Supreme Court

New South Wales

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| Case Name: | Les & Zelda Investments Pty Ltd v Whitehaven Coal Ltd |
| Medium Neutral Citation: | [2020] NSWSC 1091 |
| Hearing Date(s): | 30 and 31 July 2020 |
| Date of Orders: | 5 August 2020 |
| Decision Date: | 5 August 2020 |
| Jurisdiction: | Equity |
| Before: | Parker J |
| Decision: | [101] |
| Catchwords: | COSTS – security for costs – assessment of quantum – where security provided in tranches – method of assessment – shareholder class action – litigation funder – whether discount from estimated party-party costs appropriate |
| Legislation Cited: | Civil Procedure Act 2005 (NSW), s 101(4)<br>Companies Act 1862, 25 & 26 Vict, c 89, s 69<br>Corporations Act 2001 (Cth), s 1335(1)<br>Federal Court of Australia Act 1976 (Cth), s 56<br>Federal Court Rules 2011 (Cth), pt 19.01<br>High Court Procedure Act 1903 (Cth), s 35(2)<br>Rules of Supreme Court, 1875<br>Rules of Supreme Court, 1883<br>Uniform Civil Procedure Rules 2005 (NSW), rr 42.21, 51.50 |
| Cases Cited: | Aberdare & Plymouth Co v Hankey (No 2) (1888) 32 SJ 644<br>Australia Worldwide Pty Ltd v AW Exports Pty Ltd [2018] NSWSC 1632<br>Brundza v Robbie & Co (No 2) (1952) 88 CLR 171<br>Dominion Brewery Ltd v Foster (1898) 77 LT 507 |

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| | Farmitalia Carlo Erba SrL v Delat West Pty Ltd (1994) 28 IPR 336<br>Foss Export Agency Pty Ltd v Trotman (1949) 67 WN (NSW) 1<br>Imperial Bank of China, India, and Japan v Bank of Hindustan, China and Japan (1866) LR 1 Ch App 437<br>Kupang Resources Ltd v Elias [2018] NSWSC 1553<br>Mundi v Hesse [2018] NSWSC 1548<br>Norcast S.árL v Bradken Limited [2012] FCA 765<br>Pioneer Park Pty Ltd v Australian and New Zealand Banking Group Limited [2007] NSWCA 344<br>Procon (GB) Ltd v Provincial Building Co Ltd [1984] 2 All ER 368<br>Sunday Times Newspaper Company Ltd v McIntosh (1933) SR (NSW) 371<br>Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd [2009] NSWSC 563<br>Voxson Pty Ltd v Telstra Corporation Ltd (No 8) [2017] FCA 1427 |
| Texts Cited: | Commercial List and Technology and Construction List (Practice Note SC Eq 3), paragraph 57 |
| Category: | Procedural rulings |
| Parties: | Whitehaven Coal Limited (Applicant/Defendant)<br>Les & Zelda Investments Pty Ltd (Respondent/Plaintiff) |
| Representation: | Counsel:<br>S Doyle QC/I Ahmed (Applicant/Defendant)<br>DR Pritchard SC (Respondent/Plaintiff)<br><br>Solicitors:<br>Allens (Applicant/Defendant)<br>Bartley Cohen (Respondent/Plaintiff) |
| File Number(s): | 2019/184678 |
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## JUDGMENT

**Issued 19 August 2020**

1 This judgment sets out my reasons for interlocutory orders I made in these proceedings on 5 August. The orders followed a hearing on 30 July. On the

following day I gave an ex tempore judgment setting out my conclusions on the application. I made the orders in chambers on 5 August after the parties had submitted competing minutes of order to give effect to my conclusions.

2 The judgment is not being published as an ex tempore one because after I had delivered my reasons orally it was discovered that part of what I had said had not been successfully recorded. What follows is based on the transcript until that runs out, and then on the notes I had prepared for delivery of my reasons. I have taken the opportunity to refer in detail to some of the authorities to which I was referred in argument but I did not expressly deal with in my oral judgment. This is found at [42] to [86] below.

