

SUPREME COURT OF QUEENSLAND

CITATION: *Emanuel Management P/L (in liq) & Ors v Foster's Brewing Group Ltd & Ors* [2003] QCA 552

PARTIES: **EMANUEL MANAGEMENT PTY LTD (IN LIQUIDATION)** ACN 007 840 913
SEGACIOUS PTY LTD (IN LIQUIDATION) ACN 010 748 544
MEKA SECURITIES PTY LTD (IN LIQUIDATION) ACN 007 724 629
COFORDO 251 PTY LTD (IN LIQUIDATION) ACN 010 683 584
GRANGEVILLE PTY LTD (IN LIQUIDATION) ACN 008 104 854
EMANUEL (NO. 14) PTY LTD (IN LIQUIDATION) ACN 008 080 206
P.B.R.S. PTY LTD (IN LIQUIDATION) ACN 007 799 546
PATERSON & CO PTY LTD (IN LIQUIDATION) ACN 007 679 763
GIUSEPPE NOMINEES PTY LTD (IN LIQUIDATION) ACN 007 771 486
LONSDALE STAGE 2 PTY LTD (IN LIQUIDATION) ACN 007 812 928
EMANUEL PROPERTIES PTY LTD (IN LIQUIDATION) ACN 007 740 123
EMANUEL (NO. 4) PTY LTD (IN LIQUIDATION) ACN 008 036 995
EMANUEL (RUNDLE MALL) PTY LTD (IN LIQUIDATION) ACN 007 983 851
VILLA-CAIRNS PTY LTD (IN LIQUIDATION) ACN 010 633 459
ADDSTONE PTY LTD (IN LIQUIDATION) ACN 010 764 977
ANTLIA PTY LTD (IN LIQUIDATION) ACN 010 688 776
CENTAURUS PTY LTD (IN LIQUIDATION) ACN 010 688 767
CLOUDLAND INVESTMENTS PTY LTD (IN LIQUIDATION) ACN 010 319 730
COFORDO 260 PTY LTD (IN LIQUIDATION) ACN 010 685 775
DERWENT WATER PTY LTD (IN LIQUIDATION) ACN 010 688 721
EMANUEL (NO. 7) PTY LTD (IN LIQUIDATION) ACN 008 053 352
LASCIVIOUS PTY LTD (IN LIQUIDATION) ACN 010 749 032

LEOMINOR PTY LTD (IN LIQUIDATION) ACN 010 688 758
LIVILLA PTY LTD (IN LIQUIDATION) ACN 010 748 571
SAROON PTY LTD (IN LIQUIDATION) ACN 010 633 548
WOODVILLE INDUSTRIAL PARK PTY LTD (IN LIQUIDATION) ACN 008 037 018
AIRLIE BEACH PTY LTD (IN LIQUIDATION) ACN 008 203 218
NAVICIO PTY LTD ACN 010 616 690
AIRLIE BAY DEVELOPMENTS PTY LTD (IN LIQUIDATION) ACN 010 177 232
ELIZABETH HOUSE PTY LTD (IN LIQUIDATION) ACN 007 548 487
ADDSTEAD PTY LTD (IN LIQUIDATION) ACN 010 764 931
BRONSTEAD PTY LTD (IN LIQUIDATION) ACN 010 906 475
CARMINA BURANA PTY LTD (IN LIQUIDATION) ACN 010 672 849
CARSIM PTY LTD (IN LIQUIDATION) ACN 007 760 116
CC LOT 1 PTY LTD (IN LIQUIDATION) ACN 008 037 063
CC LOT 4 PTY LTD (IN LIQUIDATION) ACN 008 037 036
DANGIER PTY LTD (IN LIQUIDATION) ACN 010 731 012
EMANUEL (NO. 8) PTY LTD (IN LIQUIDATION) ACN 008 053 343
EMANUEL (NO. 9) PTY LTD (IN LIQUIDATION) ACN 008 053 334
EMANUEL (NO. 13) PTY LTD (IN LIQUIDATION) ACN 008 080 180
EMANUEL (NO. 15) PTY LTD (IN LIQUIDATION) ACN 010 748 606
EMANUEL (MALLTOWN) PTY LTD (IN LIQUIDATION) ACN 007 885 403
EMANUEL (QLD) PTY LTD (IN LIQUIDATION) ACN 008 100 810
EMANUEL (SOUTH AUST) PTY LTD (IN LIQUIDATION) ACN 007 963 466
EMANUEL CONSTRUCTIONS PTY LTD (IN LIQUIDATION) ACN 007 639 438
EMANUEL ENTERPRISES PTY LTD (IN LIQUIDATION) ACN 007 838 691
EMANUEL HOLDINGS PTY LTD (IN LIQUIDATION) ACN 007 653 974
EMANUEL INVESTMENTS PTY LTD (IN LIQUIDATION) ACN 007 743 400

