COURT OF APPEAL

MORRISON JA

Appeal No 3160 of 2019
DC No 5866 of 2018

Morrison JA

JOSEPH WILLIAM SMITH **Applicants/Respondents**

MIAMI MOTORS PTY LTD
ACN 009 812 266

v

MICHAEL DERMOTT YARWOOD **Respondent/Appellant**

BRISBANE

MONDAY, 20 MAY 2019

JUDGMENT

MORRISON JA: The respondents to this appeal apply for an order that the appellant give security for the costs of the appeal. The application is made pursuant to r 772 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the UCPR"). The amount sought is $57,091.25, based upon a report prepared by a costs assessor, estimating the anticipated costs in defending the appeal up until and including the first day of hearing.

Legal principles

Rule 772(1) of the *UCPR* provides that this Court "… may order an appellant to give security, in the form the court considers appropriate, for the prosecution of the appeal without delay and for payment of any costs the Court of Appeal may award to a respondent".

The power to order security for costs is unfettered one, both as to whether to order security, and if so, in what amount. Relevant factors include:[1] (i) that the appellant has had their day in court and lost; (ii) the appellant's financial position; (iii) the prospects of success on appeal; and (iv) any delay in bringing the application.

Where the prospects of success on appeal are "bleak", and the appellant is without funds, there are powerful reasons for ordering security.[2]

Discussion

There is no doubt that the appellant is impecunious. His own material filed on this application deposes to that fact, and he frankly conceded it during the course of submissions. However, his affidavit filed on 9 May 2019 reveals that he is the co-trustee of two family trusts, of which he is a named beneficiary, along with his wife and each of his children. Those trusts hold interests in commercial undertakings but any equity or value in them is not readily realisable.[3] During the course of submissions the appellant conceded that the other trustee was his son and that if he made a timely request of him it was likely that an advance could be made to meet any order for security for costs. Thus, whilst the appellant is presently impecunious, any order for security would not stifle his appeal.

As to the prospects of success on the appeal, the position cannot be stated with any certainty. The order the subject of the appeal was one for summary judgment. The underlying claim was that the appellant received an amount of $1.65 million from money which was being withheld by the Department of Transport as the consequence of a resumption of land. The claim was that the appellant had not accounted for that money. There is no challenge to the fact that the money was received into a bank account controlled by the appellant.

When the matter was first heard by the learned primary judge on 7 November 2018, his Honour was not prepared to give summary judgment at that time. His Honour explained the reason for that, namely that the appellant had said during the hearing that all of the issues

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1 *Natcraft Pty Ltd v Det Norske Veritas* [2002] QCA 241; *Woolworths Group Ltd v Day* [2018] QCA 79 at [7].
2 *Murchie v Big Kart Track Pty Ltd (No 2)* [2003] 1 Qd R 528 at 530.
3 Appellant's affidavit, para 13.

could be explained and the amount accounted for, so it was said, by a proper analysis of some thousands of documents disclosed by the appellant shortly prior to the hearing. As a consequence his Honour did not dismiss the application for summary judgment, but adjourned it so that the appellant could file further material with respect to that issue.[4]

The result was an order made on 10 December 2018 that the appellant file any further material on that issue by 4.00 pm on 4 February 2019. The application was then listed for hearing on 4 March 2019.

On 4 March 2019 an issue had arisen as to whether the appellant had capacity to take part in the litigation in light of a medical condition which had manifested in the meantime. The consequence was that on 4 March 2019 the learned primary judge adjourned the matter again until 11 March, but made two relevant orders. The first was that the appellant file any affidavits on which he intended to rely in respect of his capacity to take part in the litigation, by 7 March 2019. Further, it was ordered that any deponent of such an affidavit[5] be available for cross-examination at the hearing which was adjourned until 11 March.

