SUPREME COURT OF QUEENSLAND

CITATION:	*Maggbury P/L & Anor v Hafele Australia P/L & Anor* [2000] QSC 220
PARTIES:	**MAGGBURY PTY LTD** ACN 011 007 793 (first plaintiff) **GISMA PTY LTD** ACN 072 964 311 (second plaintiff) v **HAFELE AUSTRALIA PTY LTD** ACN 006 021 432 (first defendant) **HAFELE GMBH & CO** (second defendant)
FILE NO:	No 8775 of 1998
DIVISION:	Trial Division
DELIVERED ON:	31 August 2000
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2000
JUDGE:	White J
ORDER:	**The plaintiffs provide security for the second defendant's costs of and incidental to proceedings S 8775/98 (contempt application) in the sum of $48,000 in a form satisfactory to the Registrar of the Court within 21 days of this order and in default the contempt proceedings be stayed.**
CATCHWORDS:	Security for costs – contempt proceedings arising from alleged breach of trial judgment order.
COUNSEL:	G C McGowan for the applicant /second defendant S J Lee for the respondents /plaintiffs
SOLICITORS:	Shand Taylor for the applicant /second defendant O'Shea Corser and Wadley for the respondents /plaintiffs

[1] The second defendant, Hafele Gmbh & Co, seeks security for its costs in the application bought by the plaintiffs seeking orders against the second defendant for contempt of orders made by Byrne J on 22 January 1999 ("the contempt proceedings").

[2] The plaintiffs resist the application on a number of bases. They object to the court entertaining the application at all because

- the second defendant has not paid to the plaintiffs certain assessed costs and is thereby in contempt, and

- the second defendant's solicitors are Victorian solicitors not admitted to practice in Queensland and, although represented by Queensland solicitors on the record, in fact are retained to act as principal solicitors, and thereby are in contempt.

[3] If the application is entertained the plaintiffs submit, since these are contempt proceedings, that

- there is no jurisdiction to order security for costs in quasi-criminal (which includes contempt) proceedings save in exceptional circumstances; or

- if there is jurisdiction, as a matter of discretion, orders for security should only be made in exceptional circumstances, or

- it is in the public interest that proceedings such as contempt proceedings be heard.

[4] **Background**

The plaintiffs, Maggbury Pty Ltd and Gisma Pty Ltd, brought an action in this court against the defendants, an Australian company and its parent German company seeking relief, inter alia, in respect of alleged breaches of a confidential agreement, the wrongful termination of an oral agreement, and the misuse of and unauthorised disclosure of confidential information arising out of intellectual property in the design of a certain folding ironing board. The trial judge found in favour of the plaintiffs and awarded damages in the amount of $25,000 and imposed an injunction restraining the defendants or their agents from manufacturing or distributing the ironing board. The defendants appealed and on 12 May 2000 the Court of Appeal allowed the appeal, setting aside the injunction *ab initio* and reducing the amount of the plaintiffs' damages to $5,000. Costs, yet to be assessed, were awarded in favour of the defendants in respect of the appeal. The Court of Appeal ordered that there be no order as to the costs of the trial and granted the plaintiffs an indemnity certificate in respect of the defendants appeal costs.

[5] The plaintiffs were persuaded that the second defendant, in breach of the trial judge's orders, continued to manufacture and distribute the ironing board after delivery of the judgment on 22 January 1999. The second defendant distributes its products world wide and the particulars provided by the plaintiffs refer to alleged distribution in countries as widely spread as China, Ireland, USA, Sweden, Austria and New Zealand. The plaintiffs commenced these contempt proceedings on 29 July 1999. A number of interlocutory applications have been heard in respect of

them including by Fryberg J who ordered on 6 January 2000 that certain of the second defendant's documents, for which privilege from disclosure was claimed, be produced for inspection by the plaintiffs. A stay of that order pending appeal was refused. That appeal is to be heard in Brisbane on 31 August 2000.

[6] The plaintiffs have filed an application for special leave to appeal from the decision of the Court of Appeal to the High Court. I was informed that the special leave application may be heard in November this year. If granted, the High Court may hear an appeal if it sits in Brisbane next June but there is no indication from the High Court Registry as to when an appeal might be heard.

