SUPREME COURT OF QUEENSLAND

CITATION:	*Nambour Valley Estates Pty Ltd v Henebery Holdings Investment Trust & Anor* [2007] QSC 393
PARTIES:	**NAMBOUR VALLEY ESTATES PTY LTD ACN 107 929 797 (RECEIVERS APPOINTED)** (respondent/plaintiff) **v** **HENEBERY HOLDINGS PTY LTD ACN 114 969 434 as trustee for HENEBERY HOLDINGS INVESTMENT TRUST** (applicant/defendant)
FILE NO:	BS6269 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	21 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2007
JUDGE:	Daubney J
ORDER:	**1. That the plaintiff provide security for the defendant's costs of and incidental to this proceeding up to and including the first day of trial in the amount of $50,000.00 (inclusive of GST).** **2. Such security be provided by way of Bank Guarantee to the satisfaction of the principal registrar of the Supreme Court of Queensland, to be deposited with the said principal registrar within 28 days after the date of this Order.** **3. The plaintiff pay the defendant's costs of and incidental to this application fixed in the sum of $4,950.00 within 28 days of the date of this Order.**
CATCHWORDS:	PROCEDURE – COSTS – SECURITY FOR COSTS – OTHER MATTERS – where defendant seeks security for costs – where there is reason to believe that the plaintiff may be unable to pay the defendant's costs if unsuccessful - whether discretion should be exercised in favour of granting security for costs *Corporations Act 2001* (Cth) s 1335 *Trade Practices Act 1974* (Cth) s 52, s 53A, s 87 *Trust Accounts Act 1973* (Qld) s 12(4)(b) *Uniform Civil Procedure Rules 1999* (Qld) r 670

Bell Wholesale Co Ltd v Gates Export Corporation (1984) 2 FCR 1, considered
Bosun Pty Ltd (in liq) v Makris (2003) 21 ACLC 666, cited
Dalma Formwood Pty Ltd (Admins appt'd) v Concrete Constructions Group Ltd [1998] NSWSC 472, considered
Harpur v Ariadne Australia Ltd (No 2) [1984] 2 Qd R 523, applied
Health & Life Care Ltd v Price Waterhouse (1993) 11 ACLC 1110, cited
Seabird Corporation Ltd (Receiver and Manager Appointed) (in liq) v National Securities Exchanges Guarantee Corporation Ltd (1989) 7 ACLC 1263, approved
Sent & Anor v Jet Corporation of Australia Pty Ltd (1984) 2 FCR 201, cited
Sydmar Pty Ltd v Statewise Developments Pty Ltd (1987) 73 ALR 289, distinguished
Voxson Ltd v McLaughlins Financial Services Ltd & Anor [2007] QSC 83, approved

COUNSEL: JW Peden for the applicant/defendant
LA Jurth for the respondent/plaintiff

SOLICITORS: Russell and Co for the applicant/defendant
Mullins Lawyers for the respondent/plaintiff

[1] **DAUBNEY J**: By a written contract dated 1 July 2005, the plaintiff agreed to sell a property situated at 213 Nambour-Mapleton Road, Nambour to the defendant. The contract required a deposit of $350,000 to be paid by specified instalments of $10,000 on the signing of the contract and $340,000 within 10 days thereafter. The $10,000 was to be paid direct to the plaintiff, and was expressed to be 'non-refundable unless the Vendor defaults under the terms of this Contract'. The parties also agreed that the balance deposit could be 'released to the Vendor prior to completion, at the Vendor's discretion'.

[2] As events transpired, only $250,000 of the deposit was paid:
- $100,000 by a cheque to the plaintiff, and
- $150,000 by direct transfer to the plaintiff's bank account.

[3] The plaintiff subsequently paid this $250,000 into its then solicitor's trust account.

[4] On 19 July 2005, Alida Cornwall on behalf of the defendant sent an email to the plaintiff terminating the contract and demanding the return of the deposit moneys which had been made.

[5] On 1 August 2005, the defendant's solicitors sent a facsimile to the plaintiff's solicitors advising that the defendant did not intend settling on the due date for completion, 11 August 2005. The plaintiff treated this as a repudiation of the contract, elected to terminate, and declared the deposit moneys forfeited.

