

SUPREME COURT OF QUEENSLAND

CITATION: *The MCF Group Pty Ltd v Coleman & Ors* [2015] QCA 268

PARTIES: **THE MCF GROUP PTY LTD**
ACN 100 683 369
(applicant)
v
DAVID COLEMAN
(first respondent)
COLEMAN'S QUARRY LTD
(second respondent)
FLEETCON PTY LTD
ACN 167 643 389
(third respondent)

FILE NO/S: Appeal No 5709 of 2015
DC No 1367 of 2015

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: District Court at Brisbane – [2015] QDC 130

DELIVERED ON: 8 December 2015

DELIVERED AT: Brisbane

HEARING DATE: 16 November 2015

JUDGES: Fraser and Morrison JJA and Boddice J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **1. Leave to appeal be refused.**
2. The applicant pay the respondents' costs of the application, to be assessed on a standard basis.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – where the primary judge dismissed applications filed by the applicant seeking interlocutory injunctive and other relief in relation to a claim for the return by the respondents of excavators allegedly owned by the applicant – where the basis for the primary judge's dismissal of the applications was that there was a serious question to be tried, and the balance of convenience was equal, but that the offered undertakings as to damages were of doubtful value – where the applicant sought leave to appeal against those orders – whether the leave sought ought to be granted

District Court of Queensland Act 1967 (Qld), s 118(3)

Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva) [1980] 1 All ER 213; [1975] 2 Lloyd's Rep 509, cited

COUNSEL: P J Trout for the applicant
D Marks for the respondent

SOLICITORS: Dare Lawyers for the applicant
McKeering Downs Lawyers for the respondent

- [1] **FRASER JA:** I agree with the reasons for judgment of Boddice J and the orders proposed by his Honour.
- [2] **MORRISON JA:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour.
- [3] **BODDICE J:** On 14 May 2015, the primary Judge dismissed applications filed by the applicant, on 9 and 22 April 2015, seeking interlocutory injunctive and other relief in relation to a claim for the return by the respondents of excavators allegedly owned by the applicant. The primary Judge ordered the applicant pay the respondents' costs of the applications, to be assessed on the standard basis.
- [4] The applicant seeks leave to appeal against those orders. At issue is whether leave to appeal ought to be granted, pursuant to s 118(3) of the *District Court of Queensland Act 1967 (Qld)* and, if so, whether the primary Judge erred in concluding the offered undertakings as to damages were of doubtful value.

Background

- [5] The excavators in question were originally located in Ireland, where the first respondent utilised them in a business operated by the second respondent. The applicant alleged it entered into an agreement to purchase the excavators from the first and second respondent. Part of the agreement was that the excavators would be relocated to Australia for use in a new enterprise, in which the first respondent would have an involvement as an employee.
- [6] The excavators were transported to Australia and used by the applicant in that enterprise. However, the respondents began to use them for a monthly fee to complete certain jobs on their own behalf.

Claim

- [7] On 7 April 2015, the applicant filed a claim and statement of claim seeking damages for breach of contract and/or conversion or detinue. On 9 April 2015, the applicant successfully obtained, *ex parte* injunctive relief. That relief restraining the respondents from dealing with or disposing of two excavators the subject of the application was subject to the applicant providing the usual undertaking as to damages. That injunctive relief was later extended, by various orders, until a hearing of the continuation of the injunction on 14 May 2015.
- [8] On 22 April 2015, the applicant filed a further application for possession of the excavators. That application sought possession of the excavators pending further hearing of the matter. Other relief was sought in relation to associated equipment.

Primary decision

- [9] The primary Judge considered that although there was some doubt as to the applicant's claim to have paid for the excavators, there was a serious question to be tried as to what was agreed between the parties and whether that agreement was varied through the term of the relationship. The primary Judge also found the balance of convenience was even between the parties. However, as the undertaking offered by the applicant was of doubtful value, the balance of convenience ultimately favoured dismissal of the application.
- [10] The primary Judge found the undertakings offered by the applicant and its director of doubtful value, because the applicant had doubtful assets, and the material established the director was, at best, a beneficiary of a discretionary trust which had made little profit. The applicant also had doubtful assets. Without particulars of what assets the applicant's director had in his own name, there was a lack of confidence in the value of any undertaking.

