SUPREME COURT OF QUEENSLAND

CITATION:	*Jenkins v Martin & Anor* [2004] QSC 417
PARTIES:	**ROBERT ALEXANDER JENKINS and BERICE HOPE JENKINS** (plaintiffs) **v** **WILLIAM JOHN MARTIN** (first defendant) **BARWICKS** (a firm) (second defendant)
FILE NO/S:	SC 3941 of 1997 and SC 2728 of 2000
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	25 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	8 October 2004
JUDGE:	Wilson J
ORDER:	**1) That within 21 days of this order the plaintiffs give security for the first defendant's costs of the appeal in the sum of $7,500-00 in a form approved by the Registrar;** **2) That within 21 days of this order the plaintiffs give security for the second defendant's costs of the appeal in the sum of $7,500-00 in a form approved by the Registrar.**
CATCHWORDS:	APPEAL AND NEW TRIAL – QUEENSLAND – SECURITY FOR COSTS – Where plaintiffs sue counsel and solicitors who acted for them in earlier litigation - where judge dismissed plaintiffs' application for leave to file tenth version of statement of claim and dismissed claim for want of prosecution - appeal against order dismissing claim - where appeal is against exercise of discretion in an interlocutory matter - where plaintiffs' prospects on appeal are not good - where plaintiffs are impecunious - where plaintiffs contend impecuniosity stems from defendants' mishandling of earlier litigation - whether security for costs of the appeal will be ordered against the plaintiffs *Uniform Civil Procedure Rules* 1999 (Qld), r 772 *Natcraft Pty Ltd & anor v Det Norske Veritas & anor* [2002]

QCA 241, followed

COUNSEL:	W Cusack (sol) for the plaintiffs JB Sweeney for the first defendant JC Faulkner for the second defendant
SOLICITORS:	Cusack Galvin & James for the plaintiffs Carter Newell for the for the first defendant Coyne & Associates for the second defendant

[1] **WILSON J:** On 22 July 2004 PD McMurdo J heard an application by the plaintiffs for leave to deliver an amended statement of claim and applications by the defendants to have the proceeding dismissed for want of prosecution. His Honour –

(i) dismissed the plaintiffs' application;

(ii) dismissed the proceeding against the first defendant for want of prosecution;

(iii) dismissed the proceeding against the second defendant for want of prosecution, on condition that within 14 days the second defendant undertake not to pursue any claim against the plaintiffs for fees and expenses for which it had sued in SC 3941 of 1997.

[2] The plaintiffs filed a notice of appeal against His Honour's decision on 31 August 2004. On 5 October 2004 the defendants filed applications for security for costs of the appeal, the first defendant seeking security in the sum of $25,000-00 and the second defendant seeking security in the sum of $30,000-00.

Principles

[3] Under r 772 of the *Uniform Civil Procedure Rules* an application for security for the costs of an appeal may be made to the Court of Appeal or the court that made the decision appealed from. The court hearing the application has an unfettered discretion whether to order security, and if so, in what amount. Relevant factors on an application for security for costs of an appeal include the appellant's prospects on the appeal, the appellant's financial position, the cause of the appellant's impecuniosity (if he or she is impecunious), the fact that the appellant has already had a day in court and lost, any delay in bringing the application, and that it is generally inappropriate to order an impecunious appellant to provide greater security than is absolutely necessary: *Natcraft Pty Ltd & anor v Det Norske Veritas & anor* [2002] QCA 241.

Background

[4] It is necessary to trace a little of the history of the matter in order to understand the issues raised on these applications for security for costs. Two proceedings were consolidated by order of Moynihan SJA made in March 2002 – SC 3491 of 1997 and SC 2728 of 2000, and the plaintiffs were ordered to file a statement of claim in the consolidated proceeding. In SC 3491 of 1997 Barwicks (the second defendant in the consolidated proceeding) sued the Jenkins (the plaintiffs in the consolidated proceeding) for $316,154-55 for legal fees and expenses, and in that proceeding the Jenkins counterclaimed against Barwicks and Martin (the first defendant in the

consolidated proceeding) for professional negligence. The Jenkins also brought a separate proceeding (SC 2728 of 2000) against Martin for professional negligence. By the time the order for consolidation was made, the Jenkins had already made several attempts to produce acceptable pleadings in the 2 proceedings, and the one ordered by Moynihan SJA was effectively the fourth version of their statement of claim. However, they continued to struggle to formulate their case and the application which was before PD McMurdo J was for leave to file the tenth version of their pleading. Even then, senior counsel who appeared on the application conceded that further changes would have to be made, and so foreshadowed an eleventh version. In particular, he conceded that there were elements of the damages claim which were not pleaded in the tenth statement of claim.

