SUPREME COURT OF QUEENSLAND

CITATION:	*Treadstone Developments Pty Ltd Wever Family Trust v The Salisbury Group Pty Ltd & Ors* [2014] QSC 109
PARTIES:	**TREADSTONE DEVELOPMENTS PTY LTD ATF WEAVER FAMILY TRUST** **ACN 069 137 177** (plaintiff) **v** **THE SALISBURY GROUP PTY LTD (IN LIQUIDATION)** **ACN 089 332 918** (not a party to the application) **AVANTEOS INVESTMENTS LIMITED** **ACN 096 259 979** (second defendant) **IAN WEAVER** (not a party to the application) **COMMONWEALTH BANK OF AUSTRALIA** **ACN 123 123 124** (fourth defendant)
FILE NO/S:	No 6878 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	23 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2014
JUDGE:	Daubney J
ORDER:	**On the application by the second and fourth defendants for security for costs, it is ordered:** 1. **That, within 28 days, the plaintiff shall provide, in a form satisfactory to the Registrar, security for the second and fourth defendants' costs up to and including the first day of trial in the amount of $200,000;** 2. **Costs reserved.** **On the plaintiff's application for leave to amend, it is**

ordered:

1. **That the plaintiff have leave to file and serve an amended claim and amended statement of claim substantially in the form of the draft amended claim and statement of claim exhibited to the affidavit of Alexander Philip Nase sworn 27 February 2014;**

2. **Costs reserved.**

On the plaintiff's application for disclosure and leave to proceed, it is ordered:

1. **That, within seven days, the first defendant, by its liquidators Mr Stephen Hathway and Mr Terry Van der Velde, deliver a copy of the first defendant's professional indemnity insurance policy that was current as at 11 July 2008, including any cover notes, certificates of insurance, policy schedules, standard terms and conditions or other documents that form part of the insurance contract;**

2. **Pursuant to s 500(2) of the *Corporations Act*, the plaintiff has leave nunc pro tunc to proceed against the first defendant, provided that the plaintiff may not enforce any money judgment or order for the payment of money against the first defendant without the further leave of the court.**

3. **Costs reserved.**

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS - OTHER REASONS FOR SECURITY - where the second and fourth defendants seek security for costs – where the corporate plaintiff would be unable to satisfy an order for costs – whether the guarantees of those standing behind the plaintiff can be accepted as security – whether the plaintiff's impecuniosity was caused by the defendants – whether an order for security would stifle the litigation

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – JURISDICTION AND GENERALLY - where the plaintiff seeks leave to amend its statement of claim – where the application is not opposed – where the plaintiff also seeks leave to proceed against the first defendant – where the first defendant is a company in liquidation – where the grant of leave is not opposed - whether it is appropriate to include conditions on the grant of leave

PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS –

DISCOVERY OF DOCUMENTS – GENERALLY – where the plaintiff seeks to discover whether the first defendant holds a responsive policy of professional indemnity – where the plaintiff agues that the continuance of the proceeding depends on this discovery – where there is no doubt to the existence of the policy – whether there are sufficient special circumstances, in conjunction with the interest of justice, that require disclosure of the policy

Uniform Civil Procedure Rules 1999 (Qld), ch 17 pt 1
Corporations Act 2001 (Cth), s 1335

Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd [2012] QCA 114, followed
Bell Wholesale Co Pty Ltd v Gates Export Corporation (1984) 2 FCR 1, followed
Bryan E Fencott and Assocs Pty Ltd v Eretta Pty Ltd (1987) 16 FCR 497, followed
Company Solutions (Aust) Pty Ltd v Keppel Cairncross Shipyard Ltd (in liq) [2004] QSC 379, followed
Jazabas Pty Ltd v Haddad (2007) 65 ACSR 276; [2007] NSWCA 291, followed
Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire [2010] 2 Qd R 85; [2009] QCA 254, cited

COUNSEL: M Jones for the plaintiff
PK O'Higgins for the second and fourth defendants

SOLICITORS: Tucker & Cowen for the plaintiff
Henry Davis York Lawyers for the second and fourth defendants

[1] Whilst this proceeding was commenced by an originating application filed on 26 July 2013, it is to proceed on pleadings. The plaintiff's claims for damages rest on allegations of negligence, contraventions of the statutory prohibitions on misleading and deceptive conduct, unconscionable conduct and breach of contract.

