31/00; [2000] VSC 291

SUPREME COURT OF VICTORIA

NATIONAL AUSTRALIA BANK LTD v PETIT-BREUILH & Ors (No 3)

Balmford J

28 June, 26 July 2000

PRACTICE AND PROCEDURE – CIVIL PROCEEDINGS – APPLICATION OF "SLIP RULE" – TEST TO BE APPLIED – RULE EXERCISED ULTIMATELY TO AVOID INJUSTICE – WHETHER CORRECTION WOULD HAVE BEEN MADE IF DRAWN TO COURT'S ATTENTION AT THE TIME OF MAKING THE ORDER.

As a result of judgment against NAB, an order was made that NAB completely indemnify P-B and Ors for their costs. In making the order for costs, the judge adopted the form of the draft order submitted by counsel for P-B and Ors. The costs order did not refer to several interlocutory proceedings where costs had been ordered to be paid by P-B and Ors in favour of NAB. In submitting that the judge should apply the 'slip rule', counsel for P-B and Ors conceded that he had accidentally omitted to address the question of the costs of the interlocutory proceedings. It was his view that the draft as submitted was wide enough to cover all costs in the proceeding.

HELD: 'Slip rule' applied. NAB ordered to pay all costs including those associated with the interlocutory proceedings.

1. An exercise of the power of the court under the 'slip rule' is ultimately to avoid injustice. The rationale of the rule requires that an omission or mistake should not be treated as accidental if the proposed amendment requires the exercise of an independent discretion or is a matter upon which a real difference of opinion might exist. In general, the test is if the matter had been drawn to the court's attention would the correction at once have been made?

***Storey & Keers Pty Ltd v Johnstone* (1987) 9 NSWLR 446;**

***Hatton v Harris* [1892] AC 547, applied.**

2. Having regard to the unconscionable behaviour of NAB to P-B and Ors over a period of years as well as the late discovery with all that that led to in the conduct of the proceeding, if the payment of the costs of the interlocutory proceedings had been raised on the making of the order for indemnity costs, it would have been ensured that that order was expressed in such a way as to make it clear that it was intended to comprehend the vacating of the interlocutory costs orders and to make NAB pay, on an indemnity basis, P-B's and Ors' costs of the interlocutory proceedings. The exercise of the power of the court under the 'slip rule' to make the orders sought will avoid injustice which would occur if P-B and Ors were not completely indemnified by NAB for all of their costs.

BALMFORD J:

Introduction

1. The substantive issues in this matter were heard over fourteen days in July and August 1999. On 5 October 1999 I handed down a judgment containing certain findings and inviting submissions as to the form of the orders to be made and as to costs, and the matter was adjourned to that end. Submissions were made in due course and on 18 October 1999 I made the following orders:

1. The Plaintiff s claim is dismissed.
2. It is declared that the guarantee executed by the Defendants on 8 October 1992 in favour of the Plaintiff is void *ab initio* and is set aside.
3. The Third Party proceeding of the First, Second, Fourth, Fifth, Sixth and Seventhnamed Defendants is struck out.

4. The Plaintiff pay the costs of the Defendants, including all reserved costs and the costs of the First, Fourth, Fifth, Sixth and Seventhnamed Defendants in respect of the Third Party proceeding, such costs to include all costs of the Defendants except in so far as they are of an unreasonable amount or have been unreasonably incurred and so that, subject to the above exceptions, the Defendants will be completely indemnified by the Plaintiff for their costs.

5. The Plaintiff pay the Third Parties' costs of the principal proceeding and of the Third Party proceeding on a party and party basis.

These reasons for judgment should be read together with the reasons delivered on 5 and 18 October 1999.

2. The taxation of the costs of the First, Fourth, Fifth, Sixth and Seventh Defendants ("the five defendants"), is part-heard before Master Cain. A summons for the taxation of the costs of the Second and Third Defendants ("the two defendants") has been filed, but the hearing is adjourned until the conclusion of the taxation of the costs of the five defendants. In the course of that taxation a question arose as to whether, as a matter of principle, order number 4, providing for indemnity costs, could encompass costs falling into the following two categories:

> (a) costs incurred by the five defendants in making or resisting interlocutory applications in circumstances where those interlocutory applications resulted, *inter alia*, in orders for costs against the five defendants ("the interlocutory costs orders"); and
>
> (b) costs paid or payable to the plaintiff by the five defendants pursuant to the interlocutory costs orders.

