

# SUPREME COURT OF QUEENSLAND

CITATION: *O'Connor & Ors v CWC Investors Pty Ltd & Ors (No 2)*  
[2019] QSC 138

PARTIES: **KEITH O'CONNOR**  
(first plaintiff)  
**SUSAN MAREE O'CONNOR**  
(second plaintiff)

**COMSTON PTY LTD**  
ACN 010 212 316  
(third plaintiff)

v

**CWC INVESTORS PTY LTD AS TRUSTEE FOR THE  
CWC INVESTMENT UNIT TRUST**  
ACN 113 607 748  
(first defendant)

**CWC COFA PTY LTD AS TRUSTEE FOR THE CWC  
CORPORATE OPPORTUNITY 1A TRUST**  
ACN 113 611 911  
(second defendant)

**CWC COFB PTY LTD AS TRUSTEE FOR THE CWC  
CORPORATE OPPORTUNITY 1B TRUST**  
ACN 114 881 113  
(third defendant)

**TANARRA CAPITAL AUSTRALIA PTY LTD**  
ACN 114 164 331  
(fourth defendant)

**BETTYAL PTY LTD**  
ACN 074 216 247  
(fifth defendant)

**BRENDAN MADDEN**  
(sixth defendant)

**LINDSAY PHILLIPS**  
(seventh defendant)

**DAVID BLOWER**  
(eighth defendant)

**JOHN LOCKETT**  
(ninth defendant)

**ROBERT GREGG**  
(tenth defendant)

**ALEC BRENNAN AM**  
(eleventh defendant)

FILE NO: BS No 2496 of 2017

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 7 June 2019

DELIVERED AT: Brisbane

HEARING DATE: 15 May 2019

JUDGE: Flanagan J

ORDER: **1. The application to stay the enforcement of the costs order of 11 October 2018 is dismissed.**

**2. The O'Connor parties pay the CWC parties' costs of and incidental to the application.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INTERLOCUTORY PROCEEDINGS – where plaintiffs seek to stay the enforcement of a money order – where the money order arises out of two indemnity costs orders relating to a summary judgment and strike out application and a subsequently amended statement of claim – where the plaintiffs allege they will be bankrupted if a stay were not granted – where there is a history of the plaintiffs receiving loans from family members to continue the proceeding – whether a stay should be granted

*Uniform Civil Procedure Rules 1999 (Qld) r 800*

*Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685, cited

*Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453, cited

*Croney v Nand* [1999] 2 Qd R 342, cited

*Lee v Abedian & Ors* [2017] QSC 22, considered

*O'Connor & ors v CWC Investors Pty Ltd & ors* [2017] QSC 279, cited

*Virgtel Ltd v Zabusky (No 2)* [2009] QCA 349, considered

COUNSEL: The first plaintiff appeared on his own behalf and on behalf of the second and third plaintiffs  
J D McKenna QC with D Fuller for the defendants

SOLICITORS: The first plaintiff appeared on his own behalf and on behalf of the second and third plaintiffs  
Minter Ellison for the defendants

- [1] By application filed 21 December 2018 the applicants seek, pursuant to r 800 of the *Uniform Civil Procedure Rules 1999 (Qld) (UCPR)*, a stay of the enforcement of a costs order made 11 October 2018.
- [2] The costs order, which was made by the Deputy Registrar, was in the following terms:
- “The Plaintiffs pay the [sic] Defendants costs pursuant to:
- (a) the orders of the court dated 24 November 2017 and 19 February 2018; and
- (b) the certificate of the costs assessor filed 2 October 2018 assessed at \$338,613.52.”
- [3] The court orders referred to in the costs order are indemnity costs orders made by Bond J in circumstances which are detailed below.

