IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted

AT MELBOURNE
CIVIL DIVISION
COMMERCIAL
BUILDING CASES DIVISION

Case No. CI-09-03684

ARROW INTERNATIONAL AUSTRALIA LTD
(ACN 103 265 649) Plaintiff

v

77 BOUVERIE PTY LTD
(ACN 112 684 723) First Defendant

and

TON LEONG LIM Second Defendant by Counterclaim

JUDGE:	HIS HONOUR JUDGE GINNANE
WHERE HELD:	Melbourne
DATE OF HEARING:	11 August 2010
DATE OF JUDGMENT:	17 August 2010 - Revised 23 August 2010
CASE MAY BE CITED AS:	Arrow International Australia Ltd v 77 Bouverie Pty Ltd & Anor.
MEDIUM NEUTRAL CITATION: (Revised)	[2010] VCC 1094

REASONS FOR JUDGMENT

Catchwords: PRACTICE – Security for costs – plaintiff a foreign corporation – overlap of plaintiff's claim and first defendant's counterclaim – delay – security for future costs granted.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr R Andrew	Meier Denison Guymer
For the Defendants	Mr D McAndrew	Piper Alderman

HIS HONOUR:

1 Before the Court is the defendants' Summons seeking security for costs under Order 62 of the *County Court Civil Procedure Rules* 2008 and s.1335 of the *Corporations Act* ("the *Act*").

2 The amount claimed, in the case of the plaintiff, is some $2,500,000, and in the case of the defendants, up to $3,165,000. The trial is fixed for hearing on 6 September 2010.

3 The defendants' application relies on the fact that the plaintiff is a foreign corporation not ordinarily resident in the State of Victoria. The plaintiff is a company registered in New Zealand with three directors – two of whom are resident in New Zealand and one resident in Australia. In addition, the defendants contend that there is reason to believe that the plaintiff has insufficient assets in Victoria to pay their costs if ordered to do so.

4 The defendants claim security for the costs on an estimate of a twenty-day hearing in the sum of $926,000, of which approximately $561,700 is yet to be incurred.

5 The history of the proceedings is set out in Mr Emmett's affidavit filed in support of the defendants' application as follows:

> "By contract dated 17 October 2008, the plaintiff and the first defendant entered into a construction contract for the lump sum of $7,500,000 and the various payments have been made pursuant to that."

6 The contract was to erect a building at Bouverie Street, Carlton.

7 Mr Emmett also states that additional payments have been made to the plaintiff pursuant to the *Building and Construction Industry Security of Payment Act* 2002. He states that in or about 10 July 2009, the plaintiff suspended work and that the first defendant contends the suspension was not pursuant to the contract nor in accordance with the requirements of the *Act*.

The first defendant contends that while the plaintiff resumed a site presence on or about 24 November 2009, no substantive work took place thereafter and it terminated the contract on 9 February 2010. There are competing claims by the parties about the termination of the contract and whether it amounted to a repudiation.

8 The plaintiff's claim is for moneys due under the contract and for damages caused by the repudiation of the contract. There is also a claim under the *Trade Practices Act* 1974 for misleading and deceptive conduct brought by the plaintiff against the first defendant based on alleged representations said to be made by the second defendant, Mr Lim, about his experience to manage a project like that being undertaken, and his capacity to answer questions and requests for information concerning the contract documentation in a timely manner. Mr Lim, who is a director of the first defendant, is said to be liable under the accessorial provisions in s.75B(1)(c) of the *Trade Practices Act*.

9 The defendants' Further Amended Defence and Counterclaim alleges that the plaintiff is indebted to the first defendant in respect of payment certificates served in June, September and December 2009 and January 2010. The first defendant also claims an entitlement to liquidated damages by reason of the plaintiff failing to bring the works to practical completion by 1 July 2009. It denies the representations, upon which the misleading and deceptive claim is based, and that it was in substantial default under the contract and alleges that it lawfully brought the contract to an end on 9 February 2010. It claims repayment of various alleged overpayments made to the plaintiff.

