# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Allen Dodd as Trustee for the Dodd Superannuation Fund v Shine Corporate Ltd* [2018] QSC 40 |
| PARTIES: | **ALLEN DODD AS TRUSTEE FOR THE DODD SUPERANNUATION FUND**<br>**ABN 44 675 922 732**<br>(plaintiff)<br>**v**<br>**SHINE CORPORATE LTD**<br>(defendant) |
| FILE NO/S: | BS No 10009 of 2017 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 14 March 2018 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 19 January 2018 |
| JUDGE: | Martin J |

ORDER:

**1. Within 14 days of the date of this Order, the Plaintiff is to provide security for the Defendant's costs of and incidental to this proceeding up to and including the completion of disclosure in the amount of $325,000 by way of payment into Court.**

**2. If security is not provided in accordance with the Order in paragraph 1 above, the proceeding is stayed until such security is provided.**

**3. The Defendant has liberty to apply:**

**(a) in relation to the terms of the order in paragraph 1 above;**

**(b) for additional security for costs in relation to stages of the**

**proceeding not the subject of the Order in paragraph 1 above.**

**4. The Plaintiff pay the Defendant's costs of and incidental to this Application.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – AMOUNT AND NATURE OF SECURITY – where the Plaintiff commenced representative proceedings pursuant to *Civil Proceedings Act* 2011 Part 13A – where the Plaintiff seeks damages for misleading and deceptive conduct – where it is accepted by the Plaintiff that a security for costs order should be made – where it is not agreed what amount constitutes an adequate security for the Defendant's costs – where the Plaintiff is not in a position to meet a costs order in favour of the Defendant – where the Plaintiff has entered into an agreement with a litigation funder – where the litigation funder does not see fit, or is unable to provide, evidence of its financial position – where the litigation funding agreement does not require the litigation funder to indemnify the Plaintiff for any adverse costs order – where there is therefore doubt whether the litigation funder has the capacity to meet any adverse costs order – where Plaintiff and Defendant rely on separate and conflicting estimates of quantum of security - whether a higher level of security for costs should be ordered where a litigation funding agreement is in place - whether the evidence from either the Plaintiff or Defendant as to assessment of quantum of security should be preferred

Civil Proceedings Act 2011

Uniform Civil Procedure Rules 1999

Bufalo Corporation Pty Ltd v Lendlease Primelife Ltd (No 3) [2010] VSC 263
Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd and Others (1987) 16 FCR 497
Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jaques [2016] QSC 2
Lee v Abedian & Ors [2017] QSC 22
Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 7) [2005] VSC 275

COUNSEL: J McKenna QC and S Hooper for the applicant/defendant
A Crowe QC and E Holmes for the respondent/plaintiff

SOLICITORS: King and Wood Mallesons for the applicant/defendant

Quinn Emanuel for the respondent/plaintiff

[1] The defendant (Shine) seeks an order for security for costs. The plaintiff (Dodd) accepts that an order should be made. The issue to be decided is: what amount constitutes an adequate security for Shine's costs?

**The principal action**

[2] This is a representative proceeding brought pursuant to Part 13A of the *Civil Proceedings Act* 2011. Dodd sues on his own behalf, as a trustee, and on behalf of other persons who share certain characteristics. Not all persons in that latter group have yet been identified.

[3] Dodd alleges that Shine engaged in misleading or deceptive conduct by, among other things, failing to disclose information to the Australian Stock Exchange in contravention of a number of legislative provisions.

[4] Those contraventions, it is alleged, caused Dodd and members of the group to suffer loss and damage. The contraventions are alleged to have taken place between August 2014 and January 2016, although there are allegations concerning earlier events, the first of which was in October 2013. The plaintiff has not quantified the loss and damage. That could not be done given that the group members have not yet been identified. There was evidence, though, that this action has been referred to in the media and that damages in the order of $250 million have been mentioned.