3. The plaintiff has also filed a summons for taxation of its costs pursuant to five interlocutory costs orders, which are described below. The plaintiff further argued that the five defendants were not entitled to be indemnified by the plaintiff in respect of their costs of an application by the third parties for the adjournment of the proceedings which was made before Mr Justice Byrne on 15 July 1999. His Honour made no order as to the costs of the five defendants.

The five defendants

4. This matter comes before me on a summons filed by the five defendants seeking, in summary, orders that the interlocutory costs orders be vacated and that the plaintiff pay the costs of the five defendants in respect of those matters and also of the application before Mr Justice Byrne; or alternatively that the plaintiff indemnify the five defendants in respect of the interlocutory costs orders and the orders of Mr Justice Byrne.

5. For reasons set out in my judgment of 18 October 1999, I there adopted the form of the draft order submitted by all of the defendants. Mr Palmer, for the five defendants, conceded that in making his submissions as to the appropriateness of that form of order he had accidentally omitted to address the question of the costs of the interlocutory proceedings. It was his view that the draft order as submitted was wide enough to cover all costs in the proceeding, so that the defendants would not have to bear the costs of the plaintiff of those interlocutory proceedings and would be indemnified by the plaintiff for their own costs. However, Master Cain had ruled that the order of the Court, in the form of the draft order, did not have that effect.

6. Details of the interlocutory costs orders, so far as presently relevant, are set out hereunder. They were:

> (a) an order of Master Evans made on 25 March 1998. This order was made following a summons filed by the plaintiff when six of the defendants were in default in filing and serving further and better particulars of their amended defence and counterclaim and an affidavit of documents.
>
> (b) an order of Master Kings made on 2 June 1998 at the directions hearing for the list of civil cases, when the defendants informed the court that they wished to apply for leave to join the third parties and accordingly the proceeding was not ready for trial.
>
> (c) an order of Master Wheeler made on 22 June 1998 when he gave leave to six of the defendants to join the third parties.
>
> (d) an order of Master Bruce made on 14 August 1998 at a directions hearing relating to the conduct of the third party proceedings.
>
> (e) an order of Master Evans made on 14 October 1998 following the adjournment of a summons filed by six of the defendants seeking orders that the third parties be made defendants in the proceeding.

7. At the proceeding before Mr Justice Byrne all defendants opposed the application by the third parties to vacate the trial date. That application was also opposed by the plaintiff on the ground that it was ready to proceed, and was, understandably, rejected. As to that matter, I said

at paragraph 6 of my reasons for judgment delivered on 5 October 1999:

> However, it transpired that the bank's affidavit of documents, which had been sworn on 7 January 1998, was significantly incomplete. Many documents were discovered by the bank well after the commencement of the hearing, and only after repeated demands by counsel for the defendants. The Frankston branch of the bank was handling the loan to the Co-operative from November 1994, and the statement of claim refers to the Co-operative as "indebted to the Bank on its accounts conducted at the Bank's Frankston Branch". Nevertheless, the substantial file of the Frankston branch, which incorporated relevant material from the Burwood and Moorabbin East branches from 1991 onwards ("the Frankston file"), was not produced until after counsel for the five defendants had closed his case. The evidence of the solicitor who had the handling of this matter for the bank was that that was when the Frankston file "came to light". The latest document on the Frankston file is dated in January 1999, and it includes a note of a conversation with that solicitor in December 1998. Other documents were still being discovered on the final day of evidence, that is day twelve of the hearing. The bank's conduct of its case in this manner affected the ability of counsel for the defendants to present their case.

