PARTIES	TSAKIRIOS & KELLY PTY LTD trading as N.A.R. NORTH AUSTRALIAN REALTY THE PROFESSIONALS and BAYRIDGE (NORTHERN TERRITORY) PTY LTD
	TSAKIRIOS & KELLY PTY LTD trading as N.A.R. NORTH AUSTRALIAN REALTY THE PROFESSIONALS and GLIDECORP PTY LTD
	TSAKIRIOS & KELLY PTY LTD trading as N.A.R. NORTH AUSTRALIAN REALTY THE PROFESSIONALS and BAYRIDGE PTY LTD and ORS
TITLE OF COURT	In the Supreme Court of the Northern Territory of Australia
JURISDICTION	Interlocutory Application
FILE NUMBERS	235/92 (9217256); 78/93 (9309614); 171/95 (9517390)
DELIVERED	26 September 1996
REASONS OF	Master Coulehan

Catchwords:

PRACTICE - Northern Territory - costs - security - O.62 Supreme Court Rules - S.1335 Corporations Law - shareholders guarantee - sufficiency

Cases referred to:

Erolen v Baulkham Hills Shire Council - 10 ACLR 441
Gentry Bros. Pty Ltd v Wilson Brown & Associates Pty Ltd
8 ACSR 405
Harpur v Ariadne Australia Ltd (1984) 2 Qd.R 523
Japalm Pty Ltd v Hamilton Island Enterprises Pty Ltd
15 ACSR 532
Mantaray Pty Ltd v Brookfield Breeding Co. Pty Ltd
8 ACLC 304
Territory Broadcasting Pty Ltd v Darwin Broadcasters Pty Ltd
106 FLR 66

Representation

Counsel:

Plaintiff	Mr Roussos
Defendant	Mr Silvester

Solicitors:

Plaintiff	Cridlands
Defendant	Mildrens

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

235/92 (9217256)	BETWEEN: TSAKIRIOS & KELLY PTY LTD trading as N.A.R. NORTH AUSTRALIAN REALTY THE PROFESSIONALS and BAYRIDGE (NORTHERN TERRITORY) PTY LTD
78/93 (9309614)	TSAKIRIOS & KELLY PTY LTD trading as N.A.R. NORTH AUSTRALIAN REALTY THE PROFESSIONALS and GLIDECORP PTY LTD
171/95 (9517390)	TSAKIRIOS & KELLY PTY LTD trading as N.A.R. NORTH AUSTRALIAN REALTY THE PROFESSIONALS and BAYRIDGE PTY LTD and ORS

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 26 September 1996)

The defendants have sought security for costs in three proceedings pursuant to O.62 Supreme Court Rules and S.1335 of the Corporations Law. As most of the evidence is common to all 3 proceedings and they were argued together, it is convenient to consider them together.

Objection was taken to certain paragraphs in the affidavits of Androniki Tsakirios sworn 22 July 1996. Most of the objections were dealt with at the hearing, those that were taken de bene esse I deal with now.

In proceedings numbered 235 of 1992 and 171 of 1995, paragraph 4, which is identical in each affidavit, was objected to on the basis that it contained hearsay and was irrelevant. I consider that the evidence, although hearsay, is otherwise admissible under O.43.03(2) and is relevant to the strength of the plaintiffs' case. Paragraph 4 is therefore admitted in each case.

In proceeding numbered 78 of 1995, paragraph 15 is objected to as irrelevant. In effect, the objection was to annexure D to the affidavit, which is a copy of a letter from the plaintiff to a firm of solicitors. The relevance of this letter to the application is not apparent. Paragraph 25 is struck out.

As to the merits of the applications, there is evidence that the plaintiff is not trading and has no appreciable assets. It was not argued that the plaintiff should not provide security, the dispute being as to the amount and the manner of giving security.

As to the amount, the defendants adduced evidence as to expected costs if the proceedings went to trial. These estimates were not disputed save that the plaintiffs argued that proceedings numbered 235 of 1992 and 171 of 1995 should be treated as one action for the purpose of giving security.

These proceedings constitute substantially the same cause of action, the difference being the name of the defendants and consequential relief sought. The plaintiff submitted that an application would be made to consolidate these proceedings, in which case the costs need not be duplicated. However, as the proceedings now stand alone it is necessary that they be treated as separate proceedings for the purpose of the application for security for costs.

As to the manner of giving security, the directors and shareholders of the plaintiff, George and Androniki Tsakirios, have offered to provide written guarantees in respect of any costs awarded to the defendants. There is evidence that they have assets in the Northern Territory sufficient to cover the sums sought by the defendants. They have also offered to give an undertaking not to dispose of the family home and an investment unit until after the proceedings have been resolved. I note that there appears to be two investment properties and it is not clear which one is referred to.

