SUPREME COURT OF QUEENSLAND

CITATION:	*Aqwell Pty Ltd v BJC Drilling Services Pty Ltd* [2008] QSC 266
PARTIES:	**AQWELL PTY LTD (ACN 007 726 981)** (plaintiff) **v** **BJC DRILLING SERVICES PTY LTD (ACN 086 032 742)** (first defendant) and **COLIN BRUCE DONEGAN** (second defendant) and **JON HUGH BEVERLEY CROSSKILL** (third defendant) and **BRIAN DALE WEBER** (fourth defendant)
FILE NO:	7523 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	30 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2008
JUDGE:	Daubney J
ORDER:	**1. The defendants' application for security for costs be adjourned for a further 21 days to permit the lodgement with the Registrar of the Court of an irrevocable guarantee by Peter Davis Rogers, in a form acceptable to the Registrar, in favour of the defendants and each of them whereby Mr Rogers guarantees every obligation which the plaintiff may have to pay any costs order made against the plaintiff in this proceeding** **2. Upon lodgement of the said guarantee, the defendants' application for security for costs will stand dismissed** **3. The parties will have liberty to apply** **4. Costs reserved**

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – POVERTY – LACK OF MEANS – where plaintiff corporation previously ordered to provide security for costs – where significant additional work required to be undertaken – where defendant seeks order for further security – where plaintiff impecunious – where sole director and shareholder of plaintiff indicates willingness to offer personal guarantee – whether further security ought be ordered

Corporations Act 2001 (Cth)
Uniform Civil Procedure Rules 1999 (Qld)

Aqwell Pty Ltd v BJC Drilling Services Pty Ltd [2007] QSC 140
Covecorp Constructions Pty Ltd v Indigo Projects Pty Ltd [2007] QSC 262
Epping Plaza Fresh Fruits & Vegetables Pty Ltd v Bevendale Pty Ltd [1999] 2 VR 191
Erolen Pty Ltd v Baulkham Hills Shire Council (1993) 11 ACLC 511
Gallus Properties Pty Ltd v Richardson [2004] QSC 15
Gentry Bros Pty Ltd v Wilson Brown & Associates Pty Ltd (1992) 10 ACLC 1394
Goodman v Lorenzen [2000] QCA 11
Harpur v Ariadne Australia Limited [1984] 2 Qd R 523
Maggbury Pty Ltd v Hafele Australia Pty Ltd [2001] 2 Qd R 187
Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd (1990) 8 ACLC 304

COUNSEL: S S Monks for the plaintiff
D M Morgan for the defendant

SOLICITORS: Lillas & Loel Lawyers for the plaintiff
Crilly Lawyers for the defendant

[1] The defendants have applied for the following order:

> 'That pursuant to Rule 670 of the *Uniform Civil Procedure Rules* 199, or alternatively section 1335(1) of the *Corporations Act* 2001 the Plaintiff provide further security for the Defendant's costs in the amount of $100,000.00.'

[2] I should observe immediately that, as is apparent from the wording of the relief sought, the first defendant at least already enjoys the benefit of an order for security for costs. On 27 May 2004, at a time when the first defendant was the only defendant, Mullins J ordered:

> 'The Plaintiff on or before 10 June 2004 provide security for the Defendant's costs in the amount of $60,000.00 by way of a cash deposit, bank guarantee or other security satisfactory to the Registrar.'

[3] *Uniform Civil Procedure Rules* 1999 (Qld) (*"UCPR")* Rule 675, within Chapter 17 relating to security for costs, provides:

> 'The court may set aside or vary an order made under this part in special circumstances.'

[4] In *Covecorp Constructions Pty Ltd v Indigo Projects Pty Ltd* [2007] QSC 262, Martin J considered a defendant's application 'for an order increasing the amount of security for costs to be provided' over and above that which had been previously ordered. His Honour, at [21], said that he did not see how that application could be anything but an application to vary an existing order, whether that application be made in the inherent jurisdiction or under Rule 670. I have the same view of the present application.

