



Supreme Court of Western Australia

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ABORIGINAL GROUP TRAINING WA (INC) -v- PEEDAC PTY LTD [2004] WASC 51 (26 March 2004)

Last Updated: 26 March 2004

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

IN CHAMBERS

CITATION : ABORIGINAL GROUP TRAINING WA (INC) -v- PEEDAC PTY LTD [2004] WASC 51

CORAM : MASTER NEWNES

HEARD : 2 MARCH 2004

DELIVERED : 26 MARCH 2004

FILE NO/S : CIV 2207 of 2003

BETWEEN : ABORIGINAL GROUP TRAINING WA (INC)

Plaintiff

AND

PEEDAC PTY LTD

Defendant

Catchwords:

Practice and procedure - Security for costs - O 25 - Plaintiff charitable organisation - Omission of address from writ - Financial support by third party - Relevant principles - Turns on own facts

Legislation:

Supreme Court Rules, O 25

Result:

Security for costs refused

Category: B

Representation:

Counsel:

Plaintiff : Mr A J Aristei

Defendant : Mr R J Price

Solicitors:

Plaintiff : Tan & Tan

Defendant : Marks & Sands

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

Case(s) also cited:

Brundza v Robbie and Co (No 2) (1952) [88 CLR 171](#)

Impex Pty Ltd v Crouner Products Ltd (1994) 13 ACSR 440

M A Productions Pty Ltd v Austarama Television Pty Ltd (1982) 1 ACLC 404

Memutu Pty Ltd v Lissenden (1983) 8 ACLR 364





Sabaza Pty Ltd v AMP Society (1981) 6 ACLR 194

Shannon v Australian & New Zealand Banking Group Ltd (No 2) [1994] 2 Qd R 563

Sheen v Burke [1993] 1 VR 584

Yandil Holdings Pty Ltd v Insurance Company of North America (1985) 3 ACLC 542

1 **MASTER NEWNES:** This is an application by the defendant for an order for security for costs under O 25 of the *Supreme Court Rules*.

2 The proceedings were commenced by the plaintiff in October 2003. The plaintiff is an association incorporated pursuant to the [Associations Incorporation Act 1987](#) (WA). The defendant is a company incorporated under the [Corporations Act 2001](#) (Cth). Its one fully paid share is held by  **Perth**  Employment Enterprise Development Aboriginal Corporation, an Aboriginal association incorporated pursuant to the [Aboriginal Councils and Associations Act 1976](#) (Cth). Both the plaintiff and the defendant are non-profit, charitable organisations. The defendant is funded by the Commonwealth Government through the Aboriginal and Torres Strait Islander Services ("ATSIS") to operate the Community Development Employment Project ("CDEP") within the  **Perth Noongar**  regional council area. It was formerly funded by the predecessor to ATSIS, the Aboriginal and Torres Strait Islander Commission.

3 CDEP is a programme to provide employment and training as an alternative to government income

support. Participants in CDEP are required to give up their pensions or unemployment benefits to join a CDEP. The funding provided for a CDEP may be in the form of wages and/or operational funding.

4 In about August 1999, the plaintiff and the defendant entered into a Memorandum of Understanding which entitled the plaintiff to obtain funding from the defendant for placing CDEP participants into jobs or training.

5 In August 2001, the plaintiff and the defendant entered into a new Memorandum of Understanding (the "MOU"), which allowed the plaintiff to obtain operational funding, in addition to the wages funding it had previously received under the 1999 Memorandum of Understanding.



6 The defendant says that the plaintiff failed to meet certain obligations under the MOU and, on 21 October 2001, the defendant terminated the MOU. The plaintiff, accordingly, lost the operational income it might otherwise have received under the MOU. The defendant says that it continued to provide wages funding to the plaintiff for eligible CDEP participants for the next 12 months.

7 According to the defendant, the plaintiff was also a Registered Training Organisation ("RTO"), Group Training Organisation ("GTO") and a Job Network Provider ("JNP") and received income independently of the defendant in those capacities. The defendant says that the plaintiff has since had its status as an RTO and GTO revoked and its contract as a JNP has not been renewed. It therefore no longer has any significant source of income.

