SUPREME COURT OF QUEENSLAND

CITATION:	*Commercial & Process Services Australia Pty Ltd & Anor v Craven* [2020] QCA 177
PARTIES:	**COMMERCIAL & PROCESS SERVICES AUSTRALIA PTY LTD** ACN 151 394 679 (first respondent/first applicant) **WARREN NIGEL RUSS** (second respondent/second applicant) **v** **GORDON JAMES CRAVEN** (appellant/respondent)
FILE NO/S:	Appeal No 2850 of 2020 DC No 165 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs
ORIGINATING COURT:	District Court at Maroochydore – [2020] QDC 12 (Cash QC DCJ)
DELIVERED ON:	25 August 2020
DELIVERED AT:	Brisbane
HEARING DATE:	17 June 2020
JUDGE:	Morrison JA
ORDERS:	**1. The appellant provides security for costs for the first and second respondents' costs of the proceedings in Appeal No 2850 of 2020 in the amount of $10,000 in a form acceptable to the Registrar of the Court within 14 days.** **2. The appeal proceedings be stayed pending payment of the security.** **3. The costs of this application be reserved.** **4. If the security is not paid, the appeal proceedings, including reserved costs, be dismissed and Mr Craven pay the applicant respondents' costs in connection with the appeal proceedings.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – where Mr Craven and his wife occupied a property owned by their daughter – where she had granted a tenancy to her company and that company had granted a subtenancy to Mr and Mrs Craven – where Mr Craven became a bankrupt in 2015 – where the trustee in bankruptcy claimed funds which had

been invested in the property – where a Deed of Settlement was entered into between the daughter and the trustee for the sale of the property and division of the proceeds – where a Power of Attorney was also granted to the trustee to take steps to deal with and sell the property – where the trustee's solicitors engaged Mr Russ to take possession of and secure the property – where in 2016 Mr Craven and his wife commenced a proceeding in the District Court seeking damages for trespass and wrongful eviction arising out of the attendances of Mr Russ on the property – where that proceeding was eventually discontinued after a Settlement Deed was entered into between Mr Craven and his wife, and the trustee – where the trustee was indemnified under the Deed – where in 2017 Mr Craven instituted the present proceedings in the District Court, claiming damages for trespass and unlawful eviction, once again in relation to the attendances of Mr Russ – where Mr Craven made an application for summary judgment and the applicants/respondents applied for security for costs – where the summary judgment application was dismissed, and the application for security for costs was adjourned – where Mr Craven appealed the dismissal of summary judgment – where an application was then brought to have Mr Craven pay security for the costs of the appeal – where orders were made that Mr Craven provide security, and if security was not paid, the appeal proceedings be dismissed – where Mr Craven did not pay security, and his appeal was dismissed – where in 2019 the adjourned application for security for costs came on for hearing – where the primary judge ordered that Mr Craven provide security for costs of the District Court proceedings – where Mr Craven lodged an application for leave to appeal, challenging the order for security for costs – where the applicants/respondents seek an order for security for costs of the appeal, and that is the application before this Court – whether security for costs should be ordered

Uniform Civil Procedure Rules 1999 (Qld), r 772

Banks & Anor v Copas Newnham Pty Ltd & Ors [2001] QCA 526, cited
Craven v Commercial & Process Services Australia Pty Ltd & Anor [2020] QDC 12, cited
Ivory v Telstra Corp Ltd & Anor [2001] QCA 490, cited
Mbuzi v Hall & Anor [2010] QSC 359, cited
Natcraft Pty Ltd & Anor v Det Norske Veritas & Anor [2002] QCA 241, cited
Toms v Fuller [2010] QCA 73, cited

COUNSEL: C Toogood (*sol*) for the applicants
The respondent appeared on his own behalf

SOLICITORS: Chris Toogood Legal for the applicants

The respondent appeared on his own behalf

[1] **MORRISON JA:** Mr Craven and his wife occupied a property owned by their daughter. She had granted a tenancy to her company, Penny's Flowers Pty Ltd. The company granted a subtenancy to Mr and Mrs Craven.

