39.

WALTER BAHR and JOHANNA MARIA BAHR

v.

MARCUS GRENVILLE NICOLAY

and

DAVID GEORGE THOMPSON and THELMA CONSTANCE THOMPSON

and

IAN LANGDON SHELLABEAR and JENNIFER ELIZABETH SHELLABEAR

JUDGMENT TOOHEY J.

Heard: 27 August 1987
Delivered: 28 August 1987

WALTER BAHR and JOHANNA MARIA BAHR

v.

MARCUS GRENVILLE NICOLAY

and

DAVID GEORGE THOMPSON and THELMA CONSTANCE THOMPSON

and

IAN LANGDON SHELLABEAR and JENNIFER ELIZABETH SHELLABEAR

On 14 August 1987 the Court granted to the appellants special leave to appeal from the judgment of the Full Court of the Supreme Court of Western Australia given on 25 May 1987. The appeal itself is listed for hearing on 15 September in Perth.

The second respondents, who are the respondents most affected by the appeal, seek security for costs. They do so in reliance upon what may be described as the second limb of O.70 r.7(1) of the High Court Rules viz. security "for the payment of such costs as may be awarded by the Court to the respondent".

In Lucas v. Yorke (1983) 58 A.L.J.R. 20, at p.21; 50 A.L.R. 228, at p.229 Brennan J. described the discretion to order security for the costs of an appeal conferred by O.70 r.10 of the High Court Rules as they then stood as "absolute". The same is true of the power conferred by O.70 r.7(1). Nevertheless, the discretion must be exercised judicially and this means, as Rich J. pointed out in King v.

Commercial Bank of Australia Ltd. (1920) 28 C.L.R. 289, at p.292 that "in each case the Judge has to inquire how, on the whole, justice will be best served".

In consequence I do not approach the present summons by reference to particular rules. The impecuniosity of the appellants and the likelihood that they will be unable to meet the second respondents' costs if they are unsuccessful in their appeal is a matter to be taken into account. But there is no rule that security should ordinarily be ordered in such a case: see Lucas v. Yorke at p.21; pp.228-229 of A.L.R.

It may be accepted that the appellants will not be able to pay the second respondents' costs of the appeal if the appeal fails. It is unnecessary to canvass the appellants' financial situation because their counsel did not argue to the contrary. The second respondents put forward, in support of their application, the fact that there is already owing to them by the appellants a substantial sum arising from proceedings in the District Court of Western Australia which were associated with matters in the litigation giving rise to the present appeal. Those costs were taxed in the sum of $4,788, to which must be added an amount of $1,070.10 payable by the appellants to the second respondents by way of indemnity for other costs awarded in the District Court action. Both sets of costs were taxed and allowed on 23 August 1983. They have been attracting

interest since and there is now an amount due of nearly $10,000. The second respondents have taken steps to enforce payment of the amount due to them in the District Court but their prospects of recovery, at any rate of recovery in full, are not good.

The appellants are also indebted to the second respondents in regard to the costs of the action in the Supreme Court and the appellants' unsuccessful appeal to the Full Court, though the latter costs have not yet been taxed. Execution on the Supreme Court judgment has been stayed pending hearing of the appeal to this Court, so long as the appellants make certain payments into court.

In the same way as they do not dispute their impecuniosity, the appellants do not dispute that the costs of the District Court proceedings are outstanding, though they do contend that there is rent owing to them by the second respondents.

In the final analysis, the appellants offer three reasons why security for costs should not be ordered against them. The first is that their unhappy financial position has been aggravated by actions of the second respondents. On this point, they put their case no higher than one of aggravation; there is no doubt that they were in some financial difficulties before the events giving rise to this litigation. Thus the case is distinguishable from Lucas v.

Yorke where the appellants' impecuniosity arose from losses they sustained as a result of buying and carrying on the business in connection with which they claimed there had been misleading or deceptive conduct. Just how far, if at all, the second respondents' conduct has brought about a worsening of the appellants' financial position is very hard to say. There is some relevant material in the affidavits filed in support of and in opposition to the summmons for security for costs and there is material in the evidence adduced on the trial of the action in the Supreme Court. But much of the material is contentious and has to be looked at in context. I am not prepared to reach any conclusion adverse to the second respondents on this aspect.

Second, the appellants say that, if they are ordered to provide security, effectively they will be precluded from prosecuting their appeal. And, third, they say that the questions raised by the appeal are questions of considerable general importance, bearing as they do upon the scope of indefeasibility of title under the Torrens System, on the proper approach to be taken by courts to the pleading and presentation of actions for specific performance for the sale of land and on the capacity of courts to mould orders to give effect to such claims. The appeal does raise important questions that have implications beyond the immediate issues between the parties to the appeal. This is a relevant consideration, I accept: see Smail v. Burton [1975] V.R. 776, cf. Kardynal v. Dodek [1978] V.R. 414.

I have not found this an easy matter to resolve. I am conscious of the financial implications for the second respondents if they have to meet an appeal and are successful. Nevertheless, while not underrating those implications, they are confined to the costs of fighting an appeal which is estimated to last no more than one day, in circumstances where the appellants necessarily have the responsibility of preparing appeal books and presenting the appeal. And the Court has considered the questions arising on appeal to be sufficiently important and sufficiently arguable to warrant the grant of special leave. No doubt this may be said of any case in which special leave to appeal is granted and I do not suggest that for this reason alone the summons should be refused. To do so would render the power to order security under O.70 r.7(1) virtually nugatory.

But I start with the fact that the Court has a broad discretion and that in each case the task is to determine how justice will be best served. I have taken into account all of the matters urged on behalf of the appellants on the one hand and the second respondents on the other - the history of the litigation, the whole of the circumstances surrounding the appellants' financial position, the importance of the questions they wish to argue on appeal (and the implications of answers to those questions for persons other than the parties to the appeal) and the fact

that, though unsuccessful against the second respondents in the Supreme Court, the appellants have a case which is fairly arguable.

A factor which I regard as of considerable importance is that the land involved in this appeal is, from the point of view of the appellants, their principal asset. It is true that by reason of the orders made by the Full Court of the Supreme Court of Western Australia they have a claim for damages against the third respondents; but no attempt was made on either side to assess the value of that claim. The matter was put this way by Madden C.J. in Arons v. Mclnerney (1899) 25 V.L.R. 148, at p.150:

> " We have laid down a principle that where a man has no means except the property in respect of which he has raised the litigation, and if he were to succeed he would be entitled to that property, we ought not to embarrass him by ordering him to find security, and thereby perchance throw out his appeal altogether, and thus deprive him of that to which he may be entitled. That is a fair and proper rule."

In the context of O.70 r.7(1) I do not regard what was said by Madden C.J. as a "rule". But it is an important consideration and one that tips the scales against the second respondents. In my view, justice would be best served by refusing to order security for costs.

This and the preceding five pages constitute my reasons for judgment in Walter Bahr and Johanna Maria Bahr v. Marcus Grenville Nicolay and David George Thompson and Thelma Constance Thompson and Ian Langdon Shellabear and Jennifer Elizabeth Shellabear.

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I certify that this and the preceding five pages are a true copy of the reasons for judgment herein of his Honour Justice Toohey

Associate

Dated: 28 August 1987

IN THE HIGH COURT OF AUSTRALIA

WALTER BAHR and JOHANNA MARIA BAHR

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REASONS FOR JUDGMENT

Judgment delivered at PERTH

on 28 AUGUST 1987

RM74/30574