SUPREME COURT OF QUEENSLAND

CITATION:	*Muir & Anor v McGowan & Ors* [2010] QCA 154
PARTIES:	**JACK AND KATHLEEN MUIR** (applicants/cost respondents) **v** **JOHN PARKER SM** (first respondent) **GLENN & KATHY McGOWAN** (second respondents/costs applicants)
FILE NO:	Appeal No 2700 of 2010 SC No 9546 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Security for costs application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	21 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	21 June 2010
JUDGE:	White JA
ORDERS:	**1. Until further order, the application by Jack and Kay Muir for leave to appeal the orders of Justice Mullins made 16 February 2010 be stayed until Jack and Kay Muir give security in the sum of $14,500 in such form as may be agreed by the parties or in default determined by the Registrar of Appeals for the costs of that application;** **2. Reserve the costs of this application;** **3. Pursuant to r 440, the following list of scandalous material be struck out:** **From document 'Application to Court of Appeal':** **a. Page 1 - Paragraph (6);** **b. Page 3 – last two lines;** **c. Page 4 – last line;** **d. Page 5 – From "In presenting my evidence on appeal" to "despicable thing to do";** **e. Page 6 - last three lines of the first paragraph.** **From document ' Addendum Affidavit"** **f. Page 3 – Paragraph 2(c);** **g. Page 3 – Paragraph 4.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – where applicants unsuccessfully applied for review

	of decision of first respondent Magistrate sitting as referee in the Small Claims Tribunal – where applicants have applied for leave to appeal to the Court of Appeal – where applicants have previously sought relief from payment of filing fees and would be unable to satisfy order for costs – where second respondents have applied for security for costs of the application for leave to appeal – where second respondents seek further order staying the hearing of the application until security is provided – whether application for security for costs should be granted
	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – OTHER MATTERS – orders to strike out scandalous material from affidavit under r 440 of the *Uniform Civil Procedure Rules* 1999 (Qld)
	Judicial Review Act 1991 (Qld), s 43, s 48 *Uniform Civil Procedure Rules* 1999 (Qld), r 440, r 670, r 671, r 672, r 772
	Bell v Bay-Jespersen [2004] 2 Qd R 235; [2004] QCA 68, cited *Harpur v Ariadne Australia Ltd (No 2)* [1984] 2 Qd R 523, cited
COUNSEL:	J Muir appeared in person and on behalf of K Muir L Byrnes (solicitor) for the first respondent N Stubbins for the second respondents/ costs applicants
SOLICITORS:	J Muir appeared in person and on behalf of K Muir Crown Law for the first respondent Ryans Solicitors & Attorneys for the second respondents/ costs applicants

HER HONOUR: The second respondents, Mr and Mrs McGowan, have applied for an order that the applicants, Mr and Mrs Muir, provide security for the costs of their application for leave to appeal the order of Justice Mullins, dismissing their application for review of the decision of the first respondent Magistrate sitting as a referee in the Small Claims Tribunal.

I shall refer to Mr and Mrs Muir and Mr and Mrs McGowan as "the Muirs" and "the McGowans" not out of any disrespect, but in order to seem a little less wordy.

The McGowans seek a further order staying the hearing of the Muirs application until security is provided. Whilst the McGowans are and have been legally represented, the Muirs are not.

The Muirs application to review the decision of the first respondent, was dismissed by Justice Mullins after an extensive hearing including further oral evidence, although Mr Muir now complains that he was not given an adequate hearing to put the case that he really wished.

It is not apparent from her Honour's reasons whether she dismissed the application pursuant to s 48 of the *Judicial Review Act* 1991 (Qld), but she found that the Muirs had not made out a case for an order setting aside the Magistrate's decision. If the decision to dismiss the application was made under s 48, and it is likely that it was, then leave is required to appeal her Honour's order by virtue of s 48(5).

This affects the power of the Court of Appeal to make an order for security for the costs of an application for leave to appeal, as r 772 of the *Uniform Civil Procedure Rules* provides only for security for an appeal. However, the question may be largely academic as the more general rules about security for costs, that is rr 670, 671 and 672 have been held to be applicable to applications for leave to appeal. As to this, see the discussion by McPherson JA in *Bell v Bay-Jespersen* [2004] 2 Qd R 235.