3 Before the Court was an application for security for costs. The defendant, in class action proceedings, was seeking from the plaintiff a tranche of security for its costs of the proceedings. The security sought was mainly for the costs of providing discovery.

4 The defendant, Whitehaven Coal Limited, is, as its name suggests, a holding company for a coal mining group. Its shares are listed on the Australian Stock Exchange.

5 The claim against it arises out of a merger undertaken by Whitehaven with another company or companies in the 2011/2012 financial year. As part of that merger, shares in Whitehaven, known as “milestone shares”, were issued to a group of investors. The milestone shares were subject to restrictions which made them less valuable than ordinary Whitehaven shares, but the terms of issue provided if certain coal developments were undertaken by Whitehaven, the restrictions on the shares would be removed and they would thereafter be equivalent to ordinary shares. The restrictions were not ultimately removed because the coal developments were not undertaken.

6 The group members for whose benefit these proceedings are brought are the investors who were issued with milestone shares as part of the merger. They allege that in the course of the merger, misleading and deceptive statements were made to them to encourage them to take up the milestone shares. They also allege that Whitehaven could and should have undertaken the relevant

coal developments, with the result that the shares should have eventually had the same rights as ordinary Whitehaven shares.

7 There are 34 million milestone shares in question. Counsel for the plaintiff stated that the claim as a whole is worth between $30 to $40 million.

8 The plaintiff which represents the group of milestone share investors for the purpose of these proceedings is Les & Zelda Investments Pty Limited (“LZI”). LZI is a company controlled by Mr Leslie Tinkler. He is the father of the well-known investor Mr Nathan Tinkler.

9 LZI holds some milestone shares but most of the shares are held by other entities more closely related to Mr Nathan Tinkler. Originally, Mr Nathan Tinkler was the plaintiff in the proceedings. It is he who is funding the claim. In the rest of this judgment, “Mr Tinkler” refers to Mr Nathan Tinkler.

10 There was no dispute that LZI would be unable to meet Whitehaven's costs if Whitehaven were successful in defending the claim. Counsel for LZI accepted that some security was warranted. The issue was the quantum of that security. There was also a minor question about when the security should be provided.

11 Whitehaven sought security in the improbably precise amount of $833,039. LZI's figure was $250,000, although counsel appeared to accept in argument that the proper figure might be somewhat higher.

12 Whitehaven has now (as at 9 July this year) expended almost $1.7 million in costs. The estimate before me was that the completion of the discovery would involve further costs of almost $300,000. If I were to order further security in the amount sought by Whitehaven, the total amount of security, including the amount provided last year, would be $1.333 million.

13 Counsel for LZI advanced two groups of arguments in opposition to the application. I will deal with them in turn.

**Second application for security**

14 The first group of arguments centred on the fact that this was not the first application for security which had been made in these proceedings which resulted in consent orders on 12 July 2019. The orders required LZI to provide security in the sum of $500,000. That amount was paid.

15 Counsel for LZI presented two arguments about the fact that this was the second application for security. His first argument was that there had been delay in bringing the second application.

16 For the purposes of his second argument, counsel pointed out that the amount claimed for discovery was $1.2 million. Counsel submitted that when this was subtracted from the total costs to date (including the costs to be incurred), it could be seen that Whitehaven was effectively using this application to obtain further security for its earlier non-discovery costs, which had been covered by the first application. Counsel argued that this was impermissible.

17 I should point out immediately that in the consent orders made by the Court on the first application there was an express grant of leave for Whitehaven to apply for further security. The making of the present application was expressly foreshadowed in correspondence and also at directions hearings.

18 It is also clear that the present application will not be the last. More security will be required to cover the costs of preparing Whitehaven's evidence and more still will be required for the costs of conducting the hearing.