### **Relevant history**

- [4] The applicants, who I will refer to as the O’Connor parties, commenced the present proceeding against the respondents, who I will refer to as the CWC parties, on 10 March 2017 by way of a claim and statement of claim. The principal claim for relief is an order setting aside a settlement deed.
- [5] The settlement deed concerned a previous proceeding which was commenced on 26 February 2010 by the CWC parties against the O’Connor parties and others.<sup>1</sup>
- [6] In his affidavit, Mr Fletcher, a solicitor for the CWC parties, provides the following background to the previous proceeding:<sup>2</sup>

“The previous proceeding was a commercial dispute relating to the ownership and management of PPI Corporation Pty Ltd (**PPI Operations**) and its parent company PPI Corporation Holdings Pty Ltd (**PPI**). The CWC parties held a substantial majority of the shares in PPI. The first plaintiff (**Mr O’Connor**) and the third plaintiff in the present proceeding were also shareholders of PPI. Mr O’Connor was a former director of PPI and PPI Operations and the former Chief Financial Officer of PPI Operations.

The CWC parties alleged, among other things, that Mr O’Connor had:

- (a) made unfounded allegations of criminal behaviour, fraud, dishonesty and misleading conduct against the CWC parties and other defendants in the current proceedings (who were directors and other officers of PPI and PPI Operations);

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<sup>1</sup> Affidavit of Michael Thomas Fletcher filed 8 May 2019, paragraphs 3-4.

<sup>2</sup> Affidavit of Michael Thomas Fletcher filed 8 May 2019, paragraphs 6-8.

- (b) improperly disclosed PPI's confidential information, attended PPI's offices and accessed its documents; and
- (c) issued 'notices of default' and a 'termination notice' under the Shareholders Agreement between the parties without any legal basis.

The relief the CWC parties sought included:

- (a) injunctions against Mr O'Connor restraining him from making allegations of fraud or criminal behaviour against anyone involved in PPI or PPI Operations, as the CWC parties alleged he had been doing;
- (b) injunctions against all the defendants in the previous proceeding restraining them from relying on the purported 'notices of default' and 'termination notice' to prevent the CWC parties from voting at PPI meetings, receiving or participating in any PPI distributions or transferring shares in PPI or receiving information about PPI or PPI Operations; and
- (c) declarations as to the termination of the Shareholders Agreement between the parties."

[7] The previous proceeding settled on the second day of a two week trial. Both parties in the previous proceeding were represented by Senior Counsel.<sup>3</sup>

[8] Mr Fletcher summarises the settlement deed as having the following effect:<sup>4</sup>

- “(a) Mr O'Connor and the third plaintiff agreed to pay the CWC parties \$315,000 and to give the CWC parties a share mortgage over their shares in PPI to secure those obligations;
- (b) the parties agree to release one another from all claims in the previous proceeding and in relation to the Shareholders Agreement and the affairs of PPI and PPI Operations;
- (c) Mr O'Connor and the third plaintiff agreed to withdraw his allegations of criminal behaviour, fraud and similar matters and release the CWC parties and officers from any claims relating to those allegations and any claims relating to the sale of PPI and PPI Operations;
- (d) these releases were an absolutely bar and defence to any claim agreed to be released;
- (e) the parties agreed to discontinue the previous proceeding;
- (f) the O'Connor parties agreed that selling the assets of PPI Operations and PPI was in the shareholders' best interests and agreed not to obstruct that sale;
- (g) the parties agreed to bear their own costs associated with the Settlement Deed; and

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<sup>3</sup> Affidavit of Michael Thomas Fletcher filed 8 May 2019, paragraphs 10-11.

<sup>4</sup> Affidavit of Michael Thomas Fletcher filed 8 May 2019, paragraphs 10-12.

