Anchung Pty Ltd v Northern Territory of Australia [2016] NTSC 34

PARTIES:	ANCHUNG PTY LTD v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	31 of 2015 (21517154)
DELIVERED:	11 July 2016
HEARING DATES:	23 June 2016
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

COSTS – Security for costs – Application to increase amount of security previously ordered – Principles applicable to the making of an order – Requirement of changed circumstances – Impact of delay in bringing an application.

Anchung Pty Ltd v Northern Territory of Australia [2015] NTSC 76.
Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd [2001] FCA 1603.
Re Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation); Wrenfeld Pty Ltd v Finch [1991] NTSC 18.
Ravi Nominees Pty Ltd v Phillips Fox (1992) 10 ACLC 1313.

Security for Costs, Colbran, S., Longman Professional, 1993.
Security for Costs, Delaney J, The Lawbook Company Ltd, 1989.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Robertson SC
Defendant:	Mr Crawley

Solicitors:

Plaintiff:	Ward Keller
Defendant:	HWL Ebsworth

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Anchung Pty Ltd v Northern Territory of Australia [2016] NTSC 34

No. 31 of 2015 (21517154)

BETWEEN:

ANCHUNG PTY LTD
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: MASTER LUPPINO

REASONS

(Delivered 11 July 2016)

[1] On 30 June 2016 I made an order by way of security for costs with reasons to be subsequently published. These are those reasons.

[2] The application was the second application by the Defendant and sought an increase in the amount of the security previously ordered.

[3] The previous application was filed by the Defendant on 24 September 2015. After the hearing of that application I ordered the Plaintiff to give security

for costs in the sum of $80,500. Reasons were published on 12 November 2015.[1]

[4] In those reasons the lateness of the application for security had a bearing on the amount of security ordered. I then said that delay in bringing an application can be taken into account in determining whether or not an order for security for costs should be made and it could also be taken into account in determining the quantum of the security ordered.[2] I also acknowledged that delay was not an automatic bar to an order but simply one of the factors to be taken into account in the exercise of the discretion to award security. The explanation for the delay can also be taken into account for the same purpose.

[5] At the time of the first application the matter was at the stage where the Case Management Conference had concluded and a trial date had been set. That trial date was vacated for various reasons but in part due to extensions given to the Plaintiff to comply with the order for security for costs. The matter has now again been set for trial for 7 days commencing 25 July 2016.

[6] The evidence of likely costs presented by the Defendant on the first application, calculated from 24 September 2015, was that future costs were estimated to be of the order of $150,000 being approximately $80,000 in solicitor's fees and $70,000 in counsel fees.

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1 *Anchung Pty Ltd v Northern Territory of Australia* [2015] NTSC 76.
2 *Anchung Pty Ltd v Northern Territory of Australia* [2015] NTSC 76 at paras 25-29.

[7] The current application seeks an order for further security in the approximate amount of $206,000, or alternatively $158,000, in each case over and above the amount ordered on the first application.

[8] The Defendant's evidence on this application is that between 24 September 2015 (the key date in respect of the first application) and 20 May 2016 fee earners at the Defendant's solicitors have performed chargeable work, calculated at the Supreme Court scale and with a 20% uplift for care and conduct, amounting to approximately $108,000. Counsel fees between the same period amount to approximately $27,000. Hence the total costs for that period are approximately $135,000.

[9] Costs from 20 May 2016 until conclusion of the trial (which is set for 7 days from 25 July 2016, hence a relatively short period of approximately two months), are estimated at $178,000 inclusive of counsel fees which are estimated at $92,500. A comparison with the estimate referred to in paragraph 6 above demonstrates that the initial estimate has now been more than doubled, namely an increase of approximately $163,000.

[10] The estimate of the Defendant's costs seemingly justifies the comment of Mr Robertson, for the Plaintiff, of a 'Rolls Royce' service. However for current purposes I take the estimate given at face value. I think that is sufficient for current purposes given these reasons and also avoids the detailed analysis that would be required to better assess the bona fides of the estimate.

