SUPREME COURT OF QUEENSLAND

CITATION:	*Business and Personal Solutions Pty Ltd v John Clive Witherspoon & Ors* [2022] QSC 10
PARTIES:	**BUSINESS AND PERSONAL SOLUTIONS PTY LTD** ACN 167 335 195 (plaintiff) **v** **JOHN CLIVE WITHERSPOON AND ORS** (first defendant)
FILE NO/S:	BS 8725/20
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	17 February 2022
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2022
JUDGE:	Brown J

ORDER:

1. **The plaintiff's application filed 20 January 2022 is dismissed.**
2. **Pursuant to r 670 of the *Uniform Civil Procedure Rules 1999* (UCPR), the plaintiff provide security, in a form satisfactory to the registrar, for the first and second defendants' costs of the proceeding to the first day of trial in the amount of $110,000, within 28 days.**
3. **Within 28 days, the plaintiff shall provide security for the third, fourth and fifth defendants' costs of the proceeding up to and including the first day of trial in the amount of $190,000, by payment of that sum into Court or the provision of a bank guarantee in a form satisfactory to the Registrar.**
4. **Within seven days, the plaintiff is to file and serve written submissions as to the costs of the applications filed on 21 July 2021, 19 August 2021 and 20 January 2022, limited to four pages.**
5. **Within seven days after receipt of the plaintiff's written submissions, the defendants are to file and serve written submissions in response, limited to four**

pages.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – where plaintiff applies for summary judgment – where plaintiff and defendants entered into a consultancy agreement and subsequent deed of agreement – whether the Consultancy Agreement was affected by illegality pursuant to s 24 of the *Legal Profession Act 2007* (Qld) – whether the Deed rescinded the Consultancy Agreement by its expressed terms – whether Deed a standalone Deed of Settlement – whether order for summary judgment should be made pursuant to r 292 UCPR

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – SECURITY FOR COSTS – where defendants apply for security for costs separately – where plaintiff unable to provide security – whether order requiring plaintiff to provide security for costs should be made having regard to the discretionary factors in r 672 UCPR

Legal Profession Act 2007 (Qld), s 24
Property Law Act 1974 (Qld), s 228
Uniform Civil Procedure Rules 1999 (Qld), rr 292, 671, 672

Binder v Alachozous (1972) 2 QB 151, cited
Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd [2009] 2 Qd R 202, cited
Brooks v Burns Philp Trustee Co Ltd (1969) 121 CLR 432, cited
Cannane v Cannane Pty Ltd (1998) 192 CLR 557, cited
Chen v Australian & New Zealand Banking Group Ltd & Anor [2001] QSC 043, cited
Coldham-Fussell & Ors v Commissioner of Taxation [2011] QCA 45, cited
Combined Property Holdings Pty Ltd v Galea & Orr [2020] QSC 338, cited
Combined Property Holdings Pty Ltd v Galea [2020] QSC 338, cited
Cornall v Nagle (1995) 2 VR 188, cited
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, cited
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7, cited
Forlyle Pty Ltd v Tiver & Anor [2007] SASC 464, cited
Gekko Developments Pty Ltd v Centa Company Pty Ltd (No 3) [2015] QSC 87; *Combined Property Holdings v Galea & Ors* [2020] QSC 338, cited
Gynch v Polish Club Ltd (2015) 255 CLR 414, cited
Hyperion Technology Pty Ltd v Queensland Motorways

Limited [2013] QSC 20, cited
IBM Australia Ltd v State of Queensland [2015] QSC 342, cited
JNJ Resources Pty Ltd v Crouch & Lyndon (A Firm) (No 2) [2014] QSC 137, cited
L*egal Services Commissioner v Walter* [2011] QSC 132, cited
Neumann Contractors Pty Ltd v Transpunt No 5 Pty Ltd [2011] 2 Qd R 114, cited
Specialised Explosives Blasting & Training Pty Ltd (2010) 2 Qd R 85, cited
Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd (2010) 2 Qd R 85 at 88, cited
Suncare Constructions Australia Pty Ltd v Gainspace (Mackay) Pty Ltd [2016] QSC 67, cited
Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd (1957) 98 CLR 93, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 2019 CLR 165, cited
Westpac Banking Corp v Hughes [2012] 1 Qd R 581, cited
Wise Investments Pty Ltd v Ruddy Tomlins & Baxter, Solicitors (A Firm) & Anor [2019] QCA 271, cited
Yango Pastoral Co Pty v First Chicago Australia Ltd (1978) 139 CLR 410, cited

COUNSEL: B Kidston with J McLean for the Plaintiff
S Russell for the First and Second Defendants
S Kelly for the Third, Fourth and Fifth Defendants

SOLICITORS: Enyo Lawyers for the Plaintiff
Linstell Lawyers for the First and Second Defendants
Cohen Legal for the Third, Fourth and Fifth Defendants

Applications

[1] There were three applications that had to be determined in relation to this matter. The first was an application by the plaintiff for a summary judgment against the first and second defendants. The second was a security for costs application by the first and second defendants. The third was an application for security for costs by the third to fifth defendants.

[2] If the plaintiff is successful against the first and second defendants that will obviously resolve the claim for security for costs by the first and second defendants. The plaintiff also contends that it will affect the security for costs application made against it by the third, fourth and fifth defendants.

Summary Judgment

Background

[3] The claim by the plaintiff against the first and second defendants seeks a debt due and owing or alternatively, damages which relates to services provided under a Consultancy Agreement and the subsequent entry into a Deed of Agreement between the plaintiff and the first and second defendants. Whether or not the Deed of Agreement is a standalone agreement is a key matter to be decided in the summary judgment application. The plaintiff contends it is a complete answer to the defences of the first and second defendants which largely seek to impugn the Consultancy Agreement. The plaintiff has a further claim in relation to the transfer of properties to the third, fourth and fifth defendants by the first and second defendants which is not the subject of the summary judgment application.

[4] While there was a significant amount of affidavit evidence read in the application, very little of it was ultimately directly referred to given the way events unfolded. By way of overview the following facts are said to be uncontentious.

[5] The first and second defendants owned a number of rural properties and amongst other things cattle. In 2008 the first and second defendants were in dispute with the Commonwealth Bank of Australia (**CBA**) in relation to facilities which they had originally held with Bankwest but were taken over by the CBA. According to the CBA, the first and second defendants were in default and owed it in excess of $12 million to it.

[6] In August 2014, the first and second defendants entered into a Consultancy Agreement (**Consultancy Agreement**) with the plaintiff to assist them in the dispute with the bank. The plaintiff was described as a 'consultant' under the Consultancy Agreement. Geoffrey Shannon was identified as one of the key personnel and is the sole director of the plaintiff which was re-registered in 2021. The consultant is not an incorporated legal practice within the meaning of the *Legal Profession Act* 2007 (Qld) (**LPA**), nor is Geoffrey Shannon a lawyer.

