SUPREME COURT OF QUEENSLAND

CITATION:	*Schokman & Anor v Hogg* [2003] QCA 28
PARTIES:	**VINCE SCHOKMAN** **CAROL SCHOKMAN** (applicants/appellants) v **EARLE RAYMOND HOGG** (respondent)
FILE NO/S:	Appeal No 4111 of 2002 SC No 2834 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	10 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2003
JUDGES:	Davies and Williams JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	PROCEDURE - COSTS - SECURITY FOR COSTS - POVERTY - LACK OF MEANS - where trial judge refused application for security for costs in an arbitration - where respondent impecunious - where respondent had a real interest in the outcome of the proceedings - whether respondent's impoverishment is a basis for an order for security *Cowell v Taylor* (1885) 31 ChD 34, considered *Coyle v Cassimatis* [1994] 2 QdR 262, considered *Harpur v Ariadne Australia Ltd* [1984] 2 QdR 523, considered *Pacific Acceptance Corporation Ltd v Forsyth (trading as Flack and Flack) (No 2)* [1967] 2 NSWR 402, considered
COUNSEL:	B D O'Donnell QC, with T Matthews, for the appellants K E Downes for the respondent
SOLICITORS:	Dibbs Barker Gosling for the appellants Clayton Utz for the respondent

DAVIES JA: This is an appeal from a discretionary decision refusing an application by the respondents in that application, the respondents who are also respondents in an arbitration for security for their costs against an impecunious claimant.

It is common ground that the principles applicable to an application for security for costs of trial applied to that application and that the principles with respect to an appeal against such a decision apply to this appeal.

The respondent to this appeal is a builder. He has claimed in an arbitration sums of money said to be due for work done by him under a building contract dated 5 July 1999 with the appellant for the construction of the Mandalay Aged Care Facility. The contract sum was over $3.6 million. There is an alternative claim upon a quantum meruit. The respondent's primary claim is for over $800,000 and the alternative claim is for over $1.1 million. There is a defence and counter-claim by the appellant but there is nothing to indicate, and it was not argued, that the respondent's claim is unarguable. The arbitration proceeded for some time and adjourned but is likely to resume again soon. It had not commenced, I think, when the application was heard by the learned primary judge.

It is undisputed that the respondent is now insolvent. On 21 February 2002 he entered into a deed of arrangement with a trustee for his creditors. Pursuant to it he undertook to diligently proceed with the subject proceedings and to attempt

to recover monies from another company; and he agreed that, to the extent that he recovered money in either respect he would pay to the trustee an amount being the smaller of his net recovery and whatever monies were required to allow the claims of his ordinary creditors at the date of the deed to receive a dividend of 100 cents in the dollar.

Certain related creditors, described in the deed as non-claiming parties, were effectively and for all practical purposes, not entitled to distribution under the deed. It seems to be common ground that the totality of debts entitled to payment under the deed, that is, the independent creditors, was $600,000. The related creditors appear to be members of the respondent's family and a family company.

If the respondent is wholly successful in the current arbitration all of the creditors entitled to payment under the deed of arrangement, that is, the independent creditors, will be paid 100 cents in the dollar and there will be more than $200,000 or alternatively $500,000 left over either for the respondent or members of his family. To that extent, therefore, in my opinion, the respondent has a real interest in the outcome of the present proceedings other than the discharge of his debts to independent creditors.

The respondent has an additional interest in the success of these proceedings. If he defaults under the deed of arrangement, including by failing to pay out his independent

creditors in full, his remaining assets, albeit small, will become available for distribution among his creditors.

The appellant submitted that the impecuniosity of the respondent combined with the arrangement with his creditors to which I have just referred, warranted an order requiring security for their costs. Mr O'Donnell rightly pointed out that, neither under the deed nor in any other way are the trustees or the creditors exposing themselves to liability for the appellant's costs should the respondent fail in the arbitration. It was also pointed out correctly that, if the respondent had become bankrupt the arbitration would have had to be conducted by his trustee in bankruptcy who would therefore become liable for costs.

In applications for security for costs against an individual, as opposed to one against a company, one starts with the general proposition, in applications at first instance, that poverty is not a bar to a litigant: see *Cowell v. Taylor* (1885) 31 ChD 34 at 38.

In saying "as opposed to one against a company" I have in mind that the very basis for the exercise of jurisdiction to order security for costs against a company, as distinct from an individual, is that the company is impoverished: see *Pacific Acceptance Corporation v. Forsyth* (*trading as Flack & Flack) (No. 2)* [1967] 2 NSWR 402 at 407; and *Harper v. Ariadne Australia Limited* [1994] 2 QdR 523 at 532. In the latter of those cases Mr Justice Connolly explained the mischief at

which the company provision, which is now s 1335 of the *Corporations Law* is aimed. He said:

> "An individual who conducts his business affairs by a medium of a corporation without assets would otherwise be in a position to expose his opponent to a massive bill of costs without hazarding his own assets. The purpose of an order for security is to require him, if not to come out from behind the skirts of the company, at least to bring his own assets into play. If, however, he is already available for whatever he is worth, the object of the legislation is seen to be satisfied."

