SUPREME COURT OF QUEENSLAND

CITATION:	*Programmed Solutions P/L v Dectar P/L* [2007] QCA 385
PARTIES:	**PROGRAMMED SOLUTIONS PTY LTD** ACN 110 261 679 (plaintiff/respondent) **v** **DECTAR PTY LTD** ACN 008 659 121 (defendant/applicant)
FILE NO/S:	Appeal No 4109 of 2007 DC No 19 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	9 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2007
JUDGES:	de Jersey CJ, Jerrard JA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application is refused, with costs to be assessed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – FROM INTERLOCUTORY DECISIONS – LEAVE TO APPEAL – where application for security for costs dismissed by District Court – where primary Judge satisfied that respondent plaintiff company unlikely to be able to meet costs order if made against it – where grounds on which application refused involved error of fact – where application for security made almost a year after claim filed – where director of respondent plaintiff offered personal guarantee – whether substantial injustice would result if leave to appeal refused PROCEDURE – COSTS – SECURITY FOR COSTS – PLAINTIFF – where application for security for costs dismissed by District Court – where applicant seeks leave to appeal – whether refusal of an order for security for costs determines substantive rights or procedural rights *Corporations Act 2001* (Cth), s 1335

District Court of Queensland Act 1967 (Qld), s 118
Uniform Civil Procedure Rules 1999 (Qld), r 670, r 617

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170, considered
AWA Ltd v Exicom Australia Pty Ltd (1990) 19 NSWLR 705, cited
Buckley v Bennell Design & Construction Pty Ltd (1974) 1 ACLR 301, cited
Harpur v Ariadne Australia Limited (No 2) [1984] 2 Qd R 523, considered
Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 744, cited
Knockholt Pty Ltd v Graff [1975] Qd R 88, cited
Pickering v McArthur [2005] QCA 294; Appeal No 4013 of 2005, 16 August 2005, cited

COUNSEL: C J Ryall for the plaintiff/respondent
D R Cooper SC for the defendant/applicant

SOLICITORS: Williams Graham Carman for the plaintiff/ respondent
Morrow Petersen for the defendant/applicant

[1] **de JERSEY CJ**: The circumstances leading to the present application are summarised as necessary in the reasons for judgment of Jerrard JA. It is necessary for the applicant to seek leave to appeal under s 118(3) of the *District Court of Queensland Act 1967* (Qld).

[2] The dismissal of an application for security for costs plainly concerns a matter of practice and procedure. In such cases, a grant of leave will usually depend on an applicant's establishing that if denied leave, the applicant will be subjected to "substantial injustice". See *Pickering v McArthur* [2005] QCA 294.

[3] It is difficult to see how that could be the case here, where the refusal of an order for security of costs does not impede the progress of the proceeding to a determination on the merits.

[4] Relying on *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, at 179, the applicant sought to distinguish this procedural case on the ground that the refusal of an order for security "effectively determines substantive rights". Counsel identified that as a party's "right to be protected against the costs of proceedings initiated against it by an indigent corporate plaintiff". The presently relevant "substantive right" is, however, the right to a determination on the merits.

[5] With respect to a submission made to us, I observe there is nothing in *Harpur v Ariadne Australia Limited* [1984] 2 Qd R 523 which would support a conclusion that a denial of security for costs amounts to a determination of substantive rights.

[6] Had security been ordered on an erroneous basis, security which the plaintiff could not provide, such that the proceeding would be terminated or forever stayed, then

the plaintiff's "substantive rights" would have been affected. But that is not so where the refusal of security will not deny or prejudice a hearing on the merits.

[7] What the applicant seeks to characterise as a substantive right is in truth no more than a procedural right, being a right to be protected in an appropriate case in relation to costs.

[8] If a refusal of security amounted to a graphically, rather than merely arguably, wrong exercise of discretion, the case for a grant of leave may nevertheless gain some arguable strength. But this exercise of discretion was in my view not even arguably wrong.

[9] Technical issues of set-off aside, what the primary Judge essentially held was this: the plaintiff will be unable to provide any substantial security which may be ordered; but as against the plaintiff's apparently uncomplicated and straightforward case, seemingly difficult to refute, it is the defendant's cross-claim which is the source of any potential complexity in the matter overall; in those circumstances, the plaintiff should not be required to furnish security, and especially after allowing for the aspects of delay, and proffered guarantee, to which my colleagues refer. There is nothing obviously wrong with a discretionary refusal of security in those circumstances: it was a course reasonably open to the Judge.

