SUPREME COURT OF QUEENSLAND

CITATION:	*Gekko Developments Pty Ltd v Centa Company Pty Ltd* [2013] QSC 126
PARTIES:	**GEKKO DEVELOPMENTS PTY LTD** **ACN 139 260 674** (Plaintiff/Respondent) v **CENTA COMPANY PTY LTD ACN 010 059 944** (Defendant/Applicant)
FILE NO/S:	BS 7936 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	14 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2013
JUDGE:	Philip McMurdo J
ORDER:	**1. Within 28 days of the date of this order, the plaintiff provide security for the defendant's costs, up to and including the first day of trial, in the sum of $452,962 by payment into court or otherwise in a form satisfactory to the Registrar.** **2. If the plaintiff fails to comply with order 1, the proceeding be stayed pending provision of security in that sum or until further order.** **3. Each party have liberty to apply for such variation of the first of these orders as the circumstances then warrant.**
CATCHWORDS:	PROCEDURE – COSTS – SECURITY FOR COSTS – where defendant applies for security for costs – where plaintiff unable to provide security – where creditors of the plaintiff unwilling to provide security – whether order requiring plaintiff to provide security for costs should be made having regard to the discretionary factors in r 672 UCPR – whether creditors could be reasonably expected to provide security *Uniform Civil Procedure Rules*, r 672

Ariss & Anor v Express Interiors Pty Ltd (in liquidation) [1996] 2 VR 507, cited
Australian Equity Investors v Colliers International (NSW) Pty Ltd [2012] FCAFC 57, considered
Bell Wholesale Co Limited v Gates Export Corporation (1984) 2 FCR 1, considered
Impex Pty Ltd v Crowner Products Ltd & Ors (1994) 13 ACSR 440, applied
Pioneer Park Pty Ltd (in liq) & Ors v Australian and New Zealand Banking Group Ltd (2007) 65 ACSR 383; [2007] NSWCA 344, considered

COUNSEL: A J H Morris QC with V G Brennan for the plaintiff
D Kelly SC with M Trim for the defendant

SOLICITORS: McMahon Clarke for the plaintiff
McCullough Robertson for the defendant

[1] The defendant applies for security for costs. The amount of the security which is sought is $452,962, which according to its evidence will be the amount of its costs up to but excluding the first day of the trial. The plaintiff has no assets and apparently no means of providing security. Its only shareholder is another company, which is itself without funds. Its ultimate owner is its only director, Mr Brown. He agrees to be personally liable for any costs ordered against the plaintiff. But he is unable to provide the security which is sought and no creditor of the company is willing to do so. The plaintiff's lawyers are acting on a speculative basis.

[2] The plaintiff's case arises from an option to purchase which, it is all but conceded, was granted to it by the defendant. The property was a shopping centre in the CBD of Brisbane. The parties signed two documents, each dated 1 October 2009, in substantially the same terms. One document provided for an option to purchase at a price of $85 million. The other provided for a price of $150 million. The defendant pleads that the $150 million document was not signed until late January or early February 2010. Nothing is likely to turn upon that question.

[3] Each document was stated to have been executed as a deed. Neither bears the corporate seal of either of the parties. But it is far from clear that it would not be a deed according to s 127 of the *Corporations Act 2001* (Cth). The point could matter only if, as the defendant pleads, the stated option consideration of $10.00 was not in fact paid.

[4] The option was enforceable only in the event that the plaintiff succeeded in obtaining a certain development approval of the land, within 11 months from the date of the grant of the option. If that approval was obtained, the option could be exercised within 12 months of the grant of the option.

[5] There was a due diligence period specified within each of these documents. The $85 million document specified a due diligence period of 60 days. The $150 million document specified 30 days. At the end of that period, if the plaintiff wished to proceed and keep its option alive, it had to pay a so-called Security Deposit of $2 million to the defendant, which was non-refundable but which would be credited towards the price in the event that the option was exercised.

[6] It is unnecessary to explore here the explanation for the fact that there were two documents, specifying different prices. The plaintiff says that the true agreement was for $150 million. To the extent that the defendant agrees that an option was granted, it would appear that it accepts that this was the price.

[7] The security deposit was never paid. The defendant says that if there was an enforceable option, it became unenforceable once the due date for its payment passed. The defendant's pleading suggests that there was some understanding at least, reached on or about 1 February 2010, to extend the date for payment of the security deposit by a period of 30 days. That would appear to be consistent with its case that the $150 million document was signed at that time, because it specifies a due diligence period of 30 days.

