[2011] QCA 202

COURT OF APPEAL

MUIR JA

Appeal No 5635 of 2011
SC No 165 of 2009

DIETHARDT EUGEN BRUDERLE	**Applicant/Defendant**
and	
PARS PRO TOTO PTY LTD ACN 010 859 579	**Applicant/Defendant**
and	
SVARGO KLAUS FREITAG	**Respondent/Plaintiff**

BRISBANE

DATE 19/08/2011

MUIR JA: The respondents to this appeal apply under r 772 of the *Uniform Civil Procedure Rules* 1999 (Qld) for security for costs in the sum of $30,000. The appeal is against an order of a judge of the trial division of this Court made on 31 May 2011 determining against the appellant/respondent the preliminary question of whether his claim was statute barred. The primary judge gave judgment for the applicants on the whole of the claim and ordered that the respondent pay the applicants' costs.

The primary judge explained the applicants' case as follows in his reasons. The respondent sued as administrator of the estate of one Günter Muller who died in April 1990. At the time of his death, the deceased was a director and shareholder of the second applicant ("the company"). No letters of administration were tendered at first instance and the applicants challenged the respondent's right to represent the estate. The primary judge, however, found it unnecessary to determine the question of standing.

The respondent alleged that the first applicant acted fraudulently in the conduct of the affairs of the company, thereby causing loss to his estate. It was further alleged that the respondent, by his conduct towards the beneficiaries of the estate, created a constructive trust which he breached by his dealing with the assets of the estate and that he cloaked that fraud by failing to file correct annual company returns and to give a proper account to the shareholders. There were other allegations of irregularities in changing the second applicant's share structure in 2002 and in "the directorate since 2003."

The primary judge observed that the second applicant's balance sheet for 1990 indicated that it "had no value at that time" and that "it has not been shown that it has any value now." His Honour noted also that the respondent "acknowledges that he believed that the company had shut down in 1992." It was found also that, between 1990 and 1992, the respondent undertook investigations into the second applicant's financial affairs. Elsewhere in his reasons, the primary judge recorded circumstances from which it could be inferred that the respondent had investigated the financial affairs of the second applicant in 1991 and 1992 and had made a deliberate decision not to "pursue litigation". The primary judge held that the respondent could not use s 38 of the *Limitation of Actions Act* 1974 (Qld) to extend the limitation period as the respondent, who bore the onus of proof, could not show that it could not have discovered the fraud by using reasonable diligence, see *Hutchinson v Equititour Pty Ltd & Ors* [2010] QCA 104. It was further held that there was no evidence linking the conduct of the first applicant to any detriment in the value of the estate.

The primary judge's decision was based on a further amended statement of claim filed on 3 December 2009. It is not a model of the pleader's art but the gist of the respondent's contentions are apparent. The central contention is that the first applicant made representations to the respondent and the beneficiaries of the deceased's estate concerning the deceased's and other shares in the company and concerning the company's real property. In reliance on those representations, the respondent and the beneficiaries agreed not to seek repayment of $80,000 paid by the deceased for his shares in the company and compensation

for the costs of improvements made by the deceased to the real property until after the development of the real property had been finalised.

Related representations were alleged, such as:

(a) A representation that the first applicant would act as manager of the company and agent for the respondent and the beneficiaries, and continuously report on relevant progress.

(b) A representation that the deceased's shares would be transferred to the respondent as soon as he was granted letters of administration.

It was alleged that the first applicant's promises were not fulfilled in that, amongst other things: he promptly caused the company to sell the real property; he concealed the fact of the sale and failed to report as promised; he failed to transfer the deceased's shares, as promised.

It is alleged, I think, that the representations were promises which gave rise to a binding contract or contracts and that the breach of contractual terms caused the respondent and the beneficiaries loss and damage. A failure to account is also alleged, although there is no duty to account alleged.

Another allegation of substance is that the first applicant, in breach of his fiduciary duties as agent and director, paid the proceeds of sale of the real property to himself.

The respondent admits that some of his claims may be statute barred but asserts that some are not. The great bulk of the allegations in the statement of claim appear to relate to events and circumstances in and about 1990. Those that do not, subject to my later observations, struggle to show a cause of action within any applicable limitation period. However, on the state of the material before me, it is impossible to conclude that the respondent has no prospect of

succeeding on an argument that all of the claims are not statute barred. There is no limitation period for claims of breach of fiduciary duty. Equity may, by analogy with provisions of the limitations legislation, bar old claims but that was not a matter considered by the learned primary judge.

It is perhaps conceivable that s 27(2) of the *Limitation of Actions Act* 1974 (Qld), which provides for a six year limitation period for an action by a beneficiary to recover trust property or in respect of breach of trust may be applicable. Subsection (2) is expressed to be subject to subsection (1). It provides, in effect, that there is no limitation period applicable to an action for a beneficiary under a trust of the kind there stated. I mention this provision, although it does appear to me that its application on the pleadings would be something of a long shot.

On the material before me, the respondent's prospects of success on appeal do not appear good but, as I have said, I am unable to decide that there are no prospects. The applicants assert that there is reason to believe that the respondent will not be able to pay the applicants' costs of the appeal if ordered to do so. There is a hearsay assertion by the first applicant that the respondent has no land registered in his name but it is also asserted, in effect, that the respondent is the major shareholder in a company and that his shares would provide "enough security for costs, awards or compensation." In fact, the respondent has already provided security for costs in the form of a charge over 80 shares in the company held by the estate. There is some doubt about whether the respondent has complied with the order for the security, but that is a matter that the applicants have been aware of for many months now and have not sought to take any steps to ensure that that security is put in proper form.

Another relevant consideration is that the parties are, and always have been, without legal representation. The first applicant swears that he intends to "engage a solicitor or barrister in respect to the ... appeal" but that is merely a statement of present intention. He does not swear that he has gone as far as approaching a legal representative and discussing the terms and

scope of any retainer. Moreover, he has already provided the registry, and presumably the respondent, with an outline of argument on the appeal in response to the respondent's outline of argument on the appeal dated 25 July 2011. The content of the first applicant's outline does not suggest that it was prepared with the benefit of legal advice.

Taking these matters into account, I would exercise my unfettered discretion by refusing the application for security for costs and making no order as to costs. Because the parties are self represented, there is no particular point in making any order as to costs of this application and I decline to do so.