JURISDICTION	:	DISTRICT COURT OF WESTERN AUSTRALIA IN CIVIL
LOCATION	:	PERTH
CITATION	:	SHORESIDE PTY LTD T/A KASTLE -v- WROXTON DEVELOPMENTS PTY LTD [2023] WADC 112
CORAM	:	GETHING DCJ
HEARD	:	28 SEPTEMBER 2023
DELIVERED	:	2 OCTOBER 2023
FILE NO/S	:	CIV 1072 of 2022
BETWEEN	:	SHORESIDE PTY LTD T/A KASTLE Plaintiff AND WROXTON DEVELOPMENTS PTY LTD First Defendant API VALUERS PTY LTD Second Defendant MICHELANGELO MELANI Third Defendant ANGELO PAOLIELLO Fourth Defendant SALVATORE PASQUALE LORENTI Fifth Defendant WROXTON DEVELOPMENTS PTY LTD Plaintiff by counterclaim SHORESIDE PTY LTD TRADING AS KASTLE

Defendant by counterclaim

Catchwords:

Practice and procedure - Security for costs - Delay - Turns on own facts

Legislation:

Corporations Act 2001 (Cth), s 1335
District Court Rules 2005 (WA), r 48B

Result:

Application granted

Representation:

Counsel:

Plaintiff	:	Mr B G Grubb
First Defendant	:	Mr J C Yeldon
Second Defendant	:	Mr T Galic
Third Defendant	:	Mr T Galic
Fourth Defendant	:	Mr J C Yeldon
Fifth Defendant	:	Mr J C Yeldon
Plaintiff by counterclaim	:	Mr J C Yeldon
Defendant by counterclaim	:	Mr B G Grubb

Solicitors:

Plaintiff	:	Tudori Hager Grubb
First Defendant	:	Westmont Legal
Second Defendant	:	TGC Lawyers
Third Defendant	:	TGC Lawyers
Fourth Defendant	:	Westmont Legal
Fifth Defendant	:	Westmont Legal
Plaintiff by counterclaim	:	Westmont Legal
Defendant by counterclaim	:	Tudori Hager Grubb

Case(s) referred to in decision(s):

57 Moss Rd Pty Ltd v T & M Buckley Pty Ltd t/as Shailer Constructions [2010] QSC 278
All Roofs Pty Ltd v Southgate Corporation Pty Ltd [2014] WASC 155
Aon Risk Services Australia Limited v Australian National University [2009] HCA 27; (2009) 239 CLR 175
Attorney-General of Botswana v Aussie Diamond Products Pty Ltd [2009] WASC 299
Bell Wholesale Co Pty Ltd v Gates Export Corp (1984) 2 FCR 1
Braziron Corporate Services Pty Ltd v Road Rail and Mine Products Pty Ltd [2022] WASC 73
Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd (1987) 16 FCR 497
Buckley v Bennell Design & Construction Pty Ltd (1974) 1 ACLR 301
Campbell-Smith as executor of the estate of Martin Banning v Lean [2017] WASCA 89
Chong v Super Equity Invests Pty Ltd [2012] NSWSC 27
FFE Minerals Australia Pty Ltd v Mining Australia Pty Ltd [2000] WASCA 69; (2000) 22 WAR 241
Frigger v Kitay in his capacity as liquidator of Computer Accounting & Tax Pty Ltd (In Liq) [No 9] [2016] WASC 92
Gartner v Ernst & Young (No 3) [2003] FCA 1437
Gentry Bros Pty Ltd v Wilson Brown & Associates Pty Ltd (1992) 8 ACSR 405
George 218 Pty Ltd v Bank of Queensland Ltd [2016] WASCA 56
Harpur v Ariadne Australia Ltd [1984] 2 Qd R 523
Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 744
Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jacques [2016] QSC 2
Livingspring Pty Ltd v Kliger Partners (2008) 20 VR 377; (2008) 66 ACSR 455
Marand Holdings Pty Ltd v Cateus International Pty Ltd [2003] WASC 238
Modern Holdings Pty Ltd v Scentre Management Ltd [2022] WASC 19
Phoenix Eagle Company Pty Ltd v Tom McArthur Pty Ltd [No 2] [2019] WASC 378
Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd [No 2] [2014] WASCA 106
Spence Financial Group Pty Ltd v GE Commercial Corporation (Australia) Pty Ltd [2007] WASC 15
Sugarloaf Hill Nominees Pty Ltd v Rewards Projects Ltd [2011] WASC 19
Sunlea Enterprised Pty Ltd as trustee for Drummond Cove Unit Trust v Pollock [2014] WASC 91
Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WASCA 129
Unified Pty Ltd v The Cancer Council Western Australia Inc [No 3] [2011] WASC 161

Vantage Holdings Group Pty Ltd v Donnelly [No 4] [2019] WASC 398
Vicon Services Pty Ltd v BHP Billiton Worsley Alumina Pty Ltd [2012] WASC 109
Vynben Pty Ltd v PA Audit Pty Ltd [2019] WASC 219
Westonia Earthmoving Pty Ltd v Cliffs Asia Pacific Iron Ore Pty Ltd [2013] WASC 57
Yici Pty Ltd v Sun Wah Marine Products (HK) Co Ltd [No 2] [2010] WASC 27

GETHING DCJ:

Factual background

1 The plaintiff, Shoreside Pty Ltd trading as Kastle, is a provider of construction supervision, project management and development services. At all material times, its directors were Michael Enslin and Justin Hatch.

