SUPREME COURT OF QUEENSLAND

CITATION:	*Get Tonic Pty Ltd v Pocket Health Pty Ltd & Ors* [2020] QSC 235
PARTIES:	**GET TONIC PTY LTD** **(ACN 620 784 714)** (plaintiff) **v** **POCKET HEALTH PTY LTD** **(ACN 623 774 676)** (first defendant) **JOE ZHOU AKA JOE YOU ZHOU** (second defendant) **MENA THEODOROU** (third defendant) **TING WANG** (fourth defendant) **JOE ZHOU PTY LTD** **(ACN 603 285 392)** (fifth defendant) **KEDRON 7 DAY CHEMIST PTY LTD** **(ACN 625 343 392)** (sixth defendant)
FILE NO:	BS No 1641 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	6 August 2020
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2020
JUDGE:	Davis J
ORDER:	**1. That security be provided in the sum of $140,000 for the costs of the first, second, fifth and sixth defendants up to and including the first day of trial, such security to be by way of a deed of guarantee of that sum given by PharmaData Licensing Pty Ltd, Adam Zackary Gilmore and Guy Adam McKenzie jointly and severally.** **2. The parties have liberty to apply if the terms of the deed cannot be agreed.** **3. The plaintiff give disclosure, by list delivered on or**

before 27 August 2020 of the following documents:

(a) documents relevant to the numbers of users of the Get Tonic app; and

(b) documents relevant to the profit generated by the plaintiff in promoting and selling the Get Tonic app.

4. The parties will be heard on the question of costs.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – AMOUNT AND NATURE OF SECURITY – where the defendants apply for an order that the plaintiff give security for costs – where the plaintiff does not contest that security should be given and has offered $140,000 in the form of company and personal guarantees – where the defendants submit the security offered is inadequate and the claim has poor prospects – where the parties have provided different estimates of the past and future costs – where it is not possible, on the evidence, to resolve the differences in the estimates of costs – whether security of $140,000 in the form of company and personal guarantees is just in all the circumstances

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION OF DOCUMENTS – GENERAL MATTERS – OTHER CASES – where the defendants apply for an order that the plaintiff make disclosure of documents which are said to be in the control of the plaintiff – where the plaintiff pleads its quantum of loss based on predictions about the future trading of the plaintiff – where the defendants seek disclosure of documents relating to the present trading of the plaintiff – where it is objectively likely that there exists financial documents which relate to the current trading of the plaintiff which have been both generated and retained – whether the documents which relate to the current trading of the plaintiff are directly relevant to allegations in the pleadings

Corporations Act 2001 (Cth), s 1335
Uniform Civil Procedure Rules 1999, r 211, r 223, 670, r 671, r 672

Australian Battery Distributors Pty Ltd v Robert Bosch (Australia) Pty Ltd [2015] FCA 1164, followed
Brundza v Robbie & Co (No 2) (1952) 88 CLR 171, followed
Gentry Bros Pty Ltd v Wilson Brown & Associates Pty Ltd (1992) 10 ACLC 1394, cited
Harpur v Ariadne [1984] 2 Qd R 523, cited
King v Commercial Bank of Australia Ltd [1920] 28 CLR

289, followed
Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jacques [2016] QSC 2, followed
Livingspring Pty Ltd v Kliger Partners (2008) 20 VR 377, followed
Lucas v Yorke (1983) 58 ALJR 20, cited
Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd (1990) 8 ACLC 304, cited
Robson v REB Engineering Pty Ltd [1997] 2 Qd R 102, cited
Robson v Robson [2008] QCA 36, cited
Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 1 QB 609, followed
Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd [2010] 2 Qd R 85, cited
Valeba Pty Ltd v Mulpha Sanctuary Cove (Development) Pty Ltd [2012] QSC 286, cited
Xstrata Queensland Ltd v Santos Ltd [2005] QSC 323, cited
Yandil Holdings Pty Ltd v Insurance Co of North America (1986) 7 NSWLR 571, cited

COUNSEL: PD Hay for the first, second, fifth and sixth defendants/applicants
M Steele for the plaintiff/respondent

SOLICITORS: Macpherson Kelley for the first, second, fifth and sixth defendants/applicants
Tucker & Cowan Solicitors for the plaintiff/respondent

[1] The first, second, fifth and sixth defendants, who I will call "the Zhou defendants", brought applications (which were heard together) seeking:

1. an order for the plaintiff to give security for costs;[1] and

2. an order that the plaintiff make further disclosure.[2]

The plaintiff's claims

[2] Adam Zackary Gilmore and Guy Adam McKenzie are directors of the plaintiff, Get Tonic Pty Ltd.

