McDermott v Richmond Sales Pty Ltd (in liq)

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Unreported Judgments Federal Court of Australia · 29 Paragraphs

Federal Court of Australia — Victoria District Registry

Kenny J

VID 177 of 2006

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Headnotes

PRACTICE AND PROCEDURE — application to vary consent orders — O 35 r 7(2)(c), O 35 r 7(4) Federal Court Rules 1979 — whether orders interlocutory.

(CTH) Corporations Act 2001 s 530C

(CTH) Federal Court of Australia Act 1976 s 23

(CTH) Federal Court Rules 1979 O 35 r 7(2), O 35 r 7(2)(c), O 35 r 7(4)

Richmond Sales Pty Ltd (In Liq) v McDermott [2006] FCA 52; *Westsub Discounts Pty Ltd v Idaps Australia Ltd (No 2)* (1990) 94 ALR 310; *Lindon v Stanton* (Supreme Court of Western Australia (Adams M), 27 November 1992, BC9200887); *Nicholson v Nicholson* [1974] 2 NSWLR 59; *Hall v Nominal Defendant* (1966) 117 CLR 423; *SZGAP v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1785; *Abigroup Ltd v Abignano* (1992) 39 FCR 74; *Comcare v Grimes* (1994) 50 FCR 60; *Maritime Union of Australia v Geraldton Port Authority (No 3)* (2001) 106 IR 119; *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 117 ALR 253; *Dudzinski v Centrelink* [2003] FCA 308; *Wati v Minister for Immigration and Multicultural Affairs* (1997) 78 FCR 543, referred

Neil J Williams, Civil Procedure

Kenny J.

[1] The applicants in this matter, Robert McDermott, Maxwell Latimer and Ann Langdon, were defendants in an earlier proceeding before me. That proceeding began as an ex-parte application, filed by Paul Burness as liquidator of Richmond Sales Pty Ltd ("Richmond Sales"), for a warrant under s 530C of the Corporations Act 2001 (Cth). The procedural history of that matter is outlined in reasons for judgment delivered on 8 February 2006: see *Richmond Sales Pty Ltd (In Liq) v McDermott* [2006] FCA 52 at [2]–[19].

[2] It is unnecessary to review all of the procedural history of the earlier proceeding involving these parties. For the

present purposes, the following facts are relevant:

- Merkel J issued a warrant on 4 December 2003 and it was served the next day. Pursuant to the warrant, Burness seized seven vehicles.
- On 24 March 2004, Burness filed an interlocutory application asking that he be directed to sell the seven seized vehicles.
- By 15 December 2004, only three vehicles remained in Burness's possession and the subject of dispute. McDermott, Latimer and Langdon, as defendants, opposed the sale of these vehicles.
- Burness's application to dispose of the vehicles was part heard on 12 and 13 July 2005.
- On 29 August 2005, McDermott, Latimer and Langdon, together with fellow defendants Michael Giuffre, John McDonald and Mary-Ann Martinek, filed an application seeking to set aside the warrant issued on 4 December 2003.
- On 10 October 2005, the parties informed the Court that they had reached a settlement concerning Burness's application of 24 March 2004 to dispose of the seized vehicles. The parties requested that the Court make consent orders consistent with the terms of this settlement. Accordingly, amongst other things on that day the Court ordered:

    1. The motor vehicle identified as a Rolls Royce Silver Ghost chassis No 2316 which is in the possession of the Plaintiff be delivered to the Defendant nominated by Walter Percival Edwards at an address in Melbourne specified by him forthwith upon nomination of that Defendant.

    2. In the event that the Defendants pay the sum of $33,000.00 to the Plaintiff on or before 31 January 2006 the Plaintiff deliver the motor vehicles identified as a Rolls Royce Phantom II Sedan chassis No 39GY and a Rolls Royce Silver Shadow II Saloon chassis No. SRH0040192 to the Defendant or Defendants nominated by Walter Percival Edwards at an address specified by him within 48 hours of receipt of the said sum.

    2A. In the event that the Defendants fail to pay the sum of $33,000.00 to the Plaintiff on or before 31 January 2006 the motor vehicles referred to in paragraph 2 hereof be the absolute property of Richmond Sales Pty Ltd (in liquidation) and the liquidator of that company be at liberty to sell those vehicles and retain the proceeds of sale as absolute property of the company in liquidation.

    2B. Reserve liberty to the parties to apply.

