SUPREME COURT OF QUEENSLAND

CITATION:	*Toms & Ors v Fuller* [2010] QCA 73
PARTIES:	**DONALD FULLER** (defendant/appellant/respondent) **v** **STEPHEN NORMAN TOMS &** **PHILLIP TOYNE &** **CHARLES ERNEST BRIGHT &** **BRETT HEADING** (plaintiffs/respondents/applicants)
FILE NO/S:	Appeal No 309 of 2010 SC No 3234 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2010
JUDGES:	McMurdo P and Holmes and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appellant to provide security for the respondents' costs of the appeal in the sum of $17,000, in a form satisfactory to the Registrar, within 28 days from today;** **2. If security is not provided by that time, the appeal will stand dismissed, without further order, and the appellant is to pay the respondents' costs of the appeal and of this application to be assessed on the standard basis;** **3. If security is provided, the costs of this application to be costs in the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – where appellant's initial and amended pleadings were struck out at first instance – where primary judge ordered appellant obtain leave to file any further pleadings – where respondents then discontinued their action – where appellant sought leave to file a further amended defence and counterclaim – where primary judge refused leave – where appellant impecunious – where appellant's prospects of

success on appeal are slight – whether appellant should be ordered to provide security for costs

Uniform Civil Procedure Rules 1999 (Qld), r 171, r 177, r 304, r 311, r 748, r 772, r 774

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, cited
Murchie v The Big Kart Track Pty Ltd (No 2) [2003] 1 Qd R 528; [2002] QCA 339, applied
Natcraft P/L & Anor v Det Norske Veritas & Anor [2002] QCA 241, applied
Re JRL; Ex parte CJL (1986) 161 CLR 342; [1986] HCA 39, cited
Ridolfi v Rigato Farms Pty Ltd [2001] 2 Qd R 455; [2000] QCA 292, cited

COUNSEL: The appellant appeared on his own behalf
K A Barlow for the respondents

SOLICITORS: The appellant appeared on his own behalf
Mallesons Stephen Jaques for the respondents

[1] **McMURDO P**: I agree with Chesterman JA's reasons for ordering the appellant to provide security for the respondents' costs of this appeal and with the orders he proposes.

[2] **HOLMES JA**: I agree with the reasons of Chesterman JA and the orders he proposes.

[3] **CHESTERMAN JA**: The respondents to the appeal have applied for an order that the appellant provide security for their costs of the appeal. They were the plaintiffs in an action commenced in the Trial Division against the appellant in which each claimed the sum of $200,000 by way of damages for defamation.

[4] On 30 March 2009 the appellant filed a document which was entitled "Initial Response to the Claim", and later, on 15 April 2009, another document which he called "Conditional Notice of Intention to Defend and Challenges to Jurisdiction and Court Location and Counterclaim".

[5] On 30 April 2009 the respondents filed an application for orders that the appellant's documents be struck out pursuant to *UCPR 171*. Prior to the hearing the appellant, on 5 May 2009, added to his armoury by filing a third document entitled "Amended Conditional Notice of Intention to Defend and Challenges to Jurisdiction and Court Location and Counterclaim".

[6] On 11 May 2009, Peter Lyons J ordered that the appellant's defences, if such they were, be struck out, and ordered the appellant to pay the respondents' costs of the application.

[7] On 6 July the appellant filed an amended defence and counterclaim which the respondent sought to have struck out by application filed 13 July 2009. On 24 July 2009 Peter Lyons J struck out the amended defence and counterclaim and ordered the appellant obtain the leave of the court before filing any further defence, or

defence and counterclaim. Again the appellant was ordered to pay the respondents' costs of the application.

[8] On 4 September 2009 the respondents filed a notice of discontinuance pursuant to *UCPR 304*, on the ground that they had not been served with a defence.

[9] On 10 September 2009 the appellant filed an application for leave to file a further amended defence and counterclaim.

[10] The application came on for determination before Peter Lyons J who began to hear it on 21 September 2009, and resumed the hearing, after a short adjournment, on 25 September 2009. During the course of the hearing some additional applications were made orally to the judge who dealt with them. One was an application by the appellant that the judge not determine his application because of apparent bias against the appellant. A second was the appellant's application that paragraphs 2(c), 2(d) and 2(e) of the respondents' solicitor's affidavit sworn 18 September 2009 be struck out. The third application made orally was the respondents'. They asked for leave to discontinue their action. This was made necessary by the primary judge's ruling that they could not discontinue the action as of right, but needed leave.

