

SUPREME COURT OF QUEENSLAND

CITATION: *Bidjara Aboriginal Housing & Land Company Ltd v Commonwealth of Australia & Ors* [2005] QCA 287

PARTIES: **BIDJARA ABORIGINAL HOUSING & LAND COMPANY LIMITED** ACN 010 017 955
(plaintiff/appellant/respondent)
v
COMMONWEALTH OF AUSTRALIA
(first defendant/first respondent/applicant)
ROSS ANDREW DUUS AND GARRY JOHN HAMILTON
(second defendants/second respondents/applicants)

FILE NO/S: Appeal No 4658 of 2005
SC No 9905 of 2003

DIVISION: Court of Appeal

PROCEEDING: Applications for Security for Costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 12 August 2005

DELIVERED AT: Brisbane

HEARING DATE: 12 August 2005

JUDGES: McPherson JA and Wilson and Dutney JJ
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **1. Order that the Commonwealth of Australia be substituted for the Aboriginal and Torres Strait Islander Commission in the title to these proceedings.**

2. Leave granted to the applicant/second respondent to read and file two affidavits: affidavit of Judith Ann Gilmore dated 11 August 2005 and affidavit of Darlene Roberta Robinson dated 11 August 2005 on the undertaking that the originals will be provided.

3. The appeal stands dismissed with costs unless, on or before 12 September 2005, or such further time as the court may before that time allow, the appellant provide security, by payment into court or otherwise to the satisfaction of the registrar, in the amount of \$10,000

for the costs of the first respondent;

4. The costs of and incidental to the application by the first respondent form part of the first respondent's costs of the appeal;

5. The application of the second respondent is dismissed;

6. The costs of the appellant and of the second respondent of and incidental to the application by the second respondent be those parties' costs in the appeal;

7. An outline of argument be provided by the appellant in form and substance complying with the Practice Direction No 1 of 2005 by 12 September 2005.

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – where identity of directors of company against which security sought may be uncertain – where no register of members of company – where grounds of appeal imprecise – whether second defendant receivers should also receive security for costs

COUNSEL: L A Stephens for the appellant/respondent
P E Hack SC, with S D Anderson, for the first respondent/
applicant
K E Downes for the second respondents/applicants

SOLICITORS: Clewett Corser & Drummond for the appellant/respondent
Australian Government Solicitor for the first respondent/
applicant
Minter Ellison for the second respondents/applicants

McPHERSON JA: We will order that the Commonwealth of Australia be substituted for the Aboriginal and Torres Strait Islander Commission in the title to the proceedings.

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McPHERSON JA: These are applications by the first and second defendants that the plaintiff provide security for the costs of an appeal against a decision given against it in the Supreme Court. The decision struck out various paragraphs of

the statement of claim, and, on some of the other, summary judgment was given against the plaintiff.

It is well settled that on an application like this two principal considerations are relevant. One is the prospects of success on the appeal. The other is whether, if not successful, the appellant will be in a position to pay, and will pay, the respondent's costs of the appeal. Judged by each of these criteria this is a matter in which security for costs may well be appropriate.

The plaintiff is a company which conducts a housing business near Charleville. It wished to branch out into another trade and for that purpose procured a loan to be given by the first defendant, whose statutory successor is the Commonwealth of Australia. The plaintiff now raises challenges to its own authority to provide guarantees and securities for the loan, as well as to the appointment of the second defendants as receivers under those securities of its assets and income. In fact, there is some doubt who it is who has or had authority to put the plaintiff in motion to institute this appeal at all.

There is evidence before us that the identity of the directors has in the course of these proceedings been shown to be uncertain, and it is said by the receivers that there is no register of members in which the members of the company are recorded. That is itself a factor which, in my opinion, weighs strongly in favour of an order for security for the

costs of the appeal in this case. It is necessary that there should be certainty about who is to pay the costs and whether they will be paid by the person who activated the appeal.

The Commonwealth has the benefit of certain provisions of the *Corporations Law* which the learned Judge at first instance held were effective to treat the instruments in its favour as legally efficacious. The second defendant receivers have an interest in protecting the secured assets against the possibility of their being diminished in this way, and that interest would extend to claims for damages made against them by the plaintiff.

In the end, however, as I understand the matter, the Commonwealth of Australia will now be the one which benefits by the assets that the second defendants as receivers collect in the course of their duties. Reading the reasons of the learned Judge at first instance, I am left with the distinct impression that the appeal is not at all promising. The notice of appeal is, for the most part, not at all precise about the errors that are assigned to the decision of the Judge below. Added to that is the fact that it seems doubtful, to say the least, whether the appellant is in a financial position to meet the costs of the appeal if unsuccessful.

All those who stand behind the plaintiff put forward a case that it is completely solvent and, if that is so, then it would be in a position without any difficulty to provide

security for the costs of this appeal. In all the circumstances it is, in my opinion, appropriate that an order for security be made.

The first defendant has estimated the costs of appeal as in the order of \$10,000. Experience gained in this Court suggests that the estimate does not err on the high side. The second defendants' estimate is slightly more, but it is content with the amount of \$10,000 in respect of the security for their costs. The amount fixed as security is not, of course, designed to provide a complete indemnity against the costs of appeal. In the circumstances I would propose to fix the amount of the security to be provided in the figure of \$10,000.

The question that then arises is whether that amount should be provided as sought in respect of the two sets of defendants or both of them, or in respect of the first defendant or applicant for the order here and for itself alone. My conclusion is that the appropriate order would be to order security in the sum of \$10,000 in favour of the first defendant, that is the Commonwealth of Australia.

Ms Downes has assured us that her clients have an indemnity from the Commonwealth in the usual form commonly obtained by receivers in these cases. For my part I cannot see why the additional cost of her being here, useful though it may be to the Court, should be borne by the appellant. I would,

therefore, make an order only for security for the costs of the first defendant respondent in this case.

The order that I propose should be made is that the appeal stand dismissed with costs unless on or before 12 September 2005, or such further time as the Court may before that date allow, security is paid into Court, or provided in a form to the satisfaction of the Registrar, in the sum of \$10,000 for the costs of the appeal of the first respondent.

The costs of the first respondent of and incidental to this application will form part of the first respondent's costs of appeal. It follows from the matters I have stated that the application by the second respondents for security for their costs should be dismissed.

I turn now to the question of the outlines about which Mr Hack SC, on behalf of the first defendant, has made some complaint.

Essentially, his complaint about it is that the outlines, such as they are, do no more than recite the grounds of appeal which are themselves most imprecise and general in their form.

I would therefore, in respect to this, ask Mr Hack to state what formal order he seeks in respect of those grounds of appeal. Before doing so or having Mr Hack formulate that order I should, however, first ask my colleagues to give their judgment in the matter of this application or applications.

WILSON J: I agree with the orders proposed by the presiding Judge with respect to the application for security for costs and with the reasons he has given.

DUTNEY J: I also agree with the orders proposed and the reasons for making those orders.

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McPHERSON JA: Further order that on or before 12 September 2005, or such further time as the Court may allow before that date, outlines of argument be provided by the appellant in form and substance complying with Practice Direction No 1 of 2005.

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