SUPREME COURT OF QUEENSLAND

CITATION:	*JNJ Resources Pty Ltd v Crouch & Lyndon (a firm) (No 2)* [2014] QSC 137
PARTIES:	**JNJ RESOURCES PTY LTD ACN 100 733 631** (plaintiff/respondent) v **CROUCH & LYNDON (a firm)** (defendant/applicant)
FILE NO/S:	BS3750/13
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	25 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	19 February 2014
JUDGE:	Jackson J
ORDERS:	**Upon John Seppanen and Judith Aileen Seppanen personally and Judith Aileen Seppanen in her capacity as the trustee of the JA & JA Trust undertaking to the Court to pay the defendant's costs of the proceeding against the plaintiff up to the first day of the trial, in the event that an order for costs is made against the plaintiff in the proceeding, the order of the Court is that:** **1. The application for security for costs is dismissed.** **2. The costs of the application be costs in the proceeding.**
CATCHWORDS:	PROCEDURE – COSTS – SECURITY FOR COSTS – OTHER MATTERS – where the defendant applied for security for costs under UCPR rule 670 or the *Corporations Act* 2001 (Cth) s 1335 – where the directors of the plaintiff company had offered a personal undertaking to pay the defendant's costs – whether the plaintiff company meets the "threshold question" that there is reason to believe, or it appears by credible testimony that there is reason to believe, that the corporation will not be able to pay the defendant's costs if successful – whether undertakings given by the plaintiff's directors are valuable – whether certain costs should be excluded from any security ordered – whether common costs between this proceeding and another proceeding brought by the plaintiff's directors should be halved in respect of any security ordered

Corporations Act 2001 (Cth), s 1335
Uniform Civil Procedure Rules 1999 (Qld), r 670

Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd [2012] QCA 114, cited
Bodycorp Repairers Pty Ltd v Maisano (No 4) [2013] VSC 247, referred to
Cornelius v Global Medical Solutions Australia Pty Ltd (2014) 98 ACSR 301; [2014] NSWCA 65, cited
Covecorp Constructions Pty Ltd v Indigo Projects Pty Ltd [2007] QSC 262, referred to
Ellis v Uniting Church in Australia Property Trust [2008] QCA 238, referred to
Foss Export Agency Pty Ltd v Trotman (1950) 67 WN (NSW) 1, cited
Great Northern Developments Pty Ltd & ors v The Portland Downs Pastoral Company Pty Ltd [2011] QCA 184, referred to
Harpur v Ariadne Aust Ltd (1984) 2 Qd R 523, cited
Jackson v Coal Resources of Queensland (unreported, QCA, No 3262 of 1999, 15 July 1999) BC9906817, referred to
KP Cable Investments Pty Ltd v Meltglow Pty Ltd (1995) 56 FCR 189, cited
Murchie v The Big Kart Track Pty Ltd (No 2) [2002] QCA 339; [2003] 1 Qd R 528, referred to
Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd [2009] QCA 254; [2010] 2 Qd R 85, cited
Togito Pty Ltd v Pioneer Investments Pty Ltd & anor [2011] QCA 24, referred to
Toms & ors v Fuller [2010] QCA 73, referred to

COUNSEL: MD Martin QC, with A Nicholas, for the plaintiff/respondent
R Ashton for the defendant/applicant

SOLICITORS: ClarkeKann for the plaintiff/respondent
Coyne & Associates for the defendant/applicant

[1] Jackson J: The defendant applies for security for costs of the proceeding in such amount as the court deems fit. The basis of the application is the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"), r 670, or the *Corporations Act* 2001 (Cth), s 1335. The "threshold question", as it is sometimes called,[1] is that one must be satisfied that the plaintiff is a corporation and there is reason to believe the corporation will not be able to pay the defendant's costs if ordered to pay them, or it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful. If that condition is met, the court may order the plaintiff to give the security the court considers appropriate, or require sufficient security to be given, and if security is not given under the order

[1] See recently, *Cornelius v Global Medical Solutions Australia Pty Ltd* (2014) 98 ACSR 301; [2014] NSWCA 65.

the court may stay all proceedings until the security is given, or the proceeding is stayed so far as it is concerns steps to be taken by the plaintiff.