2 The First Defendant, Wroxton Developments Pty Ltd (Wroxton), was the principal in respect of a proposed commercial property development on Wroxton Street in Midland (Project).

3 Kastle says that on 25 December 2019, it entered into a written agreement with Wroxton for the delivery and payment of consultancy services in respect of the Project. The agreement was styled as a 'Letter of Intent', and was signed on behalf of Wroxton and Shoreside (Letter of Intent).[1] The Letter of Intent had two parts. The first involved engaging and paying a series of design consultants to obtain drawings and documentation of the Project to allow Wroxton to apply for a building permit. This involved engaging ten named consultants for a total of $416,500. The second part was the payment to Kastle of a non-reimbursable design fee of $75,000 (ex GST) in three equal tranches (Design Fee).

4 Kastle then says that it then proceeded to engage the consultants as agreed. On 27 February 2020, it issued its first invoice. This was for $196,350 comprising the first tranche of the design fee of $25,000 and payment of consultants in the amount of $171,350 (incl GST) (February Invoice). The February Invoice, aside from the design fee amount, was not paid when due on 11 March 2020, and has not to date been paid.

5 Kastle then says that on 6 April 2020, it issued a second invoice to Wroxton in the amount of $115,841 (incl GST) (April Invoice). This was for the second tranche of the design fee in the amount of $25,000 and consultancy invoices in the amount of $90,841. The April Invoice, aside from the design fee amount, was not paid when due on 20 April 2020 and also remains outstanding.

6 As baseline, the present action is a debt recovery action for these amounts.

[1] A copy of which is at pages 30 - 32 of the Enslin Affidavit.

7 Wroxton defends the action primarily on the basis of a different construction of the Letter of Intent. It says that pursuant to the Letter of Intent:[2]

(a) it was to pay the Design Fee to Kastle;

(b) Kastle was to engage and pay all consultants;

(c) Kastle was to deliver to Wroxton drawings and documentation suitable for a building permit by 2 March 2020;

(d) Kastle and Wroxton would reach agreement on the final building construction price by no later than 9 March 2020 (a date later extended by agreement to 16 March 2020); and

(e) if (d) did not occur, 'the intended dealings between the plaintiff and the first defendant were at an end, and neither the plaintiff nor the first defendant would make any further claim against each other'.

8 Wroxton's position is that its only liability to Kastle is for the Design Fee. It says that it has paid all three tranches of the Design Fee which Kastle invoiced. In effect, its position is that the liability to pay the consultants fees is on Kastle. It took the commercial risk that no construction contract would be entered into.

9 Wroxton goes on to say that the Letter of Intent came to an end on 16 March 2020 as, contrary to the intended dealings in the Letter of Intent, Kastle failed to deliver drawings and documentations suitable for a building permit by 2 March 2020, and Wroxton and Kastle failed to agree the final construction price by no later than 16 March 2020.

10 Overlaid on to what is otherwise a straightforward debt recovery claim is a misleading conduct claim. Kastle says that it entered into the Letter of Intent, and proceeded to engage the consultants, and continue to engage the consultants, in reliance on a series of representations made by the third defendant, Michelangelo Melani, as agent for Wroxton. Mr Melani is a director of the second defendant, API Valuers Pty Ltd (API). For present purposes, I do not need to set out the contractual chain between Wroxton and API. It is sufficient to say that Kastle's case is that at all material times, Mr Melani represented himself to Kastle as acting for and on behalf of Wroxton and API in respect of dealings for the Project. The representations concerned the status of

[2] Defence, par 10.

Wroxton's financing arrangements for the Project. Kastle says that the representations were misleading and deceptive and that, in reliance on the representations, it entered into the Letter of Intent and incurred its costs and those of the consultants. It claims damages in the amount of the invoices. In addition to Wroxton, API and Mr Melani, this claim is also against two directors of Wroxton, Angelo Paoliello, the fourth defendant, and Salvatore Lorenti, the fifth defendant.

11 The defendants each assert that the oral representations were not made and the written representations were not, in context, misleading.

12 Kastle then adds in a claim for estoppel for good measure.

Security for costs

13 By application dated 1 September 2023, Wroxton, Mr Paoliello and Mr Lorenti applied for security for costs (Wroxton Application). I will refer to these defendants collectively as the Wroxton Parties. The form of security sought is payment into court in the amount of $75,000. The Wroxton Application is supported by an affidavit from their solicitor, Gavin Jahn sworn 1 September 2023 (Jahn Affidavit). Mr Jahn swore a second affidavit dated 6 September 2023, but this was not read by counsel.

14 By application dated 22 September 2023, API and Mr Melani also applied for security for costs (API Application). I will refer to these defendants collectively as the API Parties. Again, the form of security sought is payment into court in the amount of $75,000. The application is supported by an affidavit of Tihomir Galic, who is their solicitor (Galic Affidavit).

