IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
EMPLOYMENT AND INDUSTRIAL LIST

Not Restricted

S ECI 2021 01543

A40 CONSTRUCTION AND MAINTENANCE GROUP PTY LTD AS TRUSTEE FOR THE A40 CONSTRUCTION UNIT TRUST	Plaintiff
v	
AMANDA SMITH	First Defendant
ANDREW GOULSBRA	Second Defendant

JUDGE:	Ierodiaconou AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	10 February 2022
DATE OF RULING:	10 February 2022 (*ex tempore, revised)*
CASE MAY BE CITED AS:	A40 Construction and Maintenance Group Pty Ltd v Smith & Anor (No 2)
MEDIUM NEUTRAL CITATION:	2022 VSC 72

SECURITY FOR COSTS – Whether security for costs should be granted – Application for security for costs granted - Whether a director's undertaking is a suitable form of security – Appropriate quantum of security to be provided - *Livingspring Pty Ltd v Kliger Partners* [2008] 20 VR 377 - *Jafari v 23 Developments Pty Ltd* [2019] VSCA 16 - *US Realty Investments LLC #1 & Ors v Need* [2013] VSC 590 - *DIF III Global Co-Investment Fund L.P. v BBLP LLC* [2016] VSC 401 - *Trailer Trash Franchise Systems Pty Ltd v GM Fascia & Gutter Pty Ltd* [2017] VSCA 293 - *Oswal v Australia and New Zealand Banking Group Limited & Ors* [2016] VSC 119 - r 62.02 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - s 1335 *Corporations Act 2001* (Cth).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms K Wangmann	Kyard Business Law
For the Defendants	Mr D Cafari	Boutique Lawyers

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HER HONOUR:

1 This ruling determines the defendants' application for security for costs.

2 By their summons filed on 3 December 2021, the defendants seek security for costs pursuant to r 62.02 of the *Supreme Court (General Civil Procedure) Rules 2015* ('Rules') and s 1335 of the *Corporations Act 2001* (Cth) ('Corporations Act'). They seek that the plaintiff provides security for their costs in the sum of $296,182.21 (plus GST), or such other amount as the Court deems fit. They seek that security be given by payment into Court, or in such manner as the Court shall approve, and that the proceedings be stayed until security is provided.

<u>Background</u>

3 The background to this proceeding is outlined in my previous ruling *A40 Construction and Maintenance Group Pty Ltd v Smith & Anor* [2021] VSC 575 ('Ruling No 1').

4 The issues in dispute are:

(a) should the plaintiff be ordered to give security for costs?

If so:

(b) the form of security; and

(c) quantum.

5 Turning now to the first issue.

<u>Should the plaintiff be ordered to give security for costs?</u>

6 The applicable principles were not in dispute.

7 Section 1335(1) of the Corporations Act states:

> Costs
>
> (1) Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its

> defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

8 In addition to s 1335(1), r 62.02 of the Rules provides when security for costs may be ordered. Rule 62.02(1)(b) provides the Court may order security where the plaintiff is a corporation and "sues, not for the plaintiff's own benefit, but for the benefit of some other person, and there is reason to believe that the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so".

9 Pausing there: here, the plaintiff pleads that it has brought this claim as: "A40 Construction and Maintenance Group Pty Ltd t/a A40 Construction Unit Trust". The plaintiff says that it "was appointed as the trustee of the A40 Construction Unit Trust by trust deed dated 19 November 2012".[1]

10 In *Livingspring Pty Ltd v Kliger Partners*, the Court of Appeal stated that the words of the statutory test were clear and that the Court must address the question which the section poses: "Is there reason to believe that the corporation will be unable to pay the defendant's costs?"[2]

> The phrase "reason to believe" is the touchstone of jurisdiction. It requires a rational basis for the belief - and no more. The wording adopted may be contrasted with other familiar formulations such as "If the court is satisfied that ..." or "If in the view of the court it is likely that ... ". The section requires the making of a judgment, a risk assessment: is there a risk that the corporation will be unable to pay? (It adds nothing, in our view, to say that it must be a "real risk".) A risk assessment is, of necessity, imprecise. The section calls for a practical, common sense approach to the examination of the corporation's financial affairs.
>
> It may be said, with justification, that this is a low threshold. But the test simply reflects the policy of the provision, which is to protect a defendant against the risk of the plaintiff corporation's impecuniosity. The provision equips the court with the means to require that the defendant be secured against that risk.
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> The power being enlivened, the court must consider whether it should be exercised. Foremost amongst discretionary considerations will be any contention on behalf of the plaintiff that an order for security would work an injustice. We turn to consider the question of onus.

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1 Further particulars to Statement of Claim filed 10 February 2022, [1].

2 [2008] 20 VR 377 ('*Livingspring*'), [14] (citation omitted).

The onus does not shift

It was for a long time debated whether satisfaction of the threshold test - reason to believe that the corporation will be unable to pay - should "predispose" the court to exercise the discretion in favour of ordering security. In Victoria, that debate ended with the decision of this Court in *Ariss v Express Interiors Pty Ltd (In Liq)*. In that case, Phillips JA (with whom Ormiston and Charles JJA agreed) said:

> " ... [T]he debate about the word 'predisposition' ... is a sterile one and should no longer be pursued ... The discretion conferred by s 1335 should be accepted now as altogether unfettered, but upon the footing that the very fact of which there must be credible evidence in order to enliven the jurisdiction in the first place may itself be a factor, even a most significant factor, in the exercise of the discretion."