[10] Because of the basis on which I would refuse leave, I do not intend addressing, here, the particular challenges which Mr Cooper SC raised in relation to the primary Judge's reasoning. It is not necessary that I do so.

[11] I would refuse leave for this reason. The challenged order concerns a matter of practice and procedure. Because the proceeding may, notwithstanding the order, progress to a hearing on the merits, a refusal of leave will not lead to any "substantial injustice".

[12] As a matter of judicial policy, it is important to ensure that the passage of a proceeding to trial is not burdened by interlocutory skirmishes at an appellate level which consume time, money and other resources, and which will not necessarily contribute in a productive way to what really matters to the parties – that is, the determination of their substantive rights. That determination should be available expeditiously. Hence, where leave is necessary, the Court is reluctant to grant leave in procedural cases unless manifest injustice will otherwise arise. This is certainly not such a case.

[13] Also, litigants should not come to expect that applying for leave is the gateway to a comprehensive hearing on the merits – as effectively occurred here. An unduly broad canvassing of the merits, where leave is denied, may have significance in costs. It may lead, for example, to an order that an unsuccessful applicant pay indemnity costs. It should in most cases be possible to advance an application for leave, of this character, without dipping, in any comprehensive way, into the merits of the case.

[14] I would order that the application be refused, with costs to be assessed.

[15] **JERRARD JA**: This proceeding was an application for leave to appeal against an order made on 20 April 2007, in which a learned judge of the District Court

dismissed an application by Dectar Pty Ltd (the applicant) for an order that the respondent company Programmed Solutions Pty Ltd provide security for costs in a claim brought by Programmed Solutions Pty Ltd as plaintiff, against Dectar Pty Ltd as defendant. Dectar accepts that it has to demonstrate that the decision sought to be appealed is attended with sufficient doubt to warrant its being reconsidered, and show that a substantial injustice would result if leave were refused, supposing the decision to be wrong.

[16] Dectar's application for security for costs was filed on 2 February 2007, and the plaintiff's Statement of Claim was filed on 29 March 2006. Dectar has therefore delayed in asking for this security, and the plaintiff has incurred expense in preparing for trial. That is a factor telling against the defendant's application for an order for security. The application for security was said to be made either pursuant to s 1335 of the *Corporations Act 2001* (Cth), or under *UCPR* 670, or to the inherent jurisdiction of the District Court (citing *Harpur v Ariadne Australia Limited (No 2)* [1984] 2 Qd R 523 at 532).

[17] *UCPR* 671(a) relevantly provides that a court may order a plaintiff to give security for costs, if the court is satisfied the plaintiff is a corporation and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them. The applicant makes the point that the learned trial judge was satisfied that the plaintiff company was unlikely to be able to meet any order for costs against the defendant if the defendant was successful. The applicant referred to the remarks of Connelly J, giving what was the judgment of the Court, in *Harpur v Ariadne* at page 529, where His Honour wrote:

> "For practical purposes, once the legislature has made it legitimate to regard the lack of means of the plaintiff and its likely inability to meet an order for costs, this must always be a consideration of great weight and it will frequently be the determining factor."

[18] The reason the learned judge did not make an order for security for costs was because the judge considered the plaintiff's claim a relatively simple one. It was that it had provided the services of a Mr Putna to the defendant company for a certain number of hours, charged for those services at an agreed hourly rate of $100, invoiced the defendant for those hours at the agreed rate, and the defendant had paid them for a while, and then ceased to do so. The judge considered that the Notice of Intention to Defend and Defence, and the counter-claim, argued against a contract for the provision of services, and instead for an entire contract with a limited price, and with a number of implied warranties. The judge considered that the defence as pleaded was somewhat speculative, and that the defendant appeared really to be complaining about what the judge considered was faulty workmanship by the plaintiff.

[19] However, the judge also took the view that the defence and counter-claim contained no claim that the defendant was entitled to a set-off, which was the only basis on which the judge considered the defendant could refuse to pay the balance of the sums claimed by the plaintiff; that is, if that refusal was based on faulty workmanship. The judge concluded that the plaintiff would have little difficulty in proving its prima facie claim, and the controversy at trial would arise out of the defendant's pleading, not the plaintiff's. In those circumstances the judge was not prepared to make the required order.