[11] In law there is nothing to prevent a party making a second application for security for costs or an application to vary the amount of the security previously ordered. This stems from the power of the Court to order security in the first place as the Court retains a jurisdiction to vary or discharge its own order. Courts however impose limits on further applications to avoid re-litigation of issues and a second application, or an application for increased security, will only be entertained where there has been a material change of circumstances or where there is new material which impacts on the order made on the first application (see *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*[3]). In *Colbran, Security for Costs* authorities are stated for the proposition that increased security may also be ordered where delays caused by the Plaintiff tend to make the Defendant's costs run higher than expected or simply that the security originally ordered was insufficient to secure the Defendant's costs.[4]

[12] In the course of the first application, noting that the Plaintiff was under an obligation to make full and frank disclosure to the Court of all relevant material,[5] I was dissatisfied with the evidence of the Plaintiff as to its assets and liabilities, as well as the quality of the evidence of value. Nonetheless I considered that the available evidence was at least sufficient to find that the Plaintiff's assets had some value and I allowed what I thought was a conservative amount of $25,000 for that purpose. As I had determined that

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3 [2001] FCA 1603.

4 *Security for Costs*, Colbran, S., Longman Professional, 1993 at footnotes 65 and 66 at p 294.

5 *Re Darwin Joinery & Furniture Manufacturing Pty Ltd (In Liquidation); Wrenfeld Pty Ltd v Finch* [1991] NTSC 18

the quantum of security should be $105,500, I reduced that amount to $80,500 on account of that estimated value.

[13] The Defendant relies on newly available evidence. The Defendant asserts that this evidence reveals that the Plaintiff did not fully comply with its obligation of full and frank disclosure and argues that the reduction in the amount ordered for security on account of the value of the Plaintiff's assets was not justified. In addition the Defendant submits that there are changed circumstances which have impacted on the extent of costs likely to be incurred. Those circumstances are firstly, that the extent of discovery issues far exceed what was initially contemplated and that the estimated trial length has increased by two days, which the Defendant attributes to the extra work caused by the Plaintiff's conduct in the proceedings.

[14] In respect of the value of the Plaintiff's assets, further evidence reveals that the Plaintiff's liabilities far exceed even the unqualified and apparently inflated value put on the assets by the Plaintiff for the purposes of the first application. The new evidence comes from the expert's reports filed on behalf of the Plaintiff which reveal that the Plaintiff acts in the capacity of the trustee of a family trust. Although that representative capacity had not been disclosed prior to the first application, that alone is not a major concern. More relevantly, that evidence reveals that the liabilities of the trust far exceed the value of assets and that the asset position of the trust has been in deficit for a number of years.

[15] Mr Robertson objects to the evidence on the basis that it was provided late in that it was provided outside the timeframe of the procedural orders I made for the purposes of this application. He submitted that the late provision meant that the Plaintiff was not able to address that evidence in time for the hearing.

[16] To put that objection into context, the current application was commenced by summons filed on 31 May 2016 and the affidavit of Graeme Sydney Charles Buckley, made on the same date, was filed contemporaneously with the summons. The matter was first mentioned on 2 June 2016 at which time I listed the matter for hearing before me on 10 June 2016 and fixed 8 June 2016 as the date by which the Plaintiff was to file and serve the affidavit evidence it would rely on at the hearing. There was then no suggestion that the Defendant had any further evidence to provide for the purposes of the application. Indeed had there been any that would likely have resulted in delaying the hearing date to ensure that the Plaintiff had a reasonable opportunity to submit its evidence in reply.

[17] Due to the illness of the Defendant's counsel, on 8 June 2016 the hearing on 10 June 2016 was vacated and rescheduled for 20 June 2016. By that time the Plaintiff had, on 7 June 2016, filed its evidence for the purposes of the application. No further orders were made in respect of affidavit evidence in the course of that mention nor do I recall any discussion of any other evidence for the purposes of the application.

[18] On 16 June 2016 the matter was mentioned by Hiley J in respect of a return of subpoena issued by the Defendant. Again there was no mention of any further evidence to be relied on by the Defendant on the application to vary the security amount.

[19] On 17 June 2016 the matter was mentioned by Southwood ACJ when the hearing on 20 June 2016 was rescheduled to 23 June 2016. Likewise on that occasion there was no mention of any further evidence to be relied on by the Defendant.

[20] The late affidavit the Plaintiff complains of is that of Ryan Paul Sanders made 20 June 2016 which was both filed and apparently served on that date. That affidavit refers to the new evidence relied on by the Defendant to establish the financial position of the Plaintiff and which is the foundation for the allegation of insufficient disclosure by the Plaintiff in the course of the first application for security for costs. The Plaintiff complains that the late provision of that affidavit deprived the Plaintiff of the opportunity to address that evidence.

[21] It is obvious that the provision of that affidavit came after the first two dates fixed for the hearing of the summons. In purely chronological terms and having regarding to the timetabling orders that had been made, an apparently valid basis exists for complaint concerning that affidavit.