[6] The facts and allegations just outlined formed the basis of the claim and statement of claim by which this proceeding was commenced on 3 August 2005, and by which the plaintiff claims for:

(a) a declaration that the contract was validly terminated;
(b) a declaration that it was entitled to forfeit the deposit moneys paid of $250,000;
(c) the balance of $100,000 of the deposit due and owing; and
(d) damages for wrongful repudiation of the contract.

[7] It seems that the solicitors into whose trust account the $250,000 had been paid received a notice that ownership of that money was in dispute and that proceedings had been commenced because on 26 August 2005 a consent order was filed requiring those solicitors to pay the money into Court, presumably pursuant to s 12(4)(b) of the *Trust Accounts Act 1973* (Qld).

[8] On 9 September 2005, the defendant filed a defence and counterclaim, which relevantly contends that:

(a) the defendant's execution of the contract was procured by misrepresentations made on behalf of the plaintiff, that the contract was therefore void *ab initio*, and that it was lawfully rescinded by the defendant;

(b) alternatively, that the execution of the contract was procured by misrepresentations which constituted breaches of s 52 and/or s 53A of the *Trade Practices Act 1974* (Cth) ('TPA'), and the contract should be declared void pursuant to s 87 of the TPA; and

(c) alternatively, that the plaintiff's purported termination of the contract was itself a repudiation which entitled the defendant to elect to terminate the contract.

[9] The alleged misrepresentations on which the defendant relies are pleaded at length and it is unnecessary to rehearse them at length here, save to observe that in general terms it is contended that:

(a) certain representations said to be contained in a Feasibility Study about the property as to the construction costs for developing and subdividing the property in accordance with a current development approval were false, and the costs were 'significantly greater' than the $50,000 per lot (including any applicable local authority fees and contributions) which had been represented; and

(b) on several specified occasions in early June 2005, various persons (Franks, O'Neill, Carson, Johnson and Norton), each on behalf of the plaintiff, made oral representations to representatives of the defendant in relation to, relevantly, the development costs, which were false.

[10] By its counterclaim (to which Johnson, Carson, Franks and Norton were also joined as defendants-by-counterclaim), the defendant seeks against the plaintiff:

(a) a declaration that the contract is void *ab initio*;

(b) alternatively, a declaration that the contract has been validly terminated;

(c) damages (for fraudulent misrepresentation);

(d) equitable damages;

(e) damages pursuant to s 82 of the TPA; and

(f) recovery of the $250,000 deposit moneys.

[11] In its reply and answer filed on 17 October 2005, the plaintiff effectively joined issue on the allegations of misrepresentation and many of the factual assertions which underpin those allegations.

[12] The subject property was encumbered by a registered mortgage in favour of Phillip Maurice Franks (one of the defendants-by-counterclaim). By a deed of appointment dated 28 June 2007, Franks appointed Mr Peter Krejci and Mr Martin Green as joint receivers and managers of the plaintiff.

[13] That appointment of receivers and managers to the plaintiff prompted this application by the defendant for security for costs.

[14] The impecuniosity of the plaintiff would appear to be not in issue. Mr Green has sworn an affidavit in which he deposes to having reviewed the plaintiff's books and accounts in his possession, and on that basis he is of the opinion that:

(a) the plaintiff owns real property;

(b) the value of the charges encumbering the plaintiff and the real property exceed the value of the property by about $350,000;

(c) the plaintiff's bank account has a nil balance;

(d) the plaintiff has no other assets; and

(e) the plaintiff would not be able to pay any money by way of security for costs, if ordered.

[15] Mr Green also says that the receivers and managers will not personally fund a security for costs order, if it is made.

[16] On the face of it, then, the jurisdiction of the Court, by either or both of r 670 *Uniform Civil Procedure Rules 1999* (Qld) and s 1335 of the *Corporations Act 2001* (Cth), to order security for costs is enlivened. The question is whether, in the circumstances of this case, the discretion to make such an order should be exercised or not.

[17] Mr Peden of counsel, who appeared for the defendant, submitted that the discretion should be exercised in favour of an order because:

(a) the fact that there are parties standing behind the litigation who stand to benefit from it is a factor in favour of granting security;

(b) the plaintiff has no money to meet a costs order, nor could it afford a dividend in a liquidation in light of the excess of secured debts over the value of its property;

(c) there is no evidence that the conduct of the defendant has contributed to the impecuniosity of the plaintiff.