8 It appears from the material before me that there is other litigation involving the plaintiff and the defendant. There is currently an action in the Local Court in relation to moneys allegedly owing by the plaintiff to the defendant under a sublease of premises in Cannington. The sublease was terminated by the defendant, as sublessor, on 15 March 2003 for alleged non-payment of rent by the plaintiff, the sublessee. Up to the time of the termination of the sublease, the premises were occupied as the offices of the plaintiff. Since that time the plaintiff has operated from various premises and now operates from the offices of Dixon Road Accounting Pty Ltd ("Dixon Road Accounting"), which, as the name suggests, conducts an accountancy practice.

9 In an affidavit sworn on 3 December 2003 by one Richard West, on behalf of the defendant, Mr West says that the plaintiff is still listed in the telephone directory at the Cannington address. When he called the number, however, he was connected to Dixon Road Accounting and was advised by a person there that the plaintiff "[does] not exist any more". In an affidavit of one Barry Mather, sworn on 14 January 2004 on behalf of the defendant, Mr Mather says that he called the telephone number of the plaintiff in the telephone directory and the phone was answered by someone on behalf of Dixon Road Accounting. That person said that the plaintiff "[doesn't] really exist any more" and that she believed "they had shut down".

10 Suffice it to say that the plaintiff denies that it was in breach of any of its obligations under the MOU. The plaintiff alleges that the defendant refused to pay an invoice of 16 October 2001 rendered by the plaintiff under the MOU in the sum of \$30,889.89 and, by letter of 22 October 2001, purported to terminate the MOU. It is alleged that the plaintiff accepted the defendant's repudiation of the agreement in about mid-November 2002 and has since demanded that the defendant pay the sum of \$30,889.89 and claims damages to 31 October 2002, which it estimates at \$202,281, and unspecified damages thereafter.

11 According to an affidavit of Stephen Williams, sworn 3 January 2004 on behalf of the plaintiff, the defendant is the only manager of CDEP in  Perth  and was at all times aware that the plaintiff was dependent upon the defendant's performance of the MOU in order to provide the income necessary to

ensure the plaintiff's continued viability. Mr Williams says that, in addition to the plaintiff's reliance on the income which would be generated under the MOU, the defendant was aware that if it did not allocate CDEP places to the plaintiff, the plaintiff effectively could not conduct other programmes like RTO, GTO and JNP, because employers would not utilise the plaintiff's services without the wage support available through CDEP. The termination of the MOU also meant that the plaintiff could not afford to upgrade its services as required to obtain RTO and GTO funding.

12 Mr Williams says that, since the plaintiff was evicted from its Cannington premises by the defendant, the plaintiff has operated from a number of sites on a rent-free basis, including the home of a staff member. Mr Williams says that "all remaining activities" are carried out at the offices of Dixon Road Accounting and that the plaintiff does not incur rent or other charges for using those premises. All phone calls and mail have been diverted to Dixon Road Accounting to allow the plaintiff to continue in operation. Mr Williams says that the person to whom Mr West and Mr Mather spoke by telephone was a part-time employee who had no real knowledge of the plaintiff. Mr Williams says that the defendant is now based at Dixon Road Accounting. According to Mr Williams, the original offices of both the plaintiff and the defendant were at the premises of Dixon Road Accounting, which had performed major financial and management functions for both organisations. Mr Williams is a director of Dixon Road Accounting.

13 Mr Williams claims that the plaintiff's current inability to meet its debts is solely the result of the plaintiff's actions in terminating the MOU. He says the plaintiff relied on income under the MOU and, for that reason, did not maintain its cash reserves. He says that the plaintiff continues, however, to operate payroll, accounting, debtor collection and credit payment activities, as well as internal administration. It continues to get some external funding from managing other Aboriginal organisation placements.

