

SUPREME COURT OF QUEENSLAND

CITATION: *M E Packaging (Mareeba) Pty Ltd v CJS Banana Growers Group & Ors* [2004] QSC 368

PARTIES: **ME PACKAGING (MAREEBA) PTY LTD**
ACN 102 497 898
(Plaintiff)
v
CJS BANANA GROWERS GROUP
(First Defendant)
BILL GREGORY and SAM LOGUE
(Second Defendants)

FILE NO/S: 23 of 2004

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Cairns Supreme Court

DELIVERED ON: 17 September 2004

DELIVERED AT: Cairns

HEARING DATE: 17 May 2004

JUDGE: Jones J

ORDER: **1. The plaintiff give security for costs by payment of the sum of \$40,000 into court within 28 days of the date of this order.**
2. The proceeding is stayed pending compliance with the above order.
3. There be liberty to apply for further orders upon giving to the opposite party two days notice.
4. The plaintiff pay the second defendants' costs of and incidental to this application to be assessed on the standard basis

CATCHWORDS: PROCEDURE - COSTS – SECURITY FOR COSTS- where plaintiff applied for an order that the defendant provide security for costs pursuant to r 677 UCPR – whether there is reason to believe that the defendant would not be able to pay the plaintiff's costs if so ordered to pay them – where those controlling plaintiff corporation do not reside in the Jurisdiction

Uniform Civil Procedure Rules 1999

SOLICITORS: V J Butler & Associates for the plaintiff
Williams Graham & Carman for the second defendant

- [1] The second defendants seek and order that the plaintiff corporation provide security for their costs in this action. The plaintiff company claims \$273,662.40 plus interest for goods sold and delivered. The plaintiff asserts that pursuant to various requests from the second defendants between 7 January 2003 and 23 May 2003 it delivered to the second defendants banana box lids and bottoms identified in three invoices as follows:-

- (i) Invoice No. 181
- (ii) Invoice No. 191
- (iii) Invoice No. 219

- [2] By their defence, the second defendants acknowledge that the plaintiffs had supplied a number of items as follows:-

- 123,660 non-waxed banana box bottoms
- 117,170 waxed banana box bottoms
- 276,820 banana box lids

However the second defendants identify a dispute with the plaintiff about the suitability of some of the items supplied and the fact that other items were supplied without any request being made. The second defendants allege that there was further agreement that the plaintiff would supply certain items on trial and at no cost. Some items were not acceptable to the second defendants, and at the plaintiff's instructions were on-sold to others. The proceeds of the sale were supplied to cover the costs of the freight on the items. The second defendants deny any responsibility for the items referred to in the subject invoices.

- [3] That brief (and incomplete) statement of the issues reveal that serious questions of fact and credibility will need to be determined to resolve the issues between the parties. The duration of the trial is likely to exceed two days and there will inevitably be pre-trial discovery and inspections and possibly the need for expert evidence. Consequently the question of recovery of costs if successful is an important matter for the defendants.
- [4] The defendants' solicitors by letter dated 8 March 2004 to the plaintiff's solicitors sought details of the company's assets. In response, the plaintiff advised that it owned no land within the jurisdiction and the balance sheet which it enclosed showed an excess of liabilities over assets of \$91,601. Such assets as were disclosed consisted mainly of trade debtors and stock on hand. A request for further details of these assets remains unanswered.
- [5] Two of the three directors of the company reside in Hong Kong. The one local director did not have instructions to respond to the material relied upon by the applicant.
- [6] In these circumstances a prima facie case exists for the granting of security. Referring to r 671 of the *Uniform Civil Procedure Rules* (UCPR) I am satisfied that:-

- (i) The plaintiff is a corporation and there is reason to believe that it will not be able to pay the defendants' costs if so ordered;
 - (ii) Those controlling the plaintiff are ordinarily resident outside Australia;
 - (iii) The justice of the case requires the making of an order.
- [7] The relief as sought by the applicant is, of course, discretionary. Some of the discretionary considerations are enumerated in r 672 to which I have had regard. In respect of some of those I comment that the means of persons standing behind the company, if they exist, have not been disclosed. It cannot be said that the plaintiff's obvious impecuniosity has been attributable in any way to the second defendants' conduct or that an order for security for costs would be oppressive in the circumstances. The plaintiff appears to be conducting a business and attempting to break into a specific market in North Queensland. The second defendants, I would assume, are not the only potential customers.
- [8] In all the circumstances I am believe that an order for security for costs should be made.
- [9] Mr McKinstry, solicitor for the applicants, has estimated that the pre-trial costs including preparation for trial and one day's hearing would fall within the range of \$45,000 - \$55,000 of which sum 75% is likely to be recoverable on the assessment of costs on a standard basis. It seems to me in those circumstances that it is appropriate to order that the plaintiff pay security for costs in the sum of \$40,000.

Orders

- [10] I order that –
1. the plaintiff give security for costs by payment of the sum of \$40,000 into court within 28 days of the date of this order.
 2. the proceeding is stayed pending compliance with the above order.
 3. there be liberty to apply for further orders upon giving to the opposite party two days notice.
 4. the plaintiff pay the second defendants' costs of and incidental to this application to be assessed on the standard basis.