DISTRICT COURT OF QUEENSLAND

CITATION:	*Archaeo Cultural Heritage Services Pty Ltd v Gall & Ors* [2017] QDC 267
PARTIES:	**ARCHAEO CULTURAL HERITAGE SERVICES PTY LTD ACN 072 525 725 AS TRUSTEE FOR THE ARDENT UNIT TRUST** (plaintiff/respondent) **v** **BENJAMIN JAMES GALL** (first defendant/applicant) AND **LINDA JOY GALL** (second defendant/applicant) AND **AUSTRALIAN HERITAGE SPECIALISTS PTY LTD ACN 605 153 419** (third defendant/applicant)
FILE NO/S:	4926/16
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	3 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	15 September 2017
JUDGE:	Porter QC DCJ
ORDER:	**The plaintiff provide security for costs of the defendants up to trial in the amount of $60,000.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – DEFENDANT – where the plaintiff is a corporation – whether there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them – where the plaintiff is a trustee – where the plaintiff relies on its

entitlement to indemnity from trust assets for any capacity to meet a costs order – whether discretionary considerations favour refusing to order security or ordering security for a lesser amount than that claimed.

Legislation
Corporations Act 2001 (Cth) s 1335
Trusts Act 1973 (Qld) s 72
UCPR rr 671, 672

Cases
Appleglen Pty Ltd v Mainzeal Corporation Pty Ltd (1988) 79 ALR 634
Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd [2012] QCA 114
Bryan E Fencott and Assocs Pty Ltd v Eretta Pty Ltd (1987) 16 FCR 497
Suncare Constructions Australia Pty Ltd (In Liq.) v Gainspace (Mackay) Pty Ltd [2016] QSC 67
Emanuel Management Pty Ltd (in Liq) v Foster's Brewing Group Ltd [2003] QCA 552
Garra Water Investments Pty Ltd (in Liq) v Ourback Yard Nursery Pty Ltd and Anor (No 2) [2012] SASC 137
Lagarna Pty Ltd v Bridge Wholesale Acceptance Corporation (Australia) Ltd [1995] 1 VR 150
Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jacques (No 2) [2016] QSC 242
Livingspring Pty Ltd v Kliger Partners (2008) 20 VR 377.
Plyable Pty Ltd & Anor v Go Gecko (Franchise) Pty Ltd & Ors (No 2) [2016] QSC 249
Second Lenbourne Pty Ltd v Beagle Management Pty Ltd [1999] FCA 486
Vacuum Oil Company Pty Limited v Wiltshire (1945) 72 CLR 319
Xebec Pty Ltd (in liq) v *Enthe Pty Ltd* (1987) 18 ATR 893

Other
Hayton, Matthews and Mitchell *Underhill and Hayton Law of Trust and Trustees* (19th ed, Lexis Nexis, 2012) at 1021-1022, [71.7]

COUNSEL: **Plaintiff/respondent:** J W Peden

Defendants/applicants: V G Brennan

SOLICITORS: **Plaintiff/respondent:** Broadley Rees Hogan

Defendants/applicants: Corney and Lind Lawyers

Introduction

[1] In this proceeding, the defendants seek security for costs in the amount of $170,000 from the plaintiff for the costs of this proceeding until commencement of the trial.

[2] The plaintiff resists the application. It contends that the defendants have not made out the relevant threshold condition: that there is reason to believe that the plaintiff will not be able to pay the costs of the trial if it is unsuccessful.

[3] The plaintiff also contends that, if the threshold condition is met:

(a) Discretionary considerations favour refusing to order security; it relies primarily on the strength of the prima facie case and on the contention that an order for security would be oppressive; and

(b) If security is ordered, it ought to be for a significantly lesser amount than that claimed by the defendants.

Background

[4] The plaintiff provides consultancy services about heritage and archaeological matters and similar services. It was established in 1996, but by 2008 was controlled by five shareholders, of which two were brothers, being Ben Gall (the first defendant) and Simon Gall. By mid-2014, the company was controlled by Simon and Ben. Their brother Tim Gall was general manager.

[5] The relationship between the brothers deteriorated by the end of 2014, such that Tim's position was made redundant. In February 2015, Ben resigned citing unworkable current arrangements and conflict.

[6] In October 2015, Simon and Ben, appointed an independent valuer (the **Valuer**) to prepare a valuation of the company (the **Valuation**). The parties made submissions to the Valuer. Submissions by Tim Gall (adopted by Ben) contended that the company had very significant commercial opportunities in the near to medium term which made the plaintiff a valuable company. (Ironically, these are relied upon on this application by the plaintiff as answering the contention that there is reason to believe the plaintiff would not meet a costs order if successful.)

[7] Despite those submissions, the Valuation, as at 30 September 2015, provided for a relatively modest value of the business of between $77,000 and $115,000 based on estimated maintainable earnings of $71,177 per annum. The modest value attributed to the company was explained in the Valuation as follows:

(a) Key person risk, as the ability of the plaintiff to generate earnings is primarily driven by the relationships in place with Traditional Owners and Native Title Owners.

(b) Dependency on a small number of key clients. During the period 1 July 2014 to 30 September 2015, the Valuer observed six (6) clients generated 51% of the plaintiff's total revenue. Of these six (6) clients, two (2) clients generated 37% of the plaintiff's total revenue during the period.