EMANUEL PROJECTS PTY LTD (IN LIQUIDATION)

ACN 007 683 418

ESTABLISHMENT HOLDINGS PTY LTD (IN LIQUIDATION) ACN 007 736 218

ETRUSCAN PTY LTD (IN LIQUIDATION) ACN 010 731 058

HAVANA PTY LTD (IN LIQUIDATION) ACN 008 119 999

HENDON INDUSTRIAL PARK PTY LTD (IN LIQUIDATION) ACN 007 890 708

HERIOT PTY LTD (IN LIQUIDATION) ACN 010 731 021

HONDEL PTY LTD (IN LIQUIDATION) ACN 007 901 144

JOE EMANUELE PTY LTD (IN LIQUIDATION) ACN 007 623 690

LIBRA PTY LTD (IN LIQUIDATION) ACN 007 588 490

MARVIEW PTY LTD (IN LIQUIDATION) ACN 008 272 615

MOLINARA PASTORAL COMPANY PTY LTD (IN LIQUIDATION) ACN 007 705 062

ROCLIN ENTERPRISES PTY LTD (IN LIQUIDATION) ACN 007 841 161

SAYER PROPERTIES PTY LTD (IN LIQUIDATION) ACN 007 714 927

SOUTH AUSTRALIAN MANUFACTURING PARK PTY LTD (IN LIQUIDATION) ACN 008 265 058

SURENT PTY LTD (IN LIQUIDATION) ACN 008 178 434

TROMBONE PTY LTD (IN LIQUIDATION) ACN 010 633 557

WORANDO TRUST PTY LTD (IN LIQUIDATION) ACN 007 511 739

PETER IVAN MACKS

(plaintiffs/appellants/respondents)

v

FOSTER'S BREWING GROUP LTD ACN 007 620 886

GLENMORE PARK ESTATE LTD ACN 007 533 888

ELFIC LTD ACN 007 606 206

LENSWORTH PROPERTIES PTY LTD (IN LIQUIDATION) ACN 007 520 649

KINGLINGTON PTY LTD ACN 068 499 874

CALOUNDRA DOWNS PTY LTD ACN 068 356 525

CABOOLTURE WATERS PTY LTD ACN 068 499 810

MANGO HILL DEVELOPMENT PTY LTD ACN 068 244 762

JOHN FRANCIS O'GRADY

JOHN DANIEL CROSBY

(first defendants/first respondents/applicants)

COOPERS & LYBRAND (A Firm)

MURRAY GOLDIE ANDERSON

TIMOTHY JAMES CUMING

(second defendants/second respondents/applicants)

GORDIAN RUNOFF LTD ACN 052 179 647

(non-party/respondent)