[2] The plaintiff contends that it suffered loss because of investments it made in 2005 to 2007, on the advice of the first and third defendants. The plaintiff made a number of investments in a financial product called the "Beacon Managed Fund and Share Service" ("the Fund"), which was operated by the second defendant (a wholly owned subsidiary of the fourth defendant). The investments were made with funds from margin loans obtained by the plaintiff from the fourth defendant. Deterioration in underlying securities led to the fourth defendant making margin calls on the plaintiff in early 2008.

[3] In general terms, the plaintiff alleges that the first and third defendants were agents of the fourth defendant, and that the fourth defendant engaged in unconscionable conduct, is subject to an estoppel, engaged in misleading or deceptive conduct and breach of contract in connection with, relevantly, the making of the margin calls on the plaintiff. The plaintiff claims that the second defendant made

misrepresentations in documents associated with the Fund regarding the availability of margin loans from the fourth defendant for investments in the Fund.

[4] The plaintiff, as is apparent from the Court heading, sues in its capacity as trustee of the Weaver Family Trust ("the Trust"). The plaintiff has an issued capital of $3, comprising:

- one "A class" share of $1, held by Jonathan David Weaver ("Jonathan");
- one "B class" share of $1, held by Justin Ian Weaver ("Justin");
- one ordinary share of $1, held by Scott Andrew Weaver ("Scott").

The two current directors of the plaintiff are Jillian Ann Weaver ("Jillian") and Scott, who is also the company secretary.

[5] A copy of the deed dated 28 April 1995 by which the Trust was settled, with the plaintiff as trustee, was in evidence before me. It is a standard discretionary trust. By its terms, the beneficiaries of the Trust include:

(a) The third defendant (who is the husband of Jillian Weaver);

(b) Jillian;

(c) Scott;

(d) Jonathan; and

(e) Justin.

[6] A singular aspect of this proceeding is that the third defendant, who is, as I have just noted, a beneficiary of the Trust, was an "authorised representative"[1] of the first defendant (which is now in liquidation).

[7] Without descending into detail, it is fair to observe, as did counsel for the second and fourth defendants, that a significant portion of the complaints sought to be ventilated by the plaintiff in this proceeding is said to arise from advice allegedly given to the plaintiff by the third defendant (and thereby the first defendant) as agents for the fourth defendant. It is also clear enough that, in defending the proceeding, the involvement of the third defendant with the plaintiff will be an area of focus for the second and fourth defendants.

[8] There are presently three applications before me, which can conveniently be dealt with in the following order:

(a) Application by the second and fourth defendants for security for costs;

(b) Application for leave to amend the statement of claim;

(c) Application for leave to proceed against the first defendant.

Security for costs

[9] It was not in issue that the plaintiff's financial capacity is such that it would not be able to meet an adverse order for costs if it is unsuccessful at trial. Accordingly, the discretion to make an order for security for costs is enlivened under Chapter 17 Part

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1 As defined in s 916A of the *Corporations Act* 2001 (Cth).

1 of the *Uniform Civil Procedure Rules* 1999 (Qld) and s 1335 of the *Corporations Act* 2001 (Cth).

[10] The plaintiff, in its capacity as trustee, had owned a property at 23 Martingale Circuit, Clear Island Waters. This property was sold in January 2014, and two registered mortgages were discharged from the proceeds of sale. The plaintiff received a net amount of $116,635.21 from the settlement. Just over $1,000 of that has been applied to personal expenses, and monies have otherwise been transferred from that account to the plaintiff's solicitors, presumably in payment of legal fees. The amount remaining in that account (as at the date of hearing) was $97,786.54, which Scott has said, in an affidavit filed before me, "have been earmarked to fund the plaintiff's legal costs of these proceedings".

[11] The only other asset held for the Trust is a motor vehicle, said to be worth $6,000.

[12] There are liabilities in the form of unpaid legal accounts. In short, the Trust's net asset position is some $95,000, represented principally by cash at bank.

[13] Other than this cash and the motor vehicle, the plaintiff does not own, either in its own right or as trustee, any other assets of worth.