[2] Mr Craven became a bankrupt in 2015. The trustee in bankruptcy claimed funds which had been invested in the property. In June 2015 a Deed of Settlement was entered into between the daughter and the trustee for the sale of the property and division of the proceeds. A Power of Attorney was also granted to the trustee to take steps to deal with and sell the property. In August and September 2015 the trustee's solicitors engaged Mr Russ, a licensed process server and second defendant, through his company, the first defendant, to attend upon the property and serve various notices, and then take possession of and secure the property.

[3] In September 2016 Mr Craven and his wife commenced a proceeding in the District Court against the trustee and their daughter, seeking damages for trespass and wrongful eviction arising out of the attendances of Mr Russ. That proceeding was eventually discontinued after a Settlement Deed was entered into in October 2017 between Mr and Mrs Craven and the trustee. Under the Deed the trustee agreed to pay Mrs Craven $55,000 in compensation, and Mr and Mrs Craven agreed to release and indemnify the trustee.

[4] In November 2017 Mr Craven instituted the present proceedings in the District Court, claiming damages for trespass and unlawful eviction, once again in relation to the attendances of Mr Russ which were the subject of the first proceeding.

[5] In March 2019 two applications came before the learned primary judge in the District Court. One was an application by Mr Craven for summary judgment. The other was an application by the defendants, for security for costs. On 29 March 2019 the primary judge dismissed the application for summary judgment, and adjourned the application for security for costs because Mr Craven was then not in a position to deal with it.

[6] Mr Craven filed an appeal against the dismissal of his summary judgment application. An application was brought to have Mr Craven pay security for the costs of that appeal and on 29 October 2019 Philippides JA made orders that he provide security in the sum of $10,000 within 14 days, and if security was not paid, the appeal proceedings be dismissed.[1]

[7] Mr Craven did not pay the sum ordered by way of security for costs, and his appeal was dismissed.

[8] In December 2019 the adjourned application for security for costs came on for hearing. The primary judge ordered that Mr Craven provide security for costs of the District Court proceedings in the amount of $10,000, by 20 March 2020.[2]

[9] Following the judgment of Philippides JA, Mr Craven filed an application for special leave in the High Court. That application was dismissed on 18 March 2020.

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1 *Craven v Commercial & Process Services Australia Pty Ltd & Anor* [2019] QCA 235.
2 *Craven v Commercial & Process Services Australia Pty Ltd & Anor* [2020] QDC 12.

[10] Prior to the time limited for the provision of security for costs and the order made on 21 February 2020, Mr Craven lodged an application for leave to appeal, challenging the order for security for costs.

[11] The response of the respondents to that application was to seek an order for security for costs of the appeal, and that is the application before me.

Legal principles

[12] The following matters are relevant on applications for security for the costs of an appeal:

(a) the court has an unfettered discretion to order security;[3]

(b) the prospects of success on the appeal;

(c) the financial position of the appellant;

(d) the fact that an impecunious appellant, impecunious at trial, has already had a "day in court" and lost on the merits; this circumstance increases the likelihood of the exercise of a discretion in favour of an order for security for costs;

(e) the fact that the appellant blames impecuniosity on the respondent; this has diminished significance at appellate level, as compared with an application brought before trial;

(f) it is inappropriate to order an impecunious appellant to provide a greater level of security than is absolutely necessary; and

(g) whether there has been any delay in bringing the application.[4]

[13] It is no bar to the making of an order for security for costs under r 772 of the *Uniform Civil Procedure Rules* 1999 (Qld) that the respondent is a natural person.[5] In *Toms v Fuller*[6] this Court said:

> "There is no comprehensive list of the factors which might be taken into account on an application for security for the costs of an appeal; *Natcraft Pty Ltd v Det Norske Veritas & Anor* [2002] QCA 241, but where the prospects of success on appeal are "bleak", and the appellant is without funds, there are powerful reasons for ordering security: *Murchie* at 530."

Consideration

[14] Mr Craven frankly concedes that he is impecunious, and has no prospect of meeting an order for costs in the appeal. That is not surprising as he did not pay the required security for costs under the order of Philippides JA, and his only source of income consists of Centrelink benefits.

[15] Further, there is no question of Mr Craven's impecuniosity being laid at the feet of the current applicants. Nor is there any question of delay in bringing the current

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3 *Mbuzi v Hall & Anor* [2010] QSC 359.

