# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Contamination Control Laboratories Pty Ltd & Anor v Reyer & Ors* [2010] QSC 1 |
| PARTIES: | **CONTAMINATION CONTROL LABORATORIES PTY LTD ACN 094 220 890**<br>(first plaintiff)<br>and<br>**LAMINAR AIR FLOW PTY LTD ACN 106 677 329**<br>(second plaintiff)<br>**v**<br>**PETER REYER**<br>(first defendant)<br>and<br>**WILLIAM BALLINGER**<br>(second defendant)<br>and<br>**MATTHEW LUNN**<br>(third defendant)<br>and<br>**ROBERT FLOWERS**<br>(fourth defendant)<br>and<br>**JUSTIN ROWE**<br>(fifth defendant)<br>and<br>**CAMFIL FARR AUSTRALIA PTY LIMITED ACN 090 885 224**<br>(sixth defendant) |
| FILE NO: | BS7941 of 2009 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED ON: | 12 January 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7 December 2009 |
| JUDGE: | Daubney J |
| ORDERS: | **1. The second plaintiff shall provide security, in a form satisfactory to the Registrar, for the defendants' costs of and incidental to this proceeding up to and including the first day of** |

**trial in the amount of $100,000 (inclusive of GST).**

2. **Such security shall be provided by 4 pm on 12 February 2010.**

3. **The second plaintiff shall pay the defendants' standard costs of and incidental to this application.**

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – PLAINTIFF – where defendants applied for security for costs against the second plaintiff – where defendants believed the second plaintiff would be unable to pay the defendants' costs if they were successful in the proceeding – where second plaintiff did not own any real property – where second plaintiff argued that its assets consisted of intellectual property rights in particular software and documents – where second plaintiff could not ascribe a value to the intellectual property rights – where second plaintiff contended that its impecuniosity was attributable to the conduct of the defendants – whether it was an appropriate case in which security for costs ought to be ordered

*Corporations Act* 2001 (Cth)

*Aqwell Pty Ltd v BJC Drilling Services Pty Ltd* [2008] QSC 266, applied
*Caruso Australia Pty Ltd v Portec (Aust) Pty Ltd* (1984) 1 FCR 311, cited
*J & M O'Brien Enterprises Pty Ltd v Shell Co of Australia Ltd (No 2)* (1983) 7 ACLR 790, cited
*Melunu Pty Ltd v Claron Constructions Pty Ltd* [2004] NSWSC 1064, cited

COUNSEL: M Steele for the second plaintiff

M H Hindman for the defendants

SOLICITORS: McInnes Wilson Lawyers for the second plaintiff

Rouse Lawyers for the defendants

[1] The defendants have applied for security for costs against the second plaintiff.[1] The defendants contend that there is credible testimony to give reason to believe that the second plaintiff will be unable to pay the defendants' costs if they are successful in

[1] The first plaintiff having gone into liquidation, its interest in this proceeding has been acquired by the sixth defendant, and the action by the first plaintiff will not be proceeding.

the proceeding, and accordingly there should be an order for security for costs under s 1335 of the *Corporations Act* and/or *UCPR* r 670.

[2] The claim in the proceeding made by the second plaintiff derives from its assertion that it owns certain intellectual property rights in particular software and documents. It is contended that this software allows operating features of certain cabinets used in testing laboratories to be reviewed, tested and adjusted. The case against the first, second, third, fourth and fifth defendants, who are former employees of the first plaintiff, is that those former employees breached the duties of confidentiality they owed in respect of the software, infringed copyright in the software, and were involved in a contravention by the sixth defendant of s 52 of the *Trade Practices Act* 1974 ("*TPA*") in connection with its use of that software. Each of those individual defendants deny those allegations. The second plaintiff's case against the sixth defendant is that it participated in the individual defendant's breaches of confidentiality, authorised their breach of copyright of the software, made misrepresentations about the software (thereby contravening s 52 of the *TPA*), and infringed copyright in the documents. Each of those allegations is denied, except for the final allegation of infringement of copyright in the documents, which is not admitted.

[3] An ASIC search of the second plaintiff reveals that its issued capital consists of two ordinary $1 shares. Both of those shares are held by Young Engineering Pty Ltd. Mr Brian Allan Young is the second plaintiff's sole director. The second plaintiffs' registered office is at a stated address in New South Wales. It would appear that the second plaintiff does not own any real property, in New South Wales at least. An affidavit filed by the sole director of the second plaintiff does not assert that the

second plaintiff owns any property, other than the software and the copyright attaching to the software which is the subject of this proceeding and the copyright in testing commentary consisting of a published document about the standard of testing of cabinets. No attempt was made, however, to ascribe any value to that intellectual property.

[4] The second plaintiff contends that these intellectual property assets are the very assets which are in dispute in the present case, and says that "the nature and value of those assets, and the loss suffered by the second plaintiff (if any) by the defendants' misuse of those assets, is something which must await the outcome of the trial". The difficulty with that submission, of course, is that it highlights the inherently speculative nature of this proceeding, given that the second plaintiff appears itself not to be in a position even presently to put a value on the only property it claims to own.

[5] There is some conflict on the material as to whether those who stand behind the second plaintiff are of value. The second plaintiff's only shareholder, Young Engineering Pty Ltd, itself has issued capital comprising two ordinary $1 shares. Its shareholders are Brian Young and Marc Young. Brian Young is, as noted, the sole director of the second plaintiff. He was also a director of Young Engineering Pty Ltd until 30 October 2009. Investigations by the defendants have revealed that Mr Brian Young and Young Engineering Pty Ltd are guarantors for up to $3,750,000 for another company, Bardy Group Pty Ltd, which is now in liquidation. The defendants' investigations also reveal that Mr Brian Young has exercised control over two other companies which are now in liquidation, namely the first plaintiff and EAH Air Handling Pty Ltd. I note also that the liquidator's report to creditors

of the first plaintiff dated 18 November 2009 raises issues about the possibility of the first plaintiff and the other companies having been engaged in insolvent trading and uncommercial and voidable transactions, and at least queries whether Mr Brian Young would have assets available to satisfy any judgments entered against him in that regard.