[7] Under the Consultancy Agreement, the plaintiff was engaged to carry out consulting services which were said to be defined in item 1 of the schedule. Item 1 of the schedule did not define the services *per se* but provided for the calculation of the consultancy fee based on 3 per cent of the loan amount owing to Bankwest, any out-of-pocket expenses and further provided that "no additional fees required providing no engagement of external barristers and solicitors as required."

[8] Clause 2 of the Consultancy Agreement provided that the consultant was appointed for the purpose of providing consulting services. It further provided that the consultant was engaged on a subcontract basis only.

[9] Clause 2.1 of the Consultancy Agreement provided that the consultant will, subject to the client's instructions and availability of all relevant information, *inter alia*, "review all issues surrounding Bankwest prepare a complaint and lodge with appropriate regulatory body. Instruct where required Lawyers to prevent Bankwest selling assets any marketing process and provide advice as to the relevant legally permitted options."

[10] Under cl 4.1(i) of the Consultancy Agreement, the consultant warranted that it had "the necessary skills, competency, experience, capacity to undertake the Consultancy work…" Clause 4.1(ii) provided that "the consultant through his employees will make itself or any of its approved personnel available for consultation with a Client, with or without other consultants on such occasions as may be reasonably requested by the client."

[11] Item 3 of the schedule of the Consultancy Agreement listed key personnel which included Geoffrey Shannon and a number of individuals who were people with legal skills as solicitors or barristers.

[12] Clause 6 of the Consultancy Agreement provided for confidentiality and Clause 7 provided various disclaimers including cl 7.6, which provided that the consultant does not provide legal services.

[13] Clause 8 of the Consultancy Agreement provided for the consultant to lodge a charge, mortgage or other security over all present and after acquired property including land or other asset and for that security to remain in full force and effect until all fees and disbursements are paid in full.

[14] Under cl 9 of the agreement the consultancy fee was to be calculated in accordance with the schedule. It further provided that "the Client charges all of its right, title and interest whether jointly and severally in any land, realty or other assets capable of being charged owned by the Client now or in the future to secure performance by the Client of its obligations under this agreement, including but not limited to payment of the consultancy fee." Under cl 10 of the Consultancy Agreement there was provision that the defendants would pay the plaintiff a 'success fee' of 10 per cent of the reduction indebtedness that it achieved as well as outlays, which if applicable "was to override any consultancy fee set out in paragraph 9 above on the basis that it is the higher of the two amounts." A work schedule was also provided.

[15] On 2 October 2014, the CBA appointed receivers. On 29 October 2014, orders were made by this Court providing for the first and second defendants to deliver up possession of their properties. Further orders were made in 2015 providing for the receivers to have access to the properties.

[16] In July 2015, following a mediation, a Settlement Deed was entered into between the CBA and the defendants whereby the CBA agreed to receive a much reduced sum of $5.5 million in settlement of the first and second defendants' liability and indebtedness to it. Under cl 2 of the Settlement Deed there was an acknowledgement by the first and second defendants of the total amount outstanding under the facilities being $12,854,374 excluding receivership, uncharged interest and legal costs. There was also acknowledgement of the orders in the Queensland Supreme Court requiring the first and second defendants to deliver up possession and entitling the receivers to have access to and take possession of cattle on two stations. Clause 3.1 of the Settlement Deed provided for the first and second defendants to pay $5.5 million and to cause their representatives to execute a consent to judgment for the total outstanding. Non-payment of the settlement sum on the due date constituted a termination event.

[17] The plaintiff stated that on 9 July 2015 it was entitled under the Consultancy Agreement to $182,563.25 for incurred outlays and out-of-pocket expenses and a sum of $918,000.65.

[18] It is uncontroversial that was not paid by the first and second defendants.

[19] There is evidence showing that the first and second defendants had difficulties raising the monies to pay the Settlement Deed and sought extensions to pay the amount under the Settlement Deed. Mr Shannon appeared to provide some assistance in that process. The CBA was ultimately paid the settlement amount in April 2016 after the first and second defendants sold two properties to their son who is the fifth defendant and a third property to the third and fourth defendants. Those sales are alleged by the plaintiff to be void under s 228 of the *Property Law Act 1974* (Qld) (**PLA**) on the basis that they were an alienation of property made with the intention to defraud creditors. That is not the subject of the summary judgment application.

[20] Subsequently, the first and second defendants and the plaintiff, after negotiations which also sought to include the third and fifth defendants, entered into a Deed of Agreement on 28 February 2016 (**Deed**). No reference to the Consultancy Agreement specifically is made in the Deed.

[21] Under cl 3 of the Deed, the clients acknowledged "that they owe the consultants the amount owing and they hereby jointly and severally guarantee the payment of the Amount Owing to the Consultant". The Amount Owing is defined and "means the sum of $600,000 inclusive of GST". Provision was made for payment of interest in cl 4 and for a payment in instalments over 24 months in cl 5. Clause 6 made a provision for payment of the sum that the first and second defendants received as a result of carbon credit arrangements with respect to their properties within 14 days of receipt of the funds which would result in a pro rata reduction in cl 5. Clause 7 made provision for direct payment to the firm Blueprint Law. Under cl 8 of the Deed, the first and second defendants "individually jointly and severally hereby charge all plant and equipment … owned by them or in which they have an interest with payment of the Amount Owing …"

[22] Under the recitals, Recital A provided "the clients have agreed to pay the consultant the amount owing for consultancy services provided and outlays borne by the consultant resulting in a significant write down of debts owing by the clients in respect of certain properties owned by them."

[23] Up until I January 2018, the first and second defendants made payments of some $236,000 to the plaintiff[1] and a direct payment to Blueprint Law of $40,000. They otherwise had not paid the amount owing.

[24] The Further Amended Statement of Claim (**SOC**) seeks the sum of $491,854.15 together with further interest that falls due as at the date of judgment.

[25] The sum sought in respect of summary judgment was calculated to be $500,103.09.

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1 There is some dispute as to the amount paid.

The Pleadings

[26] The SOC pleads *inter alia* that the plaintiff had provided services the subject of cl 2 of the Consultancy Agreement and the first and second defendants had breached the Consultancy Agreement and were indebted to the plaintiff for the sum of $918,000.65. The SOC pleads that as a result of the failure to make the payment, negotiation was entered into between the parties which was originally to include the third and fifth defendants. The plaintiff's pleading includes an allegation that the amount of $600,000 was to be paid in satisfaction of the success fee and the outlays. The SOC pleads that the first and second defendants failed to pay the sums as provided under the Deed and as a result of their alleged repudiation, the plaintiff had given notice that it had accepted their repudiation and the agreement was lawfully terminated. The plaintiff claims the balance as a debt due and owing or alternatively, claims damages for breach of the Deed.

