

CITATION: *Fong v Fong & Ors* [2026] NTSC 58

PARTIES: FONG, William Desmond

v

FONG, William Jai Sheng

and

MA, Di

and

PAN, Han

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 2024-02040-SC

DELIVERED: 27 July 2026

HEARING DATE: 11 February 2026

JUDGMENT OF: Smyth A/AsJ

CATCHWORDS:

CIVIL PROCEDURE – Security for costs – Application for joinder of corporate plaintiff – Overlapping claims between corporate and individual plaintiffs – Substantial overlap in factual and legal issues – Core liability issues common – Additional issues confined to causation and quantum – Whether joinder materially increases defendants’ costs exposure – Settlement deed affecting only individual plaintiff – Foreshadowed preliminary issue – Contingent possibility of early disposition – Whether potential early resolution reduces exposure – Relevance of sequencing of

proceeding – Whether security would operate oppressively – Whether defendants exposed to materially greater risk of unrecoverable costs – Application of discretionary principles – Security refused

Corporations Act 2001 (Cth), s 1335

Supreme Court Rules 1987 (NT), rr 9.06, 47.04, 62.02(f)

Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41; *McLean v Discount & Finance Ltd* (1939) 64 CLR 312; *HIH Casualty & General Insurance Ltd v Territory Insurance Office* [1998] 120 NTR 24; *AMP Bank Limited v Brown & Anor* [2017] NSWSC 313; *Sparks NT Pty Ltd v Angkerle Aboriginal Corporation* [2025] NTSC 24; *Rig Air And Diesel Pty Ltd v Allwell (NT) Pty Ltd* [2024] NTSC 107; *Jazabas Pty Ltd & Ors v Haddad & Ors* [2007] NSWCA 291; *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* [1995] FCA 76; (1995) 56 FCR 189; *SX Projects Pty Ltd (in liquidation) and Anor v Battaglia and Ors* [2016] NSWSC 1385; *Funds First Pty Ltd v Owners Corporation Strata Plan 66609 (No 2)* [2008] NSWSC 428; *Vlietstra v Ranger & Anor* [2005] NTSC 6; *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 1317; *Darwin Joinery and Furniture Manufacturing Pty Ltd (in liquidation) v Finch* (Supreme Court of the Northern Territory, Kearny J, 23 July 1991); *Mac-Attack Equipment Hire Pty Ltd v AJ Lucas Operations Pty Ltd* [2010] NTSC 27, referred to.

G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 5th Ed, 2021)

REPRESENTATION:

Counsel:

Plaintiff:	Dr C Ford SC
Defendants:	R Sanders

Solicitors:

Plaintiff:	Piper Grimster Jones Lawyers
Defendants:	Cleland Lawyers

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

Fong v Fong & Ors [2026] NTSC 58
No. 2024-02040-SC

BETWEEN:

WILLIAM DESMOND FONG
Plaintiff

AND:

WILLIAM JAI SHENG FONG
First Defendant

DI MA
Second Defendant

HAN PAN
Third Defendant

CORAM: SMYTH A/AsJ

REASONS FOR DECISION

(Delivered 27 July 2026)

- [1] This is an application by the Plaintiff on summons, filed 24 September 2025, to join two further plaintiffs, Red Tower (NT) Pty Ltd ('Red Tower') and Victor Lai ('Victor'), to the proceeding and for leave to file and serve a further amended statement of claim as was annexed to the summons. The Defendants made an application on summons, filed 19 December 2025, for security for costs in an amount to be fixed as a condition of leave being granted to Red Tower being joined to these proceedings as a co-plaintiff.

- [2] The following affidavits were relied on for the purpose of the parties' applications and are taken as read: William Desmond Fong made 6 June 2024, 12 July 2024 and 13 September 2024; Cameron Jones made 3 March 2025, 19 November 2025 and 23 January 2026; William Jai-Sheng Fong made 9 September 2025 and 2 February 2026; and Thomas Walker made 24 September 2025 and 19 December 2025.¹

Background to the Proceeding

- [3] The proceeding has undergone a material transformation across successive pleadings. The proceeding was originally commenced by originating motion but ordered, on 12 July 2024, to have been commenced by writ. The current Plaintiff ('Desmond') is the father of the First Defendant ('William') and father-in-law of Second Defendant ('Di Ma'). The Third Defendant ('Han Pan') is the mother-in-law of William and mother of Di Ma.
- [4] Very generally, the foundation of the claim relates to an alleged arrangement between Desmond and William/Di Ma in early 2023, whereby the latter were given a number of Chinese coins belonging to Desmond so that they may get valued and possibly sold if the valuations were acceptable. It is alleged that the proceeds of the sale of the coins were for the purpose of funding a loan repayment from Red Tower to Limba Business Lending Pty

¹ Subject to objections made to the affidavits of Cameron Jones made 19 November 2025 at [5(c)] and [8]. Such objections were made on the basis of an 'assertion of a conclusion of law not admitted by the defendants' and of an 'inadmissible opinion as to the value of land'. The objection was upheld but certain paragraphs were admitted on the proviso that the statements were given on the basis of what Mr Jones was told by Desmond, and were not taken as the truth of facts, but in respect to [5(c)], the allegation is simply that William was a co-guarantor to Limba for the loan, and [8], that the value of Red Tower's land is an estimate by Desmond and not a value established by independent evidence.

