SUPREME COURT OF QUEENSLAND

CITATION:	*Monto Coal 2 Pty Ltd & Ors v Sanrus Pty Ltd & Ors* [2018] QCA 309
PARTIES:	**MONTO COAL 2 PTY LTD** ACN 098 919 414 (first appellant) **MONTO COAL PTY LTD** ACN 098 393 072 (second appellant) **MACARTHUR COAL LIMITED** ACN 096 001 955 (third appellant) **v** **SANRUS PTY LTD as trustee of THE QC TRUST** ACN 097 049 315 (first respondent) **EDGE DEVELOPMENTS PTY LTD as trustee of THE KOWHAI TRUST** ACN 010 309 529 (second respondent) **H & J ENTERPRISES (QLD) PTY LTD as trustee of THE H & J TRUST** ACN 077 333 736 (third respondent)
FILE NO/S:	Appeal No 3949 of 2018 SC No 8609 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 53 (Crow J)
DELIVERED ON:	9 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2018
JUDGES:	Gotterson and McMurdo JJA and Boddice J
ORDERS:	**1. Appeal dismissed.** **2. The appellants are to pay the respondents' costs of the appeal on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – FACTORS RELEVANT TO EXERCISE OF DISCRETION – PLAINTIFF'S OR APPLICANT'S IMPECUNIOSITY – GENERALLY – where the defendants applied for security

for costs – where the learned primary judge dismissed the application – where, under r 671(a) of the *Uniform Civil Procedure Rules* 1999 (Qld), a pre-condition for an order of security for costs is that "there is reason to believe that the plaintiff will not be able to pay the defendant's costs if ordered to pay them" – whether the learned primary judge failed to apply the correct test – whether "there is reason to believe that the [plaintiff companies] will not be able to pay the [defendants'] costs if ordered to pay to them"

Uniform Civil Procedure Rules 1999 (Qld), r 671(a)

Beach Petroleum NL v Johnson (1992) 7 ACSR 203; [1992] FCA 110, cited
Cornelius v Global Medical Solutions Australia Pty Ltd (2014) 98 ACSR 301; [2014] NSWCA 65, approved
George v Rockett (1990) 170 CLR 104; [1990] HCA 26, cited
Livingspring Pty Ltd v Kliger Partners (2008) 20 VR 377; [2008] VSCA 93, considered
Robson v Robson & Anor [2008] QCA 36, applied

COUNSEL: A M Pomerenke QC, with A C Stumer, for the appellants
P L O'Shea QC, with D K Fuller, for the respondents

SOLICITORS: Allens for the appellants
Holding Redlich for the respondents

[1] **GOTTERSON JA:** This proceeding was commenced in the Trial Division on 1 October 2007. It is listed for trial over 16 weeks in 2019. On 11 December 2007, a consent order was made, on the defendants' application, requiring the plaintiffs to provide security for the formers' costs of and incidental to the proceeding in the sum of $250,000. The security was duly provided.

[2] On 4 December 2017, the defendants exercised the liberty conferred by that order to apply for an increase in the security. They did so by filing an application pursuant to r 671(a) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") for security for the defendants' costs up to and including the first day of trial in the sum of $4,000,000.[1]

[3] The application was heard on 27 February 2018 by a judge of the Trial Division. On 15 March 2018, his Honour gave judgment for the plaintiffs and dismissed the application. Later, on 29 March 2017, he made a further order that the defendants pay the plaintiffs' costs of the application on the standard basis.[2]

[4] On 12 April 2018, the defendants filed a notice of appeal to this Court against the judgment given on 15 March 2018.[3] At the hearing of the appeal on 20 July 2018,

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1 AB2 64-65.
2 AB1 34.
3 AB2 1-6.

leave was given to the defendants to amend the notice of appeal in order to appeal also against the costs order.[4]

The Monto Coal Joint Venture

[5] This proceeding has its origins in a suite of agreements entered into in May 2002 to which the plaintiffs and the defendants were parties. In summary, the plaintiffs and an associate company had interests, directly or indirectly, in coal reserves in the Monto area. The objective of the agreements was to constitute a joint venture, the Monto Coal Joint Venture ("MCJV"), to exploit the reserves by means of the Monto Coal Project.