[8] According to an affidavit of Mr Brown, he met with the defendant's Mr Yuan and an agent acting for the defendant on 30 January 2010 and said to them that the plaintiff needed more time to pay the security deposit, but was confident that the plaintiff could locate an investor which would take over or fund the purchase and who could contribute the security deposit. He says that Mr Yuan responded with words to the effect that "he agreed to give me more time to pay the $2 million", and that Mr Yuan said words such as "don't come back to Australia until you find an investor." That evidence is not reflected in the plaintiff's Reply. But the effect of the plaintiff's case is that the defendant, by an affirmation of the option agreement or by an estoppel, became precluded from relying upon the non-payment of the security deposit.

[9] The plaintiff's case is that he subsequently succeeded in finding an investor, to whom he introduced Mr Yuan, but that the defendant then dealt directly with this investor and repudiated the option agreement. The plaintiff claims that subsequently, at a meeting between Mr Brown and Mr Yuan in late May 2010, the parties agreed to compromise a claim by the plaintiff for breach of contract, upon terms that the defendant would pay to the plaintiff $28 million. This figure was supposedly reached by adding $3 million, as the plaintiff's estimated costs of the transaction to that point, to $25 million, which is said to have been the amount above $150 that the investor was prepared to pay the plaintiff for the option.

[10] No document purports to record this alleged agreement. On 26 July 2010, Mr Brown wrote to Mr Yuan requesting a meeting, the purpose of which was to "discuss the progress of the … development and to discuss your commitment to me on the 29th May 2010 to pay a figure of 3 million Australian dollars compensation."[1]

[11] It seems that Mr Brown was unsuccessful in arranging such a meeting. Consequently, Mr Brown decided to go to Mr Yuan's house one night, where he demanded a payment. This encounter was acrimonious. Mr and Mrs Yuan complained to the police. But Mr Brown's recollection is that after a heated argument at the commencement of his visit, "the conversation became quite civil" and that Mr Yuan again confirmed that the plaintiff would be paid $28 million. Mr Brown says that he followed this up with an email to Mr Yuan's son on 30 August 2010. But that email, like Mr Brown's letter of 26 July 2010, refers to an

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1 Exhibit DB-7 to the affidavit of Darren Brown, Court document number 17, page 207.

agreement for the payment of only $3 million. Again, this document is markedly at odds with Mr Brown's case that the defendant agreed to pay $28 million.

[12] These proceedings were commenced by a claim filed on 31 August 2012. The plaintiff's primary claim is for $28 million upon that alleged compromise of May 2010. Alternatively, the plaintiff seeks damages for breach of contract, for which there are several variations. One of them is that the plaintiff would have made a profit of $25 million from transferring its interest to that investor. But another is a much larger claim, under which it is asserted that the plaintiff would have made a profit of $121,084,500, which is 30 per cent of the profit from a joint venture which, it is said, would have proceeded for the acquisition and development of this land. Clearly that claim has the potential for a very extensive and expensive factual inquiry. The plaintiff also claims to have suffered loss and damage, represented by "costs and expenses incurred in connection with [the transaction]" consisting of four amounts, each expressed in round terms and totalling $800,000.

[13] The case is defended upon several grounds. But clearly one of the defendant's principal arguments will be that, at least by the plaintiff's failure to pay the security deposit, the defendant became entitled to terminate any option agreement, which it did by May 2010. It denies that it made any compromise agreement with the plaintiff to pay $28 million or any other amount.

[14] The plaintiff is a company which was specially acquired for this transaction. It has no assets (save for the suggested causes of action). Its ultimate owner, Mr Brown, has no substantial assets and his guarantee would be unable to satisfy an order for costs in an amount of about $450,000. He is a real estate agent, working in a business of which he is a half owner and from which he is paid about $120,000 per annum before tax. There was no contest that the court is empowered to give security for costs in these circumstances. The question is whether, having regard to the discretionary factors set out in r 672 of the *Uniform Civil Procedure Rules* 1999 (Qld), an order should be made.

[15] Some of the discretionary matters have been mentioned already, in that I have referred to the means (or lack of means) of Mr Brown. But it is also necessary to say something of the position of others who might benefit from a successful prosecution of this claim. In particular, the applicant refers to some creditors who are said to be potential beneficiaries of a judgment in favour of the plaintiff.

[16] The defendant points first to a Mr Peter Campbell and a Mr Haemish Campbell. They are owed about $132,000, which they advanced to the company to cover some initial expenses for this transaction. They did so upon an expectation that if the transaction went ahead, they would have some equity participation. But in the present circumstances, they are simply now lenders whose debt continues to accrue interest. They are not willing to fund the litigation and in particular to provide any security for costs.

[17] The defendant also points to a Mr Pride, who is relevantly in the same position but who is owed only $7,500 plus interest.

[18] The defendant's submission in respect of these creditors relies upon *Bell Wholesale Co Limited v Gates Export Corporation*,[2] where the Full Court of the Federal Court (Sheppard, Morling and Neaves JJ) said:[3]

> "… a Court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means. It is not for the party seeking security to raise the matter; it is an essential part of the case of a company seeking to resist an order for security on the ground that the granting of security will frustrate the litigation to raise the issue of the impecuniosity of those whom the litigation will benefit and to prove the necessary facts."

