SUPREME COURT OF QUEENSLAND

CITATION:	*DJ Fry Developments Pty Ltd v Permanent Mortgages Pty Limited & Anor* [2021] QSC 350
PARTIES:	**D.J. FRY DEVELOPMENTS PTY LTD** **ACN 065 214 226 AS TRUSTEE FOR THE DJ FRY FAMILY TRUST** (plaintiff) **v** **PERMANENT MORTGAGES PTY LTD** ACN 097 176 362 (first defendant) **LA TROBE FINANCIAL SERVICES PTY LIMITED** ACN 006 479 527 (second defendant)
FILE NO/S:	SC No 185 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	17 December 2021
DELIVERED AT:	Brisbane
HEARING DATE:	15 December 2021
JUDGE:	Crow J
ORDER:	**1. The plaintiff's application for summary judgment filed 1 October 2021 is dismissed.** **2. The plaintiff provide security for the defendants' costs of and incidental to the proceeding up to the first day of the trial in the amount of $100,000.00, by way of payment into Court by 31 January 2022.** **3. That, if the security requested is not provided, the proceeding is stayed until the security is provided.** **4. The plaintiff pay the defendants' costs on the standard basis in respect of both the application filed by the defendants on 23 August 2021 and the application filed by the plaintiff on 1 October 2021.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – where the plaintiff sought to develop land into residential lots – where the first defendant provided the money to do so and took a mortgage over the land – where the plaintiff acquired various development approvals, subject to third party rights - where the plaintiff defaulted on the mortgage prior to commencing development – where the defendant exercised their right of sale as mortgagee – where plaintiff alleges that the defendant failed to take proper care as required in exercising their power of sale mainly due to a failure to properly advertise the property as having development approval – where the plaintiff seeks summary judgment as the defendants have no reasonable prospect of defending the claim – whether summary judgment ought to be granted

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – AMOUNT AND NATURE OF SECURITY – where the plaintiff makes claim against the defendants for their alleged failure to properly discharge their duties in relation to their power of sale as mortgagee – where the defendant seek a partial indemnity for their costs up to the first day of trial – where the plaintiff and directors of the plaintiff claim to be impecunious – where the plaintiff submits that any order for security for costs would stifle litigation – whether, on the balance, security for costs ought to be ordered

Civil Proceedings Act 2011 (Qld), s 103ZA
Corporations Act 2001 (Cth), s 133, s 420
Property Law Act 1974 (Qld), s 85
Uniform Civil Procedure Rules 1999 (Qld), r 292, r 670

Bell Wholesale Co Ltd v Gates Export Corp (No 2) (1984) 2 FCR 1; [1984] FCA 34, applied
Equititrust Ltd v Tucker [2020] QSC 269, applied
Halvorson & Anor v Birkenhead Super Pty Limited atf Birkenhead Superannuation Benefits Fund [2021] QCA 211, followed
Stella Life Spa Pty Ltd v L Corp Investments Pty Ltd [2017] QSC 333, applied

COUNSEL: D W Honchin for the plaintiff
K M Riedel for the first and second defendant

SOLICITORS: Access Legal for the plaintiff
King & Wood Mallesons for the first and second defendant

[1] By claim filed 11 March 2013, the plaintiff, DJ Fry Developments Pty Ltd (ACN 065 214 226) as Trustee for The DJ Fry Family Trust ("DJ Fry"), sought an account or alternatively damages against the first defendant, Permanent Mortgages Pty Ltd

(ACN 097 176 362) ("Permanent Mortgages") and the second defendant, La Trobe Financial Services Pty Limited (ACN 006 479 527) ("La Trobe Financial") for the sum of $2,579,594.32.

[2] By its amended statement of claim (ASOC), DJ Fry increased its claim to the sum of $3,272,110.32. The defendants deny liability.

[3] Following the filing of the ASOC on 19 February 2021, the defendants, on 23 August 2021, filed an application seeking security for costs up to the first day of trial in the amount of $145,000. On 1 October 2021, DJ Fry filed an application seeking summary judgment under r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). At the commencement of the hearing, the defendants were granted leave to file an amended defence.

