Anchung Pty Ltd v Northern Territory of Australia [2015] NTSC 76

PARTIES:	ANCHUNG PTY LTD
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	31 of 2015 (21517154)
DELIVERED:	12 November 2015
HEARING DATES:	27 October 2015
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

COSTS – Security for costs – Principles applicable to the making of an order – Impact of delay in bringing application – Determination of nature of the security and the quantum of the security.

Bell Wholesale Co Ltd v Gates Export Corp (1984) 2 FCR 1.
HP Mercantile Pty Ltd v Dierickx [2013] NSWCA 87.
Livingspring v Kliger Partners [2008] VSCA 9.
Pucciamati v Walker Nominees Pty Ltd [2002] NTSC 13.
Beach Petroleum NL v Johnson (1992) 10 ACLC 525 at p 527.
Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch, Unreported, Supreme Court NT, Kearney J, 23 July 1991.
Jazabas Pty Ltd & Ors v Haddad & Ors [2007] NSWCA 291.
Mac-Attack Equipment Hire Pty Ltd v AJ Lucas Operations Pty Ltd [2010] NTSC 27.
Iskandar & Natrabu v Merpati [2005] NTSC 85.

Milingimpi Educational and Cultural Association Inc v Davis; *The Museums and Art Galleries Board and the Northern Territory of Australia*, Unreported, Supreme Court NT, Kearney J, 12 October 1990.
Ravi Nominees Pty Ltd v Phillips Fox (1992) 10 ACLC 1313.
PG Gabel Pty Ltd (il liq) v Katherine Enterprises Pty Ltd (1977) 29 FLR 108.
Buckley v Bennell Design & Construction Pty Ltd (1974) 1 ACLR 301.
Octocane Pty Ltd v SRJ Property Development Pty Ltd (1999) SASR 471.
MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd [2002 FCA 821.
Felsink Pty Ltd v City of Maribyrnong [2007] VSC 821.
Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd (1995) ATPR 41-444.
Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd (1985) 1 NSWLR 114.

Law of Costs, Dal Pont, G.E., Third Edition, LexisNexis Butterworths

Supreme Court Rules, O 62.02
Corporations Act 2001, s 1335

REPRESENTATION:

Counsel:

Plaintiff:	Mr Baldry
Defendant:	Mr Crawley

Solicitors:

Plaintiff:	Ward Keller
Defendant:	HWL Ebsworth

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Anchung Pty Ltd v Northern Territory of Australia [2015] NTSC 76

No. 31 of 2015 (21517154)

BETWEEN:

ANCHUNG PTY LTD
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: MASTER LUPPINO

REASONS

(Delivered 12 November 2015)

[1] The Defendant seeks an order for security for costs in the sum of $250,000.

[2] The background facts are that the Plaintiff, ostensibly through the agency of a related entity ("Renhe") submitted a proposal to the Northern Territory Police for the provision of housing for police officers at Milikapiti on Melville Island. The Plaintiff was to source suitable allotments on which transportable type housing would be sited. Third parties would then acquire the properties once the housing had been fully established and they would

then lease the houses to the Northern Territory for housing for police officers for a 20 year term.

[3] The housing was to be ready, and the tenancy was to start, by 31 December 2014. Although the facts in the lead up to the termination of the agreement are in dispute, it appears clear that the Plaintiff experienced difficulties in completing the agreement. Despite that, the Plaintiff pleads that it was willing and able to perform the agreement at all material times.[1] The Defendant denies that. The particulars in support of the denial refer to correspondence from Mr Neville Roberts, on behalf of the Plaintiff and/or Renhe, referring to funding difficulties.[2] Those particulars allege that at one point Mr Roberts states that the agreement might not proceed due to the funding difficulties.[3] Another suggests a new finance option could be available if certain key features of the arrangement, namely increased rental and tenure, could be negotiated.[4]

[4] Ultimately the Northern Territory terminated the agreement. The Plaintiff treated that as a repudiation of the agreement and then commenced the current proceedings shortly after that.

[5] Clearly the pleadings put the financial capacity of the Plaintiff, at least in respect of the financing of the arrangement, in issue at the outset.

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1 Amended Statement of Claim filed 21 April 2015 at para 5.
2 Amended Defence filed 17 July 2015 at para 5.
3 Amended Defence filed 17 July 2015 at para 5.
4 Amended Defence filed 17 July 2015 at para 5.