(d) the plaintiff is not in the effective position of a defendant – it seeks the release of the $250,000 held in Court and sues for the payment of the balance deposit of $100,000 and damages; whilst the defendant has admittedly counterclaimed for repayment of the $250,000, the prospect of it now recovering anything further from the plaintiff by way of damages is remote;

(e) whilst it can be said that any order for security for costs has the potential to stifle litigation, the Court should look to the means of those behind the litigation. Neither the receivers nor the secured creditor say that they do not have the capacity to put up security; the highest it is put is that the receivers say that they 'will not agree to personally fund a security for costs order'; and

(f) there has been no delay in bringing the application for security for costs.

[18] The most significant of these factors in my view is that there is a secured creditor who clearly stands to benefit from this litigation but who has not offered to put up the necessary security. If the plaintiff succeeds in the action, then the $250,000 presently in court and the further $100,000 which the defendant would be ordered to pay would, on Mr Green's affidavit, largely, if not wholly, flow through to the secured creditor. The significance of this factor is evident, in principle, from the following oft-cited passage in the judgment of the Full Federal Court in *Bell Wholesale Co Ltd v Gates Export Corporation*:[1]

> In our opinion a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means. It is not for the parties seeking security to raise the matter; it is an essential part of the case of a company seeking to resist an order for security on the ground that the granting of security will frustrate the litigation to raise the issue of the impecuniosity of those whom the litigation will benefit and to prove the necessary facts.

[19] The plaintiff, however, argued that the discretion to order security ought not be made in this case in circumstances where:

(a) the claim and the counterclaim arise out of the same or substantially the same factual matrix; and

(b) the making of an order for security for costs would stifle the proceeding.

[20] The proposition that a court would be reluctant to see a claim stayed because of an inability to provide security for costs when there is a cross-claim proceeding which covers substantially the same factual areas has been affirmed in a number of cases, including *Sydmar Pty Ltd v Statewise Developments Pty Ltd*,[2] *Dalma Formwood Pty Ltd (Admin's appt'd) v Concrete Constructions Group Ltd*[3] and *Voxson Ltd v McLaughlins Financial Services Ltd & Anor*.[4] I respectfully agree with the observation of Mullins J in the *Voxson* case that it is 'logical' that security should

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1 (1984) 2 FCR 1, 4.
2 (1987) 73 ALR 289.
3 [1998] NSWSC 472.
4 [2007] QSC 83.

not be ordered when the same evidence would be adduced in relation to both a claim and a counterclaim in the same proceeding.

[21] In my view, this is the most significant consideration raised for the plaintiff on the facts of the present case. The application of this factor is exemplified in the circumstances considered in *Sydmar Pty Ltd v Statewide Developments Pty Ltd*.[5] In that case, a plaintiff sued to recover fees alleged to be owing and damages for breach of a written consultancy agreement by which the plaintiff agreed to provide the defendant with special services in the supervision of the defendant's mining operation and the assessment and implementation of expansions of the defendant's mining program. By its counterclaim, the defendant alleged that the plaintiff had been negligent in and about the supervision, management and control of the mining operations at a particular location and had given negligent advice in two respects. The defendant further alleged that the plaintiff was in breach of the agreement by failing to ensure that the plaintiff and its employees 'did their utmost to promote and ensure the success of the mining operations at Spaid and to protect and further the defendant's reputation and interests'. The defendant also alleged that the plaintiff failed to take reasonable care in the performance of its responsibilities under the agreement. Smart J, after setting out the nature of the claim, defence and counterclaim at significant length, said:[6]

> It was apparent that most of the trial would be occupied by the matters raised in paras 6, 7 and 9 of the defence and the cross-claim.

His Honour further noted:[7]

> It was not seriously in issue that the matters raised in paras 6,7 and 9 of the defence would require a wide-ranging factual investigation into three mining operations and the leading of considerable expert evidence. Notwithstanding that neither side has given detailed consideration to the evidence to be called, it is apparent from an examination of the particulars given, as well as the evidence, that with these matters included in the trial it is likely to take 20 days. It could easily take 30 days. There are complex questions of fact and some questions of law. Without these matters the trial should finish in three to four days.

