SUPREME COURT OF QUEENSLAND

CITATION:	*Schneider v Alusa & Ors* [2012] QSC 37
PARTIES:	**JOHANN JOSEF SCHNEIDER** (Respondent/Plaintiff) v **ALUSA PTY LTD (ACN 084 846 533)** (Applicant/First Defendant) **ALAN ROSS GAYNOR** (Applicant/Second Defendant) **ALAN ROSS GAYNOR as PERSONAL REPRESENTATIVE OF THE ESTATE OF URSULA JANE GAYNOR** (Applicant/Third Defendant)
FILE NO/S:	324 of 2010
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	28 February 2012
DELIVERED AT:	Cairns
HEARING DATE:	3 February 2012
JUDGE:	Henry J
ORDER:	**1. The application for an order for security for costs is dismissed.** **2. Costs reserved.**
CATCHWORDS:	PROCEDURE – COSTS – SECURITY FOR COSTS – where the defendant seeks an order for security for costs under r 671(b) – where the plaintiff is suing in capacity as trustee - whether the sub-rule applies where the plaintiff is suing for his own benefit as well as the benefit of others PROCEDURE – COSTS – SECURITY FOR COSTS – where the defendant seeks an order for security for costs under r 671(h) – where application by the plaintiff made at the same time and consented to by defendant – where application could have been brought earlier – whether delay, prospects of success or means of determinative weight *Uniform Civil Procedure Rules 1999* (Qld) r 18, r 671(b),(h), r 672.

Bride (as trustees of the Pinwernying Family Trust) v Stewart Unreported, Fed. Court of Aust., WA G191 of 1998, 19 January 1990, BC9003288.
Cowell v Taylor (1885) 31 Ch D 34.
Green (as liquidator of Armico Mining Pty Ltd) v CGU Insurance Ltd (2008) 67 ACSR 105.
Jeffrey & Katauskas v SST Consulting (2009) 239 CLR 75.
Upton and Anor v TVW Enterprises LTD and Anor (1984) 57 ALR 361.

COUNSEL: T W Quinn for the applicant/defendants
M Jonsson for the respondent/plaintiff

SOLICITORS: Lyne & Co for the applicant/defendants
Preston Law for the respondent/plaintiff

[2] By an application filed 3 January 2012, the defendants applied for an order, pursuant to r 670 of the *Uniform Civil Procedure Rules* ("UCPR"), that the plaintiff give security in the sum of $150,000 for the defendants' costs of and incidental to the proceedings.

Background

[3] The Further Amended Statement of Claim seeks the taking of an account of monies received or alternatively damages for conversion in respect of cattle allegedly removed by the defendants from a property known as St Ronans and in respect of the progeny of such cattle.

[4] St Ronans was one of three adjoining cattle properties, the other two being Springfield and Sundown, owned by a group of companies controlled by Donald Logan ("the Logan Group"). The Logan Group ran cattle on all three properties, treating the properties as one.

[5] The Logan Group sold St Ronans to R & E Henry Pty Ltd by a contract dated 23 June 1997. R & E Henry Pty Ltd then on-sold St Ronans by contract dated 3 December 1998 to the plaintiff, Johann Schneider, and Klaus Schneider as trustees of Schneider Property Trust ("the trustees").

[6] The contract between the trustees and R & E Henry Pty Ltd identified the property acquired as the leasehold land on which St Ronans was located. It did not specifically describe cattle as being part of the property acquired and it did not list cattle in the contract's third schedule, which apportioned components of the overall purchase price to specific items. On the other hand, clause 2 of the contract purported to expressly reserve property and assets set out in schedule 2 from the sale and the attached schedule 2 read "nil".

[7] The first defendant, whose directors were the second defendant and his now deceased wife Ursula Gaynor, purchased nearby Springfield by a contract dated 30 October 1998. On the same date the first defendant also entered into a contract for purchase of the livestock from D & G Logans Cattle Pty Ltd as trustee for the Georgina Donfam Grazing Trust. The livestock was described in the contract as including branded and unbranded cattle then depastured on Springfield as well as

cattle bearing five specified brands wherever depastured within two local shires, a geographical area including St Ronans.

[8] The plaintiff pleads that on settling the purchase of St Ronans on or about 7 January 1999, the trustees thereupon assumed possession of all cattle depastured on St Ronans, save for cattle branded "SPY" and agisted on St Ronans by the defendants, as trustee for the benefit of those interested in the Schneider Property Trust.

