SUPREME COURT OF QUEENSLAND

CITATION:	*Robson & Ors v Robson* [2010] QSC 378
PARTIES:	In BS 7342/2000: **HANNOVER INTERNATIONAL LIMITED** (Plaintiff) v **CHARLES WILLIAM ROBSON** (Defendant) AND In BS 8937/2000: **MINE & QUARRY EQUIPMENT INTERNATIONAL LTD (ARBN 079 139 683)** (Plaintiff) v **CHARLES WILLIAM ROBSON** (Defendant) AND In BS 10177/2004: **GARY FRANCIS ROBSON** (Plaintiff) v **CHARLES WILLIAM ROBSON** (First Defendant) and **SANDRA LEIGH ROBSON** (Second Defendant)
FILE NOS:	BS 7342/2000, BS 8937/2000, BS 10177/2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2010
JUDGE:	McMurdo J
ORDER:	**1. The application for a stay of proceedings number 10177 of 2004 is dismissed.** **2. The application for security for costs in each proceedings is refused.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – STAYING PROCEEDINGS – where the trial commenced in February 2010 but had to be adjourned after six days of hearing because the plaintiff had failed to make proper disclosure – where the plaintiff was ordered to make that disclosure by April and after doing so the defendants complained that the disclosure was still inadequate – where the defendants were directed to make any application for further disclosure and those applications were given a full day for hearing in June, in which the defendants were partly successful – where the trial is due to recommence in December – whether the proceedings should now be stayed upon the basis that the plaintiff has still failed to make propose disclosure and that this default will deprive the defendants of a fair trial.

PROCEDURE – COSTS – SECURITY FOR COSTS – RESIDENCE OUT OF JURISDICTION – GENERALLY – where the plaintiff regularly lives both in Australia and outside Australia – where in September 2007 the defendants unsuccessfully applied for security for costs against the plaintiff – where the trial is part heard and due to recommence in December 2010 – whether the plaintiff should be ordered to give security for costs on the basis that he is ordinarily resident outside Australia.

Bankruptcy Act 1966 (Cth)
Uniform Civil Procedure Rules 1999 (Qld) r 671(e), 672

R v Barnet London Borough Council; Ex parte Nilish Shah [1983] 2 AC 309
Corbett v Nguyen [2008] NSWSC 1265
Corby v Channel Seven Sydney Pty Ltd [2008] NSWSC 245
Devaynes v Noble; Clayton's Case (1816) 1 MER 572
Inland Revenue Commissioners v Lysaght [1928] AC 234
Levene v Inland Revenue Commissioners [1928] AC 217
Leyvand v Barasch (2000) 144 SJLB 126
Logue v Hansen Technologies Ltd & Anor (2003) 125 FCR 590
Mango Boulevard Pty Ltd v Spencer & Ors [2008] QCA 274
Re Taylor; Ex parte Natwest Australia Bank Limited (1992) 37 FCR 194
Robson v Robson & Anor [2008] QCA 36
Stack & Anor v Brisbane City Council & Ors (1996) 71 FCR 523

COUNSEL: D de Jersey for the plaintiffs
A Morris QC and J W Peden for the defendants

SOLICITORS: James Byrne and Rudz Solicitors for the plaintiffs
Russell and Company Solicitors for the defendants

[1] The joint trial of these three proceedings commenced in February 2010. After six days of hearing, it had to be adjourned because the plaintiffs had failed to make proper disclosure. The corporate plaintiffs are companies controlled by Mr Gary Robson who is the plaintiff in the third proceeding, which I will call the trust action. In that case, he seeks to have transferred to him shares which are allegedly held for him on trust by his brother and sister-in-law. The value of the shares is dependent upon the value of real estate held by the relevant company, but the value of the property in question is at least in excess of $5 million. In the other proceedings, the plaintiffs claim to be owed money by the defendant in sums totalling about $1.6 million. Those proceedings were commenced as long ago as 2000 and the trust action was commenced in 2004.

[2] The litigation has not been conducted at all times, by either side, with the expedition and diligence to be expected of modern day litigants and lawyers. I need not detail here the unfortunate history of this litigation, but it is necessary to mention some events. The first is that the trust action was originally set down for trial in March 2008, but within a few days of the scheduled commencement, the parties asked the Court to adjourn the trial because each was intending to substantially amend its pleading. The trial was adjourned and the trust action was removed from the Commercial List. That was followed by a series of attempts by the defendants to amend their pleading, each of which culminated with the amendments being struck out and with orders for costs in favour of Gary Robson being made on 3 October 2008, 26 March 2009, 1 June 2009 and 8 October 2009. The three proceedings were then ordered to be heard together and the trial was set down for February this year. After six days the trial had to be adjourned because the plaintiffs seriously defaulted in the performance of their obligations to make proper disclosure. They were ordered to make that disclosure by 15 April 2010. The defendants were awarded their costs occasioned by the adjournment of the trial upon the indemnity basis.

