SUPREME COURT OF QUEENSLAND

CITATION:	*Plyable Pty Ltd & Anor v Go Gecko (Franchise) Pty Ltd & Ors* [2016] QSC 249
PARTIES:	**PLYABLE PTY LTD** (first plaintiff) **WILLIAM DAVID FEA** (second plaintiff) **v** **GO GECKO (FRANCHISE) PTY LTD** (first defendant) **NOEL PATRICK SCULLY** (second defendant) **JOHN MCKINSTRY** (third defendant) **GEOFF EDWARD DOYLE** (fourth defendant) **WAYNE LESLIE HOCKEY** (seventh defendant) **NEM AUSTRALASIA PTY LTD** (eighth defendant)
FILE NO/S:	SC No 988 of 2015
DIVISION:	Trial Division
PROCEEDING:	Applications for security for costs
DELIVERED ON:	31 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2016
JUDGE:	Bond J
ORDER:	**In relation to the application by the first defendant, the orders of the Court are that:** **1. By 4.00pm on 11 November 2016 the plaintiffs provide security for the first defendant's costs of and incidental to this proceeding up to and including the first day of the trial of this proceeding in the amount of $205,621.01.** **2. The security to be provided pursuant to the previous order be given by:** **(a) delivery to the Registrar of an irrevocable bank guarantee, in the amount of $205,621.01, drawn in favour of the Principal Registrar of the Supreme Court at Brisbane and which guarantee is otherwise on terms**

satisfactory to the Registrar; or

(b) payment into Court of the sum of $205,621.01.

3. The plaintiffs and the first defendant have liberty to apply in relation to the terms of the previous two orders upon first giving seven (7) clear business days written notice to the other parties.

In relation to the application by the second, third and eighth defendants, the orders of the Court are that:

1. By 4.00pm on 11 November 2016, the first plaintiff provide security for the second, third and eighth defendants' costs of and incidental to this proceeding up to and including the first day of trial, in the amount of $205,621.01.

2. The security to be provided pursuant to the previous order be given by:

(a) delivery to the Registrar of an irrevocable bank guarantee, in the amount of $205,621.01, drawn in favour of the Principal Registrar of the Supreme Court at Brisbane and which guarantee is otherwise on terms satisfactory to the Registrar; or

(b) payment into Court of the sum of $205,621.01.

3. The first plaintiff and the second, third and eighth defendants have liberty to apply in relation to the terms of the previous two orders upon first giving seven (7) clear business days written notice to the other parties.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – FACTORS RELEVANT TO EXERCISE OF DISCRETION – PLAINTIFF'S OR APPLICANT'S IMPECUNIOSITY – GENERALLY – where first defendant applies for security for costs against second plaintiff – whether it is appropriate for natural person to provide security in the circumstances

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – FACTORS RELEVANT TO EXERCISE OF DISCRETION – JUSTICE OF THE CASE – where second plaintiff made a series of statements that reveal an oppressive attitude towards litigation – whether justice of the case supports a security for costs order in the circumstances

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – FACTORS RELEVANT TO EXERCISE OF DISCRETION – COSTS OF PRIOR PROCEEDING OR EARLIER

APPLICATIONS UNPAID – where evidence that plaintiffs have unpaid costs liability pursuant to a previous costs order – where limited evidence going to assets and liabilities of the plaintiffs – where second plaintiff has offered personal undertaking to pay costs – whether reason to believe that the second plaintiff's undertaking is valuable

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – AMOUNT AND NATURE OF SECURITY – where first defendant and second, third and eighth defendants rely on separate estimates to quantify their probable costs to the first day of trial – where plaintiffs put in material contesting those estimates – whether defendants' evidence cogent and supports the quantum claimed

Australian Consumer Law (Cth), s 18
Corporations Act 2001 (Cth), s 1335
Trade Practices Act 1974 (Cth), s 52, s 82
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 670, r 671, r 672

Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd [2010] QSC 176, cited
Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd [2012] QCA 114, cited
Bryan E Fencott and Assocs Pty Ltd v Eretta Pty Ltd (1987) 16 FCR 497, cited
Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 744, cited
Mbuzi v Hall [2010] QSC 359, cited
Mbzui v Hall [2010] QCA 356, cited
Robson v Robson [2008] QCA 36, cited

COUNSEL: M D Martin QC, with C J Crawford, for the plaintiffs
D de Jersey for the first defendant
R P S Jackson QC, with A Nicholas, for the second, third and eighth defendants

SOLICITORS: Jason Nott Solicitors for the plaintiffs
Bennett & Philp Lawyers for the first defendant
DLA Piper Australia for the second, third and eighth defendants

Background

[1] In 2010 Go Gecko (Franchise) Pty Ltd (**Go Gecko**) as franchisor and Plyable Pty Ltd (**Plyable**) as franchisee entered into two Go Gecko real estate agency franchise agreements for the Moorooka and Annerley territories in Brisbane. For each franchise Plyable paid Go Gecko $66,000. Mr Fea (a director and shareholder of Plyable) was a guarantor of Plyable's liability to Go Gecko under the franchise agreement.