In a relatively recent judgment of the Full Court of the Federal Court, the effect of that passage was described as follows:[4]

> "The passage in *Bell Wholesale* is not to be read like a statute and the discretion thereby ossified. It does not require that the class of those benefited by the litigation be divided into two further sub-classes viz those standing behind the applicant and those standing, presumably, elsewhere. The principle at play is a simple one: those who stand to share the benefits of litigation cannot shirk its burdens. We do not think the court in *Bell Wholesale* intended to say any more than that. Indeed this is clear from the last sentence of the passage quoted above which, in terms, talks only of those standing to benefit from the litigation. It follows that the concepts of 'benefiting from' and 'standing behind' are elements in the same concept. It is no surprise, therefore, that arms length creditors have been held to be persons to whom the principle applies: see, for example, *Cosdean Investments Pty Ltd v Football Federation of Australia Ltd (No 2)* [2007] FCA 163 at [15]-[29] per Mansfield J."

[19] Although, as the defendant's argument agrees, the facts and circumstances of each case must be considered. The defendant argues that the effect of these authorities in the present case is that security should be ordered because there are persons "standing behind the proceeding" who are not demonstrated to lack the means from which to provide security. In the same way, it is said that an order for security would not stifle the proceeding.[5] However, the position of one of these creditors is that it stands to gain only a very small sum from a successful outcome for the plaintiff and the position of the others is that their likely dividend would be still a relatively small proportion of the amount of the security which is being sought. It would not seem to be reasonable to expect any creditor to contribute to security for such a large sum for such a relatively small return, especially where the outcome is dependent upon contested factual questions involving the credibility and reliability of witnesses. In *Impex Pty Ltd v Crowner Products Ltd & Ors*,[6] Macrossan CJ,

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2 (1984) 2 FCR 1.

3 (1984) 2 FCR 1 at 4.

4 *Australian Equity Investors v Colliers International (NSW) Pty Ltd* [2012] FCAFC 57 at [30] per Jacobson, Besanko and Perram JJ.

5 UCPR, r 672(h).

6 (1994) 13 ACSR 440.

referring to *Bell Wholesale Pty Ltd v Gates Export Corporation*, put the matter in this way:

> "It is clearly established that when a plaintiff company seeks to avoid an order to provide security on the ground that it is impecunious and its suit would be stifled in consequence of an order, the onus lies on it to show that this would indeed be the consequence and this requires attention to the question whether others who might *reasonably be expected to furnish security*, eg shareholders and creditors, are unable to provide it."[7]
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> (Emphasis added)

[20] According to an affidavit of Mr Brown, he is the major creditor of the company, having lent to the plaintiff $281,168.50, but there are also other creditors (including the Campbells and Mr Pride) from which there are total creditors of $426,142.[8] The largest of those other creditors is a Mr Rice who is said to be owed a "general manager's salary" of $125,000. None of these creditors (save for Mr Brown who of course is also interested as the ultimate shareholder) has a debt and therefore an interest in the outcome, from which it might reasonably be expected that it would provide security.

[21] The next of the discretionary considerations under r 672 is the matter of the merits of the plaintiff's claim in the proceeding. During the hearing of this application, I had the impression that it would be difficult to venture a view upon the respective merits in this case, because the outcome seemed to ultimately depend upon who was believed in relation to a meeting between the parties which took place in late May 2010. However, with a fuller consideration of the evidence, I am of the view that the plaintiff's case could be described as having poor prospects, for these reasons.

[22] The first is that there is no document which supports the plaintiff's case about the terms of the alleged compromise and there are two documents, each coming from the plaintiff, which are against it, because each refers to an agreement for the plaintiff to be paid not $28 million, but $3 million. Now the plaintiff might say that the agreed amount contained a component in the sum of $3 million. But the documents of July and August 2010 give no indication of any payment beyond $3 million.

[23] Further, neither of those documents refers to the sum of $3 million as being limited to a reimbursement of expenses and it is clear from Mr Brown's own evidence that the plaintiff's expenses were not even almost $3 million. In paragraph 42 of his principal affidavit, Mr Brown says that between 1 July 2009 and 30 July 2010 the plaintiff incurred expenses, as he there sets out, which totalled $426,142. Yet in the same affidavit he gives evidence of conversations with Mr Yuan, in which he claims to have told Mr Yuan that he wanted $3 million for the plaintiff's costs. Now unless he was seriously misleading Mr Yuan as to the amount of his costs, he is unlikely to have told him that the plaintiff should be paid $3 million for its costs apart from some compensation for lost profits. The plaintiff's prospects on this respect are not enhanced by the fact it has pleaded that its "costs and expenses incurred in connection with the matters referred to in this pleading" totalled

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7 (1994) 13 ACSR 440 at 446 approved by the Victorian Court of Appeal in *Ariss & Anor v Express Interiors Pty Ltd (in liquidation)* [1996] 2 VR 507 at 515.

