

SUPREME COURT OF QUEENSLAND

CITATION: *Mantonella Pty Ltd v Thompson* [2011] QCA 108

PARTIES: **MANTONELLA PTY LTD**
ACN 069 012 531
(appellant)
v
MYLES THOMPSON
(applicant/respondent)

FILE NO/S: Appeal No 5067 of 2008
DC No 288 of 2007

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: District Court at Cairns

DELIVERED ON: 31 May 2011

DELIVERED AT: Brisbane

HEARING DATE: 23 May 2011

JUDGES: Margaret McMurdo P, Cullinane and Jones JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. The security for costs held to the credit of this appeal, including any accretions thereon, be discharged by the payment to the respondent of such sum for counsel's fees as the Deputy Registrar, (Appeals), considers reasonable in satisfaction of the costs of the proceeding (including the costs of this application).**

2. The balance of the fund (if any) is to be paid out to the appellant.

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – OTHER MATTERS – where appellant paid security for costs into Court for purposes of appeal – respondent applying for costs to be paid out – appellant applying for counsel fees of the respondent required to be paid out of the security to be assessed

Uniform Civil Procedure Rules 1999 (Qld), r 676(3)

COUNSEL: A Jorgensen appeared in his capacity as manager of Mantonella Pty Ltd
M P Sumner-Potts for the respondent

SOLICITORS: A Jorgensen appeared in his capacity as manager of
Mantonella Pty Ltd
Myles Thompson Lawyers for the respondent

- [1] **MARGARET McMURDO P:** I agree with the reasons and proposed orders of Jones J.
- [2] **CULLINANE J:** I agree with the reasons of Jones J in this matter and the orders he proposes.
- [3] **JONES J:** On 7 April 2009, the appeal in this proceeding was dismissed with an order that the appellant pay the respondent's costs. An application for leave to appeal to the High Court of Australia was refused on 9 December 2009.
- [4] In the course of the appeal proceeding, the appellant, pursuant to a consent order, paid into court the sum of \$5,000 as security for costs. The respondent now applies for payment out of this security together with accretions thereon in part satisfaction of his costs. The costs ordered to be paid are yet to be assessed and there may be no utility in the respondent incurring the expense in doing so. Counsel who appeared for the respondent on the appeal has submitted a memorandum of fees in general terms for the sum of \$16,500 (including GST). That memorandum referred to fees earned prior to, and since, the order for security for costs was made.
- [5] When this application came on for hearing Mr Jorgensen, a former director of the appellant company and now the manager of its business, was granted to leave to appear on behalf of the company. He opposed the payment out of the full amount of the security on the grounds that he had not been provided with an itemised costs statement and contending that counsel's fees should amount to no more than \$3,000 having regard to the amount in dispute and the length of time involved. The respondent is a solicitor acting on his own behalf and not therefore entitled to claim for his costs.
- [6] Mr Sumner-Potts of Counsel, who appeared for the respondent, abandoned that part of the application to have the Court assess or fix the costs of appeal thus making unnecessary the provision of an itemised statement of costs. But he argued that counsel's fees inevitably would exceed \$5,000 and sought payment out of the whole of the security and accretions.
- [7] The application is made pursuant to R 676 of the *Uniform Civil Procedure Rules* (UCPR) which relevantly provides:
- “(1) ...
- (2) *If judgment is given requiring the party to pay all or part of the costs of the proceeding, the security may be applied in satisfaction of those costs.*
- (3) *However, the security must be discharged –*
- (a) *if a judgment is given which is not within subrule (2); or*
- (b) *if the court orders the discharge of the security; or*
- (c) *if the party entitled to the benefit of the security consents to its discharge; or*
- (d) *in relation to the balance after costs have been satisfied under subrule (2).”*

- [8] The issue now raised relates to the requirement of subrule 3(d) namely, what amount is required to satisfy costs. On this issue there is simply no evidence other than the presentation by counsel of the memorandum of fees, which is now challenged. That challenge will no doubt continue unless an itemised costs statement is presented or, at least, until an independent costs assessor opines as to the level of counsel's fees considered to be reasonable. On the receipt of such material the Deputy Registrar, (Appeals), would be in a position to determine whether the amount of counsel's fees reasonably incurred in responding to the appeal exceeds the sum presently held on account of this appeal.
- [9] Once the requirements of R 676(3) have been satisfied the security must be discharged. In my view, that discharge can be achieved by an order directing the Registrar to apply from the funds held in Court in respect of this appeal, such sum for counsel's fees as the Deputy Registrar, (Appeals), considers is reasonable to satisfy the costs of the appeal (including the costs of this application). The balance of the fund (if any) should be paid out to the appellant.
- [10] I would therefore order as follows:-
1. The security for costs held to the credit of this appeal, including any accretions thereon, be discharged by the payment to the respondent of such sum for counsel's fees as the Deputy Registrar, (Appeals), considers reasonable in satisfaction of the costs of the proceeding (including the costs of this application).
 2. The balance of the fund (if any) is to be paid out to the appellant.