

DISTRICT COURT OF QUEENSLAND

CITATION: *Mitchell v Jobst* [2022] QDC 218

PARTIES: **WILLIAM JAMES MITCHELL**
(plaintiff/respondent)

v

KARL JOBST
(defendant/applicant)

FILE NO: 136/21

DIVISION: Civil

PROCEEDING: Claim/Application

ORIGINATING COURT: Cairns

DELIVERED ON: 19 August 2022

DELIVERED AT: Cairns

HEARING DATE: 28 July 2022

JUDGE: Morzone QC DCJ

ORDER:

- 1. The plaintiff will further provide security for the defendant's costs of the proceeding in the amount of \$15,000.**
- 2. The plaintiff give the further security by way of deposit into the plaintiff's solicitor's trust account for that purpose on condition that the amount is to remain in their trust account and is only to be released by order of the Court or by the written consent of the parties.**
- 3. Unless either party applies for, or the parties otherwise agree on, a different costs order, within 14 days of this judgment - the plaintiff will pay the defendant's costs of the application to be assessed on the standard basis.**

CATCHWORDS: CIVIL PROCEEDING - CIVIL PROCEDURE – APPLICATION – Application for security for costs – competing approaches on a broad-brush assessments of actual and anticipated costs.

Legislation

Uniform Civil Procedure Rules 1999 (Qld) rr 386, 670, 671, 672.

Cases

Murphy Operator v Gladstone Ports Corp (No 6) [2020] QSC 192

COUNSEL: M Jonsson QC for the Plaintiff/Respondent
 MT de Waard for the Defendant/Applicant

SOLICITORS: Miller Bou Samra Lawyers for the Plaintiff/Respondent
 Mills Oakley for the Defendant/Applicant

Summary

- [1] The defendant applies for security for costs in the amount of \$50,000 pursuant to r 670 of the *Uniform Civil Procedure Rules 1999* (Qld).
- [2] The plaintiff sues the defendant for over \$450,000 for damages for defamation, which is contested and will likely require a trial. After the defendant first raised concerns about security for costs, by way of an earlier compromise, the plaintiff provided security for costs by way of deposit of \$50,000 into his solicitor's trust account in November 2021. The defendant now applies for further security for a further \$50,000 having regard to the contest disclosed by the pleadings. The plaintiff opposes the application asserting that the agreed security is sufficient absent any material change of circumstances, and a requirement for more would be oppressive.
- [3] Rule 670 empowers the court to order the plaintiff to give the security that the court considers appropriate for the defendant's costs of and incidental to the proceeding, subject to rr 671 and 672 and consideration of prerequisite and discretionary factors in the exercise of the court's discretion, and assessment. The prerequisite is met here since the defendant ordinarily lives outside Australia.
- [4] The determinative issues are:
 1. Will an order for additional security for costs be oppressive?
 2. If not, how much additional security is appropriate?
- [5] It seems to me that further security for costs is appropriate. In my view further security in addition to the amount already deposited will not be oppressive in the amount to be ordered. I prefer the estimates of the plaintiff's solicitor of standard basis costs moderated up to and including the first day of trial and one additional for preparation for trial, then apply a discount of about 25% for contingencies to settle on \$65,000 excluding GST as an appropriate amount of security for costs.

- [6] Accordingly, I will order the plaintiff to pay further security in the amount of \$15,000 by deposit into the plaintiff's solicitor's trust account for that specific purpose.

Will an order for additional security for costs be oppressive?

