

AUSTRALIA / JUDGMENT

Darcey v The Preterm Foundation [1987] FCA 260

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discretion of the Court - Impecuniosity as a factor -

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CATCHWORDS

PRACTICE - Security for costs of appeal - Unfettered discretion of the Court - Impecuniosity as a factor - Whether the appeal was brought, not for the benefit of the appellant, but for the benefit of another - Whether at 1S appropriate on an application for security for costs to consider the merits of the appeal - Appeal raising an arguable question of law - security refused. Federal Court of Australia Act 1976 Federal Court Rules Order 52 1r.20, Order 53 r.8, Order 28 r.3

DARCEY -V- THE PRETERM FOUNDATION

NSW G.520 of 1986

Burchett J.

Sydney

18 May 1987

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IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY No. G.520 of 1986

GENERAL DIVISION

BETWEEN: PATRICK MICHAEL DARCEY
Applicant
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THE PRETERM FOUNDATION
Respondent
MINUTE OF ORDER OF THE COURT
Judge Making Order: Burchett J.
Where Order Made: Sydney '
Date of Order: 18 May 1987

THE COURT ORDERS
THAT: (1) The motion for security for costs be dismissed.
(2) The costs of the motion be reserved.
NOTE: Settlement and entry of orders is dealt with in Order
36 of the Federal Court Rules.
IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY No. G.520 of 1986
GENERAL DIVISION

BETWEEN: PATRICK MICHAEL
DARCEY
Applicant

AND: THE PRETERM
FOUNDATION
Respondent

REASONS FOR JUDGMENT

BURCHETT J. This is an application for an order for security for the costs of the respondent to an appeal brought by the appellant to

the Full Court of this Court against a sequestration order made under the Bankruptcy Act 1966.

By s.56 of the Federal Court of Australia Act 1976 it is provided, inter alia, as follows:

"(1) The Court or a Judge may order a plaintiff in a proceeding in the Court or an appellant in an appeal to the Court to give security for the payment of costs that may be awarded against him.

(5) This section does not affect the operation of any provision made by or under any other Act or by the Rules of Court For or in relation to the furnishing of security."

By s.59(2)(n) Rules of Court are authorized which "may make provision for or in relation to ... the furnishing of

security."

Order 52 rule 20 provides:

"Unless the Court or a Judge otherwise directs no security for costs of an appeal to the Court shall be required."

In *Beard v. Prestige Baking Industries Pty Ltd* (1980) 51 F.L.R. 454 at 456 Northrop J., dealing with an application under

this rule which was then in relevantly similar terms, said:

"In the present case, the basic principle appears to be that there should be no order for security of costs in relation to an appeal. The fact that an appellant would be unable to pay the costs awarded against him, if the appeal fails, is a strong factor to be taken into account in considering whether to award security for costs or not, but it is not the only factor."

Since then, there have been a number of decisions relevant to the proposition stated by his Honour, the tendency of which is to confirm that impecuniosity is a factor but does not in itself establish an entitlement. In all cases the Court has an unfettered discretion to be exercised in the light of the

whole of the circumstances.

Under the analogous rule of the Supreme Court of New South Wales (which, however, resembles the rule - Order 53 rule

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appeals being appeals from the Administrative Appeals Tribunal in limiting its application to "special circumstances") It was held in *Abdurahman v. Field* (unreported, 4 March 1986) in the joint judgment of Kirby P., Glass and Samuels JJA. that:

"The general rule is that no security for costs of an appeal is required"; and that

"Normally the financial position of an appellant is not of itself sufficient to

establish 'special circumstances' and to warrant an order for security of costs."

In the earlier decision *Lall v. 53-55 Hall Street Pty Ltd* [1978]

1 N.S.W.L.R. 310 at 312 it had been said:

"While the lack of means of the appellant is an important matter for consideration and may provide 'special circumstances', it should be added, as this Court said in *Kennedy v. McGeechan* [1978] 1 N.S.W.L.R. 315(n.) '... , impecuniosity may not conclude the matter. Considerations of possible frustration of an apparently genuine appeal or concerning the subject matter of the appeal, such as appeals involving matters of great moment or the liberty of the subject, may provide reasons to refuse an order."