[6] The Defendant sought information regarding the financial capacity of the Plaintiff in the form of discovery of documents relative to the Plaintiff's pleading that it was willing and able to perform the agreement at all material times. Orders to that effect were made at the Case Management Conference on 19 August 2015. I was told, without dispute, that the Plaintiff has not fully complied with that order. All the Plaintiff has apparently provided are copies of one page in respect of two separate bank accounts in the name of Helen Roberts, the wife of Mr Neville Roberts, which accounts are in credit in total for approximately $280,000.

[7] Following the Plaintiff's failure to comply with requests to confirm its capacity to meet any adverse costs liability, the Defendant decided to apply for security for costs. The Plaintiff was first put on notice of the Defendant's intention to seek security for costs at the Case Management conference on 19 August 2015.

[8] The Defendant has conducted enquiries and searches in an attempt to determine the Plaintiff's financial position. The evidence the Defendant relies on reveals:-

1. The Plaintiff has no real estate or other assets of a registrable nature in the Northern Territory;

2. The Plaintiff's ABN was cancelled on 26 June 2014 (although the significance of that was not explained);

4. The Plaintiff has a liability, secured by a registered commercial charge over one of the housing units the subject of the claim, in favour of a Mr Rebbeck, registered on 22 January 2015 in respect of an agreement made in May 2014 for the amount of $450,000;

5. The Plaintiff was registered as a corporation in South Australia on 6 July 1999;

6. The Plaintiff's registered office is in South Australia;

7. Helen Roberts, who was the sole director and secretary of the Plaintiff, resigned from both positions on 5 June 2014 and Neville Roberts has been the sole director and secretary of the Plaintiff since that date;

8. The Plaintiff's issued share capital is $1,000 and all of the issued shares are owned by Helen Roberts.

[9] The Plaintiff has also provided affidavit evidence for the purposes of the application. In addition to evidence separately dealt with below, the Plaintiff's evidence adds that:-

1. The Plaintiff owns the two transportable units the subject of the claim;

2. The Plaintiff is not currently trading and does not have any day to day recurring business costs.

[10] With that background, the application for an order for security for costs is made pursuant to Rule 62 of the *Supreme Court Rules* (the "SCR") and section 1335 of the *Corporations Act*. It is recognised that the two provisions are alternative sources of power for making an order for security for costs.[5]

[11] The relevant parts of Rule 62 of the SCR, as they apply to the current application, provide as follows:-

> 62.02 When to give security
>
> (1) Where:
>
> (a) the Plaintiff is ordinarily resident out of the Territory;
>
> (b) the Plaintiff is a corporation or (not being a Plaintiff who sues in a representative capacity) sues not for his own benefit but for the benefit of another person and there is reason to believe that the Plaintiff has insufficient assets in the Territory to pay the costs of the Defendant if ordered to do so;
>
> (c) a proceeding by the Plaintiff in another court for the same claim is pending;
>
> (d) subject to subrule (2), the address of the Plaintiff is not stated or is not stated correctly in his originating process;
>
> (e) the Plaintiff has changed his address after the commencement of the proceeding in order to avoid the consequences of the proceeding; or
>
> (f) under an Act or the Corporations Act 2001 the Court may require security for costs,
>
> the Court may, on the application of a Defendant, order that the Plaintiff give security for the costs of the Defendant of the proceeding and that the proceeding as against the Defendant be stayed until the security is given.

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5 *Bell Wholesale Co Ltd v Gates Export Corp* (1984) 2 FCR 1 at p 3.

(2) The Court shall not require a Plaintiff to give security by reason only of subrule (1)(d) if in failing to state his address or to state his correct address the Plaintiff acted innocently and without intention to deceive.

62.03 Manner of giving security

Where an order is made requiring the Plaintiff to give security for costs, security shall be given in the manner and at the time the Court directs.

62.04 Failure to give security

Where a Plaintiff fails to give the security required by an order, the Court may dismiss his claim.

62.05 Variation or setting aside

The Court may set aside or vary an order requiring a Plaintiff to give security for costs.

[12] Section 1335 of the *Corporations Act* provides as follows:-

> 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.