As I will mention in a moment, Mr O'Donnell submits that the analogous principle should apply proportionately it seems in a case such as this but, at least on the law as it has been stated so far, the cases decided on applications for security for costs against companies are distinguishable from those seeking security for costs against an individual.

For that reason it seems to me *Rosenfield Nominees Pty Ltd v. Bain and Co* relied on by Mr O'Donnell which is unreported but was decided on 13 October 1988 in the Supreme Court of New South Wales are distinguishable.

So it seems to me that on orthodox authority, the respondent's impoverishment cannot be a basis for an order for security. The appellant, through Mr O'Donnell, seems clearly enough to accept this but his contention is perhaps encapsulated in the ground of appeal which reads as follows:

> "Her Honour ought to have concluded that a natural plaintiff who is impoverished should be required to provide security for the defendant's costs in circumstances where:

(a) the action is being conducted by the plaintiff at the request of his creditors (or other persons), and those creditors (or others) stand to benefit if the action is successful;

(b) it is appropriate, in the interests of justice, that those creditors (or others) should bear some of the risk with respect to costs if the action is unsuccessful;

(c) those creditors (or other persons) have not been shown to be incapable of putting the plaintiff in a position to provide appropriate security for the defendant's costs,

notwithstanding that the plaintiff will himself obtain some benefit if the action is successful."

Mr O'Donnell has summarised that contention in the following form, that persons who stand to benefit from plaintiffs' success such that it is appropriate that they bear some of the risks of litigation should do so in order that there be a fair balance struck between the interests of an impecunious plaintiff and a defendant.

No authority was cited to support this proposition. Indeed on the contrary there is a long line of authorities elsewhere and in the Supreme Court of Queensland to the contrary. *Coyle v. Cassimatis* [1994] 2 QdR 262 is a recent example of this. That was a much stronger case for the appellant than for the person seeking security than this was for the appellant, for it was contended in that case, with some substance, that it was unlikely that the plaintiff would recover more than the amount owing to his creditors.

Nevertheless, Mr Justice Ryan refused to order security. Indeed he went so far as to say and I quote:

> "I consider that an order for security for costs should not be made against an impecunious plaintiff unless it is unequivocally established that he is suing as a nominal plaintiff only."

I do not think we need to go as far as in this case as Mr Justice Ryan did in that but I should add to his judgment in that case the judgment of the Full Court of Queensland in *Harper v. Ariadne* to which I have already referred which involved an individual plaintiff as well as a company plaintiff and I refer in particular to pages 530 and 531 of that case.

The submission also seems to me to be inconsistent with the basis upon which rule 671 was enacted. It would be curious if an additional exception to the basic rule were formulated in these terms in the light of that rule and in the light of the specific rules which are contained in the paragraphs of that rule.

We are then, it seems to me, left with an exercise of discretion by a judge refusing to order security in circumstances where it was plainly arguable that the respondent claimant would, if successful in the arbitration recover possibly $200,000 or even $500,000 in excess of the amount owing to the creditors entitled under the deed. I can find no error in her Honour's reasoning and nor does her conclusion compel the view that some error must have occurred.

Courts have long been jealous of the rights of impecunious litigants to sue at least at first instance and I can see no basis for changing that rule as substantially as Mr O'Donnell submits we should.

The appellant here has also relied on some evidence of what took place since the hearing before the learned primary judge. Nothing really seems to emerge from that of any importance and Mr O'Donnell in fairness to him I should say did not rely on it in any specific way today. All it seems to show to me is that there was a time when the respondent appeared to be unable to proceed with the arbitration. That seems to have changed. He has now reached the point where he has been able to obtain money to $25,000 to pay the arbitrator's fees and thus enable the arbitration to be continued and he has sworn that the money did not come from the creditor.

The learned primary judge was also of the view that there was evidence that the respondent's impecuniosity came about at least in part through his failure to obtain payments to which he claimed to be entitled under the contract or presumably on the alternative basis.

In my view it is unnecessary to consider the correctness of her Honour's conclusion in this respect which was contested by Mr O'Donnell. Even without that consideration no error has been demonstrated in my view in her Honour's reasoning or

conclusion that no order for security should be made and no new basis has been shown for reconsideration.
I would therefore dismiss the appeal.

WILLIAMS JA: Mr O'Donnell frankly conceded that he was asking this Court to broaden the basis on which a Court could order security for costs against a plaintiff. Given the long-standing authorities referred to by Justice Davies, and the provisions of rule 671, I am not persuaded that another exception along the lines sought by Mr O'Donnell should be recognised by this Court.

I agree with the reasons of Justice Davies. The appeal should be dismissed.

CULLINANE J: I also agree that the appeal should be dismissed for the reasons of the presiding judge.