(c) The loss of key professional staff and the likely adverse impact these changes will have on the ability of the plaintiff to generate future earnings.

(d) The Company's exposure to industries, such as mining and resources, which continue to 'slow down' and face considerable uncertainty in the future. Notably, the Company generated 36.22% of its revenue between 1 July 2014 and 30 September 2015 from projects associated with the mining and resources sector. Furthermore, the Company's second and third largest clients, collectively representing 23% of total revenue during the period, were associated with projects in the mining and resources sector.

(e) The decision by Ben Gall to establish the third defendant in direct competition with the Company, including the promotion of the third defendant with the assistance of former senior employees of the Company.

[8] As just noted, following his departure from the company, Ben commenced a new business, through the third defendant, which competed with the plaintiff. The plaintiff alleges that Ben did so in breach of a valid restraint clause in the Shareholders' Agreement.

[9] The plaintiff commenced proceedings on 16 December 2016. The amended statement of claim filed on 5 September 2017 advances a wide range of causes of action including claims for breach of fiduciary duty and misuse of confidential information, breach of the restraint of trade clause in the Shareholders' Agreement, unlawful detention of company property, conspiracy, misleading or deceptive conduct, passing off and inducing breach of contract. Not all claims are advanced against all the defendants. For example, the claim of inducing breach of contract is advanced against only Mrs Gall.

[10] The defendants filed a defence on 14 February 2017 by which they disputed all the claims.

Correspondence relating to security for costs

[11] Security for costs appears to have been first raised by a letter from the defendants' solicitors (**C&L**) on 3 March 2017. Correspondence continued thereafter on a regular basis. The correspondence contained offers of security made on an open basis:

(a) On 3 March 2017, C&L sought security in the amount of $200,000 in total;

(b) On 3 April 2017, the plaintiff's solicitors (**BRH**) rejected that offer and offered security of $15,000 in total;

(c) On 26 April 2017, an offer of security of $66,684.29 was made by BRH for the plaintiff;

(d) On 19 May 2017, a counter-offer to accept $62,443.63 as security was made by C&L for the defendants on the condition that a further application for security might be made if it became apparent that such an amount was inadequate;

(e) On 27 June 2017, C&L re-made the offer contained in the 19 May 2017 letter;

(f) On 26 July 2017, C&L wrote foreshadowing an application and estimating recoverable costs to trial at $208,000;

(g) On 28 July 2017, C&L demanded security in the amount of $207,915.50;

(h) On 14 August 2017, BRH offered security in the amount of $35,000 in total;

(i) On 30 August 2017, the defendants filed this application seeking security of $170,000. The submissions indicate this amount was sought up to trial; and

(j) On 31 August 2017, BRH made a further offer of security of $75,000.

[12] All offers by the plaintiff appear to have been made on the basis that it was an offer for security until the end of trial.

The Threshold Issue

The Law

[13] The application is brought under rule 671 *Uniform Civil Procedure Rules* (**UCPR**) and also section 1335 *Corporations Act 2001 (Cth)* (**Act**).

[14] Section 1335 is, relevantly, in these terms:

> "… 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 …"

[15] Rule 671 relevantly identifies a threshold condition for discretion to order security as follows:

> "… there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them …"

[16] In *Livingspring Pty Ltd v Kliger Partners* (2008) 20 VR 377, the Victorian Court of Appeal dealt with the approach to be adopted to section 1335 and the relevant Victorian rule as follows:

> [10] The plaintiff being a corporation, the application for an order for security for costs is brought pursuant to r 62.02(1)(b) of the Supreme Court (General Civil Procedure) Rules and s 1335(1) of the Corporations Act 2001 (Cth). Rule 62.02(1)(b) relevantly provides that, where there is reason to believe that the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so, the court may order that the plaintiff give security for costs. Section 1335(1) 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.
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> Although the wording is not identical, the applicable principles have been developed — and applied — on the assumption that they apply equally to the rule of court and to the statutory provision. Considerations of certainty underline the wisdom of that approach.
>
> [11] The first question to be addressed is whether the threshold condition for the exercise of the power is satisfied, that is, whether:
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> > there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful.
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> That jurisdictional condition must be satisfied before the discretionary power to order security for costs is enlivened.
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> [12] In the present case, the judge applied what he described as "the generally accepted test on the threshold question", being that formulated by von Doussa J in *Beach Petroleum NL v Johnson*, as follows:
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> > In my opinion the power of the court under s 1335 arises if credible evidence establishes that there is reason to believe there is a real chance that in events which can fairly be described as reasonably possible the plaintiff corporation will be unable to pay the costs of the defendant on service of the allocatur, if judgment goes against it. This will be so even if in other events which can also be fairly described as reasonably possible the plaintiff corporation would be able to pay the costs. The degree of likelihood of the plaintiff corporation being unable to pay the costs along with all the circumstances, actual and possible, about its financial position,

> would be then taken into account in the exercise of discretion, and in framing the orders of the court if the decision is to order security.

This formulation has been applied many times. In our respectful view, however, it is wrong to substitute a judicial exposition for the words of the statute itself. As the High Court has stated repeatedly in recent years, it is the words of the statute which govern. Kirby J made the point very clearly in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue*:

> Where the law in issue is expressed in the form of an Act of an Australian legislature, it is in the words of that statute that the content of the legal obligation is to be found, not in judicial synonyms, restatements or approximations.