[3] Get Tonic alleges that it developed a "mobile telephone application", in modern parlance, an "app" (the Get Tonic app).[3] The Get Tonic app facilitates the ordering and delivery of prescription medicines which are sold by pharmacies.[4]

[4] The second defendant, Mr Joe Zhou, is a director of each of the first, fifth and sixth defendants: Pocket Health Pty Ltd, Joe Zhou Pty Ltd and Kedron 7 Day Chemist Pty Ltd.[5]

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1 CFI 72.
2 CFI 71.
3 Amended statement of claim (CFI 25), paragraph 1.
4 Amended statement of claim, paragraph 1.
5 Amended statement of claim, paragraph 4.

[5] Each of the third and fourth defendants, Mena Theodorou and Ting Wang, are directors of Pocket Health Pty Ltd.[6]

[6] The fifth defendant, Joe Zhou Pty Ltd owns and operates a pharmacy in Maroochydore.[7] The sixth defendant, Kedron 7 Day Chemist Pty Ltd, owns and operates a pharmacy in Kedron.[8]

[7] Mr Zhou made contact with Mr McKenzie and ultimately spoke to both Mr McKenzie and Mr Gilmore.[9] Get Tonic's case is that Mr Zhou made a number of representations to Mr McKenzie and Mr Gilmore:

1. He told Mr McKenzie that he had no intention of competing with the business of Get Tonic or competing with the Get Tonic app.[10]

2. On a separate occasion, he told Mr McKenzie and Mr Gilmore that he had no desire to compete with Get Tonic's business and no intention of building an app that would compete with the Get Tonic app.[11]

3. He told Mr McKenzie and Mr Gilmore that doing business with him and with the Maroochydore pharmacy would create no risk whatsoever to Get Tonic.[12]

[8] Get Tonic also alleges that the failure of Mr Zhou to inform Mr McKenzie and Mr Gilmore of certain activities of Pocket Health was conduct which remade, or at least reinforced, the alleged representations that I have described above.[13]

[9] Get Tonic alleges that in reliance upon the various representations, it entered into contracts with Joe Zhou Pty Ltd (in relation to the Maroochydore pharmacy) and Kedron 7 Day Chemist Pty Ltd (in relation to the Kedron pharmacy) whereby the Get Tonic app would be made available to them. It is unnecessary to analyse these contracts. It is sufficient to say that they both contain covenants protecting Get Tonic's intellectual property in the Get Tonic app and protecting information that is confidential to Get Tonic.

[10] Get Tonic alleges that, unbeknown to Mr McKenzie and Mr Gilmore, Mr Zhou had, prior to his contact with them, began planning to develop an app in competition with the Get Tonic app.[14] That app, the myMedKit app, was launched in competition to the Get Tonic app.[15]

[11] Get Tonic claims damages and other relief against the Zhou defendants on various causes of action based on the alleged representations, breach of contract and the alleged misuse of intellectual property and confidential information.

[12] Get Tonic's claim is much more complicated than I have described, but that broad description will suffice for present purposes. Of some importance, though, to the

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6 Amended statement of claim, paragraphs 5-6.
7 Amended statement of claim, paragraph 7.
8 Amended statement of claim, paragraph 8.
9 Amended statement of claim, paragraphs 11-13.
10 Amended statement of claim, paragraph 11(e)(iii).
11 Amended statement of claim, paragraph 13(a).
12 Amended statement of claim, paragraph 13(c).
13 Amended statement of claim, paragraphs 24 and 27(e).
14 Amended statement of claim, paragraphs 14-22.
15 Amended statement of claim, paragraph 22.

Zhou defendants on these applications is the way in which the loss is pleaded. Paragraph 56 of the amended statement of claim is in these terms:

> "56. By reason of the second defendant's contravention of section 18 of the ACL:[16]
>
> (a) the plaintiff gave the second, fifth and sixth defendants access to the non-public information of the plaintiff relating to the Tonic App;
>
> (b) the first and second defendant were able to develop a competing app, namely the myMedKit app, some six to twelve months earlier than would otherwise have been possible without access to the non-public information of the plaintiff relating to the Tonic App;
>
> (c) the first defendant, by reason of developing the myMedKit app earlier than would otherwise have been possible, was able to obtain an agreement (in its own behalf, or by a related body corporate) relating to the marketing or online ordering and delivery of prescription medicine and other products sold by pharmacies, with Tonic Health Media Limited (Tonic Health Media) or a related body corporate on or about 5 March 2019;
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> (d) the plaintiff did not obtain an agreement with Tonic Health Media or a related body corporate because the first defendant (or a related body corporate) had already obtained an agreement;
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> (e) the plaintiff would have obtained an agreement with Tonic Health Media or a related body corporate, from on or about 5 March 2019, because the plaintiff and Tonic App were, before myMedKit was launched, the only participants in Australia in the market of providing a mobile telephone application for the ordering and delivery of prescription medicine and other products sold by pharmacies;
>
> (f) the plaintiff has thereby suffered loss and damage, being the amount of lost profit it would have been able to obtain from an agreement with Tonic Health Media or a related body corporate, being approximately $3.3 million between the date of this statement of claim and December 2021."

[13] Paragraph 56 of the amended statement of claim concerns the misrepresentation claim. Paragraph 58 concerns the breach of confidentiality by Mr Zhou. Paragraph 59 concerns the breach of contract by Mr Theodorou. Paragraph 60 concerns the breach of contract by Mr Wang. Paragraph 61 concerns the breach of contract by

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16 Defined in the pleading as the Australian Consumer Law.

Joe Zhou Pty Ltd. Paragraph 63 concerns the breach of contract by Kedron 7 Day Chemist Pty Ltd.

[14] All those paragraphs have a similar structure to paragraph 56 in that the damage is alleged to be suffered as a result of Tonic Health Media agreeing to use Pocket Health's myMedKit app rather than the Get Tonic app. These paragraphs all follow the structure of paragraph 56 in that the loss under each head is causally linked to:

1. Get Tonic not securing an agreement with Tonic Health Media for that company to use the Get Tonic app.

2. Pocket Health, or some associated company, securing an agreement with Tonic Health Media for that company to use the myMedKit app.

[15] Mr Kenneth Philp is the solicitor for the Zhou defendants. In his affidavit of 12 June 2020:

1. Mr Philp swears that the allegation that Pocket Health has entered into any agreement with Tonic Health Media (or an associated company) is denied.[17]

2. Mr Philp exhibits an email dated 25 July 2019 from solicitors acting for Tonic Health Media, the effect of which is that there was at one stage a prospect of an agreement being entered into between Pocket Health and Tonic Health Media concerning the myMedKit app but these negotiations broke down. Ultimately, no agreement was entered into.[18]

The proceeding to date

[16] The originating application was filed on 15 February 2019 and the statement of claim was filed on 18 April 2019.[19] At that stage, Mr Philp's firm acted for all defendants.

[17] A defence and counterclaim of all defendants was filed on 27 May 2019.[20]

[18] On 18 December 2019, Mr Theodorou and Mr Wang, the third and fourth defendants, filed a notice of change of solicitors[21] and have been separately represented ever since.[22]

[19] The current applications were filed on 3 June 2020.[23]

[20] There have also been amendments to the pleadings and interlocutory applications. Disclosure has largely been completed but there are remaining disputes including the complaint the subject of the present application for further disclosure.

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17 Paragraph 13.
18 Exhibit KP-5.
19 CFI 22.
20 CFI 23.
21 CFI 50.
22 Another notice of change of solicitors was filed on 14 April 2020, CFI 70.
23 CFI 71 and 72.

The security for costs application

[21] On 1 April 2020, the Zhou defendants' solicitors made demand for security for costs in the sum of $250,000 by bank guarantee.[24] It was asserted in that letter (authored by Mr Philp) that the Zhou defendants' costs of and including the first day of trial would be $300,000. That was described in the letter as "a very much conservative estimate".[25]

[22] Get Tonic's solicitors responded promptly to the demand for security for costs. They did not contest that security should be given. By letter dated 16 April 2020, they offered $140,000 in the form of a guarantee from PharmaData Licencing Pty Ltd, a company associated with Get Tonic.[26]

[23] On 27 April 2020, the Zhou defendants' solicitors responded, rejecting the security which was offered and insisting on a bank guarantee in a sum of $220,000.[27]

[24] On 5 May 2020, Get Tonic's solicitors wrote to the Zhou defendants' solicitors offering to provide evidence of PharmaData's financial substance, and re-offering that company's guarantee as security for the costs.[28]

[25] The application for security for costs was filed on 3 June 2020 which prompted another letter from Get Tonic's solicitors dated 11 June 2020.[29] In that letter, the Zhou defendants' solicitors were informed that the proposed guarantee would be provided not only by PharmaData but also by Mr McKenzie and Mr Gilmore.