[5] To the extent, therefore, that the defendants now move under Rule 675, 'special circumstances' need to be shown. Martin J also referred to the test for varying an order for security for costs without recourse to Rule 675 by citing the following observations of McPherson JA in *Goodman v Lorenzen* [2000] QCA 11 at [6]:

> 'The order [for security for costs] was interlocutory in character, and interlocutory orders are, at least to some extent and in some circumstances, susceptible of variation either by the judge who made them or otherwise without the necessity for an appeal. What is, however, generally required as a prerequisite to varying or setting aside such an order is new material providing evidence of additional relevant facts, which have arisen or been discovered since the earlier application or order was made, that require a different order from that originally made, or would have done so at the time when that order was made.'

[6] This proceeding has been on foot since 2002. It was originally brought as a claim against the first defendant only being, in effect, for an account of the profit derived in a joint venture between the parties for the operation of certain rotary drills which the plaintiff had agreed to sell to the first defendant. Some of the history of the matter is recounted in the reasons for judgment of Helman J in *Aqwell Pty Ltd v BJC Drilling Services Pty Ltd* [2007] QSC 140 at [3]:

> 'These proceedings began on 16 August 2002 when the plaintiff applied to this court for an order for the appointment of receivers and managers of the joint venture. On 19 September 2002 an order was made appointing receivers. On 9 October 2003, by consent, an order was made that the receivership be terminated. On 3 March 2004 an order was made giving the plaintiff leave to file and serve a further amended statement of claim, the pleading the plaintiff now seeks to amend. (The further amended statement of claim was not filed until 22 September 2004.) On 27 May 2004 an order was made by Mullins J that on or before 10 June 2004 the plaintiff provide security for costs in the sum of $60,000. It was not until 16 September 2005 that the security was provided by a payment into court. On 4 April 2006 a request for trial date was filed.'

[7] On that occasion, Helman J acceded in part to an application by the plaintiff to make significant amendments to its pleading, namely to add a claim against the first defendant for breach of fiduciary obligations and also to add the parties who are now the second, third and fourth defendants to answer claims that they were accessories to the breach of fiduciary obligations.

[8] The defendants point to the significant work in the matter which has been undertaken since Mullins J ordered security for costs in 2004, including:-

- responding to the plaintiff's request for particulars;
- amending the pleadings in respect to the plaintiff's further amended statement of claim;
- taking part in a mediation;
- making application for a release of undertakings previously given to the Court;
- briefing the forensic expert accountant;
- making application for further directions.

[9] The further work to be undertaken to bring the matter to the first day of trial is said by the defendants to include:

- responding to an application by the plaintiff for further disclosure (this application has since been dealt with);
- providing further material to the forensic accountant;
- preparation of evidence for trial;
- briefing, and obtaining from counsel, an advice on evidence;
- pre-trial conferences and preparation for trial;
- briefing counsel, and attending with counsel, on the first day of trial.

[10] Even a cursory review of the court documents in this matter reveals that the case now sought to be advanced is significantly more complex than that which was before Mullins J. Moreover, the history reveals that much more work has been, and will be, occasioned for the defendants as a consequence of the plaintiff's conduct of the proceeding, including the not insignificant broadening of issues and addition of parties in 2007 (noting also, as recorded by Helman J, that a request for trial of the case as originally formulated was filed in April 2006).

[11] It seems to me that these matters constitute sufficient 'special circumstances' for the purposes of Rule 675, or such additional relevant facts in connection with the exercise of the inherent jurisdiction, as to raise the exercise of the discretion to vary the existing order for security for costs.

[12] That then gives rise to two questions:

1. Whether the discretion to vary ought be exercised, and
2. If so, what further security ought be ordered.

[13] As to the first of these, it is not in issue that the plaintiff is impecunious, and would not be able to meet any costs order made against it.

[14] The defendants submit that the discretion ought be exercised in their favour because:

(a) there is no-one of means standing behind the plaintiff;

(b) the plaintiff has nothing more than an arguable case;

(c) the genuineness of the proceeding ought be questioned 'given the extraordinary interlocutory steps and delays which have been experienced and which are directly attributable to the plaintiff';

(d) this is a purely commercial dispute and there are no questions of public importance;

(e) the plaintiff has previously provided security for costs. Even if the effect of ordering further security is to stifle the litigation, this has to be considered in the context of the significant pre-trial steps yet to be completed.

