Mac-Attack Equipment Hire Pty Ltd v AJ Lucas Operations Pty Ltd [2010] NTSC 27

PARTIES:	Mac-Attack Equipment Hire Pty Ltd
	v
	AJ Lucas Operations Pty Ltd
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	181/09 (20942951)
DELIVERED:	27 May 2010
HEARING DATES:	30 April 2010
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

COSTS – security for costs – principles which apply to the making of an order – assessment of nature of the security and the quantum of the security.

Jazabas Pty Ltd & Ors v Haddad & Ors [2007] NSWCA 291;
Iskandar & Natrabu v Merpati [2005] NTSC 85;
Milingimpi Educational and Cultural Association Inc v Davis; *The Museums and Art Galleries Board and the Northern Territory of Australia*, unreported, Supreme Court NT, Kearney J, 12 October 1990;
Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch, unreported Supreme Court NT, Kearney J, 23 July 1991;
Gentry Bros Pty Ltd v Wilson Brown and Associates Pty Ltd (1992) 8 ACSR 405.

Supreme Court Rules, O.62 r.2

Corporations Act 2001, s 1335

REPRESENTATION:

Counsel:

Plaintiff:	W Roper
Defendant:	A Wyvill SC

Solicitors:

Plaintiff:	Hunt & Hunt
Defendant:	Ward Keller

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Mac-Attack Equipment Hire Pty Ltd v AJ Lucas Operations Pty Ltd [2010] NTSC 27
No. 181/09 (20942951)

BETWEEN:

Mac-Attack Equipment Hire Pty Ltd
Plaintiff

AND:

AJ Lucas Operations Pty Ltd
Defendant

CORAM: MASTER LUPPINO

REASONS FOR JUDGMENT

(Delivered 27 May 2010)

[1] In this matter the Defendant has sought an order for security for costs against the Plaintiff. The application is made pursuant to Order 62 of the *Supreme Court Rules* and s 1335 of the *Corporations Act*.

[2] The matter has its genesis in an adjudication pursuant to the *Construction Contracts (Security of Payments) Act*. A request was made by the Plaintiff in these proceedings under that Act on 8 July 2009 and the dispute was referred to an adjudicator. On 7 August 2009 the Adjudicator found in favour of the Plaintiff.

[3] Thereafter, by Originating Motion filed on 18 August 2009 the Defendant sought a declaration in this Court that the adjudicator's decision was void. That matter was heard on 14 September 2009. On 18 September 2009 the Court held that the adjudication was valid. The Defendant thereupon appealed to the Court of Appeal and on 23 September 2009 the Court of Appeal ruled in favour of the Defendant and ordered the Plaintiff to pay all of the costs of the Defendant, including those at first instance. Those costs have since been taxed in an amount in excess of $62,000.00.

[4] The current proceedings were commenced by the Plaintiff and I understand that it covers essentially the same subject matter in the previous adjudication.

[5] Order 62 of the *Supreme Court Rules* provides as follows:-

Order 62 Security for costs

62.01 Definitions

In this Order, unless the contrary intention appears:

defendant includes a person against whom a claim is made in a proceeding.

defence includes a defence to a counterclaim and defence to a statement of a third party claim.

plaintiff includes a person who makes a claim in a proceeding.

62.02 When to give security

(1) Where:

(a) the plaintiff is ordinarily resident out of the Territory;

(b) the plaintiff is a corporation or (not being a plaintiff who sues in a representative capacity) sues not for his own benefit but for the benefit of another person and there is reason to believe that the plaintiff has

insufficient assets in the Territory to pay the costs of the defendant if ordered to do so;

(c) a proceeding by the plaintiff in another court for the same claim is pending;

(d) subject to subrule (2), the address of the plaintiff is not stated or is not stated correctly in his originating process;

(e) the plaintiff has changed his address after the commencement of the proceeding in order to avoid the consequences of the proceeding; or

(f) under an Act or the Corporations Act 2001 the Court may require security for costs,

the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against the defendant be stayed until the security is given.

(2) The Court shall not require a plaintiff to give security by reason only of subrule (1)(d) if in failing to state his address or to state his correct address the plaintiff acted innocently and without intention to deceive.

62.03 Manner of giving security

Where an order is made requiring the plaintiff to give security for costs, security shall be given in the manner and at the time the Court directs.

62.04 Failure to give security

Where a plaintiff fails to give the security required by an order, the Court may dismiss his claim.

62.05 Variation or setting aside

The Court may set aside or vary an order requiring a plaintiff to give security for costs.