[5] In the late 1970's the plaintiffs and General Credits Investments Pty Ltd were joint venturers in a project to develop certain land at Airlie Beach. There was a falling out between the joint venturers, and a deed of compromise was executed in September 1985. The compromise gave rise to further dispute and litigation – proceeding no 1596 of 1991 between the Jenkins and General Credits. Mr Martin of Queen's Counsel (the first defendant in the consolidated proceeding) was retained to advise the Jenkins in 1988, and he acted for them in proceeding no 1596 of 1991 until a settlement was reached some days after the trial had commenced. Barwicks acted for the Jenkins in that litigation from September 1991. Under the settlement the Jenkins were not required to pay anything to General Credits, but they agreed to transfer all of their units in the trust which was the vehicle for the joint venture to General Credits for no payment, and each party bore its own costs.

[6] In proceeding SC 3941 of 1997 Barwicks claimed $316,154-55 as outstanding costs and expenses for the General Credits case. The Jenkins defended and counterclaimed damages for the alleged misconduct of what had been a good case; but by 2000 their complaint had changed, and they then alleged that their case against General Credits had always been a weak one and that they had been wrongly advised by Martin and Barwicks that it was a good case. They amended their counterclaim, adding Martin as a defendant to it, and also issued separate proceedings (SC 2728 of 2000) against him.

Prospects

[7] Appellate courts are generally slow to interfere with a primary judge's exercise of discretion in an interlocutory application, and an appellant must show that the exercise of discretion miscarried in some way.

[8] On the hearing of the applications for security for costs the plaintiffs' solicitor began by submitting that the primary judge had erred in finding –

(i) that their claim against Martin was statute barred;

(ii) that there was good reason to suggest that they had perpetrated an abuse of process by shifting ground in the way their case was pleaded;

(iii) that they had indulged in unreasonable delay in pursuing their claim.

[9] The primary judge did not find that the plaintiffs' claim against Martin was statute barred, although he considered there was a strong argument that it was. The tenth version of the statement of claim introduced a claim of breach of fiduciary duty

against Martin and Barwicks. Senior counsel for the plaintiffs abandoned that claim, informing the primary judge that it had been introduced in anticipation of a plea by one or both defendants that the case was time barred, and foreshadowing a plea in reply that the defendants had fraudulently concealed the plaintiffs' rights of action thereby postponing the expiry of the limitation period. His Honour said at para 21 of his reasons for judgment –

> "In the light of this foreshadowed plea of fraudulent concealment, it would not be appropriate to determine summarily the question of whether the proceedings against Mr Martin or Barwicks are time barred. Proceedings should be summarily dismissed on this basis only in the clearest of cases: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533. However the relevance of the proceedings against Mr Martin being apparently statute barred, save for this question of fraudulent concealment, and the lateness of the allegation of fraudulent concealment, are important matters in the consideration of whether the Jenkins proceedings should be dismissed for want of due prosecution."

Later he returned to this issue in paras 36 and 37 when he was considering Martin's application that the proceeding be struck out for want of prosecution. He observed that the only apparent basis for the plaintiffs to resist the argument that they had sued Martin out of time was the assertion of fraud now made for the first time – the outcome of which was a factual question.

[10] In paras 6 and 7 of his reasons for judgment the primary judge carefully recounted the various draft pleadings and orders of the court which had culminated in the necessity for an application for leave to file the tenth version of the statement of claim. Ultimately it was because the plaintiffs had still not produced a proper pleading that he refused leave. This is what he said at paras 27 – 29 –

> "27. As I have mentioned, Mr Savage [senior counsel for the plaintiffs] conceded that there were amendments which would have to be made to this tenth version of the statement of claim. In my view, the most serious of the matters for amendment is the case as to damages. If these proceedings were to go forward it would be essential for the defendants to be properly informed of the facts relied upon to establish a certain loss or losses. As any loss claimed would involve an allegation of a basis upon which General Credits would have settled at a particular time, it would be necessary for the Jenkins to plead the terms of that (lost) compromise, when it would have been acceptable to General Credits and the facts and circumstances from which any inference as to General Credits' likely attitude to a certain settlement is to be drawn.
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> 28. The pleading is also defective by the prayer for relief not distinguishing the relief claimed against Mr Martin from that claimed against Barwicks. Further, the pleading wrongly asserts a right to set off against Barwicks' claim for costs the amount of any damages from the defaults of Mr Martin. And Mr Savage now disavows the allegations of breach of

> fiduciary duty, which in any case were pleaded without proper particulars, such as those of the 'male plaintiff's several requests'.
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> 29. Accordingly, the plaintiffs' application for leave to file this tenth version of the statement of claim must be dismissed."

