CITATION:	*Rig Air And Diesel Pty Ltd v Allwell (NT) Pty Ltd* [2024] NTSC 107
PARTIES:	RIG AIR AND DIESEL PTY LTD (ACN 651 772 208) v ALLWELL (NT) PTY LTD (ACN 605 851 208)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2023-03009-SC
DELIVERED:	20 December 2024
HEARING DATE:	13 November 2024
JUDGMENT OF:	Luppino AsJ

CATCHWORDS:

Practice and Procedure – Pleadings – Amendment of Pleadings – Leave to amend pleadings is routinely refused if the amended pleading is liable to strike out – On an application for leave to amend, Courts are concerned only with the proper raising of issues, not the merits.

Practice and Procedure – Embarrassing pleadings – When a pleading is embarrassing.

Practice and Procedure – Joinder of parties for the purpose of pursuing the cause of action the subject of the proposed amendment of pleadings – Relevant principles – Joinder is appropriate to ensure that all necessary parties are before the Court so that all issues are litigated in a cost effective

manner and avoiding multiplicity of proceedings – Rules 9.02 and 9.06 are to be given a wide beneficial interpretation.

Costs – Security for costs – Relevant principles – Upon the satisfaction of a qualifying factor in r 62.02(1) an order for security for costs is in the discretion of the Court – Factors relevant to the exercise of the discretion – Order may be refused if there is an unjustified delay in bringing application.

Partnership Act 1997 (NT*) s 5.*
Corporations Act 2001 (NT) s 1335.
Supreme Court Rules 1987 (NT), rr 9.02, 9.06, 23.02(c), 62.02(1)(f).

Aldebaran Contracting Pty Ltd v Tiwi Islands Regional Council [2021] NTSC 89; *Anchung Pty Ltd v Northern Territory of Australia* [2015] NTSC 76; *Barnes v Addy* (1874) LR 9 Ch App 244; *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252; *Bruce v Oldhams Press Ltd* [1936] 1 KB 697; *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497; *Buckley v Bennell Design & Constructions Pty Ltd* (1974) 1 ACLR 301; *Chan v Zacharia* (1984) 154 CLR 178; *Countrywide Austral Pty Limited v Emergency Media Pty Ltd* [2018] VSC 540; *Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch* Unreported, Supreme Court NT, Kearney J, 23 July 1991; *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193; *Environinvest Ltd v Prescott; Environinvest Ltd v Blackburne Pty Ltd* [2011] VSC 325; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Green v CGU Insurance Ltd* (2008) NSWCA 148; *Grimaldi v Chameleon Mining NL & Anor (No 2)* (2012) 287 ALR 22; *HP Mercantile Pty Ltd v Dierickx* [2013] NSWCA 87 ; *Jazabas Pty Ltd & Ors v Haddad & Ors* [2007] NSWCA 291; *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 9; *LKAJ Two Pty Ltd v Squire Patton Boggs (AU) & Anor* [2020] NTSC 45; *MacDonnell Shire Council v Miller & Ors* [2009] NTSC 46; *MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* [2002] FCA 821; *Motor Accidents (Compensation) Commission v Toyota Motor Corporation Australia Ltd & Anor* [2023] NTSC 65; *Oshlack v Richmond River Council* (1998) 193 CLR 72; *PG Gabel Pty Ltd (in liq) v Katherine Enterprises Pty Ltd* (1977) 29 FLR 108; *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62; *Pucciarmati v Walker Nominees Pty Ltd* [2002] NTSC 13; *Ravi Nominees Pty Ltd v Phillips Fox* (1992) 10 ACLC 1313; *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 1 NSWLR 114; *Territory Pastoral Company Pty Ltd & Ors v Elders Ltd* [2009] NTSC 69; *The Commonwealth of*

Australia v Verwayen (1990) 170 CLR 394; *Tradestock Pty Ltd v TNT (Management) Pty Ltd* (1997) 30 FLR 343; *United Dominions Corporation Ltd v Brian Pty Ltd & Ors* (1986) 157 CLR 1.