[6] The principal agreement was the Monto Coal Joint Venture Agreement[5] ("Joint Venture Agreement") to which the three plaintiffs and Monto Coal 2 Pty Ltd ("Monto Coal 2") were the parties. At the time, Monto Coal 2 was a wholly-owned subsidiary of Macarthur Coal Ltd ("Macarthur Coal"). Since 1 April 2008, Macarthur Coal has been the majority shareholder of Monto Coal 2.

[7] The role of the MCJV was to undertake the Monto Coal Project. The purpose of this project was to develop a mine and associated infrastructure capable of producing 10 million tonnes or more of saleable coal per annum.[6]

[8] Monto Coal 2 acquired a 51 per cent interest in the MCJV and the plaintiffs shared between them the remaining 49 per cent interest.

[9] A Management Agreement[7] was also made on 16 May 2002. The parties to it were the joint venture participants and Monto Coal Pty Ltd ("Monto Coal"). Under the agreement, Monto Coal was appointed manager of the Monto Coal Project. It is a wholly-owned subsidiary of Macarthur Coal.

[10] The Joint Venture Agreement contemplated a two-stage development. Stage 1 was to undertake mining operations which would achieve production of between 1 million and 1.5 million tonnes of saleable coal per annum. Clause 5.1 obliged the participants to use all reasonable efforts to obtain the grant of the required mining lease and, having regard to all relevant factors relating to the Monto Coal Project and its economic viability, to develop Stage 1 within three years of the commencement date, 16 May 2002.[8]

[11] Stage 2 was to undertake mine development and mine operations beyond Stage 1 "with the expectations of production being 10,000,000 tonnes or more of saleable coal per annum". The participants agreed to undertake a Stage 2 Feasibility Study during the Stage 1 mine development.[9]

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4 AB1 35-40; Appeal Transcript ("AT") 1-3 l10. No separate grounds of appeal are advanced in respect of the costs order.

5 AB2 508-538.

6 Joint Venture Agreement cl l. 2.1

7 AB2 539-557.

8 It was agreed, ibid, that for the avoidance of doubt, Monto Coal 2 was not to have any regard for the profitability of any other ventures entered into, or to be entered into, by Macarthur Coal or any of its related corporations, in fulfilling its obligations under clause 5.1.

9 Cl 6.

[12] Clause 4 governed the joint venture relationship. Each participant was to act in good faith towards the other participants.[10] This obligation expressly required each of them to be just and faithful in all activities and dealings with the others in relation to the MCJV.[11]

[13] Funding for joint venture expenditure was to be raised by cash calls. Monto Coal 2 was solely liable to meet such calls for, *inter alia*, the mine development for Stage 1, the costs of the Stage 2 Feasibility Study and of proving up the entire resource.[12]

[14] Management and control of the MCJV was vested in a Management Committee.[13] Participants with an interest of at least five per cent in the joint venture were entitled to appoint a representative to the Management Committee.[14] Each representative had a voting entitlement commensurate with the interest held by his or her appointing participant.[15]

[15] The power and authority of the Management Committee was full and complete with respect to all decisions and determinations required or permitted to be made by the participants with respect to the Monto Coal Project and joint venture assets. It extended to power to cease, curtail, suspend or resume the project and to supervise the activities of the manager.[16]

[16] At a Management Committee meeting held on 4 July 2003, Monto Coal 2, by its representative, proposed a motion that all work on the Monto Coal Project be suspended. The motion was carried on the vote of that representative and over the opposition of the representatives of the other participants. Stage 1 has not been advanced. The mining lease to which clause 5.1 was referenced was granted on the 21 April 2005. The Stage 2 Feasibility Study has not been undertaken.

The pleaded cases

[17] The learned primary judge summarised the pleaded cases of the parties in terms which I am content to adopt and which are not challenged on appeal. His Honour observed:

> "[13] The plaintiffs allege (*inter alia*) that:
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> (a) cl 5.1 of the Joint Venture Agreement contained an unconditional obligation to commence mining operations producing between 1 million and 1.5 million tonnes of saleable coal per annum within three years of the Commencement Date (i.e. by 16 May 2005);[17]
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> (b) Monto Coal 2 was obliged to pay for and develop Stage 1 and undertake the Stage 2 Feasibility Study unless and until it was in possession of information from which it

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10 Cl 4.1(f).
11 Cls 4.1(f), (i).
12 Cl 5.2. This liability was subject to a minimum aggregate amount of $5,700,000 for the first two of these items.
13 Cl 7.1.
14 Cl 7.4.
15 Cl 7.11.
16 Cl 7.22.
17 Reply at [62](s). See also *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd* [2014] QSC 282 at [18], [21].

