Gwalwa Daraniki Association Inc v Chin (No 2) [2018] NTSC 24

PARTIES:	GWALWA DARANIKI ASSOCIATION INC v MICHAEL CHIN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	121 of 2016 (21656120)
DELIVERED:	20 April 2018
HEARING DATE:	21 March 2018
JUDGMENT OF:	LUPPINO AsJ

CATCHWORDS:

COSTS – Security for costs – Nature of an order for security for costs – Principles which apply to the making of an order for security for costs pursuant to Rule 62.02 – Requirement to establish a qualifying factor – Factors relevant to the exercise of the Court's discretion –Strength of the Plaintiff's case – Delay – Conduct of the litigation - Whether the Plaintiff's impecuniosity was caused by the Defendant – Whether the order will operate oppressively and stultify the proceedings.

Supreme Court Rules, rr 48.12, 62.02.
Corporations Act 2001, s 1335.
Crown Lands Act, s 46.
Associations Act, s 100.
Limitation Act, s 44.

Idoport Pty Ltd & Anor v National Australia Bank Ltd & Anor [2001] NSWSC 744.
Mac-Attack Equipment Hire Pty Ltd v AJ Lucas Operations Pty Ltd [2010] NTSC 27.
Jazabas Pty Ltd & Ors v Haddad & Ors [2007] NSWCA 291.
Beach Petroleum NL v Johnson (1992) 10 ACLC 525.
HP Mercantile Pty Ltd v Dierickx [2013] NSWCA 87.
Livingspring v Kliger Partners [2008] VSCA 9.
Pucciamati v Walker Nominees Pty Ltd [2002] NTSC 13.
Anchung Pty Ltd v Northern Territory of Australia [2015] NTSC 76.
Tradestock Pty Ltd v TNT (Management) Pty Ltd (1997) 30 FLR 343.
Green v CGU Insurance Ltd (2008) NSWCA 148.
Oshlack v Richmond River Council (1998) 193 CLR 72.
Buckley v Bennell Design & Construction Pty Ltd (1974) 1 ACLR 301.
Southern Cross Exploration v Fire and All Risks Insurance Co Ltd (1985) 1 NSWLR 114.
Ravi Nominees Pty Ltd v Phillips Fox (1992) 10 ACLC 1313.
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Smail v Burton (1975) 1 ACLR 74.
Bryan E Fencott v Eretta Pty Ltd (1987) 16 FCR 497.
PG Gabel Pty Ltd (il liq) v Katherine Enterprises Pty Ltd (1977) 29 FLR 108.
Gwalwa Daraniki Association Inc v Chin [2017] NTSC 51.

Security for Costs, Delaney J, The Lawbook Company Ltd, 1989.

REPRESENTATION:

Counsel:

Plaintiff:	M Crawley SC
Defendant:	D McConnel

Solicitors:

Plaintiff:	Paul Maher Solicitors
Defendant:	Hunt & Hunt Lawyers

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

Gwalwa Daraniki Association Inc v Chin (No 2)
[2018] NTSC 24

No. 121 of 2016 (21656120)

BETWEEN:

Gwalwa Daraniki Association Inc
Plaintiff

AND:

Michael Chin
Defendant

CORAM: LUPPINO AsJ

REASONS

(Delivered 20 April 2018)

[1] The Defendant has applied for an order for security for costs in respect of both past and future costs.

[2] The power of the Court to order security for costs is derived from three sources. Two are statutory, namely section 1335 of the *Corporations Act* and Rule 62.02 of the *Supreme Court Rules* ("SCR"). The third is the inherent jurisdiction of the Court, a power that is broader than the statutory sources.[1]

[3] The Defendant makes this application only pursuant to Rule 62.02 of the SCR. In any case the difference in approach between that Rule and section

1 *Idoport Pty Ltd & Anor v National Australia Bank Ltd & Anor* [2001] NSWSC 744.

1335 of the *Corporations Act* is minimal for current purposes and in any case, section 1335 of the *Corporations Act* is effectively incorporated into Rule 62.02 by reason of Rule 62.02(1)(f).

[4] The parts of Rule 62 of the SCR relevant to the application, provide as follows:-

> Order 62 Security for costs
>
> 62.02 When to give security
>
> (1) Where:
>
> (a) the plaintiff is ordinarily resident out of the Territory;
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> (b) the plaintiff is a corporation or (not being a plaintiff who sues in a representative capacity) sues not for his own benefit but for the benefit of another person 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;
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> (c) a proceeding by the plaintiff in another court for the same claim is pending;
>
> (d) subject to subrule (2), the address of the plaintiff is not stated or is not stated correctly in his originating process;
>
> (e) the plaintiff has changed his address after the commencement of the proceeding in order to avoid the consequences of the proceeding; or
>
> (f) under an Act or the Corporations Act 2001 the Court may require security for costs,
>
> 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.

[5] There is no dispute between the parties as to the applicable principles. Determination of whether security for costs pursuant to Rule 62.02 should be ordered is a two-step process. In the first step the applicant must show that at least one of the qualifying requirements set out in Rule 62.02(1) are

satisfied. The Defendant relies on Rule 62.02(1)(b), namely that there is reason to believe that the Plaintiff has insufficient assets in the Territory to pay, or will be unable to pay, the costs of the Defendant if ordered to do so.