[6] Section 1335 of the *Corporations Act,* as far as it is relevant to the current matter, provides as follows:-

1335 Costs

(1) Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if

> successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

[7] It is settled law that the foregoing sections confer a discretion on the Court to order security for costs in appropriate cases. The first task for the Court is to determine whether the discretion is enlivened. That has been appropriately conceded in this case and is not in dispute.

[8] It is also settled law that the discretion is unfettered and is to be exercised having regard to all the circumstances of the case. The authorities do not attempt to exhaustively list all of the matters relevant to the exercise of the discretion as those factors will vary from case to case. There are however well established guidelines which Courts typically take into account in determining such applications. In *Jazabas Pty Ltd & Ors v Haddad & Ors*[1] *("Jazabas")*, these were reported to be:-

(1) Whether the application was brought promptly;

(2) The strength and bona fides of the Plaintiff's case;

(3) Whether the Plaintiff's impecuniosity was caused by the Defendant's conduct;

(4) Whether the application for security is oppressive and will stultify the Plaintiff's claim;

[1] [2007] NSWCA 291

(5) Whether there are any persons standing behind the company who are likely to benefit from the litigation and who are willing to provide the necessary security;

(6) Whether the persons standing behind the company have offered personal undertakings to be liable for the costs and if so what the form of the undertaking is;

(7) Security will only ordinarily be ordered against a party who is in substance a Plaintiff.

[9] In the Northern Territory, *Iskandar & Natrabu v Merpati*[2], and *Milingimpi Educational and Cultural Association Inc v Davis; The Museums and Art Galleries Board and the Northern Territory of Australia*, an unreported decision of Kearney J delivered 12 October 1990, acknowledged four of the foregoing factors.

[10] In the current matter factors (1) and (7) from *Jazabas* are not in issue. Factor (2) is relevant as to part of the Plaintiff's claim and is discussed in greater detail below. Factors (3) and (4) are conceded by the Plaintiff. Likewise factors (5) and (6) remain relevant and are also discussed in greater detail below.

[11] *Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch*, an unreported decision of Kearny J dated 23 July 1991, is authority

[2] [2005] NTSC 85

for the proposition that a Plaintiff company seeking to resist an application for security for costs should place before the Court a full and frank statement of its assets and liabilities as well as those of its backers. This becomes particularly relevant on the facts of the current matter for reasons which are outlined below.

[12] Other relevant principles which can be extracted from the various cases and authorities are:-

(1) The Court is to determine an adequate amount for security having regard to the nature of the claim;

(2) An adequate amount is one that is neither illusory nor oppressive (the latter no doubt being another way of saying that it should not stultify the Plaintiff's claim);

(3) The amount ordered does not have to be a pre-estimate of the actual costs;

(4) It is appropriate to allow a deduction on account of any Counterclaim;

(5) It is appropriate to factor in contingencies such as the possibility that the action will settle at same stage.

[13] With respect to the last of these principles, in my view that means that it is also appropriate to have regard to the possibility of refinement and narrowing of the issues before the Court. This is particularly relevant in

respect of the Plaintiff's claim for consequential loss. Mr Wyvill SC for the Defendant had much to say concerning how lacking in merit that part of the claim seemed to have. That is particularly relevant to the question of security for costs as that aspect of the claim is, as the Defendant's assessment of costs demonstrates, the most significant in terms of costs.

[14] A brief summary of the nature of the case will help put things in context. The Plaintiff's claim arises out of a hiring agreement where the Plaintiff hired certain heavy machinery to the Defendant for a fee determined in accordance with the agreement. The Plaintiff alleges that in breach of the terms of the hire, the equipment was returned in a damaged condition and the Plaintiff incurred repair costs and lost the use of the equipment pending its repair. Damages are claimed for the repair costs and the loss of use. The Plaintiff however also claims consequential loss claiming it has also lost profit and that the value of its business has diminished as a result. These aspects are not particularised at present The end result is that for a hiring contract where the Defendant paid the Plaintiff slightly less than $900,000.00 in hiring fees, the Plaintiff claims losses quantified in the Amended Statement of Claim at approximately $2.7 million, of which approximately $2.0 million is in respect of consequential loss.

[15] It can be seen therefore that of the claims made by the Plaintiff, the most significant are the claims for consequential loss. That is also confirmed by a consideration of the nature of the evidence which will be required in respect of those claims. Mr Wyvill SC alleges that the claims for consequential loss

are exaggerated and unlikely to satisfy causation requirements. He relies on the nature of those claims to support the estimate of the Defendant's costs made by the Defendant's solicitor. One significant expense, it is alleged, will be the need to engage a forensic accountant.