Ltd ('Limba'), and that William and Di Ma knew that. Red Tower is a company whose principal asset was a parcel of land at Hingston Beach in the Northern Territory.

[5] It appears that there was hope, at various stages, that the land would be subdivided and be worth substantially more than its original purchase price.² Red Tower's affairs were closely connected with members of the Fong family: Desmond was, at times, a director and shareholder.³ William and Victor were directors of Red Tower, including at time of the Limba loan.⁴ It is alleged that in 2022, Red Tower had borrowed money from Limba and had provided security over the real property owned by Red Tower. It is alleged that in 2024, William and Di Ma were told by Desmond that the proceeds of the coin sales were required to repay a \$200,000 loan to Limba. Failing repayment, it was said that the mortgagee would commence possession proceedings in respect to Red Tower's land.

[6] It is alleged that certain number of the coins were sold but that Desmond did not receive the proceed of the sales, nor the return of any unsold coins. It is also alleged that some or all of the proceeds from the coin sales were used by William and Di Ma to facilitate the purchase, in Di Ma's name, a property in the Australian Capital Territory. Further, it is alleged that some

² In evidence, there were various assertions as to the potential value of the land if subdivided. Although applications for subdivision were made, none were approved.

³ Although, it would appear Desmond was not a director or shareholder between September 2019 and August 2024.

⁴ Desmond ceased as a director on 2 September 2019 and was replaced by William. Desmond was reappointed a director on 2 August 2024. Victor was a director from 19 November 2021.

or all of the proceeds from the coin sales were given to Han Pan by William and Di Ma for the purpose of paying her tax liabilities in China, or additionally given to her.

- [7] The statement of claim, filed 12 July 2024, advanced a personal claim by Desmond. The proceedings sought largely equitable relief by way of accounting, tracing and declarations of trust, equitable interests in real property and damages arising from diminution in the value of Desmond's interest in Red Tower. The statement of claim relates to events which are alleged to have occurred in 2022 (with the loan to Red Tower from Limba secured by mortgage over Red Tower's land), in 2023 (the giving and sale of coins) and in 2024 (proceed of coin sales needed to pay back the Limba loan and purchase of property by Di Ma with alleged proceeds of the coin sales).
- [8] Leave was granted on 4 April 2025 for the Plaintiff to amend his statement of claim. The amendment followed a purported settlement of the proceeding between the parties, evinced by settlement deed dated 20 September 2024. The amended statement of claim left the original claim intact but also introduced allegations of the breach and termination of the settlement deed, thereby adding a contractual dimension to the dispute.
- [9] Both a defence to the amended statement of claim and a counterclaim were filed on 24 April 2025. The defence, very generally, pleads that the Plaintiff gave the coins to William and Di Ma as a gift, in part as gratitude for their support throughout recent years and to make up for not giving them

a wedding gift in 2016. The defence also pleads a defence under the deed of settlement by the application of a general release and covenant against further claims. Those matters are pleaded as a complete defence. The counterclaim, amongst other things, pleads various breaches of the deed by Desmond (with related remedies). This included an indemnity said to have been granted by Desmond to William in respect to his liability arising from being a co-guarantor to the Limba loan. A defence to the counterclaim was filed on 8 May 2025, pleading that the settlement deed ceased to have effect upon termination⁵ and otherwise denying the counterclaim.

- [10] Adding further complication to this matter is a further amended summons filed by the Defendants on 9 September 2025. This summons was adjourned pending the outcome of the applications. The adjourned summons sought, in part, orders for a separate trial pursuant to r 47.04 of the *Supreme Court Rules 1987* (NT) ('the Rules'). The separate trial sought was to be within the proceeding and in respect to the proper construction of the deed of settlement, which may have the prospect of resolving the entire proceeding or substantially in part.

The Plaintiff's proposed pleaded case

- [11] The proposed further amended statement of claim ('PFASOC'), being the subject of this application, is annexure 'A' to the Plaintiff's summons filed 24 September 2025.

⁵ Or in the alternative, it would be inequitable to allow the Defendants to rely on it by reason of their breaches as pleaded and they should therefore be estopped.