10 The following matters are of significance in determining this application. First, that the plaintiff is a foreign corporation, albeit one that is apparently a subsidiary of a company in New Zealand. The authorities demonstrate that to avoid an order for security for costs being made, the foreign corporation must show that it has assets out of Australia or, indeed, in Australia, against which

an order for costs could be enforced under the *Foreign Judgments Act* 1991. There is some authority that if the plaintiff resides in a jurisdiction in which a judgment could be enforced in accordance under the *Foreign Judgments Act* 1991, the Court, if it does order security, may order that amount be the additional costs which the defendants would incur for the registration and execution of judgment in the other jurisdiction, but that is dependent on what evidence is shown about the assets of the plaintiff and of any parent company.

11 The second matter is the issue of delay in bringing this application. The proceeding was first commenced on 6 August 2009 by an originating motion seeking a summary judgment under s.16 of the *Building and Construction Industry Security of Payment Act* 2002. His Honour Judge Shelton refused the application for a summary judgment because of the existence of triable issues. Subsequently, pleadings were exchanged. The request for security for costs appears to have been first raised on 5 May 2010. The plaintiff's case is that it has incurred significant costs that would be rendered nugatory if an order for security for cost were made. Those costs are set out in the affidavit filed on behalf of the plaintiff by Mr Guymer, its solicitor. They include such matters as preparing voluminous witness statements, the details of which are set out. There is also the cost of the mediation held on 16 June 2010.

12 The other matter of some importance is the argument by the plaintiff that the first defendant has a substantial counterclaim which exceeds the amount claimed by the plaintiff. It is submitted that courts rarely order security for costs where a defendant has a counterclaim concerning the same issues and disputes. I do not consider that the authorities go that far, especially in the case of a foreign corporation.

13 The defendants' application was supported by a detailed affidavit of Mr Emmett, their solicitor, sworn on 5 August 2010, which states that:

- the plaintiff is a foreign corporation;
- that it does not own real estate in Australia;
- that its working capital is small – reference is made to a sum of $764,086;
- that its balance sheet, which is not in evidence, does not provide any evidence of assets;
- that the plaintiff has not apparently obtained any exemptions from the requirements for filing documents applicable under the *Corporations Act* in respect of foreign corporations.

14 Mr Emmett exhibits a credit report from Hughes Investigations Pty Ltd, which states, in the second last paragraph:

> "We cannot locate any assets owned by Arrow or any information which suggests that it owns any assets in Australia. There are no Profit & Loss figures available on the company."

15 However, the report does state that Arrow has an extensive commercial credit history, having made approximately fifty-nine credit applications in the past five years and that it had completed a large project in Queensland in 2009.

16 There is no evidence in that report of any commercial delinquency by Arrow, but it does not go into details of the company's present assets. Mr Emmett states that he sought information regarding the plaintiff's assets from its solicitors but it has not been forthcoming. Apparently he was provided with a balance sheet on confidential terms, but Mr Emmett states that its contents do not satisfy the defendants that the plaintiff will be able to satisfy any adverse costs orders made in these proceedings taking into account the plaintiff's own costs in running a 20-day proceeding. He states that enquiries have failed to identify any projects being undertaken by Arrow, with the exception of a project at Sunshine, and that that appeared to be nearing completion.

17 Mr Emmett makes reference to the question of uncertainty of the appropriate

name of the Australian company name of the plaintiff. However, having read all the material, I do not think that that issue is determinative of this application.

18 The affidavit of Mr Guymer states that, as at 31 March 2010, the plaintiff had net assets in Australia of $833,536. In paragraph 5 of his affidavit, he states that the whereabouts and locations of Arrow's current projects are commercially sensitive and should not be provided to the defendants. He also states that:

> "During the project, which is the subject of this dispute, while our client was in possession of the building site at Bouverie Street, Carlton, the Second Defendant was known by himself or through other employees, to keep a constant visual, either at or outside the Bouverie site and Arrow is concerned that there is the risk that the Defendants might obstruct or interfere with or hinder works being undertaken by Arrow elsewhere, or cause harm to its relationships with its other customers or clients by contacting them."

