[2012] QCA 354

COURT OF APPEAL

MUIR JA

Appeal No 11355 of 2012
DC No 307 of 2012

PETER ELFYD LLEWELLYN & RODERICK WICKHAM JAMES	**Applicants**
v	
BUSTFREE PTY LTD	**Respondent**

BRISBANE

DATE 14/12/2012

JUDGMENT

MUIR JA: The applicants were defendants in proceedings commenced by the respondent in the District Court in Southport. The respondent claimed $200,000 damages for shares which were issued or transferred to the applicants in 2003 and damages of $550,000 for misappropriation of its funds and mismanagement of its affairs. This description of the respondent's claims is taken from the applicant's outline of argument. A copy of the claim and statement of claim were not before me.

The applicants and the respondent each made application for summary judgment. On 9 November 2011, the primary judge, after a hearing that day, made orders which were also not before me although, a copy of an order made by the primary judge on 24 August 2012 was exhibited to the affidavit relied on by the applicants.

On 24 August 2012, the primary judge ordered that the respondent file and serve on the

applicants' solicitors further and better particulars of its allegations that a deed of settlement note on 29 March 2004 was "void and liable to be set aside for fraud and/or unconscionable conduct and/or unfair dealing". It was further ordered that, on or before 21 September 2012, the respondent file and serve on the applicants' solicitors all affidavits evidencing the allegations of such fraud, unconscionable conduct or unfair dealing.

In his reasons, the primary judge referred to the particulars and affidavit evidence provided in response to the orders. He noted that the documents upon which the respondent relied to support the particulars all pre-dated the deed. His Honour observed that, before entering into the deed, the controller of the respondent, Ms Westall, was represented by solicitors and that in an email of 15 March 2004, to the applicants' solicitors, the respondent's solicitors had expressed approval of the content of the proposed deed.

The primary judge referred to an assertion by Ms Westall that she did not see a copy of the deed before signing it, but found that Ms Westall "with legal advice knew what she was signing, and agreed to sign it". He found also that had Ms Westall been concerned about matters raised by her on the hearing before him with a view to resisting summary judgment, she ought to have raised them with her solicitor before signing the deed.

The primary judge concluded that the respondent had no real prospect of succeeding on all or any part of the claims set out in the deed.

The respondent appealed against the primary judge's order. Some of the grounds of appeal in the notice of appeal appear to be merely part of the narrative. It is unnecessary to make any further reference to them. The other grounds are that:

1. the primary judge erred by refusing to hear all closing submissions from the respondent;
2. the respondent received the applicants' outline of argument on the evening

before the hearing in electronic form only. She did not read it until after the hearing before the primary judge and was thus disadvantaged;

3. the applicants' "strike-out arguments" had been refused on two prior occasions and it was thus apparent that the respondent "had a case"; and

4. further evidence "offered" by the respondent was not considered by the primary judge.

The Court's discretion to order security against an appellant in favour of a respondent under r 670 of the *Uniform Civil Procedure Rules* 1999 is unfettered. I will not attempt an exposition of those considerations which are relevant to the exercise of the discretion on such applications beyond observing that:

1. The object of such an order is to protect an applicant against the inability of a respondent to meet an order for costs should the respondent's appeal be unsuccessful. Consequently, an order will not, normally at least, be made unless it is shown by implication or otherwise that a respondent may be able to meet a costs order if it loses.

2. An argument that a respondent has a reasonable case on the merits is of less cogency than it would be in an application for security for costs before a trial. This observation extends also to the proposition that a security for costs order might stifle an appeal. The reason for this is that the respondent has already had a decision by the Court on the merits.

3. An undertaking by a director or shareholder to stand behind an impecunious respondent will tend to count against the making of an order for security only to the extent that the undertaking has practical substance.

4. An order for security for costs should be for a sum no greater than is necessary and such orders are not necessarily intended to provide a full indemnity.

5. Whether the applicant has caused or contributed to the respondent's impecuniosity is a relevant consideration.

The evidence plainly establishes that the respondent will be unable to meet an order for costs should the respondent's appeal be unsuccessful. The respondent was removed from the register but was reinstated to enable this proceeding to be instituted and prosecuted. There is no dispute about the applicants' evidence that the respondent's costs, assessed on the standard basis in respect of the appeal, are likely to approximately $15,000.

It is not so clear, however, that the respondent does not have an arguable case. It is impossible to be satisfied in that respect without a consideration of the pleadings. Moreover, the primary judge, with respect, may have taken an unduly simplistic approach to the determination of whether a triable issue existed. He appeared to be of the view that if the respondent was aware of the matters particularised as fraud, unconscionable conduct or unfair dealing and, being legally represented, signed the deed, it followed, necessarily, that the deed could not be impugned. That approach would normally be apt where a plaintiff is relying on fraudulent misrepresentation, but unconscionability or duress are not necessarily negated by the fact that the plaintiff was in receipt of legal advice. The receipt of such advice is not necessarily the complete answer to such claims if properly pleaded and if it could be shown that the defendant by its wrongful conduct had put the plaintiff in such a position that it had no option but to sign the disputed instrument in order, for example, to salvage something from a fiscal wreckage. That is particularly so if it is possible to draw the inference that the wrongful conduct would continue if the instrument was not signed.

I refer to the discussion on duress in "On Equity" by Young, Croft and Smith, at pp 331–336. Paragraph (q) of the recital is also relevant to this discussion.

In an affidavit before the primary judge, Ms Westall, the respondent's controlling mind, deposed, in substance, to being deprived of funds by the applicants such that she was left

without the ability to feed herself and her daughter while the applicants paid themselves wages and dividends. She swore also to threats being made to her by one of the applicants and to the cumulative consequences of maltreatment by the applicants, being stress, which caused her to be hospitalised. It was implicit, if not expressed, in her affidavit that if she did not sign the deed the company would be denuded of money and she would be further harassed. She swears to having lost confidence in her solicitor and to not discussing the content of the deed with him. There was some evidence which supported Ms Westall's allegations (not in respect of the loss of confidence and not perusing the deed), including letters by her solicitors and statements and former employees of the respondent.

Having regard, *inter alia*, to the possibility that the respondent's impecuniosity may have been caused by the applicants' and my inability to assess, satisfactorily, the respondent's prospects of success, as well as what appears to me to be a possibly erroneous approach to the application of the appropriate test by the primary judge, I decline to order security for costs.

I have it in mind also that the issues to be determined on the appeal are straightforward and that the bulk of the applicants' preparation to the appeal will have been done already in preparation for the hearing before the primary judge and in preparation for this hearing.

I order that the application be dismissed and that the costs of, and incidental to, the application be the parties' costs in the appeal.

Now, the consequences of that order, Ms Westall, are that if you lose the appeal you will have to pay the costs of this application and the costs of the appeal.

I also suggest that if you possibly can, you approach somebody to see if you can get some legal assistance. Some of the arguments that you are seeking to mount are not necessarily particularly straightforward and the submissions that you made in this matter do not give much confidence that you have much of a capacity to appreciate what the real issues are and to concentrate on them and only on them.