15 The net effect is that the security sought from the plaintiff is in the amount of $150,000.

16 Mr Enslin, a director of the plaintiff, filed an affidavit in opposition to the application dated 14 September 2023 (Enslin Affidavit).

17 The action is listed for a 10-day trial commencing 16 October 2023.

18 The security for costs applications were heard by me on 28 September 2023. At the conclusion of argument, I made orders in the following terms (along with some case management orders which I do not need to quote):

1. Unless by 10 October 2023 each of Michael Enslin and Justin Hatch file and serve separate undertakings to the court to pay to the defendants a total amount of up to $50,000, towards any taxed costs which the plaintiff is ordered to pay the defendants after judgment in the action:

   (a) the action be stayed; and

   (b) the trial listed to commence 16 October 2023 be vacated.

2. The stay in order 1 is subject to the First Defendant giving an undertaking to the court not to proceed with the matters which are the subject of its counterclaim in the event that the proceedings are stayed as a result of a failure to meet any order for security for costs.

3. There be liberty to the parties, Mr Enslin and Mr Hatch to apply in relation to the apportionment of the amounts required to be paid to the defendants pursuant to order 1.

4. In the event that the plaintiff's claim herein is stayed pursuant to the order in paragraph 1 for a period in excess of three months, the defendants have liberty to move for judgment against the plaintiff.

5. The application for security for costs by the first, fourth and fifth defendants dated 1 September 2023 be otherwise dismissed, with the costs of and incidental to the application being in the cause.

6. The application for security for costs by the second and third defendants dated 22 September 2023 be otherwise dismissed, with the costs of and incidental to the application being in the cause.

19 I said that I would publish my reasons which are as follows.

Legal framework

20 Each application is subject to DCR r 48B, which provides:

48B. Interlocutory applications after listing for trial

(1A) This rule does not apply to an interlocutory application to amend pleadings.

(1) If an application for an interlocutory order is filed after a case is listed for trial, the application must be accompanied by an affidavit of the party making the application or the lawyer representing the party.

> (2) The affidavit is to set out the facts that ground the party's or the lawyer's argument that the order is necessary.
>
> (3) Unless justice requires otherwise, the Court will not grant an application referred to in subrule (1) if to do so would necessitate adjourning the trial.

21 More specifically, each application is brought pursuant to *Corporations Act 2001* (Cth) s 1335(1) (CA) and *Rules of the Supreme Court 1971* (WA) O 25 (RSC). It is sufficient for me to determine the application pursuant to CA s 1335, as no counsel suggested that the outcome would be different applying RSC O 25.

22 CA s 1335 provides:

> (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.

23 The District Court is a 'court' for the purposes of CA s 1335(1).[3]

24 The power in CA s 1335 contains a threshold test or jurisdictional requirement and a discretion. The threshold requirement is that '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'. Once enlivened, the discretion is unfettered by the terms of CA s 1335(1), though must be exercised judicially by reference to established principle and considering all the circumstances of the case.[4]

25 Consequently, three issues arise for determination:

- What costs would Kastle be required to pay if the defendants were successful in their defences?

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[3] CA s 58AA.

[4] ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129 [67], [71] (Kenneth Martin J with whom Pullin JA agreed) (***Swansdale***); ***FFE Minerals Australia Pty Ltd v Mining Australia Pty Ltd*** [2000] WASCA 69; (2000) 22 WAR 241 [21] (Pidgeon & Owen JJ) (***FFE***); ***Phoenix Eagle Company Pty Ltd v Tom McArthur Pty Ltd [No 2]*** [2019] WASC 378 [14] (Allanson J) (***Phoenix***); ***Westonia Earthmoving Pty Ltd v Cliffs Asia Pacific Iron Ore Pty Ltd*** [2013] WASC 57 [5] - [6] (Edelman J) (***Westonia***); ***Braziron Corporate Services Pty Ltd v Road Rail and Mine Products Pty Ltd*** [2022] WASC 73 [37] (Strk J) (***Braziron***); ***Modern Holdings Pty Ltd v Scentre Management Ltd*** [2022] WASC 19 [18] (Strk J) (***Modern Holdings***).

- Is there reason to believe that Kastle will be unable to pay the costs of the defendants if successful in their defences?

- If there is, how should the discretion be exercised?

What costs would Kastle be required to pay if the defendants were successful in their defences?

26 The applications only seek security for costs going forwards, being the costs of getting up for trial and trial.

27 In the Jahn Affidavit, Mr Jahn deposes that the Wroxton Parties have spent $45,000 so far in legal costs. He estimates future costs to be in the vicinity of $145,000, as follows:[5]

(a) costs for counsel to be briefed, get up, and prepare for trial, approximately $35,000 to $40,000;

(b) costs for counsel to appeal, being $55,000; and

(c) costs of the instructing solicitor in preparation for trial and trial, being $50,000.

28 I proceeded on the basis that the API Parties anticipate spending the same amount to take the action to trial, say $150,000. I pause here to observe (as I did during oral argument) that this information is to the effect that, collectively, the Wroxton Parties and API Parties are going to be spending around $300,000 to defend a claim worth around $300,000. I add to this that, self-evidently due to the application, the claim is against a party from whom they have real doubts as to whether they will be able to recover any future costs, let alone any past costs. The common sense and cost-effectiveness of this approach are not immediately apparent.