Rule 670 provides, relevantly:
"On application by a defendant, the court may order the plaintiff to give the security the court considers appropriate for the defendant's costs of and incidental to the proceeding."

The approach to such an application is governed by r 671 in the first instance. The court may order security only if satisfied, relevant to this case, that “the justice of the case requires the making of the order".

Amongst the discretionary factors to which the Court may have regard, are the means of those standing behind the proceeding, the prospects of success of the proceeding, and the likely costs. It seems to me plainly right to conclude that the Muirs could not satisfy any order for costs, should they be unsuccessful in their application for leave to appeal or the appeal.

Mr Muir has sought relief from the payment of filing fees in the Supreme Court on the ground that he and Mrs Muir are in receipt of a means tested pension. The McGowan's solicitor's search reveals no real property assets within the jurisdiction, and in their names, and a company search has revealed nothing. I'll return to this aspect of the application in a moment.

It's necessary to say something briefly about the background of the proceedings. The McGowans were the landlords and the Muirs the tenants of a residential property at Buddina on the Sunshine Coast for a fixed term, which commenced in November 2005 until November 2007, and the term was further extended, expiring on the 12th of November 2008. It appears that the Muirs continued to reside in the premises on a periodic tenancy basis pursuant to s 46 of the *Residential Tenancies Act* 1994 (Qld).

Negotiations for the rent between the McGowans and the Muirs in respect of this periodic tenancy broke down. The McGowans issued the Muirs with a Form 12 notice to leave under the *Residential Tenancy Act* on the 27th of February 2009. That required them to leave the premises within two months, that is, by the 27th of April 2009. It seems that the Muirs declined to leave and the McGowans brought an application before the Small Claims Tribunal on the 12th of May 2009.

The Magistrate in that hearing accepted the Muirs contention that they had received no notice. It seems the Muirs intimated then that they intended to move out of the rented premises. They issued the McGowans with a Form 13 Notice of Intention to Leave. The first notice was on the 12th of May 2009, and the second on the 14th of May 2009. The date which the notices stipulated that they would leave was the 21st of May 2009.

The McGowans contended that each of those forms was invalid. To recover the bond lodged under the initial fixed term in 2005 to cover what they asserted was the balance of the rent for a period of 14 days, the McGowans filed a Form 16 Dispute Resolution Request with the Residential Tenancy Authority on the 4th of June 2009. The matter came before the Small Claims Tribunal on the 5th of August 2009. The decision made by the first respondent Magistrate was in favour of the McGowans.

The Muirs filed an application for a statutory order of review in a Form 54, pursuant to r 566 of the *Uniform Civil Procedure Rules* on 31st August 2009. Strictly, it ought to have been in Form 56, pursuant to r 567, being pursuant to s 43 of the *Judicial Review Act.* But r 569 permits the Court to deal with such an application as if started correctly, and this Justice Mullins did.

The ground of review was a denial of natural justice by not being permitted to advance their case in the Small Claims Tribunal hearing. Initially relief was sought only against the first respondent Magistrate. However, at the first directions hearing on the 17th of September 2009, the McGowans were joined as parties to the review proceedings by direction of the Chief Justice. An amended application was filed on the 7th of October 2009. It seems the second respondent, the McGowans, only became aware of the application for review when they received letters from Crown Law and the Muirs at the end of October. After a request to the Supreme Court Registry, they received the amended application and the original supporting affidavit.

There was an appearance before the Court on the 11th of November 2009, and another on the 24th of November. Finally, the application was heard on the 16th of February 2010, but dismissed by her Honour Justice Mullins that day. Her Honour ordered the Muirs to pay the McGowan's costs of the appearances on the 11th and 24th of November, and the costs of the application amended on the 7th of October 2009.

On the 16th of March 2010, the applicants lodged their appeal, later amended to an application for leave to appeal, to the Court of Appeal against the decision of Justice Mullins. On the 16th of April 2010, the McGowan's solicitors sent a statement of the costs awarded to them by Justice Mullins in the sum of $16,710.93.

