SUPREME COURT OF QUEENSLAND

CITATION:	*Woolworths Group Ltd & Ors v Day* [2018] QCA 79
PARTIES:	**WOOLWORTHS GROUP LIMITED** ACN 000 014 675 (not a party to the application) **CPM AUSTRALIA PTY LTD** ACN 063 244 824 (first applicant) **RETAIL ACTIVATION PTY LTD** ACN 111 852 129 (second applicant) **v** **OLGA DAY** (respondent)
FILE NO/S:	Appeal No 158 of 2018 SC No 6016 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 27 November 2017 (Douglas J)
DELIVERED ON:	27 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Morrison JA
ORDERS:	**1. The application is refused.** **2. The costs of the application are the parties' costs on the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – where the applicants filed an application for security for costs a month before the appeal is to be heard – where the appeal is from an interlocutory order – where the respondent is impecunious – whether an indemnity certificate should be granted *Uniform Civil Procedure Rules* 1999 (Qld), r 772 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170; [1981] HCA 39, cited *Jackson v Coal Resources of Queensland Ltd* [1999] QCA 265, cited *Loel & Anor v Miller & Anor* [2017] QCA 203, cited

Murchie v Big Kart Track Pty Ltd (No 2) [2003] 1 Qd R 528; [2002] QCA 339, followed
Palmer v Parbery [2017] QCA 238, cited

COUNSEL: No appearance by the applicants, the applicants' joint submissions were heard on the papers
No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: Mills Oakley for the applicants
No appearance for the respondent

[1] **MORRISON JA:** This is an application for security for costs of the appeal. For convenience, I will refer to the parties to this application by their designations in the appeal proper. The second and third respondents seek the order pursuant to r 772 of the *Uniform Civil Procedure Rules* 1999 (Qld). They contend that security of $20,000 be ordered, either in money or property to that value.

Background to the litigation

[2] On 18 December 2014, the appellant slipped and fell in a supermarket operated by Woolworths Limited (the first respondent to the appeal), near a demonstration table operated by an employee of the second and third respondents. As a result of this fall, the appellant claims that she suffered significant injuries including an aggravation of a prolapsed L5/S1 disc, a medial meniscal tear in her left knee, a grade II to III lateral ligament tear in her left ankle and an aggravation of post-traumatic stress disorder and major depression and anxiety disorder.

[3] The appellant commenced proceedings pursuant to the *Personal Injuries Proceedings Act* 2002 (Qld) (**PIPA**). Within these proceedings, on 16 October 2017 an application was filed on behalf of the respondents seeking orders that the appellant submit to independent medico-legal examinations. At the same time an application was filed by the first respondent, seeking orders to strike out parts of the appellant's Statement of Claim. A separate application was filed by the appellant seeking relief of this nature: (i) that the proceedings be consolidated with others commenced by the appellant in the Supreme Court; (ii) that the original proceedings be set down for trial; and (iii) declarations concerning certificates of readiness for trial signed on behalf of the respondents prior to the filing of the original proceedings.

[4] All those applications were heard on 27 November 2017 by Douglas J. Orders were made that the appellant's application be dismissed and the proceeding be stayed until the appellant underwent the required independent medico-legal examinations, on the undertaking of the respondents to meet the fees of the specified experts; and certain parts of the appellant's Statement of Claim were struck out.

[5] The appellant filed a notice of appeal on 8 January 2018, seeking to set aside all of the orders made by the primary judge.

Legal principles

[6] Rule 772(1) of the *Uniform Civil Procedure Rules* relevantly provides:

> "(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."

[7] In *Loel & Anor v Miller & Anor*[1] I set out some of the relevant principles:[2]

> "[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.[3] As to those factors this Court said in *Toms v Fuller*:[4]
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> > '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.'
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> [4] Further, as McMurdo JA said in *Woolworths Ltd v Berhane*:[5]
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> > '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 ordering of security for costs against a personal plaintiff ahead of a trial are of less relevance in the present context.'"

Discussion

[8] In the present case the appellant has not yet had "her day in court" in the sense of a trial as she appeals from orders made on interlocutory applications filed in the proceedings below. However, on the issues to be agitated on the appeal she has had her day in court.

[9] Whilst there exists a predisposition against the ordering of security for costs against a personal plaintiff ahead of a trial,[6] that is of less relevance when considering an appeal.