[6] On the other hand, Mr Young has filed an affidavit in which he deposes to being a director and shareholder of Colt Ventilation Pty Ltd, trustee of the Woodville Property Trust. He says that there are two units issued in this trust, one of which is owned by Young Engineering Pty Ltd as trustee for the Young Family Trust. He gives details of the real property owned by Colt Ventilation Pty Ltd, and asserts that the collective value of those properties (with the exception of that identified as the "Mayfield property") is $6,900,000. He further says that the liabilities in respect of the properties (with the exception of the Mayfield property) is $4,900,000, leaving a net value of $2,000,000. I note, however, that the material gives no indication either as to the value of the "Mayfield property" nor any liabilities due in respect of that property.

[7] In *Aqwell Pty Ltd v BJC Drilling Services Pty Ltd*,[2] I said at [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 fact of which, in the particular factual context, may play an important and possibly decisive role – *Harpur v Ariadne Australia Ltd* (1984) 2 Qd R 523, per Connelly J as 530."

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2 [2008] QSC 266.

[8] The only discretionary factor really advanced on behalf of the second plaintiff as to why an order for security for costs ought not be made is an assertion that the second plaintiff's impecuniosity is attributable to the conduct of the defendants. That assertion, however, is simply not made out either by the evidence of the second plaintiff's director or by reference to the statement of claim which articulates the claim made in this proceeding. True it is that the second plaintiff claims unliquidated damages for the breaches of the intellectual property referred to above, but nowhere is it asserted, for example, that the value of that intellectual property in the hands of the second plaintiff has been diminished or extinguished by reason of the conduct of the defendants. Nor, as I have noted, is there any deposition as to the value of that intellectual property. It is not enough to assert, as the second plaintiff does, that, because the claim concerns misuse of the second plaintiff's only assets, "any lack of value of those assets must be attributable, at least in some degree, to the conduct of the defendants". That is simply not the case advanced in the pleadings, nor is it supported by affidavit material. And in any event, it is not enough to show that the wrongful conduct of the defendants, if established at trial, is a contributing factor to a diminution in the value of the assets.[3] Rather, it has to be shown that there is a "real causal connection between the conduct and the impecuniosity which in the exercise of the Court's discretion, would make it unjust to require security, and it must be established that the applicant for security for costs has been guilty of some form of misconduct or unacceptable business dealings qua the respondent".[4]

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3 *J & M O'Brien Enterprises Pty Ltd v Shell Co of Australia Ltd (No 2)* (1983) 7 ACLR 790 at 794.

4 *Melunu Pty Ltd v Claron Constructions Pty Ltd* [2004] NSWSC 1064 at [31], citing Rolfe J in *Dalma Formwork Pty Ltd v Concrete Constructions Group* [1998] NSWSC 472.

[9] It is also relevant, in my consideration, that whilst Mr Young has deposed to there being the capacity in other entities in which he is involved to raise funds for the purposes of providing security for costs, neither the sole shareholder of the second plaintiff nor Mr Young himself, as the parties who, presumably, stand to benefit from this litigation have themselves offered to put up the necessary security.

[10] Having regard to these factors, and in light of the effective impecuniosity of the second plaintiff, it is clear to me that this is an appropriate case in which security for costs ought be ordered.

[11] The defendants' solicitor has filed an affidavit in which he says that more than $50,000 (including GST) has been expended by the defendants in costs to date. He gives a detailed estimate of the defendants' standard costs up to and including the first day of trial (assuming that all defendants remain represented by the one firm) of some $138,720 (including GST). This includes significant preparation costs, particularly associated with disclosure. The defendants' solicitor's costs estimate has not been challenged by the second plaintiff. The estimated costs of $138,720 are for those costs anticipated between now and trial.[5]

[12] Having regard to the usual rule that the amount to be allowed under an order for security for costs is not meant to represent a complete indemnity but a reasonable amount, it seems to me that the appropriate exercise of discretion in the present case would fix security in the sum of $100,000. That would, for example, take account of any inadvertent over-estimation by the defendants' solicitor in the amount of time and cost which will be expended in what he presently anticipates to be an extensive

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[5] As this will be an order for security for future costs, it is not appropriate to take into account costs already incurred – *Caruso Australia Pty Ltd v Portec (Aust) Pty Ltd* (1984) 1 FCR 311.

disclosure process. Having regard to the present holiday season, I would allow the second plaintiff until 12 February 2010 (which is more than four weeks hence) to provide that security.

[13] There is, in my view, no reason why the defendants should not have their costs of the present application. On 28 November 2009, the defendant's solicitors wrote to the plaintiffs' solicitors asserting impecuniosity on the part of the second plaintiff, and asking for details of any assets which the second plaintiff might have. There was no response to that letter. Moreover, the only basis for opposition to the present application was, for the reasons I have already given, without merit.

[14] Accordingly, there will be the following orders:

1. The second plaintiff shall provide security, in a form satisfactory to the Registrar, for the defendants' costs of and incidental to this proceeding up to and including the first day of trial in the amount of $100,000 (inclusive of GST).

3. Such security shall be provided by 4 pm on 12 February 2010.

3. The second plaintiff shall pay the defendants' standard costs of and incidental to this application.