[2002] QCA 251

COURT OF APPEAL

de JERSEY CJ
WILLIAMS JA
JERRARD JA

Appeal No 2940 of 2002

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| ANNE PAIVI EDWARDS | First Respondent (Plaintiff) |
| and | |
| CLINICAL BEAUTY PTY LTD (ACN 073 347 092) | Not party to appeal (First Defendant) |
| and | |
| WARREN WING NIN CHAN | Appellant (Second Defendant) |

Appeal No 2941 of 2002

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| ANNE PAIVI EDWARDS | Appellant (Plaintiff) |
| and | |
| CLINICAL BEAUTY PTY LTD and | Respondent (First Defendant) |
| WARREN WING NIN CHAN | Respondent (Second Defendant) |

BRISBANE

..DATE 22/07/2002

JUDGMENT

THE CHIEF JUSTICE: There will be an order that Primrose Couper Cronin Rudkin have leave to withdraw as solicitors for the second defendant. And that the second defendant pay their costs of and incidental to the application for leave to withdraw to be assessed.

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THE CHIEF JUSTICE: The applicant failed in her claim against the first defendant company and the learned primary Judge found that when the applicant met with the first defendant's director Ms Noon on the 1st of May 1998 it was the applicant herself who specified Dr Chan as the doctor she wished to carry out the procedure. That must be the correct interpretation of his Honour's reasons for judgment.

The Judge said he was not satisfied that Ms Noon recommended Dr Chan. Those findings were plainly based on a comparative assessment of the credibility of the applicant and Ms Noon in a case where as his Honour pointed out elsewhere credibility loomed large. The Judge also rejected the applicant's evidence as to representations made by Ms Noon and found it unlikely that the applicant would have relied on any in any case because the applicant was shortly to see Dr Chan. Those findings again were heavily dependant on matters of credibility.

The applicant seeks leave to appeal against the dismissal of her claim against the first defendant because subsequently to

the conclusion of the hearing the first defendant fell into liquidation. Leave under the Corporations Law is additionally necessary.

The application for leave to appeal should, in my view, be refused because an appeal would not enjoy any substantial prospect of success. The applicant would contend that the Judge should have held the first defendant vicariously responsible for the second defendant's negligence, the second defendant being the first defendant's servant or agent.

In its defence, the first defendant effectively denied that the second defendant was its servant or agent. As the Judge pointed out, evidence of their relationship was not led. There would be no prospect of success on this point of appeal in those circumstances.

The effective findings that it was the applicant herself who nominated Dr Chan and that Ms Noon did not actively recommend Dr Chan and that Ms Noon made no representation relied on by the applicant were all, as I have said, heavily dependent on the resolution of issues of competing credibility. The reasons for judgment suggest no error of approach.

In those circumstances an appeal would have no substantial prospects of success and the application for leave to appeal should, in my view, be refused.

WILLIAMS JA: I agree.

JERRARD JA: Yes, I agree. I have nothing to add.

THE CHIEF JUSTICE: That application is refused.

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THE CHIEF JUSTICE: This is an application for leave to appeal against a judgment given in the District Court in favour of the respondent/plaintiff against the second defendant, the present applicant, in the sum of $40,000, damages for medical negligence.

The learned Judge found that the second defendant had been negligent on two bases, positioning the implants too high and for failing to warn the plaintiff in advance of the procedure that the result could put her in a worse position than she was in even allowing for the exercise of reasonable care. On the evidence accepted by the Judge the doctor did no more than tell the plaintiff that his operation upon her would make her look better than in photographs she presented.

On the basis of Rogers v. Whittaker, the risk that she may end up in a worse position appears plainly to have been a risk to which the doctor should have drawn attention as the learned Judge indeed found.

Mr Greenwood QC, who appeared for the applicant, relied heavily upon the written acknowledgement that in essence a

result could not be guaranteed, a document in pro forma presentation signed by the applicant, but the Judge accepted the plaintiff's evidence that had she been told she could end up in a worse position she would not have gone ahead. And that evidence of what was specifically said or not said really, in the circumstances of the Judge's assessment, prevailed over the form of documentary acknowledgement.

His overall conclusion in the case was heavily dependent on his resolution of issues of credibility. I cannot see that an appeal would have any substantial prospect of reversing the findings which he made, particularly in relation to the inadequacy of the warning.

I should add that Mr Greenwood at the outset sought more time so that the case could be further explored before the applications were heard. Any need for more time relates back to the applicant's failure to discharge his financial commitment to his former solicitors. We were offered no basis for concluding that that position would soon ameliorate. It would be unwarranted not now to proceed, acknowledging, on the other hand, the plaintiff's reasonable expectation that the matter will be brought to finality.

I would refuse the application for leave to appeal.

WILLIAMS JA: I agree.

JERRARD JA: Yes, I agree, and I add only that the learned

trial Judge accepted the plaintiff's evidence that had she not been sure of a good result from a relatively simple procedure she would not have proceeded with the operation. He had already made the finding that the doctor's pre-operation consultation with the plaintiff was inadequate in that the doctor did not take the time or trouble to explain to the plaintiff the risks of a less than successful outcome.

The doctor's application complaining about the finding of the a defective pre-trial consultation depended upon a complaint that the only evidence about that came from the plaintiff whose evidence was said to be so discredited as not to be capable of acceptance.

As to her credibility, the learned Judge had found that she was perfectly capable of dishonesty when she thought that that was to her material advantage and not much deserving of credit and his Honour was thus very alive to her general lack of credit worthiness. However, on the specific matter of pre-operation consultation he saw no reason to doubt the proof of her account and he accepted it. The appellant medical practitioner's evidence gives no assistance since he has said that he had no actual recollection of any conversation prior to the operation.

I agree with the conclusions of the Chief Justice that the applicant has not pointed to any materials in evidence or in the reasons for judgment which would suggest prospects of success on the appeal and that his application should be

dismissed.

THE CHIEF JUSTICE: The application for leave to appeal is refused with costs to be assessed.

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