Preliminary Issues

Status of the Victorian solicitors

[7] Two costs orders in favour of the second defendant against the plaintiffs have been made by me in respect of interlocutory applications heard on 1 February and 12 May 2000. The parties appeared before Deputy Registrar Figg on 13 July 2000 for the assessment of those costs. She raised with them the status of the Victorian solicitors since none of the partners of that firm was admitted to practice in Queensland. This may compromise the defendant's entitlement to have assessed and to recover the fees paid to the Victorian solicitors as principals in the conduct of the Queensland applications. Throughout all of the litigation the Victorian solicitors had retained Shand Taylor as their agents in Queensland. Deputy Registrar Figg directed that the defendant redraw, file and serve its bills of costs to reflect "that the Melbourne solicitors are the principals and the Brisbane solicitors are town agents….." . The appropriateness of that direction was brought before the applications judge and Wilson J ordered on 10 August 2000 that the following questions be referred to the court for determination:

"(a) Are the defendants entitled to have assessed and recover on a standard basis, fees paid to Messrs Logie-Smith Lanyon for the work undertaken by that firm as principals in the conduct of the litigation in the Supreme Court of Queensland referred to in the two costs statements filed 26 June 2000;

(b) If the answer to (a) is yes, then on what scale are those fees to be assessed;

(c) Should the directions made by Deputy Registrar Figg on 13 July 2000 … be set aside."

It is not appropriate that I make any comment on an issue yet to be determined by the court. There is otherwise no reason for precluding the second defendant from bringing this application merely because it retains Victorian solicitors. There is a Queensland firm of solicitors on the record.

The unpaid costs

[8] The defendants sought to stay the judgment of Byrne J pending appeal. On 24 March 1999 the Court of Appeal did so upon payment into court of the sum of $25,000 awarded by Byrne J and the amount of the costs when assessed. The damages have been paid into court. The costs have not yet been assessed. The plaintiffs have obtained two interlocutory orders for their costs which were assessed

by Deputy Registrar Figg on 9 June 2000 in the sums of $3,274.50 and $5,025.05 respectively. On 1 August the plaintiffs demanded payment of those sums by the second defendant which have not been satisfied. The plaintiffs sought to have those sums satisfied from the money in court by order of a deputy registrar of this court. When unsuccessful, they sought the same order from the deputy registrar of the Magistrate's Court without success.

[9] The plaintiffs propose applying to the Court of Appeal on 31 August 2000, when the second defendant's appeal is heard, for an order for the payment of those costs from the funds held in court pursuant to the order of the Court of Appeal of 24 March 1999.

[10] There will be circumstances when a failure to satisfy an order to pay costs which have been assessed may be held to be a contempt, following which the party in contempt, in the exercise of the court's discretion, will not be permitted to bring further applications, or to be heard by the court in those proceedings until the contempt is purged, Halsbury, 4 ed Vol 9 para 106. That is not the case here. The second defendant has not been held to be in contempt. The defendant has costs orders in its favour against the plaintiffs in respect of two interlocutory hearings which, on their face are greater than the amount sought by the plaintiffs in satisfaction of their costs orders. The appeal which gave rise to the costs orders which the plaintiffs wish to enforce is about to be heard. The plaintiff companies are impecunious. The costs sums were demanded only recently. Their non-payment does not preclude the second defendant's application.

[11] Neither of the preliminary points taken on behalf of the plaintiffs preclude the court from entertaining the second defendant's application for security for costs.

Security for costs

Contempt proceedings

[12] The plaintiffs submit that since contempt proceedings are essentially criminal in nature there is no jurisdiction to bring an application for security for costs pursuant to the UCPR which are confined to civil proceedings. Similarly with respect to section 1335 of the *Corporations Law.* I do not propose to canvas Dr Lee's submissions on this point - not because they are without merit - but because the second defendant relies also on the inherent jurisdiction of the court to control its process and this is an adequate source of power, see I H Jacob "*The inherent jurisdiction of the Court*" *(1970)* Current Legal Problems 23 at 24 where he observed:

> "The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation…..
> The inherent jurisdiction of the court maybe exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually

> exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction."

The question whether security ought to be ordered in contempt proceedings is a discretionary one and will be considered below.

The plaintiffs capacity to meet an order for costs

[13] The plaintiffs do not concede that they are presently impecunious and that any order for costs in favour of the second defendant would be unlikely to be met. Searches reveal that the plaintiff companies have the usual modest paid up capital. The director of the first plaintiff is Mr Gary Allen (the inventor of the ironing board). His wife Mrs Ines Allen is the director of the second plaintiff. The 1995 Annual Return of the first plaintiff shows an operating loss after tax of $45,495. Subsequent Annual Returns provide very few details save that its value is $2. The recent (1998 and 1999) Annual Reports of the second plaintiff reveal that it has no assets or operating profits and a share value of $1. Searches do not reveal that either company owns any property.