[14] The language of the statutory test is clear. The court must address the question which the section poses:

> Is there reason to believe that the corporation will be unable to pay the defendant's costs?

There is no warrant for — and no apparent advantage in — adopting the much lengthier *Beach Petroleum* formulation, which requires the court to decide whether there is:

> reason to believe there is a real chance that in events which can fairly be described as reasonably possible the plaintiff corporation will be unable to pay, … even if in other events which can also be fairly described as reasonably possible the plaintiff corporation would be able to pay …

[15] The phrase "reason to believe" is the touchstone of jurisdiction. It requires a rational basis for the belief — and no more. The wording adopted may be contrasted with other familiar formulations such as "if the court is satisfied that" or "if in the view of the court it is likely that". The section requires the making of a judgment, a risk assessment: is there a risk that the corporation will be unable to pay? (It adds nothing, in our view, to say that it must be a "real risk".) A risk assessment is, of necessity, imprecise. The section calls for a practical, commonsense approach to the examination of the corporation's financial affairs.

[16] It may be said, with justification, that this is a low threshold. But the test simply reflects the policy of the provision, which is to protect a defendant against the risk of the plaintiff corporation's impecuniosity. The provision equips the court with the means to require that the defendant be secured against that risk.

[Footnotes omitted]

[17] The rule under consideration in that case differs from Rule 671(a) only by the additional words in the Victorian rule requiring that assets to be considered are limited to those located in Victoria. This qualification did not play a part in their Honours' analysis and in my view, their Honour's observations are applicable to rule 671(a). I will address the threshold question in the manner identified in this passage.

[18] Although the threshold might be low, the onus is on the plaintiff to establish that the threshold condition is made out.

[19] It is convenient at this point also to note that *Livingspring* observes that care must be taken in applying the proposition that an evidentiary onus rests on the plaintiff once the threshold is met. There the Court of Appeal made the following observations (which I respectfully adopt):

> [18] It was for a long time debated whether satisfaction of the threshold test — reason to believe that the corporation will be unable to pay — should "predispose" the court to exercise the discretion in favour of ordering security. In Victoria, that debate ended with the decision of this court in *Ariss v Express Interiors Pty Ltd (in liq)*. In that case, Phillips JA (with whom Ormiston and Charles JJA agreed) said:
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> > [T]he debate about the word "predisposition" … is a sterile one and should no longer be pursued … [T]he discretion conferred by s 1335 should be accepted now as altogether unfettered, but upon the footing that the very fact of which there must be credible evidence in order to enliven the jurisdiction in the first place may itself be a factor, even a most significant factor, in the exercise of the discretion.
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> [19] The same point may be expressed slightly differently, as follows. The threshold condition for the exercise of the power to order security defines the circumstances in which Parliament contemplated that the power would be exercised. That is, the power was conferred for the purpose of protecting the defendant against the very risk which must be shown to exist before the power can be exercised. In this sense, satisfaction of the threshold condition — demonstrating the existence of the risk — "calls for" the fulfilment of the purpose for which the power was conferred. Whether the power should be exercised in the particular case will, of course, depend upon all the circumstances.
>
> [20] On ordinary principles, it is for the defendant-applicant to persuade the court that the discretion should be exercised in its favour. In the present case, however, the judge applied the following statement of Jacobson J in *Reinsurance Australia Corporation Ltd v HIH Casualty and General Insurance Ltd (in liq)*:

> The effect of the authorities is that if an applicant for security discharges the evidentiary burden of showing a *prima facie* case, there is then an evidentiary onus upon the opponent to satisfy the Court that, taking into account all relevant factors, the discretion ought to be exercised against the making of an order.

The judge's conclusion was expressed in these terms:

> After considering all the matters going to my discretion, I am not satisfied my discretion ought to be exercised against the making of an order and I have therefore decided that [LS] should give security for [Kliger's] costs.

[21] Senior counsel for LS argued that his Honour had, in effect, imposed a persuasive burden on the plaintiff corporation. His Honour had approached the application, it was said, on the basis that once the threshold condition was satisfied the power would be exercised in the defendant's favour, unless the plaintiff corporation persuaded the court (by reference to discretionary factors) that it should not be so exercised. In our view, this objection is made out. While the satisfaction of the threshold condition in the relevant sense "calls for" the exercise of the power, this does not alter the fact that the burden rests on the defendant, from first to last, to persuade the court that the order for security should be made.

[22] There are, of course, particular discretionary matters of which the plaintiff must necessarily have carriage. If, for example, the plaintiff corporation asserts that an order for security would impose on it such a financial burden as would stultify the litigation, the plaintiff must establish the facts which make good that assertion. We respectfully adopt what the Full Federal Court said in this regard in *Bell Wholesale Co Pty Ltd v Gates Export Corporation (No 2)*:

> In our opinion a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means. It is not for the party seeking security to raise the matter; it is an essential part of the case of a company seeking to resist an order for security on the ground that the granting of the security will frustrate the litigation to raise the issue of impecuniosity of those whom the litigation will benefit and to prove the necessary facts.
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> The same would be true of a contention that the plaintiff's impecuniosity was caused by the defendant.
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> [Footnotes omitted]

Is the threshold requirement met?

