



Supreme Court
New South Wales

Case Name: TCM Enterprises Pty Ltd (in liquidation) v The Owners
- Strata Plan No 78894

Medium Neutral Citation: [2023] NSWSC 1637

Hearing Date(s): 4 December 2023

Date of Orders: 21 December 2023

Decision Date: 21 December 2023

Jurisdiction: Common Law

Before: Wright J

Decision: (1) The second plaintiff, Global Investment Group Holdings Pty Ltd, is to give security for the first defendant's costs in the amount of \$65,000.00, security for the second defendant's costs in the amount of \$65,000.00, and security for the third defendant's costs in the amount of \$90,000.00, such security to be provided in a form agreed between the relevant parties or, in the absence of agreement, by payment into Court.
(2) The proceedings are stayed until such time as each amount of security referred to in order (1) has been provided.
(3) The plaintiff is to pay the defendants' costs of the defendants' notices of motion seeking security for costs.

Catchwords: COSTS – security for costs – whether power to order security engaged – factors relevant to the exercise of discretion in relation to security for costs – where financial circumstances of plaintiff not in evidence – where no relevant delay in bringing application for security – plaintiff to provide security for costs

Legislation Cited: Civil Procedure Act 2005 (NSW), ss 57,58, 67
Corporations Act 2001 (Cth), s 1335

Uniform Civil Procedure Rules 2005 (NSW), r 42.21

Cases Cited: Cornelius v Global Medical Solutions Australia Pty Ltd [2014] NSWCA 65; 32 ACLC 14-010
De Jong v Carnival PLC [2016] NSWSC 347
Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia [2020] NSWSC 1607

Category: Procedural rulings

Parties: TCM Enterprises Pty Ltd (First Plaintiff)
Global Investment Group Holdings Pty Ltd (Second Plaintiff)
The Owners – Strata Plan No 78894 (First Defendant)
Strata Community Insurance Agencies Pty Ltd (Second Defendant)
KatzBergin Loss Adjusters Pty Ltd (Third Defendant)

Representation: Counsel:
S Scevola (Second Plaintiff)
C Purdy (First Defendant)
S Ahmed (Second Defendant)
S Walsh (Third Defendant)

Solicitors:
Marsdens Law Group (Second Plaintiff)
Mills Oakley (First and Second Defendant)
Hill and Wilcox (Third Defendant)

File Number(s): 2021/00179161

JUDGMENT

1 The Court has before it applications for orders that the second plaintiff, Global Investment Group Holdings Pty Ltd (GIGH), provide security for costs, and related orders, as sought in notices of motion filed on 21 August 2023, 25 May 2023 and 26 May 2023 by the first defendant, The Owners - Strata Plan No 78894 (the Owners Corporation), the second defendant, Strata Community Insurance Agencies Pty Ltd (SC Insurance), and the third defendant, KatzBergin Loss Adjusters Pty Ltd (KatzBergin), respectively.

Background

- 2 The background to the present application can be adequately summarised as follows.
- 3 As its name implies, the Owners Corporation is the owner of the common property of a strata scheme for a multistorey building in Concord, New South Wales (the Building). The lots comprising the ground floor of the Building were, from late 2015, leased to the first plaintiff, TMCM Enterprises Pty Ltd (TMCM). At the relevant times, TMCM operated a café and restaurant business from the ground floor of the Building.
- 4 On 23 January 2020, a fire started within the exhaust ducting from the ground floor café and restaurant and, as a result, various lots as well as the common property in the Building were damaged.
- 5 The Owners Corporation and the owners of 17 lots in the Building who suffered loss and damage because of the fire made claims under a policy of insurance issued by SC Insurance. SC Insurance appointed KatzBergin as loss adjusters in respect of the claims made as a result of the fire.
- 6 On 22 June 2021, TMCM commenced the present proceedings in the District Court against the Owners Corporation, SC Insurance and KatzBergin (the TMCM Proceedings). In the TMCM Proceedings, TMCM alleged in effect that:
 - (1) TMCM had appointed Bespoke Developments NSW Pty Ltd (Bespoke) to act on its behalf to ensure that rectification work required as a result of the fire was carried out and completed in a timely manner;
 - (2) KatzBergin, as agent of SC Insurance, represented to Bespoke that if TMCM undertook work to the common property it would be paid for by way of cash settlement;
 - (3) During June to September 2020 Bespoke undertook work on the common property “consequent to” the damage caused by the fire with the Owners Corporation’s and KatzBergin’s knowledge and permission;
 - (4) The Owner’s Corporation accepted the benefit of the work for which TMCM paid, or was liable to pay, \$534,523.99;
 - (5) In the circumstances, the Owner’s Corporation, SC Insurance and/or KatzBergin were liable to make restitution or reimburse TMCM for the cost of the works or otherwise pay that amount to TMCM.

