SUPREME COURT OF QUEENSLAND

CITATION:	*Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd & Ors* [2010] QSC 176
PARTIES:	**AQUA BLUE (NOOSA) PTY LTD** **ACN 084 831 121** (plaintiff) **v** **SOIL SURVEYS ENGINEERING PTY LTD** **ACN 054 043 631** (first defendant) and **QANTEC MCWILLIAM PTY LTD** **ACN 086 342 065** (second defendant) and **GOLDER ASSOCIATES PTY LTD** **ACN 006 107 857** (third defendant) and **PALMGROVE HOLDINGS PTY LTD** **ACN 010 870 925** (fifth defendant) and **JAMES EDWARD CARRUTHERS** (sixth defendant) and **LYNETTE JOY CARRUTHERS** (seventh defendant)
FILE NO:	BS 5216 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	28 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2009
JUDGE:	Daubney J
ORDER:	**1. The plaintiff provide further security for the defendants' costs (in a form to be agreed between the parties or, failing such agreement, in a form satisfactory to the Registrar) in the following further amounts:**

(a) First defendant's costs $100,000

(b) Second defendant's costs $100,000

(c) Third defendant's costs $100,000

(d) Fifth, sixth and seventh defendants' costs $100,000

2. The costs of this application will be reserved.

3. I will hear the parties as to the time for provision of this further security and as to any further directions.

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – GENERALLY –where the parties had previously made an agreement regarding security for costs – where each of the defendants have made an application for further security for costs – where considerable procedural steps and changes to circumstances have occurred between the original agreement and the application for further security for costs – whether the Court's discretion should be exercised – whether the defendants application for further security for costs should be granted

Uniform Civil Procedure Rules 1999 (Qld), r 692, r 670, r 671, r 675

Aqwell Pty Ltd v BJC Drilling Services Pty Ltd [2008] QSC 266, cited
Ballance & Ors v Smith & Ors (1895) 1 ALR 144, cited
Bell Wholesale Co Ltd v Gates Export Corporation (1984) 2 FCR 1, cited
Bryan E Fencott and Assocs Pty Ltd v Eretta Pty Ltd (1987) 16 FCR 497, applied
Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 744, cited
Scott v Telegraph Newspaper Co Ltd [1939] QWN 6, cited
Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd [2009] QCA 254; (2009) ALR 387, applied

COUNSEL: G Gibson QC with D O'Brien for the plaintiff
J Sweeney for the first defendant
A Collins for the second defendant
L Priddle for the third defendant
G Diehm SC with A Lucich for the fifth, sixth and seventh defendants

SOLICITORS: Warlow Scott Lawyers for the plaintiff
Carter Newell Lawyers for the first defendant
Minter Ellison Lawyers for the second defendant
Hawthorn Cuppaidge & Badgery for the third defendant
Butler McDermott Lawyers for the fifth, sixth and seventh defendants

[1] Each of the defendants has applied for an order for security for costs. It is necessary to set out some detail of the background to these applications.

[2] The plaintiff was the owner of land situated at 94 Noosa Drive, Noosa Heads. In August 2004, the plaintiff entered into a contract with the fifth defendant for the performance of certain construction works connected with a building development on the land. The sixth and seventh defendants, the directors and shareholders of the fifth defendant, guaranteed the performance of the fifth defendant under that construction contract. Performance of the construction contract involved earthworks. The first, second and third defendants were involved in those earthworks in their professional capacities:

(a) In the case of the first defendant, having been retained by the plaintiff to provide geotechnical services;

(b) In the case of the second defendant, having been retained by the plaintiff to "provide comprehensive professional engineering services for the design, documentation, tendering and superintendence of the Construction Contract and inspection of a proposed development on the land" (as the plaintiff pleads its case against the second defendant);

(c) In the case of the third defendant, having been retained by the plaintiff to provide geotechnical services.

[3] These proceedings were commenced in June 2005. At that time, the first, second and third defendants were sued. (Proceedings commenced against the fourth defendant have since been discontinued.) In May 2006, a consent order was made joining the fifth defendant to the proceeding. The sixth and seventh defendants were not joined until March 2009. The claim against the fifth defendant is in respect of the earthworks carried out by the fifth defendant at the project. The fifth defendant has counter-claimed against the plaintiff for monies it contends remain owing to it by the plaintiff under the construction contract.