REPRESENTATION:

Counsel:

Plaintiff:	D Robinson SC
Defendant:	K Sharma

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	Mills Oakley

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Rig Air And Diesel Pty Ltd v Allwell (NT) Pty Ltd [2024] NTSC 107

No. 2023-03009-SC

BETWEEN:

RIG AIR AND DIESEL PTY LTD (ACN 651 772 208)

Plaintiff

v

ALLWELL (NT) PTY LTD (ACN 605 851 208)

Defendant

CORAM: Luppino AsJ

REASONS

(Delivered 20 December 2024)

[1] Two Summonses filed in this proceeding were heard concurrently on 13 November 2024.

[2] The first Summons was filed by the Plaintiff on 22 July 2024. Multiple orders were sought, namely, for the joinder of the directors of the Defendant, for leave to amend the Statement of Claim to plead a case

against those directors, for the quarantining of certain funds and for discovery.

[3] The application for orders quarantining funds was abandoned by the time of the hearing. I will dismiss the relevant paragraphs of the Plaintiff's Summons.

[4] Although argument commenced in respect of the orders for discovery, that also did not proceed. That was because a consent order had been made well before the hearing on that part of the Summons. The Defendant conceded that it had not fully complied with that order and indicated an intention to seek to re-visit the scope of the discovery agreed to and ordered. The Plaintiff sought orders compelling the Defendant's compliance with that order. In my view, as an order had been made in respect of that part of the Summons, the Plaintiff needed to make a separate application seeking orders in the nature of enforcement, essentially an application for contempt for non-compliance with that order.

[5] In the case of the Defendant, in my view if the Defendant wanted to re-visit the scope of the discovery agreed to and ordered, an order apparently agreed to freely and on legal advice, the Defendant ought to have applied well before the hearing for a variation of that order. In the end, I considered that I was *functus officio* in respect of the discovery order in the Plaintiff's Summons and it was left to the parties to make any further and separate

application as they thought fit. I will dismiss the relevant paragraphs of the Plaintiff's Summons.

[6] The Defendant's Summons was filed on 27 September 2024 and sought an order for security for costs and related orders.

[7] Multiple affidavits were filed and relied on. In respect of the Plaintiff's Summons, there were five separate affidavits of the Plaintiff's solicitor, Mr Spain. On that Summons the Defendant relied on the affidavit of two of the Defendant's solicitors, namely Ms Cleveland and Mr Elkins.

[8] On the Defendant's Summons, the Defendant's evidence consisted of two further affidavits of Ms Cleveland and a further affidavit of Mr Elkins. The Plaintiff's evidence consisted of a further affidavit of Mr Spain.

[9] Dealing first with the Plaintiff's Summons. The purpose of the proposed joinder of the Defendant's directors was to enable the Plaintiff to claim personally against those directors for their alleged involvement in a breach of fiduciary duty by the Defendant, an allegation which was the basis for the proposed pleading amendment. The Defendant opposed the joinder and the related order for leave to amend pleadings. That was based firstly, on case management principles, specifically the delay in making the application. In the circumstances of this case, that does not warrant further consideration. Secondly, and more significantly, based on pleadings considerations.

[10] There are some preliminary questions which need to be first dealt with. First, central to the grant of leave to amend and to join the directors is the existence of fiduciary duties between the Plaintiff and the Defendant. Those duties are alleged to arise out of the written agreement entered into by the parties which they described as a joint venture agreement. The Plaintiff's current Statement of Claim, as well as the proposed amended Statement of Claim (ASOC), pleads that the relationship between the parties pursuant to that agreement was that of partners.

[11] A partnership relationship indisputably involves fiduciary duties between the partners. Central to that pleading is the provision in the joint venture agreement that the Plaintiff and the Defendant would equally share the profits of the joint venture. That is an admitted fact on the pleadings. That profit share arrangement, it was submitted, was the hallmark of a partnership relationship, relying on section 5 of the *Partnership Act 1997* (NT). That section describes a partnership as "… *the relation between people carrying on business in common with a view of profit*…".

