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Court rejects security for costs application against impecunious appellant

Mark Brookes, Partner

Tom Pepper, Solicitor

Introduction

Parties who successfully defend claims by impecunious plaintiffs are often placed in the unfortunate position of being unable to recover the amount of any cost awards made in their favour.

The *Uniform Civil Procedure Rules 1999* (Qld) provides mechanisms for parties to apply to the court to order a plaintiff/appellant to give security to the court for an amount the court considers appropriate for the defendant's costs of and incidental to the proceeding or appeal (as the case may be).[1] Common methods of providing security include making a payment into court or lodging a bond or guarantee from a bank.

The purpose of an order for security for costs is to grant the defendant piece of mind that its expenses of defending the claim will be satisfied in the event it is successful.

Woolworths Ltd v Berhane[2] illustrates the issues the courts will consider when deciding whether to grant security for costs and is a reminder that even in the case of an impecunious plaintiff/appellant, the court will not necessarily make an order that they pay security for costs.

Background

Woolworths Ltd v Berhane involved an application by Woolworths for security for the costs of the appeal made by Mr Behrane from a decision of the District Court of Queensland to dismiss his claim for personal injuries against Woolworths. Woolworths sought an amount exceeding $98,000 for security.

Mr Behrane's assets comprised a car (which he used to transport his three school aged children) and two or three thousand dollars in a bank account. He was in receipt of a *'Newstart Allowance'* from Centrelink and worked varied part time hours as a translator and migrant worker for $32 per hour.

The evidence was that Mr Behrane would not be able to meet the award for security if it was

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made, and such an order would frustrate his ability to continue with his appeal.

Decision

The court has an unfettered discretion whether to order security and to decide the amount.[3] Factors relevant to the discretion include whether the plaintiff has had a chance to have *'their day in court'*, the plaintiff's impecuniosity and their prospects of success on appeal.

His Honour Philip McMurdo JA noted that impecuniosity of itself is not a determinative consideration for an application for security for costs and that whether a plaintiff has had 'their day in court' is of less relevance to an application for security of costs for an appeal (rather than a trial).

Mr Behrane's solicitors were known to specialise in personal injury claims on a speculative basis and the court inferred that they had acted on behalf of Mr Behrane on that basis (including funding counsel's fees). In these circumstances there were not two but three distinct interests in the outcome of the appeal, being the interests of the parties to the appeal as well as that of Mr Behrane's solicitors (who without succeeding on the appeal, would likely not be able to recover their legal fees).

His Honour's focus centred predominately on Mr Behrane's prospects of success in the appeal. The findings at trial were:

1. Woolworths was negligent by not supervising the implementation of a safe system of work in respect of the manner and frequency of handling of loads by employees such as Mr Behrane;
2. Mr Behrane was injured in his workplace by suffering an aggravation of a pre-existing degenerative condition; but
3. Because Mr Behrane would have suffered his injury regardless of the respondent's negligence the claim was dismissed.

Having regard to the above findings the principal issue on appeal was whether the factual finding was wrong. The Court of Appeal considered that it was not unlikely that the trial judge had erred by failing to consider whether Mr Behrane had a claim upon the basis of acceleration of the onset of the condition of which he complained as a result of the respondent's negligence, and therefore Mr Behrane's case was at least arguable.

In light of the apparently reasonable prospects of success in the appeal Woolworth's application for security was refused, allowing Mr Behrane to proceed with his appeal without having to pay security for costs.

Comment

This decision reminds defendants (and their insurers) that an order for security for costs will not always be granted in favour of a respondent to an appeal from an impecunious litigant.

In this case, Woolworths, despite successfully defending the claim at trial, and Mr Behrane being clearly impecunious, were refused an order for security for costs meaning that in the event they are successful at the appeal and awarded a costs order, it is unlikely they will ever recover the amount of the costs award.

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[1] See rules 670 (first instance) and 772 (appeal).
[2] [2016] QCA 238.
[3] *Murchie v Big Kart Track Pty Ltd* (No 2) [2003] 1 Qd R 528.

Authors

Mark Brookes
Partner

P: (07) 3000 8301
E: mbrookes@carternewell.com

Tom Pepper
Solicitor

P: (07) 3000 8360
E: tpepper@carternewell.com

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