On the other hand, in the Supreme Court of Victoria it has been held that the practice is to make an order for security for costs of an appeal, on the appellant being shown to be unable to pay the respondent's costs should the appeal fail, unless some exceptional circumstances are shown: *Scerri v. Northam Holdings~*

Pty Ltd [1967] V.R. 674; *Woodhead v. Capricorn Caravans Pty Ltd*

(*Murphy, Fullagar and Gobbo JJ.*, unreported, 9 October 1986). Nevertheless, in the last case, in which *Abdurahman v. Field* does not appear to have been cited, *Murphy J.* (with whom *Fullagar J.* agreed) referred to "the general discretion that I believe this

Court has." He also said:

"The discretion which the Court has to make such an order is, however, not limited in any way by the terms of the rule."

In this Court, the terms of s.56 and of the applicable rule suggest no limitation upon the broad discretion to be exercised by the Court. In *Lucas v. Yorke* (1983) 50 A.L.R. 228 *Brennan J.* referred to a similarly broad discretion conferred

upon the High Court by its rules. He held that:

"The discretion is not fettered by a rule, such as the rule adopted by the Court of Appeal in *Hall v. Snowden, Hubbard & Co.*

[1899] 1 Q.B. 593, that security for costs is ordinarily ordered when a respondent shows that the appellant, if unsuccessful, will be unable through poverty to pay the costs of the appeal."

(Hall's case is authority for a rule corresponding to that stated in the Victorian Supreme Court.) On the contrary, he held the discretion was absolute. Similarly, *Brennan J.* pointed out, *Gibbs C.J.* in *D.J.E. Constructions Pty Ltd v. Maddox* (1981) 38 A.L.R. 185 had treated the inability of an appellant to meet the costs of an unsuccessful appeal as a relevant factor, but as *Brennan J.* commented in *Lucas v. Yorke* at 228:

"It is no more than a factor to be weighed in all the circumstances."

In my view, the decisions of *Gibbs C.J.* and *Brennan J.* (which follow an earlier decision of *Rich J.* to which *Brennan J.*

refers) apply to s.56 of the Federal Court Act and rule 20 of Order 52, which are not relevantly distinguishable from the provisions their Honours were considering.

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This approach is also consonant with that taken under the comparable, though differently worded, rule mentioned above relating to appeals from the Administrative Appeals Tribunal, as to which see *Arnold on behalf of Australians for Animals*

v. The State of Queensland (Woodward, Wilcox and Burchett JJ., unreported, 13 May 1987).

The circumstances of the present case are not usual. The appellant has been for a number of years a member of a religious community within the Roman Catholic church known as the Mother of God Brothers. The members of the community received on 31 December 1984, from the Roman Catholic Bishop of Wagga Wagga, a constitution in accordance with the Canon Law of the Roman Catholic church. However, the community had been in existence for some time previously, and the appellant had become a novice on 1 January 1976 when he had taken temporary private vows of poverty, chastity and obedience. On 7 August 1982, he had taken final and perpetual vows to become a fully professed member. In accordance with his vows, the appellant says that since 7 August 1982 he has not held any beneficial interest in any property, and he has not received payment for any work performed by him since 1979. During his novitiate, prior to that year, he had earned some income at times, but had always paid it on receipt to the community. For the past two years, he has been supported by the community as a full time theological student in a seminary at Hunters Hill. The community's main source of income is from outside employment engaged in by some of its members whose earnings are paid to the community.

In 1982, the appellant was charged, pursuant to s.4(1)

of the Inclosed Lands Protection Act 1901 (NSW), with an offence

of entry on 15 October 1981 without lawful excuse into the respondent's premises at 50 Cooper Street Surry Hills without the consent of the person apparently in charge thereof. The appellant pleaded not guilty to the charge, and in connection with his defence caused a subpoena to be issued requiring the respondent to produce a number of medical patient records which he claimed were relevant to his defence. The respondent applied to set aside the subpoena, and was successful. The appellant was also successful in his defence of the charge against him. The appellant was ordered to pay the respondent's costs of the application to set aside the subpoena, assessed at \$4,000. A challenge to this order by way of prerogative writ failed:

Darcey v. Preterm Foundation Clinic [1983] 2 N.S.W.L.R. 497. The

appellant was ordered to pay the costs of the prerogative writ proceedings, but those costs have never been taxed.

Proceedings in bankruptcy, commenced by the respondent against the appellant in respect of the costs order for \$4,000, were heard on 28 October 1986, when Evatt J. made a sequestration order against the appellant. It was in his appeal against that order that the present application for security for costs was made.