[12] Although the Defendant denies that the relationship between the parties was a partnership, Mr Sharma, counsel for the Defendant agreed that if the parties were partners, the relationship would be a fiduciary relationship. In the context of leave to amend pleadings it is not necessary for me to determine whether or not a partnership relationship actually existed. That is a question for the trial Judge. It is not necessary for me to determine the merits before I can grant leave to amend. It is sufficient if the case is

reasonably arguable.[1] I have no doubt that is the case and the concession made by the Defendant reinforces that.

[13] In any case, even disregarding the pleading of a partnership relationship, *United Dominions Corporation Ltd v Brian Pty Ltd & Ors*[2] held that a joint venture could create a fiduciary relationship where there is profit sharing. That likewise would render the point reasonably arguable for the purposes of leave to amend.

[14] The second preliminary point arises as the joint venture had concluded before the occurrence of the breach of fiduciary duty alleged by the Plaintiff. *Chan v Zacharia*[3] confirms that fiduciary duties continue until a partnership is wound up and a final accounting occurs. It is admitted on the pleadings that a winding up and accounting is still to occur.

[15] Relevant rules contained in the *Supreme Court Rules 1987* (NT) (SCR) dealing with joinder are rules 9.02 and 9.06. Those rules provide.

> **9.02 Permissive joinder of parties**
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> (1) Two or more persons may be joined as plaintiffs or defendants in a proceeding:
>
> (a) where:
>
> (i) if separate proceedings were brought by or against each of them, a common question of law or fact would arise in all the proceedings; and

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1 *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at p 456.

2 (1986) 157 CLR 1 at p 11.

3 (1984) 154 CLR 178.

(ii) all rights to relief claimed in the proceeding (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions; or

(b) subject to subrule (2), where the Court, before or after the joinder, gives leave to do so.

(2) The Court shall not give leave under subrule (1)(b) unless it is satisfied that the joinder:

(a) will not embarrass or delay the trial of the proceeding;

(b) will not prejudice a party; or

(c) is not otherwise inconvenient.

9.06 Additional, removal, substitution of party

At any stage of a proceeding the Court may order that:

(a) a person who is not a proper or necessary party, whether or not he was one originally, cease to be a party;

(b) any of the following persons be added as a party:

(i) a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated on; or

(ii) a person between whom and a party to the proceeding there may exist a question arising out of, or relating to or connected with, a claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding; or

(c) a person to whom paragraph (b) applies be substituted for one to whom paragraph (a) applies.

[16] The Plaintiff submitted that the principles governing joinder of parties to an existing proceeding are uncontroversial and I agree. Rules 9.02 and 9.06 of the SCR are intended to ensure that all necessary parties are before the Court to enable all issues to be litigated in a cost effective manner and so that multiplicity of proceedings is avoided (see *Territory Pastoral Company*

Pty Ltd v Elders Ltd[4] and *Countrywide Austral Pty Limited v Emergency Media Pty Ltd*[5]). *Territory Pastoral Company Pty Ltd v Elders Ltd* is also authority for the proposition that those rules are to be given a wide beneficial interpretation.

[17] The Defendant's opposition to the Plaintiff's applications on account of pleadings issues was on the basis that the pleading in the ASOC of the cause of action which supports the joinder did not plead all material facts necessary to support that cause of action. The Defendant argued therefore that the proposed amendments would be liable to strike out. In turn, without leave to make those amendments, joinder of the Defendant's directors was neither required nor appropriate on the basis that joinder should not be permitted in conjunction with a pleading which is liable to strike out.

[18] That objection relies on what is commonly referred to as the futility principle. In short, that principle is that an amendment which is liable to strike out will not be permitted. Specifically, the test is whether the amendments are so obviously bad in law that it would be futile to allow them.[6]

[19] The particulars of the Defendant's argument was that the facts pleaded in the ASOC did not plead material facts to satisfy the requirements for third

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4 [2009] NTSC 69 at para 16.

5 [2018] VSC 540 at para 31.

6 *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394; *MacDonnell Shire Council v Miller & Ors* [2009] NTSC 46; *Motor Accidents (Compensation) Commission v Toyota Motor Corporation Australia Ltd & Anor* [2023] NTSC 65.

party liability for knowing involvement in a breach of fiduciary duty. The Defendant read the ASOC as also proposing a cause of action based on that. The Defendant submitted that knowledge by the third party of dishonesty by the fiduciary is an element of that cause of action requiring the pleading of material facts to that effect. The Defendant submitted that the proposed pleading was deficient on that account as it only alleged that the Defendant owed fiduciary duties and did not plead material facts going to dishonesty, or knowledge of that dishonesty, on the part of the director third parties.

