[2013] QCA 344

COURT OF APPEAL

FRASER JA

Appeal No 9606 of 2013
SC No 192 of 2005

SUNCORP METWAY LTD
ACN 010 831 722 **Applicant**

v

MORAY McINTOSH
as personal representative of the estate of
MARIA McINTOSH (deceased) **Respondent**

BRISBANE

WEDNESDAY, 20 NOVEMBER 2013

FRASER JA: The respondent has applied for orders that the appellants provide security for the respondent's costs of resisting the appellants' appeal.

The appellants owned improved real property and vacant land. In order to obtain the purchase price to buy a motel, they borrowed from the respondent a total amount of $1,660,000 in two loan transactions upon the security of all of that property. In proceedings in the Trial Division, the appellants claimed damages from the respondent of about $260,000 and they claimed to be relieved from what the respondent alleged was a substantial debt owing to it under the loan agreements and securities.

As a condition of one of the loan agreements, a commercial lending facility for about $400,000, that amount was to be repaid in full by 30 April 1999 from the sale of property.

The condition included the statement that "the bank is not prepared to extend the debt beyond this time and full clearance is expected". The appellants alleged that the respondent's local manager, Mr Bath, represented, immediately before the execution of the documents and the drawing down of the advance, that provided that the appellants placed one of the secured properties, the "citrus farm", on the market for sale, the bank would not enforce that condition because it was a "mere formality". Another condition in the respondent's letter of offer permitted the appellants to defer the payment of interest and principal for certain periods, at the expiry of which the interest accrued would be capitalised and the term of the facility would be extended by the length of the period "provided you obtain the prior written approval of the bank".

The appellants allege that the respondent's refusal to capitalise interest payments as requested on two occasions was unreasonable. The appellants then alleged that by a combination of those matters, they were in a position of economic disadvantage which they explained in detail in their pleading. The appellants allege that the respondent unconscientiously took advantage of the appellants' disadvantage, which the respondent had caused by treating the loans as being in default, imposing penalty interest, and appointing receivers to the security properties, thereby resulting in the incurring of substantial debts and expenses and ultimately the sale of the security properties.

The appellants' claims were rejected by the trial judge, who gave judgment in favour of the respondent on the counterclaim for about $440,000: [2013] QSC 255.

The court's discretion to order security for costs under r 772 of the *Uniform Civil Procedure Rules* 1999 is unfettered. Relevant considerations include the impecuniosity of an appellant, the fact that an appellant has already had a trial and lost, and the prospects of success on appeal: see *Murchie v Big Kart Track Pty Ltd (No 2)* [2003] 1 Qd R 528 at paragraph [6]. It is not in issue that if the appellants fail in their appeal, they will be unable to pay the respondent's costs of the appeal if ordered to do so.

In support of the appeal, Mr McIntosh has made written and oral submissions, in which he attests to the honesty of himself and his family members in advancing the claims. As I read

the judgment, the trial judge did not impugn the honesty of the witnesses but found that the evidence of the witnesses, insofar as it supported the claimed misrepresentation, was unreliable.

The respondent raises two main points about the appellants' prospects of success in the appeal. The first is that the appellants' notice of appeal seeks orders which were not sought at trial, namely, rescission of the original contract and damages of about $1 million, which the appellants allege was the value of their equity in the security properties at the time of the loans. Those claims do appear to be doomed to fail because they were not pleaded or litigated at the trial, but Mr McIntosh has said that if necessary, they will be withdrawn. The notice of appeal also claims "the reversal of the judgment handed down". Bearing in mind that the appellants are not legally represented, if the appeal were otherwise meritorious, I would not treat the irregular wording of this claim as an obstacle to the court granting the relief which the appellants sought at trial.

The respondent's more substantial point about prospects is that the appellants' claim was rejected on the basis of apparently reliable documentary evidence, the evidence of Mr McIntosh himself, and the trial judge's assessment that contrary evidence given by some of the appellants' witnesses was unreliable. A statement in paragraph 28 of Mr McIntosh's outline of argument that the only qualification upon the bank extending time for a payment was "so long as the bank could see that there were genuine efforts to sell" is inconsistent with a passage in his own evidence quoted by the trial judge: at paragraphs [53] and [54] of the reasons, the trial judge pointed out that the representation sworn to by Mr McIntosh different from the pleaded representation by the inclusion of the qualifications that an extension would be granted only if the motel was going satisfactorily and the accounts were in order. The trial judge had earlier referred to the context of a file note made by Mr Schaumberg, an area manager of the respondent, of a meeting between him, Mr Bath and Mr McIntosh. The file note recorded Mr Schaumberg responding to Mr McIntosh's reference to a different bank having approved a similar advance allowing him 12 months to sell his spare land that, "if we were to relent from an immediate sale, it would be for a period of no more than six months".

Furthermore, the appellants' outline of submissions itself refers to a subsequent letter by Mr McIntosh to the respondent of 29 June 1999, in which Mr McIntosh did not assert the pleaded representation, but rather the qualified representation that the appellants had been "given the understanding that favourable consideration would be given at the end of the six months to extend the time to sell if genuine efforts had been made to sell". As the trial judge observed at paragraph [61] of the reasons, the appellants' solicitors also wrote on 13 July 1999, asserting only that the representation was that the respondent "would look favourably at an extension". And as the trial judge also pointed out, at paragraph [53] of the reasons, the qualifications upon the alleged representation to which Mr McIntosh swore were strikingly similar to Mr Bath's letter of 4 August 1999 that "the only indication that was given to the McIntoshs' that this period of time given to sell the farm may be extended, was if in the event that the motel was trading profitably and all facilities were in order". It seems that it was not until a letter to the banking ombudsman on 7 August 1999 that Mr McIntosh asserted an unqualified representation by Mr Bath that the term would be extended at the end of the six months.

