PARTIES:	ANDADO PASTORAL COMPANY PTY LTD v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	105 of 1990 (9004215)
DELIVERED:	2 October 2002
HEARING DATE:	17 September 2002
JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Plaintiff:	A. Lindsay
Defendant:	M. Grant

Solicitors:

Plaintiff:	Cridlands
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	C
Judgment ID Number:	bai0210
Number of pages:	22

bai0210

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

Andado Pastoral Company Pty Ltd v Northern Territory of Australia [2002] NTSC 56
No. 105 of 1990 (9004215)

BETWEEN:

ANDADO PASTORAL COMPANY PTY LTD
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 2 October 2002)

Background

[1] The plaintiff was the owner of Andado Station, a cattle station on the border of the Simpson Desert. In around 1970, the Commonwealth, State and Territory governments commenced a campaign to rid cattle in Australia of the diseases, tuberculosis and brucellosis ("the BTEC campaign").

[2] By 1980, the defendant (via the Minister for Primary Production and his Department) was responsible for the conduct of the BTEC campaign in the Northern Territory. It is the plaintiff's case that on or about 1 May 1981, the defendant ordered the plaintiff to destock (i.e. slaughter) most of the

cattle it owned and in October 1982, the defendant ordered the plaintiff to remove all cattle on Andado Station. On the plaintiff's case, the defendant had no statutory authority to make either order. Further, it is claimed by the plaintiff that in around February 1984, the defendant, without statutory authority, shot approximately 1,600 animals owned by the plaintiff on Andado Station.

[3] The plaintiff claims that after complying with the destocking orders and losing the animals shot by the defendant, the plaintiff did not have a financially viable cattle station. In 1984, it is claimed, the defendant declined to give the plaintiff financial assistance to continue operating as a cattle station.

[4] The plaintiff sold Andado Station in 1986 for a sum which was sufficient to clear the secured creditors. After that time, the plaintiff had no business and did not trade.

[5] In summary, it is the plaintiff's primary position that it carried out the destocking and allowed the shooting of its cattle, under compulsion from the defendant. The defendant's position is that the plaintiff carried out the destocking and allowed the shooting of its cattle by consent.

[6] The statement of claim puts the plaintiff's case in a variety of ways – lack of authority, negligence, conversion, compulsory acquisition not on 'just terms', misfeasance in public office, negligent misrepresentation, trespass, breach of fiduciary duty and contract. It is not necessary for present

purposes to examine the pleadings in any detail. It is sufficient to note that the factual elements for the various alleged causes of action are the same.

History of Proceedings

[7] The plaintiff commenced proceedings by a generally endorsed writ in February 1990. The proceedings are one of a number of proceedings against the defendant arising from the BTEC campaign.

[8] In February 1991, the plaintiff and defendant advised the Court that they were awaiting the outcome of what was then regarded as BTEC campaign test case (*Mengal v Northern Territory of Australia*). The decision in *Mengel* was delivered by Asche CJ on 29 January 1993 (*Mengel v Northern Territory* (1992) 109 FLR 411). The judgment was the subject of appeal. The Court of Appeal delivered its judgment on 12 April 1994 (N*orthern Territory v Mengel* (1994) 95 NTR 8). The matter was further appealed to the High Court which delivered its judgment on 19 April 1995 (*Northern Territory v Mengel* (1996) 185 CLR 307).

[9] Following the High Court's decision in *Mengel*, the plaintiff's solicitors had settlement discussions with the defendant in another case arising out of the BTEC campaign (*Turner v Northern Territory)*. Those discussions concluded with a settlement of that matter in June 1995. The plaintiff's solicitors then entered into settlement negotiations with the defendant concerning the plaintiff's case. Those discussions were not successful and on 24 June 1996, the defendant advised the Court that the parties were

unable to reach a settlement and would be proceeding with the filing and service of formal pleadings.

[10] For around the next two years, the parties dealt with pleadings, particulars and discovery. The plaintiff made a number of successful interlocutory applications against the defendant. These included

(a) an interlocutory judgment in default of defence obtained on 16 October 1996 which was eventually set aside on 19 December 1996 with the defendant ordered to pay the plaintiff's costs;

(b) an order on 10 April 1997 that the defendant answer the plaintiff's request for further and better particulars and pay the plaintiff's costs of the application;

(c) an order on 25 September 1997 that the defendant file and serve an affidavit verifying its list of documents and that it pay the plaintiff's costs;

(d) an order on 27 November 1997 that the defendant provide further and better answers to the plaintiff's request for further and better particulars and that the defendant pay certain of the plaintiff's costs;

(e) an order on 21 May 1998, that unless the defendant provide an affidavit of discovery and further and better particulars its defence be struck out and the plaintiff may enter judgment accordingly and orders that the defendant pay the plaintiff's costs of the application.

