SUPREME COURT OF QUEENSLAND

CITATION:	*MNSBJ Pty Ltd v Downing* [2017] QCA 141
PARTIES:	**MNSBJ PTY LTD** ACN 144 779 448 (applicant) **v** **ARTHUR CHARLES DOWNING** (respondent)
FILE NO/S:	Appeal No 3317 of 2017 DC No 3903 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	District Court at Brisbane – Unreported, 9 March 2017
DELIVERED ON:	21 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	12 May 2017
JUDGE:	Morrison JA
ORDERS:	**1. The application to strike out the appeal is refused.** **2. The appellant is to file a notice of appeal complying with Rule 747 and Form 64 of the *Uniform Civil Procedure Rules* 1999 (Qld) within 21 days of today.** **3. The respondent is to provide security for the costs of the appeal, in the sum of $13,800, in a form to the satisfaction of the Registrar, within 60 days of today.** **4. Subject to order No. 2, the proceedings be stayed until payment of security in accordance with order No. 3.** **5. The respondent to the application for security for costs is to pay the applicant's costs of that application, to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where summary judgment was granted to the applicant as plaintiff in the proceedings below – where the respondent appealed that order – where the respondent brought the appeal using an application to appeal form – where the applicant contends that the appeal should have been brought by way of a notice of appeal – where the applicant contends that the application for leave to appeal fails to articulate grounds of appeal – where the applicant

submits that the failure to articulate grounds of appeal is vexatious, frivolous and an abuse of process – whether errors when constituting the appeal and failure to articulate grounds of appeal triggers a discretion to dismiss the appeal under r 371 of the *Uniform Civil Procedure Rules* – whether the appeal should be dismissed

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – where the applicant alternatively applies for security for costs – where the respondent was unsuccessful in the District Court – where the respondent concedes financial difficulties – where an order for security of costs should be made

District Court of Queensland Act 1967 (Qld), s 118
Uniform Civil Procedure Rules 1999 (Qld), r 371, r 746, r 772

von Risefer v Permanent Trustee Co Ltd [2005] 1 Qd R 681; [2005] QCA 109, considered
Robertson v Hollings & Ors [2009] QCA 303, considered

COUNSEL: J C Faulkner for the applicant
No appearance for the respondent

SOLICITORS: Mathews Hunt Legal for the applicant
The respondent appeared on his own behalf

[1] **MORRISON JA:** This is an application by the first respondent to the appeal to have the appeal struck out on the ground that it has been improperly brought, and is vexatious, frivolous and an abuse of process. The application is brought under rules 371(2)(e) and 371(2)(f) of the *Uniform Civil Procedure Rules* 1999 (Qld) (***UCPR***), which allow the court to make orders to strike out a proceeding where a party has not complied with the *UCPR*. The applicant alternatively applies for security for costs pursuant to rule 772 of the *UCPR*.

The proceedings below

[2] The applicant (**MNSBJ**) and Mr Downing entered into a share sale and purchase deed in September 2015 whereby Mr Downing was to purchase shares in a development project from the respondents to the appeal. The deed was never settled. On 23 August 2016 MNSBJ's solicitors wrote to Mr Downing demanding settlement of the deed. Following Mr Downing's resistance to settling the deed, MNSBJ instituted proceedings in the District Court claiming specific performance of the obligations under the deed, or alternatively damages. Mr Downing's defence was served on 1 February 2017.

[3] On 23 February 2017, MNSBJ filed an application for summary judgment. On 9 March 2017 judgment was given against Mr Downing, ordering specific performance and requiring settlement of the share purchase by 31 March 2017. Mr Downing seeks to appeal against those orders.

[4] In granting summary judgment, the learned primary judge was required to consider the prospects of Mr Downing's defence succeeding. His Honour concluded that it had no real prospects of success.

[5] The defence admitted the execution of the deed, its terms, that it was a binding contract to purchase the shares, and the price payable.