[3] At a directions hearing on 22 April 2010, the defendants complained that the disclosure was still inadequate. I directed that any application by the defendants for further disclosure be brought in the period 11 to 21 May. On 6 May, the defendants filed in the trust action an application, returnable on 21 May, for orders under r 223(2) of the *Uniform Civil Procedure Rules 1999*. On 13 May, the defendants filed another application, also returnable on 21 May, for orders under r 223(2) and for further specific orders in relation to disclosure of documents, as well as an order pursuant to r 225(2) that in the event of default with compliance with those proposed orders, the trust action should stand dismissed and the defendants should be at liberty to enter judgment. On 21 May, those applications were adjourned by consent and they were given a full day for hearing on 9 June. After argument occupying most of that day, I made some orders upon the defendants' application but they were only partially successful. Their costs of that application were made their costs in the cause. Gary Robson was ordered to file and serve affidavits as to certain matters by 18 June and 7 July. He subsequently filed the one affidavit, responding to each of those orders, on 21 June.

[4] The defendants now apply for an order staying the further prosecution of the trust action, pursuant to r 225(2)(a), upon the basis that Gary Robson has still failed to make proper disclosure and that this default will deprive them of a fair trial. They argue that he has failed to comply with the orders made on 9 June. But for the most part their complaints are ones which they could have made, but did not argue, on

that day, notwithstanding that this was allocated for the hearing of *any* disclosure application (as they had been ordered to make by 21 May).

[5] In the alternative to that application for a stay of the trust action, they seek security for costs in that proceeding. In September 2007 they unsuccessfully applied for security for costs, and unsuccessfully appealed that outcome.[1] But their case is now based upon r 671(e), the suggestion being that Gary Robson is now ordinarily resident outside Australia. And in the proceedings brought by the corporate plaintiffs, there are applications for (further) security for costs.

Plaintiff's disclosure in the trust action

[6] It is convenient to discuss first the alleged non-compliance with the orders of 9 June, which concerns electronic documents. At this point it is necessary to say something more of the application which was heard and determined on 9 June. It was the application filed on 13 May which was then pursued. Paragraph 1 of that application sought an order pursuant to r 223(2) that the plaintiff file and serve an affidavit stating, in respect of certain documents or classes of documents, whether the document or class existed and what had happened to it if it had ceased to exist or left the plaintiff's possession or control. The documents or classes of documents were identified by an extensive schedule to the application. Paragraph 2 of the application concerned what were described as "three or four boxes of documents referred to by the plaintiff in his oral evidence herein on 24 February 2010". It sought an order that the plaintiff explain by an affidavit whether he had delivered such documents to his solicitors and what steps they had taken to identify and disclose any relevant documents within those boxes.

[7] For the most part then the defendants' complaints had been distilled to the schedule, which described documents or classes of documents, which was the subject of their application for an order under r 223(2). Gary Robson's response was to file an affidavit on 25 May which, as I held on 9 June, might be thought to have anticipated the making of the orders sought by the defendants' application. As I then said, this affidavit, with one qualification, appeared to provide the information sought. I noted that there were submissions for the defendants to the effect that I should entertain some doubt as to the reliability of the affidavit but the defendants did not seek a finding that the affidavit was inaccurate in any particular respect. I held that the affidavit effectively met what was sought by paragraphs 1(a), 1(b)(i) and 1(c) of the application. Paragraph 1(a) sought an affidavit stating whether or not the document or class of document existed. Paragraph 1(b)(i) sought an affidavit stating the circumstances in which a document or class of document had ceased to exist, including whether it had been lost, destroyed or had passed out of the possession or control of the plaintiff and if so, when. Paragraph 1(c) sought an order that the affidavit set out the circumstances in which any document or class of documents had passed out of the plaintiff's possession or control and information as to where and in whose possession or control such documents could now be found. Paragraphs 1(b)(ii), (iii) and (iv) sought orders that the affidavit state what steps the plaintiff and its solicitors had taken and when to preserve documents for disclosure and that the affidavit should contain other information as to communications between the plaintiff or the plaintiff's solicitors and any other person in relation to such steps as were taken to preserve documents. The affidavit which Gary Robson

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1 *Robson v Robson & Anor* [2008] QCA 36.

had sworn did not address those parts of the application. But I was not persuaded to make an order for an affidavit in those respects, which I held would not promote compliance with the plaintiff's duty of disclosure. I made orders as were sought by paragraph 2 of the application (relating to the boxes).

