JUDGMENT No. 536 / 93

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION

No. G18 of 1993

BETWEEN: STARTUNE PTY. LTD. (ACN 010 963 587)

Applicant

AND: ULTRA TUNE SYSTEMS (AUSTRALIA) PTY. LTD. (ACN 006 406 622)

Respondent

AND: ULTRA TUNE SYSTEMS (AUSTRALIA) PTY. LTD. (ACN 006 406 622)

Cross-Claimant

AND: STARTUNE PTY. LTD. (ACN 010 963 587)

First Cross-Respondent

AND: MICHELLE ANNE SCHLOITHE

Second Cross-Respondent

JUDGE MAKING ORDER: Cooper J.
WHERE MADE: Brisbane
DATE OF ORDER: 6 August, 1993

MINUTES OF ORDER

THE COURT ORDERS:

1. The applicant provide security for the costs of the respondent of the proceedings, excluding the cross-claim, in the sum of THIRTY THOUSAND DOLLARS ($30,000.00) in a form satisfactory to the District Registrar of the Court.

2. The proceedings instituted on the applicant's application and statement of claim be stayed until security for costs is provided.

3. The applicant, Startune Pty. Ltd. pay the costs of the respondent of and incidental to the notice of motion to be taxed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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AND: MICHELLE ANNE SCHLOITHE

Second Cross-Respondent

CORAM: Cooper J.

PLACE: Brisbane

DATE: 6 August, 1993

REASONS FOR JUDGMENT

This is an application by the respondent for an order for security for costs. The material establishes that the applicant (in the principal proceedings) is impecunious and Counsel for the applicant does not suggest otherwise. There is no material to suggest and it was not submitted that the impecuniosity was caused by the conduct complained of by the applicant in its statement of claim. The material establishes that the records of the Australian Securities Commission show two

directors of the applicant. One, Darryl Raymond Schloithe, was declared bankrupt on 22 October, 1992. There is no material before the court as to the financial circumstances of the other, Robert Arthur Ashely. The applicant has a paid up capital of $2.00.

I am satisfied that there is reason to believe that the applicant will be unable to pay the costs of the respondent if the respondent is successful in its defence of the applicant's proceedings. The requirements of section 1335(1) of the Corporations Law are therefore established. Of course, the court is not bound to make an order under section 1335 of the Corporations Law or section 56 of the Federal Court of Australia Act 1976 and retains a discretion as to whether or not security for costs will be ordered. The discretion is to be exercised having regard to whether the interests of justice will be best served in any particular case by making or refusing an order for security for costs (Gentry Bros. Pty. Ltd. v. Wilson Brown & Associates Pty. Ltd. (1992) 8 ACSR 405 at 411).

Counsel for the respondent submitted that the circumstances weighing heavily in favour of the making of an order were the undoubted impecuniosity (Harpur v. Ariadne Australia Limited [1984] 2 Qd.R. 523 at 529 - 530), that there is no evidence and it has not been submitted that to order security would frustrate the litigation (Bell Wholesale Co. Ltd. v. Gates Export Corporation (1984) 2 F.C.R. 1 (FC) at 4), and that there is no causal link between the impecuniosity and the conduct complained of (Fat-sel Pty. Ltd. v. Brambles Holdings Ltd. (1985) A.T.P.R. 40-544 at 46,428).

Counsel for the applicant submits that there are discretionary grounds against granting security. Firstly, it is submitted that there is a substantial overlap of the issues and facts raised in the applicant's claim against the respondent and in the applicant's defence of the cross-claim by the respondents (Sydmar Pty. Ltd. v. Statewide Developments Pty. Ltd. (1987) 5 A.C.L.C. 480 at 484). Secondly, it is submitted that the applicant was forced into court to bring the proceedings by the "self help" action taken by the respondent. That is, the proceedings are essentially "defensive" (Hellar Factors Pty. Ltd. v. John Arnold's Surf Shop Pty. Ltd. (1979) C.L.C. 40-571 at 32,449; Sydmar Pty. Ltd. at 484). Thirdly, it is submitted that there had been delay in bringing the application for security for costs (Buckley v. Bennett Design & Constructions Pty. Ltd. (1974) 1 A.C.L.R. 301; Sydmar Pty. Ltd. at 484).

