SUPREME COURT OF QUEENSLAND

CITATION:	*Thompson v Robinson* [2005] QCA 253
PARTIES:	**COLIN JAMES THOMPSON** (plaintiff/respondent) v **ROBERT RAYMOND LLOYD ROBINSON** (defendant/applicant)
FILE NO/S:	Appeal No 30 of 2005 DC No 3122 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs Miscellaneous Application - Civil
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	13 July 2005
JUDGES:	de Jersey CJ, Williams and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Applications dismissed** **2. Applicant to pay respondent's costs on the standard basis**
CATCHWORDS:	PROCEDURE - COSTS - SECURITY FOR COSTS - OTHER MATTERS - where security for costs of an appeal had been ordered - application made for variation of security for costs order - where applicant had failed to satisfy the security for costs order - where applicant claimed to be impecunious - where applicant claimed to have been expecting to receive a sum of money that was not paid - where applicant asserted that the prospects of success on the appeal were "very good" - whether the discretion to vary the security for costs order should be exercised PROCEDURE - SUPREME COURT PROCEDURE - QUEENSLAND - PRACTICE UNDER RULES OF COURT - STAYING PROCEEDINGS - where payment of monies owing under a judgment was stayed pending the hearing of an appeal within six months - where appeal was not heard within the time limit - where prospective appellant made application for a variation of the original stay order - whether application

was competent - whether the discretion to vary the stay order should be exercised - whether the appeal should be dismissed

Uniform Civil Procedure Rules 1999 (Qld), r 761(2), r 772(4)

Coleman v Greenland (No 2) [2004] QCA 180; Appeal No 2619 of 2004, 28 May 2004, applied
Coleman v Greenland (No 3) [2004] QCA 236; Appeal No 2619 of 2004, 14 July 2004, distinguished

COUNSEL: D C Spence for the applicant
M J Liddy for the respondent

SOLICITORS: Clewett Corser & Drummond (Toowoomba) for the applicant
Georgeson & Company for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the orders proposed by his Honour and with his reasons.

[2] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Keane JA and there is nothing I wish to add thereto. I agree with all that is said therein, and with the orders proposed.

[3] **KEANE JA:** The applicant is the appellant in other proceedings before this Court in which he seeks to challenge a judgment entered against him consequent upon the verdict of a jury in favour of the respondent in the respondent's action against the appellant for damages for defamation. On 6 April 2005, the learned primary judge ordered that the applicant provide security for the respondent's costs of the appeal in the sum of $15,000 to be paid by 6 June 2005. The applicant accepts that he did not oppose the making of this order. The applicant does not now seek to argue that the provision of security for costs should not be required at all. Rather, the applicant asked in his written submissions that the amount of security be varied to $5,000. At the hearing of the application the applicant proposed that security of $5,000 be paid within 48 hours, with a further $10,000 to be paid within three months, with the appeal being stayed pending that payment. This variation ("the first variation") is sought pursuant to r 772(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR").

[4] The applicant also seeks, by an application filed on 11 July 2005, to vary the order of 6 April 2005 by which the learned primary judge ordered that, if the applicant's appeal is not determined after a period of six months from 6 April 2005, an order that further enforcement of the decision under appeal be stayed upon one-half of the money recovered under an enforcement warrant on 16 March 2005 being paid into the trust account of the respondent's solicitors to be held pending the determination of the appeal, be automatically lifted. The applicant seeks to vary that order to the extent that, if the applicant complies in all respects with any new timetable set by the Court of Appeal Registry, the stay as to half of the judgment sum be maintained, and not automatically lifted, until the determination of the appeal. This variation ("the second variation") is sought pursuant to r 761(2) of the UCPR.

The first variation

[5] On the hearing before the learned primary judge there was evidence from the solicitor for the respondent that his costs of the appeal were likely to be of the order of $25,000. The respondent sought security in the sum of $20,000. In the end, however, neither party argued against the fixing of security at $15,000 with the obligation to provide the security being postponed for two months.