[6] The second step is the exercise of the discretion of the Court to order security for costs and that is only considered if at least one of the factors in Rule 62.02(1) are satisfied. In *Mac-Attack Equipment Hire Pty Ltd v AJ Lucas Operations Pty Ltd*,[2] I said that it is settled law that the discretion to order security for costs is unfettered and is to be exercised having regard to all the circumstances of the case. What is a relevant factor varies from case to case and previously decided cases are not precedential and only operate as guidelines.[3] The guidelines were considered more fully in *Jazabas Pty Ltd & Ors v Haddad & Ors*[4].

[7] I deal first with the question of whether the discretion has been enlivened. The threshold set in Rule 62.02(1) is an undemanding one and merely requires the applicant to show that there is a rational basis sufficient to establish a prima facie case.[5]

[8] Mr Crawley SC, for the Plaintiff argued that the discretion was not enlivened based on the evidence of the financial statements of the Plaintiff where the value of the Plaintiff's real estate interests is recorded as having an unencumbered value of approximately $12 million. Although that is not

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2 [2010] NTSC 27.

3 [2010] NTSC 27 at para 8. See also *Idoport Pty Ltd & Anor v National Australia Bank Ltd & Anor* [2001] NSWSC 744 at para 47.

4 [2007] NSWCA 291

5 *Beach Petroleum NL v Johnson* (1992) 10 ACLC 525; *HP Mercantile Pty Ltd v Dierickx* [2013] NSWCA 87; *Livingspring v Kliger Partners* [2008] VSCA 9; *Pucciamati v Walker Nominees Pty Ltd* [2002] NTSC 13; *Anchung Pty Ltd v Northern Territory of Australia* [2015] NTSC 76.

an actual valuation, the Plaintiff argues that it demonstrates that it has sufficient assets to enable it to meet any claim for costs even if the true actual value of those assets was only a small proportion of that book value.

[9] The real estate holdings of the Plaintiff comprise land held under a Perpetual Crown Lease. Situated on that land are a number of commercial premises which generate rental income on that land. For example, it includes the McDonalds fast food outlet on Bagot Road, the adjoining service station and pharmacy outlet, an aged care centre at Coconut Grove and various other commercially let premises. There are also 41 houses on the land. The substantial rental income derived from those commercial premises would ordinarily translate to a significant market value for the land.

[10] However, relevant to assessing whether the Plaintiff has, per Rule 62.02(1)(b), "*insufficient assets in the Territory to pay the costs of the Defendant if ordered to do so*", is that the land is held under a Perpetual Crown Lease. Section 46 of the *Crown Lands Act*, as well as section 110 of the *Associations Act*, significantly restricts access to that asset as recourse to satisfy an adverse costs order. Both sections prohibit, inter alia, a transfer, sublease, mortgage or charge without Ministerial consent.

[11] Therefore there is no certainty that the Defendant, if favoured with a costs order against the Plaintiff, could enforce that order against that real estate, regardless of its value. At best enforcement could likely only occur via attachment or indirectly through the winding up process. In any case the impediment of Ministerial consent would still then exist. As the facts in the

substantive proceedings illustrate, there is no certainty that Ministerial consent would be granted. I think it is more likely that the Crown would resume the land in the event that the Plaintiff was wound up. I agree with the submissions of Mr McConnel, for the Defendant, that it cannot be said that the land is available to satisfy a costs order if there is a legal impediment, beyond the Plaintiff's control such as, in the current case, the requirement to obtain Ministerial consent.

[12] Therefore I disregard the Plaintiff's real estate interests held under a Crown Lease for current purposes. That asset is not in reality available to satisfy a costs order if made. I am therefore satisfied that the discretion has been enlivened.

[13] The exercise of the Court's discretion, as the second step in the process, involves a balancing of the competing interests of the parties. As Smithers J said in *Tradestock Pty Ltd v TNT (Management) Pty Ltd*[6]:-

> No doubt the answer is to be found by ascertaining where, on considerations of what is just and reasonable, the balance rests between the risk of exposing an innocent defendant to the expense of defending his position and the risk of unnecessarily shutting out from relief a plaintiff whose case if litigated would result in his obtaining that relief.[7]

[14] The relevant factors in the current application, as identified by the parties in argument are, the strength and bona fides of the Plaintiff's case, the delay in bringing the application, whether the Plaintiff's impecuniosity was caused by the Defendant, whether it would be unfair or oppressive to make the

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6 (1997) 30 FLR 343.
7 (1997) 30 FLR 343 at 348.

order as it would stultify the proceedings and, lastly, the conduct of the Plaintiff in the litigation. The Defendant raised the last factor and the argument advanced in that respect had some overlap with the factor of the strength and bona fides of the Plaintiff's case and the factor of delay.

[15] I now set out a summary of the relevant facts to provide context for the respective arguments in respect of the factor of the strength and the bona fides of the Plaintiff's case.

[16] Gwelo Investments Pty Ltd ("Gwelo") is a developer who approached the Plaintiff with a proposal to develop a large part of the Plaintiff' Crown lease land.[8] After some discussions, the proposal was first recorded in writing in a letter from Gwelo to the Plaintiff dated 15 December 2008. The development proposed was substantial. It consisted of a seawall, a rowing course, a marina, some commercial development and the creation of a number of residential allotments.

[17] The proposal took into account that it could take many years to secure all necessary approvals for the development. Gwelo sought the exclusive rights to develop the land for a 12 year period and was prepared to pay the Plaintiff an amount of $250,000 per annum just for the exclusive rights.

[18] The Defendant was the Plaintiff's lawyer of long standing and he was instructed to advise and act for the Plaintiff in respect of the proposal, including the documentation for the proposal.