[6] The central allegation in the defence was that the deed was entered into by reason of misleading representations by one Sutherland that the funds to pay for the share purchase would come from other transactions to which Mr Downing's company, Australian Pacific Investments (Qld) Pty Ltd (**API**), was a party. Under those transactions:

(a) API had a call option under which it could acquire land from one Venturiello on which to develop a water park and associated developments;

(b) early finance for stage 1 was provided by the plaintiff investors, arranged by one Baird;

(c) Baird introduced Sutherland as the main financier;

(d) Sutherland's company (Nurrowin) agreed to acquire the benefit of API's call option, and take over the development;

(e) Nurrowin and API entered into a deed to govern the purchase of the call option;

(f) that deed required that two further deeds be entered into, one governing rights between the plaintiff investors in the proceeding and API (the SSP Investors Deed), and the other governing rights between Baird and API (the Baird Settlement Deed); and

(g) under Nurrowin's deed, if it exercised the call option and purchased the land under the resulting contract, it was required to pay the plaintiff investors directly for the sale of their shares to Mr Browning under the SSP Investors Deed, and pay a $1.25m fee to API.

[7] Nurrowin exercised the call option and purchased the land. However it did not pay the investors or API. It transpired that a boundary realignment issue led to Venturiello having the claimed right to cancel the call option and contract under it. Therefore the original land contract between Venturiello and Nurrowin was terminated and replaced by a different contract. That contract settled on 24 December 2015, the day after the original contract was due to settle. API was not told of the boundary problem and therefore denied the chance to rectify it and keep the original land sale contract in place. It was alleged that Sutherland and his companies (including Nurrowin), by not revealing the boundary problem, had engaged in misleading conduct, contrary to the representations made when the deed between API and Nurrowin was made.

[8] Further, API commenced proceedings in the Supreme Court against the Sutherland interests to recover the money due to the investors and API. Mr Downing's submissions to the learned primary judge, and to this Court, were that the money to pay the investor shareholders under the deed was to come from the transactions the subject of those other proceedings.

[9] Browning admitted in correspondence prior to the current proceedings being instituted against him, that the shareholders were owed the money under the deed.[1]

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1 Letters dated 7 and 20 September 2016, part of exhibit AER-5 to the affidavit of Ms Rofe.

[10] The learned primary judge held that the defence suffered because the deed between the investors and Mr Browning was not alleged to be interdependent with or conditional upon any other transaction.

[11] In his reasons the learned primary judge referred to the test to be applied on an application for summary judgment,[2] set out the relevant provisions of the deed, and summarized the submissions made as to the impact of Sutherland's conduct. His Honour then dealt with the weakness in the pleaded defence:

> "It is not, however, in the defence, alleged that the contract between [Mr Browning] and the plaintiffs was vitiated by fraud or other misconduct by the plaintiffs or their agents. He did appear to make that suggestion in oral submissions to me. Rather, it seems to me that he appears to submit, in the defence, that the completion of the contract between he and the plaintiffs should be dependent on his achieving a successful outcome to the Supreme Court proceedings, or, at least, until the determination of those proceedings.
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> The difficulty with such a submission, in light of the defence which has been filed, is that the deed, as I have indicated is an entire deed.
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> …
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> In my view, the meaning of the deed, which is relatively short, is not difficult to understand. The obligation was to pay the agreed sum of $264,000 on a day determined by the sale of the land to Nurrowin, that is, on the 24th of December 2015. In the absence of any allegation in the pleading of fraudulent misconduct, indeed, of agency, it seems to me that the issues that [Mr Browning] wishes to ventilate in the Supreme Court are not relevant to the interpretation of the deed in his Court. The deed clearly provides that on Nurrowin acquiring the land as described in the deed, that completion of the obligations under the deed are to take place.
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> In the circumstances, it appears to me that on the basis of the pleadings, [Mr Browning] has not shown that he any real prospect of successfully defending the plaintiffs' claim."

[12] There is nothing in the deed itself to suggest that execution of that deed was conditional upon other negotiations or transactions. The completion date was simply defined as "the date on which Nurrowin … acquires the Land": clause 1.1. Further, the deed contained an entire agreement clause: clause 8.7. On its face, performance was not conditional on any other transaction.

[13] However, in the defence Mr Downing made several allegations which arguably raised a defence based upon a breach of the *Australian Consumer Law*.[3] Thus it was alleged that:

(a) the SSP Investors Deed was entered into because of representations made by Sutherland and Nurrowin, that the price for the shares would be paid from the fee due under Nurrowin's deed: paragraph 2;

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2 *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259 at [7]; *Bolton Properties Pty Ltd v JK Investments Australia Pty Ltd* [2009] QCA 135.

3 *Competition and Consumer Act* 2010 (Cth), Schedule 2.

