

COURT OF APPEAL

GOTTERSON JA

**Appeal No 11539 of 2018
DC No 228 of 2018**

**GLOBE VALLEY PTY LTD
ACN 056 599 654**

First Applicant

DEBORAH HEGARTY

Second Applicant

PETER ROSS HEGARTY

Third Applicant

v

GORDON JAMES CRAVEN

Respondent

BRISBANE

TUESDAY, 27 NOVEMBER 2018

JUDGMENT

GOTTERSON JA: The three applicants for an order for security for costs, Globe Valley Pty Ltd, Peter Ross Hegarty and Deborah Hegarty, are the respondents to an appeal by the respondent to their application, Gordon James Craven. The appeal was commenced by Mr Craven on 23 October 2018 upon the filing of a notice of appeal. He is appealing against orders made by a judge of the District Court *ex tempore* on 27 September 2018. By those orders, a proceeding that Mr Craven had brought in the District Court against the applicants and others for defamation was dismissed as a proceeding against the applicants. He was ordered to pay their costs.

The proceeding was dismissed under r 674(c) of the *Uniform Civil Procedure Rules (UCPR)* in circumstances where Mr Craven had failed to comply with an order earlier made by another judge of the District Court on 10 August 2018 that he provide security for the costs of the applicants as defendants in the proceeding. The order required security in the amount of \$10,000 to be provided in a form satisfactory to the registrar by 4 pm on 24 August 2018. Such security was not provided. Mr Craven did not seek leave to appeal against the security for costs order; however, he did file an application pursuant to r 675 of the *UCPR*, which was returnable on 2 October 2018, for an order setting aside that order. The learned primary judge considered that that application had dismal prospects of success. When he made orders, he vacated the hearing date for that application, the need for a hearing having been displaced by the dismissal of his proceeding.

The present application was filed on 5 November 2018. It is made under r 772 of the *UCPR*. This rule confers an unfettered discretion to order payment of security for costs in an appeal. The factors relevant to the exercise of the discretion have been identified and discussed in a number of decisions of this court. Mr Craven is acting for himself. His notice of appeal sets out some 13 grounds of appeal, most of which are expressed in terms of recourse to “the justice of the case in all the circumstances”. What is relevant for present purposes are the prospects of success that Mr Craven’s appeal has. The strong impression I have is that they are poor for the following reasons.

The order dismissing the proceeding was a discretionary one. The circumstance necessary for the engagement of the discretion under r 674(c), namely, a failure to provide security as ordered, had indisputably occurred. Further, Mr Craven has not advanced any persuasive argument to the effect that the decision of the judge who made the order was infected by an error of the kind that, according to well-established principles, vitiates the exercise of a judicial discretion. Additionally, Mr Craven has not satisfied me that he has an arguable case that the learned primary judge was wrong in his assessment of the prospects of success of his r 675 application.

In particular, his Honour is not shown to have erred with respect to his finding of an absence of special circumstances required in order to exercise the discretion conferred by that rule. A second relevant factor is Mr Craven's financial position. He was from the 5th of March 2015 until the 21st of March 2018 an undischarged bankrupt. Significantly, his bankruptcy had its origins in a failure to pay costs ordered against him in a proceeding in the Federal Court of Australia in excess of \$30,000. Those facts support an inference that if costs are awarded against Mr Craven in this appeal, the applicants are at significant risk that he would be unable to pay them.

These two factors combine to present a reasonably compelling case for an order for security for costs. Against it, Mr Craven submits that he cannot provide any security for costs and that an order that he do so would stifle his appeal. To my mind, the risk that the appeal might be stifled needs to be weighed conservatively. Mr Craven has already had the benefit of serious consideration by two judges of the District Court of, in the first place, whether a security for costs order ought to have been made in that proceeding and, in the second place, whether the order that was made should have been set aside. Mr Craven's claimed impecuniosity should be viewed similarly. He has not pleaded, either in the District Court proceeding, or in antecedent proceedings in the Federal Court and the Federal Circuit Court, wrongful conduct on the part of the respondents directed at him which caused him financial ruin.

I consider that these two last mentioned factors do not individually or together outweigh the strong case for an order for security for costs of the appeal presented by the factors which I discussed first. I am prepared, therefore, to make such an order. There is evidence before the Court that the applicant's solicitor has assessed their costs of responding to this appeal. The assessment is in an amount of slightly more than \$36,500. Mr Craven has not filed any evidence challenging this assessment. The amount for which security is sought is \$10,000.

In all the circumstances, that is not an unreasonable amount. It need be borne in mind that, of course, costs assessed on the standard basis are likely to be well less than the solicitor's assessment. The orders of the Court are as follows:

1. The appellant, Gordon James Craven, is to provide security for the costs of the appeal to the first, second and third respondents in the sum of \$10,000 and in a form acceptable to the registrar of the Court within 28 days of today's date.
2. The costs of this application are costs in the cause.
3. Liberty to apply.

Adjourn the Court.