SUPREME COURT OF QUEENSLAND

CITATION:	*Loel & Anor v Miller & Anor* [2017] QCA 203
PARTIES:	**JAMES BERESFORD LOEL** (first respondent/first applicant) **PAUL BERNARD MAHAN** (second respondent/second applicant) **v** **PETER JOHN FRANCIS MILLER** (first appellant/first respondent) **SUSAN MARY MILLER** (second appellant/second respondent)
FILE NO/S:	Appeal No 13275 of 2016 SC No 989 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 289 (Flanagan J)
DELIVERED ON:	14 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	22 June 2017
JUDGE:	Morrison JA
ORDERS:	**1. The appellants are to furnish to the Registrar as security for the respondents' costs of the appeal, the amount of $10,000 by 4 pm on 20 October 2017, in a form satisfactory to the Registrar.** **2. The respondents' costs of and incidental to this application are to be their costs in the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – where the respondent brings an application for security for costs in the appeal – where the appellant brings the appeal having lost at trial – where the court is required to consider a number of factors including prospects of success on appeal and the appellants' financial status – where the prospects of success on appeal rely on the success of two grounds of appeal – where the appellants concede impecuniosity – where the appellants submit that their impecuniosity is a direct result of the respondents' conduct – whether an order for security of costs should be made *Land Title Act* 1994 (Qld), s 130

Uniform Civil Procedure Rules 1999 (Qld), r 772

Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd & Ors [2003] QCA 552, considered
Miller & Anor v Loel & Anor [2016] QSC 289, considered
Murchie v Big Kart Track Pty Ltd (No 2) [2003] 1 Qd R 528; [2002] QCA 339, applied
Toms v Fuller [2010] QCA 73, applied
Woolworths Ltd v Berhane [2016] QCA 238, considered

COUNSEL: J M Lavercombe (*sol*) for the respondents/applicants
The appellants/respondents appeared on their own behalf

SOLICITORS: Lillas & Loel Lawyers for the respondents/applicants
The appellants/respondents appeared on their own behalf

[1] **MORRISON JA:** This is an application by the respondents to the appeal for an order that the appellants provide security for the respondents' costs of and incidental to the appeal. They seek that $25,300.75 be paid into the Court, and the appeal stayed until that occurs.

[2] Rule 772 of the *Uniform Civil Procedure Rules* 1999 (Qld) confers on this Court a broad discretion to order a party to give security for the costs of an appeal. It relevantly provides:

> "772(1) The Court of Appeal ... may order an appellant to give security, in the form the court considers appropriate, for the prosecution of the appeal without delay and for payment of any costs the Court of Appeal may award to a respondent."

[3] The power under r 772 has been described as an "unfettered" discretion whether to order security and, if so, in what amount. Relevant factors include that the party has "had their day in court and lost", that party's financial position and the prospects of success on appeal.[1] As to those factors this Court said in *Toms v Fuller*:[2]

> "There is no comprehensive list of the factors which might be taken into account on an application for security for the costs of an appeal; *Natcraft Pty Ltd v Det Norske Veritas* [2002] QCA 241, but where the prospects of success on appeal are "bleak", and the appellant is without funds, there are powerful reasons for ordering security: *Murchie* at 530."

[4] Further, as McMurdo JA said in *Woolworths Ltd v Berhane*:[3]

> "Another of the considerations referred to in *Murchie* is the fact that the plaintiff has had his day in court. Put another way, the discretion which is to be exercised under r 772 has a different content from that to be exercised where security for costs is sought ahead of a trial. In particular, the authorities which show a predisposition against the

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1 *Murchie v Big Kart Track Pty Ltd (No 2)* [2003] 1 Qd R 528. See also *Natcraft Pty Ltd v Det Norske Veritas & Anor* [2002] QCA 241, and *Mt Nathan Landowners Pty Ltd (in liq) v Morris* [2008] QCA 409.
2 [2010] QCA 73 at [26] per Chesterman JA, McMurdo P and Holmes JA concurring.
3 [2016] QCA 238.

ordering of security for costs against a personal plaintiff ahead of a trial are of less relevance in the present context."

The proceedings below

[5] The crux of this dispute involves the lodging of a caveat executed by the first respondent (Mr Loel) in June 2012. The caveat was lodged on behalf of Devren Pty Ltd (**Devren**) over real property owned by Old Coach Developments Pty Ltd (**Old Coach**). The appellants, Mr and Mrs Miller, were the directors and principal shareholders of Old Coach. The caveat was eventually removed in July 2015, following an order for its removal by Boddice J.[4]

[6] In 2016, the appellants brought proceedings in the Supreme Court against Mr Loel and Mr Mahan, the directors of Devren, under s 130 of the *Land Title Act* 1994 (Qld). That section provides:

"**130 Compensation for improper caveat**

(1) A person who lodges or continues a caveat without reasonable cause must compensate anyone else who suffers loss or damage as a result.

