
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : FRIGGER -v- COMPUTER ACCOUNTING & TAX
PTY LTD [2023] WASCA 152

CORAM : MAZZA JA
MITCHELL JA

HEARD : 26 OCTOBER 2023

DELIVERED : 26 OCTOBER 2023

PUBLISHED : 26 OCTOBER 2023

FILE NO/S : CACV 41 of 2023

BETWEEN : ANGELA CECILIA THERESA FRIGGER
First Appellant

HARTMUT HUBERT FRIGGER
Second Appellant

AND

COMPUTER ACCOUNTING & TAX PTY LTD
First Respondent

MERVYN JONATHAN KITAY
Second Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA

Coram : SMITH J

Citation : IN THE MATTER of Computer Accounting and Tax
Pty Ltd (ACN 009 470 491) [No 4] [2023] WASC 90

File Number : COR 2 of 2010

Catchwords:

Appeal - Practice and procedure - Application for security for costs - Turns on own facts

Legislation:

Nil

Result:

Application for security for costs granted

Category: B

Representation:

Counsel:

First Appellant : In person
Second Appellant : In person
First Respondent : B W Ashdown
Second Respondent : B W Ashdown

Solicitors:

First Appellant : In person
Second Appellant : In person
First Respondent : Herbert Smith Freehills
Second Respondent : Herbert Smith Freehills

Case(s) referred to in decision(s):

Clough Limited v Forge Group Limited (in liq) [2022] WASCA 179
Frigger v Professional Services of Australia Pty Ltd [2022] WASCA 119
George 218 Pty Ltd v Bank of Queensland Limited [2016] WASCA 56
Hancock Prospecting Pty Ltd v Hancock [No 3] [2016] WASC 423
Harvard Nominees Pty Ltd v Dimension Agriculture Pty Ltd (in liq) [2023] FCAFC 140
Marsh v Baxter [No 2] [2016] WASCA 51
Noye v Robbins [2010] WASCA 83
Oil Basins Ltd v Watson [2017] FCAFC 103; (2017) 252 FCR 420
Oze-Igiehon v Rasier Operations BV [2017] WASCA 107

REASONS OF THE COURT:

1 At the hearing of the respondents' application for security for costs on 26 October 2023, we made the following orders for reasons to be published later:

1. The appellants pay into court the sum of \$18,000 as security for the respondents' costs of the appeal.
2. The appeal is stayed pending compliance with order 1 of these orders.
3. Unless the appellants comply with order 1 of these orders by 4.00 pm on 16 November 2023, the appeal is dismissed and the appellants must pay the respondents' costs of the appeal, including reserved costs, to be assessed if not agreed.
4. The costs of the respondents' application in an appeal filed on 2 June 2023 be reserved.

2 These are our reasons for making those orders.

Background

3 The general background to the protracted litigation of which this appeal forms part is summarised in the annexure to the decision of this court in *Frigger v Professional Services of Australia Pty Ltd*.¹

4 The current appeal is against orders made by the primary judge in COR 2 of 2010 on 24 March 2023. COR 2 of 2010 are the proceedings in which orders were made for the winding up of the first respondent (CAT). The second respondent, Mr Kitay, is the liquidator of CAT.

5 The challenged orders were made in relation to an application by interlocutory process filed in COR 2 of 2010 on 28 October 2022 and amended on 6 December 2022 (**Primary Claim**). The application was made by the appellants, Mrs and Mr Frigger, as trustees of the Frigger Super Fund. The relief sought by the appellants included orders requiring Mr Kitay to transfer specified land to them as trustees of the Frigger Super Fund, and to pay damages for loss of opportunity resulting from the retention of what they contend were assets of the Frigger Super Fund.

¹ *Frigger v Professional Services of Australia Pty Ltd* [2022] WASCA 119.

6 A similar claim to the Primary Claim had previously been made by Mrs Frigger as trustee of the Frigger Super Fund in COR 126 of 2020. The application for relief had been struck out on the basis that Mrs Frigger, acting alone, lacked standing to bring the application. On 25 October 2022, Allanson J ordered that Mrs Frigger's application be struck out and that she pay Mr Kitay's costs. By 24 March 2023, those costs were provisionally assessed in the amount of \$28,259.10 and had not been paid.

7 On 24 March 2023, the primary judge made orders which had the effect of staying the Primary Claim until the appellants paid the following amounts into court:

1. \$30,000 as security for the respondents' costs of their anticipated application to strike out, or obtain summary judgment in, the Primary Claim; and
2. \$28,259.10, being the costs provisionally assessed in COR 126 of 2020.

