



Equity Division Supreme Court New South Wales

Case Name: **Mitchell v Roads and Maritime Services** (now known as Transport for NSW)

Medium Neutral Citation: [2022] NSWSC 500

Hearing Date(s): 26 April 2022

Date of Decision: 28 April 2022

Jurisdiction: Equity - Commercial List

Before: Ball J

Decision:

- (1) The plaintiffs give security for the first defendant's costs in the amount of \$415,000, such security to be provided in a form agreed between the parties or, in the absence of agreement, by payment into Court;
- (2) In the event that the security set out in order (1) is not provided within 28 days of the date of this judgment, the proceedings be stayed until such time as the security is provided;
- (3) The plaintiffs pay the first defendant's costs of the first defendant's notice of motion filed on 15 December 2021;
- (4) The matter be listed for further directions on 6 May 2022.

Catchwords: COSTS — Security for costs — Power to order — Procedure and discretion — Where proceedings brought in part for benefit of litigation funder whose identity is unknown

Legislation Cited: *Civil Procedure Act 2005* (NSW)
Land Acquisition (Just Terms Compensation) Act 1991 (NSW)
Roads Act 1993 (NSW)
Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited: *Cappello v Roads and Maritime Services* [2019] NSWCA 227; (2019) 100 NSWLR 259
De Jong v Carnival plc [2016] NSWSC 347
Louise Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia [2020] NSWSC 1607

Category: Procedural rulings

Parties: Darren Mitchell (First Plaintiff)
Rosaline Mitchell (Second Plaintiff)
Roads and Maritime Services (now known as Transport for NSW) (First Defendant)

Representation: Counsel:
GA Sirtes SC with LM Johnston (First Defendant)

Solicitors:
Hall Partners (Plaintiff)
Crown Solicitor for NSW (First Defendant)

File Number(s): 2021/88654

Publication Restriction: None

JUDGMENT

Introduction

- 1 By a notice of motion filed on 15 December 2021, the first defendant, Roads and Maritime Services (now known as Transport for NSW) (**TfNSW**), seeks security for its costs of these proceedings.

Background

- 2 The proceedings are representative proceedings brought by the plaintiffs on behalf of themselves and all persons who have had subterranean land compulsorily acquired from them by TfNSW for the WestConnex M4-M5 Link Project (**the Project**). The land was acquired from group members for the construction of tunnels forming part of the Project. It was acquired from them without their consent and without compensation.
- 3 The proceedings were commenced on 30 March 2021. The plaintiffs filed an amended statement of claim on 27 April 2021. On 28 April 2021, the Crown Solicitor on behalf of TfNSW sent a letter to the plaintiffs raising a number of issues with the statement of claim, including the fact that the claim appeared to raise an issue that had been decided adversely to the plaintiffs in *Cappello v Roads and Maritime Services* [2019] NSWCA 227; (2019) 100 NSWLR 259 — namely, whether TfNSW’s acquisition of the plaintiffs’ land was not authorised by s 177(1) of the *Roads Act 1993* (NSW) because the land was acquired for the purpose of a tollway that would be privately operated and would generate revenue for the State. That letter also raised the question of security for costs and sought information on whether the proceedings were being funded by a litigation funder.
- 4 Following that letter, the statement of claim was amended on a number of occasions. The final version of the claim is to be found in an amended commercial list statement filed on 14 March 2022. That document continues to raise the question whether the acquisition was authorised by s 177(1) of the *Roads Act* for the reasons given. It also raises the question whether TfNSW has “sold” the land in contravention of s 179 of the *Roads Act* because it will

ultimately lease the acquired land to a tollway operator for a fixed period. It also raises the question whether s 62(2) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) does not apply, with the result that compensation is payable to the plaintiffs because TfNSW acquired a reversionary interest in the land, which it did not acquire (or does not hold) for the purpose of constructing a tunnel.