- 7 On 25 January 2022, SC Insurance, exercising its rights of subrogation, commenced proceedings in the Supreme Court in the names of the Owners Corporation and the owners of the 17 affected lots to recover damages for the loss and damage suffered by them from five defendants: the builder who carried out the work to convert the ground floor of the Building into a café and restaurant, including the installation of a wood fired pizza oven and alterations to the then current exhaust ducting; the certifier who issued the Complying Development Certificate in respect of that work and the certifier's employer; TMCM which operated the café and restaurant; and, the company retained by TMCM to inspect and clean the exhaust system. These proceedings (the Fire Damage Proceedings) have file number 2022/00022202.
- 8 On 5 April 2022, a members' voluntary winding up resolution in respect of TMCM was passed and a liquidator was appointed to the company. The liquidator determined that there were limited funds available in the liquidation and, on that basis, determined not to prosecute the TMCM proceedings. GIGH made an offer to purchase the rights or causes of action underlying those proceedings for \$3,500.
- 9 On 3 May 2022, the liquidator of TMCM entered into a deed of assignment with GIGH and Mr Meitanis, director of GIGH and a former director of TMCM, under which the causes of action the subject of the TMCM Proceedings were assigned to GIGH. It was not in dispute that the amount paid for the assignment was \$3,500.00 or that GIGH gave written notice of the assignment to each of the Owner's Corporation, SC Insurance and KatzBergin.
- 10 On 24 August 2022, GIGH was ordered to be joined as the second plaintiff in the TMCM Proceedings. TMCM remained a plaintiff in the TMCM Proceedings but it was not in dispute that TMCM had not taken any relevant active role in the TMCM Proceedings after going into liquidation.
- 11 On 2 September 2022, an amended statement of claim was filed in the Fire Damage Proceedings and it appears that, as a consequence of TMCM's liquidation, TMCM was replaced as the fourth defendant in the Fire Damage Proceedings with Insurance Australia Limited, trading as CGU Insurance. The

damage caused by the fire was claimed in these proceedings to have given rise to rectification costs in the order of \$3 million.

12 On 7 December 2022 and pursuant to orders made on 24 August 2022, GIGH filed an amended statement of claim in the TCMC proceedings. In that pleading, GIGH in effect alleged that:

- (1) as a result of discussions and correspondence between Bespoke as TCMC's agent and KatzBergin as SC Insurance's agent, Bespoke undertook work to the common property comprising rectification work as a result of the fire and renovation work and SC Insurance agreed to reimburse TCMC for the work to the common property completed by Bespoke;
- (2) SC Insurance failed to pay to TCMC the cost of completing the work to the common property carried out by Bespoke which was claimed to be \$534,523;
- (3) the Owners Corporation, SC Insurance and/or KatzBergin were liable to TCMC and/or GIGH for \$534,523, being the value of work carried out by Bespoke to the common property, on a number of bases:
 - (a) SC Insurance was liable on the basis of breach of contract;
 - (b) the Owners Corporation, and/or SC Insurance, were liable on the basis of restitution for unjust enrichment or equitable compensation;
 - (c) KatzBergin and SC Insurance were liable as a result of misleading and deceptive conduct contrary to s 18 of the Australian Consumer Law and/or negligent misstatement; and
 - (d) KatzBergin was liable on the basis of fraudulent misrepresentation and mistake.