[27] The further amended defence of the first and second defendants (**the defence**) raises a number of defences which are for the most part directed to the Consultancy Agreement. Relevant to the summary judgment the defence denies the first and second defendants were required to pay the success fee. Further the defence denies that the Amount Owing of $600,000 specified under the Deed was to be paid in satisfaction of the success fee and the outlays on the basis that it was not provided for in the Deed. As to the failure to pay the balance of monies sought of the Amount Owing, paragraph 29B of the defence alleges that on the proper construction of the Deed, the only amounts payable under the Deed were payable in respect of the services provided under the Consultancy Agreement for which the plaintiff was entitled to be paid. Based on the allegations pleaded in 14A and 16 the defendants plead that no amount was payable under the Consultancy Agreement and the Deed did not create any liability of the first and second defendants to the plaintiff.

[28] Paragraph 14A of the defence provides that:

> "14A. As to the Consultancy Agreement, the Defendants say further that:
>
> Mr Geoff Shannon is not, and has never been, an Australian legal practitioner within the meaning of the Legal Profession Act 2007 (Qld) (**LPA**);
>
> the plaintiff is not, and has never been, an incorporated legal practice within the meaning of the LPA;
>
> neither Mr Shannon nor the plaintiff were entitled to engage in legal practice within the meaning of the LPA;
>
> on the proper construction of the Consultancy agreement and Clause 2, the performance of the services provided for in the Consultancy Agreement required the "consultant" to engage in legal practice;
>
> in these premises, the Consultancy Agreement is void for illegality."

[29] Further, paragraph 29C(a) of the defence pleads in the alternative that on its proper construction the material effect of the Deed was to fix the sum payable to the plaintiff under the Consultancy Agreement.

[30] Prior to the summary judgement application the defendants confirmed to the plaintiff that they did not wish to amend their pleading.

Principles of Summary Judgment

[31] The principles of summary judgment in relation to r 292 of the UCPR are not in contention.

[32] UCPR r 292(2) provides:

> "If the court is satisfied that –
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the plaintiff against the defendant for all or part of the plaintiff's claim and may make any other order the court considers appropriate."

[33] Rule 292 of the UCPR should be applied using its clear and unambiguous language and keeping in mind the purpose of the UCPR to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. The key requirements of which the Court must be satisfied are "no real prospect" in the defence of a claim and "there is no need for the trial of the claim".

[34] Rule 292 of the UCPR is expressed in clear and plain language. It requires no judicial gloss to understand its meaning.[2]

[35] The question for the Court is not whether the defendant's case is "hopeless" or "bound to fail." The appropriate inquiry is whether there exists a real, as opposed to fanciful, prospect of success.[3]

[36] Issues raised in proceedings will be determined summarily only in the clearest of cases, where there is a high degree of certainty about the outcome.[4] The Court's jurisdiction should only be exercised where the plaintiff cannot improve its position by a proper amendment of the pleading.[5]

[37] Where facts are settled and the respective rights of parties turn upon questions of law, r 292 of the UCPR would require the Court to give judgment even if it involves a difficult question of law.[6]

Does the Deed Stand Alone?

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2 *Coldham-Fussell v Commissioner of Taxation* [2011] QCA 45, at 29 [98] (White JA, De Jersey CJ and McMurdo P agreeing).

3 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, at 234-235[11] (Williams JA); *Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd* [2009] 2 Qd R 202, at 206 [1] (Holmes JA), and 217 [74] (Daubney J).

4 *Neumann Contractors Pty Ltd v Transpunt No 5 Pty Ltd* [2011] 2 Qd R 114, at 136, [80] - [81]; *Westpac Banking Corp v Hughes* [2012] 1 Qd R 581, at 602 [74] (Chesterman JA).

5 *Chen v Australian & New Zealand Banking Group Ltd & Anor* [2001] QSC 043.

6 *Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd* [2009] 2 Qd R 202.

[38] According to the plaintiff, the grounds raised by the first and second defendants concern an attempt to vitiate the Consultancy Agreement and are rendered otiose by the parties entering into the Deed, which the plaintiff refers to as the "Wrong Agreement Point." The plaintiff contends that unless the first and second defendants can escape the Deed or it does not operate in the manner contended for by the plaintiff, they have no defence. Counsel for the first and second defendants accepted the latter proposition. In that respect, the first and second defendants contend that the application for summary judgment should be dismissed if it is necessary to have regard to the Consultancy Agreement to determine the plaintiff's rights. According to the first and second defendants cl 3 of the Deed does not create a standalone engagement because:

(a) if the Deed should be characterised as a compromise or settlement of the amounts owing, the Court will not enforce the compromise of an illegal contract;

(b) Otherwise, if the Deed is not characterised as a compromise or settlement then on its proper construction it serves only to fix the quantum of the amount owing under the Consultancy Agreement rather than to create an independent payment obligation.

Did the Deed rescind the Consultancy Agreement?

[39] In relation to the ground of defence that the Deed on its proper construction only fixed the amount payable under the Consultancy Agreement and did not create any liability by the first and second defendants to the plaintiff, the plaintiff contends that the Deed is in substance a Deed of Settlement. It contends that the Deed is to be interpreted according to the usual rules of contract interpretation,[7] and to be construed having regard to the intention of the parties ascertained objectively from being read as a whole and the factual matrix from which it emerged.[8] The meaning of the terms of the commercial contract is to be determined by what a reasonable businessperson would have understood those terms to have meant. That requires consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract.[9]

[40] According to the plaintiff, the effect of the Deed being entered into by the same parties after the Consultancy Agreement was to rescind the Consultancy Agreement, although the Consultancy Agreement had not been expressly terminated. In that regard, they particularly rely on Taylor J in *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93 (***Tallerman***) at 144 where it was stated:

> "…parties to an agreement may vary some of its terms by subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement."

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7 *IBM Australia Ltd v State of Queensland* [2015] QSC 342.

8 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 2019 CLR 165.

9 *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7 (**Woodside**) at [35].

[41] Taylor J in *Tallerman* identified that the contract may be varied by way of partial rescission with the substitution of new terms for those rescinded.

[42] The plaintiff contends that the intention of the parties as disclosed by the Deed is unequivocally to rescind the Consultancy Agreement by its express terms, consistent with the commercial purpose to be achieved, namely, to settle the dispute between the parties as to the amount payable under the Consultancy Agreement.

[43] That was not a matter expressly pleaded by the plaintiff which the first and second defendants contend is a basis for the Court to refuse to exercise its discretion to grant summary judgment. The plaintiff however contends it is a matter of law that did not need to be pleaded.

[44] The plaintiff identifies a number of aspects in support of its argument which include that there is a provision for the payment of the Amount Owing in cl 3 of the Deed which is considerably less than the amount of the success fee under the Consultancy Agreement and not calculated on the basis set out in the Consultancy Agreement, provision for interest, provision for payment by instalments and for security to be given over all plant and equipment owned by the first and second defendants including that identified in the schedule in cl 8 which is narrower than that provided for in the Consultancy Agreement and only in respect of the Amount Owing. According to the plaintiff that would not be necessary if the Consultancy Agreement continued given the width of the charge imposed under that agreement.