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[8] The developer was Gwelo initially but later, a subsidiary of Gwelo, specifically incorporated for the purposes of the development was nominated by Gwelo. Any reference to "the developer" or "Gwelo" in these reasons therefore should be taken to refer to Gwelo or that separate entity, as the case requires.

[19] Although Gwelo's lawyers drafted the documents, the Defendant had input into the nature and form of the documents from the outset. After much discussion and correspondence between Gwelo's lawyers and the Defendant, on behalf of the Plaintiff, the final form of documents and their terms were agreed. The final documents consisted of an Agreement and a Sublease. The payments of $250,000 per annum were expressed to be rent in the Sublease and an "Annual Fee" in the Agreement.[9] The documents were executed on 30 March 2009.

[20] As a Sublease requires the consent of the Minister for Lands pursuant to section 46 of the *Crown Lands Act*, the Sublease was made subject to that consent. That consent was not immediately sought but in the interim Gwelo paid the Annual Fee. When Ministerial consent was first sought it was refused. That occurred on 3 August 2012, some three years and four months after the documents were executed. Gwelo continued to pay the Annual Fee after that refusal.

[21] Gwelo then wrote to the Plaintiff on 29 October 2013. The letter proposed a strategy to progress the development given the then recent change of government. Implicit in that letter was an intention to re-apply for Ministerial consent. Part of that strategy involved some proposed changes to the extent of the development. The letter also contained a reference to the triggering clause in the Agreement whereby Gwelo could require the Plaintiff to surrender its Crown lease in favour of Gwelo. An examination of that clause clearly demonstrates that to have been a step in the process of

9 For convenience I will refer to the annual payments as 'Annual Fees' in these reasons.

the conversion of the land to freehold land. Therefore that could not occur then as, at the date of that letter, it was still dependant on the obtaining of Ministerial consent to the proposal and of the proposal advancing to that stage. The actual clause of the Agreement[10] was expressed to be subject to compliance with all terms of both the Agreement and the Sublease. Therefore the right of Gwelo to require the Plaintiff to surrender the Sublease was not triggered. Notwithstanding that the Defendant apparently interpreted Gwelo's letter to mean that Gwelo was exercising that right.

[22] The Defendant drafted the Plaintiff's reply and arranged for the Plaintiff to send it to Gwelo. The Plaintiff did so and the final letter was dated 24 December 2013. It was a long and detailed letter. The Defendant was of the view that upon the refusal of Ministerial consent to the Sublease on 3 August 2012, the arrangement automatically terminated with no ongoing liability for either party. The letter asserted that but it went further. It asserted that some of the provisions in the documents were unconscionable and/or in breach of the *Crown Lands Act* and the *Associations Act*. It also asserted that the Agreement and Sublease did not accurately reflect the proposal that Gwelo had initially submitted to the Plaintiff, which is consistent with the case of the Plaintiff in these proceedings. Those assertions are remarkable given that it was the Defendant who advised the Plaintiff to enter into the documents and he was involved in the process throughout. As the Plaintiff now argues, that appears to be strong evidence

10 Clause 2.1.

of the inadequacy of the Agreement and the Sublease to properly record the proposal.

[23] Gwelo responded by letter dated 6 March 2014. That letter challenged the assertions in the Plaintiff's letter of 24 December 2013. It specifically noted the Defendant's involvement in the negotiations in respect of the documents on behalf of the Plaintiff and expressed surprise that the Plaintiff was now alleging a variance between the documents and the proposal, as well as unconscionability. Gwelo then alleged that the Plaintiff's letter amounted to repudiation of the agreement. It then accepted that repudiation and terminated the Agreement and the Sublease. Gwelo also indicated that it would cease payments of the Annual Fee from that date and advised that it would claim damages against the Plaintiff, including repayment of the Annual Fees paid up to that date. The sum total of Annual Fees paid to that date was $1.17 million. However, since then Gwelo has not commenced proceedings against the Plaintiff to seek repayment of the Annual Fees paid.[11]

[24] Part of the Plaintiff's evidence for trial is that Gwelo, but for the termination flowing from the Plaintiff's letter of 24 December 2013, would have continued to pay the Annual Fee for the balance of the 12 year period. The Sublease however also contained a provision enabling the developer to optionally terminate after 31 March 2012 on three months notice.[12]

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11 It did however consent to being joined as a defendant in these proceedings on the application of the Plaintiff. It has also defended separate proceedings by the Plaintiff seeking removal of a caveat lodged by Gwelo over the Plaintiff's Crown Lease.

12 Clause 2.4.

Therefore, although the Plaintiff was essentially bound for a 12 year period, Gwelo, at its option, was bound for a lesser period.

[25] The Plaintiff's claim against the Defendant is now only in respect of the loss of the ongoing payment of the Annual Fee of $250,000 for the balance of the 12 year term. The Defendant argues that on the proper construction of the documents, the refusal of Ministerial consent automatically terminated the Sublease with no ongoing liability for either party and consequently the Plaintiff is not entitled to any amount.

[26] The Plaintiff disputes that construction. In the alternative the Plaintiff contends that if the Defendant’s construction is correct, then the Defendant was negligent in any event as he was engaged to ensure that the documents entered into reflected the initial proposal namely, for payment of Annual Fees for a 12 year period. The Plaintiff’s case is that a form of documents other than a Sublease could have, and should have, been adopted and in that case Ministerial consent would not have been required and then Annual Fees would have continued. That is correct at least until Gwelo exercised its optional rights of termination.