- On 10 October 2005, the Court also made orders concerning the timing of submissions regarding the defendants' application of 29 August 2005 to set aside the warrant.
- On 8 February 2006, the Court delivered reasons for judgment dismissing the defendants' application to set aside the warrant.

[3] On 23 February 2006, the applicants filed this application, under s 23 of the Federal Court of Australia Act 1976 (Cth), seeking that paras 2 and 2A of the orders of 10 October 2005 be varied. The applicants ask the Court to extend the time for payment of the sum of $33,000.

Evidence and Submissions

[4] The applicants relied on affidavits sworn by their solicitor Walter Edwards on 22 February 2006 and 15 March 2006. Edwards attached correspondence between the parties as exhibits to his first affidavit. Mr Edwards deposed that it was "contemplated by the parties (and by the Defendants [sic] solicitors in particular) that the application to set aside the Warrant would be determined by 31 January 2006 (being the date for payment of the settlement funds upon the Liquidators [sic] proceedings)."

[5] Edwards further deposed that, on 31 January 2006, he sent a fax to Burness's solicitors stating that $33,000 had been paid into a trust account to enable the payment of the settlement amount. On 1 February 2006, Edwards

sent another fax stating that the funds would be held in the trust account until the determination of the application to set aside the warrant. Amongst other things, this facsimile stated: "With regard to the payment of the $33,000 we advise that on counsel's advice, we will be holding those funds in our trust account, pending the decision of her Honour Justice Kenny … we believe that your client is likely to owe our clients substantial costs which will exceed the amount already being held by us."

[6] In response, Burness's solicitors stated that, pursuant to the Court's orders of 10 October 2006, the relevant vehicles were now the property of Richmond Sales. Edwards then wrote to Burness's solicitors seeking an undertaking that the vehicles would not be sold until judgment was handed down on the application to set aside the warrant. Burness's solicitors replied that, for practical reasons, the vehicles could not be sold within that time-frame.

[7] Edwards stated that, on 8 February 2006, after judgment was delivered on the application to set aside the warrant, he caused a trust account cheque for $33,000 to be delivered to Burness's solicitors. Burness's solicitor, Chris Charles, returned the cheque by mail with a cover letter stating that he had no instructions to accept the funds.

[8] In his second affidavit, Edwards deposed that:

> Pursuant to the Court Orders made by consent on 10 October 2005 the Liquidator failed to deliver Vehicle 2316 to the person that I nominated (as specified in clause 1 of the Orders) until some two weeks after the making of the order.
>
> On 31 January 2006 I informed McDermott's Workshop of my trust account details as he had indicated to me that he was providing by direct transfer of funds the amount of $33,000.00 being the sum required to payout the Liquidator pursuant to clause 2 of the 10 October 2005 orders …
>
> Funds were shown as having been 'cleared' into my trust account on 1 February 2006.
>
> I informed the Applicants that I had received the funds into my trust account on 1 February 2006, however, the Applicants indicated to me that the funds were in fact deposited into my trust account on 31 January 2006.

Counsel for the applicants submitted that the Court has the power to vary the order under O 35 r 7(2)(c) of the Federal Court Rules 1979 which allows the Court to "vary or set aside a judgment or order after the order has been entered where … the order is interlocutory." The applicants argued that the consent orders were interlocutory because they included an order reserving liberty to apply. Counsel for the applicants also relied on O 35 r 7(4) (and, in this connection, *Westsub Discounts Pty Ltd v Idaps Australia Ltd (No 2)* *(1990) 94 ALR 310*) and the inherent jurisdiction of the Court.

[9] In the applicants' view, a number of factors support the conclusion that this is an appropriate case to exercise the discretion conferred by O 35 r 7(2) or O 35 r 7(4) or in the Court's inherent jurisdiction. First, so the applicants claimed, the consent orders show that the intention of the parties was that $33,000 be exchanged for the relevant vehicles. Secondly, this money was available to be transferred to the respondents on 31 January 2006 (or at the latest 1 February 2006). Thirdly, according to the applicants, the reason that the money was not delivered on 31 January 2006 was that, contrary to both parties' expectations, reasons for judgment regarding the application to set aside the warrant were not delivered until after than date. Fourthly, the money is available to be paid immediately. Fifthly, the respondents would not, so the applicants said, be prejudiced by a variation in the order. Sixthly, having regard to the liquidator's own delay in delivering vehicle 2316, there should have been no difficulty in the parties agreeing to disregard the delay on the applicants' side. Finally, if the time were not extended, then the liquidator would, so the applicants said, receive a windfall gain not intended by the settlement giving rise to the orders of 10 October 2005.