8. In my reasons for judgment on the application for indemnity costs, delivered on 18 October 1999, after citing that paragraph, I went on to say, at paragraphs 10 to 13:

> It is also relevant that the Frankston file contained the file note of 9 October 1992, which confirmed the evidence of the defendants as to the agreement which had been made "that in the event of a change of committee the new members will sign a fresh guarantee for the amount of the outstanding debt and assume the responsibility to ensure repayments are made". That file note was relevant to the credit of the defendants as well as bearing its own significance in the context of whether the actions of the bank in the transaction involved were "fair, just and reasonable". There were 245 documents on the Frankston file (excluding those which were the subject of privilege). Some of those documents were, in the event, highly relevant in assisting the Court as to particular matters which were necessary to be decided, such as the presence or absence of the warning clause at the time when the guarantee was executed. And there were indications on the file of a lack of action by the bank, which was also relevant.
>
> It was submitted for the defendants, and I have no reason to doubt, that had that file been produced in the normal course of discovery, that is, in January 1998, or at some later stage in advance of the hearing, this case, which occupied fourteen days of Court time, could have been significantly shorter, and might well not have proceeded to a hearing at all. Mr Palmer had indicated at page 950 of the transcript that, had he had access to that file before the commencement of the hearing, he would have sought to amend the counterclaim to include a plea of fraud which, on the findings of the Court, would have succeeded...
>
> No explanation was given by the plaintiff for the late discovery of the Frankston file. The bank and its advisers are no strangers to litigation. It must have been apparent to those who prepared the statement of claim that there would have been a relevant file at the Frankston branch of the bank. I cannot find that the bank had no knowledge of the existence of that file, current for twelve months after (and for a number of years before) the swearing of the bank's affidavit of documents, in the branch of the bank where it was claimed that the defendants' debt to the bank existed. And the late discovery of that file and of much other material must be viewed in the light of the successful resistance by the bank, on the ground that it was ready to proceed, of two applications to vacate the listed trial date. The adjective "high-handed", used by Tadgell J in *Australian Guarantee Corporation v De Jager*, [1984] VR 483 at 502 to describe the conduct on which he there based an award of solicitor-client costs, comes to mind.
> ...
> I would impute to the bank and to those advising it no more than incompetence in the preparation of its case. But it is not for the defendants to bear the burden of that incompetence.

9. On re-reading these passages I notice that there is an ambiguity in the second paragraph for which I apologise. In the sentence commencing "Mr Palmer had indicated ...", the expression ", he submitted," should be added after the words "a plea of fraud which". I myself gave no consideration to the question of whether that plea would have succeeded, it not being necessary for me to do so, and I would not wish to be taken as having made any finding thereon.

10. I found the joinder of the third parties to be reasonable in all the circumstances. I went on to say at paragraph 15:

> I am satisfied that the late discovery of many documents, and particularly of the Frankston file,

> considered in the context of the case as a whole, was a circumstance which can be said to be "special", in the sense of taking the matter out of the usual basis on which costs are awarded. Accordingly, there will be an order that the plaintiff pay the costs of the defendants, including, for the reasons set out in the preceding paragraph, the costs of the five defendants in respect of the third party proceedings, in the terms of the draft minute submitted by the defendants; that is, "all costs of the defendants except in so far as they are of an unreasonable amount or have been unreasonably incurred and so that, subject to the above exceptions, the defendants will be completely indemnified by the plaintiff for their costs". It is unnecessary to consider the other submissions of the defendants as to other circumstances which might have been regarded as "special" in that sense.

11. Mr Palmer was concerned to emphasise that his clients' present claim was grounded in the late discovery, and pointed out that the plaintiff's affidavit of discovery was sworn on 7 January 1998 and, on the findings of the Court, the plaintiff was from that date onwards in continuing breach of its obligation to provide proper discovery. All of the interlocutory proceedings, the costs of which are here being considered, took place after that date. He did not seek to go outside the reasons given for the making by the Court of the order for indemnity costs. He emphasised that, if the Frankston file had been discovered as it should have been in January 1998, the matter might not have proceeded at all.

12. Mr Palmer submitted that the Court had power to exercise the "slip rule", to be found in the inherent jurisdiction of the Courts of Common Law and the Court of Chancery to correct any clerical mistake or error in a judgment or order which was the result of an accidental slip or omission. (See the judgment of McHugh JA in *Storey & Keers Pty Ltd v Johnstone* (1987) 9 NSWLR 446 at 449.) The rule is now formalised, so far as this Court is concerned, in Rule 36.07 of the *General Rules of Procedure in Civil Proceedings* 1996 ("the Rules"), which reads:

> 36.07. The Court may at any time correct a clerical mistake in a judgment or order or an error arising in a judgment or order from any accidental slip or omission.