[27] The Defendant in turn contends that in any case the optional right of termination in clause 2.4 of the Sublease meant that the arrangement would not have run its 12 year course. Implicit in that argument is that Gwelo would have required a clause to that effect in whatever alternative form of documents the Plaintiff now says should have been adopted. For now I assume that to be the case as that appears very likely. The Defendant's case

is that Gwelo would likely have terminated the agreement when it was clear that the proposal would not secure all necessary approvals. In that case the damages representing the loss of the Annual Fees would only be for a limited period.

[28] I agree that it is likely that Gwelo would have terminated the arrangement pursuant to clause 2.4 of the Sublease when it was clear that the project would not be approved. What is not known is when that would have occurred, if at all. If the Defendant secures a finding that at some time within the balance of the 12 year term, the proposal would not be approved, then that will have a significant effect on the quantum of the Plaintiff's claim. That however may reduce quantum.[13] It does not show that the Plaintiff's case is not strong.

[29] In the same vein the Defendant also relies on the evidence of proposals by the Plaintiff for alternative developments on the land as well as attempts by Gwelo to bypass the Plaintiff and deal direct with the Northern Territory. The Defendant therefore argues that this is evidence that the arrangement with Gwelo would not have proceeded for the balance of the term in any case. Again that is an argument about quantum only and in any case I do not consider that to be a strong point. The evidence shows that nothing came of the Plaintiff's investigations of alternative proposals and quite some time has elapsed since then. Further, Gwelo's attempt to deal with the Northern Territory directly was resoundingly rejected by the Northern Territory.

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13 Currently quantum based on a loss of $250,000 per annum for the balance of the 12 year term is approximately $1,875,000. If it is established that Gwelo would have terminated as early as the Defendant now suggests, which is approximately June 2014, quantum would still be of the order of $187,000.

[30] I have come to the conclusion that the Plaintiff's case is not a weak case as the Defendant submits. The Defendant's own criticism of the documents which he was involved in negotiating and preparing, and which he advised the Plaintiff to enter into, is strong evidence that the Defendant was negligent in not requiring a form of documents which would have seen the Annual Fees paid through to the expiry of the 12 year term without qualification, or subject only to the optional right termination that the developer apparently required.

[31] At best the Defendant has an arguable case to restrict the quantum of the Plaintiff's case if it establishes that Gwelo would have exercised its optional rights of termination by that time, but that is far from certain. Part of the Plaintiff's evidence for trial, which was referred to in the course of argument, is an affidavit of the principal of Gwelo who states that he still believes that the development will go ahead. There is also evidence in the form of the settlement of the caveat proceedings between the Plaintiff and Gwelo, which is discussed in more detail below, which provided for Gwelo to make a further approach to the Northern Territory in an attempt to ascertain whether the development might be approved at some future time. That approach was recently made and currently awaits a final response from the Northern Territory.

[32] Dealing next with the question of delay, the procedural history of the matter and some further background facts specific to that issue need to be considered. The proceedings were commenced by Writ filed 5 December 2016. Management of the case proceeded routinely albeit delayed by reason

of an interlocutory application by the Plaintiff seeking to join Gwelo as a party and by delays resulting from the amendment of the Plaintiff's Statement of Claim. The Amended Statement of Claim was filed on 25 August 2017, a Defence was filed on 9 December 2017, particulars of the Amended Statement of Claim were provided on 14 December 2017 and an Amended Defence was filed on 15 January 2018. An Amended Reply was filed on 19 January 2018.

[33] At a directions hearing held on 15 September 2017, pursuant to Rule 48.12 of the SCR the parties were ordered to attend a Settlement Conference on 22 November 2017. A Case Management Conference was initially held on 13 December 2017 and then adjourned to 15 January 2018. On that later date directions were given in the lead up to trial and the matter was placed in the list of cases for hearing in the May 2018 civil sittings. The matter was subsequently listed for trial to commence 28 May 2018.

[34] The current application was made by summons filed 16 February 2018. The argument was heard on 21 March 2018. Further affidavit evidence and written submissions concluded on 28 March 2018. As a result of the pre-trial directions made at the adjourned Case Management Conference, by the time of the hearing of argument on the current application, the Plaintiff had filed all of its affidavits of evidence in chief. The Defendant filed his affidavit evidence by 28 March 2018.

[35] The Defendant first put the Plaintiff on notice of the intention to seek an order for security for costs by letter dated 14 December 2017. The Plaintiff

promptly replied, by letter dated 20 December 2017, refusing the request with reasons.

[36] That occurred prior to the conclusion of the adjourned Case Management Conference on 15 January 2018 and hence prior to the occasion when the time required for the Plaintiff to file and serve its affidavit evidence was under consideration. There was no mention of an intention by the Defendant to seek security for costs on that occasion. As a result I think it was reasonable for the Plaintiff to have assumed that the Defendant had abandoned its intention to seek security for costs.

[37] The last of the pre-trial directions[14] are due for completion by 23 April 2018. Therefore by the time of publication of these reasons the Plaintiff has nearly completed all required steps in the lead up to trial and only the actual preparation for trial remains to be done. The lateness of the application for security therefore means that the Plaintiff has been put in a position of significant disadvantage, in the form of incurring costs which may not be recouped if an order for security for costs is now made.

