SUPREME COURT OF QUEENSLAND

CITATION:	*Molony & Anor v ACN 009 697 367 P/L (In Liq)* [2003] QCA 120
PARTIES:	**RAY MOLONY** (first plaintiff/first appellant) **INTERNATIONAL JOCKEY SCHOOL PTY LTD** ACN 085 035 383 (second plaintiff/second appellant) **v** **ACN 009 697 367 PTY LTD (FORMERLY FRED MARSH PTY LTD (IN LIQUIDATION))** (defendant/respondent)
FILE NO/S:	Appeal No 6356 of 2002 SC No 85 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from Interlocutory Decision
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	21 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2003
JUDGES:	McMurdo P, Williams JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal to the extent of varying para 2 of the order of 20 June 2002 by adding after the words "the defendant's costs" the words "in the sum of $35,000"; and** **2. Varying para 3 of the order of 20 June 2002 by adding after the words "proceedings" the words "by the second named plaintiff"** **3. If it is necessary for leave to proceed to be obtained, give leave to the appellants to proceed against the respondent** **4. The respondent pay the appellants' costs of the appeal limited to the filing of the notice of appeal**
CATCHWORDS:	PROCEDURE - SECURITY FOR COSTS - OTHER MATTERS - where primary judge ordered that the appellant company give security for the respondent's costs pursuant to r 670 *Uniform Civil Procedure Rules* - where order not complied with – whether primary judge erred in law and/or contrary to the principles founded in law upon which an order

for security for costs can be ordered against a natural person - whether the orders denied the first appellant natural justice - whether order was made without jurisdiction to stay the proceeding against the first plaintiff as the respondent's application for orders for security for cost and the staying of the proceeding as only directed against the appellant company - whether appellant company's case can be split from first appellant's case

Corporations Act 2001 (Cth), s 1335
Trade Practices Act 1974 (Cth), s 52
Uniform Civil Procedure Rules 1999, rr 670-672

Adam P Brown Male Fashions Pty Ltd v Phillip Morris Inc (1981) 148 CLR 170, considered
Harpur v Ariadne Australia Limited [1984] 2 Qd R 523, considered
Molony & Anor v ACN 009 697 367Pty Ltd [2002] QCA 420; Appeal No 6356 of 2002, 10 October 2002, considered

COUNSEL: The first appellant appeared on his own behalf and by leave on behalf of the second appellant
M M Stewart SC for the respondent

SOLICITORS: The first appellant appeared on his own behalf and by leave on behalf of the second appellant
Ebsworth & Ebsworth for the respondent

[1] **McMURDO P:** This is an appeal from an order made on 20 June 2002 by a judge of the Trial Division that the second named appellant ("the appellant company") give security for the respondent's costs within 28 days and that in the event that order is not complied with, the proceedings be stayed until the order for security for costs has been complied with. Security for costs has not been given.

[2] The first named appellant, Mr Molony, represents himself on this appeal and, by leave, the appellant company of which he is a director and sole shareholder. The appellants' action was commenced on 22 June 2001. Mr Molony claims that on 16 October 2000 he, on behalf of himself and the appellant company, entered into an unregistered lease with the respondent for about three years. The appellants claim the respondent breached the terms of the lease and as a result both appellants suffered losses. The total amount claimed by the appellants in the amended statement of claim is $330,524.46, together with interest and costs, for breach of contract and misleading and deceptive conduct in breach of s 52 *Trade Practices Act* 1974 (Cth). Of that sum, $282,000, the bulk of the claim, related solely to a claim for lost income by the appellant company from its business of training stable hands and others; the loss of income claimed solely by Mr Molony from his horse riding business was $6,400.

[3] The respondent successfully applied to the primary judge for orders, which included an order that the appellant company give security for the respondent's costs within 14 days under r 670 UCPR or s 1335 *Corporations Act* 2001 (Cth) and in the event

that the appellant company failed to provide such security, that the proceeding be stayed until the order for security has been complied with; the respondent did not ask for security for costs against Mr Molony.

[4] On 5 September 2002 the appellants applied to the primary judge for a correction of the order of 20 June 2002 under the slip rule insofar as it purported to stay the proceedings brought by Mr Molony. His Honour refused that application, indicating that he intended to stay both the proceedings brought by Mr Molony and those brought by the appellant company and there had been no slip.

[5] In their lengthy grounds of appeal, the appellants claim his Honour's order of 20 June 2002 was wrong in law and/or contrary to the principles founded in law upon which an order for security for costs can be ordered against a natural person; was made on considerations based upon findings of fact that were wrong, and/or there was no evidence upon which to base those findings of fact and/or irrelevant considerations; denied Mr Molony natural justice; was made without jurisdiction to stay the proceeding against Mr Molony as the respondent's application for orders for security for costs and the staying of the proceeding was only directed against the appellant company; that his Honour erred in his decision to make those orders in that the decision against the appellant company was made on considerations based upon findings of fact that were wrong and/or there was no evidence upon which to base those findings of fact and/or irrelevant considerations; the justice of the case requires that the appellant company's case not be split from Mr Molony's case because having one hearing is in the interests of all parties and the justice system and the order was contrary to the principles contained in rr 671 and 672 of the UCPR and/or common law. The appellants seek an order setting aside all the primary judge's orders or an order setting aside the order in respect of Mr Molony. The appellants also now seek an order that they be allowed to amend their claim and statement of claim.

