

***Mathew (SA) Nominees Pty Ltd v Belconnen Automotive Pty Ltd* [2019] SASC 39 (21 March 2019) – South Australia Supreme Court**

‘Contract’ – ‘Costs’ – ‘Misleading conduct’ – ‘Specific performance’

Civil proceedings: claim by plaintiff for specific performance of motor vehicle purchase contracts; counterclaim by defendant for misleading conduct, jurisdictional challenge; and security for costs application by defendant.

Appeal type: appeal against Magistrate’s reasons, security for costs order, and failure to make jurisdictional challenge order.

Facts: The plaintiff purchased three high performance Holden motor vehicles in the name of the plaintiff’s company. Only two are relevant to this matter. The purchases were negotiated by Mr Mazzacano and two others. Mr Mazzacano, as a former Holden employee, was entitled to an employee discount scheme. The plaintiff’s claims that he ordered the vehicles and was invoiced for each by the defendant (\$42,927 and \$44,467). He paid both the balance and deposit. The defendant contends that the plaintiff company was not entitled to access the discounts as the purchase was not for the benefit of Mr Mazzacano. The defendant did not deliver the vehicles but returned the purchase monies to the plaintiff. The plaintiff sought specific performance of its contracts with the defendant on 19 July 2017 and filed an application for summary judgment. The defendant filed a defence stating that the plaintiff was not entitled to the EPSA discount. The defendant subsequently filed an amended defence and counterclaim, and included a counterclaim for misleading conduct and the defendant filed interrogatories seeking clarification on the nature of the business being operated by the plaintiff asking ‘what is the nature of the business that was being operated by the plaintiff during 2017’.

The defendants made a jurisdictional challenge and a security for costs application. The plaintiff appeals against orders granting security for costs and declining to order costs in relation to the defendant’s jurisdictional challenge.

Issues:

1. The Magistrate’s Reasons are inadequate in that they fail to address various issues raised by the plaintiff.
2. The Magistrate erred in his decision to order security for costs in giving no weight, or insufficient weight to various matters.
3. The Magistrate erred in ordering security for costs in an excessive amount, in particular having regard to

the true quantum of the dispute, the inclusion of past the failure to make to make reductions for the costs of the counterclaim and the interruption caused by the failed jurisdiction application.

4. The magistrate erred in failing to make an order (in respect of the defendant's jurisdictional challenge that the defendant pay the plaintiff's costs of that application).

Decision and reasoning:

Dismissing the appeal, Doyle J held:

There was no error in relation to the Magistrate's exercise of his discretion to order security for costs per *House v King* (1936) 55 CLR 499.

The plaintiff did not establish that there was the potential for substantial injustice were permission to be refused and the orders for security left to stand.

Reasoning – appeal ground 1:

That a Magistrate attaches insufficient weight to a particular consideration is not, in itself, an allegation of error in the sense required by *House v The King* at [49]. That 'Appellate intervention in interlocutory decision making' should be 'truly exceptional at [50]. In relation to the alleged inadequacy of reasons in relation to both security for costs and the costs of the failed jurisdiction application, his Honour, held at [53] that 'in the case of interlocutory disputes, little by way of reasoning may be required'... 'as long as the key planks in the judge's reasoning process leading to the relevant decision are apparent, that will generally suffice'. The Magistrate in their reasons, 'identified the plaintiff's status as a trustee company', the 'defendant's delay in bringing the application' and 'stated his conclusions in relation to the availability of security for past costs' at [55]. In the event that a plaintiff is a trustee, a defendant 'should not be subjected to the potential complexity...expense and uncertainty, associated with having to resort to derivative rights in order to recover any costs' at [64]. The plaintiff did not identify whether it holds the properties in its own right or as trustee, and as such the Magistrate was right to attach significance to the consideration [75]. In relation to the Magistrate not giving any weight to the defendants' delay in bringing the application for security. While 'it is a well-established that applications for security should be brought promptly' [at 78], whether it is in the interests of justice to make an order for security is also a factor [at 82].

Other matters that were of some relevance to the discretion to order security was the absence of indication by the plaintiff that it would not be able to provide security, further there was no challenge to the bona fides or arguable merit of the plaintiff's claim including that he had paid the for the cars prior to the order for security for costs. At [104] it was open for the Magistrate to make a reduction to the quantum of security upon the existence of the counterclaim, however the amount ordered was not 'erroneously high'.

Conclusion as to security for costs:

- > The plaintiff did not suggest that it was unable to provide security.
- > The plaintiff having to meet its costs obligations flowing from the litigation constitutes an injustice or prejudice in this case.

Reasoning – appeal ground 2:

At [65] ‘while it is significant, the context of an application for security, that a plaintiff is suing as trustee, it does not follow automatically that it will be appropriate that there be an order for security’.