WRENFELD PTY LTD T/A COMPUDRAFT AUSTRALIA V G.D.FINCH

Supreme Court of the Northern Territory of Australia

Kearney J

18 and 23 July 1991 at Darwin.

APPEAL - appeal from Master - re-hearing de novo - weight of decision under appeal - requirements for reception of fresh evidence - Supreme Court Rules, Rule 77.05(7)(b)

APPEAL - appeal from Master - whether grounds of appeal required - whether Form 77A apposite - Supreme Court Rules, Rule 77.05

CORPORATION - when impecunious corporation required to give security for costs - burden of proof - whether Court's discretion unfettered - Supreme Court Rules, Rule 62.02(1) - Corporations Law s.1335

COSTS - security for costs - impecunious plaintiff corporation - general and unfettered discretion of Court - what is just and reasonable in the circumstances - relevant factors

PRACTICE & PROCEDURE - appeal from Master - re-hearing de novo - requirements for reception of fresh evidence - Supreme Court Rules, Rule 77.05(7)(b)

Cases referred to:

Australian Dairy Corporation v Murray Goulburn Co-operative Co. Ltd [1990] VR 335
Bell Wholesale Co. Ltd v Gates Export Corporation [1964] 2 F.C.R. 1
Dudley E. King Lino Typers Pty Ltd v Tozer Kemsley & Millgrove Australia Ltd [unreported, S.C. (Vic), 22.6.88]
Ladd v Marshall [1954] 3 All E.R. 745
Milingimbi Educational & Cultural Association Inc v Davies [unreported, S.C. (NT), 12.10.90]
N.T. of Australia v DJM Developments Pty Ltd [unreported, S.C. (NT), 15.3.91]
Southwell v Specialised Engineering Services Pty Ltd (1990) 70 NTR 6
Tradestock Pty Ltd v TNT Management Pty Ltd (1977) 14 ALR 52

Counsel for the Appellant:	C. Delaney
Solicitors for the Appellant:	Elston & Gilchrist
Counsel for the Respondent:	J. Duguid
Solicitors for the Respondent:	Waters, James & McCormack

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 631 of 1990

IN THE MATTER OF

DARWIN JOINERY &
FURNITURE MANUFACTURING
PTY LTD (IN LIQUIDATION)

AND IN THE MATTER OF

THE COMPANIES (NORTHERN
TERRITORY) CODE

BETWEEN:

WRENFELD PTY LTD t/a
COMPUDRAFT AUSTRALIA
Appellant

AND:

GEOFFREY DONALD FINCH
Respondent

CORAM: KEARNEY J

RULING

(Delivered 23 July 1991)

On 4 July 1991 the Master dismissed an application by the Respondent (herein "the liquidator") of 18 June 1991 that the Appellant (herein "Wrenfeld") be ordered to give security for costs. On 10 July 1991 the liquidator appealed against the Master's decision. The appeal was argued before me on 18 July; I rule on it today.

The Notice of Appeal set out two grounds of appeal. In passing, I note that in Southwell v Specialised Engineering Services Pty Ltd (1990) 70 NTR 6 at p.8 I indicated that it was unnecessary to specify grounds of appeal in this type of appeal. The reason is simple; there is no point in doing so. See the observations of McGarvie J in Australian Dairy Corporation v Murray Goulburn Co-operative Co. Ltd. (1990) VR 335 at p.378.

Further evidence

At the outset Mr Delaney for the liquidator sought special leave under Rule 77.05(7)(b) to rely upon affidavit evidence which had not been used before the Master. Mr Duguid for Wrenfeld opposed the grant of special leave. It is clear on such an application that the applicant may be required to explain by evidence why the new material had not been put before the Master; see Dudley E King Lino Typers Pty Ltd v Tozer Kemsley and Millgrove Australia Ltd (unreported, S.C.(Vic), Southwell J, 22 June 1988). I did not put Mr Delaney to formal proof.

