

SUPREME COURT OF QUEENSLAND

CITATION: *MacTaggart Property Developments Pty Ltd v Spanwood Pty Ltd & Ors* [2009] QSC 177

PARTIES: **MACTAGGART PROPERTY DEVELOPMENTS PTY LTD**
ACN: 001 703 395
(plaintiff/respondent)
v
SPANWOOD PTY LTD
ACN: 010 922 273
(first defendant)
SNOWVIEW PTY LTD t/as L.J. HOOKER
CLEVELAND
ACN: 056 246 935
(second defendant)
DAVID JOHN PATERSON
(third defendant)
PETER ROSS CALPIN and GERARD JOSEPH PAGLIARO
(fourth defendants/applicants)
QBE INSURANCE (AUSTRALIA) LIMITED
ACN: 003 191 035
(third party)

FILE NO/S: BS 11999 of 2003
DIVISION: Trial Division
PROCEEDING: Application
ORIGINATING COURT: Supreme Court at Brisbane
DELIVERED ON: 7 July 2009
DELIVERED AT: Brisbane
HEARING DATE: 2 July 2009
JUDGE: Chief Justice

ORDER:

1. That the plaintiff furnish security for the costs of the fourth defendants, already incurred and to be incurred up to the commencement of the trial, in the sum of or to the value of \$225,000, in form satisfactory to the Registrar.
2. That pending the provision of such security, the proceeding against the fourth defendants be stayed.
3. That the fourth defendants be at liberty to make further application for security for the costs of the trial.
4. That costs be reserved.

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – plaintiff company in liquidation – whether costs should be limited to costs to be incurred – consideration of effect of order on the proceeding

Body Corporate and Community Management Act 1997 (Qld) s 163

Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 5) [2006] FCA 1672, considered

Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd [2008] NSWCA 148, considered

COUNSEL: S J Lee for the plaintiff
D A Kelly SC with J K Chapple for the fourth defendant

SOLICITORS: Gadens for the plaintiff
McCullough Robertson for the fourth defendant

- [1] **CHIEF JUSTICE:** The fourth defendants seek an order against the plaintiff, a company in liquidation, for the provision of security for costs: to the value of \$247,498 if ordered to the commencement of trial; or \$396,058 if ordered to the conclusion of the trial. Limited security has been accepted by other defendants. On the day of the hearing of the instant application, the plaintiff's liquidator offered a personal guarantee of \$90,000 security for the fourth defendants' costs.
- [2] The plaintiff claims \$1.1 million damages in negligence against the fourth defendant solicitors. They acted for the plaintiff in the plaintiff's purchase of two lots in a retirement village. The claim is based on the alleged failure of the fourth defendants to advise the plaintiff of its right to terminate the contract, for an alleged failure to provide a statement under section 163 of the *Body Corporate and Community Management Act*; to search the body corporate records to see if any service agreements had been entered into for the units and to ascertain the truth or falsity of representations as to cash flow projections; and of the beneficial interest in the sale of the second defendant Snowview Pty Ltd and its director the third defendant Mr Paterson.

- [3] I say at once that I find it difficult to make an even preliminary assessment of the prospects. I note the advice of counsel, provided to the solicitors for the liquidator, that he had “not formed a view on its prospects”. Mr Lee, who appeared for the respondent, mentioned criticism by Byrne SJA at a hearing on 4 June 2009 in relation to paragraph 14(d) of the defence: whether it was sufficiently forthcoming. But as the exhibits to the nine paragraph affidavit by M J Broderick filed by leave show, there was also criticism of the statement of claim, though less substantial, and the matter was left between the parties with the suggestion that it would be more efficient were an amended statement of claim delivered, to be followed by an amended defence.
- [4] While the proceeding was commenced in December 2003, concerning a transaction in April 2000, it was not until January 2008 that the plaintiff was placed into liquidation. The fourth defendant first became aware of that in April 2008. The proceeding fell into abeyance and was not reactivated until 28 January this year. In May last year, the solicitors for the plaintiff were advised that were the proceeding restored, security for costs would be sought. At the hearing on 28 January 2009, counsel for the plaintiff stated that the respondents’ entitlement to security was “readily conceded”, and that security “would be provided”. Mr Lee sought to demonstrate that the fourth defendant should have earlier entertained concern as to the plaintiff’s financial position. I was not satisfied, however, that any such concern should have been sufficient to prompt the need for an earlier request for the provision of security.
- [5] The question of the likely effect on the litigation arises. This chose in action is the company’s only asset. It seems unlikely any creditor would provide the necessary funds. The director Mr MacTaggart has asserted that a related entity provided the

funding up to the point of liquidation. No funds have since been provided, and there is no suggestion of any approach to any so-called litigation funder.

[6] In *Green v CGU Insurance Ltd* [2008] NSWCA 148, Hodgson JA said (p 8):

“Where the plaintiff is a company in liquidation, and not the liquidator, then security for costs will more readily be ordered, although the court’s discretion is unfettered ... and there is no presupposition in favour of granting security ... however, the court will not refuse to order security on the ground that this will frustrate the litigation unless the company proves that those who stand behind the company and would benefit from the litigation are unable to provide security ...”

[7] I accept that there is no sufficient evidence that the impecuniosity of the plaintiff is attributable to any act or omission on the part of the fourth defendants, notwithstanding the liquidator’s assertion.

[8] Mr Lee submitted that because of a liquidator’s status as an officer of the court, pursuing such a claim in the discharge of a statutory duty, his position should be accorded some deference, warranting the court’s taking a moderate approach. Also, there is, he submitted, a public interest dimension to the ventilation of a claim of negligence against solicitors. I did not consider that either of those features should prevail against an order for the provision of security in an otherwise appropriate case. Neither does the possibility that the plaintiff might succeed against one defendant but not others. As mentioned during submissions, other matters aside, the plaintiff might not succeed in recovering under such a judgment.

[9] A major matter raised for consideration was whether any order for security should be limited to costs to be incurred. There is no particular reason why such a limitation should be imposed, especially where, as here, the liquidation occurred comparatively recently. I refer to the analysis of Collier J in *Citrus Queensland Pty*

Ltd v Sunstate Orchards Pty Ltd (No 5) [2006] FCA 1672, para 43, where Her Honour collects relevant authorities.

[10] As mentioned during argument, I do however consider that the costs to be considered should be those incurred and to be incurred up to the commencement of the trial. It may be that the matter will be compromised at that stage. Further, there is at this stage uncertainty as to the likely length of the trial.

[11] As to the quantum of those costs, the estimate put forward for the fourth defendants is \$247,498. The competing assessment put forward for the plaintiff is \$208,684. Those estimates have been provided by reliable and experienced practitioners. I propose to take a rounded-off mean of those two amounts, and set the security to be provided at the sum of \$225,000.

[12] The orders I made are as follows:

1. that the plaintiff furnish security for the costs of the fourth defendants, already incurred and to be incurred up to the commencement of the trial, in the sum of or to the value of \$225,000, in form satisfactory to the Registrar;
2. that pending the provision of such security, the proceeding against the fourth defendants be stayed;
3. that the fourth defendants be at liberty to make further application for security for the costs of the trial; and
4. that costs be reserved.