The same point may be expressed slightly differently, as follows. The threshold condition for the exercise of the power to order security defines the circumstances in which Parliament contemplated that the power would be exercised. That is, the power was conferred for the purpose of protecting the defendant against the very risk which must be shown to exist before the power can be exercised. In this sense, satisfaction of the threshold condition - demonstrating the existence of the risk - "calls for" the fulfilment of the purpose for which the power was conferred. Whether the power should be exercised in the particular case will, of course, depend upon all the circumstances.

On ordinary principles, it is for the defendant-applicant to persuade the court that the discretion should be exercised in its favour. ...

… While the satisfaction of the threshold condition in the relevant sense "calls for" the exercise of the power, this does not alter the fact that the burden rests on the defendant, from first to last, to persuade the court that the order for security should be made.

There are, of course, particular discretionary matters of which the plaintiff must necessarily have carriage. If, for example, the plaintiff corporation asserts that an order for security would impose on it such a financial burden as would stultify the litigation, the plaintiff must establish the facts which make good that assertion. We respectfully adopt what the Full Federal Court said in this regard in *Bell Wholesale Co Limited v Gates Export Corp*:

> "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 a 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 the security will frustrate the litigation to raise the issue of impecuniosity of those whom the litigation will benefit and to prove the necessary facts.

> The same would be true of a contention that the plaintiff's impecuniosity was caused by the defendant.[3]

11 I adopt the relevant principles stated by the Court of Appeal in *Jafari v 23 Developments Pty Ltd*:[4]

> The Court has a wide and unfettered discretion in deciding whether or not to grant security for a respondent's costs of a proposed appeal and, if so, in what amount. The principles were summarised by Dodds-Streeton JA (Redlich JA agreeing) in *Maher v Commonwealth Bank of Australia*, where the discretion was described as one depending 'entirely on the circumstances of each particular case'. Nevertheless, Dodds-Streeton JA gave a non-exhaustive list of matters relevant to the exercise of the discretion:
>
> (1) the prospects of success of the appeal;
>
> (2) the quantum of risk that a costs order would not be satisfied;
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> (3) whether the making of an order would be oppressive in that it would stifle a reasonably arguable claim;
>
> (4) whether any impecuniosity of the appellant arises out of the conduct complained of;
>
> (5) whether there are other aspects of public interest which weigh in the balance against such an order; and
>
> (6) whether there are any particular discretionary matters peculiar to the circumstances of the case.
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> … An impecunious party seeking to resist a security for costs order on the basis it will stifle a claim or appeal should expressly depose to that fact.

12 Turning now to the key issues in dispute between the parties.

Prospects of success

13 I described the allegations regarding the written domestic building contract in paragraph 7 of Ruling No 1. As I said there, the building contract names A40 Construction Unit Trust (the 'Unit Trust') as the builder, and appears to be signed off by Mr Thomas Landy on behalf of the Unit Trust. The plaintiff says it is a party to the contract and relies upon it.

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3 Ibid, [15]-[22] (citations omitted).

4 [2019] VSCA 16 (Whelan, Hargrave JJA) [6], [12].

14 The defendants say that the merits of the case are tipped in favour of the defendants. They do acknowledge though that ultimately where matters are complex, the question of the prospect of success becomes almost a neutral point.[5]

15 The defendants submit that Mr Landy, a registered builder, nominated to sign the domestic building contract with the second defendant on behalf of the Unit Trust. They say he has never been the trustee of the Unit Trust. They say that a unit trust cannot enter into a contract without a trustee. They say the Unit Trust was the registered builder. Further, Mr Landy is one of two directors of the plaintiff. The defendants say that the plaintiff did not comply with s 127 of the Corporations Act. Subsections 127(1)(a) and (b) of the Corporations Act provide that a company may execute a document without using a common seal if it is signed by its two directors, or a director and a company secretary. The building contract was between Mr Landy, who is not named as a plaintiff, and the second defendant.[6] The defendants say this affects the plaintiff's merits of success.

16 The defendants also say that the contract is clearly a fixed price contract. The plaintiff's solicitors refer to it as a fixed price contract for $550,000 including GST.[7] The defendants say that as the contract is a fixed price one, it follows that the plaintiff cannot succeed on its claim for payment of $200,000 above the fixed price. They also refer to the changes in the quantum of compensation sought: $189,000 in the invoices, then $209,000 in the statement of claim, then $229,000 in a spreadsheet exhibited to the Caillard affidavit,[8] and then a return to $189,000 in submissions.

17 The defendants also rely upon Victoria Police advising that it would not investigate the second defendant, despite the plaintiff's directors reporting him to Victoria Police in relation to alleged criminal offences. Further, despite the plaintiff's directors also reporting the first defendant in respect of criminal offences, and interviewing her, Victoria Police ceased its investigation of the complaint. The decision of Victoria

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5 *US Realty Investments LLC #1 & Ors v Need* [2013] VSC 590 (*'US Realty'*), per Derham AsJ.
6 Defence filed 30 July 2021, [7B].
7 Affidavit of Anthony Penalver Caillard sworn 8 February 2022 (the 'Caillard affidavit'), [7].
8 Exhibit 'APC-1' to the Caillard affidavit, 36-41.

