[2004] QSC 477

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No S7589 of 1997

ROSS MACKENZIE MAX REYNOLDS and MARGO LOGAN REYNOLDS	Plaintiffs
and	
ALUMA-LITE PRODUCTS PTY LTD ACN 009 843 832	Defendant

BRISBANE

..DATE 16/12/2004

ORDER

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HIS HONOUR: This is an application by the defendant ("the mortgagee") for the striking out of parts of an amended statement of claim which was amended by the plaintiffs ("the mortgagors") without leave on 3 August 2004. It is necessary to refer to the history of the matter.

The mortgagors were the owners of a property near Warwick and, it seems clear, defaulted in making payments under a mortgage. At some time in 1995, the mortgagee commenced proceedings against the mortgagors to recover the whole of the debt or a sum which I infer to be the whole of the debt and also possession of the mortgaged property. Judgment was given for the mortgagee on 14 March 1996. An order for recovery of possession of land was made but it was further ordered that execution of any writ of possession be stayed until 28 March 1996 - that is, for two weeks.

On 29 March, the parties executed a deed of extension which provided for a further stay of execution of the writ of possession (which had issued pursuant to the judgment) on terms set out in the deed.

The deed was not complied with and in October 1996 the mortgagors applied to have the judgment set aside and also to have the writ of possession set aside. That application was refused by Justice Dowsett on 30 October that year.

The mortgagee had in the meantime (on 5 October 1996) taken possession of the land. At the same time it also took

possession of the crops and livestock on the land, considerable numbers of chattels on the land and grain allegedly stored on the land. Much but not all of this property was the subject of collateral securities granted by the mortgagors to the mortgagee. Subsequently the mortgagee sold the land and the property the subject of the collateral securities and allowed the mortgagors to come and take the property not the subject of any security.

The mortgagors commenced the present action on 15 July 1997, claiming declaratory relief and damages. The statement of claim as initially pleaded sought damages for detinue in respect of a nominated quantity of grain in silos, nominated cattle and pieces of machinery used for farming, harvesting and earthmoving.

It also claimed that the mortgagee exercised the power of sale prior to the expiration of the 30 day notice required by statute. Particulars of that claim were given. That claim is no longer pursued.

Next the original statement of claim asserted that the mortgagee failed to exercise reasonable care to ensure that the property was sold at market value, relying on s 85 of the Property Law Act as well as the general law. Various particulars were given.

Next the mortgagors alleged failure to return the property not the subject of securities. That allegation has been overtaken

by the subsequent return of the property, allegedly in August and September 1998.

Finally, there was a claim that the mortgage was invalid by reason of the conduct of certain solicitors but that claim was struck out by order of the Court on 12 November 1998.

I presume a defence was, in due course, delivered. The parties proceeded through disclosure at a very desultory pace and it seems that the action went to sleep. In September 2003, the mortgagee sought to have the action struck out for want of prosecution but the Judge hearing the matter held that the mortgagors should have one last chance and made orders for interlocutory steps in relation to disclosure which it is unnecessary to spell out.

The matter came before the Court again in November this year when yet another order was made in relation to disclosure. There was a requirement for a draft order for directions so that the matter would be ready for trial, such draft to be filed by 29 November. The matter came back again before the Court on 9 December and further directions were made. Those directions referred to amendments to the defence and counter claim and to the reply.

The present application was filed on 3 December and was noticed in the directions that were given. In the meantime the mortgagee had delivered three amended defences responding to the amended statement of claim. No point had been taken

about the deficiencies of which the mortgagee now complains. The validity of the defences has not been challenged although they were delivered by a director on behalf of the mortgagee which at the time had no legal representation.

The first issue which arises is whether the present application should be summarily dismissed by reason of the failure of the mortgagee to give notice in accordance with rule 444 of the Uniform Civil Procedure Rules. No such notice was given but it is plain from the reference to this application in the order to which I have referred and from the references earlier in Exhibits 2 and 3 to the present application that abundant notice was given to the mortgagors of this application. The mortgagors did not raise any point regarding rule 444 in response nor did they seek the information which that rule requires to be provided.

