SUPREME COURT OF SOUTH AUSTRALIA

(Appeal to a Single Judge)

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ISLANDER ENTERPRISES PTY LTD v COMMONWEALTH OF AUSTRALIA

[2023] SASC 84

Judgment of the Honourable Justice McIntyre

25 May 2023

PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - SECURITY FOR COSTS - APPEAL OR REVIEW

PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - SECURITY FOR COSTS - FACTORS RELEVANT TO EXERCISE OF DISCRETION – DELAY

PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - SECURITY FOR COSTS - FACTORS RELEVANT TO EXERCISE OF DISCRETION - PLAINTIFF'S OR APPLICANT'S IMPECUNIOSITY

The appellant appealed against an order of a Master of the Supreme Court granting the respondent's application for security for costs.

The appellant complained that the learned Master: erred in finding there was not an undue delay in bringing the application (ground 1); erred in finding that there was insufficient information to conclude that the appellant is impecunious and that the order for security would stultify the action (grounds 2 and 3); erred in finding that it is in the interests of justice to order security for costs because the respondent is the Commonwealth and hence would be expending public funds (ground 4); and failed to give appropriate weight to the outstanding costs order in favour of the appellant from an earlier application made by the respondent (ground 5).

Held:

1. Leave to appeal is declined.

Uniform Civil Rules 2020 (SA)) rr 115.1(2), 213.1, 215.1(2)(i), referred to.

On Appeal from SUPREME COURT OF SOUTH AUSTRALIA (HER HONOUR JUDGE BOCHNER) CIV-20-002117

Appellant: ISLANDER ENTERPRISES PTY LTD In Person Counsel: MR P ADAMS - Solicitor: O'LOUGHLINS LAWYERS

Respondent: THE COMMONWEALTH OF AUSTRALIA In Person Counsel: MR D O'LEARY SC WITH MS M SCANLON - Solicitor: MCCULLOUGH ROBERTSON (NSW)

Hearing Date/s: 10/03/2023

File No/s: CIV-22-014019

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Chakravarti v Advertiser Newspapers Ltd (1998) 72 SASR 361; *Draoui v Le* [2021] SASCA 33; *Collex Waste Management Services Pty Ltd v Corporation of the City of Enfield (No 2)* [2000] SASC 140; *Tyne v UBS AG* [2014] FCA 1073; *House v The King* (1936) 55 CLR 499; *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497; *Linc Energy Ltd v Chief Executive Administering Environmental Protection Act 1994* [2015] 1 Qd R 1; *R v Nemer* (2003) 87 SASR 168; *Reschke v Trevor Reschke Nominees Pty Ltd* [2020] SASC 60, considered.

ISLANDER ENTERPRISES PTY LTD v COMMONWEALTH OF AUSTRALIA
[2023] SASC 84

Single Judge Appeal: Civil

McINTYRE J

Introduction

1 This is an appeal from a decision of a Master of the Supreme Court granting the respondent's application for security for costs. The Master delivered reasons for her decision on 16 November 2022 and made orders, *inter alia*, that:

1. The applicant provide security for the respondent's costs in a sum of $110,000 by way of payment into Court, in the form of a bank guarantee or such other form as the Court may direct within 14 days of this order; and

2. In default of compliance with order 1, the applicant's claim against the respondent be stayed pursuant to r 115.1(2) of the *Uniform Civil Rules 2020* (SA) (UCR).

2 As this is an interlocutory decision, leave to appeal is required under UCR r 213.1. For the reasons that follow, I decline to grant leave to appeal the decision.

3 The respondent filed a notice of alternative contentions in support of a submission that the Master's decision could also have been made on alternative grounds. In view of my findings on the question of leave I will not deal with the matters set out in that notice.

Background facts

4 On or about 7 August 2014, the applicant entered into a contract with the respondent to provide aerial surveillance of the waters around various Pacific Ocean islands. The contract was for an initial period of 12 months. On 5 August 2015, the respondent advised the applicant that it did not intend to renew the contract.

5 The applicant says that the respondent is in breach of the contract by failing to undertake a contract review four months prior to the end of the contract to assess the viability of the services and determine whether they would be continued. In addition, the applicant says that the termination was contrary to representations made by the respondent that the contract would be renewed following the first year. It is said those representations were made prior to the parties entering into the contract and were relied upon by the applicant in entering into the contract. The applicant further says that the representations were repeated and continuing up to the date of the notice of non-renewal. The applicant says that, in further

reliance upon the representations, it had entered into contracts for the purchase of additional aircraft, positioned fuel throughout various Pacific islands for support of ongoing aerial surveillance operations, and acquired specialist equipment.