[16] The evidence before me in relation to the application is mostly from the Defendant. The evidence adduced by the Plaintiff is scant. It consists firstly of the evidence of Ms Cheong where she estimates that the likely costs will be of the order of $60,000.00. Secondly, an extract of a statement of a bank account of the directors of the Plaintiff which covers a finite but limited time period. The Plaintiff has not produced any other financial evidence whether of the Plaintiff itself or of its directors. There is little material from the Defendant to apply against the *Jazabas* principles.

[17] On the other hand, the extensive evidence put forward by the Defendant is as follows:-

(1) From ASIC documents, the paid up capital of the Plaintiff is $20, all issued shares in the company are owned by Mr and Mrs McPartland who are the directors of the Plaintiff, the company has 23 registered charges securing a total liability of the order of $4.5 million dollars and lastly, the registered office of the company is in South Australia. These records do not indicate the current status of those charges, specifically the amount they currently secure. The Plaintiff has opted to not elaborate on that.

(2) The Plaintiff does not own any real estate.

(3) Mr and Mrs McPartland were involved in the purchase of a property in South Australia for $260,000.00 in September 2008. The property was apparently purchased on behalf of their superannuation fund. Superannuation funds are not permitted to borrow funds to purchase real estate. The schedule of the payments made by the Defendant to the Plaintiff in the course of the hiring contract indicates that a payment in the sum of $260,000.00 coincides with that purchase. The inference is that those payments have somehow found themselves into the source of funds for the acquisition of the property by the superannuation fund. The inference is a strong one. There may be a legitimate explanation but the Plaintiff has not taken the opportunity to put anything up in answer.

(4) In the course of payments made by the Defendant to the Plaintiff there was an overpayment in the order $18,000.00. It has not been repaid despite demand and forms part of the proceedings by way of Counterclaim. I do not consider that this adds much to the Defendant's case on the application.

(5) There is some limited evidence that the Plaintiff has no business reputation or presence in the Northern Territory. I am not convinced that this is overly relevant even if it is established. The current proceedings however seem to belie that as the Defendant certainly

managed to enter into a significant contractual arrangement with the Plaintiff.

(6) The McPartlands own other real estate which is the subject of a mortgage. Neither the Plaintiff or its directors have provided details of that mortgage. This is relevant given that it has been put on behalf of the Plaintiff that the directors are prepared to offer personal liability, albeit limited in amount, to satisfy the security sought.

(7) The Plaintiff has a history of defaulting on debts. Evidence of two instances has been produced, neither of which I consider to be overly significant or persuasive when viewed alone, at least on that account.

(8) The bank statement of the McPartlands referred to above (paragraph 16), shows a credit balance as of 1 April 2010 of the order $122,000.00. It also shows substantial credits into the account of the order of $140,000.00 over a period of some two and a half months. The source of those funds has not been identified.

(9) The Plaintiff is subject to the costs order in favour of the Defendant of over $62,000.00 following the taxation of the costs of the proceedings referred to in paragraph 3 above.

(10) Requests made by the Defendant's solicitors to the Plaintiff's solicitors for information regarding the financial position of the Plaintiff, specifically in relation to the ability of the Plaintiff to satisfy any cost orders, have gone unanswered. The Defendant's solicitors first sought the information on 3 February 2010. That was in writing and that letter succinctly pointed out the specific concerns of the Defendant in connection with the Plaintiff's financial position in the context of security for costs and sought appropriate financial documentation. Apart from a letter from the Plaintiff's solicitors seeking an extension of time to provide a response, no such information has been forthcoming. The extent of the Plaintiff's disclosure for financial matters relevant either to the Plaintiff or its backers is the bank statement referred to in paragraphs 16 and 17(8) above.

[18] Although I consider that the limited evidence of apparent defaults in payment of debt by the Plaintiff (see paragraph 17(7) above) is inconclusive on its own, when viewed against the purchase by the Plaintiff's director's superannuation fund of the property in South Australia (see paragraph 17(3)), it takes on a greater significance. This is because the history of the payments made by the Defendant to the Plaintiff pursuant to the subject hiring agreement signifies a significant cash flow for the Plaintiff yet the Plaintiff or its directors seemed to be more focused on tax effective spending than paying the Plaintiff's debtors. Again there may be a

legitimate explanation but importantly, the Plaintiff has chosen not to put forward any material to explain this.