[8] The one respect in which Gary Robson's affidavit may not have met paragraph 1 of the application was in relation to electronic documents. It was unclear whether his affidavit referred to documents in electronic form. It is necessary to set out this part of my reasons:

> As I have said, there is a qualification to that; it relates to documents in electronic form. It was argued for the defendants that the affidavit filed on 25 May does not address documents of that kind. It is not clear to me that that is so but nor is it clear that it does address documents of that kind. In those circumstances, counsel for the plaintiffs agreed to an order for the provision of an affidavit by Mr Gary Robson to clarify that point.
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> Accordingly, it will be ordered that by 18 June 2010 the plaintiffs will file and serve a further affidavit, sworn by Mr Gary Francis Robson, going to whether his affidavit filed on 25 May 2010 and its schedule refers to documents in electronic form as well as documents in paper form. I expect that if that affidavit is to the effect that electronic documents had not been included, the plaintiffs would provide a further affidavit corresponding with that filed on 25 May and addressing documents in electronic form.
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> That expectation is not meant to indicate a concluded view on the merits of the application under rule 223. Rather it comes from the fact that the affidavit of 25 May was volunteered and so would a further affidavit relating to electronic material be expected to be volunteered.

[9] On the face of his affidavit filed on 21 June, Gary Robson complied with that order. He identified certain items within the schedule to his affidavit filed on 25 May, and said various things as to whether an electronic version of the document had ever existed. He swore that with the exception of those items, his affidavit of 25 May had referred to documents in electronic form as well as hard copy form.

[10] The defendants tendered extensive evidence in support of the present application, the effect of which is that there must have existed other electronic documents which have not been disclosed. The defendants read several affidavits recently prepared for the present application, including one to which the exhibits comprised some 1,020 pages. They included a report dated 9 September 2010 made by an accountant, Mr Hains, who was instructed as follows:

> We confirm that we wish to retain you, on behalf of the defendants, to provide us with a report on whether computer files and documents in original electronic form must have existed to record certain business transactions of the relevant entities.

The solicitors sent to Mr Hains certain classes of documents and asked that he "provide a report to the Court on whether computer files and documents in original electronic form existed in relation to these hard copy documents".

[11] Mr Hains summarised his opinion as follows:

> 2.1 Based on the information provided to me, I have identified various documents which, in my opinion, have been originally prepared in electronic form or would otherwise have existed as electronic files. …

[12] In the course of argument, the defendants made several complaints about the disclosure of electronic documents. It was submitted that Gary Robson's affidavit filed on 21 June was false. More generally, it was alleged that he had failed to disclose electronic documents. I asked counsel for the defendants to identify the strongest examples of these defaults and counsel referred to a document which had been disclosed by Gary Robson, in his disclosure of April 2010, as document number 405. It is a printed version of an electronic spreadsheet file, headed "Summary of trading for MQEI". It was disclosed as "Summary of trading for MQEI 01/1992 to 12/1999" and as having been attached to item 404 in that list of documents, and created by a person unknown . Item 404 was a fax or email from Gary Robson to a Mr Barrett. The document in its electronic form was not disclosed distinctly from the hard copy version.

[13] Counsel for the defendants asserted that Gary Robson had sworn in his affidavit filed on 21 June that this document "had never existed in electronic form". However, the defendants' case here misunderstands that affidavit, which must be read with my judgment of 9 June and Gary Robson's affidavit filed 25 May. He was ordered to provide an affidavit (as to electronic documents) only in respect of those documents or classes of documents which were within the schedule to his affidavit of 25 May. When I invited counsel for the defendants to identify document 405 within that schedule, they referred first to item 24 of that schedule which was a category of documents described as "books of account, ledgers, journals, accounting records, balance sheets or financial reports of MQEI recording the source of the payments … between … 1992 and … 1994". As to that category, according to Gary Robson's schedule, a document fitting that description had never existed. Having already disclosed document 405, clearly he was not treating document 405 as within that category. His stance in that respect was not unreasonable, because document 405 does not itself record the source of the payments. Counsel for the defendants then referred to other items in the schedule of the affidavit of 25 May, about which the same point applies. The result is that document 405 was not shown to have been within the schedule to Gary Robson's affidavit filed on 25 May. Accordingly, it was not the subject of my orders on 9 June. The fact that the affidavit of 21 June does not refer to it and in particular, state that the document once existed in electronic form, constitutes no default in compliance with my order.