[11] Approximately six weeks after the last order, the trial of another case arising from the BTEC campaign commenced (*Lexcray v Northern Territory*). The parties then requested the Court to await the decision in that matter. Judgment in *Lexcray* was delivered by Kearney J on 30 August 1999 (*Lexcray Pty Ltd v Northern Territory of Australia* [1999] NTSC 91, unreported). The judgment was appealed to the Court of Appeal which

delivered its judgment on 18 January 2001 (*Lexcray v Northern Territory* (2001) NTCA 1, unreported). *Lexcray* is presently the subject of an application for special leave to appeal to the High Court, however the matter has been referred back to the Court of Appeal by the High Court to consider an issue concerning the discovery of allegedly fresh evidence.

[12] On 3 April 2001, due to the ill health of Kevin Clark (now deceased) a director of, and a key witness for, the plaintiff, the plaintiff made an application to the Court for orders in relation to the examination of Mr Clark. Following a letter of request to the Chief Judge of the District Court of South Australia, the examination of Mr Clark took place before Judge Worthington in the District Court of South Australia in Adelaide on 16 and 17 May 2001.

[13] On 20 September 2001, the defendant was ordered to provide an affidavit of specific discovery and ordered to pay the plaintiff's costs.

[14] On 19 December 2001, the Master ordered that the parties have leave to file and serve interrogatories and the matter was referred to the Chief Justice to be allocated to a judge for the purposes of case management.

Application for security for costs

[15] By summons filed on 27 May 2002, the defendant made the present application for the plaintiff to provide the sum of $400,000 as security for

the costs of the defendant. The defendant also seeks an order that until security is given, the proceeding be stayed.

[16] Order 62.01(1)(b) of the *Supreme Court Rules* provides:

> "(1) Where –
>
> (a) …
>
> (b) the plaintiff is a corporation … and there is reason to believe that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so;
>
> (c) – (f) …
>
> the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against the defendant be stayed until the security is given."

[17] The exercise of the power under Rule 62.01(1)(b) requires as a pre-condition that the Court believes "that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so" and that there is reason for that belief. If that pre-condition is satisfied, the discretion to order security for costs is unfettered and must be exercised having regard to all the circumstances of the case (see *Watkins v Ranger Uranium Mines Pty Ltd* (1985) 35 NTR 27 at 33, per Nader J). There is no predisposition in favour of the defendant. The fact that the plaintiff is unable to pay is itself a substantial factor in the exercise of the Court's discretion : see *Watkins*, supra at 34, *Pearson v Naydler* (1977) 1 WLR 899 at 906 and *Milingimbi Educational and Cultural Association Inc v Davis*, Supreme Court of the

Northern Territory, SC 259/1987, unreported, delivered 12 October 1990, per Kearney J at p 9.

[18] In *Milingimbi Educational and Cultural Association Inc v Davis*, supra at p 9-10, Kearney J summarised the factors to be considered in the exercise of the discretion to order security for costs as: -

a) whether the order will frustrate the plaintiff's claim;

b) the merits of the claim

c) the cause of the plaintiff's impecuniosity; and

d) any delay in bringing the application for security for costs.

[19] His Honour then continued at 10, supra:

> "None of these four factors alone will determine the outcome either way, but all of them should be weighed in the balance to determine what is just between the parties."

[20] With respect, I agree with the approach adopted by Kearney J in an application of the present nature (and see also *Summerglen Pty Ltd v Steppes Pty Ltd*, Supreme Court of the Northern Territory, SC 242/1992, unreported, delivered 25 November 1993, per Mildren J; *Mohammad Ayyoush v Darsiah Samin & Another*, Supreme Court of the Northern Territory, SC 204/1993, unreported, delivered 17 March 1994, per Kearney J).