14 According to Mr Williams, the plaintiff currently has approximately \$5000 cash in hand at the Commonwealth Bank, an amount of approximately \$10,000 which is recoverable from debtors and has access to a guarantee from Dixon Road Accounting to the value of \$30,000. It is indebted to Dixon Road Accounting for approximately \$60,000 for accounting, payroll and management advice since 1 April 2002.

15 The defendant denies that the termination of the MOU is the cause of the plaintiff's current financial plight. According to an affidavit of Mr West, on behalf of the defendant, as early as 27 March 2001 the plaintiff had written to the defendant saying that the plaintiff did not have the funds to meet its share of a joint liability, but would pay \$1000 per month from July 2001 until its cash flow improved. He says the plaintiff was also unable to pay the fit-out costs of its Cannington premises and defaulted on lease payments due to the defendant under the sublease of those premises.

16 There is annexed to Mr West's affidavit of 18 February 2004 financial statements for the plaintiff for the period 1 July 2000 to 30 June 2001. It appears from the profit and loss statement that, in that period, the plaintiff incurred a loss of \$55,611.23. The balance sheet shows net assets over liabilities of \$84,000, including assets of \$123,000 cash on hand and net debtors of \$186,000. It would appear from Mr Williams' affidavit that the plaintiff's financial position has deteriorated markedly since then. There is, however, no evidence that the plaintiff has deliberately divested itself of its assets with a view to depriving the defendant of its ability to recover costs in the event the plaintiff's action is unsuccessful.

17 Mr Williams, who is an accountant, says that, at the time of entering into the MOU, he was the internal auditor of the plaintiff. At the end of June 2001, he examined the financial position of the plaintiff. He says that had the MOU not been entered into, the plaintiff would have needed to consider winding up the organisation and liquidating its assets.

18 The defendant now seeks an order for security for costs under O 25 or the inherent jurisdiction of the Court. Under O 25 r 1 "no order shall be made merely on account of the poverty of the plaintiff or the likely inability of the plaintiff to pay any costs which may be awarded against him". Rule 2 sets out a number of grounds for the making of the order. They fall under three main heads, namely, where the plaintiff:

(1) is ordinarily resident outside, or is about to depart from, the jurisdiction, or enjoys within the jurisdiction some immunity from the normal processes of execution;

(2) is insolvent or has previously failed to pay costs awarded against him in relation to substantially the same subject matter; or

(3) has in the past vexatiously brought litigation against the same or some other defendant.

19 Under r 3, the granting of security is in the discretion of the Court and there are three matters of which the Court shall take account, being:

(a) the *prima facie* merits of the claim;

(b) what property is within the jurisdiction to satisfy any order for costs against the plaintiff; and

(c) whether the normal processes of the Court would be available to enforce of any order for costs made against the plaintiff.

20 It is well-established that, on an application under O 25, the Court has an unfettered discretion and the grounds for ordering security are not limited to those set out in r 2. But in *Sarac v Croatian House Hrvatski Dom (Inc)* unreported; FCt SCt of WA; Library No 950675; 12 December 1995, Rowland J (with whom Kennedy ACJ and Pidgeon J agreed) said that "the wording of the Order and rr 2 and 3 certainly give a hint as to the basis upon which the Court should deal with such an application".

21 In the present application, the defendant does not suggest that the plaintiff falls within any of the grounds set out in r 2. It says, however, that in the circumstances it is in the interests of justice that security be ordered. It relies essentially on six grounds. They are as follows:

(1) the plaintiff is impecunious or would be unable to meet any order for costs which may be made against it;

(2) the plaintiff is receiving financial support from a third party;

(3) a third party stands to gain if the plaintiff is successful in the action;

(4) the address of the plaintiff is not contained in the writ of summons;

(5) the plaintiff has "virtually ceased to exist"

(6) the plaintiff's conduct in filing affidavit material that is "scandalous and prejudicial".