[22] However, although Mr Sanders makes assertions in that affidavit, the evidence on which all that is based is evidence that was contained in the

affidavit of Mr Buckley filed on 31 May 2016. To that extent it was provided in time. In any case it derives from the Plaintiff's own evidence hence the only legitimate complaint that the Plaintiff can have is the lateness of notice of reliance, not of knowledge of the actual evidence. That is a different matter and one that does not cause me much concern. I find it hard to accept that the Plaintiff did not anticipate that the Defendant would rely on that evidence on the application without specific notice of that intention. Moreover as it is evidence from the Plaintiff, it is difficult to conceive how the Plaintiff could legitimately challenge it, despite Mr Robertson's submissions to the contrary. Lastly, it ought to be admitted as it is necessary to have regard to it in the discretionary review of the order of this Court and where the Plaintiff has otherwise obtained a benefit by failing to fully comply with the obligations on it as a party opposing an order for security for costs. For those reasons, in my view the evidence should be allowed.

[23] On the basis of this further evidence, the evidence led by the Plaintiff as the net value of its assets on the first application was misleading by reason of the omission of the evidence now produced, most of which was apparently available to the Plaintiff at the time of the first application.

[24] The Defendant's submissions in respect of the second limb of the test, i.e., the changed circumstances, are more problematic. In a nutshell the changed circumstances which the Defendant relies on are firstly, that discovery issues were more significant than anticipated, secondly, that there was more

evidence than initially contemplated which resulted in the extended trial duration and, lastly, that discovery and documents produced in response to subpoenas reveal that the Defendant's case in respect of challenging the Plaintiff's allegation that it was ready and able to complete the agreement is now much stronger.[6] The relevance of the last circumstance is that, it was submitted, there is greater prospect of success by the Defendant and in that event the financial position of the Plaintiff means that the Defendant will be out of pocket despite a successful outcome.

[25] There were many submissions on both sides in respect of the increased scope of discovery and evidence. I accept the submissions of the Plaintiff in that respect. Quite apart from the Defendant complaining that it could not anticipate the extent of discovery issues, the Plaintiff convincingly argues that the Defendant ought to have been aware of the issues concerning discovery from an early time. The Plaintiff relies on the fact that the Defendant had applied for judgment in default of discovery even before payment of the first amount ordered for security.

[26] The Defendant lays the blame for the additional work on the conduct of the Plaintiff. It argued that much additional work resulted from the Plaintiff's Further Amended Statement of Claim and that is largely attributable to the expansion of the scope of the factual issues in the Plaintiff's claim, coupled with the need to obtain expert evidence for that purpose. However, Mr Robertson convincingly argued and demonstrated that the amendments made

6 This is discussed in greater detail in my reasons dealing with the first application at para 3.

in that pleading are insignificant in that respect. He satisfied me that although extensive additional particulars are set out in one part they were merely particulars which had been previously provided and the occasion of the amendment presented an opportunity to incorporate those in the pleading. Other than that, the amendment was largely to simplify the claim for damages to one based on capitalisation of the rental stream as opposed to the more complicated basis initially pleaded. Although that still required expert reports, one a forensic accounting report and the other a valuation, the Defendant chose not to obtain an answering report to the forensic accountant report, which was the more substantive report, and chose only to obtain an answering report in respect of the valuation.

[27] I accept Mr Robertson's analysis of that pleading. He went further however and argued that much additional work is due to the conduct of Defendant. Specifically, the Defendant had mooted an amendment to its pleaded case and despite being pressed for details, delayed in taking steps to formalise those amendments. The amendments tied in with a proposed Counterclaim.

[28] Mr Robertson pointed out the amendments made to the Defence and the commencement of the Counterclaim were the main cause of the additional work and material. The Defendant had initially pleaded that there was no agreement as alleged by the Plaintiff. The Amended Defence however admits the agreement but introduced extensive particulars which both challenged the terms the Plaintiff alleged and added new terms to tie in with

the Counterclaim, which is essentially a claim seeking rectification of the agreement.

[29] Lastly the Plaintiff pointed out that the Defendant had complicated the evidence by obtaining, at a late stage and without prior indication of its intention to do so, an expert quantity surveyor report. The Defendant's report came well after the due date for provision of all of its reports. It was served recently, i.e., approximately mid-June. Such is the lateness of the provision of the report that the Plaintiff is still endeavouring to obtain a report in answer and, at least as at the date the matter was argued before me, did not know whether an answering report would be available in time for the trial. The Plaintiff pointed out that the Defendant's pleadings did not put the matters canvassed in that report in issue. For current purposes, it should be clear that that is a matter entirely attributable to the conduct of the Defendant and which self-evidently results in additional work and in incurring costs which were not anticipated beforehand.