could be determined that the Monto Coal Project was not economically viable.[18]

[14] The plaintiffs allege that Monto Coal 2 has breached the Joint Venture Agreement by (*inter alia*):

(a) voting in favour of a resolution (on 4 July 2003) to suspend work on the Monto Coal Project and subsequently using its majority interest to maintain that suspension;[19]

(b) failing to take any reasonable steps to develop Stage 1 of the mine;[20]

(c) ignoring or refusing requests by the plaintiffs to proceed with development of the mine;[21]

(d) failing to undertake the Stage 2 Feasibility Study;[22] and

(e) exercising its right to vote on the Management Committee for the MCJV in bad faith and with regard to extraneous interests.

[15] The plaintiffs allege that Monto Coal 2 has continued to breach the Joint Venture Agreement (including by acting in bad faith) throughout the period from 2003 to 2012.[23]

[16] The plaintiffs allege the breaches of the Joint Venture Agreement by Monto Coal 2 have caused them damage because (*inter alia*) they have:[24]

(a) lost the opportunity to earn a profit from the sale of coal from Stage 1 and Stage 2; and/or

(b) lost the opportunity to sell their respective interests in the MCJV at a value reflecting the stage to which the Monto Coal Project would have advanced had Monto Coal 2 not breached its obligations.

[17] The defendants deny the allegations that Monto Coal 2 has breached the Joint Venture Agreement.

[18] The defendants maintain that on a proper construction of the Joint Venture Agreement:[25]

(a) the obligation of the Participants to develop Stage 1 within three years of the Commencement Date was not absolute or unconditional;

(b) cl 5.1 of the Joint Venture Agreement required only that the Participants use reasonable efforts to develop

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18 Reply at [34].
19 Amended Consolidated Statement of Claim ("ACSOC") at para 20(a).
20 Ibid at para 20(b).
21 Ibid at para 30(c).
22 Ibid at para 20(d).
23 Ibid at para 27.
24 Ibid at para 23.
25 Third Further Amended Defence ("3FAD") at para 83.

Stage 1 within three years of the Commencement Date (i.e. by 16 May 2005);

(c) in making reasonable efforts, the Participants were required to have regard to all relevant factors relating to the Monto Coal Project and the economic viability of the Monto Coal Project;

(d) in assessing all relevant factors relating to the Monto Coal Project and the economic viability of the Monto Coal Project, the Participants were required to act in good faith and reasonably.

[19] As to the allegations of breach, the defendants maintain that:

(a) by 4 July 2003 (when it voted in favour of suspension), Monto Coal 2:

(i) had formed the view, reasonably and in good faith, that the Monto Coal Project was not then economically viable in light of the then current and predicted coal prices;[26]

(ii) had formed the intention, reasonably and in good faith, to take no steps to cause the Joint Venture Management Committee to make the decisions necessary to complete development of Stage 1 by 16 May 2005;[27]

(b) between 4 July 2003 and 16 May 2005, Monto Coal 2:

(i) continued to hold the view, reasonably and in good faith, that the Monto Coal Project was not economically viable in the form contemplated by the Joint Venture Agreement;[28]

(ii) continued to hold the intention, reasonably and in good faith, to take no steps to cause the Joint Venture Management Committee to make the decisions necessary to complete development of Stage 1 by 16 May 2005;[29]

(c) between 16 May 2005 and May 2012, Monto Coal 2 reasonably and in good faith:[30]

(i) continued to assess whether it should cause the Joint Venture Management Committee to make decisions necessary to develop a mine;

(ii) formed the view that it should not take those steps;

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26 Ibid at paras 129A and 129B.
27 Ibid at paras 129C and 129D.
28 Ibid at paras 130B and 130C.
29 Ibid at paras 130D and 130E.
30 Ibid at para 156E.