19 I do not consider that that reasoning provides an explanation for not providing adequate details of the plaintiff's assets. In the case of a foreign corporation, when the application for security for costs is supported by material which provides some basis for such an order, a plaintiff needs to be frank with the Court about its asset structure.

20 The defendants submit that Mr Guymer's affidavit discloses no evidence as to the plaintiff's capacity to pay an adverse cost's order. They object to Mr Guymer's statements about the balance sheet.

21 I consider that there is force in the defendants' submissions. Whilst it is true that there is no evidence of commercial delinquency on the part of Arrow, I have not been impressed by the failure of the plaintiff to be frank with the Court about its assets. The defendants also refer to the fact that there was no evidence adduced by the plaintiff as to its preparedness to provide alternative security, its assets in New Zealand or its willingness not to dissipate assets.

22 The defendants contend that there has been no delay in bringing the

application. The Amended Statement of Claim was filed and served on 12 March 2010. I do not accept that submission. There has been delay. There is no reason why the application for security could not have been made at a much earlier point and not left to a period little more than three weeks before the trial.

23 Drawing all these matters together, I conclude that taking into account the affidavit of Mr Emmett, the lack of evidence produced in response by the plaintiff about its asset position and the fact that it is a foreign corporation, there is reason to believe that the plaintiff has insufficient assets to pay the costs of the defendants if ordered to do so.

24 However, I consider that the amount of any security that I order should be reduced from the amount that it otherwise might be because of the following factors. First is the delay in making the application. I am only prepared to order security in respect of future costs, and up until the end of day 2 of the trial, taking into account that commercial trials, not least building cases, often settle or collapse. It would be unfair to require the plaintiff to provide security for costs that may never be incurred.

25 I add the following which is additional to the reasons that I announced on 17 August 2010, so that it is clear why I have only ordered security until day 2 of the trial. The defendants will be at liberty to seek an order from the trial Judge, if the trial proceeds beyond the second day, for further security in respect of the remainder of the trial. Whether further security will be ordered will be a matter for the trial Judge, who may take into account the evidence about the plaintiff's assets then produced to the Court.

26 The second factor that I have taken into account in reducing the amount of security awarded is the fact that there is a counterclaim. If an order for security for costs prevents the plaintiff pursuing its proceeding, then the counterclaim will still proceed and there will an overlap between the matters of

fact relevant to the counterclaim and the facts that would have been relevant to the claim. This factor in itself does not justify refusal of security in the present circumstances where the plaintiff has declined to disclose its asset structure to the Court.

27 I have been assisted in determining the application by the judgment of Smith J in the Supreme Court of Victoria in *Felsink Pty Ltd v City of Maribyrnong*,[1] especially at paragraphs 29 and following. His Honour also ordered security for the first two days of the trial, while noting that the matter could be revisited if the trial proceeded beyond that point.

28 Turning to the question of the quantum of security, I deal first with the position of the first defendant. I propose only to award security in respect of some of the costs still to be incurred. Those costs are identified by Mr Emmett as involving two stages:

(i) Phase 1 being finalising reply evidence and reviewing reply and expert evidence;

(ii) Phase 2 being intensive preparation for a 20 day trial.

29 The two sums allocated to those stages amount to $209,100. Those costs are estimated on a solicitor-client basis and appear to be towards the higher end of the costs that would be allowed. I therefore have to reduce that amount to a party-party basis. I will also have to reduce it because of the fact that a substantial part of those costs may well be attributable to the counterclaim which will be pursued in any event. Doing the best I can in an imprecise exercise, I propose to allow by way of security 45 per cent of the sum of $209,100, which, on my calculations, comes to the amount of $94,095.

