

**JUDGMENT McDUGALL J** : Supreme Court of New South Wales, equity Division T&C List. 26<sup>th</sup> March 2007

- 1 This is an application for further security for costs. It is brought pursuant to s 1335 of the *Corporations Act 2001* or alternatively, pursuant to UCPR r 42.21, or alternatively, pursuant to the Court's inherent jurisdiction. There is no doubt - it was not disputed - that the relevant jurisdictional fact, namely, that the Court be satisfied that the plaintiff, if called upon to do so, would be unlikely to be in a position to pay the defendant's costs - has been established.
- 2 It is necessary to pay some attention to the background. The proceedings relate to a construction contract between the plaintiff, as proprietor, and the defendant, as builder. The defendant made a number of claims pursuant to the *Building and Construction Industry Security of Payment Act 1999*.
- 3 One of those claims, numbered 13, and served on 15 July 2003, was for a little under \$750,000. There were proceedings in this Court relating to that progress claim, and an earlier one, which was substantially repeated in the latter. I determined the challenges to the payment claim in favour of the present defendant: *ISIS Projects v Clarence Street* [2004] NSWSC 714.
- 4 In these proceedings, the plaintiff alleges, among other things, that it has overpaid the defendant for the construction work carried out by the defendant, and that part of the work carried out by the defendant was incomplete or defective. The plaintiff also alleges that the defendant has breached a term of the contract requiring the defendant to furnish "as built" construction drawings on completion of the project.
- 5 As to the claim for overpayment, the plaintiff wishes to argue - and in principle must succeed on the argument - that no estoppel flows from any prior adjudication or from any judgment of the Court given in respect of any prior adjudication; or, indeed, from any judgment of the Court given in default of the adjudication as where, for example, there has been a failure to provide a payment schedule. The precise nature of the relief is not spelt out in the Act; but section 32 makes plain, in principle, the position that I have just outlined.
- 6 Of course, the defendant's position is that it has not been overpaid one cent; and that of all the defective or incomplete works alleged by the plaintiff, it has rectified or caused to be rectified all those that are truly defects.
- 7 The proceedings now before the Court were commenced by summons filed on 15 October 2004. The defendant made application for security for costs, "up to but not including a final hearing in the amount of \$350,000 ...", by notice of motion filed on 24 November 2004. That notice of motion stated, in a way that does not seem entirely consistent with the Rules and forms then in force, that "The relief sought in this notice of motion is without prejudice to the defendant's entitlement to . . . seek an order for the provision of further security for its costs at a later stage in these proceedings".
- 8 That notice of motion was dealt with on 14 December 2004 by Bergin J. It is apparent that her Honour took a view, during the course of argument, that it was not necessary for her to decide the precise quantum for which security should be given (no doubt, having been satisfied either by evidence or by concession, that the relevant jurisdictional facts had been proved).
- 9 What happened is demonstrated in the transcript from 22.31 to 23.30:

*HER HONOUR: Putting that to the side at the moment, your client has a liability close to one million dollars and very little security, and that is at best. Mr Elliott, at this stage I would be minded to get the directors to give a bank guarantee in the total amount as offered, rather than in two tranches, that is, \$150,000 immediately. Do you want to argue against that?*

*ELLIOTT: I would first of all need some instructions. I have an initial reluctance to accept that position for various reasons, one of which is that there is a significant differential between Mr Henry's estimation and your Honour's figure of \$150,000.*

*HER HONOUR: Except I am of the view that these parties should be moved into a different mode. To expend the costs on the various arms of this litigation, and I accept Mr Henry's experience over the last 30-odd years, it is expensive, but if there is security proffered on the basis that the parties go into mediation immediately, then there may be some good sense that comes out of it. It must be obvious that if the carpet wasn't there, it wasn't there. There must be an adjustment that can be made, and if you utilise a mediator facility type of approach, with a person experienced in this field, the parties are likely to get a prompt result, that is what I am thinking.*

*Mr Southwick, I am minded to award security, but in the form of a bank guarantee on the basis that mediation occurs no later than the end of February. So what will happen is the parties move into that mode immediately, that is the bank guarantee of the two tranches immediately. I will adjourn while you get instructions.*

SHORT ADJOURNMENT

RESUMPTION

*ELLIOTT: May I hand up orders. The parties are in agreement subject to your Honour's views.*

