[2003] QSC 164

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Transcript of Proceedings

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Date: 15 May, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

No SC 10942 of 1998

QUALITY CORPORATION (AUST) PTY LIMITED ACN 071 974 954	First Plaintiff
and	
JOHN ERIC SKELTON	Second Plaintiff
and	
MARY DIANNE SKELTON	Third Plaintiff
and	
MILLFORD BUILDERS (VIC) PTY LTD ACN 005 342 530	First Defendant
and	
PHILIP KEITH STRAWFORD	Second Defendant
and	
ROSLYN JOY THOMAS	Third Defendant

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

and

RESORT BROKERS PTY LTD
ACN 010 536 811 Fourth Defendant

and

RODNEY ASKEN Fifth Defendant

BRISBANE

..DATE 22/04/2003

JUDGMENT

HIS HONOUR: The first plaintiff has succeeded against all defendants, who should be ordered to pay its costs. The relief obtained is an award of damages, together with interest thereon, which is relief which could have been given by the District Court.

Accordingly, the costs which the first plaintiff may recover must be assessed as if the proceeding had been started in the District Court, unless the Court otherwise orders, see Rule 698.

The proceedings were brought with the benefit of Mr Calabro's "final draft" report, dated 9 November 1998. He quantified the first plaintiff's damage at a little over $306,000, comprising $202,025 for "loss on investment" and $104,603 for "loss of rent".

The former component was calculated by use of an amount for rental of a little less than $120,000, instead of the actual rent of $140,000. I have concluded that the damages should be calculated in this case by capitalising future maintainable earnings, calculated by reference to the actual rent.

Had Mr Calabro done that in the first report, his valuation of the business would have been some $57,000 or so lower and he would have thereby calculated the damage at about $260,000. Therefore, there was still an apparently reasonable basis for bringing the proceeding in this Court, even if the first plaintiff and its legal advisers had recalculated Mr Calabro's

damage assessment by rejecting his two stage approach as I have done in the judgment.

The plaintiff has failed to recover at least $250,000 in damages, because I used a somewhat lower capitalisation rate and different figures for income and expenditure. I have also allowed $10,000 for the value of the Jacaranda lease as another of the plaintiff's witnesses Mr Rabbitt conceded was appropriate.

Mr Logan, SC, has submitted that a separately quantified "loss of rent" was never recoverable as a matter of law, so that "this was never a case when as a matter of prudence, the first plaintiff had to commence its proceeding in the Supreme Court."

I reject that submission. It seems to me that it was indeed prudent for the first plaintiff and its legal advisers to have started the proceedings in this Court, because Mr Calabro's report still indicated an assessment of the order of $260,000.

The first plaintiff has submitted that I should adopt an approach indicated by a judgment of Moynihan J, in McIvor v. Meshlawn Pty Ltd, unreported, 10 November 1999, number 5901 of 1996, in which his Honour said, at 14: "The relevant test seems to be whether on a proper evaluation of his chances at the time of the institution of proceedings, the plaintiff's damages were within the jurisdiction of the District Court. Hussey v. Paige, 1973, Queensland Reports, 509, at 51314."

The first plaintiff submits that adopting this approach, the first plaintiff should have its costs on the Supreme Court scale, because there was, in effect, a reasonable basis for bringing the proceedings here upon an evaluation of the chances of recovering damages of at least $250,000 at the time proceedings had to be and were commenced.

It is not clear to me that the approach indicated by McIvor is unaffected by the change brought about by the introduction of the Uniform Civil Procedure Rules and in particular, Rule 698, which now places the onus upon a plaintiff to justify why it should have its costs of bringing a proceeding in the wrong Court.

In McIvor, the relevant rule was held to be the former rule, that is Order 91, Rule 2 of the former Supreme Court Rules, under which a plaintiff did not appear to bear the same onus.