[14] At that point the defendants' argument became more general. It was that the electronic version of document 405 should have been disclosed also, and that documents in electronic form from which this spreadsheet was derived should also have been disclosed.

[15] That first submission is not immediately attractive. These days most business documents begin their life in electronic form and some are then printed. The argument seems to be that parties should disclose the electronic version distinctly from the paper document. In some cases, there might be some point in that exercise. In most cases, the present one included, it would be pointless.

[16] As to the documents from which this document 405 was compiled, it is not demonstrated that there are any such documents which are directly relevant which have not been disclosed. It may be readily accepted that there are electronic documents from which this spreadsheet was derived, but it is incumbent upon the defendants to demonstrate their direct relevance.

[17] The defendants' counsel did not attempt to identify any document or class of document within the schedule to the affidavit of 25 May for which there would be an electronic equivalent and to which reference should have been made, but was not made, within the affidavit of 21 June. Accordingly the defendants have failed to make out their case of a breach of the order of 9 June in relation to electronic documents and their argument misconceives the effect of that order.

[18] The defendants' counsel frankly conceded that apart from their complaint about a breach of the orders of 9 June in relation to electronic documents, there is no allegation of defective disclosure which is based upon facts and circumstances which have arisen since 9 June. In effect, it is claimed that the defendants' representatives have become aware of alleged defects since then by further consideration being given to what had or had not been disclosed before then. In other words, the other matters which are the basis for this application are complaints which the defendants could have made but did not make in their application heard on 9 June. Yet they were directed to make any application in relation to disclosure by a certain date, and a full day was allocated for its hearing.

[19] In some cases, the due disclosure of documents can be essential for a proper outcome of the litigation. But disclosure is not an end in itself and a less than perfect compliance with the disclosure obligation ordinarily does not deprive the opposite party of a fair trial. Nor, of course, is disclosure the only interlocutory event which can affect the fair conduct of litigation. The interests of justice can also be affected by the extent to which extended interlocutory disputes unduly tax the resources of the parties and of the Court. The undue proliferation of interlocutory disputes needs to be checked, where possible, to avoid an injustice in the individual case. But that is also necessary because of the potential impact of undue delay and expense on the community's confidence in the administration of justice.

[20] This litigation has a history which does little credit to either side. Now there is this application, supported by more than 1,000 pages of written evidence. In those circumstances, I asked the defendants' counsel to identify the most serious examples of the alleged defaults of Mr Gary Robson (in addition to those identified in the electronic documents argument). I turn now to those matters. If they do not provide a cause for staying the trust action, it is not incumbent upon the Court to trawl through the balance of the evidence in case the defendants' counsel have not identified that which is most likely to affect the likely fairness of the trial.

[21] Outside that category of electronic documents, counsel for the defendants said that their "very best" example of non-disclosure was in respect of a certain bank account in the name of Mine and Quarry Equipment International Ltd with the ANZ Bank in Vanuatu. Mr Robson's supplementary disclosure of April 2010 included six copy facsimile sheets, which were instructions to that bank to "please debit the account of [MQEI] account number 524955A". Three of those referred to payments which are pleaded in paragraphs 55(b) to (d) of the Defence.

[22] Mr Robson's supplementary disclosure in February and April of 2010 included copies of bank statements for 12 bank accounts held by MQEI with that bank in Vanuatu and there have also been disclosed other documents relevant to bank accounts such as other statements, deposit slips, receipts and credit advices. But it is said that none of the transactions recorded by those documents has any apparent relevance. What has not been disclosed is any document in relation to account number 524955A.

[23] In his schedule to his affidavit filed on 25 May, Mr Robson addressed a category of documents described as "bank statements of MQEI showing receipt by MQEI of funds which MQEI paid to Yalgold between 10 May 1999 and 12 September 1999 in the total amount of $458,437". He completed the schedule with the response that no document fitting that description had ever existed, adding the comment that "bank statements would not identify which funds received were paid to Yalgold". The effect of his response was that although a bank statement of an account from which the funds were paid to Yalgold would evidence that payment, it would not identify the source of the funds from which the payment had been made. The fact of the payments is not in issue and Mr Robson's response is not plainly untrue. Conceivably, the state of a bank account might show that a payment was able to be made only because of a certain credit to that account which preceded the payment and in that way a statement might be directly relevant to a question of the source of the funds. But that is not inevitably the case. And it was not suggested that by some fiction, such as the application of the rule in *Clayton's Case*,[2] a bank statement would reveal which credits funded the relevant debit to the account.

