SUPREME COURT OF QUEENSLAND

CITATION:	*Natcraft P/L & Anor v Det Norske Veritas & Anor* [2002] QCA 241
PARTIES:	**NATCRAFT PTY LTD** ACN 010 592 775 (deregistered) (first plaintiff/first appellant) **HENLOCK PTY LIMITED** ACN 010 431 688 (second plaintiff/second appellant) **v** **DET NORSKE VERITAS** ACN 000 749 708 (first defendant/first respondent) **PETER COLLEY** (second defendant/second respondent)
FILE NO/S:	Appeal No 9550 of 2001 SC No 7976 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 July 2002
DELIVERED AT:	Brisbane
HEARING DATE:	1 July 2002
JUDGES:	Davies, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. Application for security for costs dismissed** **2. Costs of the application to be reserved**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – application by respondents for security for costs against appellants – where respondents claim that appellants' appeal should be struck out on basis that first appellant has been deregistered and that neither appellant has any assets nor could satisfy any order for costs – where appellants have made significant expenditure in preparation for the appeal – where respondents' delay in lodging security for costs application was excessive and inexplicable – where possible unfairness and error resulted from appellant conducting his own case at trial – whether security for costs application should be granted

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – WHEN NOT ALLOWED TO BE RAISED ON APPEAL – QUESTIONS NOT RAISED ON PLEADINGS OR IN ARGUMENT – where case pleaded by appellants during trial differed from that described at commencement of trial and in appellants' outline of argument – where learned trial judge considered merits of both pleadings and found against the appellants in both – where trial would not have been conducted differently had the case been pleaded as originally described – whether case to be pleaded on appeal was referred to in original pleadings

Uniform Civil Procedure Rules 1999 (Qld), r 772

Banks v Copas Newham Pty Ltd [2001] QCA 526; Appeal No 9434 of 2001, 21 November 2001, considered
Commonwealth Bank of Australia v Eise (1991) 6 ACSR 1, considered
Devenish v Jewel Food Stores Pty Ltd (1990) 64 ALJR 533, followed
Intercraft Covenant Pty Ltd v Sampas Pty Ltd (1997) 18 WAR 306, considered
Ivory v Telstra Corp Ltd [2001] QCA 490; Appeal No 4059 of 2001, 7 November 2001, considered
Jackson v Coal Resources of Queensland Ltd [2000] QCA 413; Appeal No 3262 of 1999, 4 October 2000, considered
James v Australian and New Zealand Banking Group (No.1) (1985) 9 FCR 442, followed
Quenbeyan Leagues Club Ltd v Poldune Pty Ltd [2001] NSWSC 898; Appeal No 3418 of 1996, 16 October 2001, considered
Smail v Burton [1975] VR 776, followed

COUNSEL: D O'Gorman for the appellants
G A Thompson SC with HP Bowskill for the respondents

SOLICITORS: Lawrence W Hewitt (Mackay) for the appellants
Ebsworth & Ebsworth for the respondents

[1] **DAVIES JA:** In my opinion this application should be dismissed. Subject to the following comments, I agree with the reasons of Jerrard JA for that conclusion.

[2] It is impossible to state comprehensively the factors which are relevant to assessment of an application of this kind and I do not understand his Honour to be attempting to do that. The matters to which he refers are undoubtedly factors which courts take into account in assessing such an application but it would be misleading to imply that other factors may not be relevant as this application demonstrates.

[3] There are three further comments which I would like to make. The first is that, as his Honour has pointed out in the third dot point of [9] of his reasons, an impecunious plaintiff who has lost at trial on the merits will have greater difficulty in relying on apparent merits as a factor against the making of an order for security

the effect of which might stifle an appeal than would have been the case in respect of a similar reliance in opposition to an application for security of costs before trial. That is especially so where, as may have been the case here, the decision on the merits involved findings of fact based on credit.

[4] Secondly, an undertaking by a person standing behind an appellant company to be liable for any costs order made against it on the appeal, is a relevant factor against making an order for security only because and to the extent to which that undertaking is likely to be honoured. And where, as here, that person himself has no means of paying such costs, such an undertaking is worthless.

