SUPREME COURT OF QUEENSLAND

CITATION:	*Molony & Anor v ACN 009 697 367 P/L (In Liq)* [2004] QCA 151
PARTIES:	**RAY MOLONY** (first plaintiff/respondent) **INTERNATIONAL JOCKEY SCHOOL PTY LTD** ACN 085 035 383 (second plaintiff) **v** **ACN 009 697 367 PTY LTD (FORMERLY FRED MARSH PTY LIMITED) (IN LIQUIDATION)** (defendant/applicant)
FILE NO/S:	Appeal No 12014 of 2003 SC No 85 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	7 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	30 March 2004
JUDGES:	McMurdo P, Davies JA and Fryberg J Separate reasons for judgment of each member of the Court, McMurdo P and Davies JA concurring as to the orders made, Fryberg J dissenting in part
ORDERS:	**1. Dismiss the application** **2. The costs of the application be reserved to the Court hearing this appeal**
CATCHWORDS:	APPEAL AND NEW TRIAL – Practice and procedure – Queensland – Security for costs – Particular cases
COUNSEL:	A W Duffy for the applicant J T Bradshaw for the respondent
SOLICITORS:	Ebsworth & Ebsworth for the applicant Thompson & Royds (Cairns) for the respondent

[1] **McMURDO P:** I agree with the reasons of Fryberg J as qualified by the reasons of Davies JA.

[2] Another factor which favours the refusal of this application for an order for security for costs is that although the appellant filed the notice of appeal in this matter on 24

December 2003, the respondent's application for security for costs was not filed in this Court until 4 March 2004. The appeal is listed for hearing within days and the lengthy two volume appeal record and extensive submissions have now been prepared. Significant costs have already been incurred.

[3] I agree with Davies JA and Fryberg J that the application for security for costs should be dismissed and with the orders proposed by Davies JA.

[4] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of Fryberg J. I accept his Honour's statement of the relevant facts and I agree with him, for the reasons which he gives, that the appellant's prospects of success in appealing against the learned primary judge's order that the amended statement of claim filed on 25 July 2003 be struck out are negligible. When the other factors referred to by his Honour are taken into account it would follow that, if this were the only order the subject of appeal to this Court, it would be appropriate to make an order for security for costs.

[5] However, as pointed out by his Honour, the learned primary judge also directed that no further amended statement of claim be filed without the leave of the Court. It is not abundantly clear from the learned primary judge's reasons why he made this order. However it appears likely that he made it because he concluded that, upon the corporate plaintiff's statement of claim being stayed, the appellant was attempting, by the amended statement of claim which his Honour struck out, to claim as his own loss, losses which had previously been claimed by the corporate plaintiff and which, if recoverable, were recoverable only by the corporate plaintiff.

[6] I find it impossible, on the material before this Court, to say whether this conclusion which is one of mixed fact and law, is correct or not. We do not have before us all of the material which was before the learned primary judge, all of which will no doubt be before this Court when it hears the appeal from his Honour's orders in less than a week's time.

[7] It may be correct, as Fryberg J thinks, that that question cannot be resolved without hearing oral evidence, in particular cross-examination of the appellant. On the other hand it may be that, on a close examination of all the material before the learned primary judge, his conclusion in that respect was justified.

[8] Even if that conclusion were justified it does not necessarily follow that his Honour's second order should have been made. For example, there was apparently some evidence before his Honour, but not before this Court, that the claim for loss of profits from the business of conducting horse riding tours had previously been grossly underestimated. Presumably his Honour rejected that evidence because his Honour's order would have required leave to make an amendment to the statement of claim increasing the claim for those losses in accordance with that evidence.

[9] It seems to me that because of the paucity of evidence before this Court on this application and because of the proximity of the hearing date of this appeal, the appeal should not be stifled by an order for security for costs. I would therefore dismiss the application. However, because an examination of all the evidence before his Honour may show that there was no substance in the appeal against either order, I would reserve the costs of this application to the Court hearing this appeal.

Orders

1. Dismiss the application.

2. That the costs of the application be reserved to the Court hearing this appeal.

[10] **FRYBERG J:** On 11 December 2003 Jones J ordered that the appellant's amended statement of claim filed on 25 July 2003 be struck out as being an abuse of process and directed that no further statement of claim be filed without the leave of the Court. The present proceeding is an application by the respondent for security for the costs of the appellant's appeal against that order. To avoid confusion I shall continue to refer to the applicant as "the respondent".