The applicant seeks in the proceedings damages for breach of a franchise agreement made on or about 1 September, 1989, damages for breach of an agreement allegedly made in August, 1992 whereby it was agreed that the respondent would procure a purchaser to buy the franchise from the applicant, damages for misleading and deceptive conduct in making representations leading to the alleged August, 1992 agreement, and damages and other relief consequent upon the applicant on 16 November, 1992 entering into possession of the premises where the franchise business was operating and thereafter operating the business until 22 November, 1992.

The respondent by its defence denies that it breached the franchise agreement, denies the making of the alleged agreement in August, 1992 or at all, denies that it made the representations alleged, alleges that the entry into possession

of the premises and franchise business was with the consent of the applicant and denies that the applicant is entitled to damages or any consequential damages in consequence thereof.

The respondent by its cross-claim seeks to recover $34,248.00 being the balance of legal fees agreed to be paid by the applicant and another under a written agreement dated 18 June, 1991 in consequence of proceedings between the parties in the Supreme Court of Queensland together with $5,624.05 being money claimed as payable by the applicant under the franchise agreement to the respondent.

By its defence to the cross-claim the applicant alleges that on 14 April, 1992 the parties orally agreed that the applicant would not be obliged to pay the sum of $34,248.00 if the applicant assigned its interest in the franchise agreement to a Mr. Kriedemann or a company associated with him or to some other assignee acceptable to the respondent. There is no allegation that the applicant performed its obligation to transfer the business. Indeed on the facts as pleaded and central to the applicant's causes of action in the principal application, it did not do so and remained in possession until November, 1992. Rather, it is alleged that the oral agreement of April, 1992 was varied in August, 1992 by the agreement pleaded in paragraphs 6 and 7 of the applicant's statement of claim and that in the circumstances pleaded in the statement of claim the applicant was prevented from performing the April, 1992 agreement as varied and of obtaining a discharge of its liability in the sum of $34,248 00. The applicant alleges that in consequence it is not obliged to pay the sum of $34,248.00. The applicant denies that it is indebted in the sum of $5,624.05 under

the franchise agreement.

In my view, while there may be some overlapping of evidence because of the alleged variation in August, 1992 to the alleged April, 1992 agreement, the overlap is not substantial and the major issues of fact and law arise under the applicant's principal application and not on the cross-claim. Such overlap as there is is a factor which I have taken into account. However, it is not one of great weight in this case.

That the entry into possession in November, 1992 was the catalyst which ultimately led to these proceedings being brought in February, 1993, I accept. However, there is an issue as to whether such entry was with the consent of the applicant or simply an act of "self help" under the franchise agreement.

The only action of the respondent which could be described as "offensive" was the entry into possession on 16 November, 1992 and the conduct of the business until 22 November, 1992. The applicant alleges that such conduct was repudiatory of the franchise agreement. However, the applicant does not seek in these proceedings to defend its rights under the franchise agreement and to protect their future enjoyment. For example, the proceedings were not brought to regain possession of the premises and to restrain the respondent from interfering in the applicant's benefit of the franchise.

The applicant on 4 December, 1992 accepted the alleged repudiation

and elected to sue for damages. Properly characterised, the claims of the applicant are not defensive to rights sought to be exercised under the franchise agreement by the respondent against the applicant or its property. When one turns to the cross-claim, the defences pleaded were not sought to be advanced in the principal application in the form of declaratory or other relief. They raise matters distinct from the issues which the applicant raises in its statement of claim. Indeed, that the respondent agreed to release the debt for costs arising out of the Supreme Court proceedings is not pleaded as a relevant term of the agreement alleged in paragraphs 6 and 7 of the statement of claim.

Although the question of whether the proceedings are in truth defensive is relevant to the exercise of the discretion, as Pincus J. observed in Montchel Pty. Ltd. v. Civil Aviation Authority (QG 121 of 1991, Unreported, 2 December, 1991). There are cases which are partly within and partly outside the principle underlying section 1335 of the Corporations Law. That is, they may be both "offensive" and "defensive" in the issues they raise and the relief sought. Such cases remain properly the subject of the exercise of a discretion to order security for costs; it is a matter of discounting for the defensive features (See also Interwest Ltd. v. Tricontinental Corporation Ltd (1991) 5 A.S.C R. 621 at 627 - 628) In my view this case ought to be regarded as primarily offensive.

