PARTIES:	LOIZOS, Nicolas
	v
	CARLTON & UNITED BREWERIES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE WORK HEALTH COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No 177 of 1996
DELIVERED:	11 February 1997
HEARING DATES:	17 October 1996
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Costs - Security for costs - Appeal - Power to make order - Existence of special circumstances - Inability of appellant to pay successful respondent's costs may be special circumstances - Reason for impecuniosity of appellant relevant - Brought about by parties relationship.

Corporations Law
Work Health Act 1986 (NT) s97(1)
Local Court Act 1989 (NT) s31
Northern Territory Supreme Court Rules 1987 (NT) r83.01

Scerri v Northam Holdings Pty Ltd [1967] VR 674, discussed.
Lall v 53-55 Hall Street Pty Ltd [1978] 1 NSWLR 310 at 313-14, noted.

Costs - Security for costs - Appeal - Whether fundamental issue raised by appeal addressed by prior proceedings - Whether appeal an abuse of process relevant in considering security application - Prospects of success of appeal and importance of a point of law sought to be raised relevant considerations.

Work Health Act 1986 (NT) ss64, 65 & 65(7)
Work Health Court Rules 1987 (NT) r24(2)
Northern Territory Supreme Court Rules 1987 (NT) rr23.02 and 23.04
Workmens Compensation Ordinance 1949 (NT)

Walton v Gardiner (1992-93) 177 CLR 378 at 393, referred to.
Henderson v Henderson (1843) 67 E.R. 313 at 319, as discussed in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 598, referred to.

REPRESENTATION:

Counsel:

Appellant:	Mr T Riley QC
Respondent:	Mr J Waters

Solicitors:

Appellant:	Waters James McCormack
Respondent:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	mar97008
Number of pages:	10

mar97008

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

No. 177 of 1996

BETWEEN:

NICOLAS LOIZOS
Appellant

AND:

CARLTON & UNITED BREWERIES
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 11 February 1997)

The respondent applies for an order that the appellant give security for its costs of and incidental to the appeal. If a tribunal, a decision of which is the subject of an appeal, has power to award costs in respect of proceedings before it, this Court may, in special circumstances, order that such security as it thinks fit be given for the costs of the appeal (r83.11). The appeal is from a decision of the Work Health Court, a tribunal within the definition of r83.01. It has long been the practice of that court to award costs, but on this application the appellant argued that it had no such power and thus there was

no jurisdiction to make an order for security of costs here. I reject that argument. True it is that there is no express conferral of power on the tribunal to award costs, although there are sundry references in the Act and Rules that assumes that it has such power, for example, s95(1)(b) and (c) and rr29 and 30. I need not decide whether the power is to be implied or found in the inherent jurisdiction of the tribunal nor whether by those means or others the tribunal has power to award costs as part of its incidental powers under s94(1)(a). It is sufficient to decide this preliminary issue by reference to s97(1) whereby the Court has the powers of the Local Court, and the powers of the Local Court to award costs is undoubted (s31 *Local Court Act* 1989 (NT)). Have special circumstances be shown? Such circumstances must be shown before the Court has jurisdiction to make the order sought. Once shown, however, the Court has an unfettered discretion to be exercised in all of the circumstances of the case. In Victoria, the jurisdiction from which the rule here being considered derives, the inability of an appellant to pay a successful respondent's costs of an appeal, have been held to amount to special circumstances under "long and well established practice" (*Scerri v Northam Holdings Pty Ltd* [1967] VR 674). That practice is not a rule of law to be applied in every case. It may be that notwithstanding that inability, special circumstances may not be found. This rule is not in terms of legislation which lay down that such an order may be made if there is reason to believe that the party will be unable to pay costs (*Corporations Law)*. Not all appellants are impecunious, those who are, however, present a circumstance which may be categorised as special. (Other cases include *Smail v Burton* [1975] VR 776; *Wilson v Lowery*, Supreme Court NT unreported 21 November 1991, Martin

CJ., and *Ayyoush v Adjurn* Supreme Court NT unreported 17 March 1994, Kearney J).