(2) In a proceeding for compensation under subsection (1), a court of competent jurisdiction may include in a judgment for compensation a component for exemplary damages.

(3) In a proceeding for compensation under subsection (1), it must be presumed that the caveat was lodged or continued without reasonable cause unless the person who lodged or continued it proves that it was lodged or continued with reasonable cause."

[7] The learned primary judge summarised how s 130 operates:[5]

"By operation of s 130(1) and s 130(3) the onus is on the first and second defendants to prove that the caveat was lodged or continued with reasonable cause. The onus is on the plaintiffs to establish that they suffered loss or damage as a result of the lodgement or continuation of the caveat without reasonable cause."

[8] His Honour then summarised the issues to be tried:[6]

"1. Did Mr Loel lodge or continue the caveat with reasonable cause?

2. Did Mr Mahan continue the caveat with reasonable cause?

3. If the caveat was lodged or continued by either Mr Loel or Mr Mahan without reasonable cause have the plaintiffs established that they suffered loss or damage as a result?"

[9] The learned primary judge dismissed the appellants' claim.

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4 *Devren Pty Ltd v Old Coach Developments Pty Ltd & Ors* [2015] QSC 53.

5 *Miller & Anor v Loel & Anor* [2016] QSC 289 at [5].

6 [2016] QSC 289 at [6].

[10] In determining the first issue, his Honour made a comprehensive examination of the facts and was satisfied that at the time the caveat was lodged Mr Loel had lodged it with reasonable cause, and that remained the case at all times until 19 March 2015 when Boddice J ordered it be removed.[7] That was based on findings that he held an honest belief, based on reasonable grounds, that Old Coach held the real property as constructive trustee for Devren. Further, that he made the appropriate legal enquiries and took the necessary investigative steps to reach that state of belief. The learned primary judge rejected five attacks on Mr Loel's state of belief, finding that he brought his own independent legal mind to the lodging of the caveat.

[11] His Honour concluded that Mr Loel was not responsible for continuing the caveat between 19 March 2015 and 12 July 2015, because in that period, Boddice J's order that the caveat be removed allowed the appellants to have the caveat removed.[8]

[12] Determination on the second issue was closely related to the first. The contention was that Mr Mahan was a "dummy" director who knowingly facilitated Mr Loel's control over Devren, and was liable on that basis under s 130(1). The learned primary judge found that if, as contended, Mr Mahan relied entirely on Mr Loel, then his liability rose or fell according to Mr Loel's honest belief.[9] Because the learned primary judge had already found that Mr Loel lodged and continued the caveat with reasonable cause, his Honour concluded that Mr Mahan, even if considered "a person" under s 130(1), did the same.

[13] It having been determined that the caveat was lodged with reasonable cause, it was not necessary to determine whether the appellants had established that they suffered loss or damage. The loss claimed was, in effect, the loss of the opportunity to use money which, but for the caveat, the appellants would have received, to commence a further land development project. The learned primary judge discussed the principles governing lost opportunities and found that there was insufficient evidence to support the appellants' claim that they had suffered through lost trading opportunities as a result of the caveat.[10] His Honour described the evidence on loss as being "wholly deficient".[11]

The Appeal

[14] The notice of appeal filed 20 December 2016, sets out 31 grounds of appeal. The respondents analysed the merits of most grounds in their outline filed on the application. The grounds of appeal can be summarised as follows:

(a) grounds 1, 17 and 18 relate to contended errors in finding that Mr Loel lodged and maintained the caveat with reasonable cause;

(b) grounds 4 to 8 relate to statements or findings by other judges in other proceedings, and the contention that weight should have been given to those statements or findings;

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7 [2016] QSC 289 at [57]-[78].
8 [2016] QSC 289 at [79]-[82].
9 [2016] QSC 289 at [86].
10 [2016] QSC 289 at [88]-[112].
11 [2016] QSC 289 at [112].

(c) grounds 20 and 22 challenge the learned primary judge's finding on issue two, contending that Mr Mahan's responsibility for the caveat is separate to Mr Loel's;

(d) grounds 24-31 deal with the loss the appellants claimed was suffered because of the caveat (issue three in the judgment below); and

(e) the remaining grounds deal with alleged errors in the learned primary judge's consideration of evidence and fact finding.

