SUPREME COURT OF QUEENSLAND

CITATION:	*Matusevich & Ors v Nipperess & Ors* [2008] QSC 275
PARTIES:	**NIKOLAI KORNEEVICH MATUSEVICH and RUFINA PHILLIPOVNA STRELNIKOVA and GALINA PETROVNA STRELNIKOVA and NINA PETROVNA KLUCHINSKAYA** (plaintiffs) **v** **JANICE MAY NIPPERESS and ALLA BRUNCKHORST** (first defendant) and **NICHOLAS BABIY and TATIANA FLORIANOVA** (second defendant)
FILE NO:	855 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	10 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	3 July 2008
JUDGE:	Daubney J
ORDER:	**1. That that the plaintiffs provide security, in a form satisfactory to the Registrar, for the first defendants' costs up to and including the first day of trial in the sum of $25,000** **2. If such security for costs is not provided within 28 days, the plaintiffs' proceeding against the first defendants will be stayed** **3. Costs reserved**
CATCHWORDS:	PROCEDURE – COSTS – SECURITY FOR COSTS – RESIDENCE OUT OF JURISDICTION – where deceased had made a number of wills – where plaintiff contends that wills dated 12 January 2004 and 19 January 2004 fail because the deceased lacked testamentary capacity – where plaintiffs claim as beneficiaries upon intestacy – where first defendant applies for security for costs – where plaintiffs are impecunious and resident in Kazakhstan – where no reciprocal arrangement for enforcement of judgments between Australia and Kazakhstan – where order for security likely to stifle claim – where significant doubt as to merits of

plaintiffs' claim – whether order for security ought be made

Uniform Civil Procedure Rules 1999 (Qld)

P.S. Chellaram v China Ocean Shipping (1991) 102 ALR 321
Re Devoy Fitzgerald and Tender v Fitzgerald [1943] St R Qd 137

COUNSEL: D J Morgan for the plaintiffs
M K Conrick for the first defendant

SOLICITORS: Compass Legal Solutions for the plaintiffs
Spranklins for the first defendant

[1] Rufina Stash ('the deceased') died on 18 September 2004. She was 90 years old. She had been married twice during her lifetime, but had no children from either marriage. She had emigrated from Siberia to Queensland some 47 years prior to her death.

[2] The material before me discloses that the deceased had made a number of wills in the years prior to her death. In reverse chronological order, they were:

- a will dated 19 January 2004 prepared by Peter Rowlands, solicitor, appointing the first defendants as executors;

- a will dated 12 January 2004 prepared by the Public Trustee appointing the second defendants as executors;

- a will dated 9 December 2002 prepared by Peter Rowlands, solicitor, appointing the first defendants as executors;

- a will dated 1 March 2000 prepared by K A Taylor, solicitor, appointing Mykola Serdiuk and Russ Brunckhorst as executors.

[3] It also appears, from the material, that the deceased made an 'informal' will of some sort in August 2002, another will in January 2002, and a previous will as long ago as May 1994, but the evidence concerning these is sketchy and incomplete.

[4] The plaintiffs in this proceeding are relatives of the deceased:

- Galina Petrovna Strelnikova and Nina Petrovna Kluchinskaya are the deceased's surviving sisters;

- Nikolai Korneevich Matusevich is a nephew of the deceased, being the son of a sister who had died before the deceased;

- Rufina Phillipovna Strelnikova is a niece of the deceased, being the daughter of Galina.

[5] On 2 February 2006, the plaintiffs instituted this proceeding, by which they seek an order that the Court pronounce in solemn form against each of the wills dated 12 January 2004 and 19 January 2004 and an order for the grant of Letters of Administration in Intestacy to one Cyril Martin, who was said to be the 'duly appointed attorney for the plaintiffs'. It is asserted in the statement of claim filed on behalf of the plaintiffs, in effect, that each of these wills fails because the deceased lacked testamentary capacity when she executed them. The statement of claim further pleads that the deceased had 'previously executed a will which has now been lost and whose contents cannot otherwise be reconstructed', and gives the following particulars of that allegation:

> 'In or about 2001 the deceased made a will with Mr Andrew Rouyanian, solicitor. Despite diligent search, this will has not been located nor has any other evidence of its contents been discovered. Mr Rouyanian cannot remember the contents of the will with sufficient certainty nor detail to allow it to be reconstructed.'