[45] Counsel for the first and second defendants however contends that the Deed in effect runs parallel with the Consultancy Agreement. Criticism was made in that regard by the plaintiff on the basis that was not pleaded. The first and second defendants referred to the fact that was on the basis the question of recission had not been pleaded. However, the defence did deny the amount owing in the Deed was agreed in satisfaction of the success fee and outlays and that the Deed only fixed the Amount Owing under the Consultancy Agreement. While further matters were raised in argument it was foreshadowed by the terms of the defence. In that regard both the plaintiff and the first and second defendants could be criticised for not pleading with greater clarity and matters that may take the other side by surprise.

[46] According to the first and second defendants, the construction contended for by the plaintiff of the Deed by which it is said to rescind the Consultancy Agreement is incorrect because:

(a) the Deed on its proper construction is agreement fixing the amount owing but does not create an obligation to pay which arises under the Consultancy Agreement. In particular, it refers to the recitals of the Deed which it makes clear by being framed in the past tense that the first and second defendants "have agreed to pay the Consultant the Amount Owing for consulting services provided and outlays borne by the Consultant resulting in a significant write down of debts owing by the Clients in respect of certain properties owned by them", that the consultant had agreed to a delayed payment arrangement for the Amount Owing and the "parties have so agreed subject to the terms and conditions of the Deed". As to the latter, the first and second defendants contend that in effect that provides the Deed has priority;

(b) The language of cl 3 is not consistent with the creation of a primary obligation insofar as its language refers to an acknowledgement. It states that "The clients acknowledge that they owe the Consultant the Amount Owing and they hereby jointly and severally guarantee the payment of the Amount Owing to the Consultant". As to the reference to "guarantee", while the first and second defendants agree that is in part explicable by the fact the third and fifth defendants were originally a party to the Deed, they contend that the reference to a guarantee is also consistent with the fact cl 3 does not create a primary obligation otherwise it would be nonsensical;

(c) There is no release of the first and second defendants from the balance said to have been owing under the Consultancy Agreement and no forbearance in relation to the balance of the amount. The fact that it was not intended to release the Amount Owing under the Consultancy Agreement is said to be supported by an email exchange between the second defendant and Mr Shannon of 20 February 2016 where Mr Shannon referred to the Deed and stated that "I am doing so because I need to show the companies something tangible" and further "We really need help with payment at least half so we can cover others and, a plan with security to lay the balance…" said to be admissible because of the ambiguity in the Consultancy Agreement. Insofar as it may be relevant to the commercial purpose of the document the email may be admissible[10];

(d) The confidentiality security clauses in the Consultancy Agreement are matters which continue. The first and second defendants contend that the security arrangement is a narrower class of collateral in the Deed because it is directed to a lesser payment; and

(e) The narrower scope of the security provided for in the Deed is consistent with there being a deferral arrangement and a lesser amount being fixed for payment under the Deed.

[47] The plaintiff contends to the extent that language of cl 3 is confusing, the fact it creates a primary obligation is made clear by cl 5 which states "The Amount Owing will be paid by the Clients to the Consultant as follows".

[48] The Deed is plainly not well drafted and neither construction proposed fits neatly in the language used. In some ways the argument of the first and second defendants is quite surprising, given the difference said to be owing under the Consultancy Agreement as opposed to the Deed. However, there are number of matters that support the defendants' construction that the intention of the Deed was to fix the Amount Owing under the Consultancy Agreement, rather than creating a new obligation which effectively substituted new terms and at least partially rescinded the Consultancy Agreement, namely that:

(a) The language in cl 3 is an acknowledgment of what is owing rather than creating a new obligation to pay that is not referable to the Consultancy Agreement;

(b) The recitals to the Deed particularly Recital A supports the fact the acknowledgment in cl 3 is referring to an agreement to pay for consulting

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10 *Woodside* at [35].

services already in existence and makes explicit reference to the consultancy services which are otherwise undefined in the Deed;

(c) The fixing of the Amount Owing under the Deed is consistent with the fact that the Consultancy Agreement provided formulas for the calculation of the fees which could be adopted;

(d) There is no reference to what was to happen to security already created under the terms of the Consultancy Agreement or the provision for any release of the amounts said to be owing under the Consultancy Agreement which exceed the Amount Owing under the Deed. The Deed does not refer to any dispute between the parties. Of course, that does not preclude the Court concluding that was in fact the case if properly construed that is found to reflect the parties intention. However, the language of the Deed does not suggest that the Amount Owing is the product of a compromise. There is the difference in the Amount Owing and the amount calculated owing under the Consultancy Agreement. While the disparity in the amounts suggests that there has been a compromise it is also consistent with the parties agreeing that is the amount that was owing under the Consultancy Agreement. While the plaintiff provided correspondence between the parties leading to the Deed, a review of the correspondence assuming it is relevant to the commercial purpose and factual matrix in relation to the Deed is fairly equivocal and does not clearly support the fact that the commercial purpose of the Deed was to settle a dispute between the parties as to the amount payable under the Consultancy Agreement as opposed to fixing the amount payable. I note that paragraph 18 of the SOC pleads that as particulars of the failure of the defendants to pay the success fee and outlays under the Consultancy Agreement correspondence exchanged after the Deed. While that is not an admission and not a matter of any significant weight, it does support the fact that there is some confusion as to the inter-relationship between the Consultancy Agreement and the Deed. Similarly, there is some inconsistency in the defendants' position. The defendants admit at paragraph 19 of the defence that the plaintiff had offered to accept an amount in satisfaction of the Success Fee and the outlays on the basis that the first to fourth defendants would enter the Deed, they deny that the Amount Owing under the Deed was in satisfaction of the Deed;

(e) The payment plan provided for in cl 5 of the Deed is consistent with the fact that there was a deferred payment arrangement of the amount fixed for the consulting fee rather than the Deed creating a payment obligation.

(f) While the provision for security in cl 8 of the Deed is more consistent with an intention to create new obligations under the Deed given broader security had been provided for under the Consultancy Agreement in cl 8 and cl 9, it is also consistent with the parties seeking to ensure that the Amount Owing was secured given it is unclear whether the security in the Consultancy Agreement extended to the Success Fee and the language used is different from cl 9.

[49] I am not satisfied that the Deed is a deed of settlement which stands alone from the Consultancy Agreement. It is not appropriate for me to make a final determination of the matter since while generally a question of construction on the basis of the document it is likely extrinsic evidence will be relevant to the construction, at least in identifying the commercial purpose of the document. In that regard both parties

made reference to extrinsic evidence being relevant at least in relation to commercial purpose in the hearing. The matter is therefore one which should be left to a trial.

