

SUPREME COURT OF QUEENSLAND

CITATION: *OK Printing Co Pty Ltd v Preston* [2006] QSC 126

PARTIES: **OK PRINTING CO PTY LTD and**
OSSI WALLENUS
v
SUZANNE PRESTON

FILE NO/S: 536 of 2004

DIVISION: Trial

PROCEEDING: Applications

ORIGINATING COURT: Supreme Court

DELIVERED ON: 5 May 2006

DELIVERED AT: Cairns

HEARING DATE: 3 February 2006

JUDGE: Jones J

ORDER: **1. Upon the male plaintiff providing a guarantee in the sum of \$20,000 as security for the corporate plaintiff's costs and in a form acceptable to the defendant, the application will be dismissed.**

2. Such guarantee be provided within 28 days and in the event it is not provided, the action will be stayed.

3. Costs of and incidental to the application shall be costs in the cause unless application is made for different order within 14 days.

4. Parties have liberty to apply upon 2 days notice to the other parties.

CATCHWORDS: CORPORATIONS – CONSTITUTION AND LEGAL CAPACITY – EXTERNAL LITIGATION – SECURITY FOR COSTS – DISCRETION OF THE COURT – where corporate plaintiff and individual plaintiff – where corporate plaintiff impecunious – where individual plaintiff gives a personal guarantee – whether discretion to make an order for security for costs should be exercised

COUNSEL: Mr C Ryall for the applicant

Mr J Sheridan for the respondent

SOLICITORS: Gayler Cleland Towne Solicitors for the applicant
William Royds Lawyers for the respondent

- [1] By this application the defendant seeks an order that the corporate plaintiff give \$20,000 by way of security for costs for a proceeding originating in this court on 3 November 2004. The application is brought pursuant to r 671 (a) of the *Uniform Civil Procedure Rules* and s 1335 of the *Corporations Act 2001*.
- [2] Both Rule 671 (a) of *UCPR* and s 1335 of the *Corporations Act* give the Court the discretion to order a plaintiff to give security for costs if the court is satisfied the plaintiff is a corporation and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them.
- [3] The corporate plaintiff has not provided details of its financial state but the application has proceeded on the basis that it is impecunious and therefore I assume that it is unlikely to be able to pay the defendant's costs in the event of an unfavourable costs order. The male plaintiff, Ossi Wallenius, was the director and sole shareholder of the corporate plaintiff and given the corporate plaintiff's impecuniosity has made an offer to personally guarantee the corporate plaintiff's costs. Notwithstanding, it is a general discretionary matter for the Court as to whether an order for security for costs against the corporate plaintiff should be made.¹
- [4] Prior to the dispute arising, the corporate plaintiff owned and operated a printing business with the registered name "Cairns Print Direct". The male plaintiff was the half-owner of a different business which conducted t-shirt printing called "Cairns T-Shirts".
- [5] The dispute between the parties concerns the alleged sale of the company's printing business and the male plaintiff's half-share of the t-shirt printing business to the defendant, Suzanne Preston. Mr Wallenius and Ms Preston were previously married and for a time Ms Preston helped with the running of the company's printing business. After the couple separated, negotiations began between them for the sale of the businesses to Ms Preston.
- [6] In bringing their claim the plaintiffs solely rely upon an alleged agreement in writing dated 18 February 2003² between the male plaintiff and the defendant. This document shows an intention between those parties that the businesses should be sold to the defendant for the total purchase price of \$165,000.00.
- [7] The plaintiffs now seek \$300,000.00 from the defendant which is money said to be owing from the sale of the businesses, as well as a number of other obligations related to that sale. The Statement of Claim does not distinguish between claims by the corporate plaintiff and those of the male plaintiff, but the only part of the total amount seemingly claimable by the male plaintiff does not exceed \$30,000.

¹*Harpur v Ariadne* [1984] 2 Qd R 523

² Ex "A" to the affidavit of Ossi Wallenius sworn 6 December 2005.