[4] In summary, the plaintiff's claims are as follows:

(a) As against the first defendant, that it represented that the treatment of peat material on the site was not required when the peat did, in fact, require treatment at a specified rate;

(b) As against the second defendant, that it wrongly certified certain amounts as payable under the construction contract and negligently managed the tender process;

(c) As against the third defendant, that it breached certain contractual obligations, particularly by failing to address the extent of peat on the site;

(d) As against the fifth defendant, that it did not complete the earthworks in accordance with its contractual obligations and was not entitled to various amounts which were certified as payable to it;

(e) As against the sixth and seventh defendants, as guarantors of the fifth defendant.

[5] In 2007, the plaintiff sold the land to an entity known as Resortcorp for $33,400,000. That contract was completed on 25 June 2007. In July 2007, the plaintiff agreed to secure $200,000 in its solicitor's trust account in respect of the fifth defendant's counter-claim.

[6] In mid-2007, negotiations were also conducted between the plaintiff's solicitors and the respective solicitors for the (then) defendants with a view to agreement being reached as to the amounts of security for costs which the plaintiff would voluntarily secure.

[7] On 8 June 2007, the plaintiff's solicitors wrote to all of the solicitors for the (then) defendants saying:

> "We refer to your recent correspondence regarding the retention of monies for security for your clients' anticipated costs of trial in this matter. Your correspondence has been forwarded to Counsel to review.
>
> We advise that settlement of our client's sale of the land is due on 25 June 2007.
>
> Our client proposes to have a costs assessor (Tony Garrett) make an independent and objective assessment of your clients' anticipated costs of trial in this matter. Mr Garrett believes that he will be able to have a response to your clients' proposals by next Wednesday 13 June 2007.
>
> We believe that this is a reasonable time in which to respond to your clients' requests. Any application brought before then would be premature and any unnecessary Court costs will be claimed by our client."

[8] Correspondence then ensued between the plaintiff's solicitors and the solicitors for the individual defendants, culminating in about August 2007 in the plaintiff's solicitors giving the following undertakings to the respective defendants:

(a) to hold $106,156 in trust as security for the first defendant's costs;

(b) to hold $108,142.90 in trust as security for the second defendant's costs;

(c) to hold $100,000 in trust as security for the third defendant's costs;

(d) to hold $110,446.90 in trust as security for the fifth defendant's costs.

[9] A considerable amount of water has flowed under the bridge since the parties reached these agreements in mid-2007. Procedurally, at least, the steps since then have included:

- 12 December 2007 – plaintiff files second amended statement of claim
- 17 December 2007 – parties participate in a mediation
- 28 November 2008 – plaintiff files third amended statement of claim
- 20 February 2009 – sixth and seventh defendants are joined to the proceeding

- 17 March 2009 – plaintiff (with leave) files second amended claim and a fresh statement of claim

- April 2009 – further and better particulars of the fresh statement of claim are sought

- May 2009 – further and better particulars of the fresh statement of claim are provided

- July-August 2009 – the defendants file defences to the fresh statement of claim, followed by requests for, and the provision of, particulars.

[10] The plaintiff's solicitor has confirmed on affidavit that his firm holds in trust the sum of $624,745.80 (being the total of the amounts agreed to be retained by way of security for costs plus the $200,000 security in respect of the fifth defendant's counter-claim).