[20] Two possible avenues of third party liability for involvement in a breach of fiduciary duty have been identified in argument in the current case. The first is that based on the second limb of *Barnes v Addy*[7] (*Barnes*), the principle having been most recently considered by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[8] (*Farah*). Liability for participating in a breach of trust deriving from the second limb in *Barnes* is commonly referred to as knowing assistance in a breach of trust or fiduciary duty. In *Farah*, in relation to that cause of action the High Court said:

> As conventionally understood in Australia, the second limb makes a defendant liable if that defendant assists a trustee or fiduciary with knowledge of a dishonest and fraudulent design on the part of the trustee or fiduciary.[9]

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7 (1874) LR 9 Ch App 244.

8 (2007) 230 CLR 89.

9 (2007) 230 CLR 89 at para 160.

[21] In the same case, the High Court, noting with apparent approval the distinction recognised in *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd*,[10] said:

> …there is a distinction between rendering liable a defendant participating with knowledge in a dishonest and fraudulent design, and rendering liable a defendant who dishonestly procures or assists in a breach of trust or fiduciary obligation where the trustee or fiduciary need not have engaged in a dishonest or fraudulent design.[11]

[22] The second avenue is liability for knowingly procuring or inducing a breach of fiduciary duty. The latter has been most recently discussed firstly, by the Full Court of the Federal Court of Australia in *Grimaldi v Chameleon Mining NL & Anor (No 2)*[12] (*Grimaldi*) and secondly, by the New South Wales Court of Appeal in *Pittmore Pty Ltd v Chan*[13] (*Pittmore*). There are two elements of that cause of action, firstly, intentional conduct causing, and intended to cause, the breach of trust or fiduciary duty. Secondly, knowledge by the third party that they were bringing about that breach.[14]

[23] Unlike actions based on the second limb of *Barnes*, dishonesty is not an element of the cause of action of knowingly procuring or inducing a breach of fiduciary duty (see *Pittmore*[15] *and Grimaldi*[16]).

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10 (1987) 78 ALR 193.

11 (2007) 230 CLR 89 at para 163.

12 (2012) 287 ALR 22.

13 (2020) 104 NSWLR 62.

14 *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62 at paras 152 and 186.

15 (2020) 104 NSWLR 62 at para 152.

16 (2012) 287 ALR 22 at para 245.

[24] Relying on *Farah*, the Defendant submitted that the directors could only be liable under the second limb of *Barnes* if they acted with knowledge of a dishonest and fraudulent design by the Defendant. I agree. Then, the Defendant's argument proceeded, as the ASOC does not plead a dishonest or fraudulent design by the Defendant, or knowledge of that by the directors, the pleading was deficient to support that cause of action. With that I also agree. As part of that argument, the Defendant submitted that the proposed pleading of knowledge by the directors of the matters in paragraphs 1-30 of the ASOC did not cure that deficiency as those paragraphs did not allege knowledge of a dishonest or fraudulent design by the Defendant.

[25] The Plaintiff submitted that the allegation of breach of fiduciary duty was grounded in paragraph 28 of the ASOC where the Plaintiff pleads that at the end of the joint venture, the Defendant appropriated the business previously conducted by the joint venture and continued to operate the business for its own benefit. Further, that the Defendant used the stock and the plant and equipment purchased by the joint venture in the conduct of that business. That was denied in the Defence but by letter of 6 August 2024 the Defendant admitted that it had used some stock after the termination of the joint venture.

[26] The Plaintiff argued that the liability of the directors as alleged in paragraph 41 of the ASOC namely, that the directors procured, assisted, benefited from and participated in the breach of fiduciary duty was predicated upon the directors' involvement as the sole directors of the Defendant and actively

involved in the running of the Defendant's business. It was argued that they were therefore aware of the background matters referred to in paragraphs 1-30 of the ASOC and that they approved or permitted the Defendant to engage in the conduct referred to in paragraph 40(b) of the ASOC namely, appropriating the assets of the joint venture.