19 When an application for security is made, as the authorities require it to be made, at an early stage of the proceedings, it is always a problem to estimate what the future recoverable costs of the defendant will be. I was confronted with such a problem in *Kupang Resources Ltd v Elias* [2018] NSWSC 1553. That was a Corporations List case where the plaintiff was, as in this case, being funded by an external funder.

20 In *Kupang* I tried to address the problem of uncertainty by providing in my orders for security to be provided in tranches according to a timetable, with the final tranche to be provided after the matter was set down for trial. Built into the timetable was a direction that when the matter was set down for trial the defendant was to file an affidavit setting out the costs incurred to that point, and an estimate of the costs to be incurred thereafter to the completion of the proceedings. Either party then had liberty to apply to vary the amount of the final tranche of security before it was paid.

21 The purpose of making orders in this form was to give both parties the opportunity to review the total amount of security at a time when there would be more information about the actual course of the proceedings, and the level of costs which would ultimately be incurred could be more precisely estimated. As I explained at [20]-[22], I thought that the approach was in the interests of both parties. I still think that is so. In particular, the funder benefits because not all of the security must be produced, or financed, at once. And the review mechanism allows for the total amount of security to be adjusted downwards if the actual costs turn out to be not so extensive as is initially thought.

22 In the later case of *Australia Worldwide Pty Ltd v AW Exports Pty Ltd* [2018] NSWSC 1632 the approach I had taken in *Kupang* was challenged by the plaintiff. It was argued that the approach would impose additional hearings and costs on the parties for the purpose of varying the level of security. But while I acknowledged the need to balance the desirability of achieving the right figure against the cost of doing so, I thought that the review mechanism which I had adopted in *Kupang* struck the right balance: see at [76]-[78].

23 In the present case there is no formal timetable for the provision of security in tranches, but in effect that is the approach the parties will be following. As I have said, the application was conducted before me on the basis that there would be at least one and possibly more further applications for security as the case proceeds.

24 In *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 563 at [28], Barrett J (as his Honour then was) identified the mischief which may result in a defendant’s delayed application for security being refused. That mischief is that if the plaintiff is unable to furnish security, it will lose the benefit of costs incurred in the meantime.

25 That is not this case. It was not suggested that provision of security in the amounts sought by Whitehaven would stultify the litigation or that any delay in bringing the application had made any difference to Mr Tinkler's decision to fund the proceedings. LZI's legal representatives were well aware that this application was coming.

26 In these circumstances I think that the arguments from counsel for LZI have minimal attraction. It would be unprofitable now to spend time debating whether Whitehaven should have sought a somewhat larger figure in its first application or should have made this application somewhat earlier. Given the large uncertainties which still exist about what Whitehaven's total costs will eventually be, and the total amount of security which will need to be provided, it is much better to approach the present application by aggregating all of the costs incurred to this point, and fixing the further security to be provided by reference to those total costs. I propose to deal with the application in that way.

27 In written submissions lodged prior to the hearing of the application, counsel for LZI took a point about the costs of the transfer of these proceedings to this Court (they were initially begun in the Supreme Court of Queensland). The argument was that Whitehaven had a right to proceed to assessment and payment of those costs and they should not, therefore, be taken into account in fixing the amount of the security to be ordered.

28 The Commercial List and Technology and Construction List (Practice Note SC Eq 3), paragraph 57 provides that interlocutory costs orders in Commercial List proceedings are to be immediately assessable, unless the Court otherwise orders. No such order has been made in this case. But, as counsel for Whitehaven pointed out, recently, in *Mundi v Hesse* [2018] NSWSC 1548, Rees J stated that the Practice Note does not make interlocutory costs orders, even if assessed, immediately enforceable.

29 Ultimately the point was not pressed by counsel for LZI in oral argument. That was understandable. Even if it were open to Whitehaven to obtain an assessment, and payment, of the costs in question without waiting for the end of the proceedings, there is not much to be said for forcing Whitehaven to do so. The amount involved would be relatively small and if Whitehaven succeeds it will recover its costs of the transfer application without a separate assessment.

