[2002] QSC 165

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

Application No 4329 of 2002

DANIELLE MARIE CROMWELL — Applicant

and

TROY EDWIN DRABSCH — Respondent

BRISBANE

..DATE 21/05/2002

JUDGMENT

HIS HONOUR: In this matter, the applicant has sought to have the application, which is for an injunction to restrain the respondent from "communicating directly or indirectly with the applicant and with any persons known by the respondent, to be relatives and/or associates of the applicant", adjourned to a date to be fixed.

The application for the adjournment arises, I am told, out of the delivery late yesterday afternoon, of an affidavit by the respondent, in which the respondent states that in the light of the applicant's affidavit, he has no intention of further contacting the applicant and no need to do so.

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HIS HONOUR: The applicant does not suggest that the adjournment of the application would achieve anything by way of the production of further evidence, or indeed, of anything which would facilitate the future hearing of the application.

Her point seems to be that she is willing at the moment to accept a statement from the respondent, that he will not contact her, but wishes to keep the application alive as a vehicle to re-enliven the position, should he change his mind.

It seems to me that that would be an improper use of the adjournment process. If in the future, events occur which

would lead the applicant to the view that she has a right to an injunction, an application can be made to cover that event.

There is no reason in the material to suppose that such an event is likely. The application can be decided at the present time. No side wishes to put in further material. The merits of the application are able to be decided and in my view, there would be no purpose to be served by the granting of an adjournment in the circumstances. I accept the respondent's submission in this regard.

Consequently, the application for an adjournment is refused.

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HIS HONOUR: This is an originating application seeking an order that the respondent be restrained from communicating with the applicant.

When the matter came on for determination today, the applicant informed the Court that she was not pursuing the application. The matter has therefore turned into an argument about costs.

The respondent has sought costs on an indemnity basis. Essentially, there are two grounds for this. The first is that the application is wholly misconceived, in that there is no cause of action of the sort described by counsel for

the applicant as anticipatory trespass to the person, and the facts come nowhere near establishing an anticipated nuisance.

The second is the fact that the respondent has in fact done nothing wrong at any time. It is argued that all he has done is sought to obtain information from the applicant relating to litigation pending in the District Court, on appeal from the Magistrates Court. He in fact has on no occasion spoken to the applicant, but has left messages with a friend of hers, with whom she lives and with relatives, seeking to have her contact him.

The applicant is an employee of the insurer GIO, by whatever its proper name these days might be. She was the telephone operator who received a phone call from the respondent a couple of years ago, in which he sought to put in place household insurance. According to the respondent, he told the applicant - among other things - that he had a criminal conviction. He in fact does have convictions for driving whilst his blood alcohol content was point one, for receiving in 1986 and for attempted false pretences in 1990.

The insurance company, when his premises were subsequently destroyed by fire, denied that these matters had been disclosed to it and defended proceedings in the Magistrates Court (in which both parties were represented by solicitors) brought upon the policy.

During the course of the hearing, the person with whom the telephone conversation establishing the insurance took place, was not called by the defendant.

I was informed that it was common ground that this was the telephone call in which the relevant disclosure would have been required to be made and would have been made, if it were made at all, and that no form of proposal was either sought or was given.

It is, therefore, surprising that the telephone operator was not called by the defendant in the Magistrates Court proceedings and it is perfectly understandable that the present respondent would have felt concerned that all relevant evidence had not been placed before the Magistrate.

Nonetheless the Magistrate was apparently satisfied that the defendant company had discharged the onus of proving non disclosure. He disbelieved the plaintiff, that is the present respondent.

The latter appealed to the District Court and that appeal is pending. One of the grounds of appeal relates to the non disclosure point.

His attempts to contact the present applicant to ascertain the position in relation to that point were rebuffed. He spoke to others, who said that they would either leave a message for the applicant or that the applicant did not wish

to speak to him.

In fact the applicant contacted police. The material does not disclose what the police were told, but the respondent was apparently warned about stalking the applicant. This seems an extraordinary over reaction to the efforts of a person to obtain evidence for litigation on a point which one would have thought would have been of the utmost materiality.