Prospects of success

[15] When considering the prospects of success of the appeal, a determination of the likely outcome is not necessary nor appropriate at this stage of the proceedings. Rather, the exercise is to make a preliminary assessment of whether the appeal can be said to be one with arguable merit as opposed to one devoid of merit. As was said in *Murchie*:[12]

> "In these circumstances attention must be focused on the plaintiff's prospects of success on appeal, because the Court will not readily shut out a litigant with potential merit. Of course, it is not for the Court to prejudge the outcome of the appeal on an application for security for costs, but if her prospects are bleak, as they were described by senior counsel for the defendants, that would be a powerful factor in favour of ordering security."

[16] Central to the success of the appeal is the success of grounds 1 and 22, as those deal with the key issue surrounding the lodging of the caveat and s 130(1) of the *Land Title Act*. In the Notice of Appeal, they are expressed as follows:

> "[Ground 1] The learned trial judge erred in concluding that the first respondents had, at any time, reasonable grounds to lodge the caveat, because of an alleged honest belief that there were reasonable grounds to do so.
>
> [Ground 22] The learned trial judge erred by concluding that the second respondent's responsibility for maintaining the caveat falls or rises in accordance with the first respondent's honest belief and that he was not responsible for his own conduct in the matter."

[17] In an affidavit relied upon on this application, the appellants contended that "Mr Loel was either careless or incompetent in reaching the reasons set out below and was required to take reasonable care in reviewing the information available to him before lodging the caveat, in order to satisfy the reasonable grounds test".[13] Mr Loel's decision was based, as I have said above, on his conclusion that Old Coach was a constructive trustee of the land for Devren. That arose because of the terms of cl 16.14 of a Shareholders Agreement between Old Coach and Devren. On that issue the learned primary judge found that Mr Loel considered and took legal advice in respect of the effect of the clause.

[18] The respondents to the appeal submitted that ground 1 raises issues that were not part of the appellants' pleaded case before the primary judge. Clauses 2 and 16.14

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12 *Murchie* at [8].

13 Affidavit of Mr Miller filed 19 June 2017, paragraph 10.

of the Shareholder Agreement, and the operation of those clauses were issues raised before the learned primary judge. His Honour considered the effect of cl 16.14 generally but was not required to consider the interpretation advanced on appeal, that is, whether the provision for termination of the joint venture agreement prevented a caveat being lodged. That said, this contention seems to be one not raised at the trial.

[19] The appellants' submission on this ground also brought in a contention advanced below and rejected by the learned primary judge. It was that in 2011, the then directors of Devren, Mr Hobson and Mr Clair, conspired to secretly and improperly induce Mr Miller to provide funding to develop the lots in circumstances where they intended to lodge claims to secure control of the joint venture. The appellants claimed at trial, and in their appeal outline, that Mr Hobson and Mr Clair instructed solicitors with the purpose of seeking various injunctions and interlocutory orders that would make it difficult for Mr Miller to defend legal action. The appellants referred to that as a "secret conspiracy" between Mr Hobson and Mr Clair.

[20] The learned primary judge dealt with that argument as part of his discussion about whether the caveat had been lodged with reasonable cause. His Honour outlined and included extracts of email communications that revealed there was a contemplated legal challenge that would affect the appellants and their related entities, however his Honour ultimately found that Mr Loel, being the person who lodged and continued the caveat had not considered nor read those emails. In proceedings SC 5638 of 2012, Mr Loel gave evidence that he was not aware of a conspiracy between Mr Hobson and Mr Clair. Mr Loel's evidence was that he believed Mr Hobson and Mr Clair had a poor relationship, such that "if you put [them] in the same room… there'd be need for an ambulance". The learned primary judge evidently accepted Mr Loel's evidence.[14]

[21] The learned primary judge was satisfied that Mr Loel brought his own independent legal mind to the lodging of the caveat. His Honour rejected the appellant's submission that Mr Loel and Mr Hobson were aware of Mr Miller's efforts to convert Lots 22 and 23 to a saleable state. His Honour found that when Mr Loel lodged the caveat, he was absolutely unware of the arrangements in place to improve the Lots. Consequently, the primary judge accepted that Mr Loel lodged the caveat having an honest and reasonable belief that cl 16.14 was engaged.

