[2002] QCA 70

COURT OF APPEAL

DAVIES JA
MUIR J
PHILIPPIDES J

Appeal No 520 of 2002

TREVOR ALLAN EVANS Respondent

and

DANIEL JAMES CREEVEY Appellant

BRISBANE

..DATE 13/03/2002

JUDGMENT

MUIR J: The applicant defendant pursuant to section 118(3) of the District Courts Act 1967 seeks leave to appeal against a decision of a Judge of the District Court on 20 December 2001 giving leave to proceed pursuant to rule 389(2) of the Uniform Civil Procedure Rules. The subrule provides that if no step has been taken in a proceeding for two years from the time the last step was taken, a new step may not be taken without the order of the Court which may be made either with or without notice.

The circumstances in which an Appellate Court may interfere with the exercise by a primary Judge of a discretion are discussed in an oft repeated passage in the judgment of Dixon, Evatt and McTiernan JJ in House v. The King (1936) 55 CLR 499 at 504-505, which it is unnecessary for me to repeat.

It is also necessary to bear in mind that the application is for leave to appeal from an interlocutory order. Appellate Courts exercise particular caution when reviewing such decisions for the reasons discussed in Adam P Brown Male Fashions Proprietary Limited v. Phillip Morris Incorporated (1981) 148 CLR 170 at 176-177, Re the will of Gilbert, deceased (1946) SR NSW 370 at 374, and Decor Corporation v. Dart Industries Inc (1991) 33 FCR 397 at 398-9.

The applicant alleges the following errors on the part of the learned primary Judge:

(a) failure to take into account that the critical events giving rise to the litigation occurred in early to mid 1990 in excess of 11 years prior to the application and about five years prior to the institution of proceedings;

(b) failure to take into account the fact that the action is still not ready for trial and that discovery and inspection are outstanding and the respondent has yet to obtain expert valuation and other evidence;

(c) failure to take into account the respondent's failure to satisfactorily explain delay;

(d) failure to give any apparent weight to the respondent's failure to comply with Court orders on a number of occasions;

(e) failure to apply the correct test to the question of prejudice namely whether the respondent had satisfied the onus of showing that any prejudice the applicant may suffer is not such as to cause injustice to the applicant should the action be permitted to continue.

It is submitted also that the primary Judge erred in concluding that the delay relating to a mediation engaged in by the parties should not count against the respondent.

Before considering these complaints further, it is desirable to explain the nature of the action and to say a little about its conduct. The respondent claims $84,180 damages for negligence and/or breach of contract against the applicant.

In summary, it is alleged that the applicant was a member of a firm of solicitors representing the respondent in relation to a property settlement and maintenance dispute between the respondent and his former wife. Pursuant to his retainer, the applicant prepared a maintenance agreement. It was signed in 1990 by the respondent and his former wife and some of its terms were implemented. In breach of his duty, the applicant failed to obtain the Family Court's approval of the agreement as required by section 87(2) of the Family Law Act.

The respondent's former wife made application in 1992 to the Family Court for orders concerning property and maintenance. Acting on expert legal advice, the respondent consented to an order which was financially less advantageous to him than the 1990 agreement and thereby suffered loss and damage. He also suffered further loss through incurring legal fees which would not have been incurred if the 1990 agreement had been binding and enforced.

The proceedings recommenced on 15 June 1995. An amended plaint was filed on 27 September 1995. The applicant requested further and better particulars in October 1995 which request was not satisfied until March 1996. Also in that

month an entry of appearance and defence was filed by the applicant.

The respondent swore that between July 1996 and December 1996 he was not kept informed by his former solicitor of what steps were being taken in the proceedings and that he changed solicitors in September 1996.

In April 1997, the respondent successfully resisted an application to strike out the proceedings for want of prosecution. Later in that year, inspection of the respondent's documents took place and interrogatories were delivered by both sides and answered. Little was done to progress the action in 1998 or for most of 1999.

In December 1999, the respondent's present solicitors commenced acting for him and gave notice of intention to take a further step in the action. Also in December 1999, the applicant's solicitors in response to a request from the respondent's solicitors indicated the applicant's willingness to mediate. A mediation was then arranged at the same leisurely pace which has distinguished the progress of the action.

On 16 June 2000, the respondent's solicitors wrote to the applicant's solicitors nominating three persons as mediators and discussing proposed mediation arrangements. The applicant's solicitors responded on 28 June 2000 and, in

September, communications took place concerning a list of documents to go to the mediator. Further communications took place in November 2000 with a view to finalising details of the mediation.

On 15 March 2001, the applicant's solicitors wrote to the respondent's solicitors stating that the mediation then proposed was not a mediation by a Court appointed mediator which was the type of mediation to which the applicant had initially agreed. It was asserted that if mediation was unsuccessful the respondent would be required to make application for leave to proceed.

A preliminary conference for the mediation was held on 16 March 2001 and the mediation took place on 12 April 2001. There is no evidence of any work done with a view to progressing the matter between 12 April and 9 November 2001 when the respondent's solicitors wrote to the applicant's solicitors advising that an application for leave to proceed had been prepared.

In the course of his able address on behalf of the applicant, Mr Wilson submitted that his Honour erred in concluding, in effect, that the delay in the mediation process was irrelevant to the application having regard to the desirability of encouraging parties to resolve their disputes by mediation. I accept the submission.

It may be accepted that mediation is to be encouraged but a party seeking to mediate is not thereby relieved of the obligation to proceed in an expeditious way imposed by rule 5(3) of the Uniform Civil Procedure Rules. A mediation process under the rules carried out with diligence will no doubt satisfy that obligation.