[5] The representations which are alleged to have been misleading or deceptive concerned:

(a) the adequacy and appropriateness of its systems for assessing the recoverability of "work in progress" (WIP), fees and disbursements,

(b) recoverability rates for WIP,

(c) the quantum of Shine's assets, as reported in its financial statements,

(d) the compliance of Shine's financial statements with accounting standards and the *Corporations Act*, and

(e) the forecast earnings of Shine before interest, tax, depreciation and amortisation for a future financial period.

[6] Shine defends the claim on a number of bases including that:

**(a)** it did not make the alleged representations,

**(b)** if it did make the representations, it had reasonable grounds for doing so,

**(c)** it did not engage in any conduct which was misleading or deceptive, or likely to mislead or deceive, and

**(d)** the "information" which the plaintiff alleges was required to be disclosed to the Australian Stock Exchange did not exist.

**The litigation funder**

[7] It is not in dispute that neither Dodd nor the fund of which he is a trustee is in a position to meet a costs order in favour of the defendant.

[8] As is the usual procedure with a representative proceeding, the plaintiff has entered into an agreement with a litigation funder. In this case it is Regency Funding Pty Ltd. A redacted copy of the funding agreement has been exhibited to an affidavit. It demonstrates that Regency:

(f) is obliged to pay any "adverse costs order" as defined in the agreement,

(g) is permitted to terminate the agreement at any time which would terminate its obligations under the agreement, and

(h) is entitled to payments in respect of the proceeds of the claim.

[9] Regency is not the owner or lessee of any real property in Australia and it has not granted any security interest registered on the Personal Properties Securities Register. Its ultimate holding company is Dipla Holdings LLC which is a company registered in Delaware in the United States of America.

[10] Regency has paid $75,000 into court by way of interim security and its ultimate submission is that it should not be required to provide security for more than a further $75,000 for costs incurred to the end of disclosure.

[11] There is no evidence of Regency's capacity to make any payment. There is no evidence of its financial means at all. I infer, from the submission made on Regency's behalf, that it has the ability to make a further payment in the order of $75,000 by way of security.

[12] The funding agreement, so far as it is known to the defendant, provides little comfort. Apart from the concerns about Regency's capacity to meet any costs order, the agreement does not require Regency to indemnify the plaintiff for an adverse costs order. Regency may, it appears, withdraw from the agreement (perhaps upon satisfying certain notice conditions) and at that point Dodd would not be able to rely on its support to satisfy any adverse costs order.

**Principles to be applied**

[13] In applying the principles referred to below, it is important to bear in mind that the defendant cannot obtain a costs order against any of the group members save in particular circumstances where common issues are not being decided: see s 103ZB *Civil Proceedings Act* 2011. This effectively limits recovery to Dodd or Regency.

[14] Further, under r 672(a) of the *Uniform Civil Procedure Rules* 1999, the court is entitled to have regard to the means of those standing behind the proceedings. In this case, it is Regency which stands to benefit from any success of the plaintiff.

[15] It has been emphasised in many cases that the assessment of an appropriate amount for security for costs is not susceptible of great precision. It is not like the assessment of costs which takes place after the event. To a greater or lesser extent, the court is required to apply the experience gained through the observation of similar cases and the steps which were taken and those which were necessary to take. As French J (as he then was) stated in *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd and Others*:[1]

> "The process of estimation embodies to a considerable extent, necessary reliance on the 'feel' of the case after considering relevant factors…"[2]

[16] In many authorities it is said that a "broad brush" approach is to be taken when fixing the amount of security for costs. In *Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jaques*,[3] Jackson J said:

> "[52] … A broad brush approach does not require that. Parties should not be encouraged to devote extensive resources (including court resources) to questions of security for costs. It should not be forgotten that an order for security is not a final assessment of anything about the amount of the costs that may be payable but a provision against a contingent amount that depends on a number of things that are not amenable to precise predictions."

