CITATION: *Veetemp Australasia Pty Ltd v GRD Group NT Pty Ltd* [2010] NTMC 060

PARTIES:	VEETEMP AUSTRALASIA PTY LTD
	V
	GRD GROUP NT PTY LTD
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	21004015
DELIVERED ON:	20 September 2010
DELIVERED AT:	Darwin
HEARING DATE(s):	15 September 2010
JUDGMENT OF:	J Johnson JR

CATCHWORDS:

COSTS: SECURITY FOR COSTS – PART 31 OF THE *LOCAL COURT RULES* - BURDEN OF PROOF

REPRESENTATION:

Counsel:

Plaintiff/Respondent:	Mr Rowbottam
Defendant/Applicant:	Mr McConnel

Solicitors:

Plaintiff/Respondent:	Withnalls
Defendant/Applicant:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2010] NTMC 060
Number of paragraphs:	39

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

No. 21004015

BETWEEN:

VEETEMP AUSTRALASIA PTY LTD
Plaintiff/Respondent

AND:

GRD GROUP NT PTY LTD
Defendant/Applicant

REASONS FOR JUDGMENT

(Delivered 20 September 2010)

Mr J JOHNSON JR:

1. This is an interlocutory Application by the defendant in the proceeding proper for an order that the plaintiff give security for the defendant's costs of defending the proceeding and that the proceeding against the defendant be stayed until the security is given. Such Application is countenanced by *Part 31 Security for Costs* of the *Local Court Rules*. Of most relevance to this Application is Rule 31.02 of Part 31 which is here recited:

> **31.02 When security for costs may be ordered**
> (1) Where:
> (a) a plaintiff is ordinarily resident out of the Territory;
> (b) a plaintiff:
> (i) is a corporation; or
> (ii) is suing for the benefit of another person and not for the plaintiff's own benefit (other than a plaintiff suing in a representative capacity),

> 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) a proceeding by the plaintiff for the same claim is pending in another court;
>
> (d) subject to subrule (2), the address of a plaintiff is not stated or is stated incorrectly in the plaintiff's originating process;
>
> (e) a plaintiff has changed his or her address after the commencement of the proceeding in order to avoid the consequences of the proceeding; or
>
> (f) the Court may require security for costs under the Corporations Act 2001 or another Act,
>
> on the application of a defendant, the Court may order that the plaintiff give security for the defendant's costs of defending the proceeding and that the proceeding against the defendant be stayed until the security is given.

2. In its submissions by Counsel, Mr Rowbottam, the plaintiff/respondent explicitly conceded that it was a corporation as that term is used in Rule 31.02(1)(b)(i), and implicitly conceded that it was not otherwise immune from an Application for security for costs. Rather, it argued that the defendant had failed to prove, on the usual standard of civil persuasion, that there was "...reason to believe that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so."

Evidence of the Defendant/Applicant

3. The evidence of the defendant/applicant centred upon a range of affidavit material which, for the sake of brevity I will not recite in full, buttressed by the submissions of Counsel, Mr McConnel. The thrust of that evidence went to the assertion that the plaintiff was a "$2.00 company" with a history of "financial stress" and without assets or, indeed, any other capacity sufficient to pay any order for costs against it which may flow from the proceeding proper.

4. In aid of that assertion the defendant placed before the Court, inter alia, a range of publicly available documentation which, it appears, was largely sourced from the Australian Securities and Investments Commission and relevant Title Searches. Relying upon that documentation, the defendant's written submissions summarised what, in its view, it showed and what inferences the Court ought properly draw from it:

> Second Precondition: Reason to believe that the company does not have assets in the Territory sufficient to meet the defendant's costs if so ordered.
>
> 5. The Court is entitled to draw an inference against the plaintiff, in the absence of a full and frank statement of its financial affairs being provided to the Court: *Orison v Strategic Minerals Corporation NL* 91987) 77 ALR 141 at 162; *Darwin Joinery and Wrenfield Pty Ltd v Finch* [1990] NTSC unreported, at [8].
>
> 6. The company search shows that the company is a limited liability company. It has 2 shares issued, fully paid with a total of $2.00 paid for the shares. It is, literally, a "$2 company".
>
> 7. The company has at all times since 1998 been under the control of Stephen Howe. From that time, it has continuously been the subject of fixed and floating charges in favour of either National Australia Bank (until 2009) or Commonwealth Bank, suggesting that the company conducts borrowings for both chattels and for its capital requirements.
>
> 8. For a period of 7 years, the company also provided a fixed charge in favour of Kalliope Howe, who was also the registered proprietor of the business premises of the plaintiff. The plaintiff occupied those premises without a registered lease until the property was transferred away from Ms Howe in May 2010 and a lease was registered in favour of the plaintiff. The change of ownership took place after the first request for security and, notwithstanding that the defendant specifically raised the issue of transfer of the property the plaintiff refused to disclose any information in respect to it.
>
> 9. The company appears to have changed financiers from NAB to Commonwealth Bank in June 2009. The Court is entitled, in the absence of full and frank statement as to the financial position of the plaintiff, to assume that the company either (a) required additional financial assistance that NAB was not prepared to provide; (b) had breached a fundamental term of its financial arrangements with NAB resulting in NAB terminating its facilities or (c) could otherwise not service its financial commitments and had to re-finance.

> 10. For a period of 6 months in 2008 the plaintiff charged the assets of the company in favour of Cash Resources Australia. Cash Resources Australia is a debt factoring or cash flow financing company that provides cash flow assistance for financially stressed companies. Such arrangements typically involve the borrower obtaining a discounted amount of its debtor invoices directly from CRA with CRA becoming the assignee of the whole of the invoice and thereby making a profit on collection of the invoice. The arrangement with CRA is *prima facie,* a breach of the terms of the plaintiff's loan agreement with NAB.

10. The material also showed that the plaintiff did not own any real property.

Evidence of the Plaintiff/Respondent

11. The plaintiff/respondent's case was that the defendant's application for security was no more than "blind assertion", unparticularised, and lacking in any cogent evidence for reason to believe that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so. The plaintiff corporation had, it was said, a 14 year history of payments to the satisfaction of financial institutions and, in the absence of any credible evidence that it was in financial difficulty, there was no sound basis for an order that it provide security. Similarly, the plaintiff asserted that it had no known judgement debts or bad debts; all charges referred to by the defendant in its evidence had been satisfied; and there was simply no credible evidence of a "lack of ability to pay". In those circumstances the plaintiff resisted any basis for it to be "forced to disclose its financial circumstances" or to "handover confidential company documents".

12. As to disclosure, the plaintiff said that it had only been served with the bulk of the defendant's affidavit material late on the day prior to the hearing of the Application and, thus, "had no time to provide detailed documents" in response.

13. Nonetheless, the plaintiff did put before the Court three documents in an attempt to show its ongoing financial viability. The *first* of these was a letter, dated 15 September 2010, from a Mr Jamie Fava. The letter was on the letterhead of the Commonwealth Bank but the position of Mr Fava was

not disclosed. Aside from a one line reference to "recent discussions", a meeting between its author and the plaintiff on 10 September 2010, and a final one line invitation to contact Mr Fava "if you have any queries", the letter said:

> The Bank is satisfied with Veetemp's financial performance. Updated records confirm the business is showing good profits along with solid cash flow projections for the next 12 month period.

14. The *second* was a letter on the letterhead of BDO (NT). This letter is signed in such a manner as to make identification of the signatory impossible to determine, and nothing else in the letter identifies the name or position of its author. This letter confirms that BDO (NT) "act as accountants and business advisors for the [plaintiff]" and goes on to say:

> We advise that we have checked with the Australian Taxation Office and Australian Securities and Investments Commission and found the company to be up to date with all its income tax return, business activity statement and annual return lodgements.

15. The *third* was a computer statement of activity of the plaintiff corporation's *Business Online Saver* account with the Commonwealth Bank. The period of that statement is stated as "begins 25 June 2010" and "ends 20 July 2010". Its essential content is reproduced below:

Date	Transaction	Debit	Credit	Balance
25 Jun 2010	OPENING BALANCE			Nil
25 Jun	settlement		$700,000.00	$700,000.00 CR
01 Jul	CREDIT INTEREST		$517.81	$700,517.81 CR
20 Jul 2010	CLOSING BALANCE			$700,517.81 CR

16. These 3 documents were, effectively, the extent of financial disclosure made by the plaintiff; albeit that on its assertion the late service of the defendant's affidavit material upon it had precluded the provision of any further detail.