22 The defendant acknowledged that the impecuniosity of the plaintiff was not, of itself, sufficient to require the plaintiff to provide security for costs, but submitted that, where the jurisdiction to make an order is established, the impecuniosity of the plaintiff is a factor to be considered in the exercise of the

discretion: *Thune v London Properties Ltd* [1990] 1 All ER 972 at 980.

23 The first question is whether the plaintiff would be able to meet any order for costs that might be made against it in the proceedings. In that respect, the financial documents for the financial year ended 30 June 2002 are of little assistance. It is clear from Mr Williams' affidavit that a good deal of water has passed under the bridge since then. It appears from that affidavit that the defendant has, at best, access to some \$15,000 and a guarantee from Dixon Road Accounting of \$30,000. Against that is a debt owing to Dixon Road Accounting of \$60,000. It appears the plaintiff has very little by way of income. It cannot afford to rent premises and is reliant on the provision of office space and facilities by Dixon Road Accounting.

24 The plaintiff's estimate of costs assumes a trial of four days and estimated its costs at some \$53,000. The plaintiff took issue with the estimate of costs and suggested that the trial should not take more than three days at a cost not exceeding \$35,000 for each party. Whether the trial takes three days or four days, I am satisfied, on the material before me, that the plaintiff would not be in a position to meet any order for costs which might be made in the defendant's favour at trial.

25 On the second ground, it was argued on behalf of the defendant that it was a relevant factor on this application that a third party, in this case Dixon Road Accounting, was financially supporting the plaintiff, with the result that the application for security was not based merely on the plaintiff's poverty. It was submitted that, if the plaintiff is impecunious, but there is evidence that a third party is financially supporting the plaintiff, the Court may order security in the expectation that the third party has the capacity to fund that order. Indeed, the fact that an impecunious plaintiff is receiving financial support is itself a strong reason to order security for costs. Counsel for the defendant relied on *Bond v Trustee of the Property of Alan Bond, A bankrupt* (1994) 32 ALD 770.

26 In *Bond v Trustee of the Property of Alan Bond*, the appellant was an undischarged bankrupt and the respondent was his trustee in bankruptcy. The respondent made an assessment of income attributable to the appellant for the purposes of Div 4B of Pt VI of the *Bankruptcy Act*. His assessment was the subject of an unsuccessful appeal to the Administrative Appeals Tribunal and the appellant appealed to the Federal Court. The respondent sought an order for security for the costs of the appeal. Under the *Rules of the Federal Court*, the Court may "in special circumstances" order security for costs for such an appeal. It was not in dispute that an agreement had been entered into between the appellant and his son by which the son agreed to make money available to meet the commitments of the appellant. It was accepted that payments by the son under the agreement were purely discretionary. There was evidence that the son had met, among other things, very substantial sums by way of legal expenses in respect of the appellant. It was submitted on behalf of the appellant in opposition to the application that, as an undischarged bankrupt, the appellant had no capacity to meet any order to provide security and that that inability would lead to the stultification of the proceedings. It was argued that no order to provide security should, in the alternative, be imposed on the son because he was not a party to the proceedings and did not stand to benefit by them.

27 French J concluded that it was probable that the funding of the appellant's expenses in relation to legal proceedings would continue to be made and it was highly unlikely that funds would not be provided to enable the appellant to comply with an order for security. His Honour went on [at 14 - 15]:

"So I think the special circumstance in this case is that he is nominally impecunious but is being funded or likely to be funded by members of his family. The framework that they have set up and the course of conduct which they have established indicates that a security order would be met. In other words, I think it is highly unlikely that this appeal would be stultified by the making of such an order in these circumstances

Having regard to the particular factual matrix in which this motion is brought and the background which has been exposed, both on the evidence before me and in the findings of the Administrative Appeals Tribunal I am satisfied that this is a case in which I should order the provision of security ... "

28 The defendant argued that in the present case the plaintiff is being supported by Dixon Road Accounting, which has provided services valued at over \$60,000 without payment and a guarantee to the plaintiff in the sum of \$30,000. The defendant pointed out that it appears from Mr Williams' affidavit that Dixon Road Accounting is "the financial adviser" of the plaintiff, and in effective management of it. The defendant also says that Dixon Road Accounting stands to benefit from the plaintiff's action in respect of the debt of \$60,000 currently owed by the plaintiff to Dixon Road Accounting and future work which would come from the continued activities of the plaintiff.