[5] And the third is that, especially where, as here, an appellant, who is not a lawyer, has conducted his own case at trial, the possibility that some unfairness to him in the conduct and consequent error in the outcome of that trial may have arisen, may also be a factor to take into account in such assessment. It is possible - and I put it no higher than that - that some such unfairness and error may have arisen here.

[6] That possibility together with an insufficiently explained delay in bringing this application, the readiness of this appeal for hearing and the proximity of the appeal hearing date, in my opinion justify refusing this application.

Orders

1. Dismiss the application.
2. Reserve the costs of the application.

[7] **WILLIAMS JA**: I agree with the reasons of Jerrard JA subject to the comments made by Davies JA. I agree with the orders proposed.

[8] **JERRARD JA**: The respondents in this appeal filed an application on 29 May 2002 for orders that the appellants give security for costs in an amount and form considered appropriate by the court. Their outline of argument in support of that application filed 27 June 2002 argues as well that since the first appellant Natcraft Pty Ltd was deregistered on 18 February 2002, the appeal by it is incompetent and should be struck out in any event. The appellants have replied by affidavit and argument to the first application, and admit the deregistration of the first appellant. At an appropriate time the appeal by Natcraft may have to be struck out.

[9] The respondents' application for security for costs is brought pursuant to r 772 of the *Uniform Civil Procedure Rules* 1999 (Qld). A number of decided cases have established matters which are relevant on such applications. These include:

- The appellants' prospects of success on the appeal (see *Banks v Copas Newham Pty Ltd*[1]).

- The financial position of the appellants. Where an appellant is without funds or assets this factor is important, and provides what this court has described as a "persuasive" reason for ordering security for costs. This is because that appellant would be unable to satisfy any order for costs made against the appellant should the appeal be unsuccessful (see *Banks* (supra) and *Ivory v Telstra Corp Ltd*[2]*).*

[1] [2001] QCA 526
[2] [2001] QCA 490

- The fact an impecunious appellant, impecunious at trial, has already had a "day in court" and lost on the merits. That circumstance increases rather than reduces the likelihood of the exercise of a discretion in favour of an order for security for costs (see *Ivory* (supra)).

- The fact that the appellant blames impecuniosity on a respondent who asks for orders for security for costs. This matter has a diminished significance at appellant level, by contrast with its significance at trial level (see de Jersey CJ *Jackson v Coal Resources of Queensland Ltd*[3]).

- That it is inappropriate to order an impecunious appellant to provide a greater security than is absolutely necessary (see Young CJ in *Commonwealth Bank of Australia v Eise*[4]).

- That the giving of a personal undertaking by one who stands behind a company does not preclude an order for security for costs (see *Intercraft Covenant Pty Ltd v Sampas Pty Ltd*[5]).

- Whether there has been any delay in bringing the application for security for costs.

[10] The central issue where there has not been delay is well summarised in the judgment of Malcolm CJ in *Intercraft* (supra), wherein His Honour said at page 316 that the application has to be looked at in the light of all relevant considerations, including the merits of the action and whether the ordering of security will stifle an action which has some apparent merit. Here the evidence from the sole director of the second appellant company is that neither he personally, nor either appellant company, has any assets or could satisfy any order for security for costs. That director, Mr Michael Althaus, had given the respondent defendants his personal undertaking at the trial to pay costs, if any, awarded should the action be unsuccessful. Clearly he could not give any such undertaking of any value on this appeal. The defendant respondents calculate their recoverable trial costs are no less than $100,000, and it is apparent from the affidavit of Mr Althaus filed in this appeal on 26 June 2002 that his only prospect of satisfying that undertaking is from future earnings. All of this supports making the order.

[11] As against that, there is the respondents' delay in bringing this application. The appellants filed their notice of appeal on 24 October 2001, and served it on the respondents on or about 31 October 2001, filed a 14 page outline of argument with extensive transcript references and a good deal of citation of authority on 24 December 2001, and the respondents served their outline of argument on 4 February 2002.

