[2011] QCA 216

COURT OF APPEAL

MUIR JA

Appeal No 7049 of 2011
DC No 707 of 2011

THE RESERVE VAULT PTY LTD **ACN 110 082 427**	**(Applicant/Defendant)**
and	
BARRIER REEF ARTS PTY LTD **ACN 118 145 627**	**(First Respondent/First Plaintiff)**
and	
BLUE STAR CAPITAL LIMITED **ACN 092 798 635**	**(Second Respondent/Second Plaintiff)**
and	
BRISCOE PROPERTIES PTY LTD	**(Third Respondent/Third Plaintiff)**

BRISBANE

30/08/11

JUDGMENT

HIS HONOUR: The defendant in District Court proceedings (this applicant) has appealed against an order of the District Court on 4 August 2011 dismissing its application to set aside orders of a judge of the District Court made on 9 June 2011. The orders were made summarily and included an order that the applicant deliver up possession of artwork known as "The Reef Panorama" to the respondents/plaintiffs within 14 days of the date of the order. The application is for a stay of the orders made on 9 June 2011. The respondents oppose the stay application and apply for security for costs of the appeal in the sum of $37,661.70.

The statement of claim in the proceedings made the following allegations. The first respondent ("Barrier Reef") purchased a large artwork known as "The Reef Panorama" consisting of 33 painted fibreglass panels. Barrier Reef instructed the second respondent {"Blue Star") to attempt to sell the artwork. In or around October 2006, a representative of Blue Star and a representative of the applicant orally agreed that the applicant would display the artwork at its premises, known as "The Vault", for six to eight months before storing it. A monthly storage fee of $500 (exclusive of GST) was payable after the completion of the display period. The applicant has been in possession of the artwork since November 2006.

The applicant had a duty to keep the artwork safe and to deliver it to Blue Star on demand in the order and condition it was in when deposited.

On 10 October 2010, Barrier Reef sold three panels of the artwork to the third respondent ("Briscoe").

Despite demands by Blue Star, the applicant has refused to deliver up the artwork unless outstanding invoices were paid.

Blue Star refused to pay the invoices, which are for $553.00 (exclusive of GST) per month and "a finance charge".

On 20 January 2011, Barrier Reef sold four more of the fibre glass panels to Briscoe.

Barrier Reef was induced to enter into the agreement with the applicant by misrepresentations made by the applicant. Had it not been for the misrepresentations Barrier Reef would not have agreed to pay $500 per month and would not have paid any of the invoices issued to it by the applicant.

Each of the respondents claim delivery up of the artwork and, in the alternative, damages in

the sum of $750,000; the "estimated" value of the artwork. Blue Star claimed also to have the agreement set aside. All respondents claimed relief under the *Competition and Consumer Act* 2010 (Cth).

In a defence which failed to comply with the requirements of the *Uniform Civil Procedure Rules* 1999 (Qld), the applicant admitted, denied and did not admit various specified allegations in the statement of claim. The only other content of the defence was a brief narrative which did not reveal the basis of any defence.

The sale of three panels to Blue Star was alleged to have occurred in December 2010. The sale of the four panels to Briscoe was alleged to have occurred in January 2011. The only demand for delivery up of the panels would appear to have been made by Blue Star which, it seems, was not prepared to pay any of the applicant's costs or expenses for storing the artwork.

It was argued on behalf of the applicant that it has an arguable case on the appeal and that, if the stay is not granted, it will suffer irremediable harm: its lien over the artwork will be lost. The applicant's primary argument on the merits of its case is that the primary judge erred in holding that, to be successful in its application to set aside summary judgment, it had to provide both a reasonable explanation for its failure to attend the hearing of the summary judgment application and a sufficient basis for the judgment not to be maintained.

Despite the conclusion to the contrary in *GEL Custodians Pty Ltd v RQ Consultants Pty Ltd and Ors* [2010] QSC 181, there is no warrant in principle for the grafting on to r 302 of the *Uniform Civil Procedure Rules* 1999 (Qld) of a prerequisite to a successful application that an applicant which failed to appear on the hearing of the summary judgment application must provide a reasonable explanation for the failure: presumably the primary judge meant "reasonable excuse". A discretion conferred on the Court by Rules of Court or statutory provisions is not to be fettered by conditions formulated by previous Courts exercising the

discretion. That is not to say that useful guidance in relation to the exercise of the discretion cannot be obtained from considering the accumulated wisdom and insight provided by precedent.