*HER HONOUR: I should list it so that there is an end date when you come back to work up litigation, if that is what you have to do ultimately.*

*ELLIOTT: Yes, your Honour, we should have a directions hearing in early March. May I just note something that I think is obvious anyway, that we reserve our rights to apply for such - - -*

*HER HONOUR: Yes, I will make those orders. I will say it without prejudice to both parties.*

*Without prejudice to either party's position, and by consent, I make the orders in the short minutes of order initialled by me and dated today. I list the matter for directions on 4 March 2005. I reserve the question of costs."*

- 10 The "orders" referred to by counsel and her Honour included as order 1 an order that: *"The plaintiff provide the defendant with security of costs by way of bank guarantee from an Australian retail bank in the sum of \$150,000 by 15 January 2005."*
- 11 Order 2 provided for a stay until the security was provided. Order 3 provided that once security was given, there should be a mediation, *"to be completed by 28 February 2005"*.
- 12 The form of security was subsequently amended by agreement between the parties, but nothing - save some accrual of interest - turns on that.
- 13 A mediation was indeed attempted. It did not complete by 28 February 2005, but continued from time to time thereafter, until finally it was either terminated or abandoned, without success, in about June 2005.
- 14 Thereafter, there were a number of disputes between the parties as to various matters, including payment of money, discovery, a Scott Schedule and the like. On 6 October 2005 the Court (Einstein J) indicated that the plaintiff should file its evidence. Directions were given for that; and the directions were from time to time extended because of the plaintiff's non compliance with earlier time limits.
- 15 The plaintiff has now filed its evidence. The defendant's solicitor says that he has re-examined the question of costs in the light of the evidence actually filed, and has come to the view that the amount originally sought was insufficient. Part of this (although not a substantial part) is explained by increases in charge out rates.
- 16 If that were the only reason for the present application, it would fail. Apart from anything else, since security has been given by way of deposit and interest has accrued, there has been some protection for interest in charge out rates. However, the substantial reason for the increase in the amount sought relates to what the defendant's solicitor now perceives to be the far more substantial work required.
- 17 The estimate given by him, up to and including completion of what he says is likely to be a three week hearing, is that the defendant will incur approximately \$988,000 in costs. After some discount for concessions is made, the amount of the application was said to be for \$625,000-odd, revised downwards to \$530,500-odd. It is clear that it includes all the defendant's costs to date, including the cost of the mediation.
- 18 The hearing has proceeded on the basis that I would determine the question of principle and, if I decide that further security should be given, refer out to a costs assessor or other qualified person quantification of the defendant's likely party and party costs, on the basis that, armed with a report from such a person, the Court would determine the amount for which further security should be given.
- 19 On the question of principle, the plaintiff raises three substantial issues. Firstly, it submitted that the application had not been brought with the requisite promptness. Secondly, it submitted that its case was strong, and was pressed in good faith, and that the defendant's defence was not bolstered by any prior determination or judgment in its favour. Thirdly, it submitted that the effect of the making of an order for further security would be to stultify the litigation, so that the application for further security should be viewed as oppressive.
- 20 It is plain that, whatever head of power is relied upon, the discretion to order security for costs is broad and relatively unfettered. The oft cited factors that the Courts frequently take into account are no more than guideposts. See the judgment of Beazley J in *K P Cable Investments Pty Limited v Meltglow Pty Limited* (1995) 56 FCR 189 at 196 and following.
- 21 It is also plain that the Court does not approach an application for security on the basis that if a defendant makes out a *prima facie* case for the provision of security, the security should be ordered in the amount that, in effect, indemnifies it against all costs that it might incur. See *Bryan E Fencott & Associates Pty Limited v Eretta Pty Limited* (1987) 16 FCR 497. I would add that any view that the discretion should be effectively constrained or directed in such a way would be inconsistent with what I have observed as its relevantly unfettered character.
- 22 The authorities, I think, on a proper analysis also make it plain that delay is not to be looked at in the abstract. What is important is whether, assuming that delay has been shown, such delay causes actual prejudice to the party against whom the order is sought. Even if prejudice is shown, the application need not fail; but unless it is shown, the significance of delay as a countervailing factor disappears. See the decision of Hunter J in *Hughes Bros Pty Limited v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (7 November 1995, unreported; BC 95079079).
- 23 It is, I think, plain that there has been relevant delay in the bringing of the application. The evidence of the defendant's solicitor, Mr Henry, demonstrates that he was aware in October 2005 - ie, at the time when the plaintiff was ordered to file its defence - that the security given to that date had been, in effect, exhausted. See paragraphs 28 and 29 of his affidavit sworn 1 December 2006.
- 24 But Mr Henry did not then re-agitate what he says was the right to further security reserved by the orders Bergin J made on 14 December 2004. He stood by and permitted the plaintiff to go ahead and prepare and serve its evidence. His affidavit makes it plain why he did so: he did so because the defendant was not incurring costs at any substantial rate over that time, because it *"was required to do very little in these proceedings, other than attend several directions hearings and dealing with correspondence"*. See paragraph 32 of the same affidavit.

