07/03; [2003] VSC 71

SUPREME COURT OF VICTORIA

ELSEGOOD v GOTTS & ANOR

Balmford J

6, 18 March 2003

CIVIL PROCEEDINGS – PROCEEDING FOR DECLARATION OF LIFE INTEREST IN LAND – PROCEEDING TO RESTRAIN PERSON FROM REMOVAL FROM LAND – APPLICATION FOR SUMMARY DISMISSAL OF PROCEEDING – ALLEGATION THAT PROCEEDING DID NOT DISCLOSE A CAUSE OF ACTION – BASIS ON WHICH SUMMARY DISMISSAL CAN OCCUR – JURISDICTION OF COURT TO BE SPARINGLY INVOKED – WHETHER APPROPRIATE TO GRANT APPLICATION: *SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES* 1996, R23.01(1).

1. The jurisdiction of a court to dismiss a claim on the basis that it discloses no reasonable cause of action is to be sparingly invoked. The power to order summary judgment must be exercised with exceptional caution and should never be exercised unless it is clear that there is no real question to be tried.

***McKellar v Container Terminal Management Services* [1999] FCA 1101; (1999) 165 ALR 409, and**

***Webster v Lampard* [1993] HCA 57; (1993) 177 CLR 598; (1993) 116 ALR 545; (1993) 67 ALJR 886; [1993] Aust Torts Reports 62,435, applied.**

2. Where a person claimed a life interest in land by virtue of an agreement said to be partly written, partly oral and partly to be inferred, and whilst there may have been no memorandum or note in writing complying with the requirements of s126 of the *Instruments Act* 1958, there may have been grounds on which the person could rely on the equitable doctrine of part performance. In those circumstances, it was not appropriate to grant the application to strike out the claim on the ground that it did not disclose a cause of action.

BALMFORD J:

1. In the statement of claim filed with the writ issued on 3 July 2002 the plaintiff claims a declaration that he has, for the purposes of section 89(1) of the *Transfer of Land Act* 1958 an estate or interest in the land known as Sterling Park and more particularly described in Certificates of Title Volume 9895 Folios 016 and 017 ("the land"); a declaration that he is entitled to register a caveat over the land pursuant to that section; and an injunction restraining the defendant from removing him from the land. A defence was filed on 2 August 2002.

2. The present proceeding is the return of a summons filed on 1 November 2002 seeking that the plaintiff's statement of claim be struck out either under Rule 23.01 of the *Supreme Court (General Civil Procedure) Rules* 1996 or under the inherent jurisdiction of the Court. There are other heads of relief sought in the summons, most of which would more appropriately be the subject of a counterclaim. However, no counterclaim has been brought. On 17 September 2002, Beach J ordered that the defendant have leave to bring an application under Order 23 returnable before a Judge in the Practice Court. I was not informed of His Honour's reasons for granting leave for the application to be brought before a Judge rather than a Master.

3. There was before the Court a letter from the third party addressed to the solicitors for the defendant, indicating that she did not intend to appear on the return of the summons or to claim costs, and making comments, which in the event it is not necessary to consider in the present context, as to certain of the heads of relief.

4. Rule 23.01(1) reads, so far as relevant:

> 23.01(1) Where a proceeding generally or any claim in a proceeding—
> (a) does not disclose a cause of action;
> (b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the Court—
the Court may stay the proceeding generally or in relation to any claim or give judgment in the proceeding generally or in relation to any claim.

5. The principal submission of Mr Mort, for the defendant, was brought under paragraph (a) of that provision, on the ground that the statement of claim did not disclose a cause of action. While he referred to paragraphs (b) and (c), he rightly did not seriously contend that either of those provisions applied to the statement of claim.

6. In *McKellar v Container Terminal Management Services*[1] Weinberg J conveniently set out the present state of the authorities on the principles governing summary dismissal. His Honour said:

> It is clearly established that the jurisdiction of the Court to dismiss a claim upon the basis that it discloses no reasonable cause of action is to be sparingly invoked.

In *Dey v Victorian Railways Commissioners* [1949] HCA 1; (1949) 78 CLR 62; [1949] ALR 333; 23 ALJR 48 Dixon J (as he then was) stated at CLR 91:

> A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.

In *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125; [1965] ALR 636; 38 ALJR 253 Barwick CJ cited that passage with approval at 129-30, and stated earlier at CLR 128-9:

> The plaintiff rightly points out that the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion. I have examined the case law on the subject, to some of which I was referred in argument and to which I append a list of references. There is no need for me to discuss in any detail the various decisions, some of which were given in cases in which the inherent jurisdiction of a court was invoked and others in cases in which counterpart rules to Order 26, r. 18, were the suggested source of authority to deal summarily with the claim in question. It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action – if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal - is clearly demonstrated. The test to be applied has been variously expressed; "so obviously untenable that it cannot possibly succeed"; "manifestly groundless"; "so manifestly faulty that it does not admit of argument"; "discloses a case which the Court is satisfied cannot succeed"; "under no possibility can there be a good cause of action"; "be manifest that to allow them" (the pleadings) "to stand would involve useless expense".

