SUPREME COURT OF QUEENSLAND

CITATION:	*Plyable Pty Ltd & Anor v Go Gecko (Franchise) Pty Ltd & Ors (No 2)* [2016] QSC 256
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 costs
DELIVERED ON:	9 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	31 October 2016
JUDGE:	Bond J
ORDER:	**The orders of the Court are that:** **1. The plaintiffs pay the first defendant's costs of paragraph 4 of the application filed 14 October 2015.** **2. The first plaintiff pay the second, third and eighth defendants' costs of the application filed 26 April 2016.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INTERLOCUTORY PROCEEDINGS – GENERALLY – where first defendant and second, third and eighth defendants have successfully sought security for costs – where defendants apply for the

costs of the applications – where plaintiff resists and submits appropriate order it to either reserve the costs or order that the costs be costs in the proceeding – appropriate order as to costs in the circumstances

Uniform Civil Procedure Rules 1999 (Qld), r 681

Caruso Australia Pty Ltd v Portec (Australia) Pty Ltd (1984) 1 FCR 311; 8 ACLR 818; 2 ACLC 286, cited
Collignon Developments Pty Ltd v Wurth (1975) 1 ACLR 314, cited
Combined Property Industries (Qld) Pty Ltd v Pullenvale Estates Pty Ltd (2001) 19 ACLC 765; [2001] QSC 76, cited
Frigger v Clavey Legal Pty Ltd [No 2] [2015] WASCA 258, followed
Heiliger v Marcus (1901) 18 WN (NSW) 253, cited
Jazabas Pty Ltd v Haddad [2006] NSWSC 880, cited
MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd [2002] FCA 821, cited
Mignon Cakes Pty Ltd v Hiltide Pty Ltd [2004] FCA 142, cited
Pacific Acceptance Corp Ltd v Forsyth (No 2) [1967] 2 NSWR 402; (1967) 85 WN (NSW) 715, cited
Plyable Pty Ltd v Go Gecko (Franchise) Pty Ltd [2016] QSC 249, referred to
Specialised Building Materials Pty Ltd v E U Occusted Pty Ltd (1981) 58 FLR 270; (1981) 37 ACTR 8, cited

Budd and Ryan, "Security for Costs – A Practitioner's Guide" (1990) 20 QLSJ 215
G E Dal Pont, *Law of Costs* (Butterworths, 3 ed, 2013)
R Quick and E Harris, *Quick on Costs* (Thomson Reuters)

COUNSEL: M Martin QC for the plaintiffs
D de Jersey for the first defendant
S Devitt (Sol) 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

[1] In *Plyable Pty Ltd v Go Gecko (Franchise) Pty Ltd* [2016] QSC 249, I made orders that the plaintiffs provide security for costs on the application by the first defendant and also orders that the first plaintiff provide security for costs on the application of the second, third and eighth defendants.

[2] In my reasons for judgment I expressed the preliminary view that costs should follow the event in each application but indicated that I would hear the parties on that question.

[3] The successful applicants submitted that costs should follow the event. They also relied upon parts of the evidence before me on the principal application which, they submitted, supported the view that the need for the fully argued applications was engendered by the unreasonable conduct of the plaintiffs in various respects.

[4] The plaintiffs submitted that I should order either that costs be reserved or they should be costs in the proceeding. In support of that submission the plaintiffs –

(a) cited the unreported decision of Holmes J (as the Chief Justice then was) in *Iron Gates Pty Ltd (in liq) v Richmond River Shire Council* [2002] QSC 458, which involved a successful application for security for costs, and an order that costs of the application be costs in the cause, but which contained no discussion of principle;

(b) admitted that other examples could be found of decisions involving successful applications for security for costs but in which orders were made that costs should follow the event; and

(c) also contended that an analogy could be drawn with applications for interlocutory injunctions, where costs are not usually awarded against the unsuccessful opposing party but are made either reserved or made costs in the proceeding.

[5] As to that last proposition, I do not accept the validity of the analogy. It seems to me that the differences between the nature of the discretion and the risks which must be addressed are too great to make the analogy useful.