[11] Whilst not pleaded as such, it is apparent on the material before me that the plaintiff was and is the trustee of a unit trust known as the "Aqua Blue (Noosa) Unit Trust". The plaintiff itself is a company with a paid up capital of only $17. It is uncontroversial that the asset which the plaintiff held, being the subject land at Noosa, was sold in mid-2007 for $33,400,000. It is also clear on the material before me that most of the net proceeds of sale have been distributed to the unit holders of that trust. The plaintiff's solicitor has said in his affidavit that after settlement of the sale, the net proceeds were distributed to the unit holders, other than the amounts which had been accepted as security for the defendants, a separate security of $25,000 associated with the settlement of the sale of the site (which has since been distributed), and with the balance to pay ongoing expenses of the plaintiff (primarily its legal costs for running this matter). The plaintiff's solicitor also deposed that, since agreeing in mid-2007 to retain the respective amounts as security for the defendant's costs, the plaintiff itself has incurred just in excess of a further $300,000 in the costs associated with prosecuting its claim. He also swears to having been informed by Mr William Cassidy, who has day to day conduct of the plaintiff, of the following matters, namely:

(a) That it was in reliance upon the acceptance by the defendants of the amounts of security that Mr Cassidy reached a view that the balance monies from the proceeds of sale could be distributed to the unit holders; and

(b) If further security for costs were ordered in the amounts now claimed by the defendants, or indeed in an amount in excess of approximately $100,000 the plaintiff would not have the funds to pay such an amount in addition to its own legal costs, and the plaintiff does not have any recourse to unit holders to raise that amount.

[12] There is, on the material before me, a real issue as to whether the defendants had this level of knowledge about the plaintiff's affairs at the time that security was agreed to in mid-2007. For example, the first defendant's solicitor has sworn an affidavit in which he says:

> "6. It was not apparent to me from the correspondence in June 2007 that Mr Cassidy (who appears to be the controller of the trustee) was

> offering security in a final, and not to be varied form, or that he intended distribute the proceeds to unit holders in a unit trust.
>
> 7. In June 2007 I was unaware that the plaintiff was a trustee. It was not apparent to me, from the pleadings or from the correspondence that the plaintiff was suing in a representative capacity. It was not until particulars were provided by the plaintiff in response to a request for particulars of the third amended statement of claim filed on 21 November 2008 that there was any indication that in fact the plaintiff was a trustee for a unit trust. Those particulars were provided on or about 23 January 2009.
>
> 8. It is incorrect to say that [the solicitors for the first defendant] accepted the sum of $106,156 for security 'against the backdrop of knowledge that any proceeds of sale would be distributed to unit holders'. Had I been aware that the plaintiff was acting in the capacity of a trustee, the first defendant would have sought further undertakings as to any distribution of proceeds from the trustee to the unitholders."

[13] It does, however, seem uncontroversial that the plaintiff does not have the capacity, beyond the amounts which have been voluntarily retained, to pay the defendants' costs if ordered to pay them.

[14] I have already referred to the fact that, on its own material, the plaintiff has incurred more than $300,000 in costs since it agreed to retain those amounts as security.

[15] Mr Adam Bloom, who is both a legal practitioner and an approved court-appointed costs assessor, has sworn an affidavit in which he estimates that the quantum of each of the defendants' costs to date, assessed on the standard basis in the range of 70-80 per cent of the total incurred, would be in the order of the following amounts:

-	first defendant	$211,000.00
-	second defendant	$166,000.00
-	third defendant	$155,000.00
-	fifth, sixth and seventh defendants	$240,000.00

[16] Mr Bloom has also expressed an opinion as to the amount of the defendants' future costs of defending the fresh statement of claim up to and including the first day of trial as follows:

-	first defendant	$490,841.00
-	second defendant	$475,692.90
-	third defendant	$374,710.00
-	fifth, sixth and seventh defendants	$544,656.90

[17] Mr Bloom has set out in his affidavit some detail of the methodology he adopted to arrive at these estimates. In relation to the costs incurred to date, Mr Bloom says that he made a broad assessment of the total of professional costs and outlays incurred by each of the defendants, having regard to the instructions given to him to make an assessment in the context of an application being made by the defendants to obtain additional security from the plaintiff and as evidence of the global recovery likely on a standard basis for the entire defence of the matter from when each defendant was first served. He says that he examined the summary of past

accounts rendered by each of the defendants' firms. He did not engage in what he described as the obviously time-consuming process of examining each of the defendant's complete files, but rather applied his experience of the costs assessment regime, particularly having regard to the relatively new system of external costs assessments under the *Uniform Civil Procedure Rules*, and expressed his view that a "reasonable anticipated party/party recovery of those fees and outlays already incurred by each defendant to be approximately 70-80 per cent of all costs and outlays paid or liable to be paid by each defendant".