(d) between 4 July 2003 and May 2012, Monto Coal 2 took steps to cause the Joint Venture Management to continue to prepare for the possible development of the mine, including (*inter alia*), obtaining the grant of the Mining Lease, continuing exploration activities and regularly assessing the feasibility of the Monto Coal Project.[31]

[20] As to the issue of damages, the defendants plead that, even if Monto Coal 2 was in breach of the Joint Venture Agreement (which is denied), that breach has not been causative of any loss to the plaintiffs because (*inter alia*):[32]

(a) if Stage 1 of the Monto Coal Project had been developed by 16 May 2005, it would not have made any profits;

(b) if the Stage 2 Feasibility Study had been conducted by 16 May 2005 it would not have shown the Monto Coal Project to be profitable, with the consequence that Monto Coal 2 would not have exercised its vote in favour of development of Stage 2;

(c) if the development of Stage 2 had been achieved, it would not have earned any profits because the capital costs and operating costs would have exceeded revenue."

[18] Relief by way of damages is sought by the plaintiffs against Macarthur Coal on the pleaded basis that it procured and/or induced Monto Coal 2 to breach its obligations as alleged.[33] The claim against Monto Coal is based on alleged breach of the Management Agreement in failing to use all reasonable efforts to obtain a grant of the mining lease for the Monto Coal deposit prior to 21 April 2005.[34]

[19] The damages claimed by the plaintiffs for the losses alleged to have been incurred by them respectively as a result of the alleged breaches of contract exceed $1,190,000,000. As well, aggravated and exemplary damages are sought.

[20] As the pleadings indicate, this proceeding is evidently a complex one. More than 30,000 documents have been discovered. The conduct of a range of executives and employees of Monto Coal 2 and Macarthur Coal over a lengthy 17-year timeframe is put in issue. As many as 60 witnesses may be called to testify. They will include experts whose evidence will address the likelihood that a Stage 2 Feasibility Study would have demonstrated that mine development of Stage 2 would have been profitable,[35] and cover topics including mine planning, geology, environmental approvals, port and rail capacity, water, coal handling and preparation, foreign exchange, coal markets and financial modelling of cash flows.[36]

The decision at first instance

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31 Ibid at paras 134(b), 16l(d) and sch 3.
32 Ibid at paras 163(e), (f) and (i).
33 ACSOC at para 31.
34 Ibid at paras 24, 25.
35 As alleged in ibid at para 23(c), particular (d).
36 Affidavit of M G Ilott sworn 4 December 2017 at para 47(d)(iv): AB2 110-111.

[21] The learned primary judge noted that r 671(a) permits the court to give security for costs only if it is satisfied that the plaintiff is a corporation and there is reason to believe that it will not be able to pay the defendant's costs if ordered to pay them.[37] His Honour observed that an applicant has an evidentiary burden of leading cogent evidence to establish a prima facie entitlement to an order.[38] As well, he set out the discretionary factors to which the court, pursuant to r 672 UCPR, must have regard in deciding whether to make an order.[39]

[22] In terms of approach, the learned primary judge adopted a two-stage process drawing upon the judgment of this Court in *Robson v Robson & Anor*.[40] That approach is not challenged on appeal. The first stage in it involved consideration of whether the court was satisfied in terms of r 671(a). The second, which was to be undertaken only if the court was so satisfied, required consideration of whether security should be granted having regard to the factors in r 672.[41]

[23] In undertaking the first stage, his Honour recorded that cost estimates before him of the defendants' costs to trial on the standard basis were, from the defendants, $4,000,000; and from the plaintiffs, $2,500,000.[42] Further, he noted that each of the plaintiffs was a small proprietary company with very limited paid up capital. On the basis of their financial statements alone, the plaintiffs could not meet costs orders of the magnitude suggested. The plaintiffs accepted that that was so.[43]

[24] Each plaintiff is, however, the trustee of a trading trust. For each trust, its principal asset is the respective plaintiff's interest as participant in the MCJV. As trustee, each plaintiff is entitled to indemnity from trust assets for all expenses reasonably incurred in or about the execution of the trust.[44]

[25] It was common ground, his Honour observed, that the only asset of value that each plaintiff might access to meet an adverse costs order was the interest in the MCJV held on trust for it.[45] Having made that observation, at paragraph [38] of the reasons, he summed up the essential issue for this stage as being "whether the plaintiff corporations' interests in the MCJV [are] sufficient to meet any likely costs order in the event their actions are dismissed".

[26] A valuation of the Monto Coal Project prepared by Mr Geoffrey Hall was in evidence. It contained the only evidence of the project's current value before the learned primary judge. His Honour regarded the valuation given to it of $100 million as the best evidence of current value before him.[46]

[27] The learned primary judge accepted that it did not follow from the value of $100 million that the value of the plaintiff participants' 49 per cent interest in the MCJV was

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37 Reasons at [30].