[13] Both Rule 62.02 and section 1335 confer a discretionary power on the Court which is enlivened if the factors in Rule 62.02 or section 1335 are satisfied. Relevantly those factors are that there is reason to believe, based on credible testimony in the case of section 1335, that the Plaintiff has insufficient assets, in the Territory in the case of Rule 62.02, to pay, or will be unable to pay, the costs of the Defendant if ordered to do so.

[14] Mr Crawley for the Defendant, submitted that the discretion has been enlivened. He relied on *HP Mercantile Pty Ltd v Dierickx*,[6] *Livingspring v Kliger Partners*[7] and *Pucciamati v Walker Nominees Pty Ltd*[8] and submitted that the threshold test is an undemanding one and is satisfied if a rational basis sufficient to establish a *prima facie* case is established.

[15] The approach to be taken in determining the threshold question was explained by von Doussa J in *Beach Petroleum NL v Johnson*[9] ("*Beach Petroleum*"). His Honour said:-

> In my opinion the power of the court under s 1335 arises if credible evidence establishes that there is reason to believe there is a real chance that in events which can fairly be described as reasonably possible the plaintiff corporation will be unable to pay the costs of the defendant on service of the allocatur, if judgment goes against it. This will be so even if in other events which can also be fairly described as reasonably possible the plaintiff corporation would be able to pay the costs. The degree of likelihood of the plaintiff corporation being unable to pay the costs along with all the circumstances, actual and possible, about its financial position, would be then to be taken into account in the exercise of the discretion, and in framing the orders of the court if the decision is to order security.

[16] Mr Crawley submitted that it was incumbent on the Plaintiff to place before the Court a full and frank statement of its assets and liabilities as well as those of its backers: *Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch*[10] ("*Darwin Joinery*"). The Plaintiff acknowledges this requirement. Mr Baldry for the Plaintiff conceded that the evidence put on behalf of the Plaintiff only goes to the question of the threshold test and

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6 [2013] NSWCA 87.
7 [2008] VSCA 9.
8 [2002] NTSC 13.
9 (1992) 10 ACLC 525 at p 527.
10 Unreported, Supreme Court NT, Kearny J, 23 July 1991.

does not purport to satisfy the obligations required by *Darwin Joinery* in the event that the discretion is found to be enlivened. The effect of that is that there is no evidence relied on by the Plaintiff relevant to the exercise of the discretion.

[17] The Plaintiff argues that the discretion is not enlivened because the proper likely costs of the Defendant are less than the Plaintiff's equity in the assets it owns in the Northern Territory. The assets referred to are the two housing units the subject of the current claim.

[18] I discuss the quantum of costs in more detail below but for the purposes of his submission that the threshold test has not been met, Mr Baldry examined the Defendant's estimate of past and future costs and submitted that the Defendant's estimate is excessive. With that I agree for the reasons which appear below. Mr Baldry then submitted that the Defendant's likely proper costs, both past and future, are $149,000 at the highest. Accepting that for the moment for the purposes of argument, Mr Baldry went on to argue that as that amount was less than the equity in the Plaintiff's assets in the Northern Territory, the discretion was therefore not enlivened.

[19] That does not necessarily follow as the test is that there is reason to believe that the Plaintiff has insufficient assets in the Territory or will be unable to pay the costs of the Defendant if ordered to do so. The net asset position of the Plaintiff alone is not necessarily determinative. That falls within the qualification put on the test by von Doussa J in Beach Petroleum, i.e., "....

even if in other events which can also be fairly described as reasonably possible the plaintiff corporation would be able to pay the costs".

[20] It could only be relevant in any case if the nett asset position was established by admissible evidence and I cannot accept the argument that the threshold test has not been satisfied as submitted as I do not consider that proper evidence of value has been provided. The evidence relied on by Mr Baldry is the evidence of Mr Neville Roberts which purports to value the two units based purely on the sum total of acquisition costs, transport costs, establishment costs and import duties. Based on those sums, Mr Roberts says that the value of the units, once installed in a remote or rural location, is $550,000 for each. He asserts that after allowing for the secured debt to Mr Rebbeck, there is total equity in the two units of approximately $253,000.