(b) Nurrowin was a company which carried on business, and Sutherland was its director: paragraph 2(C);

(c) Nurrowin's deed, the SSP Investors Deed and the Baird Settlement Deed "formed the suite of agreements that … Nurrowin required to acquire the Call Option": paragraph 2(M);

(d) all three deeds were prepared by Sutherland's lawyers, on his instructions or Nurrowin's instructions: paragraph 2(O), (U), (V) and (W);

(e) the Baird Settlement Deed was "one part of a suite of agreements to enable … Nurrowin to acquire the Call Option" and was "required by Nurrowin for its acquisition of the Call Option": paragraph 2(V)(ii)(c) and 2(v)(iii);

(f) the SSP Investors Deed was "one part of a suite of agreements to enable … Nurrowin to acquire the Call Option" and was "required by Nurrowin for its acquisition of the Call Option": paragraph 2(X)(iv)(c) and 2(X)(v);

(g) Sutherland and the investors were knowingly concerned in the conduct of Nurrowin: paragraph 2(JJ);

(h) Nurrowin and Sutherland represented that if there was a boundary issue API would be informed and given the opportunity to rectify it: paragraph 2(KK), (LL), (MM);

(i) when the boundary issue arose Nurrowin knew that the failure to rectify it might give the vendor the right to terminate the land contract: paragraph 2(NN);

(j) Nurrowin and Sutherland did not inform API: paragraph 2(OO);

(k) in the premises Sutherland and Nurrowin engaged in misleading and deceptive conduct, or conduct likely to mislead or deceive, under the *Australian Consumer Law*: paragraph 2(QQ);

(l) by reason of that conduct API and Mr Downing had suffered detriment by signing the three deeds: paragraph 2(QQ); and

(m) at all times the plaintiff investors acted with knowledge of the representations made by Sutherland and Nurrowin: paragraph 9.

[14] Whilst it was alleged that the shareholders were knowingly concerned in Nurrowin's and Sutherland's conduct, and that the conduct was misleading or deceptive under the *Australian Consumer Law*, the defence does not plead any particular relief that might be available under the *Australian Consumer Law*.

[15] No claim was made to relief in the nature of rectification of any of the deeds, or amendment to counter the effect of the misleading conduct. In fact the defence sought that the present proceedings be stayed or transferred to the Supreme Court to be heard with those proceedings.

[16] The learned primary judge did not examine the viability of the cause of action which, although poorly pleaded, raised misleading or deceptive conduct under the *Australian Consumer Law*. Indeed to the extent that his Honour referred to vitiating

conduct, it was to say that it was not alleged.[4] That was, arguably, an error. Whilst poorly pleaded the defence did raise that the deeds were brought into existence by misleading or deceptive conduct, in which the plaintiffs were knowingly concerned.

[17] The fact that the defence pleads matters inadequately should not be weighed too heavily given that Mr Downing is self-represented. At first instance one consideration that should have been weighed in account was whether, properly pleaded, there was a viable defence. That does not seem to have figured in the reasoning of the learned primary judge.

[18] Further, the defence pleaded that the deeds were each "one part of a suite of agreements to enable … Nurrowin to acquire the Call Option" and "required by Nurrowin for its acquisition of the Call Option". Again, although poorly pleaded, the defence might be seen to raise the contention that the deeds were, in fact, conditional upon one another. Under the head base on the *Australian Consumer Law*, relief could arguably be sought to rectify the deeds to ensure that settlement of each was conditional upon the settlement of the others. On one view, such a result would not be odd. Why otherwise would Nurrowin agree to pay the purchase price for the plaintiffs' shares directly to the plaintiffs? Given that the deeds were all part of the arrangements for Nurrowin to assume the call option, why would Mr Downing assume the obligation to the plaintiffs if the other parts of the overall transaction did not proceed?

[19] This is not the occasion for those matters to be finally determined. All that need be assessed is whether the appeal has no real prospects. In my view, that cannot be concluded.

Mr Downing's Appeal

[20] In their current application, MNSBJ raised issues about how the appeal is constituted. MNSBJ argued that the appeal is flawed because:

(a) it is unclear whether the appeal is an application for leave to appeal or a notice appeal; if the appeal is brought by way of an application for leave to appeal, such an application is unnecessary as leave is not required to bring the appeal;[5]

(b) the form filed does not specify whether all or part of the judgment is appealed from;

(c) the form filed does not provide any grounds for appeal and no error of the District Court is identified.