[6] However support for the plaintiffs' contention can be found in *Quick on Costs*,[1] at [4.9710]), where the learned authors state:

> Where a defendant is successful in the application for security for costs, the costs of the application or further application are usually reserved to the trial (*Caruso Australia Pty Ltd v Portec (Australia) Pty Ltd* (1984) 1 FCR 311; 8 ACLR 818; 2 ACLC 286), or made costs in the cause: *Pacific Acceptance Corp Ltd v Forsyth (t/a Flack & Flack) (No 2)* [1967] 2 NSWR 402 at 409; *Specialised Building Materials Pty Ltd v E U Occusted Pty Ltd* (1981) 37 ACTR 8; Budd and Ryan, "Security for Costs – A Practitioner's Guide" (1990) 20 QLSJ 215 at 219. More rarely costs have been made to follow the outcome of the application: *Heiliger v Marcus* (1901) 18 WN (NSW) 253; *Collignon Developments Pty Ltd v Wurth* (1975) 1 ACLR 314 at 316. It is more usual and sensible to make the costs costs in the cause or reserve them because the application is posited upon a certain outcome to the trial, namely the plaintiff's failure at trial: Budd and Ryan, "Security for Costs – A Practitioner's Guide" (1990) 20 QLSJ 215 at 220.

[7] Of the cases cited in that passage, *Caruso* and *Pacific Acceptance Corp Ltd* are, like *Iron Gates Pty Ltd (in liq) v Richmond River Shire Council*, merely examples of the exercise of the costs discretion in a particular way. They contain no discussion of principle. Nor does the article to which reference is made. And, notably, the assertion that a security for costs application is posited upon (or assumes) the plaintiff's failure (or the defendants' success) at trial is wrong, because the Court makes no such assumption. Rather the discretion is much more nuanced: see the discussion of relevant principle in my judgment on the merits of the application at [18] to [21].

[8] Brief explanation for the orders made occurs in *Specialised Building Materials Pty Ltd*, *Heiliger v Marcus*, or *Collignon Developments Pty Ltd*. In *Heiliger v Marcus*, Cohen J said, "… as the defendant applied to the plaintiff to give security before taking out this summons the plaintiff must pay the costs of this application." The explanation provided in the other two cases appears sufficiently from the judgment of Kelly J of the ACT Supreme Court in *Specialised Building Materials Pty Ltd* (at 11 to 12):

> As to costs I note what was said by Needham J in *Collignon Developments Pty Ltd v Wurth,* supra, at p 316, where he said: "While I feel that there is perhaps some reason for saying that under s 363, because the assumption has to be made that the defendant will be successful in his defence the costs should be made costs in the proceedings, such a conclusion I think is probably unjustified. If it were correct then in every application under s 363 such an order should have been made, but my experience is that orders are frequently made for costs to be paid by one or other party to such application. I think as the first defendant has been successful the ordinary consequence should follow."
>
> While appreciating the force of an argument that I should follow the practice of a court where applications under s 363 are made much more frequently than in this court, I am nevertheless presently unpersuaded that an order that the defendant should pay the plaintiff's costs of the application is the correct one. I say this noting that the defendant by its counsel put its case moderately and helpfully.

---

1 R Quick and E Harris, *Quick on Costs*, Thomson Reuters, vol 2 (at update 55).

> My preliminary view is that I should order that the costs of the application be costs in the cause, treating it rather as though it was an application for directions. I will, however, hear argument on the question of costs.
>
> [After argument, the court ordered]: "… that the costs of the application up to the date of delivery of brief to counsel for the plaintiff be costs in the cause and thereafter the defendant pay half the plaintiff's taxed costs incurred after that delivery, such costs to include the costs of delivery of brief to counsel."

[9] The result is that the authorities cited by *Quick on Costs* do not, to my mind, establish the existence of the approach which the learned authors contend is the usual course.

[10] The question is also considered in Dal Pont's *Law of Costs*[2] in the following passage (relevant footnotes omitted and inserted in text):

> Consistent with the 'indemnity rule' that applies to civil proceedings in Australia, a defendant who is unsuccessful in an application for security will almost invariably bear the costs of the application. If, however, the defendant is successful – that is, an order for security is made – the costs of the application are often reserved or declared to be costs in the cause [See, for example, *Collignon Developments Pty Ltd v Wurth* (1975) 1 ACLR 314 at 316 per Needham J (SC(NSW)); *Mignon Cakes Pty Ltd v Hiltide Pty Ltd* [2004] FCA 142 at [19]-[21] per Allsop J]. The reason for this is that a court is reticent to order costs against a plaintiff in respect of an application concerning what is to eventuate if the plaintiff loses at trial. If the plaintiff is successful at trial, it is likely that the defendant will bear the costs of the application for security, whereas the opposite is likely to be the case where the defendant succeeds. Yet the matter remains in the court's discretion, and the circumstances in a particular case may justify the trial judge making no order as to the costs of the application for security [Cf *Combined Property Industries (Qld) Pty Ltd v Pullenvale Estates Pty Ltd* (2001) 19 ACLC 765 at 769; [2001] QSC 76 per Mullins J] or requiring the plaintiff against whom security is ordered to pay the costs of the security application [See, for example, *MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* [2002] FCA 821 at [38] per Sackville J; *Jazabas Pty Ltd v Haddad* [2006] NSWSC 880]. The latter may be appropriate where the court is concerned that making the costs of the security application costs in the cause (or costs in the appeal) will prejudice the defendant (or respondent) if the action (or appeal) does not proceed [See, for example, *Adult Guardian v B* (2002) 29 Fam LR 384; [2002] FamCA 874 at [93]-[94] (FC)].