Accepting that it was reasonable for the plaintiff to rely on Mr Calabro's report, the question is whether I should be persuaded that there should be a different order for costs than that stipulated by Rule 698(3) and in particular, whether I should be persuaded that the defendants should be ordered to pay costs of a certain level, because Mr Calabro used a capitalisation rate higher than that which I have concluded was appropriate and used figures for earnings a little different from those which I have found appropriate and which were said to be appropriate by Mr Rabbitt, another witness called for the plaintiff.

It seems to me that in the present case the first plaintiff has not shown why the Court should otherwise order in terms of Rule 698(1) and so the first plaintiff should recover its costs against the defendant according to Rule 698(3). That is the defendant should be ordered and will be ordered to pay the first plaintiff its costs assessed as if the proceeding had been started in the District Court.

The next matters for determination concern the position in costs between the second and third plaintiffs and the defendants. It is clear that the second and third plaintiffs, whose claims have failed entirely, ought not to have any costs. Prima facie they ought to be ordered to pay to the defendants the defendants' costs of defending the proceeding brought by them.

There is a potential for dispute and indeed unfairness involved in questions of the extent to which the defendants were put to further costs by reason of the claims by the second and third plaintiffs. The additional issues raised by the claims brought by the second and third plaintiffs, over and above those already involved in the first plaintiff's case, were relatively small and in turn the costs incurred by the defendants in having to meet those additional issues would be a relatively small part of the defendants' costs.

I am concerned that there is a potential for unfairness to the second and third plaintiffs by, in the assessment process, too much of the defendants' costs being assessed as referable to

the costs of defending the second and third plaintiffs' claim when for the most part the issues involved in the second and third plaintiffs' cases were ones which the defendants had to meet in any event in defending the first plaintiff's claim.

Rule 682 provides that the Court may make an order for costs in relation to a particular question in or a particular part of a proceeding. As I understood the oral submissions for both parties there was common ground that that rule - and in particular Rule 682(2), would permit me to fix a percentage of the defendants' costs of the entire proceeding which is fairly attributable to that part of the proceeding that involves their defence of the claims of the second and third plaintiffs.

Such an apportionment is necessarily somewhat imprecise but it has the advantage of avoiding a further dispute as to what part of the defendants' costs are attributable to the defence of the second and third plaintiffs' claim and it is an apportionment which I can make at least with the benefit of having conducted the trial and seeing what part of the trial was due to the existence of claims by the second and third plaintiffs.

The trial involved eight days of hearing and I think it is a fair assessment to regard one day of that as effectively caused by the existence of claims by the second and third plaintiffs. To put it another way the case is likely to have finished a day earlier had it been a claim by the first

plaintiff alone. The evidence distinctly relating to the claims by the second and third plaintiffs was relatively limited and to a large extent uncontested. There were significant legal issues as to the recoverability of the damages claimed by the second and third plaintiffs which did add to the length of the legal submissions.

As best I can apportion then the part of the hearing due to the existence of the second and third plaintiff's claims, I would do so by apportioning one-eighth of the hearing, and, in turn, the costs of the hearing, to their claims.

It seems to me also that it would be reasonable to make a like apportionment for the defendant's overall costs of the proceeding; that is including both pre-trial costs as well as the costs of the hearing itself.

In the circumstances, I shall declare, pursuant to Rule 682(2), that the percentage of the costs of the defendants in this proceeding, attributable to the part of the proceeding which is the defence of the claims of the second and third plaintiffs, is one-eighth of those costs.

Accordingly, I shall order that the second and third plaintiffs shall pay to the defendants one-eighth of the defendants' costs of the entire proceeding.

There is a further question perhaps as to whether those costs - that is the costs in favour of the defendants - should be

assessed on a Supreme Court or District Court basis. It is not the defendants' fault that they were sued in the Supreme Court and, having succeeded against the second and third plaintiffs, I see no reason why those costs ordered in their favour ought not to be assessed on the Supreme Court scale.

Lastly, I should mention that there was argument for the defendants in reliance upon an offer to settle.

The offer was one which was capable of acceptance by all plaintiffs jointly; that is it was not open to the second and third plaintiffs to accept the offer without the first plaintiff at the same time having to accept that offer. It was an offer which, so far as damages were concerned, offered the first plaintiff less than the sum which I have held should be awarded in its favour.

