

# SUPREME COURT OF QUEENSLAND

CITATION: *Pacific Century Production P/L v Taylor's Contracting Services P/L* [2002] QSC 025

PARTIES: **PACIFIC CENTURY PRODUCTION PTY LTD Trading  
as EVERGREEN FARMS ACN 087 505 860**  
(plaintiff)  
**v**  
**TAYLOR'S CONTRACTING SERVICES PTY LTD**  
**ACN 068 844 557**  
(defendant)

FILE NO: S8167/01

DIVISION: Trial

DELIVERED ON: 14 February 2002

DELIVERED AT: Brisbane

HEARING DATE: 6 February 2002

JUDGE: Chesterman J

ORDER: **1. That the defendant provide security for the plaintiff's costs of answering the counterclaim in the sum of \$50,000.**

**2. That the prosecution of the counterclaim be stayed until the plaintiff's costs of answering the counterclaim are secured to the sum of \$50,000.**

**3. That the costs of and incidental to this application are the plaintiff's costs in the cause.**

CATCHWORDS: COSTS – SECURITY FOR COSTS – applicant for security in respect of defendant's counterclaim – whether counterclaim gave rise to new questions of law or fact – whether defendant in a position to satisfy costs order.

*Uniform Civil Procedure Rule r 671(a)*

COUNSEL: J Sweeney for the applicant  
D Savage for the respondent

SOLICITORS: Hickey Lawyers for the applicant  
Gadens Lawyers for the respondent

[1] **CHESTERMAN J:** The plaintiff is an orchardist which grows substantial amounts of table grapes near Emerald. The defendant is a contractor who supplied materials for and constructed grape trellises on the plaintiff's orchard. The amounts of money involved are substantial: the plaintiff alleges that it has paid the defendant about \$2¼m. It is the plaintiff's complaint that part of the work done by the defendant

was defective and that the defendant repudiated a promise it made to rectify its defective performance. The plaintiff also claims that it has overpaid the defendant and seeks to recover the balance. The amended statement of claim does not make clear the amount sought but the sum claimed in the original claim was \$859,000.

- [2] The defendant disputes its liability to pay the plaintiff any money and has counterclaimed to recover the sum of \$370,076.58 for work done and goods supplied to the plaintiff for which it has not been paid.
- [3] The plaintiff in turn disputes liability to the defendant on the counterclaim. In addition to a number of specific defences the plaintiff asserts that it is entitled to set off against any sum which may be found payable to the defendant so much of its claim for damages as will extinguish that amount.
- [4] The defendant has obtained an order that the plaintiff provide \$100,000 by way of security for its costs of the action. That amount has been provided. The plaintiff now seeks a similar order in the sum of about \$50,000 in respect of the costs it will incur in resisting the counterclaim.
- [5] The application was argued on a single basis. The defendant submits that all the facts relevant to its counterclaim are integral to the plaintiff's claims so that no additional costs will be incurred by the plaintiff in resisting the counterclaim. This was the sole focus of the submissions. No arguments were addressed to the court with respect to the plaintiff's solicitors' estimate of costs that will be incurred in answering the counterclaim, and no attempt was made to show that the defendant's substance would enable it to meet an order for costs of the estimated amount.
- [6] The defendant's advisors apparently took the view that the plaintiff's claim against it should be notionally accepted, at least as a contingent liability, in deciding whether it would be able to satisfy an order for costs. In the event that it was ordered to pay \$800,000 or more to the plaintiff it would be insolvent. For this reason, it seemed, the defendant did not provide evidence of his financial position. I doubt the correctness of this approach. Where the claim is disputed and no gauge of the merit of the dispute is possible the amount of the claim is probably to be disregarded in ascertaining whether *UCPR* 671(a) has been satisfied.
- [7] The plaintiff's material establishes that the defendant is a private company with a paid up share capital of only \$2. It is registered outside the State of Queensland and most of its business is conducted outside Queensland. It owns no real property and has charged all its assets in favour of the Commonwealth Bank. In the absence of any contrary evidence from the defendant I find there is reason to believe that it may not be able to satisfy an order for costs in the sum of \$50,000.

