

SUPREME COURT OF QUEENSLAND

CITATION: *Sorbello & Ors. v. Sorbello & Anor.* [2003] QSC 383

PARTIES: **GINA SHEZ MARIA SORBELLO, JAI DESMOND SORBELLO and ANDRE GIOVANI SORBELLO (by his litigation guardian BERYL EMILY ANDERSON)**
(plaintiff)
v.
JOHN SORBELLO
(first defendant)
AND
CROWN IMPORTS INTERNATIONAL PTY LTD
A.C.N. 070 946 799
(second defendant)

FILE NO: 4483 of 2003

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 12 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 22 August 2003

JUDGE: Helman J.

CATCHWORDS: PRACTICE AND PRACTICE – striking out of claim and statement of claim – whether reasonable cause of action disclosed.

COUNSEL: N.J. Thompson for the plaintiff
R.J. Clutterbuck for the defendants

SOLICITORS: Gray’s Professional Services Group for the plaintiff
Arcuri Lawyers for the defendants

- [1] This is an application by the defendants pursuant to rule 171 of the *Uniform Civil Procedure Rules* 1999 that the plaintiffs’ claim and statement of claim filed on 22 May 2003 be struck out as disclosing no reasonable cause of action, or as unnecessary or scandalous, or as being maintained frivolously or vexatiously or as being otherwise an abuse of the process of the court.
- [2] The plaintiffs are children of the first defendant born of his union with Debbie Gay (or Gai) Anderson whom he married on 15 September 1979 and who died of cancer on 17 November 1995. He remarried in February 1998. The first, second, and third plaintiffs were born on 14 November 1980, 22 March 1983, and 30 June 1994 respectively, so that only the third plaintiff has not yet attained the age of majority. His litigation guardian is his maternal grandmother, who the evidence shows is

antagonistic towards the first defendant and who is party to proceedings concerning the third plaintiff against the first defendant in the Family Court of Australia. The first defendant is the sole director and secretary of the second defendant, in which shares are held by him and the first plaintiff. The first defendant holds ninety-eight of ninety-nine issued shares.

- [3] On 26 October 1995 the deceased made a will in which she appointed the first defendant executor and trustee of her estate and in which she left the whole of her estate, real and personal, to him. At the deceased's death there was in existence a life assurance policy in the sum of \$150,000 in respect of her life, and she was a joint tenant with the first defendant of land on which the matrimonial home stood at 27 Pintail Crescent, Burleigh Waters. The plaintiffs' proceeding concerns \$100,000 of the proceeds of the life policy which were paid to the first defendant and the deceased's share in the land.
- [4] The plaintiffs bring their claim relying on an alleged agreement between the deceased and the first defendant made in 1995 after the deceased had been diagnosed as suffering from terminal cancer. The plaintiffs allege that under the terms of the agreement the first defendant promised to hold \$100,000 of the proceeds of the assurance policy for the benefit of the plaintiffs and the first defendant was also to hold the deceased's share in the land at 27 Pintail Crescent for the benefit of the plaintiffs. The plaintiffs allege that the agreement was a contract for their benefit within the terms of s. 55 of the *Property Law Act 1974* which rendered the first defendant trustee of the \$100,000 and of the deceased's interest in the land. The plaintiffs allege that they have accepted the first defendant's promises and that the first defendant has failed - not completely, but to a large extent - to perform the duties he undertook by making those promises. The second defendant, the plaintiffs allege, was knowingly party to the first defendant's breaches of trust. The plaintiffs claim specific performance of the agreement, a declaration that certain real property held by the defendants and the first defendant's second wife is held on trust for the plaintiffs, equitable compensation, and other, ancillary, relief.
- [5] In the amended defence filed on behalf of the defendants on 4 August 2003 they deny the agreement alleged by the plaintiffs asserting that in 1995 all that was agreed between the deceased and the first defendant was that a sum of \$100,000 would be earmarked for, *inter alia*, the maintenance and support of the plaintiffs to be divided equally among them and to be paid by the first defendant to them at times and in sums to be determined in his absolute discretion: see paragraphs 5(a) and 19(b) of the amended defence. In paragraph 10(a) the first defendant pleads that any equitable relationship created for the benefit of the plaintiffs was discretionary.
- [6] In a reply to the amended defence filed on 19 August 2003 the plaintiffs adopted and relied upon the admissions contained in the amended defence 'and by operation of the Uniform Civil Procedure Rules' and otherwise joined issue with the defendants.
- [7] On behalf of the defendants several arguments were advanced in support of the application.
- [8] First was an argument advanced in reliance on s. 28(e) of the *Succession Act 1981*, which provides that, unless a contrary intention appears by a will, a disposition of

property without words of limitation, whether to a person beneficially or as executor or trustee, is to be construed as passing the whole estate or interest of the testator therein. It was submitted that, whatever may have been the position before the death of the deceased, it was overtaken by the will, the 'express instrument' beyond which one cannot go as an indication of the wishes of the deceased. An obvious answer to that submission is that the will may not necessarily have been inconsistent with the prior establishment of a trust in respect of the deceased's property; but, further, it may be, once the facts of the case are examined in more detail, that the proceeds of the assurance policy were not disposed of by the will. The deceased's legal joint interest in the real property would have passed to the first defendant by the right of survivorship, although it may be that the agreement between the deceased and the first defendant had the effect of severing the joint tenancy in equity: see MacDonald, McCrimmon, Wallace, and Stephenson, *Real Property Law in Queensland* (1998), p. 263.

- [9] Secondly, it was argued that the trust, if there was one, was on the pleadings, discretionary. Particular reliance was placed upon the inadequacy of the reply in meeting that allegation in the defence. Although it was conceded on behalf of the plaintiffs that some amendments to the reply may be required, it is not clear from what is before me that it could not be established that the agreement between the deceased and the first defendant alleged by the plaintiffs was not discretionary in the sense contended for by the defendants. There is sufficient to warrant further examination of the facts of the case at a trial, in my view.
- [10] Thirdly, it was submitted that the first defendant's alleged promise relied on by the plaintiffs was void, voidable, or unenforceable on the principles explained in *Countess of Bective v. Federal Commissioner of Taxation* (1932) 47 C.L.R. 417, in particular at p. 420; but the precise applicability of those principles to the facts of this case must await a full examination of those facts.
- [11] Fourthly, it was argued that formal requirements for the creation of the plaintiff's alleged interests in the land have not been met. The defendants have not however pleaded defences relying on those inadequacies and consequently the plaintiffs have not had an opportunity to meet such defences.
- [12] Fifthly, an argument in reliance on s. 55(2) of the *Property Law Act* that the plaintiffs could not establish that the deceased had not discharged the first defendant from any duties they rely on has no merit, since there is nothing before me, including any pleading to that effect, to suggest that such a discharge was given.
- [13] In the result I am not persuaded that it has been demonstrated that the plaintiffs' proceeding should be brought to a summary end. I shall dismiss the application. I shall invite further submissions on any directions that may be required and costs.