38 Ibid at [49], citing *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 per Einstein J at [60]-[62].

39 Reasons at [31].

40 [2008] QCA 36.

41 Reasons at [32].

42 Ibid at [34].

43 Ibid at [35], [36].

44 *Trusts Act* 1973 (Qld) s 72.

45 Reasons at [37].

46 Ibid at [49]. His Honour discounted an alternative valuation of $1 million to $2 million for the project given by Mr Hall in a supplementary report, prepared on the assumption that Monto Coal 2 was not acting "as the other participants believed it should" as an "improper basis" of valuation for current purposes, given that a separate valuation by another valuer, Mr Lyons, put the value the of the project's real property alone at $4,220,000: Ibid at [47], [48].

$49 million. The true value, his Honour said, depended upon the terms of the Joint Venture Agreement.[47] He then undertook a review of certain provisions of that agreement. Clause 12, he noted, conferred a pre-emptive right on non-transferring participants to acquire the interest of a transferring participant on specified terms.[48]

[28] Thus, in the event that the plaintiffs were ordered to pay the defendants' costs of the proceeding, the interests in the MCJV held on trust for them respectively could be sold under clause 12 to meet the costs order. If that occurred but the pre-emptive right was not exercised, the interests could be sold to a willing third party purchaser.[49] Whether the sale was to a non-transferring participant or to a third party, the likelihood is, his Honour thought, that the plaintiffs would have recourse to these interests and sell them in order to meet an adverse costs order.[50]

[29] The plaintiff submitted to his Honour that in the event that there was no willing purchaser, they could apply for the appointment of a statutory trustee for sale of the joint venture assets under s 38(1) of the *Property Law Act* 1974 (Qld).[51] After an examination of relevant authorities and a consideration of various provisions in the Joint Venture Agreement, he accepted the submission.[52]

[30] The learned primary judge also gave consideration to a Call and Put Option Deed dated 29 April 2011 by which the second plaintiff, Edge Developments Pty Ltd as trustee of The Kowhai Trust, granted to a third party an option to purchase its 4.9 per cent interest in the MCJV for $10 million, subsequently reduced to $4.9 million by a deed of variation dated 5 June 2017. His Honour regarded the amended price level as being arguably consistent with Mr Hall's valuation.[53]

[31] Further, his Honour was satisfied by undertakings given to the court on behalf of the first and third plaintiffs that they would not, without notice, take steps to decrease significantly the value of their respective interests in the MCJV.[54] He noted that the put and call option deed acknowledged the pre-emptive right conferred by clause 12.[55]

[32] At that point, the learned primary judge then made a critical finding. His Honour said at [73] of the reasons:

> "I conclude from the foregoing that the defendants have not satisfied the Court in terms of *UCPR* r 671(a) that the plaintiff corporations will not be able to pay the defendants' costs if ordered to pay them. Whilst that finding is sufficient to dispose of the application, in deference to the careful submissions put both on behalf of the applicant and the respondents, I shall set out my conclusions in respect of the other two issues which were the subject of dispute between the parties."

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47 Ibid at [50].
48 Ibid at [51].
49 Ibid at [52].
50 Ibid at [65].
51 Ibid at [53].
52 Ibid at [54]-[65].
53 Ibid at [66]-[68].
54 Ibid at [69]-[71].
55 Ibid at [72].

[33] The first disputed issue discussed concerned the r 672 discretionary factors. As to them, his Honour said:[56]

> "I would conclude on the basis that the plaintiff corporations have an interest of value in the joint venture that the discretionary factors weigh more in the plaintiff corporations' favour and against the order for security for costs. A factor, as Connolly J would put it, "of great weight" in exercising the discretion to order security for costs is the means or lack of means of a plaintiff. If I had acceded to Mr Pomeranke QC's submission that the plaintiff corporations' interests in the joint venture were of little or no value, then that factor of great weight would have tipped the balance in the defendant corporations' favour."

[34] The second disputed issue was the quantum of the security. Had he ordered security for costs, his Honour would have fixed the amount at $3.25 million. That sum, he accepted, is the "simplistic average" of the two assessments of $4 million and $2.5 million to which I have referred.[57] His Honour noted, but did not have regard for, a revised estimate of $5 million for the defendants' costs from 4 September 2017 up to the first day of trial prepared by their solicitor, Mr M G Ilott.[58]

The grounds of appeal

[35] There are four grounds of appeal. Ground 1 alleges that the learned primary judge failed to apply the correct test for the first stage of the process under r 671(a).