[26] A similar offer was made to the third and fourth defendants, although that offer seems to be limited to the guarantees of Mr McKenzie and Mr Gilmore, and not PharmaData.[30]

[27] The result is that security in the amount of $140,000 for each group of defendants (by personal guarantees) was offered up to and including the first day of trial. A total of $280,000 was offered for all defendants.

[28] The Zhou defendants, in the present application, submit that:

1. security in the sum of $140,000 is insufficient;
2. security in the sum of $250,000 should be ordered;
3. the form of security offered is not sufficient; and
4. security should be given by way of a bank guarantee.

[29] Rules 670, 671 and 672 of the *Uniform Civil Procedure Rules* 1999 (UCPR) concern applications for security for costs. They provide, relevantly, as follows:

"**670 Security for costs**

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24 CFI 75, Affidavit of Emily Jane Anderson, paragraph 4, pages 1 to 3 of exhibit EJA-1.
25 Page 2 of the letter.
26 CFI 75, Affidavit of Emily Jane Anderson, paragraph 5, pages 4-5 of exhibit EJA-1.
27 CFI 75, Affidavit of Emily Jane Anderson, paragraph 6, pages 6-8 of exhibit EJA-1.
28 CFI 75, Affidavit of Emily Jane Anderson, paragraph 7, pages 9-12 of exhibit EJA-1.
29 CFI 75, Affidavit of Emily Jane Anderson, paragraph 8, pages 13-15 of exhibit EJA-1.
30 Affidavit of Emily Jane Anderson, filed by leave on 16 June 2020, paragraph 4.

(1) On application by a defendant, the court may order the plaintiff to give the security the court considers appropriate for the defendant's costs of and incidental to the proceeding.

(2) This rule applies subject to the provisions of these rules, particularly, rules 671 and 672.

671 Prerequisite for security for costs

The court may order a plaintiff to give security for costs only if the court is satisfied—

(a) the plaintiff is a corporation and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them; or …

672 Discretionary factors for security for costs

In deciding whether to make an order, the court may have regard to any of the following matters—

(a) the means of those standing behind the proceeding;

(b) the prospects of success or merits of the proceeding;

(c) the genuineness of the proceeding;

(d) for rule 671(a)—the impecuniosity of a corporation;

(e) whether the plaintiff's impecuniosity is attributable to the defendant's conduct;

(f) whether the plaintiff is effectively in the position of a defendant;

(g) whether an order for security for costs would be oppressive;

(h) whether an order for security for costs would stifle the proceeding;

(i) whether the proceeding involves a matter of public importance;

(j) whether there has been an admission or payment into court;

(k) whether delay by the plaintiff in starting the proceeding has prejudiced the defendant;

(l) whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;

(m) the costs of the proceeding." (emphasis added)

[30] Jurisdiction to award security for costs in a proceeding is also granted by s 1335 of the *Corporations Act* 2001 (Cth). That provides, relevantly:

> "1335 Costs
>
> (1) Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given. …" (emphasis added)

[31] No party submits that there is any material difference between the discretion recognised in s 1335 of the *Corporations Act* and the discretion under the UCPR.

[32] The approach is well settled. Firstly, an applicant must satisfy the court that there is "reason to believe [the corporate plaintiff] will not be able to pay the defendants' costs if ordered to pay them".[31] Once that threshold question is answered in favour of an applicant for security for costs, a discretion to award security arises.[32] That discretion is not fettered by the express words of the statute,[33] but like any discretion it must be exercised judicially and must be exercised consistently with the purposes for which the discretion has been granted.[34]

[33] Rule 672 contains a list of considerations in the exercise of the discretion. That list is not exhaustive.[35]

[34] Here, the threshold issue is not in question. When the question of security was raised, the solicitors for Get Tonic immediately offered security. There has been no attempt by Get Tonic to prove that its assets and resources are such that there is not "reason to believe [Get Tonic] will not be able to pay the [Zhou defendants'] costs if ordered to pay them".

[35] The next question then is whether, as a matter of discretion, security should be ordered. Again, this is not in issue. Get Tonic does not submit that discretionary factors should lead to a conclusion that security should be denied.

[36] Here, PharmaData and Mr McKenzie and Mr Gilmore, the directors of Get Tonic, offer guarantees. Where those standing behind a company are prepared to guarantee the costs of a party who the company sues, that guarantee may be a discretionary factor in favour of not ordering security,[36] because the point of ordering security for costs is to prevent those standing behind a plaintiff company from protecting their

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31 Rule 671(a) and s 1335.

