SUPREME COURT OF QUEENSLAND

CITATION:	*The Actors Workshop Pty Ltd v Harrison* [2014] QCA 92
PARTIES:	**THE ACTORS WORKSHOP PTY LTD** (applicant) **v** **GAVIN HARRISON** (respondent)
FILE NOS:	Appeal No 2369 of 2014 DC No 2020 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	28 April 2014
JUDGE:	Morrison JA
ORDERS:	**1. Pursuant to r 772 of the *Uniform Civil Procedure Rules* 1999 the appellant provide security for the application for leave to appeal to the Court of Appeal, and of any appeal associated with a grant of leave, in the sum of $11,600, in a form approved by the Registrar.** **2. Such security be provided within 28 days of the date of this order.** **3. Until the security is given a party to the appeal shall not take a further step in the proceedings without the leave of the Court of Appeal.** **4. If the security is not given as required by paragraph 1 of this order, the appeal be stayed so far as it concerns steps to be taken by the appellant, unless the Court of Appeal otherwise orders.** **5. The appellant pay the respondent's costs of and incidental to the application, to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – where the respondent in the appeal proper applies for security for costs of the application for leave to appeal and the appeal itself pursuant to r 772 of the *Uniform Civil Procedure Rules* 1999 – where in the primary court proceedings the appellant unsuccessfully sought damages from the

respondent for personal injuries and other loss suffered whilst attending an acting course conducted by the respondent – where the appellant has not and is unable to pay the judgment debt order against him in the primary court proceedings – where the primary court judge made adverse findings as to the appellant's credit – where the appellant is impecunious – where the appellant has had a trial on the merits – whether security for costs should be ordered

Uniform Civil Procedure Rules 1999 (Qld), r 772

Banks & Anor v Copas Newnham Pty Ltd & Ors [2001] QCA 526, cited
Commonwealth Bank of Australia v Eise (1991) 6 ACSR 1, cited
Harrison v The Actors Workshop Australia Pty Ltd [2014] QDC 40, related
Ivory v Telstra Corp Ltd & Anor [2001] QCA 490, cited
Mbuzi v Hall & Anor [2010] QSC 359, cited
Natcraft PtyLtd & Anor v Det Norske Veritas & Anor [2002] QCA 241, cited

COUNSEL: R S Ashton for the applicant
The respondent appeared on his own behalf

SOLICITORS: Thynne & Macartney for the applicant
The respondent appeared on his own behalf

[1] **MORRISON JA:** This is an application pursuant to r 772 of the *Uniform Civil Procedure Rules* 1999, for an order that the appellant give security for the respondent's costs of the application for leave to appeal, and of the appeal itself. Rule 772 provides:

> "(1) The Court of Appeal, or the court that made the decision appealed from, may order an appellant to give security, in the form the court considers appropriate, for the prosecution of the appeal without delay and for payment of any costs the Court of Appeal may award to a respondent.
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> (2) A court may make the order at any time on the application of a respondent to the appeal.
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> (3) The order must set the amount of security that must be given and the time within which it must be given.
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> (4) The Court of Appeal may at any time set aside or vary an order made under this rule."

[2] It is convenient if I refer to the parties to this application by their designations in the appeal proper. Thus, it is the respondent to the appeal that now seeks the order for security for costs.

[3] The appellant commenced proceedings in the District Court of Queensland against the respondent, on 6 June 2013. The claim was for damages for personal injuries and other loss, suffered while attending an acting course conducted by the

respondent in March 2012. The matter proceeded to a three day trial, and on 5 March 2014 the learned primary judge dismissed the appellant's claim.[1] The appellant made an application for leave to appeal on 13 March 2014. The present application was filed by the respondent on 27 March 2014.

The appellant's circumstances

[4] The appellant admits to being impecunious. He was so at the time of the trial, and at all times since. He attributes his impecunious state partly to the injury sustained whilst attending the course conducted by the respondent. The injury was consisted of a posterior dislocation and radial head fracture in his left elbow, requiring an attendance at the Princess Alexandra Hospital and subsequent surgery to reattach bony fragments to the radial head of his elbow.