6 The applicant brings this action alleging breach of contract, misleading and deceptive conduct, unconscionable conduct, and promissory estoppel.

Preliminary issue

7 The applicant seeks to adduce fresh evidence on its appeal in the form of two affidavits; specifically, an affidavit of Christopher Stanley Langton, a director of the applicant, affirmed on 25 November 2022 and Stephen Peter White, solicitor for the applicant, sworn on 6 March 2023.

8 The applicant requires leave of the Court under UCR r 215.1(2)(i) to rely on this material. Such leave should be granted exceptionally.[1] The relevant principles are:[2]

- Whether the evidence was available at the hearing below, or could with reasonable diligence have been obtained for use at that hearing.
- Whether the evidence is such that it would have had an important influence on the result. While it need not necessarily be decisive, it must be more than merely useful.
- The likely impact of the evidence in terms of whether it is controversial or contested, and, if so, whether its receipt is likely to require cross-examination, further responding evidence or that the matter be remitted for rehearing; and
- The public interest in the finality of litigation.[3]

9 The applicant in this case has been represented at all times by a solicitor and counsel. It is apparent from the face of the two affidavits that the material contained therein is not new material and was or ought to have been available at the time of the argument before the Master. The applicant has argued that Mr Langton did not provide an affidavit for the Master because he was busy earning money to stay afloat.[4] Given the importance of the security for costs argument, this is not a compelling reason for the failure to provide the material to the Master. The applicant further says that this material was before the Master, albeit in a different form, and that the material does no more than address a concern raised

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1 *Chakravarti v Advertiser Newspapers Ltd* (1998) 72 SASR 361 at 372.
2 *Draoui v Le* [2021] SASCA 33 at [102].
3 *Chakravarti v Advertiser Newspapers Ltd* (1998) 72 SASR 361 at 373; *Collex Waste Management Services Pty Ltd v Corporation of the City of Enfield (No 2)* [2000] SASC 140 at [27].
4 T23.

by her Honour as part of her decision. I take the "concern" to be the comments at paragraphs [28] and [29] of the Master's reasons for decision:

> The fact that no evidence has been adduced in respect of the applicant's financial position, both before and after entry into the contract with the respondent is telling. The only evidence is that provided by Mr White; none of the applicant's directors or shareholders has given evidence about the applicant's financial position. I am unable to conclude that the applicant is impecunious.
>
> I consider that the fact that Mr Langton has not deposed to his own financial position weighs heavily in favour of making an order for security. The only evidence is from his solicitor, who deposes that Mr Langton does not own any real property or significant assets in Australia. The question of the property and assets that he owns outside of Australia has not been addressed. Nor have the assets of financial positions of Mr Fuller and Hermoine June Langton been disclosed.

10 If this is the case, then it is challenging to understand on what basis it would be appropriate to allow the tender of the affidavits on the appeal. The additional material does not fully address the lack of evidence on the topic of the financial position of the directors and shareholders and accordingly, even if admitted, the information contained in the affidavits is unlikely to have had a significant impact on the result.

11 The applicant further contends that when issues of the sufficiency of evidence as to the financial position of the directors and shareholders of the company arose during argument, the Master's attention was drawn to *Tyne v UBS AG*[5] as authority for the proposition that if she considered the issue to be finely balanced and that further evidence was required, she could call for that material and an affidavit could be provided. I infer from the fact that the Master did not call for such further evidence that she did not consider the matter to be finely balanced. I see no error in that conclusion.

12 The respondent says that it would suffer prejudice if these affidavits were received as evidence on this appeal. It would be deprived of the opportunity to make forensic decisions to seek to cross-examine the deponents and/or to obtain further and better discovery about the financial information deposed to in those affidavits.

13 In all the circumstances I decline to admit the additional two affidavits.

Leave to appeal

14 The impugned decision was a discretionary decision made on a matter of practice and law. The applicant says, however, that it is a matter which finally determines the proceedings because of the stultifying effect of the decision upon the applicant's ability to continue the proceedings. It is unclear from the

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5 [2014] FCA 1073.

submissions whether the applicant accepts that leave is required to appeal the decision under UCR r 213.1. In my view, leave is required.

15 The applicant accepts that the principles of appellate restraint in *House v The King* apply.[6] Accordingly, it is necessary to consider whether the Master:

- acted on a wrong principle;
- was guided by extraneous or irrelevant facts;
- mistook the facts;
- failed to take into account a material consideration; or
- reached an outcome which was manifestly unreasonable or plainly unjust.