- 25 I should note that it was submitted for the plaintiff that the defendant: "remained silent as a deliberate forensic strategy to permit [the plaintiff] to expend significant costs in the hope that the financial position would then be that the proceedings might be stultified." (written submissions paragraph 29).
- 26 That proposition was not put to the defendant's solicitor in cross-examination. In my view it is a serious charge to make against a solicitor of the Court; and although the submission is directed at the defendant, it is based, quite clearly, on the relevant parts of the solicitor's affidavit. I do not think that I should reach a conclusion of that nature without the solicitor in question having been given the opportunity in cross-examination to deal with the point.
- 27 Nonetheless, it remains the fact, on that solicitor's own evidence, that the defendant stood by, as I have said, when it knew, or must have appreciated, that the plaintiff (if it be on its evidence) would incur substantial expenses in doing so. Thus, if there were evidence of relevant prejudice, there would be a strong case for dismissing the application for further security.
- 28 However, on an analysis and rereading of the plaintiff's evidence, I do not think that any relevant prejudice has been made out. The plaintiff's evidence - both coming from its solicitor and from one of its directors, Mr Voukidis - focuses on changes in the plaintiff's position from January 2005 to date. Thus, both the solicitor and Mr Voukidis go to some lengths to demonstrate changes in the financial position of the plaintiff, and of the joint venturers who carried on the project through the vehicle of the plaintiff.
- 29 If January 2005 were the relevant date, that material would provide some basis for concluding that the plaintiff had sustained prejudice by reason of the delay. But the relevant time is October. The evidence gives the Court no basis on which to assess the position of the plaintiff as at October 2005, or on which to conclude that the plaintiff has suffered prejudice by reason of some change in its position since that date. The only relevant fact to which any date can be given relates to the sequestration of the estate of a director of one of the joint venturers which apparently occurred on 17 May 2005. It was, thus, something that was in existence prior to the relevant date, namely October 2005. To the extent that the position of that person can be said to relate also to the joint venture, of which he was a director, the same conclusion follows.
- 30 Thus, as I have said, I do not think that the plaintiff's evidence makes good any question of prejudice focused on the relevant time, which, in my view, is October 2005 and not January 2005. It follows from what I have said are the relevant principles, that the delay - paltry though the explanation for it may be - is not of itself a sufficient reason for denying the defendant the further security that it seeks.
- 31 What I have said disposes of the first and second points raised by the plaintiff. The third point, that to order further security would stultify the litigation, was effectively conceded in the course of argument. When I say "conceded" I do not mean that the defendant conceded it; but, rather, that the plaintiff acknowledged that it could not be pressed. That concession was properly made.
- 32 It is clear that, where a claim of stultification is to succeed, the plaintiff raising it must demonstrate that it has approached all reasonable sources of finance, and has been knocked back. The plaintiff's evidence falls far short of saying that; on the contrary, I think it is a reasonable inference, from the plaintiff's evidence, that one of the joint venturers could, in fact, afford to fund the preparation of further security in the continuation of the litigation.
- 33 It will be seen that I have dealt with the application on the basis that it was not foreclosed by the way in which Bergin J dealt with it (or with the prior application) on 14 December 2004. Her Honour gave no reasons, so that what she had in mind must be gleaned from the transcript. It is, I think, relevantly plain that her Honour was not minded to go into the detail of the quantification of the defendant's claim, and that she perceived that there might be another course - "a different mode" - that would, in effect, short circuit the need to rule upon the quantum of security.
- 34 No doubt, her Honour hoped that the mediation might resolve the dispute. But, even if it were not to do that, it might legitimately have been expected that a mediation would lead to some narrowing of the issues, with a consequent impact on the proper quantum of any security or further security.
- 35 Counsel for the defendant made it plain that the defendant reserved its rights. Her Honour cut across counsel and did not permit him to say what was the precise nature of the right that was reserved. However, when that passage is read in context, it is, I think, a reasonable inference that the right sought to be reserved - and that her Honour clearly thought could properly be reserved - was the right to apply for further security in the event that the mediation was not successful, and that the quantum of the defendant's likely costs exceeded an amount for which as at December 2004 \$150,000 could be regarded as an appropriate provision.
- 36 That, I think, follows from her Honour's expression that the orders to be made would be made "without prejudice to both parties". If her Honour were not meaning thereby to recognise the defendant's reservation of its right to seek further security, it is very difficult to see why there was any relevant position of the defendant that needed to be protected by that form of words.
- 37 Thus, I do not think that this is a case where the question of security has been dealt with, after full investigation of, among other things, the likely quantum. If it were such a case, I might have taken a very different view. But I think that her Honour, understandably enough in the last week of a busy term, did not wish to go into detail, but at the same time, wished to ensure that the matter could proceed to mediation.