[6] The respondent no longer seeks to support that part of the order staying Mr Molony's action. That differs from its position at the application for leave to appeal and to extend time within which to appeal, which was heard by this Court on 10 October 2002[1] when the respondent firmly opposed the making of those orders which it has now conceded since 11 December 2002.[2]

[7] Only the orders concerning the appellant company remain in contention.

[8] Mr Molony has not offered or provided security for the costs which have or may be awarded against the appellant company. It seems common ground that both appellants are impecunious and have no prospect of meeting any costs ordered in the action and the appellants have not submitted that the material before the learned primary judge warranted a different conclusion.

[9] The order sought by the appellants to amend the claim and statement of claim does not relate to the order appealed from but, in any case, the amended statement of claim can be further amended without leave or any further order.

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1 *Molony & Anor v ACN 009 697 367 Pty Ltd*, [2002] QCA 420; Appeal No 6356 of 2002, 10 October 2002. The appellants unsuccessfully applied for leave to appeal, mistakenly believing that leave was necessary when, in fact, they had an appeal as of right. The application for leave to appeal was struck out with costs to be assessed but leave to appeal was extended to 25 October 2002.

2 The date of the filing of the respondent's outline of argument in this appeal.

[10] Mr Molony has not established any breach of natural justice: his counsel at first instance had the opportunity to make and made detailed submissions on his behalf.

[11] Mr Molony's primary contention to set aside his Honour's order concerning the appellant company is that his Honour made findings of fact which were not open on the evidence, namely, that:

> "… [the appellants'] prospects of proving even the existence of the lease on which the whole case depends are not particularly encouraging on present material. Details of correspondence exhibited before me show the [appellants] having difficulty in providing basic particulars of their claim.
> [16] The [appellants] contend that their present impecuniosity is due to the [respondent's] breach of the alleged lease. The evidence, however, suggests that the [appellants'] business had not been established when the [appellants] vacated the premises. The [appellants'] claim will depend on establishing the potential success of the business. Also it is somewhat surprising to me that alternative premises could not be found for a business such as this which would have mitigated the [appellants'] loss." [3]

[12] Mr Molony contends that there was evidence before the primary judge which demonstrated the appellants' businesses were well-established and profitable; he has referred us to an untranslated document in Japanese contained in a supplementary record book, incomprehensible to those who do not read Japanese, which is said to be a refund of $30,000 from a student unable to take part in the appellant company's training course because of the respondent's breach of the lease; he has also referred to some Japanese bank statements. This evidence was not, however, before the primary judge. Nor was there any solid evidence of the business' trading figures before or after the lease was allegedly entered into; the congratulatory letter from the Commonwealth Minister for Trade, emphasised by Mr Molony, certainly did not constitute such evidence. Material placed before the judge by the respondent suggested the appellants' records demonstrated an operating loss in the 1999 financial year and an operating profit of less than $4,000 in the 2000 financial year.

[13] The appellants emphasise that the individual behind the respondent corporation, Mr Fred Marsh, has died. That does not mean there is no defence to the appellants' claim that there was a lease with the respondent company. It remains necessary for the appellants to establish their claim; his Honour was understandably of the view that, on the material before him, this would be difficult, at least for the appellant company, which was not a party to the lease. The appellants have not established that his Honour made findings of fact which were not open on the material before him.

[14] The appellants claim there is such an overlap in each of their claims that the claims cannot be separated and the impecunious appellant company should not have been required to provide security for costs with the resulting stay of its proceedings. The amended statement of claim makes two quite distinct claims by the appellant company and Mr Molony for their respective business losses.[4] Whilst it is not entirely clear whether some of the smaller claimed amounts are Mr Molony's, the

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3 *Molony and International Jockey School Pty Ltd v ACN 009 697 367 P/L* SC No 85 of 2001, 20 June 2002, [15] and [16].

4 See para [2] of these Reasons.

appellant company's or both, this is something which can easily be overcome when Mr Molony amends his claim.

[15] This is an appeal from the exercise of a discretion in an interlocutory application on a matter of practice and procedure, which is not lightly overturned: see *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc*.[5]

[16] His Honour has taken into account the relevant considerations listed in UCPR r 671 and r 672, especially r 671(a) and r 672(a), (b), (d) and (m). The exercise of judicial discretion in ordering security for costs against the impecunious appellant company and a stay in the event of non-compliance, on the facts before the court, was unexceptional: see *Harpur v Ariadne Australia Limited*.[6] The appellants have not demonstrated any error to justify setting aside his Honour's order in respect of the appellant company.

[17] I would allow the appeal to the extent of varying para 3 of the order of 20 June 2002 by adding after the words "the proceedings" the words "by the second named plaintiff".

