IN THE COURT OF APPEAL [1994] QCA 268

SUPREME COURT OF QUEENSLAND

Appeal No. 190 of 1993

Before Fitzgerald P.
Pincus JA.
Byrne J.

[Acheron Pty. Ltd. v. Connors and Kent]

BETWEEN:

ACHERON PTY. LTD.
(Defendant) Appellant

AND:

WILLIAM RICHARD KINGSLEY CONNORS
and ROSEMARY ANNE KENT
(Plaintiffs) Respondents

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 28/07/94

I agree with the orders proposed by Byrne J., whose reasons for judgment demonstrate that the appellant is liable to the respondents in the sum of $31,394.41, the wholesale value of the trading stock.

It has been said that an application to set aside a judgment should not be refused because the judgment debtor's case is a weak one : see e.g. *Rosing v. Ben Shemesh (1960) V.R. 173, 176-177*. Assuming that to be so, it provides no sufficient basis for setting aside a judgment where the judgment debtor's material shows only that the judgement may have been entered on an incorrectly formulated claim but that the judgment nonetheless correctly gives effect to a demonstrated liability.

IN THE COURT OF APPEAL

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Appeal No. 190 of 1993.

Brisbane

[Acheron v. Conners and Kent]

BETWEEN:

ACHERON PTY LTD
(Defendant) Appellant

AND:

WILLIAM RICHARD KINGSLEY CONNERS
and ROSEMARY ANNE KENT
(Plaintiffs) Respondents

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 28/07/1994

This is an appeal from a Supreme Court judgment in favour of the respondents against the appellant in a sum of $31,394.41, together with $739.70 interest. That judgment was entered in substitution for a judgment given under O. 18 r. 1 in a larger sum, namely $276,534.41 together with interest.

The larger judgment was no doubt obtained without difficulty for, due to a misunderstanding, there was no appearance on behalf of the appellant when the summons for judgment was heard. The primary judge was satisfied with the appellant's explanation for its failure to appear and the application made to his Honour to set aside the larger judgment was successful except as to the sum presently in question. That sum was claimed, in the pleading endorsed on the writ, as due under an oral contract for sale of the trading stock of a hotel.

There was also a claim for the price of plant and equipment.

The appellant's case below, as disclosed by the affidavits filed, was that it did not deny having made an agreement for the sale of the stock to it; its defence as so disclosed was that the agreement was made, not with the respondents personally, but with them as agents for a company Jalwick Pty Ltd ("Jalwick") which, it is common ground, owned the goods in question at the time of the agreement for sale. The first question is whether that defence was in substance abandoned during the hearing below.

The respondents' case below was that the agreement for sale of the goods was made by them personally, and not on behalf of Jalwick, and that the goods were the subject of a floating charge given by Jalwick in their favour, which crystallised shortly before the agreement for sale was made; in short, the respondents said that they sold, not on behalf of Jalwick, but as the holders of a security given by that company.

The primary judge said, with reference to that part of the claim before him with which the Court is presently concerned:

> "There is, as I understand it, no dispute as to the reasonableness of this price or with respect to the subject matter of the stocktake".

His Honour also remarked:

> "There is, as I have previously indicated, no dispute concerning the $31,394.41 attributable to stock. The respondents seem to me to be entitled to retain the benefit of the judgment and of the execution in respect of that amount".

Apart from the portions of his Honour's reasons just quoted, one finds no specific explanation of the reason why the primary judge discriminated between the sum for which his Honour let judgment go, and the balance of the claim, with respect to which the appellant obtained leave to defend.

Mr D Fraser Q.C., who led Mr M J Burns for the respondents, argued that the Court should not reject the primary judge's view of the matter, namely that there was really no dispute about the stock. The critical passage in the evidence is the following, in cross-examination of G F O'Donnell, a director of the appellant:

> "And you never indeed tried to fix a value for either of those matters, that's the stock and the plant?-- Yes, I did.
>
> When did you do that?-- There's no dispute about the stock, Okay?
>
> Yes?-- Whatsoever."

It appears that the primary judge took these answers literally and did not treat the evidence as intended to convey merely that the price of the stock was not in issue. We are invited to adopt a narrower construction of the evidence, but I have come to the conclusion that we should not do so. It has to be kept in mind that the primary judge was exercising a discretion and also that he had a better opportunity than we have of understanding what was intended to be conveyed by the oral evidence.

