

SUPREME COURT OF QUEENSLAND

CITATION: *Mallonland Pty Ltd & Anor v Advanta Seeds Pty Ltd (No 2)*
[2020] QSC 21

PARTIES: **MALLONLAND PTY LTD ACN 051 136 291 (AS
TRUSTEE FOR THE ANDREW JENNER FAMILY
TRUST)**
(First Plaintiff)

AND

**ME & JL NITSCHKE PTY LTD ACN 074 520 228 (AS
TRUSTEE FOR THE NITSCHKE FAMILY TRUST)**
(Second Plaintiff)

v

ADVANTA SEEDS PTY LTD ACN 010 933 061
(Defendant)

FILE NO/S: BS No 4103 of 2017

DIVISION: Trial Division

PROCEEDING: Application filed 5 February 2020

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 28 February 2020

DELIVERED AT: Brisbane

HEARING DATE: 17 February 2020

JUDGE: Jackson J

ORDER: **The order of the Court is that:**

- 1. The plaintiffs provide further security for the defendant's costs of the proceeding in the amount of \$1,400,000.**
- 2. The security may be given by way of cash, bank guarantee or an indemnity by AmTrust Europe Ltd drawn in favour of the Principal Registrar of the Supreme Court of Queensland on terms and in a form satisfactory to the Registrar but to include an undertaking by AmTrust Europe Ltd that it will not seek security for its costs in respect of any application made by the defendant in the United Kingdom to register any costs order in this proceeding that AmTrust Europe Ltd pay the defendant's costs.**

3. **The plaintiffs pay into Court the further sum of \$20,000 as security for the costs of registration of a foreign judgment in the United Kingdom should enforcement of the indemnity be required.**
4. **Costs of the application are the defendant's costs in the proceeding.**

CATCHWORDS: PROCEDURE– CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS– SECURITY FOR COSTS– AMOUNT AND NATURE OF SECURITY – where the plaintiffs have been ordered to provide security for the defendant's costs of the proceeding up to the first day of trial – where the order gave liberty to apply for an increase in the amount of the security – where the defendant applied for further security for costs for the period up to the first day of trial and for the costs of the trial – where the defendant applied for the further security to be given in cash or by bank guarantee and not by an indemnity or insurance bond– where the court ordered that the plaintiffs provide further security for the defendant's costs of the proceeding– where the court ordered that the security may be given by way of cash, bank guarantee or by an indemnity.

Civil Proceedings Act 2011 (Qld), Part 13A
Uniform Civil Procedure Rules 1999 (Qld), Chapter 3 Part 1
 Division 5

Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (1994) 134 ALR 187, cited
DIF III Global Co-Investment Fund, LPP v BBLP LLC [2016] VSC 401, cited
Equititrust v Tucker [2016] QSC 51, cited
Green v CGU Insurance Ltd (2008) 67 ACSR 105, cited
Lanai Unit Holdings Pty Ltd v Jaques [2016] QSC 2, cited
Madgwick v Kelly (2013) 212 FCR 1, cited
More Group Pty Ltd v Czesler (Ruling No 1) [2017] VSC 638, cited
PPK Willoughby Pty Ltd v Baird [2019] NSWCA 48, cited

COUNSEL: D Campbell QC for the plaintiffs
 R Douglas QC for the defendant

SOLICITORS: Creevey Russell for the plaintiffs
 Clifford Gouldson Lawyers for the defendant

Jackson J:

[1] This is an application for security for costs.

- [2] The proceeding is a class action brought as a representative proceeding under Part 13A of the *Civil Proceedings Act* 2011 (Qld) and Chapter 3 Part 1 Division 5 of the *Uniform Civil Procedure Rules* 1999 (Qld).
- [3] Simplified, the plaintiffs' claim is that the defendant negligently or misleadingly or deceptively supplied a product seed known as MH43 for the commercial growing of sorghum as a crop but not for stock feed. The plaintiffs allege that the seed was contaminated with a seed for another species of plant commonly known as shattercane, or which had similar properties to shattercane, as a contaminant.
- [4] The plaintiffs allege that they and other group members used the contaminated seed resulting in reduced crop yields, the costs of eradicating or managing the spread of the contaminant plant and other loss.
- [5] The proceeding is brought as a class action because there are more than seven claimants in the represented group who have claims for damages arising out of the same, similar or related circumstances, although each group member's claim for damages is individual. It is suggested that the overall amount of the claims of the plaintiffs, the five "sample" group members whose damages claims are alleged in the statement of claim, and the balance of the group members whose claims are yet to be identified in the proceeding will amount to a sum in excess of \$100 million.
- [6] The proceeding is funded by a litigation funder under a litigation funding agreement which provides for the funder to be responsible for the whole of the defendant's costs of the proceeding, if the plaintiffs are unsuccessful and for security for costs the plaintiffs may be ordered to provide. If the proceeding is successful, the litigation funder is to be indemnified for the plaintiffs' costs of the proceeding and to be remunerated by a share of the proceeds of the plaintiffs' and some represented group members' successful claims. It may be appropriate in such circumstances, although not necessarily required in every case, to order that security for the defendant's costs of a class action proceeding be provided.¹
- [7] On 28 July 2017, the plaintiffs were ordered to provide security for the defendant's costs of the proceeding in the sum of \$160,000.
- [8] On 18 April 2018, the plaintiffs were ordered to provide further security for the defendant's costs of the proceeding up to and including the first day of the trial in the sum of \$226,000.
- [9] On that occasion, the security was ordered to be given by an indemnity or insurance bond from AmTrust Europe Ltd ("AmTrust"), a United Kingdom based insurer located in London. Because AmTrust is a foreign company in this jurisdiction, the order provided further for an undertaking by it not to seek security for costs in respect of any application by the defendant to register any costs order and that the plaintiffs pay the sum of \$20,000 into court to cover the costs of registration of a foreign judgment in the United Kingdom.
- [10] The 18 April 2018 order provided that the defendant had liberty to apply by giving three business days' written notice, including to increase the amount of the security