- (h) the parties agreed and acknowledge that they had freely entered into the Settlement Deed after having the opportunity to carefully consider its contents and to obtain legal or other professional advice on the matters in the Deed, and that they understood the content and consequences of entering into the Deed.”
- [9] In relation to the present proceeding, on 24 April 2017 the CWC parties filed a defence to the claim and statement of claim, and on 6 June 2017 the O’Connor parties filed a reply to the defence.<sup>5</sup>
- [10] On 17 July 2017, the CWC parties filed an application for summary judgment in relation to all or part of the plaintiffs’ claim or, alternatively, to strike out all or part of the plaintiffs’ statement of claim.<sup>6</sup>
- [11] The summary judgment and strike out application was heard by Bond J on 20 November 2017.
- [12] On 24 November 2017, Bond J delivered judgment and published his Reasons.<sup>7</sup> His Honour gave summary judgment in favour of the CWC parties in so far as the O’Connor parties’ claim sought the repayment of the costs of the previous proceeding. Bond J also struck out the statement of claim in its entirety, subject to the following order:
- “The plaintiffs must file and serve a statement of claim which pleads:
- (a) all their claims for relief deriving from the allegation that the plaintiffs were induced to enter into the Settlement Deed by the CWC parties’ fraudulent misrepresentation that they had no knowledge of the dealing between CopperCo and PPI in late August and early September 2008 in which CopperCo placed large orders for PVC pipe with PPI; and, in particular,
  - (b) the material facts relied on to establish the causal link between the alleged fraudulent representation and the plaintiffs entering into the Settlement Deed.”
- [13] His Honour further ordered the O’Connor parties to pay the CWC parties’ costs of and incidental to their application on the indemnity basis. In ordering indemnity costs, his Honour observed as follows:<sup>8</sup>
- “In light of:
- (a) the gross deficiencies in the statement of claim;
  - (b) the groundless claim for refund of the costs spent on the defence and counterclaim in the previous proceeding; and

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<sup>5</sup> Affidavit of Michael Thomas Fletcher filed 8 May 2019, paragraphs 14-15.

<sup>6</sup> Affidavit of Michael Thomas Fletcher filed 8 May 2019, paragraph 16.

<sup>7</sup> *O’Connor & ors v CWC Investors Pty Ltd & ors* [2017] QSC 279.

<sup>8</sup> [2017] QSC 279, [69]-[72].

- (c) the fact that the plaintiffs' true case emerged for the first time only in the oral submissions in response to the summary judgment application,

I conclude that thus far the plaintiffs have been guilty of undue prolongation of this proceeding by making groundless and irrelevant contentions which should never have been advanced.

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For completeness, I observe that the defendants had sought an order that, if the proceeding continued, it be stayed until the plaintiffs had discharged their obligations in relation to costs. In light of the approach I have taken, I would not make such an order now, but would reconsider the question once I have considered whether the plaintiffs have a real prospect of success in relation to the claim advanced in the further statement of claim."

- [14] Previously in his Reasons, his Honour had observed that the statement of claim did not comply with the rules of pleading and that, if the proceeding were to continue, the statement of claim would have to be struck out.<sup>9</sup> Counsel for the O'Connor parties had not contended to the contrary.<sup>10</sup> His Honour further observed that counsel for the O'Connor parties "did not seek to support the proposition that there was an arguable case (let alone a case with a real prospect of success) in respect of the claim for refund of the costs of the defence and counterclaim in the previous proceeding."<sup>11</sup>
- [15] After the O'Connor parties filed an amended statement of claim pursuant to the order of Bond J on 24 November 2017, his Honour, on 19 February 2018, made a further costs order in favour of the CWC parties to the following effect:
- "The plaintiffs must pay the defendants' costs thrown away by the amendments constituted by a comparison between the statement of claim filed 10 March 2017 and the statement of claim filed 5 February 2018 to be assessed on the indemnity basis."
- [16] At the time that these two indemnity costs orders were made by Bond J on 24 November 2017 and 19 February 2018, the O'Connor parties were represented by counsel.<sup>12</sup> On neither of these occasions did the O'Connor parties apply to Bond J for a stay in respect of these orders.
- [17] Subsequently, the CWC parties took steps to enforce these costs orders, which are outlined in Mr Fletcher's affidavit:<sup>13</sup>
- "On 29 March 2018, the [CWC parties] served on the [O'Connor parties'] then solicitors a costs statement claiming \$396,565.42 for [their] costs pursuant to Justice Bond's orders of 24 November 2017 and [19] February 2018.

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<sup>9</sup> [2017] QSC 279, [39].

<sup>10</sup> [2017] QSC 279, [39].

<sup>11</sup> [2017] QSC 279, [40].

<sup>12</sup> Affidavit of Michael Thomas Fletcher filed 8 May 2019, paragraphs 21 and 24.

