SUPREME COURT OF QUEENSLAND

CITATION:	*Gekko Developments Pty Ltd v Centa Company Pty Ltd (No 2)* [2013] QSC 353
PARTIES:	**GEKKO DEVELOPMENTS PTY LTD** ACN 139 260 674 (plaintiff) v **CENTA COMPANY PTY LTD** ACN 010 059 944 (defendant)
FILE NO/S:	BS 7936 of 2012
DIVISION:	Trial Division
PROCEEDING:	Interlocutory application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2013
JUDGE:	Philip McMurdo J
ORDERS:	**1. Upon Darren Brown's undertaking to consent to an order for costs against him which corresponds with any order for costs made against the plaintiff, paragraph 1 of the orders made on 14 May 2013 be varied to substitute "42 days" for "28 days" and an amount of $60,000 for the amount of $452,962.** **2. The plaintiff will have leave to amend the claim and statement of claim by filing and serving amended documents, which accord with these reasons, by 29 January 2014.**
CATCHWORDS:	PROCEDURE – COSTS – SECURITY FOR COSTS – where the plaintiff was ordered to pay security for costs – where the plaintiff now seeks leave to file an amended claim and statement of claim substantially narrowing the scope and expense of the litigation – where the defendant argues that the proceeding should now be dismissed as no security has been provided – where the defendant argues that if the proceeding is permitted to continue the plaintiff should still be ordered to pay security for costs – whether the proceeding should be dismissed because the plaintiff has not provided security – whether the plaintiff should be allowed to amend its claim and statement of claim – whether security for costs should be

ordered and, if so, in what amount

Uniform Civil Procedure Rules, r 672

Gekko Developments Pty Ltd v Centa Company Pty Ltd [2013] QSC 126, related
K P Cable Investments Pty Ltd v Meltglow Pty Limited (1995) 56 FCR 189; [1995] FCA 76, cited
Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd [2010] 2 Qd R 85; [2009] QCA 254, cited

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] On 14 May 2013, I ordered that the plaintiff provide security for the defendant's costs, up to and including the first day of the trial, in the sum of $452,962. I stayed the proceeding pending the provision of that security or until further order. Each party was given liberty to apply for a variation of those orders as the circumstances then warranted.[1]

[2] In that judgment I discussed the plaintiff's claim, the likely issues in the proceeding and the apparent strength or otherwise of the respective cases. I made three particular observations which are of present relevance. The first was that the plaintiff's then pleaded case contained a very extensive and alternative claim for damages for breach of contract, for an amount in excess of $121 million, which I found difficult to accept as a genuine claim.[2] Secondly, I said that absent that damages claim, the case would involve a relatively narrow factual inquiry and would require no expert evidence and very little disclosure and management of documents.[3]

[3] Thirdly, I noted the apparent tension between the plaintiff's claim that the parties compromised their dispute upon the defendant's promise to pay $28 million and the written demands which the plaintiff then made for the payment, not of that sum, but of $3 million.[4]

[4] My judgment acknowledged that the question of security for costs should be revisited in the event that the ambit of the plaintiff's case was narrowed.[5] The plaintiff now applies to amend its claim and statement of claim in a way which would very substantially reduce the scope and expense of the litigation. At the same time, it applies to set aside the order for security for costs. The defendant submits that no security having been provided, the proceeding should now be dismissed. Alternatively, it says that if the proposed amendments are permitted, the amount of the security should be reduced to $304,950. This amount is the estimate, prepared by Mr G J Robinson for the defendant, of its likely costs to the first day of the trial upon the amended case.

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1 *Gekko Developments Pty Ltd v Centa Company Pty Ltd* [2013] QSC 126.
2 *Gekko Developments Pty Ltd v Centa Company Pty Ltd* [2013] QSC 126 at [25].
3 *Gekko Developments Pty Ltd v Centa Company Pty Ltd* [2013] QSC 126 at [27].
4 *Gekko Developments Pty Ltd v Centa Company Pty Ltd* [2013] QSC 126 at [22].
5 *Gekko Developments Pty Ltd v Centa Company Pty Ltd* [2013] QSC 126 at [29].

