previous question. That question being answered in the negative, the dismissal was clearly erroneous.

H. C. OF A. 1920.

O'FLAHERTY v. McBRIDE.

Questions answered: (*a*) *Yes*; (*b*) *No*; (*c*) *No. Case remitted to Special Magistrate to do what is right consistently with this order. Respondent to pay costs of appeal.*

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Fisher, Ward, Powers & Jeffries.*

Solicitors for the respondent, *Varley, Evan & Thomson.*

B. L.

Appl *Lucas v Yorke* 58 ALJR 20

Dist *Thunderdome Racetiming & Scoring v Donan Industries Pty Ltd* (1992) 36 FCR 297

[HIGH COURT OF AUSTRALIA.]

ROFF COURTNEY KING . . . . . APPELLANT;
RESPONDENT,

AND

THE COMMERCIAL BANK OF AUSTRALIA LIMITED . . . . . RESPONDENT.
PETITIONER,

Practice—High Court—Appeal from Supreme Court of State—Security for costs—Reduction of security—Grounds for reduction—High Court Procedure Act 1903-1915 (*No.* 7 *of* 1903—*No.* 5 *of* 1915), *secs.* 35, 36.

In exercising the discretion given by sec. 36 of the *High Court Procedure Act* to the High Court to reduce the amount of security for the costs of an appeal from the Supreme Court of a State, the Court may take into consideration the nature of the case, that is, whether it affects the status of the appellant or affects him pecuniarily, the fact that there has been unsuccessful and protracted litigation between the appellant and the respondent, and that the appellant, if impecunious, may sue *in formâ pauperis.*

H. C. OF A. 1920.

MELBOURNE, *Oct.* 18, 20.

Rich J. IN CHAMBERS.

H. C. OF A. 1920. KING v. COMMERCIAL BANK OF AUSTRALIA LTD.

Therefore, where the appellant was impecunious, and, in the opinion of the Court, was indulging in the luxury of an appeal to that Court and was dragging the respondent from one Court to another while, after lengthy and costly litigation, engaged in an appeal to the Full Court of the Supreme Court against the same respondent in respect of a matter arising out of the same transaction, the Court refused to reduce the security.

APPLICATION.

Roff Courtney King gave notice of appeal to the High Court from the decision of the Full Court dismissing an appeal by him from an order *nisi* and an order absolute for the sequestration of his estate made on the petition of the Commercial Bank of Australia Ltd. The appellant now applied to the High Court for an order reducing the security for the costs of the appeal to a nominal amount. The application was heard by *Rich* J. in Chambers.

The material facts appear in the judgment hereunder.

H. I. Cohen, in support of the application.

Lowe, to oppose.

Cur. adv. vult.

Oct. 20.

RICH J. read the following judgment:—This is an application under sec. 36 of the *High Court Procedure Act* for an order to reduce the security for the costs of an appeal to a nominal amount.

The question for my determination emerges from what is characterized by the applicant in his affidavit as " long drawn out, very costly and expensive litigation " between himself and the respondent Bank. On 21st October 1919 a specially indorsed writ was issued out of the Supreme Court of Victoria by the respondent Bank against the applicant claiming £10,248 2s. 11d., moneys alleged to be owing in respect of an overdraft and interest amounting to £5,200 9s. 8d., and in respect of promissory notes and interest £5,047 13s. 3d. On 22nd October 1919 a writ was issued by the applicant in the same Court against the respondent Bank claiming £10,000 for damages for breaches of contract by the respondent, and for the injury to the credit and reputation of the applicant by reason of such breaches and by reason also of the sending of notices to the customers and clients of the applicant demanding payment

of certain promissory notes made by them in favour of the applicant which to the knowledge of the respondent had been paid, discharged or renewed, and for libel contained in the said notices.

On 5th November 1919 *Mann* J. gave the respondent liberty to sign final judgment against the applicant for the said sum of £5,200 9s. 8d. with interest and costs, and gave liberty to the applicant to defend as to the residue of the respondent's claim. On 11th November 1919 the applicant appealed to this Court against this order. On 3rd December 1919 the respondent discontinued that part of its action which related to the said sum of £5,047 13s. 3d. On 12th January 1920 the respondent issued a writ in the Supreme Court of Victoria against the applicant for the sum of £308 15s. 10d. principal and interest alleged to be due to it as the indorsee and holder of three several promissory notes indorsed by the applicant. On 15th January 1920 *Mann* J. refused an application by the applicant for leave to defend this action but gave leave to appeal. On 23rd January 1920 judgment for this sum and costs was signed by the respondent, and on the same day a writ of *fieri facias* was issued by the respondent against the applicant. On 27th January 1920 an appeal to this Court was instituted by the applicant against the judgment of 23rd January 1920. On the next day the writ of *fieri facias* was returned indorsed *nulla bona*. On 11th February 1920 an order *nisi* for the sequestration of the applicant's estate was made by *Hood* J., based on the return to the writ of *fieri facias*. On 17th March 1920 this order was discharged by *Cussen* J., without prejudice to the respondent's right to institute proceedings after the appeal to this Court had been disposed of. On 11th and 12th May 1920 this Court dismissed each of the appeals already referred to with costs (1). On 28th May 1920 an order *nisi* for sequestration of the estate of the applicant was made by *Hood* J. based on the return to the writ of *fieri facias*. That order was enlarged to 10th June 1920. On 17th June 1920, after four days' hearing, *Schutt* J. made the order *nisi* absolute. On 18th June 1920 the applicant appealed to the Full Court of the Supreme Court of Victoria against the

(1) 27 C.L.R., 569.