[18] Mr Bloom's estimates have been criticised by the costs assessor retained by the plaintiff, Mr Garrett. In relation to Mr Bloom's approach and methodology:

(a) Mr Garrett refers to Mr Bloom's estimate of various categories of costs for tasks set out in the Supreme Court scale, but says that Mr Bloom has not indicated the basis of his calculations in those estimates (e.g. the number of letters exchanged, the drafting of documents on a folio basis or the number of telephone calls which involved skilled or unskilled attendances), and says that, without this information, it is impossible for him to formulate "a considered view as to [Mr Bloom's methodology]";

(b) In respect of Mr Bloom's estimate of the likely recoverable costs being 70-80 per cent of the actual costs and outlays, Mr Garrett says that this estimate does not disclose how those charges have been calculated. Mr Garrett says that, to ascertain that figure, it would be necessary for an examination of the accounts to the client or the time costing printouts based on the Supreme Court scale to calculate the difference between recoverable standard costs and those costs recoverable on a solicitor and own client basis.

In short, Mr Garrett says:

> "In the absence of proper detail as to the scale items that have been used and the basis for the costings adopted by Mr Bloom in his affidavit, I am not able to accept the costs as calculated and allowed by him in his costs schedule."

[19] Despite expressing that view as to Mr Bloom's estimate, Mr Garrett then went on to criticise numerous of the items referred to in Mr Bloom's estimated costs schedule. The divergence between Mr Bloom and Mr Garrett in respect of the recoverable costs is quite stark. For example, Mr Bloom has made the following estimate of the standard costs he anticipates will be recoverable by each of the groups of defendants in respect of lay witness statements:

-	first defendant	$23,300 (allowing 200 folios across three statements; all conferences, correspondence, emails, photocopying)
-	second defendant	$26,600 (allowing 300 folios across two large statements, conferences, correspondence, emails, photocopying)

-	third defendant	$18,000 (allowing 200 folios for two statements, conferences, correspondence, emails, photocopying)
-	fifth-seventh defendants	$18,000 (allowing 200 folios for two statements, conference, correspondence, emails, photocopying)

[20] Mr Garrett says that it is not at all apparent to him how these sums have been calculated. He says that, in the previous costs schedules prepared by him, he had made allowances totalling $1,444 for witness statements. Mr Garrett says that without detail, it is not possible for him to "accept the appropriateness of the amounts claimed". He does say, however, to give an example of the basis on which he considers the amounts referred to by Mr Bloom are excessive, that if one assumed 200 folios, then the allowable amount under the Supreme Court scale for drafting and producing the statements would be $4,480 (excluding care and consideration).

[21] As I have said, there is no real issue before me that the plaintiff, being a corporation, would not be able to pay the defendants' costs if ordered to pay them, even if one takes into account the amounts already voluntarily retained as security. I would therefore be satisfied of the threshold requirement referred to in *UCPR* r 671(a). The discretion under r 670 is therefore enlivened.

[22] The plaintiff submitted that, as the plaintiff had previously voluntarily undertaken to retain amounts by way of security for costs, the application should be approached in the same way as if there had previously been orders made for security for costs and application was now being made to vary those orders by increasing the amount of security to be provided. In that specific regard, r 675 relevantly provides that the Court may "vary an order made under [UCPR Chapter 17] in special circumstances". Adopting that approach, the plaintiff argued that the fact that the parties had previously agreed on amounts of security for costs is a strong discretionary factor against further security being provided.

[23] The obvious objection to this point is that r 675 is not engaged in the present case because there is no previous order to be varied. I think, however, that in general terms the approach advocated by counsel for the plaintiff is appropriate. It has long been the law that the Court has power to order further security for costs where there has been a material change of circumstance since an initial order – see, for example, *Ballance & Ors v Smith & Ors* (1895) 1 ALR 144; *Scott v Telegraph Newspaper Co Ltd* [1939] QWN 6. And, at the very least, the fact that security was voluntarily provided is a matter relevant to the exercise of the discretion as to whether that security should effectively be increased.