13 On 10 July 2023, the Owners Corporation filed a defence to the amended statement of claim in the TCMC Proceedings. No other defendant has yet filed a defence in these proceedings.

14 On 17 July 2023, the TCMC Proceedings were transferred from the District Court to this Court and an order was made that they be heard together with the Fire Damage Proceedings.

The applications for security for costs in the TCMC Proceedings

15 Before filing their notices of motion seeking security for costs, the Owners Corporation, SC Insurance and KatzBergin conducted searches and made

enquiries concerning GIGH and its financial position. Those searches and enquiries included what is set out below.

Searches

- 16 On 5 May 2022, Mr Roberts, solicitor for the Owners Corporation, arranged for an ASIC search of GIGH and an Owner Enquiry search with the NSW Land Registry of GIGH to be carried out. The ASIC Current and Historical Extract established that the only director of GIGH was Mr Meitanis, the paid up share capital was \$100, and the 100 fully paid \$1 shares were all held beneficially by Kathy Meitanis, Mr Meitanis's wife. There was no record suggesting any relevant activity by the company. The Owner Enquiry search with the NSW Land Registry yielded no results for GIGH.
- 17 Similar searches were carried out by Mr Curry, solicitor for SC Insurance, in 2023 and the results were said to be the same.
- 18 On 25 May 2023, Ms Skaltsounis, solicitor for KatzBergin, obtained a grantor search in respect of GIGH via the Personal Property Securities Register. That search indicated that GIGH had not granted any registered security interests in relation to personal property owned by it.
- 19 Finally, it can be noted that TMCM and GIGH alleged in the original statement of claim and the amended statement of claim in the TMCM Proceedings that TMCM had engaged Bespoke Developments NSW Pty Ltd to carry out and supervise works on TMCM's behalf. Ms Skaltsounis was, however, unable to locate a company with that name but noted that the organisational representative of the business name "Bespoke Developments (NSW)" was recorded as being Mr Meitanis.

Enquiries

- 20 On 7 December 2022, the solicitors for SC Insurance sent by email a letter, signed on behalf of each of the Owners Corporation, SC Insurance and KatzBergin, to GIGH, care of GIGH's solicitors. It was expressly noted that the letter was from the three defendants in the TMCM Proceedings jointly. In that letter, GIGH was put on notice that the three defendants were considering making an application for security for costs and the following documentation was sought to enable the defendants properly to consider such an application:

“a. [GIGH]’s bank and investment account statements, profit and loss statements and/or anything other documents recording income for the period 1 July 2020 to date;

b. [GIGH]’s annual reports for the for the [sic] period 1 July 2020 to date;

c. [GIGH]’s credit card statements and/or loan statements for the period 1 July 2020 to date;

d. [GIGH]’s income tax statements for the period 1 July 2020 to date;

e. [GIGH]’s balance sheets, financial statement and accounts receivable for the period 1 July 2020 to date;

f. Any contract or agreement for financial accommodation or a loan, entered into by [GIGH], which remains outstanding or unresolved;

g. A list of the property currently owned by [GIGH], together with documents establishing any amount owed by [GIGH] secured against the title of such property; and

h. Details of any other assets held by [GIGH].”

21 The three defendants requested that such documentation be provided by 14 December 2022.

22 On 15 December 2022, the solicitors for SC Insurance sent an email to the solicitors for GIGH noting that no response had been received to the letter sent on 7 December 2022 and asked that they be urgently advised as to when a substantive response would be received.

23 On 19 December 2022, the solicitors for GIGH responded saying that they were still obtaining instructions and would “come back to you shortly”.

24 On 17 January 2023, the solicitors for SC Insurance sent another email to the solicitors for GIGH noting that no response had been received and enquiring when a substantive response could be expected.

