

SUPREME COURT OF QUEENSLAND

CITATION: *Bunnings Group Ltd v Asden Developments & Ors* [2013] QCA 387

PARTIES: **BUNNINGS GROUP LTD**
ACN 008 672 179
(appellant)
v
ASDEN DEVELOPMENTS PTY LTD
ACN 115 851 833
(first respondent)
MELINDA JAYNE NICHOLS
(second respondent)
PETER NICHOLS, DEBRA NICHOLS,
GEORGE NICHOLS, JONATHAN PAUL McLEOD &
BILL KARAGEOZIS
(third respondents)

FILE NO: Appeal No 4031 of 2013
SC No 2798 of 2011

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 December 2013

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Muir and Gotterson JJA and Margaret Wilson J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The third respondents pay the appellant’s costs of the appeal.**
2. The third respondents (other than Mr Karageozis) pay the appellant’s costs of and incidental to the application filed on 21 March 2013, except insofar as that application concerned the second respondent only.
3. No order as to the costs of the cross-application filed by leave on 9 April 2013.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the parties made written submissions on the costs of the appeal and the costs of the

applications before the primary judge – where the appellant succeeded on the issues argued on the appeal – whether the third respondents should be ordered to pay the appellant’s costs of the appeal – where the primary judge made orders favouring the appellant on its claim against the second respondent, which were not the subject of the appeal – where the third respondents (other than Mr Karageozis), although not originally named in the primary proceeding, attended, were heard, and urged the primary judge to dismiss the parts of the appellant’s application relevant to the appeal – where this Court determined that the primary judge erred in his determination of those issues – whether the third respondents should be ordered to pay the appellant’s costs of the primary application filed on 21 March 2013 and the third respondents’ cross-application filed 9 April 2013

COUNSEL: No appearance by the appellant, the appellant’s submissions were heard on the papers
 No appearance for the first and second respondents
 No appearance by the third respondents, the third respondents’ submissions were heard on the papers

SOLICITORS: Bennett & Philp Lawyers for the appellant
 No appearance for the first and second respondents
 Mills Oakley Lawyers for the third respondents

- [1] **MUIR JA:** I agree with the reasons of Margaret Wilson J and with the orders she proposes.
- [2] **GOTTERSON JA:** I agree with the orders proposed by Margaret Wilson J and with the reasons given by her Honour.
- [3] **MARGARET WILSON J:** The parties have made written submissions on the costs of the appeal and the costs of the applications before the primary judge.

Submissions on the costs of the appeal

- [4] Counsel for the appellant submitted that his client succeeded on the appeal in the face of opposition from the third respondents, and that accordingly the third respondents should pay the costs of the appeal.
- [5] Counsel for the third respondents submitted that there should be no order for the costs of the appeal. He made these points –
- (a) The appellant did not seek a stay of the primary judge’s order. In consequence, lots 1, 4 and 5 were sold and the net proceeds were “dissipated” by the statutory trustees;
 - (b) In the notice of appeal, the appellant sought (inter alia) an order setting aside paragraph 3 of the primary’s judge’s order which was for the removal of the caveat. That aspect of his Honour’s order was not set aside on appeal;
 - (c) As the first respondent is in liquidation and the second respondent is bankrupt, there would be no utility in the further prosecution of the proceedings even if leave were granted.

Discussion

- [6] The third respondents were three of the former tenants in common and the statutory trustees for sale.
- [7] The order for the removal of the caveat was not in issue on the hearing of the appeal, as counsel for the appellant did not submit that it was wrongly made.
- [8] The appellant succeeded on the issues argued on the appeal. The primary judge's order had full force and effect until set aside on appeal. In the absence of a stay of that order, the moneys in the solicitors' trust account were released and on-paid by the statutory trustees pursuant to his Honour's order. Three of the third respondents were the recipients of those moneys, presumably after deduction of the expenses of the other third respondents who were the statutory trustees.
- [9] The utility of the further prosecution of these proceedings is not relevant to the costs of the appeal.
- [10] In the circumstances, there should be an order that the third respondents pay the appellant's costs of the appeal.

Submissions on costs at first instance

- [11] There were two applications before the primary judge –
- (a) application by the appellant filed on 21 March 2013 seeking judgment against the second respondent and declarations and consequential orders in relation to its interest as chargee in moneys held in a solicitors' trust account;
 - (b) cross-application by the third respondents (other than Mr Karageozis) filed by leave on 9 April 2013 seeking the addition of Mr Karageozis as a statutory trustee, the removal of the caveat, and the release of the moneys held in the solicitors' trust account.
- [12] On the appellant's application, the primary judge made orders favouring the appellant on its claim against the second respondent, although his Honour did not make any order as to costs. Those orders were not the subject of the appeal.
- [13] The remainder of the appellant's application concerned the issues argued on the appeal. Although not originally named in the proceeding, the third respondents (other than Mr Karageozis) attended, were heard, and urged the Court to dismiss that part of the application.
- [14] The cross-application was unopposed in so far as it related to the addition of Mr Karageozis as a statutory trustee.¹
- [15] Prior to the hearing, the appellant had been reluctant to withdraw the caveat. Despite this reluctance, it had withdrawn the caveat as against two of the lots to allow them to be sold, and enough of the sale proceeds to meet the amount then owing to the appellant had been paid into a solicitors' trust account. At the hearing, the appellant indicated its willingness to withdraw the caveat as against the

¹ *Bunnings Group Limited v Asden Developments Pty Ltd & Anor* [2013] QSC 99 at 1-5; AR 14.

remaining three lots, so long as its interests were protected.² The appellant opposed the release of the moneys in the solicitors' trust account. In this context, counsel for the appellants has submitted to this Court that the removal of the caveat was not opposed, while counsel for the third respondents has submitted that it was opposed. Be that as it may, the issues argued on the appeal were raised before the primary judge on both the application and the cross-application. This Court has determined that his Honour erred in his determination of those issues.

- [16] Counsel for the appellant submitted that the third respondents should pay the appellant's costs of and incidental to the application filed on 21 March 2013, except insofar as the application concerned the second respondent only, and that there should be no order as to the costs of the cross-application.
- [17] Counsel for the third respondents submitted that the third respondents should have their costs of the cross-application. He submitted that the cross-application had to be brought to have the caveat removed so that lots 1, 4 and 5 could be sold. He submitted that "no further costs were incurred in contending that the funds held in the [solicitors'] trust account be paid to the third respondents."

Discussion

- [18] As I have indicated, by the time the applications came before the primary judge, the appellant did not oppose an order for the removal of the caveat so long as its interests were protected. The real issue was the appellant's claim to have a charge on the proceeds of sale of the five lots. That issue arose on both the application and the cross-application, and it was the nub of the appeal.
- [19] Thus, the appellant was largely successful on both its application and the cross-application. The applications raised an important point of principle, although they concerned a comparatively modest amount of money.
- [20] In all the circumstances, there should be an order that the third respondents (other than Mr Karageozis) pay the appellant's costs of and incidental to the application filed on 21 March 2013, except insofar as that application concerned the second respondent only, and there should be no order as to the costs of the cross-application filed by leave on 9 April 2013.

Orders

- [21] I would order –
- (i) that the third respondents pay the appellant's costs of the appeal;
 - (ii) that the third respondents (other than Mr Karageozis) pay the appellant's costs of and incidental to the application filed on 21 March 2013, except insofar as that application concerned the second respondent only;
 - (iii) that there be no order as to the costs of the cross-application filed by leave on 9 April 2013.

² AR 5, AR 8.