SUPREME COURT OF QUEENSLAND

CITATION:	*Eastgate Properties P/L v J Hutchinson P/L* [2005] QCA 342
PARTIES:	**EASTGATE PROPERTIES PTY LTD** ACN 099 706 215 (plaintiff/respondent) **v** **J HUTCHINSON PTY LTD** ACN 009 778 330 (defendant/applicant)
FILE NO/S:	Appeal No 6074 of 2005 SC No 8870 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	16 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2005
JUDGES:	McPherson, Jerrard and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for security for costs granted** **2. The respondent is ordered to give security for the applicant's costs of the appeal in the sum of $15,000, to the satisfaction of the Registrar, within 14 days of 16 September 2005 and, in the meantime, all further proceedings are stayed** **3. The respondent is to pay the applicant's costs of, and incidental to, the application to be assessed on the standard basis**
CATCHWORDS:	APPEAL AND NEW TRIAL - APPEAL – PRACTICE AND PROCEDURE - QUEENSLAND - SECURITY FOR COSTS - where the respondent had brought an appeal against the dismissal of its claim against the applicant - where the learned trial judge had taken an adverse view of the credibility of the respondent's witnesses - where it was clear that the respondent would become insolvent if the appeal failed - whether security for costs should be ordered - whether the Court of Appeal should continue to adopt a conservative approach when determining the quantum of security for costs

Emanuel Management P/L (in liq) v Foster's Brewing Group Ltd & Ors [2003] QCA 552; Appeal No 7185 of 2003, 12 December 2003, cited

Luadaka v Dooley & Anor [2003] QCA 51; Appeal No 9380 of 2002, 21 February 2003, cited

Murchie v The Big Cart Track Pty Ltd (No 2) [2002] QCA 339; [2003] 1 Qd R 528, cited

Natcraft Pty Ltd v Det Norske Veritas [2002] QCA 241; Appeal No 9550 of 2001, 9 July 2002, cited

Thompson v Robinson [2005] QCA 253; Appeal No 30 of 2005, 22 July 2005, cited

COUNSEL: J B Sweeney for the applicant
A M Musgrave for the respondent

SOLICITORS: MacGillivrays for the applicant
Lynch & Co for the respondent

KEANE JA: Eastgate Properties Pty Ltd has brought an appeal against the dismissal, save in a comparatively minor respect, of its claim against J Hutchinson Pty Ltd. Hutchinson has applied for security for costs of the appeal. Eastgate's claim against Hutchinson arose out of Eastgate's engagement of Hutchinson in March 2003 to carry out building work associated with the development of land at Murarrie as an industrial warehouse complex.

During the course of the works, it was discovered that buildings erected by Hutchinson encroached on the neighbouring land. Hutchinson remedied all but one of these encroachments. The parties negotiated a deed that provided for the timing of the payment of the contract price by Eastgate to Hutchinson while also recognising Hutchinson's obligations to remedy the remaining encroachment. This deed was dated 6 August 2003.

The matters relevant to this application include Eastgate's prospects of success on appeal and whether or not it will be able to meet any costs order that might follow if it is unsuccessful. See, for example, *Lewis v Strickland and Anor* [2004] QCA 134; Appeal No 11464 of 2003, 30 April 2004 at [5]. The learned trial judge found that, on 16 September 2003, the parties orally agreed to a variation of the deed whereby Hutchinson's obligations in relation to the removal of the remaining encroachment were to be extinguished upon the provision of specified documents by Hutchinson to Eastgate.

His Honour's findings in this regard were based on his acceptance of the evidence given by Mr Hutchinson, Mr Quinn, Mr Norton and Ms Williams about that meeting and his rejection of the evidence of Mr George and Mr King. His Honour took an

adverse view of the credibility of Messrs George and King. That does not mean that the issues on appeal are necessarily likely to be resolved against the appellant, but it does mean that it is not possible to describe the prospects that Eastgate will succeed on the appeal as so strong as to render the risk of a hollow judgment for costs against it a consideration of little weight on an application for security for costs of the appeal.

Eastgate was a vehicle incorporated by Messrs Reichert, King and George to undertake the development at Murarrie. The material before the Court does not suggest that Eastgate has any assets which would be available to meet Hutchinson's costs of the appeal should it be unsuccessful. It is clear that Eastgate will become insolvent if its appeal fails.