[5] The other demonstrated cause of the appellant's impecuniosity is the failure of a business which he conducted under the name of Pro Teeth Whitening (Aust) Pty Ltd ("**Pro Teeth Whitening**"). That failure was, it seems, largely caused by a product recall notice issued on 6 February 2012. Whilst the company contested the validity of the recall notice in the Federal Magistrates Court[2] and, according to the appellant, successfully so, the practical consequence of the recall notice was that the business was destroyed.

[6] The appellant filed an affidavit saying that he was currently unemployed and receiving no financial assistance from the government. He says that he does not have the financial means to pay any order for security for costs. He has no real estate, investment property or shares, little in his bank account, and not much in the way of prospects of obtaining employment. His previous work history was in IT, and he does not have the funds to obtain retraining in that area. His assets are small, consisting of a used utility valued at $7,000, a joint share of furniture and effects worth $10,000, and a small amount in a bank account. His wife owns a motor vehicle valued at $8,000 and earns between $400 and $650 per week after tax, in "part-time casual" positions.

The proceedings at trial

[7] The appellant's claim concerned an injury to his elbow, sustained while attending an acting class in the respondent's premises. He was one of 10 students undertaking an improvisation class, conducted by an employee of the respondent. All of the students were adults. The improvisation class required the students to engage in an activity called "slow motion tag". This, they were told, meant that, when told to do so, they had to run as fast as possible to avoid being tagged by others, and then to move as slowly as possible and continue to avoid being tagged, when told to do that. The game alternated between maximum and minimum speeds with rapidly varying and random duration for each. There was no set direction in which to move during the activity.

[8] During a high speed segment the appellant's case was that he tripped on an unidentified but firm and rigid object, falling forward at high speed and injuring his left arm, which he put out to break his fall.[3] The appellant contended that there were objects stored on the periphery of the space. The essential negligence alleged

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1 *Harrison v The Actors Workshop Australia Pty Ltd* [2014] QDC 40 ("**Reasons**").

2 Now the Federal Circuit Court.

3 Reasons at [6].

against the respondent was to instruct 10 students to run as fast as possible within a confined space, with obstacles on the perimeter, and no control over the direction or speed of students' running.

[9] The learned trial judge rejected the appellant's evidence, and in doing so made seriously adverse findings as to his credit. Part of the reason for that was that the appellant did not reveal the impact on his business of the product recall notices by the ACCC, and the subsequent court action involving that notice. The appellant claimed part of his loss on the basis of his companies[4] having a gross income of nearly $600,000, and that he "earned approximately 70% of [the company] income in benefits".[5] His claim for future economic loss was "estimated at 20% reduction in average income" until age 65.

[10] The appellant's evidence was that the biggest effect of his elbow injury was the business impact on his companies, because he was the only employee. He described it as a "death blow to my business".[6] However, cross-examination revealed the truth, which was that Pro Teeth Whitening had effectively shut down because of the recall notice. The appellant accepted in cross-examination that his description of the "death blow" was false. Not surprisingly the learned trial judge took an adverse view of the appellant's credit as a result.

[11] However, the appellant's credit also suffered because an analysis of the company records did not support his claim that 70 per cent of the companies' gross income was for his benefit.[7]

[12] When cross-examination touched on questions of fringe benefits tax, the appellant claimed privilege from answering the questions on the grounds that it might incriminate him.[8] The learned trial judge was taken to the various documents in which the appellant referred to the cause of his impecuniosity, as well as the failure of Pro Teeth Whitening, as being attributable to the recall notice. In those documents no mention was made of the impact of his physical injury sustained at the respondent's improvisation class. The learned trial judge noted that and also said:

> "It must of course be remembered that the defendant did not in these proceedings tell me anything of any product recall referred to in those proceedings or of any other circumstance which might have adversely affected the earning capacity of the companies when giving his evidence-in-chief."[9]

[13] His Honour took a serious view of the appellant's attempt to explain away the absence of any reference to the product recall notice in these terms:

> "His statement to me that he did not think the product recall was relevant to the assessment of the damages I was required to make was in my view disingenuous at best and more probably deliberately dishonest. The cross-examination does little to enhance his credibility

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4 Pro Teeth Whitening and NaturaMed Health Pty Ltd.
5 Reasons at [13].
6 Reasons at [11].
7 Reasons at [16]-[18].
8 Reasons at [19].
9 Reasons at [30].

