[2002] QSC 227

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 4160 of 2002

FELY WOODWARD — Plaintiff

and

BERNAFON AUSTRALIA PTY LTD (ACN 050 487 593) — Defendant

BRISBANE

..DATE 23/05/2002

ORDER

HIS HONOUR: This is an application by the plaintiff in proceedings presently pending in the District Court for an order that the action be transferred to the Supreme Court. The application is brought under section 82 of the District Court Act 1967.

The material filed on behalf of the applicant is designed to show that there exists reasonable ground for supposing the amount recoverable in respect of the claim to be in excess of the amount recoverable in the action in the District Court. That has been the applicant's approach to the matter.

The respondents were contacted by the applicant prior to the filing of the application and were requested to consent to the transfer. The respondents responded to that request by saying that they could not consent to the request until their solicitors had seen all of the material relied upon by the applicant and until they had obtained instructions.

The applicant thereupon brought the application and served the material but even that did not produce consent from the respondents. Before me, the respondents have adopted the position that they neither consent to nor oppose the application.

I therefore embarked upon the hearing of the application and a consideration of the issue as it was presented by the applicant. When it came to a matter of actually looking at

the relevant section, it became apparent that the approach which the applicant had adopted might not, in fact, be the correct one. To explain that, it is necessary to refer to the form of the relevant section as it now stands and compare it to the form of the section as it previously stood.

Until 1989, the question was governed by section 83(1) of the District Court Act. That Act provided so far as material:

> "83. (1) **Plaintiff's right to transfer action of contract or tort from District Court so as to increase his claim.** Where there is now or hereafter pending in a District Court an action founded on contract or tort wherein the plaintiff claims damages, the plaintiff may at any time apply to the Supreme Court or a Judge thereof for an order to transfer the action to the Supreme Court, on the ground that there is reasonable ground for supposing the amount recoverable in respect of his claim to be in excess of the amount recoverable in the action in a District Court.
>
> If, on any such application, the Court or Judge is satisfied that there is reasonable ground as aforesaid, it or he shall make an order that the action be transferred to the Supreme Court."

In 1989, the relevant provision was amended. It was subsequently, in 1995, renumbered and now stands as section 82. It now provides:

> 82.(1) Where there is now or hereafter pending in a District Court an action, the plaintiff may at any time apply to the Supreme Court or a judge thereof for an order to transfer the action to the Supreme Court, on the ground that there is reasonable ground for supposing that the relief or remedy sought is not available in the District Court.
>
> (2) If, on any such application, the Court or judge is satisfied that there is reasonable ground as aforesaid, it or the judge shall make an order that the action be transferred to the Supreme Court."

The important distinction between the two provisions is that the current section makes the right of transfer dependent upon the existence of reasonable ground for supposing that the relief or remedy sought is not available in the District Court. That is a subjective criterion and, on its face, would seem to require only that the plaintiff nominate the amount which it wishes to recover and unequivocally indicate that it, in fact, wishes to recover that amount.

The pre-1989 position is in notable contrast. It requires a demonstration objectively that there be reasonable ground for supposing that the amount recoverable in respect of the plaintiff's claim exceeds the jurisdiction of the District Court.

In policy terms, this is a sensible amendment. The plaintiff is always at liberty, assuming that the limitation period has not expired, to commence fresh proceedings in this Court. In doing so the plaintiff can nominate the amount for which he or she sues. It therefore makes perfect sense for the legislature to provide in effect that simply by asking for it, the plaintiff ought to be able to transfer an action from the District Court to this Court.

It is unlikely that such a change would affect the number of applications for transfer since, if in the end result the plaintiff fails to recover more than could have been recovered in the District Court, costs are likely to be awarded only on the District Court scale.

Moreover if a defendant has made an offer under the Rules which is not accepted the plaintiff will be exposed to costs on the Supreme Court scale. It is difficult to see any merit or any practical benefit in requiring a plaintiff to go some way toward proving his or her case as an ingredient in a transfer application. In policy terms therefore it seems to me that the legislative change makes perfect sense.

In the short time which I have had available during the luncheon adjournment of this chamber application, I have not discovered any case in which this question has been considered. I have attempted to search not only the cases on transfers from the District Court to the Supreme Court but also the cases on transfers from the Magistrates Court to the District Court because a cognate question arises in that context also.

That is to say the previous section 79 was equivalent to the current section 80 and the previous section 83(1) is equivalent to the current section 82.

I have not found any case, as I say, in either the District or the Supreme Court in which the change in wording has been considered. On the contrary everyone seems to have assumed, and I confess that until the matter was examined during argument today I also assumed, that the case law as decided prior to 1989 governed the matter.

In that context I refer to cases such as Stiffel v. The Industrial Dwelling Society Limited [1973] 2 All England Reports 1131 and Re: Lovell, a decision of Master Lee QC, as he then was, in OS 587 of 1983 on the 5th of August 1983.

An example of that approach being followed since the change in the legislation is the decision of Justice Williams, as he then was, in Doo v. Murphy, No 995 of 1992, decided on 22 December 1992. In that case his Honour followed Re: Lovell.

Now that the point has come to the surface it is my view that the wording of the legislation should be applied as it stands. I do not think it is necessary for a plaintiff to show that there are reasonable grounds for supposing that the amount recoverable in respect of his or her claim would exceed the jurisdiction but only to show such grounds for supposing that the amount sought would do so.

I do not think the use of the words "reasonable grounds" is surplusage notwithstanding the subjective nature of the material to be shown since the test has to be applied not only in the context of likely recovery of particular sums of money but also in the context of other forms of relief, the availability of which might be dubious, particularly in the context of applications respecting transfers from the Magistrates Court to the District Court.

In the present case the applicant has clearly demonstrated on the material that she genuinely seeks to recover an amount in excess of the jurisdiction of the District Court. In my view that is a sufficient reason for granting the order sought and that is the basis upon which I proposed prior to the luncheon adjournment to grant the order.

I would, however, indicate that even if I were wrong in my interpretation of the legislation I am satisfied that the plaintiff has in fact shown a reasonably arguable case for recovery of an amount within the jurisdiction of this Court; but I emphasise that is not the basis of my decision.

The applicant also seeks an order for the payment by the respondent of her costs to the extent that the costs of the application exceed the costs which would have been incurred had the matter been dealt with under Rule 666 of the Uniform Civil Procedure Rules. Practice Direction number 3 of 2001 is designed to encourage parties to use Rule 666 in cases such as this.

Paragraph 10 of that direction clearly warns defendants of the perils to which they are exposed if they do not consent to orders of this sort. Of course, that does not mean that defendants will be mulcted in costs if for good reason they choose to oppose the order sought.

In the present case I have already indicated that I am satisfied the applicant has demonstrated, even in accordance

with the test formerly provided for such cases, the existence of a likelihood of success.

In other words, in my view this is a case where, had the defendant considered its position properly in the light of the material put forward by the plaintiff, it would have appreciated even on the view of the law which the plaintiff was adopting that the applicant was likely to succeed in this application.

It would have realised that on any reasonable view the order was warranted. It is therefore, in my judgment, a case where the defendant should have proceeded under Rule 666. Its refusal to do so should be met by an order of the sort applied for by the plaintiff.

I therefore order that action number D3575 of 2000 pending in the District Court at Brisbane be transferred to this Court.

I further order that the respondents pay so much of the applicants costs of and incidental to this application as exceed the costs which the plaintiff would have incurred had the matter proceeded under Rule 666.

I further order that otherwise the costs of the application be costs in the cause.