16 In *Draoui v Le*,[7] the Court of Appeal reviewed a decision of a single Judge to dismiss a proceeding due to the applicant's failure to pay security for costs. Doyle JA outlined the practical impact of the principles in *House v The King* as follows:[8]

> In accordance with these principles, an appellate court may intervene in two broad categories of case. First, if it is established that the judge below has acted on a wrong principle, has allowed extraneous or irrelevant matters to guide or affect them, has mistaken the facts, or has not taken into account some material consideration. Secondly, if it is established that the result embodied in the order made is, upon the facts, unreasonable or plainly unjust, such that it can be inferred that there has been a failure to properly exercise the relevant discretion, despite the precise nature or source of the error not being identifiable. These two categories of case are sometimes distinguished from each other by referring to them as process and outcome errors, or as specific and inferred errors.

17 Accordingly, considerations relevant to the question of leave to appeal and the *House v The King* restrictions are similar and collectively impose a heavy burden upon applicants to convince the court to displace discretionary interlocutory decisions. The applicant therefore needs to demonstrate not only that an error occurred, but that there was a specific or inferred process error. Bearing these principles in mind I will now proceed to the individual grounds of appeal.

Delay

18 Ground 1 of the appeal provides as follows:

> The Learned Master erred in finding that there had been no undue delay in bringing the application for security for costs two and a half years after commencement of the proceedings because it was brought following a mediation.

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6 (1936) 55 CLR 499 at 505.
7 [2021] SASCA 33.
8 [2021] SASCA 33 at [71].

19 The procedural history set out in the affidavit of Stephen White dated 29 June 2022[9] identifies a considerable delay of nearly two years from the issue of proceedings until the application for security was brought.

20 The respondent filed a defence on 2 December 2020, four months after the claim was filed. The applicant says that any application for security should have been brought at the time the respondent filed its defence if not before. The respondent then brought a cross-vesting application which was heard by David J on 15 April 2021 and was dismissed on 7 July 2021. The respondent did not bring an application for security until after a court ordered mediation on 20 April 2022 which did not result in a settlement.

21 The applicant says that it incurred significant costs prior to the respondent bringing its application for security. It is said that the Master fell into error when she dismissed the work done in relation to discovery as being irrelevant on the grounds that it was useful for this to take place prior to mediation.[10] It is submitted that this approach is fundamentally at odds with the principle that security applications should be brought as soon as possible.[11] The applicant submits that it was "patently unjust" for the respondent to allow costs to accumulate over two years before bringing the application.

22 The respondent, on the other hand, submits that it is clear from her reasons for decision that the Master expressly took account of the applicant's submissions in relation to undue delay which included the procedural history of the matter, the complaint about discovery, the mediation and the applicant's position that two years had unreasonably lapsed in the matter before the application was made. The respondent says that it is equally plain from the reasons that the Master preferred and gave greater weight to the respondent's submissions on these topics including the respondent's explanation that it reasonably delayed the application until after mediation and that the respondent's application was brought promptly once the matter did not settle.

23 I do not consider that there is anything unreasonable or improper about the Master's conclusions. The Master took all material considerations into account. The Master rejected the applicant's submissions on delay, preferring those of the respondent. That does not amount to an appealable error.

Findings as to impecuniosity/stultification

24 Grounds 2 and 3 of the appeal are as follows:

> 2. The Learned Master erred in finding that it could not be concluded that the applicant was impecunious when both the respondent and the applicant were in agreement that the applicant was impecunious and this fact was not in issue.

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9 Appeal book tab 5 at [13]-[32].
10 Reasons for Decision at [20].
11 *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 514-515.

3. The Learned Master erred in finding that the Court could not be satisfied that an order for security would stultify the action in circumstances where it was agreed by all parties that the applicant was impecunious.

25 These grounds overlap to some extent. I will deal with them together.

26 The applicant contends that, at the hearing of the application for security, both parties acknowledged that the applicant was impecunious. This was supported by affidavit evidence from both parties and was not an issue before the Court. It is contended that, contrary to the evidence before the Court, the Master found that it could not be concluded the applicant was impecunious.[12]

27 The applicant further contends that the Master fell into error when she was not satisfied that an order for security would stultify the action despite the agreed position that the applicant was impecunious. It is said that the Court gave too much weight to the absence of an affidavit from Mr Langton as to his own financial position in circumstances where there was an explanation for that situation. Further it is said the Court gave no, or insufficient, weight to the evidence before the Court concerning the lack of means of both the applicant and Mr Langton and to the fact that an order for security would stifle the litigation by reason of impecuniosity of the applicant and the directors and shareholders of the applicant.

