[2003] QSC 342

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Transcript of Proceedings

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Date: 24 September, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No S3836 of 2002

DALLAS COOPER HAWKINS	First Plaintiff/First Respondent
and	
LINDA ROSEMARY IZZARD	Second Plaintiff/Second Respondent
and	
PERMARIG PTY LTD (ACN 086 570 584)	First Defendant/Applicant
and	
BRISBANE CITY COUNCIL	Second Defendant
and	
END FS PTY LTD (ACN 007 015 965) (FORMERLY KNOWN AS FISHER STEWART PTY LTD) (IN LIQUIDATION)	First Third Party
and	

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FISHER STEWART QUEENSLAND PTY LTD
(ACN 072 942 520) Second Third Party

BRISBANE

..DATE 17/09/2003

JUDGMENT

HIS HONOUR: This is an application by the first defendant, supported by the second defendant, for an order that paragraph 31(a) of the plaintiffs' statement of claim be struck out and for consequential orders.

The defendants rely on rules 162 and 171 of the Uniform Civil Procedure Rules 1999. The sum sought in the plaintiffs' action against each defendant is $671,763.61, claimed as damages for breach of contract in the case of the first defendant and as damages for breach of duty in the case of the second defendant. Included in the $671,763.61 in each case is $161,729.81 particularized in paragraph 31(a) as "costs associated with proceedings in the Planning and Environment Court".

In their statement of claim, the plaintiffs allege that on or about 7 April 2000 they agreed in writing to purchase contaminated land in a subdivision at Rocklea from the first defendant; that the second defendant had approved the first defendant's application to subdivide land which included the land purchased by the plaintiffs, subject to certain conditions; that the first defendant failed to comply with those conditions; that the second defendant did not take any, or sufficient, steps to require or ensure that the first defendant complied with the conditions of its approval and failed or refused to consider whether to require or ensure such compliance; that the first defendant was guilty of breaches of its contract with the plaintiffs and the second defendant was in breach of duties it owed to the plaintiffs;

and that as a result of those breaches the plaintiffs had suffered loss and damage of $671,763.61.

In paragraphs 16, 17 and 18 of their statement of claim, the plaintiffs allege that the first defendant conducted earthworks on the land in such a way as to fail to comply with the conditions of the approval of the subdivision. Paragraphs 21 and 22 of the statement of claim are as follows:

> 21. On 10 November 2000 the plaintiffs commenced proceedings in the Planning and Environment Court at Brisbane in Planning and Environment Appeal No 4516 of 2000:
>
> (a) as a consequence of the matters referred to in paragraphs 16, 17 and 18 herein;
>
> (b) in order to protect their interest in the land;
>
> (c) following demand made upon the first defendant to rectify its non-compliance with the approval package, which demand was refused;
>
> (d) following demand made upon the second defendant to ensure the first defendant's compliance with the approval package, which demand was refused.
>
> 22. On 30 March 2001 the Planning and Environment Court:
>
> (b) made a declaration that conditions [specified] of the approval package had not been complied with;
>
> (c) made findings that the first defendant:
>
> (i) had breached the conditions of approval
>
> (ii) had committed development offences pursuant to s4.3.3(1) of the Integrated Planning Act 1997 (Qld);

(d) ordered the first defendant to remedy its offences and comply with certain other orders requiring the undertaking of certain earthworks;

(e) made the orders referred to herein despite the first defendant contending and calling evidence to the contrary during the hearing of the proceedings;

(f) made the orders referred to herein despite the second defendant contending and calling evidence to the contrary during the hearing of the proceedings.

It is common ground that Brabazon D.C.J., who sat in the Planning and Environment Court to hear and determine the plaintiffs' proceeding in that Court, made no order as to costs. That was because of the application of s.4.1.23 of the Integrated Planning Act 1997 to the case. That section, so far as it is relevant, is as follows:

4.1.23 Costs

(1) Each party to a proceeding in the court must bear the party's own costs for the proceeding.