Impecuniosity

[11] It is common ground that the appellant is impecunious. He says (and it is not challenged by the respondent) that an order for security will stifle the appeal. He also claims that his impecuniosity is a direct result of the respondent's conduct. It is not possible to decide that claim in this application. In these circumstances the most important factors to take into account on the application are the appellant's conduct and his prospects of success in the appeal; and it was upon those factors that the oral argument in the application focused. Unfortunately the argument took place before the appeal record was complete and without all of the relevant material. This Court must do the best it can on the material before it. To understand the argument it is necessary to set out some of the history of the action.

History of the action

[12] On 27 June 2001 the appellant and International Jockey School Pty Ltd filed a claim for $298,500 against the respondent for breach of contract and misleading and deceptive conduct. They alleged that at all material times the appellant was engaged in the business of conducting horse riding tours and the company was engaged in the business of training stable hands and others interested in the pursuit of horse riding. They claimed that in about July 2000 the respondent made representations to them which were misleading or deceptive. On about 11 July, "as a result of the representations made by the Defendant to the Plaintiffs and not otherwise" the appellant on behalf of both plaintiffs made an agreement with the respondent for a lease of land owned by it at Freshwater. Subsequently, they alleged, the appellant leased the land from the respondent for a period from 1 October 2000 until 31 October 2003 and then as a tenant from month to month until at least 31 December 2003. The lease was alleged to have been made for the purpose of allowing the company as beneficiary to carry on the training business, reliance being placed on s 55 of the *Property Law Act 1974*. From January to May 2001 the respondent committed a number of breaches of the lease causing damage to the appellant and the company and on 15 June 2001 wrongfully terminated the lease and evicted them. As a result the appellant sustained a loss of income due to his inability to conduct the horse riding tour business of $57,000, the company sustained a loss of income from the training business of $180,000 and both plaintiffs suffered miscellaneous damage in the total amount of $37,600.

[13] On 9 October 2001 the plaintiffs amended the statement of claim. The appellant now asserted that his loss resulted from his inability to conduct the horse riding tour business *full time*; and his claim was reduced to $6,400. The company's claim was increased to $282,000 by the inclusion of a number of short term enrolments allegedly lost by the respondent's conduct. The miscellaneous claims were

variously amended to a new total of $42,129.46. Otherwise the plaintiffs' allegations remained substantially the same.

[14] On 21 March 2003 the Court of Appeal affirmed with variations an order that the company provide security for the respondent's costs.[1] Proceedings by the company were stayed until the security be provided. It has not been provided and they remain stayed. During the two months following the Court of Appeal decision three further sets of amendments were made to the statement of claim. All were disallowed by the order made on 14 July 2003. They are not in the material before us, nor do we know the basis on which they were disallowed; the discussion in the transcript of proceedings in which the orders now under appeal were made suggests it may have been on formal grounds. A further amended statement of claim was filed on 25 July 2003; that is the one the striking out of which gave rise to the present appeal. It substantially recast the case for the plaintiffs.

Prospects of success: the latest amendment of the statement of claim

[15] The most obvious difficulty with this statement of claim is that it was filed on behalf of both plaintiffs. That was plainly inconsistent with the order staying the company's claim. The sole method by which the appellant could have amended the statement of claim on his own behalf only was by delivering a separate statement of claim. The difficulty was not simply formal. In the existing pleading the plaintiffs' claims were so integrated that it was not possible to recast the claim of the appellant and leave that of the company untouched. The appellant attempted the exercise by adding 52 new paragraphs at the beginning of the document in which he detailed his own claim, and amending a number of references to "the plaintiffs" in the balance of the pleading to read "the corporate Plaintiff". He also added a new paragraph 53, "The corporate Plaintiff repeats and relies upon the facts stated in the male Plaintiff's Statement of Claim." These amendments brought about a substantial change to the company's claim. At first instance Jones J found that insofar as the amended statement of claim purported to alter the pleading for the company's claim it was a nullity. Whether that was technically correct need not be considered; his Honour did not rest his decision on this point.

[16] The changes also produced significant internal inconsistencies within the document. It is unnecessary to set them out in detail; some of them are referred to in passing below. In addition, the claim for loss of income was so lacking in detail as to be embarrassing. Jones J did not refer to these matters in his reasons for judgment. Nonetheless I have no doubt that a statement of claim in this form would impair a fair trial of the action.

[17] Although the decision at first instance was not based on these matters it is in my view open to the court in the appeal to uphold the striking out order (the first order made below) for these reasons. In my judgment the appellant's prospects of having that order reversed are negligible.