4 See *Natcraft Pty Ltd & Anor v Det Norske Veritas & Anor* [2002] QCA 241 at [8]; *Mbuzi v Hall & Anor* [2010] QSC 359; *Banks & Anor v Copas Newnham Pty Ltd & Ors* [2001] QCA 526; *Ivory v Telstra Corp Ltd & Anor* [2001] QCA 490.

5 *Ivory v Telstra Corp Ltd & Anor* [2001] QCA 490.

6 [2010] QCA 73 at [26].

application. Finally, Mr Craven does not contest the propriety of the sum in which the security is sought, namely $10,000.

[16] Central to the considerations on this application are the prospects of success on the appeal. That must be judged in light of the nature of the order against which the appeal is brought, namely an interlocutory order for security for costs, based on the exercise of a discretion by the primary judge.

Approach of the primary judge

[17] After setting out the background to the litigation in the District Court, and some other matters of history, the learned primary judge referred to the principles applicable on the application, drawn largely from *Mbuzi v Hall & Anor*.[7] During the course of the hearing before me no criticism was levelled at the recitation of the background or the accuracy of the principles referred to.

[18] The primary judge noted that there was no evidence to suggest that Mr Craven had satisfied any of the various orders for security for costs, and also noted that he had failed to pay the costs ordered against him when the summary judgment application was dismissed. These and other matters led his Honour to conclude that Mr Craven would be unable to satisfy any future costs order that might be made in the District Court proceedings. On the hearing before me, Mr Craven accepted that that was a justified finding.

[19] His Honour then turned to the prospects of success of the claim in the District Court. His Honour found that the claim did not enjoy great prospects of success, largely because the claim alleging trespass and wrongful eviction was first brought against his trustee in bankruptcy, and after those claims were settled, Mr Craven instituted the current proceedings "pursuing essentially the same claims he settled against the Trustee". His Honour continued:[8]

> "There appears to be a strong argument that the defendants were acting on the instructions of the Trustee when they did the things that are said by Mr Craven to be actionable. Even if Mr Craven has a legitimate claim against the defendants, they would be entitled to join the Trustee who in turn would be entitled to rely upon the indemnity given to them by Mr Craven. While there may be room for argument about the scope of the indemnity, I do not consider that Mr Craven's claim enjoys great prospects of success."

[20] His Honour then noted contentions raised about whether the current defendants acted outside the scope of their agency with the trustee, and how that might impact upon any indemnity in favour of the trustee. His Honour concluded that there was nothing in the material that suggested that there was strength in an argument that the defendants had acted outside the scope of their agency.[9]

[21] Mr Craven challenged those findings, contending that the primary judge had overlooked a central issue because of "fabricated" evidence adduced before him on

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7 [2010] QSC 359 at [67]-[68] and [70].
8 Reasons below at [10].
9 Reasons below at [11].

the summary judgment application. I will attempt to summarise the contention, though it was made at much greater length by Mr Craven in the course of argument:

(a) there was no issue on the pleadings, as they stood at the time of the summary judgment application, that the tenancy under which Mr and Mrs Craven occupied the land had been terminated, or that the land had been abandoned;

(b) on the night before the summary judgment application was heard the defendants provided an affidavit which fabricated evidence in order to mount an argument that the tenancy had terminated or the land had been abandoned;

(c) that had misled the primary judge into believing, contrary to the pleadings, that there was a serious question in dispute "about whether the lease was terminated", that issue involving contested questions of fact and law, which precluded the grant of summary judgment;

(d) the fabricated evidence, which Mr Craven also called "fake issues" and a "sham", was supported by old submissions by the solicitor then acting for the defendants at the summary judgment hearing; those submissions were that there was an issue about whether the lease had been terminated on the basis of abandonment;

(e) the fabricated evidence created an attitude on the part of the primary judge in his refusal of the summary judgment application, which continued over into his hearing of the application for security for costs; the fake issues wrongly led his Honour to the conclusion that the prospects in the proceedings were poor when, in fact, they were strong; and

(f) the essence of the fabricated evidence was a statement by Mr Russ, referring to an occasion when he was at the property, in these terms: "There were some items left in the backyard and 'humpy', some distance away from the house, but in my view they had no commercial value"; accompanying that statement in Mr Russ' affidavit were a series of photographs which he had taken on that day, none of which were photographs of various household goods and items, and two shipping containers, which Mr and Mrs Craven owned and which were on the property.

