[2016] QCA 319

COURT OF APPEAL

FRASER JA

Appeal No 7177 of 2016
DC No 1777 of 2015

COMMONWEALTH BANK OF AUSTRALIA **Respondent/Applicant**
ACN 123 123 124

v

MARIO JOHN MENSO **Appellant/Respondent**

BRISBANE

TUESDAY, 29 NOVEMBER 2016

JUDGMENT

FRASER JA: This is an application for security for costs of this appeal. The appeal is, or purports to be, an appeal against a decision of a judge in the District Court, who I will describe as the primary judge, on 24 May 2016. I will briefly mention the most relevant aspects of the chronology.

In May 2015, the respondent filed a claim in the District Court claiming a sum of about $160,000 as the outstanding balance of a loan and recovery of possession of the appellant's land, which was secured by mortgage in favour of the respondent for the repayment of the loan. The appellant filed a notice of intention to defend and counter-claim in June 2015.

In April 2016, the respondent filed an application for summary judgment on its claim and against the appellant on his counter-claim. In May 2016, the appellant filed two applications:

one which sought orders that the matter proceed to trial and another, which sought leave to amend his defence and for a stay of the proceedings in the District Court.

On 24 May 2016, the primary judge granted the respondent summary judgment against the appellant in respect of the respondent's claim and the appellant's counter-claim and the primary judge dismissed the appellant's applications.

On 21 June 2016, an enforcement warrant was issued to the District Court for the enforcement of the orders made by the primary judge. On 14 July 2016, the appellant filed an appeal in this Court, which was out of time, and an application to stay enforcement of the primary judge's decision pending the appeal.

On 21 July 2016, Justice Morrison dismissed the appellant's application for a stay. That decision is *Menso v Commonwealth Bank of Australia* [2016] QCA 188. On 11 August 2016, the respondent obtained possession of the appellant's land which was the subject of the mortgage.

On or about 14 October 2016, the appellant filed an outline of argument in the appeal and it appears that this was served on the respondent on or about 24 October 2016. The present application, the respondent's application for security for costs, was filed on 31 October 2016.

An important consideration in considering whether security for costs on appeal should be granted concerns the financial position of the appellant. In *Natcraft Pty Ltd v Det Norske Veritas & Anor* [2002] QCA 241, Justice Jerrard observed that, where an appellant is without funds or assets, this factor is important and provides what this Court has described as a persuasive reason for ordering security for costs. I note, in that respect, that the respondent has adduced affidavit evidence which is uncontradicted and which suggests that the value of the security property is insufficient to fund the repayment of the whole of the outstanding debt.

Other considerations of significance include the appellant's prospects of success in the appeal. In order to discuss that point, it is necessary to say a little bit more about the decision in the District Court. The primary judge referred to the matters which the appellant had raised by way

of defence and by way of counter-claim. I will briefly summarise the matters to which the primary judge referred.

First, that the appellant referred to occasions in March and April 2015 when he was unfortunately the victim of two separate offences of breaking and entering; second, that the appellant had tried to obtain work and made an attempt to repay the loan; third, that the appellant's financial position, that is to say, his inability to repay the debt, was the result or partly the result of actions by government agencies and the difficulties in resolving the litigation, and other litigation in which he is involved, had made the appellant's life and planning his life very difficult. The primary judge referred also to the fact that a default judgment was entered against the appellant, which made his ability to obtain credit yet more difficult because the default judgment appeared on the credit record.

Next, that the appellant had made offers to the respondent bank to mediate, which the bank had not taken up. The appellant had argued that if the respondent had agreed to the appellant's proposals, that would have benefited both parties. The primary judge referred to an occasion on 16 October 2012 when the respondent wrote letters to the appellant and to his former trustee in bankruptcy, in which the respondent described the appellant in a place visible in the envelope as a bankrupt. That was not accurate because the appellant's bankruptcy had been annulled, as I understand it. The appellant submitted to the primary judge that this was defamatory of him, both in relation to the publication to the former trustee in bankruptcy and in relation to anyone else who had read the letter, or at least the addressing in the letter.

The appellant also raised an argument before the primary judge that an employee of the respondent bank had addressed the appellant in a humiliating way, which would have been audible to people in the vicinity. The primary judge referred to another matter, which was the appellant's contention that the respondent had failed to offer to make amends for the defamation and the difficulties it may have caused for the appellant. The appellant argued that a credit history wrongly showed him to be a bankrupt until a date as late as 2015. He submitted that the respondent knew or would have known that the credit history wrongly showed him to be

a bankrupt and that the respondent should have advised the appellant of the error in the credit history. The appellant also referred the primary judge to claims against other bodies and he argued that he needed more time properly to formulate a good defence.

The primary judge concluded that some of the appellant's argument, if he were able to adduce sufficient evidence in support of them, might give him causes of action against others and perhaps even a cause of action against the respondent. The primary judge held, however, that the possibility that the appellant might be able to sue the respondent on one of those claims did not amount to a defence to the respondent's claim. At best, it might have permitted the appellant to institute a separate proceeding against the respondent.