[20] The defendants rely on the following considerations as demonstrating that the threshold condition for an order of security is met:

(a) That the plaintiff has nominal paid up capital;

(b) That the plaintiff has no real property;

(c) That there are two charges registered in respect of the assets of the company;

(d) That the equity value of the company was assessed by the professional valuer at being between $19,906 and $58,413 as at 30 September 2015;

(e) That it made a trading loss in the financial year ended 30 June 2016 of $49,232; and

(f) That the plaintiff is entirely reliant on its entitlement to indemnity as trustee to be able to meet any costs order.

[21] None of those matters are disputed as matters of fact. Rather, the plaintiff seeks to put those matters into a context which robs them of their persuasive force. In particular, the plaintiff contends as follows.

[22] **First**, although the company has nominal paid up capital, that is not remarkable as the plaintiff is the trustee of a trading trust supplying professional services and has a valuable right of indemnity as trustee of the Ardent Unit Trust.

[23] **Second**, the lack of real property is unremarkable as the company is a professional services provider whose capacity to pay is derived from its income flow from provision of services.

[24] **Third**, the facilities are up to date and not in default.

[25] **Fourth**, the valuation as at 30 September 2015 was undertaken on then current figures and took into account the dispute between the parties and the imminent departure of the Ben and Tim Gall. The plaintiff points to better trading figures for the 2016-2017 year and the prospects of the company into the future arising from its opportunities identified, inter alia, by Ben and Tim in submissions to the Valuer. Mr Peden for the plaintiff also points to evidence that the plaintiff has substantial cash on hand.

[26] **Fifth**, the same considerations inform the response to the trading loss in 2016. The trading figures for the 2016-2017 year indicate that better times are expected into the future.

[27] **Sixth,** the right to indemnity provides a sufficient basis for the plaintiff to be able to meet a costs order if unsuccessful.

[28] These matters identify the two key issues in assessing the threshold question as being:

(a) The current and future performance of the plaintiff as trustee; and

(b) The relevance of the fact that the plaintiff is reliant on its right to indemnity from trust assets for any capacity to meet a costs order.

Financial Performance

[29] The plaintiff relied on an affidavit of Mr Kier, who has been the accountant for the plaintiff since September 2013. Mr Keir's evidence was brief. He exhibited a table showing the unaudited profit/loss for the 2016 and 2017 financial years. The former was -$49,232, as alleged by the defendants. The latter was $372,960. He expressed the opinion that the company was solvent based on his knowledge of its affairs and the facts that it had no outstanding tax liabilities, no accounts past due and had an excess of assets over liabilities.

[30] It is evident from his cross examination that Mr Keir's opinion was based on the information given to him by the plaintiff (with the exception of the tax liabilities issue). Further, current solvency is not the question: the question is whether there is reason to believe the plaintiff would not meet a costs order if unsuccessful. While the two matters are related, they are not the same. I find Mr Keir's opinion of limited assistance in addressing the threshold question, given its lack of detail, its reliance on figures provided by the plaintiff, and its focus on current solvency. There is, however, some evidence that the plaintiff will make a substantial profit in the 2017 year.

[31] Of more direct assistance is the evidence of Ms O'Neill, who swears on information and belief that:

(a) The plaintiff had $340,000 on hand as at 6 September 2017, an assertion supported by bank statements showing that sum;

(b) The plaintiff's cash on hand over the year to September 2017 varied between about $165,000 and $300,000 with debtors consistently around $300,000;

(c) The plaintiff had no overdraft facility; and

(d) The plaintiff had no outstanding invoices with trade creditors.

[32] Mr Brennan, for the defendants, is critical of this evidence as presenting a limited picture of the affairs of the company. There is some substance to this criticism. I note, for example, that there has been no complete statement of assets and liabilities

of the trust put before the Court. Further, whether intentionally or not, the evidence appears to be careful in what is said and not said. For example, while the plaintiff says it has no trade creditors, it begs the question as to whether there are other creditors or liabilities on the balance sheet. I note in that regard Mr Gall's evidence that liabilities of approximately $100,000 for leave would exist at any given time and that the need to pay up front amounts to traditional owner clients for work is an expense the plaintiff had to carry in the past. Mr Brennan critcised the plaintiff for relying on evidence on information and belief rather than evidence of Simon Gall. Although Ms O'Neill's evidence was admissible, and not objected to, it did limit the defendant's ability to test the issues of concern with the person with actual knowledge of the affairs of the plaintiff. The Court was therefore left with Ms O'Neill's evidence as it stood.

[33] On the other hand, from a profit and loss perspective, it appears that a profit of over $300,000 is not unprecedented. It appears that the 2015 profit was of that order. Mr Peden makes the point that on the limited sample, 2016, the year of the fall out between the brothers, is the unusual year, and that a substantial profit is the norm, although a sample size is a small one from which to draw any firm conclusions.

[34] Mr Peden also buttresses his submission that 2016 was an aberration by reference to the submissions of Ben to the valuer. Mr Peden referred to a statement from Tim Gall adopted by Ben in paragraph 6 above. These submissions were extensive and paint a very positive picture of the future cash flow prospects of the plaintiff based on its entrenched positions as advisor in large on-going projects. Simon is identified as the key figure. Tim Gall also contended that the loss of him and Ben from the company would not have a significant effect on the company. He identified the company's only real weakness as being Mr Simon Gall's lack of business and leadership skills, which could easily be covered by employing such expertise at a reasonable sum.