[17] Consistent with that approach, an applicant is not required to present evidence on an application of this kind as though it were preparing a costs statement for past costs, or supplementing the statement as if for a final costs assessment.[4] An order for security for costs does not provide a defendant with an indemnity for the expenses of defending a claim – it is intended to provide protection against the risk that an order for party and party costs in the defendant's favour might not be satisfied.[5]

[18] A matter which is ordinarily taken into account on an application for security for costs up to the first day of trial is the chance of the matter settling or otherwise not proceeding before that time is reached. As security is only sought up until the conclusion of disclosure, that consideration does not have as much weight. Nevertheless, it is a consideration which is usually referred to as contributing towards a discounting of a defendant's estimate of future costs. Another matter, of course, is that the defendant may be anxious to include all aspects of costs which may be incurred and thus arrive at an overstatement.

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1 (1987) 16 FCR 497.

2 At 515.

3 [2016] QSC 2.

4 *Lanai Unit Holdings Pty Ltd v Eretta Pty Ltd and Others* (1987) 16 FCR 497 at [54].

5 *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 7)* [2005] VSC 275 at [5].

[19] Consideration must also be given to the fact that a litigation funder is in place. Ordinarily, this is a matter which favours the making of security for costs order, but, in this case, that is not an issue. Some attention, though, should be given to the issue of whether a higher level of security should be ordered where such an arrangement is in place. In *Bufalo Corporation Pty Ltd v Lendlease Primelife Ltd (No 3)*[6] Judd J said:

> "[53] There is much to be said for the proposition that where a litigation funder has elected not to provide an irrevocable indemnity to a plaintiff for all costs that may be ordered against the plaintiff and declined to provide information to satisfy the court of its ability to meet any order for costs, it should provide a full indemnity to the defendants for any order for costs in their favour made against the plaintiff.
>
> [54] As against such a proposition, the plaintiff argued that the litigation funder should not be penalised for providing the plaintiff with access to justice by funding its claim. Such an argument may have greater weight in a jurisdiction, such as the United States of America, where orders for costs against an unsuccessful party are usual. In this jurisdiction, however, access to justice carries with it financial responsibilities. One such responsibility is to meet orders for costs. In a jurisdiction where, in the ordinary course, costs follow the event, the failure of the plaintiff's case will usually result in an order that the plaintiff pay the successful defendants' costs."

[20] In *Bufalo* (as in this case) the litigation funder did not see fit, or was unable to provide, evidence of its financial position. Nevertheless, Judd J did not order that security in the form of a full indemnity be provided. If the interposition of a funder into the relationship between plaintiff and defendant is to have any effect on the assessment of a suitable amount, then that effect will be to loosen, slightly, the stringency which normally attaches to the calculation.

**The Quantum**

[21] The arguments about quantum in these types of cases tend to run according to an established script. The defendant, usually in measured tones, points out all the complications and pitfalls which lurk within the action and which will reasonably require substantial work. The plaintiff, usually in measured tones, responds by saying that the action is not all that complicated and the necessary work could be done for an amount substantially less than the defendant's overly anxious estimate. And, on occasion, the plaintiff will leaven its submissions by reference to *Lee v Abedian & Ors*.[7]. That case concerned the assessment of costs but, nevertheless, it is relevant to the task of considering what should be allowed by way of security. Justice Applegarth's automotive analogy is instructive:

> "[74] Just as the Sunland defendants are allowed to hire a Rolls Royce, they are entitled to engage senior counsel who charge $15,000 or more per day. Senior and junior

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6 [2010] VSC 263.

7 [2017] QSC 22.

counsel may spend many days preparing for an interlocutory application. Doing so may maximise Sunland's chances of success. However, the assessment of even indemnity costs is governed by what is reasonable.

[75] To continue the motoring analogy, the Sunland defendants could recover the costs that would be reasonably incurred to hire a reliable car which would get them to their intended destination, safely, comfortably and directly, not a Rolls Royce taking a more scenic route."