- FILE NO/S: Appeal No 7185 of 2003
SC No 3723 of 1999
- DIVISION: Court of Appeal
- PROCEEDING: Application for Security for Costs
- ORIGINATING COURT: Supreme Court at Brisbane
- DELIVERED ON: 12 December 2003
- DELIVERED AT: Brisbane
- HEARING DATE: 11 September 2003
- JUDGES: Jerrard JA and Dutney and Philippides JJ
Separate reasons for judgement of each member of the Court, each concurring as to the orders made
- ORDERS:
1. **Unless the appellants deliver to the Registrar within 14 days an irrevocable and unconditional guarantee by Gordian Runoff Limited which guarantees to the first group of respondents any obligation which the appellants may incur to pay the first respondents' costs of and incidental to this appeal, then the appellants are to provide security for the first group of respondents' costs of and incidental to this appeal by the provision of security in the amount of \$950,000, either by payment of that amount into court or by the provision of an irrevocable and unconditional guarantee from one of the Commonwealth Bank of Australia Limited, National Australia Bank Limited, Australia and New Zealand Banking Group Limited, Westpac Banking Group Limited or Suncorp Metway Limited;**
 2. **Unless the appellants deliver to the Registrar within 14 days an irrevocable and unconditional guarantee by Gordian Runoff Limited which guarantees to the second group of respondents any obligation which the appellants may incur to pay the second respondents' costs of and incidental to this appeal, then the appellants are to provide security for the second group of respondents' costs of and incidental to this appeal by the provision of security in the amount of \$750,000 either by payment of that amount into court or by the provision of an irrevocable and unconditional guarantee from one of the Commonwealth Bank of**

Australia Limited, National Australia Bank Limited, Australia and New Zealand Banking Group Limited, Westpac Banking Group Limited or Suncorp Metway Limited;

- 3. This appeal is stayed until the security required by orders 1 and 2 is provided;**
- 4. Each party has liberty to apply;**
- 5. Costs are each party's costs in the appeal**

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS OF AN APPEAL – where quantum of security challenged – whether the appellants should be required to provide security on the basis of a complete indemnity for any costs likely to be incurred – whether quantum of security should correspond with the estimated costs

Uniform Civil Procedure Rules 1999 (Qld), r 772

Allstate Life Insurance Co & Ors v Australia and New Zealand Banking Group Ltd & Ors (No 19) (1995) 134 ALR 187, considered

Bruce Pie & Sons Pty Ltd v R H Mainwaring, English and Peldan [1985] 1 Qd R 401, cited

Emanuel Management Pty Ltd & Ors v Foster's Brewing Group Ltd & Ors [2003] QSC 205; SC No 3723 of 1999, 17 July 2003, referred to

Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors [2003] QSC 299; SC No 3723 of 1999, 11 September 2003, referred to

Idoport Pty Ltd & Anor v National Australia Bank Limited & Ors [2001] NSWSC 744, referred to

*Kimtran Pty Ltd & Anor v Downie & Anor [2003] QCA 424; Appeal No 5473 of 2003, 26 September 2003, distinguished *Knight v F P Special Assets Ltd* (1992) 174 CLR 178, cited *Murchie v The Big Cart Track Pty Ltd (No 2) [2003] 1 Qd R 528, followed**

Natcraft Pty Ltd v Det Norske Veritas [2002] QCA 241; Appel No 9550 of 2001, 9 July 2002, followed

Procon (GB) Ltd v Provincial Building Co Ltd & Ors [1984] 2 All ER 368, cited

COUNSEL: K Philp (sol) for the plaintiffs/appellants/respondents
P A Keane QC, with J D McKenna SC, for the first defendants/first respondents/applicants
G A Thompson SC for the second defendants/second respondents/applicants
M H Hindman for Gordian Runoff Limited