30 In argument counsel for LZI also referred briefly to additional costs associated with amendments to the defence. However the quantum of costs involved was

not identified and I passed over this as being an issue too small to spend time on.

**Assessment of quantum of security**

31 The second group of arguments by counsel for LZI focused on the quantum claimed for the discovery task itself. In order to deal with these arguments I need to say something more about the nature and cost of the discovery task as revealed by the evidence.

*Evidence on quantum*

32 In support of its application Whitehaven led evidence from Jonathan Light who is the solicitor responsible at Allens, Whitehaven's solicitors, for the conduct of the matter. Mr Light described the work done and planned on the discovery task. He also provided details of the costs incurred by Whitehaven to this point and the estimated costs of completing the discovery.

33 As I have already stated, the amount involved in total is a bit less than $2 million. It was accepted by counsel for Whitehaven that the costs of mounting this security application should be deducted and dealt with after the application had been decided. Those costs amounted to almost $150,000 and, accordingly, the total amount incurred (including, for this purpose, the completion of discovery) can be taken at $1.85 million.

34 Whitehaven also led expert evidence from a costs assessor, Mr Taylor. Mr Taylor reviewed the bills and the evidence provided by Mr Light about the nature of the task. Among other things he looked at the rate charged by the different members of the Allens team who have worked on the case. He adjusted those rates so as to reflect what he considered to be the rates recoverable on assessment. In most cases (and in all of the cases of the more senior Allens' personnel) this involved a reduction in the rate charged to the client. Then Mr Taylor applied a further 10 to 15 per cent reduction to account for the possibility of duplication and other expenditure not being allowed on assessment.

35 This exercise was done for all of the costs which have so far been incurred. The total amount of recoverable costs, subject to an adjustment which I do not need to go into detail about, as estimated by Mr Taylor, was $1,333,039.

Subtracting the $500,000 already provided yielded the figure sought by Whitehaven in this application.

36 For LZI, evidence was also led from the solicitor responsible for the conduct of the proceedings (Mr Cohen) and an external costs consultant, Ms Mossman. Ms Mossman conducted her own analysis of the actual costs incurred and estimated future costs, making similar adjustments to those made to Mr Taylor, although hers were somewhat higher. In the case of past costs, for instance, she reduced the Allens rate charged to the client by 57 per cent. In the case of the discovery task she reduced it by 39 per cent. This compares with Mr Taylor's figure which involved a reduction overall of about 28 per cent.

37 Ms Mossman's figure for the costs of the discovery task recoverable on assessment was $585,000 but she then took account of various points made by Mr Cohen in his affidavit. As I will describe in more detail in a moment, Mr Cohen suggested that the discovery task could have been done more efficiently and with fewer people involved. When those observations were taken into account Ms Mossman's figure was reduced further, to a range between $145,000 and $199,000.

38 The nature of the discovery task was described in Mr Light's affidavit. Discovery has been ordered by reference to categories of documents in the usual way. These categories were negotiated between the parties.

39 As would be expected, the discovery categories cover documents concerning the merger transaction and the state of knowledge Whitehaven had about the allegedly misleading and deceptive matters which are the subject of the claim. These documents date to 2011-2012.

40 The categories also include documents relevant to the group members' claim that Whitehaven failed to take the steps necessary to remove the restrictions from the milestone shares. These document categories are designed to capture documents which Whitehaven holds concerning the progressing of the coal projects in question and they extend up to 2018.

41 According to Mr Light, the initial estimate of the number of documents which Whitehaven held, and which could potentially be relevant, was 1.7 million.

Duplicates were eliminated and various automated techniques were used to reduce that number to 120,000 documents requiring physical review. The actual review was carried out by a team of more junior staff but the process has been supervised by more senior Allens' personnel, as would be expected.