[2] Proceeding 3549/13 in this court was a proceeding commenced by Go Gecko on 18 April 2013. In that proceeding Go Gecko advanced a claim against Plyable and Mr Fea for unpaid franchise fees and equitable damages.

[3] On 7 October 2014, more than a year after Go Gecko's proceeding was commenced, Byrne SJA heard an application by Plyable and Mr Fea for leave to file a counterclaim. By the proposed counterclaim, Plyable and Mr Fea asserted several causes of action, namely damages for breach of contract, damages for contravention of statutory duties and equitable damages. His Honour dismissed the application, noting the applicants' delay in making the application and the absence of an expert quantum report supporting the proposed damages claim. During argument Byrne SJA said:

> Your side's had a year when the pleadings have been closed to have gone and got a report if it was serious about it. It just looks like a pleading that's designed to delay the prosecution of the plaintiff's case. I wouldn't be disposed to grant you leave to deliver a counter-claim which doesn't even begin to identify what the loss may be. Why don't you come back and start a proceeding when you're ready.
>
> …
>
> … But you put forward a pleading that will just be – your claims for damages will just be struck out. That will be the next thing, because you've made no attempt at all to quantify them. It makes it look as though it's not genuine when that happens…

[4] In his reasons refusing the application, his Honour stated:

> The counter claim asserts several causes of action, namely damages for breach of contract, damages for contravention of the statutory duty and equitable damages. But there has been no attempt whatsoever to quantify any of the claimed losses. This, [Plyable and Mr Fea's solicitor] accepts, is not consistent with the rules.
>
> If leave were now granted, there is every prospect that the due progress of the litigation which the plaintiff has commenced against the defendants would be intercepted.
>
> Ordinarily, in a case such as this, there would be little to be said for refusing leave in respect of a properly pleaded counter claim, and that for two reasons: one, because as [Plyable and Mr Fea's solicitor] points out there is, as yet, no request for trial; and, secondly, the applicant can always institute fresh proceedings.
>
> But the absence of any suggestion of particulars of the loss is an indication that the plaintiffs are very likely to be delayed in the due prosecution of their case if the counter claim is permitted to be delivered in this form, with [Plyable and Mr Fea's solicitor] accepting that his side will not be in a position to quantify the damages unless and until an accountant's report has been obtained.

[5] On 8 January 2015, Go Gecko's claim in proceeding 3549/13 was transferred by consent to the District Court.

[6] The present proceeding (988/15) was commenced in this court on 30 January 2015. Plyable and Mr Fea are now up to their fifth further amended statement of claim. As there articulated, they claim that the two franchise agreements (and Mr Fea's guarantees) were entered into in reliance upon misleading and deceptive representations made by Go Gecko concerning the anticipated financial performance of the two real estate agency franchises. They allege the representations were misleading or deceptive within the meaning of s 52 of the *Trade Practices Act* 1974 (Cth) (**TPA**). They also allege that the second defendant, Mr Scully, was knowingly concerned in any contravention of s 52 of the TPA by Go Gecko.

[7] Plyable contends that, by reason of Go Gecko's conduct, Plyable suffered loss and damage (which Plyable claims pursuant to s 82 of the TPA) as follows:

(a) the two amounts of $66,000 paid for the franchises;

(b) trading losses during the period they held the franchises, in the sum of $8,550;

(c) the value of the lost opportunity to pursue other real estate businesses in the same areas which would have proved to be more profitable; and

(d) any liability which they might incur to Go Gecko in the District Court proceeding.

[8] Plyable contends that the value of the lost opportunity to pursue other real estate businesses was a little over $29 million. It pleads that particulars of that sum will be set out in an expert report. I observe:

(a) Proceeding 988/15 was filed four months after the attempt was first made to introduce the claim as a counterclaim in the proceeding commenced by Go Gecko and only weeks after that proceeding was transferred to the District Court by consent.

(b) Although many months have passed since Byrne SJA's observations and it is pleaded that further particulars of the $29 million claim will be set out in an expert report, there is still no expert report as to quantum, let alone one which would provide support for such a large claim.

[9] In addition it is alleged that Plyable persisted with the franchise agreements and incurred additional losses in reliance upon representations made by Mr Scully and the third defendant, Mr McKinstry, which were misleading or deceptive within the meaning of s 18 of the Australian Consumer Law (**ACL**). Plyable says that if not for those representations, Plyable would have ceased operating the franchises from 19 July 2011. The representations made by Mr Scully and Mr McKinstry were said to be made by them on behalf of Go Gecko and further or alternatively, NEM Australasia Pty Ltd, the eighth defendant (which was a company of which they were both directors). The two natural persons and the two corporations are said to be responsible under the ACL for the loss which Plyable suffered, namely the $1,462,560 in income which could have been earned between 19 July 2011 and July 2012.

