PARTIES:	MOHAMMAD AYYOUSH
	v
	DARSIAH SAMIN AND FATIMA ADJRUN
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	APPEAL FROM LOCAL COURT EXERCISING TERRITORY JURISDICTION
FILE NOS:	No. 204 of 1993
DELIVERED:	Darwin 18 May 1994
HEARING DATES:	17 March 1994
JUDGMENT OF:	KEARNEY J

CATCHWORDS:

Costs - security for costs - appeal - whether impecuniosity may be "special circumstances"

Supreme Court Rules (NT), r83.11(1)

Wilson v Lowery (1991) NTJ 1147, followed, in part
Kennedy v McGeechan [1978] 1 NSWLR 315n, followed
Lall v 53-55 Hall Street Pty Ltd [1978] 1 NSWLR 310, followed
Fletcher v Commissioner of Taxation (1992) 37 FCR 288, followed
Webster v Lampard (1993) 112 ALR 174, followed
Kiely v Beneficial Finance Corp. Ltd (1991) 6 WAR 521, followed
Commonwealth Bank of Australia v Eise (1991) 6 ACSR 1, followed
Harlock v Ashberry (1881) 19 Ch. D. 84, referred to
Stock v Woods [1957] St R Qd 62, referred to

Costs - security for costs - appeal - whether exercise of costs discretion untrammelled - relevant factors

Supreme Court Rules (NT), r83.11(1)

P S Chellaram and Co Ltd v China Ocean Shipping Co (1991) 102 ALR 321, applied
Wilson v Lowery (1991) NTJ 1147, followed

Milingimbi Educational and Cultural Association Inc v Davis (1990) NTJ 921, followed
Summerglen Pty Ltd v Steppes Pty Ltd (unreported, Mildren J, 25 November 1993), followed
Pearson v Naydler (1977) 1 W.L.R. 899, followed
Lall v 53-55 Hall Street Pty Ltd [1978] 1 NSWLR 310, followed
Kennedy v McGeechan [1978] 1 NSWLR 315n, followed

REPRESENTATION:

Counsel:

Appellant:	In person
Respondent:	A.J. Fitzgerald

Solicitor:

Appellant:	In person
Respondent:	NTLAC

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 204 of 1993

IN THE MATTER OF the Local Court Act

AND IN THE MATTER OF an appeal from a decision of the Local Court at Darwin

BETWEEN:

MOHAMMAD AYYOUSH
Appellant

AND:

DARSIAH SAMIN & FATIMA ADJRUN
Respondents

CORAM: KEARNEY J

INTERLOCUTORY JUDGMENT

(Delivered 18 May 1994)

The background to the appeal from the Local Court

In August 1991 the appellant instituted proceedings in the Local Court against the respondents. He sued Ms Samin to recover monies she owed him under a loan agreement of 28 October 1990, and Mrs Adjrun as her guarantor. At the hearing on 21 April 1993 he withdrew his claims. However, the respondents pursued counterclaims they had lodged. They contended that they had respectively given certain gold jewellery to the appellant as security for separate loans of money they had respectively obtained; he contended that they had sold the jewellery to him.

They claimed damages for conversion of their jewellery. The learned Magistrate generally accepted the respondents' accounts in preference to that of the appellant, when handing down his decision on 24 September 1993. He found that while "the whereabouts of [Ms Samin's] jewellery is a mystery", Mrs Adjrun's jewellery had been returned to her in March 1993. Mrs Adjrun contended that she had repaid her own loan within the agreed time but the appellant had refused to return her jewellery to her until Ms Samin had repaid her loan. As to her claim for damages for the conversion of her jewellery his Worship held:-

> "Mr Ayyoush had the use of Mrs Adjrun's jewellery, wrongfully, for a period in excess of 19 months.
>
> I consider that Mrs Adjrun is entitled to be compensated for the wrongful retention by Mr Ayyoush of the jewellery. I calculate the damages as follows. The value of the jewellery on 28 September 1991 - - - was $8100. Mr Ayyoush, when loaning money to Mrs Adjrun, loaned money at an interest rate of 20 percent. I consider that this interest rate is applicable in determining the loss to Mrs Adjrun of the use of her jewellery. Twenty percent of $8100 is $1620 per annum or $135 per month. Mr Ayyoush had the use of the jewellery for about 19 months; 19 months at the rate of $135 per month is $2565. I consider that the sum of $2565 is ample compensation for the loss to Mrs Adjrun of her jewellery for a period of 19 months." (emphasis mine)

His Worship gave judgment for Mrs Adjrun in the sum of $2565, and for Ms Samin in the sum of $2379, on their counterclaims.

