

HIGH COURT OF AUSTRALIA

GAUDRON J

FRANK PERRE & ORS

APPELLANTS

AND

APAND PTY LTD

RESPONDENT

Perre v Apand Pty Ltd (A27-1998) [1998] HCA 63
15 September 1998

ORDER

1. *Respondent's application dismissed with costs on receipt of undertakings of appellants in the form specified in the reasons for judgment.*
2. *Certify for Counsel.*

Application for security for costs.

Representation:

T A Gray QC with J S Roder for the appellants (instructed by Townsends)

M A Frayne for the respondent (instructed by Phillips Fox)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

1 GAUDRON J. The appellants are members of the Perre family or, in the case of
the corporate appellants, companies associated with them. It is convenient to refer
to them collectively as "the Perres". At the relevant time, the Perres grew potatoes
in the Riverland region of South Australia. They sold them primarily in Western
Australia where, they claim, the wholesale price was stable and, usually, higher
than elsewhere in Australia.

2 At all relevant times, it was a condition of the entry of potatoes into Western
Australia that they not be grown or packed within 20 kilometers of an outbreak of
bacterial wilt detected in the previous five years. The property upon which the
Perres grew their potatoes is situated near a property owned by members of the
Sparnon family ("the Sparnons"). The Sparnons grew an experimental potato crop
on that land using seed potatoes supplied by the respondent, Apand Pty Ltd
("Apand"). The crop was infected with bacterial wilt. The Perres' crop was not
affected but they were no longer able to sell their potatoes in Western Australia.
They claim that, in consequence, they suffered economic loss.

3 The Sparnons and the Perres commenced proceedings in negligence against
Apand, the Minister of Primary Industries and the State of South Australia in the
Federal Court of Australia¹. The proceedings were heard together before
von Doussa J. His Honour held that there was no negligence on the part of the
Minister of Primary Industries or the State of South Australia but that the Sparnons
were entitled to a verdict against Apand. However, his Honour found that Apand
owed no duty of care to the Perres, who suffered economic loss only, because there
was no relationship of proximity between them.

4 Apand appealed to the Full Court of the Federal Court from the decision and
orders made against it in the Sparnon proceedings, challenging the finding of
negligence and, also, various factual findings upon which that finding was based.
The Perres appealed from the order dismissing their action. Apand filed a Notice
of Contention in the appeal by the Perres, raising the same issues as in their appeal
in the Sparnon matter. The appeals were heard together. In the result, neither
appeal was successful and Apand failed on its Notice of Contention.

5 The Perres sought and were granted special leave to appeal to this Court from
the order dismissing their appeal to the Full Federal Court. A Notice of Appeal
has been filed and Apand has filed a Notice of Contention raising substantially the
same matters as were raised in its appeal to the Full Court in the Sparnon matter.
Apand has now applied to this Court seeking an order that the Perres provide cash
security of \$50,000 for the costs of the appeal. Apand estimates its costs at

1 The Perres also claimed damages against Apand under s 82 of the *Trade Practices Act 1974* (Cth) for misleading and deceptive conduct under s 52 of that Act.

\$54,396, an amount that includes the costs referable to the issues raised by its Notice of Contention.

6 The evidence indicates that, if they do not succeed in their appeal, it is unlikely that the Perres will be able to meet their liability for the costs of the proceedings below and in this Court. And it is not in issue that they cannot provide cash security in the sum of \$50,000 or in any other sum. However, they have offered undertakings that they will not dispose of their assets, similar in terms to undertakings given in the Federal Court in support of a successful application by them to stay costs orders made in that court.

7 The Perres raise a number of matters in opposition to the order sought by Apand. It is necessary to mention only two. First, they claim that their impecuniosity stems from the actions of Apand for which they claim an entitlement to damages. That contention must be qualified to the extent that a large part of their impecuniosity is referable to costs orders made against them in favour of the Minister of Primary Industries and the State of South Australia. The second matter raised by the Perres, which is related to the first, is that, in the circumstances, it would be unjust if, because of their impecuniosity, they could not pursue their appeal.

8 The general approach of this Court in relation to the giving of security for costs is that "appellants who have persuaded the Court that their applications for special leave to appeal warrant a grant ought not lightly to be shut out because of their financial position."² That is not to say that where, as here, the question for determination in the appeal is a matter of general importance, that consideration can "override the interests of the parties"³. Rather, it is necessary, in that situation, to ask whether the interests of justice will be served by shutting out the appeal⁴.

9 I am not satisfied that the interests of justice are served by shutting out the Perres' appeal. Their appeal raises a precise legal question of considerable importance. If they are correct in their contention, to shut out their appeal would, *prima facie*, at least, be to heap injustice upon injustice. I say "*prima facie*" because of the issues raised by the Notice of Contention. Those issues, which involve some factual findings, have twice been decided against Apand. And if the findings

2 *Webster v Lampard* (1993) 67 ALJR 393 at 394 per Toohey J; 112 ALR 174 at 176. See also *Devenish v Jewel Food Stores Pty Ltd* (1990) 64 ALJR 533 at 534 per Mason CJ; 94 ALR 664 at 666; *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 72 ALJR 1055 at 1062 per Kirby J; 155 ALR 1 at 10.

3 *Lucas v Yorke* (1984) 58 ALJR 20 at 21 per Brennan J.

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3.

challenged by the Notice of Contention stand, some part of the plight of the Perres will be referable to Apand's actions even if liability does not attach. In these circumstances, but subject to one matter, the application should be dismissed.

- 10 As already indicated, the Perres have offered undertakings not to dispose of their assets pending appeal. They have also offered an undertaking to prosecute the appeal in a timely fashion. There is no reason why those undertakings should not be given. Counsel for the Perres should inform the Registrar of the Court in writing of the precise terms of those undertakings and of the Perres' adherence to them on or before 4.00 pm Thursday, 17 September 1998. On receipt of that communication, an order will be made dismissing the application. And because the undertakings were proffered before the application was made, the application will be dismissed with costs.
- 11 There will be a certificate that this is an appropriate matter for the attendance of Counsel in Chambers.