SUPREME COURT OF QUEENSLAND

CITATION:	*Cherbourg Food Processing Company P/L & Ors v Enterprises (Qld) P/L & Ors* [2012] QSC 162
PARTIES:	**CHERBOURG FOOD PROCESSING COMPANY PTY LTD ACN 094 612 209 (IN LIQUIDATION) (SUBJECT TO DEED OF COMPANY ARRANGEMENT)** (first plaintiff) and **KEVIN JOHN HOEY** (second plaintiff) and **WILLIAM FRANCIS BAILEY** (third plaintiff) v **ENTERPRISES (QLD) PTY LTD ACN 081 913 868** (first defendant) and **CAMERON BEITH MCDOUGALL** (second defendant) and **PAUL MICHAEL VOLL** (third defendant)
FILE NO/S:	BS7159/08
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	18 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	15 March 2012
JUDGE:	Ann Lyons J
ORDER:	---
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the third defendant seeks summary judgment against the second and third plaintiffs pursuant to *Uniform Civil Procedure Rules 1999* (Qld) r 293 or, alternatively, that certain paragraphs of the Statement of Claim be struck out and the second defendant joins in that application – where the plaintiff has no real prospects of succeeding on all or part of the claim and that there is no

need for a trial of the claim or part of the claim because the claim for loss and damage purely relates to a claim which does not exist.

PROCEDURE – COSTS – SECURITY FOR COSTS – where the second and third defendants seek an order for security for costs pursuant to *Uniform Civil Procedure Rules 1999* (Qld) r 670 – where the first plaintiff, a company, poses a real risk of being unable to satisfy an order as to costs – where there are significant difficulties with the case as pleaded by the plaintiff – where there is no evidence that the plaintiff's impecuniosity was caused by the actions of the defendants and there has not been any significant delay in bringing this application.

Corporations Act 2001 (Cth) s 1317H(1), s 237, s 1335
Trade Practices Act 1974 (Cth), s 180, 181, 182
Uniform Civil Procedure Rules 1999 (Qld) r 293, s 69, s 670, s 671, s 672

Bell Wholesale Co Pty Ltd v Gates Export Corp (No2) (1984) 52 ALR 176
Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd (1987) 16 FCR 497
Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd [2004] FCA 1334
Hession and Others v Century 21 South Pacific Ltd (In Liq) (1992) 28 NSWLR 120
Jazabas Pty Ltd v Haddad [2007] NSWCA 291
Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd (2009) 239 CLR 75
Pioneer Park Pty Ltd (in liquidation) & Ors v Australia and New Zealand Banking Group Limited [2007] NSWCA 344
Process Engineering Pty Ltd v Derby Meat Processing Co Ltd [1977] WAR 145
Robson v Robson & Anor [2008] QCA 36
Yandil Holdings Pty Ltd v Insurance Co of North America (1985) 3 ACLC 542

COUNSEL: M Lawrence for the first and second plaintiffs
W Bailey appeared on his own behalf
No appearance by the first defendant
M N Cooke for the second defendant
PJ McCafferty for the third defendant

SOLICITORS: Archibald and Brown for the first and second plaintiffs
Rostron Carlyle for the second defendant
Brian Bartley and Associates for the third defendant

ANN LYONS J:

Background

[1] The first, second and third plaintiffs filed a Claim and Statement of Claim on 28 July 2008. The pleadings have been amended a number of times and a fifth Amended Statement of Claim was filed on 12 March 2012.

[2] The plaintiffs seek compensation orders against the defendants under s 1317H(1) of the *Corporations Act* 2001 (Cth) ("*Corporations Act*"), alleging contraventions of sections 180, 181 and 182 and damages under the *Trade Practices Act* 1974 (Cth) ("*TPA*").

[3] The key factual allegations can be summarised as follows:

(1) The first plaintiff Cherbourg Food Processing Company Pty Ltd ("CFPC"), a company which operated an abattoir and tannery at Murgon, alleges that in 2003 a joint venture was entered into between it and the first defendant Enterprises (Qld) Pty Ltd ("Enterprises"), a company which provided money and investment services. The second and third plaintiffs were co-directors and shareholders of CFPC at the time.

(2) CFPC was wound up on 24 November 2004 as a result of an application filed on behalf of the deputy Commissioner of Taxation and a liquidator was appointed on 15 December 2004.