Prospects of success

[10] The appellant's prospects of success on appeal are relevant to the decision as to whether this case is a proper one in which to order security for costs.[7] As I stated in

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1 [2017] QCA 203 at [3]-[4].
2 Internal citations from the original passage.
3 *Murchie v Big Kart Track Pty Ltd (No 2)* [2003] 1 Qd R 528. See also *Natcraft Pty Ltd & Anor v Det Norske Veritas & Anor* [2002] QCA 241 and *Mt Nathan Landowners Pty Ltd (in liq) v Morris* [2008] QCA 409.
4 [2010] QCA 73 at [26] per Chesterman JA, McMurdo P and Holmes JA concurring.
5 [2016] QCA 238.
6 *Woolworths Ltd v Berhane* [2016] QCA 238, per McMurdo JA.
7 *Murchie v Big Kart Track Pty Ltd (No 2)* [2003] 1 Qd R 528 at [8].

Loel & Anor v Miller & Anor [2017] QCA 203, a preliminary assessment of whether an appeal can be said to be one with arguable merit is appropriate at this stage of proceedings, rather than a determination of the likely outcome. What follows is just that, a preliminary assessment not approaching a full consideration of the merits.

[11] A Notice of Appeal was filed by the appellant on 8 January 2018, outlining seven extensive grounds of appeal. The respondents submit that grounds 3, 4, 5 and 6 particularly concern them, with grounds 3, 4 and 5 relating to the order of the primary judge staying the proceedings below until the appellant undergoes independent medico-legal examination and ground 6 being the primary judge erring in law by refusing to consolidate the proceedings below with another personal injuries action sought by the appellant against other defendants.

[12] The orders of the primary judge did not determine any issue ahead of the trial, but concerned only matters relating to procedure. This decision on the three interlocutory applications might have no consequence for the outcome,[8] and the appellant's "day in court" still lies before her with the opportunity to make her case. The appellant has previously complied with obligations under PIPA requiring her to obtain and disclose a number of medico-legal reports, and on the undertaking of the respondents, any costs incurred in the appellant undergoing the further ordered independent examinations are to be borne by them.

[13] There are several reasons why one might not be overly sanguine about the prospects of the appeal. First, appellate courts must exercise particular caution in reviewing discretionary judgments relating to practice and procedure except where an error of principle and substantial injustice can be demonstrated.[9] The decisions here were as to matters of practice and procedure.

[14] Secondly, one of the challenged orders was the dismissal of the appellant's application to amalgamate the present proceedings with other proceedings in the Supreme Court. In the other proceedings the appellant sues an entirely different set of respondents, and the issues are different. The only similarity is that in each proceedings the appellant says she sustained personal injuries. It is not obvious why there was a compelling reason to join the proceedings.

[15] Thirdly, as to the order striking out parts of the Statement of Claim, if there was not a pleadable case on the areas struck out, then one might wonder at whether a substantial injustice might be demonstrated. Though the ground of appeal relating to the striking out concerns only Woolworths, it will have an effect on the appeal.

[16] Fourthly, the principal relief against which the appeal is directed is the order that she submit to independent medico-legal examinations, to be conducted at the cost of the respondents. The proceedings have not yet come to trial, and a central issue for the respondents is the degree to which there are pre-existing injuries or conditions. Given that state of affairs, success on the appeal would mean the respondents are denied, at least for the present, the chance of having that issue pursued.

[17] I am not persuaded that the appellant's prospects are strong.

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8 *Palmer v Parbery* [2017] QCA 238 per McMurdo JA.

9 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177, per Gibbs CJ, Aickin, Wilson and Brennan JJ.

The appellant's financial position

[18] The appellant accepts that she would not be able to pay the respondents' costs as she "currently has very limited funds".[10] She has no real estate or other property of any real value. She has a limited number of shares and a nominal amount of savings in her personal bank accounts. In late 2014, her husband lost his job and in other proceedings referred to in the material, the appellant left her previous employment due to her suffering post-traumatic stress disorder.

[19] The appellant claims that her impecuniosity is the direct result of her fall in the Woolworths supermarket, contributing to her injuries and her ability to be employed in the future. The appellant further deposes that the depletion of her savings is due to the medical expenses and costs surrounding her care and treatment. As was observed in *Jackson v Coal Resources of Queensland Ltd* that might be relevant before a trial but of diminished significance after the trial and on appeal.[11] Here there has been no trial on the substantive issues, so this factor has some relevance.

[20] However, it is relevant to note that if this appeal concludes adversely for the appellant, it will not affect her ability to pursue her damages claim.

[21] With this in mind, whilst poverty should not be a bar to litigation, noting that an order for security for costs might lead to the appeal being dismissed were the appellant unable to meet such an order, as in *Loel & Anor v Miller & Anor* the appellant's impecuniosity is a factor in favour of granting this application. Balanced against that is the fact, which can be accepted for present purposes, that the appellant's impecuniosity has been caused (at least in part) by the respondents.