[22] At the core of the contentions advanced by Mr Craven on this aspect was the proposition that the state of the pleadings before the primary judge on the hearing of the application for security for costs left no doubt as to the fact that termination or abandonment were not in issue. In my view, that belief is misconceived.

[23] The amended statement of claim pleaded that Mr and Mrs Craven had lawful occupation and possession of the property: paragraph 2. That was denied on the basis that Mr Craven did not have lawful occupation and possession of the property: paragraph 4 of the amended defence.

[24] Paragraph 4 of the amended statement of claim alleged that Mr Russ had been engaged and instructed by the trustee in bankruptcy, and the trustee's lawyers. That allegation was admitted in the amended defence: paragraph 6. Paragraph 7 of the amended defence went on to allege that at all material times the defendants had acted "in accordance with the express and explicit instructions of the Trustee and the Solicitors", and were therefore acting as agents: paragraph 7. Paragraph 8 then

alleged that at all material times Mr Craven was aware of the fact that the defendants were acting as agents.

[25] Paragraph 6 of the amended statement of claim made a series of allegations that when Mr Russ visited the property he was trespassing, had entered on "an erroneous conclusion that the Property had been abandoned", but the property had not been abandoned: paragraphs 6, 6.1(c) and (d). The response in the amended defence was to deny those allegations and then to make the positive allegation that Mr Russ "did not trespass on the property, as at all material times [Mr Russ] entered on the property with the lawful authority and in particular with the express authority of the plaintiff's trustee in bankruptcy".

[26] Paragraph 7 of the amended statement of claim pleaded in a variety of ways that Mr Craven had lawfully been in possession of the property, and was unlawfully dispossessed: in particular, paragraphs 7.6 and 7.7. Those allegations were denied in the amended defence, on the basis that "the plaintiff was not in possession of the property because the plaintiff had already left the property and resided at 4 Spicer Street, Gympie …": paragraph 16A.

[27] That review is sufficient to demonstrate that the primary judge was correct to conclude that there were serious questions over the entitlement of Mr Craven to occupation of the property. His Honour did not, in terms, address the question of termination or abandonment, no doubt because that was not necessary.

[28] In my view, the suggestion that Mr Russ' affidavit revealed fabricated evidence is also misconceived. In his affidavit Mr Russ was responding to allegations in the application for summary judgment. He commenced by deposing that he did not trespass on the property, but "entered with the lawful/express authority of the plaintiff's trustee", and in so doing relied upon the advice of his instructing solicitor: paragraph 4. Then, as he addressed events in a chronological form, he deposed to events on 8 September 2015 which commenced with the solicitors providing him with a photograph of another investigator serving a Form 15 Abandonment Termination Notice at the property: paragraph 16. Then in paragraph 18 he deposed:

> "At around 11.00am that day, I attended to the property in accordance with ABL's instructions to take possession of the property by changing the locks at the property. The house had been emptied save for a ripped-up child's cot mattress. There were items left in the backyard and 'humpy', some distance away from the house, but in my view they had no commercial value. I changed the locks. Exhibit W11 are photographs taken on the day."

[29] On the face of that statement Mr Russ was offering his opinion that the items left in the backyard and the humpy had no commercial value. That statement acknowledged that there were items left in the back yard, without stating what they were. Mr Craven has gone to great lengths to exhibit various photographs which show items of property that belong to him and his wife. Some of them are items plainly inside the house or perhaps a garage or shed, but plainly not in the back yard. Some are items in the back yard and include things such as a number of pieces of timber on a stand, an aluminium extension ladder, an aluminium stand and two shipping containers. Whether they were within the items to which Mr Russ

referred is not able to be determined on the present material. Mr Russ was aware of the shipping containers because he had been instructed to secure them. On that basis there is reason to doubt that when he referred to "items left in the back yard" he was referring to the shipping containers. In any event, none of it means that Mr Russ was lying when he expressed his opinion that those items in the backyard and the humpy had no commercial value. The fact that someone else, such as Mr Craven, might think that the items had a value does not mean that Mr Russ' statement was false.