29 I do not consider that the matters relied upon by the plaintiff weigh significantly in the balance. It appears from Mr Williams' affidavit that the debt of \$60,000 to Dixon Road Accounting is owing for accounting, payroll and management advice to the plaintiff since 1 April 2002, not advice or assistance relating to the litigation. There is also no evidence that Dixon Road Accounting stands to gain financially if the plaintiff is successful in the action, apart from the prospect of receiving payment of the outstanding moneys as a creditor in the normal course. I am not satisfied on the evidence that the current action is essentially being maintained by Dixon Road Accounting to enable it to recover the debt it is owed by the plaintiff. I do not regard the fact that Dixon Road Accounting may get future work from the plaintiff if the action succeeds, and the plaintiff is able to continue its activities, as a factor of any significant weight.

30 Whilst Dixon Road Accounting has provided, or is prepared to provide, a guarantee of \$30,000 for the plaintiff, it is not apparent that that is specifically to facilitate the litigation, as opposed to providing a means by which the plaintiff may continue its activities generally. It is also not clear that Dixon Road Accounting will provide, or continue to provide, funds to enable the plaintiff to pursue the action or to meet any order for security for costs that might be made against it.

31 Moreover, it is common ground that the plaintiff is a non-profit, charitable organisation. It, like the defendant, is very largely, if not entirely, reliant on public funds to enable it to carry on its activities. This case is therefore different, for instance, to the case of a plaintiff trading company where shareholders may stand to gain some direct or indirect benefit as a result of the company being successful in litigation, or of a trustee where the beneficiaries may stand to gain such a benefit. It is also, in my view, different to the case of a litigant who stands to gain a personal benefit if the litigation is successful and who is financially supported by family members or others to that end.

32 The defendant also argued that the Court's jurisdiction to order security was enlivened by the omission of the plaintiff's address in the writ of summons in the action. The address of the plaintiff contained in the writ is the address of its solicitors. As an incorporated association, the plaintiff, unlike a corporation incorporated under the [Corporations Act](#), does not have an address on a public register, so, it was submitted, the address on the writ assumes the same importance as it does in the case of an individual.

33 At common law, a plaintiff who misdescribed or concealed their address was liable to be ordered to give security for costs. It was submitted on behalf of the defendant that it is not necessary that the misdescription or concealment is done with an intention to evade or deceive, and counsel for the defendant referred to *Knight v Ponsonby* [1925] 1 KB 545 where (at 553), Eve J said:

"If the address endorsed on the writ is not one of permanent character it may well afford grounds for ordering of security, even in the absence of any suggestion that the address is an illusory or misleading one ... "

34 I do not, however, consider that that statement is authority for a general proposition that a misdescription may of itself be sufficient, even if it was innocent and made without any intention to deceive. The passage relied on is clearly *obiter*, the issue in that case being whether security would be ordered where there was a sufficient address on the writ but the plaintiff had been compelled to move from that address and, due to poverty and adversity, had been unable as at the date of the application to acquire a permanent address, and no such principle was referred to by the other members of the Court. Moreover, such a principle would be inconsistent with long-standing authority.

35 In *Simpson v Burton* (1839) 8 LJ Ch NS 328 Lord Langdale MR summarised the rule as follows:

36 "There can be no doubt, that it is the duty of a plaintiff to state his place of residence, truly and accurately at the time he files his bill, and if, for the purpose of avoiding all access to him, he wilfully misrepresents his residence, he will be ordered to give security for costs. I do not think the rule extends to a case where he has done so innocently, and from mere error."