[2] A "check list" of discretionary matters to which the court may have regard is contained in UCPR r 672. However, the discretion under both s 670 and s 1335 has been described as unfettered,[2] once the threshold question has been answered in the defendant's favour.

[3] In *JNJ Resources Pty Ltd v Crouch & Lyndon*[3] I described the circumstances from which the plaintiff's claim is made. There is no question for present purposes that the plaintiff's claim should not be treated as bone fide or that the "strength and bone fides" of the plaintiff's case should affect the disposition of the application one way or the other.[4]

[4] There were three issues that were fought on the hearing of the application. First, whether the defendant has satisfied the threshold question because its assets include raw materials or stockpiles worth $2,000,000. On that factual basis, the plaintiff submits that it is more than capable of meeting an order for the defendant's costs. Second, the plaintiff submits that the offer by the plaintiff's directors, Mr and Mrs Seppanen, to unconditionally guarantee payment of any adverse costs order, is sufficient for the court to dismiss the application for security as a matter of discretion, on condition that they do so. Third, the plaintiff submits that the defendant's application for security in the sum of $253,967, for the costs up to and including the first day of trial, is excessive and that the amount of any security ordered should be in the sum of $115,000.

Threshold question

[5] The plaintiff company carries on business supplying stock feeds, bentonite products and soil conditioners. The financial statements of the plaintiff for the year ended 30 June 2012 show a deficiency of net assets of $446,566.41. The total assets of $738,099.17 included assets described as "Inventories – raw materials" in the sum of $2,000. The total liabilities included a sum, described as "Loans – JA & JA Family Trust", of $987,559.39. Mrs Seppanen says that the financial statements for the year ending 30 June 2013 will not differ substantially from the financial statements for the year ending 30 June 2012. Inconsistently with that, she says that the financial statements for the year ended 30 June 2012 do not include the actual value for the stock piles of bentonite, which she estimates have a value of $2,000,000. Inconsistently with that again, the plaintiff's amended statement of claim alleges that the plaintiff will be unable to sell the stock pile of raw materials stored on the land on which it conducts its business, that the stockpile of raw material will become unsaleable due to the passage of time, and will need to be disposed of at a cost to the plaintiff estimated as approximately $14,000,000. In that state of inconsistency, and in the absence of any explanation by Mrs Seppanen or any other witness on the plaintiff's part, I am not prepared to draw the inference that the plaintiff has a valuable stock pile of raw material of $2,000,000 which

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2 See, for example, *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* [2009] QCA 254; [2010] 2 Qd R 85; *Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd* [2012] QCA 114.

3 [2014] QSC 13, [7]-[26].

4 See *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, 197.

would generate or provide a cash flow sufficient to meet an order for costs in the defendant's favour if the defendant is successful in proceeding.

[6] Once that point is reached, the defendant has satisfied the threshold question that by credible testimony there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if successful in its defence or there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them.

Discretion as to security

[7] The plaintiff relied on the delay by the defendant in bringing the application.[5] In the circumstances of this case, and having regard to the correspondence exchanged between the parties during the time which has elapsed, in my view, delay is not determinative.

[8] Mr and Mrs Seppanen have each offered an unconditional guarantee for the payment of any adverse costs order. Mrs Seppanen offers to do so both in respect of her personal assets and as trustee of the JA & JA Trust ("the trust").

[9] Mrs Seppanen swears that she is the trustee of the trust. She does not exhibit a copy of the trust deed. The nature of the business she carries on as trustee is not sworn to. However, the financial statements for the trust for the year ended 30 June 2012 reveal that it has a trading account in respect of some raw materials and a live stock statement apparently relating to a business of primary production. In any event, the net profit of the trust's activities for the year ended 30 June 2012 was a loss of $32,943.19. There was a deficiency of $78,640.97 in the net assets of the trust at 30 June 2012. The total assets of the trust included as current assets a loan to the plaintiff in the sum of $987,559.39 and as non-current assets "Buildings - at cost" of $910,907.49 and plant and equipment of $470,822.27. The liabilities of the trust included financial liabilities of a loan to Mrs Seppanen in the sum of $1,038,068.88. The same amount was owed to Mr Seppanen. The plaintiff's solicitor says that Mrs Seppanen says further that the item "Buildings - at cost" is the land described as lot 358 on registered plan 214851 situated at 116 Voss Road, Glenmorganvale. The plaintiff produced a valuation of that land as at 7 December 2012 in the sum of $1,050,000.