[15] The plaintiff submits unequivocally that the ordering of further security would stymie the plaintiff's action. Non-compliance with an order to provide further security would inevitably lead to the action being struck out for want of prosecution, and this, says the plaintiff, would be oppressive as it would deny the plaintiff the right to litigate. This oppression would be compounded, it is said, by consideration of the fact that the Court has already ordered, and the parties have paid for, an expert accountant to report on the central issues.

[16] It is well settled that the Court has an unfettered discretion on the question of ordering security for costs, and that this discretion is to be exercised only after taking account of all the circumstances of the case. The matters advanced by each side in the present case to which I have just referred all need to be weighed in the mix. It is also clear that, having regard to the provisions of s 1335 of the *Corporations Act* 2001 (Cth), the impecuniosity of a company is a factor which, in the particular factual context, may play an important and possibly decisive role – *Harpur v Ariadne Australia Limited* [1984] 2 Qd R 523, per Connolly J at 530.

[17] There is, however, a further consideration in this case, namely that the person who stands behind the corporate plaintiff, Mr Peter Rogers, has indicated his willingness to guarantee the obligation of the plaintiff to pay any costs order against the plaintiff in this proceeding. The material makes it clear that, like the plaintiff, Mr Rogers is impecunious. His personal assets comprise vehicles, a truck, an air compressor, and drilling equipment, all of which he says is worth about $175,000. He continues to work via the plaintiff as a driller. He has deposed that in the financial year ended 30 June 2008, the gross income from drilling (net of GST) was some $165,000. The net income after payment of business expenses was $63,700, or some $1,225 on average per week. From this, he pays rent and other personal living expenses which he says amount to $879 per week, leaving some $349 per week. These calculations

make no allowance for the income tax which will be payable by him on the income he derives form the plaintiff.

[18] He also says that his financial position was very different when Mullins J made the order for security for costs in May 2004. At that time, apart from the income he was earning, he was married, his wife was working, they owned a house worth $600,000 and had other assets to the value of $170,000. Unfortunately since then Mr Rogers has separated from his wife. The matrimonial assets have largely been dissipated, not least in discharging debts owed by the plaintiff to the Australian Taxation Office and paying legal fees in connection with this litigation. So parlous had the plaintiff's and Mr Rogers' financial positions become that, in order eventually to meet the existing order for security for costs, he borrowed the $60,000 from his solicitor. He still owes his solicitor about two thirds of that loan.

[19] When this matter first came before me, a concern was raised as to whether, having regard to the register of members disclosed in a company search of the plaintiff, it was correct to assert that Mr Rogers was the only real person standing behind the corporate plaintiff. The hearing was adjourned to enable further material to be put on in connection with the persons whose names are also listed as shareholders of the company. That material has been obtained, and it now appears:

1. Mr Rogers' estranged wife, Karen, held one share in the plaintiff. She has now received independent legal advice, and has transferred her share to Mr Rogers. Mrs Rogers has sworn an affidavit confirming her separation from her husband in July 2007, saying that the breakdown in the marriage is permanent. She deposes to being unwilling, and in any event unable, to lend money to Mr Rogers for this litigation. She owns little, as their former family house and other assets have been lost. She works as a teacher, lives in rented premises, has no savings, and says that she has no desire to be connected with this litigation in any way; hence her agreement to transfer the share she held in the plaintiff to her husband.

2. Mr Rogers' brother, Mr Gregory Rogers, was issued with two shares in the plaintiff in May 2008, at a time when Mrs Rogers still held a share. Given the marital discord between Mrs Rogers and her husband, the reason for the two shares being issued to Gregory Rogers is clear enough. With Mrs Rogers since transferring her share to Mr Rogers, Gregory Rogers has also transferred the two shares issued to him to Mr Rogers. Gregory Rogers now has no interest in the plaintiff, has no interest in the fruits of the litigation, and has deposed to his unwillingness to lend his brother money or otherwise involve his assets in any way in connection with the plaintiff or this litigation.

