[2002] QCA 335

COURT OF APPEAL

McMURDO P
JERRARD JA
ATKINSON J

Appeal No 4285 of 2002

JOHN BERESFORD GRACE — Applicant (Plaintiff)

and

NICOLE JENEKA — Respondent (Defendant)

BRISBANE

..DATE 03/09/2002

JUDGMENT

THE PRESIDENT: Justice Atkinson will deliver her reasons first.

ATKINSON J: On the 16th of April 2002, the trial of this matter was listed in the District Court. At the commencement of proceedings on that day, the applicant's solicitors withdrew from the case and the applicant, who was the plaintiff at trial, sought an adjournment. The learned trial judge granted the adjournment but made an order that the applicant pay the respondent's costs thrown away by the adjournment and that the applicant pay security for costs in the action in the sum of $15,000. The applicant seeks leave to appeal against both aspects of the costs order.

The order for costs was made under section 341 of the Property Law Act 1974 (Qld). That section reads:

"(1) A party proceeding under this part bears the parties own costs.

(2) However, if the Court is satisfied there are circumstances justifying it making an order, it may make any order for costs or security for costs it considers appropriate.

(3) The Court may make an order at any stage of the proceeding or after the proceeding ends.

(4) In considering whether there are circumstances justifying it making an order, the Court must consider the following matters -

(a) The income, property and financial resources of each of the parties;

(b) Whether any party has legal aid and the terms of the legal aid;

(c) The conduct of each of the parties in relation to the proceeding, including, for example conduct about pleadings, particulars,

disclosure, inspection, interrogatories, admissions of fact and production of documents;

(d) Whether the proceeding results from a party's failure to comply with the previous order made under this part;

(e) Whether any party has been wholly unsuccessful in the proceeding;

(f) Whether any party made an offer to settle under the Uniform Civil Procedure Rules 1999 and the terms of the offer;

(g) Any fact or circumstance the Court considers the justice of the case requires to be taken into account."

Section 341 was introduced to give effect to a different costs regime with regard to property disputes between partners or former partners to de facto relationships from the costs regime which applies to most civil litigation before the courts of this State: see the Queensland Law Reform Commission: report No 44, De Facto Relationships June 1993 at pages 123 to 124. In other civil litigation the usual rule is that costs are in the discretion of the court but follow the event unless the court considers that another order is more appropriate: see UCPR Rule 689(1).

Section 341 has been the subject of little judicial consideration in Queensland. It would, therefore, be appropriate to grant leave to appeal pursuant to section 118(3) of the District Court Act 1967, despite the fact that the orders made were interlocutory, so long as the decision is attended with sufficient doubt to warrant its being reconsidered and substantial injustice would result from the order being allowed to stand: see Bonnici v. Taylor [2001] QCA 502 at p.5.

This application is concerned with two interlocutory orders. Firstly that the applicant pay the respondent's costs thrown away by the adjournment, and secondly that the applicant pay security for costs. Each will require separate consideration.

Section 341 is closely based on section 117 of the Family Law Act 1975 Commonwealth, and is intended to adopt the approach of section 117 in establishing the general rule that parties will bear their own costs: see the QLRC Report number 44 at page 123. Section 117 of the Family Law Act was originally in a similar form to that now found in subsections 1, 2 and 3 of section 341. Regulation 173 of the Family Law Regulations set out the matters found in subsection 4 of section 341. The application of factors enumerated was within the discretion of the Court rather than mandatory as it now is.

Section 117, as it was then, was considered by the High Court in Penfold v. Penfold (1979) 144 CLR 311. The High Court held that section 117 established a general rule that parties must bear their own costs, but that this rule "must yield whenever a judge finds in a particular case that there are circumstances justifying the making of an order for costs". To make an order for costs the judge must make a finding of "justifying circumstances", but there is no requirement that an applicant for costs must show "a clear case" for an award of costs. The Court went on to state at 315 to 316:

> "[Section 117] does not in our view as a matter of law require the judge to specify the circumstances which justify the making of an order. It does not expressly

> say so and in the context of the making of an order for costs there is no sufficient basis for making an implication. Judges very frequently make orders for costs without giving reasons or making findings, even when costs are in issue. The absence of reasons or findings does not in itself indicate that a judge has erroneously exercised his [or her] discretion to award costs, though it will place an appellate court in the position of examining the circumstances and of determining for itself whether the circumstances show that the discretion was erroneously exercised."

Section 117 of the Family Law Act was amended in 1983 so that the matters formally enumerated by regulation were now set out in the Act and their consideration has been made mandatory. That is the form in which it has been substantially replicated in section 341 of the Property Law Act. Subsection 4 of section 341 states that the Court must consider the matters listed in that subsection. This is a mandatory requirement and a demonstrated failure to consider any of the matters that were relevant will amount to an improper exercise of the discretion: see Brown v. Brown [1998] Fam CA 115 at [15].

A court on appeal is, however, reluctant to interfere with a trial judge's discretion as to costs and will only do so if the result is plainly unjust or if the discretion was exercised on wrong principles. It is, therefore, necessary to consider whether the discretion of the learned primary judge was exercised according to law and specifically whether there were circumstances before the judge that could justify the making of the costs orders that were made.

The approach taken to the section by Justice Moynihan in Stevens v. Ell [2002] QSC 166 at [6] shows that each matter

set out in subsection 341(4) should be considered with regard to its relevance and whether deviation from the usual order in such a case that each party should bear its own costs is justified.

The learned primary judge did not give any formal reasons for his decision; however, the transcript of the proceedings on 16th of April 2002 reveal some of the matters that were placed before the learned primary judge and his Honour's consideration of the matters there dealt with. It is, however, desirable for a judge to set out clearly the considerations which have been taken into account if an order is made other than the usual costs order that each party bears its own costs.