I am satisfied that the appellant would be unable to pay the costs of the appeal if he was unsuccessful. Searches in the only publicly available records in the Territory disclose no land or motor vehicle registered in his name. There is no evidence that he is employed, and such evidence as goes to his earning capacity indicate that he has been out of work for many years. There are costs orders against him in other proceedings between the same parties, amounting in all to at least $33,000, which have not been met. In that regard he protests that he never received a demand for payment, but I do not regard that as being relevant. It is a debt, he knew of it, (at the latest when he was served with the affidavits in support of this application), and he has not attempted to show that he could pay it. He is disobeying Court orders. The appellant's estimate of the costs of the appeal is $10,000. The respondent has a decision in its favour which debars the appellant from proceeding further against it in the Work Health Court. It is in a better position to press this application than a party at first instance, *Lall v 53-55 Hall Street Pty Ltd* [1978] 1 NSWLR 310 at 313, and note the remarks regarding: "unreasonable and harassing appeals" and at p314 those dwelling on the effect which impecuniosity and stubbornness may have upon an opposing party. I do not for the moment apply those observations against the interests of the respondent, but a brief review of the history of the relationship and proceedings between these parties may prove instructive.

The appellant was injured whilst employed by the respondent in February 1961, and was paid compensation pursuant to the then *Workmens Compensation Ordinance* 1949 (NT). In 1965 he left Australia, returning in 1974, departing again in 1975, and returning in 1984. He then took up employment here, but in October 1986 was granted an invalid pension. In April 1988 he commenced proceedings against the respondent, and on 23 March 1989 the respondent accepted that the appellant was totally incapacitated for work as from that date. In May 1989 the Work Health Court found that the appellant had unreasonably refused treatment which disentitled him to be paid compensation for the period October 1986 to March 1989, his claim for compensation being for weekly payments during that period. I have been unable to find amongst the material presented to this Court the appellant's Statement of Claim in the Work Health Court grounding the 1988 proceedings, but relying upon what was said by Mr Gray CSM in his reasons giving rise to the appeal in this matter, that Statement of Claim alleged it was the 1961 injury which gave rise to the claim. As to the respondent's entitlement after March 1989, the Work Health Court made orders for the payment of weekly compensation, but in doing so made errors of law as to quantum, disclosed in the reasons of Martin CJ., on appeal delivered on 22 October 1992 and confirmed in the Court of Appeal in February 1994. The appellant was then found to be entitled to certain benefits under s65(7) of the *Work Health Act* 1986 (NT) as it applied prior to 15 October 1991. It was subsequently amended in such a way that the appellant is said to be no longer entitled to those benefits. It is not necessary to go into the details of that for these purposes.

On 4 March 1994 the respondent gave notice to the appellant ceasing payments based upon what it perceived to be the effect of the amendment to s65(7). The appellant did not lodge any appeal against that cancellation. The time for appeal expired in April 1994. He did however, take fresh proceedings in the Work Health Court in January 1996, and it was his Worship's decision upon the application of the appellant to strike out the respondent's Statement of Claim in that new application which gave rise to the appeal and this application for security for costs. His Worship took the view that the new claim was an abuse of process. What was that claim as disclosed before the Work Health Court? As originally framed it shows that it was again based upon the accident of February 1961 and that "as a result of the injury sustained .... he has been totally incapacitated for employment from February 1961 until the present date and continuing (apart from short periods of employment in 1984 and 1985)". That Statement of Claim was amended in the course of the proceedings before his Worship on the strike out application, and relevantly now alleges that:

> "3. As a result of the original injury the Applicant was totally and partially incapacitated for employment from time to time between February 1961 and 1985. The applicant received workers compensation for some part of that period of incapacity pursuant to the Workmen's Compensation Ordinance 1949.
>
> 4. In 1985 the applicant suffered a deterioration of the earlier injury "the injury" resulting in total incapacity for employment. The injury arose out of the Applicant's employment with the Respondent".

He claims compensation on the basis of incapacity as a result of that injury from 18 March 1994 to the date of the application and thereafter. The

Work Health Act provides that where a worker is totally or partially incapacitated for work as a result of an injury there is an entitlement to weekly compensation (ss64 and 65). Injury is relevantly defined as meaning a physical injury out of or in the course of employment and includes "the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury ...".

