

SUPREME COURT OF QUEENSLAND

CITATION: *Whelan Air Conditioning Pty Ltd v Arcape Pty Ltd* [2012]
QSC 187

PARTIES: **WHELAN AIR CONDITIONING PTY LTD**
(ACN 005 769 782)
(Plaintiff)
(First Defendant on Counterclaim)

v

ARCAPE PTY LTD (ACN 010 871 280)
(Defendant)

and

GEOFFREY RAYMOND WILLIAMS
(Second Defendant to Counterclaim)

and

JILL OLIVIA RAYMENT-WILLIAMS
(Third Defendant to Counterclaim)

FILE NO/S: BS 10754 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court

DELIVERED ON: 13 July 2012

DELIVERED AT: Brisbane

HEARING DATE: 19 June 2012

JUDGE: Boddice J

ORDER: **1. The application is refused.**

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS –
RELEVANT FACTORS – where the defendant seeks an
order pursuant to s 1335 of the *Corporations Act* 2001 and/or
rule 671 of the *Uniform Civil Procedure Rules* 1999 that the
plaintiff provide security for its costs and that the plaintiff's
proceedings be stayed until such security is provided – where
the plaintiff opposes the order on the ground that the real
dispute in the litigation concerns the defendant's
counterclaim – where the plaintiff contends the defendant
delayed bringing the application – where the corporate
plaintiff is presently impecunious – where the individual
behind the plaintiff has offered his personal liability for any

costs order – whether security for costs should be ordered

Corporations Act 2001 (Cth)

Uniform Civil Procedure Rules 1999 (Qld)

Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd
[2012] QCA 114

Specialised Explosives Blasting & Training P/L v Huddy's
Plant Hire P/L [2009] QCA 254

COUNSEL: T Matthews for the Applicant

J Peden for the Respondent

SOLICITORS: Egans Solicitors for the Applicant

MacDonnells Law for the Respondent

- [1] The defendant seeks orders that the plaintiff provide security for its costs in the sum of \$84,841, and that the plaintiff's proceedings be stayed until such security is provided by the plaintiff. The plaintiff opposes an order for security for costs. Alternatively, the plaintiff contends the amount claimed is excessive.

The proceedings

- [2] The proceedings arise out of a dispute between the plaintiff, as lessee and operator of a hotel in Rockhampton, and the defendant, as lessor and owner of the hotel property. The plaintiff operated the hotel between 2003 and September 2010. Its lease terminated on 30 September 2010.
- [3] Pursuant to the terms of the lease, the defendant had an option to acquire plant and equipment, including gaming machines, at the hotel. The defendant purported to exercise that option by notice given on 6 September 2010.
- [4] The plaintiff contends the defendant wrongfully repudiated the lease by taking possession of the hotel on 28 September 2010, and, as a consequence, the plaintiff

was relieved of any obligation under the lease to convey the plant and equipment, including the gaming machines, to the defendant.

[5] The defendant contends it lawfully exercised its option to acquire the plant and equipment, but denies liability to pay for that plant and equipment on the basis it is entitled to a significant sum owing by the plaintiff. It seeks to set off that sum against any liability for the plant and equipment.

[6] At the commencement of the proceeding, the applicant sought interlocutory injunctive relief. That relief was refused on the basis that although the plaintiff had demonstrated a prima facie case that it was entitled to recover the plant and equipment, the balance of convenience favoured leaving the equipment in place pending determination of the proceeding.

[7] Following dismissal of that interlocutory application, the parties filed and served pleadings. No further steps were taken in the proceeding between February 2011 and May 2012, when the defendant served a notice of intention to proceed. That notice was preceded by an intervention notice from the Registry.

Defendant's Submissions

[8] The defendant submits an order for security for costs should be made, notwithstanding a delay in the bringing of the application, as security for costs was raised shortly after the commencement of proceedings but was not pursued when the plaintiff allowed its claim to lie in abeyance. Once proceedings were reactivated, the defendant promptly made this application.

- [9] The defendant submits security for costs should be ordered as the plaintiff is a corporation without assets. Further, an offer by the second defendant to be personally liable for any costs order is worthless as there is no evidence he has capacity to meet any costs order.