<sup>13</sup> Affidavit of Michael Thomas Fletcher filed 8 May 2019, paragraphs 27-34.

On 19 April 2018, the [O'Connor parties] served a notice of objection to the costs statement with a proposed reduction of \$62,847.05 to \$333,718.37.

On 17 July 2018, a costs assessor was appointed by the Court.

On 3 August 2018, the [CWC parties] agreed to compromise the costs being sought in the costs statement in the interest of the efficient conduct of the proceeding...

On 29 August 2018, the [CWC parties] served on the [O'Connor parties'] solicitors and on the costs assessor a supplementary costs statement...

On 2 October 2018, the costs assessor filed a certificate of assessment.

On 11 October 2018, the Deputy Registrar of the Court made an order that the O'Connor parties pay the [CWC parties'] costs in the assessed amount of \$338,613.52 (**costs order**).

On 7 December 2018, a demand for payment of the costs order by 21 December 2018 was served on the [O'Connor parties]..."

- [18] The CWC parties first became aware that the O'Connor parties wished to stay the enforcement of the costs order on 13 December 2018, which was when Mr Fletcher received a letter from the O'Connor parties' solicitors to that effect.<sup>14</sup>
- [19] The O'Connor parties filed the present application, pursuant to r 800 of the UCPR, on 21 December 2018.
- [20] The CWC parties have not yet applied either for summary judgment or to strike out the amended statement of claim filed by the O'Connor parties on 5 February 2018.

### **Consideration**

- [21] Rule 800(1) of the UCPR provides:

“A court may, on application by an enforcement debtor—

- (a) stay the enforcement of all or part of a money order, including because of facts arising or discovered after the order was made; and
- (b) make the orders it considers appropriate, including an order for payment by instalments.”

- [22] Rule 800(1) was considered by the Court of Appeal in *Virgtel Ltd & Anor v Zabusky & Ors (No 2)*.<sup>15</sup> President McMurdo (with whom Mullins and Philippides JJ agreed) stated:<sup>16</sup>

“The costs orders the subject of this appeal are final orders. It follows that, ordinarily, the Virgtel companies are entitled to the ‘fruits of their victory’

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<sup>14</sup> Affidavit of Michael Thomas Fletcher filed 8 May 2019, paragraph 35.

<sup>15</sup> [2009] QCA 349.

<sup>16</sup> [2009] QCA 349, [19].

by enforcing those final costs orders before the conclusion of the action, unless the appellants show ‘special or exceptional circumstances’ warranting a stay: *Alexander v Cambridge Credit Corp Ltd*,<sup>17</sup> *Cronney v Nand*.<sup>18</sup> The onus is on the appellants to demonstrate why the court should grant the stay and deny the Virgtel companies the benefit of the orders in their favour.”

- [23] Similar to the situation in *Virgtel*, the costs order made by the Deputy Registrar on 11 October 2018 is a final order and the CWC parties would ordinarily be entitled to payment of the amount of \$338,613.52. The observation by McMurdo P that a party in the position of the O’Connor parties must show “special or exceptional circumstances” warranting a stay is not a test which is reflected in the wording of r 800(1), which makes no express reference to such a test. As observed by Applegarth J in *Lee v Abedian & Ors*:<sup>19</sup>

“The ultimate issue is whether it is appropriate to grant a stay in the particular circumstances of this case, taking into account the need to do justice between the parties by balancing their competing rights and interests. An applicant for a stay does not need to show special or exceptional circumstances.<sup>20</sup> Nevertheless, the onus is upon the applicant to demonstrate that it is appropriate for a stay to be granted. In general, courts should not be disposed to delay the enforcement of their orders,<sup>21</sup> and a successful party in litigation is entitled to the fruits of a judgment.<sup>22</sup>”

- [24] A relevant consideration that was identified both in *Virgtel* and *Lee* is that delay in bringing an application is a factor which dictates against the granting of a stay. President McMurdo considered this factor to be “highly relevant”:<sup>23</sup>