In October 1993 the appellant filed a Notice of Appeal from his Worship's decision setting out 6 grounds of appeal alleging various errors of law.

The application for security for costs

By Summons of 28 February 1994 this application was brought by the respondents under r83.11(1) of the Supreme Court Rules, seeking an order that the appellant provide security for the respondents' costs of the appeal. The appellant, appearing in person in this Court and the Local Court, opposed the application.

Rule 83.11 provides:-

> "(1) If a tribunal, a decision of which is the subject of an appeal, has power to award costs in respect of proceedings before it, the Court may, in special circumstances, order that such security as it thinks fit be given for the costs of the appeal.
>
> (2) Subject to subrule (1), no security for the costs of an appeal to the Court is required." (emphasis mine)

It follows from r83.01 and s31 of the Local Court Act that the Local Court, for the purposes of r83.11(1), is a "tribunal" with "power to award costs in respect of proceedings before it." I consider that the effect of r83.11(1) is that this Court has discretionary power to order security for the costs of the appeal, where it is satisfied that "special circumstances" render it just to do so.

The submissions

Mr Fitzgerald of counsel for the respondents, relying on *Summerglen Pty Ltd v Steppes Pty Ltd* (unreported, Mildren J, 25 November 1993) submitted that there were 3 matters which this Court must bear in mind on this application, viz:

(a) The respondents bear the onus of establishing that there is, prima facie, reason to believe that the appellant will not be able to pay the respondents'

legal costs, if unsuccessful in his appeal. I consider that that concession was rightly made; see *Chester v Candam Investments Pty Ltd* (1985) 61 ALR 729.

(b) Once the respondents establish a prima facie case in terms of (a), there is "a practical" onus on the appellant to adduce or point to some evidence to enable the Court to draw an inference that he is not impecunious in that sense. I accept that; see *Orison Pty Ltd v Strategic Minerals Corp N.L.* (1987) 77 ALR 141 at p162. This is not a 'live' issue in this case, since the appellant frankly concedes that he is impecunious, a matter in any event established by the affidavit evidence of the respondents.

(c) The substantive claim of the appellant in the appeal must have been made bona fide and it must have a reasonable chance of success. I accept this proposition; see *Sydmar Pty Ltd v Statewise Developments Pty Ltd* (1987) 11 ACLR 616 at p626, per Smart J.

It was against that background that Mr Fitzgerald submitted (i) that the appellant is impecunious and (ii) that his appeal has no merits; and for either reason the Court should exercise its discretion to order security of costs.

The appellant submitted that his grounds of appeal were bona fide and would be established; he conceded that he was

impecunious but, he submitted, "just because people have no money does not mean you cannot have justice." That was the extent of his submissions; accordingly, I have examined for myself such reply as may be made to the application.

Impecuniosity and "special circumstances"

It is necessary to consider whether "special circumstances" exist; it is only in that situation that the discretionary power under r83.11(1) to order security for costs is enlivened. In *Wilson v Lowery* (1991) NTJ 1147 Martin J (as he then was) considered (at pp1152-1154) some of the Victorian and New South Wales authorities on provisions similar to r83.11. His Honour concluded at p1155:-

> "The weight of [those] authorities - - - leads me to the view that impecuniosity of an appellant is a "special circumstance" within the meaning of the rule. There are good reasons why that is so, but, notwithstanding the establishment of the special circumstances, the discretion must still be exercised after taking into account all the circumstances of the particular case. No rules can be formulated in advance as to how the discretion should be exercised (per Rich J. in *King v Commercial Bank of Australia Ltd* (1920) 28 CLR 289 at p292)". (emphasis mine)

I respectfully agree that the discretion is untrammelled; but I consider that while an appellant's impecuniosity may be a "special circumstance" (and ground an award of security), it is not necessarily so, despite some Victorian authorities to that effect; see *Kennedy v McGeechan* [1978] 1 NSWLR 315n. There are no established categories of "special circumstances", which attract an award of security as a settled practice.

