

SUPREME COURT OF QUEENSLAND

CITATION: *Laghaifar v Nooravi & Anor* [2003] QCA 178

PARTIES: **SOHAIL LAGHAIFAR**
(plaintiff/appellant/respondent)
v
FARZAD NOORAVI
HOMA NOORAVI
(defendants/respondents/applicants)

FILE NO/S: Appeal No 9910 of 2002
SC No 78 of 2002

DIVISION: Court of Appeal

PROCEEDING: Application for Security for Costs

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 2 May 2003

DELIVERED AT: Brisbane

HEARING DATE: 16 April 2003

JUDGES: McMurdo P, Fryberg and Muir JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The appellant provide within seven days security for costs of the appeal in the sum of \$7,500 in a form satisfactory to the Registrar or by payment into the court of that sum**
2. If that order is not met, the appeal is dismissed with costs
3. Otherwise the costs of and incidental to this application are reserved

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – OTHER MATTERS – where prospects of success of appeal, plaintiff/appellant's financial position and delay in prosecuting appeal are significant factors in determining whether security for costs should be ordered

Banks v Copus Newham Pty Ltd [2001] QCA 526; Appeal No 7434 of 2001, 21 November 2001, considered
Natcraft Pty Ltd & Anor v Det Norske Veritas & Anor [2002] QCA 241, Appeal No 9550 of 2001, 9 July 2002, applied
Smail v Burton (1975) VR 776, considered

Land Titles Act 1994 (Qld), s 188B
Uniform Civil Procedure Rules 1999 (Qld)

COUNSEL: The plaintiff/appellant/respondent appeared on his own behalf
K J Priestly for the defendants/respondents/applicants

SOLICITORS: The plaintiff/appellant appeared on his own behalf
Mark G Johnston for the defendants/respondents/applicants

- [1] **McMURDO P:** The applicant respondents ("the Nooravis") have applied for security for costs of an appeal commenced by the respondent appellant, Mr Laghaifar, on 3 October 2002.
- [2] Mr Laghaifar commenced an action in the Supreme Court at Cairns against the Nooravis claiming \$3,350,000 as his equitable interest in a property known as *The Ark*, which was purchased by the Nooravis from the mortgagee in possession. Mr Laghaifar claimed the Nooravis fraudulently purchased the property at an under-value and on notice of Mr Laghaifar's equitable interest in *The Ark* and that Mr Laghaifar subsequently suffered losses; he claimed damages with interest and costs and an order under s 188B *Land Titles Act* 1994 (Qld).
- [3] On 5 September 2002 the Nooravis applied for summary judgment or, alternatively, that Mr Laghaifar's claim be struck out. That application was heard on 1 October 2002.
- [4] Mr Laghaifar's statement of claim contended the following. Mr Laghaifar purchased *The Ark* on 25 November 1996, obtained Council approval for the construction of shops and residential units and commenced building work. The builder later abandoned the construction. To the knowledge of the Nooravis, Mr Laghaifar prepared and arranged assignments of various leases and acted on behalf of lessees to gain Council approval. In November 1997 *The Ark* was valued at \$3,600,000. Mr Laghaifar, with the knowledge of the Nooravis, expended \$400,000 and his own labour on completing *The Ark*. In February 1999, Mr Laghaifar's financiers became mortgagees in possession of *The Ark*. Between October and November 2001, Mr Laghaifar provided notice to the Nooravis and their solicitors of his interest in *The Ark*. On or about 9 January 2002, Mr Laghaifar became aware that the Nooravis had purchased *The Ark*, without notice to Mr Laghaifar, for \$250,000. Mr Laghaifar claimed the Nooravis purchased *The Ark* fraudulently, under-valued and on notice of Mr Laghaifar's interest because they knew that Mr Laghaifar's labour and expenditure on *The Ark* was greater than the purchase price, that the true value of *The Ark* far exceeded the purchase price, that Mr Laghaifar had an equitable interest in *The Ark* which was the subject of an action before the Supreme Court in Cairns, that the Nooravis had knowledge that Mr Laghaifar had placed caveats over the title to *The Ark* and that they gained an unconscionable bargain through their knowledge.
- [5] The learned primary judge concluded that the statement of claim failed to assert facts to establish the allegation of fraud against the Nooravis and that it should be struck out. He allowed, however, 21 days to amend the claim to make it legally sustainable and to comply with the provisions of the UCPR.
- [6] This appeal is from that decision. Mr Laghaifar in his notice of appeal contends first, that the learned primary judge erred in striking out the statement of claim in that the pleadings did disclose a reasonable cause of action and the striking out of

the claim has denied him his right to natural justice; and, second, refusing his application to amend denied him natural justice and because of evidence before the court that the Nooravis did not make full disclosure, it was contrary to procedural fairness to strike out the claim when all documentation from which particulars of the alleged fraud could be discerned were within the possession and control of the Nooravis. The second ground of appeal is not responsive to the order appealed from; the application was not one for discovery.