[14] The only evidence before me by beneficiaries of the Trust were affidavits by Scott and by his mother Jillian.

[15] In his affidavit, Scott set out the financial position of the plaintiff and the Trust, which I have summarised above. After stating that the plaintiff does not have funds to provide security for the second and fourth defendants' costs in the proceeding, he then said:

> "I am concerned that if any order for security for costs is made, it will stifle the proceedings."

[16] Scott confirmed that the proceedings had been commenced by the plaintiff in its capacity as trustee, and said:

> "19. Because Jillian and I are the only directors of the Plaintiff, we will, on behalf of the Plaintiff, decide which beneficiaries will receive a distribution from the net proceeds recovered from these proceedings after payment of legal costs.
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> 20. I intend to distribute the net proceeds of the action to Jillian and myself because we provided personal guarantees in support of the loan facilities to the Mortgagee and the margin loan facility between the Plaintiff and CBA. No other beneficiaries will receive any distribution from the net proceeds of this action, or otherwise benefit from these proceedings. No other beneficiaries made any form of contribution to the investments prior to the failure of the investments."

[17] Scott then outlined his own financial circumstances. He is a body corporate manager with an annual income of $59,000. His assets comprise a small amount of cash, personal belongings and a motor vehicle, while he has a credit card debt of some $21,000. His net asset position is worth some $29,000. His affidavit continues:

> "25. I do not have sufficient funds to provide security for the Second or Fourth Defendants estimated costs of the proceedings.

> 26. I say that the Plaintiff's financial position has been caused by the Defendants' conduct. The Plaintiff has suffered the loss and damage particularised in the Claim and Statement of Claim as a result of the Defendant's conduct.
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> **Guarantee**
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> 27. I offer a personal guarantee that the Plaintiff will pay any costs order that may be made against it in favour of the Second or Fourth Defendants in these proceedings, and thereby expose myself personally to the risk of an adverse costs order.
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> 28. I am prepared to provide a personal guarantee because I believe that the Plaintiff has a good claim against the Second and Fourth Defendants."

[18] In her affidavit, Jillian agreed with Scott's statements with respect to the financial position of the plaintiff. In relation to any proceeds received from judgment in this proceeding, she said:

> "5. I intend to distribute the net proceeds of the action to Scott and myself because we provided personal guarantees in support of the loan facilities provided by Permanent Custodians Limited to the Plaintiff, and the margin loan facility between the Plaintiff and the CBA. No other beneficiaries will receive any distribution from the net proceeds of this action, or otherwise benefit from these proceedings."

[19] Jillian gave a summary of her assets and liabilities. She said that she has some $3,400 cash at bank and personal items worth some $60,000. She has credit card liabilities of $15,000, leaving a net asset position worth $48,460. She also said that she did not have sufficient funds to provide security for the second or fourth defendants' costs. She also offered a guarantee in the following terms:

> "15. I offer a personal guarantee that the Plaintiff will pay any costs order that may be made against it in favour of the Second of Fourth Defendants in these proceedings, and thereby expose myself personally to the risk of an adverse costs order.
>
> 16. I am prepared to provide a personal guarantee because I believe that the Plaintiff has a good claim against the Second and Fourth Defendants."

[20] Apart from the third defendant, the other immediately identifiable beneficiaries of the Trust are Jonathan and Justin. No evidence was adduced from either of those as to their worth. However, Jillian, in her affidavit, provided some information about each of those two sons:

(a) In relation to Jonathan, she said he had for the past several years had casual employment while undertaking a part-time university degree. She said he had recently commenced full-time employment as an operations manager, has three children to support and that she believes that his net asset position is similar to Scott. She said that as far as she is aware Jonathan does not have sufficient funds to provide security for the second and fourth defendants' costs;

(b) In relation to Justin, Jillian stated that he had been unemployed for eight months and had been solely supported by his partner during that time. Justin had recently commenced full-time employment on an annual salary of $80,000. Jillian said that Justin has no assets other than a small amount of personal items and a six year old son to support. As far as she is aware, Justin did not have sufficient funds to provide security for the second and fourth defendants' costs.