The trial judge referred at paragraph [52] of the reasons to evidence given by Mrs McIntosh that Mr Bath said words to the effect that the condition was only a formality and he was sure that the bank would defer it until such time as they had sold their real estate, but found that she was "unconvincing in rejecting the possibility that Mr Bath had qualified the representation". The trial judge referred also to evidence given by the appellants' sons of conversations they said they had had with Mr Bath. Mr James McIntosh gave evidence that Mr Bath told him that the appellants would have to sell one of their properties within six months, which the trial judge found to be inconsistent with the alleged representation. Mr Peter McIntosh gave evidence that Mr Bath stated the condition was a formality and he could guarantee that it would never be acted on. As to that, the trial judge rejected the evidence as not being a reliable recollection. The trial judge accepted the evidence of Mr Bath that, whilst he had no independent recollection of the conversation with the plaintiffs, he had no authority to make any such representation and there was no reason why he would have done so.

The trial judge referred to other evidence and ultimately held that the alleged representation was not made but that Mr Bath made a representation that the respondent would consider an extension of six months only if the appellants were attempting to sell their property, the motel was trading profitably and all the facilities were in order. The trial judge rejected the appellants' case that the respondent knew it was not possible for the appellants to sell their property within six months. The trial judge also held that the appellants were not in any position of "special" disadvantage at all, being well experienced in commerce and, at worse, being in an inferior bargaining position.

The finding that the pleaded representation was not made was in part based upon the trial judge's assessment of the reliability of evidence given by some of the witnesses. The appellants face substantial difficulties in fulfilling the necessary condition for a challenge to such a finding that the trial judge failed to use his Honour's advantage in seeing and hearing the witnesses giving evidence or that the evidence upon which the trial judge relied was inconsistent with incontrovertible facts or "glaringly improbable": see *Fox v Percy* (2003) 214 CLR 118 at paragraphs [26] to [27].

As to the appellants' contention that the respondent acted unconscionably in not deferring the payment of interest, the appellants' outline develops arguments that their inability to pay the interest was attributable to causes beyond their control, including devastating cyclonic weather, and that the motel business was demonstrably sustainable if the necessary deferral of the interest obligation were granted. These arguments do not identify error in the trial judge's reasons for rejecting the claims that the two pleaded requests for deferral of interest were unreasonably refused. The trial judge found that the respondent did not approve requests made by the appellants for interest payments to be deferred. The first refusal could not be regarded as unreasonable because it was made only within about three months after the loan arrangements were under way. The second request was not unreasonably refused because, by that time, the appellants had failed to sell their property by the 30 April 1999 deadline or by the 30 September 1999 extended deadline and had not agreed to a proposal made the respondent for a debt reduction.

The appellant has also filed an application to adduce fresh evidence. The fresh evidence is in the form of notes which Mr McIntosh told me had made himself. The application says that the documents could not be introduced into the trial because they were not uncovered until searches of documents following the death of Maria McIntosh in January of 2013. The purpose of seeking to adduce the documents in evidence is said to be to show that Mr Bath, who was accepted as an honest witness by the trial judge, was dishonest. The dishonesty was said to be illustrated by Mr Bath having put in figures he must have known to be incorrect in the loan application which he sent on to his superiors. The evidence sought to be adduced, however, does not show that the figures written down by Mr McIntosh were communicated to Mr Bath. Mr McIntosh told me that there was a communication by him of the figures to Mr Bath by the separate document, but that he did have that at the trial. Mr McIntosh said that it was not adduced in evidence or apparently used in cross-examination of Mr Bath because of legal advice. It is apparent that the evidence which is sought to be adduced does not satisfy the usual tests for the reception of fresh evidence in an appeal, one of those conditions being that the evidence could not have been obtained for use at the trial by due diligence. So the prospects of the application to adduce fresh evidence in the appeal being successful appear to be remote.

In summary, whilst my assessment is necessarily provisional and on limited material, the appellants' prospects of success in the appeal appear to be unpromising.

There has been no delay in applying for security such as would suggest that it ought not to be granted. The judgment under appeal was given on 19 September 2013. The notice of appeal was filed on 11 October 2013 and the application for security was filed on 5 November 2013. Having regard to the limited significance of suggestions that the respondent is to blame for the appellants' impecuniosity in an appeal (see *Natcraft Pty Ltd v Det Norske Veritas & Anor* [2002] QCA 241 at paragraphs [2] and [9]), the combination of the appellants' impecuniosity and their apparently unpromising prospects of success in the appeal persuades me that security should be ordered, notwithstanding the possibility that this might result in the stifling of the appeal.

A costs assessor has estimated the respondent's recoverable costs, assessed on the standard basis, in contesting the appeal at $21,121.70, on the basis of an appeal hearing occupying two hours. There is nothing to indicate any unreasonableness in that estimate.

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FRASER JA: I order that by 4 pm on Wednesday, 18 December 2013 the appellants provide security for the respondent's costs of the appeal in the amount of $21,121.70 in a form satisfactory to the registrar. I also order that until such security is provided the appeal is stayed so far as it concerns steps to be taken by the respondent.

...

FRASER JA: I order that the costs of the application be costs in the appeal.

You understand, Mr McIntosh, that the effect of those orders is that if the security is not provided by that date, then the appeal will be stayed and it will be stayed until the security is provided. And you should be aware that if the security is not provided by the time that I mentioned, 18 December, then it would be open after that time for the bank or for the Court, on its own motion, to strike out the appeal or dismiss the appeal.