[21] I cannot accept Mr Roberts' assertion as admissible evidence of value. The assertions he makes as to value are undeniably in the realm of expert opinion evidence but his qualification to give that evidence has not been established. Moreover his approach is simplistic. He bases his assessment of value on acquisition costs and on the basis that the units are sited in a remote location. The evidence however reveals that the units remain stored in Darwin. I have no evidence of their current condition or of their marketability. I have no evidence as to what allowance needs to be made due to any adverse market factors likely to impact on any potential sale.

[22] I think it is clear, inferentially at least, that there are adverse factors which impact on the potential sale of those units. The Plaintiff has accepted the Defendant's repudiation of the agreement and now claims for damages only. The Plaintiff has been free to sell the units since March 2015 at the latest. Indeed the Plaintiff has been under a duty to mitigate any claimed loss and that would require attempts to sell the two units. Evidence of any such attempts would be relevant to the current application but the Plaintiff has not led any such evidence. I therefore infer that there are adverse market factors relating to the sale of the units and I would expect a valid valuation would, in assessing market value, have regard to the fact that the units are in storage only.

[23] I reject Mr Roberts' evidence in this respect and absent admissible evidence of value and I conclude that the Plaintiff does not have assets, in the Northern Territory or otherwise, sufficient to meet any adverse costs order and would be unable to pay costs if ordered to do so. Therefore the Court's discretion has been enlivened.

[24] It is settled law that once enlivened the discretion is unfettered and is to be exercised having regard to all circumstances of the case. The factors relevant to the exercise of discretion will vary from case to case. There are however some recognised factors which Courts typically take into account.

These were set out in *Jazabas Pty Ltd & Ors v Haddad & Ors*[11] ("*Jazabas*"), namely:-

(1) Whether there has been any delay in bringing the application;

(2) The strength and bona fides of the Plaintiff's case;

(3) Whether the Plaintiff's impecuniosity was caused by the Defendant's conduct;

(4) Whether the application for security is oppressive and will stultify the Plaintiff's claim;

(5) Whether there are any persons standing behind the company who are likely to benefit from the litigation and who are willing to provide the necessary security;

(6) Whether the persons standing behind the company have offered personal undertakings to be liable for the costs and if so what the form of the undertaking is;

(7) Security will only ordinarily be ordered against a party who is in substance a Plaintiff.

[25] I now deal in turn with such of the factors that apply in the current case. The first, and the most contentious on the argument before me, is delay. Delay in

[11] [2007] NSWCA 291. See also *Mac-Attack Equipment Hire Pty Ltd v AJ Lucas Operations Pty Ltd* [2010] NTSC 27, *Iskandar & Natrabu v Merpati* [2005] NTSC 85, *Milingimpi Educational and Cultural Association Inc v Davis*; *The Museums and Art Galleries Board and the Northern Territory of Australia*, Unreported, Supreme Court NT, Kearney J, 12 October 1990.

bringing an application can be taken into account in determining whether or not an order for security for costs should be made. Alternatively, delay may be taken into account in determining the quantum of a security order. It is fairly well settled that an application for security for costs should be made promptly. This is discussed at length in *Law of Costs*.[12] In that text the authorities in relation to the issue are discussed with reliance on *Ravi Nominees Pty Ltd v Phillips Fox*[13] for the essential or basic principle. That principle is based on fairness, specifically that a plaintiff otherwise incurs costs that an early application and order for security would have avoided and which costs may ultimately be wasted if the security order has the effect of ending the proceedings.

[26] Although an application for security for costs should be made without undue delay, any delay is not automatically a bar to an order. It is only one of the factors to be taken into account in the exercise of the discretion. That is particularly the case if there is a reasonable explanation for the delay.[14] The example cited by Street CJ in *Buckley v Bennell Design & Construction Pty Ltd*,[15] is where the plaintiff's impecuniosity was only discoverable at a late stage or where the likely length of the proceedings could not have been foreseen when the action was commenced.

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12 Dal Pont, G.E., Third Edition, LexisNexis Butterworths at p 1036.
13 (1992) 10 ACLC 1313.
14 *PG Gabel Pty Ltd (il liq) v Katherine Enterprises Pty Ltd* (1977) 29 FLR 108.
15 *Buckley v Bennell Design & Construction Pty Ltd* (1974) 1 ACLR 301 at p 308.