32 *Harpur v Ariadne* [1984] 2 Qd R 523 at 529.

33 To be exercised in "all the circumstances of the case"; *Sir Lindsay Parkinson & Co v Triplan Ltd* [1973] 1 QB 609, per Lord Denning MR at 626, and Lord Lawton at 628, following consistently.

34 *King v Commercial Bank of Australia Limited* [1920] 28 CLR 289 at 292 and *Lucas v Yorke* (1983) 58 ALJR 20.

35 *Valeba Pty Ltd v Mulpha Sanctuary Cove (Development) Pty Ltd* [2012] QSC 286 at [6] and see generally *Robson v Robson* [2008] QCA 36.

36 See *Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd* (1990) 8 ACLC 304; *Gentry Bros Pty Ltd v Wilson Brown & Associates Pty Ltd* (1992) 10 ACLC 1394; and *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* [2010] 2 Qd R 85.

own assets by the corporate veil. That was the principle established in *Harpur v Ariadne*.[37]

[37] The Zhou defendants made submissions that the $140,000 offer of Mr Mackenzie and Mr Gilmore provides only a limited form of personal guarantee and a limited form of exposure.

[38] The Zhou defendants also made a point of the way the damages claim had been structured and the fact that there is evidence that there has been no agreement reached between Tonic Health Media and Pocket Health about the myMedKit app.[38] They submit that the action is doomed to fail. The email from Tonic Health Media is now a year old. The Zhou defendants seemingly have insufficient confidence to bring an application for summary judgment.

[39] In any event, neither the *Harpur v Ariadne* point nor the arguments about prospects have much at all to do with the current application for security. Once Get Tonic conceded the threshold issue and conceded that security ought to be given, the only issues then are the quantum and form of the security. It might be marginally relevant to those issues that Mr McKenzie and Mr Gilmore are not prepared to give an unlimited guarantee and that there may be doubts about Get Tonic's prospects in the action. However, the real contest is elsewhere; how much security and how it should be given.

[40] Mr Philp prepared an analysis of costs incurred and to be incurred by his clients which he swore as accurate in his affidavit of 2 June 2020.[39] He assessed the costs as:

1. past costs - $82,449.02;
2. future costs - $264,288.40.

[41] Jeffrey Carl Petersen is a costs assessor who was retained by Get Tonic to critique Mr Philip's analysis and assess the costs. He assessed the costs as:

1. costs incurred prior to the application for security being made (past costs) - $63,386.23;
2. costs from the point of the application for security to the end of the first day of trial (future costs) - $122,067.20.[40]

[42] Mr Philp then, in his affidavit of 12 June 2020, critiqued Mr Petersen's critique of Mr Philp's opinions expressed in his earlier affidavit.

[43] The difference between Mr Petersen's assessment and Mr Philp's assessment largely concerns the future costs. They are less than $20,000 apart on the past costs.

[44] The difference between the two opinions, as they relate to future costs, can be mainly attributed to the following:

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37 [1984] 2 Qd R 523.
38 As explained at paragraphs [12]-[15] of these reasons.
39 CFI 74.
40 Affidavit of Jeffrey Carl Petersen, CFI 78.

1. Mr Petersen assumes that the trial will take five days to hear. Mr Philp says seven.

2. Mr Philp opines that the expert evidence will be more extensive than does Mr Petersen.

3. Mr Philp opines that the experts' costs will be higher than does Mr Petersen.

4. Mr Philp opines that much more preparation work for trial (by both barristers and solicitors) will be required than does Ms Petersen.

[45] There are other differences of opinion into which it is unnecessary to descend.

[46] It is for the Zhou defendants to prove the appropriate quantum of the security. As Maxwell P and Buchanan JA said in *Livingspring Pty Ltd v Kliger* Partners,[41] "the burden rests on the defendant, from first to last, to persuade the court that the order for security should be made".[42] They seek to do this by relying upon Mr Philp's opinion and they point to Mr Philp's undoubtedly extensive experience as a solicitor practising in commercial litigation.

[47] In written submissions, Mr Hay of counsel for the Zhou defendants casts doubt upon the independence of Mr Petersen because "Mr Petersen has been engaged by the plaintiff to prepare its costs statement in regard to its successful disclosure application against the present applicants". Mr Hay also criticises Mr Petersen as displaying "a lack of experience in managing and preparing for litigation".

[48] No application was made to cross-examine Mr Petersen, notwithstanding that during argument I directly asked Mr Hay whether he intended to do so and he declined.[43] Mr Petersen is a solicitor, therefore an officer of the court, and a witness whose expertise to express the opinions that he did, was not questioned. The appropriateness then of casting aspersions upon his independence and experience without firstly testing those issues in cross-examination, is doubtful.