[19] There was much debate centred on estimating the costs of the proceedings. It is important to note the Defendant was on notice of the Plaintiff's consequential loss claim well before the application for security for costs. Initially the Defendant's solicitor estimated costs on account of the consequential loss claim of the order of $5,000.00. In a further Affidavit filed by the Defendant's solicitor it is alleged that owing to a more detailed consideration of the amendments made in the Amended Statement of Claim that costs estimate had to be revised. The revision on that account alone was in excess of the amount first estimated for the entire costs. Curiously, when the Amended Statement of Claim is compared to the initial Statement of Claim there is little which justifies a revision based simply on the amendments made in the Amended Statement of Claim. As the matter finally stood, the respective estimates are $62,000.00 on behalf of the Plaintiff and a range of between $390,000.00 and $600,000.00 on the part of the Defendant.

[20] I consider that the Defendant's estimate of costs is excessive. Much work was done by both parties for the purposes of the adjudication and I expect that is likely to translate into some cost savings or efficiencies in the current proceedings. Likewise, albeit to a lesser extent, the work done in the proceedings at first instance in this Court and the appeal to the Court of Appeal. I do not believe that this has been sufficiently factored in.

[21] Mr Roper, for the Plaintiff, submitted that an appropriate amount of security is $62,000.00. That amount is based on the Plaintiff's solicitors estimate of costs, which I consider to be conservative. As to the form of the security Mr Roper submitted that an undertaking by the Plaintiff's directors in that amount should be sufficient. This seems to rely on the principle in *Gentry Bros Pty Ltd v Wilson Brown and Associates Pty Ltd*[3]. That case is to the effect that where the shareholders of a company are willing to be personally liable for the costs of the company then they should be in no worse position then if they were suing in their own names. This was considered but left unresolved in *Jazabas*. If that is to be considered as a fixed principle or even a presumption, then it seems to restrict the discretion of the Court. That then runs counter to the numerous authorities, including those of this Court, which state that the discretion is unfettered. Consistent with the nature of the discretion and those authorities, the principle in *Gentry Bros Pty Ltd* should only be treated as a relevant factor rather than a fixed principle or a presumption. Nonetheless, even if that authority represented the law in the Northern Territory (which I doubt), its application here is negated by the restricted nature of the undertaking that has been offered.

[22] In my view applying the principles stated above to the facts of this case, an order for security for costs is appropriate. In terms of the quantum of the order, noting I am not obliged to fix an amount reflective of the full

[3] (1992) 8 ACSR 405

estimated costs and that I can have regard to contingencies, an adequate amount is $90,000.00.

[23] In making this assessment I am relying on an anticipated refinement of the Plaintiff's claim in respect of the consequential loss claim. Although it is difficult to be definitive given the stage of the proceedings, the Plaintiff's claim for consequential loss appears weak. If that translates at a relatively early stage to a refinement down of that claim there will be a consequent reduction in the work involved in preparing this matter for hearing. Nothing prevents the Defendant from making a further application for security for costs and if, after an appropriate period of time, the Plaintiff either maintains the consequential loss claim as made or alternatively fails to refine it to any significant extent, it would be appropriate for the Defendant to make a further application for security for costs.

[24] As to the form of the security, I consider that anything in the nature of an undertaking by the directors of the Plaintiff is inappropriate given the extent of the non disclosure of financial matters. There are too many unanswered questions concerning the financial standing of the Plaintiff and its directors. That information is peculiar to the Plaintiff and its backers. The Defendant has taken that as far as is reasonably practicable. Importantly, the Plaintiff has been put on notice concerning the relevance and importance of that information. The Plaintiff's response has simply been to produce some selected and limited information. Knowledge that as 1 April 2010 the Plaintiff's directors had an amount of the order of $122,000.00 in an account

is insufficient to support an unrestricted undertaking, even if such an undertaking had had been offered. Better information concerning the asset and liability status of the Plaintiff's directors is required for that purpose as there is otherwise no certainty that the funds are not required for example to meet a commitment which may fall due before any claim for costs could be met.

[25] For those reasons the security must be in the form of a cash deposit or a bank guarantee or similar. I am prepared to hear the parties further to refine this if need be. There will be a stay of the proceedings until the security is finalised. Likewise I will hear the parties in relation to any ancillary matter such as investment of any cash deposit and the like.

[26] Lastly I will hear the parties as to the costs of the application.