[9] The plaintiff pleads that the defendants unjustifiably and without authority of the trustees removed cattle from St Ronans in June 1999, September 2001, October 2005 and September/October 2008. Those cattle and their progeny are the subject of the plaintiff's claim for the taking of an account or alternatively damages for conversion. The plaintiff pleads the defendants have held those cattle and their progeny upon a constructive or resulting trust for the plaintiff in his capacity as the sole remaining trustee of The Schneider Property Trust.[1]

[10] The Claim was filed on 21 June 2010, long after the earlier of the above-mentioned alleged conversions. The limited progress of the litigation, including the delay in the filing of a notice of intention to defend following requests by the defendants for particulars, between then and September 2011 was canvassed in my decision in this matter of 7 October 2011 in which I dismissed an application to dismiss the Claim for want of prosecution.[2]

[11] The Defence, filed 18 November 2011, pleads inter alia a limitation of actions defence in respect of the cattle allegedly removed in 1999 and 2001 and denies that the 1998 agreement for sale of St Ronans operated to confer any interest by the purchasers in the cattle then depastured at St Ronans. The Defence pleads the removal of cattle occurred with the consent of the trustees and that the cattle belonged to the defendants.

Basis of application

[12] The applicants seek the exercise of the Court's jurisdiction to make an order that the plaintiff give security for costs pursuant to r 671 which relevantly provides:

> **"*671. Pre-requisite for security for costs***
> *The Court may order a plaintiff to give security for costs only if the court is satisfied –*
> *…*
> *(b) the plaintiff is suing for the benefit of another person, rather than for the plaintiff's own benefit, and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them; or*
> *…*
> *(h) the justice of the case requires the making of the order."*

[13] The applicant submits its application meets the requirements of either or both of limbs (b) and (h) of r 671.

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1 Further Amended Statement of Claim, [6].

2 *Schneider v Alusa Pty Ltd & Ors* [2011] QSC 366.

Rule 671(b): Is the plaintiff suing for the benefit of another person rather than his own benefit?

[14] Rule 671(b) applies, inter alia, where "*the plaintiff is suing for the benefit of another person, rather than for the plaintiff's own benefit".*

[15] The applicant submits the plaintiff is suing in a representative capacity and thus for the benefit of another. Rule 18 of the UCPR provides:

> *"If a person is suing or being sued in a representative capacity, the plaintiff or applicant must state the representative capacity on the originating process."*

[16] While the Claim nominates the plaintiff as *"Johann Josef Schneider"*, that part of the claim which under Form 2 ought be endorsed per r 18 if a plaintiff is suing in a representative capacity is endorsed, *"The Plaintiff sues in a representative capacity, namely in his capacity as trustee of The Schneider Property Trust".*

[17] It is apparent from the trust deed that the plaintiff is a beneficiary but not the sole beneficiary of the trust. The applicant submits it is self evident the plaintiff is suing for the benefit of another person thus enlivening the application of r 671(b).

[18] However, as the respondent emphasises, the mere fact the plaintiff is prosecuting the action representatively in his capacity as the sole remaining trustee, does not necessarily mean he is a plaintiff described by r 671(b), namely a "*plaintiff ... suing for the benefit of another person, rather than for the plaintiff's own benefit.*

[19] In *Bride (as trustees of the Pinwernying Family Trust) v Stewart*[3] French J, as he then was, observed of O 28 r 3(1)(b) of the Federal Court Rules, a provision similar to r 671(b), that it reflected the common law exception to the general principle that the poverty or insolvency of an applicant is not sufficient cause for an order for security for costs. That exception, as articulated by Bowen LJ in *Cowell v Taylor*,[4] was that "*if an insolvent sues as nominal plaintiff for the benefit of somebody else he must give security".* In *Bride* French J reviewed the application of that exceptional rule to trustees:

> *The "benefit" to which the rule refers is not readily amenable to exhaustive definition. In particular it is not to be limited to a direct financial gain — Andrews v Caltex Oil (Australia) Ltd (1982) 40 ALR 305. This broad approach has an impact on both limbs of the rule which is directed to the case in which an applicant is not only suing for the benefit of another person, but also does not sue for his own benefit. Where a trustee of a trust is also one of its beneficiaries, as I take to be the case here although there was no direct evidence of the fact, it may be the case that he does not, by reason of his status as a beneficiary, sue for his own benefit when he sues as trustee. But when he sues as trustee in the discharge of his duty to the beneficiaries the concept of "benefit" is, in my opinion, arguably wide enough to envisage the fulfilment of that duty. On that basis and simply as a matter of construction the rule would not apply to such a case.*

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3 Unreported, Fed. Court of Aust., WA G191 of 1998, 19 January 1990, BC9003288.