[14] The financial position of those standing behind the plaintiff companies should next be considered. Mr and Mrs Allen reside in a house at Nerang owned by Mystico Pty Ltd of which they are shareholders. That property is encumbered by a mortgage in favour of the National Australia Bank in respect of collateral security of $480,000 which Mr Allen deposed in 1998 had been drawn on to the extent of $470,000. The property is listed for sale with agents at $450,000.

[15] Mr and Mrs Allen are being sued by one Darryl Fussell in the District Court at Southport for $90,000 plus interest and costs . The claim describes the $90,000 as a loan whilst the Allens assert that it was a gift. The action is set down for trial.

[16] Credit reference searches reveal that Mr Allen was the director of three corporations which, in 1996, 1991 and 1985 respectively were under external administration or strike-off. In his affidavit sworn on 15 October 1998 (exhibited to the affidavit of his solicitor, Mr Richard Jefferis filed by leave on 21 August 2000) Mr Allen swore that the contents of the home had a value of $85,000, that he and Mrs Allen owned a motor vehicle with equity of $15,000, and that he owned a fork lift, boat and ride-on mower valued at $25,000. There is no up to date affidavit in respect of these personal assets. Their value must necessarily be discounted, not least because of the difficulty of immediately converting them into cash, and the concern that they may no longer be in existence.

[17] Mr Jefferis deposes that the plaintiffs owe their former solicitors $115,000 in fees and costs which, by agreement, are to be paid off by instalments of $5,000 per month. There is no indication of the source of those funds. The plaintiffs have on going obligations to their present solicitors in respect of substantial costs already incurred with respect to solicitor and client costs for the appeal and the contempt proceedings.

[18] Despite detailed submissions including, inter alia, that the defendants' costs of the appeal are excessive, that the plaintiffs are likely, ultimately, to be successful in their High Court appeal, and that they have been granted an indemnity certificate pursuant to the *Appeal Costs Fund Act* 1973 for the defendants' costs of the appeal, there is no evidence to displace the clear inference that neither the plaintiffs nor Mr and Mrs Allen, who have offered their personal guarantees, could meet an order for costs. That leaves the somewhat shadowy figure of Mr D Gull. The two costs statements issued by the plaintiffs' solicitors describe instructions in the litigation as being given by Mr Don Gull. The defendants' solicitors raised the possibility that Mr Gull was involved in a champertous arrangement with the plaintiffs.

[19] It is unnecessary to describe in detail the correspondence on this matter. It is exhibited to the lengthy affidavits. For the purposes of this application the relevant passage is in the letter of 4 May 2000 from the plaintiffs' solicitors.

> "Our instructions are that there is no funding by Mr Gull of the proceedings in return for a share in Mr Allen's patent in his wall mounted ironing board, or a share of the damages awarded to Mr Allen by Justice Byrne or any further awards sought by Gisma and Maggbury in the contempt proceedings.
>
> Mr Gull has an interest in Gisma [the second plaintiff] since well before any court proceedings were commenced. That interest has always been a genuine commercial and substantive interest in the Plaintiff's ironing board project."

Mr Jefferis deposes

> "I am informed by Mr Don Gull and verily believe that he is not prepared to and will not advance any money for the purpose of payment into court for the second defendant's costs in the contempt proceedings. Even if he were willing, Mr Gull has no cash on hand to make such a payment, all the cash-flow from his business is needed to defray ongoing business commitments to meet his other commitments." para 35

[20] The inference to be drawn from Mr Jefferis' affidavit is that at least some of the plaintiffs' legal costs are currently being met for the contempt proceedings, including the appeal to be heard on 31 August and the special leave application in the High Court, and that Mr Gull or interests controlled by him are doing so.

[21] Mr Jefferis deposes that Mr Allen informed him that the plaintiffs intend to prosecute the contempt proceedings "to its conclusion, unless and until they receive an apology from the second defendant, costs and compensation for the sales made in breach of the injunction." para 34

[22] As *Harpur v Ariadne Australia Limited* [1984] 2 Qd R 523 established, an order for security for costs will not generally be made when those behind a corporation bring their own assets into play, at 532. This the Allens have offered to do. Mr Jefferis deposes that since Mr Gull will not offer security and Mr and Mrs Allen can only

offer what limited resources they have, any order would stifle the contempt proceedings. The mere fact that Mr and Mrs Allen have offered personal guarantees, whilst it is important, is not determinative of the question, *Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1; *K P Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189; *A V Spares Pty Ltd v Skywest Aviation Pty Ltd* (1997) 24 ACSR 272. There is, however, someone standing behind the plaintiffs who stands to gain from the successful outcome of the litigation and who is funding it, either in whole or in part, and, unlike Mr and Mrs Allen, is not prepared to offer any security for the costs of the second defendant. It is to him that the plaintiffs can look, *Drumdurno Pty Ltd v Braham* (1982) 42 ALR 563; *Impex Pty Ltd v Crowner Products Ltd* (1994) 13 ACSR 440; *Dalrymple Park Pty Ltd v Tabe & Lees* (1996) 22 ACSR 71.