¹ *Green v CGU Insurance Ltd* (2008) 67 ACSR 105; [2008] NSWCA 148, [51] and [88]; *Madgwick v Kelly* (2013) 212 FCR 1, [12].

for costs provided up to the first day of the trial or with regard to the form of indemnity or adequacy of the indemnity as security for costs.

- [11] The defendant applies for further security for costs in three respects: first, to increase the amount for the period up to the first day of trial; second, for the costs for the trial itself; third, for the further security to be given in cash or by bank guarantee and not by an indemnity or insurance bond by AmTrust.
- [12] Bearing in mind the sum of the amounts of the existing orders for security for costs up to the first day of trial is \$386,000 the initially remarkable feature of the present application is that the defendant applies for further security for costs for the same period in the amount of approximately \$1.5 million.
- [13] There are numerous possible questions or points of difference between the parties as to the bases on which the defendant applies for that additional sum by way of security and security for the costs of the trial. However, the plaintiffs confined their opposition to the orders sought in a constructive way that makes it necessary to deal with only a limited number of points.
- [14] Broadly speaking, the plaintiffs' position may be summarised as follows. First, the plaintiffs oppose the making of any order for further security in respect of the costs up to the first day of trial that were incurred before the end of November 2019, because it was only then that the defendant notified an intention to make application for further security for costs. The plaintiffs' position is that up until the first day of the trial only the costs after the date of notification that further security was sought should be the subject of an increased amount.
- [15] Second, the plaintiffs submit that for the period from the end of November 2019 to day 1 of the trial, the amount of the defendant's estimate of the costs to be incurred should be reduced for the reasons set out in the affidavit of the plaintiff's costs assessor, Mr Robinson.
- [16] Third, the plaintiffs submit that the defendant's estimate of the costs of the trial from day 1 to day 19 (being its whole length) should be reduced for the reasons that are set out in the affidavit of Mr Robinson.
- [17] Fourth, the plaintiffs submit that the allowances or estimates that might otherwise be made in respect of the defendant's costs should be reduced for the fact that some of those costs will be common costs incurred for legal costs or disbursements that relate both to this proceeding and to the proceeding between *Bennie & Anor* and the defendant, number 10075/16, which is to be tried at the same time and under an order that the evidence in one proceeding shall be evidence in the other proceeding so far as relevant to both.
- [18] Fifth, the plaintiffs submit that it is appropriate to order that the security may be provided by way of an indemnity from AmTrust as was ordered by the order for further security made on 18 April 2018.
- [19] Although the order for further security for costs made on 18 April 2018 provided that those costs were for the period up to and including the first day of trial, the order expressly contemplated that the defendant might apply to increase the amount of the security provided up to the first day of the trial. The defendant submits that

the liberty to apply creates a basis for an application for an order for further security of the costs both for the period from the order up to the first day of the trial including any past costs that have already been incurred.

- [20] The terms of the order do not distinguish between future and past costs up to the first day of trial at the time of making the application. However, that does not mean that the discretionary question whether delay should be a reason not to order some or all of those costs is foreclosed.
- [21] The parties made no submissions as to the bases on which the further security for costs ordered on 18 April 2018 in the total sum of \$386,000 had been calculated. An affidavit of Benjamin Gouldson filed 13 February 2020 deals with the quantum of costs for which further security is sought. It contains two sources of evidence.
- [22] First, there is a report by David Topp, costs assessor, estimating the defendant's standard basis assessable costs from those incurred for an application heard on 21 November 2019 to the first day of trial and for the costs of the trial to be incurred thereafter. Summarising, Mr Topp's estimates can be tabled as follows:

21 November 2019 to first day of trial

Further interlocutory applications	\$56,702.46
Mediation	\$54,739.54
Witness statements	\$343,636.80
Notices to admit	\$6,957.00
Advice on evidence	\$27,835.67
Telephone calls and correspondence	\$5,970.50
Solicitor's preparation for trial	\$6,448.00
Counsel's fees for preparing for trial	\$149,600
Care and consideration	\$113,295.71
Total	\$765,185.68

- [23] Mr Topp also estimates the standard basis assessable costs of the trial from day 1 to day 19 as follows:

Costs of Trial

Day 1	\$22,935.41
Day 2 - 19	\$398,651.78

[24] The overall total on Mr Topp's report for an estimate of standard basis assessable costs for the period from 21 November 2019 to the end of day 19 of the trial is \$1,186,772.87.