[11] On 25 September 2009 the primary judge refused the appellant's applications that he disqualify himself for bias, and to strike out the subparagraphs of the affidavit, giving reasons for doing so. Consideration of the remaining applications was reserved. On 18 December 2009 his Honour refused the appellant leave to file his further amended defence and counterclaim and gave the respondents leave to discontinue their action. His Honour published written reasons. On the same day his Honour heard arguments as to costs and ordered that the appellant pay the respondents' costs on the indemnity basis.

[12] On 11 January 2010 the appellant filed a notice of appeal which is some 15 pages in length. Mr Fuller seeks to have the orders made by Peter Lyons J on 25 September and 18 December 2009 set aside and, instead, seeks an order that he have leave to file his further amended defence and counterclaim. As well he seeks an order for discovery of documents which, as far as I can tell, was not the subject of discussion before the primary judge, or of any order.

[13] The application for security is made pursuant to *UCPR 772*. The respondents ask that the appellant provide $17,000 by order of security for their costs of the appeal, and do so within 14 days. They seek, as well, pursuant to *UCPR 774* that the appeal be stayed until security is provided and that, if it is not provided, the appeal be dismissed with costs without further order.

[14] Before turning to the submissions advanced on the application it will be convenient to say something of the primary judge's reasons for the orders made. His Honour observed the curiosity that the appellant should insist upon delivering an amended defence when the respondents, the plaintiffs in the action, had indicated that they would not prosecute their claims and sought to discontinue the proceedings. The primary judge pointed out that any counterclaim the appellant wished to bring could be the subject of separate proceedings.

[15] In relation to the form and content of the appellant's proposed pleadings the primary judge said:

"[7] The following rules of pleading are relevant to Mr Fuller's application:-

(a) A pleading must be as brief as the nature of the case permits;

(b) A pleading must contain a statement of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

…

[9] The function of a pleading is to state, with sufficient clarity, the case that a party must meet. Pleadings serve a basic requirement of procedural fairness in litigation, by ensuring a party has the opportunity of meeting the case made against that party; and they also serve the important purpose of defining issues for decision. While procedural fairness is a matter of great importance in litigation, the definition of the issues for decision is also important, as it identifies the matters which the Court must deal with in its decision.

…

[11] By way of overview, it may be noted that the *FADC* (further amended defence and counterclaim) is some 88 pages in length. It consists of 184 paragraphs, many of which include numerous sub-paragraphs.

[12] The first 76 pages appear to constitute the defence. There then follows four pages which appear to be intended to identify the relief sought by Mr Fuller by way of counterclaim. Much of this is taken up with stating "findings" which Mr Fuller seeks. He also seeks an order that the "matter" be referred to ASIC, pursuant to the *Corporations Act* 2001 (Cth); and damages for defamation and fraudulent misrepresentation; as well as interests and costs. The balance of the document appears to be intended to provide the basis for the counterclaim.

[13] There is an obvious difficulty in granting leave to file a document which includes a defence to a statement of claim, when the plaintiffs seek leave to discontinue the claim. However, the difficulties with the *FADC* are considerably greater.

[14] After the FADC sets out the "relief" which Mr Fuller seeks, it continues with some 68 paragraphs. The first paragraph incorporates all of the allegations in the defence. It does so without any attempt to limit the incorporation to identified matters, which may arguably be relevant to any relief sought. For that reason alone, it is embarrassing. It deals with matters which may possibly be relevant to pleadings in the plaintiffs' action, but which are plainly not material facts for any action by Mr Fuller.

> [15] Beyond that, the *FADC* is a mixture of narrative, often flamboyantly expressed, argumentative material, and evidence. It represents a departure from the rules of pleading on an extensive scale. Even if one's attention were confined to the counterclaim, this conclusion is not substantially altered". (footnotes omitted)

[16] The respondents' reasons for wishing to discontinue their action were explained in their solicitor's affidavit, by the three sub-paragraphs the appellant objected to. Mr McDonnell deposed that each respondent had informed him that:

> "(c) (they) take the view that (to) continue this proceeding will involve considerable expense in respect of applications to repeatedly strike out documents filed by the (appellant);
>
> (d) (they) take the view that there is little prospect of the (appellant) delivering a defence which complies with the rules and which would therefore allow the matter to proceed in a timely and cost effective manner; and
>
> (e) (they) consider it is unlikely that the proceeding will resolve in the near future."