The defendants seek more substantial security such as payment into court, a bank guarantee or mortgages of real estate.

There is authority for the proposition that the objects of the Rule and the Act have been achieved if the person who stands behind the plaintiff company make their assets available for the payment of costs. See ***Harpur v Ariadne Australia Ltd (1984) 2 Qd.R 523***, ***Mantaray Pty Ltd v Brookfield Breeding Co. Pty Ltd 8 ACLC 304***, ***Territory Broadcasting Pty Ltd v Darwin Broadcasters Pty Ltd 106 FLR 66*** and ***Gentry Bros. Pty Ltd v Wilson Brown and Associates Pty Ltd 8 ACSR 405***. In ***Gentry Bros.***, Cooper J at p.415 said : ... ***The making of an order which secures the personal liability of the shareholders is in itself the provision of security*** ....."

It is to be noted, however, that some reservations have been expressed as to this approach. In ***Erolen v Baulkham Hills Shire Council 10 ACLR 441***, Powell J said at p.456 "***While I am prepared to accept that the offer of a guarantee is a factor to be taken into account in determining what is the proper form of security to be provided in a case in which an order for security is appropriate, I am quite unable to share the views expressed by Byrne J in Mantaray v Brookfield Breeding Co.***

***Pty Ltd*, supra, and by Cooper J in *Gentry Bros. Pty Ltd v Wilson Brown and Associates Pty Ltd*, supra, which are to the effect that, once the shareholders have agreed to accept personal liability for any judgment for costs, the statutory purpose of S.1335 of the Corporations Law is fulfilled - such an approach, so it seems to me, would be as much "a fetter" on the court's discretion as the, now discarded, approach 'of a "bias" in favour of making an order once it is shown that the plaintiff is impecunious' "** (see also ***Japalm Pty Ltd v Hamilton Island Enterprises Pty Ltd* 16 ACSR 532, 534**).

I approach the question of security on the basis that there is no presumption that an acceptance of liability by shareholders is necessarily sufficient. However, in the light of the assets and liabilities disclosed by Mr and Mrs Tsakirios I consider that the defendants will be sufficiently secured if a written guarantee is provided, together with an undertaking not to dispose of or further encumber the real estate referred to in paragraph 4 of the affidavit of Androniki Tsakirios sworn 11 September 1996, without leave of the Court, until the proceedings have been completed and any costs ordered to be paid by the plaintiff to the defendants have been paid.

The orders will be as follows:

In proceeding numbered 235 of 1992

1. The plaintiff give security for costs in this proceeding.

2. That such security be in the form of a personal joint and several guarantee by George Tsakirios and Androniki Tsakirios to pay to the defendant any costs which the plaintiff may be ordered to pay to the defendant in a sum not exceeding $45,600-00. Failing agreement between the parties, the form of the guarantee to be to the satisfaction of the Registrar.

3. That George Tsakirios and Androniki Tsakirios give a written undertaking to the Court not to transfer or otherwise dispose of or further encumber the real property referred to in paragraph 4 of the affidavit of Androniki Tsakirios sworn 11 September 1996 and filed in proceeding 171

of 1995, without leave of the Court, until this proceeding has been completed and any costs ordered to be paid by the plaintiff to the defendant have been paid.

In proceeding numbered 78 of 1993

1. The plaintiff give security for costs in this proceeding.

2. That such security be in the form of a personal joint and several guarantee by George Tsakirios and Androniki Tsakirios to pay to the defendant any costs which the plaintiff may be ordered to pay to the defendant in a sum not exceeding $24,600-00. Failing agreement between the parties, the form of the guarantee to be to the satisfaction of the Registrar.

3. That George Tsakirios and Androniki Tsakirios give a written undertaking to the Court not to transfer or otherwise dispose of or further encumber the real property referred to in paragraph 4 of the affidavit of Androniki Tsakirios sworn 11 September 1996 and filed in proceeding 171 of 1995, without leave of the Court, until this proceeding has been completed and any costs ordered to be paid by the plaintiff to the defendant have been paid.

In proceeding numbered 171 of 1995

1. The plaintiff give security for costs in this proceeding.

2. That such security be in the form of a personal joint and several guarantee by George Tsakirios and Androniki Tsakirios to pay to the defendants any costs which the plaintiff may be ordered to pay to the defendants in a sum not exceeding $45,600-00. Failing agreement between the parties, the form of the guarantee to be to the satisfaction of the Registrar.

3. That George Tsakirios and Androniki Tsakirios give a written undertaking to the Court not to transfer or otherwise dispose of or further encumber the real property referred to in paragraph 4 of the affidavit of Androniki Tsakirios sworn 11 September 1996, without leave of the Court,

until this proceeding has been completed and any costs ordered to be paid by the plaintiff to the defendants have been paid.