*Security discount*

42 Counsel for LZI launched a frontal assault on the claim for more than $800,000 in security for the costs of discovery. He characterised Whitehaven as running a "Rolls Royce" defence (a phrase used by Perram J in *Voxson Pty Ltd v Telstra Corporation Ltd (No 8)* [2017] FCA 1427 at [16]). Counsel submitted that Whitehaven was entitled to run its defence this way if it wished, but that should not determine the amount of security ordered by the Court.

43 Counsel also suggested, without going so far as to adopt the "rule of two-thirds" (as to which see below at [72]) that the Court should err on the low side in any assessment of the costs. As I understood it counsel was arguing that an applicant in an application of this sort could not expect to receive even the likely assessable amount of its costs; there should be some discount to that figure.

44 I thought it was important in evaluating these submissions to bear in mind that, in an application of this sort, the Court is not determining how much will ultimately be payable by way of costs. All the Court is doing is fixing an amount of security to be applied against whatever costs the defendant, if successful, will recover. If, on assessment, the costs are less than the amount of security provided, the plaintiff will get its money back.

45 It is true that the plaintiff (or funder) must finance whatever sum of security is ordered by the Court. If the security is provided in cash, there will be an opportunity cost from not having the money available for other uses. If it is provided by way of bank guarantee, then the bank will charge a borrowing fee. The more security is ordered, the more costly financing it will be. But if the justice of the case requires that the plaintiff provide security, the prejudice to the plaintiff (or funder) in fixing the level of security too high is only the marginal financing cost.

46 It is also important to remember why security is awarded in the first place. It is wrong that those who stand behind an impecunious corporate plaintiff should be able to benefit from the upside of successful litigation but be protected from the downside of paying the defendant's costs if the claim is unsuccessful. It is this imbalance between risk and reward which an order for security is designed to ameliorate.

47 In my opinion these considerations are of particular importance in the present case. Those who stand behind LZI are conducting commercial litigation on a large scale. They are evidently well-resourced. They hope to obtain damages in the tens of millions of dollars to reflect the loss of profit, or opportunity for profit, they say that they should have made from investment in the milestone shares.

48 I think that, in commercial litigation of this type, those who stand behind this litigation and hope to benefit from it should expect to have to provide fully for the costs of the defendant if the claim is unsuccessful. Those costs should be regarded as part of the expense of mounting the litigation, no less important than the payment of the plaintiff's own lawyers and the payment of the fees charged by the Court.

49 In these circumstances, a complaint from LZI about being required to provide security for a "Rolls Royce" defence was of limited weight. Given the amount at stake, Whitehaven could hardly be expected to conduct its defence on a shoestring. As already stated, the downside for LZI in over-providing for security is marginal. The cost of financing an extra $100,000 or $200,000 in security would be a mere bagatelle in the scheme of this litigation. But if the claim fails and the security proves to be too little, that will directly result in an equivalent shortfall for Whitehaven.

50 Of course it might be possible to recover such a shortfall by way of a third party costs order against Mr Tinkler or the entities associated with him which are funding the litigation. But there would be obvious difficulties and uncertainties with this if it became necessary after the claim had failed. In the circumstances, I saw no need at all to err on the low side in fixing the amount of security. If anything the opposite was the case.

51 I do not think that these conclusions are inconsistent with the authorities which were cited to me by counsel for LZI. Indeed, I hope to show that they are supported by both principle and authority.

52 Before addressing counsel's authorities, I should say something about the statutory context. This application is made under the *Corporations Act 2001* (Cth) ("CA"), s 1335(1). That 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.

53 In terms, the power given to the Court is a power to award "sufficient" security for the defendant's costs. This is a long-standing feature of companies legislation. It can be traced back at least as far as the *Companies Act 1862*, 25 & 26 Vict, c 89, s 69 which provided:

> Where a Limited Company is Plaintiff or Pursuer in any Action, Suit, or other legal Proceeding, any Judge having Jurisdiction in the Matter may, if it appears by any credible Testimony that there is Reason to believe that if the Defendant be successful in his Defence the Assets of the Company will be insufficient to pay his Costs, require sufficient Security to be given for such Costs, and may stay all Proceedings until such Security is given.