[10] Plyable also claims that Go Gecko breached the terms of the franchise agreements in various ways, in consequence of which Plyable suffered loss in the sum of $15,110,152. The same observations can be made in relation to that damages claim as I have made in relation to the $29 million lost opportunity claim.

[11] Plyable claims against the present applicants as follows:

(a) against Go Gecko and the second and third defendants, damages pursuant to s 82 of the TPA totalling in excess of $29 million;

(b) against Go Gecko –

(i) an order under the TPA, that the two franchise agreements are void;

(ii) damages for breach of contract in the sum of $15,110,152; and

(iii) an order that it should be indemnified in respect of any judgment awarded against it in the District Court proceeding;

(c) against Go Gecko and the second, third and eighth defendants damages under the ACL in the sum of $1,462,560; and

(d) costs and interest.

[12] Mr Fea does not advance a damages claim. He advances claims only against Go Gecko for –

(a) an order under the TPA, that the two franchise agreements are void;

(b) an order that he should be indemnified in respect of any judgment awarded against him in the District Court proceeding; and

(c) costs.

The applications for orders that the plaintiffs provide security for costs

[13] I have before me separate applications for security for costs by Go Gecko and by the second, third and eighth defendants.

[14] Go Gecko applies for orders that both Plyable and Mr Fea provide security for Go Gecko's costs in these terms:

1. Pursuant to Section 1335 of the *Corporations Act* or, alternatively, UCPR 670, by 4 PM on 31 May 2016 the [plaintiffs][1] provide security for the first defendant's costs of and incidental to these proceedings up to and including the first day of the trial of these proceedings in the amount of $314,028.98, such security to be provided by way of either:-
    a) payment into Court of the $314,028.98; or, at the first plaintiff's option,
    b) by way of an irrevocable bank guarantee drawn on an Australian bank in favour of the Principal Registrar of this Honourable Court at Brisbane ("Registrar") which guarantee is to be on terms that are satisfactory to the Registrar, and delivering that bank guarantee to the Registrar.
2. By 4 PM on 31 May 2016 the [plaintiffs are] to deliver to the first defendant's solicitors evidence of the payment of the $314,028.98 into Court or alternatively a copy of the bank guarantee, a copy of the letter to the Registrar enclosing that bank guarantee, and particulars of the date and time that that letter was delivered to the Registry of this Court.
3. Until such security is provided, the proceeding against the first defendant is stayed.
4. The plaintiffs and the first defendant have leave to apply to vary the terms of paragraph 1 of these Orders (including but not limited to varying the amount of the security of $314,028.98) upon first giving seven (7) clear business days written notice to the other parties.
5. The first and second plaintiffs pay the first defendant's costs of the Application.

[15] Plyable and Mr Fea had the same representation before me. Mr Fea resists Go Gecko's application on the basis that there is no evidence that would bring this case within the extraordinary circumstances which justify an order for security against an individual. Plyable also resists the application and argues that it should be dismissed because Mr Fea has provided a valuable undertaking to pay any costs awarded against Plyable.

[16] The second, third and eighth defendants apply for an order that Plyable provide them with security for their costs in these terms:

1. Pursuant to section 1335 of the *Corporations Act 2001* and rule 670 of the *Uniform Civil Procedure Rules 1999* (**UCPR**), by 4.00pm on 31 May 2016, the first plaintiff provide security for the second, third and eighth defendants' costs of and incidental to this proceeding up to and including the first day of trial, in the amount of $205,621.01.
2. Pursuant to rule 673 of the UCPR, the security to be provided pursuant to order 1 above be given by:
    a) delivery to the Registrar of an irrevocable bank guarantee, in the amount of $205,621.01, drawn in favour of the Principal Registrar of the Supreme Court at Brisbane and which guarantee is otherwise on terms satisfactory to the Registrar; or
    b) payment into Court of the sum of $205,621.01.
3. The first plaintiff pay the second, third and eighth defendants' costs of and incidental to the application to be assessed on the standard basis.

[17] Plyable resists the application by the second, third and eighth defendants on the same grounds that it resists Go Gecko's application against it.

Relevant principle

[18] Section 1335(1) of the *Corporations Act* 2001 (Cth) provides:

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[1] Go Gecko's application sought orders that both plaintiffs provide security. At one stage during the hearing Go Gecko indicated that it did not press its application in relation to the natural person, Mr Fea, but it altered that position and the question whether an order should be made against the natural person was dealt with.

Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if 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 in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

[19] The relevant parts of rr 670, 671 and 672 of the UCPR are as follows (emphasis added):

670 Security for costs

(1) **On application by a defendant, the court may order the plaintiff to give the security the court considers appropriate for the defendant's costs of and incidental to the proceeding**.

(2) This rule applies subject to the provisions of these rules, particularly, rules 671 and 672.

…

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

…; or

(h) **the justice of the case requires the making of the order**.