- 38 For those reasons, I think that it is appropriate, in principle, for an order to be made for the provision of further security. It follows that the question of quantum is one that will need to be dealt with by the mechanism that I have indicated. However, in the hope that the parties might be able to resolve the question between themselves, without the expense and delay of a reference out, I will make some further observations.
- 39 The first observation is to reflect what I have said already: that nothing in the nature of the discretion requires it to be exercised with some sort of presumption that a successful defendant is to get full indemnity.
- 40 The second is that it is by no means plain that in the circumstances as I have outlined, then, the defendant should be given security now for the costs referable to the mediation. However, in case the defendant wishes to contest that position, I will do no more than flag my concern.
- 41 The third observation is that if a case is to be made out for the provision of substantial further security, it may well be appropriate for that security to be provided by "tranches". In other words, it might be appropriate to order security in a particular sum now, to cover the costs up to completion of the evidence, and a further sum thereafter, to cover the costs of the hearing (including preparation for hearing).
- 42 In the circumstances, however, it is unnecessary to do anything more at present in relation to the question of security, other than to direct the parties to bring in short minutes of order, either disposing of the question or providing for its progression in the way that I have outlined earlier in these reasons.
- 43 The defendant's notice of motion also raises some questions as to the adequacy of the plaintiff's "pleadings", and as to a Scott Schedule prepared by the plaintiff. The plaintiff accepts that it should amend its summons. It does not accept that all the complaints made by the defendant are appropriate, and for the reasons that I indicated to counsel in the course of argument, I do not think so either.
- 44 However, it is obviously desirable that the summons should state as clearly as possible the factual and legal bases for the relief claimed; and, since the plaintiff accepts that the summons should be amended, it is appropriate to give it an opportunity to do so.
- 45 As to the Scott Schedule, the document is plainly out of date. Some of the items in it have been dealt with either by concession or by the performance of work. It is appropriate for the Scott Schedule to be updated, so as to reflect only what remains of that aspect of the dispute between the parties.
- 46 In the circumstances, I would ordinarily order that the plaintiff file and serve an amended summons by a particular date; and likewise, an amended Scott Schedule. Since I have not yet made any order for further security (let alone an order that the proceedings be stayed until any further security is provided), there is no technical reason why I could not now give those directions.
- 47 But, in the circumstances, where it is at least likely that there will be an order for further security, and perhaps in a substantial sum, I think it best to give the plaintiff an opportunity to consider its position.
- 48 The last matter to be mentioned is the further conduct of the proceedings. They are presently listed for directions on 13 April 2007. Unless the parties can agree in the course of this week as to what should happen, that date should be vacated. Even if the parties do agree, it is likely that it should be vacated, because the plaintiff will need some time to amend its summons and Scott Schedule, and the defendant will need some time to deal with the amended documents.
- 49 I think the best course is to leave it to the parties to try and work out how best to take the matter forward. If they cannot do so, I will resolve that dispute when the matter comes back before me for directions in the course of this week.
- 50 The formal orders I make are that I direct the parties to bring in short minutes of order to give effect to these reasons, and I stand the notice of motion over to 9.30 am on Friday 30 March 2007 before me. I reserve for consideration then the question of costs.