[49] No application was made to cross-examine Mr Philp, so his evidence was also untested.

[50] I am left with competing opinions of Mr Philp on the one hand and Mr Petersen on the other. There is little material beyond the pleadings upon which I can form my own opinion as to what work and resources will be expected to be done by the Zhou defendants in defence of the claim.

[51] I find that it is not possible to resolve the differences in Mr Petersen's and Mr Philp's evidence.

[52] Security need not be a full indemnity for a defendant's costs.[44] The sum to be ordered should be just in all the circumstances of the case.[45] While security can be ordered for past costs, that is a matter of discretion.[46]

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41 (2008) 20 VR 377.
42 At 383, [21].
43 T 1-28, line 43 to T 1-29, line 25.
44 *Brundza v Robbie & Co (No 2)* (1952) 88 CLR 171 at 175.
45 *Harpur v Ariadne* [1984] 2 Qd R 523 at 529.

[53] Early in the proceedings, all defendants were represented by the same lawyers. At that point, at least, the lawyers must have thought that representing all defendants presented no conflicts. The reasons behind the third and fourth defendants electing to be separately represented from the Zhou defendants is unexplained. The total security offered in relation to all defendants is $280,000.

[54] The claims against Mr Theodorou and Mr Wang, the third and fourth defendants, are based on alleged breaches of the End User Licence Agreement (EULA).[47] It is alleged that each of Mr Zhou, Mr Theodorou and Mr Wang were registered users of the Get Tonic app, and therefore were parties to the EULA which contained covenants prohibiting users from copying or altering the apps. It is alleged that Mr Zhou, Mr Theodorou and Mr Wang breached these covenants by assisting Pocket Health to develop the myMedKit app with information they obtained when using the Get Tonic app.

[55] The case against the Zhou defendants is much wider and more extensive than the case against Mr Theodorou and Mr Wang.

[56] I draw the inference that if Mr Theodorou and Mr Wang were represented by the same solicitors as the Zhou defendants, the costs incurred would not be substantially higher.

[57] Each defendant is entitled to be represented as they see fit, and each defendant is entitled to apply for security. However, here, a total of $280,000 security has been offered to all defendants and I take that into account in assessing whether the security offered to the Zhou defendants is just in all the circumstances.

[58] I accept that there are discretionary factors in favour of the Zhou defendants. Mr McKenzie and Mr Gilmore could afford to guarantee a higher sum. An order for security by guarantee of more than $140,000 is unlikely to be stifling or oppressive.

[59] However, I consider that $140,000 by way of security for the Zhou defendants' costs up to and including the first day of trial is sufficient. In so deciding, I have taken into account all the circumstances, including:

1. the amount offered is substantial;
2. the application is made relatively late in the proceedings;[48]
3. the Zhou defendants therefore elected to assume the risk of non-recovery of costs until they made the decision to raise the issue on 1 April 2020;
4. in this case I would not give security for past costs;
5. the total security offered to all defendants is $280,000;

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46 *Australian Battery Distributors Pty Ltd v Robert Bosch (Australia) Pty Ltd* [2015] FCA 1164 at [63], *Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jacques* [2016] QSC 2.

47 Amended statement of claim, paragraph 46-54 and 59-60, the prayer for relief, paragraphs 3-4.

48 *Lanai Unit Holdings Pty Ltd v Stephen Jacques* [2016] QSC 2 at [22]-[24] and the authorities referred to there.

6. that sum of $280,000 exceeds the future costs of the Zhou defendants, as estimated by Mr Philp;

7. from the pleadings, I draw the inference that if Mr Philp's firm was acting on behalf of all defendants, the costs of so doing would be little more than the costs of acting for just the Zhou defendants; and

8. the sum of $140,000 exceeds Mr Petersen's estimate for future costs.

[60] The form that security is given is a matter of discretion.[49] The giving of security by way of directors' guarantee of a corporate defendant is a recognised form of security and may be appropriate where the directors are persons of substance.[50]

[61] Both Mr McKenzie and Mr Gilmore swore affidavits where they listed either assets they owned or assets they controlled. Those assets included real property to which they attributed estimates of value.

[62] Mr Hay took objection to the estimates of value of the real estate. Those objections were properly founded given that neither Mr McKenzie nor Mr Gilmore profess any expertise in real estate valuation.