37 There are other long-standing authorities to the same effect: see *Smith v Cornfoot* (1847) 1 De G & Sm 684; *Griffith v Ricketts* (1846) 67 ER 884; *Player v Anderson* (1846) 60 ER 556; *Hurst v Padwick* (1848) 17 LJ Ch NS 169; *Manby v Bewicke* 8 De G M & G 468; *Knight v Cory* (1863) 32 LJ Ch NS 127; *Chellew v Brown* [1923] All ER 506. Two years after the decision in *Knight v Ponsonby*, in *Brooks v Wilkins* [1927] WN 136, Eve J declined to order security for costs where the plaintiff, who lead a peripatetic life and had no permanent address, had given a temporary address in the writ. Eve J said he was quite satisfied that the plaintiff had no intention to mislead and, that being so, there was nothing which warranted an order for security for costs.

38 In my view, a failure to include the plaintiff's address in the writ, or a misdescription of the address, will not provide grounds to order security for costs if the omission or misdescription was innocent and done without any intention to mislead.

39 In the present case, the defendant argued that, in addition to the omission of an address in the writ, the address of the plaintiff remained uncertain. It could not be located through the telephone directory and when the number in the directory was telephoned, the caller was told that the plaintiff no longer existed. In the affidavit of Mr Williams, filed on behalf of the plaintiff, Mr Williams says simply that "all the remaining activities" of the plaintiff are carried out at Dixon Road Accounting and that it is "being based at the offices of Dixon Road Accounting Accounting". It was submitted on behalf of the plaintiff that it was to be inferred that the omission of the plaintiff's address in the writ was intentional and was not an oversight.

40 In response to those submissions, counsel for the plaintiff sought leave to adduce further evidence of the circumstances in which the plaintiff's address in the writ was given as the solicitor's address. The plaintiff did not oppose the application and I granted leave.

41 In an affidavit sworn 4 March 2004, the solicitor for the plaintiff said that, as a result of representing the plaintiff in relation to this dispute and the Local Court proceedings, he was under the impression the plaintiff was looking to secure new premises and he decided to use his own office as the plaintiff's address in the writ in order to ensure that all correspondence was received in respect of this matter. The solicitor says that it was he who decided that, for convenience, his office address should be

used as the address in the writ.

42 In his affidavit, Mr Williams has provided an explanation as to why the telephone inquiries referred to by the defendant were answered as they were.

43 In the circumstances, I am not satisfied that there is any basis for an order for security for costs to be made on the ground that the plaintiff has misdescribed or concealed its address.

44 The defendant also contended that it was a relevant factor that the plaintiff had "virtually ceased to exist". The defendant argued that, on the evidence, the plaintiff carries on no current activities apart from attending to administrative matters arising from its past activities and had, for all practical purposes, ceased to exist. Counsel referred to *Lal Lal Iron Co NL v Mulligan* (1885) 11 VLR 58, where an order for security was made against a no liability company which had ceased to carry on business and sold all of its assets.

45 It was submitted by the plaintiff that the circumstances of that case are not at all analogous to those of the present case. In *Lal Lal Iron Co NL* (*supra*) the company had reached the position where it appeared its commercial life was at an end and it should be deregistered. The company had disposed of all of its assets and had not had the means to carry on business for some 18 months. It did not have a registered office or a manager. The Court noted (at 59 - 60) that the company had "virtually indeed ceased to exist for all purposes of responsibility to the defendant in the event of its failing in the litigation it has commenced; it is equally inaccessible to the final process of this Court as if it were a foreign company".

46 In this instance, it was submitted, the plaintiff plainly intended to continue its activities, but effectively had been prevented from doing so by the alleged breach of contract by the defendant, which had deprived the plaintiff of the income that would have enabled it to continue those activities. There was no intention to cease operations permanently and, on the contrary, there was evidence that some activities were being carried on through funding obtained from managing other Aboriginal organisation placements.

47 On the material before me, there is no indication that the plaintiff has wound up, or is winding up, its affairs in the manner of the plaintiff in *Lal Lal Iron Co NL*. Although the activities of the plaintiff are currently minimal, there is nothing to suggest that it does not intend to carry on the activities for which it was incorporated, if and when it is financially able to do so.