[21] In support of the application, Mr Grant for the defendant relied upon the affidavits of Claire Miller (sworn 13 May 2002), David Walters (sworn 3 July 1992), Keith Locke and Graham Calley (both sworn

17 December 1996) and a transcript of the examination of Kevin Clark taken before Judge Worthington in May 2001 (see para [12] above).

[22] Mr Alan Lindsay, for the plaintiff, relied upon his own affidavit, sworn on 17 June 2002.

[23] The first question which needs to be addressed is whether the defendant has established that "there is reason to believe" the plaintiff would be unable to pay costs awarded against it.

[24] Claire Miller is a solicitor in private practice who shares the care and conduct of the present matter with a government solicitor on behalf of the defendant. In her affidavit, Ms Miller refers to her experience as a solicitor in the commercial litigation area and, in particular, her experience in preparing another case arising out of the BTEC campaign (*Lexcray v Northern Territory*) on behalf of the defendant. Ms Miller expresses the opinion that the present proceeding is "complex, involved and difficult". Based on her experience with *Lexcray* and other cases similar to the present, Ms Miller expresses the belief that further interlocutory applications will need to be taken prior to the hearing. She estimates that the defendant's future costs will be in the region of $400,000.

[25] Ms Miller's affidavit provides a detailed breakdown of her estimate based on the defendant calling nine lay witnesses and three experts at a twenty day trial at which the defendant would be represented by senior and junior counsel.

[26] David Walters is a Territory legal practitioner who has practised as a specialist cost consultant for the past twelve years. He prepared the defendant's bill of costs in both the Supreme Court and Court of Appeal proceedings in *Lexcray*. Mr Walters has reviewed the affidavits of Ms Miller and Mr Lindsay. Mr Walters expects a trial of the current proceeding to occupy 20 days. In his opinion, the defendant's costs which would be allowable on taxation from now to the conclusion of the trial would be a minimum of $300,000 and up to $400,000.

[27] Mr Walters' affidavit provides a detailed estimate of costs in the sum of $308,000, based on a fifteen day trial where the defendant is to be represented by senior and junior counsel calling nine lay witnesses and three experts.

[28] For the plaintiff, Mr Lindsay estimates the defendant's costs at $94,200, based on a ten day trial, allowing seven days preparation for senior and junior counsel. The estimate is confined to the cost of trial only (counsel and solicitors' fees) and does not include any "pre-trial matters" nor (apparently) any allowance for witness fees (including experts).

[29] In submissions supplementing the material in his affidavit, Mr Lindsay criticised the defendant's estimates of the cost of likely interlocutory applications and preparation of witness statements, the rates adopted for counsels' fees, the estimated length of the trial and the number of hours allocated to solicitors and clerks. Mr Lindsay also submitted that the

defendant's estimates were based on the experience of Ms Miller and Mr Walters in *Lexcray* rather than the present proceeding.

[30] I do not consider that it would be a useful exercise for me to attempt an item by item analysis of the parties' various estimates of the defendant's future costs. In practical terms, the defendant is in a better position to estimate its future costs than the plaintiff. However, while acknowledging that some of the criticisms of the defendant's estimates have a degree of validity, I consider that Mr Lindsay's approach to the likely future course and costs of the proceedings is overly optimistic. I am reluctant to suggest a realistic estimate of the defendant's future costs, but on the basis of the present information, I am confident that such (taxed) costs would be not less than $250,000.

[31] It is not a matter of dispute that the plaintiff's only asset is an unencumbered residential property at 10 Goyder Street, Alice Springs. The current value of the property is estimated to be $170,000 (para 68 of Mr Lindsay's affidavit).

[32] I am satisfied that there is sufficient material in the affidavits to warrant, in the absence of other evidence, a reasonable belief that the plaintiff is impecunious in terms of Rule 62.01(1)(b), ie that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so. The pre-condition for the exercise of the power to order security for costs being satisfied, it is necessary to consider the exercise of that discretionary power.

Whether an order for security for costs would frustrate the plaintiff's claim

[33] Mr Lindsay submitted that if the plaintiff is ordered to provide cash security or security in excess of its equity in the Goyder Street property, the plaintiff's claim will be frustrated. However, I am not persuaded that that is necessarily correct.

[34] In *Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1 at 4, Sheppard, Morling and Neaves JJ of the Federal Court held

> "In our opinion a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means. It is not for the party seeking security to raise the matter; it is an essential part of the case of a company seeking to resist an order for security on the ground that the granting of security will frustrate the litigation to raise the issue of the impecuniosity of those whom the litigation will benefit and to prove the necessary facts."