> about all aspects of his evidence. It causes me a very significant concern about accepting him as a witness of truth with respect to the circumstances of the accident [itself], or with respect to what instructions he says he was given by Ms Randall."[10]

[14] Apart from his adverse view as to the appellant's credit, the learned trial judge preferred the evidence of the respondent's witnesses, which included the principal of the respondent's college, the teacher of the improvisation subject, and three other students who were involved in the activity on that day. The significant aspects of their evidence were that:

(a) the improvisation activity was a prominent feature in learning skills to be an actor, and an essential activity;[11]

(b) the students had been told the purposes of the activity, which was not just a warm up exercise, but to teach "chivalry", namely playing with care and goodwill and overcoming any tendency to be unduly competitive;[12]

(c) the students were told that the slow motion part of the exercise was so that they could become aware of their body movements and they could pay attention to their muscularity and how their bodies moved in slow motion;[13]

(d) the students were instructed that when the pace changed to a normal or fast mode, they had to "play with chivalry", avoid making sudden erratic movements to avoid being caught and not try to get away from other students who might be trying to tag them;[14] and

(e) the students saw the appellant fall, and it was not because he hit any particular object, let alone a firm and rigid object as the appellant contended, but that "suddenly he just tripped"[15] and "he just fell".[16]

[15] The learned trial judge found that the plaintiff fell and injured himself in the way in which the students described, and that he was not near any inanimate object which might have caused him to trip.[17] His Honour recited the appellant's evidence, which was that at the time he was running and turning behind to look at another student who was attempting to tag him. His Honour did not accept the appellant's evidence that he felt his foot impact with the foot of another student, or an object stored in some part of the room. His Honour went on:

> "I find that no such inanimate object caused him to fall but cannot determine if he struck the foot of another student or fell [without the] involvement of another student. He may have tripped over his own feet when looking behind him, as he says he was doing. The fact that he may not have fallen in the past does not assist me to conclude that

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10 Reasons at [31].
11 Reasons at [34].
12 Reasons at [33], [35].
13 Reasons at [36].
14 Reasons at [36].
15 Reasons at [39].
16 Reasons at [40].
17 Reasons at [41].

> he must therefore have struck the foot of another student, and in any case I do not accept his evidence of the cause of his falling because of the significant concerns I have about his honesty."[18]

[16] His Honour's findings also included the fact that the improvisation exercise had been used regularly in the past without any prior mishap. His Honour found that the appellant:

> "suffered the fall and consequent injury because he tried to run excessively fast to avoid being tagged whilst he was looking behind him to enable him to see the wouldbe tagger. Such an approach was, I find, contrary to [the purpose] of the exercise as explained to him by Ms Randall."[19]

[17] The learned primary judge found that the respondent's conduct of the exercise was a reasonable one because the foreseeable risk of a collision was small, and the risk of significant injury was relatively slight. The injury was sustained because the appellant engaged in the activity in the way contrary to the instructions given to him.[20] His Honour found, therefore, that it was not unreasonable to conduct the activity in the way in which it was done. His Honour concluded, on the question of liability, as follows:

> "In my view, whilst a reasonable person in the position of the defendant, or Ms Randall, would have foreseen that the slow motion tag activity as undertaken involved some risk of injury to the plaintiff, such reasonable person would have concluded that to conduct the activity as Ms Randall did was reasonable, and that whilst there was a risk of injury, the risk was low. The school had conducted the activity in the past without incident. Even if someone fell, generally the effect would be inconsequential. It was a well recognised activity referred to in literature on the subject of training actors. It taught skills that were relevant. Ms Randall's specific evidence about both of those matters was unchallenged, and I accept this."[21]

Applicable principles

[18] The authorities establish that the following matters are relevant on applications such as this:

(a) the court has an unfettered discretion to order security;[22]

(b) the prospects of success on the appeal;

(c) the financial position of the appellant;

(d) the fact that an impecunious appellant, impecunious at trial, has already had a "day in court" and lost on the merits; this circumstance increases the likelihood of the exercise of a discretion in favour of an order for security for costs;

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18 Reasons at [41].
19 Reasons at [42].
20 Reasons at [43]-[44].
21 Reasons at [47].
22 *Mbuzi v Hall & Anor* [2010] QSC 359.