[11] As to the authorities cited by the learned author:

(a) I have already addressed Needham J's discussion in *Collignon* (see [8] above).

(b) In *Mignon Cakes Pty Ltd v Hiltide Pty Ltd* [2004] FCA 142, Allsop J (as his Honour then was) addressed the question of the costs of the application at [19] to [21]:

> [19] The respondents seek costs of the motion. Mr Snow, in a letter dated 18 November 2003, sought security but not in any particular amount. Mr Lever has indicated that no security was offered prior to today. Mr White does not contest that. Questions of security in circumstances such as this are not easy when the applicant is adamant that its impecuniosity is caused by the conduct of the respondents. If it be the case that the applicant had the worth and profitability of this business misrepresented to it I think that the interests of justice would not be served by necessarily requiring them to pay the costs of this contested motion.
>
> [20] However, it is clear that the applicant is not in any position whatsoever to pay the costs and no evidence of the inability of those standing behind the applicant has been brought forward, one assumes because it cannot be brought forward to show that the action would be stultified. In those circumstances, I think it would have been reasonable for the applicant to offer some security. In the end, however, I do not think justice would be done at the moment by awarding costs on the motion. I say that in large part because I think on the material before me this case is going to descend to a point of distinction based on who is telling the Court the truth.
>
> [21] In those circumstances, the appropriate choice seems to me to be either to reserve the question of costs, or to make the costs costs in the cause. Theoretically the former would be preferable, but I think, in particular lest I not hear the case, although I am the docket judge, I think it appropriate to make an order that costs be costs in the cause, and I so order.

---

2 G E Dal Pont, *Law of Costs* (Butterworths, 3rd ed, 2013) at 28.61.

(c) In *Combined Property Industries (Qld) Pty Ltd v Pullenvale Estates Pty Ltd* (2001) 19 ACLC 765 at 769; [2001] QSC 76 at [29], Mullins J stated:

> [29] The applicant seeks an order for its costs of this application. One factor which militates against such order is the excessive amount in respect of which security was sought at the outset. On the other hand, the respondent merely opposed the giving of the security for costs without suggesting that it provide security in a more modest amount. On balance, because the applicant has succeeded, I am inclined to order that the respondent pay the applicant's costs of the application, but I will hear submissions from the parties on the appropriate costs order.

Neither of the versions of her Honour's reasons cited by the learned author reveal whether her Honour's initial inclination to order that the respondent pay the applicant's costs of the application was varied by the parties' submissions on that point. The reports do not suggest that her Honour disposed of the question of costs at all.

(d) In *MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* [2002] FCA 821, Sackville J's commentary on the question of the costs is limited to observing that as "the respondents have largely succeeded on their respective motions. I see no reason why costs should not follow the event".

(e) In *Jazabas Pty Ltd v Haddad* [2006] NSWSC 880, Simpson J made an order that the unsuccessful plaintiff pay the costs of successful defendants' security for costs applications and that the costs be paid forthwith (contrary to the default position in that jurisdiction that costs usually did not become payable until the conclusion of the proceedings). Her Honour held:

> 13 … The very purpose of an order for security for costs is to protect defendants against the prospect of incurring significant costs which, if the defendants are successful, the plaintiffs are likely to be unable to meet.
>
> 14 The fact that these costs have actually been incurred, as distinct from being putative costs, suggests a further reason that it would be appropriate to make such an order; that is, the very circumstances that give rise to the order for security for costs also support an order that the costs incurred in pursuing that application should be paid before further costs are incurred.
>
> 15 Accordingly, I will make an order of the kind proposed in favour of each of the defendants.

[12] In my view the authorities cited by Dal Pont do not establish that there is any particular "usual" approach to the question of the nature of the award which should be made in the event of a successful security for costs application. Nor do they provide evidence in support of the proposition the exercise of the costs discretion by reserving costs or making them costs in the cause occurs more frequently than the exercise of the discretion in any other way.