[27] An analysis of the ASOC is required to deal with the submissions. The requisite background matters are pleaded in paragraphs 1-30 of the ASOC. Particularly relevant is the pleading in paragraph 11 that the Defendant owed the Plaintiff the identified fiduciary duties. Secondly, the pleading in paragraph 36 that the Defendant breached those duties. Then follows, in paragraphs 40-41, the substantive allegations proposed against the directors, which I will set out in full namely:

> 40. By reason of the matters referred to in subparagraph 3(b) above, at all times the Directors:
>
> (a) knew of each of the matters referred to in paragraphs 1 to 30 above; and
>
> (b) approved, authorised, permitted and/or allowed [*the Defendant*] to engage in the conduct referred to in paragraph 28 above after the joint venture ended.
>
> 41. By reason of the matters referred to in the preceding paragraph, the Directors procured and assisted [*the Defendant*] and benefited from, participated in and were knowingly involved in the breach by [*the Defendant*] of the fiduciary duties referred to in paragraph 36 above.

[28] Paragraph 41 of the ASOC could be read as combining the cause of action based on the second limb in *Barnes* as well as the cause of action of knowingly procuring or inducing a breach of fiduciary duty. The terms

'*participated*' and '*assisted*' are associated with the second limb of *Barnes*, albeit that I note the reference in paragraph 41 of the ASOC to "*procured and assisted*" repeats what the High Court said in *Farah* when referring to the cause of action of knowingly procuring or inducing a breach of fiduciary duty.

[29] In the course of argument Mr Robinson, senior counsel for the Plaintiff, said that the proposed pleading was intended to rely only on the cause of action of knowingly procuring or inducing a breach of fiduciary duty.[17] In that event, the pleading of a dishonest or fraudulent design by the Defendant will not be required.[18] The confusion concerning that means that the Defendant was right to address both causes of action. It appears that a tidy up of the pleadings will be required in any case if the leave sought by the Plaintiff is given, something which Mr Robinson at least accepted as being possibly required.[19]

[30] What that means though is that paragraph 41 of the ASOC, in conjunction with paragraph 40, could be embarrassing as it could be said that those paragraphs blend the material facts relative to two different causes of action. An embarrassing pleading offends against rule 23.02(c) of the SCR. Broadly, a pleading is embarrassing if it does not state the allegations sufficiently clearly such that the opposing party is rightly in doubt as to

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17 Transcript pp 16, 18, 21 and 22.

18 See para 23 above.

19 Transcript p 52.

what is alleged.[20] Many defects can render a pleading embarrassing but specific instances which have application in the current case are pleadings which are ambiguous,[21] pleadings which are confusing[22] and pleadings which do not plead all necessary material facts.[23] If the proposed pleading is embarrassing it would be liable to strike out such that the futility principle would be a bar to leave to amend on that account also.

[31] The most significant of the Defendant's submissions in respect of the cause of action of knowingly procuring or inducing a breach of fiduciary duty, is that the ASOC does not plead that the director third parties knew that the conduct alleged against them caused a breach of fiduciary duty and that they intended that and, that they knew they were bringing about that breach.

[32] Mr Robinson said that the Plaintiff relied on establishing the level of knowledge described in *Pittmore* as a want of probity based on the knowledge of all relevant circumstances.[24] In the case of a third party procuring or inducing a breach of fiduciary duty, it is sufficient knowledge if the third party knew of facts which could indicate a breach of fiduciary duty to a reasonable person.[25] Further, as dishonesty is not an element of that cause of action, it cannot be necessary to plead dishonesty. With that I

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20 *LKAJ Two Pty Ltd v Squire Patton Boggs (AU) & Anor* [2020] NTSC 45; *Aldebaran Contracting Pty Ltd v Tiwi Islands Regional Council* [2021] NTSC 89.

21 *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252.

22 *Environinvest Ltd v Prescott; Environinvest Ltd v Blackburne Pty Ltd* [2011] VSC 325.

23 *Bruce v Oldhams Press Ltd* [1936] 1 KB 697.

24 *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62 at para 190.

