

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : RED CHAMBER CO -v- ROBERTS
[No 2] [2015] WASC 398

CORAM : MITCHELL J

HEARD : 8 OCTOBER 2015

DELIVERED : 8 OCTOBER 2015

PUBLISHED : 21 OCTOBER 2015

FILE NO/S : CIV 1482 of 2015

BETWEEN : RED CHAMBER CO
First Plaintiff

RED CHAMBER AUSTRALIA PTY LTD
Second Plaintiff

AND

PETER JAMES ROBERTS
First Defendant

CAROLE GODBOLT-ROBERTS
Second Defendant

CARTESIAN CONSULTING PTY LTD
Third Defendant

Catchwords:

Practice and procedure - Security for costs - Undertaking provided by non-party corporation

Legislation:

Corporations Act 2001 (Cth), s 1335

Result:

Application dismissed, subject to the filing of undertakings

Category: B

Representation:

Counsel:

First Plaintiff	:	Mr C R Bailey
Second Plaintiff	:	Mr C R Bailey
First Defendant	:	No appearance
Second Defendant	:	Mr A Metaxas
Third Defendant	:	Mr A Metaxas

Solicitors:

First Plaintiff	:	Williams + Hughes
Second Plaintiff	:	Williams + Hughes
First Defendant	:	No appearance
Second Defendant	:	Metaxas & Hager
Third Defendant	:	Metaxas & Hager

Case(s) referred to in judgment(s):

Austcorp Project Number 20 Pty Ltd v LM Investment Management Ltd (in liq)
[2014] FCA 1371
Field Camp Services Pty Ltd v Site Accommodation Pty Ltd [2011]
WASCA 118
Red Chamber Co v Red Chamber Foods Australia Pty Ltd [2015] WASC 198
Sugarloaf Hill Nominees Pty Ltd v Rewards Projects Ltd [2011] WASC 19
Tirops Safety Technology Pty Ltd v Lazer Safe Pty Ltd [2005] WASC 164
Unified Pty Ltd v The Cancer Council Western Australia Inc [No 3] [2011]
WASC 161
Westonia Earthmoving Pty Ltd v Cliffs Asia Pacific Iron Ore Pty Ltd [2013]
WASC 57

MITCHELL J:

(This judgment was delivered extemporaneously and has been edited from the court's record of the decision.)

1 The second and third defendants in these proceedings apply for security for costs and a stay of proceedings until security is given under s 1335 of the *Corporations Act 2001* (Cth). That section empowers me to make such orders if it appears by credible testimony that there is reason to believe that the plaintiffs, which are corporations, will be unable to pay the defendants' costs if they are successful in their defence.

Background

2 The first plaintiff (Red Chamber Co) and the second plaintiff (Red Chamber Australia) are companies incorporated in the United States and Australia respectively. The first defendant, Mr Roberts, is a former director of Red Chamber Australia and formerly held the shares of Red Chamber Australia on trust for Red Chamber Co. The second defendant, Ms Godbolt-Roberts, is Mr Roberts' wife. The third defendant (Cartesian) is a company controlled by Ms Godbolt-Roberts.

3 In brief, the plaintiffs claim that Mr Roberts breached the fiduciary duty he owed to them. The breach of fiduciary duty is said to involve Mr Roberts diverting the business and property of Red Chamber Australia to companies which he and Ms Godbolt-Roberts controlled. It is also alleged that Mr Roberts breached his fiduciary duty by causing Red Chamber Australia to enter into a consultancy agreement with, and make payments to, Cartesian. The plaintiffs allege that Ms Godbolt-Roberts and Cartesian knowingly assisted Mr Roberts in that breach of fiduciary duty, which is said to involve a fraudulent and dishonest design.

4 Ms Godbolt-Roberts and Cartesian admit that Red Chamber Australia and Cartesian entered into the consultancy agreement and received payments under that agreement, but say that Mr Roberts was authorised to enter into the agreement and did so with the knowledge of Red Chamber Co. They deny knowingly assisting Mr Roberts in any fraudulent and dishonest design, claim that Ms Godbolt-Roberts at all times understood Mr Roberts to be the legal owner of the shares in Red Chamber Australia, and claim that they were entitled to assume that Mr Roberts had authority to engage Cartesian on behalf of Red Chamber Australia.

5 The background to these proceedings, and the manner in which the current claims arose in the proceedings, are set out in my decision in *Red Chamber Co v Red Chamber Foods Australia Pty Ltd*.¹ As I noted in that case, Red Chamber Australia carried on a seafood business which was, in substance, transferred to Red Chamber Foods Australia Pty Ltd (Red Chamber Foods), prompting the commencement of earlier related proceedings. It appears that that business has since been transferred to Red Chamber Company Pty Ltd (Red Chamber Company), which is not a party to these proceedings. In the reasons I gave in *Red Chamber Co*, I concluded that the plaintiffs have a good arguable case against the defendants, based on affidavit material which had been filed by the plaintiffs at that time.

