

SUPREME COURT OF QUEENSLAND

CITATION: *Williams v CD Protective Services (No. 2)* [2010] QSC 75

PARTIES: **JULIE WILLIAMS AS OFFICIAL LIQUIDATOR OF C & D GLOBAL PROTECTION PTY LTD (IN LIQUIDATION)**
(plaintiff)
v
C D PROTECTIVE SERVICES PTY LTD
(first defendant)
WHELAN, Craig Robert
(second defendant)
HELFERT, Joseph Aaron
(third defendant)

FILE NO/S: SC No 8075 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 22 January 2010

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 14 January 2010

JUDGE: Margaret Wilson J

ORDER: **On the defendants' application for security for costs it is ordered:**

- 1. that the application be dismissed;**
- 2. that the defendants pay the plaintiff's costs of and incidental to the application to be assessed on the standard basis.**

On the defendants' application to strike out all or part of the amended statement of claim it is ordered:

- 1. that the plaintiff pay the defendants' costs of and incidental to the application to be assessed on the standard basis.**

On the plaintiff's application for approval of the funding agreement it is ordered:

- 1. that there be no order as to costs as between the plaintiff and the defendants;**
- 2. that the liquidator's costs be costs in the liquidation.**

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – PLAINTIFF – where defendants seek an order that plaintiff provide security for costs – where plaintiff sues as liquidator of C & D Global Protection Pty Ltd – where plaintiff is a natural person – where general policy is that an order for security for costs will not be made against a natural person, save in the circumstances in paragraphs (b), (c), (d), (e) and (f) of r 671 of the *Uniform Civil Procedure Rules 1999* (Qld) – where defendants rely on r 671(h) that the justice of the case requires the making of an order for security for costs – whether s 671(h) has been satisfied

Corporations Act 2001 (Cth), 477(2B)

Uniform Civil Procedure Rules 1999 (Qld), r 671, r 672

Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Limited (2008) 67 ACSR 105, considered

Jarbin Pty Ltd v Clutha Ltd (In liq) (2004) 180 FLR 393, considered

Robson v Robson [2008] QCA 36, considered

COUNSEL: C A Johnstone for the plaintiff.
D Rangiah SC for the defendants.

SOLICITORS: Minter Ellison Lawyers for the plaintiff.
Piper Alderman Lawyers for the defendants.

HER HONOUR: This is an application for security for costs. The defendants seek an order that the plaintiff provide security for costs in the amount of \$264,500 or such other amount as the Court may determine. That is the defendants' solicitor's estimate of the costs of the proceeding, including an eight day trial. Their estimate of the costs to the first day of trial is \$221,000.

The plaintiff Julie Williams sues as the liquidator of C & D Global Protection Pty Ltd. She is a natural person. In the claim she seeks to set aside a voidable transaction, and as against the second and third defendants (former directors of C & D Global Protection Pty Ltd), she seeks relief for insolvent trading and breach of fiduciary duty.

On 14 November 2007 the second and third defendants obtained a valuation of C & D Global Protection Pty Ltd's assets of \$305,945. That included \$100,000 for the goodwill of its business.

On 19 November 2007 the company's business was transferred to the first defendant, itself a company controlled by the second and third defendants, for \$1,526.07.

On 21 November 2007 the second and third defendants resolved to put the company into voluntary administration.

On 14 December 2007 the Federal Court ordered that the company be wound up.

At the date of the business transfer the company had debts of \$1.683 million, the bulk of which, \$1.421 million, was owed to the Australian Taxation Office.

Security for costs is dealt with in rules 671 and 672 of the UCPR.

671 Prerequisite for security for costs

The court may order a plaintiff to give security for costs only if the court is satisfied -

- (a) 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; or
- (b) the plaintiff is suing for the benefit of another person, rather than for the plaintiff's own benefit, and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them; or
- (c) the address of the plaintiff is not stated or is misstated in the originating process, unless there is reason to believe this was done without intention to deceive; or
- (d) the plaintiff has changed address since the start of the proceeding and there is reason to believe this was done to avoid the consequences of the proceeding; or
- (e) the plaintiff is ordinarily resident outside Australia; or
- (f) the plaintiff is, or is about to depart Australia to become, ordinarily resident outside Australia and

there is reason to believe the plaintiff has insufficient property of a fixed and permanent nature available for enforcement to pay the defendant's costs if ordered to pay them; or

- (g) an Act authorises the making of the order; or
- (h) the justice of the case requires the making of the order.

