[2008] QCA 368

COURT OF APPEAL

MUIR JA
WHITE AJA
McMURDO J

Appeal No 9692 of 2008

GREGORY MELVILLE RAEDEL AND KATHLEEN TERESA RAEDEL	**Appellants**
and	
JEZER CONSTRUCTION GROUP PTY LTD ACN 054 548 319	**Respondent**

BRISBANE

DATE 27/11/2008

JUDGMENT

MUIR JA: Justice McMurdo will deliver his reasons first.

McMURDO J: The respondent applies to strike out this appeal on the ground that it has no prospect of success. Alternatively it applies for security for costs.

The appeal is against a judgment of the District Court which after a four day trial dismissed the appellant's claim with costs.

The appellants were the principals of Ramaville Pty Ltd, which carried on business as a landscaping contractor. It contracted with the respondent for the performance of certain work in the construction of a retirement home at Caboolture. The respondent was the head contractor. Ramaville's subcontract was in writing and dated 7 August 1998.

Ramaville performed, or purportedly performed, its subcontract by about the end of 1998. In 1999, Ramaville commenced these proceedings, claiming $77,403.38 against the respondent, in which the respondent made a counterclaim for $278,000.

On 15 September 2000, Ramaville was ordered to be wound up on the insolvency ground. On the previous day, Ramaville executed a deed by which it purported to assign certain debts to the appellants, including what was said to be then owed to it by the respondent under or in relation to this subcontract.

Thereafter the appellants sought to recover what they said had been the amount owing to Ramaville. The appellants were substituted for Ramaville as plaintiffs in the proceedings. In the District Court, the respondent argued that this assignment by Ramaville was ineffective, but that argument was unsuccessful and is not pursued here.

The learned trial Judge concluded that the claims by and against Ramaville were mutual dealings which upon its winding up engaged Section 553C of the *Corporations Act* 2001 (Cth), with the result that what was due to Ramaville by the respondent had to be set off against whatever was due by it, with only the balance of the account admissible to proof against Ramaville, or payable to it. At the trial the appellants disputed the operation of Section 553C but this is not amongst the grounds of appeal.

The appellant's claim for $77,403.38 made no allowance for any sum which the respondent had claimed from Ramaville. Notwithstanding the substitution of the appellants for Ramaville, the respondent persisted with its counterclaim, but of course no liability of Ramaville had passed to the appellants, so that on no basis could the respondent have recovered anything from them.

But what was within the counterclaim was relevant to the set-off under Section 553C. Accordingly, at the trial, the appellants had to prove their claim for $77,803 and defeat the respondent's case that it had been entitled to at least that amount from Ramaville.

The trial Judge held that of the claim for $77,403, only $36,488.13 was owing by the respondent. He further held that the respondent had been entitled to set off amounts totalling at least $92,894 so that at the relevant date, the balance of the account was in the respondent's favour to the extent of $56,405.87. Consequently, there was nothing owing by the respondent which could have been assigned to the appellants and their claim was dismissed.

There are five grounds of appeal set out in a notice of appeal filed by the appellants personally. They were then without legal representation, as they had been at the trial. Today they have been assisted by counsel. Within those five grounds of appeal, there are distinct challenges to various parts of the judgment dealing with components of the appellants' claim and of the set-off amounts. The fourth and fifth grounds of appeal together challenge the set-off which was found by the trial Judge in the sum of $92,894. Of that, the fourth ground of appeal, which I will call the liquidated damages point, accounts for $62,000. In effect, upon this application, the respondent has to demonstrate that there is no arguable case in relation to at least that $62,000 liquidated damages claim. If the respondent cannot do that, then it follows that there is an arguable ground of appeal by which the appellants could hope to obtain a judgment in their favour, regardless of the outcome upon their other grounds.

