JUDGMENT : Martin J . Trial Division. Supreme Court of Queensland at Brisbane. 19th September 2007

[1] This is an application by the defendant ("Indigo") for orders for security for costs up to and including the last day of the trial of this action and that the action be stayed pending payment of the security. In the written outline submitted on behalf of Indigo the application is described as being *"for an order increasing the amount of security for costs to be provided by the plaintiff'*. This raises the need for consideration of UCPR 675 which I deal with below.

[2] The application has been brought in action 2763 of 2002. That action has been referred to as the "*building claim"*. It is to be heard as the same time as the trial of 10 157 of 2001 which has been referred to as the *"earthworks claim*".

[3] The trials of both actions are to be heard together and have been set down to commence on 8 October 2007. Eight weeks has been allocated for the hearing.

History and background

[4] The claims relate to two separate contracts pursuant to which the plaintiff ("Covecorp") carried out earthworks and then building work for the construction of the Great Western Super Centre at Keperra in Brisbane. Stage 1 was the earthworks component. It involved a lump sum earthworks contract in the AS2124-1986 form with some amendments. On the material referred to during the application it seems clear that there will be substantial questions concerning the terms and conditions of the contract as questions of credit will arise with respect to certain of those terms. Under that contract there was an agreed lump sum price of $500,000. The plaintiff has been paid over $2,000,000 under that contract and claims an additional $1,500,000 to $1,600,000.

[5] It is said on behalf of Indigo that the essence of the claim concerns the true nature of the contractual obligation of Covecorp to construct one of the three retaining walls that were part of the contract. There will be much evidence about the ground conditions. Covecorp claims that the conditions encountered were different from those that were the subject of the tender documents and relies upon a "*latent conditions"* claim and a claim for delay. From the pleadings, it appears that Indigo will defend on the basis that the tender documents clearly informed the tenderer about the nature of the ground conditions and that tenderers should make their own enquiries. There is also a dispute about whether a particular drawing (SK3) was part of the contract.

[6] Under the building claim, Covecorp claims approximately $1,500,000 arising out of numerous variations. Indigo counterclaims for loss of rent in the sum of $439,000 caused by the delays in opening the shopping centre.

[7] This will be a complex trial involving considerable expert and lay evidence, and in which questions of credit will play an important part in the determination of the relevant terms of one of the contracts.

[8] As often occurs in cases of this nature, the form of the dispute has changed over time and so have the pleadings. In fact, each party has leave to further amend and those draft pleadings were tendered during the hearing. It is simply not possible for me to make any attempt to gauge the likelihood of the plaintiff's succeeding in a case like this.

[9] This is not the first application for security for costs. On 29 August 2002, Muir J (as he then was) made orders by consent for security in the sum of $70,000 up to the first day of trial in the building claim and a similar order in the earthworks claim for $100,000. That security was eventually provided.

[I0] When the first application for security was made the defendant estimated its costs, in both actions, to be $615,000 up to and including the first day of trial. There was agreement between the parties (and this formed the basis of the order) that security would be provided in the combined amount of $170,000, that is, $415,000 less than the amount estimated by Indigo.

[11] From the date of that order until 6 June 2006, there were no further communications between the parties about the issue of costs. On the latter date, Indigo's solicitors asserted in a letter to Covecorp's solicitors that the security order was insufficient. The concerns of Indigo were set out in the letter which concluded: *"In light of the above, please have your client provide us with documentary evidence of its ability to pay the costs of our client in excess of $170,000. It should be ordered to do so, by close of business on 13 June 2006."*

[12] On 13 June 2006, Covecorp's solicitors replied and asked: *"Can you please advise us how much security your client would like."*

[13] There was no response to that inquiry until 8 May 2007 when Indigo's solicitors wrote to Covecorp's solicitors. That letter (wrongly dated 8 May 2006) commences: "Now that the vast majority of the interlocutory steps in this proceeding have concluded and both parties have a very clear understanding of the costs involved in prosecuting and defending the proceeding, my client would like to return to the issue of security for costs. On this topic, I refer to my letter dated 6 June 2006."

[14] The letter then goes on to list a number of matters which had, in the author's view, extended the costs of preparation quite substantially. The letter concludes: *"Please have your client provide further security in the form of a bank guarantee in the sum of $430,000 by close of business on 23 May 2007, failing which I am instructed to apply for the relevant orders."*

[15] Covecorp responded on 21 May 2007 contesting Indigo's ability to obtain security in some respects and seeking further information, but conceding that it was prepared to provide further security if it was obliged to do so.

