SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

P LYONS J

No 12405 of 2008

MARINA WONG	Plaintiff
and	
GLOBAL CEMENT AUSTRALIA PTY LTD. (ACN 085 873 329)	Plaintiff
and	
ANTHONY JOHN HUISMAN	Defendant
and	
GREGORY ALLAN ISON	Defendant
and	
LORRAINE ISON	Defendant

BRISBANE

..DATE 22/07/2009

ORDER

HIS HONOUR: In this action the first and second plaintiffs have sued the defendants for an amount of $194,000 as a result of the defendants having called on a bank guarantee issued by the Bank of Queensland Limited, and the second plaintiff has claimed a further sum of $887,000.

The defendants now seek an order for security for costs.

It is necessary to say a little more about the action. The statement of claim alleges that the defendants were the registered proprietors of land at 120, Gosport Street, Hemmant. That was the subject of a lease in favour of the second plaintiff. It was a term of the lease that the tenant provide a guarantee by a bank for the due performance by the tenant of its obligations under the lease. There was a further term of the lease that the landlord might call up the bank guarantee to compensate the landlord for the loss suffered as a result of a failure by the tenant to perform its obligations under the lease.

The statement of claim alleges that on 1st of July, 2008, the defendants wrongfully purported to determine the lease and that on the 8th of July, the second plaintiff accepted the defendant's conduct as repudiating the lease, and it self-terminated the lease.

It also alleges that the second plaintiff was the owner of certain chattels of which the defendants took possession on re-entry, and which they caused to be destroyed.

The statement of claim also alleges that the defendants called up the amount payable under the bank guarantee of $194,000. The claim previously mentioned made by both plaintiffs for the sum of $194,000 relates to the calling up by the defendants of the bank guarantee, and the claim of the second plaintiff for $887,000 is in respect of the chattels.

The second plaintiff is a company. The title to the action states that a controller has been appointed to it. I am told that receivers were appointed on the 20th of February, 2008, pursuant to a fixed and floating charge held by National Australia Bank Limited. The action was commenced on the 2nd of December, 2008. On the 13th of February, 2009, the solicitors for the defendants wrote to the solicitors for the plaintiffs expressing concern about "Your client's financial position", and referring to the appointment of a receiver/manager, and the appointment of controllers.

A schedule in the letter identified estimated costs totalling $51,598.50 on the basis of a three day trial, and calling for payment of that amount into Court as security.

On the 27th of March, 2009, solicitors for the defendants again wrote to the solicitors for the plaintiffs. That letter referred to the letter of 13th of February, 2009, and stated there had been no response in relation to the request for security. It gave notice that a Court application would be proceeded with.

On the same day, the solicitors for the plaintiffs responded. They stated that they were still awaiting final instructions concerning the provision of security for costs; and that in any event, they would challenge the amount claimed, and that by reference to authority they did not think that an application would be successful.

The present application was filed on the 14th of July. It is necessary to say a little more about the course of the proceedings.

On the 5th of January, 2009, the defendants filed and served a notice of intention to defend and defence. On the 19th of January, 2009, the plaintiffs filed and served a reply. On the 2nd of February, 2009, the plaintiff applied for orders for further and better particulars of the defence. The further and better particulars were provided on about 16 February, 2009. The letter of the 13th of February, to which I have referred was written at about that time. The letter of the 27th of March, 2009, raised an issue about whether the second plaintiff's action could proceed. In essence, the allegation seems to have been that with the appointment of receivers, the directors could not cause the second plaintiff to bring the proceedings.

The action had been commenced apparently as a result of a decision by the directors and without the authority of the receiver. It seemed that this issue had emerged at an interlocutory hearing before White J on the 19th of February.

The letter from the solicitors for the plaintiffs of the 27th of March, contested the proposition that the second plaintiff could not proceed with the action. It also pointed out that the two matters raised in the letter from the solicitors for the defendants of that date were mutually exclusive. That is to say, if the application to remove the second plaintiff from the action was successful, the question of the provision of security for costs would be irrelevant.

An application was made on the 28th of April by the defendants for orders that the second plaintiff's claim be struck out on the basis that the second plaintiff was in receivership and its director could not instruct solicitors to bring the claim. On the 5th of June, 2009, that application was dismissed.

In the meantime, on the 24th of April, 2009, the plaintiffs made disclosure, as did the defendants on the 1st of May, 2009. On the 17th of June, 2009, the plaintiffs requested copies of documents in the defendants' list.

The application is made under Rule 670 of the Uniform Civil Procedure Rules. Under Rule 671 the Court has power to order a plaintiff to give security for costs only if satisfied of one of a number of things. One is that 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.