[22] As for ground 22, the learned primary judge's finding was that Mr Mahan's responsibility for the caveat was limited to that of Mr Loel. The appellants' case was that Mr Mahan knowingly facilitated Mr Loel's ability to exercise complete control over the affairs and was therefore a "person" under s 130(1). If that submission was accepted, Mr Mahan would be required to prove that from the date of his appointment, the caveat was continued with reasonable cause. Mr Mahan submitted that he had no knowledge of the caveat and was not personally liable for Devren's lodging of the caveat. The learned primary judge framed the issue arising from those submissions as: "whether a director is liable for the acts of the company taken without his knowledge and/or whether such a director is "a person" within the meaning of s 130".[15]

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14 [2016] QSC 289 at [69]-[71].

15 [2016] QSC 289 at [85].

[23] The learned primary judge did not resolve the issue, instead accepting that Mr Mahan relied entirely on Mr Loel in relation to the conduct of the litigation and that the issue was therefore irrelevant. His Honour stated that because Mr Loel was responsible for conducting the litigation, Mr Mahan's liability could not exceed Mr Loel's and was dependent entirely on Mr Loel being found liable. The appellant's continue their original allegations on this application:[16]

> "[Mr Mahan] unwittingly entered into a conspiracy to ensure that Mr Loel had complete control of the company to allow him to prosecute a strategy."

[24] The same affidavit asserts that Mr Loel was not entitled to act on Mr Mahan's instructions because Mr Loel was acting as a de facto director himself.

[25] On these two major grounds the appellants did little more than repeat evidence that was adduced below, and rejected by the learned primary judge. No real attempt was made to identify an appellable error. The principal hurdle that these grounds face is that they seek to challenge findings of fact, based at least in part on an assessment of the credibility of Mr Loel and Mr Mahan. The disparity between Mr Loel's evidence and the appellants' claim was resolved by the learned primary judge's assessment of Mr Loel's evidence, its reliability and accuracy. Where the appeal grounds seek to challenge factual findings there is an obvious problem.[17] As was said in *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd & Ors*, when assessing the prospects of success at a preliminary stage:[18]

> "While the prospects of success on the appeal cannot at this stage be assessed it is sufficient for present purposes to observe that many of the grounds of appeal seek to traverse findings of fact by the trial judge. Ordinarily the need to reverse fact findings on appeal does not instil great confidence in the outcome."

[26] Unless the appellants can succeed on grounds 1 and 22, the other grounds will not avail them. In my view, the appeal therefore faces some significant hurdles. However, it cannot be said to be unarguable, however, I would categorise the prospects for success as limited.

Financial status of the Appellants

[27] Impecuniosity is but one of the relevant factors on an application such as this. The appellants concede that they have limited income and submitted that their impecuniosity is due to loss suffered by the caveat. The appellants describe their current financial status in this way:[19]

> "The appellants are impecunious directly as a result of the actions of the first respondents in lodging and continuing the caveat and the second respondents in continuing the caveat over Lot 23 and their only source of income is that relieved from Centrelink and a UK pension, and they have no financial resources."

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16 Affidavit of Mr Miller filed 19 June 2017, paragraph 17.
17 *Fox v Percy* (2003) 214 CLR 118 at 127-128, [26]-[29].
18 [2003] QCA 552, at [5].
19 Affidavit of Mr Miller filed 19 June 2017, paragraph 23(d).

[28] That was supported by an affidavit under Mr Miller's hand, exhibited to which were Bank of Queensland statements, showings credits only by Centrelink pension payments. The difficulty the respondent raised about these statements is that they do not identify the account holder as Mr or Mrs Miller, a fact which underpins the respondents' argument that the appellants are yet to file any material from which a "sensible assessment" of their financial position can be made.[20] The respondents filed an affidavit which confirms that the appellants do not own any real property in Australia and that a costs order was made against them in December 2016 by the learned primary judge.

[29] I am satisfied that if the appeal is dismissed and if a costs order is made against the appellants, they are unlikely to be able to satisfy that order. As much was conceded by Mr Miller at the hearing of this application.

[30] The respondents conceded in oral submissions that it is a material consideration that the appellants allege their impecuniosity to be the direct result of the lodging and continuing of the caveat. Their position on that was that the loss the appellants claim to have suffered is yet to be proved in evidence.

[31] That is not the only difficulty in quantifying the appellant's alleged loss. Because the loss was that the appellants were unable to commence another land development project the learned primary judge correctly approached the claim on the basis of the loss of an opportunity. This required his Honour to engage in a risk-benefit analysis of the lost opportunity. The strongest evidence produced at trial which supported the likely success of future projects were notes from the Bank of Queensland. The primary judge disregarded those notes as hearsay, leaving the appellants with no evidence that future land development projects would actually be successful. Nor was there any evidence that of a contemplated future land development.

