

SUPREME COURT OF QUEENSLAND

CITATION: *Craven v Commercial & Process Services Australia Pty Ltd & Anor* [2019] QCA 235

PARTIES: **GORDON JAMES CRAVEN**
(appellant/respondent)
v
COMMERCIAL & PROCESS SERVICES AUSTRALIA LTD
ACN 151 394 679
(first respondent/applicant)
WARREN NIGEL RUSS
(second respondent/applicant)

FILE NO/S: Appeal No 4246 of 2019
DC No 165 of 2017

DIVISION: Court of Appeal

PROCEEDING: Application for Security for Costs

ORIGINATING COURT: District Court at Maroochydore – Unreported, 29 March 2019 (Cash QC DCJ)

DELIVERED ON: 29 October 2019

DELIVERED AT: Brisbane

HEARING DATE: 19 June 2019

JUDGE: Philippides JA

ORDERS: **1. Mr Craven provide security for the applicant respondents' costs in the sum of \$10,000 within 14 days.**

2. The appeal proceedings be stayed pending payment of the security.

3. If the security is not paid, the appeal proceedings be dismissed and Mr Craven pay to the applicant respondents' their costs in connection with the appeal proceedings.

4. Mr Craven pay the applicant respondents' costs of and incidental to the application filed 21 May 2019.

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – where the respondents seek security for costs for the appellant's application to appeal against the dismissal of a summary judgment application – where that summary judgment application was for damages for trespass and unlawful eviction in relation to the second respondent's attendance, as a licensed process server, on the property

which the appellant occupied – where the appellant was served with a bankruptcy notice in February 2019 – whether security for costs should be granted

COUNSEL: The appellant/respondent appeared on his own behalf
S D Argles (*sol*) for the first and second respondents/applicants

SOLICITORS: The appellant/respondent appeared on his own behalf
Aejis Legal for the first and second respondents/applicants

- [1] **PHILIPPIDES JA:** This is an application for security for costs in relation to an application to appeal against the dismissal of a summary judgment application brought by Mr Craven, the plaintiff in a District Court proceeding and the respondent to this application.
- [2] The background to the proceeding is that Mr Craven and his wife occupied a property owned by their daughter, Penelope, who in 2007 granted a tenancy to a company Penny's Flowers Pty Ltd, of which she was then the director and shareholder. The company granted a subtenancy to Mr and Mrs Craven and a further subtenancy in 2013 at a time when Mr Craven was a director and his wife was apparently the sole shareholder.
- [3] Mr Craven became a bankrupt in 2015. The Trustee in bankruptcy claimed funds invested in the property. In June 2015, a Deed of Settlement was entered into between Penelope and the Trustee for the sale of the property and division of the proceeds of sale. A Power of Attorney was also granted to the Trustee to take steps to deal with and sell the property. Subsequently, in August and September 2015, the Trustee's solicitors engaged Mr Russ, a licensed process server (the second defendant), through his company (the first defendant) to make various attendances at the property to serve an Entry Notice, take possession and secure the property.
- [4] In September 2016, Mr Craven and his wife commenced a proceeding in the District Court against the Trustee and Penelope for, amongst other claims, trespass and wrongful eviction arising from the attendances of Mr Russ (the first proceeding). The first proceeding was discontinued on a Settlement Deed being entered into in October 2017 between Mr and Mrs Craven and the Trustee. Pursuant to that Deed, the Trustee agreed, *inter alia*, to pay Mrs Craven \$55,000 in compensation and Mr and Mrs Craven agreed to release and indemnify the Trustee.
- [5] By the present District Court proceeding commenced by Mr Craven in November 2017 (the second proceeding), damages including aggravated and exemplary damages are sought for trespass and unlawful eviction in relation to the attendances of Mr Russ, the subject of the first proceeding.
- [6] The application for security for costs is made on the basis that the justice of the case requires the making of an order and there is reason to believe Mr Craven would be unable to pay an adverse costs order should he fail in the application for leave to appeal.
- [7] The application for leave to appeal concerns a discretionary decision of the primary judge on an interlocutory application. His Honour rejected the proposition that no arguable defence was raised by the amended defences in the second proceeding and held to the contrary that those defences would clearly necessitate a trial. The

defences concern, amongst other issues, whether the tenancy in question had terminated and whether the possession was unlawful or not. In addition, an issue arises as to whether the indemnity given to the Trustee extends to preclude the second proceeding on the basis that the defendants as agents are entitled to be indemnified in the ordinary course by the principal (see paras 17C and 17D of the amended defence of the first and second defendants). It is evident that Mr Craven's application for leave to appeal the primary judge's decision has poor prospects of success.

- [8] In addition to the absence of a strong meritorious application for leave to appeal, there is every reason to conclude that Mr Craven will be unable to meet any adverse costs order. He was discharged from bankruptcy in March 2018. However, in February 2019, a new bankruptcy notice was issued against him for nearly \$50,000. There were also outstanding costs orders against him. Mr Craven has not made any payment with regard to the bankruptcy notice or costs orders and has not responded to requests to demonstrate he has the means to satisfy an adverse costs order in the appeal proceedings. Property searches do not reveal any property owned by Mr or Mrs Craven. The contention that the Cravens' financial situation is attributable to the conduct of the respondents to the appeal cannot be sustained.
- [9] In any event, the appeal only concerns an interlocutory process not the claim itself. The fact that an order for security for costs might stifle proceedings is not alone necessarily a ground for refusing an order for security for costs. Furthermore, any hardship for Mr Craven in the making of the order sought must be balanced against the right to some protection by the present applicants for their costs in an appeal Mr Craven has elected to bring.
- [10] I consider security for the applicants' costs should be provided in the sum of \$10,000 and make the following orders:
1. Mr Craven provide security for the applicant respondents' costs in the sum of \$10,000 within 14 days.
 2. The appeal proceedings be stayed pending payment of the security.
 3. If the security is not paid, the appeal proceedings be dismissed and Mr Craven pay to the applicant respondents' their costs in connection with the appeal proceedings.
 4. Mr Craven pay the applicant respondents' costs of and incidental to the application filed 21 May 2019.