25 On 19 January 2023, the solicitors for GIGH wrote to the solicitors for SC Insurance a letter which included under the heading “Security for Costs”:

“2. In your letter of 6 December 2022, you advised that the Defendants are considering bringing an application for security for costs.

3. You would no doubt be aware that any application for security will unlikely be determined until the parties understand what the issues in the case are.

4. In circumstances where your clients have not yet filed their Defences, it is not apparent what the issues in the proceedings will be.

5. The appropriate time for any discussion as to security to occur or for any application for security to be brought is after pleadings have closed.

6. In any event, in view of your clients foreshadowed application for security, please let us know what you anticipate your fees to litigate the matter to be.”

- 26 On 28 March 2023, the solicitors for SC Insurance responded, on behalf of all three defendants, to the solicitors for GIGH’s letter of 19 January 2023. It was noted that the defendants disagreed that any application for security for costs should not be determined until defences had been filed and it was also noted that the documents requested in the joint letter sent on 7 December 2022 had not been provided. In response to the request for the defendants’ anticipated defence costs, it was noted that the defendants assumed the matter would run to a three-day hearing in the District Court and the costs were estimated at \$140,000 for the Owners Corporation, \$140,000 for SC Insurance and \$120,000 for KatzBergin. The request for the provision of documents was reiterated and the defendants asked that they be made available by 11 April 2023.
- 27 None of the documentation in relation to GIGH’s financial position which was requested has ever been provided.

Applications for security for costs

- 28 As noted above, on 25 May 2023, 26 May 2023 and 21 August 2023, SC Insurance, KatzBergin and the Owners Corporation, respectively, filed a notice of motion in the TCM Proceedings seeking, *inter alia*, orders that GIGH provide security for costs and a stay of those proceedings until the security is provided.

The Court’s power to order security for costs and a stay

- 29 Relevantly, the Court has power to make an order for security for costs and grant a stay under r 42.21 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR), under s 1335 of the *Corporations Act 2001* (Cth) and in the exercise of its inherent power. It may also grant a stay if security is not provided, under s 67 of the *Civil Procedure Act 2005* (NSW) (the CPA).
- 30 For present purposes, it is sufficient to note that UCPR r 42.21 relevantly provides:

“(1) If, in any proceedings, it appears to the court on the application of a defendant—

...

(d) that there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so, or

(e) that a plaintiff is suing, not for his or her own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so, or

...

the court may order the plaintiff to give such security as the court thinks fit, in such manner as the court directs, for the defendant's costs of the proceedings and that the proceedings be stayed until the security is given.

...

(2) Security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct.

(3) If the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.

(4) This rule does not affect the provisions of any Act under which the court may require security for costs to be given."

31 Similarly, s 1335 of the Corporations Act relevantly provides:

"(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."

32 The words "reason to believe" in both provisions acknowledge that on an application for security for costs, as a matter of practicality, a court will not be able to undertake as thorough an examination of the financial position of a plaintiff and the court's assessment will be a preliminary one based on limited materials: *Cornelius v Global Medical Solutions Australia Pty Ltd* [2014] NSWCA 65 (*Cornelius*) at [16]; 32 ACLC 14-010. Nonetheless, before the power to order security is engaged, the Court must be satisfied that there is "reason to believe" that the plaintiff "will be" unable to meet an adverse costs order and a conclusion that there is a risk of that occurring is insufficient: *Cornelius* at [16].

33 In addition, s 67 of the CPA provides:

"Subject to rules of court, the court may at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day."

34 It has been accepted that s 67 confers a general power on the Court to make an order staying proceedings unless and until security for costs is given: *De Jong v Carnival PLC* [2016] NSWSC 347 at [45]ff per Beech-Jones J; *Louise Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWSC 1607 at [11] per Sackar J.

Is the Court's power enlivened in the present case?

35 In the present case, the evidence of the solicitors for the three defendants and of the solicitor for GIGH was not challenged and I accept that it was all credible. The findings set out above are based on that testimony.