…

672 Discretionary factors for security for costs

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

(a) the means of those standing behind the proceeding;

(b) the prospects of success or merits of the proceeding;

(c) the genuineness of the proceeding;

(d) for rule 671(a)—the impecuniosity of a corporation;

(e) whether the plaintiff's impecuniosity is attributable to the defendant's conduct;

(f) whether the plaintiff is effectively in the position of a defendant;

(g) whether an order for security for costs would be oppressive;

(h) whether an order for security for costs would stifle the proceeding;

(i) whether the proceeding involves a matter of public importance;

(j) whether there has been an admission or payment into court;

(k) whether delay by the plaintiff in starting the proceeding has prejudiced the defendant;

(l) whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;

(m) the costs of the proceeding.

[20] *Robson v Robson* [2008] QCA 36 suggests that I must first find established the necessary prerequisites to the making of an order by a consideration of the matters referred to in r 671 and it is only if those prerequisites are established that I should embark upon a consideration of the discretionary considerations identified in r 672.

[21] In *Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd* [2012] QCA 114 at [18] Margaret Wilson AJA (with whom McMurdo P and Applegarth J agreed) observed (footnotes omitted, emphasis added):

[18] The application for security for costs was made pursuant to r 670 of the *Uniform Civil Procedure Rules* 1999 (Qld). As the primary judge observed, **the discretion to order security for costs is**

unfettered and should be exercised having regard to all of the circumstances of the particular case without any predisposition in favour of an award of security. Her Honour observed:

> "A number of cases have established that it is not possible to ascertain or list all of the matters relevant to the exercise of the discretion because factors clearly vary from case to case and the weight to be given in any circumstances depends on the circumstances of each case."

She referred in particular to the convenient summary of relevant considerations contained in Beazley J's judgment in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd*:

> "1. That such applications should be brought promptly. This is a principle of longstanding: … I should state immediately that there is no issue of delay in this case.
>
> 2. That **regard is to be had to the strength and bona fides of the applicant's case are relevant considerations**: …As a general rule, where a claim is prima facie regular on its face and discloses a cause of action, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide with a reasonable prospect of success. …
>
> 3. **Whether the applicant's impecuniosity was caused by the respondent's conduct subject of the claim**: …
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> 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: see … In *Yandil Holdings* Clarke J stated the principle in these terms:
>
> > '[t]he fact that the ordering of security will frustrate the plaintiff's rights to litigate its claim because of its financial condition does not automatically lead to the refusal of an order. Nonetheless it will usually operate as a powerful factor in favour of exercising the court's discretion in the plaintiff's favour.'
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> This factor is related to the next, namely:
>
> 5. **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**: see … The combined effect of these two principles was summarised by Meagher JA in *Hession* as follows:
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> > '… a company in liquidation against whom an order for security for costs 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 or creditors) … Finally, whilst it is both true and important that poverty must be no bar to litigation, what that means is that the courts must be astute to see that no person pursuing a claim which is not frivolous is precluded from doing so by the erection of obstacles which poverty is unable to surmount; it does not mean that proof of insolvency automatically confers an immunity from statutory provisions which deal with insolvent plaintiffs.'
>
> 6. **An issue related to the last guideline is whether persons standing behind the company have offered any personal undertaking to be liable for the costs** and if so, the form of any such undertaking: …
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> 7. **Security will only ordinarily be ordered against a party who is in substance a plaintiff, and an order ought not to be made against parties who are defending themselves and thus forced to litigate**: see … *Weily's Quarries v Devine Shipping* where Zeeman J stated:
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> > '[t]he general proposition that security ought not to be ordered where the proceedings are defensive in the sense of directly resisting proceedings already brought or seeking to halt self-help procedures is no more than that, a general proposition. It ought not to be elevated to being a rule of law. In many cases of that nature it could be considered oppressive to require security and that in itself may be sufficient to refuse to make an order … …'"

Discussion

Mr Fea admits there are no assets and boasts that someone else is funding the litigation and the defendants will be unable to recover their costs even if they succeed

[22] Before embarking upon an analysis of the other evidence relevant to the disposition of the applications, it is relevant to record a discrete and unusual aspect of the evidence before me. I do so because it is evidence which I was invited to conclude should colour, necessarily, many aspects of both the fact finding and discretion which are relevant to the determination of these applications.

[23] Between 18 April 2013 and 9 July 2013 Mr Fea sent a series of emphatic text messages to the second defendant in which he made statements which reveal his attitude to this proceeding, the defendants and the question of his exposure for costs awards. Amongst other things, he stated:

(a) "[m]y home transferred to my ex today as part of the divorce. No assets left so with nothing to lose and all to gain – its [sic] your money you throw away ☺ My sister will pay the bills, sweet eh!";

(b) "… [t]his is a good day for me. I told Conaghan the hit man idea would have been cheaper for you. ☺…";

(c) "[y]our costs will be twice what is estimated - (lawyers do that) the minute you lodge you allow me to take it to the world!! A public forum at last. …";

(d) "… [t]here is no win here for you but, if your [sic] smart, your only salvation is to have me go away never to be heard from again. …";