- [7] The plaintiff argues that the discretion to order additional security for costs should not be permitted to be invoked by the defendant as an instrument of oppression.
- [8] The plaintiff contrasts the defendant's quantification of anticipated costs up to and including the first day of trial in an aggregate amount of \$138,000 excluding GST at the 8 November 2021 compromise, with the defendant's revised estimate of \$210,000 excluding GST contended here. The plaintiff relies on the absence of any material change in circumstances justifying that dramatic departure and change to the *status quo* of the security held.
- [9] The defendant argues that the revised estimate was caused by the unanticipated contest disclosed by the pleadings. The defendant points to the plaintiff's positive denial of his pleading of the statutory defence of contextual truth. The critical allegations are in paragraph 18 of his amended reply file on 10 November 2021, where the defendant stated that the following contextual imputations are substantially true:
- (i) the plaintiff was publicly exposed as having cheated to achieve his record scores in the video arcade game, Donkey Kong;
 - (ii) the plaintiff was banned from submitting scores to Twin Galaxies LLC for cheating;
 - (iii) the plaintiff had planned to create a video that he could fraudulently use as evidence that he had achieved a score of 1,062,800 in the video arcade game, Donkey Kong;
 - (iv) the plaintiff had callously expressed joy at the thought of Mr Smith's death;
 - (v) the plaintiff uses litigation to force third parties to recognise his achievements in videogaming.
- [10] It seems that, notwithstanding the very serious nature of the allegations, the defendant did not anticipate the need to prove the allegations and has found himself deficient in preparation for a contest on the issues. It is argued that the practical consequence is that the trial will increase by 2 days to 5 days and require more arduous preparation proofing those relevant witnesses and preparing their written and oral testimony, apparently not previously expected or accounted for in the estimated costs proffered on 27 October 2021 before the compromise on 8 November 2022. This is borne out in the comparison of the defendant's estimate proffered on 27 October 2021 and the estimate set out in the affidavit of the defendant's solicitor sworn on 5 July 2022.
- [11] Whilst the plaintiff may perceive that there has been no material change of circumstances on surface, I am prepared to accept that the defendant has found

himself wanting as to the nature and scope of proving his case before pleading his case.

- [12] In my view further security in the amount ordered here, in addition to the amount already deposited, will not be oppressive in the circumstances.

How much additional security should be ordered?

- [13] The applicant defendant bears the onus to show a *prima facie* entitlement to an order for security for costs, and if established, that burden shifts to the respondent plaintiff to satisfy the court to either refuse or reduce the amount in the exercise of the court's discretion.

- [14] The approach to assessing the appropriate amount for an order for security for costs, is the subject of considerable authority.

- [15] The principles were conveniently distilled in *Murphy Operator v Gladstone Ports Corp (No 6)* [2020] QSC 192 at [119], which I respectfully adopt as follows:

1. parties are not encouraged to devote extensive resources to questions of security;
2. assessing likely costs in large-scale litigation is not a simple matter and necessarily involves elements of uncertainty;
3. the amount does not need to be determined with mathematical precision and the process does not require a full assessment of costs but by its nature requires a "broad brush" assessment;
4. it is not incumbent on the defendant to present evidence on a security for costs application as though it were preparing a costs statement for past costs, or supplementing the statement as if for a final costs assessment;
5. the process of estimation undertaken by a judge determining a security for costs application embodies to a considerable extent necessary reliance on the "feel" of the case the judge has after considering relevant factors, and the adoption of a broad approach to arrive at a pragmatic outcome which is regarded as appropriate;
6. while the Court does not seek to provide the defendant with an indemnity for the expenses of defending the claim, it should provide protection against the risk that an order for [standard] costs in the defendant's favour might not be satisfied; and
7. it is relevant to consider whether the security sought is proportionate to the quantum of the claim.

- [16] Whilst the exercise does not call for a detailed assessment of indemnification for costs, the court ought be able to have sufficient confidence in estimating the anticipated costs on the standard basis up to the first day of trial. I must confess lack of confidence in the defendant's contended estimate in support of this application based on actual and anticipated solicitor and own client costs. I find it

difficult to reconcile with the previous iteration proffered in November 2022, and the scale of costs relevant to a costs assessment on the standard basis.

- [17] The defendant’s solicitor starts from a base of the “*defendant’s fees and disbursements including Counsel’s fees from the commencement of the Proceeding up to and including the first day of trial will cost in the order of at least \$200,000 (excluding GST)*” including:

Description	Estimated professional fees of Mills Oakley and disbursements, including Counsel’s fees (excluding GST)
Reviewing and considering the Claim and Statement of Claim and providing advice to the defendant in respect of same	\$7,500
Drafting the Notice of Intention to Defend and Defence, and correspondence and conferences with the defendant to take instructions to assist with the preparation of same, including Counsel settling the Notice of Intention to Defend and Defence	\$25,000
Reviewing and considering the Reply providing advice to the defendant in respect of same	\$5,000
Drafting the amendments to the Defence, and correspondence and conferences with the defendant to take instructions to assist with the preparation of same, including Counsel settling the amendments to the Defence	\$15,000
Drafting the interlocutory application brought by the defendant to transfer the proceeding to a different registry, including an allowance to take instructions, correspondence with the plaintiff and consider the plaintiff’s response (including affidavit material in reply), brief Counsel and appear at the hearing of the application, including an allowance for Counsel to consider the brief, draft supporting material and appear at the hearing plus travel costs Notably, this application has been adjourned to the registry and will potentially require a further hearing	\$25,000
Review of the defendant’s documents and preparation and delivery of the defendant’s List of Documents	\$12,500
Review of the plaintiff’s List of Documents and Supplementary List of Documents, and the relevant documents	\$5,000
Preparing for and attending the mediation between the parties, including an allowance for Counsel to consider the brief and appear at the mediation plus travel costs	\$25,000
Preparation and exchange of witness summaries, including considering witness summaries served by the plaintiff	\$30,000
The defendant’s preparation for trial, which we now estimate	\$40,000

to be set down for 5 days in light of the matters pleaded in the Reply. That will require at least 5 days preparation beforehand by both us and Counsel	
Any additional or incidental work costing of our time and Counsel's time	\$15,000
Drafting the interlocutory application brought by the defendant for security for costs, including an allowance to take instructions, correspondence with the plaintiff and consider the plaintiff's response (including affidavit material in reply), brief Counsel and appear at the hearing of the application, including an allowance for Counsel to consider the brief, draft supporting material and appear at the hearing plus travel costs	\$5,000
TOTAL	\$210,000

[18] The plaintiff's solicitor then deposes that:

"35. It is my experience that the usual recovery of costs on a standard assessment, for a matter in the District Court is approximately 65% to 70% of a part's actual professional fees incurred (based on the hoarsely rates charged by professional staff in my team at Mills Oakley) and 90-100% of a party's disbursement. I have discounted my estimates accordingly.

36. The defendant applies for security in the amount of \$50,000 which is calculated based on 50% of the defendant's estimated fees and outlays off at least \$200,000, noting that \$50,000 has already been paid by the plaintiff as security for costs."

[19] It seems to me that the defendant's solicitor's approach starts with the defendant's actual and anticipated solicitor and own client costs from which 50% discount is applied to arrive at an estimate recoverable standard costs and contingencies for an anticipated 5-day trial. While inconsistent with the last sentence of paragraph 35, it is consistent with the solicitor's deposition in paragraphs 31 that the defendant has already "incurred costs" in the order of \$122,000 (being \$97,000 for solicitors and \$25,000 for counsel), which equates to the costs for the steps completed to the date of swearing his affidavit on 22 June 2022.

[20] In contrast, the plaintiff's solicitors' approach uses the defendant's estimated recoverable standard basis costs as the baseline, then applies a discount of 25% for contingencies. Accordingly, he estimates of the defendant's discounted recoverable costs and outlays as \$74,475 exclusive of GST, calculated up to and including attending for a 2-day trial as follows:

Description	Estimate of Professional Fees
Perusal of statement of claim	\$2,500.00
Drafting defence	\$3,500.00

Perusing reply	\$1,000.00
Interlocutory application of the defendant to transfer the proceedings to a different Registry	\$5,000.00
Giving and receiving disclosure	\$5,000.00
Attending at the mediation on 19 May 2022 including ½ proportion of the mediator's fee	\$10,000.00
Defendant's application for security for costs	\$5,000.00
Preparation for a trial estimated to be set down for two days	\$20,000.00
Attendance at a trial in the District Court for two days	\$30,000.00
General care and conduct	\$12,300.00
General disbursements (not including counsel's fees) including setting down fee	\$5,000.00
Sub-Total	\$99,300.00
Less Discount by 25%	\$24,825.00
Total	\$74,475.00
Less amount held as Security For Costs	\$50,000.00
Additional Security	\$24,475.00