[50] I am not satisfied that the defendants have no real prospect of success in their characterisation of the Deed not standing alone from the consultancy agreement and that it was intended to fix the Amount Owing, such that the Consultancy Agreement remains relevant.

If the Deed is a Deed of Settlement

[51] According to the first and second defendants, even if the Deed is a deed of compromise, it is arguable that the Court will not enforce the compromise on the basis it is a compromise of an illegal compromise.

[52] In that regard, it contends that the Consultancy Agreement required the plaintiff, which is not an incorporated legal practice, to engage in legal practice within the meaning of s 24 of the LPA.

[53] At the relevant time, s 24(1) under s 24(4) of the LPA provided that:

> "**24 Prohibition on engaging in legal practice when not entitled**
>
> (1) A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.
>
> Maximum penalty–300 penalty units or 2 years imprisonment.
>
> …
>
> (4) A person is not entitled to recover any amount in relation to anything the person did in contravention of subsection (1)."

[54] If, as the plaintiff contends the Deed is, properly characterised as a deed of compromise, does that have the effect that, at least in terms of enforcement of a debt, the Deed is not an agreement to perform legal services as the first and second defendants contend the Consultancy Agreement was and therefore, is not affected by any alleged illegality said to affect the Consultancy Agreement. In that regard the plaintiff refers to *Connolly v Suthers*[11] where the Court of Appeal stated that:

> "By contrast, the payments agreed to be made under the deed of compromise, together with the securities agreed to be given under that deed, were of a different character. They were promised in compromise of the action brought on the deed of guarantee, the respondent on its part 25 agreeing to discontinue that action. Though the amounts of the payments promised were the same as the amounts under the deed of guarantee, though payable at different times, the promise to pay them bore the character of part of a total promise made to compromise an action. Consequently the payments did not have the character of payments for past 30 legal services and

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11 (1995) 2 Qd R 117 at 120.

> consequently were not payments for fees, charges or disbursements within the meaning of that term in s. 3."

[55] *Connolly v Suther*s was not a case where there was a suggestion of illegality. Rather the question in that case was one of jurisdiction and whether the District Court had jurisdiction to make orders in relation to a compromise or s 3 of the *Solicitors Act* 1891.

[56] Counsel for the first and second defendants, however, contended that even if the Deed was a Deed of Compromise, the Court would not necessarily enforce it, if to do so would enforce a compromise of an illegal contract. In this regard, it is recognised there are competing considerations. As Lord Denning in *Binder v Alachozous* (***Binder***)[12] stated:

> "There are here two competing considerations. On the one hand the Moneylenders Acts are for the protection of borrowers. The judges will, therefore, not allow a moneylender to use a compromise as a means of getting round the Act. They will inquire into the circumstances giving rise to the compromise. They will not allow the moneylender to take unfair advantage of the borrower. Even if the borrower consents to judgment being entered against him, the courts will go behind that consent, if the justice of the case so requires. For instance, where the interest charged was so high that it was presumed to be harsh and unconscionable, the court refused to enforce a consent to judgment.
>
> On the other hand, it is important that the courts should enforce compromises which are agreed in good faith between lender and borrower. If the court is satisfied that the terms are fair and reasonable, then the compromise should be held binding. For instance, if there is a genuine difference as to whether the lender is a moneylender or not, then it is open to the parties to enter into a bona fide agreement of compromise. Otherwise, there could never be a compromise of such an action. Every case would have to go to the court for final determination and decision. That cannot be right."

[57] That requires an examination of the circumstances of entry into the compromise. If correct, the matter obviously requires a trial.

[58] As to the determination of whether the plaintiff had engaged in legal practice when not a legal practitioner, the first and second defendants contend that consistent with the decision of Daubney J in *Legal Services Commissioner v Walter* (***Walter***)[13] the Court had to consider the impugned conduct to ascertain whether it amounts to the person carrying on or exercising the profession of law and has thereby practised law. In *Walter* his Honour stated that the fact that a person is engaged in the business of providing legal services is indicative that person practicing law but a person may be practicing law without being in business. Alternatively, it may arise

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12 (1972) 2 QB 151.Referred to with approval in *Forlyle Pty Ltd v Tiver & Anor* [2007] SASC 464 by Debelle J.

13 [2011] QSC 132 at 11.

from examination of the services provided to the first and second defendants and how they were provided.[14]

[59] Despite the fact that the plaintiff indicated that the Wrong Agreement Point was a complete answer to the contention of the first and second defendants that the Consultancy Agreement was tainted by illegality, the plaintiff's Counsel in seeking to reply to *Binder* raised whether the Consultancy Agreement was illegal on the basis of what is pleaded in paragraph 14A, which it contends is confined to an allegation that the entry into the Consultancy Agreement was in breach of the LPA which cannot succeed. While Counsel for the plaintiff contended that was not a departure from his earlier concession as his contention was that as a matter of law, the Consultancy Agreement was not on its face in breach of s 24 LPA rather than requiring an examination of the services performed. In that respect, Counsel for the first and second defendants contended that had that position been raised earlier it would have made submissions as to aspects of the Consultancy Agreement which supported the fact that the defendants had an arguable case and summary judgment should not be given. In any event, Counsel for the first and second defendants submitted that their case was not so confined and extended to a contention that the services provided by the plaintiff were in breach of s 24(1) of the LPA.

[60] While the first and second defendants' pleading could have greater clarity, I do not consider that their pleaded case is not so confined. While paragraph 14A(c) refers to the proper construction of the Consultancy Agreement and cl 2, it then refers to "the performance of the services provided for in the Consultancy Agreement required the "consultant to engage in legal practice." Further paragraph 29B of the defence refers the only amount payable under the deed "were payable in respect of services provided for which the plaintiff was entitled to be paid".

[61] The first and second defendants' Counsel also referred the Court to *Brooks v Burns Philp Trustee Co Ltd*[15] where the Court stated that if there was to be an implied statutory consequence it need not always go so far as to render the agreement made in breach of an express or implied statutory prohibition "void" or "vitiated" or "nullified" or "invalid" in the sense of being devoid of legal consequences.

[62] The majority in *Gynch v Polish Club Ltd* (***Gynch***) [16] stated that:

> "In Equuscorp Pty Ltd v Haxton (45), French CJ, Crennan and Kiefel JJ explained that an agreement may be unenforceable for statutory illegality in three categories of case, where:
>
> > "(i) the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute;
> >
> > (ii) the making of the agreement is impliedly prohibited by statute. A particular case of an implied prohibition arises where the agreement is to do an act the doing of which is prohibited by the statute;

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14 See the three alternatives at [15] discussed by his Honour by reference to *Cornall v Nagle* (1995) 2 VR 188.

15 (1969) 121 CLR 432 at 458-9.

16 (2015) 255 CLR 414.