Eastgate advances no suggestion that the appeal would be stifled if the order for security was to be made. In my opinion such a suggestion could not sensibly be made while Messrs Reichert, King and George refrain, as they have, from disclosing the financial resources available to them to fund the appeal or making any offer to do so. Thus, there is no reason to think the provision of security apt to protect Hutchinson against the costs of the appeal is likely to cause any material prejudice to Eastgate in terms of its ability to prosecute the appeal. In any event, that consideration is of less moment on appeal than at first instance. See *Luadaka v Dooley & Anor* [2003] QCA 51; Appeal No 9380 of 2002, 21 February 2003, and *Thompson v Robinson* [2005] QCA 253; Appeal No 30 of 2005, 22 July 2005.

In these circumstances, there is, in my view, a compelling case that Hutchinson should be protected from the risk that it will be left with a hollow judgment for the costs of the appeal in the event that Eastgate's appeal is dismissed. See *Natcraft Pty Ltd v Det Norske Veritas* [2002] QCA 241; Appeal No 9550 of 2001, 9 July 2002; *Murchie v. The Big Kart Track Pty Ltd (No 2)* [2002] QCA 339; [2003] 1 Qd R 528.

As to the quantum of security, Hutchinson now seeks security for costs of the appeal of the order of $17,000. The reasonableness of that sum is supported by expert assessment in the sum of about $23,000. Eastgate has also submitted a report by an expert assessing the likely cost of the appeal to be $10,861. Eastgate points out that the Hutchinson estimate includes an allowance of approximately $3,000 as the costs of preparing for this application. This amount relates only to the costs of a separate interlocutory proceeding, and so usually it would be inappropriate to order that this amount be provided as security for the appeal.

In this case, however, Hutchinson was forced to incur the cost of the present application by Eastgate's failure to respond in any meaningful way to Hutchinson's reasonable request for security for costs which was made on 9 August 2005. Accordingly, I would not delete this amount from consideration in fixing upon the appropriate sum for security. Further, Eastgate's assessment proceeds on the footing that costs already incurred on the appeal should not be the subject of security. That approach should not be accepted. The approach to be preferred is that supported by the judgment of French J in *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497.

This Court has generally adopted a conservative approach when it has come to determining the quantum of any amount to be awarded as security for costs. See *Emanuel Management Pty Ltd (in liq) v Fosters Brewing Group Ltd & Ors* [2003] QCA 552; Appeal No 7185 of 2003, 12 December 2003 at [16]. More importantly, it is not the practice of this Court closely to examine the competing estimates of the likely costs of an appeal as if it were performing in advance of the hearing of the appeal the exercise of assessment carried out by the Deputy Registrar after the appeal has been decided.

In the present case the evidence of a likely insolvency of Eastgate is not challenged. Bearing in mind the injustice which would arise if Hutchinson were to be left with a hollow judgment for costs in the event that the appeal is dismissed, and notwithstanding the conservative approach usually adopted by the Court to matters of quantum, I would favour fixing the amount of security in respect of costs of the appeal at $20,000.

Hutchinson acknowledges, however, that there is likely to be a sum of the order of $5,000 left over from $30,000 security for the costs of the trial given in December 2004 and that this sum should be deducted from the amount of any further security to be ordered by the Court.

In my opinion, therefore, Hutchinson's application for security should be granted. Eastgate should be ordered to give security for Hutchinson's costs of the appeal in the sum of $15,000 to the satisfaction of the Registrar within 14 days of today's date and, in the meantime, all further proceedings should be stayed. Eastgate should be ordered to pay Hutchinson's costs of, and incidental to, this application to be assessed on the standard basis.

McPHERSON JA: I agree with the reasons given by Justice Keane, and with the order his Honour has foreshadowed. I would add, rather and only by way of emphasis, that it is not

the function of this Court on an application like this for security for the costs of appeal to attempt to undertake or anticipate an assessment of the costs of proceedings at trial or to engage in a taking of accounts between the parties to those proceedings.

Whether and in what amount security should be ordered in this Court for the costs of a particular appeal involves the application of a discretionary judgment and should remain a relatively simple and straightforward process. The order should go in the form proposed by his Honour.

JERRARD JA: I agree with the reasons for judgment given by His Honour, Keane JA, and with the orders that His Honour proposed and with the further remarks of the presiding judge.

McPHERSON JA: The order will be as it is proposed in the reasons of Justice Keane.
