

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA.)

CORAM : MANN C. J.

BETWEEN :

KEITH ALLAN IRISH and MORTON WILLIAM BREWSTER.

AND

Plaintiffs

DELTA SERVICE STATION PTY. LTD.
DELTA EARTHMOVING PTY. LTD.
DELTA INDUSTRIES (N.G.) PTY. LTD.
NEW GUINEA MOTORS PTY. LTD.
DONALD ARTHUR CLAMP and
JOHN ALBERT MARTIN.

Defendants.

J U D G M E N T .

1968
June 7.
Pt. Moresby.
MANN C.J.

On the 29th May, 1968, when I gave my reasons for concluding that there was a prima facie case established by the plaintiffs, the matter was allowed to stand adjourned to enable my reasons to be considered and to enable counsel to take further instructions.

The solicitors for the plaintiffs gave notice to bring the matter on for hearing last week and the matter was again stood over until this morning, with an intimation from me that the defendants should come prepared for the conclusion of the outstanding Motion.

Mr. Bayliss, for the defendants, at the outset objected to the continued hearing of the case on the ground that there was an appeal pending to the High Court against my earlier ruling and that I should refrain from taking any action which would interfere with the appeal.

It was contended for the plaintiffs that there was no appeal pending and that there was no appeal as of right and, further, that the documents which appeared to have been filed in the High Court were not in the form appropriate either to an application for leave to appeal, or to an appeal as of right. A copy of a document described as a Notice of Application to Appeal, and an affidavit in support, which had been filed with the Registrar of this Court were referred to.

Irish and
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The Delta
Companies.

Mann C.J.

Without producing any further evidence Mr. Bayliss indicated from the Bar Table that his clients had been advised by Counsel that there might be an appeal as of right and that his clients relied on the Notice both ways. He also intimated that his clients objected to my concluding the present hearing on the ground that this would inhibit their right to contest the present proceedings on the facts should the appeal to the High Court not be successful. Therefore, he sought an adjournment until the High Court appeal had been disposed of.

Mr. Lander, for the plaintiffs, contended that the outstanding proceedings should proceed now to a conclusion, because there was no appeal as of right, and although something was now pending before the High Court sitting at Brisbane, the documents filed did not disclose what course was being taken and there was no evidence to show that either an appeal or an application for leave was in fact pending. A telegram from the Deputy Registrar of the High Court in Brisbane was produced without objection. From this it appears that it is open to the appellants to seek a further hearing of whatever proceedings in relation to an appeal are pending.

Mr. Bayliss further contended that since the next steps in the hearing before me were intimately interwoven with the proposed appeal, it would be inappropriate for me to decide whether or not an appeal was pending, or what might be the outcome. It was said that it was more appropriate for me to leave these questions to the High Court, since the matter was before that Court.

Reliance was placed by the defendants upon Order 70, Rules 9 and 12 of the Rules of the High Court, even to the extent of my extending their application from judgments of the Supreme Court of a State to decisions and rulings of a Supreme Court of a Territory. It seems to me that there is no semblance of a power residing in this Court to do anything of the kind and that my clear duty is to proceed with the present hearing, unless upon a proper construction of the Rules, there is at the moment a stay of proceedings.

It seems to me that the true position is as follows :

(1) The rules comprised in Order 70 of the Rules of the High Court, apply so far as they are expressed to do so to each of the four classes of appeals set out in Rule 1, which include appeals from this Court.

(2) An appeal to the High Court may include an appeal from this Court by virtue of the provisions of Section 64 of the Papua and New Guinea Act, 1949-1968. The appeal operates subject to such conditions as are provided by Ordinance. In the Supreme Court Ordinance, 1949, of this Territory, the conditions provided for by Section 12 include the condition that "an appeal shall lie only with the leave of the Full Court of the High Court." It is also provided, inter alia, that the Justices of the High Court or a majority of them may make Rules of Court for regulating the practice and procedure in regard to appeals from the Supreme Court.

From all of this it appears to me to be quite clear that the leave of the High Court is necessary before an appeal can be said to exist and that I have no power to interfere in any way with the Rules of the High Court.

