SUPREME COURT OF QUEENSLAND

CITATION:	*Karam v Mansukhani & Anor* [2006] QCA 349
PARTIES:	**THAMIR KARAM** (applicant/respondent) **v** **DAYAL HASSAM MANSUKHANI** (first respondent/first appellant) **POOJA DAYAL MANSUKHANI** (second respondent/second appellant)
FILE NO:	CA No 4624 of 2006 DC No 380 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs
ORIGINATING COURT:	District Court at Southport
DELIVERED EX TEMPORE ON:	14 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	14 September 2006
JUDGES:	McMurdo P, Jones and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for security for costs is granted** **2. Appellant Mrs Mansukhani is to give security to the satisfaction of the Registrar of the Court of Appeal in the sum of $7,000 on or before 12 October 2006 for payment of any costs the Court of Appeal may award to the respondent Dr Karam** **3. The purported appeal is to be stayed until the security required is provided** **4. The appellant is to pay the respondent's costs of and incidental to this application** **5. If the security is not provided by 12 October 2006, the purported appeal is to be struck out with costs and without further order**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – where appellant has several costs orders made

	against them in District Court – where these costs orders have not been satisfied – where appellant is a citizen of India and has no property or assets in Australia – where appellant has been refused visa for re-entry into Australia – whether security for costs should be awarded and in what amount
	Uniform Civil Procedure Rules 1999 (Qld), r 668, r 772
	Commonwealth Bank of Australia v Eise (1991) 6 ACSR 1, cited *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [2003] QCA 552, cited *Murchie v The Big Kart Track* [2003] 1 Qd R 528, cited *Peterson v Rockhampton Permanent Building Society* [1988] 2 Qd R 49, cited
COUNSEL:	K El-Asswad for the applicant No appearance for the respondent
SOLICITORS:	Ledger Commercial & Property Lawyers for the applicant No appearance for the respondent

THE PRESIDENT: Justice Douglas will deliver his reasons first.

DOUGLAS J: This is an application for security for costs by the respondent to a purported appeal. The purported appeal is from a decision of the District Court of 1st June 2006 refusing an application pursuant to r 668 of the *Uniform Civil Procedure Rules* 1999 (Qld) to set aside a previous judgment obtained by the respondent against the appellant and two other parties.

It seems that leave to appeal is required under s 118 of the *District Court of Queensland Act* 1967 (Qld) and no application for leave to appeal has yet been filed in the matter.

The appellant was also ordered to pay costs in respect of a variety of matters arising out of the action heard in the District Court including the costs of that proceeding to be assessed on the standard basis. Several other costs orders made against her were to be assessed on the indemnity basis. The costs orders followed a decision of that court in September 2005 giving judgment for the respondent for $55,092 together with interest. It appears that leave to appeal from the costs orders has not yet been sought either.

The appellant is a citizen of India who resides in Mumbai but has provided an address for service in Australia. The evidence is that she has no property or assets in Australia. The respondent's solicitors have asked her to provide her tax returns and financial accounts to demonstrate that she has the cash flow and/or asset backing to meet an adverse costs order or for the provision of a bank guarantee in the sum of $30,000 to be held by the Court as security until the apperal is finalised.

The appellant has also failed to pay earlier costs orders and the amount of the judgment obtained against her in circumstances where the respondent has already incurred significant costs himself in the conduct of the proceedings in the District Court.

The appellant has also been refused a visa for her re-entry into Australia.

The order of the learned trial judge refusing leave to reopen the matter under UCPR r 668 was accompanied by an order that the appellant pay the costs on the indemnity basis on the ground that she had not established any facts that had arisen after his judgment entitling her to be relieved from that judgment.

Rule 772 of the UCPR permits this Court to order an appellant to give security for the prosecution of the appeal and for payment of any costs that the Court may award to a respondent on the application of the respondent. The discretion is unfettered. See *Peterson v Rockhampton Permanent Building Society* (1988) 2 QdR 49 and *Murchie v The Big Cart Track Pty Ltd [No 2]* (2003) 1 QdR 528.