[24] The fact that Mr Robson has disclosed other bank statements and records which are of no apparent relevance does not inspire confidence that he has carefully applied himself to the task. But if he has disclosed other material unnecessarily, it does not follow that the statements for this account are directly relevant. Ultimately it is not established that his disclosure is deficient in this respect.

[25] Counsel for the defendants also put forward another category, which was also said to be a particularly strong example of default, which involves documents relevant to a sale by MQEI of two machines called crushers. There are issues as to whether MQEI sold them to a company called Lihir Gold and as to the price, the identity of their true owner, who paid what to build them and how much profit MQEI made. In their application filed on 13 May the defendants specifically sought documents relating to these sales which are alleged by Gary Robson. In particular, they sought an order that there be an affidavit under r 223(2) in relation to any documents showing that MQEI was the owner of the two crushers referred to in his Reply. In the schedule to his affidavit of 25 May, in answer to the question "has a document fitting this description ever existed?", he answered "yes, as disclosed". The defendants contend that no document has been disclosed. Similarly, he gave the same answer in respect of the category of documents described as "documents showing that MQEI incurred expenses in respect of the transaction with Lihir". In his affidavit filed on 21 June, when dealing with the electronic documents point, he said this as to those categories of documents (as well as certain other categories of documents):

> [T]hese documents would have been prepared by Linda or the other staff. I do not know whether they retained electronic copies of any

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2 *Devaynes v Noble; Clayton's Case* (1816) 1 Mer 572.

> of these documents. If they did, such copies would have been on a computer or computers at the Tile Street Premises and as I have not had access to or possession of the records or access to the Tile Street Premises since about May 2000, I am unaware as to whether they now exist.

[26] The defendants rely upon an affidavit from Ms Mulcahy saying that she does not know of and has never seen any such documents. Ultimately the defendants' argument seems to be that Mr Robson has falsely sworn that he has disclosed documents relevant to this subject, the truth being that he has not. Of course, that does not establish that there are such documents. And in his affidavit of 21 June, he seems to retreat from the contention that there were such documents or at least that they now exist. It is no more likely that such documents exist and have not been disclosed as it is that Mr Robson was wrong in claiming that there were such documents and that they had been disclosed. If it was the latter, that does him little credit. But it does not represent a failure to discharge the disclosure obligation, let alone one which would prejudice a fair trial.

[27] As the defendants accept, the jurisdiction to grant a stay or dismiss an action upon the grounds which were argued here is one to be exercised "with great care" and "extreme caution".[3] An assessment of every argument flagged by the defendants' outline of submissions would seem to be unproductive, given the fate of those arguments which counsel for the defendants said were their strongest. But it is notable that the defendants ultimately complain that they cannot be given a fair trial because of alleged deficiencies in the supplementary disclosure made to them no less than five months prior to this application being heard.

[28] Lastly, it should be noted that counsel for the defendants sought to cross-examine Gary Robson upon this application, as they had sought to do in the hearing of 9 June. My reasons for refusing to allow that cross-examination were the same as I then gave.

[29] The application for a stay of the trust action will be dismissed.

Security for costs

[30] In the trust action the defendants seek the provision of security in the sum of $515,643.66 or alternatively in the sum of $85,804.66. In the MQEI case, the defendant seeks security of $184,895.66 or alternatively $59,724.66. In the Hannover case, the defendant seeks $214,551.91 or alternatively $60,728.66.

[31] According to the estimates of Mr Garrett, a solicitor specialising in legal costing, the defendants' costs to 1 March 2010 (the adjournment of the trial) were of the order of $429,000 in relation to the trust action, $158,000 in relation to the claim by Hanover International Limited and about $125,000 in relation to the claim by MQEI. The costs in the three proceedings from 2 March to 17 August 2010 have been, respectively, about $59,000, $34,000 and $33,000. The costs across the three matters between 13 September and the first day of the proposed resumption of the trial (1 December 2010) have been estimated at $79,668.

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[3] *Mango Boulevard Pty Ltd v Spencer & Ors* [2008] QCA 274 at [28] per Muir JA.

[32] Hannover and MQEI have each provided security of $25,000 since 2002. As already mentioned, the defendants unsuccessfully applied for security for costs against Gary Robson in September 2007 and unsuccessfully appealed that outcome. But they now rely upon r 671(e), contending that there is clear evidence that Mr Robson is "ordinarily resident outside Australia".

