[2002] QCA 255

COURT OF APPEAL

de JERSEY CJ
JERRARD JA
WILSON J

Appeal No 3631 of 2002

LEESA MAREE BOND	Applicant (Plaintiff)
And	
JOHN MICHAEL CERRUTO	Not party to appeal (First Defendant)
And	
ARTHUR JOSEPH PALK	First Respondent (Second Defendant)
And	
COLES MYER LTD	Second Respondent (Third Defendant)
And	

THE COUNCIL OF THE SHIRE OF PINE RIVERS	Not party to appeal (Fourth Defendant)
And	
STATE OF QUEENSLAND	Not party to appeal (Fourth Defendant)
And	
NOMINAL DEFENDANT	Third Respondent (Defendant by election)
And	
FAI GENERAL INSURANCE CO LTD	Not party to appeal (Defendant by election)

BRISBANE

..DATE 23/07/2002

JUDGMENT

JERRARD JA: In this application the second and third defendants and the defendant by election applied to this Court for orders that the appellant, who was the unsuccessful plaintiff in the trial of this matter, provide security for costs of the appeal.

It is not disputed that the plaintiff is an undischarged bankrupt, having last been bankrupted under a debtors petition filed 1st August 2000. She has no current income and no assets. She was injured on 22nd November 1993 when a motor vehicle she was driving collided with the rear of a motor vehicle driven by the second defendant and owned by the third defendant.

The reasons for judgment of the learned trial Judge delivered on 25th March 2002 record that the plaintiff's case was conducted on the basis that immediately prior to her colliding with the second defendant's vehicle, it had moved out of a southbound left-hand lane of the Bruce Highway into a right-hand southbound lane. This manoeuvre occurred when vehicles travelling south in both lanes had begun to slow down, and on the plaintiff's case it resulting in cutting down the plaintiff's breaking distance and causing her to collide with the second defendant's vehicle.

The second defendant's evidence, as recorded in the reasons for judgment, was that he had moved into that right-hand lane some distance before the point of collision.

It is obvious that the facts upon which liability turned were in short compass. The learned Judge referred to the contents of three documents completed by the plaintiff in the two weeks after the collision, which appeared inconsistent with the version she gave in evidence as described by the Judge.

The learned Judge also referred to the plaintiff's own account, the second defendant's account and to evidence supporting the plaintiff's account given by her husband and her stepson. The Judge did not think any inferences could safely be drawn from the skid marks and debris seen by the plaintiff and her husband a day or so after the accident, and held that in the circumstances the Judge was not prepared to conclude that the second defendant's vehicle moved out of the left lane immediately prior to the collisions. The "collisions" last referred to occurred when the plaintiff's vehicle drove the second defendant's vehicle forward into the vehicle ahead of the second defendant's, that vehicle being driven by the third defendant.

The Judge held that the plaintiff's action therefore failed. On or about 22nd April 2002 the plaintiff gave notice of an appeal against that decision, asserting that the learned Judge erred in finding that her case was conducted on the basis described, that the Judge ought to have drawn inferences from the evidence regarding the skid marks and crash debris, and that the learned Judge did not "consider the fact that the defendant gave evidence contrary to his own pleadings, his sworn answers to interrogatories and to his counsel's cross-

examination of the plaintiff". Those appeared to be the significant points raised in the appeal.

The material filed to date by the appellant does not explain why the learned Judge erred in finding that the plaintiff's case had been conducted on a particular basis, nor why he ought to have drawn inferences from the skid marks. The appellant's material does not identify or describe the evidence given by "the defendant" which contradicted his own pleadings, his answers to interrogatories or his counsel's cross-examination.

If there is merit in those grounds of appeal it has not yet been clearly demonstrated. On the other hand the reasons for judgment clearly do refer to and rely upon documents completed by the plaintiff between one day after the collision and a fortnight after. It seems undeniable that the contents do appear inconsistent with the version the judgment records the plaintiff giving. Accordingly on the hearing of the appeal the plaintiff will face the challenge described in Devries v. Australian National Railways Commission (1992-1993) 177 CLR 472 at pages 479/490. The findings of the learned trial Judge in this matter were not simply based on the credibility of the witnesses as appearing to the Judge, but rather upon both oral evidence and three separate accounts in writing by the plaintiff a short time after.

The principles relevant on an application for security for costs on the hearing of an appeal are not in dispute, and were

recently remarked upon in a judgment of this Court in Natcraft Pty Ltd v. Det Norske Veritas and Another [2002] QCA 241. The matters particularly relevant on this application are the appellant's bankruptcy, her complete lack of assets, the fact that she has already had a "day in court" and has lost on the merits, and the fact that the reasons for judgment and her grounds of appeal to date demonstrate limited prospects of success on appeal.

These matters tell in favour of making an order for security for costs. Telling against making that order is the simple point that she makes that her parlous financial state, due to her inability to work, results from the accident. Further, the submission is made that the real applicant is "a large insurance company/fund" and, of course, the applicant's third defendant is a large public company. The appellant/plaintiff submits that an order for security for costs will have a negligible impact on the applicants, but will cause considerable hardship to her own family.

Those matters advanced on her behalf have some force, but not enough, in the absence of material from the plaintiff suggesting she has some reasonable prospects of success, to avoid entirely an order for security for costs. Absent that material, I think the application must succeed subject to the caveat that it is inappropriate to order an impecunious appellant to provide a greater security than is absolutely necessary. Further, the Court strives not to shut its doors to those who may have some merit.

Here the applicants at first asked for security in the amount of $45,000, that apparently being the total of the costs awarded at trial and the applicants' estimated solicitors and own clients' costs of the appeal at $12,000. The applicant has since recalculated those by affidavit to be more likely to be $6,000 on a party and party basis. The appellant has made an open offer to pay $3,000 for security for costs, which she will borrow from her husband's business, and she has provided an affidavit opinion that the applicants' party and party costs will be more like five and a half thousand dollars.

I consider that the appellant, on the material filed by the two parties, cannot be said to have no prospects of success, and I repeat that the Court endeavours to exercise its discretionary power on these applications so as not to shut its doors where some merit may exist. It appears that the appeal will be limited to liability and the short factual issues that have already been described.

I think that, in the circumstances, the appropriate order is that the appellant/plaintiff provide the respondent/defendants' costs of the appeal in the amount of $3,000, or provide security for those costs of the appeal in that amount, and that pending such payment or provision of such security the proceedings on the appeal be stayed.

THE CHIEF JUSTICE: Yes, I agree.

WILSON J: I agree.

MR KENT: Your Honours, in those circumstances I would ask that the costs of this application-----

THE CHIEF JUSTICE: I think there was a slight - it provides security for the applicants' costs of the appeal in the sum of $3,000, but Justice Jerrard will fix that up when he corrects the transcript.

JERRARD J: I may have said - expressed "applicant/respondent" incorrectly, but I will correct that.

MR KENT: Thank you, your Honour. As to the costs of this application I simply seek an order that the costs be each party's costs in the course in the event. As it happens the offer of $3,000 was not made until after the application was served. It would be-----

THE CHIEF JUSTICE: Well, why don't we simply order that the costs of this application be costs in the appeal.

MR KENT: Yes, thank you, your Honour.

THE CHIEF JUSTICE: That is the order.