[38] An order for security for costs is protective in nature. It protects the efficacy of the exercise of the jurisdiction to award costs.[15] Delay is an important consideration in an application for security for costs. Numerous authorities

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14 Notice of objections to evidence were filed by 16 April 2018 and Responses to the objections are due 23 April 2018.

15 *Idoport Pty Ltd & Anor v National Australia Bank Ltd & Anor* [2001] NSWSC 744; *Green v CGU Insurance Ltd* (2008) NSWCA 148; *Oshlack v Richmond River Council* (1998) 193 CLR 72; *Buckley v Bennell Design & Construction Pty Ltd* (1974) 1 ACLR 301; *Southern Cross Exploration v Fire and All Risks Insurance Co Ltd* (1985) 1 NSWLR 114; *Ravi Nominees Pty Ltd v Phillips Fox* (1992) 10 ACLC 1313; *Octocane Pty Ltd v SRJ Property Development Pty Ltd* (1999) SASR 471; *MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* [2002 FCA 821.

recognise that it would be unjust to permit a Defendant to stand by and allow the Plaintiff to work on its case and then ask for security after significant costs have been incurred.[16] The rationale for this 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.[17]

[39] In *Anchung Pty Ltd v Northern Territory of Australia*,[18] consistent with numerous other authorities, I said that delay in bringing an application for security for costs can be taken into account in determining whether or not an order should be made and that delay could also be taken into account in determining the quantum of the security ordered.[19] 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 Court's discretion. I also confirmed that the explanation for the delay is a relevant matter.[20]

[40] In *Idoport Pty Ltd & Anor v National Australia Bank Ltd & Anor*[21], Einstein J approved of the comments of French J (as he then was) in *Bryan E Fencott v Eretta Pty Ltd*[22] where French J said:-

> The further a plaintiff has proceeded in an action and the greater the costs it has been allowed to incur without steps being taken to apply for

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16 *Smail v Burton* (1975) 1 ACLR 74; *Bryan E Fencott v Eretta Pty Ltd* (1987) 16 FCR 497; *Buckley v Bennell Design & Construction Pty Ltd* (1974) 1 ACLR 301; *Southern Cross Exploration v Fire and All Risks Insurance Co Ltd* (1985) 1 NSWLR 114.
17 *Ravi Nominees Pty Ltd v Phillips Fox* (1992) 10 ACLC 1313.
18 [2015] NTSC 76.
19 [2015] NTSC 76 at paras 25-29.
20 *PG Gabel Pty Ltd (in liq) v Katherine Enterprises Pty Ltd* (1977) 29 FLR 108.
21 [2001] NSWSC 744.
22 (1987) 16 FCR 497.

> an order for costs, the more difficult it will be to persuade the court that such an order is not, in the circumstances, unfair or oppressive.[23]

[41] In the same case Einstein J approved of the following comments of Moffitt P in *Buckley v Bennell Design & Construction Pty Ltd*[24] namely:-

> The primary reason why the application should be brought promptly and pressed to determination promptly is that the company, which by assumption has financial problems, is entitled to know its position in relation to security at the outset, and before it embarks to any real extent on its litigation, and certainly before it is allowed to or permits substantial sums of money towards litigating its claim.[25]

[42] *Southern Cross Exploration v Fire and All Risks Insurance Co Ltd*[26] is authority that the length of the delay and the nature of the acts done during the interval are factors which might otherwise excuse a delay. In that case the Court approved of a statement of principle, albeit specifically from a case involving laches, in these terms:-

> …Two circumstances, always important in such cases….. are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other…[27]

[43] I discussed instances where delay was excused in *Anchung Pty Ltd v Northern Territory of Australia*[28] such as where the plaintiff's impecuniosity was only discoverable at a late stage or where the likely length of the proceedings could not have been foreseen when the action was commenced[29]; where the procedural activity occupying the parties in the form of an application for summary judgment and extensive work on

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23 (1987) 16 FCR 497 at 514.
24 (1974) 1 ACLR 301.
25 (1974) 1 ACLR 301 at 309.
26 *Southern Cross Exploration v Fire and All Risks Insurance Co Ltd* (1985) 1 NSWLR 114.
27 *Southern Cross Exploration v Fire and All Risks Insurance Co Ltd* (1985) 1 NSWLR 114 at 125.
28 [2015] NTSC 76 at paras 26-28; See also *PG Gabel Pty Ltd v Katherine Enterprises Pty Ltd* (1977) 29 FLR 108.
29 *Buckley v Bennell Design & Construction Pty Ltd* (1974) 1 ACLR 301.

pleadings was considered sufficient to excuse the delay[30]; where the delay was due to the plaintiff's failure to provide information reasonably requested by the defendant.[31] *Delaney, Security for Costs* sets out a number of cases dealing with this issue and in particular to instances where the delay was fatal to the application.[32]

[44] The Defendant argued that it was reasonable not to bring the application sooner for a number of reasons. The first was that the Plaintiff's claim appeared initially to be arguable, albeit that it was denied, when pre-action correspondence was entered into. As that occurred before proceedings commenced, that can only serve as background and cannot be relevant to delay on a stand-alone basis.