(3) It is alleged that the terms of the 2003 joint venture agreement were that Enterprises would acquire a 50 percent equity interest in CFPC upon payment of the sum of $500,000 with a further advance of $250,000 by way of loan.

(4) The second defendant was the director of Enterprises. The third defendant, a solicitor, prepared the joint venture documents which were signed by the second and third plaintiffs on 27 May 2003. It is alleged that the documents signed by plaintiffs were not in accordance with the agreement reached between the parties as the payment of $500,000 was characterised as a loan advance secured by a company charge over the company assets.

(5) Prior to the execution of the documents it is alleged that two representations were made:
   i. That the paper work was in line with what was agreed to; and
   ii. When the $250,000 had been repaid, the company charge and personal guarantees would be released.

(6) The plaintiffs allege that:
   i. The second defendant breached certain duties under the *Corporations Act* as well as duties recognised in equity;
   ii. The third defendant, the solicitor who acted for CFPC, breached certain duties including failing to ensure the terms of the joint venture documents reflected the terms of the agreement and by making the representations alleged;
   iii. The third defendant was involved in the breaches of duty of the second defendant, by reason of s 79 of an Act which is not specified;

iv. CFPC was placed under the control of a receiver and manager in circumstances where it "would reasonably be expected that CFPC would have been able to continue trading, and be in a position to meet [its] debts, and would not have suffered any depletion of its assets in connection with the appointment of Receivers and Managers, and, as a result of such appointment, CFPC has suffered loss or damage or has incurred liability";
v. But for the second defendant's conduct, CFPC would not have given the letter of acceptance and would not have executed the joint venture documents;
vi. CFPC would have instead entered into a different joint venture agreement with Ampco Pty Ltd, which would not have resulted in receivers and managers being appointed to CFPC;
vii. CFPC has lost the value of its goodwill to the tune of $1,585,508.00;
viii. CFPC was placed into liquidation in circumstances where it would reasonably be expected to have been able to continue to trade.

(7) Essentially the first plaintiff, a company in liquidation, seeks declarations that the first and second defendants were knowingly concerned in the breaches of the *TPA* as well as damages or compensation in excess of $1,500,000.00. It is alleged that the first and second defendants purported to appoint receivers and managers to the first plaintiff when it was a breach of the joint venture agreement and a breach of their director's duties and fiduciary duties.

(8) The second and third plaintiffs have a different cause of action and seek an amount of $123,816.98 which is the amount of the Australian Taxation Office ("ATO") debt, in quantified damages from the defendants as well as other damages yet to be quantified.

(9) The defendants dispute the claim and deny the existence of a joint venture and the terms alleged to have been agreed upon by the parties. In particular, they argue that the executed agreement is the only evidence of the parties' intentions and that the monies advanced were a loan.

The current applications

[4] Pursuant to an application filed on 20 January 2012 the second defendant seeks an order that the first, second and third plaintiffs give security for the second defendant's costs. The initial figure of $200,000 has now been amended to an amount of $176,025.04.

[5] Pursuant to an application filed on 6 March 2012 the third defendant also seeks an order that the first plaintiff give security for costs in the amount of $135,000.

[6] The third defendant also seeks summary judgment against the second and third plaintiffs pursuant to *Uniform Civil Procedure Rules 1999* (Qld) ("*UCPR*") r 293 or, alternatively, that certain paragraphs of the Statement of Claim be struck out. The second defendant joins in that application.

[7] At the hearing of this application the second plaintiff and the third plaintiff indicated that they both wished to file Notices of Discontinuance.

[8] Despite the foreshadowing of the filing of those documents, both the second and third defendants wish to pursue orders for summary judgment against the second and third plaintiffs.

The application for summary judgment against the second and third plaintiffs.

[9] The second and third plaintiffs' claim sought the amount of an ATO debt of $123,816.98 as quantified damages. The fourth amended statement of claim, filed on behalf of the first and second plaintiffs on 4 August 2010, deleted paragraphs 39 and 40. In my view none of the allegations made in the Fourth Amended Statement of Claim support the claims for loss by the second and third plaintiffs as discrete from the claim by the first plaintiff. It is also clear that the ATO debt was in fact settled with no adverse orders as against the first or second plaintiffs.

