

DISTRICT COURT OF QUEENSLAND

CITATION: *WPG 28 Pty Ltd & Anor v Dowling & Ors* [2019] QDC 139

PARTIES: **WPG 28 PTY LTD**
(first plaintiff)

and

WALKER DEVELOPMENT SERVICES PTY LTD
(second plaintiff)

v

CRAIG ANTHONY JOHN DOWLING
(first defendant)

and

WESLEY STREET PTY LTD
(second defendant)

and

WESLEY DEVELOPMENTS PTY LTD
(third defendant)

FILE NO/S: 1906/19

DIVISION: Civil

PROCEEDING: Application

ORIGINATING
COURT: District Court, Brisbane

DELIVERED ON: 8 August 2019

DELIVERED AT: Brisbane

HEARING DATE: 11 July 2019

JUDGE: Sheridan DCJ

ORDER:

- 1. On or before 5 September 2019, the plaintiffs pay into court the amount of \$70,000.00 as security for the defendants' costs of the proceeding pursuant to r 670 of the Uniform Civil Procedure Rules 1999 (Qld).**
- 2. The plaintiffs pay the defendants' costs of this application to be assessed on a standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEDURE IN STATE AND TERRITORY COURTS – COSTS – SECURITY FOR COSTS – FACTORS RELEVANT FOR EXERCISE OF DISCRETION – where defendants made an application for

security of costs – whether security should be awarded and, if so, the appropriate amount

Uniform Civil Procedure Rules 1999 (Qld)
Corporations Act 2001 (Cth)

COUNSEL: DV Ferraro for the applicant defendants
No appearance for the respondent plaintiffs

SOLICITORS: O’Shea Partners for the applicant defendants

- [2] The first, second and third defendants seek an order that the first and second plaintiffs provide security for the defendants’ costs of defending the plaintiffs’ claim.
- [3] The plaintiffs’ claim and statement of claim was filed on 30 May 2019 by its lawyer, DSS Law. The defendants were served on 13 June 2019.
- [4] The application for security and supporting affidavit of Mr Thomas O’Shea of O’Shea and Partners, as solicitor for the defendants, was served on the plaintiffs by email sent to the plaintiffs’ solicitors on 28 June 2019. The application was to be heard on 11 July 2019. The Notice of Intention to Defend and Defence was served by email on the plaintiffs’ solicitors on 4 July 2019.
- [5] On 10 July 2019, Mr Thomas Klepper of DSS Law, as solicitor for the plaintiffs, sent by email to the defendants’ solicitors a Notice of Acting in Person. The Notice stated that the First and Second Plaintiffs are no longer represented by DSS Law and are now acting in person.
- [6] At the hearing of the application, there was no appearance for the plaintiffs.

Principal proceedings

- [7] The plaintiffs’ claim seeks damages for breach of an agreement and, further and in the alternative, damages for misrepresentation or damages for misleading and deceptive conduct under the Australian Consumer Law and, further and in the alternative, a declaration of constructive trust, equitable damages and restitution for unjust enrichment.
- [8] The alleged agreement involved the transfer of a property located at Lutwyche which had been purchased by the first plaintiff for the purpose of developing the property to construct 32 residential apartments. The plaintiffs’ allege that pursuant to the agreement, the property was to be transferred for an agreed sum to the first defendant and a project management agreement was to be entered into between the second plaintiff and the second defendant.
- [9] It is alleged the first defendant incorporated the second defendant for the purpose of facilitating the sale contract. The project management agreement is alleged to have been entered into by the second plaintiff and the first defendant on behalf of the third defendant.

- [10] It is alleged the first and/or third defendants failed to perform their obligations under the project management agreement and in breach of the head agreement the first and/or second defendants sold the property to a third party buyer.
- [11] The defendants admit the execution of a sale contract for the property by Walker on behalf of the first plaintiff but otherwise deny the existence of any legally binding agreement on the terms as pleaded by the plaintiffs and deny any breach of any agreement and any claim for damages.

Application for security

- [12] The application for security was brought pursuant to r 670 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), as an alternative s 1335(1) of the *Corporations Act 2001* (Cth) and as a further alternative the inherent jurisdiction of the court.
- [13] In proceeding with an application for security pursuant to r 670 of the UCPR, the court is required to treat the preconditions for making an order for security as contained in r 671 separately from the discretionary factors set out in r 672 of the UCPR.

Pre-requisites for security for costs

- [14] In making submissions on behalf of the defendants, reliance was placed on r 671(a) of the UCPR. Sub-paragraph (a) of r 671 provides that the court may order a plaintiff to give security for costs only 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.*” In support of the application, the defendants relied upon:
- (a) Property searches showing that the plaintiffs do not own or have any interest in real property in Queensland;
 - (b) An allegation in the Statement of Claim that the first defendant knew of the “the First Plaintiff’s dire financial circumstances”, in around March 2018;
 - (c) Company searches show that the first plaintiff has share capital of only \$100 and the second plaintiff has share capital of only \$1;
 - (d) The adverse inference to be drawn by the plaintiffs’ failure to produce evidence showing that it is not impecunious despite the correspondence from the defendants’ solicitors to the plaintiffs’ solicitor on 13 June 2019 and 27 June 2019, foreshadowing the application for security for costs on the basis of the plaintiffs’ impecuniosity.
- [15] In light of the above, it was submitted that the precondition in r 671(a) of the UCPR was met such that the jurisdiction to order security for costs was enlivened. Furthermore, it was submitted that the above matters also satisfy the test set out in s 1335(1) of the *Corporations Act 2001* (Cth).