- [8] The counterclaim is for work done and materials supplied particulars of which are contained in invoices previously delivered to the plaintiff. There are six items:

(a)	pruning	\$220,496.94
(b)	labour – trellising 85.5 acres	\$58,090.81
(c)	supply of vine guards	\$16,843.20
(d)	supply of steel (for the trellising)	\$43,313.15
(e)	supply of nursery labels	\$15,312.00
(f)	supply of citrus trees	\$16,020.45
	Total	<u>\$370,076.58</u>

- [9] The counterclaim elicited two responses from the plaintiff. It delivered an answer on 12 December 2001 and, in addition, delivered an amended statement of claim also filed 12 December 2001. The amended statement of claim is a complicated document but it is apparent that a number of the amendments were made with a view to defeating, by pre-emption, some of the items in the counterclaim. What is more these amendments go only to that end and do not advance the plaintiff's own case. This is perhaps a curious way for the pleadings to have developed but the result is, I think, that issues will arise in the litigation by reason only of the counterclaim. It is true that not all the matters raised by way of resistance to the counterclaim are in that category, but some are. The defendant's submission that no new issue arises from the counterclaim cannot be accepted. There is, as I have mentioned, no challenge to the assessment of the additional costs that the plaintiff will incur by answering the counterclaim.
- [10] Part of the plaintiff's answer to the counterclaim with respect to the demand for payment for pruning:

"denies that any money is owing . . . on the grounds pleaded in paragraphs 40 to 47 of the amended statement of claim."

Paragraphs 40 to 47 plead, in essence that the total contract price to be paid to the defendant for pruning was not to exceed \$458,833.75 and the actual price might, depending upon a complex of circumstances, be less. The paragraphs go on to plead that the defendant has delivered invoices in respect of pruning for amounts which exceed the total contract price and that the plaintiff has paid an amount of \$284,220.19. The plaintiff's final position on this point is that:

". . . when (the defendant) discloses . . . the actual cost . . . to perform the work, (the plaintiff) is liable to pay that amount . . . up to a maximum of \$458,833.90 less \$284,220.06."

Despite appearing in the amended statement of claim the subject matter of these paragraphs are a response to the counterclaim.

- [11] The second item, labour to install trellises on 85.5 acres, is met in the Answer by an allegation that the work for which payment is claimed was part of the work to be performed by the defendant pursuant to the development agreement made between the parties, and that not only has the plaintiff been paid in full, it has been overpaid. Details of the calculation of the overpayment appear in paragraph 23 of the amended statement of claim. A refund is sought in the amount of \$272,763.99 so, in that respect, the plaintiff's answer to this part of the counterclaim does involve the proof of part of its own claim. However the original claim was for damages for breach of contract. The precise scope of the work to be done by the defendant pursuant to that contract was not in issue. The areas which were to be trellised as part of the agreement are now in issue by reason of the counterclaim and that gives rise to an additional dispute with respect of which the plaintiff will incur costs.
- [12] The plaintiff answers the third item in the counterclaim, the cost of supplying vine guards, by pleading that (para 14 and para 15 of the Answer) that it was an express term of the planting agreement that a tree guard would be included in the contract price and, alternatively, the cost charged is unreasonable. The statement of claim has not been amended by reason of this part of the counterclaim. The claim is resisted on grounds found only in the Answer. They are not part of the plaintiff's claim.

- [13] The plaintiff does not claim it will incur any additional costs defending the claim for payment for the supply of steel and says nothing about the claim for supplying citrus trees. With respect to the supply of nursery labels it defends (para 21 of the Answer) on the basis of an oral agreement:

“To supply labour to label approximately 20,000 trees . . . with labels supplied by (the plaintiff) at the rate of 6 cents (not 60 cents) per label . . .”

The defendant has apparently claimed at the rate of 60 cents per label. The plaintiff asserts that the contract price for affixing labels (not supplying them) was \$1,531.20. This issue, too, arises only the counterclaim and is not part of the plaintiff's separate claim for payment.

- [14] The costs which it is said the plaintiff will incur in defending the counterclaim are assessed in the sum of \$51,607.80. I round the amount down to \$50,000 and order that the defendant provide security to the satisfaction of the registrar for the plaintiff's costs of answering the counterclaim in the sum of \$50,000 and that the prosecution of the counterclaim be stayed until those costs are secured. The cost of the application will be the plaintiff's costs in the cause.