[35] On the basis of Mr Lindsay's affidavit, I am satisfied that neither of the surviving directors of the plaintiff (who stand to gain in the event of a successful outcome to the proceeding) has an income in excess of their living expenses. I accept that neither director could finance a loan to provide cash for security of the defendant's future costs. However, Mr Lindsay's affidavit also states that Mr Phillip Clark has around $245,000 equity in a Western Australia farm property and Ms Molly Clark owns "Old Andado Station", comprising some forty square miles, which at least

until recent times was operated (on a subsistence basis) as tourist accommodation for about six months of each year. No estimate is given as to the present value of Old Andado Station.

[36] Taking into account the Goyder Street property, it would appear that the plaintiff and its surviving directors have unencumbered assets to the value well in excess of the figure of $250,000 which I have adopted for any order which might be made for security for the costs of the defendant.

[37] Order 62.03 provides:

> "Where an order is made requiring the plaintiff to give security for costs, security shall be given in the manner and at the time the Court directs."

[38] An order to give security for costs may take many forms aside from payment of cash into court. For example, security for costs may be ordered to be in the form of a bank guarantee or a bond.

[39] In *Memutu Pty Ltd v Lissenden* (1983) 8 ACLR 364, the plaintiff, which had no assets, was the trustee of a family trust. The Supreme Court of New South Wales required a principal beneficiary under the trust to indemnify the plaintiff in respect of liability for the defendant's costs.

[40] In *MA Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 7 ACLR 97, the Supreme Court of NSW ordered that a director of the plaintiff company undertake to the court that if costs were awarded against the

plaintiff he would execute a charge over his interest in certain real estate to meet a claim for costs up to a specified amount.

[41] While I am satisfied that an order to pay $250,000 into Court would frustrate the plaintiff's claim, I am also satisfied that an order to give security for costs in some other appropriate manner would not necessarily have that effect.

The merits of the claim

[42] Numerous authorities support the proposition that the merits of the plaintiff's claim is relevant to the exercise of the discretion to order a plaintiff corporation to give security for costs. For example, in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 1 QB 609 at 626, Denning MR included amongst the matters which might be taken into account:

> "… whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success … The court might also consider whether the application for security was being used oppressively – so as to try to stifle a genuine claim."

[43] It is, of course, unusually difficult to assess the merits of a case, such as the present, of reasonable complexity at an interlocutory stage. The strength of the plaintiff's case will depend of course upon the evidence. In the ordinary course of events it would be a waste of resources to consider at length the merits of such a case. There is also the consideration that I might well have to try the case and it would be quite inappropriate to address the merits in detail during interlocutory proceedings.

[44] In the circumstances of the present case, I will say only that I am satisfied on the basis of the affidavit material that the plaintiff's claim is bona fide and that while I am not persuaded that the plaintiff has an overwhelmingly strong case, it is not clearly hopeless.

[45] Mr Lindsay submitted that the defendant's application is oppressive because –

a) the plaintiff has a legitimate claim and only limited resources to litigate it;

b) the defendant has delayed the application virtually until the matter is ready to be listed for trial;

c) the defendant declined in correspondence to address the factors relevant to exercise of the court's discretion to order security for costs;

d) the defendant has made no effort to join the plaintiff's attempts to limit the costs of the proceeding; and

e) the defendant is using the application to avoid answering interrogatories.

[46] I do not consider it necessary to address these submissions in detail. In the present context, it is important to keep in mind that it is the plaintiff which is seeking to litigate matters dating back twenty years, having commenced proceedings more than twelve years ago. While it is true that the defendant agreed with the plaintiff's request to await the outcome of what were seen as "test cases" (*Mengel* and *Lexcray*) it is also relevant that, to date, the outcome of such cases has not been at all favourable to the plaintiff's claim. I am satisfied that the defendant is not seeking to secure an order for security of costs as an instrument of oppression.

The cause of the plaintiff's impecuniosity

[47] Mr Lindsay submitted that it was the defendant's actions in ordering destocking and destruction of the plaintiff's cattle on Andado Station which led to the plaintiff's impecuniosity.