[22] This case followed that script.

[23] The defendant relied upon evidence from Mr Justin McDonnell, the solicitor on the record for the defendant. Mr McDonnell's experience and expertise in this area cannot be gainsaid. For the plaintiff, evidence from Mr Graham Robinson was called. He has substantial experience in the area of assessment of costs. Each approached the task from the opposite end of the telescope – Mr McDonnell looking forward and seeing a panorama of problems, Mr Robinson looking through the other end and having a much narrower field of vision.

*The defendant's approach*

[24] Mr McDonnell engaged in an exercise in which he brought together the costs which had been incurred up to 15 December 2017 (when the defence was filed) and the costs which he estimated would be incurred until the conclusion of disclosure. In a detailed examination of what he expected would be needed to be done, he identified the costs which would, in his opinion, necessarily be expended and then went into further detail setting out the tasks which would be required to be performed, the particular legal practitioner who would be involved in the item of work, and the amount of time which would likely be required. After quantifying the existing and expected future costs, he then identified the proportion of those costs which, on the basis of his experience, he said could reasonably be expected to be recovered on an assessment. To arrive at that figure he reduced the solicitors' fees to 65% of the amount he had calculated, counsel's fees to 90% of the amount he had calculated, and he left disbursements at 100%. He then applied a discount of 25% on the total of those fees to arrive at the figure sought.

[25] A summary of that conclusion was as follows:

| **KWM fees** | |
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| Costs already incurred to 15 December 2017 | $269,149.00 |
| Estimate of costs from 18 December 2017 to completion of disclosure | $644,440.00 |
| **Counsel fees** | |
| Costs already incurred to 15 December 2017 | $87,075.00 |
| Estimate of costs from 18 December 2017 to completion of disclosure | $85,500.00 |
| **Other disbursements (including experts' fees)** | |
| Costs already incurred to 15 December 2017 | $476.13 |

| **Quantum of security sought to completion of disclosure** | |
|---|---|
| Total estimated costs to completion of disclosure | $1,086,640.13 |
| 65% of subtotal of KWM fees | $593,832.85 |
| 90% of subtotal of counsel fees | $155,317.50 |
| 100% of other disbursements | $476.13 |
| Subtotal | $749,626.48 |
| **Further discount by 25%** | **$562,219.86** |

[26] The defendant seeks security in the amount of $544,000 which reflects a further reduction on the amount in the summary above following some minor changes in light of further information received by Mr McDonnell.

*The plaintiff's approach*

[27] The plaintiff estimates that the defendant would recover $225,000 on the standard basis up to and including disclosure. Mr Robinson estimates the costs that would be allowed in any assessment are as follows:

(a) fees incurred up to 6 November 2017 - $40,000

(b) case assessment and development - $20,000

(c) preparing defence - $52,000

(d) reviewing reply - $15,000

(e) directions hearings - $8,000

(f) interlocutory applications - $40,000

(g) discovery - $50,000

**Total - $225,000**.

[28] The defendant criticises the plaintiff's approach on the basis that it is based on the fees and disbursements which the solicitors have incurred and anticipates they will incur, rather than on the amount it would be likely to recover in any costs assessment.

*The "broad brush"*

[29] A comparison was prepared by the plaintiff of various aspects of the manner in which the two experts had proceeded. A number of matters arise which need to be taken into account. One is that the defendant's estimates appear to be based, so far as solicitors' fees are concerned, on a time costing basis. That would be appropriate if all such fees were allowable on a time costing basis but that is not necessarily the case. Mr Robinson also points out that the Supreme Court scale rates (including an allowance for care and consideration) should be the basis upon which an estimate is undertaken. He is also of the opinion that, on assessment, the

defendant would recover significantly less than 65% of its solicitor's fees and 90% of its counsel's fees.