- [12] The PFASOC effects a more fundamental change than the previous amendment: Red Tower and Victor are sought to be joined as plaintiffs; the arrangement concerning the coins is formalised as a “coin agreement” or common purpose giving rise to express trust and fiduciary obligations; and the case is expanded to include claims for substantial corporate loss, knowing receipt, and equitable contribution between co-guarantors. The scope of the litigation is thereby significantly broadened, both factually and legally.
- [13] The PFASOC pleads the loan between Red Tower and Limba with more particulars: in February 2022, Red Tower entered into a substantial loan agreement with Limba. The loan was secured by a mortgage over the Hingston Beach land and supported by personal guarantees, limited to \$1,000,000, from both Victor and William.⁶ By early 2023, Red Tower was unable to meet its obligations under that loan. Against that background, the Plaintiff(s) say that a critical arrangement was made involving Desmond’s extensive personal collection of approximately 4,000 rare and mint Chinese coins.
- [14] According to the proposed pleading, Desmond delivered possession of the coin collection to William and Di Ma. This was done on the basis of an agreement, or at least a shared common purpose, that the coins would be valued and, if appropriate, sold (primarily in overseas markets such as Hong

6 Who were directors of Red Tower at that time.

Kong and mainland China). The proceeds of sale were to be applied to reduce or discharge Red Tower's debt to Limba, with any unsold coins to be returned to Desmond.

[15] From that arrangement, the Plaintiff(s) allege that a trust arose:⁷ William and Di Ma held the coins, and any proceeds of sale, on trust for Red Tower and/or Desmond, were for defined purposes. Namely, to apply sale proceeds to the Red Tower's debt and to return any remaining coins to Desmond. As a result of the trust, the Defendants are said to have owed fiduciary duties, to Red Tower, Desmond and Victor, to act in good faith, obtain the best available price, apply proceeds only for the agreed purpose, and promptly account for what they received.

[16] The Plaintiff(s) case is that those duties were seriously breached. They allege that William and Di Ma did sell some of the coins, but instead of applying the proceeds to the Limba debt, they retained control of the money and diverted significant amounts of it for other purposes. In particular, it is alleged that they used substantial funds to pay liabilities of the third defendant, Han Pan, and to confer other financial benefits upon her. Most significantly, it is alleged that they used over \$1.2 million from the proceeds to acquire a residential property in the Australian Capital Territory in Di Ma's name.

⁷ Although not a matter for determination, the arrangement might more properly be described as a bailment giving rise to fiduciary duties.

- [17] At the same time, the Plaintiff(s) allege that the Defendants failed to account for the proceeds of sale and did not return all of the unsold coins. The whereabouts and value of many coins remain unknown.
- [18] The consequences of this alleged conduct are central to the claim. Because the proceeds were not applied to the Limba loan, Red Tower remained in default and Limba exercised its mortgage rights, taking possession of the Hingston Beach land and selling it at a figure significantly below its alleged development value, leaving a substantial shortfall and continuing debt.
- [19] In respect to Red Tower, its claim is that it was deprived of the benefit of the coin sale proceeds which should have been applied to its loan. As a result, it lost its principal asset (being the Hingston Beach land) and remains burdened with a large residual debt. It claims that the Defendants' breaches of trust and fiduciary duties caused that loss, and it seeks compensation together with an interest in the Australian Capital Territory property said to have been acquired with misapplied funds.
- [20] The Defendants do not oppose the joinder of Red Tower per se but submit that any joinder should be on condition that Red Tower be ordered to pay security for costs or alternatively, if joined, that part of the proceeding by Red Tower be stayed unless security for costs is paid. Similarly, the amendments in respect to the claim relating to Desmond were not actively opposed.

[21] In respect to Victor, his proposed role in the proceeding arises as a person who was arguably beneficially interested in the proper application of the proceeds of the sale of the coins, or as a co-guarantor of the Limba loan.

[22] The Defendants opposed the joinder of Victor on the basis that no cause of action arises, and therefore the amendment should not be allowed in circumstances where the amendment would be liable to be struck out.

Joinder of Victor

[23] The Plaintiff seeks to join Victor on two main bases.⁸

[24] First, it is said that as a result of the trust which arose, following the acceptance of the coins by William and Di Ma, that William and Di Ma owed Victor (as well as Red Tower and Desmond) certain fiduciary duties which were breached.⁹ The Defendants oppose that on the basis that Victor's claim is not based on being a beneficiary, but upon an assertion that William and Di Ma owed fiduciary duties to him on some other basis which was not articulated and is untenable.

[25] That basis of the claim by Victor is not without some difficulty. Foremost, Victor is not said to be a beneficiary of the trust;¹⁰ simply that, as a result of the trust, he was owed a fiduciary duty by the Defendants not to use the

⁸ A third basis as beneficiary of a constructive trust over the Australian Capital Territory property is plead in the PFASOC at [20].

⁹ In the PFASOC, a trust is alleged at [14], fiduciary duties to Victor are alleged at [15], breaches of those duties at [16] and causation at [17].