Support for this view is provided by various authorities: *Lall v 53-55 Hall Street Pty Ltd* [1978] 1 NSWLR 310;

Fletcher v Commissioner of Taxation (1992) 37 FCR 288, and the authorities cited at pp291-3; *Webster v Lampard* (1993) 112 ALR 174; *Kiely v Beneficial Finance Corp Ltd* (1991) 6 WAR 521; and *Commonwealth Bank of Australia v Eise* (1991) 6 ACSR 1 at p3. As it was put in *Fletcher* (supra) at p293:-

> "Given that, as a general rule and in the exercise of an unfettered discretion, mere impecuniosity of a plaintiff who is a natural person (not being an appellant from an existing judicial decision) will not be a ground for ordering that person to provide security, why should the position be different when the case arises under O53, r8 [that is, the Federal Court Rule akin to r83.11(1), relating to appeals from the Administrative Appeals Tribunal]? Indeed, it is difficult to see, when the court's rules require the existence of "special circumstances" before security will be ordered, that the court would be more ready to make an order against an impecunious natural person than it would be if there was no request that "special circumstances" be present. This is not to say that impecuniosity will be irrelevant to the exercise of the discretion, but mere impecuniosity of itself will not generally result in an order being made." (emphasis mine)

While an inability to pay the costs of an unsuccessful appeal is a very relevant consideration - and prima facie an injustice to the respondent who has already succeeded in the Court below - in my opinion the weight of the modern authorities is that impecuniosity of an appellant will not per se generally result in an order for security for costs. That is contrary to the former settled practice to require an appellant unable through impecuniosity to pay the costs of the appeal, if unsuccessful, to provide security for costs, without proof of any special circumstances; see, for example, *Harlock v Ashberry* (1881) 19 Ch. D. 84. The widely-held view that impecuniosity was per se a special circumstance was linked to the former common provision

that access to an appellate court was conditional upon the appellant (impecunious or not) depositing a sum as security for the costs of the appeal; see *Stock v Woods* [1957] St R Qd 62 at p65. That requirement is now gone; see r83.11(2). The modern view takes account of the need to prevent the stifling of the statutory right to appeal - here s19 of the Local Court Act - which the interests of justice usually require to be dealt with on its merits. The Court must have regard to the nature of the appeal, to avoid the possible frustration of an apparently genuine appeal; see *Kennedy v McGeechan* (supra). In the result, in each case, as Martin J said in *Wilson v Lowery* (supra), "all the circumstances" must be taken into account when deciding how the discretion is to be exercised. The poverty of an appellant is no more than one factor, to be weighed with others as part of those circumstances, when deciding whether there are special circumstances requiring that an order for security be made. Rule 83.11(1) stresses the special nature of an order for security for costs on appeal, in the sense that special circumstances must exist before such an order will be made.

I turn to consider whether in "all the circumstances" of this particular case there are "special circumstances" such that security for costs should be ordered. I consider that in the exercise of that unfettered discretion the approach mentioned by McHugh J in *P S Chellaram & Co Ltd v China Ocean Shipping Co* (1991) 102 ALR 321 should be adopted. His Honour said at p323:-

> "To make or refuse to make an order for 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." (emphasis mine).

See also *Wilson v Lowery* (supra) at p1155 (p5).

I consider that the factors relevant to an application for security in an action at first instance, to which r62.02 applies, are relevant to proceedings under r83.11, although they may operate with a different emphasis; see *Lall v 53-55 Hall Street Pty Ltd* (supra) at pp313-4. I turn to the factors relevant to this application.

The relevant factors

I adopt the approach in *Milingimbi Educational and Cultural Association Inc v Davis*, (unreported, Kearney J, 12 October 1990), a case involving r62.06, at pp9-10:-

> "The discretion to order security for costs is unfettered and must be exercised having regard to all the circumstances of the case; see *Watkins Ltd v Ranger Uranium Mines Pty Ltd* (1985) 35 NTR 27 at p33, per Nader J. There is no predisposition in favour of the defendant. The inability of the plaintiff to pay the defendant's costs is itself a substantial factor in the exercise of the discretion; see *Pearson v Naydler* (1977) 1 W.L.R. 899. The factors to be considered in the exercise of that discretion are set out in *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at pp512-5, viz:-
>
> (1) Whether the order will frustrate the plaintiff's claim.
>
> (2) The merits of the claim.
>
> (3) The cause of the plaintiff's impecuniosity.
>
> (4) Any delay in bringing the application for security for costs.

> None of these four factors alone will determine the outcome either way, but all of them should be weighed in the balance to determine what is just between the parties." (emphasis mine)

Mildren J followed that approach in *Summerglen Pty Ltd v Steppes Pty Ltd* (supra) at pp12-14. The factors applicable where the plaintiff is a corporation apply where the plaintiff is a natural person: see *Pearson v Naydler* [1977] 1 WLR 899 at pp902-905, and *Kennedy v McGeechan* (supra).

The factors (1)-(4) set out above are not exhaustive: see S. E. Colbran 'Security for Costs' 1992, pp233-235. However for the purposes of this case, they are the factors relevant for consideration; I turn to them.

