[2016] QCA 238

COURT OF APPEAL

PHILIP McMURDO JA

Appeal No 6979 of 2016
DC No 4729 of 2013

WOOLWORTHS LIMITED
ABN 88 000 014 675 **Applicant**

v

BERHANE GHEBREIGZIABIHER BERHANE **Respondent**

BRISBANE

MONDAY, 19 SEPTEMBER 2016

JUDGMENT

PHILIP McMURDO JA: The respondent to this appeal applies for security for the costs of the appeal under r 772 of the *Uniform Civil Procedure Rules*. The discretion which arises under that rule is a broad one. In *Murchie v Big Kart Track Pty Ltd (No 2)* [2003] 1 Qd R 528, in the joint judgment of Justices Davies, Jerrard and Wilson, it was said that the Court, under this rule, has:

> "…an unfettered discretion whether to order security and, if so, in what amount."

and that:

> "The fact the plaintiff has already had "her day in court" and lost, her impecuniosity, and her prospects of success on appeal –"

were all factors relevant to the exercise of that discretion.

This is an appeal from a judgment in the District Court which dismissed a claim by the appellant for damages for personal injury arising, he alleged, from his employment by the respondent. I was referred by counsel for the appellant, the respondent to the present application, to several authorities in New South Wales, Victoria, South Australia, and Tasmania, which have discussed the question of whether, in what might be called the ordinary case of an impecunious unsuccessful plaintiff appealing a personal injuries judgment, ordinarily security for costs will not be ordered.

In particular, I was referred to the recent judgment of the Victorian Court of Appeal in *Trkulja v Dobrijevic & Ors* [2015] VSCA 281 and a judgment in the Supreme Court of South Australia in *McVicar v S & J White Pty Ltd* [2006] SASC 233. I was referred also to a judgment of Hodgson JA in the New South Wales Court of Appeal in *Porter v Gordian Runoff Limited & Anor* [2004] NSWCA 69 where it was said that:

> "In practice, orders are not normally made simply because an appellant is impecunious, because to do so would frustrate many genuine appeals."

That passage has been cited in New South Wales and in some other jurisdictions in support of the proposition that ordinarily, in a personal injuries case, an appeal by an unsuccessful and impecunious plaintiff will not be the subject of an order for security for costs. However, as counsel for the appellant also properly pointed out, those decisions in other jurisdictions must be considered in the context of the procedural rules which there apply. In particular, in New South Wales and, it would appear, in Victoria, there is a necessity for an applicant for security for costs to show special circumstances. That requirement does not exist under the Queensland r 772.

There is, nevertheless, a persuasive onus which is upon any applicant for security under that rule and impecuniosity, of itself, would not be a determinative consideration. As the Court said in *Murchie*, the discretion is broad and it requires a consideration of all relevant circumstances, of which impecuniosity is but one.

Clearly also, it is relevant to consider the apparent prospects of success in the appeal. The trial judge here found that the respondent to the appeal was negligent by not supervising the implementation of a safe system of work in respect of the manner and frequency of handling of

loads by employees such as the appellant. His Honour found that the appellant was injured in this workplace by suffering an aggravation of a pre-existing degenerative condition. But ultimately, he dismissed the appellant's claim because he found that the appellant would have suffered this injury regardless of the respondent's negligence. The principal issue, and perhaps the only issue in this appeal, is whether that factual finding was wrong. I do not have the trial record, but extracts from the evidence, as set out in the appellant's outline of argument, suggest that the appellant has at least an arguable case. In particular, it is not unlikely that the trial judge has erred by failing to consider whether the appellant had a claim upon the basis of acceleration of the onset of the condition of which he complained as a result of the respondent's negligence.

Against that argument, counsel for the respondent in the appeal submitted that an examination of the relevant evidence would result in the conclusion that his Honour was correct to reject the appellant's case, as he did. Further, it was submitted that it was no part of the appellant's pleaded case that there was a loss from the acceleration of the pre-existing condition and that, therefore, if the trial judge has not determined that question, it is because it was not raised for determination at the trial.

In the context of this application, it is not possible to reach a clear view as to who is likely to win the appeal. It is sufficient to say that, on the material available to me and having read the reasons for judgment of the trial judge, the appellant's case can be considered to be at least an arguable one.

The appellant is impecunious. He has assets consisting only of a car and two or three thousand dollars in a bank account. He has three school aged children. He says that he requires the vehicle to transport his children. He is in receipt of a Newstart Allowance from Centrelink. He has part-time work as a translator and migrant resource worker. His hours of work vary significantly, but he works from time to time for an amount of $32 per hour. There is evidence from a solicitor for the appellant that if the security which is sought or any other security is ordered, the appellant will not be able to prosecute the appeal as he has no financial resources to provide security, and that such an order would frustrate his ability to continue with his appeal.

If he is able to prosecute his appeal, he will do so with the benefit of representation by both senior and junior counsel. Senior counsel, with the appellant's trial counsel, who appears today, have written the appellant's outline of argument. The same senior counsel is briefed to argue the appeal. He is not engaged upon a speculative basis. The appellant's solicitors are a firm who, it is well known, specialise in personal injury claims and act upon a speculative basis. It may be inferred that they have acted upon that basis thus far in this litigation and would do so for the appeal. And they are funding the fees of at least senior counsel.

In these circumstances, in a sense, there are not two but three distinct interests in the outcome of the appeal, namely, the interests of the parties to the appeal and that of the appellant's solicitors. However, the appellant retains his own distinct interest in the outcome and, it is fair to assume, one which in a monetary sense is greater than that of his lawyers.

These circumstances do not engage the principle often applied, for example, in the case of corporations, that a party which is no more than a nominal plaintiff will be ordered to provide security so that those who stand to benefit from success in the claim should bear the risk of the claim failing. That principle is not engaged, because it cannot be said in any sense that the present appellant is a party with no real interest of his own in the outcome. In that respect I agree with what was said by Penfold J in *Hughes and Janrule Pty Ltd* (2011) 177 ACTR 1; [2011] ACTCA 15 at [165].

Another of the considerations referred to in *Murchie* is the fact that the plaintiff has had his day in court. Put another way, the discretion which is to be exercised under r 772 has a different content from that to be exercised where security for costs is sought ahead of a trial. In particular, the authorities which show a predisposition against the ordering of security for costs against a personal plaintiff ahead of a trial are of less relevance in the present context.

The amount for which security is sought, according to the filed material, exceeds $98,000. The damages which were assessed were less than $250,000. Whether costs of that order could be thought to be at all proportionate in the circumstances of the present case need not be discussed, although the amount of the security which is sought seems, at first glance, to be somewhat

alarming. But in my conclusion, having regard to the apparently reasonable prospects of success in the appeal – by which I mean that, as I have said, the appeal is arguable – the application for security should be refused.

…

The remaining question is one of the costs of the present application. It is true that the application has been unsuccessful. And in that circumstance, the costs of the application might be thought to follow the event. However, should it be determined that the appeal lacked merit, it seems to me that there would be something of an injustice to the respondent by having them meet the costs of this application which has failed, in no small way, because of the preliminary view which I have reached as to the merits of the appeal.

The fairer course is to order that each party's costs of this application be that party's costs in the appeal, and it will be so ordered.