36 Based on the credible testimony of the solicitors for the three defendants, I also find that GIGH is a corporation incorporated in 2019, it has a paid up capital of only \$100, it does not own any real property in New South Wales, it has not given any security over personal property owned by it, it only paid \$3,500 for the rights or causes of action of TMCM relied upon by it in the TMCM Proceedings and it is a plaintiff in those proceedings. Those findings provide, in my view, a foundation for inferring that GIGH is a corporation which lacks any substantial assets of its own. Furthermore, GIGH has been requested to provide documentary evidence relating to its financial position but has chosen not to meet such requests. In addition, despite having the opportunity to do so, it has not put on any evidence to establish that it was not in a position to comply with those requests or that it did have substantial assets or an ability to pay the defendants' costs, should the three defendants be successful in their defence of the TMCM Proceedings.

37 In those circumstances and having regard to the evidence as a whole, I am satisfied that there is reason to believe that GIGH is a corporation which is a plaintiff in the TMCM Proceedings and which will be unable to an adverse costs order if each or any of the defendants is successful in its defence of the TMCM Proceedings.

38 Accordingly, I accept that the Court's power to order security for costs and a stay pending provision of security is enlivened in this case.

Should security for costs be ordered?

39 Under UCPR r 42.21, guidance is given as to the factors which may be relevant to determining whether an order for security for costs should be made in subr (1A). That subsection provides:

“(1A) In determining whether it is appropriate to make an order that a plaintiff referred to in subrule (1) give security for costs, the court may have regard to the following matters and such other matters as it considers relevant—

- (a) the prospects of success or merits of the proceedings,
- (b) the genuineness of the proceedings,
- (c) the impecuniosity of the plaintiff,
- (d) whether the plaintiff’s impecuniosity is attributable to the defendant’s conduct,
- (e) whether the plaintiff is effectively in the position of a defendant,
- (f) whether an order for security for costs would stifle the proceedings,
- (g) whether the proceedings involves a matter of public importance,
- (h) whether there has been an admission or payment in court,
- (i) whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant,
- (j) the costs of the proceedings,
- (k) whether the security sought is proportionate to the importance and complexity of the subject matter in dispute,
- (l) the timing of the application for security for costs,
- (m) whether an order for costs made against the plaintiff would be enforceable within Australia,
- (n) the ease and convenience or otherwise of enforcing a New South Wales court judgment or order in the country of a non-resident plaintiff.”

40 In the present case, factors (m) and (n) have no relevant applicability.

41 As to the other factors, it is difficult, if not impossible, to form a properly informed judgment, before the evidence has been filed or served, as to GIGH’s prospects of success or the merits of the proceedings. At present, in my view, there is nothing in the amended statement of claim or the evidence adduced in relation to the notices of motion to suggest that the TMCM Proceedings are without merit, lack reasonable prospects of success or are not genuine.

42 The evidence, in my view, supports the inference that GIGH is impecunious. Since, however, GIGH is only the assignee of TMCM’s rights or causes of

action and was not involved in any relevant respect with the subject matter of the proceedings, it is not the case that GIGH's impecuniosity could properly be attributed to the conduct of any of the three defendants.

- 43 GIGH could not be said to be effectively in the position of a defendant in the TMCM Proceedings.
- 44 There was no evidence adduced on behalf of GIGH to the effect that an order for security for costs would stifle the proceedings and, in my view, there is no sufficient basis for inferring that this is the case. It was accepted that Mr Meitanis stood behind GIGH, as well as Bespoke and TMCM, and there was no evidence as to his financial position and, in particular, there was no evidence that he lacked the ability to fund GIGH's conduct of the TMCM proceedings or any costs order against GIGH.
- 45 The TMCM Proceedings do not appear to me to involve any matter of public importance, since they are effectively limited to the private rights and interests of TMCM in relation to money allegedly expended for the remediation and renovation of common property in the Building.
- 46 There has been no admission or payment into court in the TMCM Proceedings. Nor has there been any apparent delay in commencement of the TMCM Proceeding which might have prejudiced the defendants.
- 47 The likely costs of the TMCM Proceedings have been estimated by the solicitors for each of the three defendants. These costs, as well as the amounts sought by way of security, do not appear to me to be generally extravagant or disproportionate, having regard to the complexity and importance of the subject matter of the TMCM Proceedings and the particular issues which each of the three defendants might have to address. To the extent that there is overlap between those issues, that could be appropriately addressed by reducing the amount of security required to be provided in respect of each defendant rather than by refusing to order that any security be provided. I have also taken into account that the first and second defendants have retained the same firm of solicitors, even though each has a different named solicitor in the record. This may reflect the fact that in respect of some or all of the claims made by the