[23] There are other discretionary factors which need to be considered before reaching a conclusion as to whether security should be ordered.

Ought security be ordered in contempt proceedings?

[24] Contempt proceedings, even though brought by a private entity to protect its private rights, are essentially criminal in character, *Witham v Holloway* [1995] 183 CLR 525. The plaintiffs contend that except in exceptional circumstances security will not be ordered in (quasi) criminal proceedings such as contempt because there is a public interest aspect in such proceedings in vindicating the courts' authority. The latter proposition is correct, *Witham* at 533, but it by no means follows that security will not be ordered if other factors necessary to make such an order are present merely because the proceedings are contempt proceedings. It is not without relevance that a private prosecutor in criminal proceedings is required to give security as a pre-condition to the presentation of an information, *Criminal Code* s 687; Colbran, *Security for Costs* (1993) 129.

[25] *Brown v Environment Protection Authority*, unreported decision of Priestley JA (sitting alone) of 1 April 1993 (CA 40738/92) is relied on by the plaintiffs in supplementary material. It has a number of distinguishing features from the present case. There were issues of public importance in that proceeding which had been brought by a private individual to test the lawfulness of a decision by the NSW Environmental Protection Agency to grant licences under the *Pollution Control Act* (NSW) to Associated Pulp and Paper Mills on conditions which permitted the discharge of pollutants into the Shoalhaven River. The application had been dismissed at first instance where no security for costs had been sought. Priestley JA declined to order security for a number of reasons. He concluded that a great many members of the public regarded the matter of the issue of the licences and the conditions as important. He also found that the appellant, although not a person of any great means, was personally exposed to liability in costs should the appeal be unsuccessful. Further, Rule 11 of the NSW Supreme Court Rules provided that no security for the costs of an appeal should be required unless the Court of Appeal considered that there were special circumstances.

[26] Apart from the allegation that the second defendant breached an order of the court by continuing to distribute ironing boards between the date of the trial judgment and that of the Court of Appeal, there is no public interest in these contempt proceedings. Neither has the person, inferentially funding the litigation and who

has an interest in it, been prepared to offer his worth as did the appellant in *Brown*. Finally, Rule 11 has no corresponding counterpart for this application.

Delay

[27] The contempt proceedings were commenced on 29 July 1999. The second defendant foreshadowed an application for security on 11 April 2000. There was extensive correspondence thereafter, particularly relating to the position of Mr Gull. The application for security was not filed and served until 8 August 2000. In the interim, there had been a number of interlocutory applications. The contempt proceedings have, to date, been expensive for both parties involving investigations in many countries with the attendant costs of language translation. Although there are no pleadings, extensive particulars have been given and there has been equally extensive documentary disclosure. The second defendant submits that until the Court of Appeal decision, substantially reversing the trial judgment, there was some prospect that the $25,000.00 plus interest which was paid into court and which would have come to the plaintiffs had the appeal been dismissed, might have been available for the contempt proceedings.

[28] Whether the plaintiffs would have proceeded with the contempt proceedings had security been sought and ordered shortly after the commencement of those proceedings remains speculative. The plaintiffs evince great determination to pursue these proceedings notwithstanding the Court of Appeal decision. Nonetheless the second defendant has permitted the proceedings to continue for over a year when having a reasonable understanding of the costs involved and without bringing on an application. Mr Jefferis deposes that the plaintiffs have incurred $161,396.14 in solicitor/own client costs in the contempt proceedings to the end of July 2000.

[29] If the other discretionary factors suggest that security ought to be ordered, I would order it prospectively from the date of the application to reflect the delay in bringing the application

Other discretionary factors

[30] This is not an application where it is appropriate to take a preliminary view of the strength and weakness of the plaintiffs' case. There are numerous invoices and other documents from companies "associated with" the second defendant around the world. Evidence will be required to establish whether any breaches found to have occurred were accidental or the movement of stock between subsidiaries as contended for by the second defendant. Any such a finding would tend to negative contempt. It has been submitted by the second defendant that the contempt proceedings are simply an attempt by the plaintiffs to "top up" the relatively modest $25,000.00 awarded by Byrne J as damages.

