[2019] QCA 140

COURT OF APPEAL

PHILIPPIDES JA
McMURDO JA
BRADLEY J

Appeal No 2001 of 2019
SC No 1236 of 2019

GJINRO INVESTMENTS PTY LTD
ACN 617 672 232

QUEENMAC EDUCATION PTY LTD
ACN 629 269 290 AS TRUSTEE FOR QUEENMAC
BUSINESS TRUST

JIN GAN

DAVID MICHAEL GROSS

REQUEL YOLANDA GROSS-OGLE **Appellants**

v

STEPHEN ANDREW McGREGOR

SRS HOLDINGS AUST PTY LTD
ACN 608 710 863

JULIE ANN McGREGOR **Respondents**

BRISBANE

WEDNESDAY, 17 JULY 2019

JUDGMENT

McMURDO JA: On 14 February 2019, the appellant successfully applied for freezing orders against the respondents, who are a married couple and a company of which Mr McGregor is the director and shareholder. It is unnecessary to discuss the basis for those orders because neither party seems to suggest now that they ought not to have been made. The present controversy involves further orders made by the same judge on 20 February 2019. The orders of 14 February were set aside and replaced by freezing orders which, relevantly for this appeal, contained one new paragraph.

The appellants argue that the judge erred in replacing the earlier orders; although, save for that one paragraph, the other changes were made by consent. They seek an order setting aside the orders of 20 February and restoring the orders of 14 February. As I will explain, the appellants' argument misunderstands the effect of that particular paragraph. There would be no utility in restoring the orders of 14 February 2019. The appellant's position is just as well protected under the second set of orders made by the judge. The only point of this appeal might be to allow the appellants to argue that they should have their costs of the hearing on 20 February, rather than having to pay the costs as the judge ordered.

The orders of 14 February, for the most part, followed the terms of the pro forma freezing order in Practice Direction number 1 of 2007. The relevant amount was $400,000. Again, following the terms of the pro forma freezing order, the orders defined what was included within the assets of a respondent both by a general description and by reference to particular assets, including any money held in accounts with any bank and, most particularly, money held in certain accounts with the Commonwealth Bank of Australia. One of those stated accounts is in the name of Mr and Mrs McGregor and the other is in the name of the company.

There were exceptions which were expressed within these orders which provided that the orders did not prohibit a respondent from "paying the respondent's ordinary living expenses" or "paying the respondent's reasonable legal expenses", but in that respect, there was a departure from the pro forma freezing order which provides for a statement of a certain weekly or daily amount for living expenses and a certain amount for legal expenses. That departure created difficulties for the Commonwealth Bank, as I will explain.

On 15 February 2019, the appellants' then solicitor, Mr McMahon, wrote to the bank enclosing a copy of the orders. Unfortunately, his covering letter was an imprecise description of the effect of the orders. He wrote that certain assets were to be "frozen" until further notice, namely, all money held in bank accounts, any money held in Mr and Mrs McGregor's account, and any money held in the company's account. The letter made no reference to the rights of the respondents to deal with assets beyond the relevant amount or to deal with assets to pay ordinary living expenses and reasonable legal expenses. However, the letter did enclose a copy of the orders and the bank with its resources was able to judge their effect for itself.

The bank placed what it described as stops on the accounts, which it explained in two emails sent to the lawyers on each side of this dispute on the afternoon of 19 February. The bank's concern was that as the custodian of the named accounts and having been notified of the orders, it would be in contempt of court if it were to "facilitate a breach of the orders." It was said that the difficulty came from the wording of the exceptions to the orders, which were so general that the bank would be unable to decide whether or not a transaction would fall within them. The bank requested that the parties seek to vary the orders "to specify a daily or weekly limit of ordinary living expenses" and to "provide details of the solicitors to which the reasonable legal fee may be paid or otherwise provide specific information which would enable the bank to recognise whether a transaction appears to be permitted".