plaintiffs the Owners Corporation may be indemnified by SC Insurance, although this issue was not addressed in the evidence or the submissions.

- 48 As to the timing of the application for security for costs, GIGH submitted the defendants delayed the proceedings by not advancing their applications for security for costs “much earlier on in the proceedings”. In particular, it was said in GIGH’s solicitor’s affidavit that the TMCM proceedings were commenced on 22 January 2021 and the first, second and third defendants had delayed until 21 August 2023, 25 May 2023 and 26 May 2023, respectively, before bringing their respective applications for security for costs. These propositions are, in my view, misguided for a number of reasons. First, the TMCM Proceedings were actually commenced on 22 June 2021, not 22 January 2021, by a statement of claim dated 21 June 2021. Secondly, it was GIGH’s financial position which caused the three defendants to make applications for security for costs and GIGH did not become a plaintiff in the TMCM Proceedings until 24 August 2022, and the amended statement of claim in which GIGH pleaded its case was not filed until 7 December 2022. Thirdly, on 7 December 2022, the three defendants put GIGH on notice that they were considering making an application for security for costs and sought documentation concerning GIGH’s financial position. GIGH did not respond in a timely fashion but, when a response was given, no financial documentation was provided and GIGH’s solicitors contended that “[t]he appropriate time for any discussion as to security to occur or for any application for security to be brought is after pleadings have closed”. The defendants continued to press for documentation concerning GIGH’s financial position, finally requesting that it be provided by 11 April 2023. No documentation was provided by that date or subsequently.
- 49 In all these circumstances, it does not appear to me that the defendants delayed filing the notices of motion seeking security for costs or delayed to such an extent that an order for security should be refused on that account.
- 50 GIGH also argued that “[a]t all material times the alter ego and person standing behind both TMCM and GIGH as plaintiff companies has always been Mr Costa John Meitanis” and “the Court ordering security would cause significant additional hardship, in a matter where the second plaintiff is only seeking

restitution and recompense for monies already expended which were promised to be repaid". As noted above, there was no evidence adduced as to Mr Meitanis's or GIGH's financial positions. In these circumstances, there was no proper basis for concluding that ordering security would cause any financial hardship beyond what was inherent in the provision of security itself.

- 51 Finally, in accordance with s 58 of the CPA, I have taken into account the dictates of justice, including the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings, the objects in s 57(1) and the matters in s 58(2) which have, in substance, already been dealt with when considering the factors referred to in UCPR r 42.21(1A).
- 52 In all the circumstances and taking into account all of the relevant principles and considerations, I am of the view that it is appropriate to order that GIGH provide security for costs in the TCM Proceedings.

Determination of the quantum of security for costs

- 53 The principles to be applied in determining the quantum of the security for costs order were not generally in dispute. They were helpfully summarised by Sackar J in *Louise Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWSC 1607 at [11]-[20]. Most relevantly for present purposes, these principles included those set out in the following paragraphs of his Honour's judgment:

"12. In determining the quantum of an order for security the Court does not set out to give a complete and certain indemnity to a defendant and there is no principle that entitles a defendant to be given security for the whole of its recoverable costs (*CBX2 Pty Ltd v National Australia Bank (No 2)* [2015] NSWSC 1969 at [54] and [55]).