The appellant took delivery of the stock, sold much of it

and made no attempt to pay Jalwick, or indeed anyone else, for it. There was no evidence that Jalwick had ever claimed the price. In those circumstances it would not seem extraordinary that O'Donnell should not press the argument about the stock and should confine the question to the larger issue, namely the appellant's liability for the plant and equipment.

No sufficient reason appears for holding his Honour's understanding of the basis upon which the matter was conducted before him, namely that liability for the stock was no longer in question, to have been incorrect.

I agree with the orders proposed by Byrne J.

IN THE COURT OF APPEAL

SUPREME COURT OF

QUEENSLAND

Brisbane Appeal No. 190 of 1993

[Acheron Pty Ltd v. Conners and Kent]

BETWEEN:

ACHERON PTY LTD

Appellant

AND:

WILLIAM RICHARD KINGSLEY CONNERS and ROSEMARY ANNE KENT

Respondents

The President
Mr Justice Pincus
Mr Justice Byrne

Judgment delivered : 28/07/1994

Separate reasons for judgment by the President, Pincus J.A. and Byrne J. All concurring as to the orders.

Appeal allowed to the extent that the order made by Moynihan SJA is varied by substituting for paras. 1 and 2 thereof an order that the judgment given against the applicant on 2 August 1993 be varied by substituting "$31,394.41" for "$276,534.41." The appeal is otherwise dismissed. The appellant must pay the respondents' costs of the appeal to be taxed.

CATCHWORDS: **PRACTICE - application to set aside regularly entered summary judgment - appellant shown to be liable for the judgment sum - whether judgment should be set aside even though at a trial the liability would inevitably be established on some cause of action.**

Counsel: Mr J Rolls for appellant
Mr D Fraser Q.C. with him Mr M J Burns for respondents

Solicitors: Messrs Short Punch & Greatorix for appellant
Messrs Nicol Robinson & Kidd for respondents

Hearing Date: 05/05/1994

IN THE COURT OF APPEAL

SUPREME COURT OF

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Brisbane Appeal No. 190 of 1993

Before The President
Mr Justice Pincus
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[Acheron Pty Ltd v. Conners and Kent]

BETWEEN:

ACHERON PTY LTD

Appellant

AND:

WILLIAM RICHARD KINGSLEY CONNERS and ROSEMARY ANNE KENT

Respondents

REASONS FOR JUDGMENT - BYRNE J.

Judgment delivered : 28/07/1994

The respondents caused a specially endorsed writ to be issued out of the Brisbane Registry claiming from the appellant moneys said to be due under oral agreements made between them on 4 May 1993. According to the statement of claim, both agreements resulted from negotiations between Mrs Kent, for herself and for Mr Conners, and Mr O'Donnell, a director of the appellant. One such agreement related to the sale to the appellant of the trading stock of the Metropolitan Hotel at Mackay. The other was for the sale to the appellant of plant and equipment used in the hotel business.

The appellant's Gold Coast solicitors arranged for an appearance to be entered nominating Brisbane solicitors as the

address for service. The respondents decided to apply for summary judgment and arranged for service of the summons and the supporting affidavits on the Brisbane solicitors. Some difficulty in communication between those solicitors and their Gold Coast principals meant that there was no appearance for the appellant when the respondents sought summary judgment. The evidence before the Chamber Judge showed an entitlement to judgment in respect of the debts alleged to arise on the contracts. A regular judgment was then entered for $276,534.41, and interest.

On learning of the judgment, the appellant promptly applied to set it aside pursuant to R.S.C. O. 18 r. 10B, which provides:

> "Any judgment given against a defendant who does not appear at the hearing ... may be set aside or varied by the Court or a Judge on such terms as they or he may think just."

Several affidavits were read in support of the appellant's application. Apart from explaining that the appellant's failure to appear on the hearing of the application for summary judgment was attributable to lapses in the offices of the solicitors rather than to any fault on the part of the appellant, the affidavits put many of the pertinent facts into contention. The Judge was persuaded that the appellant's evidence disclosed an arguable defence to the claim in respect of plant and equipment. However, his Honour concluded that the appellant had failed to show that judgment should not have been entered for the price of the trading stock: $31,394.41. He gave effect to these views

by ordering that the judgment be set aside, that the appellant have leave to defend so much of the claim as related to the plant and equipment, and that judgment be entered against the appellant for $31,394.41, and interest. This appeal challenges the last of those decisions.

