DISTRICT COURT OF QUEENSLAND

CITATION:	*Deters v Deters & Anor* [2019] QDC 112
PARTIES:	**MARK JOE DETERS** (plaintiff/respondent) **v** **MARGARETHA JACOBA DETERS** (first defendant/applicant) **and** **KAREL JOZEF DETERS** (second defendant/applicant)
FILE NO/S:	4155/18
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	8 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	27 June 2019
JUDGE:	Sheridan DCJ
ORDER:	**1. On or before 29 July 2019, the plaintiff pay into court the amount of $45,000.00 as security for costs pursuant to r 670 of the *Uniform Civil Procedure Rules* 1999 (Qld).** **2. The plaintiff pay the costs of the first and second defendants of and incidental to this application to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEDURE IN STATE AND TERRITORY COURTS – COSTS – SECURITY FOR COSTS – FACTORS RELEVANT TO EXERCISE OF DISCRETION - where plaintiff's solicitors withdrew as solicitors on the record – where defendants subsequently made an application for security of costs
COUNSEL:	T Jackson for the defendants/applicants
SOLICITORS:	Morgan Mac Lawyers for the plaintiff/respondent Mistry Fallahi for the defendants/applicants

Introduction

[1] The present application is one filed on 6 June 2019 in which the first and second defendants, as applicants, seek an order that the respondent/plaintiff provide security for the defendants' costs of defending the plaintiff's claim.

[2] Subsequent to the filing of the application but prior to the hearing of the application, the solicitors for the plaintiff filed an application for leave to withdraw as the solicitors on the record.

[3] The application for security was brought pursuant to r 670(1) of the *Uniform Civil Procedure Rules* (Qld) 1999 (**UCPR).** In proceeding with an application for security, the court is required to treat the pre-conditions for making an order for security as contained in r 671 separately from the discretionary factors set out in r 672 of the UCPR.[1]

[4] Mr Morgan, as the solicitor on the record for the plaintiff, confirmed that his firm had been served with the application and supporting affidavits and confirmed that he had forwarded the application and supporting affidavits to the plaintiff. An email from the plaintiff to Mr Morgan said to be sent on 24 June 2019 at 7:51pm (Exhibit 4) makes it clear the plaintiff had knowledge of the application. In his email, while the plaintiff questioned the likely success of the defendants' application, the plaintiff did not request that the application be adjourned.

[5] In granting the solicitors on the record leave to withdraw, leave was made subject to a condition that the offices of the solicitors remain as the address for service until such time as a new solicitor is appointed or the plaintiff files an address for service in accordance with the UCPR.

Principal Proceedings

[6] The plaintiff is the adult son of the defendants. In the principal proceedings, the plaintiff claims various forms of relief arising out of the purchase by the parties of two properties: one in Queensland and one in Western Australia (**the Properties**). The defendants subsequently purchased a third property, situated in New South Wales, using the equity in the Properties.

[7] At the time of purchase of each of the Properties, the plaintiff was granted a $1/100^{th}$ of the estate in fee simple as tenant in common with the first defendant holding a $60/100^{th}$ share and the second defendant holding a $39/100^{th}$ share.

[8] The plaintiff claims that the unconscionable conduct of his parents, the first and second defendants, deprived him of an equitable interest in the Properties equal to his contribution to the acquisition of the Properties: the plaintiff having become jointly and severally liable for the debt owing to the mortgagors of the Properties. It is not alleged by the plaintiff that he contributed any capital to the purchase of any of the properties. The plaintiff alleges that he did not obtain a registered interest equal to his contribution and received no income from the Properties and obtained no interest in the third property.

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1 *Robson v Robson & Anor* [2008] QCA 36 per Keane JA.

[9] The property in Western Australia was sold by the defendants in November 2005 and the property in New South Wales was resumed by the State Government in February 2010.

[10] The plaintiff claims the defendants have not accounted to the plaintiff for the income received from those properties nor the proceeds from the sale of those properties.

[11] Included in the claim is relief by way of equitable compensation and declarations that the defendants hold such part of their registered interest in the estate in fee simple of the Queensland property on a constructive trust for the plaintiff equal to his equitable interest and declarations that they held such part of their registered interest in the other properties on constructive trust.

Prerequisites for security for costs

[12] In making submissions on behalf of the defendants reliance was placed upon subparagraphs (c), (e) or (h) of r 671 of the UCPR. In support of the application, in submissions reference was made to:

(a) The residential or business address of the plaintiff in the originating process being the address of his solicitors. There is otherwise no address for the plaintiff stated in either the claim or statement of claim.
(b) The last known mailing address stated in an email from the plaintiff to the solicitors for the defendants sent on 28 November 2017 was Mark Deters at L'Engayresque, Roqueredonde 34650, France.
(c) The absence of a response to the numerous requests made by the solicitors for the defendants asking for a current residential address for the plaintiff.

[13] In an email sent 26 June 2019 the plaintiff's solicitors asked the plaintiff to provide an address at which he may be served once they withdraw from the record as solicitors. In response, the plaintiff stated "my parents solicitors know how to contact me."

[14] It is clear from the plaintiff's most recent communication to his solicitor (being part of Exhibit 3) that the plaintiff is clearly choosing not to respond to the question asked.

[15] In making the order granting the plaintiff's solicitors leave to withdraw, the plaintiff's solicitors agreed to the inclusion of an order that the address for service remain care of their officers until such time as a notice of change of solicitors is filed or an address for service for the plaintiff in compliance with the UCPR is filed.

[16] On the basis of the information available, it would be reasonable to infer that the plaintiff is currently not ordinarily resident in Australia and in fact, remains in France. The plaintiff has not sought to refute the statements made in correspondence that he remains ordinarily resident in France.