- [8] These matters are mentioned because a relevant consideration in ordering security for costs is the corporate plaintiff's prospects of success in the proceeding. The defendant alleges that the agreement for the sale of the businesses is not enforceable because it was preliminary to a more formal document being prepared for the sale of and that this was never done. Moreover she alleges that the project for the transfer of the business was subsequently abandoned by the parties and that an alternative oral agreement was made.
- [9] The defendant by her further amended defence alleges that the sale of the Cairns T-shirts business was complete and that the proposed sale to her of the corporate plaintiff's business did not proceed when the male plaintiff said that he no longer intended to sell it but would sell to her surplus equipment. The defendant has also alleged a set-off against the plaintiff which includes the provision of personal services to the company for the period 2000-2004 for which she seeks remuneration of \$219,537.00, less an amount received of \$59,951.00. She claims also the sum of \$116,000 for provision of equipment to the plaintiff company and other sundry items leading to a total amount of approximately \$376,000.00 which the defendant seeks to set-off against any claim by the corporate plaintiff. The plaintiffs join issue on the allegations giving rise to the claim for set-off.
- [10] In assessing the relevant merits of the claim and claims for set-off it is to be noted that the corporate plaintiff was not a signatory to any agreement in writing and is unlikely to succeed unless it is shown that the male plaintiff who signed the agreement once, was by that act signing for himself and in his capacity as director. The other issues pertaining to the sale of the male plaintiff's business seem to arise more in the nature of alteration of property interests arising on the breakdown of a domestic relationship. Matters of credibility of witnesses and examination of bank records will be crucial on these issues and they cannot be determined on the material before me. But if the bank documents referred to in the amended defence establish the payments they are contended for, it seems likely that the male plaintiff's claim will have little prospect of success.
- [11] I turn now to the discretionary factors enumerated in r 672 of the *UCPR* which the Court may have regard to in determining whether to make an order for security for costs. Such considerations relevantly include:
- a) the means of those standing behind the proceeding;
 - b) the prospects of success or merits of the proceeding;
 - d) the impecuniosity of a corporation;
 - h) whether an order for security for costs would stifle the proceeding;
 - m) the costs of the proceeding;
- [12] In view of these factors I make the following comments. The male plaintiff appears to have some means and is willing to provide a personal guarantee. This has to be considered against the fact that the applicant/defendant is seeking the deposit of only \$20,000 by way of security for costs. This guarantee should provide the defendant with a certain degree of comfort. The male plaintiff has stated on oath that he holds a \$40,000 equity in his mortgaged property in Cairns and that he is

also employed. The offer of a personal guarantee indicates a willingness on Mr Wallenius's behalf to "come out from behind the skirts of the company"³ and bring his own assets into play. In *Epping Plaza v Bevendale*⁴ the Victorian Court of Appeal warned about accepting an undertaking from impecunious individuals who appear to have no chance of making it good. This concern could be alleviated if perhaps a mortgage or caveat could be lodged over the male plaintiff's property to ensure whatever equity he owns in that property would be available to support his guarantee.

- [13] This is not a case where the personal plaintiff is using the guise of a related impecunious company to avoid the consequences of an order for costs. Given that the defendant was seeking an order for security from the corporate plaintiff only in the sum of \$20,000 it is my view that in these circumstances, a secured personal guarantee for the amount given by the male plaintiff is sufficient.

ORDERS

1. Upon the male plaintiff providing a guarantee in the sum of \$20,000 as security for the corporate plaintiff's costs and in a form acceptable to the defendant, the application will be dismissed.
2. Such guarantee be provided within 28 days and in the event it is not provided, the action will be stayed.
3. Costs of and incidental to the application shall be costs in the cause unless application is made for a different order within 14 days.
4. Parties have liberty to apply upon 2 days notice to the other parties.

³ *Harpur v Ariadne* at p 532

⁴ *Epping Plaza Fresh Fruit & Vegetables Pty Ltd v Bevendale Pty Ltd* [1998] VSCA 43