¹⁰ See: PFASOC at [14]. I say beneficiary as [14] does not refer to a beneficiary; it simply states that William and Di Ma held the coins and their proceeds on trust for Red Tower and Desmond.

coins or their proceeds other than for the purpose,¹¹ and he suffered loss by their breach. The pleading alleges that the Defendants received and held property subject to a fiduciary obligation to apply it in a particular way for the benefit of identifiable persons whose financial interests were directly engaged by that application, including the company and those exposed to the underlying debt.¹² The Defendants argued that Victor's position did not differ from others which may be seen to benefit from the application of the funds to the debt (such as Red Tower's financiers, trade creditors or shareholders), and therefore would create an impermissibly allowed large class to whom duties may be owed. That is certainly arguable. However, it is equally arguable that such persons would derive only an indirect or consequential advantage from the application of the funds to the debt. Victor's specific interest could be said to arise from his position within the transaction itself as co-guarantor whose liability would be reduced by proper performance of the obligation. His entitlement to relief is indirect and depends on whether those fiduciary obligations can properly be said to extend to him, notwithstanding he is not stated to be a beneficiary of the trust itself.¹³ The Plaintiff may or may not ultimately succeed at trial on this point. However, it is sufficient to conclude that the pleading discloses an

11 As expressed in the PFASOC at [14(a)], being to pay Limba to discharge Red Tower's debt.

12 Although not expressed as clearly as that, it is pleaded that as a result of the breaches, Red Tower lost the value in the land, and Victor and William were exposed to enforcement of their guarantees under the Limba loan.

13 See, for example, discussion of the scope of fiduciary duties in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

arguable basis upon which fiduciary obligations, and corresponding equitable relief, may be said to extend to Victor.

[26] Second, subject to further discussion below, it is said that Victor has a claim for contribution as a co-guarantor against William. The right to contribution arises in equity and is founded upon the principle that equality is equity. At common law, contribution requires actual payment in excess of a proportionate share. However, equity recognises that relief may be available where liability is sufficiently imminent. In *McLean v Discount & Finance Ltd*, the High Court recognised that a judgment against a surety may justify relief prior to payment where the loss is sufficiently imminent.¹⁴ A judgment against a surety may satisfy that requirement. Co-guarantors contribute rateably (usually equally) but there are exceptions. Equity may adjust the contribution where one co-guarantor has engaged in fraud, default or inequitable conduct.¹⁵ In these circumstances, the claim is William has misapplied the proceeds of the coins which should have reduced the debt and could make him liable to pay more than 50% of his share, possibly 100%.¹⁶

[27] In the present case, default judgment has been entered against Victor in the Supreme Court of Queensland.¹⁷ That judgment fixes the existence and

¹⁴ (1939) 64 CLR 312 at 341. See also: *HIH Casualty & General Insurance Ltd v Territory Insurance Office* [1998] 120 NTR 24.

¹⁵ See: *AMP Bank Limited v Brown & Anor* [2017] NSWSC 313 at [40]-[46].

¹⁶ Prayer for relief 'K' seeks that the Defendants pay any amount Victor is ordered to pay Limba, including his costs of defending any claims brought by Limba.

¹⁷ Affidavit of Cameron Jones made 23 January 2026 at [5].

quantum of liability, and renders it immediately enforceable. In those circumstances, the liability is no longer contingent; it is present and capable of enforcement. In my view, that constitutes a case of imminent liability for the purposes of equitable contribution.

[28] The Defendants submit that no cause of action arises in the absence of payment. That submission reflects the position at common law but does not fully accommodate the equitable authorities. The Defendants further submit that the pleading is defective in that it asserts a duty. That criticism is well made. Contribution is a remedial right and not a freestanding obligation. The proposed pleading at paragraph 21 of the PFASOC (and likely all of paragraph 22 as well), is defective and would be liable to strike out.¹⁸ It had pleaded that William owed a duty to Victor as co-guarantor to use the proceeds of sale of the coins in accordance with the terms of the trust,¹⁹ the duty arising from the equitable principles of contribution. At hearing, counsel for the Plaintiff(s) sought to further amend the pleading such that it was alleged William owed Victor a duty arising from the equitable principles of contribution. In my view, that still does not fix the issue. It is not the occasion to suggest wording for the pleading nor to grant leave for a proposed amendment in the off chance that the amending party will cure any defect. The material facts giving rise to a cause of action for equitable contribution between co-contributors should be relatively straight forward to

18 Even assuming the duty of good faith.

19 The trust plead in the PFASOC at [14].

plead. It is established by pleading that both are liable for the same debt, the debtor has defaulted and one guarantor has paid or is liable to bear more than their fair share, giving rise to a right to proportional reimbursement from the other.²⁰ Further, in respect to the last point, if the claim is that William is liable for more than his share of the contribution due to his conduct, that should be pleaded as well. That is, because of William's conduct, it would be inequitable for the liability of the First Defendant and proposed third plaintiff to be apportioned equally. Presently, as proposed, that aspect of Victor's claim it is not pleaded sufficiently.

[29] Furthermore, it is also claimed that the issue of whether William is actually a co-guarantor is not settled and is being challenged by way of defence in the Queensland Supreme Court proceedings (i.e. default judgment has been entered against Victor, but William is defending liability). Be that as it may, that should not prevent the Plaintiff from pleading that cause of action. It may well be that William is found not to be a guarantor by virtue of judgment of the Supreme Court of Queensland. If that occurs before this matter is determined, presumably some reliance may be placed on that outcome. If this matter proceeds first, he will need to argue the guarantor point but presumably the argument would be put on the same grounds as in Queensland. An outcome in Queensland is not guaranteed, and in my

²⁰ At present, the PFASOC pleads the existence of the personal guarantees at [6(d)] and that Red Tower was unable to repay the amount outstanding to Limba under the loan agreement at [9]. Additionally, at [17(e)], reference is made to the Supreme Court of Queensland proceeding but not the judgment entered against Victor.

opinion, it is not sufficient, in the interests of justice, to delay this matter pending that outcome.