[10] Accordingly, the claim for loss and damage purely relates to the ATO claim which does not exist. It is also clear that the proposed fifth amended statement of claim purports to remove the second plaintiff and its claim against the second defendant. Rule 69 of the *UCPR* provides that only the Court may remove a party from a proceeding.

Should there be an order for summary judgment?

[11] The principles in relation to an application for summary judgment are quite clear. *UCPR* r 293 provides that a Court may give summary judgment for a defendant in a proceeding if satisfied the plaintiff has no real prospects of succeeding on all or part of the claim and that there is no need for a trial of the claim or part of the claim. Clearly, the power is similar to that provided to a plaintiff who seeks summary judgment against a defendant.

[12] I consider that the requirements of *UCPR* r 293 have been satisfied. There is no cause of action pleaded by the second or third plaintiffs and I do not consider that there is any evidence or argument before me as to why summary judgment should not be entered. In my view the second and third plaintiffs have no real prospects of succeeding and there is no need for a trial.

[13] Accordingly judgment should be entered against the second and third plaintiffs.

[14] The second and third defendants also seek an order that the second and third plaintiffs pay the costs of and incidental to the proceedings, including reserve costs so far as they relate to the costs of defending the second and third plaintiffs' claim. I consider they should be paid on a standard basis up to the date of the filing of the third amended Statement of Claim on 27 February 2009 and that from 28 February 2009 costs should be on an indemnity basis given the absolute futility of the claims after the compromise of the ATO proceedings. The affidavit of Paul Rojas sworn 12 March 2012 provides that the ATO Tax claim was settled on 25 November 2008. It is clear therefore that the second and third plaintiffs' claims should not have been pursued in the third amended statement of claim as there was no prima facie cause of action.

[15] The second and third defendants also seek an order that the second and third plaintiffs pay the second and third defendant's costs of and incidental to Supreme

Court proceedings 11848 of 2007 including reserve costs on a standard basis to be agreed or if not agreed to be as assessed.

[16] That proceeding relates to an application by the second and third plaintiffs, pursuant to s 237 of the *Corporations Act*, for orders that they be granted leave to bring proceedings on behalf of the first plaintiff against the defendants. On that occasion the Court extended time for lodgement of the charges on the company. Costs were reserved to the finalisation of the matter. In my view an application for costs in relation to those proceedings is premature and should await the finalisation of the entire proceedings.

Application for the security of costs

[17] The second and third defendants seek an order for security for costs. The application is brought pursuant to *UCPR* r 670. Section 1335(1) of the *Corporations Act* also authorises the Court to require a plaintiff corporation to give sufficient security for the defendant's costs if it appears by credible testimony that there is reason to believe that the plaintiff corporation will, if the defendant is successful, be unable to pay the defendant's costs.

[18] Security was previously provided by the second plaintiff in the form of a bank guarantee dated 21 August 2009 in the sum of $40,000. That amount was renewed on 24 March 2011. The bank guarantee, however, expired on 30 September 2011 and has not been renewed despite requests.

[19] The second defendant now indicates that its costs to trial are estimated at $176,025.04. The third defendant has indicated that its costs to trial would be estimated at $135,000.

[20] It is argued that the plaintiff poses a real risk of being unable to satisfy an order as to costs. The defendants, as the applicants, have the evidentiary onus in establishing a prima facie entitlement to an order and, in particular, an order for a particular amount. However, once the defendants have led evidence to establish an entitlement the onus then falls on the plaintiff to satisfy the Court that it should refuse the order or alternatively order security in a lesser amount.

[21] The applicants must generally satisfy one of the several prerequisites under *UCPR* r 671 *before* the court will consider an application for security for costs. Rule 672 then outlines the matters the court should have regard to in deciding whether to make an order.

> "**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."

[22] In the current case the plaintiff is a company in liquidation. The decision in *Process Engineering Pty Ltd v Derby Meat Processing Co Ltd*[1] established that the fact that a company is in liquidation is sufficient evidence to satisfy this threshold test. It is not however determinative of the ultimate issue as to whether security should be ordered as it is simply one factor the Court should consider. There is no doubt that liquidation is a circumstance of some weight in the Court's discretion. Counsel for the second plaintiff also concedes that the first plaintiff is an impecunious corporation and that the threshold test of eligibility has been satisfied. I am satisfied therefore that the threshold test pursuant to *UCPR* r 671 has been satisfied.