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Prospects of success: abuse of process

[18] Both at first instance and on the application before us the respondent pressed its argument that the amended statement of claim constituted an abuse of process of court. That argument will be central upon the hearing of the appeal. It raises disputed questions of fact and cannot be determined solely on the pleading. To understand the alleged abuse it is necessary first to identify the relevant changes to the appellant's claim.

[19] In the first two statements of claim the appellant alleged that at all material times he was engaged in the business of conducting horse riding tours and the company (which is named International Jockey School Pty Ltd) was engaged in the business of training stable hands and others interested in the pursuit of horse riding. In the challenged claim he continued the allegation that at all material times he was engaged in the business of conducting horse riding tours; but he added an allegation (para 1(b)) that on 9 July 1997 he "registered a business name and also began trading as International Jockey School, teaching international students to ride racehorses". Four paragraphs later he alleged that he commenced trading as International Jockey School in 1998 (para 5). He then asserted a series of verifiable acts allegedly carried out by him from late 1997 until early 1999 in the name of, or trading as, International Jockey School. Those allegations were apparently designed to support the assertion that he was trading in this name.

[20] The appellant then specified the representations allegedly made by the respondent. Most of the first relevant paragraph contained a word-for-word repetition of the original pleading, except that the representations were now alleged to have been made in the first week of August, not in July. It was no longer alleged that the agreement for lease was made "as a result of the representations … and not otherwise". On the contrary it was now alleged that the appellant submitted a written offer to take a lease on 17 July 2000, ie prior to the making of the representations. Significantly, an additional representation was alleged:

> "17(e) The Defendant would lease the land to the male Plaintiff and the male Plaintiff would be free to occupy the land and to use the land for his horse riding *and jockey training* business, including the facilities on the land without interference from the Defendant" (emphasis added).

[21] More novelty followed. The appellant next alleged (for the first time) that on 17 August 2000 the respondent wrote a letter to the Cairns City Council that stated that the purpose for the change of use of the land was to allow the appellant "to conduct his horse riding and training activities on the land". He alleged that by writing that letter the respondent made representations to him - the mechanism was not explained. These representations were then pleaded in identical terms to the first set of representations, including the one quoted above. The appellant then alleged that on 16 October "in reliance on the conduct and representations of the Defendant" he entered into the lease. He alleged that on or about 25 November 2000 he moved "the business"[2] and 32 of his horses onto the land in reliance on, among other things, the representations. No such reliance had originally been pleaded.

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[2] This use of "business" (para 28 of the amended statement of claim) was confusing and probably embarrassing. The term was defined at the beginning of the amended statement of claim (para

[22] The pleading continued with allegations of breaches of the lease by the respondent, culminating in an alleged wrongful termination of lease and eviction of the appellant. Much of this conduct was characterised (apparently in the alternative) as the making of representations. Then it was alleged without giving particulars that as a result of the respondent's breach of contract and its misleading and deceptive conduct the appellant suffered loss of income as follows:

"(i)	Year 1.	Net profit	$149,000.00
(ii)	Year 2.	Net profit	$177,000.00
(iii)	Year 3.	Net profit	$189,000.00
(iv)	Total	Net profit	$515,000.00"

Jones J noted that the quantum of this claim was based on "the continuation of the training organisation International Jockey School in competition with the corporate plaintiff". Apparently he based that on affidavit evidence read on behalf of the appellant.

[23] The respondent contends that by the amended statement of claim the appellant is attempting (falsely) to litigate in his own name a claim which could only be brought by the company. There was considerable evidence before Jones J (including an earlier proof of debt submitted by the appellant on behalf of the company to the respondent) to support that inference. The improbability of the appellant continuing a business called International Jockey School in competition with his own company International Jockey School Pty Ltd is manifest. For present purposes it is unnecessary to make a detailed evaluation of the evidence.

[24] At first instance his Honour made the following finding:

> "Weighing the evidence upon which the original and first amended Claims were formulated and the evidence now relied upon for these substantial amendments, I can find little of substance to justify the proposed changes. It is improbable that having formed a company (of which he is the sole shareholder) to take over a business, the male plaintiff would continue to operate in competition with the company. Therefore, I reject as a basis of claim any loss of income referable to the training business."

After rejecting a submission that the appellant's action should be struck out in its entirety he wrote, "I will however strike out the proposed amended Statement of Claim filed on 25 July 2003 as being an abuse of process. I propose to make a further order that the male plaintiff not be permitted to file any further amended Statement of Claim without the leave of the Court."