Turning then to the prospects of success on the appeal, for that is one of the factors that a Court will take into account. The nature of the relief sought against the first respondent Magistrate was to the same effect as the former prerogative writ of certiorari, now abolished

as to form by s43 of the *Judicial Review Act*. Such relief is discretionary in nature. As Justice McPherson observed in *Bell v Bay-Jespersen* at [19]:

"...it would be a notoriously difficult task on appeal to challenge the decision of the primary Judge."

His Honour was there referring to a decision made under s 43 of the *Judicial Review Act*. A Court reviewing such a decision must be satisfied that it was clearly wrong (see *House v The King* (1936) 55 CLR 499; [1936] HCA 40). A reference to her Honour's reasons reveals that Mr Muir had a full hearing before her Honour, he was there representing both himself and his wife, and Mr Muir was able to put their case, and to elaborate on matters that were before the Small Claims Tribunal.

Her Honour permitted Mr Muir to give supplementary oral evidence. He was cross-examined. Mr McGowan was cross-examined by Mr Muir. At page 3 of her Honour's reasons, she said:

"It was apparent during the cross-examination of Mr Muir that, even on Mr Muir's version of events, he was given an opportunity by the first respondent to put his case as to why he should not pay the rent that was claimed by Mr and Mrs McGowan, but that he did not make effective use of that opportunity."

And at page 5, her Honour said:

"There were a number of aspects of the proceeding before the first respondent that Mr Muir conceded in evidence today that he did not have a clear recollection about. On his own view, he was given an opportunity to present his case and Mr Muir acknowledged that he was asked by the first respondent as to why he was not prepared to pay the claim of Mr and Mrs McGowan."

And at page 6 her Honour said:

"Although the first respondent refused Mr Muir's request for an adjournment when it came to the time in the hearing for Mr Muir to put his case, Mr McGowan gives evidence that the first

respondent waited for approximately five minutes to allow Mr Muir time to gather his thoughts. Although Mr Muir cannot recall that that hiatus occurred, I accept Mr McGowan's recollection of that period of time that the first respondent did give to Mr Muir."

Her Honour dealt with the claim that the first respondent had bullied Mr Muir. She said of that matter, at pages 6 and 7:

"I consider that that [the bullying claim] is an unfair description of the first respondent who is endeavouring to get to the nub of a tenancy dispute that was before him that was clearly to do with the adequacy of the period of notice that was given by Mr and Mrs Muir to vacate the premises, which itself was related to the grounds that Mr and Mrs Muir sought to rely on to vacate the premises. Firmness on the part of the first respondent to keep Mr Muir focused on the issues should not be described as bullying."

Nonetheless, Mr Muir submits that her Honour fell into error in relying on unreliable affidavits filed - perhaps I will go back a step. The submission that in some manner the affidavits of Barry and Moss were false because they were prepared by the McGowan's solicitors and paid for by the McGowans certainly must be rejected, and that is part of Mr Muir's argument that her Honour fell into error by relying upon these unreliable affidavits.

Mr Muir also alleges that her Honour misunderstood the issue that the McGowans had impermissibly taken bond money, as I understand the submission, for rent. There seems to me to be no support for the contention that her Honour did not understand the issues that were raised in the review application. To my mind there is no prospect that the Muirs will be successful in seeking to set aside her Honour's order.

The next matter that I should consider is the means of the applicants. As mentioned, it is unlikely that Mr and Mrs Muir will be able to pay any costs that are ordered against them should they be unsuccessful. Mr Muir seems to struggle with this inference being drawn. But Mr Muir has sworn twice that he wishes to be relieved of the filing fees for the Court. Before

the Appeal Registry, he has sworn in an affidavit the following:

"I am the appellant applying for an order to be exempted from paying filing fees to institute proceedings in the Supreme Court. In support of my affidavit I state:

(a) I receive an income tested pension under the *Social Security Act* 1991 and it is an aged pension number... valid from 7 November 2008 and expires on 31 July 2010. The amount of the pension is $402 per fortnight;

(b) I am paying $520 per week in rent;

(c) I have no close relatives to give financial help;

(d) My financial position e.g. bank statements, statements of assets and liabilities, have all been examined by Centrelink when granting my aged pension;

(e) Other information to assist you, is that I have already been granted fee waiver after making representation in person at the Supreme Court when first initiating my first application."

