

SUPREME COURT OF QUEENSLAND

CITATION: *Molony v ACN 009 697 367 P/L* [2005] QCA 277

PARTIES: **RAY MOLONY**
(plaintiff/appellant/respondent)
v
**ACN 009 697 367 PTY LTD (FORMERLY FRED
MARSH PTY LTD IN LIQUIDATION ACN 009 697 367)**
(defendant/respondent/applicant)

FILE NO/S: Appeal No 5231 of 2005
SC No 85 of 2001

DIVISION: Court of Appeal

PROCEEDING: Application for Security for Costs

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED EX TEMPORE ON: 11 August 2005

DELIVERED AT: Brisbane

HEARING DATE: 11 August 2005

JUDGES: McMurdo P, Jerrard JA and Dutney J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **1. The appellant provide security for the respondent's costs of the appeal, either in cash or by unconditional bank guarantee to the satisfaction of the Registrar, in an amount of \$10,000**
2. The sum be provided within 60 days
3. In the event the security is not provided within the time ordered the appeal is struck out with costs without further order
4. The costs of this application be costs in the appeal

CATCHWORDS: APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - SECURITY FOR COSTS
- application by respondent for security for costs of the appeal
- appellant and a company controlled by him jointly sued respondent in June 2001 – in October 2001 company went into voluntary liquidation – in June 2002 court ordered company give security for respondent's costs of the trial and stayed company's action until security provided - company failed to provide security - trial of appellant's action took place May 2005 - judgment entered in favour of respondent

and appellant ordered to pay half of respondent's costs of the action - subsequent to trial company provided security as ordered in June 2002 - appeal against findings of fact of jury - appellant appears to be impecunious - \$17,192 of costs orders in favour of respondent still outstanding - whether application for security for costs should be granted

Natcraft & Anor v Det Norske Veritas & Anor [2002] QCA 241; Appeal No 9550 of 2001, 9 July 2002, applied

COUNSEL: D J Murphy for the applicant
The respondent appeared on his own behalf

SOLICITORS: Ebsworth & Ebsworth for the applicant
The respondent appeared on his own behalf

DUTNEY J: This is an application by the respondent to the appeal for security for costs of the appeal. The appellant and a company, International Jockey School Pty Ltd ("IJS") jointly sued the respondent for damages for misleading or deceptive conduct under s 52 of the *Trade Practices Act* 1974 (Cth). The action commenced in June 2001.

In October 2001 the respondent went into voluntary liquidation. In June 2002 Justice Jones ordered IJS to give security for the respondent's costs of the trial in the amount of \$35,000 and stayed IJS's action until the security was provided. IJS did not provide the security. In February 2005 the action was listed for trial. The appellant required a jury and the trial of the appellant's action took place over nine days before Justice Muir in Cairns in May 2005. The trial of the claim by IJS remained stayed.

At trial the appellant was represented by counsel but not by a solicitor. There had been no solicitor on the record for the appellant between the filing of an amended statement of claim

in May 2004 and the trial. Following the trial Mr Molony has continued to represent himself.

At the conclusion of the trial and in consequence of the jury's answers to the questions asked of them, judgment was entered in favour of the respondent and the appellant was ordered to pay half the respondent's costs of the action. After the trial in July 2005, IJS forwarded a cheque to the Registry to satisfy the security ordered in June 2002.

In *Natcraft & Anor v Det Norske Veritas & Anor* [2002] QCA 241 at paragraph [9], Justice Jerrard, with whom the other members of the Court agreed, summarised the matters relevant to an application for security for costs of an appeal as including the following:

- "1. The appellant's prospects of success on the appeal...
2. The financial position of the appellants. Where an appellant is without funds or assets this factor is important and provides what this Court has described as a persuasive reason for ordering security for costs. This is because that appellant would be unable to satisfy any order for costs made against the appellant should the appeal be unsuccessful...
3. The fact an impecunious appellant, impecunious at trial, has already had a "day in Court" and lost on

the merits. That circumstance increases rather than reduces the likelihood of the exercise of a discretion in favour of an order for security for costs...

4. The fact that the appellant blames impecuniosity on a respondent who asks for orders for security for costs. This matter has a diminished significance at appellate level by contrast with its significance at trial level...

5. That it is inappropriate to order an impecunious appellant to provide a greater security than is absolutely necessary..."

"6. Whether there has been delay in bringing the application for security for costs."

I have not included in that list one matter to which his Honour referred which relates only to security sought against a company.

Applying those considerations to the fact here there is a compelling case for the ordering of security for costs. The appeal is against findings of fact by a jury. Such appeals are notoriously difficult. On the material before us the appellant appears to be impecunious. In response to the application for security for costs of the trial in June 2002 Mr Molony swore that he is in receipt of Centrelink benefits, that he has no business to generate income, has no investments

or real property and would be unable to meet the proposed costs. Nothing before us suggests his position has improved.

In the course of the proceedings and related appellate proceedings the respondent was awarded costs assessed at \$17,192.50 which have not been paid. On the other side of the ledger IJS has provided security since the trial. Although IJS is Mr Molony's company this fact alone is insufficient to persuade me that Mr Molony can meet the costs of an unsuccessful appeal. The appellant has had his day in Court and lost on the merits and the application has been brought promptly.

Before us the appellant does not oppose the ordering of security but contests the amount asked for and seeks 90 days within which to raise the money. The respondent's solicitor, an experienced litigation practitioner, deposes that a conservative estimate of the costs of the appeal would be \$15,000.

While I hesitate to disagree with a solicitor or Mr Hunter's expertise in this area, the costs of an earlier interlocutory appeal came to \$7,142.50. Being conscious of the practice of adopting the conservative approach to which Justice Jerrard referred in *Natcraft* I would limit the security amount to \$10,000.

Accordingly I would order that the appellant provide security for the respondent's costs of the appeal, either in cash or by

unconditional bank guarantee to the satisfaction of the Registrar, in an amount of \$10,000. I would order that such sum be provided within 60 days. I have adopted the figure of 60 days rather than the 90 days asked for because it is now six weeks since security was first sought. In the event that the security is not provided within the time ordered the appeal should be struck out with costs without further order. I would order that the costs of this application be costs in the appeal.

THE PRESIDENT: I agree.

JERRARD JA: I agree.

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