[6] The plaintiffs then plead that each of them is a beneficiary upon intestacy of the deceased.

[7] The first defendants and the second defendants respectively have defended the claim, and each has a counter-claim. By their counter-claim, the first defendants propound and seek solemn form declarations in respect of the will dated 19 January 2004. The first defendants alternatively claim, in the event of the will dated 19 January 2004 not being accepted, for declarations against the will dated 12 January 2004 and for there to be solemn form declarations in favour of the will dated 9 December 2002.

[8] The second defendants, not surprisingly, seek to propound, and have necessary declarations in favour of, the will dated 12 January 2004.

[9] Each of the plaintiffs is:

(a) resident in the Republic of Kazakhstan, and

(b) impecunious.

[10] There is no arrangement for the reciprocal enforcement of judgments between Australia and Kazakhstan. Counsel for the plaintiffs accepted that enforcing a costs judgment against the plaintiffs in Kazakhstan would be 'problematic'.

[11] The first defendants have applied for orders that the plaintiffs provide security for costs, with further orders that if the security not be provided, the proceeding be dismissed and that a caveat lodged on behalf of the plaintiffs against the estate be dismissed. The first defendants move the Court pursuant to *UCPR* rule 671, which relevantly provides:

> 'The Court may order a plaintiff to give security for costs only if the Court is satisfied –
>
> ...

(e) The plaintiff is ordinarily resident outside Australia; or

...

(h) The justice of the case requires the making of the order.'

[12] As each of the plaintiffs in this case is indisputably ordinarily resident outside Australia, the discretion pursuant to rule 671 is enlivened. There is also no argument that the Court has an unfettered discretion in this regard, which is to be exercised in all the circumstances of the case.

[13] The impecuniosity of the plaintiffs is such that it can be accepted in the present case that it is highly likely that the plaintiffs would not be able to meet an order for security for costs, and their claim would thereby be stifled. That is a relevant matter for consideration in the exercise of the discretion.

[14] I note also that under each of the wills executed by the deceased in January 2004, each of the plaintiffs was a beneficiary for specific monetary bequests (albeit in different amounts in each will). Under neither of those wills were any of the plaintiffs entitled to the residuary of the deceased's estate (which is estimated to be valued in the order of $500,000 - $600,000). Similarly, the plaintiffs were the beneficiaries of specific monetary bequests under the will dated December 2002, and were not entitled to share in the residuary estate under that will.

[15] The will dated 1 March 2000 left a number of specific monetary bequests to other people and charities, bequeathed the deceased's residence to Father Mykola Serdiuk and his wife, and left the residue of the estate in equal shares to Nikolai Matusevich, Galina Strelnikova and Nina Kluchinskaya.

[16] The fact that the making of an order for security for costs is likely to stifle the litigation militates against the exercise of the discretion to make the order. There are, however, numerous other factors which also need to be considered in the present case.

[17] Not the least of these is the fact that these plaintiffs are resident out of the jurisdiction. In *P.S. Chellaram v China Ocean Shipping*[1], McHugh J said[2]:

> 'To make or refuse to make an order for security for costs involves the exercise of a discretionary judgment. That means that the Court exercising the discretion must weigh all the circumstances of the case. The weight to be given to any circumstance depends not only upon its own intrinsic persuasiveness but upon the impact of the other circumstances which have to be weighed. A circumstance which may have very great weight when only two or three circumstances have to be weighed may be of minor significance when many circumstances have to be weighed. However, for over 200 years, the fact that a party bringing proceedings, is resident out of the jurisdiction and has no assets within the jurisdiction has been seen as a

1 (1991) 102 ALR 321.
2 at 323.