[36] Ground 2 alleges error in failing to find that there was "reason to believe" that the plaintiffs will not be able to pay the defendants' costs if ordered to pay them and in making certain findings and in proceeding on certain bases. The ground contends that his Honour ought to have found that "possible future realisation of the plaintiffs' interests in the [MCJV] did not displace the conclusion that there was 'reason to believe' that the plaintiffs will not be able to pay" such costs.

[37] Grounds 3 and 4 relate to the second stage of the process under r 671(a). The former contends that having regard to certain stated circumstances, it was an error on the part of the learned primary judge not to have exercised the discretion in favour of ordering security for costs. The latter proposes that his Honour erred in calculating the amount of the security. It contends that when regard is given to the revised costs assessment, as it should have been, the appropriate "simplistic average" is $3.75 million.

Ground 1

[38] Analysis of this ground of appeal appropriately begins with consideration of the nature of the threshold question posed by the expression in r 671(a) as to whether "there is reason to believe that [the plaintiff corporations] will not be able to pay the [defendants'] costs if ordered to pay them". For that purpose, the appellants

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56 Ibid at [80]. His Honour was referring to the judgment of Connolly J in *Re Permanent Trustee Nominees Canberra Ltd* [1989] 1 Qd R 314 at 320-321, from which he had quoted at length at Reasons at [56].

57 Reasons at [91].

58 Ibid.

referred to the joint observations of Maxwell P and Buchanan JA, who constituted the Court of Appeal of Victoria in *Livingspring Pty Ltd v Kliger Partners*.[59]

[39] In that case, their Honours considered the analogous threshold questions posed by s 1335(1) of the *Corporations Act* and r 62.02(1)(b) of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic). They said:

> "[15] The phrase "reason to believe" is the touchstone of jurisdiction. It requires a rational basis for the belief — and no more.[60] 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, commonsense approach to the examination of the corporation's financial affairs.
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> [16] 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.[61] The provision equips the court with the means to require that the defendant be secured against that risk."

[40] In reliance upon *Livingspring*, a risk assessment approach was subsequently adopted by a judge of the Supreme Court of New South Wales in ruling upon an application for security for costs made under both s 1335(1) and r 42.21(1)(d) of the *Uniform Civil Procedure Rules* 2005 (NSW). However, on appeal, in *Cornelius v Global Medical Solutions Australia Pty Ltd*,[62] the approach was criticised.

[41] In *Cornelius*, Macfarlan JA (with whom Tobias AJA agreed) said:

> "[16] The words "reason to believe" acknowledge that on an application for security for costs, as a matter of practicality, a court will not be able to undertake as thorough an examination of the financial position of a plaintiff as it would if an issue as to that arose at a final hearing. Almost inevitably, the court's assessment will be a preliminary one based on limited materials. Nevertheless, for the power to order security to arise, the outcome of the assessment must be that the court considers that there is "reason to believe" that the plaintiff "will be" unable to meet an adverse costs order. A conclusion that there is a risk that that will, or may, be the case is insufficient.

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59 (2008) 20 VR 377; [2008] VSCA 93.

60 See *Warren Mitchell Pty Ltd v Australian Maritime Officers' Union* (1993) 12 ACSR 1 at 5 per Lee J; *FFE Minerals Australia Pty Ltd v Mining Australia Pty Ltd* (2000) 22 WAR 241 at 248, [22].

61 *Ariss v Express Interiors Pty Ltd (in liq)* [1996] 2 VR 507 at 513-14.

62 (2014) 98 ACSR 301; [2014] NSWCA 65.

> [17] The words of the statute and rule are clear and should be applied according to their terms without a gloss being placed upon them. They were so applied in the last Full Bench decision of this Court applying the provisions, *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245 (*Wollongong City Council*). In that case, Beazley JA (as her Honour then was) (with whom Barrett JA agreed) referred to the onus of the applicant for security as being to establish "that there is reason to believe that the other party to the litigation will be unable to pay the costs of the litigation if unsuccessful": at [29] and [30]."