[4] It is convenient to determine the latter application prior to consideration of the defendant's application for security for costs as, plainly, if DJ Fry is to receive summary judgement in its favour then the defendants cannot obtain security for costs.

Summary Judgment for the Plaintiff

[5] Rule 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") provides:

> "**292 Summary judgment for plaintiff**
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> (1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.
>
> (2) If the court is satisfied that—
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[6] With regards to the principles governing an application under r 292, in *Halvorson & Anor v Birkenhead Super Pty Limited atf Birkenhead Superannuation Benefits Fund* [2021] QCA 211 Bowskill SJA said:

> "[25] The parties agreed that the judge at first instance correctly articulated the legal principles which apply to an application for summary judgment under r 292 of the Uniform Civil Procedure Rules 1999, by reference to this Court's decision in *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232. His Honour was cognisant of the need to be satisfied the appellants (defendants) 'ha[d] no real prospect of successfully defending all or a part of the plaintiff's claim' and that 'there is no need for a trial of the claim' and in those respects of the 'high degree of certainty about the ultimate outcome of the proceeding'

> which is required before exercising the discretion to give judgment summarily."

[7] In order for a plaintiff to demonstrate there is no real prospect of a defendant successfully defending the plaintiff's claim and that there is no need for a trial of the claim or part of the claim, regard must be had, not only to the facts relevant to any proposed defence, but also to the stage that the claim has reached and the interlocutory steps which have been taken.

[8] The ASOC and the amended defence (AD) show that many of the allegations between the parties are admitted. There is no contest as to the relationship between the parties and their business transactions are admitted.

[9] In short, DJ Fry intended to develop a block of land at 1003 Norman Road, Parkhurst and sought finance from Permanent Mortgages with La Trobe Financial being the mortgage manager on behalf of Permanent Mortgages. It is admitted that on 15 September 2006, La Trobe Financial as mortgage manager offered a loan of $900,000 upon an interest-only repayment basis for a period of one year to advance to DJ Fry. It is admitted that on 22 December 2006 ACVAL Turner Valuers provided a valuation to La Trobe Financial valuing the property at $1,986,000 without any developmental approval.

[10] Paragraph 7 of the ASOC, is admitted by the defendants, and pleads:

> "The plaintiff entered into a mortgage agreement with the first defendant on or about. The plaintiff will rely on the whole of the mortgage agreement for its full force and effect. It was an express term of the mortgage agreement that upon default, the plaintiff was entitled to exercise the power of sale of the proposed development or property."

[11] Paragraph 8 of the ASOC is denied and alleges that it was an implied term of the mortgage agreement that the power of sale by the first defendant would be exercised bona fide and that any sale would be of fair market value. There may well be little in this point given the statutory duties imposed by law under s 85(1) of the *Property Law Act* and s 420A of the *Corporations Act*.

[12] On 9 March 2007, $900,000 was advanced to DJ Fry. After the advance of that sum, on 16 March 2007, DJ Fry became registered owner of two of the three parcels of land comprising the proposed property development. The two parcels of land owned by DJ Fry were encumbered with a mortgage in favour of Permanent Mortgages. Between May and 20 June 2007, DJ Fry borrowed another $172,000 from Permanent Mortgages to fund the purchase of another property. There was then a significant delay in the proposed property development as the development applications were subject to court proceedings.

[13] Three years later, on 18 October 2010, DJ Fry succeeded in obtaining an order from the Planning and Environment Court of Queensland at Townsville to reconfigure the development site and an adjacent lot, not owned by DJ Fry, from three lots into 49 lots. Of course, this order was subject to several conditions.

[14] In November 2010, DJ Fry entered into a heads of agreement with a builder for the construction of residential buildings upon "all 48 allotments".

[15] Paragraph 14 of the ASOC is admitted by the defendants. By it, DJ Fry pleads it was in default of repayments under the mortgage and on 28 September 2011, La Trobe Financial as mortgage manager for Permanent Mortgages, issued a notice of exercise of power of sale under s 84 of the *Property Law Act.* At 28 September 2011, the total amount owed by DJ Fry to Permanent Mortgages was $1,122,889.68.

