[2018] QCA 80

COURT OF APPEAL

MORRISON JA
PHILIPPIDES JA
BOWSKILL J

Appeal No 13105 of 2017
DC No 131 of 2017

PAUL DAVID POWER	**First Appellant**
PDP GROUP (QLD) PTY LTD **ACN 069 059 294**	**Second Appellant**
v	
BETTERGROW PTY LIMITED **ACN 062 888 117**	**Respondent**

BRISBANE

THURSDAY, 3 MAY 2018

JUDGMENT

MORRISON JA: The appellants, Power and PDP Group, sued the respondent, Bettergrow, Paul Schembri and his wife, Lorraine Schembri, in respect of alleged breaches of an Australian patent. The central relief sought in the proceedings was the delivery-up of a machine described as the Mark III, which was in the possession of Paul Schembri. The contention was that Schembri's possession and use of the Mark III breached the appellants' rights under the patent. Bettergrow counterclaimed, seeking revocation of the patent.

The litigation was compromised and a settlement deed was entered into between all the relevant parties. By the time of the events relevant to these proceedings, a family dissolution meant that Mrs Schembri was no longer involved in her husband's business activities. She was, however, a party to the settlement deed. In summary, it was agreed that Schembri could retain possession of the Mark III and use it under licence from Power and PDP Group. In that respect PDP Group and Power granted Schembri an irrevocable licence to use the Mark III, and to replace it with a similar machine. Schembri was to pay a licence fee and provide various invoices in respect of the product needed for the use of the machine.

Subsequently, PDP Group and Power issued proceedings in the District Court contending that Schembri had breached the settlement deed by failing to pay the licence fee, not giving requisite notice of the appointment of additional suppliers and not giving the appropriate invoices.

No breach was alleged against Bettergrow, but it was said to be "jointly and severally liable pursuant to the deed". Bettergrow sought summary judgment, which was granted and the claim against it was dismissed. From that decision PDP Group and Power have appealed.

The Settlement Deed

The recitals to the settlement deed identified the litigation over the alleged breaches of the patent and that relief had been sought against, *inter alia*, Bettergrow and Schembri. Recital F recorded that Schembri "has operated a business using the Mark III as a sole trader" since December 2013. Recital G recorded that the parties "have agreed to settle all disputes and matters in issue the subject of or in any way related to the proceedings without admission of liability on the terms of this Deed of Settlement".

The operative provisions of the deed of settlement were as follows:

(a) Schembri was entitled to retain possession of and continue to use the Mark III under licence from PDP Group and Power: clause 2.1;

(b) Schembri was granted an irrevocable licence to use the Mark III, and the ability to build and use a replacement for the Mark III, as long as the replacement was used on the same terms: clauses 4.1 and 4.2;

(c) the parties were required to keep the terms of the deed confidential: clause 2.2 and clause 7.1;

(d) within 14 days of the execution of the deed, the parties were to sign a Notice of Discontinuance in respect of all proceedings and counterclaims, on the basis that there be no order as to costs: clause 3.1;

(e) Schembri acknowledged that PDP Group and Power had granted a non-exclusive licence to another party to exploit the patent in Queensland and proposed to exploit it elsewhere: clause 4.3;

(f) Schembri was to pay a licence fee at a specified rate at particular intervals: clause 4.1;

(g) and for the purpose of calculating and verifying the licence fee, Schembri was obliged to deliver copies of invoices from suppliers, and to give seven days' notice of the appointment of any additional or alternative supplier: clause 5.3(a) and (c).

Clause 4.5 of the settlement deed provided as follows:

> "PDP and Power reserve the right to take further proceedings against Bettergrow, [Schembri] and [Schembri's ex-wife] in order to enforce their rights under the Patent and this Deed should there be a breach of either on or after the date of execution of this Deed by PDP and Power."

Clauses 6.1 and 6.2 of the settlement deed provided the various powers with a release in the following terms:

> "**6.1. Release by PDP and Power**
> Upon execution of this Deed, except for enforcement of its terms and subject to clause 4.5, PDP and Power will release, discharge and forever hold harmless Bettergrow, [Schembri] and [Schembri's ex-wife] in relation to any Claims including for costs arising from the matters the subject of the Proceedings and the Counterclaims.
>
> **6.2. Release by Bettergrow, Schembri and Schembri's ex-wife**
> Upon execution of this Deed, except for enforcement of its terms and subject to clause 4.6, Bettergrow, [Schembri] and [Schembri's wife] will release, discharge and forever hold harmless PDP and Power in relation to any claims including for costs arising from the matters the subject of the proceedings and the counterclaims."

The findings below

The learned primary judge held that the question whether the settlement deed created joint and several obligations on both Bettergrow and PDP Group and Power, was one determined by construing the language used by the parties so as to determine their presumed intention. That required consideration, not only of the text of the document, but also the surrounding circumstances known to the parties at the time the contract was entered into, and the purpose and object of the contract.

In undertaking that exercise her Honour held that the meaning of a clause may be revealed by other parts of the document. All of those propositions were supported by authority.[1] Her Honour's exposition of the relevant legal principles is not challenged on the appeal.

The learned primary judge held that on the proper construction of the settlement deed joint and several liability was not imposed on Bettergrow. There were several reasons for that: first, there were no express words suggesting such joint and several liability; secondly, given that it was not in dispute that Bettergrow had no involvement with the business operated by Schembri at the time of, or subsequent to, the execution of the settlement deed, it could not have been the intention of the parties to impose such liability; thirdly, clause 4.5 was not rendered redundant by that construction as there were other clauses imposing obligations on Bettergrow, the breach of which might result in action, for example, clauses 3.1 and 7.1.

