

SUPREME COURT OF QUEENSLAND

CITATION: *Thompson v Robinson* [2005] QCA 387

PARTIES: **COLIN JAMES THOMPSON**
(plaintiff/respondent/applicant/respondent)
v
ROBERT RAYMOND LLOYD ROBINSON
(defendant/appellant/applicant/respondent)

FILE NO/S: Appeal No 30 of 2005
DC No 3122 of 2002

DIVISION: Court of Appeal

PROCEEDING: Application for Security for Costs
Application to Strike Out

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 21 October 2005

DELIVERED AT: Brisbane

HEARING DATE: 11 October 2005

JUDGES: McMurdo P, Keane JA and Douglas J
Judgment of the Court

ORDER: **1. Mr Robinson's application filed on 15 September 2005 is refused with costs to be assessed**
2. Mr Thompson's application filed on 3 October 2005 is granted with costs to be assessed
3. The appeal is dismissed with costs to be assessed

CATCHWORDS: APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - SECURITY FOR COSTS - appellant ordered to pay security for costs of appeal by primary judge - appellant failed to satisfy security for costs order within time - appellant applied to Court of Appeal for variation of security for costs order - Court of Appeal refused application - appellant subsequently sought to provide security to Deputy Registrar (Appeals) - Deputy Registrar (Appeals) refused to accept security - appellant made further application to Court of Appeal to vary security for costs order - respondent's legal costs up to present all unrecovered and exceed primary judgement sum - respondent's current costs incurred in relation to the appeal already close to amount of original security ordered - respondent's costs if appeal proceeds would exceed original security ordered - no satisfactory explanation by appellant as to why security he is able to give now was not available in time ordered - no

evidence provided by appellant that he has reasonable prospects of shortly obtaining further funds - arguments appellant wishes to agitate on appeal do not immediately appear plainly correct - whether appellant has shown any good reason why security for costs order should be varied - whether security for costs order should be varied

APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - STAY OF PROCEEDINGS - WHEN REFUSED - payment of monies owing under primary judgement by appellant stayed pending hearing of appeal within six months - stay order automatically lifted if appeal not heard in that time - appeal not heard within six months - appellant applied to Court of Appeal for variation of the stay order - application dismissed - appellant made further application to Court of Appeal for variation of stay order - whether application competent - whether stay order should be varied

APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - POWERS OF COURT - OTHER MATTERS - appellant dilatory in prosecuting appeal to the prejudice of respondent - respondent incurred significant costs in two interlocutory applications pending appeal - respondent denied access to half the proceeds of primary judgement sum for six months - arguments appellant wishes to agitate on appeal do not immediately appear plainly correct - appellant not shown to be able to fully compensate respondent should appeal be unsuccessful - whether appeal should be struck out

Uniform Civil Procedure Rules 1999 (Qld), r 772(4), r 774(b)

Colefax v Piggins [2001] QCA 427; Appeal No 6877 of 2001, 5 October 2001, cited

Jackson v Coal Resources of Queensland Ltd [1999] QCA 265; Appeal No 3262 of 1999, 15 July 1999, cited

Luadaka v Dooley & Anor [2003] QCA 51; Appeal No 9380 of 2002, 21 February 2003, cited

COUNSEL: C W Neville (sol) for the appellant
G D O'Sullivan for the respondent

SOLICITORS: Clewett Corser & Drummond for the appellant
Georgeson & Company for the respondent

- [1] **THE COURT:** On 7 December 2004 after a 12 day trial for defamation in the District Court, judgment was entered against the applicant, Mr Robinson, in favour of the respondent, Mr Thompson, for \$72,000 together with interest and costs. Mr Robinson filed an appeal from those orders on 4 January 2005. On 31 March 2005, the District Court heard Mr Robinson's application for a stay of the judgment pending appeal and Mr Thompson's application for security for costs of the appeal.

On 6 April 2005, Nase DCJ relevantly ordered, first, on the security for costs application, that Mr Robinson give security for costs of the appeal fixed at \$15,000 within two months and, second, on the stay application, that "enforcement of part of the decision under appeal be stayed by direction that one half of such of the money order as is recovered under an enforcement warrant issued on 16 March 2005 be paid into the trust account" of Mr Thompson's solicitors but if the appeal not be determined within six months, the stay order be automatically lifted.