[21] The affidavits which have been filed are limited to statements of personal assets, but the affidavits do not disclose in any way, either for the two deponents or in respect of the two other sons, whether there are other assets in which they hold indirect or beneficial interests, or otherwise whether they have the capacity to access funds for the purposes of providing security for costs. For example, it is notable that none of Jillian, Scott, Jonathan or Justin appear, on the face of the two affidavits which have been filed, to have any interests in real property. There is no deposition from any of them as to their residential circumstances or the capacity in which they are residing in their respective homes. Whilst each of their net asset positions may, at a strictly personal level, be relatively modest, none of them deposes to an inability to access funds to provide security for the second and fourth defendants' costs. For example, Scott's affidavit carefully deposes only to him not having "sufficient funds to provide security". He does not say that he is unable to access such funds, for example, by way of borrowings or other advances.

[22] Counsel for the plaintiff pointed to a number of factors which, it was said, militate against the exercise of the discretion to order security for costs.

[23] In relation to those who stand behind the plaintiff, it was argued:

(a) that those who stand behind the plaintiff are also without means; and

(b) Jillian and Scott, who are said to be the individuals most likely to benefit from the litigation, have offered unlimited personal guarantees.

[24] As to the first of these considerations, the plaintiff accepted that it bore the onus of establishing that those who stand behind the plaintiff are also without means. In *Specialized Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd*,[2] Muir JA, with whom Holmes JA and Philippides J agreed, said:

> "[45] A corporate plaintiff wishing to avoid an order that it give security for costs on the ground that the making of the order will prevent the continuation of the litigation, at least as a general proposition, must establish that those 'who stand behind it and who will benefit from the litigation if it is successful are also without means'.[3] In *Hession v Century 21 South Pacific Ltd (in liq)*,[4] Meagher JA, with whose reasons the other members of the court agreed, cited *Bell Wholesale Co Pty Ltd v Gates Export Corporation* as authority for the proposition that:
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> > "... a company in liquidation against whom an order for security for costs is sought cannot successfully resist such an order merely by proving that it cannot fund the litigation

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2 [2010] 2 Qd R 85.

3 *Bell Wholesale Co Pty Ltd v Gates Export Corporation* (1984) 2 FCR 1 at [4].

4 (1992) 28 NSWLR 120 at [123]; *Bell Wholesale Co Pty Ltd v Gates Export Corporation* (1984) 2 FCR 1.

> from its own resources if an order for security is made; it must prove that it cannot do so even if it relies on the other resources available to it (the company's shareholders or creditors)"."

[25] As to the plaintiff's second proposition, it is now clearly the law in Queensland that whether shareholders or other persons behind the company are exposed to personal liability for the defendant's costs, for whatever those persons may be worth, is a relevant but not necessarily a decisive consideration in the exercise of the discretion to make an order for security for costs.[5]

[26] There are, it seems to me, a number of significant hurdles which face the plaintiff in relying on these discretionary factors.

[27] It is clear that the range of those individuals interested in the plaintiff's success in the litigation extend beyond Jillian and Scott. Each of those has purported to limit the class of interested individuals by somehow fettering the discretion of the plaintiff, as trustee, with respect to the distribution of any proceeds of the litigation which pass into the Trust. Jillian and Scott each assert that no other beneficiaries, apart from Jillian and Scott, will receive any distribution from the net proceeds of the action or otherwise benefit from the proceedings.

[28] Leaving aside the clear issue that these statements of intention by Jillian and Scott as to the way in which the trustee will exercise its otherwise unfettered discretion in the future seems to constitute an impermissible fetter on the trustee's discretion,[6] the material does not permit me to attach any weight to this statement of expressed intention. This "expressed intention" by Jillian and Scott takes no account of the interests of the other beneficiaries. There is no disclosure as to any expectation that the other beneficiaries (including the third defendant) have of enjoyment of benefits from the Trust's investments by reason of, for example, previous contributions made to the business and affairs of the Trust. Nor is there any indication by the other beneficiaries of the Trust that they agree with the proposed limitation on the trustee's otherwise unfettered discretion as to the distribution of any fruits of the litigation.