[33] In a recent case in the District Court, Gary Robson was called to give evidence and when asked for his address, he gave an address at Riverhills. He was asked "do you live in Australia all the time?" to which he answered "no". He was asked "why not?" to which he answered "the majority of time I live in other countries". Upon this evidence the defendants argue that the plaintiff "is ordinarily resident outside Australia".

[34] The concept of "ordinary residence" has been the subject of many cases, most often where it is relevant for the purposes of the revenue laws, the bankruptcy laws and, on occasions, the present context of security for costs. In *Re Taylor; Ex parte Natwest Australia Bank Limited*,[4] Lockhart J referred to several of the authorities in remarking that the words "ordinarily resident" have no technical or special meaning, but are ordinary English words and that whether a person is ordinarily resident in Australia is a question of fact and degree.[5] In discussing the meaning of "ordinarily resident in Australia" within s 43(1)(b)(i) of the *Bankruptcy Act 1966* (Cth), Lockhart J said:[6]

> To say that a person is ordinarily resident in Australia must mean something more than that he is resident in Australia. The word 'ordinarily' connotes a comparison, a measure of degree. A person may have more than one residence, but he is not necessarily ordinarily resident in each of them. The question must be determined for the purposes of s 43 of the Act at a particular time. One must ask the question whether at that time the person was ordinarily resident in Australia. The concept of 'ordinary residence' for the purposes of the Act, in my opinion, connotes a place where in the ordinary course of a person's life he regularly or customarily lives. There must be some element of permanence, to be contrasted with a place where he stays only casually or intermittently. The expression 'ordinarily resident in' connotes some habit of life, and is to be contrasted with temporary or occasional residence: see *Levene* (supra) and *Lysaght* (supra). As Lord Warrington said in *Levene* (at 232): "'Ordinarily resident' means according to the way a man's life is actually ordered." The concept of ordinarily resident cannot be stated in definite terms; each case must be determined on its facts and after taking into account all relevant matters: see the Canadian case of *Thomson v Minister of National Revenue* [1946] SCR 209 per Estey J at 231.

As to whether a person could be ordinarily resident in more than one country, Lockhart J said:[7]

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4 (1992) 37 FCR 194.
5 Ibid at 197.
6 (1992) 37 FCR 194 at 198.
7 Ibid.

> … At first blush it may seem strange to say that a person can be ordinarily resident in more than one country at the same time; but on closer analysis it is not. Plainly you cannot be physically present in more than one place at the same time. But the lifestyles of people vary greatly. Some people in the ordinary pursuit of their lives regularly or customarily live in more than one place, each of which has an element of permanence about it and is not merely a place of casual or intermittent resort.
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> Most people, if asked where they were ordinarily resident at a particular time, would name but one place: their home, because that would be the only place in which they normally or customarily live, although they may travel to other places on holidays or business intermittently. Other people may have two or more houses or flats and stay for various purposes and varying lengths of time in each. it may, depending on the circumstances, be permissible to say that at a particular time they are ordinarily resident in each of the places, though they may be at that time physically present somewhere else. …

[35] In *Logue v Hansen Technologies Ltd*,[8] an application for security for costs was made upon the equivalent ground within O 28 r 3 of the *Federal Court Rules*. Weinberg J referred to several authorities, including *Levene v Inland Revenue Commissioners*,[9] *Inland Revenue Commissioners v Lysaght*[10] and *Barnet London Borough Council; Ex parte Nilish Shah*[11] (which were discussed by Lockhart J in the passages I have set out above). He noted that those cases had been applied by the English Court of Appeal in an application for security for costs[12] as he proceeded to do in that case. In particular, he considered the circumstance where a person had two ordinary residences, one within and one outside the jurisdiction. Weinberg J said:[13]

> The English authorities suggest that it may also be possible for a person to have two ordinary residences, one within the jurisdiction and one outside. In such a case the Court has power to order security for costs, but that person's connection with the United Kingdom will be relevant to the exercise of that discretion. The closer the connection, the greater the relevance. If the claimant has an established home, and is resident, though not 'ordinarily resident' in that country, security will rarely be ordered. If the claimant has an established home and is ordinarily resident in that country, security will be ordered even more rarely … .