Burden of Proof

17. In *Idoport Pty Limited & Anor v National Australia Bank Limited & 8 Ors* [2001] NSWSC, Einstein J (with references omitted) said:

> 60 Whilst from one point of view it may seem inappropriate to approach the matter in terms of the strictures of burden of proof whether of a legal or forensic character, there is certainly substantial authority which is followed in these reasons, to the effect that the defendants, as applicants for security for costs, have an evidentiary burden of leading evidence to establish a prime facie entitlement to such an order and to such an order in relation to a particular amount. Normally, in any court, the party who asserts must prove in order to succeed. In [case] the word "credible" in s1335 [of the *Corporations Act* (Cth)] was said to suggest that an evidentiary burden is undertaken by the party seeking the order who must show:
>
> *"…that the material before the Court is sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, the corporation would be unable to pay the costs of that party upon disposal of the proceedings."*
>
> 61 The evidence to be relied on must have some characteristic of cogency. Furthermore, speculation as to the insolvency or financial difficulties experienced by the plaintiff company is insufficient to ground the exercise of the discretion.
>
> 62 The approach followed in these reasons is that once the defendants have led evidence to establish the above described entitlement, an evidentiary onus falls upon the plaintiffs to satisfy the Court that *taking into account all relevant factors*, the Court's discretion ought be exercised by either refusing to order security or by ordering security in some lesser amount than was sought by the defendants.

18. I was referred to, and read, a number of cases (amongst which were *Milingimbi Educational and Cultural Association Inc v Davis* [1990] NTSC 35, and *Darwin Joinery and Wrenfield Pty Ltd v Finch* NTSC No. 631 of

1990), which establish the same foundational requirements as to burden of proof in this jurisdiction.

19. So it is, in my opinion, that at the first instance I must be satisfied that the material before the Court is sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, the plaintiff corporation would be unable to pay the costs of the defendant upon disposal of the proceedings and, if I am so satisfied upon the usual standard of civil persuasion, the evidentiary onus then falls upon the plaintiff to satisfy the Court that, taking into account all relevant factors, the Court's discretion ought be exercised by either refusing to order security or by ordering security in some lesser amount than was sought by the defendants.

20. It is important also to point out that, if the evidentiary onus does ultimately fall upon the plaintiff, the authorities are clear "that a plaintiff corporation seeking to resist an application for security should place before the Court a full and frank statement of its assets and liabilities as well as those of its shareholders" (*Darwin Joinery and Wrenfield Pty Ltd v Finch, supra* at par 8).

21. Lest there be any doubt, I should also here recite section 1335 of the *Corporations Act* (Cth) to show the similarity in its terms to those of Rule 31.02 of the *Local Court Rules*:

> **Sect 1335 Costs**
>
> (1) Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.
>
> .....

Findings

22. It now falls for me to determine whether, on the material adduced before me by the defendant, I can be satisfied that "there is reason to believe" that the plaintiff corporation would be unable to pay the costs of the defendant if successful in its defence.

23. It must be said that the defendant was at something of a forensic disadvantage in satisfying the evidentiary onus upon it. The plaintiff had pointedly refused to provide any information as to its financial circumstances absent particularisation by the defendant for its "reason to believe" and clearly articulated its intention to resist the application. The defendant was, thereby, essentially left to rely upon documents of public record to evidence its case and, upon my observation, such documents were surprisingly opaque as to the true financial circumstances of the plaintiff company.

24. Nonetheless, I am satisfied upon the usual standard of civil persuasion that there is the requisite basis for a rational belief that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so. I base such belief on:

- The historical public records of the plaintiff corporation evidencing a number of transactions involving the creation of charges between the company, a related party, its Banks and, in one instance, a non-banking institution named *Cash Resources Australia* ("CRA").

- Upon the face of that documentation, the appearance that the plaintiff company was in breach of its obligations under the charge to its long standing Bank by entering into another charge with CRA and then, 6 months later in June 2009, changing Banks to the Commonwealth.

- Evidence that for a period of some 7 years the plaintiff provided a fixed charge in favour of a related person who was also the registered

proprietor of the business premises of the plaintiff; the plaintiff occupied those premises without a registered lease until the property was transferred away from the related party in May 2010; and a lease was then registered in favour of the plaintiff.