Here the respondent argues that the prospects of success of the appeal are slight and also relies upon rr 671(e), (f) and (g) which set out some of the prerequisites for ordering security for costs against a plaintiff, not an appellant, although the issues referred to in those rules are also relevant to the position of an appellant.

They are that the plaintiff is ordinarily resident outside Australia or that the plaintiff is ordinarily resident outside Australia and there is reason to believe that the plaintiff has insufficient property of a fixed and permanent nature available for enforcement to pay the defendant's costs if ordered to pay them. The respondent also relies upon the justice of the case referred to in r 671(h).

The appellant's written submissions assert that the respondent has obtained a Mareva order in respect of property in Queensland but there is no evidence relevant to that before the Court, particularly as to whether it is property of the appellant. The respondent contends, and it seems likely, that the property was not owned by the appellant but by a company associated with her husband. The appellant's written submission also asserts that she does not have liquid funds to meet an order for security.

When one analyses the learned trial judge's reasons for refusing leave pursuant to r 668 to set aside his original order his conclusion that the further evidence sought to be relied upon was either irrelevant to the issues or already available at the hearing appears to be persuasive. The fact said to be irrelevant was the date of the plaintiff's engagement of his solicitor, whether it was on 12 May 2004 or "probably June" as he deposed to in evidence.

A second document said to provide fresh evidence was a transfer document which, on his Honour's reasons, was available before the conclusion of the trial and on the evidence before him for the application was not obtained in the manner asserted by the appellant. Apparently this evidence was said to be relevant to a conclusion that the respondent was involved in a conspiracy of a type asserted by the defendants at the trial. This is not the appeal and we do not have all the material for the appeal available to us, but on the material that is available to us the argument for

setting aside the orders of the trial based on r 668 does not appear to be promising.

The fact that the appellant resides outside the jurisdiction and appears to have no assets available here to meet an order for costs against her coupled with the apparent weakness of her case seems to me to make this an obvious situation where the order for security should be granted, nor do there appear to be any significant discretionary bars to the application being granted.

The application was made on 7 August 2006 after the sending of the email requesting such security dated 15 June 2006. The appeal was lodged on 5 June 2006 and an amended notice of appeal was filed on 10 August 2006. Consequently there has been no undue delay in the bringing of the application.

The amount claimed, $30,000, is not buttressed by any calculation of the likely costs that would be incurred by the respondent beyond the bare estimate made by his solicitor. He relies partly on the fact that the appellant is self-represented and on the fact that she has previously shown an ignorance of the law and unfamiliarity with court procedure in circumstances where the respondent will need to brief counsel to prepare submissions and attend in court.

It is inappropriate to order an impecunious appellant to provide a greater security than is absolutely necessary. See *Commonwealth Bank of Australia v Eise* (1991) 6 ACSR 1 at 4,

also as Young CJ said there, when refusing to order the provision of security in the amount sought:

> "The ordering of the security is not necessarily final and it would be open to the respondent to return to the Court in special circumstances to seek an increase in the security ordered."

In *Emanuel Management Pty Ltd (In Liquidation) v Fosters Brewing Group Ltd* [2003] QCA 552, Dutney J also referred to the fact that courts have traditionally been conservative in relation to the quantum of orders for security for costs (see paragraph 16). In my view, taking into account the limited issues likely to be litigated, an appropriate amount to order for security would be $7,000.

Accordingly I would order that the appellant give security to the satisfaction of the Registrar of the Court of Appeal in the sum of $7,000 on or before 12 October 2006 for payment of any costs the Court of Appeal may award to the respondent.

I would further order that this purported appeal be stayed until the security required is provided.

I would further order that the appellant pay the respondent's costs of and incidental to this application.

I would further order that if the security is not provided by 12 October 2006 the purported appeal is to be struck out with costs and without further order.

THE PRESIDENT: I agree.

JONES J: I agree.

THE PRESIDENT: That is the order of the Court.