[29] There is also the fact that, despite being a party on the other side of the record, the third defendant is undoubtedly a beneficiary of the Trust. No information whatsoever with respect to his financial position has been provided. Whilst he is a defendant, it is clear enough, as will appear later in this judgment, that the plaintiff is effectively seeking relief from the professional indemnity insurance policy held by the first defendant (for which the third defendant was the authorised representative).

[30] Even if I accept, despite the matters noted by me above at [21], that each of Jillian, Scott, Jonathan and Justin are of limited means, that is not necessarily the end of the matter. Insofar as only Scott and Jillian have offered guarantees for the second and fourth defendants' costs, on their own material it is unlikely that either of them

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5 *K P Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189 at [204]; *Intercraft Cabinets Pty Ltd v Sampas Pty Ltd* (1997) 18 WAR 306; *Specialized Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* [2010] 2 Qd R 85, per Muir JA at [39].

6 See *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566 per Finkelstein J at [121].

could make good on that guarantee. The worth of each of their guarantees is, therefore, limited, and ought not be readily accepted as an alternative security.[7]

[31] Accordingly, I do not consider that these matters identified by the plaintiff weigh significantly against the discretion to make an order for security for costs.

[32] The next factor identified by the plaintiff was the strength and *bona fides* of the plaintiff's case. On an application such as this, the appropriate approach is that, in the absence of evidence to the contrary, the Court will assume the claim to be *bona fide* with a reasonable prospect of success.[8] This is a relevant factor to be considered, but is clearly not decisive.

[33] Next it was argued that security for costs ought not be ordered because the plaintiff's impecuniosity was caused by the defendant. No evidence was led on behalf of the plaintiff to make good that contention, beyond general assertions in each of Jillian's and Scott's affidavits.

[34] In *Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd*,[9] Margaret Wilson AJA, with whom McMurdo P and Applegarth J agreed, cited with approval the following observations by McClennan CJ at CL in *Jazabas Pty Ltd v Haddad*:[10]

> "[94] The claimants carried the onus of establishing both the adequacy of their financial position before their dealings with the opponents and that the opponents' actions have caused or at least materially contributed to the claimants' inability to meet an order for security for costs (see *Fiduciary Ltd v Morningstar Research Pty Ltd*.[11])
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> [95] In *Law of Costs*, G E Dal Pont says:[12]
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> > '[T]he plaintiff must be able to support the allegation with relatively straightforward and unambiguous evidence of a fairly compelling nature, because otherwise the hearing of the issue of security might become a trial within a trial. For this reason, it is not enough that the defendant's conduct is merely a contributing factor – it must be the material contributor to or cause of the plaintiff's impecuniosity.' (emphasis added)
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> (see also *M A Productions Pty Ltd v Austarama Television Pty Ltd*;[13] *Fiduciary Ltd v Morningstar Research Pty Ltd*;[14] *Pioneer Park (in liq) v ANZ*;[15] *Sharjade v Darwinia Estate*.[16])"

[35] In the absence of any evidence from the plaintiff, no weight can be given to this consideration.

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7 *Epping Plaza Fresh Fruit & Vegetables Pty Ltd v Bevendale Pty Ltd* [1999] 2 VR 191 at 198.
8 *Nemutu Pty Ltd v Lissenden* (1993) 8 ACLR 364; *Specialized Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* (supra) at [17].
9 [2012] QCA 114.
10 (2007) 65 ACSR 276.
11 (2004) 208 ALR 564 at [100].
12 G E Dal Pont, "The Law of Costs" (2009, 2nd ed) at [29.96].
13 (1982) 7 ACLR 97 at 100 per Needham J.
14 [2004] NSWSC 664; (2004) 208 ALR 564 at [88] per Austin J.
15 [2005] NSWSC 832 at [14] per Einstein J.
16 [2006] NSWSC 708 at [17]-[20] per McDougall J.

[36] Similarly, little weight can be given to the plaintiff's next argument, which was that the making of an order would stifle the litigation. Beyond bald assertions by each of Jillian and Scott, no evidence was led to make good that contention. No evidence has been put on to prove that those who stand behind this company, or who stand to benefit from success in the litigation in their capacities as beneficiaries of the Trust, are not able to have access to other resources. Again, it is notable that there is simply no evidence as to the circumstances of the third defendant.

[37] Despite a faint argument by counsel for the plaintiff, there is no issue of "public importance" raised in this litigation.