[23] Clearly, once the threshold test has been satisfied, the discretion is enlivened. The Court has an unfettered discretion in deciding whether to order security. The discretion must be exercised judicially by balancing the defendant's interest in having his costs secured against the plaintiff's interest in not being precluded form litigating its claim.

[24] Some of the relevant discretionary factors are set out in *UCPR* r 672. It is not, however, an exhaustive list and provides as follows:

"**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;

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1 [1977] WAR 145.

(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."

[25] As Muir JA outlined in *Robson v Robson & Anor*,[2] there is no doubt that there is a significant interrelationship between r 671 and 672, particularly given the broad discretion in r 671(h). In *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd*[3] French J (as his Honour then was) summarised the relevant factors the Court is required to consider as follows:

> "The general principles relevant to the exercise of the discretion to order security for costs were conveniently set out by Beazley J in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189. They are:
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> 1. Whether the application for security has been brought promptly.
> 2. The strength and bona fides of the applicant's case.
> 3. Whether the applicant's impecuniosity was caused by the respondent's conduct the subject of the claim.
> 4. Whether the respondent's application for security is oppressive in the sense that it is being used merely to deny an impecunious applicant a right to litigate.
> 5. Whether there are any persons standing behind the applicant who are likely to benefit from the litigation and who are willing to provide the necessary security.
> 6. Whether the persons standing behind the applicant have offered any personal undertaking to be liable for the costs and, if so, the form of any such undertaking.
> 7. Whether the applicant is in substance a plaintiff or the proceedings are defensive in the sense of directly resisting proceedings already brought or seeking to halt the respondent's self-help procedures."

[26] Counsel for the second plaintiff argues that the interests of justice are served by declining the application for security as an order for security would stultify the proceedings. It is also argued that an application for security is premature as third party disclosure has not yet been completed and that there has been unsatisfactory disclosure by the second defendant.

Will an order stifle proceedings?

[27] The decision of *Pioneer Park Pty Ltd (in liquidation) & Ors v Australia and New Zealand Banking Group Limited*[4] confirms that the first factor the Court must consider in ordering security for costs is whether the applicant for the order has established that the respondent company is unlikely to be able to pay the costs of the applicant if the applicant is successful in its claim. In that case, the New South Wales Court of Appeal held that once impecuniosity has been established by the

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2 [2008] QCA 36.
3 [2004] FCA 1334 at 28.
4 [2007] NSWCA 344 at 47.

applicant the respondent company can seek to avoid an order for security for costs by establishing that such an order would stifle proceedings.

[28] Counsel for the second plaintiff argues that the second plaintiff, Mr Hoey, is the person who would in fact be liable to pay security for costs as the third plaintiff does not appear to be a man of financial worth. Mr Bailey was self represented at the hearing and advised the Court that he was indeed impecunious and did not currently own any property.

[29] In *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*,[5] the High Court considered the additional circumstances which may justify an order for security for costs against an impecunious plaintiff. Heydon J referred to the following considerations:

> "The first problem in these submissions is that they exaggerate the supposed immunity of impecunious litigants. Ever since the *Joint Stock Companies Act 1856* (Imp), s 69, impecunious companies have had no immunity from the obligation to give security for costs: see now r 42.21(1)(d) of the *UCPR* and s 1335 of the *Corporations Act 2001* (Cth). Persons resident outside the jurisdiction, impecunious or not, have been subjected to orders for security for costs since the late eighteenth century (175): see now r 42.21(1)(a). Orders for security may be made against plaintiffs, whether natural persons or not, who have, with intent to deceive, failed to state or misstated their addresses in the originating process (r 42.21(1)(b)). Orders for security may be made against a plaintiff, natural person or not, who has, with a view to avoiding the consequences of the proceedings, changed his, her or its address after the proceedings have commenced (r 42.21(1)(c)). And r 42.21(1)(e) provides that where it appears to the court that a person is suing, not for his, her or its own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so, the court may order the plaintiff to give security for costs. Mere impecuniosity is not an absolute barrier to ordering security for costs against a natural person, although it is a factor against doing so. In particular, there are instances additional to those listed in r 42.21(1)(a)-(c) and (e) where it can be done. They include the vexatious conduct of litigation by a plaintiff who had failed to set aside an earlier judgment, instances where the plaintiff has dissipated assets and/or not paid previous costs orders (particularly costs orders in favour of the defendant), instances where the plaintiff brings a weak case to harass the defendant and instances where the plaintiff brings a case for the benefit of others, but not solely for that benefit. Hence the supposed "general principle … that poverty is no bar to a litigant" is a severely qualified one. So is the "overriding principle of open access to justice" (or, more realistically, at least access to the courts). (Footnotes omitted)

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5 (2009) 239 CLR 75.

