TASMANIA

APPLICATION TO CONTINUE ACTION RELATING TO ENTERPRISE FOR THE EXTRACTION AND SALE OF PEAT MOSS[*]

Argo Pty Ltd v Attorney-General (No 4) **[2006]TASSC 22** (Supreme Court of Tasmania, Blow J, 10 April 2006*)*

Procedure – practice under Rules of Court – more than six years since a step taken in a proceeding

Background

This matter involved an application by the plaintiffs under the *Supreme Court Rules 2000* (Tas) for permission to take further steps in this action. The relevant subrule, r56(1) provides that:

> If a step, other than an application on which no order has been made, has not been taken in a proceeding for 6 years since the last step was taken, a party may not take any further step in the proceeding without the order of the Court or a judge.

This action related to the so-called 'peat moss affair', which attracted a great deal of media attention in Tasmania in the 1980s.

Facts

The factual circumstances in the action relate to an alleged enterprise being developed by the plaintiffs in 1984-1985 for the extraction and sale of peat moss. The third plaintiff in the action, Natureland of Tasmania Pty Ltd, held mining leases in central Tasmania and had applied for further leases. It held the leases as trustee of a unit trust, and it appears that the other plaintiffs were the owners of the units in the trust and held shares in Natureland. The defendants included the Attorney-General of Tasmania, the Tasmanian Development Authority (TDA),[1] and an officer of the TDA.

The plaintiffs alleged that, at the relevant time, they had entered into an agreement with a company, Dranale Pty Ltd, for the sale of their assets relating to the peat moss enterprise for $3 million. The plaintiffs alleged that the defendants engaged in various activities, which resulted in the plaintiffs having to reduce their sale price to $160,000. They sought to recover the difference in sale price together with interest and exemplary damages.

Causes of action

The plaintiffs instituted proceedings against the defendants in the Supreme Court of Tasmania, pleading a number of causes of action:

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[1] A body corporate established under the *Tasmanian Development Act 1983* (Tas).

- a *Beaudesert*[2]-type action for damage suffered as the inevitable consequence of the unlawful, intentional and positive acts of the defendants;
- interference with the plaintiffs' contractual relations;
- unlawful interference with the plaintiffs' trade or business interests;
- conspiracy to commit an unlawful act intended to cause economic loss;
- conspiracy to commit a lawful act intended to cause economic loss; and
- breach of fiduciary duty.

Considerations

In deciding whether or not to approve the application to permit further steps to be taken under r56(1) of the *Supreme Court Rules 2000* (Tas), Justice Blow considered the merits of each of the causes of action pleaded by the plaintiffs against the backdrop of the facts in issue.

1. The Beaudesert action

Justice Blow noted at para 9 that this claim could not possibly succeed because *Beaudesert* was overruled by the High Court in 1996.[3]

2. Interference with contractual relations

Based on the evidence before the court,[4] Blow J concluded at para 12 that there was a strong chance that this claim would fail on the basis that the relevant agreement had already been cancelled and no new contract was on foot at the time of the conduct that was alleged to have constituted the interference. Blow J outlined other additional weaknesses in the plaintiffs' case at para 13.

3. Unlawful interference with the plaintiffs' trade or business interests

Justice Blow doubted the success of this cause of action for two reasons: first, there is some doubt as to whether such a cause of action exists in Australia; and secondly, the plaintiffs may have difficulty in establishing that any of the relevant conduct by the defendants was unlawful.

4. Conspiracy to commit an unlawful act intended to cause economic loss

Unlike the tort of unlawful interference, Blow J acknowledged that there is no doubt that this tort exists, but he concluded that this cause of action was unlikely to succeed because of the same difficulty in proving unlawful activity on the part of the defendants.

5. Conspiracy to commit a lawful act intended to cause economic loss

Justice Blow noted at para 32 that in order to establish this cause of action the plaintiffs needed to establish that 'the alleged conspirators were motivated principally by a desire to cause damage to the plaintiffs'. His Honour concluded at para 35 that there was nothing in the material presented to him to suggest anything other than a desire on the part of the defendants 'to advance the economic interests of Tasmania and its Government'.

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[2] *Beaudesert Shire Council v Smith* (1966) 120 CLR 145.
[3] In *Northern Territory v Mengel* (1996) 185 CLR 307.
[4] Presented in para 11.

6. Breach of fiduciary duty

This cause of action related to the role of the defendants in arbitrating between the plaintiffs and Dranale. Whilst recognising that the categories of fiduciary relationships are not closed,[5] Blow J stated that he knew of no case in which an intermediary volunteering to facilitate commercial negotiations was held to owe a fiduciary duty to a negotiating party. Because of the novelty of the plaintiffs' claim in this regard, Blow J concluded at para 38 that there was a strong risk that it would not succeed.

Justice Blow also considered the history of the proceedings. Although the alleged causes of action occurred in 1984 and 1985, proceedings were not commenced until 1990 (albeit within the limitation period). Filing of pleadings and particulars and inspection of documents all occurred in a timely fashion by mid 1991, but there were only minor efforts on the part of the plaintiffs to prosecute the action thereafter. The plaintiffs provided some reasons for delay, including their own impecuniosity, the complexity of the litigation, slow lawyers, delays by the Court and attempts by the defendants to have the action dismissed for want of prosecution.

Against this, the defendants argued that the risk that they would not receive a fair trail was so strong that the plaintiffs should not be allowed to proceed with the action. In particular, they pointed to the fact that a number of interested parties were now dead, including one of the defendants, a director of Dranale and the TDA's inaugural chairman. Furthermore, a number of relevant documents were not available and witnesses had poor recollection of the relevant events. On this basis, Blow J concluded at para 70 that there was a very substantial risk that the trial would not be a fair one for the defendants. Moreover, there were substantial psychological, medical and financial implications for one of the defendants.

The plaintiffs attempted to raise public policy justifications for allowing them to continue with their action, including allegations of impropriety on the part of senior public servants. For Blow J, if evidence of such matters existed, it should be provided to the police, rather than being considered in a civil action.

Finally Blow J considered the plaintiffs' submission relating to duty of the Crown to be a model litigant and submissions raised by the Crown relating to abuse of process and estoppel. His Honour did not accept any of these submissions. He acknowledged the well established principle that the Crown should act as a model litigant, but did not accept that a model litigant would have consented to this application because of the substantial risk of an unfair trial.

In conclusion, Blow J held that there was no good reason for the plaintiffs to be permitted to continue with their action, bringing to an end this long saga.

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5 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96.