deed to pay $3,200 to the Plaintiff every 28 days over a period of 208 weeks with the first payment due on 13 March 2018 and then every 28 days thereafter to date.

25. I rule that the company continues to be bound to pay $3,200 every 28 days to the Plaintiff in accordance with the Deed.

26. From 14 February 2018 to the date of this Decision on 15 May 2019 is 456 days inclusive. That is 65 weeks and one day. That is 16 blocks of 28 days as at 7 May 2019. The company has made two payments of $3,200 each and therefore in accordance with the Deed it should have made 14 additional payments as at 7 May 2019, a shortfall of $44,800. The next payment of $3,200 in accordance with the Deed will fall due on Tuesday, 4 June 2019.

Breach of Director's Duties

27. Clause 1.h. of the Deed provides as follows:

> "*In the event Jon breaches his duties as a director of the company in a manner that causes Ryan to be unable to receive any payments due to him under this Deed, Ryan may claim directly against Jon for any such loss"*.

28. Mr Piper for the Plaintiff submits that the Second Defendant's behaviour amounts to a breach of a Director's fiduciary duties to the company and therefore pursuant to clause 1.h. of the Deed the Plaintiff may claim directly against the Second Defendant.

29. I am not satisfied on the evidence before me that any act or omission by the Second Defendant, whether or not constituting a breach of the Second Defendant's duties as a director of the company, has caused or will cause the Plaintiff to be unable to receive any payments due to him under the Deed. This is because there is no evidence before me that the company cannot or will not pay the Plaintiff's entitlements under the Deed following the finalisation of this litigation.

30. I am satisfied that the purpose of clause 1.h. of the Deed is to protect the Plaintiff in the event that the company becomes unable to make the payments due to the Plaintiff pursuant to the Deed **and** that any such inability arises from a breach of the Second Defendant's duties as a director of the company.

31. I am satisfied that this clause contemplates scenarios such as the company's ceasing to trade or going into liquidation or its being stripped of assets, with the consequence that it becomes unable to make payments due to the Plaintiff under the Deed. The evidence before me discloses no such scenario in this matter.

32. In these circumstances it is not necessary for me to make any finding on whether any act or omission on the part of the Second Defendant amounts to any breach of his duties as a director of the company.

Interest and Costs

33. Clauses 3 and 4 of the Deed provide as follows:

> "3. *If the Lump Sum is not paid in accordance with clause 1, interest on the Lump Sum will accrue at 10% per annum ("Interest"), and Ryan may issue legal proceedings and seek judgement against the other parties to this Deed for the Lump Sum, Interest and indemnity costs in connection with enforcing this Deed without notice.*

> "4. *In the event a Consultancy Fee is not paid then Ryan may issue legal proceedings against the Company and seek judgement for the Consultancy Fee, Interest and indemnity costs in connection with enforcing this Deed without notice"*.

34. The question for my consideration is whether the reference to "Interest" in clause 4 has the same meaning as "Interest" in clause 3. If so, then the relevant rate of interest for the purposes of clause 4 will be 10% per annum as provided for in clause 3.

35. I note that the reference to interest in the first line of clause 3 is lower case, and the reference to "interest at 10% per annum" later in clause 3 is globally described as "Interest" upper case. The reference to interest in clause 4 is also "Interest" upper case. Both clause 3 and clause 4 have the same role in the Deed, namely to provide a penalty in the event of a failure to make payments to the Plaintiff in accordance with the Deed.

36. I am satisfied and I rule that the reference to "Interest" in clause 4 of the Deed is a reference to interest at 10% per annum.

37. I rule that interest at the rate of 10% per annum is payable on the arrears of consultancy fees totalling $44,800 as at 7 May 2019. However, these arrears have been accruing over the period 13 March 2018 to 7 May 2019 so that it is not appropriate to apply the full 10% per annum to the full amount of the arrears over the whole of this period. Rather, I order that interest is to be calculated at half of the rate of 10% per annum, namely 5% per annum, on the whole of the arrears over the whole of the period. I rule that interest at the full rate of 10% per annum is payable on the sum of $44,800 from and including 8 May 2019 to the date of payment of that sum.

38. The parties conceded at the hearing that the reference to "indemnity costs" in clause 4 of the Deed should be taken to mean costs on the "indemnity basis" in rule 63.27 of the Supreme Court Rules, and I so rule.

39. Technically the Plaintiff has been unsuccessful against the Second Defendant in these proceedings. However, the evidence discloses that the Second Defendant as sole Director and sole shareholder of the company has effectively stood in the shoes of the First Defendant and taken all decisions with respect to both the subject matter and the conduct of this litigation. Under these circumstances, I am satisfied there should be no costs order in favour of the Second Defendant against the Plaintiff. I am satisfied that there should be no costs order in favour of the Second Defendant against the First Defendant company by way of a *Sanderson* Order or otherwise.

Orders

1. The First Defendant pay the Plaintiff the sum of $44,800.

2. The First Defendant pay interest on the sum of $44,800 calculated at the rate of 5% per annum over the period of 448 days being13 March 2018 to 7 May 2019 inclusive in the amount of $2,749.40 and thereafter at 10% per annum at $12.30 per day to the date of payment.

3. The First Defendant is to pay to the Plaintiff future consultancy fees of $3,200 every 28 days, with the next such payment becoming payable on 4 June 2019 and thereafter in accordance with the Deed.

4. The First Defendant pay the Plaintiff's costs of and incidental to these proceedings at 100% of the Supreme Court scale to be taxed in default of agreement on the indemnity basis.

5. The Second Defendant pay his own costs of and incidental to these proceedings.

Dated this 15th day of May 2019

JUDGE JOHN NEILL
LOCAL COURT JUDGE