[20] In short, it is clear that the present situation is that the only person who stands behind the plaintiff and who has any pecuniary interest in the outcome of this proceeding is Mr Peter Rogers. There are no litigation funders or other parties who may benefit if the plaintiff succeeds.

[21] In *Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd* (1990) 8 ACLC 304, Byrne J (as he then was) had before him a case, as here, involving an impecunious corporate plaintiff against which security for costs was sought. The director and ultimate beneficiary of a trust administered by the company offered his personal guarantee to meet any costs order which might be made against the company at trial. Byrne J referred to the proposition, which is also relevant to the present case, that the fact that an order for security for costs would frustrate the litigation does not require refusal of the application but is often a significant matter, and then said (at 306):

> 'There is no-one who might benefit if the plaintiff is successful in attempting to take advantage of the plaintiff's corporate status to avoid responsibility for the defendant's costs. In *Harpur & Ors v Ariadne Australia Limited* ... Connolly J, Campbell CJ and Demack J concurring said at ... 532 (speaking of s 533(1)):
>
> > "The mischief at which the provision is aimed is obvious. An individual who conducts his business affairs by medium of a corporation without assets would otherwise be in a position to expose his opponent to a massive bill of costs without hazarding his own assets. The purpose of an order for security is to require him, if not to come out form behind the skirts of the company, at least to bring his own assets into play. If however he is already available for whatever he is worth, the object of the legislation is seen to be satisfied."
>
> Mr Newton, for whatever he is worth, has accepted responsibility for the defendant's costs. In this case, that satisfies the object of s 533. In all the circumstances, that Mr Newton and the plaintiff are impecunious should not be a bar to the litigation's proceeding ...'.

[22] In *Gentry Bros Pty Ltd v Wilson Brown & Associates Pty Ltd* (1992) 10 ACLC 1394, Cooper J in the Federal Court, when considering a cognate situation, referred to a number of authorities, including *Mantaray*, and said, at 1399:

> 'In the instant case once the shareholders of the applicant have agreed to accept personal liability for any judgment for costs against the applicant, the statutory purpose of s 1335 as explained in the authorities to which reference has been made is satisfied. The making of an order is in itself the provision of security ...
>
> Once the shareholders have been exposed to personal liability for the applicant's costs, the weight to be given to the statutory purpose is gone. Those who stand behind the applicant once they accept personal liability for the applicant's costs are in no worse position than they would be as litigants in person in the Court ... '.

[23] This approach to treating an offer of a guarantee by those standing behind a corporate plaintiff as having the effect of fulfilling the statutory purpose has not escaped criticism. In *Erolen Pty Ltd v Baulkham Hills Shire Council* (1993) 11 ACLC 511, Young J in the Supreme Court of New South Wales said, at 524:

> 'While I am prepared to accept that the offer of a guarantee is a factor to be taken into account in determining what is the proper form of security to be provided in a case in which an order for security is appropriate, I am quite unable to share the views expressed by Byrne J in *Mantaray* ... and by Cooper J in *Gentry Bros* ... which are to the effect that, once the shareholders have agreed to accept personal liability for any judgment for

> costs, the statutory purpose of s 1335 of the Corporations Law is fulfilled – such an approach, so it seems to me, would be as much a "fetter" on the Court's discretion as the – now discarded – approach of a "bias" in favour of making an order once it is shown that the plaintiff is "impecunious".'

[24] Similarly, in *Epping Plaza Fresh Fruits & Vegetables Pty Ltd v Bevendale Pty Ltd* [1999] 2 VR 191, the Victorian court of Appeal disapproved of the observations by Cooper J in *Gentry Bros*, holding rather that the fact that those who stand behind the impecunious corporation plaintiff are prepared to expose themselves to a liability for the defendant's costs of the action is but one relevant factor to be taken into account when exercising the discretion conferred by s 1335.