Other matters

[22] There has been a degree of delay by the respondents in seeking security for costs.

[23] The relevant time frame is set at one end by the commencement of the appeal on 8 January 2018, and at the other by the hearing date set for the appeal, namely 25 May 2018. There have been some steps in the appeal process in the interim, but for present purposes it can be observed that it was not until 19 February 2018 that an issue was first raised as to security for costs, the present application was filed (in conformance with orders by the President) on 28 February 2018.

[24] On 28 February 2018 the application for security was filed. By then all the outlines on the appeal had been filed.[12] On that day Sofronoff P reviewed the matter and made directions for the application to be heard on the papers, and for submissions to be filed by 4 April 2018. As at 28 February 2018 the appeal was still two months away but the bulk of the work to prepare had been done.

[25] As it happened the appellant's submissions on the security application were not filed until 14 April, and the second and third respondents' reply on 17 April 2018. That was only some five weeks prior to the hearing of the appeal.

[26] The affidavit of Mr Garrett shows that the issue of security was first considered on 25 January 2018.[13] Searches exhibited to Mr Carter's affidavit show that by 31 January

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10 Appellant's Submissions at 16.
11 [1999] QCA 265 per de Jersey CJ at 2.
12 The appellant's is dated 5 February 2018, the respondents' outlines dated 26 February 2018.
13 Exhibit IAG 1, paragraph 33.

2018 at the latest the second and third respondents knew that the appellant had little or no assets and had received advice from Counsel as to the application.[14]

[27] Whilst the delay referred to above is not long in the overall sense, it has the characteristic that costs were being incurred by the second and third respondents knowing that they might not be recovered even if they were successful. A more prompt reaction might have been to apply shortly after the appellant's outline was available, and seek directions that further steps not be taken until the issue of security had been determined.

[28] The delay does not, in my view, disentitle the respondents to relief. It is, however, a factor that goes to the amount of security that might otherwise be ordered. This is because, going on Mr Garrett's assessment,[15] by the time the application was filed nearly half of the overall costs had already been incurred.[16] Taking a rough apportionment of those fees, Counsel's component to that time was likely about $5,000.

[29] Another matter is the potential impact of an order for security upon the hearing of the appeal, which is set for 25 May 2018.

[30] The order sought by the respondents is that the failure to provide security in 14 days would result in the immediate dismissal of the appeal. The appellant seeks a longer period of time, if an order is made, to raise the funds. She has about $3,500 in cash, and a small amount of shares ($931).

[31] She is fully dependent upon her relatives and would seek time to run a public fundraising campaign.[17] However, she has been able to meet certain costs (such as the cost of medical expenses, court fees and the like) though not costs that have been ordered against her. The appellant resides in a property owned by her daughter, and there exists another property co-owned by her husband and daughter.[18] Whilst there are mortgages over those properties, there is no evidence as to what equity remains. There is no suggestion that the appellant's family will not assist her.

[32] In my view, little credence can be given to the prospects of a public fundraising campaign. There is simply no evidence that it is likely to succeed, nor in what timeframe. However, in the circumstances 14 days is too short a time to permit the appellant to make whatever efforts she can to raise any security.

[33] There is no evidence to suggest that her relatives are unwilling to assist, even by way of loans to her. Equally, there is no evidence that they are willing to assist, and some evidence that they cannot do so in any event.[19] Even if that was to occur by way of loans obtained by her relatives secured over the two properties it is doubtful that could be put in place within 14 days.

[34] That raises the risk that any order for security would put that hearing date, now some 31 days away, in jeopardy. There is no benefit to the parties, let alone the

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14 Affidavit of Mr Carter, exhibit SC8 and SC9, and exhibit IAG 1 to Mr Garrett's affidavit, paragraph 33.
15 Exhibit IAG 2.
16 The items to that point totaled about $4,573.90, plus Counsel's fees which included an appearance on the review on 28 February 2018.
17 Affidavit of the Appellant, paragraphs 7-13.
18 Affidavit of Mr Carter, exhibits SC8 and SC9.
19 Appellant's affidavit, paragraph 12.

court, in the appeal dragging on. The hearing date should be maintained, if possible.

Conclusion

[35] Weighing the factors set out above, I would decline to order security for costs. The costs of the application should be the parties' costs in the appeal.

[36] Therefore I order:

1. The application is refused.

2. The costs of the application are the parties' costs on the appeal.