[2002] QCA 352

COURT OF APPEAL

de JERSEY CJ
JERRARD JA
ATKINSON J

Appeal No 2700 of 2002

RONBAR ENTERPRISES PTY LTD (ACN 000 733 219) (AS TRUSTEE FOR THE RON WRIGHT FAMILY TRUST NO. 2)	First Appellant (First Plaintiff)
and	
SANDRA LOUISE PEPI, SHARON LEE SCHOFIELD and KYLE JONATHON WRIGHT	Second Appellant (Second Plaintiff)
and	
MAGNAMAIN INVESTMENTS PTY LTD (ACN 074 822 521)	Respondent (Defendant)

BRISBANE

..DATE 11/09/2002

JUDGMENT

JERRARD JA: This matter was originally an appeal by the plaintiff/appellants against an order made 15 March 2002 dismissing an application by the plaintiff applicants filed 27 February 2002 seeking orders that certain parts of the defendant's further amended defence be struck out.

The defendants have since amended their defence and the appellant/plaintiffs accept that those amendments render the appeal unnecessary. The appellants ask that the appeal be dismissed but that nevertheless costs orders made against them on 15 March 2002 be set aside and that the respondents be ordered to pay the appellants' costs of and incidental to that application dismissed on 15 March 2002 and the appellants' costs of and incidental to this appeal.

In the action in which this appeal was brought, the second plaintiffs are the directors of the first plaintiff. In that action, the plaintiffs claim an order pursuant to section 87 of the Trade Practices Act declaring void both an option agreement and a deed dated 3 April 2002 and, alternatively, a declaration that the option agreement has been validly rescinded and that the deed is of no effect.

The claim and statement of claim were filed in the Brisbane Registry of this Court on 29 June 2001 and the matter was placed on the supervised case lists on 7 September 2001. A further amended defence and counterclaim was filed on 6 February 2002. The appellant/plaintiffs objected to

paragraphs 13.4A, 13.5, 13.6 and 22 of that pleading and unsuccessfully applied to have those struck out.

That defence and counterclaim, in essence, contended that the option agreement was entered into by reason of an agreement between the respondent defendant company and other associated companies on the one hand and the plaintiffs on the other hand. That agreement was to settle other proceedings in this Court in which a case appraiser had determined that a Ronald John Wright and two named companies would be liable to pay $296,000 and interest of $89,773 to the defendant/respondent company in this matter.

That defence pleaded that Ronald John Wright acted as the apparent agent of the first plaintiff in all negotiations with the defendant/respondent company leading up to the making of the option agreement in that he was a person who conducted those negotiations and who made or influenced the making of the decision of the first plaintiff to enter into the option agreement. The first plaintiff company is the trustee of the Ron Wright Family Trust No 2.

That defence pleaded that Mr Wright was not induced to enter the option agreement by any representation made by the defendant/respondent company but rather by the realisation of the likely liability to pay a substantial sum of money to it and companies associated with the defendant/respondent and, further, that the second plaintiffs were induced to enter into the option agreement by Mr Wright.

The defence also pleaded that the plaintiffs at all material times knew of the terms of a particular relevant document by reason of it having been received by Mrs Shaw then asserted to be acting on behalf or at the request of the first plaintiff and Mr Wright.

It was also pleaded that Mrs Shaw was a relative of Mr Wright and of the second plaintiffs. One of the objections the plaintiffs took to that pleading was to deny that Mrs Shaw was a relative of Mr Wright.

The appellant/plaintiffs failed to persuade the learned Judge hearing their application on 15 March 2002 that the allegation that Mr Wright acted as their apparent agent was a false issue as the appellants contended, and the learned Judge considered that no proper basis existed for striking out the paragraphs containing that pleading. The Judge also held that whether or not Mrs Shaw was a relative, in fact, was a matter, if relevant, which could be settled by evidence on the trial.

The appellants' outline of argument on the appeal complained that the learned Judge had failed to give consideration to the obligations imposed on parties by rule 5 of the *Uniform Civil Procedure Rules* and that the pleadings as to Mr Wright's control or influence of the plaintiffs was of an uncertain nature and not adequately particularised. They argued that the particulars of that supplied were really sham particulars. Further, the information placed before the learned trial Judge sufficed to show that there were insufficient instructions to

justify the incorrect pleadings that Mrs Shaw was a relative of Mr Wright.

The day after filing of the notice of appeal, the parties appeared at a supervised case list review on 22 March 2002. The respondents then announced an intention to deliver an amended pleading which would satisfy the plaintiffs' complaints and Moynihan SJA ordered that day that the proposed amended further amended defence and counterclaim be delivered by 26 March 2002. On 8 April 2002 that was done under cover of a letter by the respondents saying that it would render the appeal otiose.

On 26 April 2002 at a further supervised case list review, it was ordered that the defendants file and serve a second further amended defence and counterclaim on or before 9 May 2002. This was done on 24 May 2002 and it is common ground that that pleading does meet the plaintiffs' complaints of deficiencies in the defendant's pleadings.

That pleading continues the allegation that Mr Wright acted as the apparent agent of the plaintiff in all negotiations with the defendant leading up to the making of the compromise in the option agreement but it provides a fair body of particulars upon which the defendants rely for that pleading which were not earlier pleaded. The pleading as further amended abandons a contention that Mrs Shaw was a relative of Mr Wright but pleads that a relationship existed between them apparently relevant to the matters in issue and the pleading

particularises the matters of fact from which it is contended the inference of that relationship can be drawn.

All parties agree that the instant appeal should be dismissed. They disagree as to the appropriate orders for costs. Leave was granted on 30 August 2002 for the appellants to appeal the costs order made 15 March 2002. As to that, the defendant has amended its pleadings but only after it successfully resisted an application that the now further amended portions be struck out and only after a late order from this Court that those pleadings be amended.

In those circumstances, it appears to me that the plaintiffs have been put to trouble and expense in having the defendant reveal its defence and the matters on which it actually relied. The defendant could have done much earlier what it has done now. Had it done so, an application to strike out those abandoned pleadings would have been unnecessary.

In those circumstances, I am satisfied it is appropriate to set aside the costs order made against the appellants on 15 March 2002. The considerable extent of the variation between the pleadings subsequently filed and those to which objection was taken satisfy me that the plaintiffs were acting appropriately in bringing their application to strike out those now abandoned pleadings and, in those circumstances, I consider it appropriate to order instead that the respondents pay the plaintiffs' costs of and incidental to the application filed 27 February 2002.

With respect to the cost of this appeal, the respondents have urged its abandonment since 8 April 2002. The appeal was, in fact, rendered unnecessary when the second respondent filed a second further amended defence and counterclaim on 24 May 2002. The plaintiffs conceded on 4 September 2002 that the appeal was rendered unnecessary by those amendments but until then had pressed on with the prosecution of the appeal. They explain on the hearing of it that that was rendered necessary from their side because of the unwillingness of the present respondents to consent to or in any way act in such a way as to reverse that order of costs for costs reversed by order today.

In those circumstances, I consider that the appropriate costs order to make is that the respondent should pay the appellants' costs of this appeal.

THE CHIEF JUSTICE: I agree.

ATKINSON J: I agree.

THE CHIEF JUSTICE: Those are the orders.