The consequence of non-compliance with the rule in the ordinary case would be a refusal to hear the application. In my view, the rule is a very salutary one and I would not, in ordinary circumstances, have much hesitation in applying it. The circumstances in the present case are, however, somewhat special. The litigation has dragged on for a long time because for protracted periods the parties or one of them have been unrepresented. On each side, whether from time to time represented or not, there has been a level of impecuniosity. That has, I think, contributed in part to the situation which has arisen.

The action has, this year, come to life and, in my view, the sooner it can be forced on to trial the better. That, I think, was the purpose of the directions that were given in late November and early this month. Had the respondents been concerned about non-compliance with rule 444 it is, to say the least, surprising that they did not mention that matter when the case was before the Court and today's date discussed. It seems to me that the only function of the rule 444 point in this case is as a forensic device to seek an advantage on the hearing of the application.

In my view applying the rule so as to refuse to hear the application in this case would simply be to delay the action further, to multiply costs unnecessarily for litigants whose capacity to incur and pay costs is limited and would give justice to neither side.

I think I should exercise the power conferred by s 448 to hear the application, notwithstanding that it does not comply with part 8 of the Rules.

Counsel for the mortgagee sought to avoid the issues raised in relation to rule 444 by asserting that the application was brought under rule 379. I do not read that rule as covering this case. The significance of that submission was that if the application was brought under rule 379, rule 444 would not have applied to it. It seems to me that rule 379 is concerned to provide for applications to disallow amendments properly made under rule 378, not those improperly made. In my view,

if (as the mortgagee alleges) the amendments could be made only with leave, the application has to be treated as one brought under rule 371 with the consequence that rule 444 did apply.

The amended statement of claim departs from the original in a number of respects. It purports to have been amended pursuant to rule 378. That rule permits amendments to be made prior to the filing of a request for trial date without leave. No request for trial date has been filed. Amendments may be made, however, only if they are ones for which leave from the Court is not required. Much of the debate before me focused on the question of whether leave was required.

The first complaint made by the mortgagee was that the amendments raised a new claim in detinue. What they did was (a) increase the amount of grain which was the subject of the detinue claim in para 7 of the statement of claim; (b) add a claim in detinue for growing crops; (c) reduce the number of cattle that were the subject of the detinue claim; and (d) add a claim for detinue in respect of other chattels not previously included in the claim.

The mortgagee did not raise any argument or objection in relation to the increase in the tonnage of the grain alleged to have been detained. However, it submitted that the claim for detinue in respect of the growing crops was unsustainable as a matter of law. The mortgagors accepted that the claim in detinue could not be brought in respect of these crops. They

submitted, however, that the delay in making the application and the fact that the mortgagee had pleaded to the statement of claim on three occasions meant that the application simply should be dismissed in the exercise of my discretion. That submission was a general one not limited to this particular claim.

There is some force in that submission, but looking at the whole of the circumstances of the case, including the time that has passed and the fact that the matter was before the Court on a number of occasions recently I have come to the conclusion that this is not an appropriate case to refuse on the basis of delay or on the basis of the fact that the amended claim has been pleaded to.

The mortgagors accepted that there was no cause of action in respect of the crops referred to in para 7(b) of the amended statement of claim. Detinue does not lie for growing crops.

The schedule referred to in para 7(d) contains a huge number of additional items alleged to have been wrongfully detained. These are not items comprehended by the pleading as it originally stood. The value of these items is alleged to be the best part of $1 million. They are valued, however, on a replacement basis and it is not altogether clear that this is the correct approach.

In any event it seems to me that because there is a claim for each item as a separate item it must be held, as I think in

the end counsel for the mortgagors accepted, that each item adds a new cause of action.

Counsel for the mortgagee submitted that the causes of action thereby added were added in breach of rule 376 which requires leave to add a cause of action after expiry of the limitation period. For that reason it was submitted the case was not covered by rule 378.

Counsel for the mortgagors submitted that it could not be established that the causes of action arose outside the limitation period.

It is clear that the first demand for return of the goods was made well outside the limitation period, though it may be otherwise in respect of the last such demand. Counsel for the mortgagee submitted that it was the first demand which was the relevant one for measuring the limitation period by reason of the provisions of s 12(1) of the Limitation of Actions Act 1974, and I think that submission is correct. It follows that the amendment was made outside the limitation period prescribed. That in turn meant that it was one for which leave was required and that it has been made without compliance with the rules. It is, therefore, vulnerable to being set aside under rule 371.