- [7] Mr Laghaifar, who represents himself in this application, both here and before the learned primary judge, attempted to refer to evidence not before the primary judge. This Court cannot consider such matters. Were they relevant, Mr Laghaifar could have pleaded them in the amended statement of claim which he was given the opportunity to re-plead.
- [8] He commends to us another claim he has filed on 21 February 2003 in the Supreme Court at Cairns against ten defendants, including various solicitors, an insurer, a financier, the appellants and the Australian Securities & Investments Commission, claiming a conspiracy against him concerning his successful personal injuries claim and his financial dealings with the proceeds of that claim, including the purchase of *The Ark*. That claim is not however relevant to the issue for determination in this appeal, namely whether the learned primary judge erred in striking out the statement of claim before him; nor is it relevant to this application for security for costs.
- [9] Mr Laghaifar has not referred us to any evidence or errors in reasoning to suggest the learned primary judge's conclusions and orders may have been wrong.
- [10] Mr Laghaifar's prospects of success on the appeal are a significant factor in determining whether security for costs should be ordered.¹ On the material before this Court, Mr Laghaifar's prospects of succeeding in his appeal are poor.
- [11] Mr Laghaifar's financial position is also a relevant consideration. The Nooravis' material establishes that Mr Laghaifar is impecunious. Not only has Mr Laghaifar filed no material to dispute this claim, he has also orally confirmed his impecuniosity to the Court.
- [12] This Court has a wide discretion to order payment of security for costs on an appeal and security for costs is more likely to be ordered at appellate than at trial level.²
- [13] Mr Laghaifar's impecuniosity here cannot legitimately be blamed on the Nooravis, who purchased *The Ark* from the mortgagee in possession, Mr Laghaifar's impecuniosity, at least in part, pre-dating that event.
- [14] These considerations all favour the granting of the application for security for costs.
- [15] A further question relevant to this application is whether there has been delay in bringing the application for security for costs.³ The appeal was filed on 3 October 2002. Mr Laghaifar's undertaking about the record book was due on 10 October 2002 but was not filed until 1 November 2002. The settled index was due on 12

¹ See *Banks v Copus Newnham Pty Ltd* [2001] QCA 526; Appeal No 9434 of 2001, 21 November 2001.

² See *Natcraft Pty Ltd & Anor v Det Norske Veritas & Anor* [2002] QCA 241, Appeal No 9550 of 2001, 9 July 2002.

³ *Natcraft*, [9].

December 2002 and the record book was due on 26 December 2002. Mr Laghaifar met neither time limit and the matter was mentioned before me on 21 February 2003 in a case management hearing. I ordered that the settled index be filed and served within seven days and the record book within 14 days of the filing of the settled index; in the event of non-compliance, the matter was to be listed before me on a date to be fixed by the registrar for Mr Laghaifar to show cause why the appeal not be struck out for want of prosecution. On 3 March 2003, Mr Laghaifar provided a list of the documents he required in the appeal record book. The solicitors for the respondent have not responded with the list of material required by them, instead electing to bring this application, which was filed only on 1 April 2003. The appeal has been listed for hearing in Cairns on Tuesday, 27 May 2003.

- [16] There has been substantial delay in bringing this application but this is not a case where Mr Laghaifar has expended substantial sums of money in preparing the appeal for hearing⁴ because he is self-represented and the appeal record books have not yet been prepared, although the material prepared by the Nooravis for this application appears to contain everything pertinent to the appeal.
- [17] The learned primary judge's decision on the material before him appears to have been correct; he gave Mr Laghaifar the opportunity to re-plead his case, if he had one. It is difficult to understand why, if he does have a case, he has not taken up that opportunity, instead of pursuing this unpromising appeal. Mr Laghaifar is impecunious and although the application is brought late, he has not altered his position and incurred significant costs in preparing the appeal. In all these circumstances the competing considerations warrant the granting of the application for security for costs. The Nooravis should not be placed at risk of defending an unpromising appeal with no prospect that their costs will be met.
- [18] The material before the Court establishes that the costs of the appeal will be in the range of \$7,500 to \$10,000.
- [19] I propose the following orders:
1. The appellant provide within seven days security for costs of the appeal in the sum of \$7,500 in a form satisfactory to the Registrar or by payment into the court of that sum;
 2. If that order is not met, the appeal is dismissed with costs;
 3. Otherwise the costs of and incidental to this application are reserved.
- [20] **FRYBERG J:** I agree with the reasons of McMurdo P and with the orders she proposes.
- [21] **MUIR J:** I agree with the reasons of McMurdo P and with the orders she proposes.

⁴ *Smail v Burton* (1975) VR 776, 777; *Natcraft*, [15].