“It is highly relevant that the appellants did not apply to stay these orders until after the costs had been assessed, a certificate of assessment filed and the registrar ordered they take effect as judgments of the court. It is true that these steps would have to be taken at some point regardless of when a stay was granted. But if the Virgtel companies are to be denied the benefit of final orders, they should be informed of this as early as possible. The lateness of the appellants’ application, in the absence of any pressing new facts arising or discovered after the order under UCPR r 740 took effect, is a telling, though not conclusive, factor against its success.”<sup>24</sup>

- [25] In the present case there has been considerable delay. As is evident from the history set out above, the first indemnity costs order made by Bond J was on 24 November 2017. The second order was made on 19 February 2018. The application for a stay of enforcement was not filed until 21 December 2018, after a costs assessment process that

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<sup>17</sup> (1985) 2 NSWLR 685, 693.

<sup>18</sup> [1999] 2 Qd R 342, 348.

<sup>19</sup> [2017] QSC 22, [4].

<sup>20</sup> *Cook’s Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453, 455 [12]; *Cronney v Nand* [1999] 2 Qd R 342, 348 [33]; cf *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2009] QCA 349, [19].

<sup>21</sup> *Cook’s Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453, 455 [12].

<sup>22</sup> *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2009] QCA 349, [19].

<sup>23</sup> *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2009] QCA 349, [23].

<sup>24</sup> *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2009] QCA 349, [23].

commenced on 29 March 2018 when the CWC parties served on the O'Connor parties a costs statement. The CWC parties submit that this delay is "highly relevant" and "telling" against granting a stay.<sup>25</sup> Although it may be accepted that an application for a stay of enforcement could not be made under r 800(1) until the money order was made by the Deputy Registrar on 11 October 2018,<sup>26</sup> it remains the case that no other steps were taken by the O'Connor parties to defer the assessment of costs until after the conclusion of the trial. The relevant delay considered by the Court of Appeal in *Virgtel* was not the delay between the making of the money order and the bringing of the stay application under r 800 but rather the delay from the making of the costs orders.<sup>27</sup> If one is to assess delay from this perspective, it is striking that the O'Connor parties did not foreshadow their intention to stay the enforcement of any resulting money order until 13 December 2018, which was more than a year after the first indemnity costs order made by Bond J (24 November 2017), and two months after the Deputy Registrar's order of 11 October 2018.

- [26] In *Lee*, Applegarth J considered a relevant factor to be "the right or interest of [a party] in enforcing, prior to judgment in the proceeding, costs orders made in their favour."<sup>28</sup> A competing right or interest identified by his Honour was "the entitlement of an individual, who seeks the assistance of the Court to vindicate his or her legal rights, to litigate a claim that cannot be said to be without merit. This individual interest corresponds with the public interest in access to justice."<sup>29</sup> Applegarth J noted that in terms of the applicant's financial position he had no assets. His Honour also noted that the applicant faced "a number of legal and factual obstacles in the principal proceeding", however, the applicant's claim "[could not] be said to be without merit."<sup>30</sup> Applegarth J identified the relevant issue as being whether in all the circumstances of the case, the applicant should be obliged to pay the money "at this stage".<sup>31</sup> In concluding that a stay should be granted, Applegarth J observed as follows:<sup>32</sup>

"In summary, there is no identified irreparable harm to the Sunland defendants, such as the risk of dissipation of assets whilst a stay remains in place. There is an identified prejudice to Mr Lee if a stay is not granted. He faces bankruptcy, with certain adverse personal consequences. The Sunland defendants do not submit that bankrupting Mr Lee will result in his action being stayed. In the circumstances, the practical advantage to the Sunland defendants in allowing them to 'keep their options open' is unclear."

- [27] *Lee* was an unusual case in that if a stay of the costs order had not been granted and the Sunland defendants had proceeded to bankrupt Mr Lee, it was assumed for the purposes of the application before the Court that his bankruptcy would not have brought the proceedings to an end.<sup>33</sup> This is to be contrasted with the present case where the O'Connor parties submit that if the stay is not granted, the CWC parties could force

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<sup>25</sup> *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2009] QCA 349, [23]; Defendants' Written Submissions filed 8 May 2019, paragraph 25 citing *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2009] QCA 349, [23].