[10] The applicants conceded that they had not paid the $33,000 before 31 January 2006 because they expected a different result in the application to set aside the warrant. They argued that while this view may have been "naïve", they should not suffer prejudice as a consequence. They also sought the costs of their application.

[11] The respondents relied on an affidavit sworn by their solicitor, Chris Charles, on 6 March 2006. Charles concurred with much of Edwards's evidence. He did, however, dispute some of the applicants' claims. Charles deposed that the settlement was final and unconditional and, in particular, there was no condition that the settlement was dependent on the outcome of the defendants' application to set aside the warrant. He further deposed that Burness and Richmond Sales delivered up one vehicle to the defendant nominated by Edwards, in compliance with the orders of 10 October 2005 (and in conformity with the settlement). In argument, he said that consensual arrangements had been made with respect to the delivery of vehicle 2316 owing to difficulty in physically moving the car; and that delivery had been made within a reasonable time and in accordance with the orders of 10 October 2006.

[12] As the cheque for $33,000 was deposited into Edwards's trust account only on 30 January 2006, Charles maintained that "the cheque(s) would in the ordinary course take a number of days to clear; accordingly he [Edwards] would be in no position to tender payment of the $33,000 before vehicles 2 and 6 became the absolute property" of Richmond Sales on 1 February 2006. That is, these funds would not have been available to be paid before the due date contemplated by the consent orders.

[13] Charles also disputed Edwards's claim that the parties expected judgment regarding the application to set aside the warrant to be delivered before 31 January 2006. He stated that Burness has informed him that he had no expectation regarding the likely delivery date for that judgment and that, so far as he was concerned, "the timing and fact of the judgment was [sic] irrelevant to performance of the compromise".

[14] At the hearing, the respondents contended that O 35 r 7(2)(c) did not provide a basis for the orders sought. They submitted that paras 1, 2 and 2A of the orders of 10 October 2005 were final rather than interlocutory. They noted that the orders finally disposed of the subject matter of the 24 March 2004 application. They cited *Nicholson v Nicholson* *[1974] 2 NSWLR 59* in support of the proposition that reservation of liberty to apply, in the context of such orders, is simply a device by which further orders may be made when necessary for the purpose of implementing and giving effect to the principal relief already propounded. The respondents submitted that the reservation of liberty to apply in a final judgment or order did not permit the making of orders materially varying the substance of the order.

[15] The respondents submitted that the orders made in paras 1, 2 and 2A of the 10 October 2006 orders were final and unconditional, like the settlement agreement underlying them. Crucially, there was no condition that the settlement was dependent on the outcome of the defendants' application to set aside the warrant. In these circumstances, there was no reason to believe that the delay in payment that the applicants sought was consistent with the orders or the settlement.

[16] The respondents further submitted that a consent order giving effect to a settlement could only be set aside on grounds that would justify setting aside the contractual agreement on which the settlement was based. In support of this proposition, they referred to *Lindon v Stanton* (Supreme Court of Western Australia (Adams M), 27 November 1992, BC9200887).

[17] The respondents also argued that the applicants received no support from O 35 r 7(4) and nor could they avail themselves of the Court's inherent jurisdiction. They contended that O 35 r 7(4) conferred power to make orders that were truly supplemental and did not confer power to vary or alter the initial order.

[18] Ultimately, so the respondent said, the applicants made a decision not to pay before the end of January. This decision was based on the applicants' view that it was not in their interest to pay the money at that time. The respondents submitted that they should not be penalized for the applicants' error. The respondents noted that they would be prejudiced by any variation of the kind sought in the orders of 10 October 2006 because the vehicles were likely to be worth more than $33,000.

[19] The respondents also submitted that the applicants should pay their party and party costs.

Consideration

[20] For the reasons I am about to state I would dismiss this application. First, the relevant orders were final and the Court has no power to vary them under O 35 r 7(2), O 35 r 7(4) or in the Court's inherent jurisdiction. Secondly, even if the Court had discretion to vary the orders, there is simply no basis for doing so.

[21] An order is final if it "it finally determine[s] the rights of the parties in a principal cause pending between them": *Hall v Nominal Defendant* (1966) 117 CLR 423 at 443 per Windeyer J; see also the discussion in *SZGAP v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1785 at [32]–[34] per Lindgren J. There is no question that the orders of 10 October 2005 finally determined the rights of the parties with respect to the liquidator's application to dispose of the vehicles.