A mediation extraneous to the rules but undertaken with reasonable dispatch, even if resulting in a technical breach of such obligation, is unlikely to result in the imposition of sanctions on the party in breach. The mere pursuit of mediation, however, cannot suspend the operation of the rules and, in particular, the obligation to proceed expeditiously. Well over a year elapsed between the initial request by the respondent's solicitors concerning mediation and the holding of the unsuccessful mediation. Much of the delay was attributable to dilatory conduct on the part of the respondent's legal advisers. This delay constitutes a failure by the respondent to prosecute the action expeditiously.

Nevertheless, it does not follow, necessarily, from this conclusion that the primary Judge's decision is attendant by sufficient doubt to warrant its reconsideration by the Court. Failure to satisfactorily explain delay and past disobedience of Court orders or directions are matters relevant to a determination on applications to strike out for want of prosecution and on applications for leave to proceed. Punishment of a defaulting litigant for past transgressions,

however, is not a relevant consideration.

Of central importance is whether the respondent's dilatory conduct has prevented a fair trial and whether, if the matter is allowed to proceed, the applicant will have suffered irretrievable prejudice.

There are other relevant considerations such as the interests of other litigants and the efficient administration of justice but matters of this nature were not relied on in any substantial way on the appeal.

The applicant, although alleging failures by the respondent to comply with Court orders on four occasions in 1996 and 1997, is not able on the material to point to any specific acts of non-compliance. It is submitted that such non- compliance may be inferred from surrounding circumstances. The submission is not without substance but the bulk of the alleged failures occurred at a time when the respondent was represented by a solicitor who was subsequently struck off and there is no evidence that the respondent's conduct was in any way contumelious.

The applicant alleged that he would suffer prejudice in the following ways if the action were allowed to proceed:

(a) the applicant's insurance cover is limited to $100,000 inclusive of the costs of defending the action.

He had cover beyond that sum with FAI General Insurance Company Limited which is now in liquidation. The applicant's costs assessed on the standard basis were estimated to be approximately $50,000. Consequently, if the respondent succeeds in establishing damages to the order of $80,000, the applicant (assuming that the respondent's successful costs amount to $30,000) will not be covered for some $60,000 without taking into account interest on the claim. The interest could be expected to be substantial but an award of interest would be discretionary and the respondent's dilatory conduct would be relevant to the exercise of the discretion;

(b) the respondent has changed solicitors twice and the first solicitor failed to hand over complete files;

(c) the passage of time and dimming of recollections will necessarily lead to prejudice of the type discussed by Justice McHugh in Brisbane South Regional Health Authority v. Taylor (1997) 186 CLR 541.

The material refers to the possibility of protection under what is described as the HIH relief scheme to the extent of 90 per cent of the claim plus costs. The applicant elected not to pursue the possibility of relief under the scheme pending the outcome of the respondent's application for leave to proceed. Consequently, the extent to which the applicant may suffer prejudice as a result of reduced insurance cover is a

matter of speculation.

In the absence of an explanation of the types of documents lost and some identification of the way in which their absence may lead to prejudice, it is appropriate to regard the complaint in (b) above as concerning the type of prejudice which flows from the passage of time. That assumes in favour of the applicant that the respondent should bear responsibility for the acts or omissions of the applicant's solicitors at a time after the commencement of the litigation.

Whilst not wishing to understate the possibility of prejudice flowing from the effluxion of time, the facts of this case are not such as to suggest that the applicant is likely to suffer any serious disadvantage in that regard. The material at first instance contained no evidence of the loss or destruction of critical documents, of the unavailability of any witness of substance or which addresses the possibility that the quality of significant pieces of evidence may have been eroded through the dulling of memories.

The respondent's case is relatively simple. Its proof should be largely documentary, and the defence does little more than put the respondent to proof.

It is submitted on the applicant's behalf that the question of prejudice must be looked at in the light of the status of their action. In that regard, it is asserted without

contradiction that before the matter will be ready for trial the respondent needs to file and serve a reply, some further disclosure and inspection must take place and that the applicant may need to obtain an expert report or reports.

There are also costs orders outstanding against the respondent which he has no present means of satisfying.

It is submitted that if the matter proceeds the applicant will be put to further delay and expense and there will be some further delay before trial and, further, that if he is successful he will be unable to recover a significant proportion of his costs from the respondent.

These further matters raised on behalf of the applicant were relevant to the primary Judge's determination and remain relevant. From the earlier discussion of the nature of the action, however, it can be seen that attending to all steps necessary to make the action ready for trial should involve relatively little cost, complexity or delay.

The primary Judge exercised his discretion in favour of the respondent taking into account, as he was entitled to do, his perception of the merits of the respondent's claim. His view, which I share, was that prima facie the respondent appears to have a soundly based claim.

Mr Wilson relies on answers to interrogatories in the material

before the primary Judge to show that the applicant may have a good defence to the prima facie case. He may well be able to show a good defence on trial but, for present purposes, it is more relevant that the respondent has made out a case which appears to have substance. Moreover, it is one which is unanswered in the pleadings.

I am not particularly impressed by the point that the defence was delivered under the old rules. Even under the old rules, there was an obligation to plead matters which, if left unpleaded, might take an opponent by surprise.

It was argued that his Honour's approach was to allow only the fact that the respondent had an arguable case to outweigh the prejudice shown by the applicant as well as the other factors to which Mr Wilson pointed in the course of his submissions. In my view, that over-simplifies his Honour's approach which was, in part, to consider and assess the prejudice which might flow to either side.

In conclusion, it is my view that the decision is not attended by sufficient doubt to warrant its reconsideration. I would refuse the application.

DAVIES JA: I agree.

PHILIPPIDES J: I agree.

DAVIES JA: And the application is refused with costs.