29 The starting point in estimating the taxed costs of getting up and trial is the *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2022* (WA). This relevantly provides for:

(a) a senior practitioner rate of $506 per hour;

(b) a junior counsel rate of $473 per hour or $4,730 daily rate; and

[5] Jahn Affidavit, pars 11 - 12.

(c) a fee of brief for trial of $21,285, comprising 3.5 days of preparation and the first day of trial.

30 The case does not call for senior counsel. Nor does it call for an instructing solicitor to be present throughout the trial. Nor is there anything in the pleaded cases or the affidavit material before the court suggesting a basis for increasing the costs scale. That being so, the taxed costs should be calculated on the basis of getting up and a further 9 trial days at junior counsel daily rate. This equates to $64,000 (9 x $4,7320 + $21,282 = $63,855, say $64,000). So from what Mr Jahn tells me, he anticipates that solicitor/client costs will be double this.

31 I proceeded on the basis that the taxed costs of getting up for trial and trial of each of the Wroxton Parties and the API Parties would be $64,000, $128,000 in total.

Is there reason to believe that Kastle will be unable to pay the costs of the defendants if successful in their defences?

32 The threshold question posed by CA s 1335(1) is whether it appears by credible testimony that there is reason to believe that Kastle will be unable to pay the costs of the defendants if successful in their defences.

33 There is no evidentiary burden to be undertaken or discharged by a party seeking the security order. Rather, what is required is an evaluation of the evidence led by the applicant to see whether that leads to a reason to believe that the corporation will be unable to pay the costs of the applicant if successful in its defence.[6]

34 The principles by which this question is to be answered are well settled, and may be summarised as follows:[7]

(a) the court will adopt a practical, common sense approach to the examination of the corporation's financial affairs;

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[6] ***FFE*** [24]; ***Swansdale*** [69]; ***Sugarloaf Hill Nominees Pty Ltd v Rewards Projects Ltd*** [2011] WASC 19 [34] (Corboy J) (***Sugarloaf***); ***Vantage Holdings Group Pty Ltd v Donnelly [No 4]*** [2019] WASC 398 [209] (Smith J); ***Vynben Pty Ltd v PA Audit Pty Ltd*** [2019] WASC 219 [27] - [28] (Smith J); ***G & R Rossen Pty Ltd v Buchanan*** [2019] WASC 373 [59] (Kenneth Martin J); ***Braziron*** [33]; ***Modern Holdings*** [14].

[7] ***George 218 Pty Ltd v Bank of Queensland Ltd*** [2016] WASCA 56 [40] - [48] (Murphy JA); ***Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd [No 2]*** [2014] WASCA 106 [18] (Murphy JA) (***Pravenkav***); ***FFE*** [22] - [24]; ***Vicon Services Pty Ltd v BHP Billiton Worsley Alumina Pty Ltd*** [2012] WASC 109 [17] (Le Miere J); ***Sugarloaf*** [35]; ***Livingspring Pty Ltd v Kliger Partners*** (2008) 20 VR 377; (2008) 66 ACSR 455 [15] - [16] (Maxwell P & Buchanan JA) (***Livingspring***); ***Campbell-Smith as executor of the estate of Martin Banning v Lean*** [2017] WASCA 89 [63] (Murphy JA).

(b) it is necessary to make an assessment of the risk that the corporation will be unable to pay, an assessment that will necessarily be imprecise;

(c) a 'reason to believe' is a low threshold test;

(d) the requirement that there be 'credible testimony' is an obvious safeguard to ensure that the application is not founded purely upon speculation;

(e) in ascertaining whether there is 'credible testimony', the court does no more than judge the quality of the evidence to see if it objectively gives rise to 'a reason to believe';

(f) the court will need to fix the time at which the corporation's inability, or apprehended inability, is to be assessed, which will generally require an opinion to be formed as to the date on which judgment is likely to be given;

(g) the court will need to identify the range of assets to which recourse might be had for the purpose of enforcing an adverse costs order; and

(h) generally, the relevant assets will be those that might be immediately realised and those which could be realised in sufficient time to enable the corporation to comply with a costs order in the usual terms.

35 The time at which Kastle's capacity to pay an order for costs is to be assessed is following trial and delivery of a reserved judgment. Based on the court's current listings, in particular the heavy criminal workload of judges, I assess this to be about nine months from now, say, mid-2024.

36 As to the assets available to Kastle, the following is common ground:[8]

(a) Kastle is a construction company;

(b) Kastle's paid up capital is $10;

(c) it has one shareholder, Shoreside Group Pty Ltd;

(d) it has two directors, Mr Enslin and Mr Hatch;

[8] Jahn Affidavit, pars 6 - 9; Galic Affidavit, par 12; Enslin Affidavit, par 9.

(e) Kastle owns no property in Western Australia;

(f) neither Mr Enslin nor Mr Hatch own any property in Western Australia;

(g) Kastle does not have available cash of $75,000; and

(h) as at 31 August 2023, it had $1,780.17 in the bank.