[22] Moreover, it is settled law that orders may be final even though the Court reserves liberty to apply: see, e.g., *Abigroup Ltd v Abignano* (1992) 39 FCR 74 at 87–88 per Lockhart, Morling and Gummow JJ; *Comcare v Grimes* (1994) 50 FCR 60 at 61–62 per Wilcox J; *Maritime Union of Australia v Geraldton Port Authority (No 3)* (2001) 106 IR 119 at 122–125 per Nicholson J; and *Nicholson v Nicholson* [1974] 2 NSWLR 59 at 63 per Jenkyn J. These cases reveal that liberty to apply does not render a final order any less final: see further Neil J Williams, Civil Procedure at [I 59.01.20] and the cases cited therein.

[23] The orders in paras 2 and 2A of the orders of 10 October 2005 were final orders with respect to the application of 24 March 2004. Thus, the Court has no power to vary these orders pursuant to O 35 r 7(2). Further, the Court has no power under O 35 r 7(4) to make the orders the applicant seeks. As a Full Court said in *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 117 ALR 253 at 264 per Lee, Hill and Cooper JJ, regarding O 35 r 7(4), "[c]ritical to the jurisdiction of the court is first that the application not be one in any way to vary or alter the initial order". The applicants seek orders to vary the orders in paras 2 and 2A of the 10 October 2006 orders; and O 35 r 7(4) does not give power to do this. In the face of Full Court authority, the earlier decision in *Westsub Discounts Pty Ltd v Idaps Australia Ltd (No 2)* (1990) 94 ALR 310 is either to be distinguished or is no longer good authority.

[24] Furthermore, there is nothing shown to attract the inherent jurisdiction of the Court in this case. Accordingly, the Court has no power to vary the orders and the application must be dismissed.

[25] I would reach the same result even if the relevant orders were interlocutory. It is well established that the discretion conferred by O 35 r 7(2) should be used only in exceptional circumstances: *Dudzinski v Centrelink* [2003] FCA 308 at [11] per Spender J. The principle of finality of litigation requires courts to exercise great caution when considering whether exceptional circumstances exist warranting the variation of orders: see *Wati v Minister for Immigration and Multicultural Affairs* (1997) 78 FCR 543 at 549–552 per von Doussa, Moore and Sackville JJ. In this case, the circumstances do not support varying the orders.

[26] The applicants have conceded that they chose not to pay the $33,000 before the end of January 2006. For that reason, it is irrelevant whether or not the funds were available in a trust fund to be disbursed on 31 January 2006. The applicants chose not to pay the settlement amount on that date because they believed it was in their interest to withhold the money. They believed that they would be successful in their application to set aside the warrant. They were incorrect. Effectively, they now ask the Court to turn back the clock and undo their error at the expense of the respondents.

[27] As the respondents correctly noted, the orders in paras 1, 2 and 2A of the orders of 10 October 2005 were not dependant or conditional in any way on the result of the application to set aside the warrant. By their terms, those orders make no reference to that application. On 10 October 2005, all parties to the earlier proceeding were aware that the application to set aside the warrant was on foot. Further, on 31 January 2006, all parties were aware that

judgment regarding the application to set aside the warrant was yet to be delivered. In light of this history, the applicants in this proceeding cannot identify any mutual mistake or misapprehension or other exceptional circumstance that would justify varying the orders of 10 October 2005.

[28] Furthermore, the respondents would clearly be prejudiced if the orders were varied. The respondents agreed to settle the application of 24 March 2004. They have delivered one vehicle as required by the orders of 10 October 2005. The terms of the settlement, and the corresponding consent orders, entitled them to be paid by a certain date. If they were not paid, two of the vehicles became the property of the company in liquidation. They are entitled to the benefit of their agreement as formalised by the consent orders. Overall, the applicants have identified no grounds for varying the consent orders.

[29] In all the circumstances, the applicants should pay the respondents' costs of and incidental to the application.

Order

1. The application be dismissed.
2. The applicants pay the respondents' costs of and incidental to the application.

Note: Settlement and entry of orders is dealt with in O 36 of the Federal Court Rules.

Counsel for the applicants: *Mr P Hayes QC*
Counsel for the respondents: *Mr C Charles*
Solicitor for the applicants: *W P Edwards*
Solicitor for the respondents: *Charles Fice*