[2015] QCA 32

COURT OF APPEAL

HOLMES JA
GOTTERSON JA
PHILIPPIDES JA

Appeal No 11519 of 2014
BS No 9888 of 2014

Appeal No 9024 of 2014
DC No 52 of 2014
DC No 70 of 2014

LORAIN RONDA McELLIGOTT	**Appellant/Respondent**
v	
ADRIAN EDWIN McELLIGOTT	**Respondent/Applicant**
TAKARLI JOY McELLIGOTT	**Not a party to the Appeal**
TARSON JAMES McELLIGOTT	**Not a party to the Appeal**

BRISBANE

WEDNESDAY, 11 MARCH 2015

JUDGMENT

GOTTERSON JA: On the 4th of November 2014 an order was made in the Trial Division of the Supreme Court of Queensland declaring Lorain Ronda McElligott to be a vexatious litigant within the meaning of s 6 of the *Vexatious Proceedings Act* 2005 (Qld). The order was made on the application of Adrian Edwin McElligott in his own capacity and in his capacity as the executor and trustee of the estate of the late Joyce Alice McElligott. The order

also prohibited Lorain McElligott from instituting any proceedings in Queensland Court - apart from any appeal in that proceeding - against the estate of the late Joyce Alice McElligott or Adrian Edwin McElligott as executor of her will without the prior leave of a judge of the Supreme Court. As well, the order stayed separate appeal proceedings in instituted in this Court by Lorain McElligott. That appeal is from the decision of a judge of the District Court given on the 28th of August 2014, the appeal having been instituted on the 24th of September 2014 and numbered 9024/2014. It is convenient to refer to that appeal as the District Court appeal.

Lorain McElligott instituted an appeal against all of the orders made on the 4th of November 2014. She did so on the 1st of December 2014. That appeal, which may conveniently be referred to as the vexatious litigant appeal, is numbered 11519 of 2014. The respondents to the appeal are Adrian McElligott in his own capacity and in his capacity as executor and trustee of the will.

On the 12th of February 2015 Adrian McElligott, in his dual capacity, has filed an application in the vexatious litigant appeal in which he seeks several orders in the alternative. One is that the notice of appeal be struck out. Alternatively, an order for security for costs of that appeal is sought. Later, on the 20th of February 2015, Adrian McElligott filed an application in the stayed District Court appeal for an order that the notice of appeal in that appeal also be struck out. Both applications have been listed for hearing today.

Adrian McElligott is represented by counsel who relied on the applications, several affidavits sworn by Mr Elligott and a written outline of argument, as well as oral submissions. Lorrain McElligott did not file any affidavit material. She lodged written submissions and has given prior notice that she would not attend or be represented at today's hearing.

The Court has considered all this material, including the submissions. In my view, it is inappropriate at this point to determine either application to strike out the notice of appeal. In the case of the District Court of Appeal, the Court does not have a record of the proceedings in the District Court, including the judgment under appeal. The application to strike out the

notice of appeal in that appeal cannot meaningfully be considered in the absence of that material. The fact that the appeal has been stayed does not of itself justify striking out the appeal in circumstances where the stayed order itself is subject to appeal.

In the case of the vexatious litigant appeal the list of materials to be relied on by Adrian McElligott was provided to Lorain McElligott - who acts for herself – less than 48 hours prior to today's hearing. That list includes some five affidavits relied on by Mr McElligott at first instance; however, copies of those affidavits do not appeal to have been served on Lorain McElligott for the purposes of this application. Further, the submissions invite this court to assess the merits of the grounds of appeal stated in the notice of appeal of which there are some 19. That is an exercise more appropriately undertaken at the hearing of the appeal, should there be one, upon the benefit of full argument.

There are, however, compelling reasons for making an order for security for costs of the vexatious litigant appeal at this point. The grounds of appeal are discursive. None of them is expressed in a way which would suggest that it has substantial prospects of success. As the affidavit evidence of Adrian McElligott shows, there is good reason to suspect that a costs order in favour of Adrian McElligott in the vexatious litigant appeal would not be readily paid. She is an undischarged bankrupt.

There are five outstanding costs orders against her in favour of the estate, of which Mr McElligott is executor and trustee. It is sufficient to mention but one of them. Costs ordered to be paid on the 6th of December 2012 by a Judge of the Trial Division assessed at $13,927.20 remain unpaid. There is evidence of an estimate of $35,000 for the costs that would be incurred by Adrian McElligott in his representative capacity for the vexatious litigant appeal proceedings. That does not, of course, reflect the recoverable costs on the standard basis. I consider that the security for costs in an amount of $15,000 should be provided by Lorain McElligott and that she should have 28 days within which to provide it.

I would propose the following orders in Appeal Number 11519 of 2014:

1. The appellant, Lorain McElligott, provide security for costs of the appeal in an amount of $15,000 on or before the 8th of April 2015.

2. That such security be in a form approved by the Registrar.

3. That the costs of the application for security for costs be costs in the cause.

In both appeals I would order that the applications before the Court today otherwise be adjourned to a date to be fixed. I would note that if the security for costs are not paid as ordered, Adrian McElligott will be at liberty to relist the application in the vexatious litigant appeal for the purpose of having it struck out on that basis.

HOLMES JA: I agree.

PHILIPPIDES JA: I also agree.

HOLMES JA: The orders will be as proposed by Justice Gotterson. Thank you.