[30] Accordingly, I am not satisfied that an equitable contribution claim, as between co-guarantors in the circumstances, would be untenable. It is, at least, reasonably arguable. However, as currently framed, the proposed pleading is defective and would be liable to being struck out, though it is ultimately capable of a cure.

[31] Absent the contribution claim, there is sufficient arguable merit to allow the joinder of Victor. Leave will be granted to join Victor as a plaintiff and to make associated amendments. I am not prepared to grant leave to amend the equitable contribution claim without being satisfied that the cause of action is properly pleaded. Leave is therefore refused to amend paragraphs 21-22 of the PFASOC. However, given my comments above, a claim of equitable contribution would be arguable if pleaded correctly. I would expect the parties attempt to negotiate a suitably agreed amendment by consent, preferably before any amended pleading is filed. Otherwise, the matter may be amenable to another application to amend.

Security for Costs

[32] The Defendants seek security for costs in respect of Red Tower. Although the application was framed on the basis that security for costs should be ordered as a pre-condition to joinder, in my view, the appropriate order would be to determine the joinder first (bringing Red Tower into the

proceedings) and then determining whether security for costs should be ordered (Red Tower having been joined and therefore subject to binding orders of the Court). It is understood that there is no dispute that Red Tower is a necessary party to the proceedings such that it should be joined to the proceeding under r 9.06 of the Rules.²¹ I agree. The next step is to consider whether an order for security for costs should be made in respect to Red Tower.

[33] The principles in respect to security for costs against a corporate entity are well established and were expressed recently in *Sparks NT Pty Ltd v Angkerle Aboriginal Corporation* as follows:²²

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,

²¹ Defendants' written submissions dated 19 December 2025 at [2].

²² [2025] NTSC 24 at [5]-[7].

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.

Section 1335 of the *Corporations Act 2001* (Cth) provides:

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.

The principles to be applied in respect to the consideration of a security for costs application are well established, and were recently restated by Luppino AsJ in *Rig Air And Diesel Pty Ltd v Allwell (NT) Pty Ltd* (footnotes omitted):²³

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.

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* (“*Jazabas*”). The relevant factors in the current application, as identified by the parties in argument are, the 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.

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.

23 [2024] NTSC 107 at [39]-[41].

[34] It is not in dispute that Red Tower is a corporation and lacks assets sufficient to meet an adverse costs order. It has no assets in terms of property or cash in bank. I am satisfied that a *prima facie* case has been made out that Red Tower will be unable to pay the costs of the Defendants if successful in their defence.²⁴ The threshold for considering security is therefore met pursuant to r 62.02(f) of the Rules and s 1335 of the *Corporations Act 2001* (Cth).

[35] The second step is the favourable exercise of the Court's discretion, and that involves a balancing of the competing interests of the parties. The relevant considerations, one of which is determinative and each of which must be assessed in the circumstances of the case, include:²⁵

- (a) The effect of the delay in bringing the application: such applications should be brought promptly. Relevant factors include prejudice to the plaintiff, whether reasonable explanations for the delay exist and the timing of the application;
- (b) Whether the Defendant has adequate security: whether the applicant has any rights which it can exercise against assets of the plaintiff to satisfy an order for costs in its favour;

²⁴ Even if particularly modest costs.

²⁵ As in part summarised in *Jazabas Pty Ltd & Ors v Haddad & Ors* [2007] NSWCA 291 at [74], citing *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* [1995] FCA 76; (1995) 56 FCR 189 at 196-198. See also: considerations as to the nature of the discretion in *G E Dal Pont*, *Law of Costs* (LexisNexis Butterworths, 5th Ed, 2021) ch 29.

- (c) The *bona fides* and strength of the plaintiff's case: as a general rule, where a claim is *prima facie* regular on its face and discloses a cause of action, in the absence of evidence to the contrary, the Court should proceed on the basis that the claim is *bona fide* with a reasonable prospect of success;
- (d) Whether the application for security is oppressive and will stultify the plaintiff's claim: the Court must assess whether or not the plaintiff will be prevented from proceeding if security for costs is ordered. Evidence as to the financial resources of those standing behind the company and who stand to benefit is relevant;
- (e) 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, and 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;
- (f) Whether the plaintiff's impecuniosity was caused by the defendant's conduct;
- (g) Whether the plaintiff's claim is defensive: security will only ordinarily be ordered against a party who is, in substance, a plaintiff, and an order ought not to be made against parties who are defending themselves and thus forced to litigate;

- (h) Overlapping claims between a corporate and natural person: the Court should not make security of costs orders where corporate and natural persons are parties and claims overlap;²⁶ and
- (i) The reasonableness of the quantum: 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.