He submitted that his failure to advert to the question in making his submissions as to the appropriate costs order to be made in the proceeding constituted an "accidental slip or omission" in terms of that Rule.

13. In *Storey & Keers* McHugh JA said at 453:

> The rationale of the slip rule also requires that an omission or mistake should not be treated as accidental if the proposed amendment requires the exercise of an independent discretion or is a matter upon which a real difference of opinion might exist ... In general the test of whether a mistake or omission is accidental is that applied by Lord Herschell in *Hatton v Harris* [1892] AC 547 (at 558) if the matter had been drawn to the court's attention would the correction at once have been made?

14. In *Arnett v Holloway* [1960] VicRp 6; [1960] VR 22 Adam J had made an order for costs on the County Court scale and had been asked to correct it, under the slip rule, to provide for costs on the Supreme Court scale. He held that, although he would have awarded costs on the Supreme Court scale had his mind been directed to the question at the time of giving judgment, the slip rule did not empower him to make the amendment sought. The Full Court (Lowe, O'Bryan and Pape JJ) said at 35:

> We think that this was a case in which the learned judge, having regard to what he has said, should have made the order sought, and that justice required that the judgment be amended accordingly.

Mr Clarke, for the plaintiff, submitted that in the present case it could not be said that "if the matter had been drawn to the court's attention the correction would at once have been made". Each of the interlocutory proceedings required separate consideration by the Court, so that the correction could not have been made "at once" in the manner contemplated by the authorities. The costs on each summons in issue were "costs in any event" and not "costs in the cause" or "reserved costs". He referred to *How v Winterton* (1904) 111 LT 763 in which Kekewich J, after considering at length the nature of "costs in the action" and "reserved costs" said at 765:

> Then there is another class, and I think only one more — namely where costs are made costs "in any event". Here the defendant applied for leave to issue interrogatories against the plaintiff. I am told the reason why that was refused was because the case was coming on, and it was too late. I care

> not what the reason was. The application was refused with costs in any event — that is to say, the costs were to be paid by the applicant, the defendant. It is suggested that only means as between the defendant and the plaintiff, and that the defendant may nevertheless be allowed those costs of the application as costs in the action. Now, mark to what that leads. If the argument is sound, the defendant is not only to be allowed his own costs of the application, but also the costs which he pays to the plaintiff, the successful party, which he is to pay in any event; that is, he would be reimbursed fully the whole costs — not only his own costs, but those he was ordered to pay — namely the costs of an application which the court has held to be improper. It seems to me that costs "in any event", although it does not say so in so many words, must be implied to exclude the possibility of the defendant getting them as trustee as part of the cost of the action.

16. He also referred to *JT Stratford & Son Ltd v Lindley & Ors* (No 2) [1969] 3 All ER 1122 where Lord Denning MR said at 1123:

> There is no definition in any law book of the words "costs in the cause". But every pupil on his first day in chambers is told what it means. "Costs in the cause" means that the costs of those interlocutory proceedings are to be awarded according to the final award of costs in the action ... "Plaintiff's costs in any event" means that, no matter who wins or loses when the case is decided, the plaintiff is to have the costs of those interlocutory proceedings.

17. I accept that the intention of the Masters who made the five orders in question was that those orders were for "costs in any event". Nevertheless, they were unaware of the position as to discovery which grounded the award by the Court of indemnity costs. Nor, in the nature of things, could they be aware of the ultimate findings to be made by the Court on the substantive issue.

18. The court has an inherent power to vacate an order, although that power should be exercised sparingly. In *In Re William Bruce, an Insolvent* [1886] VicLawRp 144; (1886) 12 VLR 696 at 709, the Full Court (Higinbotham, Williams and Holroyd JJ) said:

> We are of opinion ... that the Court of Insolvency, like every other court, or judge of a court, has power to set aside an order made by it or by him upon being satisfied either that the order has been made improvidently, or that facts have been withheld from him which should have been disclosed to him, but which were not disclosed either through negligence or some other cause. Every court and every judge has, we think, power to do that, and to set aside any act of their or his own shown to have been done under circumstances which operated to deprive his mind of the power of exercising a fair judgment at the time.