[21] These flaws form the basis of MNSBJ's argument that the appeal is an abuse of process and ought to be struck out.

[22] MNSBJ is correct in their contention, advanced at the hearing of this application, that leave is not required to appeal a District Court judgment if the judgment relates to a claim of value equal to or more than the Magistrates Court jurisdictional limit (s 118(2)(b)). The Magistrates Court jurisdictional limit is $150 000. Here, the

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4 "It is not, however, in the defence, alleged that the contract between [Mr Browning] and the plaintiffs was vitiated by fraud or other misconduct by the plaintiffs".

5 See s 118(2)(b), *District Court of Queensland Act* 1967 (Qld).

claim is worth $264 000, the value of the shares that Mr Downing was to buy. Therefore, the appeal can be brought without leave.

[23] Where an appeal is able to be brought without leave, the appeal will commence by the filing of a notice of appeal (*UCPR* r 746). The required court form is Form 64.

[24] On closer inspection of the appeal materials, the appeal has been brought using Form 69, appropriate for an application to the Court of Appeal. Regardless of that error, the effect would not be substantive if the application went on to detail reasons for granting leave or grounds of appeal. Mr Downing's application does not achieve that. No grounds of appeal are formulated under the heading "3. The reasons justifying the grant of leave". The notice should contain a statement of whether the whole or part of the decision is appealed from, the grounds of appeal and the orders sought by the appellant.

[25] Therefore, the present document fails to give meet the rules and identify proper grounds of appeal.

[26] The orders sought by Mr Downing's application for leave to appeal are a re-hearing of the summary judgment application or a stay of the proceedings below until the Supreme Court are determined. Where no grounds of appeal are stated, it is difficult to reason why such orders should be granted.

[27] Further, the above discussion of how the appeal has been commenced reveal a failure to comply with the *UCPR*, and consequently discretion under r 371 is triggered, allowing further orders to be made as to the progress of the appeal.

Discussion

[28] There is no doubt that courts in common law jurisdictions hold close their power to protect parties from baseless allegations and conduct which is frivolous or vexatious.[6] This court has described the discretion to strike out proceedings improperly brought as a power which must be exercised with the utmost caution.[7] Factors which trigger the exercise of the discretion include: unidentified proceedings and those which make allegations against a party that cannot be understood, attempts to re-litigate points already heard by a court, and applications that are without merit and are therefore an abuse of the Court's processes.

[29] In the context of an appellate court, unidentified proceedings include appeals that fail to identify a ground of appeal, or a potential error below from which an appeal can be brought. This was the case in *von Risefer*. There, a failure to disclose an arguable error on part of the primary judge to form a ground of appeal was considered vexatious and an abuse of process. Keane JA (as his Honour then was) in the leading judgment, with which McPherson JA and Philippides J (as her Honour then was) agreed, said:[8]

> "The notice of appeal and the plaintiffs' outline of argument in support of their appeal disclose no arguable error on the part of the learned primary judge. Both are vexatious and an abuse of the

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6 See Keane JA's discussion in *von Risefer & Ors v Permanent Trustee Co Ltd & Ors* [2005] QCA 109 at [25].

7 *von Risefer v Permanent Trustee Co Ltd & Ors* [2005] QCA 109 [25].

8 *von Risefer* at [11].

> process of the Court. This Court has the power to bring this abuse to an end in the exercise of its inherent jurisdiction to prevent its processes being used as a means of vexation. While this power should only be exercised with caution, I am of the opinion that it should be exercised in this case to minimize the extent to which the defendants may be put to expense to respond to the vexatious and, indeed, oppressive conduct of the plaintiffs."

[30] A comparable situation arises here, where Mr Downing's appeal asks for the decision below to be overturned without providing any reasons, let alone reasons that would warrant that order being made.

[31] Another example of an appeal being struck out for similar reasons is *Robertson v Hollings & Ors*.[9] There, a notice of appeal was struck out because the notice of appeal failed to identify grounds of appeal in a comprehensible way that allowed a fair response.[10] Relevantly, the Court said:[11]

> "… litigation is not a learning experience. The courts do not permit litigants, even unrepresented litigants, to prosecute claims which cannot proceed fairly to the other parties. It is no doubt unfortunate for [the Appellant] that she does not have the benefit of competent legal advice and representation; but her misfortune in this regard does not license her to proceed unconstrained by the rules according to which adversarial litigation is conducted."