In this case it is clear that the liquidator's concern as to Wrenfeld's ability to meet any award of costs against it, stemmed from company returns provided by Wrenfeld. In para 4 of Annexure "A" to the liquidator's affidavit of 18 June 1991, and in other annexures to that

affidavit, Wrenfeld's financial position is stated as follows:-

Year ending 30 June 1988 -

Accumulated profit $6 Gross profit $72

Year ending 30 June 1990 -

Gross loss $6.80 Net assets $673.20.

On 25 March 1991 Wrenfeld's solicitors had somewhat blithely dismissed the liquidator's expressed concerns; see Annexure "B" to the liquidator's affidavit of 18 June 1991.

Mr Delaney very frankly stated that the liquidator considered that he had placed sufficient evidence before the Master and that the purpose of the proposed new materials was to clarify what had been placed before the Master. The new material is comprised in Mr Morris' affidavit of 17 July 1991. It includes what is clearly new evidence; it shows that as at 30 June 1989 Wrenfeld had net assets of $8, had made an operating profit of $3, and had an accumulated profit of $6. It also shows the break up of the item of $15,000 which the liquidator had stated in para 6(e) of his affidavit of 18 June 1991 to be his estimate of the expense of his witnesses at the trial.

I ruled on 18 July that the liquidator could rely in this appeal on Mr Morris' affidavit of 17 July 1991; I reserved the question of the effect of doing so on the question of costs. Since the appeal is a re-hearing de

novo, I do not consider that the full rigour of the three requirements in Ladd v Marshall (1954) 3 All E.R. 745 must be met before the reception of the fresh evidence is justified. Mr Delaney accordingly relied on the liquidator's affidavit of 18 June 1991, as amplified by Mr Morris' affidavit of 17 July. He noted that Wrenfeld had filed no affidavit material in reply.

The appellant's impecuniosity

It is clear that since Wrenfeld is a corporation, it may be required to give security for costs if it is shown to be impecunious. That is to say, in terms of Rule 62.02(1)(b), if "there is reason to believe that [Wrenfeld] has insufficient assets in the Territory to pay the costs of the [liquidator] if ordered to do so", Wrenfeld may be ordered to give security for the liquidator's costs. Section 1335(1) of the Corporations Law is to the same general effect. As Mr Delaney rightly accepts, it is for the liquidator to adduce such evidence of Wrenfeld's financial situation as to establish, prima facie, the necessary "reason to believe". I consider that it is clear that even when such "reason to believe" has been established there remains a general and unfettered discretion in the Court to decide whether security should be required, without any predisposition; in exercising that discretion it will apply considerations of what is just and reasonable in all the circumstances of the case. I adhere in that respect to

the view I enunciated in Milingimbi Educational and Cultural Association Inc. v Davies (unreported, 12 October 1990, p.9)

On the question of Wrenfeld's assets Mr Delaney relied on the material in the affidavits earlier mentioned. Wrenfeld has not adduced any evidence in reply to that material. I consider that a plaintiff corporation seeking to resist an application for security should place before the Court a full and frank statement of its assets and liabilities as well as those of its shareholders. Against this background, I am satisfied, in terms of Rule 62.02(1)(b), that the liquidator has shown that, prima facie, Wrenfeld has insufficient assets to pay the liquidator's costs of this litigation if ordered to do so. The question, then, is whether security should be ordered.

Relevant factors

I turn to the factors relevant to the exercise of the discretion.

First, is it likely that Wrenfeld will succeed in its action? It seems clear that, for practical reasons, the Court should not allow this issue to be investigated in detail, in connection with security for costs. Neither counsel sought to do so, before me. I have noted Mr Duguid's submissions on this matter - that the relevant issues are whether Wrenfeld's contract with Darwin Joinery &

Furniture Manufacturing Pty Ltd was a fixed-price contract or not, and whether it was wrongfully terminated by that company. I consider that Wrenfeld will clearly face difficulties in establishing its claim, though it cannot be said that it is obviously untenable. In the result, I am unable to reach any firm view as to the possibilities of Wrenfeld's success in its action.