The current appeal is against these orders.

Primary judge's approach

8 The following is a summary of the primary judge's reasons for making the orders on 24 March 2023.

Payment in respect of costs in COR 126 of 2020

9 The primary judge noted that, at the hearing of the application in the Primary Claim before her Honour, Mrs Frigger stated that she had no intention of paying the costs awarded in COR 126 of 2020.²

10 The judge noted that Mrs Frigger, in an affidavit sworn on 25 January 2023, had deposed that the Frigger Super Fund held a share portfolio with a current market value of \$17,353,082 and a savings account with an available balance of \$437,848. Her Honour held that, on that basis, it could not be found that the appellants did not have the capacity to pay the costs awarded against them in COR 126 of 2020.³

11 The judge concluded that the claims raised by Mrs Frigger in COR 126 of 2020 and the Primary Claim were the same, or substantially the same, claims in relation to the same subject matter.⁴

² *Re Computer Accounting and Tax Pty Ltd [No 4]* [2023] WASC 90 [36] (primary decision).

³ Primary decision [42].

12 Her Honour found that, in circumstances where Mrs Frigger had informed the court that she did not intend to pay the taxed costs of COR 126 of 2020, a clear abuse of process of the court arose. The primary judge held that that the court should not stand by and allow the prosecution of the Primary Claim when the costs orders of the prior failed proceedings, which raised substantially the same issues, will not be complied with.⁵

13 Her Honour therefore stayed the Primary Claim until the amount of the provisionally assessed costs in COR 126 of 2020 were paid into court.⁶

Payment as security for costs in the Primary Claim

14 The primary judge found that the respondents' foreshadowed strike out/summary judgment application could not be found to be without merit.⁷

15 The effect of encumbrances on the appellants' real property would make it very difficult for Mr Kitay to enforce any future costs order against that property.⁸

16 The appellants had access to substantial funds in the Frigger Super Fund and were not impecunious. However, they had a long history of refusing to pay costs orders made against them. The primary judge regarded this factor as bearing 'overwhelming weight' in favour of the grant of security for costs for the respondents' foreshadowed strike out/summary judgment application.⁹

17 Her Honour accepted the estimate of \$30,000 in recoverable costs of that application to be reasonable and ordered the appellants to pay that amount into court as security for costs.¹⁰

The appeal to this court

18 On 11 April 2023, the appellants appealed to this court against the orders made on 24 March 2023. By appellant's case filed on 3 May 2023, they advance three grounds of appeal which in substance contend that:

⁴ Primary decision [84].

⁵ Primary decision [86].

⁶ Primary decision [87]; *Re Computer Accounting and Tax Pty Ltd [No 4]* [2023] WASC 90 (S) [1] - [2].

⁷ Primary decision [99].

⁸ Primary decision [101].

⁹ Primary decision [102].

¹⁰ Primary decision [104] - [105].

1. The primary judge erred in requiring them to pay \$28,259.10 into court in circumstances where no such order was made in COR 126 of 2020 and the proceeding was dismissed in October 2022.
2. The primary judge erred in failing to appreciate the prima facie merits of the Primary Claim.
3. The primary judge erred by failing to consider a term deposit held in CAT's name in the amount of \$2,926,887.71 against which the respondents could enforce any costs judgment if the Primary Claim is unsuccessful.

19 The appellants contend that leave to appeal should be granted on the basis that the orders made on 24 March 2023 constitute errors of law which, if left unreversed, will unjustly deprive them of a trial of the Primary Claim.

20 On 22 May 2023, the respondents filed a respondent's answer contending that none of the grounds of appeal are established and leave to appeal should be refused.

The application for security for costs

21 On 2 June 2023, the respondents filed an application seeking orders for the payment of security for their costs of the appeal in the amount of \$18,000, the stay of the appeal pending payment of the security and the dismissal of the appeal if security is not provided.

22 The respondents' application is supported by two affidavits of David William John, one of the respondents' solicitors, which depose as to the following facts.

23 The appellants are registered proprietors of real property in Applecross. Mrs Frigger is the registered proprietor of real property in Bayswater and Como. Each property is subject to registered mortgages, caveats and property (seizure and sale) orders.

24 Searches of the Personal Property Securities Register indicate that certain bank accounts in which the appellants claim an interest are subject to securities in favour of the Frigger Super Fund.