[30] In *Bell Wholesale Co Pty Ltd v Gates Export Corp (No2)*,[6] it was held that the court could decline to order security if the company was able to establish that those who stood behind the company were also without means:

> "It is not for the party seeking security to raise the matter; it is an essential part of the case of a company seeking to resist an order for security on the ground that the granting of security will frustrate the litigation to raise the issue of impecuniosity of those whom the litigation will benefit and prove the necessary facts."

[31] Counsel argues that Mr Hoey has a number of dependents and is under considerable financial strain as he has sold assets and has obtained family loans to fund the litigation to date. It is also argued that to order him to pay security would place him under an excessive burden as he is already servicing a home loan and providing for his wife and children. The affidavit material also indicates that his marriage is under strain due to the financial burden created by the litigation. Counsel submits that an order for security would most likely promote an abandonment of the action.

[32] In *Yandil Holdings Pty Ltd v Insurance Co of North America*,[7] Clarke J held that the fact that the order of security will frustrate the plaintiff's right to litigate its claim because of its financial condition does not automatically lead to a refusal of an order but that it will usually operate as a powerful factor in favour of exercising the Court's discretion in the plaintiff's favour. This factor is related to the next issue which is whether there are any persons standing behind the company who are likely to benefit from the litigation and who are willing to provide the necessary security. Meagher JA discussed the combined effect of these two principles in *Hession and Others v Century 21 South Pacific Ltd (In Liq)*[8] as follows:

> "… a company in liquidation against whom an order for security is sought cannot successfully resist such an order merely by proving that it cannot fund the litigation from its own resources if an order for security is made; it must prove that it cannot do so even if it relies on the other resources available to it (the company's shareholders and creditors)."

[33] To resist the application for security for costs the plaintiff will need to show that the parties who stand behind the impecunious company are prepared to give indemnities that are actually worth something.[9] In *Jazabas Pty Ltd v Haddad*,[10] it was held that it may be possible to resist an order for security for costs where those who seek to benefit from the litigation are willing to step out from behind the corporate shield and offer undertakings in respect of any adverse costs order should the proceedings fail.

[34] I note that Mr Hoey previously provided security but that the bank guarantee was not renewed after it lapsed in September 2011. No further offer has been made. Counsel argues that Mr Hoey and his wife have $650,000 equity in their home, he is in secure employment and has no intention of leaving the jurisdiction. I note however the affidavit of Paul Rojas sworn 8 February 2012 exhibits a title search, conducted on 8 February 2012, of the property owned by Mr Hoey and his wife.

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6 (1984) 52 ALR 176 at 179.
7 (1985) 3 ACLC 542.
8 (1992) 28 NSWLR 120 at 123.
9 Above n 6.
10 [2007] NSWCA 291 at 2.

That search indicates that the registered proprietors are "VANESSA ALICE HOEY OF 99 UNDIVIDED 100TH PARTS AND KEVIN JOHN HOEY OF 1 UNDIVIDED 100TH PART". A mortgage is also registered to the Commonwealth Bank and there is a caveat "BY LANDMARK OPERATIONS LTD. OF THE INTEREST OF KEVIN JOHN HOEY".

[35] It is clear that any argument about the stifling of proceedings or oppression requires the Court to consider the merits of the proceeding. It is in this regard that I have some concerns.

The merits of the case

[36] An analysis of the pleadings indicates that the case pleaded by CFPC in relation to representation clearly has some significant difficulties. In particular there is a written document which arguably contains the terms of the agreement reached. Furthermore that written agreement has been signed by all the parties.

[37] The Statement of Claim alleges that a number of representations were made. The first representation is that Mr Kuskie, as a director of CFPC, made an oral representation confirming that the paperwork was in line with what had been agreed to. The second representation is that the third defendant is purported to have confirmed that the company charge and personal guarantees would be released once the $250,000 loan had been repaid. It is argued that the true nature of the joint venture was not accurately reflected in the joint venture agreement.