48 The defendant also submitted that it was a relevant factor on this application that the affidavit of Mr Williams, filed on behalf of the plaintiff, contained what the defendant said was scandalous and prejudicial material. As it turned out, the plaintiff did not rely upon the parts of the affidavit to which the defendant took objection and it was unnecessary for me to rule on them. I do not propose to do so for the purposes of this contention, as I do not consider that, in the circumstances, the objection to the affidavit material is properly a factor of any significance in determining whether security for costs should be ordered. It is not suggested by the defendant that the action is frivolous or vexatious or that the plaintiff's claim is manifestly without merit. Indeed, it was conceded by the defendant that this application should be determined on the basis that the claim was not frivolous or vexatious. In those circumstances, it does not seem to me to be relevant, even if it were made out, that the material in Mr Williams' affidavit which was objected to was unnecessary or objectionable.

49 It was acknowledged by the plaintiff that an order for security for costs would not stifle the action. In his affidavit in opposition to the application, Mr Williams specifically said that such an order would

not prevent the plaintiff pursuing the case and that it had supporters who were willing to see the litigation through to resolution, if necessary. The plaintiff did contend, however, that its present financial circumstances were due to the breach by the defendant of the MOU which had deprived the plaintiff of the income it had expected and which it required to fund its continuing activities.

50 The defendant, on the other hand, argued that the plaintiff was in a poor financial position even before the matters relied upon for its current claim arose. The defendant says that that is evidenced by its inability to meet financial commitments in 2001 and the substantial trading losses which are evidenced by its profit and loss statement for the financial year ended 30 June 2002. It was not to the point that if the alleged breach of contract by the defendant had not occurred, the plaintiff would now be in a substantially better financial position than it is. Counsel for the defendant referred to *Fat-sel Pty Ltd v Brambles Holdings Ltd* (1985) ATPR 40-544, and in particular to the passage in the judgment of Beaumont J at 46,428, as follows:

" ... there are difficulties in making out a case of impecuniosity attributable to the [defendant's] conduct as a ground for denying security for costs where the [plaintiff] relies on an alleged loss of a promissory kind rather than 'reliance' damages of the type conventionally awarded under sec 82: it is one thing to refuse security where the party claiming relief can show that the party sued brought about the impecunious party's insolvency by causing him to act to his detriment and to lose funds in that connection; it is a different thing where, as here, the [plaintiff] has not thrown away funds in reliance on the [defendant's] conduct but rather seeks to recover profits which the [defendant's] representations are alleged to have led it to expect to earn in the future. In the latter class of case, the respondent's conduct may not have improved the [plaintiff's] financial position but, in contrast to the former class of case, the conduct complained of has not worsened the [plaintiff's] financial position."

51 The plaintiff contends that, in fact, substantial losses and expenses have been incurred by reason of the defendant's breach of the MOU. It also points to the monopoly position which it says the defendant held in relation to CDEP places in  Perth  and the consequential effect on the plaintiff of the cessation of CDEP funding, not only in relation to income under the MOU, but also in respect of the defendant's capacity to continue its activities as an RTO, GTO and JNP. The plaintiff did not, however, adduce any cogent evidence that its capacity to meet any order for costs made against it has changed by reason of the termination of the MOU and the evidence, so far as it went, tended to suggest that the plaintiff had probably never been in a position to meet such costs.

52 I do not think, in the end, it is necessary to resolve this issue. I am not satisfied, on balance, that this is an appropriate case in which to order security for costs. Considerations that might apply in respect of a plaintiff engaged in commercial activities designed for profit are not relevant in the present case. As I have said, both the plaintiff and the defendant are non-profit, charitable organisations whose activities are intended to advance the interests of indigenous people. I might comment in passing that it seems to me most regrettable that they should now find themselves in the position where money is being spent on litigation between them, rather than on the advancement of the indigenous people they came into existence to assist. Be that as it may, I do not think in the circumstances of the present case it is in the interests of justice that an order for security for costs should be made and I would therefore dismiss the application.