

# SUPREME COURT OF QUEENSLAND

CITATION: *Conde v Burchill & Horsey Lawyers & Anor* [2009]  
QCA 367

PARTIES: **MILTON ANOLDO CONDE**  
(plaintiff/respondent)  
v  
**BURCHILL & HORSEY LAWYERS**  
(defendant/applicant)

**MILTON ANOLDO CONDE**  
(plaintiff/respondent)  
v  
**JULIE GILFOYLE**  
(defendant/applicant)

FILE NO/S: Appeal No 11430 of 2009  
Appeal No 11377 of 2009  
SC No 8609 of 2009  
SC No 8610 of 2009

DIVISION: Court of Appeal

PROCEEDING: Application for Security for Costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 1 December 2009

DELIVERED AT: Brisbane

HEARING DATE: 1 December 2009

JUDGES: Holmes JA

ORDERS: 

- 1. Pursuant to r 772 of the *Uniform Civil Procedure Rules 1999*, the appellant give security for the costs of the appeal which may be awarded to the respondents in the amount of \$25,000, to be paid to the Registrar within 14 days;**
- 2. Respondents are not required to file or serve their outline of submissions or to submit a draft index to the appeal book until seven days after such security has been given;**
- 3. Within three days of the giving of such security, the appellant provide particulars of ground 13 of each notice of appeal in each respect it is alleged that the orders and decisions were obtained by fraud;**
- 4. The following paragraphs of the notice of appeal are struck out: paragraphs 1.7, 1.9, 1.10, 1.28, 1.29, 1.30,**

**1.31, 1.32, 1.34, 1.35, 1.36, 1.37, 1.38, 1.39, 1.40, 1.48, 1.49, 1.50, 1.51, 2.3, 2.4, 2.5, 2.6 and 2.7 as not containing grounds of appeal;**

- 5. The costs of and incidental to the orders in relation to the applications for security for costs and postponement of time to file the draft index are costs in the appeal;**
- 6. The costs of the respondent of and incidental to the order in relation to the application for further particulars are to be paid by the appellant on the standard basis.**

**CATCHWORDS:** APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – SECURITY – where respondent’s claim and statement of claim struck out at first instance – where respondent’s appeal has limited prospects of success – where respondent bankrupt, and has multiple proceedings on foot – where applicants seek security for costs – whether respondent should be ordered to give security for costs

**COUNSEL:** R B Dickson for the applicants  
The respondent appeared on his own behalf

**SOLICITORS:** McInnes Wilson Lawyers for the applicants  
The respondent appeared on his own behalf

**HOLMES JA:** The respondents to these appeals seek an order for security for costs against the appellant, Mr Conde. They seek further orders that they not be required to file and serve their submissions or submit any draft index to the appeal until seven days after such security is given; an order that further particulars be given of paragraph 13 of the grounds of appeal, as to each respect in which it is alleged that the orders and decision below were obtained by fraud; and they seek to have a number of paragraphs of the notice of appeal struck out as not containing grounds.

The appeal arises out of two claims for malicious prosecution brought by the appellant against firstly, the first respondent, the firm of Burchill & Horsey, and secondly, the second respondent, Ms Gilfoyle, who is a partner in that firm. Each respondent filed a conditional notice of intention to defend. On their application the Chief Justice struck out the claim and statement of claim in each proceeding for a number of reasons.

The first was that each claim sought damages for a variety of forms of harm, including loss of enjoyment of life, pain and suffering, discomfort and injury to health so as to bring

the claims within “claim” as defined by the *Personal Injuries Proceedings Act 2002*, being: “[a] claim for... damages based on liability for personal injury... based in tort”. Thus written notice of the claim was required under s 9(1) of that Act before the proceedings started, a step which the appellant had not taken.

In addition, the statements of claim did not comply with the requirements of the *Uniform Civil Procedure Rules* in a number of different respects, and although the claim was expressed to be for aggravated and punitive damages, the appellant had not pleaded anything to show that the claim was within the very limited class to which s 52 of the *Civil Liability Act 2003* restricts the award of such damages.

Accordingly, the Chief Justice held that so far as the claim fell within the scope of the *Personal Injuries Proceedings Act* (that is, all but that part of the claim that sought damages for injuries, reputation and for false imprisonment), the respondents’ challenge to the Court’s jurisdiction must succeed and the challenge to the form of the claim and the statement of claim in each case as irregular must also succeed. He made the orders now appealed.

