[2019] QCA 196

COURT OF APPEAL

McMURDO JA

Appeal No 4279 of 2019
DC No 66 of 2018

BENNETT & PHILP LAWYERS **Applicant**

v

JULENE WINN **Respondent**

BRISBANE

THURSDAY, 26 SEPTEMBER 2019

JUDGMENT

McMURDO JA: There is an application by a respondent in the proceeding in this court for an order that proceeding to be struck out, essentially for want of prosecution. The proceeding in this court is an application by Ms Winn, who is legally qualified, but unrepresented, for leave to appeal against a judgment of Judge Reid delivered on 1 February 2019. Judge Reid declined to set aside an order for security of costs which had been made by Judge Koppenol in favour of the present respondent against Ms Winn. Judge Reid further ordered that Ms Winn's District Court proceeding be dismissed.

The District Court proceeding was one in which Ms Winn sought leave to appeal to that court from a decision of a magistrate. Leave to appeal to the District Court was required because the amount involved was under $25,000. In fact, the amount involved was approximately $3,000. That was the amount of an invoice issued by the respondent, a law firm, to Ms Winn,

which Ms Winn wished to challenge, firstly by obtaining an order from the Magistrates Court for that bill to be assessed. A magistrate declined to make that order and dismissed her application. Consequently, putting aside orders for costs which have been made against Ms Winn, the amount involved in her dispute is of that order of $3,000.

As I have said, Judge Reid delivered his judgment on 1 February 2019, having reserved the matter from the hearing on 16 November 2018. I have read his Honour's reasons for judgment. I have read also Ms Winn's proposed notice of appeal to this court and the grounds which are set out in that document. I have not embarked on any consideration of the merits of her proposed appeal, but I do observe that there is no manifestly persuasive ground of appeal within that document, nor does it reveal any question of general importance for the consideration of the Court of Appeal.

On 23 April this year, Ms Winn filed her application. For whatever reason, it appears that she did not serve that upon the respondent. On 29 April, the parties received an email from the registrar of the Court of Appeal, setting out a proposed timetable for the conduct of this proceeding. Ms Winn failed to file and serve her outline of argument and list of authorities, according to those directions. On 18 June 2019, she served the document that contained that notice of appeal to which I have referred. On the following day, 19 June, orders were made by the President vacating the existing timetable and setting a new timetable for the conduct of the case, culminating in a half-day hearing in this court on 10 October. That timetable required Ms Winn to file her outline of submissions and her list of authorities by 31 July. She has not done so, even by this date.

Her explanation offered for that default is that she has been in ill health and in support of that submission, she presented a bundle of documents, mainly consisting of medical certificates, which I have had marked exhibit 1 for today's application. As I said to Ms Winn in the hearing this morning, having considered that material, it is clear that she has been in poor health and has received on more than a few occasions, medical treatment for perhaps a number of conditions. But the evidence does not show that, for much of the time since the

orders were made by the President until today, she has been unable to, at least, prepare and file the outline of argument and a list of authorities upon which she wishes to rely. Although she has been off work for some of that period, it appears reasonably clear that there are times when she has been at work. I am left with the view that she has simply neglected the prosecution of this matter, which would not be entirely unlikely given the amount of money which is potentially involved in it.

I had considered allowing Ms Winn one last opportunity to remedy her defaults, by giving her until 4 pm tomorrow to file the outline and list of authorities. However, I accept what Mr Slasberg, for the respondent, has said about the practical difficulties which would then be involved in having this matter ready for hearing on the scheduled date of 10 October. It may be that, with the employment of all or much of the resources of the respondent firm, the matter could be made ready for hearing on the 10th of October, but I accept that that would be, if possible, a very substantial burden to impose upon the respondent, and where the problem has arisen from the applicant's default, it would not be just to do so.

Of course, the matter could be adjourned – that is, the hearing could be adjourned from 10 October and Ms Winn could have yet a further extension of time, but there are considerations beyond the interests of Ms Winn that are relevant before that is done. The first of them is the position of the respondent, which would then have to be delayed in the disposition of this matter and which would have to employ yet further resources towards that disposition.

The respondent's position, so far as recovering costs from the applicant, for example, costs occasioned by a further delay in the hearing of this case, would be affected by the recent decision of the High Court of Australia in *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007; [2019] HCA 29, where the High Court held that the common law of Australia does not allow for the exception, commonly referred to as the Chorley exception, which had existed for a self-represented litigant who is a solicitor.

The other relevant consideration is the interests of the Court and other litigants. Were this hearing to be adjourned from 10th of October, the case would have to be given a half day at some later date and, inevitably, that would affect the listing of another case which would otherwise take its place on that date.

For these reasons, it is in the interests of justice that the application for leave to appeal be dismissed for want of prosecution, and I will so order. I will further order that it be dismissed with costs.

...

McMURDO JA: Mr Slasberg, an employee of the respondent, has applied for the respondents' costs to be assessed on the indemnity basis. I raised with him the High Court's recent judgment in *Bell Lawyers*, as I mentioned in my earlier reasons, but I am informed that the respondent is an incorporated legal practice. That matters for the reasons that appear in paragraphs 46 through 51 of the judgment of the plurality in *Bell Lawyers*. It does not affect my conclusion earlier expressed that the application for leave to appeal should be now dismissed.

I am not persuaded, however, to order costs on the indemnity basis, and, in particular, to order that they be fixed in an amount of $8,582, as the respondent seeks. I am not unsympathetic to the respondent's position, and I do not wish to suggest that would not be an appropriate amount if costs were awarded on the indemnity basis. But I am not persuaded that this is a case where indemnity costs should be ordered.

The submissions for the respondent in this respect refer to Ms Winn's lengthy and unhappy experience as a litigant, and it is said that this present case is yet another example of a proceeding brought by her without any merit. As I said in my earlier reasons: there is no manifestly persuasive ground of appeal within the notice of appeal, nor does it appear to raise any question of general importance. But beyond that, I do not intend to embark upon a consideration of the ultimate merit of what had been her proposed appeal. It would, in my

view, not be appropriate to do so, to consider simply the question of whether there should be an award of costs on an indemnity basis.

Therefore there is not a sufficient basis for indemnity costs in this case and they will be assessed, if they have to be, on the standard basis.

Ms Winn sought to argue that she should not have to pay the costs at all. I did listen to her for some time, but as I said to her, she had not said anything which was relevant to question of whether she ought to pay the costs of a proceeding which she had brought, but failed to prosecute, and, more generally, why the costs should not follow the event. The orders will be as I've earlier pronounced, that is, that the application for leave to appeal be dismissed with costs.