**[2008] QCA 238**

**COURT OF APPEAL**

**HOLMES JA**
**FRASER JA**
**DUTNEY J**

**Appeal No 4403 of 2008**

**JOHN ELLIS** **Appellant**

**and**

**UNITING CHURCH IN AUSTRALIA PROPERTY TRUST** **Respondent**

**BRISBANE**

**DATE 15/08/2008**

**JUDGMENT**

MR R W MORGAN for the appellant

MR D J KELLY for the respondent

**HOLMES JA:** I'll ask Justice Fraser to give the first reasons.

**FRASER JA:** The plaintiff has appealed against a judgment dismissing his claim for damages for personal injuries. The defendant now applies for an order for security for costs on the appeal.

That the appellant is a plaintiff who has had his day in Court is a factor in favour of ordering the security. See *Natcraft Pty Ltd v DET Norsk Veritas* [2002] QCA 241.

The defendant contends that the plaintiff has poor prospects of succeeding in his appeal and that this supports the application for security. It is necessary then briefly to describe the

issues in the appeal. The circumstances in which the plaintiff was injured were described by the trial judge in the following terms:

> "He was walking north on the concrete path on the eastern footpath and close to its left hand edge. He traversed the Lifeline paved drive heading for the continuation of the concrete path, again intending to walk close to its left hand edge. That brought his foot into contact with a raised paver which was close to the grassed part of the footpath (marked in the photograph Exhibit 7F and indicated on photograph Exhibit 26).
>
> He was hurrying to get home, out of the increasingly heavy rain. The nearby street light was not illuminated. He had seen the raised paver several times (perhaps five or six,) in the past and considered it to be an obvious risk. However he did not consciously see it on this occasion or turn his mind to it. His left foot stood on the raised brick's left hand edge which turned his ankle to the left and he fell."

The trial judge dismissed the plaintiff's claim because, so his Honour found, the cause of the plaintiff's injury was not any breach of duty on the part of the defendant but the plaintiff's own carelessness in "failing to keep a proper lookout, failing to make use of a wide safe footpath and choosing to walk in a potentially risky line, indeed in failing to pay heed to a risk of which he was well aware."

In so concluding his Honour referred to *Neindorf v Junkovic* (2005) 222 ALR 631, and *Ghantous v Hawksbury City Council* (2001) 2006 CLR 512, in which claims of negligence were rejected in factually similar circumstances. Statements in those decisions which his Honour quoted do, on their face, support his Honour's decision to reject the plaintiff's claim.

The plaintiff's appeal does not involve any attack upon the essential findings of fact made by the trial judge. Rather, the plaintiff contends that *Ghantous* is distinguishable because it concerned a duty owed by a public authority and that *Neindorf* is distinguishable because it

concerned the duty owed by an occupier of residential premises rather than an occupier of commercial premises. The appellant submits that the trial judge erred by failing to apply what is submitted to be the more demanding duty of care owed by a commercial occupier which the defendant is said to be. That is said to be required by this Court's decision in *Pascoe v Coolum Resort Pty Ltd* [2005] QCA 354.

The defendant contends that the plaintiff's submissions misconstrue the trial judge's reasons. The real basis of the judgment is said to be that the risk caused by the raised paver was known to the plaintiff and was so slight that the defendant's failure to remove it did not amount to a breach of its duty of care, however the content of that duty be expressed. The defendant has also filed a notice of contention which contends that the raised paver did not cause the plaintiff's fall and that the defendant's system of inspection and maintenance, though ineffective to detect the danger found by the trial judge, was a reasonable one having regard to the low level of risk.

It is not clear to me that the trial judge applied a standard of care that was too undemanding. It is also not obvious that application of what the plaintiff contends is the correct standard of care would dictate the conclusion that, on the facts found by the trial judge, the defendant breached its duty of care to the plaintiff. On the other hand, the argument on this interlocutory application was necessarily quite limited. I think it preferable to avoid attempting to assess the prospects of success in the appeal which is set down to be heard in a few weeks time on 9 September 2008. It is necessary to say only that the plaintiff's prospects of success have not been demonstrated to be so poor as to provide significant support for an order for security.