> (iii) the agreement is not expressly or impliedly prohibited by a statute but is treated by the courts as unenforceable because it is a 'contract associated with or in the furtherance of illegal purposes'.
>
> In the third category of case, the court acts to uphold the policy of the law, which may make the agreement unenforceable. That policy does not impose the sanction of unenforceability on every agreement associated with or made in furtherance of illegal purposes. The court must discern from the scope and purpose of the relevant statute 'whether the legislative purpose will be fulfilled without regarding the contract or the trust as void and unenforceable'."
>
> (Footnotes omitted.)"

[63] Further Gaegler J in *Gynch*[17] stated at [60]-[62] that:

> "An agreement which is prohibited by statute is not necessarily an agreement which is unenforceable for statutory illegality, and may itself be an agreement which is associated with or in furtherance of a purpose made illegal by statute. There is some utility in laying out in broad terms the analytical framework within which the enforceability or unenforceability of such an agreement is determined.
>
> Making an agreement in breach of an express or implied statutory prohibition can have either of two differently sourced consequences for the legal enforcement of the agreement which has come to exist in fact. One is a statutory consequence, the nature and extent of which turns entirely on the construction of the statute imposing the prohibition or of some other statute. The other is a common law (or equitable) consequence, limited to withholding (or imposing conditions on) the grant of a remedy to enforce the agreement at the suit of one or more parties, the application of which turns on considerations of public policy. The distinction between those differently sourced consequences, although fundamental, has not always been recognised in the case law."

[64] I was also referred to *Yango Pastoral Co Pty v First Chicago Australia Ltd* (***Yango***)[18] where the High Court found that neither mortgages or guarantees given to a body corporate carrying on an unauthorised banking business to secure a loan was void or unenforceable. In that case, consideration was given not only to whether the effect of the *Banking Act 1959* (Cth) which prohibited an express prohibition of carrying on any banking business in Australia unless it is in the possession of an authority to do so and imposed a daily penalty for each day of the contravention impliedly prohibited contracts the making of which constituted the carrying on of business which it was found not particularly by reference to the legislative intent and the effect on depositors.[19] Further, consideration was given to whether the Court would allow the plaintiff to enforce the contract on the basis that the Court will not enforce a contract at the suit of a party who has entered into a contract with the

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17 (2015) 255 CLR 414.
18 (1978) 139 CLR 410.
19 See for example Mason J at 426-7.

object of committing an illegal act.[20] Mason J reached the view that if the contract was held to be unenforceable it would provide a windfall gain to the defendants and other borrowers in a similar position. After considering the public policy considerations and the factors in favour of enforcing the contract influenced by the legislation, his Honour concluded that the Parliament did not intend that there would be any further consequence than the penalty.[21]

[65] In the present case, s 24 of the LPA not only provides a penalty under s 24(1) but under s 24(4) provides that a person is not entitled to recover any amount in relation to anything the person did in contravention of subsection (1).

[66] The plaintiff contends that the consultant is engaged as subcontractor and that item 3 provides for key personnel which includes barristers and solicitors. It points out that the engagement of lawyers is not prohibited by the LPA. That is so. It further points to the unequivocal statement in cl 7.6. There is however, references in the Consultancy Agreement which suggests that the consultant may be carrying out legal work, notwithstanding the reference to it being a subcontractor. For instance, in cl 2.1 which refers to services the consultant is to provide which includes providing advice as to relevant legally permitted options. While lawyers are included as key personnel in item 3 of the schedule it is not clear whether they are lawyers who may be engaged by the consultant or employees of the plaintiff since it is undefined under the Consultancy Agreement.

[67] It is doubtful that entry into an agreement, such as the Consultancy Agreement, which includes a provision such as cl 2.1 is sufficient to constitute engaging in legal practice such that the Consultancy Agreement could be regarded as "void" or "unenforceable", however the fact that a party is not carrying on business as a legal practitioner does not, at least according to Daubney J in *Walter* exclude the possibility that the person is practicing law.[22] However, given such provision is contained in the Consultancy Agreement, notwithstanding the presence of cl 6 and the "Consultant" has provided such services that may well offend the Act. That requires an examination of what was done and by whom. If that is so, to enforce provisions as to payment which may include services which were engaged in contrary to the Act may render the contract unenforceable insofar as the Consultancy Agreement and Deed provide for the recovery of such services. As is apparent from the above discussion even if the Consultancy Agreement was not impliedly rendered void under the LPA, the fact that the Consultancy Agreement may be an agreement associated with or in furtherance of a purpose made illegal by statute could render it unenforceable in the third way discussed by the majority in *Gnych* or as discussed by Gaegler J in *Gnych.*[23]

[68] The factual basis of the allegation has not been explored in this application nor indeed have I had any submissions as to the legislative intention or any relevant policy considerations. It is also a matter which requires amendment to the defence to give clarity to the contention of the defendants, whose position only became clear at the hearing, although I found it was raised, albeit obliquely in the defence.

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20 See 427-428.
21 At 429-30.
22 See [58] above.
23 Or Mason J in *Yango.*

[69] It is apparent from the above discussion that I am not satisfied that as a matter of law there is not an argument that the Consultancy Agreement would not be unenforceable on the basis of principles of illegality. As is evident from the above, I further do not consider that the first and second defendants adopted such a narrow approach.

[70] Further, having regard to *Binder*, if the Consultancy Agreement is found to be affected by illegality, the Deed will not necessarily be enforced until the Court has considered the circumstances in which the compromise was entered into and determined whether enforcing the Deed would provide for payment of services for which s 24(4) does not permit recovery and allow the plaintiff to circumvent the LPA. In that regard, in the present case unlike *Binder*, the deed did not follow the parties each having a position as to whether or not the services provided were in breach of s 24 LPA and the entry into the Deed was a compromise reached on the basis of legitimately held opposing views. I am not satisfied that the defendants have no real prospect of success in relation to ground of defence based on illegality or that the Wrong Agreement Point is a complete answer to the defence raised by the first and second defendants.

[71] A further matter that also weighs against the grant of summary judgment in the Court's discretion are the circumstances in which the illegality of the Consultancy Agreement was raised by the plaintiff where the first and second defendants had been led to believe that the grounds on which it was impugning the Consultancy Agreement was not to be the subject of argument. As it turns out, given the discussion above, the first and second defendants were able to deal with the matters raised sufficiently to satisfy me that there is some prospect as opposed to no real prospect of the defence succeeding.

[72] The application will therefore be dismissed. The plaintiff will provide submissions as to costs within seven days and the first and second defendant will respond in seven days. The submissions are to be no more than four pages in length.

[73] The application for summary judgment is therefore refused.

Security for Costs

[74] All defendants seek security for costs. The third, fourth and fifth defendants are however in a different position from the first and second defendants insofar as they are the subject of a claim under s 228 of the PLA.