At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or "so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument"; "so to speak apparent at a glance".
Barwick CJ continued at CLR 130:

> " . . . in my opinion great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal. On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

The remarks of Dixon J in *Dey v Victorian Railways Commissioners* were also cited with approval by Mason CJ, Deane and Dawson JJ in *Webster v Lampard* [1993] HCA 57; (1993) 177 CLR 598; (1993) 116 ALR 545; (1993) 67 ALJR 886; [1993] Aust Torts Reports 62,435 where their Honours

said at CLR 602:

> The power to order summary judgment must be exercised with "exceptional caution" . . . and "should never be exercised unless it is clear that there is no real question to be tried".

The same strict approach has been taken in the United Kingdom. In *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368; [1986] 1 All ER 129; [1986] 2 WLR 24 Lord Templeman stated at AC 435-6:

> "My Lords, if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself."

Other United Kingdom authorities are canvassed by O'Loughlin J in *Cubillo v Commonwealth of Australia* [1999] FCA 518; (1999) 89 FCR 528; (1999) 163 ALR 395 at 415-6. They confirm that a proceeding should not be dismissed summarily merely on the ground that it appears, at the early stage of the hearing of the motion brought for that purpose, to advance a highly implausible claim which will very probably fail, but only where the claim may properly be described as unarguable, and almost incontestably bad, or where the claim is otherwise objectionable as an abuse of the process of the court. . . .

7. The plaintiff claims a life interest in the land by virtue of an agreement said to be partly in writing, partly oral and partly to be inferred. The component in writing is said to be contained in a contract of sale between the plaintiff and George Henry Eccles, the ex-husband of the defendant, of certain land at Hastings. That contract of sale is not before the Court and I am unable to comment on it.

8. Section 126 of the *Instruments Act* 1958, the Victorian provision which enacts the *Statute of Frauds*, reads:

> **126. Certain agreements to be in writing**
> An action must not be brought to charge a person upon a special promise to answer for the debt, default or miscarriage of another person or upon a contract for the sale or other disposition of an interest in land unless the agreement on which the action is brought, or a memorandum or note of the agreement, is in writing signed by the person to be charged or by a person lawfully authorised in writing by that person to sign such an agreement, memorandum or note.

The memorandum or note in writing must contain all the terms of the contract including the parties, the promise, the subject matter and the consideration. *Parker v Barnett* (1889) 16 VLR 214 at 221.

9. There was before me no memorandum or note in writing evidencing the creation of the interest claimed by the plaintiff which could comply with the requirements of section 126. Mr Mort submitted that accordingly, the plaintiff's claim was unenforceable and should be struck out at this stage. In this context he referred also to section 53 of the *Property Law Act* 1958 ("the PLA") which reads:

> **53. Instruments required to be in writing**
> (1) Subject to the provisions hereinafter contained with respect to the creation of interest in land by parol—
> (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorized in writing, or by will, or by operation of law;
> (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
> (c) a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorized in writing or by will.
>
> (2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.

10. There are substantial conflicts in the evidence contained in the affidavits of the plaintiff

sworn on 12 September 2002 and of the defendant sworn on 31 October 2002. However, it is apparent that, even allowing for those conflicts, there may well be grounds on which the plaintiff could rely on the equitable doctrine of part performance[2] to take the matter out of the operation of the *Statute of Frauds*. I say no more than that, and for present purposes it is not necessary for me to take that matter further. In respect of section 53 of the PLA, that doctrine is preserved by section 55(d) of that Act.

11. Considering the matter on the basis of the authorities to which I have referred, I am satisfied that it is not appropriate that I make the order sought by the defendant to strike out the statement of claim. The other orders which she seeks either fall with that order, or, as I have said, would more appropriately be the subject of a counterclaim.

12. The summons will be dismissed. Counsel may wish to make submissions as to costs.

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[1] [1999] FCA 1101 at [12]-[18]; (1999) 165 ALR 409
[2] see *Cooney v Burns* [1922] HCA 8; (1922) 30 CLR 216 at 122; 28 ALR 181.

APPEARANCES: For the plaintiff Elsegood: Mr G Baker, counsel. Duffy & Simon, solicitors. For the defendant Gotts: Mr DA Mort, counsel. Anderson Rice, solicitors.