The liquidated damages of $62,000 represented the application of a provision of the contract by which the respondent, on the face of the contract, was entitled to damages of $1000 per day for every day of delay in achieving practical completion. The learned trial Judge had to deal with a number of arguments in relation to the operation of those provisions. But in my respectful opinion, there is at least an arguable case that he failed to deal with one of the pleaded bases advanced by the appellants for their denial that they were obliged to pay any liquidated damages. That is the case within paragraph 6(i) and (ii) of their reply and answer.

In effect, that case is that in the circumstances which are there pleaded, the liquidated damages provision was not intended to have contractual effect, or perhaps on an alternative view of that case, the respondent should have been estopped from claiming the liquidated damages.

There were many other arguments advanced by the appellants at the trial as to why they were not liable, or Ramaville was not liable for liquidated damages. But it does appear to me to be at least arguable that his Honour erred in failing to consider this case. Further, we were told by counsel appearing now for the appellants that he will be able to refer to several instances during the course of this four day trial in which the appellants sought to adduce evidence relevant to that case but where objections to that evidence were upheld.

The particular argument I have been discussing is not yet the subject of a ground for appeal but that need not result in a striking out of the appeal. Clearly the appropriate course would be to permit an amendment to the notice of appeal to allow the appellants to advance the point.

In my opinion there is a sufficiently arguable case in this respect for it to be concluded for present purposes that the appellants have an arguable appeal, at least in relation to that component of $62,000. Accordingly, it cannot be said that this is one of those exceptional cases where this Court should strike out an appeal as an abuse of process or otherwise as having no prospects of success. The jurisdiction which the Court is being asked to exercise here is one, it has been said, to be exercised with great caution: see *von Risefer & Ors v The State of Queensland & Ors* [2005] QCA 136.

Accordingly, I would dismiss the application to strike out the appeal.

As to the application for security for costs, the respondent has submitted that this is a case in which security ought to be ordered largely because of what is said to be the relatively poor

case to be advanced by the appellants. I do not accept that the case is so relatively weak that security for costs ought to be awarded upon that basis.

It is also relevant in relation to this application for security that substantial costs have undoubtedly been caused for each side by this strike-out application, which has occupied most of a day of hearing and which must have required substantial and expensive preparation on each side, indeed something of the preparation that might be necessary for arguing the appeal itself.

In those circumstances and where the application for strike-out has failed, in my view the interest of justice do not favour the ordering of security for costs and I would refuse the respondent's application for security also.

The orders I would propose are that the respondent's applications be dismissed and that each party's costs of those applications be that party's costs in the appeal.

MUIR JA: I agree with the reasons of Justice McMurdo and with the orders he proposes.

This proceeding was always a fairly unlikely platform for a strike-out application. In order to succeed, the applicant had to advance those arguments which would have been advanced on the hearing of the appeal proper.

The bringing of the application had the potential to accelerate the determination of the appeal by quite a short period only and that advancement may be thought to be lacking in legitimacy. The application carried with it the potential which has eventuated for there to be two hearings instead of one, as Justice McMurdo has pointed out.

WHITE AJA: I agree with the reasons of Justice McMurdo and the additional observations of the Presiding Judge.

MUIR JA: The orders of the Court are that the application be dismissed, the respondent have leave to amend the notice of appeal on or before 5 December 2008 to encompass the grounds raised in argument today.

The respondent file and serve a further outline of submissions on or before 19 December 2008.

The applicant file and serve its further outline of submissions on or before 16 January 2009.

Each party's costs of and incidental to this application be its costs in the appeal.

Now, does anybody have any difficulty with that time table?

MR PEDEN: Only me, your Honour, for the obvious reason that I'm away over that Christmas vacation period. If we could have a little longer that would be appreciated.

MUIR JA: Well, there shouldn't be great difficulty, should there, Mr Stephens?

MR STEPHENS: No, your Honour.

MUIR JA: Because the appeal's not going to come on in January.

MR STEPHENS: No, your Honour.

MUIR JA: The 28th January. All right. Adjourn the Court.