I do not think that the mortgagors have adequately explained why these claims were not made at an earlier time. Making them now has a considerable capacity to delay the hearing of

the action and almost inevitably will mean that the mortgagee will be prejudiced by reason of its inability to garner evidence about the matters alleged. There is simply no reason shown why these claims could not have been made at an appropriate time. Making them now is likely to add enormously to the cost of the action, to delay it, to leave both sides in the hands of lawyers incurring additional cost for a lot longer and to be contrary to the interests of justice.

I do not think leave would be given if an application for leave were made. In my view, the amendments should be struck out. More precisely, I think it will be adequate for the terms of the order to be that the paras 7(b) and so much of 7(d) as was amended on 3 August be struck out.

The next point of attack occurred in relation to the allegation of failure to account. That is contained in para 15 of the amended statement of claim. The mortgagors conceded that insofar as para 15 referred to property which was not subject to a security interest it could not be upheld.

The mortgagee contended that this paragraph could not, as alleged in para 16, give rise to loss or damage. It further contended that any liability to account arose on the date of possession which would mean that the claim for the account was out of time and the problems of rule 376 were, again, engaged.

The duty to account relied on by the mortgagors arose under

s 85(2) of the Property Law Act. I am quite unable to see anything in the pleading which would adequately demonstrate that failure to account has arguably led to loss and damage. In my view, the most that can be claimed in respect of the parts of para 15 which do refer to secured property is the delivery of the notice required by s 85(2). That section I think makes it plain that it is the time of the exercise of the power of sale which is the material time.

While the details of the dates of sale are not altogether clear it does seem that the allegation is that the last sale of land occurred in March 1999 and it may be inferred that some of the other property at least went with the land.

In any event, the same sorts of issues in relation to leave to amend out of time as arise in relation to damages claims do not arise in relation to the duty to account. In my view, if leave were needed to plead a claim for an account it would be given.

It follows that there needs to be some parts of para 15 of the statement of claim struck out namely those parts which refer to goods which were not the subject of security. Paragraph 16 should be struck out but there should be leave to the plaintiff if leave be needed to plead a claim for delivery of notice in accordance with s 85 of the Property Law Act.

Next, complaint was made of the fact that by the amendment an admission made in para 8 of the statement of claim was

withdrawn. The mortgagors conceded that leave was required to withdraw such an admission and in the light of their pleading in relation to other matters did not press for the grant of any such leave. Consequently the paragraph should be reinstated, that is to say so much of the amendment as struck out the paragraph should be removed.

The next point of attack was in relation to paras 11 and following of the statement of claim as amended. The original claim made under that paragraph, it will be recalled - or perhaps it will not be - was based on the allegation of an exercise of the power of sale before the expiry of the 30 days notice required by the Property Law Act. That part of the paragraph was deleted by the amendment and instead the allegation is that in breach of ss 84 and 96 of the Property Law Act, the defendant wrongfully seized possession of the property and wrongfully exercised the power of sale.

Thereafter, there are pleaded what are asserted to be particulars in the amended statement of claim. Counsel for the mortgagors conceded that these paragraphs were not particulars but were matters which ought to have been pleaded as facts. Those matters relate to the deed of extension entered into after the stay on the writ of possession had expired in March 1996.

The mortgagee relied upon an argument that, in relation to para 11, the matters alleged could have been raised when the application to set aside judgment was made to Justice Dowsett

in 1996. Basing the argument upon the decision of the High Court in Port of Melbourne Authority v Anshun Pty Ltd, it was argued that the plaintiffs were estopped from raising the point. I would reject that argument. No authority was sighted to me to support the application of that doctrine to an interlocutory hearing and it seems to me wrong in principle to apply it in that way. I would not be prepared to reject para 11 on that basis.

The matters which are alleged are largely matters of record, and are not matters which are likely to cause significant difficulties of an evidentiary nature save perhaps in relation to the value of property and other heads of damage. Insofar as the value of property is concerned, there is nothing which ought to take the mortgagee by surprise.

Insofar as it is alleged that there was loss of business and loss of opportunity however, I think the claim ought not be allowed - and I should add it quite plainly does add a new cause of action for it is one now based on s 87.

I would, if this were an application for leave, allow the amendments subject to their renumbering and the removal of the word 'particulars' save for para (f)(ii) and (iii). I would point out that the opportunity referred to in (iii) will necessarily be reflected in the values determined under (i). (iii) is simply duplicating what's already there.