[38] The Deed of Acquisition was signed and dated 27 May 2003. The other documents relevant to that deed were also presented and signed by the plaintiffs at that time, including fixed and floating charges as well as the guarantees and indemnities of CFPC, International Food Exports Pty Ltd and the personal guarantees of Hoey, Bailey and Kuskie limited to $150,000.

[39] It is also asserted that Mr Kuskie had resigned as a director by that time. I note, however, that his affidavit indicates that he did not resign until the company was placed into liquidation. Furthermore the Australian Securities and Investments Commission ("ASIC") records acknowledge that as a matter of fact.

[40] There are also a number of allegations in the fifth Amended Statement of Claim in relation to the lodgement of the charge. It is alleged by the first plaintiff that Mr Kuskie could not sign the charge document. However, the affidavit material asserts Mr Kuskie's authority to do so and furthermore in proceeding BS1378 of 2004 the Court in fact extended time for lodgement of the charges on the company.

[41] It is also acknowledged in the fifth Amended Statement of Claim that the Deputy Commissioner of Taxation wound up CFPC and appointed a liquidator on 15 December 2004. Despite those facts the plaintiffs continue to allege that the company

> "would have been able to continue trading, and be in a position to meet CFPC's debts, and would not have suffered any depletion of its assets in connection with the appointment of Receivers and Managers, and, as a result of such appointment, CFPC has suffered loss or damage or has incurred liability."

[42] Accordingly, the plaintiffs assert that CFPC was placed into liquidation in circumstances were it could pay its debts when they fell due.

[43] Furthermore I note that this is not a case where the defendants withheld money from the plaintiff. It is not in dispute that:

(a) the sum of $500,000 was transferred by Enterprises to CFPC on or about 13 June 2003; and

(b) the sum of $250,000 was transferred by Allstate to International Food Exports for use by the CFPC on 18 August 2003.

Accordingly, there was a significant capital injection by the first and second defendants into CFPC.

[44] It is also clear from the affidavit material that confidential internal office memos in February 2003 indicated that there were significant concerns about the financial position of CFPC. In particular, the minutes of the meeting of 26 September 2003 indicate that the profit and loss and balance sheet for the period ending August 2003 indicated a critical shortage of funds.

[45] On 31 August 2004 a report from the liquidators indicated that unsecured creditors of the company totalled $556,891.49. In particular, I note that a report dated 24 February 2004 indicates:

(a) that the deficiency in accounts was in the amount of $587,282;

(b) cash in the bank was $300;

(c) the outstanding debtors totalled approximately $804,000 of which only $186,000 was recoverable; and

(d) the company owed $156,000 rent to Cherbourg Community Council which was then due.

[46] The expert report prepared on 29 March 2011 indicates that the company failed the solvency indicators.

[47] I can see no evidence of expert reports or any other material to support the pleadings in relation to the plaintiff's claim with respect to the ability to trade. Furthermore the expert report created by Moore Stephens dated 31 March 2005, prepared at the request of the plaintiffs, quantifies the damages claimable as $397,915 and not the $1,500,000 claimed.

[48] Accordingly I consider that there are significant difficulties with the case as pleaded by the plaintiff.

What does the justice of the case require?

[49] This consideration is extremely broad. In *Robson*,[11] Muir JA stated:

> "[32] In my view, the role of r 672 in identifying matters to which "the court may have regard" in deciding whether to make an order is to provide a checklist of those matters which are normally relevant to the determination of an application for security for costs. The matters listed in r 672 also encompass many, if not most, of the circumstances normally relevant to

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11 Above n 2.

> a determination of whether 'the justice of the case requires the making of the order.'
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> [33] I do not discern an intention that in determining whether "the justice of the case requires the making of the order" regard may not be had to any of the matters listed in paragraphs (b), (c), (f), (i), (j) or (k) of r 672. Frequently, it will be the case that one or more of the matters listed in r 672 will inform the determination under r 671(h). That would have been apparent at the time the Uniform Civil Procedure Rules were made.
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> [34] 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 one 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)."