(e) the fact that the appellant blames impecuniosity on the respondent; this has diminished significance at appellate level, as compared with an application brought before trial;

(f) it is inappropriate to order an impecunious appellant to provide a greater level of security than is absolutely necessary; and

(g) whether there has been any delay in bringing the application.[23]

[19] It is no bar to the making of an order for security under r 772, that the respondent is a natural person.[24]

[20] The above matters are key considerations, but do not exhaustively state the factors which are relevant.

Discussion

[21] Of the factors referred to some are easy to deal with: the appellant admits he is impecunious and has been at all relevant times, including before the trial; and there has been no relevant delay in bringing this application.

[22] Other factors are more telling in terms of the determination of this application. The first of those is the prospects on appeal. On any view those prospects are not good. The appellant confronts serious adverse credit findings and his evidence was not accepted as to the way in which the incident occurred. More particularly, the learned primary judge accepted the evidence of eye-witness students in the same activity, which was to the effect that the appellant simply fell over and did not trip on some inanimate object, which was the case he pleaded.

[23] Further, the appellant confronts the findings of the learned trial judge to the effect that the respondent's conduct was reasonable, given that the activity was one which had been conducted regularly in the past without incident, was a well recognised activity in terms of training actors, and conducted in a reasonable way with relevant instructions having been given to the participants. His Honour found that the appellant engaged in the activity contrary to the instructions.

[24] In those circumstances the appellant confronts very formidable obstacles in succeeding. To counter that the appellant attached an annexure to his submissions which, he contended, demonstrated contradictory evidence and errors in the approach of the learned trial judge. Having had the chance to examine that annexure, I am unable to agree.

[25] Many of the points raised were to the effect that there was some evidence to show that there were obstacles on the periphery of the activity area. That is not to the point, given that the eye-witnesses gave evidence that the appellant did not encounter any such obstacle. Other points are to assert that the plaintiff was "required to participate". That is true but it is not contrary to any finding by the trial judge. In fact the trial judge's reasons proceed upon the basis that it was an exercise called for by the respondent, and the students were asked to participate in it.

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[23] See *Natcraft Pty Ltd & Anor v Det Norske Veritas & Anor* [2002] QCA 241, at [8]; *Mbuzi v Hall & Anor* [2010] QSC 359; *Banks & Anor v Copas Newnham Pty Ltd & Ors* [2001] QCA 526; *Ivory v Telstra Corp Ltd & Anor* [2001] QCA 490.

[24] *Ivory v Telstra Corp Ltd & Anor* [2001] QCA 490.

[26] Other points were concerned with the contention that the respondent did not act as a reasonable entity because there was no informed consent to the activity or no considered thought or planning was given as to what was to be done. Neither of those matters could be sustained in light of the evidence accepted by the trial judge.

[27] Other points were directed to the assertion that the person in charge of the activity failed to pay due attention, particularly as to trip hazards. These points can hardly succeed in light of the evidence accepted from the eye-witnesses. Since the appellant did not fall because he hit one of the obstacles, it is difficult to see the relevance of the fact that objects were stored around the periphery.

[28] Further points were directed to the contention that the "tag" element of the exercise was not intended to be played as children did in a playground. That is true, but it is not contrary to any finding of the trial judge. The slow motion element of the exercise showed that it was far from anything like an activity carried out by children in a playground.

[29] There were many other points, but none of them advance the appellant's case. To a large extent they consist of attempts to point to various items of evidence to show that a contrary view could have been reached. However, all of the points confront the fact that the appellant's evidence was not accepted, and the evidence of the respondent's witnesses, particularly those of eye-witnesses, was accepted. That evidence was that the appellant simply tripped or fell while he was running, looking over his shoulder at who might tag him, and the injury did not occur in the way in which the appellant contended it did.

[30] In my view the prospects on appeal are poor.

[31] The appellant admits being impecunious. Whilst it might be that part of his impecuniosity could be traced to the injury he suffered, that does not mean that the respondent caused it. The findings at trial are against the appellant on that issue. More compelling is the evidence which suggests that the appellant's source of income from Pro Teeth Whitening disappeared, and that is the primary cause of his current predicament. That has nothing to do with the respondent.

