

COURT OF APPEAL

WHITE JA

**APPEAL No 2700 of 2010
SC No 9546 of 2009**

JACK MUIR & KATHLEEN JESSIE MUIR

Applicants

v

JOHN PARKER

First Respondent

GLENN McGOWAN & KATHY McGOWAN

Second Respondents

BRISBANE

06/05/11

EX TEMPORE JUDGMENT

- [1] **WHITE JA:** On 21 June 2010, on the application of Mr and Mrs McGowan, who are the second respondents to Mr and Mrs Muir's application for leave to appeal an order made by Justice Mullins dismissing their application for review under the *Judicial Review Act 1991* of an order made by the first respondent sitting as the Small Claims Tribunal, I made orders that they give security for the costs of their application. I fixed the security at \$14,500 to be paid in a form agreed by the parties or, failing agreement, by the Registrar of Appeals.
- [2] That security has not been provided.

- [3] When pronouncing the order I neglected to stipulate the time within which Mr and Mrs Muir were required to provide that security. Subsequently the court drew this omission to the parties' attention.
- [4] In an attempt to resolve that matter economically Mr and Mrs McGowan's solicitor sought the consent of Mr and Mrs Muir to an order which required security to be provided within 14 days of that consent order. After some initial difficulty about the correct address for Mr and Mrs Muir that correspondence was sent by facsimile and email on 4 February 2011.
- [5] Mr and Mrs Muir responded by proposing a different consent order.
- “By consent of the parties to the appeal paragraph 1 of the Order made by White JA in the Court of Appeal Court of Queensland in Brisbane on 21 June 2010 be deleted and in lieu thereof the following paragraph substitute:-
1. The application by Jack and Kay Muir for leave to appeal the orders of Justice Mullins made 16 February 2010 be deemed resolved due to discontinuance and the orders and judgment of Justice Mullins be set aside.”
- [6] The Registrar Appeals contacted the parties to re-list this matter for today.
- [7] On 18 April 2011 the solicitors for Mr and Mrs McGowan wrote to Mr and Mrs Muir rejecting their proposed compromise and offering a draft Notice of Agreement to Discontinue Appeal – Form 68 – that the appeal be dismissed and that Mr and Mrs Muir pay the costs. In response Mr and Mrs Muir proposed that the appeal be dismissed by consent and each party pay his or her own costs.
- [8] The court has received extensive written submissions from Mr Muir. Neither he nor Mrs Muir have appeared in person. They have not appeared by telephone, having been invited to do so, Mr Muir citing his hearing difficulties. Furthermore, Mr Muir writes

that he is to have serious surgery shortly and wishes to be spared the stress of an appearance.

- [9] His written material takes issue with some findings which I made when hearing the application for security about the evidence relating to his and Mrs Muir's capacity to meet an order for costs should their application for leave to appeal and appeal proper if leave were granted be unsuccessful.
- [10] It would appear that Mr and Mrs Muir do not have a copy of my reasons given on 21 June 2010. They were themselves present in the court on that day when I gave them. It is still unclear to me whether they contest the conclusion that they could not meet such an order or contest merely the basis on which I reached that conclusion. It would not ordinarily be appropriate to debate these matters since the reasons set out fully the basis for reaching the conclusion that I did. However, Mr and Mrs Muir are self represented and in that circumstance I would add only this. Their concern seems to be that I doubted Mr Muir's assertion on 21 June that certain correspondence with registry staff when he applied to have filing fees for the application/appeal waived pursuant to r 971(3) was in existence. As mentioned on 21 June, the court file revealed the correspondence which Mr Muir has appended to his letter dated 5 May 2011 save for the correspondence which post dates 21 June.
- [11] As matters now stand, both parties, but more particularly Mr and Mrs Muir, do not wish to proceed with the application for leave to appeal. No formal application to discontinue has been filed, but with that plain manifestation of intention coupled with the failure to pay security and/or prosecute the proceedings, it is in the interests of justice that they come to an end. However, in view of Mr and Mrs Muir's non-attendance, I would make orders in the nature of guillotine orders.

[12] I make the following orders:

1. The application by Jack and Kathleen Muir for leave to appeal the orders of Justice Mullins made 16 February 2010 be stayed until Jack and Kathleen Muir give security in the sum of \$14,500 in such form as may be agreed by the parties or in default as determined by the Registrar of Appeals for the costs of the application, such security to be provided on or before 4.00 pm 20 May 2011.
2. In default the application for leave to appeal filed on 16 March 2010 be dismissed.
3. Jack and Kathleen Muir pay the costs of and incidental to the application for leave to appeal.
4. Jack and Kathleen Muir pay the costs of Glenn and Kathy McGowan of and incidental to the application for security for costs including costs reserved on 21 June 2010.
5. Jack and Kathleen Muir pay Glenn and Kathy McGowan's costs of today's appearance.
6. All costs to be assessed on the standard basis.