[16] No response was made to that request until this application was filed on 16 August 2007. It was served on Covecorp on 22 August 2007.

[17] At the hearing of the application, Mr O'Shea SC, appearing for Covecorp, conceded that there was credible testimony that Covecorp would be unable to pay the costs of the action if so ordered. Thus, Indigo had passed the first threshold in an application of this type.

Issues

[18] The issues that arise out of the evidence and the arguments are:

(a) Given the earlier order for security, does UCPR 675 apply to this application?

(b) What effect, if any, does the time which has elapsed while the parties completed interlocutory steps have on this application?

(c) What effect, if any, do Indigo's counterclaims have?

(d) If security is ordered, in what amount should it be ordered?

UCPR 675

[19] Rule 675 is contained within Chapter 7, Part 1- Security for costs. It provides: *"The court may set aside or vary an order made under this part in special circumstances."*

[20] Indigo contends that it is not seeking to vary an existing order but to make an application under the inherent jurisdiction of the Court to control its own processes. In its outline of submissions, Indigo says that the application is made pursuant to UCPR 670. In any event, Indigo says, if this is an application seeking to vary an existing order, then the "*special circumstances*" requirement in UCPR 675 has been satisfied.

[21] I do not see how this application can be anything but an application to vary another order, whether that application is made in the inherent jurisdiction or under UCPR 670. If granted, this application will yield orders which will change the effect of the order made in August 2002 which required security in the amounts referred to above to be provided for Indigo's costs up to and including the first day of trial. No order was made granting liberty to apply for further security. (cf Iron Gates Pty Ltd (in liquidation) & Anor v Richmond River Shire Council & Ors [2006] QSC 141 at [41])

Has UCPR 675 been satisfied?

[22] The capacity of the Court to vary an order for security without recourse to UCPR 675 was considered in **Goodman v Lorenzen** [2000] QCA 11 where at [6] McPherson JA said: *"The order [for security for costs] was interlocutory in character, and interlocutory orders are, at least to some extent and in some circumstances, susceptible of variation either by the judge who made them or otherwise without necessity for an appeal. What is, however, generally required as a prerequisite to varying or setting aside such an order is new material providing evidence of additional relevant facts, which have arisen or been discovered since the earlier application or order was made, that require a different order from that originally made, or would have done so at the time when that order was made."*

[23] The application of UCPR 675 was considered by White J in Iron Gates. Her Honour was satisfied that "special circumstances" had been shown in a case where, after the original order for security had been granted, the nature of the action had become much more complex. This case has also, since the original order was made, become more complex: there have been a number of amended pleadings, the written statements of the witnesses are more substantial than first thought, the expected length of the trial has increased from three to eight weeks, and there have been persistent disputes over disclosure.

[24] In the light of those circumstances, Indigo has discharged its onus of showing "special circumstances" and so another order may be made if otherwise justified.

Effect of delay

[25] The Court has an unfettered discretion when determining an application for security for costs: ***Sir Lindsay Parkinson & Co v Triplan Ltd*** [1973] QB 609. Of course, such a discretion must be exercised judicially having regard to the circumstances of the case.

[26] UCPR 672 sets out a number of discretionary matters to which the Court may have regard. Although delay in making an application is not listed, it is still a relevant factor for consideration.

[27] The principles to be applied in this respect seem to be:

- An application for security must be made promptly: ***Foss Export Agency Pty Ltd v Trotman*** (1949) 67 WN (NSW) 1; ***Buckley v Bennell*** (1974) 1 ACLR 301 at 308; **Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd (**1985) 1 NSWLR 114 at 123.
- It would be unfair to allow a defendant security if that defendant has stood by and allowed the plaintiff to work on its case and incur significant expense: ***Smail v Burton; Re Insurance Associates Pty Ltd (in liq)*** (1975) 1 ACLR 74 at 75; ***King v Commercial Bank of Australia Ltd*** [1921] VLR 48 at 54; ***Stack v Brisbane City Council*** (1996) 71 FCR 523 at 531.
- Although delay is a significant factor, there is no rule requiring refusal of an application on that basis alone. It is a factor to be taken into account with other discretionary criteria. ***Commonwealth of Australia and Another v Cable Water Skiing (Australia) Ltd*** (1994) 14 ACSR 760 at 762; ***Rhema Ventures Pty Ltd v Stenders*** [1993] 2 Qd R 326 at 332-3 per Lee J. For example, security for future costs was awarded to the defendant in Commonwealth v Cable where there had been a delay of 4 years after the proceedings had commenced.