[12] On 11 February 2002 the appellants' solicitors were notified by the registry that the matter had been set down for hearing on 7 May 2002, and on 9 April 2002 those solicitors were advised that the appeal book had been completed. The second appellant has still not paid for those, but this court was told that that would happen this Thursday, 4 July 2002. The appeal did not in fact come on on 7 May 2002 due,

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[3] [2000] QCA 413
[4] (1991) 6 ACSR 1 at 4
[5] (1997) 18 WAR 306 at 316

we were told, to the unavailability of the second appellants' counsel. It has been set for hearing on 16 July 2002.

[13] The respondents filed their application for security for costs on 29 May 2002. They had given notice by letter dated 22 February 2002 to the solicitor for the second appellant of an intention to apply for security for costs, but did not do so until after the listed hearing date had been vacated. It appears that subject to the second appellants paying for the appeal books, and serving those on the respondent, all preparatory work has been completed. In these circumstances the application for security for costs is made very late.

[14] The respondents' affidavit material read in support of their application describes their solicitor having been advised by the second appellants' solicitor on 4 March 2002 that a formal response would be made "in due course" to the respondents' notice that they would ask for security for costs. That affidavit material does not otherwise explain why no further steps were taken until late May 2002.

[15] It is well established by authority that an application for security for costs should be made promptly. The reason for this is explained in the judgment of the Victorian Full Court in *Smail v Burton*[6] wherein Gillard J wrote:

> "If an appellant has expended sums of money preparing the appeal for hearing and all the matters necessary to be performed have already been performed and the appeal is ready for hearing it would be patently unjust to permit a respondent who stood by and allowed that work to be done to come to court and to ask for security after such expenses have been incurred."

[16] To the like effect are remarks by Mason CJ in *Devenish v Jewel Food Stores Pty Ltd*[7], that if there is delay in bringing an application for security for costs and the plaintiff has incurred significant expense, the application is likely to be dismissed. In *James v Australian and New Zealand Banking Group Ltd (No.1)*[8] Toohey J held that a compelling reason why an order for security for costs should not be made was the impending date of hearing of the action and the fact that:

> "so much time and cost had been expended that it would work a grave injustice [to the plaintiffs] if they were ordered to provide security for costs when it is apparent that they could not comply with such an order."[9]

[17] The second appellant's admitted lack of any assets, and the respondents' obvious delay, respectively tell for and against making the order sought. Regarding the second appellant's prospects of success on appeal, it appeared at the trial by Mr Althaus. At page four of the transcript he outlined the case the then plaintiffs wanted to make in terms which are relevantly identical to what paragraph three of the appellants' outline of argument describes as the primary question in the trial and appeal. So expressed, that case differed from the case the appellants had actually pleaded, which case as pleaded the learned trial judge dismissed. The learned judge then went on to consider the merits of a case the appellants had not specifically

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[6] [1975] VR 776 at 777
[7] (1990) 64 ALJR 533 at 534
[8] (1985) 9 FCR 442 at 446
[9] See the judgment of Master White (as she then was) in *Shaftesbury Nominees Pty Ltd* [1992] 2 Qd R 543 at 545-6 wherein these passages from *Devenish* and *James* are cited.

pleaded, but which the learned judge considered must be the real case made before him. On that case as well he found against the appellants.

[18] I think the view is open that that unpleaded case considered and dismissed by the learned judge was actually not quite the case Mr Althaus described at the commencement of the trial, and which is now repeated in the appellants' outline of argument. It is possible that the second appellant's case described by it (but not pleaded) has not been the subject of specific consideration in the judgment under appeal. To the extent that there are findings in that judgment that matters of fact as to damages had not been established, passages of transcript to which we were taken suggest it is possible Mr Althaus may have had reason to believe that the case on damages had not been concluded, and that liability was being settled first.

[19] In these circumstances it cannot be said the second appellant necessarily has only poor prospects of success on appeal. It appears that the way the case was originally described and will be presented on appeal would not have led to the trial being conducted differently had it been so pleaded (see *Queanbeyan Leagues Club Ltd v Poldune Pty Ltd*[10]. All parties having prepared for the appeal (which did not come on for hearing before this application was filed solely because of the unavailability of counsel), the competing considerations are properly resolved by dismissing the application.

[20] The order will be that the application for security for costs is dismissed.

[10] [2001] NSWSC 898 (16/10/01) at para 27 citing *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 and *Water Board v Moustakas* (1988) 180 CLR 483 at 497.