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Rich J.

orders *nisi* and the order absolute. On 15th June 1920 the applicant's action against the respondent came on for hearing before *McArthur* J. and a jury, when the objection taken on behalf of the respondent that the whole of the action was stayed under the *Insolvency Act* 1915 by reason of the sequestration order was upheld, and the learned Judge discharged the jury. On 29th July 1920 the applicant appealed to the Full Court of Victoria against this order. On 6th, 9th, 10th and 11th August 1920 the applicant's appeal against the sequestration orders was heard, and after reserving judgment the Full Court of Victoria on 27th September 1920 dismissed the appeal. The appeal against the order of *McArthur* J. was heard on 6th, 7th and 8th October 1920, when the decision of the Full Court of Victoria was reserved, and has not yet been given. The notice of appeal to this Court (the subject of this application) against the judgment of 27th September 1920 was given on 5th October 1920.

I reserved my decision to ascertain if there were any settled practice in this Court on this point. I find there is none. Under sec. 35 of the *High Court Procedure Act* security for costs in the case of appeals such as this is prescribed, and the amount of security is fixed at £50 subject to an application under sec. 36 to increase or reduce this amount. The first thing for me to consider is what principles should guide me in determining the application. Sec. 35 is a rule established by the Legislature that there shall be security to the extent of £50 unless by an affirmative act of the Court under sec. 36 that amount is reduced or increased. The burden of altering that sum rests on the party who applies for the alteration. The Legislature, however, has left absolute discretion to the Court, and has done so without prescribing any rules for its exercise. In these circumstances no rules can be formulated in advance by any Judge as to how the discretion shall be exercised. It depends entirely on the circumstances of each particular case. The discretion must, of course, be exercised judicially, which means that in each case the Judge has to inquire how, on the whole, justice will be best served, whether by altering the amount and, if so, to what extent, or by letting it stand unaltered. Authority is clear that no Judge has any jurisdiction to formulate rules controlling the unqualified

discretion conferred by the Legislature on the Court: for instance, *Hyman* v. *Rose* (1), per Lord *Loreburn* L.C., in whose judgment three other learned Lords concurred; *Palmer* v. *Palmer* (2), per Sir *S. Evans* P., following *Lindley* L.J. in a case there cited; and *Wickins* v. *Wickins* (3), following other cases. There are, however, cases which afford illustrations of circumstances proper to take into consideration in judicially exercising this discretion: one is the nature of the case. A decision affecting the status of a person is very different from one merely affecting him pecuniarily. The Legislature has recognized this distinction in sec. 35 of the *Judiciary Act*. Apart from statutory recognition, cases are numerous which show that where liberty is in question or where highly penal consequences are entailed upon the appellant by an order, that is a very important circumstance to take into account (see *Ex parte Burke* (4); *In re Phillips*; *Ex parte Treboeth Brick Co.* (5); *Hood Barrs* v. *Heriot* (6)). But there are other circumstances which are also relevant: unsuccessful protracted litigation is one. The matter may be very different where there is simply an appeal direct to this Court from the sequestration order as in *In re Phillips* (5) and a case where, as here, there has already been an appeal from that order to the Full Supreme Court of the State. This circumstance may be added to by other litigation (see *In re McHenry* (7)). There are no circumstances before me which could influence my mind as to the nature and magnitude of the estate or of the importance of the questions which might arise on the appeal. For all I know, the suggested appeal might be simply a waste of the estate and a consequent loss to creditors. I have also to bear in mind that inability to give the required security does not deprive the applicant of all opportunity to prosecute his appeal. A certain standard of poverty confers on an impecunious litigant the privilege of suing in *formâ pauperis* under the *Rules of the High Court*, Part I., Order III., r. 1; Part II., Sec. V., r. 1 (*cf. Fisk* v. *Anderson* (8)).

(1) (1912) A.C., 623, at p. 631.
(2) (1914) P., 116, at p. 121.
(3) 87 L.J. P., 155, at p. 159.
(4) 4 T.L.R., 362.
(5) (1896) 2 Q.B., 122.
(6) (1896) 2 Q.B., 375.
(7) 17 Q.B.D., 351.
(8) 19 C.L.R., 518.

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Rich J.

In the circumstances I consider that the applicant—an impecunious litigant—having had the benefit of a decision of the Full Court of Victoria, is, in the words of the judgments in *Swain* v. *Follows* (1), indulging in the luxury of an appeal to this Court and is dragging the respondent from one Court to another while engaged in another appeal to the Full Court of the State of Victoria against the same respondent in respect of a matter arising out of the same transaction, and that after lengthy and costly litigation.

I therefore refuse the application so far as it relates to the reduction.

Application dismissed.

Solicitor for the appellant, *Coy*.

Solicitors for the respondent, *J. M. Smith & Emmerton*.

B. L.

(1) 18 Q.B.D., 585, at pp. 587-588.

[HIGH COURT OF AUSTRALIA.]

IN RE PATENT OF TRUFOOD OF AUSTRALIA LIMITED.

H. C. OF A. 1920.

ON APPEAL FROM THE HIGH COURT IN ORIGINAL JURISDICTION.

MELBOURNE, *June* 10, 11; *Aug.* 17.

Patent—Extension—Adequate remuneration—Profits—Goodwill—Patents Act 1903-1909 (*No.* 21 *of* 1903—*No.* 17 *of* 1909), *sec.* 84.

Starke J.

Oct. 28, 29.

A company which was formed to operate and did operate a patent substantially for converting milk into a dry powder had, during a period of ten years covering the whole of its existence, made an average profit of between 12½ and 15 per cent. per annum on the whole of its capital invested in the business, excluding the amount paid for the patent. On an application under sec. 84 of the *Patents Act* 1903-1909 for an extension of the term of the patent,

Knox C.J., Isaacs and Rich JJ.