(e) "… I will fuck your business";

(f) "[y]ou will not beat me – you will not get me to submit. The law means very little Scully – whether you win or lose you get SFA. …";

(g) "… I will give you 24 hours to reach agreement otherwise I think you know the result";

(h) "I gave you the opportunity to call this off but, for some silly reason you think I actually care about the personal outcome ☺ …";

(i) '"The Law" is no use to you when I am broke sitting on a desert Island somewhere. Your [sic] a fool Scully – you actually 'need' me to be working towards something constructive – because until I agree to sign a waiver you are going down… I have no wife, I have no dependents, and I have debts…";

(j) "… [t]here is nothing you can threaten me with that I give a rats arse about (when you have nothing, you have nothing to give)…";

(k) "I tried to explain…to your lawyers any number of times. You need an agreement with me Scully – otherwise you know the cost to you far outweighs the cost to me – you, NEM, GG, McKinstry have a shit load more at stake than me… you are throwing money away that you will never get back…";

(l) "[u]ntil I agree to sign – you have nothing. I bet they told you this would be easy eh !! You up to $60K yet!? How much money has this really cost you ?? Good luck – still here, still defiant"; and

(m) "… [t]here is no money for you to get – you know this".

[24] Between 24 March 2013 and 20 April 2013 Mr Fea also made the following statements in correspondence about his dispute over his investment in the Go Gecko franchises:

(a) "[t]here will be no money for your fees, levies, breaches, liquidated damages no matter what the ruling so you are throwing money away (which I am very happy for you to do of course) … the assets you may 'think' I own were given to my ex as part of court orders";

(b) "[t]here is no money to recover from me but my sister/family will fund my court costs";

(c) "my new family will provide funding but not assets to pay your costs in any event. I see only pain for your clients";

(d) "Quite simply there is no win for your clients just as there is no win for me";

(e) "[t]here is no money for you to recover, your client will spend a fortune… I will be in contact with my sister to plan the next move…";

(f) "I have nothing of value to risk and all to gain";

(g) "[m]y writing is prolific, my ability immense – you should (by now) have some indication of my capacity, tenacity and voracity. I have further discussed the matter with my Sister…"; and

(h) "there is no money for you to gain anyway and the court will not allow you to close my 'only' means/source of income i.e. my office… I burn mainly time only… you burn a fortune".

[25] Plyable and Mr Fea contend that because these communications were made at a time when they were being sued by Go Gecko and before the present proceeding was commenced, I should regard them as irrelevant to the present proceeding.

[26] I reject that contention.

[27] The evidence was neither explained nor refuted by Plyable or Mr Fea. There is no evidence of any change in position as between the time the statements were made and the time of the current applications which dissuades me of their relevance. In my view, the evidence contained in Mr Fea's communications provides a strong reason to think that the justice of the case supports a security for costs order against both Plyable and Mr Fea personally. They contain admissions of impecuniosity both on his own behalf, and, in context, Plyable's behalf. And they reveal that the impecunious Mr Fea is boasting of his deliberate and cynical intention to avail himself of the fact that members of his family will stand behind him to provide him with funding for prosecuting the litigation, but will not be exposed to liability in respect of adverse costs orders.

<u>There is reason to believe that neither Plyable nor Mr Fea would be able to pay costs orders in favour of the defendants if ordered to pay them</u>

[28] Based on the evidence in the affidavit material before me, I make the following findings.

[29] First, Plyable has a paid up capital of $100 and I am not prepared to find that it has a substantial net asset position. In this regard, I observe:

(a) Plyable's says that its only asset of any worth is a rent roll which is variously referred to as having a value of between $100,000 and $230,000 (but in respect of which there is no independent evidence of value). But as to that:

(i) Between 22 and 23 October 2015 the plaintiffs' solicitor informed Go Gecko and the second, third and eighth defendants' solicitors that he was instructed that the rent roll was worth in excess of $100,000.

(ii) On 26 October 2015 Mr Fea swore on information and belief of a rental broker that the value of the rent roll was between $192,000 and $201,600; and

(iii) On 4 May 2016 the plaintiffs' solicitor stated that Mr Fea believed that the value of the rent roll had increased to between $220,000 and $230,000.

(iv) The explanation given by the plaintiffs for the increase in value ascribed to the rent roll was that the number of properties on the rent roll had increased from the date of Mr Fea's first estimate.

(b) I do not consider the evidence concerning the rent roll to be a reliable basis to reach a conclusion that Plyable has a substantial net asset position. First, the evidence that Plyable and Mr Fea relies on to establish value is sworn on information and belief as to the current market value of a rental broker and of Mr Fea himself rather than on the evidence of an independent valuer. Second, even if I were to accept the various values attributed to the rent roll by Mr Fea, those estimates tend to reinforce that the rent roll is a trading asset that is, by its nature, subject to fluctuations in value. It is clear that the rent roll is not a fixed asset but one which is likely to vary in value from time to time and no undertakings are offered which would provide any comfort as to the availability of that asset or as to the means by which its value may be protected.