[25] Additionally, Mr Topp's report estimates standard basis assessable costs for the period before 1 November 2019, as follows:

Pre-November 2019

28 June 2017 to 18 April 2018	\$240,044.93
19 April 2018 to 31 October 2019	\$609,630.97

[26] Adding those standard basis assessed costs to Mr Topp's earlier estimate from 21 November 2019 to the first day of trial totals \$1,614,861.58 which may be compared directly with the total security for costs ordered to date up to that date of \$386,000 that has been ordered, an excess of \$1,228,861.58.

[27] If the total standard basis assessed costs from 21 November 2019 to the first day of trial is added to the pre-November 2019 estimates, less the security already provided, the total would be \$1,650,448.77.

[28] Second, Mr Gouldson's affidavit does not limit the costs sought to be secured to those amounts. Instead, it seeks further or increased amounts, on a number of bases, then rounds down the overall amount of further security sought to \$2.5 million.

[29] In seeking those amounts, no distinction is made between the costs incurred before 21 November 2019 and those incurred after that day for the period up to the first day of trial. As well, Mr Gouldson does not opine that the amount of the increases he seeks are the amounts of estimates of costs that will be assessed on the standard basis. Accordingly, I do not find it necessary to further consider his opinions or the costs he details, as usually it is the standard basis of assessment that is the relevant measure of amounts.²

[30] Against Mr Topp's amounts, the plaintiffs rely on Mr Robinsons report, as follows:

21 November 2019 to first day of trial

Further interlocutory applications	\$0
Mediation	\$31,297.00
Witness statements	No estimate

² *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (1994) 134 ALR 187, 199-201; *More Group Pty Ltd v Czesler (Ruling No 1)* [2017] VSC 638, [21]-[23].

Notices to admit	No estimate
Advice on evidence	No estimate
Telephone calls and correspondence	\$5,970.50
Solicitor's preparation for trial	No estimate
Counsel's fees for preparing for trial	\$242,000
Care and consideration	No estimate

Costs of Trial

Day 1	\$12,828.27
Day 2 - 19	\$239,947.46
E-trial	\$21,433.50

- [31] The overall adjustments due to Mr Robinson's estimates, having regard to the increases and decreases from Mr Topp's estimates are not significant in making the broad-brush assessment required on an application such as this.
- [32] Mr Robinson was unable to arrive at an estimate of the defendant's standard basis assessed costs from 28 June 2017 to 31 October 2019, but it is not to be forgotten that the purpose of the estimate in the present context is to provide security, not to assess the costs as such. In my view, Mr Topp's opinion is enough to act upon for an application for security, in the circumstances presented for decision in this case.
- [33] As to the delay in notifying the plaintiffs of the application for further security up to the end of November 2019, although a ground to refuse a further order for security is that it might operate unfairly to a litigant who has assumed that no further security for past costs would be sought, in my view that is not a significant factor in the present case, because a commercial litigation funder has contracted with the plaintiffs, in any event, to pay the defendant's costs including provision of security for costs in return for a share of the anticipated proceeds of the litigation. Delay is very much a discretionary factor whose weight depends on the circumstances.³
- [34] Accordingly, in my view, it is appropriate to order that the plaintiffs provide further security for the defendant's costs incurred before 31 October 2019 in the amount of \$450,000, having regard to the sum of \$386,000 already provided.
- [35] As to the defendant's costs from 21 November 2019 to the first day of trial, in my view it is appropriate to order that the plaintiffs provide further security in the sum of \$700,000, because I do not consider that the full estimate of costs of the mediation or full costs of the proposed interlocutory applications should be included, as well as other adjusting items.

³ *PPK Willoughby Pty Ltd v Baird* [2019] NSWCA 48, [11]; *Lanai Unit Holdings Pty Ltd v Jacques* [2016] QSC 2, [18]-[24]; *More Group Pty Ltd v Czesler (Ruling No 1)* [2017] VSC 638, [24]-[27].

- [36] As to the costs of the trial, in my view, further security for the sum of \$250,000 should be ordered, having regard to the prospect of common costs being incurred as between this proceeding and the *Bennie* proceeding and because, in my own view, at this stage the trial of this proceeding may not take the full period of 19 days.
- [37] As to the form of the security, in my view, in the circumstances of the present case and this application made in the weeks before the trial is to commence, there is no sufficient reason why an indemnity or insurance bond from AmTrust is not satisfactory or appropriate.⁴

⁴ Pace Bowskill J in *Equititrust v Tucker* [2016] QSC 51, [140]; cf *DIF III Global Co-Investment Fund, LPP v BBLP LLC* [2016] VSC 401.