

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 11330/15

Plaintiff: **WILLIAM STREET GATTON PTY LTD ACN
160 699 463**

AND

First Defendant: **CRAIG ROBERT JOHN MAINDONALD**

AND

Second Defendant: **SYDNEY IVAN SUPER**

Evans Lawyers acting for the Plaintiff successfully defended an application for security for costs filed by the First Defendant.

SUMMARY

1. The First Defendant sought an order for security for costs from the Plaintiff.

Summary of the Plaintiff's claim

2. The Plaintiff alleged that the First Defendant in his position as director breached his fiduciary duties to it as a director with a dishonest and fraudulent design. The Plaintiff's case alleged that:
- (a) the First Defendant was the sole director and shareholder of a building company, Mainz Developments Pty Ltd (In Liquidation) ("Mainz");
 - (b) the First Defendant incorporated the Plaintiff and then sought investors to purchase land to develop units on which at the end would be transferred to the shareholders commensurate with their percentile shareholding;
 - (c) upon their investment those investors were to become the directors and shareholders of the Plaintiff and the First Defendant would resign as a director and shareholder. The funds were for the specific purpose described at paragraph (b);
 - (d) the First Defendant failed to update the ASIC register as required and misused the Plaintiff's funds for the benefit of Mainz and himself;
 - (e) the First Defendant misused the Plaintiff's property by raising a loan in the name of the Plaintiff secured by its property and having those loan funds paid into the account of Mainz which entered into voluntary administration (on 5 December 2014) within eight weeks of

the drawdown;

- (f) the First Defendant potentially did so with a dishonest and fraudulent design including the deliberate concealment of the above conduct.

RELEVANT LAW

3. The court may order the Plaintiff to give security on the First Defendant's application if it considers appropriate, subject to the matters in r. 671 and r. 672.
4. The Plaintiff was a corporation with \$742,500 in paid up share capital. That share capital was contributed by its shareholders at the time, some of whom were directors.
5. The Plaintiff conceded that at the time of the Application it did not own real property in Queensland however, for the reasons that were submitted below, that position had been caused by the First Defendant.
6. Section 1335(1) of the *Corporations Act 2001* (Cth) ("CA") vests the court with the discretion to make an order for security enlivened on similar grounds as set out in r. 671(a) and note r. 671(g).

Counsel instructed by Evans Lawyers made the following submissions on behalf of the Plaintiff:-

Discretionary factors

7. If the court is satisfied that the jurisdiction is enlivened in this case then the Plaintiff's position is that the circumstances are against the court's exercise of that discretion. The factors supporting the Plaintiff's position are as follows:
 - (a) the Plaintiff has the means of those standing behind it: r. 672(a);
 - (b) the Plaintiff's case is meritorious and has, *prima facie*, reasonable prospects of success: r. 672(b);
 - (c) the proceeding is genuine: r 672(c);
 - (d) the Plaintiff's lack of real property within the jurisdiction was alleged to have been caused by the First Defendant based on the allegation that he facilitated the misuse of the Plaintiff's asset for an improper purpose: r. 672(e);
 - (e) the case involves serious matters of public importance involving corporate governance and property investment schemes marketed to the public: r. 672(i).

The means of those standing behind it: r. 672(a)

8. The two main Directors of the Plaintiff provided an undertaking that they would meet any adverse costs order against the Plaintiff in a form deemed necessary by the court. They had already spent a significant amount in the proceedings on behalf of the Plaintiff, and their assets and means were substantial. It was submitted that it was a weighty factor against the exercise of the discretion to award security when there are natural persons standing behind an impecunious company whose assets are available to meet a costs order by undertaking.¹

The merits of the claim against the First Defendant: r. 672(b)

9. Whilst the court was not in a position at that interlocutory stage to reach a final decision on the issue, the Plaintiff submitted that it had a strong *prima facie* case against the First Defendant.

Without more, it was submitted that the court ought to assume it is a *bona fide* claim with reasonable prospects of success.² On the hearing of the Second Defendant's application for security for costs, Burns J accepted that the Plaintiff had reasonable prospects in its claim.