[27] Another example is *Octocane Pty Ltd v SRJ Property Development Pty Ltd*[16] where the procedural activity occupying the parties in the form of an application for summary judgment and extensive work on pleadings was considered sufficient to excuse the delay.

[28] In *MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd*[17] ("*MHG Plastic*") the plaintiff's failure to provide information reasonably requested by the defendant excused a delay. This, in conjunction with the claimed desirability of first exhausting settlement prospects, is relied on by the Defendant as an explanation for the delay in the current case. However, that has to be assessed against the Defendant's knowledge of the Plaintiff's financial difficulties during the currency of the agreement.[18] As to the Defendant's preference of exhausting settlement prospects before making the application, no reason was offered, nor can I see one, as to why the application could not have been made concurrently with those negotiations.

[29] Currently the matter is at the stage where case management has concluded and the matter has a trial date. That there has been delay is self-evident given that the Plaintiff's financial capacity has always been in issue. Proceedings were commenced on 17 April 2015 and the summons seeking security for costs was filed on 24 September 2015 despite being first mooted on 5 August 2015. A trial window[19] was fixed on that date and the matter was referred to the callover held in October 2015 for the purposes of listing

16 (1999) SASR 471.
17 [2002] FCA 821.
18 Amended Defence file 17 July 2015 at para 5.
19 Pursuant to Practice Direction No 6 of 2009 – Trial Civil Procedure Reforms, para 17.1

the matter for trial. In all the circumstances, following the approach taken in *Felsink Pty Ltd v City of Maribyrnong*[20] ("*Felsink*"), *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd*,[21] and *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd*,[22] I consider that any order for security for costs should be limited to future costs only on account of the Defendant's delay. Noting the rationale behind considerations related to delay discussed above, such a limitation will have the effect of sufficiently addressing that concern. A reduction in the quantum of the security order in that way reduces the risk that the Plaintiff's case may not proceed. Secondly, it achieves an appropriate balance between the competing interests in that the Defendant is not totally denied the protection of a security order.

[30] Dealing next with the factor of whether the Plaintiff will be shut out from making a genuine claim, *MHG Plastic* establishes that the onus is on the Plaintiff to show that those who stand behind it and who will benefit from the litigation if it is successful lack the means to finance the litigation.

[31] In the current case, no direct evidence in relation to this factor has been led by the Plaintiff. The one exception is the limited evidence that at some point Helen Roberts had approximately $280,000 in bank accounts. It is difficult to make anything of that with the scant details that have been provided. That Helen Roberts had a certain amount of funds in bank accounts at a certain time, albeit sufficient to cover any likely security order, is meaningless in

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20 [2007] VSC 821.
21 (1995) ATPR 41-444.
22 (1985) 1 NSWLR 114.

the context of any cost liability of the Plaintiff without some indication that the Plaintiff will be able to utilise those funds if required.

[32] What is known however is that the Plaintiff has paid $65,000 to date towards its own legal costs. The source of the funds for that payment has not been disclosed. On the limited evidence led by the Plaintiff, it is plain that payment of past costs likely came from a source other than the Plaintiff. It is also plain that the Plaintiff has been able to make arrangements for its future legal costs. Absent compliance by the Plaintiff with the requirements in *Darwin Joinery*, I draw appropriate inferences that the Plaintiff's backers will continue to fund the litigation and I am not satisfied that the Plaintiff will necessarily be stopped from pursuing the litigation if orders for security for costs are made.

[33] As to the strength of the Plaintiff's case, I can only make a basic assessment of that and that is based on the pleadings. The particulars to paragraph 5 of the Defence go to considerable detail regarding the contents of various correspondence submitted on behalf of the Plaintiff in the lead up to the termination of the agreement. If those particulars are confirmed by evidence, and that appears likely, then the Plaintiff may well fail to establish that it was willing and able to complete the agreement despite the allegation to the contrary in the Amended Statement of Claim.[23] This suggests that the Plaintiff's case is not strong. If correct, that would likely result in an

[23] Amended Statement of Claim filed 21 April 2015 at para 5.

adverse cost order against the Plaintiff and I have already decided that in that event the Plaintiff will likely not be able to pay those costs.