- The issue of delay will weigh more significantly in some cases than others. **Crypta Fuels Pty Ltd v Svelte Corporation Pty Ltd** (1995) 19 ACSR 68 at 71. In Crypta Fuels Lehane J noted that the cases in which orders for security were made despite delay have usually involved one or both of two factors, those being:
  a) "*...that the hearing or resumed hearing was not immediately imminent...*"; and
  b) "*...that there has been some forewarning: usually correspondence concerning the financial standing of those who might benefit from the success of an applicant or plaintiff, and often detailed correspondence foreshadowing an application for security for costs.*" (at 71).
- To similar effect was the statement by French J in ***Bryan E Fencott P/L v Eretta PIL*** (1987) 16 FCR 497 at 514:
  "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 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."
- In ***Buckley v Bennell*** (1974) 1 ACLR 301 at 309 Moffitt P put the matter as follows:
  "The right to seek security for costs and to stay proceedings, with the possible result that a claim for damages is frustrated, is a powerful weapon. Therefore, the litigant who seeks to use it against his opponent is at risk of not having it available, unless the application is made and persevered with in circumstances involving the least oppression of his opponent. 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." [emphasis added].

[28] When determining the weight to be afforded the effect of delay, the following issues need to be considered:

(a) is there an explanation for the delay and, if so, what is its weight? (**Bailey v Beagle Management Pty Ltd** (2001) 105 FCR 136 at 144; where the length of the proceedings was not foreseen when they commenced (***Buckley v Bennell Design and Constructions Pty Ltd*** (1974) 1 ACLR 301 at 308); ***Thirteenth Corp Pty Ltd v State*** (2004) 50 ACSR 425; ***James v Australia and New Zealand Banking Group Ltd (No 1)*** (1985) 9 FCR 442 at 446; ***Stack v Brisbane City Council (***1996) 71 FCR 523 at 532; per Drummond J.)

(b) the level of prejudice caused to the plaintiff if required to lodge security at a late stage (***Rhema Ventures Pty Ltd v Stenders*** [1993] 2 Qd R 326 at 333)

(c) the timing of the application for security (***James v Australia and New Zealand Banking Group Ltd (No 1)*** (1985) 9 FCR 442)

[29] Applying those principles, what effect does Indigo's delay have on this application? There was a significant delay, of some 11 months, from Indigo's letter of 6 June 2006 until it again raised the issue in its letter of 8 May 2007. Covecorp, having received no response to its letter of 13 June 2006 was not required to pursue the issue but was required to continue to prepare its case. Richard Groom, the solicitor with the carriage of Covecorp's case, deposes in his affidavit (paragraph 5) to the extent of the work performed in preparing Covecorp's case and says that the costs incurred in doing so during that 11 month period exceeded $400,000. All this was done during a time when it was not unreasonable for Covecorp to proceed on the basis that Indigo was not pressing its claim for security.

[30] Another relevant matter is that, when the first order for security was made, Indigo had estimated its costs up until the first day of trial to be $615,000. Notwithstanding that, it agreed, and the Court ordered, security for a lesser amount. Indigo now says that its costs until the first day will be greater.

[31] Although Indigo raised the issue of the provision of further security in June 206, its failure to respond to Covecorp's subsequent inquiry and its lack of action for a further 11 months lead me to the conclusion that the correct approach in these circumstances is not to allow any security for costs incurred prior to the service of the application: ***Felsink Pty Ltd v City of Maribyrnong*** [2007] VSC 49, ***Buckley v Bennell*** (1974) 1 ACLR 301 at 309. That leaves the question of security for future costs.

Counterclaims

[32] Indigo has filed counterclaims in both proceedings. Covecorp contends that substantially the same facts are going to be canvassed in determining the claims and the counterclaims and that I should take that into account on Covecorp's side when considering security. In ***Sydmar Pty Ltd v Statewise Developments Pty Ltd*** (1987) 73 ALR 289, Smart J said that a factor relevant to the exercise of discretion when ordering security was:

"(*I-1). Where substantially the same facts are likely to be canvassed in determining the action and the cross action. The Court would be slow to allow a situation where the action is stayed because of the inability to provide security but the cross action covering substantially the same factual areas proceeds.* (at 300).