[5] The plaintiff now wishes to limit its claim to an amount of $3 million, as an amount which the defendant allegedly agreed to pay by way of a compromise of the plaintiff's cause of action for breach of the option agreement. In the present statement of claim, it is pleaded that a compromise was reached in the course of a certain conversation between the plaintiff's Mr Brown and the defendant's Mr Yuen on or about 29 May 2010. It is that same conversation upon which the plaintiff's proposed amended case would rely. The present case as well as the proposed amendment appears from these paragraphs of the proposed statement of claim:

> "45. In the course of that conversation:
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> (a) Brown said words to the effect, 'How dare you Henry. You've gone behind my back and done a deal yourself. I introduced you to Ghassan Basim Khatib';
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> (b) Yuen said words to the effect, 'You didn't introduce Ghassan Basim Khatib to me. Ahmed introduced him';
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> (c) Deriard said words to the effect, 'We have to come to a solution. Henry will pay you for your costs';
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> (d) Brown said words to the effect, 'I want $3 million for my costs. ~~I also want the original deal for the markup on the purchase price. I want the $25 million we agreed~~ … Do you agree to this?'; and
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> (e) Yuen said words to the effect, 'Yes, not a problem. My handshake is my word, I am a Buddhist I cannot tell lies'.
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> 46. In the premises of the last preceding paragraph:
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> (a) Gekko accepted the repudiation by Centa of the Option Agreement ~~Call Option Deeds~~ by Yuen's Repudiatory Conduct;
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> (b) Centa agreed to pay Gekko $3 ~~$28~~ million; and
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> (c) expressly or in the alternative by necessary implication, the said payment of ~~$28~~ $3 million was to constitute an accord and satisfaction of Gekko's claim to recover damages from Centa on account of the said repudiation."

[6] There is no evidence which explains this change to the plaintiff's case, in the sense of some more recent recollection of what was said at the meeting. Rather, the position seems to be that the plaintiff has made these amendments having regard to what I said about the plaintiff's case in my previous judgment. I note that the plaintiff's solicitor says that she was instructed to make these changes on the day after my judgment was given.

[7] The proof of this amended case would not be straight forward. Would Mr Brown's evidence be that there was a conversation which also referred to a payment of $25 million? Or would his evidence be that only an amount of $3 million was discussed? Nevertheless, it can be said that the amended case, insofar as the alleged compromise is concerned, would not have the particular difficulty of a tension with the contemporaneous documents to which I referred in my earlier judgment. But still there is the point, according to the pleading, that Mr Brown said that an amount of $3 million was sought "for my costs" when it appears that the plaintiff, on Mr Brown's evidence, incurred expenses of approximately $400,000.[6]

[8] Despite the amendment, there remains the difficulty for the plaintiff's case on the issue of the security deposit, as I discussed in the previous judgment.[7]

[9] On this proposed case, I am not prepared to say that the proceeding is not genuine.[8] But the plaintiff's case could not be described as apparently strong.

[10] The defendant submits that the amendments should not be permitted because the proceeding should be dismissed. It is submitted for the defendant that the plaintiff has unduly delayed in making the present application. That submission is not so persuasive when it is seen that, despite the stay of the proceeding, some things have been done towards its prosecution since the previous judgment. After being informed, in late May and early June, of the plaintiff's intention to make these amendments, the solicitors for the defendant wrote asking for further disclosure of documents. By subsequent correspondence, this disclosure was pursued by the defendant's solicitors before, on 20 August, the plaintiff's solicitors provided a supplementary list of documents as well as the draft amended claim and statement of claim. The defendant's solicitors then sought electronic copies of the documents in the supplementary list, at the same time complaining of inadequate disclosure. Then on 28 August, the defendant's solicitors wrote to the plaintiff's solicitors seeking further particulars "of the circumstances in which [the plaintiff] alleges the "Option Agreement" was entered into, including proper particulars of all times, dates and places relevant to such circumstances." That does not appear to have been a request for particulars which was inspired by the proposed amendments. The defendant's solicitors continued to press for an inspection of "the original computer or electronic device" on which various calendar entries were stored, so as to have a forensic expert assess their authenticity. Finally, on 10 September, the plaintiff's solicitors provided further particulars in response to the defendant's request. It can therefore be seen that, notwithstanding the stay, the case has advanced somewhat since my previous judgment. The plaintiff promptly notified the defendant of its intention to amend, following that judgment. It did delay in providing draft amendments. Nevertheless, overall the plaintiff's conduct since the previous judgment does not warrant the dismissal of the proceeding.