Section 341(4)(a) requires the court to consider the "income property and financial resources of each of the parties". Submissions were made before the learned primary judge by the applicant, who was self-represented, relating to the respective financial positions of the parties. Those submissions were very general; however, the learned primary judge also had before him the pleadings which contained some financial information and on the file the financial statements of the applicant and respondent. One might assume that the judge was familiar with the relative financial positions of the parties, at least as asserted in the pleadings.

Section 341(4)(b) requires the court to consider "whether any party has legal aid and the terms of the legal aid". It is

clear from the questions asked by the learned primary judge about the applicant's eligibility for legal aid that this matter was considered.

Section 341(4)(c) requires the court to consider "the conduct of the parties in relation to the proceeding". In relation to this aspect, the applicant made submissions to the learned primary judge alleging that the respondent's conduct in the lead-up to the trial had been uncooperative and caused delays. The transcript shows that the learned primary judge turned his mind to this factor and asked questions of the respondent's counsel. In particular the learned primary judge established that the applicant's solicitors had proffered a certificate of readiness to trial and that the need for the adjournment was not unforeseeable. The learned primary judge also made reference to the applicant's pleadings which he considered to be vague and questioned the respondent's counsel about the provision of particulars. It is therefore apparent that the learned primary judge turned his mind to the conduct of the proceedings.

The applicant has conceded that the matters set out in sections 341(4)(d)to(f) were not relevant in this case. The considerations, particularly those set out in section 341(4)(c), were sufficient in this case to justify the order that the applicant pay the respondent's costs thrown away by the adjournment.

However, the order for security for costs was an onerous order for which the judge did not give reasons. The applicant contends that there were certain matters the learned primary judge ought to have considered in accordance with section 341(4)(g). The additional matters the applicant contends were relevant are:

(a) The late stage in the litigation at which the respondent's application for security for costs was made;

(b) The probability that an order for security for costs would frustrate the applicant's claim; and

(c) The correct quantum to order as security for costs.

The principles relevant to an award of security for costs were considered by the Full Court of the Family Court in Luadaka v. Luadaka (1998) FLC 92-830. The court noted that the decision to award security for costs is discretionary as is the decision about the amount of the security. It was also said that:

> "The purpose of an order for security is to secure justice between the parties by ensuring that an unsuccessful party does not occasion injustice to the other."

In relation to the stage of the litigation at which the application for security for costs was made, it is not surprising that the application was made on the day of the adjournment of the trial. The respondent's solicitor, Mr McKelvey, deposes that he was unaware that the trial was to be adjourned until the morning of 16 April 2002 when the applicant applied for the adjournment orally. The application

for security was made in response to the threat that the applicant might be forced to adjourn again if he was unable to obtain counsel. There is nothing unusual or improper in an application for security being made in these circumstances.

As to the prospect that such an order would frustrate his claim, the applicant made submissions before the judge in relation to his "extreme" financial circumstances and the possibility of his being bankrupted. In M v. M [2001] FMCA 140 at [16], it was said that "the mere fact that a litigant is impecunious is not a basis for making an order for security for costs". The justification for an order for security for costs of an impecunious party was examined by the Full Court of the Family Court in Brown and Brown, Eley and Henty (interveners) (1991) FLC 92-265 at 78, 778, where it was held that a security for costs order is intended to prevent an impecunious person from litigating without responsibility. Generally the order may be made when the defendant is an unwilling participant in the litigation. However, the court must carefully balance the rights of the defendant against the possibility that the plaintiff may be shut out of a viable claim. In this case the effect of the order would be, it was submitted, to completely shut the plaintiff out of his claim.

The final objection of the applicant is that the learned primary judge had no basis for making an award for security in the sum of $15,000. No material was before the primary judge as the respondent had not come prepared to make an application

for security for costs but did so orally after being questioned about it by the Judge.

The learned primary judge, as I said, did not give formal reasons for his order for the costs thrown away by the adjournment and security for costs. Absent a finding that the applicant has no prospects of success, the attainment of justice between the parties is much more likely to be effected by imposition of the order originally sought by the respondent that the applicant pay the costs thrown away by the adjournment and the matter be stayed until payment of those costs.

The decision as to security for costs is attended, in my view, with sufficient doubt to warrant its being reconsidered as substantial injustice may follow from allowing the order to stand.

The application for leave to appeal and the appeal shall be allowed to the extent that instead of the orders made by the primary judge the Court should order:

(1) The applicant pay the costs thrown away by the adjournment on 16 April 2002 and

(2) The matter should be stayed until payment of those costs.

THE PRESIDENT: I agree.

JERRARD JA: I agree with the reasons for judgment and proposed orders of Justice Atkinson. I add that, in my judgment, an error of principle is made out in awarding security for costs against an applicant with few resources who blames the respondent for that situation when no grounds under section 341, subsection 4 are clearly made out on the material and when the absence of reasons for judgment does not indicate that the learned Judge particularly relied on any of those grounds or any on any other matters in making those orders.

The effect of the orders was to shut the applicant out from further proceedings without any obvious or reasoned justification.

THE PRESIDENT: Mr Hamwood, the usual order in this Court is that the successful appellant would be entitled to a costs order in his favour. If that order is made here do you wish to apply for a certificate under the Appeal Costs Fund Act?

MR HAMWOOD: I do, your Honour.

THE PRESIDENT: The orders are the application for leave to appeal is granted, the appeal is allowed and instead of the orders made below it is ordered the applicant pay the costs thrown away by the adjournment on the 16th of April 2002 and the matter should be stayed until payment of those costs.

The respondent is to pay the applicant's costs of the application and the appeal to be assessed. The respondent is

granted a certificate under the Appeal Costs Fund Act 1973 Queensland.