Police was made after its forensic accountant drew matters to its attention. The defendants say that Victoria Police also questioned why the first defendant was in the accounts as a trade creditor, rather than an employee.[9] The defendants acknowledge the issue of merit is a complex matter for determination at trial.

18 The plaintiff says that the prospects of success are normally assessed neutrally in these types of applications. However here, at least in respect of the alleged authorised payments made by the first defendant to herself, the claim is exceptionally strong. The plaintiff refers to paragraph 25 of the statement of claim, and the transactions totalling $7,500. Those payments were allegedly made by the first defendant from the plaintiff's bank account into her own bank account. The plaintiff says the payments were falsely described as being payments to Coates Hire and Telstra. In paragraph 25 of the defence, the allegations are denied. There is no explanation as to why the payments were made, and there are no particulars of the defence. The first defendant does not dispute the transactions were made. There is a bank statement evidencing the transactions.[10] There is no arguable defence to the claim. This strongly points against granting security.

19 Moreover, the plaintiff says that the defendants appear to deny the claim on the basis that the relevant domestic building contract dated 5 April 2016 provided for a fixed price of $550,000 including GST, and they say the plaintiff was not entitled to seek more than the fixed price pursuant to s 16 of the *Domestic Building Contracts Act 1995* ('DBC Act').[11] They do not appear to deny that the work was performed beyond the scope of works in the contract.[12] Clearly, the plaintiff is entitled to payment for work it performed outside the scope of the contract, even if only on a quantum meruit basis or pursuant to s 16 of the DBC Act.

20 As to prospects of success, I adopt the following principles:

> As a general rule, where a claim is prima facie regular on its face and discloses a cause of action, the Court should proceed on the basis that the claim is bona

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9 Ibid, 57-61.
10 Ibid, 42-56.
11 Defence filed 30 July 2021, [10A].
12 Ibid, [9].

fide with reasonable prospects of success in the absence of evidence to the contrary;

> Assessing the plaintiffs' prospects of success is not really a practicable test in any case of reasonable complexity: *Interwest Ltd v Tricontinental Corp Ltd*. Although it will ordinarily not be practicable to reach any clear view about the merits of the plaintiff's claim, that is not to say that the merits are always irrelevant (unless totally lacking) or that the bona fides of the claim may be disregarded: *Epping Plaza Fresh Fruit & Vegetables Pty Ltd v Bevendale Pty Ltd*.
>
> The court is not obliged to consider at length the merits of the claim, and to do so would ordinarily be a waste of resources: *Impex Pty Ltd v Crowner Products Ltd*; *Ariss v Express Interiors Pty Ltd (in liq)*.[13]

21 I assess merit here neutrally. The issues raised by the parties above are more properly issues for consideration at trial. It is common ground that the contract was a fixed price one.[14] Further, it is common ground that the amounts claimed by the plaintiff have changed. The plaintiff refers to this in its pleadings and submissions.[15] The particulars of loss and damage will be issues of evidence, and for trial.

22 In respect of the defendants' submissions regarding whether the contract was properly executed, as the plaintiff says there is an alternative claim of damages on a quantum meruit basis, and accordingly, the question of whether or not there ought be payment by the defendants for building works remains a live one. Moreover, the dishonesty issues are not resolved in this civil claim by Victoria Police's actions regarding investigation. The decisions of the prosecuting authorities are made on the basis of the criminal standard of proof, not the civil one. These are serious allegations against the second defendant. I described the dishonesty allegations in Ruling No 1 and also the defendants' plea regarding the role of Victoria Police. In paragraph 25 of the statement of claim, the plaintiff alleges the first defendant dishonestly initiated seven payments totalling $7,502.56 to her personal bank account without authorisation. However, in paragraph 25 of the defence, the allegations are denied. The second defendant has not pleaded the material facts upon which she intends to

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13 *US Realty*, [26]-[28] per Derham AsJ.

14 See Caillard affidavit, [7]; Written submissions filed by the defendant dated 9 February 2022.

15 See for instance, Statement of Claim filed 11 May 2021, [18]-[19].

rely in respect of this denial. That is a matter for her. I decline to make an assessment of merit on the basis of the bank statements before me. This is an issue for trial.

23 Turning now to the next issue.

Is there reason to believe that the plaintiff will not be able to pay the defendants' costs?

24 The defendants say that there is reason to believe that the plaintiff will be unable to pay the costs of the defendants, if they are successful. They say there is ample evidence that the plaintiff is in a financially precarious position. They say that payment of a costs order of $296,182.10 (the amount sought for security) would most certainly lead to the insolvency of the plaintiff. They say that the plaintiff:

(a) holds no real property assets in Australia;[16]

(b) is indebted to 20 separate entities;[17]

(c) has a credit rating of 553, being well below the Australian average, and that rating is 'C2' - risk level is acceptable, but unfavourable conditions will likely impair capacity or willingness to meet financial commitments;[18]

(d) has share capital of only $12;[19]

(e) has not provided evidence of its financial capabilities in relation to any potential cost order, despite requests from the defendants' solicitors by correspondence dated 23 September and 13 October 2021 to the plaintiff's solicitors. See also the reply from the plaintiff's solicitors dated 1 October 2021;[20]

(f) being a registered builder, carries a liability of warranty for its work completed for 10 years from the date of completion; and

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16 National Property Ownership Report dated 23 September 2021 contained in Exhibit 'IF-4' to the affidavit of Imran Fatah affirmed 3 December 2021 (the '3 Dec 21 Fatah affidavit').