6 The pleadings are closed in the proceedings, and the parties are currently engaged in discovery.

Application

7 Ms Godbolt-Roberts and Cartesian seek an order requiring the plaintiffs to give security for costs in the proceedings. The basis for the application, disclosed in an affidavit of Gregory Emerson Metaxas sworn 22 September 2015, is an apprehension that the plaintiffs will not have the capacity to satisfy any costs order made in favour of Ms Godbolt-Roberts or Cartesian. Mr Metaxas deposes to a belief that the plaintiffs have no assets in Australia, that the business of Red Chamber Australia was transferred to Red Chamber Foods in about January 2014, and that the business was further transferred to Red Chamber Company. He also annexed a draft bill of costs estimating that Ms Godbolt-Roberts and Cartesian may incur costs of approximately \$109,000 in the proceedings.

8 The plaintiffs have filed an undertaking by Red Chamber Company to pay any costs in this action that the plaintiffs are ordered to pay to any of the defendants.

Plaintiffs' financial position

9 The plaintiffs have filed an affidavit of James William Sheridan sworn 7 October 2015. Mr Sheridan is the managing director of Red Chamber Australia, Red Chamber Foods and Red Chamber Company. He deposes to Red Chamber Company acquiring the seafood business formerly conducted by Red Chamber Australia and Red Chamber Foods in around July 2015.

¹ *Red Chamber Co v Red Chamber Foods Australia Pty Ltd* [2015] WASC 198 [3] - [13].

10 Mr Sheridan's affidavit annexes a balance sheet for Red Chamber Company which shows it to have current assets of approximately \$3.2 million, mostly comprising inventory (approximately \$2.2 million) and trade debtors (approximately \$1.7 million). Cash accounts are in overdraft by approximately \$800,000. Total liabilities are approximately \$3.8 million, principally comprising trade creditors (approximately \$750,000) and a debt of approximately \$3.1 million owed to Red Chamber Foods. It is common ground between the parties that the debt of \$3.1 million is owed in respect of the transfer of the business from Red Chamber Foods to Red Chamber Company. The correctness of the accounts is verified by Mr Sheridan and there is no evidence to suggest that they are not accurate.

11 Mr Sheridan offers an undertaking by Red Chamber Foods not to call up more than \$1.5 million of the debt owed to it until the conclusion of these proceedings and until any outstanding costs orders in favour of Ms Godbolt-Roberts and Cartesian have been discharged without providing at least 21 days' notice in writing to Ms Godbolt-Roberts and Cartesian. In his submissions to me this morning, counsel for the plaintiffs indicated that he was instructed that Red Chamber Foods would be prepared to vary that undertaking by deleting the reference to 21 days' notice, so that it becomes an absolute undertaking that the debt will not be called up until the proceedings have concluded and any outstanding costs orders have been discharged.

12 Mr Sheridan also offers an undertaking by Red Chamber Company to notify Ms Godbolt-Roberts and Cartesian if the available funds in that company's trading account fall below \$150,000, or of any event of default, material adverse change, cancellation or closure of that facility. The facility is a trade debtors finance facility under which the National Australia Bank will lend up to the lesser of 80% of the value of Red Chamber Company's trade debtors or \$3 million. As at 30 September 2015, Red Chamber Company had funds of \$490,000 available to draw down on the facility, although obviously that position depends on the value of trade debts owed to the company.

13 In my view, there is credible testimony that there is reason to believe that the plaintiffs will be unable to pay Ms Godbolt-Roberts and Cartesian's costs if they are successful in their defences. There is no evidence that the second plaintiff has any significant funds, or that the first plaintiff has any assets in Australia which could be used to satisfy a costs order.

Applicable principles

14 It is well-established that, when that threshold requirement is satisfied, s 1335 of the *Corporations Act* confers discretion to order security for costs or decline to do so. I regard the discretion conferred by s 1335 to be enlivened in this case. That discretion is to be exercised judicially, and previous cases have identified a number of non-exclusive factors which may inform the exercise of the discretion. Ultimately, an important concern is to strike a balance between the interests of the plaintiff corporation in conducting litigation to protect or enforce its rights, and the interests of a defendant in being able to recover costs if it is successful.²

15 In my view, this is a case where it is appropriate to require that some security be provided for Ms Godbolt-Roberts and Cartesian's costs, on the basis that there is sufficient reason to apprehend that the plaintiffs do not have the funds themselves to pay any costs order against them, but have the capacity to secure the provision of some security.