19. In *Re Orders made by the Honourable Justice Balmford* (unreported, decided on 16 September 1997) I considered the continuing application of the principle there stated. On the basis of the reasons there set out, which it is not necessary to repeat here, I am satisfied as to the jurisdiction of the Court to vacate the five orders of the Masters which are here under consideration.

20. As I said on 18 October, I found the late discovery a sufficient ground for making the order for indemnity costs, and accordingly did not need to consider the other grounds put forward by the defendants as justifying such an order. I am now asked to make a further order vacating orders made by other judicial officers in this proceeding, on the basis that, if the matter had been drawn to my attention when making that order the further order would at once have been made. In considering whether that is the case, I must take into account what would have been in my mind at the time; I cannot be limited to the ground on which I decided the application for an order for indemnity costs.

21. Having considered the question, I am satisfied that, had the payment of the costs of the interlocutory proceedings been raised before me on the making of the order for indemnity costs, I would have ensured that that order was expressed in such a way as to make clear that it was intended to comprehend the vacating of the interlocutory costs orders, and the making of an order that the plaintiff pay, on an indemnity basis, the defendants' costs of the five interlocutory proceedings and the application before Byrne J.

22. My satisfaction that I would have done so is grounded in the findings which I made in the substantive proceedings, on which Mr Palmer, understandably, did not feel able to rely in the present context, as well as on his submission as to the effect of the late discovery. It is appropriate to set out those findings again, as summarised at the conclusion of my reasons for judgment, where I said at paragraph 101:

> Each of the defendants was under a special disability in that he had a limited command of English other than for routine day-to-day transactions;
>
> the bank [ie the plaintiff], in the person of Mr Collins, was aware of this;
>
> the bank was by far the stronger party to the transaction;
>
> the bank, in the person of Mr Collins, nevertheless proceeded to obtain the signatures of the defendants to the guarantee, which was prima facie unconscionable in terms of the decision of the High Court in *Amadio*;
>
> the bank has not discharged the onus of satisfying me that the transaction was fair, just and reasonable. In particular:
>
> the bank took no steps to ascertain whether the defendants' financial position was such that they could meet the liability under the guarantee without incurring financial hardship;
>
> it prepared what it should have known was a defective and unregistrable mortgage;
>
> when the correct remedy for the defect was discovered, it took no action for over a year;
>
> in order to allay the expressed concerns of the defendants, and to obtain the execution of the guarantee, it gave an assurance as to the execution of fresh guarantees by an incoming committee, which assurance did not bind the bank and was not complied with;
>
> in order to allay the expressed concerns of the defendants, and to obtain the execution of the guarantee, it gave an assurance to the defendants that in the ordinary course of business, should there be default, the bank would have recourse first against the land under the mortgage before proceeding under the guarantee, which assurance did not bind the bank and, because of the neglect of the bank, was at the time impossible to comply with and was not complied with;
>
> it completed the guarantee, by the insertion of the names of the guarantors and the warning clause, after its execution by the guarantors;
>
> it failed to obtain the execution of the guarantee by all of the directors, contrary to the agreement for the loan, and did not explain to the defendants the consequences for them of that failure;
>
> it entered into the transaction without disclosing to the defendants the full implications of the guarantee so far as they personally were concerned;
>
> the defendants received no personal benefit from the transaction;
>
> it relied on the presence of Mr Rosati, who was thought to be acting for the borrower, and was certainly not acting for the defendants, as satisfying the need for the defendants to be afforded independent financial advice;
>
> it took no steps to ensure that the defendants obtained independent legal advice.

23. The initial unconscionable action of the plaintiff in obtaining the signatures of the defendants to the guarantee and its actions in that context both before and after the signatures were obtained are inexcusable. It was those actions which led to this proceeding, initiated by the plaintiff. There is no reason why the defendants should not be completely indemnified for their costs, including costs ordered by judicial officers which, while entirely justifiable on the material before those officers, arose, as did this proceeding in its entirety, purely from the wrongdoing of the plaintiff.