[32] The appellants did not adduce evidence at the trial that supported their claimed loss. There was no expert evidence, whether it be from a forensic accountant, developer or financier, expressing an opinion that could propound an examinable method of calculating the loss. The appellants filed tax returns for the three years **preceding** the lodgement of the caveat, which was lodged in 2012. Damage was said to have been suffered from 2012 to 2015. There was no material before the court by which a comparison of the tax returns for the three years before the lodgement of the caveat could be made with those tax returns filed after the lodgement of the caveat. One can well understand why His Honour described the evidence on loss as being "wholly deficient".[21] Tax returns for the three years after 2012 were adduced on this application, but they did not form part of the evidence at trial.

[33] The other complicating factor was that the appellants were not the owners of the land over which the caveat was lodged. The owner was a company in a joint venture structure. Whilst the appellants sought to argue below that the benefits under the structure flowed down to them, not only was that a matter for the joint venture, but the party sustaining any loss from the caveat was the joint venture company.

[34] Therefore, while it is a material consideration that the supposed loss was caused by the respondents, little weight can be attached to it.

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20 Respondents' Outline, paragraph [10].

21 [2016] QSC 289 at [112].

[35] The appellants rely on McMurdo JA's decision in *Woolworths Ltd v Berhane*,[22] where his Honour refused an application for security for costs despite the appellant's impecuniosity. The current appeal is distinguishable from *Berhane*. First, that appeal was a personal injuries claim brought by a firm acting on a speculative basis. The primary judge had made some findings in favour of the appellant, and the appeal was limited to causation and damages. Those factors had a significant effect on McMurdo JA's finding that because the appeal was reasonably arguable, the application should be refused.

[36] The relationship between findings of impecuniosity and the prospects of success of the appeal is interdependent. Where the reasons above have concluded that the appeal has limited prospects of success, the appellant's impecuniosity is not a barrier to allowing this application, but a factor in favour of granting the application.

[37] However, I am not persuaded in any event, given the lack of appropriate detail in the evidence, that an order for security will not be met because of the contended impecuniosity. In other words the appeal will not be stifled.

Costs Assessment

[38] The respondents rely upon a report of Mr Graham, a costs assessor. His report estimates the total costs of the appeal to be $25,300.75 including professional fees and costs and excluding GST.

[39] Mr Graham described his task as being to assess the appropriate amount of security. In fact the task he performed was to estimate the costs of the appeal on the standard basis, as appears from the report. Although the appellants did not mount a challenge against the amount of security applied for, there are items within the report about which I have some reservations.

[40] First, the report estimates that there will be two directions hearings with counsel and solicitor in attendance. I am unpersuaded that such directions hearings will be necessary, and even if they are, that counsel would be needed rather than a solicitor. Therefore, $1,796 reserved for directions hearings, and associated counsel and solicitors' fees should not, at this stage, form part of the estimate of costs of the appeal.

[41] Secondly, Mr Graham has allocated more than $3,500 for correspondence. Of this, $2,766.30 relates to 15 telephone calls requiring legal knowledge, 36 letters and 24 formal letters. At the appeal stage of litigation with such a history, this amount of correspondence appears excessive, particularly given the close relationship between lawyers and client.

[42] Thirdly, I am not satisfied that an allowance of two days for counsel's fees for settling the respondents' outline is appropriate. Telling against that is the fact that this application was argued, with a very clear identification of the reasons why all the grounds of the appeal would not succeed, by Mr Lavercombe, a solicitor working at Mr Loel's firm. That preparation suggests that even if counsel were retained to settle the outline, no more than one day would be required or appropriate. The level of detailed preparation evident in Mr Lavercombe's outline

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22 [2016] QCA 238.

for this application, dealing with the main grounds of the appeal, suggests that from the point of view of security for costs, the allowance for counsel settling the outline should be discounted.

[43] Notwithstanding that the report of Mr Graham was not challenged, for the reasons above I do not consider it appropriate to adopt his figures as applicable to security, which is not designed to be an indemnity for the costs incurred. Discounting the items I have referred to results in a figure of about $13,494. I would discount that further to reflect the possibility that the appeal may not proceed to finality.

Conclusion

[44] In the result, I consider that security should be provided, in a form satisfactory to the Registrar, in the sum of $10,000. Though the respondents sought an order that the appellants pay the costs of this application it seems to me that they should be made the respondents' costs in the appeal.

[45] The orders are:

1. The appellants are to furnish to the Registrar as security for the respondents' costs of the appeal, the amount of $10,000 by 4 pm on 20 October 2017, in a form satisfactory to the Registrar.

2. The respondents' costs of and incidental to this application are to be their costs in the appeal.