SUPREME COURT OF QUEENSLAND

CITATION:	*Lauenstein v David* [2003] QCA 185
PARTIES:	**MARY LAUENSTEIN** (plaintiff/respondent) **v** **MARK WALTER DAVID** (defendant/appellant)
FILE NO/S:	Appeal No 11754 of 2002 SC No 10314 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	6 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	6 May 2003
JUDGES:	McMurdo P, Davies and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**The appellant pay $5,000 by way of security for costs of the appeal in a manner to the satisfaction of the Registrar within 28 days; in default the appeal is to be struck out with costs**
CATCHWORDS:	PROCEDURE – COSTS – SECURITY FOR COSTS – OTHER MATTERS – where trial judge granted interlocutory injunction – whether trial judge erred in fact and in law – whether appellant is in financial position to meet costs of any order made against him *Fair Trading Act* 1989 (Qld), s 39
COUNSEL:	W J Tolton for the plaintiff/respondent B A Laurie for the defendant/appellant
SOLICITORS:	Mugford Lawyers for the plaintiff/respondent Simmonds, Crowley and Galvin for the defendant/appellant

THE PRESIDENT: This is an application for security for costs of the appeal.

The respondent/appellant, Mr David, appeals from a decision of a Judge of the Trial Division granting an interlocutory injunction restraining Mr David from exercising his rights under a mortgage of the applicant/respondent, Ms Lauenstein's property. Mr David allegedly held himself out as being a representative of a company called Equity Plus Queensland Pty Ltd, which Ms Lauenstein contacted with a view to obtaining a loan. Ms Lauenstein claimed that it was agreed the fees to be charged by Mr David would be about $7,500 but it was her understanding that these fees would only become payable if she were given the loan. Later when she was no longer in need of the loan, Mr David rendered invoices totalling $16,500 payable within 24 hours and if Ms Lauenstein did not pay that amount within 24 hours, penalty fees were to be added, bringing her claimed indebtedness to Mr David to $33,000, which he sought to recover by enforcing a bill of mortgage charged to her property.

The learned primary Judge determined there was a serious question to be tried as to the unconscionability of the action, and after considering all the relevant factors concluded that the balance of convenience favoured the granting of an interlocutory injunction.

Mr David appeals from that decision on the following grounds that the learned primary Judge:

1. erred in concluding that the circumstances relied on by Ms Lauenstein could amount to unconscionable conduct within s 39 Fair Trading Act 1989 (Qld);

2. erred in failing to require Ms Lauenstein to pay at least $7,500 into Court as a condition of granting any injunction;

3. erred in concluding that the absence of independent legal advice was relevant in circumstances where there is no evidence that had Ms Lauenstein obtained legal advice she would not have executed the mortgage;

4. erred in concluding that Ms Lauenstein was not given the opportunity to obtain independent legal advice when eight days had elapsed between her being informed of the terms of Mr David's retainer and the execution by Ms Lauenstein of the mortgage document.

Ms Lauenstein has only recently brought this application for security for costs, the appeal being filed in December last year. There has been substantial delay in the bringing of this application, a consideration which does not favour the applicant. The explanation for this delay given by the applicant is that Ms Lauenstein's depression, which she was also suffering at the time of the primary decision and it is claimed at the time of the granting of the entering into any agreement between the parties, has made it difficult for Ms

Lauenstein's lawyers to get instructions and to progress this matter.

Material filed on behalf of Ms Lauenstein indicates that Equity Plus Queensland ACN 081 913 840, on 26 November 2002, had a strike off action in progress in relation to it, that Mr David was the sole director of that company and that by 3 March 2003 Equity Plus Queensland had been deregistered. It also establishes that Mr David is a discharged bankrupt and owns no land in Queensland.

The best Mr David can say in his affidavit material as to his financial position to meet any costs order of the appeal made against him, is that he expects to acquire a parcel of land which he may be able to sell at a profit. But the material does not disclose what equity he has in that land. In the end, this material does not establish that he has clear financial means to meet the costs of any order made against him.

The applicant's lawyers claim the costs of this appeal would be in the vicinity of $10,000 but as Mr Laurie on behalf of Mr David points out, the outlines of argument have already been filed and the appeal book been prepared at Mr David's expense, the only remaining costs of the appeal now being the costs of the appeal hearing and in those circumstances the amount of costs sought is excessive. There is merit in that contention, which goes, of course, only to the quantum of any order.

It seems now regrettable that the trial of this action was not pursued diligently in the Trial Division where it seems likely the whole issue could have been concluded well before this time on its merits.

The appeal in the end is simply one from the exercise of a discretion which is not lightly interfered with on appeal. The prospects of success on any appeal are not promising.

Mr Laurie points out that Ms Lauenstein's amended statement of claim is deficient but this can, and probably should be, further amended; it is not a relevant factor in this application.

In the end, despite the delay, a consideration of all relevant factors apposite to an application of this kind favour the granting of the application for security for costs but in a more modest sum than that requested by the applicant.

I propose the following order:
that the appellant pay $5,000 by way of security for costs of the appeal in a manner to the satisfaction of the Registrar within 28 days; in default the appeal is to be struck out with costs.

DAVIES JA: I agree.

JERRARD JA: I agree.

THE PRESIDENT: That is the order of the Court.