[6] The applicant has failed to comply with this order in whole or in part. This appears to be because the applicant anticipated that a sum of $24,000 would be paid to him by a third party, and that has not happened. The learned primary judge found that the applicant "has no funds or assets available to satisfy a costs order on an appeal", and the applicant continues to assert that he is impecunious. While the appellant's apparent lack of funds would have weighed strongly against ordering security at first instance, as such an order might have effectively closed the door of the court to him, it is of much less importance on appeal.[1]

[7] It is not said that the learned primary judge was in error in fixing upon the amount of $15,000 by way of security for costs. Instead, having regard to the conduct of the applicant's case before the learned primary judge, it is contended that this Court should exercise the discretion conferred on it by r 772(4) of the UCPR because there has been a change in circumstances since the order was made. The applicant seeks to rely on the non-receipt of the funds he expected as a change of circumstances since the original order. It is well-established, however, that a disappointed expectation of receipt of funds by a party ordered to provide security does not establish a change of circumstances which may warrant setting aside an order for security for costs.[2] Indeed, such a circumstance is apt to confirm the wisdom of the original order for the provision of security because of what it suggests about the financial situation of the applicant generally.[3]

[8] It was also argued that it was a relevant factor that the scope of the appeal has now been circumscribed by the outline of argument filed on 22 April 2005. It was accepted that there was no reason for the learned primary judge to suppose that $15,000 was more than would reasonably be necessary to meet the respondent's costs in the event that the appeal is unsuccessful. The trial occupied 12 hearing days and produced 643 pages of transcript and it may reasonably have been expected that the record was likely to be voluminous. It is submitted that the record necessary for the more circumscribed appeal which the applicant now wishes to agitate will be more succinct. This argument arises from the applicant's conduct of his own case. It is not one concerned with a change in circumstances external to the applicant which are relevant to the discretion which this Court is asked to exercise. It must also be recognized that, even on the basis of the more focussed outline of argument, the appeal will still involve the preparation of a substantial record as well as professional fees. In my view, security in the amount of $15,000 still seems to be most likely to fall short of the costs actually incurred by the respondent should the

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1 *Luadaka v Dooley & Anor* [2003] QCA 51; Appeal No 9380 of 2002, 21 February 2003 at [5]. See also *Jackson v Coal Resources of Queensland Ltd* [1999] QCA 265; Appeal No 3262 of 1999, 15 July 1999 at [3].

2 *Coleman v Greenland & Ors (No 2)* [2004] QCA 180; Appeal No 2619 of 2004, 28 May 2004 at [10] - [14].

3 *Natcraft Pty Ltd v Det Norske Veritas & Anor* [2002] QCA 241; Appeal No 9550 of 2001, 9 July 2002 at [9]. See also *Lewis v Strickland & Anor* [2004] QCA 134; Appeal No 11464 of 2003, 30 April 2004 at [5].

appeal proceed. Certainly the applicant did not seek to put before this Court any evidence as to the likely quantum of costs which would support a contrary view.

[9] The applicant first filed an outline of argument in relation to his substantive appeal on 10 February 2005. It was not served on the respondent until 16 March 2005. An amended outline was filed on 22 April 2005. The respondent has not yet responded to either outline. That may well be because of the applicant's failure to comply with his obligation to provide security for costs even though that obligation was postponed for two months by the order of 6 April 2005. However that may be, the applicant invites this Court to consider his application for the first variation on the basis that the merits of his appeal are significant in relation to the extent of the provision of security for costs[4] and that this Court's consideration of the merits of the appeal must necessarily be confined to what is apparent in that regard from the applicant's outline of argument.