[17] According to the primary judge's reasons the appellant said:

> "… of these paragraphs that they are 'scandalously offending material' and that 'the imputation is that I am such a hopelessly incorrigible rogue that I *won't* be controlled by the Court; alternatively, that I am such a hopelessly mental incompetent … I can't be controlled by the court.' …
>
> In my view, the complexion which the (appellant) puts on the three paragraphs goes well beyond what they would ordinarily bear. Beyond that … they identify, at least in part, the basis of any application for leave (to discontinue) … ". (emphasis in original)

[18] The primary judge, accordingly, refused the appellant's application to strike out those paragraphs and, later, gave the respondents leave to discontinue their action.

[19] The complaint of apprehended bias appears to have had its origin in the period of adjournment between 21 and 25 September 2009. There was, on the first day, insufficient time to dispose properly of all the applications. The primary judge had intimated his preliminary opinion that the respondents needed leave to discontinue. Their counsel asked for an order granting leave to discontinue to take effect from that day, with a further order that the appellant not "bring a fresh proceeding" which reasserted the allegations in the defence and counterclaim then under consideration. His Honour declined to make the order thinking it might prejudge the application for leave to deliver that pleading.

[20] The applications were adjourned to 25 September. The respondents' counsel was asked to supply additional written submissions identifying in more detail the criticisms of the impugned pleading. Mr Fuller complains that the request to the respondents' counsel was made in "conspiratorial tones". The transcript of the hearing reveals that the parties discussed an adjournment of the hearing and, indeed, Mr Fuller requested the adjournment. There was debate about the likely amount of

time the adjourned hearing would take, in the course of which the judge said to counsel:

> "… I'd be grateful for more detailed submissions from you … about that pleading. … there is three hours available … which may be a bit tight to enable you to enlarge your submissions … ".

Agreement was fixed on 25 September at 2.00 pm for the resumed hearing. Mr Fuller said:

> "… I am very happy with that".

A little later the judge said to the appellant:

> "… I expect documents which are sent to assist the Court … to be well focused and relatively brief".

The judge having reconfirmed that the hearing would resume at 2.00 pm on 25 September, and what would be dealt with on that date, the appellant again said he was "very happy with all of that". His Honour then said that it would be a "useful thing" if counsel would provide his further written submissions to the court and to Mr Fuller on or about the afternoon of 23 September. Mr Fuller replied:

> "I am very happy with that."

[21] Mr Fuller responded to the further written submission provided by the respondents' counsel by his own document dated 25 September. It includes the following:

> "At the very commencement of proceedings you brushed aside my request as a matter of first priority that you deal with my application to strike out **the three grossly offending paragraphs within the** … Plaintiffs (sic) supporting affidavit; and instead allowed ***Mr Barlow*** to attack my pleadings … with those offending paragraphs overshadowing the proceeding. You did so even before you had set eyes on my pleadings; and **you constantly addressed me in condescending tones** … .
>
> And you sent ***Mr Barlow*** off to look up during the adjournment some point for you that might allow you to grant the plaintiffs leave to discontinue, without explaining to me what it was. **I feel as though I am about to be ambushed by you playing their role!**
>
> **That all adds up to a partisan approach in these proceedings; and I am compelled to confront you on your approach. I will indeed appeal to the Full Court if you will not treat my application for leave to file in the professional manner befitting your role**". (emphasis in original)

[22] When the hearing resumed his Honour asked the appellant whether he wished to make an application that he disqualify himself from further hearing the matter. The appellant said he did, and identified apprehended bias as the basis. The particulars were that:

(i) the judge refused to deal with his application to strike out the sub-paragraphs from Mr MacDonnell's affidavit as a "first priority";

(ii) the judge had so resolved before reading the appellant's pleadings;

(iii) the judge spoke to the appellant in "condescending tones";

(iv) the judge requested the respondents' counsel to provide further submissions on the resumed hearing to support the respondents' application for leave to discontinue.

[23] In his reasons for refusing to disqualify himself the primary judge explained that he did not give priority to the application to strike out parts of the affidavit because he had limited time to hear the application on 21 September and the other applications appeared more important. His Honour doubted that he spoke to the appellant other than politely. With respect to the fourth particular his Honour thought that the appellant had misunderstood what had happened. The only request made to counsel was for supplementary submissions dealing in more detail with the grounds of the respondents' objections to the proposed defence and counterclaim. That point had been dealt with very briefly in the initial submissions. The result was a longer document identifying the pleadings' defects, a copy of which was given to the appellant in advance of the resumed hearing. The appellant had expressed his consent to the process.

[24] The notice of appeal appears to contain further particulars of apprehended bias. These were not adumbrated before the primary judge on 25 September 2009. The further particulars are:

(i) that on 24 July 2009 when the same judge struck out an earlier proposed defence and counterclaim his Honour ordered that the appellant not file a further pleading without leave. That requirement had not been sought by the respondents who were content to allow the appellant one further chance to plead properly. The judge's additional requirement is apparently relied upon as indicating some antipathy to the appellant.