Ward JA agreed in the result. Her Honour accepted that the test requires a rational basis for the requisite belief to be held and that the requisite belief is that the corporation will be unable in the future to pay the defendant's costs, assuming the defendant were to succeed.[63]

[42] I would, with respect, adopt the reasoning of Macfarlan JA. In my view, it accords with the earlier observations of a full bench of the High Court in *George v Rockett*[64] as to the meaning of the expression "reason to believe". In a joint judgment, their Honours said:[65]

> "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

[43] I draw from these observations that for a reason to believe that a fact will exist, the objective circumstances must be sufficient to incline the mind towards accepting, rather than rejecting, that the fact **will** exist. By way of contrast, the requisite belief is not merely that the circumstance may come in to existence, or that there is some risk that it may. It is a belief that the fact will come into existence.

[44] I now turn to the reasons for judgment. Although the learned primary judge set out r 671(a), he did not discuss the meaning of "reason to believe". Nor did he refer to observations in *Livingspring*, *Cornelius* or *George*.

[45] The test that his Honour did in fact apply is best revealed by the language in which he articulated the essential issue at [38] and his ultimate conclusion at [73]. In both instances, the conclusion that the court was to reach, for the threshold question to be answered in the affirmative, was put in terms of it being satisfied that the plaintiff corporations will not be able to pay the defendants' costs if ordered to do so. No

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63 At [56], [59].
64 (1990) 170 CLR 104.
65 At 116.

mention was made of the court being satisfied that there was reason to believe that that will be so.

[46] I infer from these paragraphs that the test his Honour applied was one of whether he was satisfied that the plaintiff companies will not be able to pay the defendants' costs if ordered to do so. It is a test that required his Honour to have been satisfied on the balance of probabilities that the plaintiff companies will not be able so to pay. Put at a level of satisfaction on the balance of probabilities and without regard for "reason to believe", the test applied by his Honour is more demanding than that prescribed by r 671(a).

[47] For these reasons, I am satisfied that the learned primary judge erred by applying an incorrect test for the first stage of the process under r 671(a) and that Ground 1 has been made out. It follows that the conclusion his Honour reached by applying an incorrect test must be set aside. It is for this Court to reach its own conclusion with respect to the threshold question to be answered in the first stage of the process.

The threshold question – onus and "unable to pay"

[48] In reaching a conclusion on the threshold question, it is relevant to bear in mind that it is the applicant for security who bears the persuasive onus of establishing that there is reason to believe that the other party to the litigation will be unable to pay the costs of the litigation if unsuccessful.[66]

[49] I acknowledge that in *Sugarloaf Hill Nominees Pty Ltd v Rewards Projects Ltd*,[67] Corboy J doubted that an applicant for security bears an evidentiary onus on the threshold question. Notwithstanding, his Honour described that question as one which requires "an evaluation of the evidence led by the applicant to see whether that leads to a reason to believe that the corporation will be unable to pay the costs of the defendant". I prefer the view endorsed some three years later in *Cornelius*[68] that it is for the applicant to adduce evidence from which the requisite reason to believe may be deduced and also to persuade the court that such a deduction ought to be made.

[50] I turn next to the meaning of the expression "will be unable to pay". It is found in r 671(a) and is therefore a necessary component of the threshold question. The expression itself does not stipulate when, or by what means, the plaintiff company is to be able to pay the costs order. It does not require, for example, that in order to be able to pay a costs order, a company must have available liquid funds sufficient to meet the costs order on the date that the order is made. To put it another way, it does not state or imply that a company will be unable to pay unless it has on hand such liquid funds at that date.

[51] In *Beach Petroleum NL v Johnson*,[69] von Doussa J observed:

> "A corporation "will be unable to pay" the costs within the meaning of the section if it can only do so if given extended time to realise

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66 *Wollongong City Council* per Beazley JA at [29], [30], cited with approval by Macfarlan JA in *Cornelius* at [17].

67 [2011] WASC 19 at [34].

68 At [18]-[20] per Macfarlan JA (Tobias AJA agreeing).

69 (1992) 7 ACSR 203 at 205.

> assets which might be difficult to realise, at least at a price sufficient to provide a surplus over the liabilities, sufficient to pay the costs: see *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 1 NSWLR 114 at 121. The company will also be unable to pay the costs within the meaning of the section if the payment would be one that will amount to a preference of the defendant over other creditors such that the payment would be liable to be set aside either as a preference or as a fraudulent disposition (that is a payment made by the plaintiff corporation with the intention to defeat or delay one or more other creditors) in the event of the plaintiff corporation later going into liquidation. …
>
> In my opinion the power of the court under s 1335 arises if credible evidence establishes that there is reason to believe there is a real chance that in events which can fairly be described as reasonably possible the plaintiff corporation will be unable to pay the costs of the defendant on service of the allocatur, if judgment goes against it."