- 5 In the meantime, following an order made by Hammerschlag J on 13 August 2021, the plaintiffs, on 20 August 2021, provided TfNSW with a redacted copy of a litigation funding agreement. Following receipt of that agreement, the Crown Solicitor wrote to the plaintiffs indicating that TfNSW proposed to make an application for security for costs and asking for an unredacted copy of the litigation funding agreement. There was further correspondence between the parties on that issue. However, an unredacted version of the agreement has not been produced.

Whether security should be ordered

- 6 Relevantly, the Court has power to make an order for security for costs under Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) r 42.21, in the exercise of its inherent power and under s 67 of the *Civil Procedure Act 2005* (NSW) (**the CPA**).
- 7 UCPR r 42.21 relevantly provides:

- (1) If, in any proceedings, it appears to the court on the application of a defendant—
 - (a) that a plaintiff is ordinarily resident outside Australia, or
 - (b) that the address of a plaintiff is not stated or is mis-stated in his or her originating process, and there is reason to believe that the failure to state an address or the mis-statement of the address was made with intention to deceive, or
 - (c) that, after the commencement of the proceedings, a plaintiff has changed his or her address, and there is reason to believe that the change was made by the plaintiff with a view to avoiding the consequences of the proceedings, or

- (d) that there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so, or
- (e) that a plaintiff is suing, not for his or her own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so, or
- (f) that there is reason to believe that the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings,

the court may order the plaintiff to give such security as the court thinks fit, in such manner as the court directs, for the defendant's costs of the proceedings and that the proceedings be stayed until the security is given.

- (1A) ...
- (1B) If the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity.
- (2) Security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct.
- (3) If the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.
- (4) This rule does not affect the provisions of any Act under which the court may require security for costs to be given.

8 Section 67 of the CPA provides:

Subject to rules of court, the court may at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day.

9 It is accepted that s 67 confers a general power on the Court to make an order staying proceedings unless and until security for costs is given: see *De Jong v Carnival plc* [2016] NSWSC 347 at [45]ff per Beech-Jones J; *Louise Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWSC 1607 at [11] per Sackar J.

10 Many of the plaintiffs' objections to the application for security were directed to the provisions of r 42.21. Ultimately, however, TfNSW's claim for security rested on s 67 of the CPA and the Court's inherent power. None of the

threshold requirements set out in UCPR r 42.21(1) applies to an order for a stay under s 67 or the Court's inherent power. In many cases, it will not be appropriate to circumvent the limitations on the power to award security under rule 42.21 of the UCPR by relying on s 67 of the CPA and the Court's inherent power. To do so would make the rule otiose and undermine the purposes behind the limitations contained in it. But representative proceedings are a special case. They are brought for the benefit of persons other than the plaintiff. Often, a litigation funder is involved. The costs of the proceedings are often large. Whether the actual plaintiff is an individual or a corporation may be a matter of chance. As the cases demonstrate, the Court is often willing in those circumstances to rely on its inherent power and s 67 of the CPA in considering the question of security, with the result that the real question is whether the Court should in the exercise of its discretion make an order for security and an order staying the proceedings if security is not provided.

- 11 In my opinion, there are strong reasons for relying on the Court's inherent power and s 67 of the CPA, and strong discretionary grounds for making an order for security, in this case. It is apparent that the proceedings have been brought in part for the benefit of a litigation funder. The litigation funding agreement is in evidence. However, it has been redacted. The redactions include the name of the funder. It is apparent from the terms of the agreement that the funder will be entitled to retain a percentage of any amount recovered. The agreement also contains the following term:

7. FUNDER'S INDEMNITY

7.1 Indemnity for Order for Costs

In respect of any Proceedings the subject of a Funding Transaction the Funder must indemnify and keep indemnified the Clients from and against any Order for Costs against the Clients but only so far as it relates to the period from the date of the Funding Term Sheet for the Funding Transaction up to the date which is the earlier of:

- (a) the date of termination of the Funding Transaction under clause 9; or
- (b) the conclusion of the Proceedings at first instance;

whether or not the Order for Costs is made during the period or after the end of the period.