- Such change of ownership having taken place post the defendant's first request for security on 30 April 2010; and, notwithstanding the defendant having specifically raised the issue of transfer of the property with the plaintiff, the plaintiff's refusal to disclose any information in respect to it.

- None of the evidence before me disclosing any assets of any kind of the plaintiff in the NT, and such disclosure could have been simply made in aid of the plaintiff's resistance to an order for security.

- Similarly, none of the evidence before me disclosing, even in summary form, the plaintiff's current account standing with the Commonwealth Bank; a task which in my opinion could easily have been undertaken at short notice.

- My opinion that the plaintiff should have foreseen the possibility that the evidentiary onus might shift to it and, if it had nothing to hide, not to obfuscate in its disclosure of its financial circumstances to the Court.

- The fact that the plaintiff did obfuscate ultimately leaving it to little immunity from the inferences which the defendant says I ought draw.

25. That being the case, in my opinion the evidentiary onus now falls upon the plaintiff to satisfy the Court that, taking into account all relevant factors, the Court's discretion ought be exercised by either refusing to order security or by ordering security in some lesser amount than was sought by the defendants.

26. As I have pointed out at paragraph 12 above the plaintiff, in answer to the dearth of material evidencing a full and frank disclosure of its financial circumstances, asserted that to be the result of the late service upon it of the defendant's affidavit material. I do not accept that to be sufficient explanation for such dearth. It has been on notice since at least 20 July 2010 (and arguably much longer than that) that the plaintiff would bring such an application and it should have, in my opinion, and in circumstances where it always made clear its intention to resist such application, been in a position to meet the evidentiary obligation imposed upon it by such resistance (*Darwin Joinery and Wrenfield Pty Ltd v Finch, supra*).

27. As it transpired, the plaintiff strenuously denied at hearing that it ought be "forced to disclose its financial circumstances" or to "handover confidential company documents" (paragraph 11 above). That, with respect, misunderstands the law. Against the eventuality that the evidentiary onus may shift, as it has now done in my opinion, the plaintiff ought to have been prepared for that eventuality if it wished to maintain its resistance to an order for security and, as a result, has left itself in breach of its obligation referred to in paragraph 26.

28. As to the disclosure that the plaintiff did make (paragraphs 13, 14 and 15 above), I make the following observations. The *first* document from the Commonwealth Bank is effectively a letter of comfort saying that the Bank is "satisfied" with the plaintiff's "financial performance", and that it is showing "good profits" and "solid cash flow projections for the next 12 month period". The difficulty with that is, of course, that those "good profits" and "cash flow projections" have not been disclosed in any form whatsoever to the Court in aid of the plaintiff's resistance to providing security. The Court is, thereby, left to the margins of featureless assertion by a signatory of uncertain authority.

29. The *second* letter from BDO (NT) is even less satisfying, saying as it does that the plaintiff is "up to date", inter alia, with all its "annual return lodgements" when the evidence before me is that the plaintiff has not lodged a requisite company return since 2002. The letter provides no detail as to the overall status of the plaintiff's current financial circumstances and the signature and position of its author is indiscernible. In any event, evidence of currency of a corporation's annual return obligations is, in my opinion, of itself not conclusive as to its financial circumstances.

30. The *third* document is, in a sense, quite perplexing. As it is a statement of the plaintiff's *Business Online Saver* account, one might have thought that it would reflect the many transactions of a healthily trading corporation. Instead, it shows reference to only one amount being deposited as "settlement" and interest upon that amount. Even more curiously, it covers a period of less than one month and ends in July 2010 ie, almost 2 months prior to the hearing of this Application. I am left only to speculate whether this statement is in fact what it purports to be; whether there are other accounts of which I have not been made aware; and whether the closing balance remains at the disposal of the plaintiff as at the date of hearing.

31. I find, the onus having shifted to the plaintiff, that the plaintiff has failed to meet its obligation to place before the Court a full and frank statement of its assets and liabilities as well as those of its shareholders" (*Darwin Joinery and Wrenfield Pty Ltd v Finch, supra*) and that as a result, given my findings at paragraph 24 above, is unable to resist the defendant's application for security.