[24] For the reasons which follow, however, I am quite satisfied that there are sufficient "special circumstances", or a sufficiently material change in circumstances since the plaintiff volunteered security, to permit the exercise of the discretion to order further security for costs.

[25] The plaintiff's claim has been significantly expanded since mid-2007, when the existing security for costs arrangements were put into place. That expansion has not merely involved the inclusion of further parties (the sixth and seventh defendants)

and numerous amendments to the statement of claim, but has gone to matters of substance in respect of the plaintiff's claim. As at mid-2007, the plaintiff's then statement of claim (the amended statement of claim filed 8 June 2006) claimed damages said to be calculated as the difference between the contract prices the plaintiff could have entered into for the excavation of peat, the importation, placement and compaction of sand fill and select fill, and lime treatment and the prices which the plaintiff was obliged to pay for those works under the construction contract. The plaintiff also made specific claims against the fifth defendant under the construction contract in respect of matters such as alleged delay, rectification costs caused by the plaintiff's failure to perform works in accordance with the construction contract, and for the refund of overpayments.

[26] Under the third amended statement of claim, delivered well after the security for costs arrangements were agreed to, the plaintiff introduced a completely new and additional head of claim against each of the defendants. In short, this new head of claim arises out of a contract which the plaintiff had entered into in June 2006 to sell the land to Resortcorp, which was conditional on satisfactory due diligence being undertaken by Resortcorp. The plaintiff contends against each of the first, second, third and fifth defendants that the breaches by each of those defendants caused delays to the project which resulted in Resortcorp not being satisfied with the due diligence and terminating that contract. The plaintiff therefore claims for the losses suffered by reason of that lost contract. The amount claimed under this head of loss alone is some $1,150,000. This claim is also sought to be recovered against the sixth and seventh defendants as guarantors.

[27] The plaintiff submitted that, although the pleadings had been amended, the changes were not so significant as to warrant the conclusion that there has been a material change in the case. True it is, as was submitted, many of the allegations in the original pleading have been deleted. But I think, with respect, that it is unduly stretching matters to submit, as the plaintiff did, that the few new allegations made against the defendants largely replace previous allegations. In fact, as I have outlined above, a completely fresh claim has been introduced. It was not merely an expansion of a head of claim which had already been made, but was completely new, and obviously not within the contemplation of the defendants at the time they entered into the existing security for costs regime. The nature and extent of this new case is clearly, in my view, a sufficient material change to permit consideration of whether further security for costs should be ordered.

[28] Counsel for the plaintiff argued that the fact that there have been amendments should not count against the plaintiff for present purposes because the defendants have the protection of r 692(2), which provides:

> "A party who amends a document must pay the costs of and caused by the amendment, unless the Court otherwise orders."

[29] It was argued that many of the items for which the defendants now seek further security for costs would fall within the category of costs caused by the plaintiff's amendments, and to that extent, the plaintiff would be liable to pay for them, and therefore, they ought not be allowed for under an order for further security for costs.

[30] It seems to me, however, that there are a couple of answers to that objection. The argument conflates the prima facie liability to pay costs as stated by r 692(2) and the apparent need for there to be some way of securing the payment of those costs for

which the plaintiff becomes liable. Secondly, and pragmatically, it ignores the fact that, apart from the $200,000 held in respect of the fifth defendant's counter-claim, the plaintiff's only remaining assets are principally represented by the funds set aside as security for costs. If, as the plaintiff appears to accept, it is liable to pay the defendants' costs thrown away by reason of its amendments, one can readily foresee that payment of those costs alone will eat significantly into those extant assets, leaving relatively little, if anything, to stand as security for the defendants' future costs of the action.

[31] In terms of the discretionary factors relevant to determining whether the discretion ought to be exercised, the plaintiff argued that, in view of the fact that the funds of the unit trust had otherwise been distributed, the making of an order now for further security for costs would have the effect of stultifying the proceedings. It was contended that the original security arrangements were entered into "against the backdrop of the defendants' knowledge that the balance proceeds of sale of the settlement of the property the subject of the proceedings, less the original security, were to be distributed to the unit holders in the unit trust of which the plaintiff was the trustee". It was said that the plaintiff was entitled to proceed, as it did, on the basis that the question of security for costs "had been satisfactorily resolved between the parties".