[25] Notwithstanding these criticisms, the approach of the courts in Queensland has been to continue to regard *Harpur v Ariadne* as at least establishing that an order for security for costs will not generally be made when those behind a corporation bring their own assets into play. So much was said in terms by White J in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] 2 Qd R 187 at 192. In that case, her Honour noted, by reference to authority, that the mere fact that certain of the shareholders had offered personal guarantees, whilst important, was not determinative. Ultimately, her Honour granted security for costs. In doing so, however, her Honour emphasised the fact that there was, on the material before her, someone behind the plaintiffs who stood to gain from a successful outcome of the litigation and was contributing to its funding, but was not prepared to give security for the defendant's costs. That is not the case here.

[26] I observe also that Wilson J in *Gallus Properties Pty Ltd v Richardson* [2004] QSC 15 cited *Mantaray* in support of holding, on the facts before her Honour, that the preparedness of the person standing behind a corporate plaintiff to undertake personally to meet any costs order against the corporate plaintiff meant that an application for security for costs 'must fail' (at [19]).

[27] In my view, and with the greatest of respect to those who might have opined otherwise, there is nothing in the Queensland cases at least to suggest that a conclusion that the proffering of a personal guarantee for a defendant's costs by the person standing behind a corporate plaintiff who stands to benefit from the litigation meets the mischief at which s 1335 is aimed constitutes a fettering of the judge's discretion whether or not to order security for costs. Indeed such a notion would cut across the observations of Connolly J in *Harpur v Ariadne* in the paragraph immediately preceding that quoted by Byrne J in *Mantaray*. Connolly J said, at 532:

> 'One's approach will vary accordingly as one sees s 533(1) as, on the one hand, an isolated provision containing within itself the criteria for the exercise of the discretion, and on the other as a statement of the rule applicable to companies, to be applied as one factor in the exercise of the inherent jurisdiction. For reasons I have already given I consider the latter to be the correct approach.'

[28] In the present case, I consider that the proffering of the personal guarantee by Mr Rogers to be sufficient, in the exercise of my discretion, to tip the scale against the

ordering of further security. It, and the fact that the litigation would otherwise be stifled, are important, but not of themselves determinative, considerations. The defendants already enjoy some, albeit limited, benefit from the existing order for security for costs. True it also is that the landscape of the litigation has changed considerably since that order was made. But the landscape of the plaintiff's and Mr Rogers' circumstances have also undergone considerable changes, none for the better. As Mr Rogers is the only person standing behind the plaintiff who would benefit from this litigation, and he has now exposed himself, for whatever he is or may be worth, to liability for the defendants' costs, neither his nor the plaintiff's impecuniosity ought be a bar to the litigation, that being the inevitable effect of the ordering of further security for costs.

[29] In light of my conclusion as to the way in which I propose exercising the discretion, it is not necessary for me to make a determination as to the quantum of further security. I should record, however, that, on the material before me, had I been persuaded to order further security for costs, the amount required would have been a further $40,000 up to and including the first day of trial. Notwithstanding the sum sought in the application, evidence filed by the defendants of a costs assessor, Mr Ensor, estimated the defendants' costs (including of this application) from now until the first day of trial to be some $72,000. That assessment, whilst relevant, would not have been determinative. Also relevant, of course, would be the amount of the existing security for costs. Having regard to the established proposition that an order for security for costs is not an indemnity, and also having appropriate regard to the work to be done between now and the trial, I would have considered it appropriate to increase the total amount of security to $100,000, and hence would have fixed the further sum required at $40,000.

[30] I will order that the defendants' application for security for costs be adjourned for a further 21 days to permit the lodgement with the Registrar of the Court of an irrevocable guarantee by Peter Davis Rogers, in a form acceptable to the Registrar, in favour of the defendants and each of them whereby Mr Rogers guarantees every obligation which the plaintiff may have to pay any costs order made against the plaintiff in this proceeding.

[31] I will further order that, upon the lodgement of the said guarantee, the defendants' application for security for costs will stand dismissed.

[32] The parties will have liberty to apply.

[33] Notwithstanding the outcome, the defendant's application was neither inappropriate nor without merit. In all the circumstances, I consider it proper to reserve the costs.