For the respondent, Miss Coonan relied upon three basic submissions as justifying the making of an order for security for

costs. First, she argued that the appellant does not have access

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to funds to meet a costs order against him, and that his impecuniosity is by his own choice, albeit a choice made some years ago. Secondly, she referred to Order 28 rule 3(1)(b) of

the Federal Court Rules. That rule provides:

"Where, in any proceeding, it appears to the Court on the application of a respondent ... that an applicant is suing, not for his own benefit, but for the benefit of some other person and there is reason to believe that the applicant will be unable to pay the costs of the respondent if ordered to do so ... the Court may order that applicant to give such security as the Court thinks fit for the costs of the respondent of and incidental to the proceeding."

The argument was that the appellant's appeal is part of the conduct of litigation by him, not merely for his own benefit, but in pursuit of the aims of the religious community of which he is a member. As I understand it, the argument asks me to infer that the community is implacably hostile to the objectives of the respondent, an incorporated body which performs therapeutic abortions, and that the present appeal is a manifestation of that hostility. I think the factual basis of this submission encounters great problems. In cross-examination, the appellant said that in about 1980 he had received a direction to go to Sydney to combat abortion and to try and save unborn babies. He was not asked over what period he had pursued that mission, nor whether any of the actions taken in the course of the defence of the prosecution launched against him was for the ulterior purpose of carrying out the earlier instruction of his superiors in the community. He did say that he was not specifically instructed to carry out activities of the kind which apparently led to the

prosecution, The costs of his defence, and of the proceedings

relating to the subpoena, were not met by the community but by donations made to him by individuals. Those individuals were unwilling, when the costs order was made against the appellant, to continue to assist him. The appellant also specifically said that he had received no direction to defend the bankruptcy proceedings, and no direction from any person or association in relation to his appeal. The community had not met his costs of the appeal, nor was he planning to ask it to do so.

I accept that the benefit of some other person referred to in rule 3 is not limited to a financial benefit: *Andrews v.*

Caltex Oil (Australia) Pty Ltd (1982) 40 A.L.R. 305; *Upton v. TVW*

Enterprises Ltd (1984) 4 F.C.R. 121. In the latter case, Toohey J. pointed out that proof that a proceeding was brought for the benefit of another does not necessarily establish that it was not brought for the benefit of the applicant. On the evidence and in the circumstances of the present case, I am quite unable to conclude that the appeal has not been brought for the benefit of the appellant. It is against him that the sequestration order has been made, an order affecting his status and placing special liabilities and potential liabilities upon him. Even if the separate nature and incidents of the bankruptcy proceedings be ignored, so as to treat the appeal as but a continuation of the previous litigation, that litigation directly involved the appellant and not the community.

Miss Coonan's third proposition was that the appeal involved the discretion of a Judge under s.52(2)(b) of the

Bankruptcy Act 1966, and that it was not likely to succeed, In

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Beard's case (*supra*, at 456-7), Northrop J. expressed the view that it was inappropriate that he should consider the merits of the judgment from which the appeal was taken. In *Woodhead v. Capricorn Caravans Pty Ltd* (*supra*) it was also held that the merits of the appeal were not a legitimate consideration into which to enter upon an application for security for costs. At the same time, if the appeal could be described as "hopeless", that would clearly be a ground for making an order: *Lall v.*

53-55 Hall Street Pty Ltd (*supra*). In *D.J.E. Constructions Pty*

Ltd v. Maddox (*supra*) Gibbs C.J. said the appellant's case "raises what is undoubtedly an arguable question of law", and in the light of other circumstances peculiar to that case he refused to make an order. In the present case, being satisfied that the appeal does raise an arguable question of law, I do not think it

is necessary or appropriate that I should discuss further the

question of the merits of the appeal.

In all of the circumstances, I have concluded that justice will be best served by my declining to make any order for security for costs. At the hearing, I dismissed the motion for security for costs, reserving my reasons, which I now deliver. I

reserve the costs of the motion.

I certify that this and the preceding eight (8) pages are a true copy of the Reasons for Judgment herein of his Honour Mr. Justice Burchett.

Associate

Counsel for the Applicant: Solicitors for the Applicant: Counsel for the Respondent:

Solicitors for the Respondent:

Date of Hearing:

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Mr. C.C. Hodgekiss Forshaws, Solicitors Miss H. Coonan

Michael Rosser & Solicitors

31 March 1987

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