28 The respondent says that its position at the hearing was more nuanced than a mere agreement that the applicant company was impecunious. The respondent submitted that, even if the company was impecunious, given the lack of evidence as to the financial positions of the directors and shareholders of the company, the applicant had not discharged its onus to demonstrate that it was impecunious in the sense that the action would be stultified by an order for security. It is said that this nuance was considered and accepted by the Master as is apparent from her reasons. I accept that this is the case.

29 The Master noted the paucity of evidence advanced by the applicant in respect of its financial position and that of its three directors. She said further that this gap in the evidence lay entirely at the feet of the applicant and "weighs heavily in favour of making an order for security."[13]

30 These findings justified the ultimate finding that the applicant was not impecunious and further led to the finding that the Master was not satisfied that the order would stultify the action. In my view, the findings were based on issues and arguments which arose directly out of the submissions advanced by both parties. Accordingly, the Master did not consider irrelevant or extraneous material nor was the applicant denied an opportunity to be heard. It is not an error for a Judge not to accept an agreed statement of facts put forward by parties if that position is not supported, or is contradicted, by the evidence.[14] Given the lack of

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[12] Reasons for Decision at [28].
[13] Reasons for Decision [29].
[14] *Linc Energy Ltd v Chief Executive Administering Environmental Protection Act 1994* [2015] 1 Qd R 1 at [41]. See also *R v Nemer* (2003) 87 SASR 168 at [40], [67].

evidence about the financial circumstances of the applicant and its directors, the conclusion was justified. This was an orthodox analysis of the state of the evidence and is not infected with error. Finally, in relation to the issue of stultification, it is well settled that where a security for costs application is being sought against a corporation rather than a natural person, the question of stultification is an important but not decisive factor.[15]

Public Interest

31 Ground 4 of the appeal is that:

> The Learned Master erred in finding that because the Court was not satisfied the applicant was impecunious it was in the interests of justice to award security because the fact that the respondent was the Commonwealth meant there was a public interest in it being in a position to recoup some of its costs if successful at trial.

32 The applicant says the fact that the respondent is the Commonwealth does not in and of itself create a public interest reason for ordering security. This is plainly correct. That was not, however, the Master's finding.

33 Public interest was an issue raised by both parties in submissions which the Master addressed in her decision. The Master rejected a submission by the applicant that the proceedings raised an important public interest question related to Australia's security operations in the Pacific.[16] The Master accepted a submission by the respondent that the Commonwealth's defence involved the use of public money and therefore it was in the public interest for there to be a degree of certainty that the respondent may recoup its costs if successful at trial.[17] It is however plain from the reasons for decision that this was not the only factor that the Master considered when she found that it was in the interests of justice that an order for security be made. There is no error in the Master's reasoning on that point.

Previous costs orders

34 Ground 5 of the appeal is as follows:

> The Learned Master erred in failing to give appropriate weight to the amounts owed by the respondent to the applicant by way of costs orders payable in any event by the Commonwealth to the applicant which costs orders had already been made and have not been paid by the respondent.

35 The applicant says that it was contrary to the interests of justice for consideration not to be given to the fact that the applicant was in receipt of costs orders in its favour, the benefit of which it would be wholly denied in circumstances of impecuniosity and an order for security giving rise to a stay of proceedings.

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[15] *Reschke v Trevor Reschke Nominees Pty Ltd* [2020] SASC 60 at [45].
[16] Reasons for Decision at [30].
[17] Reasons for Decision at [31].

36 The costs orders arose from the dismissal of the respondent's cross-vesting application in 2021. In my view, this ground of appeal does not disclose an appealable error. The detailed remarks of the Master accompanying the orders made on 25 November 2022 fixing the appropriate amount for security indicate that the Master expressly took the issue of past costs orders into account. In any event, properly understood, this ground of appeal appears to be a complaint about the weight attached to the costs orders rather than a complaint that there was an error.

Conclusion

37 The applicant has not demonstrated that the Master's decision finally determines the proceedings. In my view, this is an interlocutory decision on a matter of practice and law requiring leave to proceed under UCR r 213.1. I decline to grant leave to appeal the decision.

38 The applicant has a heavy burden to discharge to obtain leave. It has not done so. The applicant has failed to demonstrate that the Master acted on a wrong principle, was guided by extraneous or irrelevant facts, mistook the facts or failed to take into account a material consideration. Further, I do not consider that the decision to grant the application for security for costs is manifestly unreasonable or unjust such that it can be inferred that there has been a failure to properly exercise the discretion. Even were I to grant leave, I would have dismissed the appeal for the same reasons.