[2016] QCA 64

COURT OF APPEAL

FRASER JA

Appeal No 10704 of 2015
SC No 1001 of 2014

STACKS MANAGED INVESTMENTS LIMITED **Applicant/Respondent**

v

TOLTECA PTY LTD **Respondent/Appellant**

BRISBANE

MONDAY, 21 MARCH 2016

JUDGMENT

FRASER JA: The respondent to this appeal has applied for an order that the appellant provide security for the respondent's costs of resisting the appeal. The litigation arose out of a loan made in early 2010 by the respondent to the appellant of $1 million for a 12 month period for the purpose of a subdivision. As part of the security for that loan the appellant granted the respondent a mortgage over a farming property where its sole director, Maria Pettett, resided with her husband and their young sons. The respondent subsequently sued the appellant for an order for the recovery of possession of the secured land. The appellant admitted the loan, the mortgage and the default but counterclaimed for relief on the basis of what was alleged to be unconscionable conduct by the respondent in breach of s 12CC of the *Australian Securities and Investments Commission Act* 2001, which regulated the relevant conduct by the respondent in connection with the transaction.

After a trial, the primary judge was not satisfied that any of the matters alleged against the respondent had been established. Her Honour found that there was a bargain freely made between the parties and expressly held that she was not satisfied that the respondent's conduct in relation to the loan was such that it could be characterised as unconscionable. Accordingly, judgment was entered in favour of the respondent and the appellant's counter-claim was dismissed.

The appellant accepts that in the event that it were to fail in its appeal and be ordered to pay costs to the respondent, then on the face of the evidence it would not be able to do so. That factor is one which favours the grant of an order for security. The appellant contends, however, that there are four reasons why security should not be ordered in the particular circumstances of this case.

One reason the appellant submits is that it has already offered a reasonable amount by way of security, namely an amount in the order of $10,000. As to that, the uncontradicted evidence of the respondent is to the effect that its costs in resisting the appeal are in the order of $71,000. The evidence shows that it is anticipated that if the costs are assessed on a standard basis they will amount to between 60 to 80 per cent of that amount, that is, between $42,600 and $56,800. Plainly enough the offer cannot be regarded as a reasonable offer in those circumstances. Mr Ferrett, who appeared for the appellant, referred to some other decisions which identified amounts of security ordered. As he acknowledged however, each case must be assessed on its own facts.

The second reason relied upon by the appellant was that what is submitted to be the penury of the appellant and the people who stand behind it is a direct result of the conduct of the respondent which the appellant attacked in the litigation. That involves two propositions. The first is that the appellant and the people who stand behind it are impecunious. While accepting that the evidence shows that the appellant is impecunious, the evidence does not show that all of the people standing behind it are impecunious. According to the uncontradicted evidence of the respondent there is a shareholder, the sole shareholder of the appellant, about whose financial position there is no evidence. The second proposition is that the penury of the

appellant and others standing behind it is a direct result of the conduct attacked in the litigation. This is inconsistent with the trial judge's conclusions. In particular, at paragraph 143 of her reasons the trial judge found that the subdivision as planned ultimately eventuated, the five blocks of the subdivision being sold for amounts which were close to the sale prices which had been projected by the appellant. Her Honour observed that:

> "Whilst the project was completed and the sale prices were ultimately realised, it took five years and not the projected one year. It would seem that the project was besest by delays and personality conflicts between Maria Pettett and John Anderson. I am not satisfied that those features would have been known or even objectively anticipated by Stacks. There is nothing to indicate it was a particularly high risk venture."

So it appears on the findings that the conduct of the respondent was not the cause of the penury of which the appellants complain.