[35] As to those matters, Ms O'Neill swore on information and belief as follows:

I am informed by the Sole Director of the Plaintiff, Simon Gall, and verily believe that: as to the matters contained the Statement of Tim Gall:

(A) The plaintiff remains a preferred service provider in relation to the Wangan Jagalingou People and they are an ongoing source of work for the Plaintiff including in relation to the Adani Mine project;

(B) Now that the Adani Mine project is proceeding, there will be a significant income generated for the Plaintiff, potentially over a number of years although the projection of Tim Gall of income of $2-5 million over next two years is an over-estimation. I am informed by Simon Gall and verily believe that this project (including Traditional Owner employment services) that doing the best he can, he estimates that the project will generate fees for the Plaintiff in the range of $500,000.00 to $1,000,000.00 over the next twelve (12) months;

(C) The Plaintiff maintains relationships with the Butchulla People and the Kabi Kabi People. Both groups are an ongoing source of work for the Plaintiff;

(D) Although the Plaintiff has not engaged a General Manager, the Plaintiff has promoted senior staff to management positions, engaged external strategic advisers and other measures to effectively manage the Plaintiff's Business.

[36] Mr Peden contends that in those circumstances, the defendants have not made out the threshold issue: that there is reason to believe the plaintiff would not meet a costs order if unsuccessful.

[37] There are, however, some difficulties with that submission.

[38] **First**, it is evident that the plaintiff has no substantial assets to meet a costs order. It depends entirely on its cash flow and net profit. While that is an unremarkable position for a professional services firm, it is not of itself an answer to the threshold question. In that context, it will depend on the magnitude of the ongoing cash flow and net profit as against the likely magnitude of the costs order which the company might have to meet if unsuccessful in these proceedings.

[39] For a large incorporated law firm, for example, there would probably be little doubt that the company could meet any reasonable costs order likely to be made in a proceeding of this kind. An incorporated sole practitioner is unlikely to be in the same position. The question is where the plaintiff lies on that continuum. That depends to an extent on the likely costs order in these proceedings. I am unassisted by evidence from either party on this question. The plaintiff's offers of security are in my view at the low end of the range of likely costs for a trial of these proceedings on a standard basis. The defendant's evidence was successfully objected to.

[40] Bearing in mind the scope of the issues raised on the pleadings and the fact that the plaintiff will have to meet not only a costs order in favour of the defendant on a standard basis if it fails at trial, but also its own costs on an indemnity basis, it is not difficult to reach the conclusion that a net profit of some $300,000 on its annual cash flow might not be sufficient.

[41] In my view, even a modest decay in financial performance could leave the plaintiff unable to meet a costs order from its cash flow.

[42] **Further,** the concerns expressed by the Valuer set out in paragraph 7 above provide a basis for some hesitation in assuming that the financial performance of the plaintiff in the last 18 months or so will to continue in the next two to three years. While some of those concerns have been seemingly misplaced, the matters referred to in at least paragraphs 7(b) and 7(d) above appear to remain relevant.

The Plaintiff as Trustees

[43] The plaintiff operates as trustee. Its entitlement to meet a court order depends on its entitlement to indemnity from trust assets for those costs. Mr Brennan for the

defendants placed significant emphasis on this consideration as supporting the conclusion that the threshold was met in this case.

[44] He relied on the decision of Goldberg J in *Second Lenbourne Pty Ltd v Beagle Management Pty Ltd* [1999] FCA 486 and that cases cited there. He relied in particular on the following passage

> [18] The evidence discloses that each applicant has a paid up capital of $2. It is not disputed that each applicant is a trustee company so that it has no other assets. On this ground alone I consider that there is credible testimony that there is reason to believe that the applicants will be unable to pay the respondents' costs if the respondents are successful. Assuming that the applicants have a right of indemnity out of the relevant trust funds which they administer is it [*sic: it is*] necessary to consider what is the position of those trust funds. The first applicant has an acknowledged liability to Equuscorp of $27,824.26 whereas the second applicant's indebtedness in respect of which the purchase of the plantation interests was made has been discharged. I am prepared to accept that for the purposes of the applications the loans in respect of which the charges were given over interests in films have been discharged in the terms identified by Mr Leaker (the applicants' solicitor) in his latest affidavit sworn 20 April 1999. All assets owned by the trust funds of which the applicants are trustees are encumbered by the charges to National Australia Bank Ltd and Challenge Bank Ltd. I consider such charges to be relevant to the issues before me. In *Armstrong White Killham (Managing Agents) Pty Ltd v Insurance Exchange of Australia Group Ltd* (unreported, Supreme Court of Victoria, Byrne J, 31 October 1997) Byrne J found that the existence of a similar charge "entirely neutral" on the issue. With respect to his Honour I would venture to disagree as such a charge is an inhibition on the freedom of the charge [*sic: chargee*] to use its assets to discharge unsecured debts where it has no other form of income or cash flow. I do not consider that the evidence of such a charge is "entirely neutral". In any event the circumstances before his Honour can be distinguished from the facts presently before me. In particular I am faced with applicants with paid up capital of $2 involved in litigation as trustee companies.
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> [Underlining added]

[45] His Honour went on to adopt the following passage by Justice Pincus in *Appleglen Pty Ltd v Mainzeal Corporation Pty Ltd* (1988) 79 ALR 634 at 635:

> As a general rule, it appears to me undesirable that those interested in a small applicant trustee company - small in the sense of having no significant capital - should be able to defeat applications for security merely on the basis that the applicant company may well be able to obtain indemnity out of the trust assets, including assets such as stock and goodwill, to meet an order for costs. Trustee companies of this sort are usually formed to reduce the impact of income tax which may, from the point of view of those interested in them, be

> a laudable objective. If the applicant's submissions here are accepted, trading in this way has accorded another advantage, namely one with respect to costs.
>
> [Underlining added]

[46] In my respectful view, the mere fact that a plaintiff is a trustee company with negligible beneficially held assets does not *of itself* dictate the conclusion that the threshold requirement is met. I do not understand Justice Goldberg or Justice Pincus as advancing that proposition. Rather, their Honours draw attention to the fact that the value of the indemnity should ordinarily be established by the plaintiff.

