[2015] QCA 238

COURT OF APPEAL

FRASER JA

Appeal No 9971 of 2015
DC No 667 of 2015

DOMINIC BURKE **Appellant**

v

GREG APEL **Respondent**

BRISBANE

MONDAY, 23 NOVEMBER 2015

JUDGMENT

FRASER JA: On the 19th of February 2015, the appellant sued the respondent in the District Court for $750,000. The respondent is a psychiatrist. The 10-page statement of claim made general allegations that the respondent breached various alleged duties in an appointment with the appellant, which apparently the appellant's employer had retained the respondent to conduct. The terms of the respondent's retainer and the purpose of the appointment were not alleged in the statement of claim. Extensive reference was made to ethical duties of psychiatrists and, irrelevantly, psychologists. The nature of the claimed loss was not disclosed. The statement of claim did not plead facts which showed that the appellant had or even might have a cause of action against the respondent.

On the 25th of March, the respondent applied to strike out the statement of claim and the claim. On the 10th of April, the appellant filed an amended statement of claim and as a result, the

respondent's application was adjourned. The respondent's application was heard by Judge Reid on the 6th of May 2015. As Judge Reid found, the amended statement of claim alleged that the appellant had suffered loss and damage as a result of the respondent's professional negligence but, like the original statement of claim, the amended statement of claim did not articulate the alleged negligence or the alleged kind or extent of loss. Again, the amended statement of claim did not allege facts which disclosed any cause of action. Judge Reid ordered that the amended statement of claim be struck out, that the appellant's action be stayed unless and until he obtained an order of the Court giving him leave to file a further amended statement of claim, that in the event that the appellant did not obtain such leave on or before 6 August 2015 his action was dismissed and he would be ordered to pay the respondent's costs of and incidental to the action to be assessed, and that the appellant pay the respondent's costs of the application in the District Court.

On the 6th of August 2015, the appellant delivered a further amended statement of claim to the respondent without first obtaining the leave to do so. On the 4th of September 2015, Judge McGill in the District Court refused to extend the time within which the appellant was required to obtain leave to file a further amended statement of claim. Judge McGill found that in terms of professional negligence and breach of professional contract, the further amended statement of claim did not allege any material facts to establish the existence of a contract and that it did not allege facts to establish the existence of a duty of care. Indeed, the pleading did not expressly state that the appellant was examined by the respondent on behalf of the respondent's employer, or at the behest of the respondent's employer, although that seemed to be the position.

Judge McGill also found that in so far as the complaint made by the appellant seemed to be a complaint that the respondent knowingly made an incorrect diagnosis, the pleading did not allege what diagnosis was made or how any such diagnosis was incorrect. It did not establish how there was a connection between the diagnosis and the appellant being denied an opportunity to claim compensation if that was what the loss was. Judge McGill found that almost all of the criticism of the previous pleading by Judge Reid on the 6th of May could be applied to the then current pleading. Judge McGill found that the amended pleading did not

overcome the difficulties identified by Judge Reid and that it would not have been appropriate to grant leave if that had been sought at the appropriate time. It was Judge McGill's conclusion that the appellant remained incapable of preparing a proper statement of claim so that no reason appeared to interfere with the decision of Judge Reid that the proceedings should be summarily determined.

On the 2nd of October 2015 the appellant filed a notice of appeal to this Court from the orders of Judge Reid and Judge McGill. The respondent argued that the notice of appeal was incompetent because the appellant had not applied for or obtained leave to appeal. Strictly speaking that is so, but the notice of appeal does seek an order granting leave to appeal on the ground, "as have a properly drafted statement of claim." The appeal, in so far as it sought to appeal the decision of Judge Reid, was out of time. Attached to the notice of appeal filed on the 2nd of October, however, was an application which included an application for an order for an extension of time, as I construe it, if that were necessary for an appeal from the decision of Judge Reid. Again, whilst, strictly speaking, the application for an extension of time has not been made, that informality might be overlooked if the matter came on for hearing before the Court of Appeal.

The respondent has applied for orders striking out the notice of appeal and dismissing the appeal on the ground that it is an abuse of process, for an order that the appellant must not start a similar proceeding against the respondent without the leave of the Court and, alternatively, for security for costs.

So far I have heard argument upon the application for an order striking out the notice of appeal as an abuse of process. That argument is put upon the basis that the notice of appeal does not allege any error in the decisions of either Judge Reid or Judge McGill yet the notice of appeal makes it plain that the appellant intends to continue to rely upon the pleading which was struck out by the operation of the order of Judge Reid. Furthermore, the respondent also pointed out that the notice of appeal is discursive and contains criticisms of various people whose actions are unconnected with the merits of the proposed appeal.

In my view, the arguments made by the respondent are unassailably correct. The notice of appeal does not allege any error in the decisions made in the District Court, yet it seeks orders which are based upon the pleading which has been struck out. For that reason, I order that the notice of appeal is struck out.

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Ms Zerner has applied for the order which is sought in the application that the appellant must not start a similar proceeding to the previous proceedings against the respondent without the leave of the Court. The Court does have jurisdiction to make such an order under r 398A of the *Uniform Civil Procedure Rules* 1999 (Qld) and there is some substance in Ms Zerner's arguments that the appellant did not respond appropriately to the reasons given by Judge Reid when he filed his further amended statement of claim in so far as it contained allegations which Judge Reid had clearly explained were not appropriate. It is also the case that there is some substance in the proposition that the notice of appeal in this Court, in so far as it seeks to continue to rely upon the previously struck out pleadings without asserting error in the decisions striking them out, suggests the possibility that Mr Burke might continue to make inappropriate claims.

But I am not persuaded that Mr Burke has acted in bad faith or that his defaults are due to anything other than his lack of legal training and perhaps difficulties in processing the facts in a way which would comply with the orders which have been made against him. I give Mr Burke credit for the possibility that he will act in accordance with the decision of this Court and not seek to re-litigate claims which have been found wanting and struck out now on three occasions. Accordingly, I would not exercise my discretion to make the order which is now sought by the respondent.

...

FRASER JA: The appellant opposes an order that the respondent have the costs of its application to strike out the notice of appeal. One point made by the appellant is that, from his perspective, it is not appropriate that the respondent recover their legal costs involved in

ascertaining and putting on affidavit details of the appellant's financial position. That does not seem to me to be a basis for not following the usual principle that costs follow the event. One order sought in the application was security for costs and it was reasonably open to the respondent to consider that obtaining the sort of evidence which the appellant mentions was necessary, or at least appropriate, to support that application. I cannot see any discretionary reason for not making an order in accordance with the event. Accordingly, I order that the appellant pay the respondent's costs of the respondent's application filed on the 10th of November 2015.