[2018] QCA 204

COURT OF APPEAL

McMURDO JA

Appeal No 5508 of 2018
DC No 165 of 2016

DMITRY BRODSKY **FIONA KATE HEALY**	**Respondents/Applicants**
v	
ALAN NEVILLE WILLI **ANN ROBYN WILLI**	**Applicants/Respondents**

BRISBANE

FRIDAY, 31 AUGUST 2018

JUDGMENT

McMURDO JA: The proceeding in this Court, which is brought by Mr and Mrs Willi, seeks leave to appeal against a judgment of the District Court in which damages were ordered against Mr and Mrs Willi in a total amount of just under $50,000. The cause of action upon which the plaintiffs in that proceeding, who are Mr Brodsky and Ms Healy, and who I shall call the respondents, was for damages for trespass to their land. The dispute between the parties is one over the respective rights and duties out of an easement in which the respondents own the [indistinct] tenement, and Mr and Mrs Willi own the dominant tenement.

The trial Judge found that things were done by Mr and Mrs Willi that went beyond their entitlement under that easement, and that they had committed a trespass for which there should be awards of damages. They – that is, the respondents – were awarded a sum of less

than $3,000, by way of compensatory damages, but larger amounts for aggravated and exemplary damages.

The proposed appeal in this Court requires leave, because the amount of the judgment was within the jurisdictional limit of the Magistrates Court. The further difficulty for Mr and Mrs Willi is that they did not apply for leave to appeal within the prescribed time, and so they must also seek an extension of time to make that application for leave to appeal. It is unnecessary today to discuss the basis for that application for an extension of time.

The matters before the Court today are the application for leave to appeal and, it would seem to [indistinct] necessarily, the application for an extension of time, and a cross-application by the respondents – that is, Mr Brodsky and Ms Healy – seeking to strike out the proceeding by Mr and Mrs Willi in this Court, and seeking further orders of the kind made in this Court in *von Risefer v Permanent Trustee Co Ltd* [2005] 1 Qd R 681.

The respondents, by their counsel, submit that the proposed grounds for appeal, on their face, demonstrate that the appeal has no prospects of success. I accept that much of the material which has been filed by Mr and Mrs Willi has no apparent relevance to their proposed appeal. However, within the grounds which they have stated for their proposed appeal, there is a complaint that the trial Judge erred in finding that Mr and Mrs Willi committed the tort of trespass by undertaking the subject work, and in not accepting the case for Mr and Mrs Willi at the trial, that they were acting under their rights, according to the terms of the easement.

I am unable to assess the merit of that ground of appeal, because, although I have read the reasons for judgment, I do not have before me the terms of the easement, save insofar as some of those terms were set out in the reasons for judgment, and, most importantly, I do not have before me the evidence at the trial. That means that the present applications can only be resolved on the basis of the other argument for the respondents, which is that there have been procedural defaults by Mr and Mrs Willi in the prosecution of the case in this Court.

It appears that the background to the strike out application, in that respect, was what occurred at a review hearing on 19 July 2018, when the appellants, – when Mr and Mrs Willi, were late

in arriving for the mention of their matter. It was that non-attendance when the matter was called – before, I should add, they appeared later in the morning – that the suggestion came from the Court that the respondents bring an application to strike out the appeal.

The present position, so far as procedural steps are concerned, is that Mr and Mrs Willi are yet to file a list of authorities, which was due on the 20th of June, and to compile the record book, which was due on the 16th of August. There was also a complaint by counsel for the respondents that they had not filed a draft index for the record book, which had to be done by the 1st of August. However, it emerged that Mr and Mrs Willi had filed the draft index on the 18th of June. The problem was, however, that a copy of it had not been given to the respondents (as counsel for the respondents says, although that is disputed by Mr and Mrs Willi).

Be that as it may, there are those two procedural steps, the list of authorities and the preparation of the record book, which must be taken. And Mrs Willi, speaking for her side, agreed that those matters could be remedied by the 21st of September. Those procedural defaults, in my view, do not warrant the drastic step of striking out the proceeding by which Mr and Mrs Willi would seek to challenge judgment against them.

As for the application for orders of the kind made in *von Risefer*, there is evidence in support of that application of other proceedings which Mr and Mrs Willi have recently brought. But importantly, in *von Risefer*, the orders were made in the context of the Court's conclusion that the appeal in that case was without, as Justice Keane described it, "discernible merit of any kind".[1] As I have explained earlier, I cannot reach that conclusion today, and counsel for the respondents correctly conceded that to be so.

Therefore, the outcome today should be that the application to strike out the appeal or the application for leave to appeal should be dismissed. That, of course, does not deny the respondents the opportunity, if they are so advised, to move the Court for that order again, in the light of any future procedural default. The orders made today will not dispose of the

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1 [2005] 1 Qd R 681 at [9].

application for leave to appeal or the related application for an extension of time in which to seek leave to appeal.

Paragraph 2 of the application filed by the respondents sought what I have called the *von Risefer* orders. I think it is appropriate that that part of the respondents' application be adjourned to a date to be fixed.

The orders will be that paragraph 1 of the application filed on 25 July 2018 by Mr Brodsky and Ms Healy be dismissed and paragraph 2 of that application be adjourned to a date to be fixed. Subject to any further submission, I would order that the costs of each party of that application be made that party's costs in the application for leave to appeal.

The Court will direct that the applicants for leave to appeal file and serve their list of authorities by 21 September 2018, and that by the same date, they file and serve the record book. It will be further directed that the application for leave to appeal and for an extension of time in which to make that application be heard by a Court comprising of three Judges on a date to be fixed by the Court or the Registrar.