[45] Secondly, that the Defendant only later learnt that Gwelo did not intend to sue the Plaintiff. The significance of this ties in with Defendant's argument that the conduct of the Plaintiff and its association with Gwelo compromises the bona fides of the Plaintiff's claim. This is discussed in greater detail below. Confined only to delay considerations for the present, the Defendant knew that Gwelo did not intend to sue the Plaintiff before the Plaintiff proposed to amend its Statement of Claim. The amendment of the Statement of Claim was first mentioned after the application by the Plaintiff seeking to join Gwelo for the purposes of claiming negative declaratory relief. This is further discussed below. That application was successfully opposed by the

30 *Octocane Pty Ltd v SRJ Property Development Pty Ltd* (1999) SASR 471
31 *MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* [2002 FCA 821.
32 *Security for Costs*, Delaney J, The Lawbook Company Ltd, 1989, at pp 174-175.

Defendant.[33] The point however is that by then the Defendant knew that Gwelo might not take action as the failure of Gwelo to do so was the reason the Plaintiff made that application. Therefore, I do not accept that as justification for the delay.

[46] The third justification claimed was that it was reasonable for the Defendant to await the Amended Statement of Claim and put his Defence on record before pursuing security for costs. I do not accept this submission especially given the timing and the relatively late filing of the Defence within the overall timeline. Clearly the Defendant already knew much about the Plaintiff's claim from pre-action correspondence and from the initial Statement of Claim. Other than a bare statement that it was reasonable to await the Amended Statement of Claim and the filing of the Defence, very little of substance was put to support this submission. I do not agree with that submission in any case. I do not see any reason why security for costs could not have been pursued concurrently.

[47] The fourth claimed justification for the delay was that shortly after the Defence was filed, a Settlement Conference date was fixed and it was reasonable to wait for that Settlement Conference to be held and to attempt to settle the Plaintiff's claim before pursuing security for costs. The Defendant’s timing is out as the date for the Settlement Conference had been set on 15 September 2017. The initial Defence was not filed until 9 October 2017. The Amended Defence was filed on 15 January 2018. In any case that

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33 *Gwalwa Daraniki Association Inc v Chin* [2017] NTSC 51.

does not explain the further delay between the date of the Settlement Conference and the date that the Defendant first notified the Plaintiff that it was seeking security for costs. Although the Defendant conducted some enquiries relevant to the application after the Settlement Conference, I am not convinced that those enquiries could not have been made earlier.

[48] The submission that it was reasonable for the Defendant to await the outcome of the Settlement Conference is a curious one. It was submitted that notifying an intention to seek security for costs before the Settlement Conference might have adversely impacted on the prospects of settlement. I do not accept that. I think that commencing the application for security, or at least putting the Plaintiff on notice of a proposed application, more likely would have bolstered the Defendant's position in negotiations at the Settlement Conference.

[49] I do not accept that the Defendant should have delayed its application on that account alone and I do not accept that the application could not have progressed concurrently with the fixing and holding of a Settlement Conference.

[50] The Defendant also seeks to justify the delay based on the conduct of the Plaintiff. This is part of the challenge to the bona fides of the Plaintiff’s claim. Whether or not this is relevant to delay on the facts is debateable but I am of the view that conduct of the type complained of, assuming that it is established, is a factor which can be taken into account in respect of the exercise of the discretion. The argument in this respect was a drawn out one

and developed by reliance on a number of pieces of evidence which the Defendant argued supported inferences favourable to the Defendant. Some further facts specific to this submission need to be discussed to set the context.

[51] The genesis of the Defendant's argument is that the Plaintiff was negotiating with the Northern Territory for a loan of approximately $3 million to enable it to pay a taxation liability and outstanding rates and taxes. The Plaintiff proposed to repay that loan through a staged process of development on the Plaintiff's Crown lease holdings. In the course of those negotiations the Northern Territory indicated that it required the removal of Gwelo's caveat before any loan could be finalised.

[52] The caveat referred to was lodged by Gwelo with the consent of the Plaintiff. The caveat records that Gwelo claims an equitable interest in the land as the "*..grantee of exclusive rights pursuant to an agreement... dated 15 December 2008*". That date is the same date as the letter from Gwelo to the Plaintiff which first recorded the development proposal. The combination of the date and the reference to "exclusive rights" in the caveat strongly suggests that the caveat is based on that letter. However, that letter was an offer, or proposal only. There was no "agreement" until it was accepted and there was no evidence of that or of any other agreement between the Plaintiff and Gwelo which could fit that description. If it does rely on the letter of 15 December 2008, I agree with Mr McConnel's submission that that would not establish a valid caveatable interest.

[53] Gwelo has resisted attempts to have the caveat removed. Attempts were made by the Plaintiff's solicitor to achieve a voluntary withdrawal of the caveat by Gwelo. The Plaintiff's solicitors wrote to Gwelo at the time that it was negotiating the aforesaid loan with the Northern Territory. The Plaintiff offered to borrow additional funds from the Northern Territory sufficient to repay the Annual Fees to Gwelo. That approach to Gwelo was unsuccessful.

[54] After the current proceedings were commenced, the Plaintiff's solicitors again wrote to Gwelo, by email on 9 March 2017, advising of the commencement of the current proceedings and inviting Gwelo to inform them of its intentions in respect of recovery of the Annual Fees. The letter referred to the impending lapse of the limitation period applicable to Gwelo's claim. Gwelo's response indicated that it would be prepared to negotiate a reasonable settlement with the Plaintiff but made it clear that it required the Annual Fees to be repaid before it would withdraw its caveat.

[55] The Plaintiff next made the application in this Court to join Gwelo to claim a negative declaration. Gwelo was served with that application and appeared at the first mention where it indicated that it did not oppose the application for joinder but otherwise declined to take any further part in the application and indicated that it would abide the Court's decision.