[10] Notwithstanding that evidence, the defendant submits that the information is confusing, incomplete and internally inconsistent. As one instance, it submits that the only account relating to Mr and Mrs Seppanens' personal position states their net assets in the amount of $118,000. That was the sum shown as their net financial position as at 25 November 2013 in a schedule attached to a letter from ClarkeKann Lawyers to Coyne & Associates dated 25 November 2013. However, a later schedule in similar form appeared in par 9 of Mrs Seppanen's affidavit filed on 3 December 2013 showing, in addition, as personal assets belonging to Mr and Mrs Seppanen, the loans owing to them by the trust in the amount of $2,076,137. There is no inconsistency, in my view, except that the earlier schedule omitted the assets consisting of the debts owed to Mr and Mrs Seppanen by the trust.

[11] As another instance, the defendant relied on apparent variances between the amount shown for the plant and equipment stated in the plaintiff's financial statements and

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[5] *Foss Export Agency Pty Ltd v Trotman* (1950) 67 WN (NSW) 1. See also *Covecorp Constructions Pty Ltd v Indigo Projects Pty Ltd* [2007] QSC 262, [25]-[28].

the amount shown for the plant and equipment stated in the trust's accounts. There is no reason why those amounts should be the same. Prima facie, they do not relate to the same plant and equipment. There was no evidence that they did and, therefore, there is no inconsistency. Further, in my view, the statement in the letter from ClarkeKann Lawyers to Coyne & Associates dated 25 November 2013 that the plant and equipment of the trust was worth "approx $300,000" is not inconsistent with the trust's financial statements prepared as at 30 June 2012.

[12] In my view, therefore, there is sufficient evidence in the affidavit material tendered by the parties to infer that the guarantees offered by Mr and Mrs Seppanen are valuable. However, from the description set out above, it is apparent that the precise information is mostly provided as at 30 June 2012 and is supported only by the general verification that the plaintiff's and the trust's position as at 30 June 2013 had not varied substantially to 30 June 2013, together with the valuation of the land as at December 2012.

[13] The adequacy of the value of the security offered is to be assessed against the defendant's estimate of $253,967 as the sum required by way of security up to the first day of the trial. However, in my view, there are some items which must be deducted from the defendant's estimate of costs. First, the estimate includes the costs of an application to strike out the statement of claim. That application was disposed of by me on 19 February 2014. The defendant did not obtain an order that the plaintiff pay those costs and there is no reason why their amount should be included in an order for security. That requires deduction of $7,839.50. Second, the defendant includes the costs of this application for security for costs in the assessment. It is arguable that not all of that amount should be included in the amount of security to be provided. The cases do not speak with one voice on the subject.[6] That requires a possible reduction of up to $13,416. Third, the defendant includes a sum for the costs of mediation. However, they are not costs which will necessarily be incurred in defending the proceeding. As yet, no mediation has been ordered. That requires a reduction of $14,769.

[14] Fourth, the plaintiff's relied on the affidavit of Ms Hapgood filed on 18 February 2014 including her statement of opinion in par 10 that the estimate of costs in the amount of $253,967 is manifestly excessive for the reasons she sets out in fourteen subparagraphs. It is unnecessary to separately analyse each of the suggested grounds for reduction. Some of them do not identify any amount. The most important is the contention which appears against ten of the items that the relevant costs will be incurred in defending not only this proceeding but the related proceeding brought by Mr and Mrs Seppanen personally against the defendant and will have to be apportioned between the costs of the two proceedings. As to that point, in my view, it is likely that there will be numerous items of common costs incurred by the defendant.

[15] Of course, this contention assumes that if the defendant is successful in the present proceeding, it will also be successful in the proceeding brought by Mr and Mrs

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[6] Compare *Jackson v Coal Resources of Queensland* (unreported, QCA, No 3262 of 1999, 15 July 1999) BC9906817, 2; *Togito Pty Ltd v Pioneer Investments Pty Ltd & anor* [2011] QCA 24; *Great Northern Developments Pty Ltd & ors v The Portland Downs Pastoral Company Pty Ltd* [2011] QCA 184; and *Murchie v The Big Kart Track Pty Ltd (No 2)* [2002] QCA 339; [2003] 1 Qd R 528, 531 [17]; *Ellis v Uniting Church in Australia Property Trust* [2008] QCA 238; *Toms & ors v Fuller* [2010] QCA 73, [47]-[48].