4 (1885) 31 Ch D 34 at 38, cited again more recently by French CJ in the joint judgment in *Jeffery & Katauskas V SST Consulting* (2009) 239 CLR 75 at 95.

> *Keely J in Riot Nominees Pty Ltd v Suzuki Australia Pty Ltd (1981) 34 ALR 653, referred to White v Butt (1909) 1 KB 50 at 54 where Buckley LJ said that he was startled by the contention that a trustee could be called a nominal plaintiff. A trustee was, in an action brought under the trust, the only possible plaintiff. In his Honour's view, O 28 r 3(1)(b) does not show an intention to depart from the common law position and was not intended to apply to a proceeding instituted by a trustee whose duty it is to carry out the terms of the trust.*
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> *Toohey J expressed some reservation about that statement as a general proposition in Upton v TVW Enterprises Ltd (1984) 57 ALR 361 at 363. His Honour observed that the use of the words "not for his own benefit" and a comparison of them with the expression "nominal plaintiff" may, in a particular case, require a reconsideration of the English authorities. And in Riv-Oland Marble Company (Vic) Pty Ltd v Settef S p A. (unrep. (Fed) court of Australia; 2 May 1988; Jenkinson J), Jenkinson J noting that White v Butt (above) was concerned with the question whether the trustee of a deed making provision for maintenance of a separated wife should be treated as nominal plaintiffs, questioned whether Buckley LJ would have had the trustee of a trading trust in mind when he made his observation. In his Honour's view, the decision in Riot Nominees (above) should be regarded as having effect only in relation to O 28 r 3(1)(b) which does not operate to limit the power conferred by s 56. And it is clear that whether or not O 28 r 3(1)(b) is applicable to trustees suing in that capacity, the wide discretion conferred by s 56 may require a consideration of whether or not the true beneficiaries of the action are standing behind what may be an empty indemnity against non-existent or insufficient trust assets.*[5]

[20] Section 56 of the then Federal Court Act 1974, referred to in the above quote, conferred a wide discretion to order the giving of security for costs although it was not regarded as falling to be exercised uninfluenced by O 28 which itself reflected the long standing practice of the Courts.[6]

[21] The analysis in *Bride* suggests it does not follow from the fact the plaintiff is a beneficiary of the Schneider Property Trust that he is suing for his own benefit when suing as trustee. However it does support the view that a trustee suing in discharge of his duty to the beneficiaries is suing for the trustee's own benefit, the benefit not being financial gain but discharge of duty.

[22] A significant added consideration in the present case is that the plaintiff deposes to having made a personal loan to him and his brother in their capacities as then joint trustees of the Schneider Property Trust to facilitate the purchase of St Ronans. If the action is successful any net proceeds of the action will be available to the plaintiff in his capacity as trustee to reduce or discharge loan monies advanced by him to him and his brother in their capacity as trustees. This bolsters the conclusion he is suing for his own benefit in that in addition to the non-financial benefit to him as trustee flowing the discharge of his duty to the beneficiaries, he also stands to

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5 Supra.

6 *Bride* supra, *High Tower Pty Ltd v Island Motel Pty Ltd* Unreported, G57 of 1988, 12 April 1989 BC8908110.

benefit financially as trustee in that the action may allow him to discharge the obligation he has as trustee to discharge the loan obligation to him as an individual.

[23] The fact that the plaintiff as trustee and the beneficiaries both potentially stand to benefit if the action is successful does not mean r 671(b) applies. Rule 671(b) applies where "*the plaintiff is suing for the benefit of another person, rather than for the plaintiff's own benefit".* The rule's use of the words *"rather than"* means it does not apply in cases where a plaintiff is suing for the plaintiff's own benefit as well as for the benefit of others.[7]

[24] In the circumstances of this case the plaintiff is not suing so as to attract the operation of r 671(b).

[25] That makes it unnecessary to consider the second limb of rule 671(b), namely whether "*there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them".*

Rule 671(h): Does the justice of the case require security for costs?