The material includes a report from the receivers of the 19th of March, 2009, revealing a total amount owed to the secured creditors of $5.26 million. The receivers report total receipts at approximately $559,000, and the estimated value of property the subject of the instrument under which they were appointed, as being nil, with a shortfall accordingly of $4.7 million. Their report also identified a cash amount in the hands of the receivers of $111,390.94. No other evidence has been put forward to establish the financial position of the second plaintiff.

In those circumstances I am satisfied that the second plaintiff is a corporation, and there is reason to believe it would not be able to pay the costs of the defendants if ordered to pay them.

There are a number of discretionary matters identified in Rule 672. One of them relates to the prospects of success or the merits of the proceeding. The material available to me generally does not allow me to form an assessment about that, save in respect of the claim of the first plaintiff to which I shall return.

It is submitted on behalf of the plaintiffs that an order for security for costs would be oppressive and would stifle the proceeding. However, the action has been instituted on the instructions of the director. I am not told anything about whether the director stands behind the proceeding nor is there material to establish the worth of the director. The material

does not address the cause of the second plaintiff's financial position.

The matters which seem to be put with most force on behalf of the plaintiffs were the fact that there are two plaintiffs, one of whom is a natural person, and the delay of defendants in bringing the application. Issue was also taken with the amount sought as security.

In support of the first of these matters, reliance is placed on Harpur v Ariadne Australia Ltd [1984] 2 Qd R 523. In that case an action was commenced by a natural person, not ordinarily resident out of the jurisdiction, and a man of substantial means, as well as by three corporations. It was said that they were made plaintiffs as a means of establishing the rights of the natural person. On appeal, it was held that security for costs ought not to be ordered.

In discussing the law, Connolly J said at 531:

"And if the defendants have an opponent who is worth powder and shot they have as much as any litigant is fairly entitled to."

His Honour referred to cases where there were two plaintiffs, one within the jurisdiction and one outside where in a number of cases that was sufficient to avoid an order for the provision of security for costs. However, his Honour referred to a number of authorities which were of different effect.

One was D'Hormusjee v Grey [1882] 10 QBD 13 where the critical point was said to be that each plaintiff was liable for the whole of the defendant's costs. It should be noted that the larger amount claimed in these proceedings is claimed by the second plaintiff only.

His Honour also referred to John Bishop (Caterers) Ltd & Anor. v National Union Bank and Ors. [1973] 1 All ER 707 where an order for security was made against a company although there was a co-plaintiff within the jurisdiction who was a natural person. The point of distinction which justified the order was that in other cases there was a complete overlap in the causes of action on which the action was brought. Again, in the present case there is not a complete overlap between the causes of action.

His Honour also referred to Pearson v Naydler [1977] 1 WLR 899 where Megarry V-C:

"Saw some force in the submission where the true plaintiff was the corporation and it was not in reality a case of a plaintiff company which had a natural person as a true co-plaintiff."

In the present case the claim by the second plaintiff for all of the sums identified is understandable. The facts relied upon to support the claim of the first plaintiff which is limited to $194,000 is that the first plaintiff was the person who arranged the provision of the bank currency which the

second plaintiff was required by the lease to provide to support obligations to pay moneys of the second plaintiff.

It is not obvious to me on the facts pleaded that the first plaintiff in truth has any claim against the defendants. I have serious doubts whether the first plaintiff is truly a co-plaintiff in respect of any claim. In any event it seems to me that the substance of the action is the claim by the second plaintiff and not that of the first plaintiff. It therefore seems to me that the presence of the first plaintiff is not a reason to refuse the application.

There has been some delay but the delay is not particularly significant in the present case. It is to my mind not irrelevant that the action was commenced in December with the intervention of the holiday period at Christmas and into the New Year. The first warning of an application for security for costs was given, as I have indicated, on the 13th of February. The outcome of correspondence which followed was that the plaintiffs took the position that it would be inconsistent for the defendants to pursue an application for security for costs at that time, and also to challenge the standing of the second plaintiff in the action. That position was not resolved until the 5th of June this year.

While some steps seem to have been taken to advance the action in the meantime, they do not seem to be particularly significant, and I note there is no suggestion that the action

is ready for trial. I therefore do not consider that the delay is such as to warrant the refusal of the application.

The third matter which I mentioned was the quantum of security sought which, as I have noted, is a little over $51,000. There does not appear to be any dispute that the trial could take three days. While it is not uncommon to make an order for security up to the first day of hearing, it seems to me that given the amount of security sought, the amounts in issue and the estimated length of the trial, it is not inappropriate to make an order for the amount sought which I propose to do. Would you have a draft order, Mr Somers?

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HIS HONOUR: I will make an order in terms of this draft, initialled by me which I will have placed with the file.