[32] As I have noted above, there is, however, a real issue as to whether the defendants did have this level of knowledge about the plaintiff's affairs at the time the original security arrangements were entered into. In any event, the plaintiff's argument fails to take into account the significant change in the case which has occurred since that time. Moreover, the plaintiff's position on this application appears to be that the funds have been distributed to the unit holders, the trustee has no right of indemnity against the unit holders, and the plaintiff simply holds no funds and has no recourse to funds for the purposes of providing further security for costs. There is, however, nothing in the material to demonstrate, for example, that those who stand to benefit from this litigation being conducted by the plaintiff, i.e. the unit holders of the unit trust, are themselves without means. In *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* [2009] QCA 254; (2009) ALR 387, Muir JA, with whom Holmes JA and Philippides J agreed, reaffirmed the long-standing proposition that:[1]

> "A corporate plaintiff wishing to avoid an order that it give security for costs on the ground that the making of the order will prevent the continuation of the litigation, at least as a general proposition, must establish that those 'who stand behind it and who will benefit from the litigation if it is successful are also without means.'"

[33] As I have said previously,[2] it is well settled that the Court has an unfettered discretion on the question of ordering security for costs, and this discretion is to be exercised only after taking account of all the circumstances of the case. The fact that there has been nothing put before me to demonstrate that those who stand behind the plaintiff and who will benefit from the litigation if it is successful are also without means is, in the context of the present case, a significant factor to be included in the mix.

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1 At [45], and citing *Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1.

2 *Aqwell Pty Ltd v BJC Drilling Services Pty Ltd* [2008] QSC 266 at [16].

[34] The plaintiff also sought to rely on delay on the part of the defendants in seeking this further security for costs. It seems to me, however, that any fair review of the chronology of this proceeding reveals that delay has been occasioned much more significantly by the plaintiff's conduct than anything on the part of the defendants. It will be recalled that the third amended statement of claim, which raised the new and fresh claim against the defendants, was filed and served some 17 months after the original security for costs arrangements, and that there was then a fresh statement of claim filed and served on 17 March 2009. It was then in the course of supervised case list management of the matter that the defendants in May 2009 started agitating for the provision of further security for costs. In all the circumstances, I do not consider that there has been any delay on the part of the defendants such as would preclude any of them from having the benefit of the exercise of the broad discretion.

[35] The position adopted by the plaintiff also, with the very greatest respect, has somewhat of an air of unreality about it. The plaintiff freely asserts that it has itself since the time of the original security arrangement expended in excess of $300,000 in costs and outlays. With that concession as to the amount which the plaintiff itself has spent since that time, the estimates made by Mr Bloom as to the total of each of the defendant's costs to date (referred to above in [15]) do not, frankly, appear to be incredible.

[36] None of the other factors referred to in r 672 as discretionary factors to which the Court might have regard are advanced by the plaintiff for the purposes of the present application.

[37] It follows from my conclusions above that I am satisfied that this is a case in which there should be an exercise of the discretion to make an order for security for costs over and above the existing voluntary arrangements between the parties.

[38] The remaining question is as to the quantum which should be further secured. I have referred above to the estimates made by Mr Bloom of the defendants' future costs of defending the case up to and including the first day of trial. The plaintiff submits that an order that requires the giving of further security in these amounts would be excessive.

[39] True it is, as the plaintiff submits, that there is an onus on the defendants to establish the amount of further security that should be ordered. The plaintiff points to Mr Garrett's criticism of the relative lack of detail or explanation as to how Mr Bloom has calculated the various amounts. It was submitted that detail of those calculations, or the scale against which individual items have been assessed, should have been provided. The plaintiff also submitted that most of the items claimed have already been accounted for in the original security provided. I have already adverted to the concern, however, that significant parts of the security already provided will be eaten up by the plaintiff's liability to pay costs thrown away by reason of the amendments it has made.

