An exercise in futility – summary dismissal applications

with Christine Smyth

Charlesworth v Griffiths & Anor [2018] QDC 115 is a well-crafted judgement by Porter DCJ in which he takes the legal traveler on a journey through the landscape of summary dismissal applications.

On this interlocutory sojourn his Honour draws upon the wisdom of several superior court decisions, taking us on a guided tour of the jurisprudence as to the correct approach. In doing so he hones in, with precision, on the applicable test in *General Steel*,[2] elucidating the remarks of Applegarth J in *Atthow v McElhone*[3] (*Atthow*), whilst reminding us that the history in the land of further provision applications (FPA) *does not* include a rule that a spouse has primacy.[4] All the while his Honour reaffirms that the two-stage test is the correct approach, regardless of the size of the estate.[5]

The executors of the estate of the late Kenneth Tandy brought an application for summary dismissal of an application by their sister, Mrs Charlesworth, who sought further provision from the estate of their late father. The estate was small, consisting primarily of a beneficiary loan account owed to the deceased by Manborough Pty Ltd as the trustee for the Tandy Family Trust, for $218,901.[6]

The deceased gifted the residue of his estate to his wife of 50 years and "Forgave any debts 'which may be owing', by Mrs Charlesworth".[7] Through the operation of the will, the executor sisters controlled the Tandy Family Trust.[8] The major asset of that trust was an historic building in which the wife resided, in the top half, rent free[9]. The bottom half was leased to a long-term reliable commercial tenant.

Mrs Tandy had superannuation of $755,000, of which she had received $588,000 from her husband's fund.[10] Her income was $40,000 a year. The applicant and her husband owned properties valued at $1.4 million, but had mortgages of $1 million, a business of negligible value, with the family expenses exceeding family income by $30,000 a year.[11]

In analysing the matters to which the court must have regard in summary dismissal applications generally but with focus on FPAs, Porter DCJ identified that the power of the court to consider these applications arises through the "inherent jurisdiction of the court to prevent abuse of its processes by the prosecution of untenable claims", with the District Court having "equivalent jurisdiction, at the least arising under s69 *District Court Act 1967* (Qld)".[12]

> "O what made
> fatuous sunbeams toil
> To break earth's sleep at all?"[1]

Porter DCJ did not accept the respondent's submission that the statement of Applegarth J in *Atthow* that that applicant's case was "practically hopeless" had "the effect...that even if a claim for provision is practically hopeless, it cannot be summarily dismissed on a *General Steel* basis".[13]

Instead, Porter DCJ clarified Applegarth J's comment as meaning that "the threshold for determination is that a proceeding is so untenable as to comprise an abuse of process".[14] How that is articulated varies. So, in *Atthow*, Applegarth J's statement was the manner in which he articulated the application of the *General Steel* test, and by making that statement he did not "set down a binding legal test for summary dismissal".[15]

In applying the *General Steel* test, Porter DCJ observed "the power to dismiss as an abuse of process is not confined to an assessment of whether there is prima facie case advanced by the application on the first stage of the *Singer v Berghouse* test. The power recognised in *General Steel* depends on all the circumstances of the particular case. Accordingly in my view, if it were demonstrated that the proceedings were 'useless and futile' because by the time a trial was completed, the estate would be so diminished as to make it plain that the applicant's claim was in all the circumstances doomed to fail, it would be open to the Court to dismiss the proceedings on a summary basis."[16]

In turning his attention to these aspects, his Honour postulated that there were a number of possible ways the "matters might play out both before and at the trial. Costs might be less than anticipated…The value of the estate might be increased during the litigation phase and so on. It might be that in most cases, the position as at completion of the trial is so speculative as to make any certain conclusion that a claim is untenable impossible practically to establish."[17]

In dismissing the application and awarding indemnity costs to Mrs Charlesworth, Porter DCJ rejected the executors' contention that Mrs Charlesworth could not satisfy the first-stage test, relying on cases which they asserted gave a long-term widow primacy.[18] In rejecting that contention, his Honour takes us through a number of decisions, ultimately relying on *Bladwell v Davis* [2004] NSWCA.[19]

In finalising the application, Porter DCJ opted for a novel solution. Truncating the directions orders, he vacated the order for mediation and set the matter down for a one-day trial. By doing this he opened a new pathway for a cost-efficient alternative in small-estate FPA disputes.

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Notes

1. *Futility* by Wilfred Owen.
2. *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125.
3. At [11].
4. At [54]-[59].
5. At [5]-[6].
6. At [21].
7. At[4].
8. At [4].
9. At [32].
10. At [31].
11. At [27].
12. At[10-[11].
13. At [12].
14. At [11].
15. At [12].
16. At [16].
17. At [17].
18. At [54].
19. The writer acted for Mrs Charlesworth and thanks her solicitor, Ms Vy Tran, and counsel, Mr David Topp, for their assistance and representation in the matter.