The applicant commenced proceedings on 11 February, 1993. The respondent entered an appearance on 1 March, 1993. Further and better particulars of the applicant's claim were filed on 11 and 29 March, 1993. The defence and cross-

claim was filed on 21 April, 1993 and the notice of motion seeking security filed on 7 May, 1993. The affidavit of Gregory Allan Downing filed in support of the motion shows that in April, 1993 inquiries were being made of the Australian Securities Commission and others to ascertain the financial position of the applicant. On 7 April, 1993 Mr. Downing by facsimile requested of the applicant's solicitors that the applicant provide security for costs in an amount of $43,000.00. A reply to that letter was faxed by the applicant's solicitors on 6 May, 1993. In the reply they contend that the respondent was not entitled to security for costs because of an accident of timing in the institution of the proceedings and queried the quantum claimed. The notice of motion was filed the next day. There is, in my view, no delay in bringing the notice of motion which would weigh against the making of an order for security.

The evidence of impecuniosity of the applicant totally outweighs any other possible countervailing factors in this case and the interests of justice require that security be ordered. This is particularly so where there is no suggestion that the impecuniosity of the applicant was caused by the conduct complained of or that the making of an order will render the applicant's proceedings nugatory.

The solicitors for the respondent have estimated the respondent's costs of the proceedings will be $43,000.00 on the basis of a five day trial involving senior and junior counsel. I am satisfied that it is not a case requiring two counsel. The issues involved are essentially questions of fact which on the pleadings are not complex. Nor do there appear to be any complex questions of law requiring two counsel. There must be some discount for the time taken on the cross-claim.

However, the issues there are straightforward and would not take any significant time.

The solicitors for the applicant have estimated that the costs allowing for a three day trial with one counsel and discounting for the cross-claim would be $22,682.00. Since the hearing of this application further applications have been foreshadowed for further and better discovery which have not been provided for in the estimates.

It is not possible in these matters to be precise or to provide in all cases a complete indemnity Guided by the estimates of the solicitors and on the basis of one counsel, giving some discount for the time taken on the cross-claim, and making my own assessment as to costs, I fix the sum for which security is to be given at $30,000.00.

The applicant resisted the application and made no offer to provide security in any amount when it was requested. Although the respondent did not recover the full amount sought, it has substantially succeeded on its application. Accordingly, the ordinary rule ought to apply and costs will follow the event.

THE COURT ORDERS:

1. The applicant provide security for the costs of the respondent of the proceedings, excluding the cross-claim, in the sum of THIRTY THOUSAND DOLLARS ($30,000.00) in a form satisfactory to the District Registrar of the Court.

2. The proceedings instituted on the applicant's application and statement of claim be stayed until security for costs is provided.

3. The applicant, Startune Pty. Ltd. pay the costs of the respondent of and incidental to the notice of motion to be taxed.

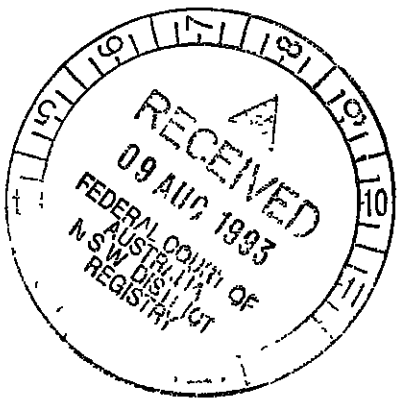
I certify that this and the preceding eight (8) pages are a true copy of the reasons for judgment herein of his Honour Mr. Justice Cooper.

Date: 6 August, 1993

Associate

Counsel for the Applicant:	S Couper
Solicitors for the Applicant:	Stokes & Panettiere
Counsel for the Respondent:	G. J. Gibson Q.C.
Solicitors for the Respondent:	Robinson & Robinson

Date of Hearing:	21 May, 1993
Place of Hearing:	Brisbane
Date of Judgment:	6 August, 1993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