25 On 20 July 2018, sequestration orders were made against the appellants under the *Bankruptcy Act 1966* (Cth) as a consequence of

their refusal to pay costs orders made against them. The appellants were discharged from bankruptcy by operation of law on 26 July 2021.

26 Mr John provides evidence of numerous occasions on which the appellants have failed to satisfy costs orders made against them and have failed to pay money into court when required to do so.

27 Mr John estimates the respondents' solicitor/client legal costs of this appeal to be in the order of \$21,208 and provides a draft bill of costs in which that estimate is made.

28 On 8 August 2023, a certificate of taxation of Mr Kitay's costs in COR 126 of 2020 was issued by the registrar in the amount of \$26,231.75. Mrs Frigger has applied for an order staying the taxation of costs in COR 126 of 2020, in which judgement stands reserved.

29 In her affidavit opposing the application for security for costs, Mrs Frigger annexes a copy of a bank statement from Macquarie Bank for an account in her name which, as at 2 October 2023, had a balance of \$293,050.06. The affidavit also asserts that the appellants have a claim for damages against Mr Kitay for an amount which exceeds \$8 million.

30 Mrs Frigger also annexed one page of transcript in which she contends Mr John stated that Mr Kitay has not paid any costs to his firm, and has no liability to pay costs, unless he recovers funds in CAT's liquidation. Mrs Frigger asserts that, since his appointment on 21 January 2020, Mr Kitay has not recovered any funds in CAT's liquidation. However, the annexed transcript does not establish either proposition. Further, no context for the transcript has been provided, and it is not clear from the extract provided what is being discussed.

31 In his responsive affidavit sworn 23 October 2023, Mr John produces documents indicating that payments into Mrs Frigger's Macquarie Bank account appear to have been made by a company occupying land which was claimed by the appellants to be an asset of the Frigger Super Fund in the primary proceedings.

Security for costs: general principles

32 The general principles in relation to security for costs were outlined in *George 218 Pty Ltd v Bank of Queensland Limited*.¹¹ In summary:

¹¹ *George 218 Pty Ltd v Bank of Queensland Limited* [2016] WASCA 56 [41] - [48]; *Oze-Igiehon v Rasier*

1. The power to order security is exercised to serve the interests of justice.
2. The discretion to order security is unfettered but must be exercised judicially. 'Special circumstances' do not have to be shown before an order for security for costs is made against an appellant.
3. An appellant's inability to satisfy a costs order should the appeal fail is generally a significant factor in favour of an order for security for costs. However, if the respondent has caused the appellant's impecuniosity, that may be a relevant countervailing factor.
4. Impecuniosity is not in itself generally the sole ground for the making of an order for security. Even where the appellant is impecunious, in all the circumstances, the interests of justice may properly be served by not making such an order.
5. Other factors generally include the appellant's prospects of success, whether the appellant would be shut out of the appeal if security for costs were ordered, and whether there has been any delay in the respondent filing the application for security for costs.
6. Ultimately, each case will turn on its own circumstances, and it is not possible to set out an exhaustive list of the relevant considerations.
7. Where security is ordered against an impecunious appellant, the amount ordered should not be greater than is absolutely necessary.

Disposition of security for costs application

33 The appellants have a long history of failing to pay costs orders. They do not claim to be impecunious, and contended in the primary proceedings that they hold significant assets in the Frigger Super Fund. The capacity of the respondents to enforce costs orders against the appellants' encumbered real property and assets of a superannuation fund is limited. Mrs Frigger's affidavit does not disclose whether amounts held in the Macquarie Bank account are trust assets. The fact that money is paid into that account from the occupant of one of the

properties claimed to be a trust asset suggests that the funds in the Macquarie Bank account might be claimed by the appellants to be assets of the Frigger Super Fund. There is no evidence that an order for security for costs will shut the appellants out from prosecuting the appeal, and they do not contend that to be the case. To the contrary, at the hearing of the present application, the appellants indicated they had the capacity to pay amounts ordered on 24 March 2023 and sought in this application by way of security for costs. The appellants' damages claim against Mr Kitay has not been substantiated.