25 *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62 at para 192.

agree. Much of what Mr Robinson said satisfies me that inferences will be relied on to establish the Plaintiff's case. I accept that and I accept that proof of knowledge does not require more than proof of facts which a reasonable person would view as amounting to a breach of fiduciary duty. However, that does not abrogate the requirement for the proper pleading of material facts related to that knowledge.

[33] In my view, as it currently stands paragraphs 40 and 41 of the ASOC are liable to strike out, at least as lacking the pleading of all necessary material facts, but also possibly as embarrassing pleadings. Leave to amend based on the current form of the ASOC therefore should be denied.

[34] Having said that, I am satisfied that a proper pleading addressing the defects identified in the preceding paragraphs is easily achievable. With a view to avoiding the costs and time likely wasted if there were to be a further application, as a proper basis for that pleading has been demonstrated, I would be prepared to grant leave to join the directors and to amend the current pleading if those defects were to be rectified. To enable that to occur, rather than making a final order regarding the Plaintiff's applications, I will adjourn that part of the Plaintiff's Summons *sine die* with directions for dealing with the required further amendments.

[35] Dealing now with the Defendant's Summons seeking security for costs. The order is sought pursuant to rule 62.02(1) of the SCR, relying on the qualifying factor in rule 62.02(1)(f), and section 1335 of the *Corporations*

Act 2001 (Cth) (the Act). As rule 62.02(1)(f) relates back to section 1335 of the Act, effectively the qualifying requirement in section 1335 of the Act applies. That requirement is that there is reason to believe, based on credible evidence, that the Plaintiff will be unable to pay the costs of the Defendant if the Defendant is successful in its defence.

[36] Rule 62 of the SCR provides as follows:-

> **Order 62 Security for costs**
>
> **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.

[37] Section 1335 of the 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.

[38] Security is sought in the amount of $444,500, which is said to represent 70% of the Defendant's estimated total costs of the proceedings, including in respect of additional costs consequent upon any permitted joinder and or amendment of the pleadings in terms of the Plaintiff's current application. The amount of security is based on an assessment made by Ms Cleveland as outlined in her affidavit made 27 September 2024.

[39] Determination of whether security for costs should be ordered is a two-step process. Firstly, the Defendant must show that one of the qualifying requirements set out in Rule 62.02(1) are satisfied. The second step is the favourable exercise of the Court's discretion and that involves a balancing of the competing interests of the parties.[26]

[40] That discretion is unfettered and is to be exercised having regard to all the circumstances of the case. There are however well established guidelines from previous cases which Courts typically have regard to in determining security for costs applications. A number of guidelines were identified in *Jazabas Pty Ltd & Ors v Haddad & Ors*[27] (*"Jazabas"*). The relevant factors in the current application, as identified by the parties in argument are, the

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[26] *Tradestock Pty Ltd v TNT (Management) Pty Ltd* (1997) 30 FLR 343.

[27] [2007] NSWCA 291.

strength of the Plaintiff's case, the failure of the Plaintiff to put on evidence of the financial position of the Plaintiff and its backers, the delay in bringing the application and whether it would be unfair or oppressive to make the order as it would stultify the proceedings.

[41] I deal first with the question of whether the discretion has been enlivened. The threshold set in Rule 62.02(1) is widely recognised in the authorities as being undemanding. It merely requires the applicant to show that there is a rational basis sufficient to establish a *prima facie* case.[28]

[42] A brief summary of the evidence on the application now follows. Notably, there is no evidence from the Plaintiff of its asset position, nor of the asset position of its backers despite that it is 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.[29]

[43] In contrast, the affidavit of Ms Cleveland confirms that enquiries and searches made reveal that the Plaintiff has little by way of assets, leaving aside for the present whatever recovery it may achieve in the proceedings.

[44] The Plaintiff relies on its potential recovery in the proceedings to oppose the application. Although not an asset which can be readily crystallised, I agree that it can be taken into account in the particular circumstances of this case.

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28 *HP Mercantile Pty Ltd v Dierickx* [2013] NSWCA 87; *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 9; *Pucciarmati v Walker Nominees Pty Ltd* [2002] NTSC 13; *Anchung Pty Ltd v Northern Territory of Australia* [2015] NTSC 76.