[30] The Plaintiff also complained of the Defendant's delay in bringing this application. The Plaintiff relied on a letter from the Defendant's solicitors to the Plaintiff's solicitors dated 11 March 2016 which foreshadows the possibility of an application for increased security. Notwithstanding that, the current application was made by summons filed 31 May 2016 and shortly before the matter was due to be listed for trial.[7] One of the affidavits relied on was only filed and served on 20 June 2016 and well after the expiry of

[7] On 10 June 2016 the matter was set for trial for 7 days commencing 25 July 2016

the procedural orders for that purpose, and after the proceedings were given trial dates.

[31] The Plaintiff submitted that no explanation has been given for the delay. There were no specific explanations given in evidence. The only explanations were provided by Mr Crawley, for the Defendant, in the course of his submissions. Drawing together various pieces of evidence and I think relying on inferences, he essentially said that the Defendant was not in a position to apply for the order until the additional costs could be assessed and until all relevant documents were obtained. I cannot put much credence on that. In my view the application is made late and without an acceptable explanation. It is made after the Plaintiff has incurred substantial costs as the Plaintiff has prepared all of its evidence in the period between the Defendant first intimating a possible application on 11 March 2016 and the filing of the current application on 31 May 2016. That is precisely the type of unfairness which the delay principle in respect of applications for security for costs seeks to avoid.

[32] Delay in bringing an application is a very pertinent factor to be taken into account. I was referred to *Delaney, Security for Costs* which set out a number of cases dealing with this issue and referred to instances where the delay was fatal to the application.[8] I discussed the impact of delay in some detail in the first decision.[9] I pointed out that the rationale behind the

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8 *Security for Costs,* Delaney J, The Lawbook Company Ltd, 1989, at pp 174-175.

9 *Anchung Pty Ltd v Northern Territory of Australia* [2015] NTSC 76 at para 25.

principle is that the Plaintiff otherwise incurs costs that an early application for security for costs would have avoided and which costs may ultimately be wasted if the order for security has the effect of ending the proceedings. I referred to the case of *Ravi Nominees Pty Ltd v Phillips Fox*[10] which held that the principle of delay is based on fairness "specifically that a Plaintiff otherwise incurs costs that an early application and order for security would have avoided on which cost may ultimately be wasted if the security order has the effect of ending the proceedings."[11] As a result of the delay in making the first application, I limited the order for security to future costs.

[33] I am not satisfied that the Defendant has made out a case for changed circumstances based on additional material and the incurring of additional costs. In my view any additional work resulting from the Plaintiff's conduct is no more than would be routinely expected. As I said in the course of argument, there can be no precision in respect of an order fixing the quantum of security for costs, nor is there ever precision in the amount of work required to prepare a case for trial or, for that matter, the duration of the trial. Those vagaries are effectively taken into account when assessing quantum of costs and is the reason for the broad approach routinely taken when assessing the amount of security. In any case, in my assessment of the material before me, there is more additional work attributable to the conduct of the Defendant than the Plaintiff.

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10 (1992) 10 ACLC 1313.

11 *Anchung Pty Ltd v Northern Territory of Australia* [2015] NTSC 76 at para 25.

[34] Had I agreed with the Defendant that there were sufficiently changed circumstances to warrant reconsideration of the quantum of security, then the delay in bringing the application, both in respect of the timing overall and specifically in respect of the time taken to make the application after it was first mooted, would, in my view, be fatal to an order.

[35] The question of the $25,000 reduction made in the first application is another matter. What is now known is that despite the obligation on a party defending an application for security for costs to make full and frank disclosure, the Plaintiff failed to fully comply. I made an assessment of the net value of the Plaintiff's assets, albeit conservative, and reduced the amount required for security accordingly. The evidence now satisfies me that had the Plaintiff properly complied with its obligations, such a reduction would not have been made.

[36] Although Mr Robertson argued that I should not have regard to the evidence for the reasons already discussed, I have nonetheless allowed the evidence. In any case, in my view this Court has jurisdiction to, and full discretion to, vary its own orders where appropriate. I can see no more appropriate case where an unjust result follows from a party's failure to comply with its obligations. That must be dissuaded.

[37] For these reasons I increased the quantum of the security for costs by $25,000. For the same reasons as given in the decision on the first application, the form of the additional security should be by payment of the

sum ordered into Court unless an alternative acceptable to the Court can be arranged in a timely fashion.