- [2] The appeal was listed for directions before the President on 17 June 2005 because Mr Robinson had not provided the security within the ordered time. Mr Robinson was ordered to pay Mr Thompson's costs of that hearing. Mr Robinson has not yet satisfied that costs order.
- [3] On 13 July 2005 this Court heard Mr Robinson's application to vary the orders made by Nase DCJ. On 22 July 2005 the Court dismissed his application with costs.¹ Mr Robinson has not yet satisfied that costs order. The Court also declined to deal with a request made on Mr Thompson's behalf at the hearing on 13 July 2005 to dismiss Mr Robinson's appeal. Mr Thompson had not brought an application for that purpose under r 774(b) of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR").²
- [4] Despite Mr Robinson's unsuccessful application to this Court, on 9 August and again on 23 August 2005 Mr Robinson sought to provide the \$15,000 security by the tender of funds in that amount to the Deputy Registrar (Appeals). The Deputy Registrar rightly declined to accept that tender of funds because the time for provision of the security under Nase DCJ's order had expired and this Court had refused to extend the time for provision of the security.
- [5] Mr Robinson brings the present application under UCPR r 772(4) to vary the orders made by Nase DCJ, first, for security for costs and, second by staying his Honour's stay order pending determination of the appeal subject to Mr Robinson's compliance with a strict timetable for the preparation of the appeal. Mr Thompson has now also brought an application in which he seeks an order under UCPR r 774(b) that Mr Robinson's appeal be dismissed with costs.

Mr Robinson's application

- [6] In the circumstances set out it is necessary for Mr Robinson to show good reason why this Court should now vary the order for security made by Nase DCJ, bearing in mind that the Court has already refused such an application once.³ Whether or not good reason is shown by Mr Robinson depends on balancing a number of factors.

Relevant factors

- [7] On Mr Robinson's behalf it is said the Court's principal concern should be the desirability of determining his appeal on its merits and that Mr Robinson's present readiness and willingness to provide the security affords good reason for this Court to extend the time for provision of the security. In this regard, it must be

¹ *Thompson v Robinson* [2005] QCA 253; Appeal No 30 of 2005, 22 July 2005.

² *Thompson v Robinson* [2005] QCA 253; Appeal No 30 of 2005, 22 July 2005 at [18].

³ Cf *Colefax v Piggins* [2001] QCA 427; Appeal No 6877 of 2001, 5 October 2001.

acknowledged that the principal reason for the Court's refusal of Mr Robinson's applications on 22 July 2005 was "the absence of any reason to expect that [the security] will be forthcoming".⁴

- [8] Against these considerations, it is necessary to balance the prejudice which might ensue to Mr Thompson from an order extending the time for the provision of security by Mr Robinson.
- [9] Mr Thompson's solicitor, Mr Ferguson, has sworn two affidavits the effect of which is to show, first, that Mr Thompson's legal costs up to the present (all of which are unrecovered) exceed the amount of Mr Thompson's judgment against Mr Robinson and, second, that Mr Thompson's costs incurred in relation to the appeal are now about \$11,500, an amount approaching the \$15,000 security originally ordered by Nase DCJ. If the appeal proceeds, Mr Thompson's costs of and incidental to the appeal will be likely to be about \$26,500.
- [10] Were security for costs of \$15,000 now ordered, Mr Thompson would obviously suffer prejudice in terms of costs thrown away between 22 July 2005 and the present time, that is, in terms of the costs involved in contesting this application. Ordinarily an order for the payment by Mr Robinson of the costs of this application would cure that prejudice. Since Nase DCJ's order Mr Thompson has also incurred, through no fault of his, costs in attending the directions hearing on 17 June 2005, and the costs of the applications determined on 22 July 2005. Mr Robinson has not provided evidence, and nor does he contend, that he has reasonable prospects of shortly obtaining the further funds to meet the existing costs orders against him in this Court, let alone the costs of this application. The unfortunate history of the matter since Mr Thompson was given judgment against Mr Robinson last December and the evidence (or lack of it) before this Court suggest that, whilst a security for costs order of \$15,000 was likely to protect Mr Thompson's position on 6 April 2005 should Mr Robinson be unsuccessful in his appeal, security in the sum of \$26,500 would now be necessary to achieve this. There is no evidence, nor even a submission, that Mr Robinson is or will soon be able to provide security for costs of the appeal in the sum of \$26,500.
- [11] It is submitted on behalf of Mr Thompson that the absence of evidence from Mr Robinson as to the source of the \$15,000 which Mr Robinson has recently been able to proffer by way of security should lead the Court to infer that Mr Robinson's previous assertions of impecuniosity were less than frank, and that Mr Robinson has deliberately sought to evade compliance with the order for security for reasons other than his impecuniosity. The Court would obviously be reluctant to draw such an adverse inference against Mr Robinson in the absence of compelling evidence. But quite apart from that, the evidence of Mr Ferguson shows that the purpose for which security for costs was originally ordered has largely been frustrated, even if not deliberately by Mr Robinson, and there is no evidence before the Court which would justify the view that the frustration of the order for security could be obviated by a further order for security for costs. There is simply no basis on which the Court could confidently expect that Mr Robinson would be able promptly to "top up" the security for costs which should be available to Mr Thompson.

⁴ *Thompson v Robinson* [2005] QCA 253; Appeal No 30 of 2005, 22 July 2005 at [12].