Consideration of Discretionary Factors

(i) *Overlap Between Claims*

[36] The Plaintiff submits that there is a significant degree of factual and legal overlap between the claims advanced by Desmond (and as proposed by Victor) and those proposed to be advanced by Red Tower, such that an order for security would, in substance, operate against the natural plaintiff(s). The Defendants submit that the claims are distinct and give rise to materially increased complexity. In assessing that issue, it is necessary to focus on the claims as ultimately proposed and to identify the extent to

²⁶ Relevant authorities have recognised that where there is complete overlap or identity of issues, such that the outcome of the case was likely to be the same for both plaintiffs, a refusal of security would be appropriate. However, there is no identity of issues where the causes of action are different. It is possible for there to be a substantial overlap of factual issues but still potentially different outcomes for plaintiffs. In such cases, security for costs might be awarded. However, of relevance will also be recognition of a factual overlap and where the marginal cost of defending a proceeding is not substantially increased by the corporate plaintiff. That is, where the defendants were no worse off as a result of the joinder and their costs were not significantly increased by the inclusion of the relevant plaintiff. In those circumstances, denial of security could still be appropriate. See: *SX Projects Pty Ltd and (in liquidation) and Anor v Battaglia and Ors* [2016] NSWSC 1385 at [15]-[18] and *Funds First Pty Ltd v Owners Corporation Strata Plan 66609 (No 2)* [2008] NSWSC 428.

which the joinder of Red Tower gives rise to additional work (and therefore costs exposure) beyond that required to determine Desmond's claim.²⁷

[37] A substantial part of the factual and legal inquiry is common to both claims. In particular, both depend upon proof of the same underlying matters: the delivery of the coins, the nature of the arrangement between the parties, the existence and content of any trust or fiduciary obligations, and the alleged breaches constituted by the sale and application of the proceeds. Those issues are issues which the Defendants may be required to meet in the conduct of the proceeding, subject to the outcome of any determination of the settlement deed. However, I acknowledge that it cannot be said that there is a complete identity between Red Tower and Desmond's claims such that all possible plaintiffs are suing in relation to one and the same Defendants, and must succeed or fail together. It is possible, notwithstanding the common aspects of the claim, that one plaintiff may succeed and another fail.

[38] Further, the existence of the settlement deed introduces a threshold issue affecting only Desmond's claim, as Red Tower was not a party to that deed. It is possible that, if determined adversely to Desmond, his claim may be narrowed or fall away entirely, with the consequence that the issues arising solely from Red Tower's claim would require determination. In that sense, the joinder of Red Tower has the potential to require the Defendants to meet

²⁷ To that effect, the Defendants' evidence (in the form of the affidavit of Thomas Walker made 29 December 2025) did not identify the costs of any overlapping work which would result from only Red Tower's joinder.

a case which might otherwise not arise if the proceeding were confined to Desmond. The Defendants rely on that possibility and submit, in substance, that the Court should proceed on the footing that the effect of the settlement deed will be determined as a preliminary issue in their favour, with the consequence that Desmond's claim would fall away and the claims would no longer overlap.

[39] That submission does not determine the present application. In my opinion, the question of security for costs is to be assessed by reference to the claims as presently formulated, and not on the basis of an assumed outcome of a proposed interlocutory application. While the foreshadowed application may affect the course of the proceeding, its outcome remains contingent. It depends both upon the exercise of the Court's discretion under r 47.04 of the Rules and the resolution of the substantive issues raised by the deed.²⁸ It is neither appropriate nor necessary to proceed on the footing that Desmond's claim will fall away. Even if that were to occur, the proceeding would not be confined solely to Red Tower's claim – Victor's claim would also remain. As determined above, the fiduciary duty alleged by Victor arises out of the same underlying transaction concerning the coins and their application. In that sense, there would remain a substantial overlap between Red Tower's claim and Victor's claim. The possibility of Desmond's claim falling away does not therefore eliminate the overlap in the proceeding as a whole.

²⁸ For relevant factors, see: *Vlietstra v Ranger & Anor* [2005] NTSC 6 at [10].

- [40] Turning now to the extent of the overlap. The overlap extends beyond background facts to the central liability issues. The allegations that the Defendants received the coins for a defined purpose, held them subject to fiduciary obligations, and misapplied the proceeds are common to the claims of Desmond, Red Tower and Victor. The resolution of those questions is likely to involve substantially the same witnesses, documents and contemporaneous communications. To that extent, the joinder of Red Tower does not materially enlarge the core evidentiary task.²⁹
- [41] The joinder of Red Tower does introduce additional issues which would not otherwise arise. Those issues concern, in substance, whether the alleged breaches caused Red Tower's default under the Limba loan, and the quantification of loss said to have been suffered by Red Tower as a result. That requires a causation inquiry as to whether, absent the alleged breaches, the loan would have been repaid or reduced so as to avoid enforcement, and an assessment of the value of the land said to have been lost.
- [42] While those additional issues are not trivial in a conceptual sense and may require some further evidence, they are confined (largely sequential to the determination of the common liability issues) and do not materially alter the scope or cost of the proceeding. They arise only after the establishment of the common liability issues and do not fundamentally alter the structure of the case. The proceeding remains, in substance, one directed to the alleged

²⁹ Cf. *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 1317 at [29]-[33].

misuse of the proceeds of the coins; the Red Tower claim adds a further inquiry as to the consequences of that alleged misuse.

