[2012] QCA 37

COURT OF APPEAL

FRASER JA

Appeal No 559 of 2012
SC No 9548 of 2009

GOLD COAST BLAZE PTY LTD
ACN 122 467 289 **Appellant**

and

BRENDAN STEVEN JOYCE **Respondent**

BRISBANE

DATE 05/03/2012

ORDER

FRASER JA: The respondent to this appeal has applied for security for costs of the appeal. The appellant opposes security on the ground that the respondent has not adduced sufficient evidence to justify a conclusion that there is reason to believe that the appellant will be unable to pay the respondent's costs if the respondent is successful in defending the appeal.

That proposition is argued on two different bases. First, the appellant argues that it is a threshold condition for the exercise of a power to order security for costs on appeal that there is reason to believe that the appellant company will be unable to pay the costs if the respondent is successful on the appeal.

In support of that proposition, the appellant cited three decisions. First, the appellant cited *Karam v Mansukhani* [2006] QCA 349. However, in that decision, Douglas J, with whom the President agreed, merely mentioned that the considerations applicable at first instance are

relevant also in an application for security on appeal, the considerations applicable at first instance, in the case of a corporation, including that there is reason to believe that the plaintiff will not be able to pay the defendant's costs if ordered to pay them. That decision did not decide that there was any such jurisdictional condition. The appellant also cited *Livingspring Pty Ltd v Kliger Partners* (2008) 20 VR 377 and *Hurworth Nominees Pty Ltd v ANZ Banking Group Ltd* [2005] NSWSC 1360. Both decisions related to the considerations applicable in an application for security for costs at first instance, not on appeal. They do not establish the jurisdictional condition for which the appellant contended.

Relevantly, it was held by this Court in *Murchie v Big Kart Track Pty Ltd (No 2)* [2003] 1 Qd R 528 at 529, paragraph 6 that "The court has an unfettered discretion whether to order security and, if so, in what amount. The fact that the plaintiff has already 'had her day in court' and lost, her impecuniosity and her prospects of success on appeal are factors relevant to the exercise of that discretion". The Court's decision that impecuniosity is a factor relevant to the exercise of the discretion to order security for costs on appeal is inconsistent with the appellant's submission that there is a jurisdictional fact concerning the appellant's likely ability to pay the respondent's costs.

The decision in *Murchie* was based upon r 772(1) of the UCPR. That rule empowers the court to order security. It uses the expression "[t]he Court of Appeal, or the court that made the decision appealed from, may order an appellant to give security...". A discretion is conferred in general terms. It would be quite wrong to read down that discretion by interposing some jurisdictional condition which is not expressed in the rule. More generally, the decisions upon which the appellant relied for that proposition were based upon rules such as appear now in r 671(a) of the UCPR and a provision of the *Corporations Act*, each of which expressly makes it a ground for ordering security that there is reason to believe that the plaintiff would not be able to pay the defendant's costs if ordered to pay them. There is no such condition in r 772.

Accordingly, I reject the first basis of the appellant's opposition to security.

The second basis upon which the appellant relied in opposing security was that, treating the necessity to establish some reason to think that the appellant would be unable to pay the costs as a material factor, in this case the respondent had not adduced evidence to demonstrate that there was any relevant impecuniosity. The appellant submitted that this was a very important factor and justified refusing security.

The evidence upon which the respondent relied in this respect was found in two places. First, company searches conducted on behalf of the respondent demonstrate that the appellant is a proprietary limited company which, at one stage, had given three company charges over its assets and, in more recent times, appears to have released only one of those three charges.

Second, the respondent relied upon correspondence between his solicitors and the solicitors for the appellant. In a letter dated 30 January 2012, the respondent's solicitors foreshadowed the application for security. They wrote that the appellant "appears to have no substantive assets, it being a company of limited paid up capital", required security for costs of the appeal and set out a suggested figure for the security of $40,000. The response from the appellant's solicitors on 1 February 2012 was to indicate that, subject to the client's instructions, engaging both senior and junior counsel for the appeal was unnecessary. The appellant's solicitors proposed that $25,000 would be a more appropriate amount to be paid into court to secure the respondent's costs of the appeal, and they indicated that they would respond further upon having obtained instructions. However, no further response was given.

In my view, taken together with the company searches, that response does give rise at least to a concern that the appellant may not have sufficient funds to provide for the costs payable to the respondent in the event that the appeal fails.

Whether it is appropriate to order security on such a basis depends also upon other factors, one of which concerns the prospects of success. I cannot make any final determination about prospects at this stage but I note that on the face of the judgment by the trial judge at [2011] QSC 407, there was a persuasive set of reasons for upholding the respondent's case.

Two issues have been raised on behalf of the appellant in support of the proposition that the appeal has good prospects of success. The first concerns the finding that the respondent and the appellant made a binding contract under which the appellant engaged the respondent as the appellant's basketball coach under a fixed term contract.