[26] There are a number of considerations enumerated in r 672 which are of relevance to the consideration in r 671(h) of whether the justice of the case requires an order for security for costs. Rule 672 relevantly provides:

> *"In deciding whether to make an order, the court may have regard to any of the following matters—*
> *(a) the means of those standing behind the proceeding;*
> *(b) the prospects of success or merits of the proceeding;…*
> *(e) whether the plaintiff's impecuniosity is attributable to the defendant's conduct;…*
> *(g) whether an order for security for costs would be oppressive;*
> *(h) whether an order for security for costs would stifle the proceeding;…*
> *(k) whether delay by the plaintiff in starting the proceeding has prejudiced the defendant;*
> *(l) whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;*
> *(m) the costs of the proceeding."*

[27] The respondent submitted in the course of oral submissions that r 671 stipulates jurisdictional conditions that need to be satisfied before the discretionary considerations set out in r 672 are enlivened. That submission is at odds with the Court of Appeal's decision in *Robson v Robson and Anor*.[8] In that matter, which was concerned with r 671(h), there was a divergence of views as to whether r 671 and r 672 require a two stage process under which the factors in r 672 only become relevant where the court is satisfied of one of the paragraphs of r 671. The majority view was a court could have regard to factors in r 672 in considering whether it is satisfied of one of the threshold matters in r 671.

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7 In *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105 at 119 Hodgson JA observed of a provision similar to r 671(b) that to apply it effectively required that the plaintiff is suing solely for the benefit of others. Similarly, in *Upton and Anor v TVW Enterprises LTD and Anor* (1984) 57 ALR 361 at 362 Toohey J observed: "*proof that a proceeding was brought for the benefit of another does not necessarily establish that it was not brought for the benefit of the applicant".*

8 [2008] QCA 36.

[28] However the language of r 672, in indicating the Court *"may have regard to"* any of the matters there listed, is permissive and not exclusory of other matters which may be relevant in all the circumstances of a particular case in assessing under r 671(h) whether the *"justice of the case requires the making of an order"* to give security for costs.

[29] One matter that is relevant to the justice of this particular case is the timing of the application for an order for security for costs. In *Robson v Robson and Anor* McMeekin J listed a number of aspects relating to the late timing of the application there as matters weighing against the exercise of the discretion to grant the application:

> *"(a) The long delay that has occurred in making the application. The long standing rule in seeking orders of this type is that they be made promptly once the defendant becomes aware of the facts on which the application is based. If it is not made promptly it is almost inevitable that there will be some prejudice to the respondent. Here the respondent is asked to find $173,000 in security. The appellants concede that is too much but, whatever the figure, it will be a substantial one. The matter is now set for trial on 25 March - only a few weeks away. To saddle any plaintiff with the task of finding a large sum of money when already on the door of the court involves prejudice.*
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> *(b) Whilst the defendants first raised the issue of security for costs by letter of 17 February 2005, which demand was promptly refused, no application was then made and the issue was not again raised until July 2007 and after the respondent had requested the trial date. The respondent was entitled to rely on the apparent abandonment of the issue.*
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> *(c) The delay has not only been extensive but followed on a summary judgment application brought by the respondent. Proceedings commenced on 22 November 2004. The defendants filed their first defence on 16 December 2004 and amended them significantly in late 2005. The summary judgment application was heard on 21 December 2005. At the very least one would have thought that the summary judgment application would have galvanised the appellants but it was not to be so."*

[30] In the present matter there was not in the past a summary judgement application but there was an application to dismiss the Claim for want of prosecution. That application was heard on 30 September last year. In the course of that application the applicants aired at length their arguments as to the disadvantage they had suffered through the late institution of the proceeding and the Claim's allegedly poor prospects of success, particularly the substantial part of it that is said to be out of time. Those arguments form a major component of the arguments now advanced in the application for security for costs. That substantial repetition of argument could easily have been avoided had the application for an order for security for costs been brought, as it could have been, at the same time as and in the alternative to the application to dismiss for want of prosecution. As at that time the Claim, filed on 21 June 2010, was well over a year old and there had therefore been ample opportunity for the defendants to enquire about the financial position of the plaintiff and his trust.

[31] The eventual application for security for costs, in the sum of $150,000, heard on 13 February 2012 was accompanied by the bringing of an application for the trial to be expedited and set down for hearing commencing 30 April 2012. The applicants did not resile from or seek to postpone the latter application when before me on 13 February and on that date I granted the latter application, setting the trial down for hearing commencing 30 April 2012. I reserved my decision as to the application for security for costs.