[33] Indigo's answer to this is that, if as a result of an inability to provide security Covecorp's actions were stayed, then Indigo would consent to a stay of its counterclaims. Mr O'Shea SC rejected that, saying that Covecorp should not have to suffer the counterclaims hanging over its head.

[34] It appears likely to me that, for at least some part of the trial, the evidence to be considered will be relevant to both claim and counterclaim, and that the arguments arising will relate to both claim and counterclaim. But it also appears to me that, as Mr O'Shea SC conceded, Indigo is not a "c*ommercial aggressor*" in the sense used by Douglas J in ***Interline Hydrocarbon Inc v Brenzil Pty*** Ltd [2005] QSC 109 at [31]-[33]. The material before me does not allow a conclusion that there will be such a close identity of evidence for both claim and counterclaim that security should be declined on that ground.

What security should be ordered?

[35] Although this application has been heard only one month before the trial is due to commence that, of itself, is not a disqualification. I have already said that security will not be ordered for the period prior to the application being made, so I now need to consider what, if any, security should be ordered for the period after the application was filed.

[36] I am satisfied that:
(a) there is credible testimony that Covecorp would be unable to pay the costs of the actions if so ordered;
(b) that an order for security for costs would not stifle the proceedings;
(c) a suitable order would not be oppressive to Covecorp; and
(d) there are no other considerations which would prevent the making of this order.

[37] Indigo seeks an order for those costs which it will incur up to the end of the trial. That is not the usual order. An order will generally be made for security up to the first day of trial and it is then open to the trial judge to consider any further applications. (***Maggbury Pty Ltd v Hafele Australia Pty Ltd*** [2001] 2 Qd R 187 at 195, ***Combined Property Industries (Qld) Pty Ltd v Pullenvale Estates Pty Ltd*** (2001) 19 ACLC 765 at 769)

[38] I think that is the appropriate course to take in these circumstances.

[39] Covecorp estimates its costs from 3 August 2007 until the first day of trial to be $446,912. This includes a sum of $348,000 for preparation by two counsel for 40 days each. That would require both counsel to have been and to be engaged on this, and only this, matter for almost the entire period between the filing of the application and the first day of trial. I think that is excessive and that 20 days is more appropriate. I am also of the opinion that the agreed reduction in the original costs estimate from $615,000 to $170,000 should be taken into account. The defendant, having made that agreement, should not now be allowed to move from it.

[40] I calculate the security which is to be ordered in the following way:

Estimated costs to date of application	$563,600.00
Plus costs from application to first day of trial	$402,220.00
(being the estimated sum of $446,912 less 10% deduction	
to account for costs incurred on the counterclaims only)	
TOTAL	$965,820.00
Less initial estimate of costs to the first day of trial	$615,000.00
TOTAL	$350,820.00
Less reduction in the fee allowed for preparation	$174,000.00
TOTAL	$176,820.00
Plus costs for the first day of trial	$10,000.00
TOTAL	$186,820.00

[41] In the earlier order for security made by Muir J the amount ordered was split between the earthworks claim and the building claim in the proportion of, approximately, 60:40. I was not addressed on this issue but I see no reason not to apply that proportion in this order.

[42] I make the following orders:

In 10157 of 2001

1. Within 14 days of today, the plaintiff give security for the defendant's costs up to and including the first day of trial in the sum of $112,092 in a form satisfactory to the Principal Registrar of the Court and in default further proceedings to be stayed.
2. Liberty to either party to apply on two days notice in writing to the other.
3. The plaintiff pay to the defendant the defendant's costs of and incidental to the application.

In 2763 of 2002

1. Within 14 days of today, the plaintiff give security for the defendant's costs up to and including the first day of trial in the sum of $74,728 in a form satisfactory to the Principal Registrar of the Court and in default further proceedings to be stayed.
2. Liberty to either party to apply on two days notice in writing to the other.
3. The plaintiff pay to the defendant the defendant's costs of and incidental to the application.

P L O' Shea SC, with him M H Hindman, for the plaintiff/respondent instructed by Holding Redlich for the plaintiff/respondent
L F Kelly, with D O' Sullivan, for the defendant/applicant instructed b y DLA Phillips Fox for the defendant/applicant