From testimony and argument, the Judge was left with the impression that there was no dispute concerning the appellant's liability to pay the price of the trading stock. It is said, however, that his Honour was mistaken in that view and that the appellant ought to have been granted leave to defend on the footing that the evidence showed an arguable case that the appellant had contracted to buy the trading stock from Jalwick Pty Ltd and not from the respondents.

Jalwick Pty Ltd, which operated the Metropolitan Hotel, is controlled by the respondents. Jalwick once owned the trading stock, plant and equipment. In July 1992 Jalwick charged its assets in favour of the respondents. In respect of trading stock, the security was a floating charge. Mr O'Donnell knew about the charge when he discussed the acquisition of the stock, plant and equipment with Mrs Kent on the morning of 4 May 1993. He deposed to a wish to deal with Jalwick, not with the respondents, claiming to have been concerned that the validity of the charge might later be questioned. The appellant contends that the conversations between Mr O'Donnell and Mrs Kent arguably suggest that Jalwick, not the respondents, contracted with the appellant to sell the trading stock. Mr O'Donnell

admits that on 4 May 1993 he concluded a contract with Mrs Kent for the purchase by the appellant of the trading stock at its wholesale value. A stock-take established the value, and therefore the price, at $31,394.41. The appellant contends that its liability, at least arguably, is to Jalwick; and so, it is said, judgment for the respondents for the agreed price of the stock was inappropriate. Jalwick has neither demanded nor been paid anything.

Between approximately 8 a.m. on 4 May, when Mr O'Donnell offered to buy the stock, and about noon that day, when Mrs Kent agreed to the proposal, the charge over the trading stock crystallised. Under the terms of their security, the respondents thereupon became entitled to possession of the trading stock and to sell it. So, when the agreement to sell the trading stock to the appellant was made, Jalwick could not give, and had no prospect of regaining, title to the goods. This circumstance tends to make it unlikely that the appellant contracted with Jalwick, especially as Mr O'Donnell swears that he told Mrs Kent that what mattered to him was that the appellant obtain clear title to the property, not whether Mrs Kent "was running the affair on her own or on Jalwick's behalf" and, in cross-examination, agreed with the suggestion that the appellant "was going to buy ... from whoever" was the owner. However that may be, that the respondents had the right to possess the trading stock and the capacity to convey title to it has another significance.

Shortly after Mr O'Donnell and Mrs Kent reached their agreement, the appellant, as agreed, took the trading stock and began to sell it. At that time, the appellant, through Mr O'Donnell, must have appreciated that the respondents would not have consented to the appellant's dealing with their stock unless they believed that the appellant had agreed to buy the goods from them. In these circumstances, if the appellant is not liable for the price of the goods, it is obliged to recompense the respondents for their value. It does not matter whether, as Mr Rolls seemed inclined to accept, the alternative obligation lies in conversion or else, which appears the better view, the law of restitution accords the entitlement as "compensation for the benefit of unjust enrichment": Australia and New Zealand Banking Group Limited v. Westpac Banking Corporation (1988) 164 CLR 662, 673; cf. Goff & Jones, The Law of Restitution, 4th ed. (1993), p.180. In tort and in restitution the measure of compensation here is the agreed value of the stock. As that value happens to be the price, the appellant's liability to the respondents for the judgment sum is established on any view, and no purpose would be served by a trial.

It is true, as Mr Rolls reminded us, that summary judgment is not available for a claim in tort for unliquidated damages. That may perhaps also be true of the claim here if based in restitution. Such considerations, however, are not decisive where application is made to set aside a judgment regularly

entered. The respondents seek to retain a money judgment in the amount to which they would inevitably show an entitlement on some cause of action were the litigation to proceed. Nothing favours the trouble and expense of a trial which can only have the same financial consequences as a judgment now for $31,394.41.

The Judge was correct in thinking that the appropriate exercise of the discretion was to permit the respondents to retain the benefit of the summary judgment to the extent of $31,394.41 and interest. The desirable way to have given effect to that determination was to have varied the judgment by substituting $31,394.41 for $276,534.41. The appeal should be allowed to that extent. The appellant must pay the respondents' costs of the appeal.