<sup>26</sup> *Lee v Abedian & Ors* [2017] QSC 22, [51].

<sup>27</sup> *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2009] QCA 349, [23].

<sup>28</sup> [2017] QSC 22, [9].

<sup>29</sup> [2017] QSC 22, [9].

<sup>30</sup> [2017] QSC 22, [38].

<sup>31</sup> [2017] QSC 22, [57].

<sup>32</sup> [2017] QSC 22, [63].

<sup>33</sup> [2017] QSC 22, [44].

bankruptcy proceedings against the O'Connor parties, "thus denying them fair and proper access to justice by proceeding to Trial."<sup>34</sup>

- [28] There are a number of difficulties with this submission. First, it is not apparent on the material that if a stay of the enforcement of the costs order is not granted, this will result in the O'Connor parties being bankrupted. Mr O'Connor's affidavit refers to his family being in a serious financial position,<sup>35</sup> with the primary asset held by his wife, the second plaintiff, being the family home<sup>36</sup>. Mr O'Connor gave oral evidence that the property was subject to a contract of sale for \$1,020,000.<sup>37</sup> There is a first registered mortgage to Westpac Bank for approximately \$920,000 and his sister has a second mortgage for approximately \$204,000.<sup>38</sup> After paying off the first mortgage from the sale proceeds, Mr O'Connor will only have approximately \$80,000 to pay to his sister.<sup>39</sup>
- [29] Mr O'Connor accepted that the reason he owes money to his sister is because she has been assisting in funding both the previous proceeding and the present proceeding.<sup>40</sup> By repaying some of the money to his sister, Mr O'Connor is hopeful that his sister will continue to provide funds for the litigation.<sup>41</sup> Mr O'Connor, however, has "no certainty" that there will be further funds, which is why he is in the process of seeking litigation funding.<sup>42</sup> Mr O'Connor exhibits to his affidavit a statement of assets, liabilities and income.<sup>43</sup> This statement records approximately \$650,000 in advances from family and friends which have not been repaid. These advances are described in the statement as loans, with some being further described as loans for "Legal & Living" expenses.
- [30] The onus of establishing that this is an appropriate case for a stay rests with the O'Connor parties. The state of the evidence presented by the O'Connor parties does not permit a finding to be made that if a stay was not granted the O'Connor parties would be bankrupted and the present proceedings brought to an end. This is because there is evidence of substantial funding by family members of the litigation in the past and there is no proper basis to find that funding from family members will not continue. Secondly, the written submissions of the O'Connor parties, which were prepared by Mr O'Connor, refer to engaging the services of forensic accountants for a third party expert report on damages, and also the fact that an associate is in consultation currently with a litigation funder.<sup>44</sup> These factors are also indicative that funding continues and will continue to be available for the litigation.

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<sup>34</sup> Submissions on Behalf of the Plaintiffs by the First Plaintiff filed 17 April 2019, paragraph 27 citing *Lee v Abedian & Ors* [2017] QSC 22.

<sup>35</sup> Mr O'Connor's only present income is the aged pension and his wife receives a disability pension: affidavit of Keith Jamieson O'Connor filed 17 April 2019, paragraphs 8-9.

<sup>36</sup> Affidavit of Keith Jamieson O'Connor filed 17 April 2019, paragraph 11.

<sup>37</sup> T 1-6, lines 28-29.

<sup>38</sup> T 1-6, lines 30.

<sup>39</sup> T 1-6, lines 25-33 and T 1-7, lines 31-37.

<sup>40</sup> T 1-7, lines 20-29.

<sup>41</sup> T 1-7, lines 31-33.

<sup>42</sup> T 1-7, line 35.

<sup>43</sup> Exhibit "OO" to the affidavit of Keith Jamieson O'Connor filed 17 April 2019.

<sup>44</sup> Submissions on Behalf of the Plaintiffs by the First Plaintiff filed 17 April 2019, paragraph 26.