[20] The applicant made the point that in paragraph 3(h) of the defence it did in fact expressly plead and raise a set-off in answer to, and in diminution of, the plaintiff's claim. The applicant also submits in this Court that its counter-claim is in truth one for an equitable set-off, because that counter-claim arises out of the assertedly poor performance of the work for which payment for the plaintiff sued. That submission referred to *AWA Ltd v Exicom Australia Pty Ltd* (1990) 19 NSWLR 705 at 710-711, *Knockholt Pty Ltd v Graff* [1975] Qd R 88 at p 90-91, per WB Campbell J, and to other authority on the nature of an equitable set-off. The applicant's first point about it having actually pleaded a set-off is factually correct, and I agree with the thrust of the second point. I add that it is not at all clear that the second argument was advanced to the trial judge.

[21] The plaintiff's Amended Statement of Claim pleads that in or about July 2004 it agreed with the defendant that it would, from then onwards, perform work on a software package which work had previously been performed for the defendant by the plaintiff's Director, Mr Putna. The plaintiff claimed the amount of $128,910. The defendant pleaded, inter alia, that the software package provided was incomplete, not fit for the purpose for which the defendant intended to use it, had not been designed and compiled with due care and skill, and cost much more than a reasonable amount the defendant might have paid for it. Those matters were all pleaded as part of the grounds on which the defendant was entitled to set-off matters to extinguish the plaintiff's claim. The defendant also counter-claimed for the amount of $518,875, consisting in part of assertedly wasted expenditure, the cost of a new system, and the cost of using the defendant's own staff.

[22] The defendant has pleaded a right of set-off, and a substantial counter-claim. The plaintiff is likely to be unable to meet any order for costs, if the defendant succeeds. The grounds on which the defendant's application for an order for security for costs failed appear, with respect, to have involved at least one error of fact, and a failure properly to characterise the defendant's counter-claim as capable of satisfying the description of an equitable set-off. But while the discretionary grounds identified in *UCPR* 672 regarding orders for security for costs do not particularly favour the plaintiff, the defendant has delayed in this application. Further, Mr Putna offered on 31 January 2007 to provide a personal guarantee to the defendant, up to the sum of $40,000, by way of security for costs. The defendant did not ask that Mr Putna provide evidence of the worth of his guarantee, nor take up the request that it draft a guarantee for execution by Mr Putna. That offer of a personal guarantee was also a relevant matter to the discretion to make or not make an order for security for costs.

[23] The plaintiff made the point that the defendant, although it described an intent to join Mr Putna, has not done so, and contended that any ordered security for costs should be no more than in the range of $20,000 to $30,000. It submitted the figure should be assessed conservatively, in reliance on an affidavit of a Mr Robert John Miller.

[24] That affidavit was filed on the plaintiff's behalf in the District Court, and the deponent expressed the opinion that the costs likely to be recoverable on the standard basis on a two to three day trial in the District Court, without substantial expert evidence or substantial or unusual disbursement, would be between $35,000 and $40,000.

[25] Because of the delay, the offer of a guarantee, and the matters discussed in the reasons for judgment of the Chief Justice and of Dutney J, I agree with the orders proposed by the Chief Justice.

[26] **DUTNEY J**: I have read the reasons of the Chief Justice with which I agree. I wish only to add the following.

[27] Even if this matter was revisited, the outcome is far from certain.

[28] The matters to which the learned primary judge referred are set out in the judgments of the other members of this Court. In addition, the material before the primary judge disclosed that prior to the application, Mr Putna, the natural person standing behind the respondent, offered to provide a personal guarantee for the applicant's costs of the action up to $40,000 in any form required by the applicant.[1] Having regard to the material, the limit of the guaranteed costs does not seem me to be an unrealistic estimate of the standard basis costs likely to be incurred from that point. By the time the application was brought, the action was, at least as far as the respondent was concerned, largely ready for trial. Pleadings had closed, lengthy particulars had been provided and the parties had exchanged lists of documents. The action had been on foot for more than 12 months. It is axiomatic that applications for security for costs should ordinarily be brought promptly and before the party against whom security is sought has expended a significant amount of costs.[2]

[29] Each of these matters individually is normally a strong discretionary factor against the award of security for costs although neither factor is necessarily determinative of the issue. However, the combined effect of these factors and the matters referred to below is such that I am not satisfied that the decision of the learned primary judge is attended by sufficient doubt to justify granting leave to bring an interlocutory appeal.

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[1] As to the significance of a natural person making himself liable for a defendant's costs see: *Harpur v Ariadne Australia Ltd* [1984] 2 Qd R 523 at 531.

[2] See *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [69] – [81]; *Buckley v Bennell Design & Construction Pty Ltd* (1974) 1 ACLR 301.