[16] As is usual in any form for notice of exercise of power of sale, the default notice sought rectification from DJ Fry by payment of the arrears owing under the mortgage, which was limited to the sum of $13,266.98. It also is an admitted fact that DJ Fry failed to remedy the default notice and that therefore, Permanent Mortgages exercised its power of sale over the property. It is further admitted that Permanent Mortgages or La Trobe Financial as its agent, engaged real estate agents Century 21 at Rockhampton to advertise and sell the property by public auction.

[17] It is an agreed fact that the proposed property development was advertised for sale in the Morning Bulletin newspaper at Rockhampton on 16 and 23 February 2013, 2 and 9 March 2013, and the advertisement expressly referred to the property development as being a "DA subdivision… development application for 49 lots – 3 stages".

[18] In addition to the advertising in the Morning Bulletin, the defendants allege that the property was also advertised by sale for auction in the Courier Mail, on realestate.com.au, on realcommercial.com.au, and on the Century 21 website. As the plaintiff's reply filed 2 August 2019 does not address this positive allegation, the additional advertisements for sale are admitted facts.

[19] Paragraph 20 of the ASOC alleges that Permanent Mortgages obtained a valuation that valued the proposed development at $800,000. It is expressly denied by the defendants on the specific basis that the valuation obtained by the defendants from Opteon on 11 February 2013 valued the property at $500,000 for market value or $400,000 for a forced sale,[1] with express reference to significant considerations raised in the Opteon valuation that there was:

> "[A] main contentious issue involved with the proposed development of this site, is the access to legal discharge points for the sewerage and water … taking into account the potential of legal access not being available to services without the additional agreements via external property owners, it is apparent that this proposed development will not occur, and its highest and best use is considered to be for the continued residential use without obvious land bank potential with advanced level of planning from the current permit."

[20] A factual contest arises in respect of paragraph 21 of the ASOC. Paragraph 21 pleads:

> "On 13th March 2013 at about 4:00pm a public auction for the sale of the proposed development property was conducted by Century 21 at Rooms in the Century 21 office at 31 East [Street] Rockhampton. At the public auction the attendees were advised by the auctioneer that

[1] A second valuation obtained from JLA Valuers, valued the land at $480, 000.

there was no development approval for the proposed development property."

[21] Paragraph 10 of the AD is not referred to in the plaintiff's reply, and accordingly as a positive allegation of fact it is taken to be admitted. This is particularly relevant given that in paragraph 10(c) of the AD, there is a specific allegation that Dennis Fry, principal of DJ Fry, advised registered bidders that the site had development approval in place. Perhaps more importantly, it is accepted that all of the registered bidders were given a copy of the development approval prior to the auction.

[22] Thus, the nub of the plaintiff's claim is not in respect of the conduct of the public auction but rather failure to properly advertise prior to the auction. This is where the case becomes complicated. The plaintiff's case is best seen in paragraphs 29(ii), (iv), (v) and (vii) of the ASOC which provide as follows:

> "(ii) advertising of the prosed [sic] development property for sale with the existence of a development application in written advertisements for the land and announcing at the public auction that there was no development approval for the proposed development property; and/or
>
> …
>
> (iv) failing to actively and effectively advertise and/or have an appropriately focused or directed marketing campaign to sell the proposed development property;
>
> (v) the advertisement for public auction incorrectly referred to a "development application for 49 lots" when in fact the proposed development property had a development approval for 49 lots under the *Sustainable Planning Act* 2009 which attached to the land; and/or
>
> …
>
> (vii) selling the proposed development property without regard to the existence of the development approval for the proposed development property."

[23] Exhibit DJF6[2] contains the advertisement with the heading "DA SUBDIVISION". The second dot point in the advertisement provides "Development Application for 49 lots – 3 stages".

[24] The plaintiff's case is that the advertisement presented to the public that the subject property only had a development application when, in fact, the property had development approval – this is said to have misled potential buyers.

[25] That, however, is not entirely correct. The correct position may be seen from the development approval itself which shows that the development application approved the reconfiguration of three lots of land into 48 lots of land. However, the plaintiff was only the registered proprietor of two of those lots. The plaintiff was not the

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[2] To the affidavit of Dennis John Fry filed 1 October 2021.

registered proprietor of Lot 1 on RP 608173, that lot was owned by Mrs O'Donnell (Mrs O'Donnell's lot").