(2) However, the court may order costs for the proceeding (including allowances to witnesses attending for giving evidence at the proceeding) as it considers appropriate in the following circumstances -

(a) the court considers the proceeding was instituted merely to delay or obstruct;

(b) the court considers the proceeding (or part of the proceeding) to have been frivolous or vexatious;

(c) a party has not been given reasonable notice of intention to apply for an adjournment of the proceeding;

(d) a party has incurred costs because the party is required to apply for an adjournment because of the conduct of another party;

(e) a party has incurred costs because another party has defaulted in the court's procedural requirements;

(f) without limiting paragraph (d), a party has incurred costs because another party has introduced (or sought to introduce) new material;

(g) if the proceeding is an appeal against a decision on a development application and the applicant did not, in responding to an information request, give all the information reasonably requested before the decision was made;

(h) the court considers an assessment manager, a referral agency or a local government should have taken an active part in a proceeding and it did not do so;

(i) an applicant, submitter, referral agency, assessment manager or local government does not properly discharge its responsibilities in the proceedings.

It is then mandatory that each party to a proceeding in the Planning and Environment Court bear the party's own costs unless the discretion provided for in section 4.1.23(2) is

successfully invoked. It is common ground that no application was made to his Honour under the latter subsection nor was it suggested, I should record, that there had been any malice in the way in which the defendants conducted their cases before his Honour.

Since sub-s.2 of section 4.1.23 of the Integrated Planning Act had no application to the proceedings before his Honour, it follows that the requirement that each party bear the party's own costs applied. On behalf of the defendants it was argued that this Court could not now entertain a claim by the plaintiffs to a sum as damages the award of which would result in their not bearing their costs of the proceedings before the Land and Environment Court. It would follow that paragraph 31(a) of the statement of claim should be struck out.

I should record here that it was not suggested on behalf of the plaintiffs that there was any discretionary consideration that could result in the refusal of this application if the defendants' argument were to be held correct in law.

The defendants relied on the principle explained in *Anderson v. Bowles* (1951) 84 C.L.R. 310 in which a landlady brought an action against a former tenant for damages which included mesne profits and a sum for expenses she had incurred by way of costs of legal proceedings she had taken to recover possession of the premises. Legislation that applied to the earlier proceedings provided, however, that no costs should be allowed in them. It was held that that prohibition prevented

the landlady's recovering the costs as damages in the subsequent proceedings. Dixon, Williams, Fullagar and Kitto JJ. explained that result as follows:

> "A question then arises as to the measure of the damages. In an action to recover mesne profits, and presumably in an action for breach of the implied condition that a lessee shall deliver up the demised premises at the termination of his tenancy, the lessor is entitled to include in the damages the costs, charges and expenses which are incurred in recovering possession. In the days when the power of the courts to award costs did not cover all proceedings the expenses of necessary proceedings in which such costs could not be awarded might be included in the assessment of the damages. At common law a court of error had no power to award costs upon any writ of error. By 8 & 9 Wm. 3, c. 11, s. 2, a partial alteration in the law was made, by which if the writ of error failed the defendant in error might recover his costs against the plaintiff in error. No provision, however, was made for costs where a judgment was reversed on error: see *Wyvil v. Stapleton* [(1724) 1 Strange 615; 93 E.R. 735], where the court remarked that the statute extended only to the case of affirmance of a judgment and that very reasonably; for why should any man in the case of reversal pay costs for the error in the court below? See further *Bell v. Potts* [(1804) 5 East 49; 102 E.R. 987]. In *Nowell v. Roake* [(1827) 7 B&C 404; 108 E.R. 774] it was decided that the landlord who had incurred the costs of the reversal in error of a judgment against him below, in the course of securing the ejectment of the tenant, could include the costs of the writ of error in the damages claimed. 'These costs', said Lord *Tenterden* C.J., 'are the consequence of keeping the plaintiff wrongfully out of possession. I see no objection to the plaintiff's recovering them as between attorney and client'.
>
> In the present case the plaintiff seeks to apply the foregoing rule to the costs of the proceedings under the Landlord and Tenant Regulations which ended in the ejectment of James. Regulation 75, corresponding with s.62 of the Act, provides, however, that no costs shall be allowed in any proceedings in relation to which the Part applies not being proceedings in respect of an offence. This is a legislative declaration that the parties to proceedings for the recovery of possession or proceedings arising thereout shall not be liable to one another for the costs of those proceedings. In the face of this legislative declaration can costs be properly included in the damages or mesne profits? It is a general rule that where it is sought to include costs incurred in other proceedings in the damages arising upon a cause of action, costs shall not be included, if as a matter of judicial determination or by a positive rule of law they are treated as costs which should be borne by