Plaintiff's submissions

- [10] The plaintiff submits an order for security should not be made as the issue in dispute in the proceeding is the defendant's counterclaim, not the plaintiff's claim. Further, the defendant's delay in bringing the application has not been satisfactorily explained by the defendant, and the plaintiff's impecuniosity is a direct consequence of the defendant's refusal to either pay for the plant and equipment or release that property to the plaintiff.
- [11] The plaintiff further contends security ought not to be ordered as the second defendant by counterclaim, the individual standing behind the plaintiff, has offered to be jointly liable with the plaintiff for any costs ordered against the plaintiff in the event the plaintiff is unsuccessful in its proceeding against the defendant.

Relevant principles for the granting of an order for security for costs

- [12] A court may order a plaintiff to give security for costs if the court is satisfied 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.¹ A court may also require a plaintiff corporation to give sufficient security for the defendant's costs if satisfied

¹ UCPR, r 671.

by credible testimony that there is reason to believe the plaintiff corporation will be unable to pay the defendant's costs if the defendant is successful in the proceeding.²

[13] The discretion to order security for costs is unfettered. It is to be exercised having regard to all of the circumstances of the particular case without any predisposition in favour of an award for security.

[14] Whilst the factors relevant to the exercise of the discretion will vary from case to case, r 672 of the UCPR lists a number of factors a court may have regard to in exercising that discretion. Rule 672 provides:

“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.”

Discussion

² *Corporations Act*, s 1335(1).

Is the jurisdiction to order security for costs enlivened?

- [15] The plaintiff is a corporation. Should it be unsuccessful in these proceedings, it is unlikely to be able to satisfy any costs order made in favour of the defendant. The Court's jurisdiction to award security for costs is enlivened in the present case.

Delay

- [16] An application for security should be brought promptly. However, delay in bringing this application is explained by the history of the proceeding.
- [17] The defendant first raised security for costs in October 2010. Pleadings were exchanged and the plaintiff then left its claim in abeyance for 12 months. It is understandable a defendant would not actively pursue security for costs in circumstances where a plaintiff was not pursuing its claim against the defendant, and the plaintiff has an inability to meet a costs order.

Should security be ordered?

- [18] In considering whether to order security, it is relevant to consider whether the applicant's impecuniosity was caused by the respondent's conduct. Whilst the plaintiff restructured its business some years ago, its inability to obtain possession of the plant and equipment in issue, or recover its monetary value, substantially impacts on the plaintiff's impecuniosity.

[19] It is also relevant that the second defendant, the individual who stands behind the plaintiff, has offered to be personally liable for any adverse costs order.³ Whilst there is no evidence as to his financial standing, the fact the individual who stands behind the plaintiff company is prepared to step out from behind the corporate shield and accept responsibility for any adverse costs orders should the proceedings fail is a factor for the Court to consider in determining whether to order security for costs.⁴ It is, however, a factor to be considered together with all other factors relevant in the particular case.

[20] One of those factors is the counterclaim brought by the defendant against the plaintiff. That counterclaim is based on an allegation that substantial sums are owed by the plaintiff to the defendant as a consequence of conduct throughout the course of the lease. This claim was first raised after the institution of the proceedings by the plaintiff. Philip McMurdo J, in refusing interlocutory relief, observed the defendant's alleged set-off "is not apparently strong".⁵ Having regard to the timing of the raising of the claim, I respectfully concur in that observation.

[21] The existence of this significant counterclaim is relevant to the exercise of my discretion as the consequence of an order for security would be that the plaintiff's claim against the defendant would be stayed pending the provision of security. Such an order would prevent the plaintiff, if unable to provide security, from pursuing its claim against the defendant. It would not, however, prevent the defendant from pursuing its counterclaim against the plaintiff. To that extent, the plaintiff is properly to be categorised as a defendant in the central claim in dispute.

³ For a discussion of the principles see *Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd* [2012] QCA 114 at [18]-[19].

⁴ See, generally, *Specialised Explosives Blasting & Training P/L v Huddy's Plant Hire P/L* [2009] QCA 254.

- [22] Balancing all of the relevant factors, I am satisfied it is not appropriate to order security for costs. To do so would result in the plaintiff's claim being stayed (until security is provided by the plaintiff) whilst the defendant is able to pursue its counterclaim. Such an outcome would render an order for security oppressive.
- [23] I decline, in the exercise of my discretion, to order security for costs.
- [24] I shall hear the parties as to costs.