Seppanen arising out of the same facts for the losses that they allege that they suffered. The assumption will not be appropriate in every case where alternative or overlapping claims are made out of the same facts by different plaintiffs. However, let that assumption be made as a reasonably likely outcome if the defendant is successful in the present proceeding. The essential contention is that the defendant's costs will have to be apportioned as between the two proceedings. The general rule, in a single proceeding, where a court orders that the costs be paid by two or more persons, is that the liability for costs is joint and several.[7] Mr and Mrs Seppanen are not parties to the present proceeding. Still, the discretion as to the exercise of costs is wide. Even so, if an item of costs is one which is necessarily incurred for the defence of both proceedings, it does not seem to me that it must follow that the amount which is recoverable in the present proceeding by the defendant can only be half of the total. To make that order throws the risk of insolvency of any of the persons ordered to pay a proportion of the costs onto the defendant. It is not immediately apparent to me why that must be so.

[16] On the other hand, it should also be recognised that in "two plaintiff" cases against a defendant with but one set of costs, as a matter of discretion, an order for security for costs may not made against one of the plaintiffs if the defendant has another individual plaintiff against whom any costs order will also be made.[8] To avoid confusion, it should be clearly stated that this is a discretionary matter, not a reason why an order for security for costs must not be made.

[17] In my view, the appropriate exercise of the discretion in the present case is that if undertakings to pay the defendant's costs are offered to the Court by Mr and Mrs Seppanen,[9] including an undertaking by Mrs Seppanen in her capacity as trustee of the JA & JA Trust, the application for security should be dismissed. My motivating reasons for that conclusion are as follows. First, it is reasonably likely that Mr and Mrs Seppanen's undertakings will be worth more than the amount of the costs which will be incurred by the defendant up to the first day of the trial. Second, it seems to me that the likelihood is that Mr and Mrs Seppanen will in any event be exposed to those costs or most of them if they are unsuccessful plaintiffs in the other proceeding. Third, there may well be a reason to reduce the amount of the costs for which security is to be given in the present proceeding because of the circumstance that they will be costs incurred in common as between the two proceedings.

[18] However, if Mr and Mrs Seppanen including Mrs Seppanen in her capacity as trustee of the JA & JA Trust do not provide the undertakings, there should be an order that the plaintiff give security for costs in the sum of $150,000 either by way of payment into court or in a form satisfactory to the registrar.

[19] Having regard to the outcomes on the disputed issues, in my provisional view, the costs of the application for security for costs should be made costs in the proceeding. However, if either of the parties wish to make submissions as to a different order for costs they may do so.

[20] The orders I propose to make are:

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7 GE Dal Pont, *Law of Costs*, 3rd ed, par 11.2.

8 *Harpur v Ariadne Australia Ltd* (No 2) (1984) 2 Qd R 523, 531.

9 As to a form for such an undertaking, see *Bodycorp Repairers Pty Ltd v Maisano (No 4)* [2013] VSC 247, [33].

1. If John Seppanen and Judith Aileen Seppanen personally and Judith Aileen Seppanen in her capacity as the trustee of the JA & JA Trust undertake to the Court to pay the defendant's costs of the proceeding against the plaintiff up to the first day of the trial, in the event that an order for costs is made against the plaintiff in the proceeding, the order of the Court is that the application for security for costs is dismissed.

2. If John Seppanen and Judith Aileen Seppanen personally and Judith Aileen Seppanen in her capacity as the trustee of the JA & JA Trust do not undertake to the Court to pay the defendant's costs of the proceeding against the plaintiff up to the first day of the trial, in the event that an order for costs is made against the plaintiff in the proceeding, it is ordered that the plaintiff provide security for the defendant's costs of the proceeding up to the first day of trial in the amount of $150,000 by payment of that sum into Court or the provision of a bank guarantee in a form satisfactory to the Registrar on or before 14 July 2014.

3. Failing provision of the security in accordance with par 1 or 2 the proceeding is stayed until further order.

4. The costs of the application for security for costs be costs in the proceeding.