[30] Mr Robinson, though, does not appear to have been briefed with all the necessary material. He was not, it would seem, provided with some evidence from Mr McDonnell which updated his earlier evidence and, to that extent, meant that Mr Robinson's evidence was not completely relevant to the claim made by the defendant.

[31] Mr Robinson was also critical of a number of the estimates given by Mr McDonnell as to the work which would likely be necessary with respect to matters such as reviewing the reply, interlocutory applications and responding to a request for particulars of the defence. While it is open to the plaintiff to rely upon Mr Robinson's general experience with respect to commercial matters, I tend to prefer Mr McDonnell's assessment of what might be necessary to be done given his much greater practical experience in the conduct of lengthy and complicated commercial matters.

[32] I do accept, though, Mr Robinson's assessment that some of the work which Mr McDonnell says will need to be done may be overstated to the extent that the work associated with, for example, reviewing the statement of claim may be covered by the work described as "considering the statement of claim". Similarly, fees with respect to legal analysis would either overlap or, perhaps, coincide with case analysis. The same might be said with respect to the development of case strategy and associated matters.

[33] Two matters for which the defendant makes substantial allowance and which the plaintiff criticises are with respect to directions hearings and interlocutory applications. Mr McDonnell estimates that two directions hearings will incur costs of $100,525. Included in that sum are allowances for: 55 hours of preparation, attendances by three solicitors for a total of 33 hours and senior counsel for two days.[8] With respect to the prospect of there being two interlocutory applications an anticipated cost of $187,800 is asserted. There are allowances for: 128 hours for preparing the application and preparing for the hearing of the application. The estimate contains an allowance for attendance at the hearings at 19 hours. It is not clear whether it also estimates counsel (presumably junior) would spend 35 hours in preparation in addition to which there is an estimate of engagement of junior and senior counsel for three days each or whether these figures represent the same work. It is at this point that the generous rumble of a Rolls Royce[9] can be heard reverberating softly in the distance.

[34] While the defendant is entitled to brief senior counsel on any application, and do as much preparation as it wishes, it is unlikely to recover the cost of senior counsel for directions hearings or, unless there is substantial complexity, an interlocutory application. The estimate provided for those matters is too great, both with respect to the number of hearings needed and the amount of work which would be recoverable on a costs assessment.

[35] The defendant has been meticulous in its examination of the work which will have to be done and which may have to be done up to the completion of disclosure. No stone has been left

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[8] This estimate was reduced by about $8,000 in Mr McDonnell's supplementary material.

[9] See *Lee v Abedian & Ors* [2017] QSC 22 at [75]-[76]

unturned, but, completing that exercise has led to an overly liberal assessment. I am satisfied, after having considered: the nature of this case, the likelihood of various steps having to be taken, and the evidence of the two approaches to assessment, that security for costs should be provided in the sum of $400,000. I have arrived at that amount (using round figures in all instances) by reducing the costs incurred before 15 December 2017 to allow for costs which would not be allowed or would otherwise be reduced on assessment ($110,000) and adding that to the estimated costs to be incurred after that time but before the end of disclosure, reducing the total estimated by half – on the basis (among other things) that it included costs which should not be considered on this type of application and over-estimated other costs – and then a further reduction for contingencies such as settlement: $730,000-$365,000=$365,000 less 20% ≈ $290,000.

[36] The amount of $400,000 is further reduced by $75,000 to take into account the amount for which security has already been given.

**Orders**

[37] Within 14 days of the date of this order, the plaintiff is to provide security for the defendant's costs of and incidental to this proceeding up to and including the completion of disclosure in the amount of $325,000 by way of payment into court.

[38] If security is not provided in accordance with the order in paragraph 1 above, the proceeding is stayed until such security is provided.

[39] The defendant has liberty to apply:

(a) in relation to the terms of the order in paragraph 1 above;

(b) for additional security for costs in relation to stages of the proceeding not the subject of the order in paragraph 1 above.

[40] The plaintiff pay the defendant's costs of and incidental to this application.