[38] There was no issue before me that this application had been brought promptly.

[39] For the reasons I have given, none of the factors relied on by the plaintiff tip the balance against the making of an order for security for costs. On the contrary, given the admitted impecuniosity of the plaintiff, it seems to me appropriate to make an order for security for costs in the present case.

[40] Turning, then, to the quantum of the security to be provided, it is appropriate to recall, as I said in *Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd*,[17] that the approach to the fixing quantum of security for costs is not a finely tuned mathematical exercise. The principles articulated by French J (as he then was) in *Bryan E Fencott and Assocs Pty Ltd v Eretta Pty Ltd*[18] remain apposite:

> "In fixing the amount of the security the court must look first at the whole case and take into account, inter alia, the chance of it collapsing without coming to trial. It is not bound to give the amount of security which a defendant says will be the amount of his costs: *Dominion Brewery Ltd v Foster* (1897) 77 LT 507.
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> The court may in such a case, order somewhat less than if there seems to be every prospect that the action will be fought to a finish: *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction* (supra) at 720.
>
> The court does not set out to give a complete and certain indemnity to a defendant: *Menhaden v Citibank NA* (1984) 1 FCR 542 at 547 per Toohey J.
>
> The process of estimation embodies to a considerable extent, necessary reliance on the 'feel' of the case after considering relevant factors: *Pearson v Naydler* (supra) at 907."

[41] The solicitor for the second and fourth defendants has prepared a detailed and itemised estimate of the costs (on a solicitor-own client basis) which the second and fourth defendants have incurred and will incur up to and including the first day of trial. The estimated total is just over $500,000. It is also estimated that the amount of that recoverable on the standard basis will be some $300,000 to $380,000.

[42] The plaintiff's solicitor has undertaken a detailed critique of that costs estimate, and has pointed out numerous areas in which the estimate allows for very high degrees of expenditure. So, for example, criticism is made of very generous allowances being made for preparation at various stages of the interlocutory and pre-trial

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17 [2010] QSC 176 at [41].

18 (1987) 16 FCR 497 at [515].

processes, including generous allowances for preparation by counsel. There is also significant criticism of the fact that the estimate takes account of, in some instances, up to three solicitors of various degrees of experience undertaking what appears to be the same work. The plaintiff's solicitor is also critical of the allowances made for the retention of senior counsel in the matter. Given the complexity of the issues raised on the face of the statement of claim, however, and the quantum of damages sought to be recovered by the plaintiff, this does not seem to me to be an imprudent proposal by the second and fourth defendants. The defendants' solicitor descends to detail in his critique of what he says are simply excessive estimates, particularly for preparation and the involvement of numerous solicitors, noting that much of what would be claimed under these items would not be recoverable as standard costs in the proceeding. The defendants' solicitor estimates that the recoverable costs up to and including the first day of trial would be $57,000 to $82,000.

[43] It seems to me, with respect, that the estimate by the plaintiff's solicitor is excessively modest. The claims sought to be ventilated by the plaintiff involve matters of some factual complexity and legal sophistication. I do agree, however, that a significant part of the costs estimated by the solicitor for the second and fourth defendants would, if incurred, simply not be recoverable on the standard basis.

[44] In all the circumstances, and adopting an appropriate "broad brush" approach, having regard to the inherent complexity of this litigation and the quantum of the plaintiff's claim, I consider that an appropriate amount to order for security for the second and fourth defendants' costs up to and including the first day of trial is $200,000.

Amendment of statement of claim

[45] The plaintiff seeks leave to amend its statement of claim. That application is not opposed, and accordingly leave will be granted.

Leave to proceed against the first defendant

[46] The plaintiff seeks leave to proceed against the first defendant, a company in liquidation, and also an order for disclosure of the first defendant's professional indemnity insurance policy.