[13] Recently, in *Frigger v Clavey Legal Pty Ltd [No 2]* [2015] WASCA 258, the Court of Appeal of the Supreme Court of Western Australia rejected the notion that there was a "normal rule" along the lines of that contended for in *Quick on Costs*. The Court of Appeal held (citations omitted):

> [41] The respondent sought its costs of the application. The appellants resisted that application. They contended that where the respondent has successfully applied for security, the 'normal' order for costs is that the costs of the application be the respondent's costs in the appeal, and that the 'normal' order should apply.
>
> [42] We ordered that the appellants pay the respondent's costs of the application. These are our reasons.
>
> [43] The costs of and incidental to all proceedings in court are in the discretion of the court: s 37(1) of the *Supreme Court Act 1935* (WA). The discretion conferred is wide, but must be exercised judicially. It is not uncommon in an application for security for costs to be reserved, or for costs to be made in the cause.

[44] Nevertheless, in dealing with an application for costs in connection with a successful application for security under the relevant companies legislation, Needham J in *Collignon Developments Pty Ltd v Wurth*, observed:

> "While I feel that there is perhaps some reason for saying that under s 363 [of the Co*mpanies Act* 1961] because the assumption has to be made that the defendant will be successful in his defence the costs should be made costs in the proceedings, such a conclusion I think is probably unjustified. If it were correct then in every application under s 363 such an order should have been made, but my experience is that orders are frequently made for costs to be paid by one or other party to such application."

[45] In that case, his Honour considered that the plaintiff should pay the costs of the application on the basis that 'as the first defendant [had] been successful the ordinary consequence should follow'. See also, in this regard, for example, *Michael Bickley Pty Ltd v Westinghouse Electric Australasia Ltd*; *Lawless v Mackendrick [No 3]*; *Sunlea Enterprises Ltd as trustee for Drummond Cove Unit Trust v Pollock*.

[46] Whilst Needham J's observations in *Collignon* were made with reference to an order for security under the companies legislation, they are equally apposite in the context of an application for security for costs under r 44(1) of the *Supreme Court (Court of Appeal) Rules*. In this court, there have been cases where costs have followed the event where an application for security has been contested and unsuccessfully resisted. There is also authority in the appellate context in which the costs of the application for security have been ordered to be costs in the appeal, even though the respondent has failed in its application for security.

[47] Accordingly, in our opinion, there is no 'normal' order as suggested by the appellants.

[48] In this case, the factors that we had particular regard to were the fact that the respondent had invited the appellants to provide security without the need for making an application and the appellants' response did not, objectively, engage with the issues; the application was resisted on a number of bases which, objectively, had little or no arguable merit; and, generally speaking, the respondent succeeded on all of the material bases upon which it sought security.

[14] I think the approach taken by the Court of Appeal in *Frigger v Clavey Legal Pty Ltd* is the correct one. I should not approach the question of whether I should order costs against the unsuccessful respondent of a fully argued security for costs application on the basis that there is some "normal" or "usual" rule that costs of such applications should be reserved or made costs in the proceeding, although such orders are open to me to make. I have the discretion which the rules of procedure in this jurisdiction give me and I should exercise that discretion judicially having regard to the particular circumstances of the case.

[15] The general rule is that set out in UCPR r 681, namely that costs of an application in a proceeding "… are in the discretion of the court but follow the event, unless the court orders otherwise."

[16] In the particular circumstances of this case, I am not persuaded that I should otherwise order.

[17] **First**, the applications were fully argued and the applicants succeeded on all the bases on which they sought security. That I reduced the amount sought by the first defendant for reasons explained in my judgment on the merits of the applications does not affect that conclusion.

[18] **Second**, the successful applicant defendants had on a very early basis invited the plaintiffs to agree to provide security without the need for making applications, but the plaintiffs determined to oppose the applications: see, for the first defendant, the affidavit of Mr Philp sworn 14 October 2015 and the material referenced therein, and for the second, third and eighth defendants, the affidavit of Ms Devitt sworn on 26 April 2016. Their response to the reasonable requests evidenced in the solicitors' letters written on behalf of the applicant defendants was inadequate and unreasonable: see, for the first defendant, the affidavit of Mr Philp sworn 15 April 2016 and the material referenced therein, and, for the second,

third and eighth defendants, the affidavit of Ms Devitt sworn on 26 April 2016 and the material referenced therein.

[19] **Third**, the application was opposed on a number of bases which, objectively, had little or no merit. I refer in particular to (1) the inadequate evidence addressing the financial position of the plaintiffs, (2) the plaintiffs' failure to address at all the issues raised by the material which I described as revealing a cynical approach to the litigation against which the defendants must be protected, and (3) the plaintiffs' evidence addressing the quantum of security. I discussed each of these matters in my judgment on the merits of the applications.

[20] Accordingly, the orders I make are as follows:

(a) The plaintiffs pay the first defendant's costs of paragraph 4 of the application filed 14 October 2015.

(b) The first plaintiff pay the second, third and eighth defendants' costs of the application filed 26 April 2016.