[32] While the trial is not quite as close to commencement as it was in *Robson,* the above sequence has some similarity to the chain of events in *Robson* which McMeekin J regarded as there weighing against an exercise of discretion favourable to the application for security for costs. There was no positive obligation on the applicants to have brought their application for security for costs at the time of their earlier application, however there would have been obvious utility in doing so given its earlier timing and potential to avoid duplication of a significant body of similar argument. The applicants' delay in not bringing the application until they were at the same time pressing successfully for the trial to be set down on an expedited basis detracts from their argument that the *"justice of the case requires"* the making of an order for security for costs. My consideration of the justice of the case necessarily involves considering the practical reality that the trial listing was expedited on the applicants' application, thus reducing the opportunity the respondent would have within which to meet the order for security for costs belatedly sought by the applicants.

[33] In advancing their argument in support of a finding pursuant to r 671(h) the applicants submit in particular that:

> (1) there was significant delay in instituting and, to a lesser extent, pursuing the claim;
> (2) the plaintiff has "*very little prospect of substantial success*"; and
> (3) the plaintiff has put no information before the Court as to his means or the means of the other beneficiaries of the Trust.

[34] I discussed the aspect of delay in determining an earlier unsuccessful application to dismiss the Claim for want of prosecution.[9] I then noted the force of the applicant's submission that there is inevitably some prejudice to the applicant flowing from the delay. As is apparent from my reasons in that matter, the respondent's explanation for his objectively lengthy delay in instituting the proceeding is that he had permitted or acquiesced to the removal of cattle from his property in the mistaken understanding the applicant had title to them. Given the value of the cattle removed it is a surprising mistake to have made. On the other hand, the applicant claims it was a mistake flowing from the representations of the second applicant. That is, the respondent alleges the delay, which I accept occasions some prejudice to the applicant, was a product of the alleged conduct of one of the applicants. Even if that is so, it is surprising the mistake was not realised earlier.

[35] As was the position at the time of the last application I am not in a position to determine with confidence whether or not there was such a representation or

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9 *Schneider v Alusa Pty Ltd & Ors* [2011] QSC 366.

whether or not it caused a mistake or whether or not the alleged mistake should have been discovered earlier.[10]

[36] In the circumstances the prejudicial impact of the significant delay in instituting proceedings upon the applicants' potential conduct of their defence is relevant, but ought not be given determinative weight, in assessing whether it is in the interests of justice to order security for costs.

[37] As to prospects I concluded in the earlier application:

> *"The plaintiff presently appears to have an arguable case. To the limited extent the claim's prospects of success can at this stage be meaningfully assessed, its prospects are not so poor as to be a consideration adverse to the respondent in the application to dismiss for want of prosecution."*[11]

[38] There has been no material filed since such as to warrant a different conclusion, save for the subsequent exchange of pleadings as to the limitation issue, the above conclusion having been expressed at a time when the then foreshadowed limitation defence had not been pleaded or replied to.[12]

[39] The Defence was filed after my decision on the application to dismiss for want of prosecution. It pleads the action, as it relates to the cattle allegedly removed in June 1999 and September 2001, is barred by virtue of the six year limitation period in ss 10(1)(a) and (2) and 12(1) of the *Limitation of Actions Act 1974* (Qld). The number of cattle removed on those occasions represents about 86% of the overall number of cattle allegedly removed.

[40] The Reply pleads in answer to the limitation defence that its claim for an account to be taken is an action by the plaintiff as beneficiary of and under the constructive or resulting trust upon which the Further Amended Statement of Claim pleads the defendants have held those cattle. The Reply pleads therefore that s 27(1) of the *Limitation of Actions Act 1974* excludes the above-mentioned periods of limitation. The Reply does not plead a mistake of the kind attracting the operation of s 38 of the Act, postponing a limitation period.

[41] The applicant contends the plaintiff's reliance upon a constructive or resulting trust should have been included in its prayer for relief. That argument does not appear to have been directly met by the respondent. By implication the respondent contends the absence of express reference in the prayer for relief to a constructive or resulting trust is not fatal because a constructive or resulting trust as pleaded provides the foundation for the relevant remedy actually sought, namely the taking of an account. It is unnecessary to determine this aspect now. The consideration of prospects with which I am here concerned is in the context of whether the justice of the case requires the making of an order for security for costs. Given that task, the focus of concern regarding the plaintiff's pleaded reliance upon a constructive or resulting trust should be on whether there is arguable substance to that reliance and not on the more technical argument as to whether it should have been expressly included in the prayer for relief.

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10 Ibid at [21].
11 Ibid at [25].
12 Ibid at [19].