37 Kastle's financial records are not before the court.

38 Adopting a practical, common sense approach to the examination of the financial affairs of Kastle, it appears to me by credible testimony that there is reason to believe that Kastle will be unable to pay the costs of either the Wroxton Parties or the API Parties if either are successful in their defences.

39 The discretion in CA s 1335 is thus enlivened. Counsel for Kastle accepts this.[9]

How should the court exercise the discretion in CA s 1335?

40 As I have noted, once enlivened, the discretion is unfettered by the terms of CA s 1335(1), though it must be exercised judicially by reference to established principle and considering all the circumstances of the case.[10] The circumstances in which the discretion should be exercised cannot be stated exhaustively, and all of the circumstances of the case should be examined.[11]

41 Once the discretion is enlivened, it is for each of the Wroxton Parties and the API Parties as the applicants to persuade the court that the discretion should be exercised in their favour. Although, each party will be required to advance evidence on the particular factual matters it wishes to assert as part of its case.[12]

42 The factors which are relevant to the present applications are:[13]

- The likelihood of Kastle being unable to pay any adverse costs order.

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[9] Plainitff's submissions dated 26 September 2023, par 1.
[10] ***Swansdale*** [67], [71]; ***FFE*** [21]; ***Phoenix*** [14]; ***Westonia*** [5] - [6]; ***Braziron*** [35], ***Modern Holdings*** [25].
[11] ***Yici Pty Ltd v Sun Wah Marine Products (HK) Co Ltd [No 2]*** [2010] WASC 27 [3] - [4] (Martin CJ); ***All Roofs Pty Ltd v Southgate Corporation Pty Ltd*** [2014] WASC 155 [33] (***All Roofs***) (Acting Master Gething); ***Braziron*** [37].
[12] ***Sugarloaf*** [34]; ***Livingspring*** [20]; ***All Roofs*** [34]; ***Braziron*** [38]; ***Modern Holdings*** [19].
[13] See generally: ***Swansdale*** [71]; ***Westonia*** [6].

- The strength and bona fides of the parties' claims.
- Whether Kastle is in substance a plaintiff or whether its proceedings were essentially defensive.
- Whether the application for security is oppressive, and in particular, whether the award of security would deny Kastle a right to litigate, and stultify its claim.
- Whether there are persons standing behind Kastle who are likely to benefit from the litigation.
- Whether the persons standing behind Kastle have offered any security or personal undertaking to be liable for the costs, and if so, the form of such an undertaking.
- Whether the application for security has been brought promptly.
- The public interest, including the impact of any order for security for costs on the upcoming trial.

43 The fact which enlivened the jurisdiction in CA s 1335, namely that there is reason to believe that Kastle will be unable to pay the costs of the defendants if successful in their defences, is a substantial factor in favour of its exercise.[14] It does not, however, establish an entitlement, or even a predisposition, in favour of ordering security for costs.[15]

44 As to the merits and bona fides of the parties' claims, on an application for security for costs, the court will not generally investigate the likelihood or otherwise of either party being successful in the action. There may be exceptional cases where the merits are clear or where the claim cannot succeed in point of law or is not brought bona fide.[16] The present action is not such a case. The issues which I have identified at [3] to [12] are issues which should properly be resolved at trial. This factor is neutral to the exercise of the discretion.

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[14] ***Pravenkav*** [19]; ***Swansdale*** [80]; ***Braziron*** [35]; ***Modern Holdings*** [15].

[15] ***Unified Pty Ltd v The Cancer Council Western Australia Inc [No 3]*** [2011] WASC 161 [11] (Allanson J) (***Unified***); ***Frigger v Kitay in his capacity as liquidator of Computer Accounting & Tax Pty Ltd (In Liq) [No 9]*** [2016] WASC 92 (Allanson J) [9] - [10]; ***Braziron*** [31]; ***Modern Holdings*** [12].

[16] ***Swansdale*** [72]; ***Gartner v Ernst & Young (No 3)*** [2003] FCA 1437 [10] (Mansfield J); ***Gentry Bros Pty Ltd v Wilson Brown & Associates Pty Ltd*** (1992) 8 ACSR 405, 416 (Cooper J) (***Gentry Bros***); ***All Roofs*** [33].

45 The Wroxton Parties have counterclaimed. This is relevant because if the Wroxton Parties are in substance a plaintiff, and Kastle's proceedings are essentially defensive, this would count against the exercise of the discretion.[17] Moreover, an order for security will not generally be made where the issues raised in a counterclaim are substantially similar to the issues raised in the claim. This is because it would be unjust for the claim to be stayed if security is not paid in circumstances where the same issues will need to be litigated in the counterclaim.[18]

46 In this case, the counterclaim essentially invites the court to dismiss the action on the basis of proper construction of the Letter of Intent. The only substantive order sought is for delivery up to Wroxton of all 'drawings, reports, specifications, et cetera obtained in respect of the Project' within a reasonable time. In my view, Kastle is the plaintiff both in form and substance. However, it would be unjust for Wroxton to be able to pursue the counterclaim in the event that the action was stayed. I addressed this in the orders made by making the stay subject to Wroxton giving an undertaking to the court not to proceed with the matters which are the subject of its counterclaim in the event that the proceedings are stayed as a result of a failure to meet any order for security for costs. This neutralised any potential prejudice.[19]