[40] I accept, as submitted by the plaintiff, that it is for the defendants to put on cogent evidence to support the quantum of security for costs claimed. In *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744, Einstein J said:

> "**[60]** Whilst from one point of view it may seem inappropriate to approach the matter in terms of the strictures of burden of proof whether of a legal or

> forensic character [cf discussion in *Mummery v Irvings* (1956) 96 CLR 99 at 118ff], there is certainly substantial authority which is followed in these reasons, to the effect that the defendants, as applicants for security for costs, have an evidentiary burden of leading evidence to establish a prime facie entitlement to such an order and to such an order in relation to a particular amount. Normally, in any court, the party who asserts must prove in order to succeed: *Scott Fell v Lloyd (Official Assignee)* (1911) 13 CLR 230 at 241; *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 717 per Kirby P. In *Warren Mitchell Pty Ltd v Australian Maritime Officers Union* (1993) 12 ACSR 1 the word "credible" in s 1335 was said to suggest that an evidentiary burden is undertaken by the party seeking the order who must show:
>
> "... that the material before the Court is sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, the corporation would be unable to pay the costs of that party upon disposal of the proceedings."
>
> **[61]** The evidence to be relied on must have some characteristic of cogency. Furthermore, speculation as to the insolvency or financial difficulties experienced by the plaintiff company is insufficient to ground the exercise of the discretion: *Warren Mitchell Pty Ltd v Australian Maritime Officers Union.*
>
> **[62]** The approach followed in these reasons is that once the defendants have led evidence to establish the above described entitlement, an evidentiary onus falls upon the plaintiffs to satisfy the Court that *taking into account all relevant factors*, the Court's discretion ought be exercised by either refusing to order security or by ordering security in some lesser amount than was sought by the defendants."

[41] That should not, however, be construed as requiring the judge hearing such an application to engage, in effect, in some sort of anticipatory assessment of costs. In the present case, I am satisfied that the evidence led by the defendants is cogent evidence, and am also satisfied on that evidence that each of the defendants will incur significant costs up to and including the first day of trial in defending this matter. However, I am also satisfied that the quantum of those costs claimed by the plaintiff needs to be discounted to take account of the matters advanced by the plaintiff. The approach to fixing the quantum to be provided by way of further security is not a finely tuned mathematical exercise. The principles appropriate to the approach to be adopted were collected by French J (as he then was) in *Bryan E Fencott and Assocs Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 515:

> "In fixing the amount of the security the court must look first at the whole case and take into account, inter alia, the chance of it collapsing without coming to trial. It is not bound to give the amount of security which a defendant says will be the amount of his costs: *Dominion Brewery Ltd v Foster* (1897) 77 LT 507.
>
> The court may in such a case, order somewhat less than if there seems to be every prospect that the action will be fought to a finish: *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction* (supra) at 720.
>
> The court does not set out to give a complete and certain indemnity to a defendant: *Menhaden v Citibank NA* (1984) 1 FCR 542 at 547 per Toohey J.

> The process of estimation embodies to a considerable extent, necessary reliance on the "feel" of the case after considering relevant factors: *Pearson v Naydler* (supra) at 907."

[42] It seems to me, having regard to all the factors to which I have referred, particularly the obvious need for there to be further security provided but tempered by the mitigating and discounting factors to which the plaintiff refers, and also acknowledging that I am of necessity adopting a 'broadbrush approach' to the question of quantification, that the amount of further security to be provided for each of the groups of defendants should be fixed at $100,000.

[43] There will be orders that, in addition to the security for costs presently voluntarily held in respect of the defendants, the plaintiff provide further security for the defendants' costs (in a form to be agreed between the parties or, failing such agreement, in a form satisfactory to the Registrar) in the following further amounts:

(a)	First defendant's costs	$100,000
(b)	Second defendant's costs	$100,000
(c)	Third defendant's costs	$100,000
(d)	Fifth, sixth and seventh defendants' costs	$100,000

[44] The costs of this application will be reserved.

[45] I will hear the parties as to the time for provision of this further security and as to any further directions.