[34] In relation to the quantum of any order for security, in *Mac-Attack Equipment Hire Pty Ltd v AJ Lucas Operations Pty Ltd*[24] I summarised the authorities and set out the principles relevant to the determination of an appropriate amount to order by way of security for costs. Those principles, insofar as they are relevant to the current case, are:-

1. The Court is to determine an adequate amount for security having regard to the nature of the claim, which is an amount that is neither illusory nor oppressive;

2. The amount ordered does not have to be a pre-estimate of the actual costs;

3. It is appropriate to factor in contingencies such as the possibility that the action will settle at same stage.

[35] The usual starting point in determining what is an adequate amount is to estimate the likely costs incurred to date (although past costs will not now be relevant given the order I propose to make) and the likely costs to be incurred until the matter is completed. The Defendant's evidence as to the likely quantum of costs to the conclusion of the matter is vague and imprecise. It lacks the typical breakdown of costs according to the nature of

[24] [2010] NTSC 27.

the work to be performed which is usually provided in these applications. The Defendant relies on a breakdown it apparently provided to the Plaintiff in without prejudice correspondence. It has elected not to annex that correspondence for the reason that it is privileged. To the extent that it is a privileged communication for the benefit of the Defendant, it could have been waived. In any case I am not convinced that the Defendant could not have repeated that breakdown in its affidavit material without annexing the privileged letter. The result is that I am left with insufficient material to assess the Defendant's likely costs. The onus is on the Defendant to present appropriate evidence of the quantum of the security order sufficient to enable me to exercise my discretion as the determination of quantum is part of that discretion.

[36] The estimates the Defendant provides are based on an assessment made as at 3 September 2015 in relation to solicitors and clerk's fees. In relation to counsel fees, the estimate is based on an estimate of fees provided, in the case of senior counsel, as at 20 August 2015 and 16 September 2015 in respect of the fees of senior junior counsel.

[37] Bearing those dates in mind and given the limitation I intend to put on the order for security, accordingly adjustments need to be made at the outset on that account. An appropriate deduction in the case of senior counsel is a relatively easy task as the estimate senior counsel has provided included a specific estimate in respect of work in conjunction with settling interlocutory applications, including the application for security for costs.

There is also a broad estimate given for all advice and email correspondence and telephone discussions from that date to the conclusion of the trial. Taking a broad approach, I think a deduction of $5,000 is appropriate to adjust the estimate to the date I propose for the order. After deducting that, that leaves estimated senior counsel fees at $52,750.

[38] In the case of senior junior, I do not have a corresponding estimate specific to the current application but I think it is appropriate to deduct one and a half days at the quoted rate of $2,625 per day for the hearing before me and preparation for the hearing. After making that deduction totalling $3,900 rounded to the nearest hundred dollars, that leaves estimated senior junior counsel fees at $19,200. Subject to those adjustments, the estimates for counsel fees are appropriate and the Plaintiff concedes that.

[39] The scant details of costs provided by the Defendant prohibit me from adopting any more than a broad approach to an appropriate discount for the estimated fees for solicitors and clerks. As estimated from 3 September 2015 they amount to $86,900 inclusive of GST, rounded to the nearest hundred dollars. I deduct $10,000 as an appropriate proportion to allow for the work relative to the security for costs application and to reduce the costs to the date from which the order for security will operate. In round figures, that reduces the amount claimed to $76,900 inclusive of GST.

[40] The Defendant's estimates of fees for solicitors and clerks is based on a total of 306 hours for solicitors and 18 hours for clerks. I think that is

excessive. That is highlighted by a comparison of the time estimated by senior counsel for preparation, incidental advice and estimated trial time. Leaving aside travel time, that estimate is approximately 75 hours.

[41] I make what I think are appropriate allowances to determine the likely work involved. As I expect an instructing solicitor will be present during the course of the trial and involvement before court commences, I approach the estimate by allowing eight hours per day for that purpose then that equates to 40 hours over the projected five hearing days. I then allow another two weeks (10 full days) at eight hours per day for preparation and work in the lead up to trial. In my assessment that is broadly sufficient having regard to the issues in dispute as I understand them and the involvement of counsel. That would result in a further 80 hours. On the Defendant's estimate of the total time required of solicitors, a further 186 hours of solicitor's time and 18 hours for clerk's time is required and that translates to over four weeks (20 full days) at eight hours per day. I do not see how that can be justified after allowing also for work by two counsel.