For that last proposition, Weinberg J cited *Leyvand v Barasch*, where Lightman J said: [14]

> The fact that the claimant is ordinarily resident out of the jurisdiction confers on the Court jurisdiction to order him to provide security. It

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8 (2003) 125 FCR 590.
9 [1928] AC 217.
10 [1928] AC 234.
11 [1983] 2 AC 309.
12 (2003) 125 FCR 590 at 598.
13 Ibid.
14 (2000) 144 SJLB 126 at [5].

> is well established that a claimant may have two ordinary residences, one within the jurisdiction and one outside. The fact that a claimant who is ordinarily resident outside the jurisdiction is also ordinarily resident within the jurisdiction does not preclude the Court ordering security. For Order 23 confers jurisdiction to order security in the case of a claimant 'ordinarily resident out of the jurisdiction' and not in the case of a claimant 'not ordinarily resident within the jurisdiction'. But the connection of the claimant with this country is of course relevant to the exercise of discretion, and the closer the connection, the greater the relevance. If the claimant has an established home and is resident here, security may rarely be required; if the claimant has an established home and is ordinarily resident here an order for security may even more rarely be ordered.

[36] That passage was followed in *Corbett v Nguyen*,[15] where White J said that where a person is ordinarily resident both within and outside the jurisdiction, "it would only be in a rare case that security for costs would be ordered against him or her, even though there is jurisdiction to do so on the basis that the person is also ordinarily resident outside Australia.[16]

[37] From the very limited evidence on the point, I find that Mr Gary Robson is ordinarily resident outside Australia, but also ordinarily resident in Australia and more specifically at that address at Riverhills. That seems to be a different address from another place in Brisbane where he was living in late 2007, when the defendants last applied for security for costs. The evidence fairly indicates that he regularly lives at that address at Riverhills and that there is a sufficient permanence in his living in Brisbane to demonstrate that he ordinarily resides here. But as he is also ordinarily resident outside Australia, the operation of sub-rule 617(e) is established and thus there is power to order security for costs. The trust case is of the kind described in *Corbett v Nguyen*. I turn to the discretionary considerations.

[38] Rule 672 of the UCPR provides relevantly:

> **Discretionary factors for security for costs**
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> In deciding whether to make an order, the court may have regard to any of the following matters –
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> (a) the means of those standing behind the proceeding;
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> (b) the prospects of success or merits of the proceeding;
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> (c) the genuineness of the proceeding;
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> (d) for rule 671(a) – the impecuniosity of a corporation;
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> …
>
> (g) whether an order for security for costs would be oppressive;

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15 [2008] NSWSC 1265 at [27], see also *Corby v Channel Seven Sydney Pty Ltd* [2008] NSWSC 245 at [25].

16 [2008] NSWSC 1265 at [11].

> (h) whether an order for security for costs would stifle the proceeding;
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> …
>
> (k) whether delay by the plaintiff in starting the proceeding has prejudiced the defendant;
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> (l) whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;
>
> (m) the costs of the proceeding.

[39] Apparently Gary Robson has no assets in Australia. His financial position overall is not clear. In the Court of Appeal's judgment concerning the previous application for security, McMeekin J remarked that all that the evidence then showed was that Mr Robson's business took him out of the country, he had not acquired assets within Australia and that he might or might not have assets outside the country.[17] That remains the state of the evidence. Hannover does not appear to have substantial assets, at least in Australia. The position of MQEI is considered below.

[40] The defendants argue that it cannot be said that any of the plaintiffs has strong prospects of success, and that weaknesses in their cases have already been "partially exposed in the first part of the trial". This is complex litigation for which there are very many issues and most of the relevant evidence is yet to be heard. Therefore, it is difficult to fairly offer any detailed consideration of the plaintiffs' prospects. But some matters must be noted. The first is that Gary Robson's action starts from the not unpromising basis of the written declarations of trust executed by the defendants. Secondly, at least many of the issues are ones upon which the defendants bear the ultimate onus of proof. Thirdly, when Gary Robson was refused summary judgment, Fryberg J considered that the defences then raised were so questionable that he imposed a condition that the defendants provide a bank guarantee for the sum of $50,000. Fourthly, it may be correct to say that there are some evidentiary gaps still to be remedied in the cases brought by the corporate plaintiffs before those cases are closed. However, the trust action has no such obvious flaw. This litigation still has a long way to run, but the strength of the plaintiff's case in the trust action is not materially different from that which appeared at the time of the previous application for security.