672 Discretionary factors for security for costs

In deciding whether to make an order, the court may have regard to any of the following matters -

- (a) the means of those standing behind the proceeding;
- (b) the prospects of success or merits of the proceeding;
- (c) the genuineness of the proceeding;
- (d) for rule 671(a) - the impecuniosity of a corporation;
- (e) whether the plaintiff's impecuniosity is attributable to the defendant's conduct;
- (f) whether the plaintiff is effectively in the position of a defendant;
- (g) whether an order for security for costs would be oppressive;
- (h) whether an order for security for costs would stifle the proceeding;
- (i) whether the proceeding involves a matter of public importance;
- (j) whether there has been an admission or payment into court;

- (k) whether delay by the plaintiff in starting the proceeding has prejudiced the defendant;
- (l) whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;
- (m) the costs of the proceeding.

If one of the paragraphs in rule 671 is enlivened, then the Court has a discretion to order security, and in exercising that discretion it may have regard to the factors in rule 672.

The defendants rely on rule 671(h): that the justice of the case requires the making of an order for security for costs.

The general policy of the law is that an order for security for costs will not be made against a natural person, save in the circumstances in paragraphs (b), (c), (d), (e) and (f) of rule 671, because poverty should not be a bar to access to justice.

In *Robson v Robson* [2008] QCA 36 the Court of Appeal (by majority) held that in determining under rule 671(h) whether the justice of the case requires the making of an order for security for costs the Court may have regard (inter alia) to the factors listed in rule 672. At paragraph 32 Muir JA said that the matters listed in rule 672 encompass many, if not most, of the circumstances normally relevant to a determination of whether the justice of the case requires the making of an order.

At paragraph 34 he said:

"Rule 671(h) is extremely broad and, if construed literally and without textual constraints, it would render otiose the other paragraphs of the rule. Paragraph (h), however, is part of a list of matters the fulfilment of any of which will enliven the discretion to make an order. It is plainly intended that the other paragraphs inform the construction of paragraph (h). It may be inferred from paragraph (a), for example, that it is not the intention of the rule to interfere with the well-established principle that 'so far as natural persons are concerned poverty was no bar to a litigant.' Accordingly, the impecuniosity of a natural person plaintiff will not, without more, fulfil the requirements of paragraph (h)." See also the judgment of McMeekin J at paragraph 61.

In the present case the liquidator, if unsuccessful, will be personally liable for any costs awarded to the defendants.

The liquidator has a funding agreement with the Australian Taxation Office which the Court has approved under section 477(2B) of the Corporations Act. The ATO has agreed to provide a capped indemnity against the plaintiff's costs. It has also agreed to provide an indemnity against costs she may be ordered to pay the defendants, capped at \$120,000. It reserves the right to withdraw, in which case the liquidator would remain personally liable.

Unlike agreements sometimes made by plaintiffs and commercial litigation funders, this agreement does not give the ATO any

entitlement to share in the fruits of the litigation. The liquidator has said that if successful she will make an application to the Court pursuant to section 564 of the Corporations Act to give the ATO some priority.

In *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Limited* (2008) 67 ACSR 105 Green as liquidator brought proceedings against the former directors and officers of a company based on the insolvent trading provisions of the corporations legislation and their insurer. The claim against the former directors and officers was settled. The insurer, the remaining defendant, made an application for security for costs. The proceedings were being financed by a commercial litigation funder. The application for security for costs was made in reliance on the Supreme Court of New South Wales' general powers to control its own process and to give directions for the conduct of proceedings.

The New South Wales Court of Appeal reviewed the authorities relating to applications for security for costs against a liquidator. At paragraph 45 Hodgson JA summarised the position as follows:

First, Liquidators suing personally are generally to be treated in the same way as natural persons.

Costs orders will be made against them if proceedings fail. An order for security for costs will be made when the conditions in the rule cognate with Queensland's rule 671 are satisfied.

In New South Wales the rules provide an express power to order security for the costs of an appeal 'in special circumstances'. His Honour stressed that mere inability to meet a costs order would not amount to special circumstances.

The second point made by his Honour was that, where the plaintiff is the company in liquidation and not the liquidator, security for costs will be more readily ordered.