It is necessary to say a little bit about the findings in order to understand the submission. The trial Judge concluded that a binding contract had been made along the terms of a document headed "Summary of Negotiations", which was signed by both parties. In support of that finding, the trial Judge referred to the terms of that document, including the following matters. One of the provisions of the terms of engagement in the document suggested that the engagement was to commence within a fortnight. Secondly, the document envisaged that the respondent would move from Wollongong to the Gold Coast in the near future. Thirdly, the document included a promise for the payment of the costs of renting accommodation whilst the respondent looked for permanent accommodation for his family. Fourthly, it also envisaged that the respondent's family would move from Wollongong to the Gold Coast in the relatively near future. So, as the trial judge found, the summary document clearly envisaged that the respondent would take actions in the very near future of considerable significance to him and his family. His Honour concluded that it was unlikely that the parties intended those actions to be taken without the benefit of a binding contract.

Next, his Honour referred to the fact that the summary included the confirmation by the respondent that he was no longer bound to a team which he had coached in Wollongong. His Honour thought that was a matter likely to be of considerable importance to the parties. Its

inclusion in the summary suggesting something more than an agreement to be binding in honour, or an agreement to agree.

Finally, in this respect, there is a formal execution clause which includes a reference to the constitution of the appellant and the due authority of its directions, which his Honour thought was difficult to understand if the summary was to be of no legal effect.

It is notable also that the appellant's appointment of the respondent as the appellant's coach was publicly announced at a press conference and included in a press release prepared by an organisation engaged by the appellant. At the press conference, a representative of the appellant and the respondent signed the summary and, in response to a question, a representative of the appellant acknowledged that it was a "multi-year deal" or a multi-year contract. The respondent appears to have acted upon the agreement by moving his family to the Gold Coast and commencing working at a salary apparently calculated in accordance with the document.

Mr Charles Wilson, who appeared for the appellant in this application, argued that the trial Judge failed to take into account, or at least failed to give proper weight to, an email which is mentioned in paragraph 31 of the judgment. This was an email sent on 15 January 2007. The sentence focused upon in the email was the statement by the solicitor for the respondent that "[t]he detail of the contract can be agreed later next week, and of course will be subject to acceptable terms being agreed between the parties." It was submitted that the trial judge failed to give sufficient weight to what, on its face, might be a concession that further contractual terms must be worked out.

That submission is one which may be advanced on the appeal, but I note that in paragraph 50 of the reasons his Honour did mention that it was clear that further terms were envisaged; but his Honour went on to hold, apparently conventionally, that such a fact, whilst it might suggest that the summary was not intended to be a binding contract, is not a decisive consideration.

The second point which was emphasised in the submissions for the appellant on appeal about prospects concerns the question whether the parties had subsequently entered into a contract on or about 8 July 2008. If the parties did enter into such a contract, then it was on terms which included a condition which, on its face, empowered the appellant to terminate the contract between the appellant and the respondent.

The submission for the appellant was that the trial judge's finding that no such contract had been established was contrary to the contemporaneous evidence of a series of emails between the respondent and a representative of the appellant. Having read through his Honour's reasons on this point from paragraph 56 to 70, however, it seems to me that the finding depended, at least in some significant part, upon an analysis of the oral evidence in which questions of reliability and credibility might well be relevant.

In the result, whilst I make no formal determination - and I certainly cannot make any finding other than a provisional one - my own view is that it has not been demonstrated that there are good prospects of this appeal succeeding.

In those circumstances, I consider that the respondent has made out an appropriate case for security for costs.

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FRASER JA: There is a small dispute about the quantum of the security that ought to be ordered. Based upon the analysis in the affidavit of Mr Faulkner, the solicitor for the respondent, a figure of $75,000 was sought. That figure was based upon the appeal occupying two days.

On my analysis of the decision and the grounds of appeal, there should be no particular difficulty in confining the hearing of this appeal to one day and it will be set down for one day. That may mean that particular attention will have to be given in the outlines of both parties to ensure that the case is put succinctly, and the same will apply in oral argument.

There is another reason why I think $75,000 is a little high. There are a couple of items in the affidavit of Mr Faulkner which strike me as being overly generous. One is an item allowing 10 hours of general assistance by a solicitor to counsel in preparation for the hearing. It is difficult to see why such a length of time would be necessary when senior counsel and junior counsel are also allowed for. I mention that one item by way of example.

It is impossible to be precise about the amount which ought to be allowed but, in my judgment, $50,000 is an appropriate figure for the security.

The second point concerns the time within which it ought to be provided. The respondent asks that it be provided within seven days. Somewhat surprisingly, the appellant's counsel does not have instructions about the ability of the appellant to provide security within that period. In the circumstances, I see no reason why I ought not to order security to be provided within seven days.

In the result, I order that the appellant give security in a form satisfactory to the Registrar for the payment of any costs which the Court may award to the respondent in the amount of $50,000 by no later than 4.00 pm on 12 March 2012.

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FRASER JA: The costs of this application are reserved.

...

FRASER JA: The respondent also asks for a stay of any further proceedings required on the respondent's part until security is provided. That application is not opposed.

Accordingly, I order that there be a stay of any further proceedings on the appeal on the part of the respondent until the security is provided.