(ii) the primary judge did not in his reasons deal at length and in detail with the questions of fact which Mr Fuller wishes to advance as a basis for his counterclaim against the respondents.

[25] The primary judge referred in his reasons to the appropriate authorities: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; and to the judgment of Mason J in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 which contains the admonition that judges not accede to such applications too readily.

[26] Against this background I turn to a consideration of the application for the security for costs. This Court in *Murchie v The Big Kart Track Pty Ltd (No 2)* [2003] 1 Qd R 528 pointed out (at 529-530) that there is an unfettered discretion whether to order security and, if so, in what amount. Factors relevant to the exercise of the discretion are that the appellant has lost after a hearing; the appellant's impecuniosity; and prospects of success on appeal. There is no comprehensive list of the factors which might be taken into account on an application for security for the costs of an appeal; *Natcraft Pty Ltd & Anor v Det Norske Veritas & Anor* [2002] QCA 241, but where the prospects of success on appeal are "bleak", and the appellant is without funds, there are powerful reasons for ordering security: *Murchie* at 530.

[27] There is no doubt the appellant is bereft of financial substance. In his own affidavit sworn 5 January 2010 he discloses that his only income is the single rate age

pension amounting to $783.70 per fortnight from which he pays $300 per fortnight rent. He does not own a motor vehicle or any real property. He assesses his present net worth at something under $10,000.

[28] The appellant has been ordered on three occasions to pay costs of interlocutory applications. Two of those orders have not been appealed against. Mr McDonnell estimates that the recoverable costs which may be assessed pursuant to those two orders will be about $46,000.

[29] The court should not, on an application for security for costs, embark upon any extended investigation of the appeal to determine its merits, nor should it prejudge the outcome of the appeal. On the other hand, where some assessment of the appellant's case can be made, and the assessment suggests the prospects of success are poor, and the appellant is without means, the court is likely to order security.

[30] The appeal is brought from interlocutory orders involving a discretionary judgment in matters of practice and procedure. The appellant faces the considerable obstacle those considerations throw up. In *Ridolfi v Rigato Farms Pty Ltd* [2001] 2 Qd R 455, the Chief Justice said (with the agreement of McPherson JA and Williams J (at 459)):

> "… appeal courts should be especially circumspect about interfering with decisions on matters of practice and procedure. As put by the High Court (*Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc*. (1981) 148 CLR 170, 177) 'particular caution' must be exercised. The constraints confirmed in *House v The King* are real constraints, to be respected not perfunctorily discarded, and they are especially powerful, in limiting an appellate court, in a case of this character.
>
> Judges who at first instance, astute to the philosophy behind the UCPR, make procedural rulings which reflect that philosophy, sometimes proceeding with an appropriate robustness, should be able to proceed confident that their rulings will not on appeal be subjected to a pedantic or overly intrusive re-examination".

[31] As well there is the point that there is a substantial element of futility in what the appellant seeks to achieve by his appeal. The respondents have discontinued their action. They cannot be made to prosecute it. There is no point in the appellant delivering a defence to an action which does not exist. An application for leave to deliver a defence is equally pointless.

[32] The appellant's concern that he has a claim against the respondents is met by the observation that he can commence an action of his own. It is not necessary that he counterclaim in the respondents' action. Indeed, he cannot do so, there being no such action. The appellant feels a particular grievance that the primary judge ignored the terms of *UCPR 177* and *UCPR 311* which the appellant contends give him an absolute right to prosecute his counterclaim. The primary judge's reasons do not mention these rules. The appellant finds the omission an egregious error which suggests bad faith on the part of the judge.

[33] *UCPR 177* provides:

> "In a proceeding, the defendant may make a counterclaim against a plaintiff, instead of bringing a separate proceeding".

UCPR 311 provides:

> "The plaintiff's discontinuance of a proceeding does not prejudice a proceeding consolidated with it or a counterclaim made by the defendant".

[34] The operation of *UCPR 177* depends upon there being a proceeding against a defendant who may counterclaim. If there be no proceeding there can be no counterclaim. Once an action is discontinued it is no longer a proceeding. *UCPR 311* continues a counterclaim made in an action before its discontinuance. There was not, in this case, a counterclaim in existence before the discontinuance of the respondents' action. The appellant tried, but failed, to file a counterclaim.

[35] These rules do not assist the appellant, despite his angry insistence that they do.