17 PPSR Grantor Summary Search result contained in Exhibit 'IF-5' to the 3 Dec 21 Fatah affidavit.

18 Company Credit Report contained in Exhibit 'IF-6' to the 3 Dec 21 Fatah affidavit.

19 Ibid.

20 Exhibits 'IF-7'–'IF-9' to the 3 Dec 21 Fatah affidavit.

(g) as a mere corporate trustee, there is a real possibility of the corporate trustee being replaced at any stage.

25 The financial reports now relied upon by the plaintiff are contained in pages 62-72 of Exhibit 'APC-1' to the Caillard affidavit. The defendants object to those accounts. They rely upon ss 135 and 136 of the *Evidence Act 2008* (Vic). The defendants say:

(a) they are books of account for the Unit Trust, and are not audited, and no declaration has been signed. It should be signed by resolution of the directors. One of the main declarations is that the company can pay debts as and when they are due;

(b) they have discrepancies – the Caillard affidavit deposes legal fees to date are $29,000 and these accounts show legal fees of $11,134;

(c) there are no supporting documents to the financial statements. For instance, they provide for wages of approximately $75,000. They provide for two loan accounts to the directors. The loans could be forgiven at any stage. No reference is made to either director being paid or taking drawings.

(d) the invoices provided are not in the plaintiff's name, but on behalf of the group;

(e) no financial returns have been provided for the last two years;

(f) even if the financial accounts were accepted, it is a lineball matter as to whether costs could be paid;

(g) the plaintiff as corporate trustee has nothing and is impecunious;

(h) the Unit Trust is not known, nor are the beneficiaries; and

(i) the value of the real property held by the directors is attempted to be shown by a real estate guide.

26 The plaintiff says that it does have assets to meet a costs order and that weighs against making the orders. It says there is no reason to believe it would be unable to pay the

costs order, if it were unsuccessful. It relies upon financial statements for the period of 1 July 2021 to 31 January 2022, exhibited to the Caillard affidavit.[21] The financial statements were prepared by the plaintiff's external accountant. Both directors have deposed that they are true and correct. The plaintiff is a small company and is not required to have audited financial statements. It would be oppressive to require them in the circumstances. The plaintiff relies on s 1305(1) of the Corporations Act - the financial statements are company books, and prima facie, each are admissible. The plaintiff says that *Strategic Financial and Project Services Pty Ltd v Bank of China Limited* is distinguishable, as it concerned financial statements not adopted by directors.[22] The financial statements are on all fours with the authority cited in paragraph 35, which concerns the admissibility of audited financial statements in the context of a security for costs application.

27 The plaintiff says the profit and loss statement discloses that its net profit from ordinary activities before income tax was $147,438.79 and, as at 31 January 2022, it had net assets of $145,563.71. The plaintiff also says the following. It continues to trade profitably. This is evident from the debtor ledger. The key assets of the plaintiff are comprised of loans. The plaintiff is recovering its debts. There are receivables of approximately $104,000 of which $75,000 is current. Only one amount is older than November 2021. Receivables are a valuable asset to be recovered. As for the loans to the directors: both directors have deposed that they are in a position to repay them. Both provide evidence of the real property they own, including that one director, Mr Nicklin, has a redraw facility of about $60,000. There is sufficient security to meet a first tranche of costs.

28 In reply to the defendants, the plaintiff says that it is wrong to characterise it as a bare trustee who holds no assets. It is indemnified as to trust property, and has a right of reimbursement.[23] It has a right of indemnity secured by a first ranking charge trust property. As to the Personal Property Securities Register ('PPSR') that the defendants

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21 Exhibit 'APC-1' to Caillard affidavit, 62-72.
22 [2009] FCA 604, [30], [33]-[34].
23 See s 36(2) of *Trustee Act 1958* (Vic).

rely upon: it does not establish the actual amounts owed by the plaintiff to those parties. Reference must be had to the plaintiff's financial statements to see what is owed. They evidence trade creditors of approximately $24,000. The defendants rely on the credit score of the plaintiff. It does not suggest that the plaintiff cannot meet an adverse costs order.

29 Turning now to my analysis.

30 There is a dispute about whether the plaintiff can rely upon unaudited accounts. In *Livingspring*, the Court of Appeal stated:[24]

> … First, the fact that the accounts were unaudited raised an issue as to the degree of comfort which the court could derive from the accounts. Secondly, the consolidated accounts were of limited assistance, since the right of LS as trustee to be indemnified in respect of any liability incurred on behalf of one of the trusts would be limited to the assets of that trust.
>
> LS called in aid on the appeal s 1305(1) of the Corporations Act which, it was said, established "a presumption that company accounts are prima facie true and correct and accurate." The provision does no such thing. All that s 1305(1) provides is that a company's books (relevantly, its financial reports and records) are admissible and are "prima facie evidence of any matter stated or recorded" in them. As the Full Federal Court said in *Whitton v Regis Towers Real Estate Pty Ltd*, s 1305 does not elevate an entry in a book of account to the status of prima facie evidence of the transaction(s) which the entry purports to record. The same must be true of an entry purporting to record the existence, and value, of an asset. The entry in the accounts:
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>> "…can be no more than prima facie evidence that an unknown person formed an opinion on an undisclosed basis that ... such a figure should appear in the accounts."
>
> Even if there had been such a statutory presumption, it would have been immediately rebutted by the discrediting of the legal fees "asset".