(1) Whether an order for security for costs will frustrate the appellant's claim

The affidavits of Anthony John Fitzgerald of 17 February 1994, Meredith Day of 16 February 1994, Trevor Jones Mott of 17 February 1994 and Dellys Lesley Clark of 17 February 1994, and the appellant's concession that he is impecunious, sufficiently establish that an order for security for costs would frustrate the appellant's claim, irrespective of the nature of the security he is required to give.

(2) The merits of the appellant's appeal

Despite the authorities to the contrary, I consider that the better view is that it is appropriate to consider the prospects of success of the appeal, and that that consideration is not limited to determining whether the appeal is clearly hopeless, or has no prospects of success. I bear in mind that ex hypothesi

the appellant has already had a "day in court", and that the prima facie assumption for present purposes is that the judgment appealed from is correct. I also bear in mind that an appeal under s19 of the Local Court Act is restricted to "a question of law" in the sense described in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139.

It is usually difficult to assess the merits of an appeal at an interlocutory stage. In any event, the hearing of an application for security is not the right forum in which to attempt to decide the issues; see *Wrenfield Pty Ltd v G D Finch* (1991) NTJ 755 at p760. Accordingly, I make no attempt to examine this aspect with any precision, or to make any detailed examination of the prospects of success.

Mr Fitzgerald made numerous submissions in relation to all 6 grounds of appeal, the thrust being that none of them have any merit.

I consider that in light of the evidence before the learned Magistrate, the appellant will clearly face difficulties in establishing the necessary error of law in relation to grounds 1-4, and 6. Ground 5 relates to that part of the judgment set out at p2, and states:

> "That the learned Magistrate erred in law in finding that the applicable interest rate in determining the loss of the respondent Fatima Adjrun was 20% per cent."

I consider that this raises a good arguable case of error in law in relation to the assessment of damages. The ground of appeal is poorly drafted; however, some leniency must be shown in that regard, bearing in mind that it was drafted by the appellant, a

litigant in person; see, for example, *Wentworth v Rogers (No.7)* (1986) 7 NSWLR 204 at 205. I note that no question of exemplary damages for the wrongful detention of the jewellery was apparently raised, apart from a brief reference at transcript p360; exemplary damages was not pleaded, as is apparently required by r4.04(1)(d)(v) of the Local Court Rules, and his Worship made no reference to it. On the whole, the appellant has a reasonably good chance of establishing Ground 5.

I should add that I consider the appeal is bona fide; the respondent did not submit otherwise.

(3) The cause of the appellant's impecuniosity

There is no evidence before this Court which points to the cause or causes of the appellant's impecuniosity. However, it cannot be blamed on the respondents: see the affidavit of Anthony John Fitzgerald (supra), which was not sought to be controverted during the hearing.

(4) The delay in making the application for security for costs

An application for security of costs must be made promptly: see *Buckley v Bennell Design and Constructions Pty Ltd* (1974) 1 ACLR 301 at 308 and *Milingimbi Educational and Cultural Assoc. Inc v Davis* (supra). The Notice of Appeal was filed on 21 October 1993; this application was instituted on 17 February 1994, some 4 months after the institution of the appeal, though r3.04 in relation to the effect of the intervening Court Vacation must be taken into account. In par7 of Mr Fitzgerald's affidavit, he states he became aware as early as 24 September 1993, that the

applicant "had no money". In my opinion, the respondents should have brought this application earlier, based on the knowledge their lawyer had at 24 September 1993. There is however no suggestion that the appellant was led by the delay to act to his detriment or to incur any expenses which would be thrown away if an order for security were made.

Conclusions

As noted earlier, none of the factors (1)-(4) taken alone are conclusive.

I consider the appeal of the appellant is made bona fide, and that the ground of appeal No.5 discloses a reasonable chance of success on that issue. If security for costs is ordered, the appellant will in effect be 'shut out' of his statutory right to appeal on a question of law. There is nothing to suggest that the appellant's impecuniosity is attributable to the respondents. There has been some delay by the respondents in making their application for security of costs, but it has not been shown that the delay adversely affected the appellant.

Taking into account all the circumstances of the case, and attempting to do justice between the parties, I consider that this is a case where the combination of the appellant's impecuniosity, his chances of success on appeal, and the consequences of ordering him to provide security do not render it just to order that he provide security for costs. The application of 28 February 1994 is refused.

I turn to the costs of the application. Applying the principles set out in *TTE Pty Ltd v Ken Day Pty Ltd* (unreported, Martin J, 29 May 1990), which I consider apply equally to interlocutory proceedings in appeals as to trials, there must be something exceptional about the circumstances of the application before an order for costs is made. Here the grounds of the application for security were reasonable. I make no order as to its costs.

Orders accordingly.