The appellant successfully submitted to his Worship that that application was an abuse of process because it was sought to litigate a new case which had already been disposed of by earlier proceedings (*Walton v Gardiner* (1992-93) 177 CLR 378 at 393). It was submitted that the proceedings commenced in 1988 resolved the respondent's entitlement to weekly compensation based upon the appellant's acceptance of liability arising from the 1961 injury, and the application of law to the circumstances thus joined between the parties. The respondent asserts that he is now raising a new claim. Although arising, it might be said, from the 1961 injury, it is a separate injury, as provided for within the legislation, being that constituted by the deterioration of the original injury occurring in 1985. In his reasons his Worship said:

> "It is clear that in the proceedings before Ms Thomas in 1988 there were, as she said, only two real issues requiring determination - the reasonableness or otherwise of a refusal to undergo an operation and whether adequate notice of the claim has been given. An examination of the reasons for decision in that matter revealed that it was not necessary for Her Worship to deal at all with any other issue and she did not do so. ... On the narrow issues argued in that case there is no explicit reference in the reasons for decision to any injury or deterioration in 1985 or for that matter in any other year."

And later:

> "In my view it is almost inconceivable that a separate injury (the 1985 deterioration) remained outstanding and unresolved at the conclusion of the 1988 litigation, including throughout the appeal process. ... The proposition that a separate injury (the 1985 deterioration) somehow remained outstanding and unresolved at the conclusion of the 1988 litigation - including throughout the appeal process - is in my view untenable. It must be concluded that by the time this new claim was issued in 1995, the worker's entitlement to compensation in respect of the 1961 injury and any deterioration of it within the period 1961 to 1991 had been determined by the 1988 proceedings."

In his Worship's view the new claim, as he called it, had already been litigated. The grounds of appeal challenge that finding.

With respect, it is not so clear to me that the past proceedings in this matter, completed prior to the new claim, addressed the fundamental issue raised in the new claim, that is, whether or not there had been a deterioration of the injury in 1985. It seems to me at this stage that the appellant's admission of liability only extended to the 1961 injury, and all proceedings prior to those initiated in 1996 had to do with the respective rights and obligations of the parties arising from that, in the light of the significant changes in the law by way of fresh and amended legislation in the meantime. I am not called upon to decide that issue, but simply to look at it as a circumstance to be taken into account upon this application for security of costs. In that regard I should mention that it does not seem to me that a determination as to whether or not the alleged 1985 injury has in fact been the

subject of a determination is necessarily the test. It may be that the extended principle expressed by Sir James Wigram V.C. in *Henderson v Henderson* (1843) 67 E.R. 313 at 319 discussed by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 commencing at 598 may have a bearing on the matter. I mention those things bearing in mind considerations such as the prospects of success on the appeal (*Kiely v Beneficial Finance Corp Limited* (1991-2) 6 WAR 521 at 527) and the importance of a point of law sought to be raised (*Smail v Burton* and *Loizos v Carlton & United Breweries* (1993) 113 FLR 239 at 241).

There are further grounds of appeal based upon his Worship's taking into account the fact that there was no medical evidence before him to substantiate that there was some deterioration of the injury in 1985. I do not decide the point, but by r24(2) of the *Work Health Court Rules* 1987 (NT), the rules of the Supreme Court relating to pleadings apply to matters in the Work Health Court (with certain exceptions) and under the *Supreme Court Rules* 1987 (NT) (23.02) where a pleading is said to be an abuse of process of the Court it may be struck out. It is provided in r23.04 that on an application under that rule no evidence shall be admissible on the question whether the claim or pleading offends against r23.02.

There is a further consideration in all this, and that is that it may be reasonably inferred that the respondent's impecuniosity has arisen from his

incapacity to work brought about by the injury in 1961, and whether that injury deteriorated in 1985 would not seem to be to the point in that regard. There are findings of incapacity for work which entitled the respondent to compensation and it appears that the rights to that compensation have been determined as a result of amendments to the legislation. The appellant cannot be held to account for the changes in the legislation, but it was as a result of the relationship between the parties that the respondent became incapacitated and the incapacity, it may be assumed for these purposes, has led to his impecuniosity.

Weighing up all these matters I am of the view that the application for security for costs should be refused. It is an interlocutory application and there is no reason why the usual rule as to costs in that regard should not be followed.

I note that there were other grounds in the application before his Worship to have the Statement of Claim struck out, which were not determined. The extent to which they were pressed is not known. I would urge the parties to consider taking such opportunity as may be available before this Court on the appeal to argue those matters as well. Otherwise, I foresee the spectacle of litigation between these parties possibly going backwards and forwards on interlocutory and preliminary points between this Court, the Court of Appeal

and the Work Health Court in the unsatisfactory pattern which has emerged in some cases.