[75] The plaintiff, quite properly, conceded that the threshold test which must be met under, relevant to this case under r 671(a) of the UCPR had been met. That is, the Court may order a plaintiff to give security for costs only if the Court is satisfied that the plaintiff is a corporation and there is reason to believe that the plaintiff will not be able to pay the defendants' costs if ordered to pay them, has been met.

[76] To all parties' credit there was also agreement as to the amount of the security that should be granted if the Court exercised its discretion in favour of the grant of security, namely $110,000 for the first and second defendants and $190,000 for the third, fourth and fifth defendants.

[77] As to whether security should in fact be ordered in the exercise of its discretion, r 672 of the UCPR provides for a number of matters to which the Court may have regard.

[78] It is conceded that there has been no delay by any of the defendants in making the applications for security.

Third, Fourth and Fifth Defendants Application

Prospects of Success

[79] The plaintiff's case against the third, fourth and fifth defendants alleges that when the three properties of the first and second defendants were transferred to them the alienation of properties was made with an intent to defraud creditors. The fifth defendant is the son of the first and second defendants. The third and fourth defendants are their other son and his wife. The monetary consideration for the sale included a sum of $5.5 million which the defendants paid to the CBA to discharge the first and second defendants' obligations to pay that sum to the CBA under their Settlement Deed and to release the CBA mortgages. The transfers contained a lesser amount for the consideration and that the consideration was for "love and affection".[24]

[80] The third, fourth and fifth defendants contend that the case against them is weak. According to the third, fourth and fifth defendants, given the amount that had to be paid to the CBA under the Settlement Deed, which I have referred to above, in a short period of time and the failed attempts by the first and second defendants to raise the monies in other ways, if the third, fourth and fifth defendants had not purchased the properties, the first and second defendants had no other way of paying the settlement sum to the CBA and the receivers would have taken possession of the properties and the cattle, as provided under the Settlement Deed. Further, the third, fourth and fifth defendants admit that the properties were sold to them for an undervalue but contends they were sold for a fair value. In that respect, they submit that the defence provided in s 228(3) of the *Property Law Act* does not require the sale be at market value and it is acknowledged it can be relied upon where a payment to discharge a mortgage at less than the property's market value is valuable consideration where in the circumstances, the payment has "real and substantial value and not one which is merely nominal or trivial or colourable", as was considered in *Wise Investments Pty Ltd v Ruddy Tomlins & Baxter, Solicitors (A Firm) & Anor.*[25] In the present case it is submitted that the sale was a sale of last resort and if the transfers to the third, fourth and fifth defendants had not occurred, the assets would not have been available to the plaintiff in any event as the CBA appointed receivers were entitled to take possession of the properties and they would not have been available in any event for the total amount outstanding set out in the deed of some $12 million. In that regard, one of the requirements to establish that a transfer of property is a diminution of the assets that would otherwise be available to satisfy the interests of the creditors which was not the case here.[26]

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24 Which was admitted in the Further Amended Defence of the Third, Fourth and Fifth Defendants.
25 [2019] QCA 271.
26 *Cannane v Cannane Pty Ltd* (1998) 192 CLR 557.

[81] The defendants have raised valid matters which affect the prospects of success of the plaintiff's action, however, the propositions will very much depend on the evidence at trial. It does not displace the general proposition that the Court should proceed on the basis that a plaintiff's claim is bona fide with reasonable prospect of success.[27]

[82] The plaintiff contends it has a strong case against the third, fourth and fifth defendants on the basis that the valuations which they had at the time of the transactions showed they were buying the properties for under market value, which is many millions more than $5.5 million. It is further contended that they were aware of the Deed providing for the Amount Owing of $600,000. The plaintiff contends that the properties should have been sold on the open market or alternatively, the first and second defendants should have taken a mortgage over the properties for the balance of the value above the purchase price of $5.5 million.

[83] Each party has raised valid contentions although the fact that the CBA through its receivers would have taken all three properties to realised them for some $12 million, appears to be a significant barrier.

[84] I am not satisfied that I should regard the general position that the Court should proceed on the basis that the plaintiff's claim is *bona fide* with reasonable prospects of success as displaced, nor that the plaintiff's case is strong. The strength of the plaintiff's case doesn't affect the disposition of the application either way.

Order Would be Oppressive/Stifle Proceedings.

[85] This consideration is linked to the means of those standing behind the proceedings. An order for security for costs will only stifle proceedings if both the company and those standing behind it are unable and not merely unwilling to meet the order.[28] The onus lies on the plaintiff to prove that the company and those who stand to benefit from the litigation do not have the means to bear an adverse costs order.[29]

[86] Those standing behind the proceedings must show that they, like the plaintiff, are without means.[30] As was the case in *Combined Property Holdings Pty Ltd v Galea & Orr,*[31] the plaintiff has not met the requirement in the present case.[32]

[87] The plaintiff's sole shareholder is Emerald Stay On Sullivan Pty Ltd of which Mr Shannon is not a director or shareholder. There is no evidence that the shareholder of the plaintiff, Emerald Stay On Sullivan Pty Ltd, whose director is Susan Bennett, is unable to provide any security. That is a factor which is a relevant consideration that favours the exercise of the discretion to grant an order for security for costs.[33] In that respect I consider the evidence in relation to Mr Shannon below.

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27 *Suncare Constructions Australia Pty Ltd v Gainspace (Mackay) Pty Ltd* [2016] QSC 67 at [11].
28 *Combined Property Holdings Pty Ltd v Galea* [2020] QSC 338.
29 *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* (2010) 2 Qd R 85.
30 *Gekko Developments Pty Ltd v Centa Company Pty Ltd (No 3)* [2015] QSC 87; *Combined Property Holdings v Galea & Ors* [2020] QSC 338.
31 [2020] QSC 338.
32 See [56-60].
33 *Hyperion Technology Pty Ltd v Queensland Motorways Limited* [2013] QSC 20 at [32].

[88] While the third, fourth and fifth defendants also pointed to the fact that the plaintiff's solicitor and counsel who were acting on a speculative basis have not offered any guarantee of security, I am not satisfied that they are necessarily a party contemplated by the parties who would be regarded as standing behind the company and standing to benefit from the success of the litigation, although I note it was raised as a matter of relevance in *Specialised Explosives Blasting & Training Pty Ltd*[34] without resolution.

[89] The plaintiff contends the Court should refuse to grant security on the basis of the undertakings offered by Mr Shannon and the plaintiff. Mr Shannon, the sole director of the plaintiff has offered to undertake to be jointly and severally liable with the plaintiff in respect of such costs orders as may be made against the plaintiff in the proceedings. The plaintiff at the hearing offered to cause the plaintiff to provide security in favour of the defendants and each of them to be registered over all, its property both present and future, as security for such costs as may be made against it in this proceeding with priority over all other security interest.

