# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Arnold v Jensen* [2003] QCA 337 |
| PARTIES: | **HAROLD ARTHUR ARNOLD**<br>(plaintiff/respondent)<br>**v**<br>**PETER JENSEN**<br>(defendant/applicant) |
| FILE NO: | Appeal No 3107 of 2003<br><br>DC No 800 of 2002 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Security for Costs |
| ORIGINATING COURT: | District Court at Southport |
| DELIVERED EXTEMPORE ON: | 4 August 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 4 August 2003 |
| JUDGES: | McMurdo P, Muir and Holmes JJ<br>Separate reasons for judgment of each member of the court, each concurring as to the orders made |
| ORDER: | **Application dismissed** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – Security for costs – Discretion of Court – Relevant considerations — where the appellant appealed against the decision of the primary court and the respondent sought security for costs pursuant to Uniform Civil Procedure Rules 1999 r772(1) – whether in the circumstances the application for security for costs should be granted<br><br>*Uniform Civil Procedure Rules* 1999 (Qld), r 772(1)<br><br>*Murchie v Big Kart Track Pty Ltd (No 2)* [2003] 1 Qd R 528 |
| COUNSEL: | Applicant appeared on his own behalf<br>S J English for the respondent |
| SOLICITORS: | Applicant appeared on his own behalf<br>No appearance for the respondent |

MUIR J: The respondent to this appeal applies, pursuant to Rule 772 of the Uniform Civil Procedure Rules, for an order that the appellant gives security for costs.

The application for security was made to the District Court at Southport and transferred to this Court with the consent of both parties, after the Judge, before whom the application came, considered it more appropriate that the matter be dealt with by the Court of Appeal.

The notice of appeal states that the appellant, the respondent to the security for costs' application, appeals against the whole of a District Court judgment given on 7 March, 2003. The grounds of appeal include a challenge to the Primary Judge's finding that the statement of claim discloses a valid cause of action. The record, although containing no copy of the order, the subject of the appeal, contains a copy of the learned Primary Judge's reasons for judgment, delivered on 7 March, 2003.

It is stated in those reasons, that the applicant be at liberty to enter judgment against the respondent in the sum of $80,000 plus interest calculated at ten per cent per annum from 7 June, 2001 and that the respondent pay the applicant's costs of and incidental to the action to be assessed.

An affidavit of the applicant deposes to an amendment on 18 March, 2003 of the order of 7 March, but contains no information as to the content of the amending order. That,

however, is not of particular significance for present purposes.

The Court has an unfettered discretion under Rule 772 whether to order security and if so, in what amount. Relevant to the exercise of the discretion are the impecuniosity of the appellant as well as the appellant's prospects of success on appeal. The evidence makes it plain that the respondent lacks the means to satisfy any costs' order made against him in the event that the appeal fails and there is no suggestion in the material that the respondent's impecuniosity was the consequence of any conduct on the part of the applicant.

The respondent's prospects of success on appeal thus assumes particular significance. As is said in Murchie v. The Big Kart Track Proprietary Limited No 2 "The Court will not readily shut out a litigant with potential merit."

It was not thought necessary, however, to put before this Court, material upon which an assessment of the merits of the respondent's case could be made, notwithstanding the fact that the applicant's counsel's outline of submissions acknowledges the relevance of the respondent's prospects for success on appeal. When this was drawn to the attention of Mr English who appears for the applicant, he sought to adjourn the application to allow the record to be supplemented.
In my view, there is little to be gained in acceding to that request. A perusal of the Court file reveals significant

deficiencies in the pleading and in my view, an arguable case that no good cause of action is pleaded.

The affidavit material filed in support of the summary judgment application is also arguably defective. The learned primary judge, in his reasons, concluded -

> "It is patently clear that the defendant does not have any defence to the plaintiff's claim, and for that reason has resorted to technical defences which really contravene the spirit, if not the letter, of rule 5 of the UCPR. There is no doubt, on the material filed, that the plaintiff did pay to the defendant the sum of $80,000 for a particular purpose. That money was received by the defendant and was not used for that purpose but was misappropriated without any excuse or cause whatsoever. There is not a skeric of a defence discernible on the pleading and the filed material."

His Honour found also that the statement of claim disclosed a valid cause of action. One can have considerable sympathy with the primary judge's approach but it is arguably unsustainable on the material before him. All parties to litigation are entitled to procedural fairness, an obvious aspect of which is the right to answer the claims brought against them, and no other claim.

On the hearing of the summary judgment application, the respondent was entitled to proceed on the basis that the only case he had to meet was the one pleaded in the statement of claim. As I have said, the statement of claim is arguably deficient. The respondent was also entitled to rely on the pleading's inadequacies, whether or not they amounted to "technical defences".

It would be inappropriate on a hearing such as this to say anything further about the likely outcome of the appeal. It suffices for present purposes to conclude that the appeal cannot be said to be bereft of legal merit. For those reasons, I would refuse the application for an adjournment, and I would dismiss the application for security for costs. The applicant may be well advised to consider whether an appropriate course of action may not be to consent to the appeal being dismissed, and for the matter being remitted to the District Court so that corrective measures can be taken.

In the course of argument, it was admitted by the respondent - and indeed there has never been a serious issue about it - that the moneys which the applicant claims in the proceedings were paid to him and have not been repaid. The respondent said, in the course of the hearing, that his contention is that the moneys were advanced, or lent, by not merely the applicant, but also the applicant's spouse and a company, and were those persons and entities made parties to the proceedings (and presumably if the allegations were properly pleaded) he would have no defence.

Those are matters to which the plaintiff's legal advisers will no doubt give due consideration.

THE PRESIDENT: I agree with what Muir J has said. The respondent's concession made this morning that were the pleadings amended and the applicant's wife and family company joined as parties, he would have no defence to the applicant's

claim make it surprising that the respondent in the circumstances, intends to pursue this appeal, but he is entitled to pursue his legal rights.

As Justice Muir explains in his reasons the applicant has failed to demonstrate the respondent's prospects of success on appeal such as to justify security for costs. I agree the application should be dismissed.

HOLMES J: I agree with the order proposed and with the reasons of both the President and Justice Muir.

THE PRESIDENT: The order is the application is dismissed.

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