47 The API Parties did not make a counterclaim.

48 As to whether the Application is oppressive, in exercising the discretion in CA s 1335, the court may consider whether ordering security for costs would stultify the ability of the company to continue with the action.[20] However, a court will not be justified in declining to make an order on the basis that the proceedings will be stultified unless the impecunious plaintiff company establishes that those who stand behind it are also unable to provide the requisite security for costs.[21]

49 Aligned to this is whether there are persons standing behind Kastle who are likely to benefit from the litigation. Where there is evidence that those who stand behind the company and who would gain

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[17] See generally: ***Westonia*** [47] - [50].
[18] ***Marand Holdings Pty Ltd v Cateus International Pty Ltd*** [2003] WASC 238 [38] - [41] (Newnes M); ***Chong v Super Equity Invests Pty Ltd*** [2012] NSWSC 27 [31] - [40] (Slattery J); ***Unified*** [25].
[19] ***Westonia*** [51].
[20] ***Unified*** [13]; ***Spence Financial Group Pty Ltd v GE Commercial Corporation (Australia) Pty Ltd*** [2007] WASC 15 [39] (Newnes M) (***Spence***); ***Bell Wholesale Co Pty Ltd v Gates Export Corp*** (1984) 2 FCR 1, 4 (judgment of the court) (***Bell Wholesale***).
[21] ***Unified*** [13]; ***Spence*** [34]; ***Bell Wholesale*** (4).

from the litigation are financially able to provide adequate security, this is 'at least a weighty consideration in favour of an order for security'.[22] This is one reason why the power to order security for costs exists:[23]

> The mischief at which the provision is aimed is obvious. An individual who conducts his business affairs by medium of a corporation without assets would otherwise be in a position to expose his opponent to a massive bill of costs without hazarding his own assets. The purpose of an order for security is to require him, if not to come out from behind the skirts of the company, at least to bring his own assets into play.

50 As mentioned, the directors of Kastle are Mr Enslin and Mr Hatch. They are no longer parties in their own right (previously they were defendants by counterclaim). Their personal assets are not currently at risk of a costs order. The evidence is that neither owns any real property in Western Australia. Neither has offered any security or personal undertaking to be liable for any costs order against Kastle.[24] Had they done so, this would have been a factor against an order for security for costs, notwithstanding that the worth of the directors may ultimately prove insufficient to satisfy any judgment in whole or in part.[25] This is because it places the party seeking security in no worse position than it would have been in had it sued those standing behind the company as litigants in person, without the imposition of the corporate entity between them.[26]

51 Mr Enslin deposes that neither he nor Mr Hatch stand to financially benefit from the litigation. He deposes that should Kastle be successful at trial, then the damages are proposed to be on-paid to the third party consultants named in the amended statement of claim who are creditors of Kastle. They are set out in a notice filed pursuant to RSC O 9A, dated 7 July 2023.[27] Nonetheless, the principle remains. These creditors of Kastle stand to get the benefit of the action, without risking their assets to do so. This is a factor in favour of an order for security for costs.

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[22] ***Sunlea Enterprises Pty Ltd as trustee for Drummond Cove Unit Trust v Pollock*** [2014] WASC 91 [84] (Allanson J).

[23] ***Harpur v Ariadne Australia Ltd*** [1984] 2 Qd R 523, 532 (Connelly J with whom Campbell CJ & Demack J agreed) (***Harpur***).

[24] ***57 Moss Rd Pty Ltd v T & M Buckley Pty Ltd t/as Shailer Constructions*** [2010] QSC 278 [31] - [33] (Ann Lyons J) ; ***Gentry Bros*** (415); ***Harpur*** (532).

[25] ***Gentry Bros*** (415).

[26] ***Gentry Bros*** (415).

[27] Enslin Affidavit, par 17, annexure MRE-16 (page 136).

52 The next, and in my view most significant, factor is delay. The action was commenced in the Supreme Court by writ filed 10 June 2020. By orders made on 27 January 2022, the file was transferred to the District Court, the file being received by the District Court on 16 March 2022. The trial dates were allocated at a listing conference on 27 June 2022.

53 As mentioned, the action is listed for a 10-day trial commencing 16 October 2023. Neither Mr Jahn nor Mr Galic gave any reason for waiting to such a late stage to bring the application. The financial position (or lack thereof) of Kastle set out at [36] could have been ascertained at any stage after the commencement of the action, over three years ago. There is no reason the applications could not have been made, say, when pleadings were closed and the issues in dispute defined. Or perhaps at the point in time the action was transferred to the District Court. There is no recent catalyst for the applications such as Kastle being served with enforcement process or a statutory demand.

54 The existence of an unexplained delay in bringing the application is a factor against the grant of security for costs, at least in relation to future costs. The reason for this is explained by Moffitt P in ***Buckley v Bennell Design & Constructions Pty Ltd***:[28]

> The primary reason why the application should be brought promptly and pressed to determination promptly is that the company, which by assumption has financial problems, is entitled to know its position in relation to security at the outset, and before it embarks to any real extent on its litigation, and certainly before it is allowed to or commits substantial sums of money towards litigating its claim.