[11] It is submitted for the defendant that there is no explanation of why the plaintiff has now departed from the case originally pleaded. But again that criticism, if accepted, would not warrant the dismissal of the proceeding.

[12] The defendant's counsel also referred to the retention, within the proposed amended claim and statement of claim, of an unspecified claim for an unquantified amount of

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6 *Gekko Developments Pty Ltd v Centa Company Pty Ltd* [2013] QSC 126 at [23].

7 *Gekko Developments Pty Ltd v Centa Company Pty Ltd* [2013] QSC 126 at [24].

8 *Uniform Civil Procedure Rules*, r 672(c).

damages for breach of contract. In the course of the argument, it was soon apparent that this was retained by an oversight. Therefore, if leave to amend is to be given, then paragraph (2) of the claim and paragraph (2) on page 16 of the proposed statement of claim should be deleted.

[13] I am not persuaded to dismiss the proceeding at this stage. And the proposed amendments should be allowed, subject to the matter in the preceding paragraph and that in paragraph [17] below.

[14] The remaining questions are whether there should still be security for costs and if so in what amount.

[15] I go then to the likely amount of the defendant's costs upon the amended case, which is relevant to whether any security should be ordered as well as to the amount of that security. There is a remarkable difference between the respective estimates of the parties. The defendant has gone to the trouble and expense of obtaining a further report from Mr Robinson, a practising barrister specialising in the assessment of costs. Of course Mr Robinson is not a counsel engaged to conduct the defendant's case and his opinion is necessarily dependent upon an understanding of the scope of the litigation according to his instructions. Mr Robinson has assessed the likely costs according to whether the trial takes three days or four days. He estimates that the costs up to but excluding the first day of a four day trial would be $304,950. This includes counsel's fees of about $151,000. Some of those fees would seem to be for a mediation, the other costs of which are included within this estimate. His alternative estimate, for the preparation for a three day trial, is $293,574.

[16] The plaintiff's solicitor estimates that the defendant's costs to the *end* of the trial would be approximately $93,000, which includes trial costs of about $39,000, upon the basis of a three day trial. Plainly, the difference between these estimates is remarkable indeed, considering that the parties do agree on the likely duration of the trial.

[17] The plaintiff's solicitor says that only four witnesses would be expected at the trial, namely Mr Brown, Mr Henry Yuen, Mr Jason Yuen and Mr Maurice Deriard. A solicitor for the defendant agrees that those four would be likely witnesses. But in his view, another six witnesses would be likely to be called. The first is a Mr Challen, who is said to be relevant to a question of what costs were incurred by the plaintiff between July 2009 and June 2010. However, upon the amended case, the plaintiff would not have to prove the costs which were incurred by him. He is not looking to recover some amount upon a restitutionary basis for services performed at the request of the defendant. The proposed amended claim and statement of claim still contain claims for $3 million "as a debt on the basis of *indebitatus assumpsit*," indicating an action to recover $3 million as a reasonable remuneration for the plaintiff's services rather than as an agreed sum to compromise for the loss of the plaintiff's option to purchase. But no facts are pleaded in the proposed statement of claim which could found such relief. In particular, the proposed paragraphs 45 and 46, as set out above, plead only an entitlement to $3 million because of the defendant's promise to pay specifically that amount. Therefore, Mr Challen's evidence would appear to be unnecessary.

[18] It is said that Mr Pride should be a witness, having regard to the matters deposed to in his affidavit of 20 March 2013 and what is pleaded in an earlier proceeding brought by the plaintiff.[9] It was there pleaded that Mr Pride was present when the option deed was exchanged on 1 October 2009. The plaintiff's case seems to be that the relevant option deed was that which provided for a consideration of $150 million. As noted in the previous judgment, the defendant concedes that it did sign (although not execute as a deed) an option agreement for a sale at $150 million. It pleads that it did so in February 2010. Therefore, there does not appear to be any real issue that the defendant granted to the plaintiff an option to purchase. The relevance of Mr Pride's evidence is not apparent.