[47] The trustee is entitled to indemnity pursuant to statute and at general law for costs reasonably incurred in performance of the trust. Absent the circumstance where the litigation is untenable or vexatious or unreasonably pursued (and there is no suggestion that this is such a case), the plaintiff trustee will be entitled to indemnity from trust assets.[1]

[48] However, one could conclude that there is reason to believe a trustee company with no substantial assets held beneficially will not be able to pay the defendant's costs order, if ordered to pay them, if one could conclude that:

(a) There is reason to believe that the trust assets will be inadequate to meet the indemnity in respect of trial costs at the time they fall to be paid; and/or

(b) There is reason to believe that there will be material impediments to realisation of the indemnity at that time.

[49] As to the former, the above analysis of the plaintiff's financial position addresses that matter for the most part. As explained, the plaintiff has no separate substantial assets or activities. It operates solely as trustee, and the above analysis relates to the financial position of the plaintiff as trustee.

[50] There is however, one aspect of the activity of the company as trustee worth additional mention. Although the trust deed was not before me, it was conceded by counsel for the plaintiff/respondent that the net income of the trust was distributed each year to the beneficiaries. The effect of that is that over time the company will not build up assets arising from retained net profits. The funds available to pay the costs if the defendants are successful will therefore be limited to those funds on hand in the year that the costs fall to be paid. That will be a year, necessarily, where the plaintiff will also have to meet its own costs of trial on a full indemnity basis.

[51] As to the latter, in *Second Lenbourne*, Golberg J adopted the following observations relating to the position of trustee plaintiff companies:

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[1] See, for example, *Vacuum Oil Company Pty Limited v Wiltshire* (1945) 72 CLR 319 and *Garra Water Investments Pty Ltd (in Liq) v Ourback Yard Nursery Pty Ltd and Anor* [2012] SASC 44 at [34]; Section 72 *Trusts Act 1973* (Qld).

> [22] It is also submitted that the Court should have regard to the difficulty that the respondents would face in executing against a trustee company. This matter was adverted to by Smithers J in *Laundry Coin-Wash Nominees Pty Ltd v Dunlop Olympic Ltd* (1985) ATPR 40-584 at 46,729 where he said:
>
> > With respect to the indemnity, unless the applicant itself co-operated, or the applicant company were wound up, benefit could not be obtained by the respondents thereunder. No direct process of execution would be available for the purpose of obtaining that benefit. Further, the extent to which the indemnity would in any event be productive would depend upon the state of the finances of the trust. And the possibility of some defence cannot be ignored.
> >
> > Where the only tangible assets of an applicant company are held in trust for another entity and its solvency depends on its right as trustee to indemnity against that entity it is necessary for the Court to have in mind the difficulties which a successful respondent would face attempting to execute in respect of an order for costs. Indeed, unless some step is taken to alleviate those difficulties it is reasonable and just to treat the applicant company as if it were without assets to meet such a liability.
>
> (See also *Lagarna Pty Ltd v Bridge Wholesale Acceptance Corporation (Australia) Ltd* [1995] 1 VR 150, 153 - 154; *World Class Alpacas Pty Ltd v Ostrich Farms (Cook Islands) Ltd* (unreported, Sundberg J, 30 October 1997).
>
> [23] In the proceeding before me there is no evidence in relation to the trust funds against which the trustees might have an indemnity for any order for costs awarded against them.

[52] The observations quoted from Smithers J focus on the latter consideration identified in paragraph 48(b) above. Those observations were picked up by Tadgell J in *Lagarna Pty Ltd v Bridge Wholesale Acceptance Corporation (Australia) Ltd* [1995] 1 VR 150, 153 – 154, where his Honour observed:

> It was contended for the defendants that order for security for costs of the appeal should be refused because holds unencumbered real estate the value of which exceeds the likely cost of the appeal and over which it has a right of recourse as trustee by way of indemnity. These facts, however, by themselves seem scarcely to meet the plaintiff's contention. The solicitors for the plaintiff have sought to inspect the trust deed under which Lagarna is constituted trustee but it has not been produced to them and it was not in evidence before us. For all that appears the trustee may, and I am prepared to assume that it would, be required at any time to transfer its legal interest in the unencumbered property to the beneficiaries of the trust or to encumber it. In *Laundry Coin-Wash Nominees Pty Ltd v Dunlop Olympic Ltd* (1985) ATPR 40-584, Smithers J observed (at 46,729) that:

> Where the only tangible assets of an applicant company are held in trust for another entity and its solvency depends on its right as trustee to indemnity against that entity it is necessary for the court to have in mind the difficulties which a successful respondent would face in attempting to execute in respect of an order for costs. Indeed, unless some step is taken to alleviate those difficulties it is reasonable and just to treat the applicant company as if it were without assets to meet such a liability.