Second, Mr Delaney submits that the liquidator has not delayed in bringing his application for security for costs. Wrenfeld issued its Writ on 2 November 1990, after the liquidator had rejected its proof of claim on 15 October 1990. The liquidator first raised his concerns as to Wrenfeld's ability to pay costs, by his solicitors' letter of 1 February 1991. As noted earlier, Wrenfeld's solicitors' reply of 25 March 1991 skated somewhat blithely over these concerns. The liquidator took out his summons on 18 June 1991. I do not consider that the liquidator was dilatory in doing so. There is no suggestion that Wrenfeld has meanwhile incurred substantial costs.

Mr Delaney referred me to Northern Territory of Australia v DJM Developments Pty Ltd (unreported, Asche CJ, 15 March 1991) and some of the cases cited therein. I note that this decision is currently under appeal. I agree that some of his Honour's observations at p.7 of the judgment appear to be applicable in this case. On the material placed before me I consider that Wrenfeld is something of

"a legal entity without substance", as Smithers J put it in Tradestock Pty Ltd v TNT Management Pty Ltd (1977) 14 ALR 52 at p.59.

Mr Duguid submitted that the Master's decision of 4 July should be given considerable weight, since the law is unchanged and the evidence is largely the same. He sought to buttress this submission to some degree by pointing to the requirement in Form 77A that grounds of appeal be stated; however, as I pointed out in Southwell (supra), Form 77A is inapposite in this regard, in that it does not accord with the requirement in Rule 77.05(7) that the appeal be by re-hearing de novo.

Mr Duguid informs me that the Master dismissed the liquidator's application because he was not satisfied on the evidence placed before him that Wrenfeld would be unable to pay any costs awarded against it. As I am of opinion that the liquidator has established a prima facie case in that respect, I consider that I must respectfully differ from the Master's conclusion, though I take into consideration and give weight to the fact that he reached the conclusion he did, on the materials before him. It is not necessary for the liquidator to show that Wrenfeld is insolvent.

Mr Duguid submits that there is a nexus between Wrenfeld's impecuniosity (as assumed for the purposes of this submission) and the conduct of the former directors of

Darwin Joinery & Furniture Manufacturing Pty Ltd in terminating the contract which gave rise to Wrenfeld's claim (by way of proof of debt in the liquidation) for breach of contract. I am unable to accept that such alleged nexus is firmly established, though the material relied on by Mr Duguid establishes a tenable argument in that respect.

Mr Duguid submits that the liquidator's estimate of costs at $33,000 is excessive. These estimates are always difficult but I consider that that estimate is excessive and that any security for costs should not exceed $12,000.

I accept that it is possible that an order requiring that security be given could frustrate Wrenfeld's claim, but that in turn depends to some degree on the nature of the security required to be given. Further, Wrenfeld has not sought to establish that its director, Mr Batley, who stands behind it and will benefit from the litigation if it is successful, is also without means. This is relevant to the exercise of the discretion, when the question is whether litigation will be frustrated; see Bell Wholesale Co. Ltd v Gates Export Corporation (1984) 2 F.C.R. 1 at p.4.

I accept that there is no suggestion that Wrenfeld's claim is not made bona fide.

Conclusion

In the result I uphold the appeal against the Master's decision of 4 July and I quash the Master's order that the liquidator's application for security of costs be dismissed. In view of the fact that the liquidator relied on additional material on the appeal, I do not consider that the Master's order as to the costs of the proceedings before him should be varied.

The orders on the appeal will be as follows:-

1. That Wrenfeld give security for the liquidator's costs in this action.

2. That such security be in the amount of $12,000, either by a deposit of cash to that amount in Court, or by a Bank guarantee, or by a personal deed of guarantee by the director of Wrenfeld Ian Francis Batley, or by such other security to the value of $12,000 as is agreed by the parties or is to the satisfaction of the Master.

3. That such security be furnished on or before 27 August 1991. By consent varied.

4. That this action be stayed until security for costs in terms of para 2, is given.

5. That Wrenfeld pay the liquidator's costs of this appeal.