[26] Furthermore, the conditions of the development approval required both the reconfiguration of Mrs O'Donnell's lot and the acquisition of sewerage easement rights over adjacent land also not owned by the plaintiff nor by Mrs O'Donnell. Clearly, as the plaintiff did not own Mrs O'Donnell's lot the defendant had no right of sale over it and, with respect to the necessary easements required on adjacent land, the defendants also did not have rights.

[27] There is a reasonable argument to be made that advertising the land as having development approval would have been misleading. However, it is also true to say that two of the lots subject to sale did have development approval, but the approval could not have practical effect without the acquisition of third-party rights – which plainly could not be sold by the defendants.

[28] Therefore, difficult questions arise as to what ought to have been the proper form of advertising in this complicated situation. Indeed, in the plaintiff's written submissions, the acronym "DA" is expressly used to make reference to development approval and there is at least a reasonable argument that a reader of the advertisement would have presumed that the "DA SUBDIVISION" was in fact a reference to a development approval.

[29] Perhaps the question becomes what a reasonable residential property developer would have construed by reading the advertisement and currently in that respect there is no evidence. It seems to me the proper conclusion is that the plaintiff has at least an argument that the advertisement is misleading, however, when pressed as to what the advertisement should have contained, counsel for the applicants agreed one way in which the advertisement ought to have read could have been: "developmental approval subject to conditions including the acquisition of rights from independent third parties." Counsel for the applicant then submitted that it would not necessarily have to be put so technically, but that it must "put people on notice that there was a development approval in place...".

[30] If that was so, then difficult questions arise as to whether that form of advertisement would have garnered any more interest, and if so, what, type of interest, in terms of potential property developers in acquiring the subject property than the advertisement that was in fact advertised. Suffice to say, numerous issues factual issues arise upon the face of the pleadings. There is considerable doubt as to the scope of duty of care being accurately pleaded in the ASOC and there is an absence of pleading of causation.

[31] I conclude that the plaintiff has not satisfied me that the defendant has no real prospects of successfully defending all or part of the plaintiff's claim and that there is no need for the trial. The application for summary judgment is therefore dismissed.

Application for Security of Costs

[32] The defendants' application for security of costs is expressed to be brought pursuant to r 670(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) or alternatively s 133(5) of the *Corporations Act* 2001, s 103ZA of the *Civil Proceedings Act* 2011 (Qld) or the inherent jurisdiction of the court.

[33] The principles under either source of power to order security for costs are similar. In particular, the court's jurisdiction to order security costs under s 133(5) of the *Corporations Act* 2001 is the same as r 671(a) of the UCPR, namely that there is reason to believe that the plaintiff corporation will be unable to pay the defendant's costs if ordered to pay them.[3]

[34] It is trite that the court engages in a two-stage process, namely whether the prerequisites under r 671 of the UCPR are satisfied and if so, whether the court should exercise its discretion to order security of costs, and if so in what amount. The factors listed in r 672 of the UCPR are relevant to the second stage.

[35] As to the first stage, it is an inescapable conclusion that there is reason to believe the plaintiff company will be unable to pay the costs order if ordered against it. As set out above, it is admitted by DJ Fry that it could not meet the arrears payments sought in the default notice, a sum of a little over $13,000. DJ Fry has not and cannot repay the principal loan of $1,122,899.68. DJ Fry has a paid-up share capital of $2 and no assets. It furthermore has a debt of some $400,000 to "Speedy Finance Pty Ltd" secured by a charge registered under the Personal and Property Securities Register in favour of Speedy Finance Pty Ltd. DJ Fry has no assets, only debt, and it would appear that the directors of DJ Fry publicly stated that they have no assets or income.[4]

[36] Mr Fry's deposes that the company DJ Fry is impecunious.[5]

[37] Rule 672 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides:

> "**672 Discretionary factors for security for costs**
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> In deciding whether to make an order, the court may have regard to any of the following matters—
>
> (a) the means of those standing behind the proceeding;
>
> (b) the prospects of success or merits of the proceeding;
>
> (c) the genuineness of the proceeding;
>
> (d) for rule 671 (a) —the impecuniosity of a corporation;
>
> (e) whether the plaintiff's impecuniosity is attributable to the defendant's conduct;
>
> (f) whether the plaintiff is effectively in the position of a defendant;
>
> (g) whether an order for security for costs would be oppressive;
>
> (h) whether an order for security for costs would stifle the proceeding;
>
> (i) whether the proceeding involves a matter of public importance;

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3 See generally *Stella Life Spa Pty Ltd v L Corp Investments Pty Ltd* [2017] QSC 333.