Despite the fact that the applicant's solicitors are the same solicitors as those acting for GIO and the respondent's the same as those who acted for him in the Magistrates Court proceedings, no letter before action was written by the applicant or her solicitors to either the respondent or his solicitors.

No attempt was made to ascertain why it was that he wanted to contact her beyond the perfectly innocent conversations deposed to by her relatives and her friend. Instead, the solicitors issued the originating application and had it served on the respondent last week.

The causes of action advanced in support of the application on behalf of the applicant were two.

The first was said to be apprehended trespass to the person. No authority was cited to me to establish that an injunction can be obtained for such an apprehension, but in principle, I see no reason why an injunction should not

issue.

There have, however, been cases - and since nothing was cited to me, I cannot name them - in which doubts have been expressed about the availability of injunctive relief to restrain assaults. For myself, I would have thought that in these days, such relief would be available.

However, it would only be available on proof of facts which made out a real risk of such an event occurring. The same is true of the second argument advanced on behalf of the applicant, that is that an injunction would lie to restrain an apprehended nuisance.

The applicant relied upon the decision of Justice Jones in McCoy Constructions Proprietary Limited v. Dabrowski, 2001 [QSC] 413. In that case, Justice Jones referred to the availability of an injunction in cases where there has been a watching or a besetting of the applicant of a kind and to a degree which was (to quote Clarke and Lindsell on Torts referred to by his Honour): "Sufficiently serious to constitute a nuisance."

The evidence in this case falls far short of amounting to either besetting or watching. I am asked to infer "watching" from the fact that the respondent made attempts to contact the applicant by talking to others and that he lived nearby.

I would not be prepared to infer "watching" from that, nor would I be prepared to infer that he was "besetting" the applicant, merely because he twice went to her premises, in an attempt to speak to her when she was not there.

No explanation has been advanced for the failure of the solicitors for the applicant, to write a letter before action. It is a matter of elementary prudence for such letters to be written and I am sure that the desirability of writing such letters is regularly taught to young solicitors at an early stage.

Perhaps there was some explanation here, but as I have said, it has not been put before me. Moreover, the solicitors for the respondent wrote to the solicitors for the applicant last week after service of the proceedings and informed them that the proceedings were unnecessary and requested that they be discontinued.

The letter stated that the respondent had no intention of further attempting to have contact with the applicant in the light of the matters set out in her affidavit. This was a reference to her deposition that she had no knowledge of the matters in issue in the Magistrates Court.

The solicitors for the applicant were not satisfied to have pointed out to them the fact that there was no such intention, notwithstanding of course that the issue of such an intention would be a fundamental matter in relation to

the grant of an injunction.

They responded by a letter which indicated their refusal to desist with the proceedings as late as last night. They took the ground that they had not received any undertaking, nor anything under the hand of the respondent.

Today the applicant has, as I have said, adopted a different stance. There is of course now an affidavit by the respondent, but it offers and contains no undertaking whatsoever.

It deposes to what was in the letter which his solicitors sent last week. Obviously, it bears upon the availability of the relief sought. For whatever reason, the applicant has not pursued that relief.

In the circumstances, I am not satisfied that the applicant ever had a significant chance of proving the elements of either of the causes of action suggested to exist. The conduct was not suggestive of anything threatening, in my view.

The strongest that the evidence goes in that regard, is some suggestion from Mr Carter that the respondent was or appeared to him, to be rough in his manner in speaking and appearance and Mr Carter says he formed the impression that the respondent was emotionally unstable and that he sounded desperate. He may well have done. That is hardly

sufficient to warrant an injunction. There is no material going directly to the issue of intention, except of course the respondent's own affidavit.

It seems to me that these proceedings were doomed and indeed, were proceedings which ought not to have been issued without a letter before action and to which a great deal more consideration should have been given before the proceedings commenced.

It seems to me that the respondent's application for costs on an indemnity basis, has been made out. The application has been completely unsuccessful. In the circumstances it should be dismissed. The applicant should be ordered to pay the respondent's costs of and incidental to the proceedings, to be assessed on an indemnity basis.

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HIS HONOUR: I am not going to summarise what I have said. It has been recorded; you can have the reasons. I am not going to try and re-summarise it.