[43] In those circumstances, I am satisfied that there is a substantial overlap between the claims.³⁰ The joinder of Red Tower does not transform the proceeding into a wholly different case, but it does give rise to a distinct and non-trivial additional inquiry in relation to causation and quantum. In my view the overlap does weigh against the making of an order for security.

(ii) *Strength of the Claim*

[44] The Defendants submit that Red Tower's claim is weak and internally inconsistent. The Plaintiff submits that, on the available material, the Defendants do not dispute key facts, including the receipt and sale of the coins and the application of the proceeds. It is not appropriate in an interlocutory application of this kind to undertake a detailed assessment of the merits. An application of this factor does not involve a detailed evaluation of the Plaintiff's prospects, only the formation of a view as to whether the claim is *bona fide* or a sham.³¹ The Defendants' prospects are also relevant. Neither the claim nor defence are sham, and are both therefore *bona fide*. This factor is neutral.

30 For further discussion, see: G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 5th Ed, 2021) p 1074.

31 *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 1317 at [20].

(iii) *Impecuniosity and its cause*

[45] The Plaintiff submits that Red Tower's impecuniosity was caused by the Defendants' conduct in that their alleged misappropriation of the proceeds of sale prevented repayment of the Limba loan and led to the loss of the company's sole asset. The Defendants dispute that contention, submitting that Red Tower was, in any event, in a weak financial position³² and that the asserted causal link is speculative and interrupted by subsequent events, including the settlement deed. The question as to whether the Defendants' conduct caused the Red Tower's impecuniosity is a relevant and potentially weighty consideration. However, in the present case, its determination is closely bound up with heavily contested issues of fact and the merits of the proceeding. The Plaintiff's claim is that William and Di Ma were given the coins for the purpose of selling them to reduce the indebtedness of Red Tower. William and Di Ma's defence is that they were given the coins as a gift. While the Court may form a provisional view where the evidence clearly supports such a conclusion, the present material does not permit that course without engaging in an impermissible assessment of disputed issues going beyond what is appropriate on an interlocutory application. In those circumstances, the factor does not materially advance the Plaintiff's position. This factor is therefore, at this stage, neutral.

32 See: affidavit of William made 18 December 2025.

(iv) *Stultification*

[46] The Plaintiff contends that an order for security would stultify the claims, relying on the limited financial resources of those standing behind the company. It is well established that the onus of establishing stultification lies on the party resisting the order, and requires full and frank disclosure of financial circumstances.³³ The Defendants submit that the evidence is inadequate in that it does not disclose the full extent of the financial resources of those involved, including their interests in companies and potential access to funds.³⁴ That criticism is justified. The material lacks the degree of detail ordinarily expected in support of an assertion that a claim will be stultified.³⁵ In the absence of such evidence, the Court cannot conclude that an order for security would prevent the continuation of the proceeding. This factor weighs moderately in favour of security.

33 See: G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 5th Ed, 2021) pp 1083, 1123. See also: *Darwin Joinery and Furniture Manufacturing Pty Ltd (in liquidation) v Finch* (Supreme Court of the Northern Territory, Kearny J, 23 July 1991), cited in *Mac-Attack Equipment Hire Pty Ltd v AJ Lucas Operations Pty Ltd* [2010] NTSC 27.

34 See: affidavit of Cameron Jones made 23 January 2026, where Mr Jones deposes that the Plaintiff expects payment from the sale of a trust property netting \$500,000 and which he intends to pay Victor to partly discharge his liability to Limba. Additionally, it is deposed that the Plaintiff intends to borrow funds from “a company” to meet any shortfall. Assuming that the amount owing to Limba, after the sale of Red Tower’s property, leaves \$1.9m owing, Desmond would be borrowing approximately \$1.4m to meet the shortfall. There is no detail as to that arrangement, notwithstanding evidence that the Plaintiff has less than \$20,000 in his bank accounts and holds no other assets other than the coin collection the subject of this dispute. In respect to Victor, his financial situation is set out in the affidavit of Mr Jones made 23 January 2026. However, William’s affidavit of 18 December 2025 deposes that Victor is also a part owner and director of a very successful building and construction firm, Remote Build (NT) Pty Ltd, which has been subject to recent and substantial government contracts.

35 See: affidavit of Cameron Jones made 23 January 2026.

(v) *Persons Standing Behind the Company*

[47] Relatedly, there are individuals who stand to benefit from the litigation and who are closely associated with the proposed corporate plaintiff (notably, Desmond and Victor). The Defendants submit that those persons may have access to resources which could be used to provide security.³⁶ The Plaintiff has not provided detailed evidence to sufficiently negate that possibility.³⁷ In those circumstances, the Court cannot proceed on the basis that no such resources are available. This factor weighs moderately in favour of security.