SOLICITORS: Bennett & Philp as town agent for Hunt & Hunt (Adelaide) for the plaintiffs/appellants/respondents
Clayton Utz for the first defendants/first respondents/applicants
Mallesons Stephen Jacques second defendants/second

respondents/applicants
Dibbs Barker Gosling for Gordian Runoff

- [1] **JERRARD JA:** In this application I have read the reasons for judgment and orders proposed by Dutney J. Although the amounts proposed to be ordered by way of security for costs in this appeal are simply enormous, in the unusual circumstances described in his Honour's reasons I agree with those reasons and orders proposed.
- [2] **DUTNEY J:** These are applications for security for costs of an appeal. There are two groups of respondents each seeking security. The trial was a long one. It lasted 105 sitting days.
- [3] The appeal is also said to be a long one. How long is a matter for conjecture. The respondents' estimate is four weeks. No such time has been allocated to it by the Court to date and no approach has been made to the Court in relation to the matter. I would be surprised if the parties could persuade the Court of Appeal to allow them to occupy such an extraordinary length of time. It seems far more likely to me that each party will be given a restricted time within which to speak to written outlines or submissions.
- [4] The grounds for the applications are straightforward. The first 65 appellants are insolvent. The 66th appellant is the liquidator of the other 65. He secured litigation funding for the trial from a company called Gordian Runoff Limited. The basis of the funding was that Gordian Runoff would receive reimbursement of its expenditure plus 35% of the net proceeds from any favourable judgement. The liquidator does not depose to any capacity to pay the costs of an unsuccessful appeal. Rather, the appellants' solicitors have chosen neither to consent to nor oppose the award of security for costs and have limited their challenge to the quantum of security sought.
- [5] There has been no delay in the bringing of the application. While the prospects of success on the appeal cannot at this stage be assessed it is sufficient for present purposes to observe that many of the grounds of appeal seek to traverse findings of fact by the trial judge. Ordinarily the need to reverse fact findings on appeal does not instil great confidence in the outcome. This case may be different. Nonetheless without more knowledge of the facts and issues than have been ventilated on this application I cannot comment further.
- [6] The principles applicable to this application are well settled. See *Natcraft Pty Ltd v Det Norske Veritas*¹ and *Murchie v The Big Cart Track Pty Ltd (No 2)*². The formal requirements for such an order are satisfied by the matters to which I have already referred. No discretionary basis for refusing the order is advanced by appellants. In those circumstances I would grant security.
- [7] The real contest is in relation to the amount. In that respect the first group of respondents ("the Foster's Brewing group") seeks an order for \$3.1 million. The second group of respondents ("the Coopers & Lybrand group") seeks \$2 million. Both the amounts and the time it is alleged will be spent on this appeal are extraordinary. It was submitted by the Coopers & Lybrand group that their estimate

¹ [2002] QCA 241

² [2003] 1 Qd R 528

of the time that will be required is accepted by the appellants, as evidenced by a letter to the registry of 2 September, 2003. Examination of that letter shows that it is simply not so.

- [8] The letter seeks only extended time within which to file the necessary outlines of argument. This is a far cry from conceding that a team of barristers and solicitors will be working on the matter to the exclusion of all else for the whole period of the extension.
- [9] In any event it does not seem to me to be necessary to explore that matter further on this application. In this application the argument was centred on two matters. The first was whether the appellants should be required to provide security on the basis of a complete indemnity for any costs likely to be incurred. The second was as to the extent to which the security should correspond with the estimated costs.
- [10] In relation to the first argument Mr Keane QC for the Foster's Brewing group based his submission on these arguments:
- The discretion as to the ordering of security for costs given by UCPR rule 772 is wide enough to include an order based on indemnity costs;
 - The usual reluctance of the Court to order security in an amount that would stifle a meritorious appeal does not apply here. There is no suggestion Gordian Runoff, a subsidiary of AMP, would be deterred from prosecuting or funding the appeal irrespective of the amount ordered;
 - This is a case where the respondents might reasonably anticipate an award of indemnity costs following the appeal.³ The conduct of the appellants at trial was irresponsible. The trial judge commented as much in the judgement at paragraph [52].⁴
- [11] Mr Thomson SC for the Coopers & Lybrand group largely adopted the arguments of Mr Keane QC.
- [12] I have no hesitation in accepting that the Court does have power under rule 772 to order security for costs on an indemnity basis. The power was recognised as existing under the Federal Court rules by Lindgren J in *Allstate Life Insurance Co & Ors v Australia and New Zealand Banking Group Ltd & Ors (No 19)*.⁵ Counsel was not, however, able to cite any instance of such an order having ever been made, something Lindgren J also commented on. It is not necessary to consider on this application whether the power extends to providing sufficient security to constitute an absolute indemnity for any likely expense, as the two groups of respondents actually seek.
- [13] In this case I am not minded to order security on an indemnity basis. There are two reasons for this. The first is the position of Gordian Runoff and the second is the traditionally conservative approach adopted by courts to the quantum of security for costs.