A more significant consideration concerns the plaintiff's financial position. Where an appellant is without funds or assets that has been described as a "persuasive" reason for ordering security for costs. See *Natcraft Pty Ltd v DET Norsk Veritas*. The same must be so where, as here, the appellant has left the jurisdiction and has no substantial assets readily

amenable to the Court's processes of execution. The evidence shows that the plaintiff moved to Thailand where he now carries on a business from which he earns little money. The defendant's solicitors wrote to the plaintiff's solicitors asking what they intended to do to satisfy their obligation to pay the defendant's costs of the trial proceedings, some $90,000. No satisfactory reply was received to that enquiry and the plaintiff has not paid any of the defendant's costs of the trial. The plaintiff has no assets readily amenable to execution, except possibly $5,000 in a bank account.

The evidence of the plaintiff's assets in Thailand is unclear but it appears that the plaintiff does own the guest house and bar where he carries on his business. The purchase price and market value are not disclosed but the plaintiff's solicitor's evidence is that the plaintiff put $365,000 towards the purchase price. That being so, one would expect that an order for security for no more than the claimed amount of about $20,000 would not stifle the appeal. The plaintiff's counsel contends, however, that it would have that effect. The only evidence on the topic is unsatisfactory. It consists of the plaintiff's solicitor's hearsay assertion that the plaintiff "does not have access to cash assets with which he could provide security for costs in the short period of time before the hearing date of the appeal." There is no evidence that the plaintiff could not quickly raise the necessary money on the security of his guest house and bar.

On the other hand the plaintiff contends that the defendant has been guilty of unexplained delay in making this application. The notice of appeal was filed on 14 May 2008. The defendant's solicitors wrote to the plaintiff's solicitors on 3 June 2008 foreshadowing an application for security for costs of the appeal and asking for the plaintiff's proposal in that respect. The reply sent on behalf of the plaintiff on 10 June 2008 unhelpfully accused the defendant of "high-handed bully boy tactics", but however much the plaintiff's solicitor's language is to be deprecated, it did make it plain that the defendant would have to apply if it wished to obtain security. The hearing date of the appeal, 19 September 2008, was fixed on 16 July 2008. Despite later threats by the defendant to make an application in letters of

10 and 18 June and 30 July, the defendant did not file its application until 5 August 2008. By then the hearing date for the appeal was about five weeks away, the plaintiff's outline of submissions had been filed, and the defendant's outline was filed the following day. The appeal is now virtually ready for hearing, the only remaining step being filing of the plaintiff's reply outline.

The defendant's précis costs assessment from a legal costs consultant (who assessed the likely costs at about $20,000) was not obtained until 5 August 2008 but there is no evidence that such an assessment - which is very brief - could not have been obtained much earlier. No other explanation for the delay is put forward. In my view, the defendant has been guilty of unreasonable and unexplained delay in making this application.

The plaintiff has, on the evidence, incurred a costs liability to date in prosecuting the appeal of some $8,000. In these circumstances the defendant's delay in applying is a significant factor militating against ordering security. See *Natcraft Pty Ltd v DET Norska Veritas* at paragraphs 15 and 16.

To refuse to order any security, though, would leave it within the power of the plaintiff entirely to frustrate attempts by the defendant to recover any of its costs if the appeal fails, even though the plaintiff appears to have sufficient assets in Thailand easily to meet such an order. That possibility strikes me as unjust in the particular circumstances here, despite the defendant's delay in applying. That such a result would be unjust is emphasised by the fact that the plaintiff has already incurred a very significant unsatisfied debt to the defendant for the costs of the trial.

The competing considerations here are best resolved, in my view, by ordering security only in such amount as to provide some measure of indemnity largely for the defendant's costs to be incurred after the date the application was filed. The evidence does not justify the conclusion that this would stifle the appeal but the risk that it might do so is not a sufficient reason to

refuse to make any order. It is not possible to be precise about the amount on the evidence but an appropriate sum seems to be about $10,000. That includes an allowance for security for the costs of this application which, despite the written submissions for the plaintiff, I think appropriate because the application was justified.

I would order that the appellant provide security for the respondent's costs of the appeal in the sum of $10,000. I note that the effect of the rules in the event that such an order is made would be to stay further prosecution of the appeal by the appellant until security is provided.

**HOLMES JA:** I agree with Justice Fraser's reasons and the order he proposes.

**DUTNEY J:** I agree.

**HOLMES JA:** The order then will be that the appellant provide security for the respondent's costs of the appeal in the sum of $10,000 in a form satisfactory to the Registrar by close of business on 29th of August.

**HOLMES JA:** Costs of this application will be costs in the appeal.

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