(vi) *Knowledge and Acceptance of Risk*

[48] The Plaintiff submits that the Defendants were aware of Red Tower's financial position and accepted the risk that their conduct would leave the company without assets. That submission depends upon a contested factual premises, including the purpose for which the coins were provided. It does not add materially to the discretionary analysis. This factor is neutral.

(vii) *Oppression and Fairness*

[49] The Plaintiff submits that it would be oppressive to order security in circumstances where the Defendants' conduct is said to have caused the company's financial position, and where those standing behind the company have already borne significant financial burdens. The Defendants submit that any oppression arises from the Plaintiff's own conduct in advancing

36 See: affidavit of William made 18 December 2025.

37 See: affidavit of Cameron Jones made 23 January 2026.

inconsistent positions and seeking to introduce a new claim at a late stage of the proceeding. Considerations of fairness operate in both directions. On the one hand, there is force in the Plaintiff's contention that, if the Defendants' conduct caused the loss, it may be unjust to require security. On the other hand, the Defendants are entitled to protection against the risk of unrecoverable costs. However, for the reasons given above, I am not satisfied that the joinder of Red Tower gives rise to a material increase in that risk. In the present case, as noted above, I am not satisfied that the joinder of Red Tower will relevantly expand the scope of the proceeding. This factor weighs moderately in against security.

(viii) Defensive Nature of the Claim

- [50] Red Tower's claim is not defensive in nature but is a positive claim for relief. This factor favours the making of an order for security.

Disposition of Security for Costs

- [51] The discretionary factors do not all point in the same direction. Red Tower is an impecunious corporate plaintiff. The evidence does not establish that an order for security would stultify the proceeding, and there are persons associated with the corporate plaintiff who may stand to benefit from the litigation whose financial circumstances are not, in my opinion, fully and frankly explained. Those considerations would, in the ordinary course, support the making of an order for security. The claim advanced by Red Tower is also a positive claim for relief.

[52] However, the weight to be given to those factors must be assessed in light of the nature of the proceeding as a whole. In circumstances where there is a substantial overlap between the claims, and where the joinder does not expose the Defendants to a materially greater risk of unrecoverable costs, the underlying rationale for ordering security, namely protection against additional costs risk, is significantly diminished. The remaining factors therefore operate against that background and do not displace the conclusion that the Defendants' exposure is not materially increased by the joinder.

[53] Notwithstanding that Red Tower is an impecunious corporate plaintiff, the present case is one in which there is a substantial overlap between the claims advanced by Desmond and those to be advanced by Red Tower. The core factual and legal issues (including the nature of the arrangement concerning the coins, the existence and content of any fiduciary obligations, and the alleged breaches) are issues which the Defendants may be required to meet in the conduct of the proceeding, whether in relation to Desmond's claim (if it proceeds) or Red Tower's claim (which would remain regardless of the outcome of any preliminary issue).

[54] The Defendants submit that, if they were to succeed on the settlement deed at a preliminary stage, Desmond's claim would fall away and those issues would not arise. That is so. However, that outcome is contingent and, in my opinion, cannot be assumed as the basis for assessing the Defendants' exposure. Unless and until such a determination is made, and the proceeding thereby fundamentally altered, the Defendants must proceed on

the footing that those issues may require to be addressed. Additionally, the determination of Desmond's claim will still leave claims by Victor and Red Tower which also overlap.

[55] While the Red Tower claim introduces additional issues of causation and quantum, those issues are confined and arise only upon proof of the common liability case. They do not, in my opinion, materially increase the Defendants' overall costs exposure. In those circumstances, the Defendants are not exposed to a materially greater risk of unrecoverable costs by reason of the joinder. To order security in such a case would be to require security in respect of costs which are likely to be incurred unless the Defendants obtain an early and dispositive determination, and would operate, in substance, as a condition upon the continuation of overlapping claims. It is therefore unnecessary to consider the issue of quantum. The application for security is therefore refused.

Orders

[56] I therefore make the following orders:

1. Pursuant to r 9.06 of the Rules, Red Tower (NT) Pty Ltd and Victor Lai are joined as First Plaintiff and Third Plaintiff to this proceeding.
2. The Plaintiffs have leave to further amend the Amended Statement of Claim in terms proposed at annexure 'A' of the Plaintiffs' summons filed 25 September 2025, save for relevant amendments in respect to

the claim for equitable contribution at paragraphs [21]-[22] of the Proposed Further Amended Statement of Claim, unless amendments to those paragraphs are agreed by consent.

3. The further amended statement of claim to be filed and served within 14 days of the date of these reasons.
4. The Defendants' summons seeking orders for security for costs is dismissed.
5. The parties will have 14 days from the date of these reasons to provide any written application in respect to costs, which will be considered on the papers. Otherwise, costs of these applications will be costs in the cause.
6. The matter will be listed for a further directions hearing at a time convenient to the parties and the Court.