- [16] On the basis of the material provided to the court, it would seem that the plaintiffs are impecunious. They certainly did not produce any evidence to the contrary. The Courts jurisdiction to order security for costs is enlivened.

Discretionary factors

- [17] Rule 672(d) of the UCPR provides that the impecuniosity of a corporation is a discretionary factor the court may have regard to in circumstances where the jurisdiction is enlivened by r 671(a) of the UCPR. In r 672(1), a further discretionary factor of relevance is the enforceability of any adverse costs order against the plaintiffs.
- [18] The defendants also rely upon emails from the director of the first plaintiff to the first defendant in support of a submission that the first plaintiff was willing to transfer assets for the purpose of defeating claims and creditors. In an email exchange between Mr Walker as the director of the first plaintiff and apparently on behalf of the Walker Property Group and the first defendant on 19 and 20 September 2017, the sale of the Lutwyche site was discussed. In the first email in the chain dated 19 September 2017, Mr Walker stated:

There are three interested parties in my Lutwyche site, but all negotiations are moving at an extremely slow pace, and all three are quite different deals. This being the case, I think it is definitely time to request that you refinance the site. As you said, to get the best price will take time.

The current debt is \$1.4m. I would like this paid out and request another \$200k cash out to keep myself going. I want to transfer the site into a new, clean entity to start afresh. I would be happy to have you as a Director of the new entity for extra security should you wish. I realise that there will be costs associated with transferring, and this would come out of the requested \$200k cash out portion, as would Land tax for which I have just received the bill.

Let me know what needs to happen and how you would like to proceed. If you want to meet up to discuss anything, then I am pretty free most of the week.

- [19] In responding to that email, the first defendant asked, “Why do you need to transfer into a new co?”
- [20] Mr Walker responded by email on the same date:

It is the cheapest and cleanest way to get out of that bad deal I told you about with the agent that is trying to force me into taking these ‘trade dollars’ as part payment for units.

I can either buy him out for \$100k, possibly more, or transfer it to a separate entity and pay roughly \$50k in stamp duty.

My Lawyer has advised that if I transfer it to a new entity, then he has no claim against me. If I don’t, then he has the sole rights to sell units until completion at extortionate rates.

I made a bad decision under pressure when I accepted his offer. Saying that, if he had performed as he promised, then it would have been plain sailing and we would be under construction by now.

- [21] In the emails there is certainly reference by Mr Walker to the existence of significant debts with respect to the property. The inference is that when Mr Walker was referring to debts owed that he was referring to the financial circumstances of both the first and second plaintiffs, or at least the first plaintiff as it was the owner of the property intended to be developed. Absent further context, however, I am not prepared to draw the conclusion sought by the defendants.
- [22] The plaintiffs do not own or have an interest in any real property in Queensland and no apparent means of satisfying any adverse costs order.
- [23] In all the circumstances, I am satisfied that an order for security should be made.

Amount of security

- [24] Having so decided, it is necessary to determine the appropriate amount of security to be awarded. The affidavit of Mr O'Shea sets out the estimate of likely costs in defending the proceeding up to the first day of trial. It was submitted that the estimate was on the low side as it does not include an amount for costs already incurred nor does it include an amount for "care and consideration".
- [25] Unfortunately, however, the estimate does not provide an hourly rate for the solicitors working on the matter nor counsel, nor provide any estimate as to the likely hours to be incurred in completing the various steps.
- [26] The estimate is very wide ranging with the total professional fees between \$100,500 to \$139,500.00 and the outlays varying between \$72,500.00 and \$100,500.00, making the total sought \$173,000.00 to \$240,000.00. The estimated costs the defendants would be able to recover on a standard basis is said to be between half to two thirds of the total costs. The estimated costs the defendants would be entitled to recover is therefore estimated to be between \$103,250.00 to \$137,666.65.
- [27] From the estimate provided it is unclear as to why provisions have been made for certain costs (such as an application to strike out, obtaining expert evidence, additional interlocutory applications, and applications for non-party disclosure). Excluding the allowance for these items reduces the estimate by some \$40,000.00.
- [28] Further, the amount allowed for the solicitor's costs of \$5000.00 to \$7,000.00 for the advice on evidence, given the allowance for counsel, appears large and the total amount allowed for mediation and preparing for trial appears large. At this stage, a reduction in those amounts of \$13,000.00 would seem appropriate.
- [29] On the information currently before the court, the amount of security should be calculated on total costs of an amount of \$120,000.00, using the lower amount of the estimate as the starting point and allowing for these reductions. That amount needs to be reduced to take account the amount that would be recovered on a standard basis. In the circumstances, it is appropriate to make an order for security for costs in favour of the defendants in an amount of \$70,000.00.
- [30] The defendants will have liberty to apply to seek further security, if necessary, as the matter progresses.

Orders

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

1. On or before 5 September 2019, the plaintiffs pay into court the amount of \$70,000.00 as security for the defendants' costs of the proceeding pursuant to r 670 of the Uniform *Civil Procedure Rules 1999* (Qld).
2. The plaintiffs pay the defendants' costs of this application to be assessed on a standard basis