[36] It is not necessary, and it is undesirable, to deal in any detail with the merits of the appeal against the refusal of leave to deliver the amended defence and counterclaim. Apart from its futility the primary judge thought it objectionable on the grounds his Honour described. It is sufficient for the purposes of this application to note that his Honour's criticisms of the pleading appear amply justified.

[37] Nor can there be any sensible prospect of success against the order allowing the respondents to discontinue their action. The rules preserve the appellant's right to any costs he incurred which were wasted by the discontinuance. The objection appears to be that *UCPR 177* and *UCPR 311* obliged the respondents to maintain their action so that the appellant can counterclaim. Those rules do not have that effect. Had there been a counterclaim in the action he could have continued it despite the discontinuance of the action. That circumstance does not exist in this case.

[38] The other orders against which the appellant appeals were both made on 25 September 2009. They were the result of oral applications and argument. Both were dismissed with reasons delivered on 25 September 2009. *UCPR 748* requires a notice of appeal to be filed within 28 days after the date of the decision. The dismissal of the appellant's two applications were decisions for the purposes of *UCPR 748*. The appellant did not file his notice of appeal until 11 January 2010, more than 28 days after the making of orders on 25 September 2009. The only orders made in December were the refusal of leave to deliver the amended pleading, and the grant of leave to discontinue the respondents' action. The appeal against the other orders is therefore incompetent.

[39] The respondents did not take this point. They were content to accept the competence of the appeal but argue that it had only bleak prospects of success. I am not sure that if there were an appeal the court could overlook the lateness of the notice. Be that as it may, because of the respondents' attitude it is appropriate to say something of the apparent merits of the appeal against the September orders.

[40] As to the refusal to strike out the three sub-paragraphs from Mr McDonnell's affidavit it is difficult to see what the appellant's argument might be. They were inserted for the purpose identified by the primary judge. No doubt they contain an implied criticism of the appellant but his characterisation of the criticism appears, as the judge thought, grossly exaggerated.

[41] It is equally difficult to discern any basis for the apprehension of bias in the primary judge from the manner in which he conducted the hearings.

[42] One struggles to understand how there can be a legitimate complaint that the primary judge did not deal with the application to strike out the paragraphs as a first priority. Not only was that application without apparent merit it was subsidiary to more important questions and time was limited.

[43] Without listening to the recording of the proceedings it is impossible to know whether Peter Lyons J spoke in condescending terms or conspiratorial tones but one notes the appellant's recorded assent to what was proposed on 21 September by way of preparation for the resumed hearing.

[44] One struggles also to comprehend an intelligible criticism of the judge's request to Mr Barlow to provide further assistance in understanding the substance of the respondents' criticisms of the proposed amended defence and counterclaim. It was that routine request for amplified submissions that led Mr Fuller to conclude that the judge was "conspiring" with counsel to "ambush" him. His Honour's kind explanation that the appellant's criticisms were based upon his misunderstanding of what had happened should be accepted.

[45] The additional grounds for alleging apprehended bias, taken in the notice of appeal but not earlier, are similarly unpromising. The time to raise any concern about the order made on 24 July was in September. The complaint that the judge did not discuss the facts which are said to underlie the counterclaim when deciding whether the pleading was in the appropriate form, is misconceived.

[46] The prosects of success on appeal are slight. The appellant is without funds. It is therefore appropriate to order security for costs.

[47] There is evidence from an experienced litigation solicitor that the costs recoverable by the respondents should the appeal fail will total $12,000. The solicitor estimates that the costs of this application recoverable pursuant to an order that costs be paid on the standard basis, are about $5,000.

[48] There should therefore be an order that the appellant provide security for the respondents' costs of the appeal in the sum of $17,000. There is no need for an order that the prosecution of the appeal be stayed pending the payment of security. *UCPR 774* provides automatically for a stay in that circumstance.

[49] More problematic is the order sought that the appeal be dismissed if security is not provided. Should such an order be made it is inevitable, barring some extraordinary fortuity, that the appeal will be dismissed. The appellant, according to his affidavit, is unable to provide any security and cannot call upon friends or family for assistance.

[50] Nevertheless, I think the order should be made. It is not right that the respondents should be put to the expense of resisting a doubtful appeal without prospect of recovering their costs if the appeal fails. The other consideration in favour of the order is that it will not affect the appellant's substantive rights. Whether or not the appeal proceeds the appellant can prosecute his separate claim against the respondents.

[51] Accordingly, I would order the appellant to provide security in the sum of $17,000 within 28 days and further order that if security not be provided by that time the appeal be dismissed, without further order, and that the appellant pay the respondents' costs of the appeal and of this application to be assessed on the standard basis.