[10] That is a bold submission by a party who seeks the indulgence of the Court in order to be relieved of obligations in respect of which he is already in default. It would be a bold submission even if that default did not itself produce the situation in which only the applicant's outline of argument in relation to the substantive appeal is available for consideration. It is a submission which should not, as a matter of elementary fairness, be accepted. While on one view it might be said that the respondent could and should have responded to the applicant's outline of argument on the appeal of 22 April 2005, ie before the expiration of the two months allowed for the provision of security by the applicant, there is no suggestion that the applicant sought to insist upon the provision of the respondent's outline during that period, and it is understandable that the respondent would wait to see whether security would be provided: if it was not provided the appeal would be automatically stayed and the respondent would have been entitled to apply to have the appeal struck out without incurring the expense involved in addressing the merits of the appeal.

[11] In any event, the applicant's submission that his prospects of success on appeal "are very good" must be regarded with some scepticism. The principal point made by the applicant in this regard concerns the decision of the learned judge at the trial of the defamation action to remove a defence of "truth and public benefit" from the consideration of the jury. This defence was said to be raised in respect of an oral statement by the applicant about the respondent at an in camera meeting of the Aboriginal and Torres Strait Islander Commission on 21 August 2001. The applicant said that the respondent "had done ten years for rape". It was alleged that one of the imputations conveyed by this statement was that the respondent was a rapist. In response, the applicant pleaded that this imputation was true and its publication was for the public benefit. It is not clearly beyond argument to the contrary that the publication of this imputation was, or could be regarded as, being for the public benefit, or that the learned trial judge was wrong to conclude that there was no basis on which a reasonable jury could possibly so regard it. It is not the function of this Court on this occasion to determine whether this ground of appeal will, or will not, succeed. It is sufficient for present purposes to say that to describe the prospect that this ground will be upheld as "very good" is to ignore that there is much to be said for the contrary view.

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[4] *Murchie v The Big Kart Track Pty Ltd (No 2)* [2002] QCA 339 at [7] - [8]; [2003] 1 Qd R 528 at 530.

[12] The respondent opposed the granting of any further extension to the applicant in relation to the provision of security in the sum of $15,000. Having regard to the absence of any reason to expect that these moneys will be forthcoming, the respondent's opposition was, in my view, well-founded.

[13] In my opinion, the applicant has not demonstrated any compelling basis for this Court to exercise the discretion to vary the order for security for costs. The application for the first variation should be dismissed.

The second variation

[14] The application for the second variation was made late. It was not supported by a written outline of argument on behalf of the applicant. There is, in truth, little that can be said in support of this application. The appellant was granted an indulgence by the learned primary judge in the sense that 50 per cent of the judgment amount is held in the respondent's solicitors' trust account rather than being paid over to the respondent in conformity with the respondent's rights under the judgment. This indulgence was granted in recognition of the applicant's concern that the respondent might not be able to reimburse the appellant in the event that the appeal was successful.

[15] It is tolerably clear that this application was occasioned by the applicant's apprehension that the appeal may not be determined within the six month period contemplated by the order of 6 April 2005. Whether or not that apprehension is well-founded, if the appellant had prosecuted his appeal with due diligence, no occasion would have arisen for the present application. As a matter of discretion, the Court should be slow to uphold a party's claim to a discretionary indulgence - and in this case a further discretionary indulgence - founded on that party's own default.

[16] Further, for my part, I doubt whether r 761(2) of the UCPR contemplates the variation of an order for a stay of judgment. Rule 761(2) contemplates the making of an order for a stay. It does not seem to me that this rule is apposite where a party wishes to challenge the terms of an order for a stay.

[17] The application for the second variation should be dismissed.

[18] At the hearing, the respondent asked that this Court proceed to dismiss the appeal pursuant to r 774(b) of the UCPR by reason of the applicant's failure to provide security if the full amount of security is not paid within seven days. The respondent cited *Coleman v Greenland (No 3)*;[5] but that was a case where an application for dismissal had been made of the kind that is expressly contemplated by r 774(b). The respondent has not made such an application.

Conclusion and orders

[19] In my opinion, the applications should be dismissed and the applicant should be ordered to pay the respondent's costs on the standard basis.

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5 [2004] QCA 236; Appeal No 2619 of 2004, 14 July 2004.