[17] In the circumstances, and particularly given the continuing refusal to provide a residential address and given the broad jurisdiction given to the court by the words, in sub-paragraph (h) of r 671, "the justice of the case requires the making of the order", the court is satisfied that, subject to consideration of the discretionary factors

listed in r 672, the prerequisite for security for costs in terms of r 671 has been established.

Discretionary factors

[18] The defendants submit there is basis for concern as to whether they will be able to pursue any judgment obtained against the plaintiff.

[19] In submissions, counsel for the defendants referred to the following factors:

(a) the means of those standing behind the proceeding;
(b) the merits and genuineness of the proceeding;
(c) the enforceability of an adverse costs order against the plaintiff; and
(d) the costs of the proceeding.

[20] Despite requests being made in correspondence since as early as 11 December 2018 (see Exhibit B to the affidavit Bhavesh Mistry sworn 30 May 2019), no evidence has been provided by the plaintiff as to his ability to meet any adverse costs order. There is evidence of property searches conducted on behalf of the defendants. That evidence suggests that the plaintiff is not the owner nor has any interest in any property in this jurisdiction, except his minor interest in the property the subject of these proceedings.

[21] That factor alone is a persuasive reason for the making of the order sought.

[22] In submissions, counsel for the defendants also referred to the relative strength of the plaintiff's claim. Counsel appropriately acknowledged that whilst the strength and bona fides of the plaintiff's case are relevant considerations, usually the court should proceed on the basis that the claim is both bona fide and has reasonable prospects and "should not go into the merits of the claim unless it can be demonstrated that there is a high degree of probability of success or failure."[2]

[23] Reference was made to three deficiencies that are evident on the face of the statement of claim, which it was said demonstrate that "there is a high degree of failure". It was acknowledged that the issues have not been raised as a matter of defence and it was accepted that they need to be. Further, it was acknowledged that some of the deficiencies might be capable of rectification through amendment of the statement of claim.

[24] As currently pleaded there seems some strength to the submissions made by the defendants. However, in the circumstances, it is unnecessary to further analyse prospects.

[25] Despite declining to make any appearance on the hearing of the application, through an email to his solicitors (Exhibit 4), the plaintiff has stated that any application for security must fail "as I can successfully argue that the defendants are 'in substance a plaintiff'". Counsel for the defendants appropriately brought the email to the court's attention. In the email, the plaintiff stated, "the legal action I took was in direct response to an eminent action against me by the defendants on a different front. Namely, their intention to proceed with an application to appoint a trustee to force the sale of the property in dispute. My action was therefore taken in defence

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2 *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 514 per French J.

to their actions. I expect that a costs for security application will be difficult for the defendants if they still want to proceed."

[26] If the court were to conclude, that the plaintiff was in substance a defendant, then that would be a factor to be considered before making an order. The court will be guided by the substance not the form: in truth is it the plaintiff who is being attacked.

[27] The request which was made by the defendants which was said to give rise to the proceedings was a request for a trustee to be appointed to permit the sale of a property in dispute. The court does not accept that the plaintiff was forced to bring these proceedings as a response to that request. The plaintiff does not suggest that he is entitled to have the property transferred to him. At best, his claim is a claim for monies which could equally have been determined following or as part of the application for the appointment of a trustee for sale. The plaintiff had a choice.

[28] In those circumstances, I do not accept that the plaintiff should be treated as though he was the defendant.

[29] In all the circumstances, I am satisfied that an order for security should be made.

Amount of security

[30] Having so decided, it is necessary to determine the appropriate amount of security to be awarded.

[31] The affidavit of Bhavesh Mistry sworn 30 May 2019 contains an analysis of the likely costs of defending the proceedings. The costs incurred up to 30 May 2019 being the date of the swearing the affidavit were $15,766.58. The estimates are based on an hourly rate for counsel of $475.00, an hourly rate of $550.00 for Mr Mistry as the principal solicitor and $440.00 for other solicitors at his firm and $330.00 for paralegals.

[32] The costs up to the hearing of the security for costs application were estimated to be in the range of between $8,750.00 and $18,200.00.[3] The costs of counsel appearing at the security for costs hearing was estimated to be $1,000 to $2,000.00. Counsel was not instructed by solicitors at the hearing so no further allowance needs to be included for costs of the actual hearing. The costs of preparation if the matter proceeded to final hearing are estimated to be between $30,300.00 and $49,100.00.[4]

[33] Based on the amounts stated in the tables in the affidavit of Bhavesh Mistry, the total solicitor/client costs anticipated to be incurred to defend the proceedings up to a conclusion of trial are $55,816.58 to $85,066.58. The total recoverable party/party costs, calculated by assuming the recovery of 60% of the total amount of costs, are $33,489.95 to $51,039.95.

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3 In the affidavit of Bhavesh Mistry, in paragraph 16 there is reference to an amount of $15,750 to $24,200, which amounts do not accord with the amounts stated in the table in paragraph 16, being the amounts referred to herein.

4 In the affidavit of Bhavesh Mistry, in paragraph 18 there is reference to an amount of $27,800 to $44,100, which amounts do not accord with the amounts stated in the table in paragraph 18, being the amounts referred to herein.

[34] Based on the hourly rates and the total amount of costs, the estimate appears to be conservative. In the circumstances, it is appropriate to make an order for security for costs in favour of the defendant in an amount of $45,000.00.

Orders

[35] Accordingly, the court makes the following orders:

1. On or before 29 July 2019, the plaintiff pay into court the amount of $45,000.00 as security for costs pursuant to r 670 of the *Uniform Civil Procedure Rules* 1999 (Qld).
2. The plaintiff pay the costs of the first and second defendants of and incidental to this application to be assessed on the standard basis.