30 So far as trial costs are concerned, as I have mentioned, I would allow the first two days of trial costs reserving the defendants' right to seek further security

1 [2007] VSC 49

from the trial Judge if the trial proceeds. In respect of trial costs, I do not have to allow such a great discount for the difference between solicitor-client and party-party costs. I emphasise that I express no concluded view about the costs that the trial Judge may ultimately allow. I allow 60 per cent of two days' costs at the rates claimed for senior counsel, junior counsel, a partner and a senior associate. I do not allow the assistance of another solicitor or paralegal. The daily costs of senior counsel, junior counsel, a partner and a senior associate at the amounts claimed total $13,690, or for two days, $27,380. Sixty per cent of that figure, which is a figure I adopt, taking into account, again, the presence of the counterclaim, comes to $16,428.

31 There is then a claim for various expenses, particularly in respect of experts, for whom there is a claim for $80,000 for further future experts' expense. There are no real details given about that claim. The plaintiff's solicitor also, without giving any real details, submits that those costs are probably referrable to the counterclaim. However, doing the best I can by considering the pleadings, it does appear that the first defendant's defence may require expert evidence and I allow half of the sum of $80,000, i.e. $40,000. I have attempted to take account of any reduction in fee that may occur following a taxation of costs and the fact that part of the experts' reports may relate to the counterclaim.

32 I allow 95 per cent of the transcript for two days at $1,000 a day or $2,000 a day. I do not read the letter from Piper Alderman attached to Mr Guymer's affidavit as suggesting that Spark and Cannon would prepare a transcript for $220, but rather $220 plus $8 per page. I would allow 95 per cent of the photocopying and preparation of the Court Book at $5,000. I will attribute 5 per cent of these costs to the security awarded in respect of the second defendant.

33 In total, so far as the first defendant is concerned, I propose to order that

security be ordered to be provided by the plaintiff in the sum of $157,173, which is made up of the following constituents:

- $94,095, being the solicitors' future preparation;
- two days at trial $16,428;
- expenses on experts' statements at $40,000;
- 95 per cent of the transcript and 95 per cent of the Court Book, at $1,900 and $4,750 respectively. Those amounts come to $157,173.

34 There is then the question of security in favour of the second defendant, Mr Lim. So far as I can on the material before the Court, I regard his case as likely to take far less time than the first defendant's. A substantial amount of the preparation required to defend the case brought against him will also be required to defend the misleading and deceptive conduct claim brought against the first defendant. The only additional issue in the case against the second defendant would be the extent of his knowledge, in the sense identified by the High Court in *Yorke v Lucas*,[2] to satisfy the higher standard that applies when a contravention of s.75B of the *Trade Practices Act* is alleged. I consider that the figure of 5 per cent of total costs is reasonable.

35 Applying that percentage to the figures before the Court, I take 5 per cent of 60 per cent, which is a reasonable party-party figure of the further costs to be incurred in the two phases that I identified previously. The costs involved in those two phases are the sum of $209,100. Sixty per cent of that, which I apply for a party-party basis, equals $125,460 and 5 per cent of that, which is attributable, in my view, to preparation involving Mr Lim, comes to $6,273.

36 I have not allowed anything in respect of the experts' reports in respect of Mr Lim's defence, as those reports appear to have general application to the

[2] (1985) 158 CLR 661

claim against the first defendant and I have already allowed $40,000 for them.

37 There are then the costs for days 1 and 2 of the trial. Following the same approach that I adopted in the case of the first defendant, 5 per cent of the first and second day's costs of the trial amount to $1,369. I have allowed 5 per cent of the cost of the Court Book and the transcript, amounting to $350, having allowed 95 per cent in the case of the first defendant. On my arithmetic, the addition of those amounts of $6,273, $1,369 and $350, totals $7,993.

38 I therefore order that the plaintiff provide security for costs of this proceeding in the following amounts:

(i) in the case of the first defendant, $157,173; and

(ii) in the case of the second defendant, $7,992.

39 Secondly, that security is to be provided in a form acceptable to the Registrar by 4.00 pm on 25 August 2010.

40 Thirdly, if the said security is not provided by that date, the plaintiff's claim is stayed subject to further order.

41 I order that the plaintiff pay the defendants' costs of their summons seeking security for costs, including the costs of this day.

42 As I have stated above, the defendants are at liberty to seek further security from the trial Judge, who will be able to determine any such request on the material before the Court at that time.

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