[47] Determining whether the first defendant holds a responsive policy of professional indemnity insurance is relevant both to the plaintiff's application for leave to proceed and to whether it is worthwhile for the plaintiff to pursue its claim against the first defendant. It has been said that an order for disclosure of such an insurance policy would be appropriate as an adjunct, or prior, to an application for leave to proceed.[19] In *Company Solutions (Aust) Pty Ltd v Keppel Cairncross Shipyard Limited (in liq)*,[20] Douglas J noted the appropriateness, in a case such as the present, of ordering that an insurance policy be disclosed. His Honour said:

> "The question of the cover provided by the insurance policy is not in issue on the pleadings between it and Keppel Cairncross but it is highly important to the practical issue whether that litigation should

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19 *Glaister v Banwell Pty Ltd* [2003] WASC 101 at [14].

20 [2004] QSC 379.

proceed. In *Lampson (Australia) Pty Ltd v Ahden Engineering (Aust) Pty Ltd* [1999] 2 Qd R 252, 256-257 Moynihan J said:

> 'The test of direct relevance introduced by O. 35 r. 4 replaces the previous rule which required discovery of indirectly relevant documents which 'might lead to a train of inquiry'; this being the test stated in *Compagnie Financiere Et Commerciale du Pacifique v Peruvian Guano Co*. Under this discovery regime an affidavit of discovery was conclusive unless the existence of other discoverable documents could be established or it could be demonstrated that documents had been excluded under a misconception, *Mulley v Manifold*. In this context O. 35 r. 14(4)(a) gives power in the circumstances there specified to order the disclosure of documents *beyond those directly relevant to the issues in the cause* or in the circumstances contemplated by subr(4).' (My emphasis.)

[48] It seems to be uncontroversial that the liquidators of the first defendant have a copy of the relevant insurance policy, but object to its production on the basis that it is confidential.

[49] The material discloses a basis for anticipating that the insurance policy may respond. The plaintiff's solicitors have corresponded with the solicitors for the insurer. At the very least, that correspondence indicates that the question of cover has not yet been determined. Counsel for the plaintiff said that this implied that "the outstanding issue is the availability of an exclusion to cover rather than whether the insuring clause of the policy responds to the loss claimed".

[50] Adopting a similar approach to that of Douglas J in *Company Solutions (Aust) Pty Ltd v Keppel Cairncross Shipyard Limited (in liquidation)*,[21] it seems to me that the form of the policy held by the first defendant is of great practical relevance to the plaintiff for the further conduct of this proceeding. There seems to be no doubt that an insured's policy exists and is in the possession of the liquidators. Those matters are sufficient special circumstances which, together with the interest of justice, require disclosure of the policy.

[51] The liquidators of the first defendant did not oppose the plaintiff having leave to proceed against the first defendant. It is clear on the face of the statement of claim that there is a serious question to be tried. It is, moreover, clear that the claim sought to be pursued against the first defendant is not one easily amenable to the proof of debt procedure.

[52] I consider, however, that it would be appropriate to include a condition on the grant of leave to the effect that the plaintiff not be permitted to enforce any money judgment or order for the payment of money without leave of the court. Such a condition is necessary for the protection of other creditors of the first defendant company.[22]

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21 Ibid at [11].

22 *Maher v Taylor* [1984] 1 NSWLR 231.

Conclusion

[53] There will be the following orders:

On the application by the second and fourth defendants for security for costs, it is ordered:

1. That, within 28 days, the plaintiff shall provide, in a form satisfactory to the Registrar, security for the second and fourth defendants' costs up to and including the first day of trial in the amount of $200,000;

2. Costs reserved.

On the plaintiff's application for leave to amend, it is ordered:

1. That the plaintiff have leave to file and serve an amended claim and amended statement of claim substantially in the form of the draft amended claim and statement of claim exhibited to the affidavit of Alexander Philip Nase sworn 27 February 2014;

2. Costs reserved.

On the plaintiff's application for disclosure and leave to proceed, it is ordered:

1. That, within seven days, the first defendant, by its liquidators Mr Stephen Hathway and Mr Terry Van der Velde, deliver a copy of the first defendant's professional indemnity insurance policy that was current as at 11 July 2008, including any cover notes, certificates of insurance, policy schedules, standard terms and conditions or other documents that form part of the insurance contract;

2. Pursuant to s 500(2) of the *Corporations Act*, the plaintiff has leave nunc pro tunc to proceed against the first defendant, provided that the plaintiff may not enforce any money judgment or order for the payment of money against the first defendant without the further leave of the court.

3. Costs reserved.