The appellants attacked the trial judge's conclusion that the respondent was not guilty of unconscionable conduct. This relates to the applicant's contention that security should not be ordered because it has good prospects of success. As to this however, the respondent submits that the basis pleaded for the appellant's claim against the respondent involved a series of alleged facts which are now shown to be inconsistent with findings of fact by the trial judge. Upon that footing the respondent argues that there are not good prospects of success, and that indeed, the appeal cannot succeed. The appellant replies that whilst it does not challenge any of the findings of fact, it does contend that the trial judge misapplied or misunderstood the effect of the authorities concerning s 12CC in holding that there was not unconscionable conduct. In this respect, I have examined the grounds of appeal and the parties' competing submissions. In the time available to me I could not possibly make a final decision about this, and nor would it be appropriate to do so. I record however that whilst I do not find that the appeal is not viable, I am not persuaded that I should make a positive finding in this application that the appeal has good prospects of success.

It is also argued for the appellant that security should not be ordered because the appeal raises a point of general importance, namely whether dishonesty is a necessary constituent of certain statutory prohibitions of unconscionable conduct. About this it is sufficient that I record that

I have not been able to find an indication in the reasons for judgment that the trial judge found that dishonesty was a necessary constituent of unconscionable conduct proscribed by s 12CC.

The respondent argued that there is no evidence about the financial position of the sole shareholder of the appellant, Mr Pop. This is a further positive reason why security should be ordered. This was flagged in the affidavit supporting the application for security insofar as it attached or exhibited a search showing that Mr Pop was the sole shareholder of the appellant. This point was made more clearly in a subsequent affidavit sworn on March 14. The absence of any evidence about Mr Pop's financial position does seem to me to be an additional reason why security should be ordered.

It is possible that ordering security might stifle the appeal, but in the absence of evidence that all persons who stand to benefit from the appeal are impecunious I am not prepared to make a finding that ordering security in an amount reasonably based upon the evidence would stifle the appeal. In these circumstances it seems the proper order is that security for costs should be ordered.

As to quantum I have already mentioned what the evidence shows. The respondent argued that security should be ordered on the basis of indemnity costs. The basis of this argument was a provision in the mortgage which the respondent argued would entitle it to recover its costs, in the event it succeeds in the appeal, on an indemnity basis. The respondent argued that this fact alone suggested that it would be appropriate to order security for costs assessed on the indemnity basis. The appellant argued that if the provision for costs on an indemnity basis had the effect for which the respondent contended it should be viewed in its context in a mortgage which identified the extent of the security to be provided by the appellant for that promise. The appellant argued that by seeking security for costs of the appeal on an indemnity basis the respondent was, therefore, acting contrary to the bargain which limited the security provided for that promise.

The appellant also argued that the absence of any decision in which security for costs on the indemnity basis had been ordered was an indication that it was inappropriate to make such an order. The respondent replied that this was a neutral factor because nor was there any decision

which considered the matter in detail and declined to make such an order. It seems to me that this, like other matters concerned with quantum of security, must be a matter which falls within the general discretion to order security. I would accept that there is a discretion to order security assessed on the indemnity basis. The usual factors to take into account in deciding whether to order security and, if so, in what amount could be taken into account. For example, if the judge ordering security formed a positive view that the appeal appeared to be merely colourable and that (as is the case here) if the appeal failed the respondent might never recover the difference between standard basis and indemnity basis costs that might be regarded as a factor supporting an order for costs assessed on the indemnity basis. In this case, having considered the matter with some care, I decline to order security assessed on the indemnity basis.

Upon the basis of the figures given by the applicant for security, that is to say the respondent to the appeal, the minimum amount which it would recover in the event it succeeded in the appeal and costs were ordered in its favour would be $42,600.

…

I order that the appellant provide security for the respondent's costs of the appeal in the amount of $42,600 in a form acceptable to the registrar by 4 pm on 18 April 2016.

….

My second order is that until the security is provided the appeal be stayed insofar as concerns steps to be taken by the respondent in the appeal.

…

I further order that the appellant pay the respondent's costs of the application for security. I reserve my decision about whether or not those costs are assessed on the indemnity basis. I give leave to the appellant to file a written submission not exceeding three pages upon that reserved question. The registry will notify the respondent if a reply is required.