[32] In my opinion the most important factor is that the appellant has already had his "day in court" and lost on the merits. He had the benefit of a three day trial, albeit one in which he represented himself, and the chance to test all of the evidence. The consequence is that he lost on the merits, and more than that, has an adverse finding as to his credit against him. In my view that is a compelling circumstance in favour of granting an order for security for costs. Given what the applicant has said in his submissions about his inability to pay the costs which he has been ordered to pay from the trial, there seems little prospect that the costs being incurred for the appeal could be met, absent some security.

[33] In my view that factor outweighs the starting point for most self-represented impecunious litigants, which is that poverty should not be a bar to litigation. It also outweighs, in my opinion, the fact that an order for security for costs might lead to the appeal being stayed. There is a deal of difference between the position before a trial on the merits, and the position pending an appeal. The appellant has had the benefit of a three day trial, and a determination of his cause, on the merits. He did not succeed in that, and faces formidable obstacles to success in the Court of Appeal.

[34] In my view security for costs should be ordered.

Amount of the security

[35] It is appropriate to provide for no greater security than is absolutely necessary.[25]

[36] The respondent provided a report by a costs assessor. There are limitations on the report in that it seems he was not given any instructions specific to this appeal, beyond the level of counsel's fees. The report records that:

> "Unlike numerous similar reports that I have prepared regarding anticipated costs in proceedings, in this instance I have not had regard to [the solicitor's] files; but only to the key pleadings from the District Court … the Notice of Appeal; and similar reports that I have prepared in such matters."[26]

[37] There is therefore a degree of speculation in the report, and a danger that a "one size fits all" approach has been used.

[38] Further, the schedule includes some categories which I would be disinclined to permit in terms of calculating a total figure. They include the respondent seeking and obtaining advice on the prospects on appeal. At first blush that might seem odd, but given the findings at trial, I think it right to approach this application on the basis that that is, in the particular circumstances of this case, an unnecessary step. Likewise, I do not see any need to include a component for settling the appeal book. The appellant will be responsible for preparing the appeal books and I think it reasonable to proceed on the basis that the respondent will simply let the appellant put into the appeal book whatever he likes.

[39] Apart from those matters the assessor has adopted the approach of limiting his estimates to common attendance, document preparation, perusals, correspondence and copying tasks. The methodology has been to adopt main categories of professional cost items, and then quantify a likely conservative number of items to perform each category of steps. This includes a 25 per cent uplift which, according to the report, "may be allowed by a court appointed costs assessor".

[40] Leaving out those matters which I consider should not be included, the assessor's estimate for professional costs, including the appropriate uplift, totals $6,519. His estimate of the outlays totals $16,800. Consequently his postulated total is $23,319. There is a degree of imprecision in that figure because some items are estimated in terms of the amount, and others are merely estimations in terms of number (such as letters, attendances, and copies).

[41] Security is not ordered in the form of an indemnity for all costs to be incurred. It is, after all, merely "security" for the costs. In my view it would be sufficient in terms of security for the costs to order the appellant to pay about half of the estimated sum. I therefore propose to order that the appellant pay the sum of $11,600 by way of security for the respondent's costs.

[42] I gave consideration at one point to whether security should be calculated only to the point of submissions being filed. I did so because of the prospect that the appellant might obtain advice, as a result of which his future conduct of the appeal might be affected. However, his determination to follow the appeal through was made plain in his submissions.

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25 *Commonwealth Bank of Australia v Eise* (1991) 6 ACSR 1, at 4 per Young CJ in Eq.

26 Exhibit JAD-7 to the Affidavit of Davidson, filed 4 April 2014.

Conclusion and orders

[43] The application for security for costs is allowed, in the sum of $11,600.

[44] Subject to any further submission the orders will be:

1. Pursuant to r 772 of the *Uniform Civil Procedure Rules* 1999 the appellant provide security for the application for leave to appeal to the Court of Appeal, and of any appeal associated with a grant of leave, in the sum of $11,600, in a form approved by the Registrar.

2. Such security be provided within 28 days of the date of this order.

3. Until the security is given a party to the appeal shall not take a further step in the proceedings without the leave of the Court of Appeal.

4. If the security is not given as required by paragraph 1 of this order, the appeal be stayed so far as it concerns steps to be taken by the appellant, unless the Court of Appeal otherwise orders.

5. The appellant pay the respondent's costs of and incidental to the application, to be assessed on the standard basis.