24. Lockhart J, with whom Black CJ agreed (Lindgren J not commenting on the point) said in *Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd* (1995) 61 FCR 385; (1995) 133 ALR 206 at 212; (1995) 18 ACSR 807; 14 ACLC 50:

> An exercise of the power of the court under the slip rule is ultimately to avoid injustice. This obvious purpose of the slip rule underlies a number of decisions of judges of this court and of other courts.

25. The exercise of the power of the court under the slip rule to make the orders sought by the five defendants will avoid the injustice which would occur if those defendants were not to be

completely indemnified by the plaintiff for all of their costs (except in so far as those costs are of an unreasonable amount or have been unreasonably incurred) arising from the behaviour of the plaintiff towards them. I should make clear that I am not suggesting that interlocutory costs orders made against a party who is ultimately successful should, as a matter of right, be reversed. As Mr Clarke rightly submitted, those costs are normally intended to be "costs in any event". Nevertheless, as I have said, I find the unconscionable behaviour of the plaintiff, over a period of years, as well as the late discovery with all that that led to in the conduct of the proceeding, to justify such a reversal in this case, given that the original costs order provided for the payment of indemnity costs.

The two defendants

26. Mr Pickering, who represented the two defendants in the original proceeding and on the present issue, had not been present on the hearing of the application for indemnity costs. It would appear, however, that counsel who represented his clients on that occasion had, like Mr Palmer, failed to direct his mind to the question of the costs of the interlocutory proceedings. Mr Pickering informed the Court that Master Cain had instructed that his clients and the third parties be notified of the making of this application, rather than requiring a separate application to be made on another day and the consequent incurring of further costs. He referred to Rule 1.14(2) of the Rules which reads:

> (2) The Court may exercise any power under these Rules of its own motion or on the application of a party or of any person who has a sufficient interest.

27. He submitted that the second defendant was in an identical position to the five defendants, and he sought orders in favour of the second defendant in the same terms as those sought by the five defendants. The third defendant had entered an appearance only some two weeks before the trial, and accordingly sought a corresponding order only in respect of the application before Mr Justice Byrne. I note that the court records of the orders of Master Kings and Master Bruce are expressed to apply to all of the defendants, which it appears may have been an error.

28. The considerations relevant to the two defendants are identical to those relevant to the five defendants, the only distinctions (apart from the third defendant's late involvement in the proceeding) being that they are represented separately from the five defendants and that their summons for taxation has been adjourned pending the conclusion of the taxation of the costs of the five defendants. All relevant parties were before me and made submissions on the application of the five defendants and the oral application of the two defendants. I am satisfied that it is appropriate, for the avoidance of additional costs, that I treat the two defendants as having made an application identical (save as to the third defendant's late involvement) with that of the five defendants and deal with it accordingly.

The third parties

29. Mr Arellano, for the third parties, submitted that it was appropriate that the costs order against his clients made by Master Bruce on 14 August 1999 be vacated, on the basis that his clients were not at that stage parties to the proceeding; and that the costs order against his clients made by Mr Justice Byrne on 15 July 1999 be vacated on the basis that his Honour was not aware of the defective discovery by the plaintiff and that had he been aware of the true situation in that regard he would have allowed the application by the third parties for an adjournment.

30. However, these matters were not the subject of any summons; and unlike the matters raised by Mr Pickering they cannot be said to be identical with the matters the subject of the summons by the five defendants, which were fully argued before me. I do not think it appropriate, in the circumstances, that I deal with his submissions.

Conclusion

31. For the reasons given, there will be orders, in addition to the orders made on 18 October 1999, that

§ the interlocutory costs orders be vacated and that the plaintiff pay, on the basis set out in the fourth order made that day:

§ the costs of the first, second, fourth, fifth, sixth and seventh defendants of the several proceedings before

Masters which are described in paragraph 6 above;

§ the costs of all seven defendants of the application made before Mr Justice Byrne on 15 July 1999; and

§ the costs of all seven defendants of this application.

APPEARANCES: For the plaintiff NAB: Mr M Clarke, counsel. Russell Kennedy, solicitors. For 1st, 4th, 6th and 7th named defendants: Mr SV Palmer, counsel. Marshalls & Dent, solicitors. For the 2nd and 3rd named defendants: Mr PJ Pickering, counsel. Antonio Caamaño, solicitors. For the Third parties: Mr RA Arellano, counsel. Antonio Caamaño, solicitors.