However, I agree with the observation by Jackson J in ***Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jacques*** about the passage just quoted that:[29]

> To the extent that it says that the plaintiff is 'entitled' to know its position, in my view, the statement is too strong. The powers under … s 1335 are discretionary and are not to be fettered by statements that a party is 'entitled' to know its position.

[28] ***Buckley v Bennell Design & Construction Pty Ltd*** (1974) 1 ACLR 301, 309 (Moffitt P) (***Buckley***).
[29] ***Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jacques*** [2016] QSC 2 [19] (Jackson J).

The balance is perhaps best struck in the following observation by French J in ***Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd***:[30]

> The further a plaintiff has proceeded in an action and the greater the costs it has been allowed to incur without steps being taken to apply for an order for security for costs, the more difficult it will be to persuade the court that such an order is not, in the circumstances, unfair or oppressive.

55 In my view, fairness (being the opposite to oppression) to a corporate plaintiff dictates that an application for security for costs should be brought at an early stage in the proceedings. This is so that, if an order is made, the corporate plaintiff can make a commercial decision to either provide security for costs or allow the action to be stayed (without having it or the other parties spend the money required to complete interlocutory processes and get the action up for trial). Mr Enslin deposes that Kastle neither contemplated nor made any funding arrangements with respect to possible security for costs applications by the defendants (quoted in full context in the next paragraph). The unexplained failure of the Wroxton Parties and the API Parties to bring their applications until this very late stage in the proceedings is a weighty factor against the exercise of the discretion.

56 There is another significant factor going to delay. This is that it would take Mr Enslin longer than the two or so weeks between now and trial to arrange for any security for costs. He deposes:

> 8. I am a qualified as a Chartered Accountant and hold a Bachelor of Commerce Degree. I was previously the CFO and Managing Director of Psaros Property Group for 12 years. Part of my role and duties at Psaros (and also with the Plaintiff) was to oversee commercial property finance with respect to first and second tier institutional and private lenders for amounts up to $25m.
>
> …
>
> 10. Since the commencement of this Action the Plaintiff has paid its solicitor's legal fees as and when they fell due. It made arrangements to fund this Action through to trial. For the reasons deposed below, the Plaintiff neither contemplated nor made any funding arrangements with respect to possible security for costs applications by the Defendants. I have inspected the books and records of the Plaintiff. Should the Court order the

[30] ***Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd*** (1987) 16 FCR 497, 514 (French J); ***Attorney-General of Botswana v Aussie Diamond Products Pty Ltd*** [2009] WASC 299 [23] (Kenneth Martin J) (***Attorney-General of Botswana***); ***Idoport Pty Ltd v National Australia Bank Ltd*** [2001] NSWSC 744 [70] - [72] (Einstein J).

Plaintiff pay security for the Defendant's costs in the amount of $75,000 I verily believe the Plaintiff would have to make a loan application to raise those funds, either privately or institutionally.

11. Based upon my prior qualifications and experience as deposed in paragraph [8] above, I verily believe the Plaintiff would:

    11.1 not know the outcome of any such loan application; and/or

    11.2 be able to draw down any security funds for payment to the Defendants (should they be provided by any lender),

    for at least 4-6 weeks as from the date of any such loan application.

12. As the trial of this action is scheduled to commence on 16 October 2023, I verily believe that, should the Security Application be granted by the Court and the Action be stayed pending payment, the trial dates of 10 days will need to be vacated to allow the loan application process to take place.

13. On the grounds as set out herein, the Plaintiff does not agree for the trial dates to be vacated and wishes the Action to proceed to trial without further delay.

No Explanation for Delay

14. I am informed by Mr Grubb and verily believe that, despite request being made by him of the Defendants' solicitor prior to the filing of the: Security Application; and supporting Jahn affidavits, no explanation for the delay of over 3 years has been provided.

15. To date, the Plaintiff has expended significant legal fees in prosecuting this Action and expects to expend a further $100,000 through to the completion of the 10-day trial. The Plaintiff has always paid its legal fees as and when fell due. On these grounds and my qualifications and experience as deposed in [8] above, I verily believe that:

    15.1 if the Security Application had been made earlier by the Defendants; and

    15.2 had the Court so ordered,

    the Plaintiff would have likely been able to provide, or make arrangements to provide, the required security such that:

15.3 the current trial dates would not be required vacated; and

15.4 the Court's lists and the Plaintiff's trial preparation would not otherwise be prejudiced and wasted.