[63] Mr Steele of counsel, who appeared for Get Tonic, called each of Mr Gilmore and Mr McKenzie to give oral evidence of facts upon which I was then invited to draw an inference that the properties were valuable. Both gave evidence of the dates of purchase, the purchase prices of the properties and any improvements done to them. Mr Hay cross-examined Mr Gilmore on a couple of peripheral matters but did not cross-examine Mr McKenzie at all.

[64] I accepted the evidence of each of Mr McKenzie and Mr Gilmore and gave short ex tempore reasons accepting that the properties were valuable and were not heavily mortgaged (relatively to their value).

[65] Mr McKenzie and Mr Gilmore are clearly persons of significant financial substance and I see no reason to doubt that they would honour the guarantees that they have offered to give.

[66] Security should be given by Get Tonic for the costs of the Zhou defendants to the extent of $140,000 by way of guarantee from PharmaData, Mr Gilmore and Mr McKenzie.

The application for further disclosure

[67] Maxwell Henry Wilkins, like Mr Philp, is a solicitor acting for the Zhou defendants. He has been working on disclosure in the case. On 5 February 2020, he sent a letter to Get Tonic's solicitors complaining that Get Tonic had not made proper disclosure.[51] Correspondence then passed between the two firms of solicitors. A supplementary list of documents was produced by Get Tonic.

[68] Mr Wilkins then examined the further documents and produced a table identifying categories of documents which he reasoned should exist, should be in Get Tonic's

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49 Rule 673(1).

50 *Yandil Holdings Pty Ltd v Insurance Co of North America* (1986) 7 NSWLR 571.

51 Affidavit of Maxwell Henry Wilkins, CFI 73, see exhibit MHW-1.

possession or control, and which had not been disclosed.[52] The only categories of documents now pressed on the present application are categories 26 and 27.[53] These are:

> "26. Documents showing the value of the agreement that is alleged would have been entered into between the Plaintiffs and Tonic Health Media were it not for the Defendants' alleged conduct.
>
> 27. Without limiting item 26 above, all documents establishing the quantum of the Plaintiff's claim for damages in each of the prayers for relief 1-6 inclusive. Your client will have to disclose as part of this all the financial records of any description that a Plaintiff would typically have to give to an independent expert accountant for the purposes of the accountant preparing an expert report to the Court on quantum."

[69] Mr Hay put the argument this way:

> "MR HAY: - - - they would've made $4 per order. And, now, there haven't been – there's no pleading of the terms – prospective terms of any agreement with Tonic Health Media, nor has there been any disclosure of any draft agreements even or any heads of agreement or anything like that. So the only way there could be a calculation assessment of what is clearly a net profit – intended to be a net profit amount of $4 per customer order, must be on the basis of some present trading figures that would show that, per order, there is, in fact, a profit and show what the net cost of sales are and things like that. There must be profit and loss documents, we say, that are relevant to – that would be given to an expert in due course - - -
>
> HIS HONOUR: Okay.
>
> MR HAY: - - - to a profit assessment. And that's – that's in a nutshell what we say about that."[54]

[70] Item 27 is really a subset of item 26. What is sought are documents showing the profit (or otherwise) from trading by Get Tonic.

[71] The documents are said to be relevant to the damages claim expressed in paragraph 56(f) of the amended statement of claim. That paragraph appears earlier in these reasons.[55] Particulars of paragraph 56(f) were sought and delivered. They are:

> "11. In relation to the claims for damages and equitable compensation referred to in paragraphs 1(a), 1(b), 2(a), 2(b), 3(a), 4(a), 5(a) and 6(a):
>
> (a) in each case the amount claimed is approximately $3.3 million, calculated at lost profit between the date of the statement of claim and December 2021 otherwise

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52 Exhibit MHW-11.
53 T 1-46, lines 1-10.
54 T 1-46, line 41 to T 1-47, line 7.
55 Paragraph [12].

obtained by the plaintiff had it obtained an agreement with Tonic Health Media;

(b) calculated on the following basis:

(i) approximately 3,000 new users per month in the first year of the agreement (beginning from June 2019); 2,000 new users per month in the second year, and 1,000 new users per month in the third year

(ii) at approximately 9 orders per user on average per year (being approximately 832,500 orders over the period until December 2021);

(iii) at approximately $4 profit per order."

[72] Rule 223 of the UCPR provides that an order for disclosure of a class of documents may be made where there is an "objective likelihood" that they have not been disclosed and should have been disclosed. To be disclosable, the documents must be "directly relevant" to an allegation in the pleadings.[56] The relevant allegation is as to the quantum of the loss.