8 Affidavit of Darren Brown, Court document number 17, paragraphs 39, 43.

$800,000,[9] an assertion which is at odds with either view of the effect of Mr Brown's affidavit, set out above.

[24] A further reason for my view of the plaintiff's prospects is in relation to the security deposit. There is no document which supports the plaintiff's case that by some means, it became relieved from the obligation to pay the non-refundable security deposit, or any part of it, whilst still enjoying an enforceable option to purchase such a valuable property by having paid only $10.00. It is true that, after the due date had passed for the payment of the security deposit, there was no purported termination of the option agreement until at least the conversation of May 2010 and that the defendant knew that the plaintiff was continuing to look for an investor. But it seems unlikely that the defendant acted in such a way as to preclude itself from dealing with its property inconsistently with the option to purchase, although it did not have the benefit of the security deposit.

[25] Rule 672(c) refers also to the matter of the genuineness of the proceeding. There is at least one part of the proceeding which is difficult to accept as genuine, which is the alternative claim for damages for an amount in excess of $121 million. On the plaintiff's case, it was prepared to pass up an opportunity to make a profit of that order by agreeing with an investor to pass on its option to purchase for a profit of $25 million. The claim for lost profits of $121 million would appear to be one which, if pursued, would require an allowance for the very many contingencies which could have affected the prospect of a redevelopment proceeding and with profits of that order, and of the plaintiff enjoying 30 per cent of these profits.

[26] It is said that the plaintiff's impecuniosity is attributable to the defendant's conduct. If, as the plaintiff alleges, the defendant has wrongfully failed to pay it $28 million, the plaintiff's *present* impecuniosity could be said to be a result of the defendant's default. But the plaintiff has always been impecunious, in the sense that it had no capital and relied upon loans which it had no prospect of repaying unless and until some other investor was persuaded to pay for whatever rights the plaintiff enjoyed. When regard is had to the origin of this matter as a relevant consideration to the exercise of the present discretion, as discussed by Basten JA in *Pioneer Park Pty Ltd (in liq) & Ors v Australian and New Zealand Banking Group Ltd*,[10] this consideration does not particularly assist the plaintiff here.

[27] The plaintiff argues that an order for security for costs would stifle the proceeding. I am persuaded that an order for security *in the amount which is sought* would stifle the proceeding *as it is presently pleaded*. The plaintiff has demonstrated that it cannot raise the funds required to provide this security. But the question is whether this will shut out any possibility of the plaintiff prosecuting what may prove to be a meritorious claim. The plaintiff has made no attempt to confine the ambit of its litigation: rather, by making this extraordinarily large claim for loss of profits, it has expanded considerably the ambit and likely cost of the proceedings. Absent that claim, this case would involve a relatively narrow factual inquiry, which would focus upon no more than about six conversations. It would require no expert evidence and very little disclosure and management of documents. It is difficult to see that such a case could exceed five days in length or that it would cost the defendant anything like the amount estimated in its evidence on this application.

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9 Statement of claim, Annexure III, page 28.

10 (2007) 65 ACSR 383 at 395-6; [2007] NSWCA 344 at [50].

[28] Further, if for the moment the large damages case is to be regarded as realistic, the plaintiff has not suggested any directions which might result in a more efficient use of resources, such as a direction that certain questions might be tried in advance of the assessment of those damages. For example, if it were concluded that the plaintiff did reach a compromise agreement, as it alleges, this damages case would be irrelevant. If the plaintiff did not prove that the defendant repudiated the option agreement and that there was an enforceable compromise, again the damages case would be irrelevant.

[29] At least in the current state of the plaintiff's proceedings, I am persuaded that security for costs should be ordered. The defendant should not be required to spend something of the order of almost $500,000 defending an apparently poor case overall, and for which the costs will be greatly increased by an apparently unrealistic claim for damages which, at present, I am not persuaded is genuine. However, the order for security for costs should make some allowance for the prospect that the ambit of the plaintiff's case might change, making the case less expensive, and warranting a reconsideration of whether this amount of security, or indeed any security, should be required.

[30] It will be ordered as follows:

1. Within 28 days of the date of this order, the plaintiff provide security for the defendant's costs, up to and including the first day of trial, in the sum of $452,962 by payment into court or otherwise in a form satisfactory to the Registrar.
2. If the plaintiff fails to comply with order 1, the proceeding be stayed pending provision of security in that sum or until further order.
3. Each party have liberty to apply for such variation of the first of these orders as the circumstances then warrant.