There being no factual dispute and the question turning on a matter of construction, the learned primary judge considered it an appropriate case to exercise the discretion to grant summary judgment.

Contentions on the appeal

The appellants' contentions on appeal are essentially the same as those raised below. It is frankly accepted that the appeal either succeeds or fails on the interpretation of the deed of

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1 *Lombard Australia Ltd v NRMA Insurance Ltd* [1968] 3 NSWR 346 at 349-350; *Waterways Authority of New South Wales v Coal & Allied (Operations) Pty Limited* [2007] NSWCA 276 at [38] to [39] and [215]; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [15] (per Gleeson CJ, McHugh, Gummow and Kirby JJ); *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109; *McCann v Switzerland Insurance Australia Ltd* (2000) 176 ALR 711 at 729.

settlement. The contention was that clause 4.5 contained a reservation which entitled Power and PDP Group to take proceedings against Bettergrow to enforce their rights under the deed if there was a breach, even if the breach was committed only by Schembri. It was submitted that if one considered clause 6.1 (the release granted in favour of Bettergrow), it became clear that clause 4.5 had two areas of operation, the first in respect of any breach of confidentiality under clauses 2.2 and 7.1; and the second, the future performance of the entire deed.

Discussion

In my respectful view the contentions advanced by Power and PDP Group cannot be accepted. The settlement deed brought an end to issues concerning the alleged breach of the patent, where Schembri was the person whose acts constituted the breaches. Recital C says as much, as it recognises that the relief sought in the proceedings was on the basis that Schembri's possession and use of the machine breached the rights under the patent. Schembri's ex-wife was recognised to have no interest in any of the business operated by Schembri: Recital F. Notwithstanding that, she was a party to the proceedings and therefore party to the settlement deed.

As for Bettergrow's involvement, the learned primary judge recorded that it was "not in dispute that [Bettergrow] had no involvement with the business operated by [Schembri] at the time of or subsequent to the execution of the settlement deed".[2] That finding is not challenged on appeal.

The settlement deed also proceeded on the basis that it was Schembri who was entitled to retain possession of and continue to use the Mark III under licence, and it was Schembri who had obligations to pay the licence fee and provide information such as invoices, and give notice of changing suppliers. No such obligations fell on Bettergrow. Bettergrow's only obligations under the settlement deed were to keep it confidential (clauses 2.2 and 7.1), to sign a Notice of Discontinuance of the proceedings and counterclaims on the basis of no order as to costs (Clause 3.1), and not to challenge the validity of the patent unless proceeding were commenced as anticipated under clause 4.5: see clause 4.6. I should also mention that clause 6.5

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[2] See the reasons below, *Power and Anor v Schembri and Anor* [2017] QDC 269 at [20].

obliged all parties to do whatever was reasonably required of them to give effect to the deed and perform their obligations under it, but that is of little moment in the present context.

The proceedings in the District Court allege breaches of the settlement only as against Schembri. Further, none of the alleged breaches involved obligations which could be performed by Bettergrow. Thus, the licence fee was in respect of an irrevocable licence granted to Schembri, not Bettergrow, which had no such rights. The obligation to pay the licence fee fell on Schembri, not Bettergrow. The obligation to provide invoices from suppliers related to the use of the Mark III machine, which was extended to Schembri, not Bettergrow. Bettergrow would have no invoices since it did not have the machine, nor the right to use it. Similarly, the obligation to give notice of an alternative supplier could not fall on Bettergrow.

Given those matters, if it had been intended that Bettergrow should remain liable for Schembri's performance under the exclusive licence and the settlement deed, one would have expected clear words to be used. There are no words in the settlement deed which, on their face, suggest the assumption of such a liability. Given that Bettergrow would have been assuming a liability essentially that of guaranteeing Schembri's performance in circumstances where it was not involved and had no contractual control, one might have expected something in the deed that was specific in form and clear and express rather than elliptical. Objectively determining the presumed intention of these parties in a commercial setting, one cannot conclude that Bettergrow intended to assume liability as a guarantor of Schembri's performance, particularly where, as the learned primary judge found, it had no involvement in Schembri's business at the time, nor since.

I reject the contention that clause 4.5 of the deed lacks utility unless the alternative construction is adopted. Bettergrow did have obligations under the settlement deed, namely to keep the deed confidential (clauses 2.2 and 7.1), to sign the Notice of Discontinuance (clause 3.1) and to take whatever steps were necessary to give effect to the deed (clause 6.5) and not to subsequently challenge the patent contrary to clause 4.6. A breach of any of these obligations would give PDP Group and Power the right to take proceedings against

Bettergrow. The source of that right is in the breach of those terms, not clause 4.5, which simply carves out a reservation from the releases otherwise granted in clause 6.1.

In my view there is simply no scope to construe clause 4.5 in a way which essentially makes Bettergrow the guarantor of Schembri's performance. The reservation in clause 4.5 relates to the enforcement of the rights of PDP Group and Power under the patent and under the settlement deed. The rights under the patent are those against Schembri, if he breached the terms of the licence granted under the settlement deed. The rights under the deed against Schembri were similar. The rights remaining under the settlement deed against Bettergrow were those limited as discussed above. The reservation under clause 4.5 did not create an obligation on the part of Bettergrow to be jointly and severally liable for the further conduct of Schembri.

In my respectful view, no error can be demonstrated in the conclusion of the learned primary judge. The appeal lacks merit and should be dismissed. I propose the following orders. The appeal is dismissed. The appellants pay the respondent's costs, of and incidental to the appeal, to be assessed on the standard basis.

PHILIPPIDES JA: I agree.

BOWSKILL J: I also agree.

MORRISON JA: The orders will be as follows:

1. The appeal is dismissed.
2. The appellants pay the respondent's costs of and incidental to the appeal to be assessed on the standard basis.