57 In this regard, the observations of Kenneth Martin J in ***Attorney-General of Botswana*** are apposite:[31]

> … But the overwhelmingly dominant factor here, as I assess matters, is the fact that this late application now carries with it the prospect of serious forensic prejudice to the plaintiff. An interruption by the potential intrusion of a stay during the pre-trial preparation for a hearing of the case, in the intensive phase of preparation as the trial looms close to commencement, is unacceptable. On that basis alone, I am satisfied that it is appropriate to dismiss the application for security.
>
> I refuse the application, invoking the observations of Toohey J in ***James v Australia and New Zealand Banking Group Ltd (No 1)*** (1985) 9 FCR 442 at 446, as to the sanction of stay and the impracticability of divorcing the concept of an order for security from its correlative enforcement, by way of a stay of the proceedings. An intrusion, even potentially, of a stay of proceedings at this very late point in time with a looming trial is a repugnant outcome that cannot be countenanced, even potentially, as a potential diversion to the plaintiff away from its full-scale preparations for the looming trial.
>
> I also mention the observations of French J (as he then was) 22 years ago, as to a need for applications for security to be made in a timely fashion, see ***Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd*** (1987) 16 FCR 497, 514, where his Honour observed:
>
> > 'The further a plaintiff has proceeded in an action and the greater the costs it has been allowed to incur without steps being taken to apply for an order for security for costs, the more difficult it will be to persuade the court that such an order is not, in the circumstances, unfair or oppressive.'
>
> In my observation, it is not so much a capacity in the plaintiff to find or secure that amount of funds at this point. Rather, it is the potential interruption by a stay to its preparations at an extremely late stage that is the consideration that is repugnant in the overall scheme. That is especially so in circumstances where the failure to make a security application since February 2008 is unsatisfactorily explained. The fact that there has been a recent change in the solicitors for the defendant is no justification and is overall, in my assessment, neither here nor there upon the issue.

[31] ***Attorney-General of Botswana*** [21] - [24]. Endorsed by his Honour in ***Duro Margaretic v Western Australian Trotting Association*** [2023] WASC 130 [24].

58 Counsel for Wroxton sought to distinguish the decision in ***Attorney-General of Botswana*** on the basis that there was no evidence the plaintiff was impecunious.[32] As Justice Kenneth Martin observed, 'absolutely nothing has been put before me to indicate that there is any risk of the sovereign nation of Botswana (in the event of various trial contingencies falling the way of the defendant and resulting in the defendant obtaining, successfully, an order for taxed costs) failing to honour its costs obligations at that time'.[33] By contrast, it is accepted in this case that Kastle has no assets with which to satisfy any order for costs.

59 The plaintiff's trial preparation is, as it should be, well advanced.[34] To vacate the trial at this late stage will inevitably involve a significant amount of costs thrown away (for example, the work done to subpoena witnesses).

60 In this regard, DCR r 48B is also significant. As mentioned, DCR r 48B(3) provides that '[u]nless justice requires' otherwise, the court will not grant an application for an interlocutory order filed after a case is listed for trial if to do so would necessitate adjourning the trial. The public interest this rule reflects is, borrowing language from RSC O 1 r 4B(1), disposing efficiently of the business of the court, maximising the efficient use of available judicial and administrative resources and facilitating the timely disposal of business. There are currently long delays in the District Court in listing civil trials, in particular civil trials of 10 days or more duration. At present, parties wishing to list a 10-day trial are being given dates in the second half of 2024. If this trial is vacated at this late stage, it will not be possible for the court to list another 10-day civil trial in its place. Moreover, the 10 days which the present parties will require in the future then become 10 days which cannot be allocated to other litigants.

61 I turn then to the exercise of the discretion. In doing so:[35]

> [T]he section requires a balance to be struck between protecting the defendant from the possible consequences of being sued by an impecunious corporation with limited liability and avoiding injustice to the corporation by unnecessarily prejudicing it in the conduct of litigation.

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[32] ts 46; ts 55.
[33] ***Attorney-General of Botswana*** [19].
[34] Epslin Affidavit, par 19.
[35] ***Sugarloaf*** [31]; ***Phoenix*** [14]; ***Buckley*** (304) (Street CJ).

62 Or put slightly differently to same effect:[36]

> The judicial discretion in balancing these factors has been described as the balance of justice between two extremes. First, not allowing the defendant to make oppressive use of s 1335, or similar provisions, to prevent the plaintiff pursuing a genuine claim; and, secondly, not permitting the controllers of an impecunious corporation to oppress a defendant by exploiting its incapacity to pay costs.

63 The exercise of the discretion involves balancing three dimensions of justice.

64 The first is the risk of injustice to the defendants from the fact that, on the evidence before the court, Kastle will be unable to pay their costs if they are successful in their defences. However, this risk has been known to the defendants for some time. The defendants have had ample opportunity to bring an application for security for costs, and have not adequately explained their failure to do so.[37] Most significantly, the applications were not brought until the cusp of trial.

65 The second is the risk of injustice to Kastle in not being able to pursue its claim. If I make an order for security for costs in the form sought, and give Kastle a period of time to comply which is not oppressive, the trial dates will need to be vacated. This will prejudice Kastle in the conduct of the litigation.

66 The third is the public interest. Taking into account the policy set out in DCR r 48B, I am not satisfied that justice requires the trial dates to be vacated.

67 In my view, the balance is appropriately stuck by requiring Kastle, through its directors, to provide some security for costs, but to do so in a manner that will not prejudice the trial dates. It is for these reasons, I made the orders set out at [18].

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[36] ***Braziron*** [39]; ***Modern Holdings*** [20].

[37] ***Aon Risk Services Australia Limited v Australian National University*** [2009] HCA 27; (2009) 239 CLR 175 [102], [103], [112] (Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ).

I certify that the preceding paragraph(s) comprise the reasons for decision of the District Court of Western Australia.

LL
Associate

2 OCTOBER 2023