[56] All of the Plaintiff's attempts to negotiate a withdrawal of caveat occurred before the failed joinder application and before any available recovery action by Gwelo was statute barred. Gwelo did nothing in respect of claiming back the Annual Fees before the expiration of the limitation period.

Following refusal of the Plaintiff's application for joinder of Gwelo, the Plaintiff commenced separate proceedings against Gwelo seeking removal of the caveat. I will hereafter refer to those proceeding as the "caveat proceedings".

[57] For the reasons discussed above, I would have to agree with Mr McConnel's submission that the Plaintiff would very likely have been successful in the caveat proceedings. Gwelo however defended those proceedings. By the time the initial directions hearing was held in the caveat proceedings, the Settlement Conference had been ordered in the current proceedings. At my suggestion and with the Plaintiff's and Gwelo's agreement, the caveat proceedings were set for an early Settlement Conference concurrent with the Settlement Conference in these proceedings. The Defendant in these proceedings was not privy to that as it was not a party to the caveat proceedings. I accept that the Defendant likely only learnt that a concurrent Settlement Conference had been ordered was shortly before the appointed date.

[58] In part the Defendant's argument is predicated on the basis that these events demonstrated that the Plaintiff deliberately, and in a secretive manner, commenced the caveat proceedings against Gwelo, then obtained a concurrent Settlement Conference date to secure a tactical advantage. However, I do not agree with that as I do not consider that the commencement of the caveat proceedings by the Plaintiff was inappropriate. This is because it was made clear by the Northern Territory that the caveat had to be removed before a loan could be made. Attempts by the Plaintiff to

negotiate a voluntary withdrawal of the caveat by Gwelo had failed. In any case, I cannot see why the Plaintiff pursing an early and concurrent Settlement Conference rather than, as Mr McConnel suggested, attempting to expedite the caveat proceedings through to hearing, should be classed as a deliberate secretive action on the Plaintiff's part with an ulterior motive. The major flaw in that submission is that the early and concurrent Settlement Conference was my suggestion.

[59] The inference the Defendant asked me to draw was that the Plaintiff and Gwelo were scheming together against the Defendant and that the Plaintiff only issued the proceedings to secure funds to repay the Annual Fees to Gwelo in return for a withdrawal of the caveat. The submission is inconsistent with other submissions of the Defendant which are prefaced on the basis that the Plaintiff would be successful in proceedings to remove the caveat and that the Plaintiff has no liability to Gwelo based on the construction of the documents, i.e., that on refusal of Ministerial consent the agreements automatically terminated without liability for further claims. The only reason that the Plaintiff might even consider repaying the Annual Fees is to secure Gwelo's assistance in the trial but what is clear from the settlement of the caveat proceedings is that Gwelo still wishes to proceed with the development and that is the more likely explanation for Gwelo's co-operation. Also, if the Defendant is correct on the damages assessment, which I discussed above in the context of the strength of the case, then the Plaintiff will not achieve damages anywhere near enough to repay the amount Gwelo has paid in Annual Fees.

[60] In any case, I think there is a more obvious and probable explanation namely, that the Plaintiff, being keen to secure the loan from the Northern Territory sooner rather than later, was prepared to repay the Annual Fees then in expectation that it could claim those Annual Fees against the Defendant. This is consistent with the Plaintiff not pursuing a loan for additional funds to cover the Annual Fees once the limitation period had expired. For that reason I am not prepared to draw the inference the Defendant suggests.

[61] Mr McConnel also argued that the conduct referred to made it clear that the Plaintiff was making a tactical manoeuvre to shore up its case against the Defendant as it required the assistance and evidence of Gwelo in the current proceedings. The suggestion is that the caveat proceedings were only commenced to secure the assistance of Gwelo in the current proceedings. That is also illogical. If that was the Plaintiff's motive, that could have been achieved more directly, and truly secretively, by agreement with Gwelo in lieu of issuing the caveat proceedings. Moreover, for the reasons I have given above, I think it was entirely proper for the Plaintiff to commence and prosecute the caveat proceedings.

[62] Mr McConnel also relied on the settlement arrived at in the caveat proceedings, specifically the Plaintiff's failure to enforce that settlement agreement, to support his submission that the Plaintiff was only attempting to secure the assistance of Gwelo to enable it to prove its claim against the Defendant. This was so, the argument proceeded, as Gwelo's evidence would be necessary to prove that the development had some prospect of

succeeding. The term of the settlement relied on was that Gwelo was to approach the Northern Territory, within three months of the Settlement Conference date, to determine if there were any prospects of the development receiving approval in the future.

[63] The agreement went on to provide that if an indication of possible approval was not given within that time, the caveat was to be withdrawn. If a positive indication was given within that time then Gwelo had a further nine months to obtain all of the necessary approvals and again, if that was unsuccessful, the caveat was to be withdrawn.

[64] Gwelo made the required approach to the Northern Territory within the required timeframe. The Northern Territory has acknowledged the proposal but has yet to finally respond to it. The last communication from the Northern Territory was by email on behalf of the Chief Minister dated 25 January 2018 which acknowledged the approach and the proposal and indicated that it was being actioned. Therefore strictly speaking, the lapse of that three month period would enable the Plaintiff to enforce the withdrawal of the caveat.

[65] Again I think there is a more probable alternative hypothesis for the Plaintiff's failure to enforce the settlement agreement than that proposed by the Defendant namely, that both the Plaintiff and Gwelo are content to await a response from the Northern Territory notwithstanding the lapse of the three month period. The inference which the Defendant seeks to draw from that fact is therefore not one that I would draw for those reasons.