[90] While Mr Shannon is prepared to be bound by the order of the Court if there is an adverse order made against it in relation to costs, there is no evidence that he will be able to meet any such costs order, although I give some weight to his preparedness to give such an undertaking, the evidence supporting the value of the undertaking or otherwise falls well short. Unlike the position in *JNJ Resources Pty Ltd v Crouch & Lyndon (A Firm) (No 2)* (***JNJ Resources***)[35] there is not sufficient evidence in the affidavit material of the plaintiff to infer that the offer by Mr Shannon is of value. In *JNJ Resources*, his Honour considered that it was reasonably likely that the undertakings offered by the individuals would be worth more than the amount of the costs that would be incurred by the defendant up to the first day of trial as well as other factors relevant to the nature of the proceedings involved in that case, which have no relevance here.[36]

[91] Mr Shannon has failed to provide evidence of the worth of his proposed undertaking, contrary to the position in *JNJ Resources.*[37] That is despite the defendants raising the lack of evidence of Mr Shannon's worth and requesting evidence prior to this application being heard. To the extent there was any evidence it came from the defendants which suggested his undertaking may not be of any value. The defendants rely on some evidence as indicating that his undertaking is of no value, namely that Mr Shannon was discharged from bankruptcy on 20 February 2017, does not own real property and is a director of three companies presently under external administration. Conversely, however, Mr Shannon did not provide evidence to demonstrate he would be unable to meet any costs order, such that to the extent he stands to gain from the proceedings his evidence supports the fact that the proceedings would be stifled.

[92] The plaintiff does not trade. The plaintiff relies on evidence of its balance sheet of the plaintiff set out in Mr McMahon's affidavit on the basis of instruction from Ms Bennett,[38] to support the worth of an offer of a fixed and floating charge over the

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34 (2010) 2 Qd R 85 at 88.
35 [2014] QSC 137 at [12].
36 At [17].
37 [2014] QSC 137.
38 Who was given authority by Mr Shannon.

plaintiff to secure the defendants' costs. However, there are a number of difficulties in relation to the balance sheet which is generally not supported by objective evidence. The basis of Ms Bennett's knowledge of the financial position of the plaintiff is not established. The amount of $1.9 million referred to as receivables, it relates to a loan from a Mr Dunning, in relation to which default judgment was obtained and a bankruptcy notice has been issued. The evidence shows there are steps to set both the judgment and the notice aside. The majority of the non-current assets which refer to loans are the subject of court claims and unsecured. They include a loan to Mr Shannon's wife which is said to be the subject of Mr Shannon's divorce proceedings and presumably may form part of the matrimonial pool. There is no evidence as to the prospects of recovery. None of that evidence gives any confidence that evidence supports the value of any fixed and floating charge. Conversely, the fact that there are presently recovery proceedings for other loans suggests that the granting of security in the present case may not stifle proceedings. I take into account that two companies to whom loans are outstanding who are to be repaid upon completion of a subdivision have agreed to subordinate their loans to allow adverse costs orders to be paid first from the assets. There is no evidence as to the state of the subdivision and likelihood and timing of repayment. To the extent money is held on trust for Whiteknight Group Pty Ltd by Enyo Lawyers the trust statement reveals the client is also SOS Emerald Pty Ltd and Geoff Shannon. Thus to the extent it offers to subordinate its interest the position of the other two clients is not revealed.

[93] No evidence has been provided of the arrangements or otherwise to transfer assets to the plaintiff after it was re-registered. Given that the company was de-registered, those assets would have become assets of the Commonwealth via ASIC, although one would assume that is likely to have occurred.

[94] I am unpersuaded that a fixed and floating charge over all assets of the plaintiff is sufficient to displace the Court ordering that security be provided, given its uncertain worth.

[95] The plaintiff also sought to raise a further contention orally at the hearing, namely that if it obtained summary judgment against the first and second defendants, it would have security over plant and equipment which exceeds the amount of security sought by the third, fourth and fifth defendants. The plaintiff provided a valuation of the plant and equipment, however it was a desktop valuation, a sight unseen asset valuation which assumed the assets were in operational order and fair condition. The charges over the equipment were originally placed upon the plant and equipment in 2014 and re-registered in January of 2022. The value is questionable however, I note that there is evidence that some of the assets which are the subject of the charges have been transferred to the third, fourth and fifth defendants, who have not responded to requests of the plaintiff to provide details of those assets or their condition. I therefore assume that the plant and equipment is of some worth. The third, fourth and fifth defendants however point to the fact that the account receivables do not include an amount said to be owing by the first and second defendants. The value of the plant and equipment is only of relevance if the plaintiff succeeds. As I have refused the summary judgment, whether the plaintiff is successful or not against the first and second defendant is a matter to be determined at trial. While there are facts which support the plaintiff having some prospects of success at trial, there are a number of defences that have been raised that could

defeat the claim or at least diminish the amount of such a claim. It is not a matter to which I can attach any significant weight in favour of not ordering security for costs against the plaintiff.

[96] The Court's discretion is unfettered. While I take into account the fact that the assets transferred to the third, fourth and fifth defendants have a value which appears to significantly exceed the amount paid by them and they still hold the assets, I do not regard the case against them as strong. They have a significant defence which arises out of the transfers in unusual circumstances.

[97] I am satisfied neither that the undertaking of Mr Shannon and the offer of a charge over the plaintiff's assets is of any significant worth such that I should exercise my discretion against ordering security. Nor am I satisfied on the evidence provided that the proceedings will be stifled by the granting of the security, given the absence of evidence from the shareholder.

[98] Weighing up all of the relevant factors on the evidence before me I am satisfied the security should be granted.

First and Second Defendants

[99] The first and second defendants do not submit that the presumption that the plaintiff has a *bona fide* action with prospects of success against them is displaced. It however relies on the same matters as the third, fourth and fifth defendants in terms of the evidence, save that obviously if the first and second defendants were to be successful in their defence, there would be no recovery under the charges.

[100] While the first and second defendants are, even on the first and second defendants' own admission, in a weaker position in terms of their prospects of defending the litigation, the defence is not without prospects. They are therefore also entitled to the grant of security.

[101] The amounts of security having been agreed between the parties I will make the order provided by the parties following submissions.

Conclusion

[102] The orders of the Court will be that:

(a) The plaintiff's application filed 20 January 2022 is dismissed.

(b) Pursuant to r 670 of the UCPR, the plaintiff provide security, in a form satisfactory to the registrar, for the first and second defendants' costs of the proceeding to the first day of trial in the amount of $110,000, within 28 days.

(c) Within 28 days, the plaintiff shall provide security for the third, fourth and fifth defendants' costs of the proceeding up to and including the first day of trial in the amount of $190,000, by payment of that sum into Court or the provision of a bank guarantee in a form satisfactory to the Registrar.

(d) Within seven days, the plaintiff is to file and serve written submissions as to the costs of the applications filed on 21 July 2021, 19 August 2021 and 20 January 2022, limited to four pages.

(e) Within seven days after receipt of the plaintiff's written submissions, the defendants are to file and serve written submissions in response, limited to four pages.