I have referred there to the first of the emails. The response of the lawyers for the respondents was to demand that the bank allow their clients to operate their accounts, because unless the accounts were "unfrozen immediately", Mr and Mrs McGregor would not be able to pay ordinary living expenses. Their email advised that if this did not occur before 5 pm that day, their clients would have no choice but to seek immediate relief from the Court with indemnity costs. What followed was the bank's second email that afternoon in which the bank's position was maintained. It was said that it was not the bank which was causing difficulties for Mr and Mrs McGregor, but the terms of the orders. About half an hour later, Mr McMahon for the appellants emailed the respondent's solicitor saying this:

> "If you provide your client's estimate of its reasonable living expenses (accompanied by justification) as well as an estimate of his reasonable legal expenses, then we will be happy to alternatively:
>
> 1. Consent to amended orders; and/or
> 2. Inform the banks [sic] of the compromise."

Early on the following day, the respondent's solicitor wrote to Mr McMahon saying that his Honour would be approached to hear the parties that morning "on the interpretation of the Order", and so the parties came before his Honour on that day. The judge took the view that Mr McMahon had misstated the effect of his orders in his letter to the bank. He rejected the statement by Mr McMahon, who was then appearing for the appellants, that it had not been his intention to mislead the bank. In his ex tempore reasons, the judge confessed to having an inclination at one stage to dissolve the freezing orders entirely, because of this misleading of the bank, but said he would not do so, and such an order had not been sought by counsel appearing for the McGregors. Instead, his Honour said he intended to vary the freezing orders so that a paragraph 3A would be added in these terms:

> "Nothing in this order prevents the Respondents from dealing with account number 33717880 with BSB 062 692 and account number 15155948 with BSB 064 000."

In his ex tempore reasons, the judge explained that variation by saying only that it ought to "satisfy the bank and so the bank accounts can be dealt with." Then came the question of costs. The judge expressed his concern that, in his view, the bank had become "alarmed and concerned about its position" because of the letter written by Mr McMahon. Therefore, he held, the respondents should have their costs against the present appellants of the appearance that day.

As it happened, the parties had agreed that the orders of 14 February should be otherwise amended in what the judge described as "fairly semantic ways." It appears that this is what prompted the judge to dissolve the orders made on 14 February and replace them with a new set of orders, rather than simply adding paragraph 3A. The appellants submit that the judge erred by misunderstanding the bank's concern. It is submitted that the bank wasn't misled by Mr McMahon's letter; rather, it had a different concern, as it explained in the two emails.

Therefore, it is now said, the orders of 14 February should not have been set aside and this Court should restore them.

In my respectful view, the judge did misunderstand the reason for the bank's position, which had been stated in its emails. The correctness of that position does not presently matter. What matters is that it was not Mr McMahon's letter which had caused the problem. But there is no utility in the outcome which the appellants seek, namely, the restoration of the orders of 14 February. The reason is that there is no difference, in effect, between the two sets of orders by the addition of paragraph 3A. That paragraph did not exempt the two named bank accounts from the scope of the orders. Rather, it confirmed that the orders were not an unqualified prohibition upon the respondents in dealing with moneys in those accounts.

It is clear that those accounts remained within the operation of the orders as made on 20 February, because the definition of a respondent's assets continued to include them specifically. It seems that an apprehension of a contrary interpretation has been the motive for this appeal, but, in my view, the orders are unambiguous and, in any case, the contrary interpretation is not suggested by the judge's reasons.

Consequently, what remains of this appeal is a contest about the costs of 20 February. The judge ordered that they be paid by the appellants because he saw Mr McMahon's letter to the bank as the cause of the problem which had brought the case back to Court. Because that was an error, so there was an error in his decision as to the costs. The question then is what, if anything, this Court should do about those costs and the costs of this appeal. In my view, it would be unjust to leave the appellants with the burden of those costs, such as they would be when the matter had come before the Court very quickly. On the other hand, the appellant's position as to the costs was affected by the circumstance that the parties had reason to be before the Court to effect the variations to the original orders to which they had agreed.

In the circumstances, and mindful of what ought to be the relatively small amounts involved, I would set aside the order for costs made on 20 February and order that each side bear its own costs of that hearing. As to the costs of the appeal, the appellants have succeeded but

only on the matter of the costs of the hearing on 20 February. I would make no order as to the costs of the appeal. In my opinion, the orders should be as follows:

1. Appeal allowed.

2. The order for costs made on 20 February 2019 set aside.

3. Each side bear its own costs of the hearing held on 20 February 2019.

4. Otherwise, the appeal is dismissed with no order as to costs.

PHILIPPIDES JA: I agree.

BRADLEY J: I agree.