31 The financial reports are admissible for this interlocutory application. They were prepared by an external accountant.[25] The directors have deposed they are true and correct.[26] Accordingly, I reject the defendants' submission that I should exercise my discretion to exclude or limit the use of the financial reports.

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24 *Livingspring*, [30], [37].

25 Caillard affidavit, [11].

26 Affidavit of Thomas John Landry affirmed on 9 February 2022; Affidavit of Anthony Derry James Nicklin affirmed on 9 February 2022.

32 The directors depose that they believe trade debts will be recovered in full, and that their respective loans to their family trusts will be repaid in full. This is of limited assistance. Intentions change. Circumstances change.

33 The plaintiff's situation is that it holds a small amount of capital in its bank accounts. Aside from some liquid assets, it has no other assets. It is used as the trading company for a trust. The trust assets are unknown. As the credit rating indicates, the plaintiff's financial situation is one that could become adversely affected by negative trading conditions. That is, debtors who do not pay, or if a building warranty claim is made against them. The current situation is that the plaintiff's finances are insufficient to cover the costs order I will make, particularly when one must factor in that it will also continue to incur its own legal costs. There is reason to believe that the plaintiff may not be able to meet an adverse costs order.

34 Turning now to the next issue.

Will the claim be stifled by an order of security for costs?

35 The defendants say that there is no evidence that the claim will be stifled by an order of security for costs. They say there is a heavy onus placed at the feet of the plaintiff to establish stifling or stultifying, and a proceeding cannot be regarded as such unless those who stand behind the plaintiff are unable or unwilling to provide the requisite security for costs.

36 The defendants say that those standing behind the company or trust must also be without means for stultification to be established. They say that the plaintiff has failed to provide any reasonable evidence to show a real causal connection or material contribution between the defendants' alleged conduct and any impecuniosity that may be claimed.

37 On the other hand, the plaintiff says that this application is oppressive. It says that the defendants have repeatedly attempted to stifle the plaintiff's claim by threatening to refer the dispute to regulatory authorities in the construction industry, making an unsuccessful application for stay of the proceedings, filing a defence that refuses to

grapple with the allegations in the statement of claim, and making various allegations of breaches of the DBC Act, although they do not actually seek any relief in respect of those alleged breaches.

38 As to stultification, I adopt the following principles from *US Realty*:

> There is a well-recognised factor (sometimes called a principle), which may affect the exercise of the Court's discretion, that the Court will not make an order for the provision of security if the order would operate to frustrate or stultify the plaintiff's arguable case legitimately instituted: *MA Productions Pty Ltd v Austarama Television Pty Ltd*; *Drumdurno Pty Ltd v Braham*; *Ariss v Express Interiors Pty Ltd (in liq)*; *Excelsior Run Pty Ltd (in liq) v Nelius Pty Ltd*; *Fiduciary Ltd v Morningstar Research Pty Ltd*. The making of an order in these circumstances may work an injustice, because the effect of the order would be that the defendants would achieve a "victory" without any contest: *Spiel v Commodity Brokers Australia Pty Ltd (in liq)*.
>
> The "stultification principle", being a factor relevant to the exercise of the discretion, does not automatically lead to refusal of the application for security. It nonetheless "usually operates as a powerful factor in favour of exercising the court's discretion in the plaintiff's favour": *Yandil Holdings Pty Ltd v Insurance Co of North America*.
>
> In *Bell Wholesale Co Pty Ltd v Gates Export Corporation (No 2)* the Full Federal Court [cited above in *Livingspring*]
>
> …
>
> In the *Bell Wholesale case*, the question was about the impecuniosity of those who would benefit.
>
> Phillips JA delivered the decision of the Court of Appeal in that case, Ormiston and Charles JJA agreeing with him. For present purposes it is what his Honour said about commercial impracticability that is relevant:
>
>> "It is true that commercial impracticability is not the same as plain want of means; and it is true also that in Bell Wholesale a Full Court of the Federal Court held that, if in that case the plaintiff company sought to resist the order for security for costs on the ground that to make the order would frustrate the litigation, then it was up to the plaintiff, itself impecunious ex hypothesi, to establish 'that those who stand behind the action and who will benefit from the litigation if it is successful ... are also without means'. ...
>>
>> …
>>
>> The argument of stultification means no more than that if an order for security is made the order cannot be met, with the result that the litigation will be brought to a premature end. Bell Wholesale decided only that, if the plaintiff relies upon a want of means to establish that the order cannot be met, the plaintiff must demonstrate that fact by reference, not to its resources (which ex hypothesi must be inadequate