(3) Order 70, Rule 9, expressly refers to subsection 2 of Section 35 of the High Court Procedure Act, 1903-1950, and is expressly limited in its application to an appeal from the judgment of the Supreme Court of a State and other State Courts therein specified. The procedure provides a substitute for the earlier Privy Council procedure governing appeals from State Courts to the Privy Council prior to the establishment of the Commonwealth. It follows from this that the provisions as to security in Rules 9 and 10 do not apply of their own force to this Territory.

(4) Those parts of Rule 12 as are appropriate may, by virtue of Rule 1, apply to the Territory. Amongst these provisions is Rule 12(1) to the general effect that an appeal does not operate as a stay of proceedings.

(5) The scope of an appeal from this Court to the

High Court is further indicated by Section 64 of the Papua and New Guinea Act. The appeals provided for are "appeals from all judgments, decrees, orders and sentences of the Supreme Court of the Territory". My ruling to the effect that the plaintiffs had established a prima facie case does not appear to me to produce any result from which an appeal may be brought under Section 64. If something came to my notice indicating that my ruling was incorrect, I would take it to be my duty at this stage to change my mind and record a formal judgment in due course to the contrary effect. It seems to me that until my ruling becomes the foundation for an appropriately recorded judgment or Order of this Court, there is nothing from which an appeal may be brought. This consideration is of special significance in the present case, because the plaintiffs are official inspectors under the Companies Ordinance, 1963, of the Territory, and are purporting to carry out their statutory functions which are clearly of the greatest importance to all concerned. The validity of their appointment and actions has been called into question and I am fully in accord with the view pressed by Counsel that it is a matter of considerable public interest and importance that any legal difficulty should be resolved by an authoritative decision. This consideration adds emphasis to the fact that it is already a very long time since the plaintiffs endeavoured to obtain possession of the records of a substantial group of companies in order to carry out their statutory investigations.

On the other hand, the defendants, as of course they are entitled to do, have relied on every conceivable point that might delay the conclusion of these proceedings and it is obvious that a long delayed, yet abortive, appeal to the High Court would produce the result that the plaintiffs would have to come back to this Court to obtain a Final Order, without any loss to the defendants, who would have all over again a new period of time within which to bring proceedings towards an appeal.

(6) No affidavits have been filed on behalf of the defence and no other evidence has been tendered, apart from a copy of the 17th edition of "Palmer's Company Precedents", a volume of which was tendered by

Mr. Bayliss to assist the Court. Since it appears to me that if an appeal does reach the High Court, that Court will require a record of an actual decision which can be set aside, varied or otherwise dealt with as the Court sees fit, I think I should now complete the hearing of the outstanding Motion and record an actual determination. At the same time, having regard to the practical difficulties involved, I think that I should avoid as far as possible altering the present situation in such a way as to embarrass the rights of the parties. I think I can reach that desirable result by making a Final Order providing for a stay of proceedings in two stages. It is open to the plaintiffs to give notice under Order 70(2) and (b) so that they can be represented on any application for leave which may be made, whereas, if the defendants propose to proceed upon the view that leave is not required, the plaintiffs may again protect themselves by an application under Rule 3.

Having regard to the provisions of Order LVII, Rule 2, of the Rules of the Supreme Court (Queensland adopted), and to the nature of the records sought to be reached by injunction, I make the following Order :

Order for injunctions in terms of (a) and (b) of the Notice of Motion: under (a) within three (3) days after expiration of stay hereby granted, and at the office of Cox Johnston and Co., Chartered Accountants of Port Moresby: under (b) that this judgment and all process in execution of Order, or to compel obedience to it, be stayed for an initial period of fourteen (14) days from the date of service of this Order at the town address for service of the defendants' solicitor; and upon filing within that initial period in the High Court of Australia by the defendants of either an affidavit for leave to appeal satisfying Order 70, Rule 2(4) of the Rules of the High Court of Australia, or a Notice of Appeal, supported by the affidavit required by Order 70, Rule 7(3) of the said Rules, for an extended period of a further fourteen (14) days, or for such other extended period, if any, as may be ordered hereafter: the plaintiffs to recover their taxed costs from the defendants, including all costs reserved.

I make no Order requiring the plaintiffs to

return the Company's records to the Company, for there appears to be no threat that the plaintiffs will fail to do their proper duty in due course with regard to records which come into their possession by virtue of the statutory provisions.

Solicitors for the Plaintiffs: Wm. Lander and Co.
Solicitors for the Defendants: C. Bayliss.