

COURT OF APPEAL

GOTTERSON JA

**Appeal No 11300 of 2012
SC No 48 of 2008**

**FAMESTOCK PTY LTD
ACN 010 499 989**

Appellant

v

**BODY CORPORATE FOR No 9 PORT DOUGLAS
ROAD COMMUNITY TITLES SCHEME 24368**

Respondent

BRISBANE

DATE 23/04/2013

JUDGMENT

GOTTERSON JA: There are two applications before the court, one by the respondent to the appeal, the Body Corporate, and the other by the appellant, Famestock. Both applications arise out of an order for security for costs of the appeal made by Fraser JA on 13 February 2013. His Honour ordered that Famestock provide security for the Body Corporate's costs of the appeal in the amount of \$21,000 by 4 pm on Friday, 29 March 2013.

Security was not provided by that date, and on 16 April 2013, the Body Corporate filed its application for an order under r 674 of the UCPR, that the appeal be dismissed. The relevant rule is, in fact, r 774(b), which empowers the Court of Appeal to dismiss an appeal if security is not provided as ordered.

On Monday, 22 April 2013, Famestock paid to the registrar the sum of \$21,000 by way of security for the Body Corporate's costs of the appeal.

It appears that at the hearing of the application for the security for costs order, Famestock indicated that it was intending to use certain funds to meet the security costs order. Those funds were an amount of \$35,000 which it had provided by way of security for costs in a separate proceeding in the District Court at Cairns, which, at that point, had not been determined. At that time, Famestock had an expectation that those funds would be released to it if it succeeded in the District Court matter. On 9 April 2013, Famestock's solicitors were advised by the Registrar of that Court that the \$35,000 would be released to them in due course.

That day, those solicitors notified the Body Corporate's solicitors of this development, and requested that their client consent to an extension of time for provision of the security for costs once the \$35,000 had been released. On the following day, the Body Corporate's solicitors indicated that consent would not be forthcoming, and that the application that they had set in train would be continued. They pointed also to the failure of Famestock to abide the timetable set for steps to be taken in preparation for the appeal.

As I have said, security was provided by Famestock on 22 April, its solicitors having received a bank cheque for the \$35,000 on 17 April, for which they arranged clearance. Given that the security has now been provided, albeit late, it would be, in my view, an improper exercise of the power under rule 774(b) to strike out the appeal.

Consistently with what is sought in Famestock's application filed on 19 April this year, I would order, in both applications, that pursuant to rule 772(4), the order made on the 13 February 2013 be varied by extending the time for provision of the security for costs to 4 pm on 22 April 2013.

Although the Body Corporate's submissions refer to rule 775(1), the application does not refer to it specifically or allude to it by reference to dismissal for want of prosecution. The application cannot be regarded as one properly brought on notice under that rule. Had such an application been made, I would not have regarded the non-compliance with the timetable as sufficient to have justified dismissal for want of prosecution. I would direct the Registrar to issue a revised timetable for the appeal.

For the record, the order and the direction that I have just mentioned are so made and given.

...

GOTTERSON JA: On the issue of costs, the merits are evenly balanced. While the circumstances for an application under rule 774 had come into existence around the time that the application was received by the Court of Appeal Registry, the Body Corporate's solicitors were told that Famestock would shortly have funds which would enable it to provide the security. Notwithstanding, a request for listing of the application was made, and no accommodation as requested of the Body Corporate was given to Famestock's solicitors. Famestock submits that a rule 444 letter was not sent prior to the application being filed and that it is irregular on that account. Even if one were to accept that that rule does apply to an order made by a judge of appeal, had the Body Corporate emailed a r 444 letter, or its solicitors emailed a rule 444 letter on the 10th of April, Famestock would still not have been able, within three days, to respond nominating a firm date by which the security would have been provided.

All in all, in my view, there should be no order for costs on either application. Other than for the order and the direction that I've already made and given, each application is dismissed.