[50] In terms of whether there has been delay in bringing this application for security, I note that this application was commenced after it became clear that the bank guarantee had lapsed and was not going to be replaced, despite ongoing requests. I also note that since these proceedings first commenced almost four years ago, in July 2008, the plaintiffs have not progressed their claims in an expeditious way and that a fifth amended statement of claim has now been filed. It is also clear that the defendant's application for security has in fact been adjourned on a number of occasions, having been initially filed in January 2012. In any event the plaintiff has not indicated that any delay in bringing the application has in fact caused them any prejudice.

[51] Counsel for the first and second plaintiffs also argues that there are real concerns in relation to disclosure by the second defendant. I do not however have sufficient evidence before me to come to a concluded view on that issue given that the allegations in the affidavit of Leslie Venville sworn 15 March 2012 have not been fully addressed in the material before. I note, however, the affidavit of the second defendant sworn 10 February 2012 in which he swears that he did not have in his possession or control the banking documents sought by the plaintiff.

[52] Ultimately, however, having taken all of the discretionary factors into account I consider that the first plaintiff should provide security for costs. In my view there are very real concerns that CFPC will be unable to satisfy an order for costs. It does not own any property in Queensland. Mr Hoey does not own any property in Queensland and has a one-hundredth share in a property in South Australia which is mortgaged and subject to a caveat. I also have concerns about the merits of the case. Furthermore, as I have set out in the foregoing paragraphs there is no evidence that

the plaintiff's impecuniosity was caused by the actions of the defendants. I do not consider there has been any significant delay in bringing this application once it became clear that the bank guarantee provided by the second plaintiff was not going to be renewed.

What security should be ordered?

[53] Having determined that the first plaintiff should provide security for costs there is no doubt that it is for the defendants to provide some support for the quantum of security claimed. That does not mean, however, that the judge is required to embark on some preliminary costs assessment. As has been pointed out in a number of cases, the approach required is necessarily a broad brush approach and not "a finely tuned mathematical exercise". In *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd*,[12] French J set out the relevant principles, including that "[t]he court does not set out to give a complete and certain indemnity to a defendant" and that "[t]he process of estimation embodies to a considerable extent, necessary reliance on the 'feel' of the case after considering relevant factors."

[54] Counsel for the plaintiffs argues that security for costs, when a defendant is in the position of a plaintiff, should not be awarded or, if they are, they should be reduced by the portion of the estimated costs of the counterclaim and should be for a modest amount. It is essentially argued that if security was to be ordered then it should be for an amount of $40,000 which was the amount previously provided by the bank guarantee.

[55] The second defendant's Security for Costs Assessment Report by costs assessor Stephen Hartwell states that the costs and outlays incurred to date by the second defendants solicitors are $157,264.26 and that approximately 60 percent to 70 percent of those fees would be recoverable on a standard basis. Taking into account the counter claim he considers that approximately 50 percent would be recoverable on a standard basis. He also considers that the trial would last five days and counsels' fees would be approximately $3,300 per day. He considers that the costs to be incurred to proceed to trial would be approximately $176,025.04.

[56] The affidavit of Rebecca Scott affirmed 15 March 2012 sets out that over $94,000 in fees and disbursements inclusive of GST have been billed and that approximately 60 percent, or $56,400, would be recoverable on a standard basis. Her estimate of the standard recoverable future costs is $82,612 which, when combined with the $56,400 already billed for fees and disbursements, totals $139,012.

[57] I consider that there is sufficient particularity in the affidavits in relation to future costs.

[58] It is clear that any order for security for costs does not aim to give a complete indemnity to a defendant. Accordingly, taking the usual broad brush approach as well as an examination of recent decisions in relation to security for costs, I consider that the first plaintiff should pay $90,000 into Court by way of security for the second defendant's costs and $70,000 into court by way of security for the third defendant's costs.

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12 (1987) 16 FCR 497 at 515.

[59] I would therefore propose that the orders for security for costs should be generally in the following terms:

1. That the first plaintiff give security for the second defendants' costs of and incidental to defending the proceedings in the sum of $90,000;

2. That the first plaintiff give security for the third defendants costs of and incidental to defending the proceedings in the sum of $70,000;

3. That security be given by payment into Court or in any other way approved by the Court or the Registrar;

4. That the security be provided within 28 days of this order, failing which the first plaintiff's claim against the second and third defendants is stayed;

5. The parties have liberty to apply.

[60] I will however hear from counsel as to the final form of the orders and as to costs.