[48] Mr Lindsay's affidavit (paragraphs 34-38) refers to the fact of the plaintiff being insolvent in late 1984, the rejection by the defendant of an application for a loan of $375,000 and two documents of the defendant (an internal memo and a letter from the Minister for Primary Production) which are said to amount to an admission that the defendant accepts a significant proportion of the blame for the plaintiff's impecuniosity.

[49] Mr Grant, for the defendant, submitted that the plaintiff's interpretation of the two documents was erroneous and stressed the absence of any records of the plaintiff indicating its financial position before and after the actions undertaken at Andado Station under the BTEC campaign. Mr Grant also referred me to the transcript of Mr Kevin Clark's examination. Mr Clark's evidence indicates that significant capital improvements were undertaken at Andado Station using short term loans obtained at high interest rates and compensation moneys for destocking paid under the BTEC campaign.

[50] Mr Clark also gave evidence that personal interest free loans from the plaintiff to its directors increased during 1981 to 1984 using moneys borrowed by the plaintiff at 15% p.a.

[51] The documents upon which the plaintiff relies as an admission that the defendant bears a significant proportion of the blame for the plaintiff's impecuniosity are likely to feature prominently in a trial of the present proceedings. Accordingly, it would not be appropriate to give detailed consideration to the proper interpretation to be given to the documents at this stage. I will only say that the documents on their face would not appear to bear anything like the weight Mr Lindsay seeks to attribute to them.

[52] There is no evidence of the plaintiff's financial position before the events which are the subject of the claim and little evidence of its position at any other time (other than to establish when the plaintiff ceased to trade upon the sale of Andado Station). On the present evidence, the plaintiff has not satisfied me that its impecuniosity was brought about by the defendant's conduct.

Delay in applying for security

[53] It is well established that delay in applying for security for costs may be ground for refusing to order security. In *Smail v Burton; Re Insurance Associates Pty Ltd (in liq.)* [1975] VR 776 at 777, Gillard J observed:

> First, it is well established that an application for security of costs should be made promptly. If an appellant has expended sums of money preparing the appeal for hearing and all the matters necessary to be performed have already been performed and the appeal is ready for hearing, it would be patently unjust to permit a respondent who stood by and allowed that work to be done to come to court and to ask for security after such expenses have been incurred. Accordingly, it is well established by authority that applications for security of costs should be made promptly and before considerable

> expense is incurred by the appellant. (See *Grant v The Banque Franco-Egyptienne* (1876), 1 CPD 143; *In re Vagg* (1886), 13 VLR 172, at pp 184-5; *In re Clough, Bradford Commercial Banking Company v Cure* (1887), 35 Ch D 7; *King v The Commercial Bank of Australia Limited* [1921] VLR 48, at p 54.) On the other hand, if there are reasonable causes for delay, including the conduct of the appellant, then different considerations might well apply. (See *In re Indian, Kingston, and Sandhurst Mining Company* (1882), 22 Ch D 83 at pp 84-5; *Pooley's Trustee v Whetham* (1886), 33 Ch D 76, at p 79; *Ellis v Stewart* (1887), 35 Ch D 459; *Forsyth v Burns* (1889), 15 VLR 359.)"

[54] At paragraphs [1] to [14] above, I have outlined the background and history of the present proceedings. In the submission of Mr Grant, for the defendant, there are reasonable causes for the defendant's delay in applying for security.

[55] Mr Grant submitted that for much of the past twelve years the proceedings have remained dormant in the expectation that other cases arising from the BTEC campaign (in particular, *Mengel* and *Lexcray*) would lead to a resolution of the proceedings one way or another. Mr Grant also emphasised the absence of any evidence that the plaintiff would be prejudiced by an order to provide security for future costs. Mr Grant conceded that the plaintiff would have incurred costs during the period of approximately two years (June 1996 to June 1998 – see paras [9] to [11] above) when the file was active – but stressed that the onus was on the plaintiff to establish prejudice and that there is no evidence as to the amount of costs incurred by the plaintiff.