> the party suing. Accordingly it is not possible to recover as part of such damages the difference between party and party costs awarded to the plaintiff in the original litigation and the costs as between solicitor and client which he has incurred: *Barnett v. Eccles Corporation* [(1900) 2 Q.B. 423, at p.428]. Further, if costs are expressly withheld by the court in the original proceeding none can be recovered in the action for damages brought by the plaintiff from whom they were so withheld: *Loton v. Devereux* [(1832) 3 B. & Ad. 343; 110 E.R. 129], where Lord *Tenterden* C.J. said: 'In such a case the Court have jurisdiction to say definitely whether there shall or shall not be costs'. In *Malden v. Fyson* [(1847) 11 Q.B. 292, at p.301; 116 E.R. 486, at p.489] Lord *Denman* C.J. said: 'And this principle was admitted, in general, to apply; so that, if any costs were awarded, nothing beyond the sum taxed according to the rules of the Court could be recovered as damages; or, if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in any other Courts.' See, further, *Pritchet v. Boevey* [(1833) 1 C. & M. 775; 149 E.R. 612].
>
> The legislature having determined that costs shall not be recoverable in proceedings of the character now in question, it would be contrary to the principles which these cases exemplify if they were included in the damages and thus were made recoverable by a side wind. The case is not like *Nowell v. Roake* depending upon a rule of the common law which simply ignored costs of legal proceedings of the character in question. It is one where the legislature, having considered whether in such proceedings costs should or should not be awarded, has expressed its conclusion in a definite provision. This should stand on the same footing as a judicial pronouncement upon the same question and as the rule that the difference between party and party costs judicially awarded and costs as between solicitor and client are not recoverable. For these reasons the costs of the proceedings should be excluded from the calculation of the damages." (pp. 322-324)

This case appears to me to fall into the same category as *Anderson v. Bowles*. It is unlike *Nowell v. Roake*, as explained by their Honours. The recent case of *Union Discount Co. Ltd* v. *Zoller* [2002] 1 W.L.R. 1517 is the same in essence, as *Nowell v. Roake*. This case is not in the same category as *Pritchet v. Boevey* in which the judge in an earlier proceeding, a successful application by the plaintiff for

discharge out of custody following an illegal arrest, made no adjudication as to the costs although he had jurisdiction to do so. It was held subsequently that the plaintiff could recover in an action for trespass and false imprisonment his costs of the application as special damages. In this case there was no adjudication, nor was there any jurisdiction to make one. This case may also be distinguished from those in which statutory provisions have been construed as not applying to cases in which a party has behaved maliciously, see *Coleman v. Buckinghams Ltd* [1964] N.S.W.R. 363 at p.369 per Herron C.J. and Walsh J.

Mr Anderson, for the plaintiffs, submitted that the principle explained in *Anderson v. Bowles* is confined to cases in which - as he put it - "the first proceedings are a necessary part of the cause of action in the second proceeding". It may be argued that *Anderson v. Bowles* was not such a case, but, in any event, that submission ignores what Mr Daubney, for the first defendant, aptly described as the "legislative prohibition" in s.4.1.23. Mr Anderson also argued that the principle explained in *Anderson v. Bowles* was restricted to cases "in which...the general policy of not reagitating earlier jurisdictional determinations...would prevent any further consideration of what is really the very same question". That argument, too, ignores the legislative prohibition in s.4.1.23.

It follows that, in my opinion, the defendants are entitled to the relief they seek.

...

HIS HONOUR: There is power to award costs on the indemnity basis, but, since my decision on the application was to the effect that there was no reasonable cause of action in relation to the damages claimed in respect of the costs of proceedings in the Planning and Environment Court and since a proper argument was advanced in support of that part of the plaintiffs' claim, I am not persuaded that the plaintiffs should be visited with the extra burden of paying costs to the first defendant on the indemnity basis.

As for the costs of the second defendant, there was no formal application before the Court by the second defendant, but its participation in the hearing of the application was not objected to on behalf of the plaintiffs and it was clearly desirable that the second defendant be heard. In those circumstances, I think the second defendant should be awarded its costs sought on the application.

...

HIS HONOUR: I order that paragraph 31(a) of the statement of claim be struck out.

I order that the plaintiffs pay to the defendants their costs of and incidental to the application to be assessed on the standard basis.