[32] Mr Downing faces challenges similar to those in *von Risefer* and *Robertson*. As noted in *Robertson*, this Court cannot allow an improperly constituted proceeding to continue simply because of a party's difficulties in understanding the court's processes and requirements. Mr Downing's appeal features the shortcomings that triggered a dismissal in both *von Risefer* and *Robertson*. Without adequate guidance as to what the grounds of appeal actually are, it is difficult to imagine what an outline of argument would entail. In this case, failing to properly articulate grounds of appeal creates a difficult task both for the respondents to the appeal and the appeal court.

[33] However, notwithstanding the difficulties confronting Mr Downing, as discussed above, it is arguable that there are appellable errors in the reasoning of the learned primary judge. It suffices to refer to the fact that no consideration was given to the implications of the imperfectly pleaded cause of action under the *Australian Consumer Law*.

[34] Proceeding with the caution warranted by authority, at this point I am reluctant to conclude that the appeal has no prospects.

[35] In the circumstances it is unnecessary to consider Mr Downing's contention that he had new evidence to support a finding of collusion between the plaintiffs and the Sutherland interests. If there is merit in that contention it can be dealt with on the appeal.

[36] The application to strike out the appeal is refused.

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9 [2009] QCA 303.
10 *Robertson* at [10]-[13].
11 *Robertson* at [11].

[37] However, the proceedings in this court can only continue if they are brought on a proper basis. Mr Downing should file a notice of appeal that complies with rule 747 of the *UCPR*, using Form 64, which properly contains a statement of whether the whole or part of the decision is appealed from, the grounds of appeal and the orders sought by the appellant.

The application for security for costs

[38] MNSBJ seek an order for security of the costs of the appeal, in the sum of $13,800. The application relies upon an estimate set out in Exhibit AER-8 to the affidavit of Ms Rofe, and is said to be on the standard basis at 60 per cent of the lower estimate.

[39] On the issue of impecuniosity, reliance is placed on statements by Mr Downing before the learned primary judge, that he could not pay the judgment. Something similar appears in his affidavit on this application, where he told Ms Rofe that the Supreme Court proceedings were "the only way in which her Clients will recover the money for their shares".[12] However, those statements were made with reference to his ability to pay the entire $264,000 judgment sum.[13]

[40] However, on 11 April 2017 he was asked to provide evidence of his ability to pay the costs and did not,[14] and before this Court he accepted that there was some evidence that he was in financial difficulty.[15] However, he said that he could pay the sum sought if given a little time.[16]

[41] Equally this Court has an undoubted discretion to order security.[17] Relevant to that issue are the fact that judgment has been given against him, any impecuniosity, and his prospects on appeal. All three favour the grant of an order for security.

[42] Exhibit AER-8 reveals that an experienced litigation solicitor estimated that the costs to the end of the appeal would be between $23,000 and $28,200. Taking the lower end of the estimates, that is split between the solicitors ($12,000) and counsel ($11,000). The solicitor's experience was also the basis for selecting 60 per cent as the recoverable portion of those costs.

[43] In the circumstances I am persuaded that security for costs ought to be provided, in a form to the satisfaction of the Registrar, in the sum of $13,800.

Costs

[44] MNSBJ have not succeeded on the application to strike out, but have succeeded on the application for security for costs. The latter occupied very little time, both in terms of material and the hearing itself, but that is no reason to deny MNSBJ its costs of that application.

Disposition

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12 Affidavit dated 8 May 2017, paragraph 13.
13 T1-19 line 1.
14 Exhibit AER-7 to the affidavit of Ms Rofe.
15 Appeal transcript T1-19 line 26.
16 Appeal transcript T1-19 lines 28-32.
17 *Murchie v Big Kart* [2003] 1 Qd R 528 at [6]; *Gold Coast Blaze Pty Ltd v Joyce* [2012] QCA 37 at [2].

[45] The orders are:

1. The application to strike out the appeal is refused.

2. The appellant is to file a notice of appeal complying with Rule 747 and Form 64 of the *Uniform Civil Procedure Rules* 1999 (Qld) within 21 days of today.

3. The respondent is to provide security for the costs of the appeal, in the sum of $13,800, in a form to the satisfaction of the Registrar, within 60 days of today.

4. Subject to order No. 2, the proceedings be stayed until payment of security in accordance with order No. 3.

5. The respondent to the application for security for costs is to pay the applicant's costs of that application, to be assessed on the standard basis.