As matters stood at 11 March 2019, the appellant had not filed any affidavit material in response to the order originally made on 10 December 2018. In other words, nothing had been filed to explain the claim for the $1.655 million, either by 4 February 2019 as ordered, or at all. Further, the affidavit filed by the appellant deposed that he was an inpatient in the Southport Hospital, receiving treatment for a major depressive disorder, possibly bipolar illness. That affidavit exhibited reports from medical practitioners which recorded aspects of the appellant's condition and capacity, but at earlier times not approximate to March 2019.[6] On an information and belief basis it was deposed that neither medical practitioner could be available for cross-examination on 11 March.[7]

The submissions advanced on behalf of the appellant for the hearing on 11 March 2019 referred to these points: (i) that the appellant suffered a life time illness of major depressive disorder; (ii) he was still an inpatient of the Southport Hospital; (iii) on release he would

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4 *Yarwood v Smith* [2018] QSC 279 at [15]-[18].
5 Referring principally to medical practitioners.
6 One report was 29 November 2018 and the other was 15 January 2019.
7 Affidavit of Mr Yarwood, dated 7 April 2019, paras 21-22.

return to the care of another practitioner to manage a recovery path; and (iv) further directions were sought leading to a hearing not before 28 May 2019.

In his reasons on the summary judgment application, the learned primary judge recorded the history of the application and referred to the appellant's affidavit which revealed that he had been admitted to hospital on 25 February 2019. His Honour observed, however, that the affidavit did not explain at all why there had been no compliance with the order originally made on 10 December 2018, requiring the filing of material by 4 February 2019. In that respect the pertinent point was that the deadline for the filing of material under the December order was some three weeks prior to when the appellant was hospitalised.

Having noted other matters which suggested that the appellant had a capacity to engage in the litigation, the learned primary judge made three relevant findings: (i) his Honour did not accept that there was evidence to show that up until 4 February 2019 the appellant lacked any relevant capacity; (ii) the appellant's affidavit did not depose that he was incapable of complying with the December order; and (iii) the purpose of the adjournment granted was to permit the provision of material explaining a defence to the claim for the $1.655 million, but no such material having been filed, and therefore his Honour would no longer postpone judgment.

Given that history there are difficulties confronting the appeal. There was no compliance with the order made on 10 December 2018, either by 4 February 2019, or at any time thereafter. However, one of the grounds of appeal is that it was an error to proceed in the absence of the appellant on 11 March 2019. On that day the learned primary judge was aware from the filed material that the appellant was in hospital, under care for a major depressive order, and that his medical practitioners were unavailable for cross-examination on that day.

In my view, whilst there are difficulties confronting the appeal, it cannot be concluded that the prospects are bleak. Equally, one cannot conclude that they are strong. In my view it is right to proceed on the basis that the appeal has some prospects of success.

In those circumstances, the appellant being impecunious absent the exercise of the trustee's discretion to make him an advance, and there being no prospect of an order for security stifling the appeal, it is appropriate to order security for costs. The question, then, is how much should be ordered.

The report by the costs assessor concludes that the likely costs to be incurred in the conduct of the appeal total $57,091.25. However, there are some matters to be observed about the basis of that calculation. First, it includes $7,881.40 which is for the costs of the application for security for costs itself. Whilst they would form part of the costs of and incidental to the appeal in the long run, a separate order can be made in respect of them, and they are not strictly the subject of the application for security as they will have been incurred prior to any such order.

Secondly, the allowances for the participation of Counsel are on the basis of Senior Counsel and Junior Counsel. Given the nature of the issues in the appeal, namely whether a summary judgment should have been given in the face of non-compliance with an order, I am doubtful that it is right to calculate the amount for security on the basis of the involvement of Senior Counsel.

Thirdly, the estimation includes some components which seem excessive, such as an attendance by a solicitor to settle the respondents' outline, and the participation of Senior Counsel to review the appeal book index. The former is hardly warranted given the issues in the case, and the latter is overly indulgent.

Fourthly, the item for care and skill includes an uplift at 25 per cent, which is arguable given the issues in the case.

If those matters are then adjusted the amount is closer to $26,000.

Given that this is an order for security, and not for indemnity in respect of anticipated costs, it seems to me appropriate to order security in the sum of $20,000. The costs of the application should be the respondents' costs in the cause.

The orders are:

1. Pursuant to r 772 of the *Uniform Civil Procedure Rules* 1999 (Qld) the appellant is, within 28 days of today, to provide security for the respondents' costs of the appeal in the amount of $20,000, in a form suitable to the Registrar.

2. Pursuant to r 774 of the *Uniform Civil Procedure Rules*, the appeal is stayed pending compliance by the appellant with order number 1.

3. Liberty to apply in the event of non-compliance with order number 1.

4. The respondents' costs of the application are to be their costs in the cause.