As far as (ii) is concerned, that late introduction of such complex matters as loss of business and the necessary investigation into the business affairs of the property would have a devastating effect on getting this action to trial, and I would not allow such a claim to be added outside the limitation period.

A further complaint which was made was that the amendment does not set out all of the elements of s 96 and I think there is force in that complaint also. Section 96 applies where the mortgagor has made default in payment of the principal sum at the expiry of the term of the mortgage or of any period for which it has been renewed or extended. That is not alleged in the amended statement of claim and it seems somewhat doubtful whether, in fact, it will be able to be proved. However I would be prepared to allow amendments or further amendments to raise those assertions and also the assertion that the mortgagors had complied with all other provisions of the mortgage in order to engage s 96.

The net result is that I am not prepared to strike out para 11 of the statement of claim as amended save to the extent of striking out subparas (f)(ii) and (f)(iii) provided that the paragraph is further amended by deleting the word particulars and re-numbering the subparagraphs under that heading as paragraphs of the statement of claim, so that they may be pleaded to; and provided further that additional paragraphs are included as are necessary to engage fully s 96 of the Act.

For the respondents it was submitted that because the last sale relied upon was less than six years ago there was no requirement for leave to make these amendments. That may be so. If it is however I would still order under rule 379 that the amendments set out in paras (f)(ii) and (iii) be struck out and I would extend time to the extent necessary to enable that application to be made.

I note in this context that there is a further difficulty for the mortgagors in that, as appears from the reasons for judgment of Justice Dowsett given on 30 October 1996, both sides then agreed that the only realistic resolution of the matter at that time was for the property to be sold by the mortgagee. That, however, is a question of fact and will have to be determined at a trial, although one would see enormous problems for the mortgagors if they choose to persist with para 11.

The next area of controversy is in relation to para 20 of the amended statement of claim where a claim for trespass is raised. Such a claim was not made in the original statement of claim. It is a claim for trespass to chattels based upon the allegation of damage to the chattels which were retaken by the plaintiffs in August and September 1998.

Theoretically, it is possible that the damage occurred at a time which was not outside the limitation period. That theoretical possibility arises only if the damage occurred after the 3rd of August 1998, which was the point six years

prior to the amendment and the date of retaking of the property during August and September of the same year, as is alleged in the amendment.

However, it seems most unlikely that that is when the damage occurred and certainly that is not what the amended statement of claim alleges. As pleaded the amended statement of claim encompasses damage occurring prior to the 3rd of August 1998 and as such it falls foul of rule 376.

That gives rise to problems because the delay which has occurred means that the parties have not directed any attention to the state of the chattels at the time they were returned.

This claim was revealed only at the time of the amendment, it was not foreshadowed and it is not, in my view, adequate for the plaintiffs to say that they took video pictures of the property which will adequately show the damage at the time of the retaking of possession. In my judgment, adding this claim at this late stage is particularly unfair and the claim is not one which would be likely to be granted leave under rule 376. I therefore think that paras 20 through to 23, which plead this claim, should be struck out.

Finally, there is a claim for aggravated and exemplary damages in para 24. There are no facts pleaded by way of preliminary pleading in the paragraphs relied upon which would justify such an award and those paragraphs also should be struck out.

It follows, therefore, that the application should be allowed to some extent. I would ask the parties to prepare a draft to be brought in tomorrow in conformity with these reasons and, having regard to the partial success which the applicant has had, it would seem to me that, subject to any argument from counsel, the costs of this application should be costs in the cause. I will, however, hear the parties on costs and also on whether the matter should be referred to mediation.

...

HIS HONOUR: I propose to make an order for mediation. I will further order that the mediation not operate as a stay on the proceedings. That means that, concurrently with the mediation, any outstanding steps that need to be taken will still be taken. The draft should therefore include the usual form of mediation order, together with a provision that it is not to operate as a stay.

I further require counsel to confer with each other, with a view to identifying any other outstanding procedural matters which would prevent either side from filing a request for trial date, and to deal with those in the draft. I propose that the draft include an order that no matters, other than what is dealt with in the order, may be raised by either side before filing a request for trial date without leave of a Judge. The purpose of that order is to make sure that you apply your minds seriously now to what remains outstanding.