(c) The evidence as to Plyable's liabilities seems to comprise the Plyable's solicitor deposing on information and belief from Mr Fea that "[Plyable] is not indebted to any other party other than its usual business operating expenses which are on terms". The deficiencies in such evidence are obvious. The proposition is, in any event, evidently wrong because Plyable and Mr Fea have an unpaid costs liability pursuant to a costs order made by me on 10 February 2016. That order has not yet been the subject of binding assessment by a costs assessor, but the second, third and eighth defendants claim payment of some $78,485.61.

(d) Mr Fea's correspondence and text messages referred to above appear to indicate that, at least in his view at the time of the communications, Plyable did not have a substantial net asset position.

(e) If Plyable had a substantial net asset position, I would have expected that it would have proved that net asset position and its unexplained failure so to do (and, in particular, its failure to provide any adequate evidence addressing its liabilities), leads me to infer that such further evidence as it could have adduced would not have assisted its position.

(f) After the hearing of the application, the plaintiffs' solicitor filed a supplementary affidavit which exhibited profit and loss statements (but not balance sheets) for the financial years ending 30 June 2013, 2014 and 2015. In each year Plyable made a trading loss. Notably, in the 2015 financial year even if one excludes $224,700 in legal expenses Plyable still only made a net profit of $24,700. This evidence does not help Plyable.

[30] Second, of Plyable's two shareholders, only Mr Fea has agreed to expose himself to personal liability for costs. However, I am not persuaded that I should attribute value to his undertaking. In this regard I observe:

(a) Mr Fea has an interest as joint tenant in a block of land, but the evidence suggests that there is no or little equity in the land, when one bears in mind the amount owed to the mortgagee.

(b) Mr Fea says that his only asset of any worth is a yacht. He says the yacht is worth $350,000 and has provided an undertaking not to sell or encumber the yacht without giving 14 days' notice of his intention to do so and there is no independent evidence of the value of the yacht because the amount attributed to it is only a value which Mr

Fea claims the vessel has for insurance purposes. Moreover, Mr Fea's ex-wife has an interest in the yacht and there is no evidence that she has yet relinquished that interest.

(c) The evidence as to his liabilities seems to comprise the his solicitor depositing on information and belief from Mr Fea that he is not indebted to any other party other than (1) his liability to the mortgagee already referred to (2) personal credit card debt in the amount of $26,770.71 and (3) a disputed person debt for $56,474 to another party. The proposition that there are no other liabilities is evidently wrong because Plyable and Mr Fea have an unpaid costs liability pursuant to a costs order made by me on 10 February 2016, to which I have earlier referred.

(d) Mr Fea's correspondence and text messages referred to above appear to indicate that, at least in his view at the time of the communications, he does not have a net asset position, let alone a substantial one.

[31] Third, if, as Mr Fea has asserted, someone within his family is funding the litigation, then that person has not provided any undertaking which would expose them to any adverse costs orders. The theoretical possibility of a costs order against a non-party does not defuse the persuasive impact of this consideration.

[32] The result is that I conclude that there is strong reason to believe that Plyable would not be able to pay costs orders in favour of the defendants if ordered to pay them. Although Mr Fea is a person standing behind Plyable and has offered his personal undertaking, that is not particularly significant in the circumstances of this case, given there is good reason to believe that his undertaking is not a valuable one, that no other undertaking is offered and given the evidence as to his cynical approach to this litigation.

The merits and genuineness of the plaintiffs' proceeding

[33] I do not have sufficient information before me to make any firm assessment as to the overall merits or genuineness of the plaintiffs' proceeding. I do, however, think that the matters to which I have referred at [8] and [10] above, provide reason to think that the quantum of Plyable's damages case may be viewed with some skepticism.

[34] I should also observe that I agree with the submission made by counsel for Go Gecko that the plaintiffs' conduct of the proceeding has been less than satisfactory and non-compliant with the obligation imposed by r 5 of the UCPR. As to this:

(a) The proceeding was commenced on 30 January 2015, but had not been served on the defendants when on 14 July 2015, an application was made to add three defendants and amend the claim and statement of claim.

(b) On 26 August 2015 the plaintiffs' application to have the matter added to the Commercial List was dismissed when the plaintiffs' Queens Counsel conceded that the amended claim and amended statement of claim needed to be entirely repleaded. Leave was granted to the plaintiffs to replead the amended claim and the further amended claim and further amended statement of claim were to be filed and served by 4.00pm on 23 September 2015.

(c) No amended claim and statement of claim were filed and served by 4.00pm on 23 September 2015.

(d) On 28 September 2015 a further amended statement of claim was filed and served. That pleading completely replaced the previous version and abandoned some claims completely.

(e) On 25 October 2015 a second further amended statement of claim was served. On 18 December 2015 a fourth amended statement of claim was filed and on 9 February

2016 a fifth amended statement of claim was filed. Ultimately I made the costs order in favour of the second, third and eighth defendants to which I have earlier referred.