- [12] The final factor of relevance to the exercise of the Court's discretion to vary the date for the provision of security is the consideration, mentioned in the decision of 22 July,⁵ that the arguments which Mr Robinson wishes to agitate on appeal, so far as it is possible for this Court to come to a preliminary view, are not plainly correct. At least, those arguments are not so clearly correct as to outweigh, in the balance of relevant considerations, the Court's inability to protect Mr Thompson against the prospect of being forced to incur more substantial legal costs, which he will have no prospect of recovering even if he is successful on the appeal, in order to defend the judgment which he has obtained.
- [13] The determination and enforcement of the rights and obligations of the parties in accordance with law is the principal function of the courts. In this case, there has been a determination of the rights of the parties by the decision at first instance. Each of the parties has had his day in court.⁶ Mr Robinson has, of course, a right of appeal against that decision. The order for security did not seek to deny that right, but sought to strike a balance whereby that right of appeal would be exercised on terms under which, if the appeal were to be unsuccessful, Mr Thompson would not suffer an undue erosion of the benefit of the judgment he had obtained by the expenditure of legal costs which he could not recover from Mr Robinson. That was an appropriate balancing of the interests of both parties. It is a balance which, unfortunately, has been upset by Mr Robinson's delay in meeting his obligations. The reason for that delay is unexplained in the sense that Mr Robinson has not satisfactorily explained why he was unable to give the security, which he is now able to give, in accordance with the terms of the order of Nase DCJ. Those terms no longer provide adequate security. Mr Robinson has not established that he can presently or shortly provide Mr Thompson with adequate security for costs of and incidental to the appeal. Mr Robinson's application to vary Nase DCJ's order for security for costs should be refused.
- [14] As to the second of Mr Robinson's applications, it is not immediately clear that UCPR r 761 allows this Court to stay the order of Nase DCJ that the stay on the enforcement of part of the judgment given on 7 December 2004 be automatically lifted if the appeal from that decision was not determined within six months. Mr Thompson would have ordinarily been entitled to the fruits of his judgment against Mr Robinson in December last year. Mr Robinson was given an indulgence by Nase DCJ's order partly staying that judgment. Mr Robinson's tenacious insistence that his appeal be kept on foot, notwithstanding his failure to comply with the order of the court below in relation to security for Mr Thompson's costs, has produced a situation where Mr Thompson would be prejudiced if the variation sought by Mr Robinson were now to be granted by the Court.
- [15] Even accepting that the application is competent under UCPR r 761, the history of this matter and the evidence before the Court in this application does not provide any reason for granting Mr Robinson's application to stay Nase DCJ's order.
- [16] It follows that Mr Robinson's application should be dismissed with costs to be assessed.

⁵ *Thompson v Robinson* [2005] QCA 253; Appeal No 30 of 2005, 22 July 2005 at [11].

⁶ Cf *Luadaka v Dooley & Anor* [2003] QCA 51; Appeal No 9380 of 2002, 21 February 2003 at [5]; *Jackson v Coal Resources of Queensland Ltd* [1999] QCA 265; Appeal No 3262 of 1999, 15 July 1999 at [3].

Mr Thompson's application to dismiss the appeal

- [17] In the circumstances set out, Mr Robinson has been dilatory in prosecuting his appeal to the obvious prejudice of Mr Thompson who has incurred significant costs in two interlocutory applications pending appeal before this Court quite apart from the costs incurred in defending Mr Robinson's current application. Mr Thompson was denied access to half the proceeds of his District Court judgment for six months, a period in which, had Mr Robinson prosecuted his appeal with diligence, it is likely the appeal would have been heard. As already noted, the arguments which Mr Robinson wishes to agitate at his appeal do not immediately appear plainly correct. Mr Robinson has not shown himself to be able to fully compensate Mr Thompson for the costs of defending the appeal should the appeal fail.
- [18] On Mr Robinson's behalf, it may be said that Mr Thompson could, and should, have moved sooner to apply to have the appeal dismissed; but against that it can be said that the appeal has been stayed since Mr Robinson's failure to provide security by 11 June 2005. There was no pressing need for Mr Thompson to expend further funds in seeking the dismissal of the appeal; and there is no suggestion that Mr Robinson suffered any prejudice as a result of Mr Thompson's delay in applying for the dismissal of the appeal.
- [19] The competing factors favour the granting of Mr Thompson's application with costs to be assessed: the appeal should be struck out with costs to be assessed.
- [20] Mr Thompson's counsel has asked for an additional order that Mr Robinson give security fixed at the sum of \$15,000 within seven days for security for the costs of the present applications and the costs previously ordered against him in this Court on 17 June 2005 and 22 July 2005. We are not confident that this Court has power to make such an order but in any case we are not persuaded that any order other than the usual order as to costs should be made.
- [21] **Orders**
1. Mr Robinson's application filed on 15 September 2005 is refused with costs to be assessed.
 2. Mr Thompson's application filed on 3 October 2005 is granted with costs to be assessed.
 3. The appeal is dismissed with costs to be assessed.