34 At this preliminary stage, the appellants' prospects of success in the appeal do not appear to us to be strong. They face the challenge that their appeal is against interlocutory procedural orders made by the judge charged with the case management of the Primary Claim. Leave to appeal is required. While there are no rigid or exhaustive criteria, generally leave should not be granted unless the decision below is plainly wrong or is attended by sufficient doubt to justify the grant of leave and a substantial injustice would be done if it remains undisturbed. In Western Australia, appellate restraint is exercised to avoid interfering with interlocutory procedural decisions, especially decisions by primary judges managing cases in the Commercial and Managed Cases List.¹²

35 The appellant's case does not challenge the primary judge's findings that the appellants had the capacity to pay the required amounts into court. On that basis it is difficult to see how any substantial injustice would flow from leaving the primary orders unreversed. It is difficult to see how the appellants' claim that the primary orders have deprived them of the right to have a trial of the Primary Claim can be accepted. There is no obvious reason why the appellants could not have paid the amounts required by the orders made on 24 March 2023 into court and proceeded with the Primary Claim. They would have the opportunity to seek repayment of the money paid into court if the Primary Claim is successful. At the hearing of this application, the appellants expressed concern as to the prejudice which they will suffer if factual and legal findings made by the primary judge are allowed to stand. However, the interlocutory nature of the primary orders would prevent any issue estoppel from arising. Our preliminary view at this provisional stage is that the appellants' case for the grant of leave to appeal is not strong.

¹² See, for example, *Clough Limited v Forge Group Limited (in liq)* [2022] WASCA 179 [21] - [23].

36 There was some delay by the respondents in applying for security for costs. The application was made almost two months after the institution of the appeal and after the appellants had prepared an appellant's case. While that is a factor counting against the grant of security for costs to a limited extent, on balance it is outweighed by the other factors to which we have referred. In all the circumstances, it is in the interests of justice to require the appellants to pay security for the respondents' costs of this appeal.

37 We do not accept the appellants' submission that the indemnity principle provides a reason why security for costs should not be required.

38 Under the indemnity principle, costs are awarded by way of indemnification so that a party who does not have a liability to their solicitors for costs cannot recover costs against an unsuccessful party to the litigation.¹³ In the absence of proof of an agreement to the contrary, a solicitor who acts on instructions for a party on the record is taken to be entitled to look to that party for costs.¹⁴ To avoid a costs order on the basis of the indemnity principle, an unsuccessful party must show that there is an agreement between the successful party and their solicitors that under no circumstances will the successful party be liable for costs. The indemnity principle will permit recovery of costs by a successful party who is under a legal liability to pay their solicitors even though the likelihood of their being called upon to do so is remote.¹⁵ The principle will allow costs recovery even though the liability may be or has been discharged by a third party.¹⁶

39 In the present case, there is no evidence establishing that the respondents have no liability to their solicitors so that they cannot recover costs from the appellants pursuant to the indemnity principle. The evidence does not overcome the presumption that the respondents are liable to pay costs to their solicitors on the record. It is, in all the circumstances, appropriate to require the appellants to provide security for what is at least a prima facie liability of the respondents to their solicitors in respect of the costs of the appeal.

¹³ *Marsh v Baxter [No 2]* [2016] WASCA 51 [31].

¹⁴ *Marsh* [37]; *Oil Basins Ltd v Watson* [2017] FCAFC 103; (2017) 252 FCR 420 [40] - [42]; *Harvard Nominees Pty Ltd v Dimension Agriculture Pty Ltd (in liq)* [2023] FCAFC 140 [18].

¹⁵ *Marsh* [32] - [35].

¹⁶ *Noye v Robbins* [2010] WASCA 83 [296] - [313] (Owen JA, Pullin JA agreeing at [380], Buss JA agreeing at [381]).

40 The appellants relied on the observation of Pritchard J in *Hancock Prospecting Pty Ltd v Hancock [No 3]*,¹⁷ that the presumption as to the existence of a retainer may be displaced by evidence inconsistent with the existence of a retainer. That observation does not assist the appellants as, in the present case, there is no evidence inconsistent with the existence of a retainer. The transcript annexed to Mrs Frigger's affidavit, on which the appellants rely, is entirely consistent with the existence of a retainer between the respondents and their solicitors.

41 The amount of security sought by the respondents appeared reasonable in the circumstances. We therefore made orders requiring the appellants to pay \$18,000 into court as security for the respondents' costs of the appeal.

42 Given the appellants' history of non-compliance with orders for the payment of security for costs and their apparent capacity to pay the security required in this appeal, it was also in the interests of justice to make an order dismissing this appeal if the required amount of security for costs in this appeal is not paid.

43 For these reasons, at the hearing of the respondents' application for security for costs, we made the orders referred to at [1] above.

¹⁷ *Hancock Prospecting Pty Ltd v Hancock [No 3]* [2016] WASC 423 [59].

REASONS OF THE COURT

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

EM
Associate to the Honourable Justice Mitchell

26 OCTOBER 2023