> circumstance of great weight in determining whether an order for security for costs should be made. Indeed, for many years the practice has been to order such a party to provide security for costs unless that party can point to other circumstances which overcome the weight of the circumstance that that person is resident out of and has no assets within the jurisdiction.'

[18] Those observations obviously apply directly to the present case. The plaintiffs sought to ameliorate the impact of that weighty consideration by offering to have their prospective benefits under the wills stand as security for payment of any costs order that may be made against them. In that regard, the plaintiffs also point out that the application for security proceeds on an assumption that, if the plaintiffs fail, they will be ordered to pay the first defendants' costs, but submit that this is not the normal situation.

[19] The will sought to be propounded by the first defendants is that of 19 January 2004. Under that will, each of the plaintiffs is left US$2,000. The first defendants' solicitor has given unchallenged evidence that the costs likely to be incurred by the first defendants up to completion of the trial will be in the range of $60,000 to $70,000 on a standard basis and $80,000 to $100,000 on an indemnity basis. Even if one were to heavily discount each of those estimates so as to make an estimate of the costs likely to be incurred up to and including the first day of trial, it is clear that the total amount of the specific bequests to the plaintiffs under the will of 19 January 2004 would be nothing like the costs to be incurred by the first defendants in preparation for the trial. That preparation will, on the issues raised by the plaintiffs, necessarily involve the marshalling of expert evidence in connection with the allegations by the plaintiffs that the deceased lacked testamentary capacity.

[20] The plaintiffs' associated submission that this offer is of value because of the limited likelihood of a costs order being made against the plaintiffs in this litigation necessarily raises an inquiry into the claims advanced by the plaintiffs.

[21] In that regard, the first defendants submitted that an order for security for costs ought be made because of the likelihood of a finding at trial that the plaintiffs lacked standing to bring this claim and in any event have no prospects of success in the claim.

[22] On the question of standing, there are real concerns in relation to the status of the plaintiff Rufina, who is the daughter of Galina. A child of a sibling of an intestate deceased qualifies as 'next of kin' for the purposes of the intestacy distribution rules under Part 3 of the *Succession Act* 1981 only if their parent predeceased the intestate – s 35(1A)(d). Galina is still alive, and no basis was advanced for Rufina's claim to be a beneficiary in intestacy. There was also a question raised as to Nikolai's standing, but I think this arose out of a statement in his solicitor's affidavit in which the solicitor referred to Nikolai being a nephew of a sibling of the deceased rather than a nephew of the deceased.

[23] In any event, it is not at all apparent how the plaintiffs contend for claims in intestacy in circumstances where the only wills under challenge are those dated 12

January 2004 and 19 January 2004, and there are prior wills which are not the subject of any challenge. Indeed, by their reply in the proceeding, the plaintiffs admit the making of the 9 December 2002 will, but seek that the respondents prove that will in solemn form.

[24] It is trite to observe that an intestacy will not arise unless there is no valid will disposing of the deceased's estate. In order to make good their claim for entitlements on an intestacy, the plaintiffs would not only have to amend their claim to challenge (for good reason) at least the wills of 9 December 2002 and 1 March 2000 which are in evidence before me but likely also challenge the will which the plaintiffs' solicitor asserted in correspondence to Peter Rowlands & Co on 29 April 2005 was made by the deceased on 13 May 1994 appointing Mr Cyril Martin as trustee and executor.

[25] There is some preliminary medical and other evidence before me which raises questions as to the deceased's testamentary capacity in early 2004. There is, for example, a report by the doctor who provided palliative care for the deceased from 28 April 2004 until her death, who says that he very much doubted the deceased's capacity in January 2004, and says 'she would have been quite vulnerable at [that] time'. On the other hand, the deceased's general practitioner, who had been seeing her on about a monthly basis since 1988, had no doubt that she possessed testamentary capacity until at least 19 January 2004. Mental status questionnaires were administered to her on 12 and 19 January 2004 in the context of her making the wills of each of those dates, and the evidence is that she scored highly on each of those questionnaires.

