COURT OF APPEAL

MUIR JA

Appeal No 159 of 2011
SC No 5325 of 2008

JAMES CONOMOS	**Applicant/Second Respondent**
and	
TOGITO PTY LTD **ACN 003 089 192**	**Respondent/Appellant**
and	
PIONEER INVESTMENTS (AUST) PTY LTD **ACN 070 004 045**	**Applicant/First Respondent**

BRISBANE

DATE 21/02/2011

JUDGMENT

MR FREEBURN: Your Honour, Freeburn, initials P A, Senior Counsel, instructed by Coyne & Associates and I appear for Mr Conomos who's second respondent in the appeal and the applicant.

MUIR JA: Okay.

MR ROBINSON: Good morning, your Honour. My name is Robinson, initials G J. I appear instructed by Lillas & Loel for Pioneer Investments (Aust) Pty Ltd, the first respondent in the substantive appeal and the first applicant.

MR HACKETT: My name is Hackett, initials P W. I'm instructed by Morgan Conley and I appear for the appellant in the proceedings who's the respondent to both the applications.

MUIR JA: The first and second respondents apply for security for the costs of the appeal. The relevant principles are well established and there was no debate about them. It's not contested that the appellant will not be able to meet the respondents' costs should the respondents be successful on the appeal.

There is debate, however, about the likely quantum of the costs. The appellant's solicitor has assessed the costs of each party, that is, of each respondent party at $12,700 approximately. The first respondent's solicitor assessed his client's costs at $45,000 approximately and a costs assessor has assessed the second respondent's costs at $43,430 - $32,636 after deducting $10,794, being the estimate for the costs of this application.

The issues raised in the appellant's outline of argument appear to be within fairly short compass. They were ventilated, I would think, extensively at first instance. Considering the likely extent of preparation for the appeal, I'm inclined to the view that there is some substance in Mr Pitman's (the solicitor for the appellant) criticisms of the respondents' respective estimates.

It is relevant, also, that an order for security for costs, at least as a general proposition, is not intended to provide a full indemnity to the applicants for the order.

A director of the appellant, Mr Smits, has offered an undertaking, in effect, to pay each of the respondents up to $25,000 on account of their assessed or agreed costs of the appeal if the appellant fails to meet a costs order. In an attempt to substantiate the worth of his undertakings, he has sworn to the value of some specified assets.

The respondents complain that it's impossible to gain a true appreciation of Mr Smits' net asset position from the material supplied. The criticisms are justified. Mr Smits seeks to show a substantial asset position by reference to a second mortgage over land owned by a company of which he is the sole director and shareholder. Nothing is said of the company's liabilities or, for that matter, of Mr Smits' own general financial position. It is clear from the material that he is a property developer and it may be inferred that he has substantial liabilities. The nature and extent of these are undisclosed.

One matter which is relevant and which has caused me to give careful consideration to

whether an order ought be made is the fact that the respondents have sought an order for the costs of the trial against Mr Smits personally: on the bases that he allegedly ran a material point in the trial, or rather caused the appellant to run such a point, for which there was no factual basis as he should have known; he is and was the company's alter ego and that he funded the trial and stood to gain in the event that the appellant succeeded. The application for costs on that basis is yet to be determined.

Mr Hackett who appears for the appellant, urged, by reference to *Instyle Contract Textiles Pty Ltd v Good Environmental Choice Services Pty Ltd* (2009) 262 ALR 445 and *Memutu Pty Ltd v Lissenden* (1983) 8 ACLR 364, that it was sufficient to avoid the making of an order that the sole director and shareholder of the company, who happened to be a solicitor who could be understood to know the propriety of offering an undertaking had, in fact, offered the undertaking in the form that I've already described.

The discretion whether to order or not order security is broad and fettered only by the necessity that it be exercised by reference to established principle and with regard to the relevant facts. The matters on which the appellant relies are relevant considerations. But it seems to me that limited scope of the undertakings offered, coupled with the unsatisfactory nature of what Mr Smits is prepared to reveal in relation to the worth of his undertaking, when added to the absence of any suggestion that the appeal might be stifled by security for costs orders, merit the conclusion that an order should be made, at least in favour of the second respondent.

The issue between the first respondent and the appellant is only the quantum of the amount of security to be ordered.

...

MUIR JA: For the foregoing reasons, I order that within seven days of today's date the appellant give security in the sum of $25,000 in a form acceptable to the Registrar for the payment of any costs the Court may award the second respondent in respect of this appeal.

I order that the costs of the parties in respect of this application for security for costs be the parties respective costs in the cause on the appeal.

...

MUIR JA: There is a very large gap between the amounts claimed by way of security and the amount ordered. There is also the fact that, to a degree, these sorts of applications are part of the exigencies of the litigation. When that is coupled with the conduct of the respondents in seeking to have the applicant made personally liable I see no reason to depart from the order that I've proposed.

I note the undertaking of Leonardus Gerardus Smits by his counsel to pay the first respondent an amount of up to $25,000 on account of his assessed or agreed costs of the appeal in the event that the appellant fails to discharge any costs order made in this proceeding in favour of the first respondent.