Applicant's submissions

- [11] The applicant submits that leave to appeal ought to be granted, as the applicant demonstrated a strong case and it is necessary in the interests of justice. A failure to grant leave would deprive the applicant of the fruits of its claim. The applicant submits the primary Judge erred in questioning the value of the undertaking offered by the applicant. No evidence filed by the respondents would lead the Court to believe the applicant would be unable to pay any damages, if required, and there was no evidence the applicant was facing insolvency or that its director had any personal financial issues or was other than a man of strong financial substance. The applicant's director had provided a personal undertaking, having attested to personal wealth in excess of \$15 million. The primary Judge also erred in finding that the primary trading of the applicant "seems to be a horse racing venture" when the applicant's accounts revealed the applicant had assets substantially in excess of its liabilities.
- [12] At the hearing of the application for leave to appeal, the applicant accepted that as the respondents no longer owned the excavators the subject of its application, there was no point in pursuing the application for leave, except in respect of costs. The applicant accepted it had not received the leave of the primary Judge to appeal costs, as required by the *District Court Act of Queensland 1967* (Qld). The application was adjourned for the applicant to take instructions in relation to the making of such an application.
- [13] Subsequent to the hearing, the applicant filed additional submissions seeking leave to amend or substitute the orders sought on appeal for an order that the second respondent pay \$145,325.00 to the Registrar of the District Court of Queensland, pending written agreement between the parties or further order of the Court.

Respondents' submissions

- [14] The respondents submit that leave to appeal ought to be refused, as the applicant does not have a strong case on appeal, and there was no substantial injustice. The applicant seeks relief which amounts to a Mareva injunction,¹ in circumstances where the excavators have not been shown to be unique or having special qualities, and the only purpose in seeking possession of the equipment is as security for a money judgment.

¹ *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1975] 2 Lloyd's Rep 509.

- [15] The respondents further submit that no error of principle has been established in respect of the primary Judge's conclusion that the undertakings as to damages offered by the applicant and its director were of doubtful value. The evidence led before the primary Judge established that the applicant's director was the primary beneficiary of a discretionary trust. There was no evidence as to that director's personal assets. There was also no reliable evidence as to the applicant's trading activities.

Discussion

- [16] Leave to appeal against an interlocutory decision of the District Court of Queensland will usually only be granted where an appeal is necessary to correct a substantial injustice and there is a reasonable argument that there is an error to be corrected on appeal.² Neither requirement is established in the present case.
- [17] The applicant's contention, that the decision of the primary Judge has resulted in a substantial injustice and is plainly wrong, is without merit. First, the relief sought before the primary Judge was misconceived. The applicant's claim was for a monetary sum. The excavators were neither unique nor special. There was no basis established to justify orders restraining dealing with that property, or placing it in the possession of the applicant. The appropriate relief, if any, to be sought by the applicant was in the nature of a Mareva injunction. That was not the relief sought below, and it is wholly inappropriate for the applicant to now seek that relief on an application for leave to appeal.
- [18] Second, the primary Judge did not dismiss the applicant's application on the basis there was no serious question to be tried between the parties. The primary judge accepted there was a serious question to be tried. The application was rejected on the basis of the doubtful value of the undertakings offered by the applicant and its director.
- [19] The primary Judge's assessment of the value of that undertaking was entirely supported by the evidence. The financial material tendered at the hearing supported a finding that the applicant was the trustee of a discretionary trust. There was limited material as to the trading circumstances of that trust and its ability to meet any undertaking as to damages.
- [20] That the material was limited was acknowledged by the applicant's director also offering a personal undertaking in relation to damages. The primary Judge correctly found that the value of that undertaking was itself doubtful. Whilst the director swore that he had personal assets of \$15 million, the material clearly established that the director was a beneficiary of a discretionary trust. There was no evidence as to any assets he owned personally in his own name. There was therefore no evidence to support a conclusion that a personal undertaking as to damages by him was of value.
- [21] Similar considerations apply to the applicant's director's apparent personal annual income of \$700,000. The asserted personal annual income was in an accountant's affidavit, under the heading "Financial Position of the Plaintiff" (as opposed to that of the applicant's director). It did not clearly distinguish between the income and assets of the applicant and the applicant's director. Further, it used the phrase "usually"; it did not contain more specific or recent figures. This imprecision meant it was open for the District Court to make the findings it did.

² *Pickering v McArthur* [2005] QCA 294 at [3].

- [22] The sufficiency of the value of any undertakings as to damages was squarely raised before the primary Judge. The applicant chose to argue the matter on the basis of the material then available. The primary Judge considered that material, and found the undertakings offered by the applicant and its director of doubtful value. That finding was reasonably open on the available material. The applicant has not shown any error of principle on the part of the primary Judge.

Conclusion

- [23] The applicant has not demonstrated that it has strong prospects of success if leave to appeal were granted. The applicant also has not established a substantial injustice. Leave to appeal should be refused.

Orders

- [24] I would order:

1. Leave to appeal be refused.
2. The applicant pay the respondents' costs of the application, to be assessed on a standard basis.