

# SUPREME COURT OF QUEENSLAND

CITATION: *Nooravi & Anor v Maytrend P/L* [2003] QCA 179

PARTIES: **FARZAD NOORAVI**  
**HOMA NOORAVI**  
(plaintiffs/respondents/applicants)  
v  
**MAYTREND PTY LTD** (ACN 079 394 611)  
(defendant/appellant/respondent)

FILE NO/S: Appeal No 9101 of 2002  
SC No 28 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 Maytrend Pty Ltd provide, by payment into court within seven days, security in respect of the costs of the appeal in the sum of \$7,500**  
**2. If that order is not complied with, the appeal should be dismissed with costs to be assessed**  
**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, appellant/respondent's financial position and delay in prosecuting appeal are significant factors in determining whether security for costs should be ordered  
*Laghaijar v Nooravi & Anor* [2003] QCA 60, Appeal No 9910 of 2002, 21 February 2003, considered

COUNSEL: K J Priestly for the plaintiffs/respondents/applicants  
R Slack appeared by leave for the defendant/appellant/respondent

SOLICITORS: Mark G Johnston for the plaintiffs/respondents/applicants  
The defendant/appellant/respondent appeared on their own behalf

- [1] **McMURDO P:** This is an application brought by the applicant respondent ("the Nooravis") for security for costs of an appeal commenced by the respondent appellant, Maytrend Pty Ltd ("Maytrend").
- [2] Maytrend is represented by leave by its sole director and shareholder, Mr Richard Slack. This application involves similar considerations and shares some factual background with *Laghaifar v Nooravi & Anor*.<sup>1</sup> On 22 February 2002, the Nooravis, owners of a property, *The Ark*, filed a claim and statement of claim against Maytrend, the lessee of shop 16 in *The Ark*, alleging that Maytrend was in breach of its lease and claiming rentals and outgoings due under the lease, possession of the premises and lost profits arising from the failure to give up possession, together with interest and costs.
- [3] After due notice and adherence to usual courtesy, the Nooravis applied to strike out Maytrend's defence and counterclaim on 29 April 2002. On 12 June 2002, Maytrend was given leave to file and serve an amended defence and counterclaim and ordered to pay the Nooravis' costs of the application. On 25 July 2002, the Nooravis brought an application for summary judgment which was determined on 1 October 2002.
- [4] Maytrend's pleaded defence and counterclaim was, as in Mr Laghaifar's matter,<sup>2</sup> a claim of equity dependant on fraudulent acquisition. After giving Maytrend's lawyer every opportunity to refer to evidence supporting its defence and counterclaim, the learned primary judge concluded that there was little or nothing by way of material to support it and that Maytrend had no real prospect of successfully defending the claim. His Honour gave judgment for the Nooravis, with costs. Maytrend's appeal is from that decision.
- [5] The principles apposite to such an application are discussed in *Laghaifar v Nooravi & Anor*.<sup>3</sup> Mr Slack has been unable to refer this Court to any evidence or error in reasoning that might throw doubt on his Honour's conclusion. Maytrend does not seem to have promising prospects of success on its appeal, a matter relevant to an application for security for costs.
- [6] The Nooravis' material establishes that Mr Slack is defending a bankruptcy application to be heard in the Federal Court on 28 April 2003 and Maytrend has not met Supreme Court orders against it for \$22,803.82. Mr Slack has not produced any evidence to this Court to establish that either he or Maytrend can pay the costs of the appeal. Although Mr Slack's statements to the Court on this issue have been contradictory, he has admitted his, and, indirectly, Maytrend's impecuniosity.
- [7] Uncontested material before this Court establishes the costs of the appeal will be in the range of \$7,500 to \$10,000.
- [8] As in *Laghaifar v Nooravi & Anor*, the Nooravis have delayed in making this application, which was not filed until 1 April 2003, the appeal having been listed for hearing in Cairns on 27 May 2003, but, for the reasons given in *Laghaifar*, that delay is not fatal to their application.

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<sup>1</sup> [2003] QCA 60; Appeal No 9910 of 2002, 21 February 2003.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

- [9] The competing interests here justify 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 of recovering their costs.
- [10] I propose the following orders:
- (1) That the appellant Maytrend Pty Ltd provide, by payment into court within seven days, security in respect of the costs of the appeal in the sum of \$7,500;
  - (2) If that order is not complied with, the appeal should be dismissed with costs to be assessed;
  - (3) Otherwise the costs of and incidental to this application are reserved.
- [11] **FRYBERG J:** I agree with the reasons of McMurdo P and with the orders she proposes.
- [12] **MUIR J:** I agree with the reasons of McMurdo P and with the orders she proposes.