[66] Overall I think there are other relevant facts which justifies refusal to draw the inferences proposed by the Defendant. The 12 year term in the initial proposal was negotiated because Gwelo considered that approvals might take a significant time. Two attempts to obtain consent had already been made and both had failed by that time. If, as other available evidence shows, Gwelo was still interested in pursuing the development, given the termination of Gwelo's agreement with the Plaintiff, the caveat was the only thing which kept Gwelo involved. The view of Gwelo that the development is still viable is not only reflected in the settlement agreement for the caveat proceedings. It is also consistent with the evidence that the principal of Gwelo is to give in the substantive hearing, albeit that the Defendant will challenge that evidence.

[67] I have already dealt with aspects of this argument when dealing with the strength and bona fides of the Plaintiff's case. In respect of the issue of delay the relevance is the Defendant's claim that it only learnt of these events shortly before the Settlement Conference. However, again noting the Defendant's argument that it was reasonable to wait for the Settlement Conference to be held before seeking security for costs, implicit in that is that the Defendant had no intention of seeking security until after the Settlement Conference in any case. Therefore I do not accept that as a justification for the delay. Nor do I accept that it demonstrates a lack of bona fides on the part of the Plaintiff.

[68] For all of these reasons I reject the Defendant's claimed justification for that delay and find that the Defendant's application has been made late, and

obviously very late. That delay remains just one factor to consider in the exercise of my discretion.

[69] As to the factor of whether an order for security will stultify the proceedings and operates oppressively and unfairly, it is relevant that the Plaintiff's real estate is unencumbered. It is also relevant that the Plaintiff was negotiating with the Northern Territory to secure a loan of a multi-million dollar amount. The relevance of the land being unencumbered is that I think it shows that financial institutions would be not prepared to lend money on security of a Crown lease. I think there are at least two reasons for that. Firstly, consent would still be required from the Minister. Secondly, even if that consent was secured, enforcement of the security would remain problematic. I think that goes a long way to explaining why the Plaintiff was negotiating to secure a loan from the Northern Territory. The Northern Territory is in a preferred position compared to any other financial institution in that respect as, if Ministerial consent was required in that case, it would be a formality.

[70] This indicates that the Plaintiff has no capacity to borrow funds on security of its interest in the Crown lease land to satisfy any order for security for costs. This however needs to be considered in the context of the principle often applied in applications for security for costs that persons who stand behind a plaintiff should establish that they cannot provide security. *Mac-Attack Equipment Hire Pty Ltd v AJ Lucas Operations Pty Ltd*[34] and the cases discussed there are authority for the proposition that a Plaintiff

[34] [2010] NTSC 27.

seeking to resist an application for security for costs should place before the Court a full and frank statement of its assets and liabilities as well as of persons who stand to gain from the proceedings as those persons may be required to give security.

[71] In this respect, Mr McConnel argued that Gwelo should be considered an entity who will benefit in the proceedings if the Plaintiff is successful. This again relies on the submission that the Plaintiff will repay the Annual Fees to Gwelo if it is successful in these proceedings. I repeat and rely on what I have said earlier in that respect. I have already rejected that submission and for the same reasons I do not accept Mr McConnel's argument that the Plaintiff will repay Gwelo the $1.17 million paid in Annual Fees if the Plaintiff is successful. I do not agree that Gwelo should be considered a person who should alternatively provide the security sought.

[72] Without that I find that an order for security would stultify the proceedings.

[73] The last of the relevant factors is whether the Plaintiff's impecuniosity was caused by the Defendant. I do not consider this to be a factor which favours the Plaintiff. The Defendant has produced evidence which shows that the Plaintiff has made a loss for the 2015 and 2016 financial years. The losses are substantially more than the $250,000 Annual Fees which the Plaintiff claims to have lost as a result of the Defendant's negligence. The Defendant also relied on evidence of poor governance on the part of the Plaintiff but I consider the stronger point is the evidence of the actual ongoing and apparently increasing losses being made by the Plaintiff. Coupled to that is

evidence that the Plaintiff has a substantial existing liability to the Australian Taxation Office and other substantial debts for property rates and taxes. In part the loan sought to be obtained from the Northern Territory was to address those liabilities. That evidence therefore shows that not only is the Plaintiff making ongoing losses, the Plaintiff cannot meet existing commitments.

[74] The Plaintiff argues that notwithstanding those losses, the fact remains that the loss of $250,000 annually is still substantial and that that income would have improved the Plaintiff's financial position overall. I accept that but even so that establishes that the Plaintiff was impecunious even before that income was lost and therefore overall its impecuniosity is not due to the Defendant.

[75] Weighing these factors, the most telling factors are the delay in making the application, the strength of the Plaintiff's case and that an order would likely stultify the proceedings. Although the delay is pronounced, that may have been able to be remedied by limits on the order for security. For example, the order could have been limited to future costs only and additionally making a deduction to represent the costs incurred by the Plaintiff in the period between when the Defendant's application ought to have been made and the date of these reasons. That might have addressed the unfairness, which is the applicable rationale.

[76] However when delay is coupled to my assessment that the Plaintiff has a strong case (even with the reduced quantum if the Defendant were to be

successful on quantum issues), and that the order would stultify an otherwise good claim, I have come to the conclusion that my discretion is appropriately exercised by refusing the order sought.

[77] I will hear the parties as to ancillary orders and as to the costs of the application.