[19] The defendant's solicitor refers to a potential witness called Mr Obeidat who, in the plaintiff's pleading in its previous proceeding, was said to have been present at the critical meeting between Mr Brown and Mr Yuen. I accept that he is a relevant witness.

[20] Next a Mr Al-Jibouri is said to be a relevant witness. He is identified in the Defence as a potential investor in the redevelopment of the subject property. However, the relevance of this fact, at least on the proposed amended case, it not apparent. The plaintiff's proposed case is not to recover a commission for introducing this investor. Its case is to recover what it says was a certain sum which the defendant agreed to pay for the plaintiff to surrender what it alleged was its entitlement to an option to purchase. For the same reasons another suggested witness, Mr Salem, would not be a relevant witness. Lastly, it is suggested that a Mr Sarham, who apparently worked with Mr Salem, should also be a witness. For the same reasons, the relevance of whatever would be his evidence is not apparent.

[21] The defendant's solicitor refers to the fact that each of Mr Obeidat, Mr Al-Jibouri, Mr Salem and Mr Sarham are located in the Middle East. No doubt the intention to proof and possibly call these witnesses has substantially contributed to the defendant's estimate of costs. As I have concluded, only Mr Obeidat would be relevant. Further, I am not persuaded that it would be necessary for the defendant's lawyers to travel to the Middle East in order to proof him. The factual question here is a very narrow one and a discussion with Mr Obeidat about his recollection should not require reference to any substantial amount of documentation.

[22] Therefore, the likely scope of the case would be a three day trial involving probably five witnesses. Some weight must be given to Mr Robinson's opinion, given his experience in the assessment of costs. But as I have said, his opinion here may result from an understanding of the scope of the litigation which is inaccurate. I must say that a case involving this limited and uncomplicated factual inquiry should cost nothing of the order of Mr Robinson's estimates in its preparation for trial. In my view, the plaintiff's estimate is likely to be much closer to what will be or should be the ultimate cost. However, some allowance should be made for Mr Obeidat's evidence as well as some other contingencies. In my view, a reasonable allowance up to and *including* the first day of the trial would be $80,000.

[23] The plaintiff's ability (or otherwise) to provide some security for costs is unchanged from that which I discussed in my previous judgment. Mr Brown's personal circumstances are unchanged. It seems that he has a substantial income, derived

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9 BS 1347 of 2011, paragraph 6 of the statement of claim.

from a business of which he is a half owner but which is not considered by his bank to be sufficiently valuable for it to lend money for this case. Mr Brown says that none of his creditors is prepared to make any contribution towards this litigation. Some of those creditors are owed amounts in excess of $100,000, as I discussed in my previous judgment.[10]

[24] It is difficult to accept that the plaintiff, through Mr Brown, has no means of raising any sum towards security for the defendant's costs. Accepting that Mr Brown's bank will not lend money for this purpose, it does not follow that there are no other sources of finance. Therefore, I am not persuaded that an order for security in an amount of, say, $60,000 would stifle the proceeding.

[25] Mr Brown still proposes an undertaking to be personally liable for any order for costs made against the plaintiff. The provision of that undertaking does not require the court to refuse an order for security but it is a relevant consideration.[11] Although Mr Brown is not wealthy, he is not impecunious. An order for costs against him is likely to have some worth.

[26] In my conclusion, the defendant can be reasonably protected against the prospect of not recovering its reasonable costs by a combination of the personal liability of Mr Brown for those costs and an order for security in an amount of $60,000.

[27] It will be ordered that upon Darren Brown's undertaking to consent to an order for costs against him which corresponds with any order for costs made against the plaintiff, paragraph 1 of the orders made on 14 May 2013 be varied to substitute "42 days" for "28 days" and an amount of $60,000 for the amount of $452,962. The plaintiff will have leave to amend the claim and statement of claim by filing and serving amended documents, which accord with these reasons, by 29 January 2014.

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10 *Gekko Developments Pty Ltd v Centa Company Pty Ltd* [2013] QSC 126 at [16] and [20].

11 *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* [2010] 2 Qd R 85 at 96 [39] per Muir JA, with whom Holmes JA and Phillipides J agreed; *K P Cable Investments Pty Ltd v Meltglow Pty Limited* (1995) 56 FCR 189 at 204.