[52] These observations imply, correctly in my view, that the period of time likely to be required for determination, by assessment or otherwise, and allowing for resolution of any disputes that arise in the determination process, is to be taken into account. So also is the opportunity that the plaintiff corporation will have within that period to realise non-liquid assets in order to pay the quantum of the ordered costs as and when they are ultimately determined.

How the threshold question should be answered

[53] In considering how the threshold should be answered, I propose to have regard to criticisms made in Ground 2 concerning the application by the learned primary judge of an albeit incorrect test.

[54] One criticism is that his Honour proceeded on the basis that the value of the Monto Coal Project is $100 million when the plaintiffs' own contention in the proceeding is that it is worth $1 million to $2 million. The latter valuation is advanced, of course, on the footing that Monto Coal 2 has acted in breach of contract in suspending Stage 1 work and in not undertaking the Stage 2 Feasibility Study, and has acted in bad faith.[70] If these alleged breaches are proved, then the plaintiffs will, in all likelihood, succeed in the proceeding. The defendants, or some of them, would be ordered to pay the plaintiffs' costs. In summary, the latter valuation is linked to an outcome where the plaintiffs will not be ordered to pay the defendants' costs.

[55] By contrast, it is if the alleged breaches of contract and bad faith are not proved, and the proceeding is dismissed, that the plaintiff corporations are at risk of an adverse costs order. Mr Hall's valuation of $100 million is his assessment of the current value of the project with the participants cooperating as the Joint Venture Agreement envisages.[71]

[56] Mr Hall's evidence is the only evidence of current value of the Monto Coal Project. He was not cross-examined. No contrary evidence of value, on either basis, was

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70 The latter valuation was prepared on that footing: AB1063.

71 AB950, 1063.

advanced. Reliance may therefore be justifiably placed on his current value of $100 million in answering the threshold question.

[57] When a current value of $100 million is accepted, the plaintiff corporations' combined 49 per cent interest in the MCJV has a very substantial value. It far exceeds the estimates of the defendant companies' recoverable costs. There is every reason to believe that the value of the combined interest will well exceed the quantum of costs that they would have to pay the defendants, if ordered to do so.

[58] There is also an aspect of timing. A further criticism made in Ground 2 refers to uncertainties in timing of the realisation of the plaintiffs' combined interest. The uncertainties derive from the mode of sale – whether upon exercise of the pre-emptive right, or sale to a third party purchaser, directly or by the medium of a trustee appointed under s 38 of the *Property Law Act* 1974 (Qld). It is said for the appellant-defendants that in view of these uncertainties, the prospect of realisation of the combined interest "does not displace the conclusion that the plaintiffs will not be able to pay the defendants' costs if ordered to pay them".

[59] With respect, that proposition assumes that the requisite conclusion is to be reached without regard for either the time required for realisation or, for that matter, the time required for determination of the quantum of costs payable. As I have explained, such an assumption is, in my view, incorrect.

[60] On the evidence adduced, there is no reason for inferring that the realisation of the combined interest would take longer than the determination of the costs payable. The latter might well take a very considerable time given that the proceeding has been on foot since 2007 and the trial is to take place over 16 weeks. Certainly, there is no evidence before the Court that would tend to show that realisation would take longer.

[61] Having regard to these factors, I am not satisfied that there is reason to believe that the plaintiff companies would not be able to pay the defendant companies' costs if ordered to do so. I would answer the threshold question in the negative. It follows that the discretion to order security for costs under r 671(a) is not enlivened. It is neither necessary nor appropriate to engage in the second stage of the process. Nor is it necessary to consider Grounds 3 and 4.

Disposition

[62] Although the conclusion of the learned primary judge on the threshold question is set aside, upon a reconsideration of it, I would reach the same conclusion as his Honour did. In that event, the appropriate order is that the appeal be dismissed. The appellants should pay the respondents' costs of the appeal on the standard basis.

Orders

[63] I would propose the following orders:

1. Appeal dismissed.

2. The appellants are to pay the respondents' costs of the appeal on the standard basis.

[64] **McMURDO JA:** I agree with Gotterson JA.

[65] **BODDICE J:** I agree with Gotterson JA.