[26] The problem for the plaintiffs, however, is that there is no evidence before me to suggest any lack of testamentary capacity on the part of the deceased prior to that time. Indeed the very highest that it could be put for the plaintiffs is, as deposed to by their solicitor, that there is what he describes as a 'strong argument that the deceased did not have mental capacity when executing [the January 2004 wills] or previous wills since 2002' (underlining added).

[27] In the absence of a challenge to each of the earlier wills, there are very real questions as to whether the plaintiffs have standing to bring this proceeding which challenges the 2004 wills. In *Re Devoy Fitzgerald and Tender v Fitzgerald*[3], Philp J, with whom Webb CJ and Manfield J agreed, said[4]:

> 'It is conceded that a person who really had an interest or pretended interest in the estate could not, merely upon showing such an interest or pretended interest, oppose a will: he must have been able to show that the grant of probate would affect some interest of his. It is also conceded that the law provided that no person could intervene in a probate action merely because he was interested in the estate: he must have shown that he was interested in the outcome. These principles were based on deep-rooted policy, because it is contrary to the interest of the State that persons having nothing to gain thereby should be permitted to institute or intervene in litigation,

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3 [1943] St R Qd 137.

4 at 144.

> and courts are not established to enable parties to litigate matters in which they have no interest affecting their liberty, rights or property.'

[28] The real dispute in this matter is as to the validity of the two wills executed in January 2004. The plaintiffs are the beneficiaries of specific bequests under each of those wills, and have no further interest in the specific question as to which of either of those wills is admitted to proof. But even if both of those wills fail, an intestacy does not arise, in light of the admitted existence of the prior wills, none of which are the subject of challenge.

[29] Whilst I expressly do not make final findings on these matters against the plaintiffs, it is nevertheless apparent from what I have said that significant doubts appear on the material in relation to the claims sought to be advanced by the plaintiffs in this proceeding. Those concerns are of sufficient magnitude as to be, in my opinion, a significant factor to be weighed in the mix for the purposes of considering the application for security for costs. It also impacts on the plaintiffs' submission concerning the costs orders which might be made in these proceedings, and certainly goes some considerable way to undermining an assumption that the plaintiffs' costs would in any event be met out of the estate even if they are unsuccessful in the litigation.

[30] The first defendant also raised concerns about the validity of the appointment of Mr Martin as the plaintiffs' attorney, and also the purported appointment of Nikolai as agent for the other plaintiffs, but given my views on the matters addressed above, it is not necessary to explore these other issues further.

[31] Given the factors to which I have referred, I consider that the balance is sufficiently weighed against the plaintiffs as to call, in the particular circumstances of this case, for the discretion to be exercised to order the plaintiffs to provide security for costs.

[32] I have already mentioned that the first defendants' solicitor has deposed to having made an estimate of the costs which will be incurred by the first defendants in this matter, both on a standard basis and an indemnity basis. The estimate given by the first defendants' solicitor, however, needs to be discounted, as security would ordinarily only be granted for the first defendants' costs up to and including the first day of trial. Account also needs to be had of the fact that the first defendants will in any event be incurring costs in the litigation with the second defendants concerning the competing 2004 wills.

[33] In all the circumstances, I consider it appropriate to require that the plaintiffs provide security for the first defendants' costs up to and including the first day of trial in the sum of $25,000. There will be a further order that, if such security for costs is not provided within 28 days, the plaintiffs' proceeding against the first defendants will be stayed. I would not, on this application, be inclined to order a striking out of the plaintiffs' claim, without the plaintiffs having the opportunity to put on further material to resist the complete termination of their claims.

[34] The costs of the application will be reserved.