29 *Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch* Unreported, Supreme Court NT, Kearney J, 23 July 1991.

The Plaintiff says that its case in respect of some of its claims is strong. That submission is based on recent admissions made by the Defendant which were previously the subject of denials in its Defence.

[45] Firstly, the Defendant has recently admitted that the Plaintiff is entitled to a 50% share of the profits but says that its accountants have calculated that entitlement at $242,000. Despite requests, the Defendant has to date failed to provide any specifics of that calculation, or the source documents on which the calculation is based. The Plaintiff claims that its share of profits is of the order of $326,000. The calculations made by the Plaintiff, although currently unverified, at least have a plausible basis. In part, the Plaintiff's calculations factor in the Plaintiff's claimed entitlement of 50% of the amount, notionally representing profits of the joint venture, held as quarantined funds in a term deposit account, the current balance being of the order of $670,000. That is still the subject of dispute by the Defendant but the point the Plaintiff makes is that even though the Defendant's calculations may be conservative, on the Defendant's own figures, a recovery of at least $242,000 appears inevitable and with that the Plaintiff would likely secure at least a partial costs order.

[46] Secondly, the Defendant had, until recently, denied the allegation that the Defendant had appropriated the stock in trade of the joint venture for its own benefit. The Defendant now admits to having used some of the stock in trade in its business. That allegation is the basis for the claim for breach of fiduciary duty in respect of the Defendant, and for knowingly procuring that

breach in respect of the Defendant's directors. The value of that stock in trade remains contentious. The Plaintiff alleges a value which would set its share at approximately $192,440 based on cost plus 45%. That, according to the Plaintiff, was the mark-up applied during the term of the joint venture. That method of calculation is also contentious. The Defendant has declined to put a figure on the value of that stock, claiming an inability to do so pending investigations and a proper accounting. Again, it would at least appear that a significant amount is involved.

[47] In addition the Plaintiff claims an entitlement to 50% of the value of the equipment of the joint venture at the end date. The Plaintiff accepts, for current purposes at least, the Defendant’s valuation of the equipment which puts that entitlement at approximately $23,000.

[48] The claim for breach of fiduciary duty for actions by the Defendant occurring after the end of the joint venture is disputed. The Plaintiff maintains that it has an alternative claim for an account of profits earned by the Defendant after the conclusion of the joint venture resulting from the use of that stock but acknowledges that a full accounting exercise is required to determine the amount of that entitlement. As a guide the Plaintiff points out that for the period during which the Defendant traded at the end of the period of the joint venture, it made a profit of over $1 million. Although the Plaintiff stops short of claiming 50% of that amount for the present, relevantly the Plaintiff points out that *prima facie*, it nonetheless has a substantial entitlement.

[49] Much is speculative concerning the potential recovery of the Plaintiff in the proceedings albeit that I agree that, on a *prima facie* basis at least, some parts of the Plaintiff's case appear strong. Failing the Plaintiff putting on details of its asset position and that of its backers, I approach consideration of whether the qualifying factor is made out from the point of view that the only basis for the Plaintiff being able to pay the Defendant's costs turns on the success of the Plaintiff's claim. As that is speculative at present, therefore on a *prima facie* basis, I am satisfied that the Defendant has established the qualifying requirement in section 1335 of the Act.

[50] Next I consider the exercise of the residual discretion. Of the factors which the Plaintiff has identified as relevant for this purpose, I do not consider that I need to go beyond the factor of delay in making the application, in association with the Defendant's justification for the delay. The order for security for costs is claimed to be justified by reason of the potential expanded scope of the proceedings following the Plaintiff's proposed joinder and amendment. Ms Cleveland, in her affidavit, deposes that costs will be higher than were previously anticipated as a result.[30] That clearly can only relate to future costs. At the very least, the Defendant therefore has no justification for the delay in respect of past costs.

[51] The Defendant's application is made some 12 months after the issue of proceedings and that clearly is a significant delay.

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30 Affidavit of Sophia Hopkins Cleveland made 27 September 2024 at paras 14-16.