- [21] Given the conventional approach to assess a defendant's costs up to and inclusive of the first day of trial, Queens Counsel for the plaintiff properly conceded that the plaintiffs' solicitor's allowance on that account could quite properly be reduced to \$7,500, being the allowance for solicitor's costs and counsel's fees applicable to the first day of the trial appearing in the defendant's solicitor's initial assessment. This would reduce the estimate by \$22,500 for attendance at trial, which after applying the 25% discount would see the plaintiff's solicitor's assessment revised to \$57,600.
- [22] The defendant's recent estimates can also be contrasted with the prospective costs of \$138,000 exclusive of GST estimated by the defendant's solicitor in his letter to the plaintiff's solicitor dated 27 October 2021. At that time the defendant's solicitor explained how on the "*present case*" he roughly estimates the prospective costs "*from today*" as being \$78,000 for solicitors, \$58,000 for counsel and \$4,000 for mediation costs. This roughly equates with the itemised analysis that followed in his letter, which was premised on a trial "*in the order of 3 days, possible longer, depending on the number of witnesses required to be called*".
- [23] By this application, the defendant's solicitor now anticipates that the costs will increase by about \$56,000 for the same period - from service of the reply to the first day of the trial - because the contest in the reply requires additional witness preparation for a five-day trial. By comparison to the earlier estimate, the increase is found in these items:
1. Review and instructions on the reply are now quantified at \$5,000 being **\$3,000** more than the \$2,000 estimated on 27 October 2021.
 2. Amendments to the defence not anticipated on 27 October 2021 are now included at **\$15,000.00**.
 3. Two interlocutory applications equating to \$30,000 are now included, being **\$8000** more than the one application anticipated on 27 October 2021;
 4. Mediation costs are now quantified at \$25,000 being **\$5,500** more than the \$19,500 estimated on 27 October 2021;

5. Preparation and exchange of witness summaries are now estimated at \$30,000 being **\$7000** more than the \$23,000 estimated on 27 October 2021;
 6. Preparation for trial now estimated at \$40,000 being **\$18,000** more than the \$22,000 estimated on 27 October 2021;
- [24] I do not accept any prospective entitlement for costs in preparation of the amended defence. The presumptive imposition of s 386 of the *Uniform Civil Procedure Rules* burdens the defendant with any costs thrown away by his successive pleading amendments. Further, it seems to me that the cost of \$25,000 attributed to drafting the defence in the first place is excessive.
- [25] The mediation has been conducted but again I'm unable to discern how the aggregate costs are said to increase to \$25,000, which also appears excessive.
- [26] Even accepting the defendant's apparent surprise to positively prove the allegations he alleged in the amended defence, I am unable to discern any justification for the increase of \$2500 for the plaintiff's review and instructions for the reply. It is also unclear to me how the contest warrants any increase in witness summaries (if required at all) and the designation of 2 additional days of preparation for trial. Neither party has elected a jury trial, and there is no requirement for the exchange of witness summaries before trial. Even if required, I think that the preparation of witness summaries would be amply covered by the trial preparation generally, or at least, such any extra cost burden can be revisited if a requirement for the exchange of witness summaries eventuates. In any event, I do not accept that the asserted need for an additional 2 days of trial preparation (or trial) is made out. I will allow an extra day of preparation for the purposes of this application.
- [27] Whilst I'm not satisfied to refuse the application, I am persuaded by the plaintiff that the amount warrants reduction in the exercise of the court's discretion. I prefer the estimates of the plaintiff's solicitor of standard basis costs moderated up to and including the first day of trial and one additional for preparation for trial, then apply a discount of about 25% for contingencies to settle on \$65,000 excluding GST as an appropriate amount of security for costs.

Orders

- [28] For these reasons, I will allow the application and make the following orders:
1. The plaintiff will further provide security for the defendant's costs of the proceeding in the amount of \$15,000.
 2. The plaintiff give the further security by way of deposit into the plaintiff's solicitor's trust account for that purpose on condition that the amount is to remain in their trust account and is only to be released by order of the Court or by the written consent of the parties.
 3. Unless either party applies for, or the parties otherwise agree on, a different costs order, within 14 days of this judgment - the plaintiff will pay the defendant's costs of the application to be assessed on the standard basis.

Judge DP Morzone QC