4 Exhibit JAM-1, page 8 to the affidavit of Justin Anthony McDonnell filed 23 August 2021.

5 Affidavit of Dennis John Fry filed 1 October 2021.

(j) whether there has been an admission or payment into court;

(k) whether delay by the plaintiff in starting the proceeding has prejudiced the defendant;

(l) whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;

(m) the costs of the proceeding."

[38] Paragraphs 45-53 of Mr Fry's affidavit filed 1 October 2021 depose as the circumstances regarding DJ Fry's position with respect to security of costs. There is no suggestion in the affidavit that Mr and Mrs Fry or the beneficiaries of the DJ Fry Family Trust are persons of means standing behind the proceedings. To the contrary, in paragraph 47 the implication is that the development project which failed "represents the financial result of our life's work."

[39] The proceeding is complicated. DJ Fry's case is based upon a failure to properly advertise for the sale of the subdivision. A copy of the advertisement is contained in Exhibit DJF6[6] which shows the 49 lots the subject of the proposed subdivision at 1003 Norman Road, Parkhurst, advertised as a DA subdivision, particulars including development application for 49 lots – 3 stages. DJ Fry argues that the defendants were negligent in relying upon the Opteon valuation of 11 February 2013 being a valuation undertaken by Mr Booth, a certified practising valuer of Opteon.

[40] Importantly, on page 3 of the 11 February 2013 valuation by Opteon, the valuer said:

> "Taking into account the potential of legal access not being available to services without the additional agreements via external property owners, it is apparent that this proposed development will not occur, and its highest and best use is considered to be for continued residential use without obvious land bank potential with advanced level of planning for the current permit."

[41] The proceeding brought by DJ Fry raises an interesting question of whether the defendants are negligent in failing to rely on an independent valuer's opinion as to the valuation of the proposed property development. That is not an easy, but not impossible, task. DJ Fry argues that it had secured the necessary additional agreements with external property owners and accordingly, the significant impediment to the increased value had been removed. However, it is plain that Permanent Mortgages, as mortgagee in possession, was not a party to the additional agreements and therefore had no enforceable legal rights in respect of the additional agreements.

[42] I cannot conclude that the plaintiff has good prospects of success on the materials currently available, however, there are too many issues to be tried to form a concluded view upon liability or quantum. I accept that the plaintiffs are genuine in their bringing of the proceedings. Although via paragraph 46 of Mr Fry's affidavit filed 1 October 2021, Mr Fry asserts that the plaintiff is impecunious as a result of the defendants' breach of duty in exercising their power of sale on 14 March 2013, I

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6 To the affidavit of Dennis John Fry filed 1 October 2021.

cannot accept such an assertion when it is an admitted fact that the plaintiffs were unable to remedy their default for a small amount of money, and, as has been shown, was significantly mortgaged to other financiers.

[43] I do not consider that an order for security of costs would be oppressive however there is legitimate concern given the poor financial status of the plaintiff DJ Fry that an order for costs may stifle the proceeding. In paragraph 49 of his affidavit filed 1 October 2021, Mr Fry deposes that the order sought by the defendants would prevent the plaintiff from prosecuting its case and not enable the merits of the case to be heard.

[44] In my view there is no evidence to suggest that matters (i) to (m) of r 672 are relevant. The oppressiveness and stifling of proceedings need to be taken into account.