(f) The long foreshadowed expert evidence containing the particulars of the damages case has not been obtained.

Considerations said to sound against the making of security for costs orders.

[35] I will address contentions which Plyable and Mr Fea advance as matters which sound against the making of the orders sought.

[36] First, they contend the orders should not be made because they would stifle the proceeding. I reject this contention. In light of the material which is in evidence, I would not be minded to draw that inference without some persuasive evidence which addressed and explained carefully and accurately –

(a) the financial position of Plyable and of Mr Fea; and

(b) the material which suggests that someone within Mr Fea's family is funding the litigation,

and the relationship of those matters to the question of the litigation being stifled.

[37] There is no material from the plaintiffs which does this.

[38] Second, they contend that they are not in substance plaintiffs. But so far as Plyable is concerned that contention cannot be maintained either in form or in substance. In form, it is the plaintiff. And in substance, given the nature and quantum of the allegations which Plyable advances, I am unwilling so to regard it, even if it were appropriate to have regard to the extant claim in the District Court. Because Mr Fea does not advance any claim for pecuniary relief, it might be said that he is in a different position. I will come back to this.

[39] Third, they say that the proceeding is genuine and they have good prospects of success. I have addressed this consideration already. I am not in a position to form that affirmative view. If anything, given the skepticism with which I presently view the quantum of Plyable's claims, this consideration sounds for rather than against the making of security for costs orders.

[40] Fourth, they say that if Plyable is impecunious that is wholly attributable to the defendants' conduct. It says much as to the way in which the plaintiffs have approached this case that the submission is made without admission that Plyable is in fact impecunious. There is no evidence proving this contention. I take the same approach to that contention as I have to the contention that the orders would stifle the proceeding.

[41] Fifth, they say that the application by Go Gecko for security for costs against Mr Fea is doomed to failure because there is no reason why the Court should take the extraordinary step of ordering that a natural person should provide security. I disagree. As to this:

(a) The principles that are applicable in circumstances where security for costs are sought against a natural person were helpfully discussed by Applegarth J in *Mbuzi v Hall* [2010] QSC 359 at [57] to [70].

(b) As his Honour there demonstrates, the general rule that an order for security for costs should not be made against an impecunious individual litigant within the jurisdiction, is a qualified one. His Honour's analysis was not overturned on appeal. The Court of Appeal accepted that the general rule was not absolute and a discretion to order security against a natural person existed and could be exercised in appropriate circumstances: see *Mbuzi v Hall* [2010] QCA 356 per Fraser JA (with whom Holmes and Muir JJA agreed) at [23].

(c) In the particular circumstances of this case, it seems to me that the following considerations justify an order against Mr Fea:

(i) In their conduct of this litigation to date, Plyable and Mr Fea have not complied with their obligations under r 5 of the UCPR: see the observations I have made at [8], [10] and [34] above.

(ii) Mr Fea has evidenced an intention to use litigation in an oppressive way with a view to his obtaining some negotiating advantage: see the discussion of the evidence at [22] to [28] above. The defendants should be protected against such cynical conduct.

(iii) Although the relief Mr Fea seeks is arguably defensive in nature because it is aimed at providing a foundation for negating the risk that he might be found liable to Go Gecko on its proceeding in the District Court, he has chosen to advance it in the context of a separate proceeding and in conjunction with the claims advanced by Plyable. Again, the defendants should be protected against the costs risk imposed on them by that conduct.

[42] Sixth, they say that if no security is awarded against Mr Fea, then security would not be awarded against Plyable because there would be no point making an order against the corporate plaintiff if the defendants have to meet the full extent of the corporate plaintiff's case at the instance of the natural person. There are two answers to this point. First, I think it is appropriate to make an order against Mr Fea. Second, Mr Fea does not advance any pecuniary claims. It is difficult to see why the allegations addressing that part of Plyable's case would have to be met in relation to Mr Fea's case.

Conclusion

[43] The prerequisites to the making of an order against Plyable are established by the evidence to which I have referred which establishes that there is good reason to believe that Plyable will not be able to pay the defendants' costs if ordered to pay them. That meets the threshold issue under both the *Corporations Act* and r 671.

[44] The prerequisites to the making of an order against Mr Fea personally exist because, for the reasons I have identified, the justice of the case requires the making of an order.

[45] Once that point is reached, that the appropriate exercise of discretion was to make an order against both plaintiffs became obvious. I have specifically addressed and rejected the arguments advanced by Plyable and Mr Fea against that course.

[46] The result is that I am persuaded that it is appropriate to make orders that Plyable and Mr Fea provide security for costs.

The appropriate quantum of the orders

[47] I have an unfettered discretion whether to order security for costs and my discretion is exercised only after taking account of all of the circumstances of the case: *Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd* [2010] QSC 176 at [33].