[31] The plaintiffs submit that they have a strong case based on admissions which are denied. They submit that there may be no order as to costs if the second defendant is found not to have been in contempt of the injunction. That is a possibility, but it is speculative.

[32] The plaintiffs assert that their difficult financial position is due to the second defendant's conduct. They were far from financially sound prior to the commencement of their relationship with the defendants. They have not sought on the evidence before me to further develop the marketability of their product or have discontinued negotiations with others. In any event, the Court of Appeal, by its decision, has effectively decided that the defendants were not the cause of the plaintiffs' losses save in some modest sum.

[33] I conclude that security ought to be provided for the second defendant's costs of these proceedings.

Quantum

[34] The second defendant has retained the services of Mr Ralph McKay, a legal costs consultant in Victoria, to prepare an estimate of its party and party costs to its Victorian solicitors to date (3 August 2000); for the application for security for costs; up to the start of the trial; and the trial hearing to judgment based on a three day trial. Mr Alan Adrian, a legal costs consultant carrying on practise in Queensland at Southport, has provided an estimate of the defendant's costs so far as they relate to its Brisbane solicitors on the same basis. The plaintiffs have retained the services of Mr Michael Graham, solicitor and legal costs assessor of Brisbane, to peruse the estimates made on behalf of the defendant and to propose other estimates.

[35] It is unnecessary to remark upon their respective qualifications. Mr Graham's experience of the approach taken to assessments in the Supreme Court at Brisbane must be regarded as superior to that of Mr McKay, but in a number of instances he has taken what I regard as an unduly spartan approach to the work that remains to be done and the outlays to be expended.

[36] Mr McKay estimates the costs for the security for costs application at $13,000.00. Mr Adrian estimates $2,600.00 for Shand Taylor's costs. Mr Graham has estimated $2,800.00 for this application largely because he has concluded that Brisbane counsel could have attended to it, and that counsel's charges are excessive and would not be allowed. In my view it is appropriate that the same junior counsel be briefed for all applications, if possible, who is familiar with the matter and the many hearings and appeals. Dr Lee, junior counsel for the plaintiffs, has been in the litigation from the outset and there would be a real disadvantage to the defendant in retaining fresh junior counsel from Brisbane.

[37] I would allow $8,000.00 for this part of the proceedings.

[38] Mr McKay estimates future costs to the commencement of trial at $33,000.00. Mr Adrian adds a further $6,000.00 for the Queensland solicitors. Mr Graham has taken a very conservative approach and estimates $12,150.00 to trial. This figure is reached by reducing the $18,000.00 for professional fees to trial to $5,000.00 - $7,000.00 for the reason that he assumes that there is not a great deal of work left to be done to prepare for trial. None of the assessors has included the pre-trial briefing of counsel in this amount. Mr Graham is critical of the failure to break down the $18,000.00. From an understanding of the complexity of the issues and that there are witnesses whose first language is not English in many countries around the

world, there is likely to be more work than might be expected in the usual case. I am not persuaded that the Queensland solicitors would be doing work to reach $6,000.00 before the trial commences without further explanation. I would allow $25,000.00 for this period.

[39] It is not unusual to allow security up to and including the first day of a trial and thereafter to leave the question of security to the trial judge on an application made by the defendant. That is the course which I propose to adopt here. The costs assessors have made their estimates on the basis of the costs for a three day trial. The major differences in approach are the disallowance for senior counsel by Mr Graham and a significant reduction in the amount for care and consideration. It is not inappropriate to make provision for senior counsel. The material on this application alone indicates the complexity and difficulty of the proceedings. Senior counsel for the defendant is located in Brisbane. It is not inappropriate to have Melbourne junior counsel who has been in the matter from its inception and who is able to consult with the client and the solicitors in Melbourne. With senior and junior counsel retained, the large amount estimated for care and consideration ought to be reduced. The amount for this period which I would take into account when assessing the question of security for costs is $15,000.00.

[40] The amount which I would order to be provided as security for the future costs of these proceedings is $48,000.00.

[41] The order is that Maggbury Pty Ltd ACN 011 007 793 and Gisma Pty Ltd ACN 072 964 311 provide security for the second defendant's costs of and incidental to proceedings S 8775/98 (contempt application) in the sum of $48,000.00 in a form satisfactory to the Registrar of the Court within 21 days of this order and in default the contempt proceedings be stayed.

[42] I would further propose, subject to any submissions to the contrary, that the costs of and incidental to this application be costs in the cause.