32. Finally, I should touch upon the remaining factors to be considered cited in *Orison v Strategic Minerals* [1987] 77 ALR 141 at 162:

> The condition for the exercise of the discretion having been satisfied, it is necessary to consider whether any order should be made. The

exercise of the discretion is made without any predisposition in favour of an order for security.

There are a number of factors to be considered which were set out in *Bryan E Fencott & Associates Pty Ltd v Evretta Pty Ltd*:

(1) Whether an order will frustrate the [plaintiff's] claim.

(2) The merits of the claim.

(3) The cause of the [plaintiff's] impecuniosity.

(4) Any delay in bringing the application for security.

33. No evidence was adduced before me to suggest that the making of an order for security will put the plaintiff in a position where it is unable to prosecute its claim. In my view its claim is plainly enough an arguable one and there is no suggestion that anything done by the defendant is responsible for any financial embarrassment facing the plaintiff. The question of delay has already been dealt with and cannot, in my opinion, be regarded as significant in the particular circumstances of this case.

Conclusion

34. This will always be a difficult balancing of interests. For mine, I do not believe that the Court should lightly enter upon orders for security for costs. In the everyday pursuit of commerce the law provides certainty of contractual terms and, in my opinion, a plaintiff ought not be dissuaded from pursuit of its ostensible contractual rights by onerous orders as to security. Similarly in my opinion, a defendant should not be deterred from assertion of its ostensible contractual rights if "there is reason to believe" that the plaintiff does not have capacity to meet any costs order against it. Be that as it may, and as was submitted by Counsel in *Idoport* (*supra*, at [33]), the jurisdiction to award security for costs must be seen as protecting the efficacy of the exercise of the jurisdiction to award costs and it is

undesirable for the Court to permit a situation to arise where a party's success is pyrrhic because an order for costs cannot be met.

35. As I have said above, the defendant in this matter was at somewhat of a forensic disadvantage and the plaintiff in, it must be said, a rather cavalier fashion, did not materially assist the Court by adducing cogent evidence as to its financial circumstances. Whilst I must keep uppermost in my mind the matters to which I have referred under the heading *Burden of Proof*, it seems that after a rigorous review of all the material before me I must stand back from the fray and objectively determine whether or not that material is sufficient for me to form a rational belief that the plaintiff corporation would be unable to pay the costs of the defendant upon disposal of the proceedings. No doubt, in the course of such an exercise, good minds will differ, but I have formed such rational belief.

36. The plaintiff, having declined to make any meaningful disclosure of its financial standing is, as a result, effectively precluded from resisting such rational belief.

37. That being the case, in my opinion the defendant/applicant is entitled to succeed in its Application.

Quantum

38. In affidavit evidence of Peggy Cheong affirmed 19 July 2010, Ms Cheong, having averred, inter alia, to being a cost assessor appointed by the Law Society of the Northern Territory, estimates the "reasonable likely costs" of defending the plaintiff's claim in the proceeding proper "...to be in the region of around $57,000 to $58,000, including disbursements for Counsel's fees and expert report costs."

39. However, and as the plaintiff points out, that estimate founds upon a trial of 5 days as opposed to the 4 days which have been allocated to it. Further, the plaintiff says that the costs attributed to the production of expert evidence

are unsupportable as no expert reports have been served upon it within the time frame prescribed by Rule 24.01 of the *Local Court Rules*. That being the case the plaintiff argues, and I agree, that the costs estimate of Ms Cheong ought be reduced by a total of $14,080.00. By my calculations, and once GST has been factored into the revised total, the estimate of Ms Cheong ($57,921.16) should be reduced to $42,433.16. Rounding up, that leaves the "reasonable likely costs" of defending the plaintiff's claim in the proceeding proper (at least in the averred opinion of Ms Cheong) in the vicinity of $42,500.00.

Orders:

1. The plaintiff/respondent in this Application pay the sum of $42,500 by way of security for costs on or before 1 October 2010.
2. Security to be by way of unconditional bank guarantee in that sum, or otherwise to the satisfaction of the Court.
3. The proceeding by the plaintiff be stayed as against the defendant until provision of that security or until further order of the Court.
4. The costs of the defendant/applicant of and incidental to this Application be reserved.

Dated this 20th day of September 2010

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JULIAN JOHNSON
JUDICIAL REGISTRAR