[56] In the defendant's submission, it was not foreseeable in 1990 when the proceedings were commenced that the matter would remain unresolved some twelve years later. In such circumstances, it was submitted that delay should not militate against an order for security limited to the defendant's future costs, particularly in circumstances where no date has yet been fixed for trial. In support of these submissions, Mr Grant referred to *Buckley v Bennell Design and Constructions Pty Ltd* (1974) 1 ACLR 301, *Aspendale Pastoral Co Ltd v W J Drever Pty Ltd* (1983) 7 ACLR 937 and *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 1 NSWLR 115. I am not persuaded that these authorities provide much by way of assistance in the present application. *Buckley* and *Southern Cross Exploration NL* were situations where the length of the hearings was not foreseen when they commenced. In *Aspendale Pastoral Lease Co Ltd* the court found that there had been no delay by the defendant in making the application for security (and the security ordered was confined only to the estimated costs of $4,000 that would be incurred up to the date upon which the action was set down for trial).

[57] In the present case, Mr Lindsay for the plaintiff emphasised that the defendant has been aware of the plaintiff's impecuniosity since late 1984 (some six years before the proceeding commenced). There was also the period of two years (June 1996 to June 1998) when the plaintiff was successful in obtaining a number of interlocutory orders against the

defendant (including judgment in default of defence – subsequently set aside) based on delays occasioned by the defendant (see para [10] above).

[58] In Mr Lindsay's submission, the defendant has given no reasonable explanation for its delay in making the present application. In the plaintiff's submission, at the latest, the appropriate time for the present application was on, or soon after, 24 June 1996 when the defendant advised the court that the parties were unable to reach a settlement and would be proceeding with the filing and service of formal pleadings (see para [9] above).

[59] I consider that there is merit in Mr Lindsay's submission as to the appropriate time when the defendant should have made an application for security. The plaintiff's impecuniosity has been well known to the defendant throughout the history of the proceedings. I consider that the defendant acted very fairly and reasonably in not seeking security shortly after the proceeding commenced in February 1990 and by agreeing that the proceedings should be left in abeyance to await the outcome of *Mengel*. Similarly, the defendant is not to be criticised for subsequently agreeing to await the outcome of *Lexcray* and for not pursuing an application after it became known that Mr Kevin Clark was terminally ill. However, there have been substantial periods of activity for the proceeding (June 1996 to June 1998 and between early 2001 and the date of the application, 27 May 2002). Although there is no evidence as to the amount of costs incurred by the plaintiff to date, I am satisfied on the basis of the history of the proceedings that such costs are not insignificant.

[60] The plaintiff was entitled to know its position in relation to security before it embarked to any real extent on its litigation and before incurring significant costs in litigating its claim.

[61] I consider that the defendant's delay in making the application has not been trifling. On the other hand, I can appreciate fully the defendant's position as the government of the Northern Territory in not wishing to be viewed as in any way seeking to take advantage of an impecunious litigant at the earliest opportunity.

Conclusions and orders

[62] As noted earlier, none of the four factors (para [18] above) alone are conclusive.

[63] In summary I am satisfied that:

a) an order for security, in an appropriate form, would not necessarily frustrate the plaintiff's claim;

b) the claim is made bona fide, albeit that the plaintiff's case is not overwhelmingly strong;

c) the present evidence is not sufficient to establish that the plaintiff's impecuniosity was brought about by the defendant's conduct;

d) the defendant is not seeking to secure an order for security as an instrument of oppression (so as to stifle a genuine claim);

e) there has been delay by the defendant in making an application for security during periods when the plaintiff was seeking actively to litigate its claim (June 1996 to June 1998 and between early 2001 and the date of the application, 27 May 2002); and

f) as a result of that delay; the plaintiff has incurred not insignificant (but unquantified) costs.

[64] Taking into account all the circumstances of the case, and attempting to do justice between the parties, I consider that this is a case where it would not be just to order that the plaintiff provide security for costs. In my view, the matter is finely balanced. I can appreciate fully the reasons for the defendant's decision to agree with the plaintiff in leaving the proceedings in abeyance pending the outcome of *Mengel* and *Lexcray*. However, the periods during which the plaintiff actively pursued its claim (and incurred costs) since June 1996 gave the defendant an ample opportunity to seek security before May 2002. Whilst the defendant's delay overall is not to be criticised, I consider that in fairness to the plaintiff, it is now too late to grant security for costs.

[65] The application of 27 May 2002 is refused.

[66] I turn to the costs of the application. The usual rule (Order 63.18 of the *Supreme Court Rules*) is that each party shall bear his own costs of an interlocutory application. In the present case, the grounds of the application

were reasonable and I am satisfied that there is no reason to depart from the usual rule. I make no order as to the costs of the application.

_____