[18] It is clear from the reasons for judgment of the learned primary judge that his Honour intended to order that the corporate appellant provide security for costs in the sum of $35,000[7] although his Honour omitted to place that amount in the formal order. The respondent conceded this during hearing of the applications before this Court on 10 October 2002. Paragraph 2 of the order of 20 June 2002 should also be amended by adding after the words "the defendant's costs" the words "in the sum of $35,000".

[19] The appeal should otherwise be dismissed. Mr Molony was successful in his part of the appeal and this has only been conceded by the respondent since 11 December 2002. In the circumstances, the appellants, who are not legally represented, should have their costs of the appeal, limited to the filing of the notice of appeal.

[20] Mr Molony has also noted that it may be necessary for him to obtain leave to proceed against the respondent company which, although solvent, is in voluntary liquidation. If leave is necessary, it should be given.

Orders:

1. Allow the appeal to the extent of varying para 2 of the order of 20 June 2002 by adding after the words "the defendant's costs" the words "in the sum of $35,000"; and
2. Varying para 3 of the order of 20 June 2002 by adding after the words "proceedings" the words "by the second named plaintiff".
3. If it is necessary for leave to proceed to be obtained, give leave to the appellants to proceed against the respondent.
4. The respondent pay the appellants' costs of the appeal limited to the filing of the notice of appeal.

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5 (1981) 148 CLR 170.
6 [1984] 2 QdR 523.
7 See fn 3 at para [18].

[21] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of the President, and I agree with what is stated therein. There is, however, one aspect of the matter on which I wish to add some remarks of my own.

[22] In this case there are two plaintiffs, and an order for security for costs could on general principle only be made against the corporate plaintiff. That raises for consideration the application of the principles on which security for costs will be granted where there is more than one plaintiff. That was considered by Connolly J (with the concurrence of Campbell CJ and Demack J) in *Harpur v Ariadne Australia Limited* [1984] 2 Qd R 523 at 531-2. As his Honour there said: "If the defendants have an opponent who is worth powder and shot they have as much as any litigant is fairly entitled to". In that case, as one of the plaintiffs was a man of substantial means, it was inappropriate to order security for costs against the corporate defendants even though, looked at in isolation, such an order could be justified against them. Connolly J analysed in particular *Sykes v Sykes* (1869) LR 4 CP 645 and *D'Hormusgee v Grey* (1882) 10 QBD 13 and noted that there was support for the proposition that "unless there is ground for making an order for security against all the plaintiffs, it cannot be made against any". The reason for that, as disclosed by the authorities, is that each plaintiff is liable for the whole of the defendant's costs.

[23] Against that background it was submitted by the appellants in this case that there was such a complete overlap between the interests of the two plaintiffs that it was inappropriate to order security for costs against one only.

[24] That issue was raised before the learned judge at first instance and was, in broad terms, dealt with in his reasons. His Honour analysed the claims made in the statement of claim and concluded that the claims of each plaintiff were significantly different. The corporate plaintiff had a claim for some $282,000.00 whereas the male plaintiff had a claim for only $6,400.00. The businesses conducted by each of the plaintiffs were entirely separate. So far as the statement of claim is concerned it is not clear which of the plaintiffs was claiming cost of erecting improvements ($5,475.46), cost of refunding monies ($30,000.00), cost of transport agistment ($154.00), cost of using caravan park amenities ($500.00), and advertising and promotion costs ($6,000.00).

[25] It follows that the substantial claim, that which justifies bringing the proceedings in the Supreme Court, is that in which the corporate plaintiff alone is interested. The male plaintiff is also impecunious and he could not meet the costs incurred in litigating the claim of the corporate plaintiff. It is therefore not a case where each plaintiff would be liable for the whole of the defendant's costs if the defendant was successful.

[26] In oral argument the appellants sought to rely on s 55 of the *Property Law Act* 1974. That section is also referred to in paragraph 6 of the Statement of Claim. I cannot see at this stage that s 55 assists the appellants' argument that there is such an overlap with respect to the claims that it would be unjust, or not in accordance with principle, to make an order for security for costs against the corporate plaintiff. Whether s 55 ultimately has any relevance to the claim of the plaintiffs is a matter to be decided at trial.

[27] I agree with the President that there is no discernible error in the reasoning of the learned judge at first instance, and I agree that the appeal should be disposed of by making the orders she proposes.

[28] **WHITE J:** I have read the reasons for judgment of the President and Williams JA and agree with them**.**

[29] The appellant, Mr Molony, made much reference to *Harpur v Ariadne Australia Limited* [1984] 2 Qd R 523 to support his principal contention that since he has exposed himself for what he is worth it is inappropriate to make an order for security for costs against the corporate plaintiff. That misconceives, as Williams JA has pointed out, the basis upon which Connolly J at 532 made the observation which Mr Molony relies on. Where there is more than one plaintiff there must be a coincidence of interest. Where all plaintiffs sue in the same interest and by the same solicitors and counsel there is but one set of costs. As both the President and Williams JA have pointed out there is very little overlap between the claims advanced on behalf of each plaintiff.

[30] I agree with their Honours that there is no error in the reasoning below save for that supporting the order against Mr Molony and agree with the orders proposed by the President.