The respondents, however, have other matters on which to rely to support the primary judge's decision: the lack of an allegation by the applicant that money is owed to it; the absence of a counterclaim in that regard and the applicant's failure to plead or rely on the existence of a lien. These are undoubtedly pertinent considerations. The applicant relies additionally on: the primary judge's treatment of a defence on the merits as a subsidiary issue; the applicant's self-representative status in the District Court and on the fact that an arguable right on its part to a lien and storage fees emerges on the face of the respondents' own allegations. Another consideration perhaps is the absence from the statement of claim of: any allegation that Blue Star was the agent of the other respondents in any material respect; the absence of any allegation of a demand for possession by or on behalf of Barrier Reef or Briscoe; the absence of an allegation of a duty owed by the applicant to those respondents and the allegation, erroneous on the face of the pleading, that each of the respondents had been deprived of "The Reef Panorama" and is entitled either to its return or its value. It may also fall to the Court, on appeal, to consider whether the public interest in finality in litigation overwhelms any right on the part of the applicant to raise an arguable defence in circumstances in which the applicant has been less than diligent in protecting its own interests.

It is desirable that the assessment of these competing considerations be made by the Court on the hearing of the appeal after full argument from the parties. It is sufficient, for present purposes, for me to conclude, as I do, that the applicant’s arguments are not bereft of merit.

There is evidence that a third party is claiming a charge over seven of the 33 panels into which the artwork is divided. It is claimed by the third party that Briscoe is in default of its obligations under the charge and that the third party is entitled to possession of the seven panels. The respondents offer an undertaking to retain three panels by way of security but

there is scant evidence as to comparative values of the seven panels and the remaining 26.

There is also no evidence which establishes, satisfactorily, that if the applicant loses any arguable claim to a lien it will not cause it to suffer irretrievable prejudice. The applicant quantifies its claim at approximately $43,000. There maybe some doubt about that but, even on the basis of the agreement alleged by the respondents, some $30,000 may be owing to the applicant and subject to a lien. I note that the respondents have not offered to pay any moneys into Court. Accordingly, having regard to the fact that the appeal should be able to be heard promptly, I conclude that a stay should be ordered.

The applicant asserts, through his solicitors, a lack of time to provide appropriate evidence in response to the security for costs application. The respondents' solicitors made it plain that their client was intending to apply for security for costs in their letter to the applicant's solicitors of 16 August 2011 in the absence of security the costs being offered. Material in support of the application was provided to the applicant's solicitors on 24 August. The solicitor who had the carriage of the matter on behalf of the applicant swears to having been told on 22 August by Mr Sands, the sole director of the applicant, that he was departing on 25 August for Singapore for medical treatment. There is no evidence of any contact between Mr Sands and the applicant's solicitors between 22 August and mid-morning on 25 August when Mr Sands told the solicitor that he was at the airport waiting to board a flight to Singapore. Mr Sands told his solicitor that he was not in a position to provide information to establish the ability of the applicant to meet an adverse costs order. He intimated that he was prepared to stand behind the applicant by undertaking to meet an adverse costs order but there is no satisfactory evidence of the worth of any such undertaking.

There is adequate evidence to support the conclusion that, if the respondents are successful on the appeal, the applicant will have no assets available to satisfy any order for costs. In the circumstances, I find it appropriate that security for costs be ordered.

Mr Hartwell, a solicitor and practising costs assessor, has assessed the respondents' costs at $37,661 but that includes: costs of the stay application; costs of the security for costs application; the sum of $3,790.56 which appears to relate to the earlier litigation and costs of enforcement proceedings. Taking into account the consideration that an order for the security for costs is not necessarily intended to provide the respondent to an appeal with a full indemnity and the lack of complexity of the few issues for determination on the appeal, I order that:

(a) By 4 pm on 16 September 2011, the applicant provide security for the respondents' costs of the appeal in the sum of $18,000 in a form satisfactory to the Registrar;

(b) Failing the furnishing of such security by that time and date, the appeal stand dismissed with costs without further order;

(c) The costs of these applications be costs in the appeal;

(d) Upon the applicant, by its counsel, giving the usual undertaking as to damages, it is ordered that paragraph 1 of the order of Samios DCJ made on 9 June 2011 be stayed and that the respondents refrain from attempting to enforce it pending determination of the appeal or earlier order.