[22] A significant part of his Honour's judgment was concerned with the question whether the matters raised in the defence were capable of constituting an equitable set-off. That question is irrelevant for present purposes. Having determined that issue in favour of the defendant, his Honour then turned to the question of whether security for costs should be provided. In weighing up the extent to which the same facts are likely to be canvassed in determining the action and the cross-action, his Honour said:[8]

> In the present case, the matters alleged in paras 6, 7 and 9 of the defence form the basis of, and indeed substantially comprise, the defendant's cross-claim. This cross-claim is large, and will involve the determination of substantial issues of fact and law not directly arising in defence to the plaintiff's allegations set out in the statement of claim. With regard to

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5 (1987) 73 ALR 289.
6 Ibid, 292.
7 Ibid, 297.
8 Ibid, 302.

> these paragraphs of the defence, the defendant is, in the words of Legoe J at 500 in *Heller Factors*, "one seeking to go out for the recovery from the opposition by attack", claiming that the plaintiff is guilty of breach of both express and implied terms of the contract of 29 August 1978.
>
> On the facts of the present case I am persuaded that the relevant paragraphs of the defence, forming a set-off, are in the nature of a separate proceeding or claim and do indeed form the basis of and a substantial part of the defendant's cross-claim.
> ...
> It is plain that the facts to be investigated in relation to paras 6, 7 and 9 of the defence are substantially identical with those to be investigated on the cross-claim. By reason of the complexity of the matters raised in the cross-claim, the time it will take to hear them and the amount claimed, the cross-claim is now the dominant part of the proceedings. The plaintiff's claim, while important to it, is, in the overall picture of the hearing time and the amount claimed, of minor importance.

[23] In approaching the counterclaim brought in the present case, it is important to remember that the starting point, even of the defendant's counterclaim, is that there was a contract between the parties. The defendant needs to succeed in its claim to have that contract avoided or rescinded in order to establish its entitlement for repayment of the $250,000 deposit moneys paid pursuant to the contract. In defending that counterclaim (and there is no bar on an impecunious plaintiff defending a counterclaim), the plaintiff would advance precisely the same case as that which it pursues in its primary claim. Indeed, it stands to reason that if the defendant is not successful in having the contract declared void or rescinded, it ought follow that the plaintiff is entitled to be paid the $250,000 out of court and also to be paid the further $100,000 deposit required under the contract. This can be seen as an example of the sort of case referred to by Rolfe J in *Dalma Formwood Pty Ltd (Administrators Appointed) v Concrete Constructions Group Ltd*,[9] where his Honour said:

> It is, therefore, a somewhat arid exercise to be considering an application for security for costs if the plaintiff can be cast in the role of a defendant and can litigate the very matters the subject of the claim by way of defence.

[24] In the present case, it is not merely the matter that the plaintiff 'could' assert the efficacy of the contract by way of a defence; the defendant, in order to succeed in its counterclaim, must completely vitiate the agreement either by way of having it declared void *ab initio* or rescinded.

[25] A determination of this contractual issue is required, apart from anything else, because $250,000 has been paid into court pursuant to s 12(4)(b) of the *Trust Accounts Act 1973* (Qld), and the moneys are to remain in Court 'to abide the decision of the Court'. The defendant will necessarily have to litigate its counterclaim in order to establish its entitlement to ownership of the moneys which have been paid into Court.

[26] A further submission by the plaintiff that an order granting security would have the effect of stifling the proceeding is, in my view, and notwithstanding the impecuniosity of the plaintiff, answered by its inability to meet any order for

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9 [1998] NSWSC 472.

security, and the lack of willingness on the part of the receivers and managers, the sole director of the plaintiff or the secured creditor to fund an order for security for costs.

[27] For the purposes of deciding in which way to exercise my discretion, therefore, the matter comes down to weighing the principal arguments on each side, namely:

(a) for the defendant, that the person behind the plaintiff who stands to benefit from success for the plaintiff in this litigation, i.e. the secured creditor, has not offered to put up the necessary security for costs of the impecunious plaintiff; and

(b) for the plaintiff, that the question of the efficacy of the contract, on which the plaintiff's claim depends, will necessarily have to be litigated in the defendant's counterclaim and to enable the defendant, if successful, to obtain payment out of court of the $250,000.