[11] The plaintiffs' solicitor submitted that any delay was attributable as much to the conduct of the defendants as it was to that of the plaintiffs. I do not accept this. The General Credits litigation was settled as long ago as 1994. It was not until Barwicks sued for their fees and expenses in 1997 that the Jenkins claimed against them and subsequently against Martin. Seven years later they still had not formulated their claims in an acceptable pleading. Moreover, there was no explanation for the failure earlier to raise the issue of fraudulent concealment in answer to Martin's assertion that the claim against him was time barred.

[12] The primary judge found that because of the circumstances of Martin's retainer (some years before the retainer of Barwicks) and his having apparently given advice in conference on numerous occasions, there would have to be an extensive examination of the facts and circumstances as they existed at least prior to 1994, and in some cases prior to 1985, to determine the instructions he received and the advice he gave, the correctness of that advice in the context in which it was given, and the prospects of a more beneficial settlement against General Credits at various points in time. His Honour considered that he was not in a position to assess the likely merits of the claim against Martin, apart from forming the view that it was not so hopeless that it ought to be struck out on that ground alone. I am not persuaded that His Honour's analysis was affected by error.

[13] His Honour accepted that Martin would be prejudiced by the absence of his records which had been destroyed in the meantime. It is the case that Martin did not himself swear to their destruction, but His Honour was entitled to accept hearsay evidence on what were interlocutory applications.

[14] The primary judge observed that the plaintiffs' case against the second defendant Barwicks seemed weaker than their case against the first defendant Martin, and unlike Martin it did not seem to have a strong case for asserting that the claim against it was time barred. He went on to note that 7 years had passed since the plaintiffs had first made a claim against it, and they had still not properly formulated that claim, and that the second defendant would face difficulties in investigating events which had taken place so long ago. He concluded that the claim against it should also be dismissed, but for the complicating factor of the second defendant's own claim against the plaintiffs for fees and expenses: even if the plaintiffs' claim were dismissed, they might still raise it by way of defence to the second defendant's claim. Accordingly His Honour ordered that the claim against the second defendant be dismissed on the condition that the second defendant undertake not to pursue its claim for fees and expenses.

[15] The plaintiffs contended that there had been a conscious decision on the part of the second defendant to buy freedom from their claim, and that the primary judge ought not to have accepted the undertaking without consulting them. I do not discern any error of principle in His Honour's approach.

[16] After the conclusion of oral argument, the plaintiffs produced a further draft amended statement of claim presumably to show the case they would litigate if the appeal were successful. That does not assist in establishing that the primary judge's exercise of discretion miscarried. Of course, if the Court of Appeal considered that it did miscarry in some relevant way, it would then re-exercise the discretion, and it could take the further pleading into account in doing so.

[17] I do not consider that the plaintiffs' prospects on the appeal are good. In forming this view, I have not taken into account opinions or prospects expressed in affidavits by the defendants' solicitors.

[18] By the time the primary judge ordered the claims to be dismissed, the plaintiffs had had more than their day in court on the pleadings issue. Each time they had lost, and even on the last occasion their counsel had conceded that the pleading still needed change. This is factor which must weigh quite heavily in favour of orders for security for costs of the appeal.

[19] The plaintiffs are admittedly impecunious. Both are elderly. Mr Jenkins is legally blind and hard of hearing. Mrs Jenkins has various health problems. Apart from some income derived from a mail order business, they are dependent on welfare payments. They own their own home, but it is heavily mortgaged, and they have arranged to borrow money from Mrs Jenkins' daughter to fund their costs of the appeal. (There was an issue raised in argument as to the purpose for which the daughter had advanced money to them, but for present purposes I assume it was indeed to fund the appeal.) There are various outstanding costs orders against the plaintiffs. At the time these applications were heard, there had been 2 assessments by the taxing officer in favour of the first defendant totalling approximately $16,000-00, but there were further costs to be assessed. There were also costs orders in favour of the second defendant; although none of these had been taxed, the estimate of independent costs consultants totalled approximately $83,000-00. Even if the plaintiffs succeeded in their present appeal, none of those costs orders would be affected.

[20] The plaintiffs' impecuniosity is not attributable to the decision under appeal. They assert that it is due to the bad advice and mishandling of their affairs by the first and second defendants. While this is not an irrelevant factor (assuming for present purposes that it may be factually correct), it must be seen in the context of their failure to formulate their claims against the first and second defendants even after 10 attempts at doing so. Viewed in that context, the weight to be accorded to it is diminished somewhat.

[21] In all the circumstances, this is a proper case in which to order the plaintiffs to provide security for the costs of the appeal. The first defendant's costs of the appeal were estimated at $25,000-00, and the second defendant's at $30,000-00. These estimates were not challenged. In fixing the level of security to be provided, the Court ought not cripple the already financially disadvantaged plaintiffs. I have decided that the plaintiffs ought to provide security to the value of $7,500-00 to each of the defendants. The security ought to be in a form satisfactory to the Registrar.

[22] I will hear the parties on costs.