[73] Mr McKenzie, in his affidavit, said this:

"7. The plaintiff has recently, and at least partly in response to COVID-19, changed its business model. The Plaintiff is still operating, its App is still available for download and orders can still be placed via the App. Its business has significantly increased in recent months."

[74] In another of his affidavits, Mr McKenzie said:

"**Item 26 and item 27**

41. The Plaintiff intends in due course to obtain expert evidence in relation to the loss and damage that it has suffered.

42. The Plaintiff does not have documents in its own possession or control which specify the loss and damage suffered by the Plaintiff.

43. The method of calculation of the loss and damage which the Plaintiff pleads that it has suffered is particularised at paragraph 11(b) of the 'Further and Better Particulars of the Statement of Claim Filed on 18 April 2019' filed 10 June 2019, as follows:

(a) approximately 3,000 new users per month in the first year of the agreement (beginning from June 2019); 2,000 new users per month in the second year, and 1,000 new users per month in the third year

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56 Rule 211.

(ii) at approximately 9 orders per user on average per year (being approximately 832,500 orders over the period until December 2021);

(iii) at approximately $4 profit per order.

44. I made those calculations based on:

(a) my knowledge, including anecdotal knowledge, of:

(i) the Tonic App;

(ii) the industry more generally;

(iii) the conversion rate of App downloads to App registrations; and

(iv) the conversion rate of App registrations to orders.

(b) my consideration of the presentation made by the Second Defendant to the Startup Worldcup at The Triffid on 10 April 2019, including the 'Revenue Model' of target revenue and gross profit, conversion rates, as referred to in that presentation. A video recording of that presentation has been disclosed by the Plaintiff (at Document 161 of its List of Documents dated 5 August 2019))."

[75] The issues are:

1. whether there are financial documents generated by Get Tonic in its business; and

2. whether they are "directly relevant" to the loss as pleaded and particularised.

[76] It is easy to conclude that it is objectively likely that there are financial documents which have been both generated and retained. Section 286 of the *Corporations Act* requires the keeping of such records. The real issue is whether the financial documents (or some of them) are "directly relevant" to the loss claimed.

[77] There are several components to the damages claim as pleaded and particularised. Firstly, had the agreement with Tonic Health Media been achieved:

1. 3,000 new users would have been recruited in each of the first 12 months;

2. 2,000 new users would have been recruited in each of the second 12 months;

3. 1,000 new users would have been recruited in each of the third 12 months; and

4. approximately nine orders per user on average per year would have been made.

[78] All those four elements to the loss claim are predictions of the trading which might have occurred with Tonic Health Media. Get Tonic has traded in the business of

promoting and selling the Get Tonic app. The public take up of the app will tend to prove or disprove the predictions that are pleaded and particularised.[57]

[79] Secondly, there is the assertion that the profit per order which would have been achieved was "approximately $4". That is also a prediction. Mr McKenzie says that the prediction comes from his knowledge of the industry and a video recording of a presentation made by Mr Zhou to the "Startup Worldcup" in April 2019.

[80] The fact that Mr McKenzie can identify the sources of information which led him to opine that the profit per order would be $4.00 does not mean that documents beyond those sources of information are not "directly relevant" to the claim.

[81] The profit which is being made now by Get Tonic per order is relevant to the particularised prediction of $4.00 per order. The profit actually being achieved may be more than $4.00 or less than $4.00 and therefore might add to or detract from Get Tonic's claim. Evidence of that present trading must be relevant and therefore the financial documents which evidence the trading are "directly relevant" to the loss claim.

[82] An order should be made for the disclosure of those categories of documents.

Orders

[83] It is ordered:

1. That security be provided in the sum of $140,000 for the costs of the first, second, fifth and sixth defendants up to and including the first day of trial, such security to be by way of a deed of guarantee of that sum given by PharmaData Licensing Pty Ltd, Adam Zackary Gilmore and Guy Adam McKenzie jointly and severally.
2. The parties have liberty to apply if the terms of the deed cannot be agreed.
3. The plaintiff give disclosure, by list delivered on or before 27 August 2020 of the following documents:
   (a) documents relevant to the numbers of users of the Get Tonic app; and
   (b) documents relevant to the profit generated by the plaintiff in promoting and selling the Get Tonic app.
4. The parties will be heard on the question of costs.

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[57] That being the test: *Robson v REB Engineering Pty Ltd* [1997] 2 Qd R 102 and *Xstrata Queensland Ltd v Santos Ltd* [2005] QSC 323 at [45].