[42] Although I accept that some significant work will be required to prepare the matter for trial, I think that the Defendant's estimate is highly overstated and I will reduce the costs estimate of the Defendant by a further 50% on this account. This allows a small buffer and also makes a corresponding adjustment in the amount estimated for clerk's fees.

[43] That reduces costs other than counsel fees to $38,500 rounded to the nearest hundred dollars. Although the Defendant's affidavit evidence asserts that the time estimated for solicitors and clerks is "anticipated recoverable" time, which seems to suggest an allowance has been made for the usual rate of recovery on taxation, that is not the case as the calculations are made based on total hours anticipated to be required so I approach it on that basis. If the rate of recovery on taxation has been allowed, then I would reject that in any case as, if only recoverable hours were included in the estimate that would mean that the Defendants were claiming that an additional 30% in hours of actual work done would be required and that is inconceivable.

[44] In *Felsink* a discount of 30% was made on account of the usual recovery on taxation and I think that is appropriate here also. It also appears that the Defendant has estimated fees by the rate specified in the Guidelines to Taxation and therefore the Defendant has not allowed for care and conduct. An uplift of 20% for care and conduct is likely. After factoring in that uplift and then applying the deduction to reflect recoverable costs, that reduces the estimated costs to $32,300 rounded to the nearest hundred dollars.

[45] Mr Baldry also submitted that costs should only be secured up to the conclusion of the first day of trial. In this respect he relies on *Felsink*. In that case security was ordered in respect of costs incurred up to the conclusion of the first two days of trial. The court there thought that was appropriate as it otherwise placed an unfair burden on the plaintiff to be required to provide security for costs which may never be incurred and on

the basis that if the matter proceeded beyond the second day, the application could be revisited before the trial Judge.

[46] The limitation for the reasons suggested seems to be based on the prospects of a settlement occurring, or the case otherwise concluding, within the suggested time period. Although a case may terminate at any point, in this case there is evidence of considerable settlement negotiations which have been unable to resolve the matter. Therefore I do not consider it is appropriate to restrict the term of the order on that basis. That would inevitably result in further argument regarding security before the trial Judge and the time the Plaintiff might then require to make arrangements if further security was ordered would also be problematic. I think all that should be avoided.

[47] In the end therefore an appropriate estimate of likely future costs is the sum total of the following:-

1.	Senior counsel	$52,750
2.	Senior junior counsel	$19,200
3.	Solicitors and clerks	$32,300
	Total:	$105,525

which I round to $105,500.

[48] From this base I now proceed to determine what is an adequate amount for the security order. Although I have rejected the Plaintiff's evidence of the value of the two units, clearly the units have some value and the Plaintiff has some equity in those units. It is clear that the debt of $450,000 owed to Mr Rebbeck was secured over the only one unit. However the circumstances of the debt to Mr Rebbeck are not in evidence and there is at least one curious aspect concerning the transaction which questions its integrity.[25] Although it may have been suggested that as Mr Rebbeck could have sought security over both, it could be said that he considered security over one unit to be sufficient, that does not necessarily form a sound base to assess value for this purpose. As I have little in the way of actual evidence to determine what the units could realise, I should be conservative in that assessment and make that assessment on a likely forced sale basis. Taking all that into account I am prepared to deduct $25,000 from the estimated fees for the purposes of fixing the amount of the security order.

[49] Lastly, as to the form of the security to be ordered, the Plaintiff submits that security should be limited to security over the two units the subject of the Plaintiff's claim. The Plaintiff offers no alternative. For the reasons discussed above when I rejected the Plaintiff's assertions as to the value of the subject units, and notwithstanding that I have made some allowance as to what amount they may realise on a forced sale of those units, the two units cannot otherwise adequately secure any potential adverse costs liability of

[25] The loan was apparently made in May 2014 but the security was only given on 22 January 2015.

the Plaintiff. Nothing else being on offer then the form of security should be cash payment into court.

[50] Accordingly there will be orders that the Plaintiff provide security for costs in the sum of $80,500, such security to be in the form of a payment by either cash by bank cheque and for the security to be held in the Litigants Fund until further order. There will also be an order that the proceedings be stayed pending compliance with the order for security for costs.

[51] I will hear the parties as to any other ancillary orders, including the time to be allowed for compliance.