[42] The applicants submit in effect that the pleading of a constructive or resulting trust is merely a transparent device to avoid the operation of the six-year limitation period. They submit the claim cannot be properly categorised as in substance falling within the meaning of s27(1)(b) of the *Limitation of Actions Act 1974*, which requires it to be an action by a beneficiary under a trust to recover from the trustee trust property or the proceeds thereof.

[43] The respondent contends however notwithstanding that the plaintiff is suing in his capacity as trustee under an express trust he may nonetheless be held to be the beneficiary under a constructive trust, holding his beneficial interest under the constructive trust as an asset under the express trust. He submits the *Limitation of Actions Act 1974* accommodates this possibility by adopting at s5(1) the extended definition of *"trust"* in the *Trusts Act 1973*, a definition which effectively extends the operation of s27(1) *"to cases where the trustee has a beneficial interest in the trust property"*.

[44] The applicant further submits that s 27(1) is limited to cases where the plaintiff is an institutional trustee and does not apply to constructive trusts of a purely remedial kind. The respondent accepts there is a body of case law that applies such a distinction to cognate provisions in other jurisdictions. There is a divergence of views between English and Australian courts as to the meaning of constructive trust although the above-mentioned body of case law as cited by the parties includes Australian cases, albeit from States other than Queensland.[13] However the respondent emphasises the point falls to be considered in the light of the language of the statute concerned and submits it is unclear whether the Queensland *Limitation of Actions Act 1974* was intended to abolish the distinction between different categories of constructive trust. That legislation draws on a definition of trust that expresses no such distinction. The respondent emphasises s 27 is a beneficial and protective provision. Such a provision should ordinarily be construed without limitations not found in the language of the statute.[14] As against this the more narrow implied meaning contended for by the applicants is founded upon a conceptual approach well supported by authority in respect of similar provisions.

[45] In the circumstances and notwithstanding the obviously significant hurdles the respondent must meet in advancing its position on the application of s 27 the respondent's position is reasonably arguable. Putting it differently, notwithstanding the apparent strength of the applicant's position on this point the respondent's prospects on the point are not so poor as to amount to a determinative consideration in considering whether the justice of the case requires the making of a costs order.

[46] It is also noteworthy in considering this point that even if the applicant succeeds on it, that will not determine the whole of the matter.

[47] The respondent has not put any material information before the Court as to his means or the assets of the trust. He deposes he is unemployed and has no income but those facts are inadequate to found his ensuing assertion, to which I give no weight, that any order for security would be oppressive or stifle the proceedings. In

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13 See for example *Piwinski v Corporate Trustees of Diocese of Armidale* [1977] 1 NSWLR 266, *Nolan v Nolan* [2004] VSCA 109, *Hewitt v Henderson & Anor* [2006] WASCA 233, *Feiglin & Anor v Ainsworth & Ors* [2011] VSC 454.

14 See for example *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 43-44.

short this is not a case in which lack of means is advanced as an argument against ordering security for costs.

[48] On the other hand there is no evidence suggesting an intention to shelter the plaintiff's assets or those of the trust from the risks of the action. The plaintiff is acting within the powers conferred by the trust deed in bringing this action and under it has an express right of indemnity against the trust assets, a right also conferred by s 72 of the *Trusts Act 1973.*

[49] The applicants apparently harbour a suspicion in this matter that there is a risk, should the claim fail, of the respondent not being able to satisfy an order for costs. The evidence is inadequate to sustain a positive inference to that effect but in any event such a risk is an incident of litigation and not a consideration which of itself favours a conclusion that the justice of the case requires an order for security for costs. An absence of information as to the means of the plaintiff and the trust is similarly not a persuasive consideration in favour of making an order for security for costs. Rather it means impecuniosity is not an argument available to the plaintiff to advance in resisting the making of such an order.

[50] It is for the applicant to satisfy the court the justice of the case requires the making of an order for security for costs.

[51] The applicant's arguments, particularly as to delay, prospects and means, fall to be considered collectively and in the light of the other circumstances of the case, including the belated pursuit of the application at the same time as a successful application to expedite the listing of the trial of the matter. In all of the circumstances the justice of the case does not require the making of an order for security for costs per r 671(h).

[52] It follows the application for security for costs must be dismissed.

[53] I have already reserved costs relating to part of the hearing before me on 3 February 2011. In the circumstances I should reserve costs in respect of this component of the hearing as well.

Orders

[54] My orders are:

1. The application for an order for security for costs is dismissed.
2. Costs reserved.