[52] Delay is an important consideration in applications for security for costs.[31] Numerous authorities recognise that it would be unjust to allow the Plaintiff to work on its case and then ask for security after significant costs have been incurred.[32] The application should be dealt with promptly because the Plaintiff is entitled to know its position in relation to security before it commits substantial sums of money towards litigating its claim.[33] The Plaintiff otherwise incurs costs that an early application would have avoided and which costs may ultimately be wasted if the order for security has the effect of ending the proceedings.[34]

[53] In *Anchung Pty Ltd v Northern Territory of Australia*,[35] consistent with numerous other authorities, I said that although delay in bringing an application for security for costs does not operate as an automatic bar to an order, delay can be taken into account as a factor relevant to the exercise of the Court's discretion[36] and also that the explanation for the delay is a relevant matter.[37]

[54] There is limited evidence as to how much of the future costs as assessed by Ms Cleveland may be attributable to that expanded scope of proceedings. I

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31 *Green v CGU Insurance Ltd* (2008) NSWCA 148; *Oshlack v Richmond River Council* (1998) 193 CLR 72; *MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* [2002] FCA 821.

32 *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497; *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 1 NSWLR 114.

33 *Buckley v Bennell Design & Constructions Pty Ltd* (1974) 1 ACLR 301 at 309.

34 *Ravi Nominees Pty Ltd v Phillips Fox* (1992) 10 ACLC 1313.

35 [2015] NTSC 76.

36 [2015] NTSC 76 at paras 25-29.

37 See also *PG Gabel Pty Ltd (in liq) v Katherine Enterprises Pty Ltd* (1977) 29 FLR 108.

think that is very relevant given the basis upon which the application for security for costs is made.

[55] Other than in respect of costs related to the proposed ASOC and the required necessary Amended Defence, in total estimated to be in the sum of $20,000, I am unable to demarcate the costs attributable to the expanded scope of proceedings on the Defendant's evidence. In my view, however, the estimated amounts for additional costs of $20,000 based on the amended pleadings is excessive. The Defendant has had to critically examine the ASOC for the current application and that sets off part of those costs. Moreover, the amendments are not extensive.

[56] The allegation of breach of fiduciary duty by the directors involves largely the same considerations as for the breach alleged against the Defendant in the initial Statement of Claim. I do not accept that the joinder and the amendment will result in a substantial amount of additional costs. That will only involve additional costs in respect of the case concerning the knowledge of the directors of the Defendant's breach and the procurement or inducement of the breach by the Defendant's directors. That part of the case is largely based on the active role of the two directors as the only directors of the Defendant in the conduct of the business of the Defendant.

[57] On the available evidence, in my view the additional future costs on account of the joinder and amendments, compared to the costs which would otherwise be incurred based on the existing pleadings, will be comparatively

small and, alone at least, does not justify the Defendant's delay in seeking order for security for costs.

[58] The late application is not argued to be justified on any other basis. Although I accept that delay is not an automatic bar and is only one of the factors relevant to the exercise of the discretion, a delay of over a year following the commencement of proceedings is unacceptable having regard to the claimed justification. The delay can operate unfairly against the Plaintiff and I consider that to be a major factor in the exercise of the discretion.

[59] I therefore refuse the Defendant's application for security for costs. Paragraphs 1-3 of the Defendant's Summons are dismissed.

[60] Re-visiting the application for leave to join and to amend, given that only relatively simple further amendments to the ASOC are required, I expect that the parties will be able to agree the further amendments to paragraphs 40 and 41 of the ASOC to address the defects I have identified. To facilitate that, I will adjourn further consideration of paragraphs 1-4 of the Plaintiff's Summons *sine die*. If, despite my expectation, the parties are unable to agree the amendments within 28 days, the Plaintiff is to file and serve, within a further seven days, an affidavit annexing a proposed further version of the Amended Statement of Claim which it considers addresses the defects to which I have referred. I give the Plaintiff leave, on seven days' notice, to relist the matter for further mention if required.

[61] Paragraphs 5-7 of the Plaintiff's Summons are dismissed.

[62] I reserve the question of costs on both Summonses and I also give liberty to apply, again on seven days' notice, for that purpose as well as for any other ancillary order.