³ Following the hearing of the applications but on the same day, Chesterman J ordered the appellants and Gordian Runoff to pay the respondents' costs of the trial on an indemnity basis. See *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Limited & Ors* [2003] QSC 299.

⁴ See *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors* [2003] QSC 205.

⁵ (1995) 134 ALR 187 at 197.

- [14] In this case, as has been acknowledged by the respondents, there is no reason to believe that Gordian Runoff is unable to meet any order for costs it might be required to pay under its agreement with the appellants or which it might be ordered to pay directly. It is difficult to imagine, having regard to its financial interest and active involvement in the action why, if it also funds the appeal, Gordian Runoff would not be ordered to pay any costs awarded against the appellants on the basis of the High Court decision in *Knight v FP Special Assets Ltd*.⁶ In light of that circumstance there is little risk of any costs order in favour of the respondents not being met. Of course, the appellants are not bound to continue to accept finance from Gordian Runoff. It seems to be common ground that the appellants are unable to fund an appeal from their own resources and therefore if Gordian Runoff does not fund the appeal some other financier would need to be found. The ordering of a substantial sum by way of security on what Mr Keane QC referred to as the “usual” basis should be sufficient to discourage the continuation of the appeal without strong financial support.
- [15] I observe that my reliance on the likelihood of a third party costs order against Gordian Runoff as a basis for refusing to order security for costs on an indemnity basis is a clear point of distinction between this case and the decision in *Kimtran Pty Ltd & Anor v Downie & Anor*⁷ where I relied on the obtaining of an order for security for costs at an early stage as a discretionary reason for refusing to order costs against the third party.
- [16] Courts have traditionally been conservative in relation to the quantum of orders for security for costs. Historically the English practice was to award security in an amount equivalent to two thirds of the estimated party and party costs. That course was abandoned as a general practice following the decision of the Court of Appeal in *GB Procon Ltd v Provincial Building Co Ltd*⁸. Nonetheless the approach tends to be generally conservative as illustrated by the decision of this Court in *Murchie v The Big Kart Track Pty Ltd (No 2)* at paragraphs [16] and [17].⁹
- [17] Two estimates of costs on the standard basis have been provided. The first is in the affidavit of Mr Philp filed on 8 September, 2003. That estimate is for the costs of the Foster’s Brewing group and totals \$428,525. No separate estimate is done for the Coopers & Lybrand group although the comment is made, and I think, correctly, that that group’s costs would be less. Despite this, Mr Philp states that he has instructions to consent to an order for both groups of respondents in the same amount of \$428,525.
- [18] For the Coopers & Lybrand group Mr McDonnell has provided an estimate of costs in his affidavit of 9th September, 2003 on the alternate bases of briefing two or one senior counsel. On the basis of two senior counsel Mr McDonnell estimates costs on the standard basis at \$1,329,994 and on the basis of one senior counsel at \$914,994.

⁶ (1992) 174 CLR 178 at 192-193.

⁷ [2003] QCA 424

⁸ [1984] 2 All ER 368. See also *Bruce Pie & Sons Pty Ltd v RH Mainwaring, English and Peldan* [1985] 1 Qd R 401 (McPherson J) and *Allstate Life Insurance Co & Ors v Australia and New Zealand Banking Group Ltd & Ors (No 19)* (1995) 134 ALR 187 at 197 – 201.