> if the discretion is called into play), but by reference to the resources of those who will benefit from the litigation and who might reasonably be expected to meet some of the costs: see also Impex at 446 per Macrossan CJ. In this case, however, the plaintiff does not rely upon want of means but upon 'commercial impracticability', meaning thereby the practical difficulty facing the plaintiff in gaining any advantage from (by applying to the costs of the litigation) such means as may exist in others, and notably its creditors. I see no reason why, as a matter of principle, that should not be a relevant circumstance when the plaintiff seeks to demonstrate that any order for security cannot be met - even though it be different from the circumstance that those who must meet any order for security are themselves without means."[27]

39 The plaintiff has not provided any evidence that a security for costs order will stifle the claim. The issues it relies upon, such as the defendants' threat to refer it to regulatory authorities, are irrelevant. And it has not provided any evidence regarding the beneficiaries of the Unit Trust (who stand to benefit from any damages awarded in respect of this proceeding) and the financial standing of those beneficiaries. Nor does it contend that the plaintiff is at risk of impecuniosity, even by way of conduct of the defendants that is alleged in its claim. Indeed, quite the opposite. That is, it says the plaintiff's financial position is sound.

40 Turning to the next issue.

Have the defendants delayed in making the application?

41 The plaintiff says that the defendants' application suffers from significant and unexplained delay. It refers to the following:

(a) the application was made seven months after commencement of the proceedings;

(b) the essential facts underpinning the plaintiff's claim are known to the defendants, and have been known since the statement of claim was served;

(c) from the commencement of the proceeding to date, the plaintiff has attended to numerous steps in the proceeding: the pleadings are complete and discovery

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27 *US Realty* [29]-[32], [34] (citations omitted).

has been partially dealt with, and further and better particulars have been requested and provided; and

(d) an order for security would unfairly prejudice the plaintiff which has incurred a considerable liability for costs so far. By 10 February 2022, it will have incurred costs in the amount of approximately $29,000.

42 The plaintiff relies on the following findings regarding delay made by Derham AsJ in *Andrews v Zuccubarr Pty Ltd*, a ruling on security for costs:[28]

> The delay in this case has not been long, perhaps six months, by comparison with other cases where delay has been found to be significant. But here, the pleadings were effectively complete, discovery was partially dealt with, and will, by the time these reasons are published, be complete. Mr Velos warned the Liquidator in his affidavit…, well before the joinder of Garland as a plaintiff, that if the matter was pressed the seventh defendants would seek security for their costs, but did nothing about it when the time came to do so, shortly after filing the Statement of Claim.
>
> …
>
> …. It is the Liquidator who in every relevant respect is responsible for Garland pursuing this proceeding, and he is incurring the costs. The prejudice to Garland's prejudice to him.
>
> In my view, the delay in this case is significant in the circumstances and is another factor that goes to the exercise of the Court's discretion to refuse to order security for the Mortgagee defendants' costs.

43 The defendants reject the submissions concerning delay.

44 I find there has been no significant delay here. The proceeding commenced on 11 May 2021. The application was made approximately seven months later, namely on 3 December 2021. However, from 23 September 2021, the defendants were requesting information about the plaintiff's financial position. The correspondence in reply effectively stonewalled them.[29]

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[28] [2020] VSC 675, [114], [116]-[117], per Derham AsJ.

[29] See Exhibits 'IF-7'–'IF-9' to the 3 Dec 21 Fatah affidavit.

Form of security

45 The defendants seek security in the form of payment into Court or a bank guarantee. The plaintiff has not made an offer of security. The plaintiff says that if security is ordered, it should be in the form of personal undertakings from the directors. On the other hand, the defendants say no undertaking has been given by a director of the plaintiff company. Even if they did give such an undertaking, the assets of the directors are certificates of title in joint names respectively.[30] The defendants ask how they could enforce a judgment against such property.

46 I adopt the following principles given by Hargrave J in *DIF III Global Co-Investment Fund L.P. v BBLP LLC*:[31]

> Drawing these threads together, in exercising its broad discretion as to the form of security for costs in the relevant security circumstances, the Court will usually apply the following principles:
>
> (1) the plaintiff is entitled to propose security in a form least disadvantageous to it;
>
> (2) the plaintiff bears a 'practical onus' of establishing that the proposed security is adequate and does not impose an 'unacceptable disadvantage' on the defendant;
>
> (3) in order to be adequate, the proposed security must satisfy the protective object of a security for costs order, namely, to provide a fund or asset against which a successful defendant can readily enforce an order for costs against the plaintiff; and
>
> (4) based on these and any other relevant considerations, the Court will determine how justice is best served in the particular circumstances of the case.

47 Applying these factors, I accept that a director's undertaking is the least disadvantageous form to the plaintiff. However, the plaintiff has not established that it is adequate. That is, that it would satisfy the protective objective of a security order. The directors' financial standing is a mystery. The directors each affirmed respective affidavits but the only asset to which they deposed was real property jointly owned

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30 See: Affidavit of Thomas John Landry affirmed on 9 February 2022; Affidavit of Anthony Derry James Nicklin affirmed on 9 February 2022.

31 [2016] VSC 401, [40], principles applied by the Court of Appeal in *Trailer Trash*.

with their wife and life partner respectively. As the defendants say, this would make enforcement of any costs order extremely difficult.