The primary judge also concluded that there was no merit in the appellant's application which was, in effect, to adjourn the proceedings to put in a better defence to support matters raised by the appellant in argument. The primary judge considered that if the appellant were given more time for that purpose, it would not be of assistance to the appellant. The primary judge also concluded that an application by the appellant for further disclosure, which seemed to relate mainly to the appellant's concerns that he was defamed, should not be permitted because the appellant did not point to any documents that were not disclosed and which would be relevant to the respondent's claim against the appellant or the appellant's counter-claims against the respondent.

For those reasons, the primary judge found that there was no substance in the defence or the counter-claim, and no sufficient basis to grant the appellant's application or adjourn the proceedings. The primary judge went on to refer to what seems to have been uncontroversial evidence that the appellant had defaulted in repayment under the loan and that the respondent was entitled to possession of the secured land under the respondent's mortgage.

The primary judge concluded that the appellant had no real prospect of defending all or part of the respondent's claim and that there was no need for a trial with respect to the respondent's claim against the appellant. Accordingly, the primary judge exercised the ensuing discretion to enter summary judgment in the way earlier described.

In the proceedings before Justice Morrison earlier mentioned, the appellant repeated the arguments he had advanced in the District Court and added some additional arguments. Justice Morrison carefully examined all of those arguments and concluded that there was no real substance in any of them.

Before me, the appellant has repeated with evident sincerity the same arguments and added some additional arguments. Some of those arguments seemed to me, with respect to the appellant, to have no bearing upon any issues which might arise in the appeal but I will refer to a couple of points.

First, the appellant argued, as I understood it, that the bank had knowledge of some of the issues which had created real difficulties for the appellant in repaying the money he owed to the bank. Secondly, in an allied point, the appellant referred to provisions of the banking code of practice, which, in the appellant's submission, should have resulted in the bank not giving him a notice of default or not insisting on other ways upon timely compliance with the repayment of the loan.

So far as I can tell from the voluminous material before me, whilst in the District Court the appellant adverted to this code, he generally did so only in quite general terms and he did so only in relation to the respondent's complaint handling procedures. It does not seem to have been an issue in the District Court that the banking code of practice supplied some ground upon which the appellant could seriously claim not to have been obliged to repay the debt or upon which the appellant could claim that the respondent was not entitled to exercise the rights given by its security which were recognised in the summary judgment.

The appellant does not have a right to raise in the appeal issues which he had not properly raised in the District Court. He may seek to raise such issues and in unusual circumstances the Court may give leave for such issues to be raised but nothing the appellant has said suggests to me that this is likely. I emphasise that I do not purport to express any final view about the appellant's prospects of success. The appellant has made the point that he requires further time to prepare the appeal and there is always the possibility that there will be some issue about

which the material currently provided by the appellant does not sufficiently educate me to make an informed judgment. It must be said, however, that I have seen nothing to doubt the decisions by the primary judge and Justice Morrison to the effect that the appellant has not shown that he has prospects of success in the appeal. At the least I am not persuaded that, on the material before me, the appellant does have a good case on appeal.

Other considerations relevant to security include the fact that an impecunious appellant has already had a day in Court and lost on the merits, which is the case in the present appeal, and it has been held in *Natcraft*, the case already mentioned, that such a circumstance increases the likelihood of the exercise of discretion in favour of an order for security for costs. It is not entirely clear to me that the appellant blames his impecuniosity on the respondent but if the appellant does so, that matter has been held, again in the same case, to have a diminished significance at appellate level in contrast with its significance at trial level. I'm persuaded that there has been no unreasonable delay in bringing the application for security for costs in circumstances in which it was necessary for the court to consider an application by the appellant for a stay of the first instance judgment.

It does seem to me that the factors I've mentioned favour an order for security for costs and I propose to make that order.

In relation to the amount of security which should be provided, I note that in *Natcraft* Justice Jerrard observed that it is inappropriate to order an impecunious appellant to provide a greater security than is absolutely necessary. The evidence filed on behalf of the respondent satisfies me that the figure of $34,500 for which security is sought is a reasonable, if not conservative, figure. Nevertheless, out of consideration for the very difficult position in which the appellant finds himself, and in compliance with the authority I've mentioned, I will order security only in the amount of $30,000.

I order that the appellant provide security for the respondent's costs of appeal in the sum of $30,000 in a form which is satisfactory to the registrar by 4 pm on 23 January 2017. I order that the appeal be stayed, so far as any steps which, otherwise, will be required to be taken by

the respondent, until the security is provided. I order that the appellant pay the respondent's costs of this application on the standard basis.

I mention, in response to the argument for those costs to be assessed on the indemnity basis, that whilst it does seem to me to be substantially arguable that that would be appropriate, on this occasion, and notwithstanding that Mr Menso had the benefit of the careful and clear reasons of Justice Morrison explaining that there was not arguable substance in his points, given the appellant's disadvantaged position as an unrepresented litigant and the apparent sincerity of his argument I propose not to order the costs to be assessed on an indemnity basis. The appellant will no doubt appreciate that in future applications, or in the appeal, if he argues points which are found to lack substance, he will be exposed to the possibility of adverse costs orders, including costs assessed on the indemnity basis.

Insofar as the appellant has brought an application which would require the respondent to disclose documents, I refuse that application for the reasons just articulated.