It therefore seems to me that the offer to settle provides no basis for the indemnity costs which have been sought by the defendants.

...

HIS HONOUR: The first of the matters raised by Mr Musgrave this afternoon concerns whether I should certify that the employment of two counsel on behalf of the first plaintiff was reasonably necessary having regard to the difficulty or importance of the case. This issue arises, of course, because I have held that the first plaintiff should have its costs

assessed as if the proceeding had been started in the District Court.

The case was one of relative complexity. It was a case which was hard-fought on both issues of liability and of quantum. There were very many issues in the case, both of law and of fact. It is pointed out for the defendants that they were represented for their several interests by Mr Logan SC appearing without junior counsel. That, of course, was a decision for the defendants but the fact that they were represented by senior counsel and not also junior counsel does not in itself answer the question of whether it was reasonably necessary for the plaintiffs, or the first plaintiff, to employ senior and junior counsel having regard to the difficulty of the case and to the plaintiff's onus of proof.

In my view the case was of a level of difficulty where it was reasonably necessary for the first plaintiff to employ senior and junior counsel and I will certify that such employment was reasonably necessary.

Mr Musgrave has also sought my leave to appeal each of the orders for costs which I have made this afternoon. That leave is sought under section 253 of the Supreme Court Act of 1995. The application for leave in relation to the first plaintiff is put on the basis that my decision involves, in effect, some important point of principle which ought to be considered by the Court of Appeal. It is said that the point of principle involved is whether, as Mr Musgrave put it, decisions such as

McIvor which I have cited and in turn Hussey cited in McIvor, being decisions indicative of an approach under the former rules, are still indicative of an approach which is just as appropriate under the terms of rule 698.

No case has been cited by either party which goes to such an issue. In particular, the first plaintiff has not pointed to any divergence of opinion within the Trial Division on that matter, or, indeed, to any suggestion in any decision under rule 698 that the very broad discretion conferred by rule 698(1) is to be affected by an approach which is perhaps suggested by the paragraph from McIvor which I have cited.

Ultimately, as I think my reasons given earlier this afternoon would indicate, I have not refused to otherwise order in terms of Rule 698(1) on the basis of some view as to some point of principle.

I have doubted whether the approach in McIvor, and to the extent that Hussey contains the same approach, is now entirely appropriate under the terms of the current rule, but it has been unnecessary for me to decide such an issue as a matter of principle.

The decision which I have reached in this case is that, in the circumstances of this case and, in particular, of Mr Calabro's report, I have been unpersuaded that I should otherwise order in terms of Rule 698. It could not be - and it has not been contended that the onus is otherwise than I have indicated;

that is in this case it is upon the first plaintiff to establish why there is something in the present case that makes for a different result from that prescribed by Rule 698(3).

The exercise of the discretion as to whether to otherwise order in terms of Rule 698(1) in this case, was not, I have to say, straight forward but that in itself is not a reason why the Court of Appeal should be asked to determine an appeal on costs only.

It seems to me that there is no point of general principle involved in my decision in relation to the first plaintiff's costs, which warrants leave being given to appeal under Section 253.

In relation to the costs between the second and third plaintiffs and the defendants, Mr Musgrave for those plaintiffs sought leave to appeal. I do not see any point of principle involved in that appeal.

The circumstances were such that there was certainly room for argument as to the appropriate apportionment and, as Mr Musgrave rightly pointed out, although the written submissions for the plaintiffs suggested a different apportionment than the one-eighth I have declared, that one-eighth apportionment was accepted by Mr Douglas SC when the matter was argued last week, as an appropriate apportionment.

It therefore seems to me that it would be wrong to give leave to appeal the costs order which I have made between the second and third plaintiffs and the defendants.

So the result, Mr Musgrave, is that I have certified for the necessity of two counsel, but I have refused leave to appeal to the Court of Appeal under Section 253 in relation to each of the costs orders.