The First Defendant is responsible for the loss of the value of the Plaintiff's assets: r. 672(e)

10. Where the Plaintiff seeks to enliven the discretion that the First Defendant has caused the lack of available assets of the Plaintiff, then it bears the onus of establishing that there is a causal connection between the First Defendant's conduct and the Plaintiff's lack of resources.³
11. The First Defendant entered into a loan agreement with the Plaintiff on 1 October 2014. The first defendant admits the allegation, but curiously says he did so on the basis in his capacity as a director of Mainz.
12. When the loan was received into the bank account of Mainz the first defendant recorded it into the books and records of Mainz as an "*Advance from Craig re Mtge on Gatton- Loan Craig*".
13. The First Defendant pleaded no authority provided by the Plaintiff to Mainz to act as its agent or otherwise and in any event such a contention would be refuted by the Plaintiff.
14. Additionally, the First Defendant resigned as a director of the Plaintiff and transferred his shares (as the Plaintiff submits he should have done in or about March to May 2013) three days before Mainz entered voluntary administration. This in itself was contradictory to any submission that he was not required to do so upon the investors making the investment on the terms set out in paragraph 2(c) herein.
15. The First Defendant's breaches of fiduciary duty were set out in paragraphs 33 to 38 of the

¹ *E&N Collins Enterprises Pty Ltd & Anor v Kingaroy Mall Pty Ltd & Ors* [2006] QSC 187 per Philippides J at [9].

² *Suncare Constructions Australia Pty Ltd & Anor v Gainspace (Mackay) Pty Ltd* [2016] QSC 67 per Jackson J at [11], followed by Burns J in the Second Defendant's application for security for costs.

³ *Contamination Control Laboratories Pty Ltd v Reyer* [2010] QSC 1 per Daubney J at [8].

Amended Statement of Claim. The First Defendant denied any breach on the grounds that as the sole director and shareholder he could, in effect, do as he wished. This proposition has some real difficulties. The Plaintiff's case is that each of the investors had paid funds to the Plaintiff in consideration of being issued with shares and appointed as directors. With respect to at least 3 of the investors this occurred in March and May 2013. They were not registered as shareholders until late 2014.

16. Paragraphs 34 to 36 of the Amended Statement of Claim set out the alleged fiduciary duties owed by the First Defendant, how those duties were breached and why those breaches are alleged to have been infected with a dishonest and fraudulent design.
17. In context it is worth noting that Mainz is alleged to have been insolvent by June 2012 pursuant to the report of David Clout as liquidator dated 14 January 2014.

The proceeding involves matters of public importance: r. 672(i)

18. The case against the First Defendant involves matters of public importance including issues associated with property marketing schemes, dealing with funds provided by investors into those schemes and corporate governance issues. Matters involving the finance industry and property investments, particularly by superannuation funds, are matters of public importance in the current climate. The public importance in this matter was further highlighted by:
 - (a) a summons for the First Defendant, by the Liquidator, to attend a three day public examination pursuant to s 596A of CA;
 - (b) a current investigation (known by the Plaintiff) into the affairs of Mainz and the First Defendant by ASIC; and
 - (c) a current investigation into the first defendants dealings concerning the use of investors funds through the said property marketing schemes by Queensland Police, of which the plaintiff is one of many complainants.

Other factors

19. The discretionary factors listed in r. 672 are not exhaustive.
20. Here, the Plaintiff's case is that its assets have been used to benefit the First Defendant and third parties associated with him. That circumstance has robbed the Plaintiff of its financial capacity. It would be grossly unfair for it to then have to provide security for the costs of pursuing the First Defendant.
21. Though not one of the matters specifically referred to in r 672, the First Defendant's delay in making an application for security for costs may be regarded as a relevant factor. It would be unfair to allow a defendant security if the defendant has stood by and allowed the plaintiff to work on its case and incur significant expense.⁴ These proceedings have been at foot since 11 November 2015. The letter sent by the First Defendant's solicitor on 9 May 2016 was the first hint of any issue concerning the security for costs. The application has not been brought in a

⁴ *Covecorp Constructions P/L v Indigo Projects P/L* [2007] QSC 262 per Martin J at [27].

timely manner and is the product only of the Second Defendant's (successful) application heard on 21 April 2016.

22. The claims against the First and Second Defendants were significantly different in terms of their alleged conduct. Further, the reasons of Burns J granting the application by the Second Defendant on 21 April 2016 have been cured here by the Plaintiff's directors providing their undertaking to provide a personal guarantee in a form satisfactory to the court and financial information as to their means.
23. Lastly, the First Defendant does not come to the court with clean hands and the genuine nature of this application ought to be considered given that:
 - (a) the First Defendant has refused to provide disclosure of documents contained within his List of Documents disclosed on 29 March 2016 despite repeated requests;
 - (b) the First Defendant has not complied with the Orders of Burns J of 9 May 2016 to provide Further and Better Particulars to the Plaintiff; and
 - (c) the First Defendant has not taken any step in this proceeding since retaining new solicitors on or about 29 February 2016 save and except for the application to set aside the Orders of Burns J made on 21 April 2016 (relating to the Plaintiff's application for further and better particulars) which was dismissed with indemnity costs on 9 May 2016 and this application.

ORDER

The Court accepted the above submissions made by Counsel instructed by Evans Lawyers and made Orders to the effect that the certain Directors of the Plaintiff were to file undertakings into Court that they would meet any adverse costs order made against the Plaintiff.