

SUPREME COURT OF QUEENSLAND

CITATION: *Green v Scottney-Turbill & Anor* [2024] QCA 5

PARTIES: **RON GREEN**
(respondent/appellant)
v
ANDREW SCOTTNEY-TURBILL
(first applicant/respondent)
ROBIN SCOTTNEY-TURBILL
(second applicant/respondent)

FILE NO/S: Appeal No 5786 of 2023
Appeal No 5787 of 2023
SC No 968 of 2022

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: Supreme Court at Brisbane – Unreported, 14 April 2023
(Cooper J)

DELIVERED EX TEMPORE ON: 30 January 2024

DELIVERED AT: Brisbane

HEARING DATE: 30 January 2024

JUDGE: Mullins P

ORDERS: **1. Appeal dismissed.**
2. Appellant must pay the respondents’ cost of the appeal.

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – where appeals stayed until appellant complied with order for security for costs – where the appellant failed to pay the security – where the respondents applied for appeals to be dismissed pursuant to r 774(b) of the *Uniform Civil Procedure Rules 1999* (Qld) – where the appellant did not provide evidence of efforts to address the fundamental problems with the claim that was the subject of the appeals – whether discretion should be exercised to dismiss appeals

Uniform Civil Procedure Rules 1999 (Qld), r 774

Green v Scottney-Turbill [2022] QSC 65, related
Green v Scottney-Turbill [2023] QCA 141, related

COUNSEL: The appellant appeared on his own behalf
S R Grant for the respondents

SOLICITORS: The appellant appeared on his own behalf
Aylward Game Solicitors for the respondents

MULLINS P: Mr Green has two appeals, 5786 of 2023 and 5787 of 2023, that are presently stayed. On 20 June 2023 I ordered that Mr Green give security for costs for the appeals in the sum of \$15,000 within 28 days by payment into Court in appeal 5786 of 2023 of the said sum, or in such other form as the Registrar of the Court permits. The appeals were stayed insofar as steps to be taken by Mr Green until the security had been given or further order. Those orders were made in the absence of Mr Green. He then filed an application for the application for security to be re-heard on the basis of affidavits affirmed by him on 21 June 2023 and 22 June 2023.

That application was heard by Bond JA, on 14 July 2023, who concluded that Mr Green demonstrated no basis either to vary or set aside the security that had been ordered in respect of the appeals and the appellant's application was dismissed with costs: *Green v Scottney-Turbill* [2023] QCA 141.

When the security was not provided the respondents then applied in each appeal pursuant to rule 774(b) of the *Uniform Civil Procedure Rules 1999* (Qld) for the appeal to be dismissed and for Mr Green to pay the respondents' costs of the appeals. That application was returnable on 12 December 2023. Although Mr Green was served with the application before the hearing, it was not in sufficient time for him to obtain the assistance of LawRight which had previously given him advice in relation to these appeals. I therefore adjourned the hearing of the respondents' applications until 30 January 2024 to enable Mr Green to consult both his accountants and LawRight.

When the applications for the appeals to be dismissed came on for hearing today Mr Green sought to file an application to the Court of Appeal seeking a stay of the appeals until determination of his application for an order under section 181(5) of the *Property Law Act 1974*. The filing of that application was opposed by the respondents as the appeals are stayed.

I refused to receive the application and the application was marked exhibit 1. Mr Green also sought to file an affidavit and a written submission in order to enable him to put before the Court his arguments as to why the appeals should not be dismissed. I permitted that affidavit affirmed on 31 January 2024 and his written submission to be filed.

Mr Green's claim on the basis of an interest in land that he occupies, that I will refer to as Lot 5, was originally in the Trial Division seeking an easement over the respondents' land, to which I will refer to as Lot 2, to support an entitlement that Mr Green claims to access water from a tank on Lot 2. The registered owner of Lot 5 was Conondale Timbers Pty Ltd that was wound up voluntarily and was deregistered in 1999. That means that Lot 5 is presently vested in ASIC. The respondents have been seeking to sell Lot 2 since 2021 and the claim by Mr Green has inhibited their plans. The respondents consider that they should not sell Lot 2 while the litigation, including the appeals, with Mr Green is ongoing.

The problems with Mr Green's claim, as articulated in the proceeding in the Trial Division, were identified in the decision of Jackson J who ordered the removal of Mr Green's caveat that had been lodged over Lot 2: *Green v Scottney-Turbill* [2022] QSC 65. Mr Green's claim for an easement in his proceeding in the Trial Division was listed for trial before Cooper J. Appeal number 5786 of 2023 is the appeal against Cooper J's refusal on 13 April 2023 to adjourn the trial. The trial then proceeded the next day in the absence of Mr Green and on the basis of admissions that had been made by Mr Green in the proceeding, and his claim was dismissed, and the respondents were given judgment on their counterclaim. Appeal number 5787 of 2023 is the appeal against the judgment given by Justice Cooper on 14 April 2023.

In the affidavits that have been filed in this appeal Mr Green is asserting that there is an equitable right to an easement on the basis of an agreement involving the respondents made some 30 years or so ago with the respondents. The problem is that this is not the claim that has been pursued in a meaningful way by Mr Green in the Trial Division, and Mr Green has failed to address the fundamental problem in his being the mover for relief when he is not the

registered owner of Lot 5, which is the land for which he is seeking to obtain the benefit of the easement over Lot 2, to enable the water supply that had been enjoyed by Lot 5 for some 30 years to continue.

That water supply has been discontinued recently by actions of the respondents, and Mr Green's problems are circular, as when he cannot get water he cannot earn income and he cannot provide security and he cannot pursue the claims that he seeks to pursue or rectify the ownership of Lot 5 which is one of the fundamental issues that needs to be addressed before any meaningful pursuit can be made of Mr Green's claim to an entitlement to pursue a right to water from Lot 2.

There have been many opportunities given to Mr Green to seek advice and to endeavour to rectify his proceedings both in the Trial Division and in this Court. A modest amount of security was ordered of \$15,000 to give Mr Green the most opportunity to pursue his appeals despite being aware of the respondents' intention to seek to have the appeals dismissed. Mr Green has not been able to do anything about providing the security. Mr Green has not been able to provide any substantial evidence of efforts to address the fundamental problems with his claim to an equitable easement that would perhaps have affected the exercise of the discretion that the respondents are seeking be exercised pursuant to rule 774(b) of the UCPR.

In the circumstances, I consider that it is appropriate that the discretion conferred by rule 774(b) be exercised in favour of the respondents. The orders which I make in each appeal 5786 of 2023 and 5787 of 2023 are:

1. Appeal dismissed.
2. Appellant must pay the respondents' costs of the appeal.