13. Rather the Court embarks on a process of estimation which embodies to a considerable extent, necessary reliance on the "feel" of the case after considering relevant factors (see, e.g., *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 515 (French J)).

14. Whilst the Court requires some evidentiary basis for the estimate of costs, a precise estimate is not required. The Court is not fixing a gross sum amount, and should not decline to act on the evidence before it because the evidence was not the "best evidence" available to support the application (*Pathway Investments Pty Ltd & Anor v National Australia Bank Limited* [2012] VSC 97 at [35]-[38]; *DIF III Global ColInvestment Fund LP v BBLP LLC* [2015] VSC 484). Although a discount for exigencies may be required (see, e.g., *Pathway Investments Pty Ltd & Anor v National Australia Bank Limited* [2012] VSC 97 at [55]).

15. Further the Court is to stand back from the amounts claimed and the precise assessment of costs to consider the case on its particular facts and will make an order that is just and reasonable in the circumstances (*Wollongong City Council v FPM Constructions Pty Ltd* [2004] NSWSC 523 at [50]).

16. In embarking on such a process the Court is not required to attempt its own detailed costs assessment but can take a “broad brush” approach having regard to the information before it, seeking to prevent (on the one hand) prejudice to the party paying costs by overestimating the costs and (on the other hand) injustice to the party recovering costs by adopting an arbitrary “fail safe” discount across the board on the costs claimed (see, e.g., *Allstate Life Insurance Co v ANZ Banking Group Ltd* (1995) 134 ALR 187 at 199–201; *Ashington Capital Pty Ltd v Parissen Capital (Project X) Pty Ltd* [2012] NSWSC 410 at [17]–[18]; *Pathway Investments Pty Ltd & Anor v National Australia Bank Limited* [2012] VSC 97 at [25]).

17. An important factor informing the exercise of the Court’s power to order security for costs where a person such as a litigation funder stands behind the plaintiff is that those who seek to benefit from litigation should bear the risks and burdens that the process entails (see, e.g., *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at 584 [83] (Austin J)).

18. However in *Allen Dodd as Trustee for the Dodd Superannuation Fund v Shine Corporate* [2018] QSC 40 Martin J noted that the involvement of a funder may loosen slightly the stringency which normally attaches to the calculation of the appropriate security amount.

19. It has also been accepted that where multiple defendants have a common interest but are separately represented the Court has a discretion to make an order having the effect that the unsuccessful plaintiff does not pay full costs in respect of all defendants. That may be achieved by disallowing the costs of the additional defendants or reducing the costs payable by the plaintiff in respect of each defendant (*ACN 115 918 959 Pty Ltd v Hoeys Lawyers Pty Ltd & Ors (Costs Ruling)* [2018] VSC 508 at [39]; see also *Local Democracy Matters Inc v Infrastructure NSW (No 2)* [2019] NSWCA 118 at [21]-[23]; *Andrianakis v Uber Technologies (Ruling No 1)* [2019] VSC 850.)”

54 Three experienced litigation solicitors have given evidence of their estimates of the amount of costs (exclusive of GST) likely to be incurred by the defendants in conducting their defences in the TCM Proceedings as follows:

- (1) Mr Roberts provided a detailed breakdown of his estimate of the future legal costs to be incurred by the Owners Corporation in defending the TCM Proceedings which totalled \$123,310. He also estimated that since the Amended Statement of Claim was filed on 7 December 2022, the firm had already incurred approximately \$18,000 in legal costs and disbursements. He did not include costs in relation to retaining expert witnesses dealing with whether TCM was responsible for the fire which will also be an issue in the Fire Damage Proceedings.
- (2) Mr Curry provided an estimate (on essentially the same basis as Mr Roberts) of \$154,800 for SC Insurance’s future costs to be incurred in defending the TCM Proceedings and approximately \$10,000 already incurred.

(3) Similarly, Ms Skaltsounis provided an estimate of \$121,717.50 for KatzBergin's future costs of defending the TMCM Proceedings and approximately \$10,000 already incurred.