[48] In that case, Daubney J also held:

(a) (at [40]), it is for the applicant defendants to put on cogent evidence to support the quantum of security for costs claimed and, following, Einstein J in *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744, that once that is done 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; and

(b) (at [41]), that the judge hearing a security for costs application does not engage, in effect, in some sort of anticipatory assessment of costs. Rather the judge should apply the principles 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.

[49] Regarding quantum, Go Gecko relies on the affidavit of its solicitor, Mr Philp, which quantifies its probable costs to the first day of trial at $314,028.98. For their part, the second, third and eighth defendants contend, and I accept, that affidavit of Ms Devitt, the partner with carriage of this matter for the defendants, provides a careful and detailed estimate of costs on which the court can safely act, particularly having regard to the conduct of the matter so far and the amount of the claim. Ms Devitt estimates $205,621.01 as the sum required by way of security up to the first day of trial[2].

[50] On the other hand, the plaintiffs' solicitor has put in material which contests these estimates. As to this:

(a) He relies on a report by a costs assessor, to suggest that Go Gecko's recoverable costs will be $73,521.59 and that the recoverable costs of the other defendants will be $43,346.44.

(b) The costs assessor contends that the costs claimed by the defendants are excessive in various ways.

[51] I am not prepared to treat the plaintiffs' costs assessor's assessment as reliable. In the first place there is no evidence that the costs assessor had been briefed with the pleadings in the case. Second, the quantum of her estimates do not strike me as realistic in light of the nature of the issues which arise in this case. Third, the costs assessor advances some propositions which were risible. For example, she asserted that the defendants should not be entitled to incur the costs of obtaining independent expert opinion evidence, apparently in ignorance of the fact that the plaintiffs have pleaded they will particularise a $29 million damages case by reference to expert opinion evidence to be delivered. And her estimates of the time which should be taken by solicitors and counsel in preparation for a 7 day trial (9.5 hours and 3 hours respectively) were indefensible. Finally, she thought that the cost of obtaining a transcript was not appropriate, when plainly it would be.

[52] Although I regard the affidavits of Mr Philp and Ms Devitt as having provided cogent evidence to support the quantum of security for costs claimed, the comparison between the two estimates gives rise to an obvious concern. Unless there is some reason to think that there would be significantly different work involved in Go Gecko's defence as compared to the second, third and eighth defendants' defence (and no such reason was advanced before me), either Mr Philp has overestimated, or Ms Devitt has underestimated. Part of

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2 This is Ms Devitt's most recent estimate and was provided to the plaintiffs' solicitor in correspondence on 8 April 2016. The amount was reflected in the draft orders provided by the first, second and eighth defendants at the hearing: see [16] above.

the explanation might lie in the fact that Mr Philp has included for costs of a mediation and Ms Devitt has not. But that difference does not appear to be a complete explanation. To my mind the fairest way to resolve the logical difficulties is to make an order in favour of each applicant for the lower estimate and to grant liberty to apply.

Orders

[53] On the application of Go Gecko, the orders I make are:

(a) By 4.00pm on 11 November 2016 the plaintiffs provide security for the first defendant's costs of and incidental to this proceeding up to and including the first day of the trial of this proceeding in the amount of $205,621.01.

(b) The security to be provided pursuant to the previous order be given by:

(i) delivery to the Registrar of an irrevocable bank guarantee, in the amount of $205,621.01, drawn in favour of the Principal Registrar of the Supreme Court at Brisbane and which guarantee is otherwise on terms satisfactory to the Registrar; or

(ii) payment into Court of the sum of $205,621.01.

(c) The plaintiffs and the first defendant have liberty to apply in relation to the terms of the previous two orders upon first giving seven (7) clear business days written notice to the other parties.

[54] I should observe that Go Gecko sought an order that until security was provided, the proceeding against it be stayed. I have determined that the better course is to allow the question of stay to be dealt with by operation of r 674, which renders a stay order unnecessary. Go Gecko also sought an order requiring the plaintiffs to provide evidence of compliance with the order at the same time as providing the security. Rule 673(3) operates to require the plaintiffs to service notice of when and how security was given "as soon as practicable" after giving security. I think that is sufficient.

[55] On the application of the second, third and eighth defendants, the orders I make are:

(a) By 4.00pm on 11 November 2016, the first plaintiff provide security for the second, third and eighth defendants' costs of and incidental to this proceeding up to and including the first day of trial, in the amount of $205,621.01.

(b) The security to be provided pursuant to the previous order be given by:

(i) delivery to the Registrar of an irrevocable bank guarantee, in the amount of $205,621.01, drawn in favour of the Principal Registrar of the Supreme Court at Brisbane and which guarantee is otherwise on terms satisfactory to the Registrar; or

(ii) payment into Court of the sum of $205,621.01.

(c) The first plaintiff and the second, third and eighth defendants have liberty to apply in relation to the terms of the previous two orders upon first giving seven (7) clear business days written notice to the other parties.

[56] My preliminary view is that costs should follow the event in each application. However, I will hear the parties on that question.