[2018] QCA 192

COURT OF APPEAL

McMURDO JA

Appeal No 6682 of 2018
SC No 2505 of 2018

IAN JAMES DOUGLAS WARREN &
JENNIFER JEAN FEITZ
STATED AS ATTORNEYS FOR
FLORENCE BURNETT WARREN **Respondents/Applicants**

v

ALEXIA MARGARET WARREN **Appellant/Respondent**

BRISBANE

FRIDAY, 17 AUGUST 2018

JUDGMENT

McMURDO JA: This is an application for the provision of security for the respondents' costs of the appeal. The appellant is an undischarged bankrupt. On 4 July 2018, the respondents' solicitors wrote to her, asking her to provide evidence that she is capable of meeting the respondents' costs of the appeal in the event that the appeal is unsuccessful. There has been no reply to that letter. It is sufficiently clear that the appellant will be unable to pay the respondents' costs in the event that the appeal is dismissed.

The appeal is against orders made in the Trial Division on 8 and 19 June 2018. It is necessary to set out some background to those orders. In February 2009, the appellant's mother executed an enduring power of attorney by which she appointed the respondents as her

attorneys for all financial and health matters except in relation to a piece of real property, which was an apartment at Albion. The appellant, who was then a solicitor, was appointed her mother's attorney in respect of the Albion property.

The appellant was declared bankrupt in February 2016, and, by s 57(2) of the *Powers of Attorney Act*, the power of attorney in her favour was immediately revoked. The appellant appears to have disputed that revocation, but the Chief Justice, by orders made on 29 March this year, declared that the appellant ceased to be her mother's attorney by the operation of s 57(2). By the same orders, the Chief Justice declared that the respondents were validly appointed as attorneys under Mrs Warren's enduring power of attorney of February 2009, and it was ordered that they be appointed her attorneys in relation to the Albion property.

It was further ordered that the appellant not purport to act as her mother's attorney and that she be restrained from entering any of her mother's real properties, other than to remove all of her belongings and personal effects from them within 30 days. Those properties included one at Bongaree.

The respondents wished to sell that property, and they had to remove the appellant's effects from there to put them into storage. The appellant's response was to cause a caveat to be lodged over the Bongaree property, purportedly on behalf of the appellant's mother. The respondents then applied to have the caveat removed.

On 8 June 2018, Justice Boddice ordered the removal of the caveat. He made further orders for the appellant's mother to be independently assessed by a geriatrician. The appellant applied to have the order removing the caveat set aside and for the other orders made on 8 June to be stayed. On 19 June 2018, Justice Boddice refused those applications. This appeal is against the orders of 8 and 19 June.

The appellant, in resisting the present application, has made a number of submissions which could be described as threshold points. The first is, she argued, that the respondents should not be heard in this court and, in particular, should not be heard on the present application, namely, their application for security of costs. The appellant's argument in that respect is that

the respondents have no authority to act on behalf of their mother, Mrs Warren, and that, therefore, their participation is, in some way, irregular and an abuse of process.

The immediate difficulty with that submission is that, of course, they are the respondents to the appeal according to the appellant's notice of appeal. They were, of course, the appellant's adversaries in the hearings from which the orders of 8 and 19 June were made. A further difficulty with that submission is that it is in the face of the orders made by the Chief Justice in March which confirmed the authority of the respondents to the appeal to act as their mother's attorney.

Now, the appellant says, in effect, that those orders ought not to have been made. There has been no appeal against them. The appellant has endeavoured to prosecute an application to set them aside in the Trial Division, but it is sufficient to say that they have not been set aside and, whilst they stand, they are irreconcilable with the appellant's present submission.

The second threshold point raised by the appellant is one which alleges misconduct on the part of the respondents' solicitor and counsel. She submitted that they ought not to be heard, at all, in this proceeding and, in particular, in respect of this morning's application. No application has been made by the appellant to prevent them from acting. And although this appears to have been a point which the appellant has made in correspondence, it was incumbent upon her – particularly, given the seriousness of allegations of that kind – to make an application to this court to prevent them from appearing, and she has not done so. Accordingly, there is, simply, no application here under which I could and should consider the serious allegations which are made.

The third threshold point made very late in the appellant's submission is that she was not served with the affidavit in support of the application. In response to that argument, counsel for the respondents to the appeal filed and read an affidavit of service. On its face, it, clearly, proves that the affidavit was duly served by being posted to the appellant's address of service. The appellant says that she has not received it; however, she admits that she was aware that there was an affidavit on the file. It appears that she has not taken the time to look at the file

and read it. In those circumstances, it seems to me that there is no unfairness in the application proceeding today.

As I have said, the appeal is against the orders made on 18 and 19 June. The notice of appeal sets out extensive grounds of appeal which need not be discussed today. That is because the orders sought in the notice of appeal are, of themselves, sufficient to demonstrate the weakness of the appellant's case.

After the caveat was removed, the respondents settled the sale of the subject property. Yet, the appellant seeks orders which would result in the caveat, which she continues to assert was a caveat which she lodged on behalf of her mother and being authorised to do so, being a registered caveat against the title of the property. Or, in the alternative, she seeks an order that the Registrar of Titles lodge a caveat over that property in favour of her mother "as caveator".

Especially in the circumstances in which the sale has been completed, there is, in my view, no prospect of the appellant obtaining orders of that kind or, more generally, orders which would seek to prevent the respondents from dealing with the property. As I have said, the sale has settled, and it emerged in argument this morning that the purchasers have granted a mortgage to a third party over it.

Otherwise, the only order sought appears to be one by which the respondents' solicitor and counsel would pay costs pursuant to r 690 of the *Uniform Civil Procedure Rules*, which provides that the court may order a lawyer to pay to the lawyer's client costs ordered to be paid by the client to another party if the party incurred the costs because of the lawyer's delay, misconduct or negligence. The relevance of that rule to this case is not at all apparent. The judge on each occasion reserved the costs.

Quite apart from those problems to the appellant's case, the appellant faces the difficulty of demonstrating how, in the face of the orders made by the Chief Justice, she could have had the authority of her mother to lodge the caveat and to resist an application for its removal. In these circumstances, the appellant should be ordered to provide security for costs.

According to the respondents' solicitor, the likely costs of the respondents will be in the range of about $29,000 to about $35,000, of which $22,000 to $27,000 is the estimate for counsel's fees. I have to say that, on my view of the merits of the appellant's case in this appeal, the task for the respondents' lawyers will not be as extensive as has been estimated. In my view, security for costs should be ordered but in an amount of $15,000.

It will be ordered that the appellant provides security for costs in the sum of $15,000 within 28 days of the date of this order in a form which is satisfactory to the registrar of this court and that the prosecution of this appeal be stayed until that security is provided.

The remaining question is one of costs. In my conclusion, the respondents should have their costs for the present application. None of the arguments made by the appellant in response to the application had any merit. It ought to appear, from the reasons I have just given, that the appellant's position in the appeal is a particularly weak one. It will be ordered that the appellant pay the respondents' costs of the application, and the court will adjourn.