48 In *Trailer Trash*,[32] the Court of Appeal stated that ordinarily a court would prefer security in a liquid form, if there was a choice between that and security in the form of a personal undertaking by a third party other than a financial institution.

> The authorities do not preclude an order that security for costs be in the form of a personal undertaking by a third party other than a financial institution. However, where the court has a choice between security in that form and security in a liquid form that enables funds to be accessed with minimum risk that litigation may be required to enforce the security, ordinarily the court should prefer the liquid form. The need to prefer the liquid form where a choice is available has become more acute since the commencement of the CPA because:
>
> (a) section 8(1) requires a court to seek to give effect to the overarching purpose in the exercise of any of its powers;
>
> (b) section 7(1) provides that the overarching purpose is 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute';
>
> (c) section 9(1) provides that in making an order in a civil proceeding, a court must further the overarching purpose by having regard to a number of objects, including: the efficient conduct of the business of the court (s9(1)(c)); the efficient use of judicial resources (s9(1)(d)); and the timely determination of the civil proceeding (s9(1)(f)); and(d)a form of security for costs which does not provide a fund which can be accessed without the cooperation of the opposing party or a person who is connected to that party —and may require the commencement of proceedings to enforce it —has the potential to undermine the overarching purpose. This is because that form of security can give rise to satellite proceedings and additional delay and costs. Such satellite proceedings are contrary to the principle of finality in litigation.[33]

49 Justice lies here in making an order that security be paid either into Court or given by bank guarantee.

<u>Quantum</u>

50 The parties agree that if orders are made requiring payment of security for costs, those payments should be given in tranches. In dispute is the quantum.

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32 *Trailer Trash Franchise Systems Pty Ltd v GM Fascia & Gutter Pty Ltd* [2017] VSCA 293 ('*Trailor Trash'*).

33 Ibid, [59].

51 The defendants seek orders that the plaintiff provide security in the sum of $296,182.10 (plus GST). They rely upon the report of Mr Gavin Carlyle Wood of Grace Consulting contained in Exhibit 'IF-10' to the 3 Dec 21 Fatah affidavit (the 'Wood report'). It is based on an estimate of 10 days for the trial. Counsel's opinion is that the trial is more likely to be five to seven days.

52 In respect of the estimate of costs for discovery: the defendants rely on the issues referred to in the 3 Dec 21 Fatah affidavit regarding compliance. They say there has been a failure to provide particulars in any meaningful fashion. The defendants sought the documents that the plaintiff referred to in its pleading, and they have not been provided. The defendants say those documents could easily have been provided, and go to the core of the case. The defendants also refer to the spreadsheet upon which the plaintiff relies as itemising its loss. They say metadata shows it was created in February 2022. The defendants say they do not have the original documents, as they are yet to be discovered. Moreover, underlying documents are required because of the fraud allegation.

53 The plaintiff says that the costs in the Wood report are grossly excessive. Further, it says they involve duplication of work. For example:

(a) mutual discovery including reviewing discovery by a solicitor is duplicated at item 7.3, $35,000, and item 8.6, $3,636.36, for counsel.

(b) mediation, including preparation by a solicitor item 7.6, $10,000, and item 8.7, $7,272.73 for counsel; and

(c) preparation for trial by both solicitor, item 7.10, $20,000, and item 8.13, $41,090.91 for counsel.

54 The plaintiff says:

(a) there is no dispute about discovery;

(b) an order for security should not take into consideration activities which the defendants would have performed, or costs incurred in the meantime, such as this application, perusal of further and better particulars, and mutual discovery;

(c) the costs claim in the Wood report eclipses the value of the plaintiff's claim which is just over $200,000. The claim ought be reasonable and proportionate to the complexity and importance of the issues in dispute, as well as the amount in dispute, as required by s 24 of the *Civil Procedure Act 2010* (Vic);

(d) an order for security for costs is intended to provide protection against the risk that an order for standard costs in the defendants' favour might not be satisfied. It does not give a complete indemnity. An allowance by way of discount should be made because the matter may settle or otherwise not proceed;

(e) the Wood report includes activities which have not been ordered or do not appear reasonably necessary: consideration of Freedom of Information material (item 7.4), directions hearing as to the inadequacy of the plaintiff's further and better particulars (items 7.5, 8.5), mediation (items 7.6, 8.7, 8.8), evidence of three expert witnesses including a structural engineer, domestic building consultant, and surveyor (items 7.87, 8.10, 8.11, 8.12, 8.17). There will be two lay witnesses from each side. The issues are confined to how the pleadings are at present; and

(f) the estimate of trial is three days, not 10 days.

55 I make the following findings regarding quantum. The Court's "modern practice" is to order security for costs up to and including mediation.[34] It takes a 'broad brush' approach and not a taxation of costs. As Sifris J stated in *Trailer Trash*:

> In determining a sufficient amount for security for costs, the court does not undertake precise mathematical calculations. Rather, it adopts a 'broad-brush' approach involving 'guesstimates as much as estimates'. However, the broad brush approach does not involve an abstract process. It must have an

[34] *US Realty*, [64].

evidentiary basis. The court must have regard to the evidence adduced by the parties as to quantum — whether in the form of an affidavit by an experienced litigation lawyer or an expert report by a costs consultant —although it is not bound by the parties' estimates. The court may scrutinise the individual items in the parties' estimates, but not to the extent of minute examination akin to a taxation.