55 As observed above, these estimates do not appear to me to be extravagant or disproportionate to the issues likely to be involved in the TMCM Proceedings. The assumptions on which they are based, including that there would be a three-day trial in the District Court, are suitably modest or conservative. I do not accept that an adequate assessment, for the purposes of ordering security, of the likely costs to be incurred cannot be made at this stage because a defence has only been filed by the Owners Corporation and not by the other two defendants.

56 It was noted by Mr Balasubramanian, the solicitor for GIGH, that in his experience a successful party entitled to recover costs on the ordinary basis recovered 65-80% of their actual costs. I accept that this is so but it is only one consideration which should be taken into account when considering the amount of security to be ordered.

57 It was also submitted on GIGH's behalf that there was significant overlap between the issues which would have to be addressed by each of the defendants in the TMCM Proceedings and the Court should not, in effect, allow a doubling up of security in these regards. I accept that there is likely to be some significant overlap in issues, both as between the Owners Corporation and SC Insurance, given that they have such commonality of interests that they have retained the same firm of solicitors, and as between SC Insurance and KatzBergin, given the alleged agency relationship between them. I also note, however, that the allegations of mistake and fraudulent misrepresentation are only made as against KatzBergin and, consequently, it is likely that that defendant will bear more costs in defending those discrete aspects of the case.

58 Although the TMCM Proceedings are to be heard together with the Fire Damage Proceedings, I do not accept that there is likely to be a large measure of overlap between the issues to be determined in the two proceedings. The TMCM Proceedings focus on work done by Bespoke and the conversations and correspondence between KatzBergin and Bespoke concerning that work. Those issues are not directly relevant to the principal issues to be determined

in the Fire Damage Proceedings which, as I understand it, relate more to responsibility for the fire, the work required to be carried out by other builders and other loss and damage suffered by the Owners Corporation and the 17 lot holders.

59 Given the estimates of costs of \$123,310, \$154,800 and \$121,717.50 for future legal costs by the Owners Corporation, SC Insurance and KatzBergin, respectively, they have sought the following amounts by way of security for costs:

- (1) the Owners Corporation - \$100,000,
- (2) SC Insurance - \$110,000; and
- (3) KatzBergin - \$120,000.

60 It can thus be seen that the Owners Corporation and SC Insurance have already factored in, in effect, discounts in the order of 20% and 30%. There is no similar discount applied in relation to KatzBergin's estimate but this might be said to reflect the fact that the estimate is conservative and KatzBergin might bear the more factually intense aspects of the defence which turn on what was said, done or approved by KatzBergin.

61 Standing back from the amounts claimed and the precise assessment of costs, and considering the relevant principles, the likely overlap of issues and interests, and the other factors applicable to the TCM Proceedings, in my view it is just and reasonable in the circumstances to order that GIGH provide security in the following amounts:

- (1) in respect of the Owners Corporation's costs - \$65,000.00;
- (2) in respect of SC Insurance's costs - \$65,000.00;
- (3) in respect of KatzBergin's costs - \$90,000.00.

62 There was no significant contest that if security for costs should be ordered, an appropriate form of stay should also be ordered.

Costs

63 There were no circumstances to which GIGH pointed nor were there any circumstances of which I am aware which would justify departing from the

general principle that costs should follow the event in respect of the present applications. Accordingly, GIGH will be ordered to pay the defendants' costs.

Orders

64 For all of these reasons, the orders of the Court are:

- (1) The second plaintiff, Global Investment Group Holdings Pty Ltd, is to give security for the first defendant's costs in the amount of \$65,000.00, security for the second defendant's costs in the amount of \$65,000.00, and security for the third defendant's costs in the amount of \$90,000.00, such security to be provided in a form agreed between the relevant parties or, in the absence of agreement, by payment into Court.
- (2) The proceedings are stayed until such time as each amount of security referred to in order (1) has been provided.
- (3) The plaintiff is to pay the defendants' costs of the defendants' notices of motion seeking security for costs.

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