⁹ [2003] 1 Qd R 528 at 530

- [19] Although not a party to these applications, Gordian Runoff was given leave to make submissions on quantum. Ms Hindman for Gordian Runoff raised a number of issues which in my view are significant. In particular she submitted that the quantum should be reduced to take account of the additional costs occasioned by the notice of contention and cross appeal of the Foster's Brewing group, the non recoverability in a costs order of GST and the general uncertainty of assessing costs at this stage of a proceeding.¹⁰
- [20] While both Mr Philp and Mr McDonnell are experienced and well regarded litigation solicitors I am inclined to base the quantum of the order on the estimates of Mr McDonnell but allowing for discounting factors submitted by Ms Hindman. Mr Philp's assessment appears to me to have already built in the discounting factors.
- [21] In using Mr McDonnell's estimate I propose to limit the hearing of the appeal to two weeks rather than four. This reduces the estimates to \$1,199,994 with two senior counsel and \$834,994 with one senior counsel. The average of these figures is \$1,017,494. If that figure is discounted by 25% for the matters referred to above it comes to \$763,120 which rounds down to \$750,000. I would order the appellants to give security for that amount for the costs of the Coopers & Lybrand group. In relation to the Foster's Brewing group, even though there is no estimate of costs on a standard basis it seems to be generally recognised that that group's exposure to costs is greater than the Coopers & Lybrand group. It follows that it should receive a higher amount by way of security. I would order the appellants to provide security for the costs of the Foster's Brewing group in the sum of \$950,000.
- [22] I would make the costs of these applications costs in the appeal. The appellants did not oppose the making of an order for security. The dispute was restricted to quantum. The quantum I would order is much less than the amount asked for by the respondents, although more than that offered by the appellants. There was never any prospect of security being offered by Gordian Runoff which company is not yet finally committed to the appeal. In the circumstances it appears to me that the burden of costs should be born by the party or parties ultimately unsuccessful in the appeal. That is in any event the usual order.
- [23] Both groups of respondents would prefer that security be provided directly by Gordian Runoff by way of guarantee. Since Gordian Runoff is not a party to these applications such an order would not be open. Nonetheless in the event that some such agreement is reached I consider that the option should be left open. The orders I propose are as follows:
1. Unless the appellants deliver to the Registrar within 14 days an irrevocable and unconditional guarantee by Gordian Runoff Limited which guarantees to the first group of respondents any obligation which the appellants may incur to pay the first respondents' costs of and incidental to this appeal, then the appellants are to provide security for the first group of respondents' costs of and incidental to this appeal by the provision of security in the amount of \$950,000, either by payment of that amount into court or by the provision of an irrevocable and unconditional guarantee

¹⁰ In *Idoport Pty Ltd & Anor v National Australia Bank Limited & Ors* [2001] NSWSC 744 at [152] Einstein J discounted the estimate by 15% under this head.

from one of the Commonwealth Bank of Australia Limited, National Australia Bank Limited, Australia and New Zealand Banking Group Limited, Westpac Banking Group Limited or Suncorp Metway Limited;

2. Unless the appellants deliver to the Registrar within 14 days an irrevocable and unconditional guarantee by Gordian Runoff Limited which guarantees to the second group of respondents any obligation which the appellants may incur to pay the second respondents' costs of and incidental to this appeal, then the appellants are to provide security for the second group of respondents' costs of and incidental to this appeal by the provision of security in the amount of \$750,000 either by payment of that amount into court or by the provision of an irrevocable and unconditional guarantee from one of the Commonwealth Bank of Australia Limited, National Australia Bank Limited, Australia and New Zealand Banking Group Limited, Westpac Banking Group Limited or Suncorp Metway Limited;
3. This appeal is stayed until the security required by orders 1 and 2 is provided;
4. Each party has liberty to apply;
5. Costs are each party's costs in the appeal.

[24] **PHLIPPIDES J:** I agree with the reasons of Dutney J and with the orders proposed.