[25] His Honour did not explain why he proposed the further order. It can easily be inferred, however, that it was designed to ensure that the appellant did not file a further statement of claim seeking recovery of damages for loss of income referable to the training business. No other purpose is obvious and the respondent does not suggest otherwise. On the contrary it asserts that the appellant is now precluded from maintaining such a claim. The latter result obtains, according to the respondent, notwithstanding that there has been neither cross-examination of witnesses nor a hearing on the merits. That this was indeed the respondent's

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1(a))to mean the horse riding tours business. However in paragraphs 18 to 50 it seems to mean the "horse riding and jockey training business" referred to in para 17(e) (above, para [20]).

position did not clearly emerge from its outline of argument. It became explicit in the course of the respondent's oral submissions:

> "MR DUFFY: Well, if I can take the extreme, your Honour. If the plaintiff came along and pleaded I claim the same loss that the corporate plaintiff pleaded in its statement of claim back then which is stayed, then undoubtedly that would be the case. If he makes a claim that at the other end of the scale is quite different to that, even – the only answer to that is if we wanted to allege well it's really in truth the same loss, not the same claim as such but the same loss that's been suffered, we would then have to plead it and evidence would have to be gone into about that.
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> FRYBERG J: Well, my problem at the moment is that albeit that this man is a solicitor, he might want to say that "The earlier pleadings were simply stuffed up by my lawyers and by me," if you like, but this is the right one. Now you might want to say, "Oh, yes, pull the other one," and cross-examine him about that but you didn't.
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> MR DUFFY: I certainly didn't cross-examine him about it, that's quite so, but he's at liberty to deliver a statement of claim and in fact will have to do so irrespective – irrespective of what becomes of the appeal after it's heard.
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> FRYBERG J: But he's foreclosed on this point on your submission.
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> MR DUFFY: Well, only – only plainly pleading a claim that is presently stayed, yes.
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> DAVIES JA: Yes, but that's just a factual-----
>
> MR DUFFY: He's foreclosed.
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> DAVIES JA: That's just a factual question, isn't it?
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> MR DUFFY: Ultimately it is, your Honour."

[26] In summary the respondent in the appeal will be seeking to uphold an order the purpose of which is to prevent any further amendment which can be characterised as a claim by the appellant for damages for loss of income referable to the training business. As a result no trial court will ever be able to determine this factual question. The order rests on a finding of fact made in interlocutory proceedings on the basis of evidence in affidavits. The appellant presented sworn evidence in support of the version in the amended statement of claim that he personally sustained such a loss[3], but the respondent did not seek to cross-examine him on that evidence. Conflicting documents have not been put to the appellant. He has not been given the opportunity to explain on oath the various matters on which the respondent relies; the submission made on his behalf that the "innuendo" advanced by the respondent was a matter for trial has not been accepted. The judge's finding of fact rejects the appellant's version.

[27] In these circumstances the appeal has a good chance of succeeding in respect of the second order. The respondent's submission to the contrary and its related submission

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[3] His affidavit was not included in the material before the Court on this application, but counsel accepted its existence in the course of argument. In any event its existence can be inferred from the reasons for judgment of Jones J. If it were necessary recourse might be had to the court file.

that the appeal serves little point is likely to be rejected. It may be that on the appeal the court would set aside the second order and remit the matter to Jones J for further hearing, to enable cross-examination of witnesses - indeed, Mr Bradshaw for the appellant conceded that a rehearing was the best the appellant could do on the appeal. Even that order would improve the appellant's position compared to that in which he now finds himself.

Delay by the appellant

[28] Finally the respondent submits that there is a real need to provide some protection to it against the manner in which the proceedings and the appeal are being conducted by the appellant. It points out that the proceedings were commenced over 2½ years ago and have not progressed beyond the pleading stage. However the material does not attempt to demonstrate that all of the delay is due to fault on the part of the appellant, and progress has been interrupted by an appeal. I am prepared to attribute delay since April 2003 to the appellant's failed attempts to amend the statement of claim; and the appellant has been late in serving his notice of appeal and filing and serving his outline of argument. This delay is a relevant factor in deciding the present application.

Discretion

[29] The position may be summarised thus: the appellant is impecunious and any order for security for the costs of the appeal will stifle the appeal; he has been guilty of some delay in progressing his action and appeal; his prospects of success are good. When these factors are considered in the context of this case I am not persuaded that the respondent has demonstrated sufficient grounds to order security.

[30] The application should be dismissed with costs.