The amount ultimately fixed by the court must not be so low that it fails to provide any real protection to the party seeking security, or so high that it is oppressive to the party required to provide the security. The amount must be 'just and reasonable' in all the circumstances of the particular case.[35]

56 I will order for security to be paid in tranches: the first tranche must be paid within 28 days of the orders consequential to this ruling, and the other tranche to be paid post mediation. The first tranche must be for the sum of $26,400. The second tranche must be for $195,000. The parties may agree to divide the second tranche into two tranches. At least part of the second tranche must be paid 28 days after mediation, if there is no successful resolution. The other part would then be paid 28 days prior to trial. The precise date for this could be decided in due course, post mediation.

57 In deciding the amount of security, I rely on the Wood report although, as explained shortly, I will not allow all of the costs contained in it.

58 The Wood report is prepared by a solicitor with expertise in costs. It was exhibited to the 3 Dec 21 Fatah affidavit. The plaintiff has elected not to provide its own estimation of costs. My estimate of the trial duration is five days, not the 10 days upon which the Wood report is based.

59 I make the following findings regarding the quantum of costs.

(a) I reject the plaintiff's submissions regarding duplication of costs between solicitor and counsel. Solicitor and counsel must work together. The Scale of Costs contained in Appendix A to Chapter 1 of the Rules recognises that costs should be allowed for both.

(b) I reject the plaintiff's submissions regarding proportionality. The issue here is that the plaintiff has elected to pursue its claim in this Court. Accordingly, costs

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35 *Trailer Trash*, [64]-[65] (citation omitted). See also *Oswal v Australia and New Zealand Banking Group Limited & Ors* [2016] VSC 119 [7]-[13].

are assessed on this Court's scale. Post mediation, I will raise again with the parties as to whether this matter could be transferred to the County Court of Victoria.

(c) I have not allowed past costs, but I have allowed security for future costs.

(d) By orders made on 4 November 2021, the parties are to mediate this dispute by 18 March 2022. I have assessed the first tranche of costs up to and including mediation by allowing $12,500 for solicitor costs, $10,909 for counsel fees, and $3,000 for mediation fees. This is a total of $26,409. I have rounded it to $26,400. I have excluded the costs regarding the security application, receipt and perusal of further and better particulars, and directions hearing. I have allowed for the solicitor to consider Freedom of Information material, as the police material appears relevant.

(e) By orders made on 4 November 2021, the parties are to discover critical documents by 18 February 2022. The plaintiff's delays in providing the material upon which its claim relies have not yet been properly explained, and are yet to be seen. More concerningly, it appears it challenges the defendants' suggestion that it will need to discover the underlying documents upon which its dishonesty allegations are based. I have allowed costs for a discovery dispute and discovery generally, but in the amount of $25,000 for solicitor fees. I have factored into the counsel fees below, an amount for discovery and a discovery dispute. I have included the amounts regarding discovery in the tranche of security to be paid *post* mediation although I urge the parties to resolve these issues beforehand, and consistently with the orders already made. It will enhance the likelihood of settlement at mediation.

(f) I will now address some of the other issues in dispute in the Wood report for post-mediation costs. I will not address *all* items, as a broad brush approach must be taken. In respect of solicitor costs, I have allowed trial preparation, but discounted it to $15,000 and trial attendance, but discounted it to allow for

a five day trial ($3,150 for the first day and $12,600 for four further days). I have allowed items such as instructions to expert and lay witnesses, but discounted those items. My estimate of the trial is that it will be of five days' duration. I will allow a total amount for post-mediation preparation by the solicitor will be in the range of $45,500 (excluding discovery).

(g) I have allowed the cost of the expert reports. It is a matter for each party as to how they wish to run their case, and which witnesses they wish to call. Having read the pleadings, I do agree that expert witnesses are likely to give evidence. I have allowed for the cost of reports to be obtained from three expert witnesses and witness fees for attendance at trial.

(h) I have allowed counsel fees for: preparation for trial ($30,000), attendance at a directions hearing, inspection of discoverable documents, appearances at a five day trial ($3,636 for first day and $14,545 for a further four days), and drafting closing submissions. I have allowed for the cost of obtaining transcript for a five day trial.

(i) Disbursements post mediation, including counsel fees, will be allowed in the amount of $98,600, together with $25,000 allowed for solicitor fees for discovery (discussed above), $26,400 allowed for fees and disbursements up to mediation, and $45,500. This amount is $195,500. I will round this to $195,000.

60 In conclusion, the defendants have sought the amount of $296,182.21 as security for costs. I will allow an amount of security that is approximately two-thirds of that, namely an amount of $195,000. The amount of $26,400 is to be paid within 28 days. The remaining amount is to be paid post mediation. If there is a dispute between the parties as to the dates of any tranches to be paid post mediation, I will hear the parties post mediation.

CERTIFICATE

I certify that this and the 22 preceding pages are a true copy of the reasons for ruling of Ierodiaconou AsJ of the Supreme Court of Victoria delivered on 21 February 2022.

DATED this twenty first day of February 2022.

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Associate