- [31] The CWC parties submit, correctly in my view, that Mr O'Connor cannot maintain that he is impecunious in any relevant sense. If that submission were accepted, it means he can immunise himself against a costs order by funding his litigation through third parties subject only to his willingness to request it. I accept that this is not a case in which the evidence establishes that enforcing the costs order will "stymie" the ability of the O'Connor parties to pursue their claim.<sup>45</sup>
- [32] It is also a relevant consideration that the costs order sought to be enforced arises from indemnity costs orders. As correctly submitted by the CWC parties, the costs that comprise the costs orders were not incurred in "the normal cut and thrust of adversarial litigation"<sup>46</sup> but resulted from the complete and undisclosed reformulation of the O'Connor parties' case in the course of the summary judgment/strike out hearing.<sup>47</sup> The basis upon which Bond J ordered indemnity costs is outlined in [13] above. Senior Counsel for the CWC parties could find no precedent where the enforcement of a money order based on indemnity costs orders of this kind had been stayed.
- [33] I have noted above at [20] that the CWC parties have not brought any application for summary judgment or to strike out the amended statement of claim filed by the O'Connor parties on 5 February 2018. That may well be because it does not wish to incur further costs in circumstances where prior indemnity costs orders remain outstanding. It remains the case, however, that the principal relief sought in the present proceedings by the O'Connor parties is that the settlement deed be set aside. The case now pleaded is that the settlement deed should be set aside because of fraudulent misrepresentation. The fraudulent misrepresentation is alleged to arise from an affidavit sworn in the previous proceeding by the CWC parties' Chief Financial Officer, Mr Birkbeck.<sup>48</sup> A further allegation is that six emails, which would have demonstrated the falsity of the representation, were not disclosed in the previous proceeding.<sup>49</sup> The O'Connor parties allege that they entered into the settlement deed in reliance on the truth of the statement contained in Mr Birkbeck's affidavit, that he was "not aware of any dealings between CopperCo and PPI Corporations Pty Ltd (or any of its subsidiaries) until [he] became aware at an investment committee meeting of the potential bad debt."<sup>50</sup>
- [34] The CWC parties submit that the fraudulent misrepresentation case currently pleaded has no obvious merit.<sup>51</sup> There are some difficulties with the fraudulent misrepresentation case. First, it treats Mr Birkbeck's statement in his affidavit as if it were a representation. Secondly, the O'Connor parties will need to establish that the statement in the affidavit constitutes a fraudulent misrepresentation upon which they relied when entering into the deed of settlement. This is in circumstances where the O'Connor parties were represented by Senior Counsel at the time of entering into the deed. For the purposes of determining the stay application, however, I have proceeded

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<sup>45</sup> Defendants' Written Submissions filed 8 May 2019, paragraph 23.

<sup>46</sup> Cf *Lee v Abedian & Ors* [2017] QSC 22, [40].

<sup>47</sup> Defendants' Written Submissions filed 8 May 2019, paragraph 20.

<sup>48</sup> Amended Statement of Claim filed 5 February 2018, paragraphs 31 and 34-36.

<sup>49</sup> Amended Statement of Claim filed 5 February 2018, paragraph 33.

<sup>50</sup> Amended Statement of Claim filed 5 February 2018, paragraph 28.

<sup>51</sup> Defendants' Written Submissions filed 8 May 2019, paragraph 21.

on the basis that the O'Connor parties have an arguable claim. The Court is simply not in a position to assess the merits of the claim at this stage.

- [35] Another factor dictating against the grant of a stay is that this is not a case in which a stay could be justified on the basis the plaintiffs would otherwise lose the benefit of a set-off that may be available if they ultimately succeed in the proceeding. The amount of damages claimed by the O'Connor parties is only \$115,000, which is less than half the amount of the costs order.<sup>52</sup>
- [36] The O'Connor parties have failed, in my view, to discharge the burden of establishing that the circumstances of the present case make it appropriate for a stay of enforcement to be granted.

### **Disposition**

- [37] I order that:
1. The application to stay the enforcement of the costs order of 11 October 2018 is dismissed.
  2. The O'Connor parties pay the CWC parties' costs of and incidental to the application.

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<sup>52</sup> Defendants' Written Submissions filed 8 May 2019, paragraph 24.