His Honour also said (at 46,731) that:

> I have concluded that an applicant being a trustee company which desires to resist an order for security for costs should establish that recourse to property held by or for it will be available to the party against whom it has brought its action and be adequate, at the appropriate time, to meet the possible liability for costs.

We were invited on behalf of the plaintiff to apply those observations, which appear to have received the approval of Jenkinson J in *Prestige Sunglasses Pty Ltd v Bernhaut Nominees* Pty Ltd (1985) ATPR 40-619, and I think we should follow them. To do so does not, in my opinion, involve any reversal of the onus which rests on an applicant for security for costs to demonstrate a probable inability of a respondent to the application to meet an order for costs. Rather, it recognises that, in circumstances such as are now disclosed by the evidence, the applicant for security should be taken to have discharged that onus.

[53] In my view, these authorities support the view that it is not just the value of the assets subject to the indemnity which must be considered when addressing the threshold issue, but also whether those assets will be available to the plaintiff company to pay the costs at the time they fall due and/or whether there will be significant barriers to accessing the value of those assets to meet the indemnity. If there is reason to believe that access to the assets might be substantially delayed or otherwise obstructed, that may be taken into account in determining whether the threshold test is met.

[54] Like the case before Tadgell J, the trust deed is not before the Court in this matter. Tadgell J speculated that the trust deed in the matter before him might require the transfer of the trust asset identified. In this case, the more probable concern would be if the plaintiff were removed as trustee of the trust by the exercise of a power of appointment under the trust deed. Mr Peden conceded that such a power existed under the trust deed. If such occurred, it can be accepted that the plaintiff would retain its right to indemnity in respect of costs reasonably incurred, including legal costs, supported by an equitable charge or lien to secure the right of indemnity.[2] However, there could well be significant delay and difficulty in the plaintiff obtaining the benefit of the indemnity in those circumstances, especially if the new

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[2] See *Xebec Pty Ltd (in liq) v Enthe Pty Ltd* (1987) 18 ATR 893.

trustee has the trust property and chooses to dispute the entitlement to indemnity, in part or in whole.

[55] Mr Peden sought to address that matter by offering an undertaking by the appointor not to exercise the power of appointment pending resolution of the proceedings. That offer was not made in a formal form, though I infer it was intended to make it in more formal form if required. The difficulty in that regard, however, is that it might not be appropriate for the Court to accept such an undertaking if, on the proper construction of the power of appointment, it was a fiduciary power.[3] In that case, questions might arise as to whether it was appropriate to accept an undertaking binding the discretion conferred by the power into the future.

Conclusion on the threshold issue

[56] In all the circumstances, and bearing in mind that the hurdle is not a high one, I am satisfied that there is reason to believe that the plaintiff will not be able to pay the defendant's costs if ordered to pay them after a trial. The factors supporting that conclusion are as follows:

(a) **First**, the only way the plaintiff could pay costs if unsuccessful is from its cash flow and net profit in the year that that liability arises. I note the point made above that all the net profit is distributed to the beneficiaries each year;

(b) **Second**, on current figures it would only take a relatively modest fall in cash flow and profit (including a default by a significant debtor) to leave the plaintiff in a position where it could not meet both its own costs of trial and the defendant's costs. This is so in circumstances where the case advanced by the plaintiff is very broad, raises significant issues and is likely to take considerable resources to prepare and to hear; and

(c) **Third,** some of the risks identified by the valuer remain relevant; and

(d) **Finally**, I retain a residual concern that the plaintiff might be replaced by the appointor under the trust deed, or that some other barrier to realisation of the plaintiff's right to indemnity might exist or arise.

[57] I should make clear, however, that last matter were addressed, I would still conclude that the threshold test was met for the other reasons given. However, in my view, there is substance to the position shown in the authorities discussed above that at least an evidential onus lies on a plaintiff trustee which cannot meet a costs order except by reference to its entitlement to indemnity to trust assets to demonstrate that there is unlikely to be material barriers to realizing that indemnity at the relevant time.

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[3] Hayton, Matthews and Mitchell *Underhill and Hayton Law of Trust and Trustees* (19th Edn) at 1021-1022 [71.7].

Discretionary factors

[58] Two factors were agitated by the parties.

Prospects of success

[59] The general rule is that the strength and bona fides of the plaintiff's case are relevant considerations, but the usual position is that the Court proceeds on the basis that the claim is bona fide and has reasonable prospects unless it can be demonstrated that there is a high degree of probability of success or failure.[4]

[60] The plaintiff contended that this was a case in which a high probability of success could be determined at this interlocutory stage. I disagree. Two particular matters were identified by the plaintiff.

[61] The first was that there is an obvious similarity between certain promotional material of the third defendant and the equivalent material of the plaintiff. That similarity is evident. However, the overall significance of that one point to the prospect of the plaintiff achieving substantial success overall in the proceedings is impossible properly to assess in an application of this kind. Further, the mere fact of similarity does not necessarily equate with success on causes of action which turn on that fact.