That latter matter was a reference to an affidavit sworn by Mr Muir, filed on 31st August 2009, in which he applied for a waiver of the fees applicable to the filing of an application for a statutory order of review. He deposed there that he was an aged pensioner. He stated the amount of his pension at $390 per fortnight, that he paid $520 per week in rent, that neither his spouse nor a close relative was able to give him financial help, and that there were no other matters considered relevant.

Before the Court today, Mr Muir seemed to be saying, as I could best understand him, that there was other material available in the registry which would support his application for filing fee waiver. An examination of the file reveals nothing more than an exchange of emails with the relevant officer, which adds nothing to the material mentioned, and there is no other file held in the Court so far as searches reveal. Accordingly, there is nothing placed before the Court which would challenge the conclusion that the Muirs would be unable to meet an order for costs.

An impecunious litigant will not lightly be turned away from a court by being compelled to put up security for costs: *Harpur v Ariadne Australia Ltd (No 2)* [1984] 2 Qd R 523). But

where a litigant has had two hearings and been unsuccessful in both, different considerations prevail. An opposite party should not be compelled to defend its victory at risk of being burdened with unsatisfied costs orders.

I turn then to the question of the quantum of the costs. Mr Michael Graham, a costs assessor, has estimated in his report an amount of $16,899.35 for the future cost of defending the Muir's application for leave to appeal. That quantum was not seriously challenged by Mr Muir on this hearing. There are, however, some items which I would question. For example, it seems to me unnecessary that both solicitor and counsel would be required at any directions hearing. Either the solicitor would attend, or counsel with a clerk. I would have thought in a matter of this kind, solicitor or an agent would attend and I would therefore delete $1,200 from the estimated costs.

The hearing Mr Graham has estimated at five and a half hours, plus one and a half hours travel. To my mind, if the hearing occupies two hours in the Court of Appeal, I will be surprised. I can't imagine the Presiding Judge allowing these issues to take any longer, if that. Accordingly, I have reduced that time to four hours, giving an amount of $1,072. So what I have done is to delete $2,500 from the estimate and round that figure to $14,500.

The next matter to deal with relates to scandalous material contained within certain of the material filed by Mr Muir. Pursuant to r 440 of the *Uniform Civil Procedure Rules*, scandalous material may be struck out by an order of the Court.

Mr Muir says that the allegations that he makes that have been challenged are important to his case, but his case is not to be determined by accusations of lying and deceit and preparing false evidence, but by pointing to evidence and making legal argument. Mr Muir referred to an affidavit of Mr McGowan in which Mr McGowan uses strong expressions against Mr Muir. That affidavit was before Justice Mullins. No objection was taken to it, and Mr McGowan was cross-examined by Mr Muir. All of the objections taken by Mr Stubbins on behalf of the McGowans I would uphold, and order that the impugned words be struck

from those affidavits. Some of them are just part paragraphs, so it's a little difficult to do more than identify them as they were identified in the course of the hearing.

In the document headed "Application to Court of Appeal", the material in paragraph (6) on the first page, should be struck out. On page 3, the last two lines should be struck out. On page 4, the last line of paragraph numbered 4, should be struck out. On page 5, from “In presenting my evidence on appeal” to "despicable thing to do". On page 6, the last three lines of the first paragraph should be struck out. The other document is headed "Addendum affidavit". On page 3 (identified as page 3 of Exhibit A), paragraph 2(c) at the top of the page should be struck out, and paragraph 4 towards the foot of that page should be struck out.

The other orders that I would propose on this application for security for costs are these:

1. That until further order, the application by Jack and Kay Muir for leave to appeal the orders of Justice Mullins made on the 16th of February 2010 be stayed until Jack and Kay Muir give security in the sum of $14,500, in such form as may be agreed by the parties, or in default as determined by the Registrar of Appeals for the costs of that application;
2. Reserve the costs of this application;
3. Pursuant to r 440, the scandalous material be struck from the Application to the Court of Appeal, and the addendum affidavit, as I have just mentioned.