Each notice of appeal contains what at first glance seems to be some 86 grounds. However, closer examination reveals that many of the paragraphs are assertions about the actual content of the proceedings which the appellant wished to bring, or the original domestic violence proceedings on which his claims were based. Others purport to set out the law and may be extracts from text books. Tellingly, the appellant’s outline of argument, or the first of those filed, largely replicates the notice of appeal. At any rate, they do not constitute grounds and the respondents properly seek that they be struck out.

Other grounds are extremely repetitive, but what one can discern is an allegation of bias on the part of the Chief Justice, for which the appellant does not identify any basis other than that he was unsuccessful, and there is an oft-repeated assertion that the common law applies in the awarding of damages for the tort of malicious prosecution to the exclusion of the *Personal Injuries Proceedings Act* and the *Civil Liability Act*. The only basis given

for that assertion is the absence of any approved form in the *Personal Injuries Proceedings Act* for claims for malicious prosecution, which it is said demonstrates that it does not apply to that tort. But, the forms developed for use with that Act are not addressed to particular torts; instead there is a general form for use where the injury is not received as a result of a medical incident.

Another ground for the appeal is that the Chief Justice failed to specify on the basis of which rule of the *Uniform Civil Procedure Rules* he struck the appellant's pleadings out. That seems odd, because his Honour identified five rules whose requirements had not been met, with the consequence that the pleadings were "scandalous and oppressive". By that it is fairly clear he was referring to the bald assertions in the statements of claim that the respondents had committed offences including fraud, fabricating evidence and so on. It is hard to see how those allegations, unsupported as they were by any pleading to justify them, could be otherwise described.

The appellant said that the Chief Justice should not have permitted the respondents to take a step in the proceedings without filing a notice of intention to defend. But the respondents had filed a conditional notice of intention to defend; properly, given their proposal to challenge the jurisdiction of the Court and to assert irregularity.

The last ground of appeal is that the "Orders or Decisions were obtained by Fraud... by misleading the Court, fishing allegations and inquiries, misconduct of litigation". Not surprisingly, the respondents seek an order that further particulars be given of that ground.

The appellant is a bankrupt, a sequestration order having been made as a result of his failure to meet an earlier costs order in an amount of \$35,000. He has filed affidavits of means and assets in support of applications for relief from paying filing fees, in which he has sworn that he has no assets and that his fortnightly income is from the disability pension.

The respondents' solicitor, Mr Burns, has written to him seeking details of his financial capacity to meet any costs order, without response. Mr Burns estimates that the costs of

the proceedings at first instance will be at least \$15,000. He estimates the costs and outlays of the appeal, including the present application, at \$45,400.

Mr Burns has identified approximately 32 other proceedings brought by the appellant in the Supreme and District Courts. To those now may be added the recently issued proceedings against the respondents' solicitors, McInnes Wilson, and against Mr Burns himself for \$16,000,000, effectively for resisting the appeal and applying for security for costs; a claim against Mr Dickson, the counsel for the respondents, for inducing a misuse of legal powers; and a claim against the Chief Justice for acting in bad faith.

The present appeal has what might be charitably described as very limited prospects and there is no means revealed by which the appellant could meet a costs order. The orders that the respondents seek should be made, although I will order a lesser amount by way of security.

I order, pursuant to Rule 772 of the *Uniform Civil Procedure Rules* 1999, that the appellant give security for the costs of the appeal which may be awarded to the respondents, by payment of \$25,000 to be paid to the Registrar within 14 days.

The respondents are not required to file or serve their outline of submissions or to submit a draft index to the appeal book until seven days after the appellant has given such security.

I order that within three days of the giving of such security, the appellant provide particulars of ground 13 of each notice of appeal as to each respect in which it is alleged that the orders and decisions were obtained by fraud.

The following paragraphs of the notice of appeal are struck out: 1.7, 1.9, 1.10, 1.28, 1.29, 1.30, 1.31, 1.32, 1.34, 1.35, 1.36, 1.37, 1.38, 1.39, 1.40, 1.48, 1.49, 1.50, 1.51, 2.3, 2.4, 2.5, 2.6 and 2.7 as not containing grounds of appeal.

The costs of and incidental to the orders in relation to the application for security for costs and postponement of the time in which the respondents are required to file their draft index are costs in the appeal.

The costs of the respondent in relation to the order for further particulars are to be paid by the appellant on the standard basis.