[28] In weighing these matters, I am mindful of the generally prevailing judicial view that my discretion in this matter is unfettered – as Connolly J observed in *Harpur v Ariadne Australia Ltd (No 2)*,[10] in point of legal principle it is not right to say that as a matter of law any one factor is to predispose the court to a decision one way or another. It is equally important, however, to note that his Honour immediately followed that statement with:

> This is not to say however that in the factual context that factor (the inability of a claimant company to meet the costs of the other party from its own resources) may not well play an important and possibly a decisive role.

It is also important to recall that, on first principles:

> The system of justice under which we operate assumes that the interests of justice are best served if a successful litigant will receive his litigation costs and that the unsuccessful party will pay them. This is one reason why courts have assumed the jurisdiction to require security. It also explains why s 1335 and its predecessors were enacted.[11]

[29] In my view, having regard to all of the considerations to which I have just referred, it would be appropriate for an order for security for costs to be made. In particular, I consider that the appointment of receivers and managers to the plaintiff, combined with the evidence to the effect that success by the plaintiff in the proceeding would largely benefit a secured creditor who has chosen not to offer security for costs, outweighs the consideration urged by the plaintiff of commonality of factual issues between the claim and the counterclaim. The following observation by Needham AJ in *Seabird Corporation Ltd (Receiver and Manager Appointed) (in liq) v National Securities Exchanges Guarantee Corporation Ltd*[12] is apposite:

> It would be unjust to allow a secured creditor an opportunity to litigate free of any risk that, should it fail, it would not be under an obligation to pay the costs of the defendant. The receiver and manager's duty, should he

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10 [1984] 2 Qd R 523.

11 See *Bosun Pty Ltd (in liq) v Makris* (2003) 21 ACLC 666, 669 (Finkelstein J).

12 (1989) 7 ACLC 1263, 1266.

> succeed in obtaining judgment, would be to apply the proceeds of the litigation towards repayment of the secured debt. In that sense, the proceedings are taken for the benefit of the secured creditor, and there is every reason, in my opinion, why the defendant should have the benefit of an order giving it some security for costs.

See also *Sent & Anor v Jet Corporation of Australia Pty Ltd*;[13] and *Health & Life Care Ltd v Price Waterhouse*.[14]

[30] As to the quantum of the security to be ordered, the defendant's solicitor, Mr Russell, who has many years experience primarily in commercial litigation, has sworn an affidavit estimating the defendant's costs up to and including the first day of trial at $136,000 (inclusive of relevant GST). The plaintiff's solicitor, Mr Lutvey, who is also a long-experienced commercial litigator, has filed an affidavit responding to Mr Russell's estimate of costs, and has significant criticisms of and issues with the cost estimate which Mr Russell performed. The costs which Mr Lutvey would allow, in contrast to Mr Russell's estimate, amounts to only about $16,000.

[31] It is quite inappropriate for me on an application such as this to attempt to predict precisely what level of costs will be incurred, by the provision of what legal and other relevant services, to the defendant up to and including the first day of trial. It seems to me, with respect, that Mr Lutvey's estimate is clearly too low, while Mr Russell's estimate is manifestly too generous. Mr Russell has, for example, allowed for seven full working days of giving general advice to the client following the close of pleadings, discovery and exchange of evidence; this allocation of time seems to me to be out of proportion to the issues raised on the pleadings. Similarly, on the material I have seen so far, I simply cannot see the necessity for the three review applications that he has allowed for. It is also important to recall that the security which is being ordered is security for costs of the plaintiff's claim, and ought not extend to providing security for so much of the costs to be incurred by the defendant as may be attributable to advancing its counterclaim. Even from the brief summary of the issues raised on the pleadings, it is clear that the significant portion of the costs to be incurred by the defendant will be directed to making good the allegations upon which it will need to rely for the purposes of obtaining an order that the contract be avoided or rescinded.

[32] In all the circumstances, the amount which I think appropriate to fix as security for costs of the plaintiff's claim is $50,000 (inclusive of GST) up to and including the first day of trial.

[33] I will hear the parties as to the appropriate form of order, and as to the costs on this application.

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13 (1984) 2 FCR 201.

14 (1993) 11 ACLC 1110.