7.3 **Security for costs** [sic]

In any Proceedings at first instance which are the subject of a Funding Transaction, if a defendant in the Proceedings obtains an order against the Clients for security for costs in the Proceedings, the Funder will provide such security for costs as the Clients may be ordered to provide. The Clients shall use all reasonable endeavours to oppose an order for security for costs against them and if ordered, to minimise the amount of the security required to be provided.

- 12 Accordingly, three things are apparent. First, the proceedings have been brought in part for the benefit of a litigation funder. Second, the litigation funder has agreed to indemnify the plaintiffs against any order for costs and to provide security for costs. Third, the litigation funder has not been named, so that there are no means by which TfNSW can determine whether the indemnity in respect of costs is likely to be honoured.
- 13 In circumstances where the proceedings are being brought partly for the benefit of a litigation funder, but it is not possible to determine how easy or difficult it will be to enforce any costs order against the litigation funder, it is appropriate that the funder should provide security, which will be the effect of an order for security in this case.
- 14 There is some suggestion in the plaintiffs' submissions that an order for security should be refused because TfNSW has delayed in bringing it. I do not accept that submission. TfNSW put the plaintiffs on notice that it intended to seek security shortly after it commenced the proceedings. The delay in making the application arose from delays by the plaintiffs in formulating their case and in attempts by TfNSW to obtain an unredacted copy of the litigation funding agreement. The funding agreement specifically recognises that the plaintiffs may have to provide security. Accordingly, this is not a case where the plaintiffs have incurred costs in pursuing a claim which they may have elected not to pursue had they appreciated that they would be required to provide security.

Quantum

- 15 That leaves the question of quantum. Mr Ryan McGowan, a solicitor employed in the office of the Crown Solicitor for NSW, gives evidence in an affidavit dated 7 April 2022 of the steps that TfNSW will likely have to take to defend the proceedings and the likely costs of taking those steps. Mr McGowan also sets out the rates the Crown Solicitor's Office and counsel have charged and will charge for the work that they do. It is apparent that those rates are relatively modest.
- 16 Mr McGowan estimates that TfNSW's total costs of the proceedings will be approximately \$450,000. That amount includes \$78,686.78 billed to 25 March 2022 and a further \$370,400 up to the conclusion of the hearing. Mr McGowan estimates that on assessment, TfNSW will recover 100 percent of counsel's fees (estimated to be \$130,000), 100 percent of expert fees (estimated to be \$140,000), 80 percent of solicitor's fees (estimated to be \$170,000) and 80 percent of other disbursements (estimated to be \$10,450). On that basis, Mr McGowan estimates that TfNSW's recoverable costs will be in the order of \$415,000.
- 17 The plaintiffs do not take issue with these estimates. On the face of it, they appear to be reasonable. In circumstances where the plaintiffs have been on notice since shortly after the proceedings were commenced that TfNSW was likely to make an application for security and any delay in its doing so was largely caused by the plaintiffs, it is appropriate that TfNSW should obtain security for past costs.

Orders

- 18 Accordingly, the orders of the Court are:
- (1) The plaintiffs give security for the first defendant's costs in the amount of \$415,000, such security to be provided in a form agreed between the parties or, in the absence of agreement, by payment into Court;

- (2) In the event that the security set out in order (1) is not provided within 28 days of the date of this judgment, the proceedings be stayed until such time as the security is provided;
- (3) The plaintiffs pay the first defendant's costs of the first defendant's notice of motion filed on 15 December 2021;
- (4) The matter be listed for further directions on 6 May 2022.

I certify that this and the 8 preceding pages are a true copy of the reasons for judgment herein of Justice Ball.

Dated: 28 April 2022

Associate: Maria Kourtis