[45] In *Equititrust Ltd v Tucker* [2020] QSC 269, Bond J at paragraphs 70-73 stated:

> **"Stifling the litigation?**
>
> [70] The plaintiff resists the orders sought by the defendants on the grounds that they would stifle or frustrate the litigation. I accept the Cowen defendants' submission that the same principles inform the Court's approach to that issue whether the resistance is founded on a suggestion that the litigation might be stifled by ordering security in a higher quantum than the plaintiff's litigation funder wishes to meet, or on a suggestion that the litigation might be stifled by ordering security in a form other than the form which the litigation funder wishes to provide.
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> [71] The leading authority in this regard is *Bell Wholesale Co Ltd v Gates Export Corp (No 2)* (1984) 2 FCR 1 at 4, where Sheppard, Morling and Neaves JJ observed:
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> > 'In our opinion a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means. It is not for the party seeking security to raise the matter; it is an essential part of the case of a company seeking to resist an order for security on the ground that the granting of security will frustrate the litigation to raise the issue of the impecuniosity of those whom **the litigation will benefit and to prove the necessary facts**.'
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> [72] That approach has been approved by McHugh J in *PS Chellaram & Co Ltd v China Ocean Shipping Co* (1991) 102 ALR 321 at 323, by the New South Wales Court of Appeal in *Hession v Century 21 South Pacific Ltd (in liq)* (1992) 28 NSWLR 120 at 123, and by Macrossan CJ in the Queensland Court of Appeal in *Impex Pty Ltd v Crowner Products Ltd*

(1994) 13 ACSR 440 at 446. It has been followed many times in single judge decisions.

[73] A litigation funder in Vannin's position is plainly a party who should be regarded as a party standing behind the plaintiff within the conception of the Bell Wholesale observations: see *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [81] per Austin J. There is evidence of Vannin's unwillingness to fund the plaintiff in certain circumstances, but as Walton J recently observed in *Ollerenshaw v The Uniting Church in Australia Property Trust (NSW)* [2017] NSWSC 1637 at [49], 'a proceeding cannot be regarded as stultified unless those who stand behind the impecunious plaintiff are unable (not unwilling) to provide the requisite security for costs.'"

(Emphasis added.)

[46] Mr Fry in his affidavit filed 1 October 2021 says in respect of this issue:

"46. The plaintiff is impecunious as a direct result of the Defendants' breach of duty to the plaintiff in exercising their power of sale, on 14 March 2013.

47. My wife and I are the controllers of the plaintiff and the beneficiaries of the Trust of which the plaintiff is the trustee. We are advanced in years and the development at Rockhampton, the subject of the claim, represents the financial result of our life's work, whereas, the defendants are large and prosperous financial institutions.

48. Consequently, the adverse effect of an order for security for costs, with which the plaintiff cannot comply, would far exceed the adverse effect of an unpaid order for costs on the defendants.

49. The order sought by the defendants would prevent the plaintiff from prosecuting its case and not enable the merits of the plaintiff's case to the heard."

[47] Mr Fry certainly directly raises the impecuniosity of the plaintiff company but does not directly raise the impecuniosity of those to whom litigation will benefit directly. Perhaps the phrase "the development at Rockhampton, the subject of the claim, represents the financial result of our life's work" does raise an inference that Mr and Mrs Fry are impecunious. However, I am unprepared to act upon that inference, as it is necessary for those facts to be proved,[7] and they have not been. Despite the desirability of providing personal undertakings from the directors', with evidence that such undertaking has some substance, being raised, it has not been answered. This issue was raised by the defendants in their written submissions prior to the commencement of the application. The issue was raised in the application and Mr and Mrs Fry, who may have offered security in the proceedings do not offer an

7 *Bell Wholesale Co Ltd v Gates Export Corp (No 2)* (1984) 2 FCR 1 at 4.

undertaking, nor a guarantee and have not disclosed the value of their real property nor any other assets they own.

[48] The need to prove the necessary facts of impecuniosity not only of the plaintiff but of those standing behind the plaintiff is plain. This need is not met by Mr Fry's claim at paragraph 47 that he and his wife are advanced in years, and the claim represents the result of their life's work, whereas the defendants are large and prosperous financial institutions. Whilst I consider that the proceedings are genuinely brought, I cannot conclude that an order for costs will stifle litigation.

[49] On balance, I have concluded that it is a proper exercise of this court's discretion to award for security of costs. Whilst the defendant's seek partial indemnity in the amount of $145, 000, I consider it is appropriate to order that security be provided in the sum of $100, 000.