[2012] QCA 147

COURT OF APPEAL

GOTTERSON JA

Appeal No 4289 of 2012
SC No 6655 of 2010

BANK OF QUEENSLAND LIMITED **Applicant**
ACN 009 656 740

v

JACQUELINE PATRICIA MULHERN **Respondent**

BRISBANE

DATE 07/06/2012

JUDGMENT

GOTTERSON JA: I propose to deal with the disposal of this application and I'll do so in the following terms.

This appeal was commenced on the 15th of May 2012 by Mrs Jacqueline Mulhern. The respondent to the appeal, Bank of Queensland Limited, applies for an order, pursuant to rule 772 of the *Uniform Civil Procedure Rules* 1999 that Mrs Mulhern provide security for the respondent's costs of the appeal.

The appeal is against summary judgment given in proceedings 6655 of 2010 on the 9th of May 2012. At the hearing of that application on the 30th of April this year, Mrs Mulhern was represented by her husband, Mr Richard Mulhern, who represents her today by leave.

There are six plaintiffs in proceedings 6655 of 2010. Five are Mulhern companies to which

receivers and managers have been appointed. The sixth plaintiff is the Bank of Queensland. The plaintiffs applied for summary judgment. Justice Douglas who heard the application, granted it and made orders to give effect to the judgment, including orders that Mrs Mulhern's counterclaim be dismissed and that she pay all of the costs of the proceedings, including reserved costs on the standard basis.

Those proceedings were brought to recover from Mrs Mulhern, money which she had withdrawn from bank accounts conducted by the first to the fifth plaintiffs with the sixth plaintiff, shortly before receivers were appointed to the companies by the sixth plaintiff, the Bank of Queensland. The total amount withdrawn was $479,466. Mrs Mulhern transferred the money to a personal account of hers at Bank West on the 19th of May 2010. Mareva orders freezing those accounts were obtained on the 25th of May 2010 and Bank West later paid them into Court on the 8th of August 2011.

As may be expected, the claims of the Mulhern company plaintiffs were based upon a breach of fiduciary duty on the part of Mrs Mulhern, she being a director of the companies at that time and upon tracing remedies available where a breach of that kind has occurred.

The claim of the bank to the moneys was based upon a proprietary interest in them arising from the triggering of crystallisation provisions and securities given by certain of the plaintiff companies to the bank which were supported by guarantees given by others.

His Honour reviewed the defences pleaded in Mrs Mulhern's proposed amended defence and the proposed counterclaim which drew upon the propositions underlying those defences. He concluded, "Accordingly, the defendant has not satisfied me that she has a real prospect of defending the claim. Although there is a superficial complexity to some of the facts, viewed simply, they amount to Mrs Mulhern taking the amount of $479,466 from the first to fifth plaintiffs in circumstances where the banks charge had crystallised in respect to the money she took from the first and second plaintiffs and where she had no entitlement to take any

money from the second to fifth plaintiffs as she had no real prospect of showing that she was owed money before receivers were appointed to those companies or at any stage. In doing so, she breached her fiduciary duties as a director of those companies in circumstances where they and the bank are entitled to trace those funds into her possession in the bank account into which she transferred the money and from there to the moneys paid into this Court." His Honour concluded, saying, "Accordingly, I shall give judgment for the plaintiffs."

The Notice of Appeal here raises some 13 grounds of appeal. Upon analysis, these grounds seek to reargue defences which his Honour found had no reasonable prospects of success. Those three grounds of defence were that the charges had not crystallised, that Mrs Mulhern was a creditor of the first to fifth plaintiff companies and that the receivers were not validly appointed.

With regard to the charges, an event of crystallisation evidently did occur when applications to wind up the companies were filed. That was a step to wind you up, an event which triggered crystallisation under the terms of the security.

On the evidence, Mrs Mulhern's claim to be a creditor of the companies was arguable only to the extent of $7,550 in respect of one of the companies. However, that company was one of those where the charge had crystallised before the money was transferred from its account.

The challenge to the validity of the appointment of the receivers is to have been based upon an alleged implied turn in the securities to the effect that a notice of demand and allowance of a reasonable time to pay were pre-conditions to appointment. Having regard to express provisions in the charges to which his Honour referred at paragraph [14] of his reasons and to the principles for implication of contractual terms, my view is that this challenge is with little substance.

It seems to me, therefore, that this is an appeal which has little prospect of success. That is a significant factor in support of the present application.

Two other factors also support an order for security for costs, in my view. The first is that Mrs Mulhern is a resident in the United States and does not appear to have any property of value in Australia. The second is that she is already indebted to the plaintiff companies and the bank by reason of an unpaid costs order against her in their favour on which costs were assessed on the 16th of December 2011 at $24,181.60.

A relevant consideration in an application of this kind is whether the making of an order would stifle the appeal. As the decision in *Natcraft Pty Ltd & Anor v Det Norske Veritas & Anor* [2001] QSC 348 shows this Court has taken the view that the stifling effect that a security for costs order might have is less significant on an appeal than it is at first instance, given that the appellant has already had their day in Court. That view is as much applicable to an appeal from a summary judgment as it is to any other appeal.

The material filed on Mrs Mulhern's behalf does not assert that if security for costs is ordered she will be unable, financially, to continue with this appeal. Nor does it contain sworn evidence of factual matters concerning her financial resources on which an inference of that kind might be drawn.

In my view, the relevant considerations here weigh in favour of making an order for security for costs. I propose to make such an order.

Mr Scott Guthrie has sworn an affidavit in which he estimates that counsel's fees for preparing and settling the respondent's submissions, preparing for hearing and appearing on the hearing of the appeal will be not less than $12,250 plus GST. He estimates that his firm's fees in relation to the appeal will be at least $8,000 plus GST. Taking that into account, I propose to fix the amount of the security at $20,000.

The orders of the court are that:

1. Pursuant to rule 772 of the *Uniform Civil Procedure Rules 1999* (Qld) the respondent

provide security for the applicant's costs of the appeal in the amount of $20,000 in a form satisfactory to the Registrar by 4.00 pm on 29 July 2012.

2. The respondent is to pay the applicant's costs of the application on the standard basis.
3. The directions for the timetable for the conduct of the appeal imposed by paragraph 39 of Practice Direction 2/2010 and confirmed by letter dated 21 May 2012 to the parties from the Deputy Registrar of the Court be vacated.