[62] Second, the plaintiff pointed to the fact that the third defendant appeared to be operating in competition to the plaintiff in breach of the various restraints pleaded by the plaintiff. However, that only begs the question as to whether the restraints will be shown to be reasonable at trial. Even allowing for the different approach in contracts involving shareholder agreement under which a buyout occurs, it is difficult to reach the conclusion that the plaintiff has a strong prospect of success without a close and detailed analysis of both pleaded cases.

Oppression

[63] The plaintiff contends that the provision of security will be oppressive because its business relies on its cash flow to expand. The evidence on this matter was general. It was not sufficient to persuade me that the impact of an order for security would be oppressive, even if it were the case that a plaintiff ought to be able to prefer expansion opportunities over making provision to secure payment of a successful defendant's costs.

[64] The plaintiff also relied upon the fact that the application is brought when the proceedings are well progressed. It is contended that I can infer from this that the defendants bring the application to oppress and not out of any real concern about recovery of costs.

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[4] *Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd* [2012] QCA 114 at [18]; *Suncare Constructions Australia Pty Ltd (In Liq.) v Gainspace (Mackay) Pty Ltd* [2016] QSC 67 at [11].

[65] I do not draw that inference. The review of the correspondence set out above indicates that the issue of security has been consistently agitated by the defendants. Further that there is likely to be substantial costs now to be incurred in preparing this matter for trial. The bringing of the application at this point, after exhausting the possibility of agreement by negotiation, does not strike me as indicative of oppression.

Amount of security

[66] The defendant seeks security from the date of the application, it does not seek security for past costs. Mr Tan identified costs up to the application in the amount of $74,360.57 had already been incurred by the defendants, calculated on an indemnity basis. Further the defendant seeks security only up to the commencement of trial.

[67] Ordinarily, security is considered on the basis of a consideration of the standard costs likely to be incurred, and is assessed against the background of estimates of likely costs by one or both of the parties. I am not in that position in this case. The plaintiff did not put any detailed evidence before the Court on the estimated standard costs of the defendants up to trial. The plaintiff was content to critique the evidence of Mr Tan for the defendants.

[68] However, Mr Tan's evidence wherein he expressed opinions as to the estimate of costs up to the first day of trial was successfully objected to by the plaintiff. The defendant did not seek to adjourn the hearing and/or to put forward further evidence. Accordingly, the Court was left with little guidance in admissible form as to the likely standard costs of the defendants up to trial.

[69] The amount of security is in the discretion of the Court. General observations about the approach to the exercise of that discretion relevant to this situation include the following:

(a) Courts have traditionally been conservative in relation to the quantum of security;[5]

(b) That in fixing security, the Court is not engaged in some sort of anticipatory assessment of costs (something impossible on the evidence in this case in any event):

> It should not be forgotten that an order for security is not a final assessment of anything…but a provision against a contingent amount that depends on a number of things that are not amenable to precise prediction. [6]

[5] *Emanuel Management Pty Ltd (in Liq) v Foster's Brewing Group Ltd* [2003] QCA 552 at [16].
[6] *Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jacques (No 2)* [2016] QSC 242 at [52].

(c) Rather, the Court should adopt the following approach:

> In fixing the amount of the security the court must look first at the whole case and take into account, inter alia, the chance of it collapsing without coming to trial. It is not bound to give the amount of security which a defendant says will be the amount of his costs: *Dominion Brewery Ltd v Foster* (1897) 77 LT 507.
>
> The court may in such a case, order somewhat less than if there seems to be every prospect that the action will be fought to a finish: *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction* ... at 720.
>
> The court does not set out to give a complete and certain indemnity to a defendant: *Menhaden v Citibank NA* (1984) 1 FCR 542 at 547 per Toohey J.
>
> The process of estimation embodies to a considerable extent, necessary reliance on the "feel" of the case after considering relevant factors: *Pearson v Naydler* ... at 907.[7]

[70] I take the following matters into consideration in assessing quantum:

(a) First, the plaintiff offered security of $75,000 on 31 August 2017. I think it fair to characterise that as an offer relating to the matter up to the end of the trial;

(b) Second, on 19 May 2017, the defendants offered to accept $62,443.63 as security on condition that a further application for security might be made if it became apparent that such an amount was inadequate;

(c) Third, the proceedings themselves raise a significant number of causes of action which raise distinct factual issues. The proceedings are unlikely to be straightforward unless the plaintiff's case is narrowed;

(d) Fourth, the total claim for all causes of action has been limited to the monetary jurisdiction of this Court, being $750,000;

(e) Fifth, as discussed above, this case is one in which the threshold condition which has been made out is that there is reason to believe that the plaintiff will not meet a costs order. However, as noted above, that is not a particularly demanding test. There are alternative scenarios which are not

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[7] *Bryan E Fencott and Assocs Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 515 cited with approval by Bond J in *Plyable Pty Ltd & Anor v Go Gecko (Franchise) Pty Ltd & Ors (No 2)* [2016] QSC 249

improbable in which the plaintiff might well prove able to meet a costs order. The plaintiff is not hopelessly insolvent;

(f) Sixth, again as discussed above, I can see no particularly compelling consideration favoring the plaintiff arising out of the discretionary considerations identified in Rule 672; and

(g) Seventh, the beneficiaries of the trust have not offered an undertaking to meet an order for costs.

[71] In all the circumstances, I order that the plaintiff provide security for costs of the defendants up to trial in the amount of $60,000.

[72] I will hear the parties as to costs and the form of the orders.