His third point was this:

"Cases in which security for costs might be ordered against a natural person or a liquidator outside those provided for in r 42.21 of the UCPR [Queensland r 671] include cases where (in addition to proof that there is reason to believe the plaintiff will be unable to pay the defendant's costs) the plaintiff has dissipated assets and/or has not paid previous costs orders (especially if those costs orders were in favour of the defendant) and/or brings a weak case to harass the defendant and/or brings a case for the benefit of others (albeit not solely for their benefit as apparently required by r 42.21(1)(e) of the UCPR [Queensland r 671(b)]). There is of course a sense in which a liquidator is suing for the benefit of others, but what was decided in *Cowell* (1885) 31 ChD 34 and *Strand* [1904] 2 Ch 1 was that this was not of itself sufficient to justify security for costs in relation to a person who has the statutory right and duty to do this."

At paragraph 83 Campbell JA set out the background against which courts developed the policy of usually not requiring liquidators to provide security for costs when suing in their own name:

- "(a) The liquidator is performing a public function under statutory authority. That public function provided a reason for not according as much weight as would be accorded in litigation purely between private individuals and of the type that fell within r 42.21(1) of the Uniform Civil Procedure Rules 2005 (NSW) (the UCPR) to the private interest of the person sued to have assurance that an order for costs would be paid.
- (b) There have always been provisions such as s 545 of the Corporation Act 2001 (Cth), that enable a liquidator to not sue if not satisfied that he or she is properly funded. That fact, combined with the potential personal liability of the liquidator for costs, and a measure of public control over the qualifications of persons who are eligible to be liquidators (for example, s 1282 of the Corporations Act), in itself has a tendency (which might not be realised in every case) for liquidators not to bring litigation unless they were satisfied that they could pay the costs if they were to lose.
- (c) That the liquidator is exposing all his or her assets to the risk of an unfavourable costs order puts the litigant into a situation somewhat analogous to a natural person plaintiff who is suing for his or her own benefit.
- (d) The liquidator's personal gain from running the litigation consists only of professional costs and

disbursements, which are themselves subject to a measure of public control, either by the court or creditors: ss 473, 499 of the Corporations Act.

- (e) Even when the liquidator is being funded by a creditor, in circumstances where the creditor is entitled to a preferential dividend under s 564 of the Corporations Act by reason of having funded the litigation, the most that the creditor can recover for its own benefit is a return of its outlay for costs, and a 100% dividend on its proved debt. A creditor who funds the litigation in those circumstances is thus doing nothing more than protecting its own legal right to be paid its debt by the company."

At paragraph 84 his Honour went on to discuss how the background is departed from if the liquidator is being funded by a commercial funder:

"That background is departed from if the liquidator is being funded by a creditor who is in commercial substance a funder who has taken assignments of debts for a fraction of the face value, as happened in *Jarbin Pty Ltd v Clutha Ltd (in liq)* (2004) 180 FLR 393; 208 ALR 242; 22 ACLC 550; [2004] NSWSC 28. It is likewise departed from when the liquidator is being funded by a commercial funder who stands to receive a proportion of the proceeds of the litigation. In those situations, there is not the same reason that there is in the ordinary situation of a liquidator suing to regard the inherent power of the court to order security as not being enlivened."

In that case the New South Wales Court of Appeal upheld an order that the liquidator provide security for costs. Salient features of that case were as follows:

- (a) A commercial funder, not a person interested in having its own rights vindicated, stood to benefit from the proceeding - although the extent to which it would benefit was not known.
- (b) The commercial funder was contractually bound to indemnify the liquidator in relation to any order for security for costs.
- (c) There was a possibility the commercial funder could be liable for costs at the instance of the defendant, but enforcing that liability could be expected to be cumbersome and highly contentious.
- (d) The commercial funder could avoid liability for future costs by terminating the agreement.

The critical distinguishing feature of the present case is that the ATO is not a commercial funder. It has no contractual right to share in the fruits of the litigation. It is simply a creditor with no priority unless the liquidator successfully makes an application to the Court pursuant to section 564 of the Corporations Act.

I am unpersuaded that the circumstances of this case are such as to take it outside the general principle that security for costs should not be awarded against a natural person. In my view rule 671(h) has not been satisfied. The application is dismissed.

...

HER HONOUR: On the defendants' application to strike out all or part of the amended statement of claim, I order the plaintiff to pay the defendants' costs of and incidental to the application to be assessed on the standard basis.

...

HER HONOUR: On the plaintiff's application for approval of the funding agreement, I order that there be no order as to costs as between the plaintiff and the defendants.

I further order that the liquidator's costs be costs in liquidation.

...

HER HONOUR: On the defendants' application for security for costs, I order the defendants to pay the plaintiff's costs of and incidental to the application to be assessed on the standard basis.

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