16 However, the provision of the undertakings by Red Chamber Company, supported by the undertaking offered by Red Chamber Foods in the modified terms suggested by counsel for the plaintiffs, is an appropriate level of security. It appears from its accounts that Red Chamber Company operates a substantial business with significant turnover, and has the capacity to meet Ms Godbolt-Roberts and Cartesian's estimated costs as things stand.

17 I accept that the position is not absolutely certain, in that Red Chamber Company's liabilities exceed its assets. However, balancing the interests of the plaintiffs in conducting litigation to enforce their claimed rights, and the interests of a defendant in being able to recover costs if successful, does not require absolute certainty of recovery.

18 As Newnes JA noted in *Field Camp Services Pty Ltd*:³

There are no hard and fast principles to be applied in determining the appropriate amount to be provided by way of security for costs. While it is clear that the amount of the security to be provided must be related to the costs likely to be incurred by the respondent on the appeal, in ordering security for costs the court does not endeavour to give a complete and

² See, for example, *Westonia Earthmoving Pty Ltd v Cliffs Asia Pacific Iron Ore Pty Ltd* [2013] WASC 57 [5] - [6]; *Sugarloaf Hill Nominees Pty Ltd v Rewards Projects Ltd* [2011] WASC 19 [31]; *Unified Pty Ltd v The Cancer Council Western Australia Inc [No 3]* [2011] WASC 161 [10]; *Tirops Safety Technology Pty Ltd v Lazer Safe Pty Ltd* [2005] WASC 164 [43].

³ *Field Camp Services Pty Ltd v Site Accommodation Pty Ltd* [2011] WASC 118 [27].

certain indemnity to the respondent: *Brundza v Robbie & Co (No 2)* [1952] HCA 49; (1952) 88 CLR 171, 175. The amount of security involves an exercise of discretion and is to be determined by what the court considers just in the circumstances.

- 19 The significance of an undertaking offered by another corporation was considered by Gleeson J in *Austcorp Project Number 20 Pty Ltd v LM Investment Management Ltd*.⁴ His Honour observed:

In *Jazabas Pty Ltd v Haddad* [2007] NSWCA 291; (2007) 65 ACSR 276 at [79] and [80] ('Jazabas'), McClellan CJ at CL cited with approval passages from *Epping Plaza Fresh Fruit & Vegetables Pty Ltd v Bevendale Pty Ltd* [1999] 2 VR 191 and *Intercraft Cabinets Pty Ltd v Sampas Pty Ltd* (1997) 18 WAR 306, which emphasised that the availability of an undertaking is an important factor, but is not decisive, in deciding whether to order security for costs. In each of those passages, the Court was concerned with undertakings given by individuals standing behind the relevant company, as opposed to a corporate entity.

Mr Lazarus argued that it was a matter of no significance that the undertaking came from corporate entities rather than an individual. On the other hand, the defendants contended that an undertaking from corporate entities should be given little to no weight. It is not necessary to resolve this issue: what is plainly important is that the value of the undertaking is relevant to the question of whether an order for security for costs should be made.

- 20 I agree that the availability of an undertaking is an important, but not decisive, factor, and the critical issue in determining the weight to be given to the undertaking is the value of the undertaking.

Conclusion

- 21 In the present circumstances, I am satisfied that the turnover, trade debtors and inventory of Red Chamber Company indicate that it has the capacity to pay Ms Godbolt-Roberts' and Cartesian's estimated costs in the event that they are successful in their defences.

- 22 If the position in relation to Red Chamber Company's bank facility changes, it will be required to notify the defendants, who will then be in a position to seek substituted security.

- 23 There is no reason to think that the debt owed to Red Chamber Foods will interfere with Red Chamber Company's capacity to pay any costs order, given the undertaking which has been contemplated.

⁴ *Austcorp Project Number 20 Pty Ltd v LM Investment Management Ltd (in liq)* [2014] FCA 1371 [32] - [33].

MITCHELL J

24 Counsel for Ms Godbolt-Roberts and Cartesian compared the situation facing the business in 2012 - 2013, when it was operated by Red Chamber Australia, with the current balance sheet. He submitted that the business in 2012 - 2013 was in a much more secure financial position than is currently the case. That may be so, but the question is whether the company offering the undertaking has a sufficient capacity to pay any costs order. As I have indicated, I am satisfied that Red Chamber Company has that capacity.

25 In all the circumstances of the present case, I consider that an undertaking by Red Chamber Company to pay any costs awarded to the defendants, supported by an undertaking by Red Chamber Foods not to call up more than \$1.5 million of the debt owed to it, would provide a just measure of security. Once adequate security of that nature has been provided, there is no warrant for the court to require further security for Ms Godbolt-Roberts' and Cartesian's costs.

26 It is appropriate that the undertakings I have referred to be committed to writing and formally filed. On the provision of those undertakings, I would be prepared to make an order dismissing the application for security for costs which recites the undertakings which have been given.