

SUPREME COURT OF QUEENSLAND

CITATION: *Coleman v Greenland & Ors (No 3)* [2004] QCA 236

PARTIES: **PATRICK JOHN COLEMAN**
(respondent/appellant)
v
BRADLEY MICHAEL GREENLAND
(first applicant/first respondent)
PAUL GAYLEN DONALDSON
(second applicant/second respondent)
BRENDAN JASON POWER
(third applicant/third respondent)
CONSTABLE BRADLEY ADAM BARDELL
(fourth applicant/fourth respondent)
STATE OF QUEENSLAND
(fifth applicant/fifth respondent)

FILE NO/S: Appeal No 2619 of 2004
SC No 809 of 2001

DIVISION: Court of Appeal

PROCEEDING: Application to Strike Out

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED EX TEMPORE ON: 14 July 2004

DELIVERED AT: Brisbane

HEARING DATE: 14 July 2004

JUDGES: de Jersey CJ, Jerrard JA and Mackenzie J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Unless by 4.00 p.m. on Thursday the 12th of August 2004 the appellant complies with the order for the provision of security for the costs of the appeal made on 1st April 2004, this appeal be deemed to be dismissed, with costs including any reserved costs, to be assessed, without the need for any further order of the Court, and the Registrar is authorised to enter up an appropriate record of that dismissal.**
2. Costs of this application should be the respondent's costs in the appeal.

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – OTHER MATTERS – where there is an application by the respondents for the dismissal of the appeal – where appellant

has not furnished \$10,000 security for costs, ordered by the Court of Appeal on 1 April 2004 – whether the court can set aside the order for security for costs

COUNSEL: No appearance by the applicant, the applicant's submissions were heard on the papers
No appearance by the respondents, the respondents' submissions were heard on the papers

SOLICITORS: No appearance by the applicant, the applicant's submissions were heard on the papers
No appearance by the respondents, the respondents' submissions were heard on the papers

THE CHIEF JUSTICE: We have considered the application of the respondents to Appeal Number 2619 of 2004 in which the appellant is Patrick John Coleman and the respondents are Bradley Michael Greenland and others, including the State of Queensland.

This application by the respondents for the dismissal of the appeal has been considered by us on the papers. The respondents seek an order - as I have said - that the appeal be dismissed. The basis of the application is that the appellant has not furnished \$10,000 security for costs, which on 1st of April 2004 the Court ordered be provided, with the proceedings stayed in the meantime.

All parties are content that this matter be determined on the papers without the need for an oral hearing. In his written submissions, the appellant has said that he does not have \$10,000 and has sought to defer his obligation to provide the security until after the appeal is determined. He hopes to recover substantial damages by succeeding in the appeal.

While the appellant secured a judgment at trial entitling him to some thousands of dollars damages, that has been stayed pending an assessment of costs awarded against the appellant in favour of the fifth respondent.

Following the Court's order on the 1st of April that the security be provided, the appellant appealed against that order and that appeal was dismissed on the 28th of May 2004. In his reasons for judgment, Williams, Justice of Appeal said this:

"Rule 772 sub-rule 3 of the Uniform Civil Procedure Rules provides that an order for security for costs 'must set the amount of security that must be given and the time within which it must be given'. Here no time was specified. That appears to me to have been a deliberate decision on the part of the Court.

Whilst the rule would ordinarily require a time to be set, circumstances may justify the Court in making the order open ended. When that occurs the appeal is stayed until such time as security is given or the appeal is dismissed for want of prosecution on an application brought by the respondents.

The respondents - in their written outline - asked the Court to fix a time within which the security should be paid. In the circumstances it is not appropriate to do that at this stage. That is not a matter addressed by the applicant in his written submissions. As indicated, the respondents have their remedy if security is not provided within a reasonable time."

My view is that a reasonable time for the provision of this security has probably by now well and truly elapsed. More than three months have passed since the order was made on the 1st of April 2004. It follows that prima facie the appeal

should be dismissed, effectively for want of prosecution. I return to the issue, however, whether we should take that step right now. The appellant's submission focuses principally on his prospects of success in the appeal. The Court ordering security on the 1st of April considered those prospects to be slight.

The appellant also characterises the attitude of the Crown in seeking to have his appeal dismissed as discriminatory and oppressive. I should say that at this stage it is of no particular moment that consideration be given to the merits of the appeal. Their relevance was considered, and rightly so, at the time the order for the provision of the security was made.

At this stage, the attention of the Court should focus on whether there has been compliance with the order, any reason advanced for non-compliance and any ground for any expectation that the security may be provided at some stage in the future.

On the material before us, there is a plain contention that the appellant does not have the means to provide the security and there is frankly no basis for any reasonable expectation that he will acquire that capacity in the future. In his written submissions, the appellant has sought an order now setting aside the order made on the 1st of April.

One appeal against that order has already been considered and dismissed by this Court. No new circumstance has been raised

which could conceivably warrant the Court's now setting aside the order made on the 1st of April.

As to the appellant's request that the Court, in effect, defer his obligation to provide the security until his hoped for success upon the hearing of the substantive appeal, taking that course would of course absurdly controvert the very purpose of the security order.

In the interest now of fairness, however, and having regard to considerations of due process, the appeal should not be dismissed except consequently upon the appellant's non-compliance with an order for the provision of security which actually sets a specific time limit. To allow almost a month would satisfy the interests of fairness, and the date I select is Thursday the 12th of August 2004.

The order of the Court should in my view be as follows:

Unless by 4.00 p.m. on Thursday the 12th of August 2004 the appellant complies with the order for the provision of security for the costs of the appeal made on 1st April 2004, this appeal be deemed to be dismissed, with costs including any reserved costs, to be assessed, without the need for any further order of the Court, and the Registrar is authorised to enter up an appropriate record of that dismissal.

Costs of this application should be the respondent's costs in the appeal.

JERRARD JA: I agree.

MACKENZIE J: I agree.

THE CHIEF JUSTICE: Those are the orders of the Court.