[30] In any event, the transcript of the oral argument before the primary judge reveals that his Honour's focus was on issues raised on the pleading, rather than disputes evident from the photographs attached to Mr Russ' affidavit. Specifically, in the course of submissions by Mr Craven the primary judge referred to the issues raised on the pleadings as to whether Mr Craven was or was not a lawful occupant or tenant. Furthermore, in the course of submissions Mr Craven highlighted the disparity between what Mr Russ said in paragraph 18 of his affidavit, and Mr Craven's own deposition, revealing that there were items of personal property such as "furniture, tools, fridges, Huon Pine timer, satchels, air conditioners, a florist's cold room under the house and two shipping containers". This was advanced to pursue the contention that Mr Craven was a tenant on the property. Further debate was truncated because Mr Craven described Mr Russ as "sailing close to the wind of perjury there".

[31] In my view, the suggestion that the primary judge was somehow persuaded by the so-called fabricated evidence into having a particular attitude which carried over, months later, into the hearing of the application for security for costs, is risible.

[32] Mr Craven's second attack was on the finding made by the primary judge as to the way in which the litigation was pursued, that being a factor raised in *Mbuzi v Hall & Anor*.[10] His Honour said:[11]

> "There is then the manner in which Mr Craven has pursued the litigation. He applied for summary judgment in circumstances where a rational assessment would have indicated such an application had little chance of success. When he attempted to challenge the refusal of his application Philippides JA said the application for leave to appeal had "poor prospects of success". Mr Craven has expressed at least some interest in seeking special leave to appeal the decision of Philippides JA to the High Court. There remains as well the unsatisfied costs order which Mr Craven frankly concedes he will not be able to satisfy by reason of his impecuniosity. Mr Craven's impecuniosity is not the result of any conduct by the defendants.
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> In summary, Mr Craven has no prospect of satisfying any costs order that might be made, I do not consider his claim to have a great chance of success, and he has pursued the claim in a manner that suggests obsessiveness rather than rational deliberation. In the circumstances, and having considered the discretionary matters listed in r 671, I am satisfied that justice of the case requires Mr Craven to pay security for the potential costs of the defendants. I appreciate

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10 [2010] QSC 359 at [68] and [70].

11 Reasons below at [12]-[13]; internal citation omitted.

> that the effect of such an order will likely be to stifle the litigation. But this is outweighed by the factors that I have noted."

[33] Mr Craven's objection was to the primary judge's characterisation of the application for summary judgment having been made notwithstanding that a rational assessment would have indicated it had little chance of success, and his characterisation of the claim being pursued in an obsessive way rather than rational deliberation.

[34] In my view, both comments were amply justified. In the hearing before me Mr Craven demonstrated an inability to understand that the pleadings as they stood before the learned primary judge on the application for summary judgment raised an issue as to the legitimacy of Mr Craven's occupation of the property, and whether it had been abandoned. A proper consideration of the pleadings would have led to the conclusion that an application for summary judgment was doomed to failure.

[35] Mr Craven's persistence in trying to challenge the decision to dismiss the application for summary judgment, all the way to the High Court, was based on that fundamental misunderstanding of the pleadings. That same misunderstanding coloured the approach taken by Mr Craven on the application before me. Pursuit of the various steps in this litigation, including the application for leave to appeal the decision to order security for costs, warrants the comment made by the primary judge which characterises pursuit of the claim in a way that "suggests obsessiveness rather than rational deliberation".

[36] In my view, Mr Craven has no reasonable prospects of succeeding in his challenge to the order made by the learned primary judge. That conclusion means that the fact that any order I now make might have the effect of stifling the application for leave to appeal to this Court is of diminished consequence, certainly to the point where it cannot outweigh considerations otherwise in favour of the grant of an order for security for costs.

[37] I therefore order:

1. The appellant provides security for costs for the first and second respondents' costs of the proceedings in Appeal No 2850 of 2020 in the amount of $10,000 in a form acceptable to the Registrar of the Court within 14 days.
2. The appeal proceedings be stayed pending payment of the security.
3. The costs of this application be reserved.
4. If the security is not paid, the appeal proceedings, including reserved costs, be dismissed and Mr Craven pay the applicant respondents' costs in connection with the appeal proceedings.