[41] In the previous application, Keane JA held that there was no power to order security because no subparagraph of r 671 had been engaged. Muir JA and McMeekin J thought that the discretionary considerations under r 672 were relevant, but held that they did not require security to be ordered. There was criticism of the delay in applying for security. In particular, it was noted that the defendants' solicitor said that after the proceeding had been commenced, the defendants had decided not to make any application for security and to wait and see whether Gary Robson prosecuted his case. Now more than two years later, and after the trial has commenced, this further application is made. In the trust action, the defendants would seek to justify that lateness by the fact that the evidence upon which they now rely as the basis for a power to order security is recent. However, it far from

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17 *Robson v Robson & Anor* [2008] QCA 36 at [63].

appears that the fact that Gary Robson is ordinarily resident outside Australia is new. Nor does it appear that there is any good explanation for the defendants being unaware of that fact or for not making an application upon this basis earlier. Perhaps attention was not given to the availability of this ground under r 671(e) earlier as it could have been. That possibility is indicated by the fact that no authority as to the meaning of ordinary residence was cited in the defendants' submissions. And in their written submissions this appeared:[18]

> Gary has previously resisted providing security in [the] Trusts proceeding, on the basis that he was an individual ordinarily resident in Australia.
>
> As can now be seen, however, Gary is no longer ordinarily resident in Australia.

This misstates the effect of the authorities. In particular, the jurisdiction to order security arises in the case of a plaintiff ordinarily resident out of Australia, rather than in a case of a plaintiff "not ordinarily resident within Australia".

[42] The defendants assert that there will be no prejudice to the plaintiffs from an order for security and that the need for security arises from the plaintiffs' defaults in making disclosure which led to the adjournment of the trial part heard. It is true that there is no evidence that an order for security would stifle any of these proceedings. However, the amounts which are sought are substantial and the trial is to resume on 1 December 2010. As McMeekin J said in respect of the previous application, if an application for security for costs is not made promptly it is almost inevitable that there will be some prejudice to the respondent and that "[t]o saddle any plaintiff with the task of finding a large sum of money when already on the door of the court involves prejudice".[19]

[43] The plaintiffs' default in making disclosure which led to the adjournment of the trial is relevant. It resulted in costs being ordered against them. To some extent they will be set off by costs ordered against the defendants from their many failed attempts to properly plead their case. The costs awarded in favour of the defendants from the adjournment are yet to be assessed. Indeed, for reasons which do not clearly appear, they are yet to be the subject of any quantified claim. Thus, no amount is put forward as the likely costs caused by the adjournment, or the net sum after allowing for the costs payable by the defendants.

[44] What I have said thus far is sufficient to dispose of the application for security in the trust action. I am not persuaded at this very late stage to order security. Accepting there is a jurisdiction to do so and that in a "rare case"[20] security for costs could be ordered against a person ordinarily resident within Australia, this is not such a case, particularly having regard to the inordinate and unexplained delay.

[45] I turn then to the applications against the corporate plaintiffs. On their behalf it is argued that the defendants are well protected by what is said to be very valuable plant and equipment owned by MQEI. It is claimed to be worth about $3,800,000. There is no proper valuation of it which is in evidence. Moreover, the so called valuation is that of Gary Robson himself and inexplicably he refuses to give

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18 Paragraphs 53 and 54.

19 [2008] QCA 36 at [68].

20 *Corbett v Nguyen* [2008] NSWSC 1265 at [11].

permission for an inspection of the plant and equipment or even to identify its location. So the assertion that MQEI has those substantial assets within Australia must be given little or no weight.

[46] However, the delay in making this further application for security is completely unexplained. The case of neither corporate plaintiff could be said to be so apparently weak at this stage that there is some changed circumstance in that respect. These two proceedings have been on foot for ten years. It is not said that there has been some material change to the financial circumstances of either company to explain this late application. The defendants point out that financial statements lodged in Australia under the *Corporations Act 2001* reveal no assets during the financial years 2006-2008 and that documents for the 2009 year are yet to be filed. But that is to demonstrate that this application could have been made and should have been made far earlier.

[47] Again, it is said that an order for security is not said by the plaintiffs to be likely to stifle their proceedings. That is relevant. But again, the lateness of this application would make an order for the provision of security prejudicial, even if it be by the grant of a registrable charge over the plant and equipment of MQEI as was suggested for the defendants. An obvious consequence of delays such as this is that a plaintiff proceeds to expend very substantial funds in the prosecution of its claim upon the expectation that it will not also have to contribute funds as security for the defendant's costs or otherwise make financial arrangements to that effect.[21]

[48] Accordingly, the applications for security in the debt proceedings will also be refused.

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[21] *Stack & Anor v Brisbane City Council & Ors* (1996) 71 FCR 523 at 531.