54 In this enactment, the power to order "sufficient" security was triggered when the assets of the company might be "insufficient" to pay the defendant's costs. The language itself linked the concept of "sufficient" security to the costs the defendant would recover if successful in defending the action.

55 Section 69 cut across the then Chancery practice, which was that where security was ordered, it was ordered in a fixed sum prescribed by rules of Court. In *Imperial Bank of China, India, and Japan v Bank of Hindustan, China and Japan* (1866) LR 1 Ch App 437 where a bill was filed in Chancery by a company which was in voluntary liquidation and the defendants sought security, Wood V-C followed the Chancery practice and awarded £100. On appeal, counsel for the defendants relied upon s 69 and observed that the section applied to all actions and suits, whether at law or in equity. This provoked an anguished response from counsel for the plaintiffs:

> Can it be intended that in each case, there shall be evidence as to the probable amount of costs, and perhaps an appeal?

56 As subsequent practice has confirmed, that was exactly what s 69 meant. The appeal was allowed and security of £300 ordered. Knight Bruce LJ said:

> It appears to me that the word "sufficient" must have been intended to have a meaning, and that if the practice of the Court was to be followed the Act would have said so. There is nothing to limit the amount of the security.

57 The post-judicature *Rules of the Supreme Court, 1875* (RSC 1875) adopted the old Common Law practice, rather than the old Chancery practice. The Common Law practice had been more flexible, allowing for the award of substantial security by reference to the costs likely to be incurred. But the language of the new rule (RSC 1875, Ord 55, r 2) was more general and did not expressly specify how the amount of security was to be determined:

> In any cause, or matter, in which security for costs is requested, the security shall be of such amount, and be given at such time or times, and in such manner and form as this court or a judge shall direct.

58 The broad power in this rule to fix the quantum of security has been carried forward to Uniform Civil Procedure Rules 2005 (NSW), r 42.21, which deals generally with orders for security in New South Wales courts. It has also been carried forward in the security provisions which apply generally to actions in the Federal Court (*Federal Court of Australia Act 1976* (Cth), s 56; Federal Court Rules 2011 (Cth), pt 19.01).

59 Section 69 came before the English Court of Appeal again in *Dominion Brewery Ltd v Foster* (1898) 77 LT 507. At first instance in the Chancery Division, security in the amount of £350 had been ordered. On appeal counsel for the defendants pointed out that “the defendant’s probable costs” had been estimated at £1,000 and that estimate had not been disputed.

60 It is not clear whether the figure of £1,000 represented the defendant’s actual costs or the costs likely to be recovered on assessment. Counsel’s argument about the defendant’s “probable costs” might suggest the latter, but counsel was also reported as submitting that the solicitor’s affidavit as to the amount likely to be “incurred” was uncontradicted.

61 Lindley MR, who gave the leading judgment, said (at 508):

> The only principle which, as it appears to me, can be said to apply to a case [under s 69] is this, that you must have regard, in deciding upon the amount of the security to be ordered, to the probable costs which the defendant will be put to so far as this can be ascertained. It would be absurd, of course, to take the estimate of the managing clerk to the defendant's solicitors and give him just what is asked for. You must look as fairly as you can at the whole case.

62 The Court increased the amount of security to £600, stating that this was a "reasonable" and "sufficient" amount. It is not clear from the report how that figure was computed. In his judgment Lindley MR mentioned the need to take account of the case collapsing before it went to trial. Presumably this, and the need to consider the defendant's estimate with some scepticism (especially if based on solicitor-client figures), accounted for the reduction from £1,000.

63 What was clear from the decision was that in principle the amount of security was linked to the defendant's "probable costs". In 1949 the Deputy Prothonotary described the practice in this Court on an application for security under the then *Companies Act* provision as being:

> … unless there is, in any particular case, some reason to the contrary, the amount ordered should be such costs as would normally be allowed the defendant on a party and party basis as far as these can now be estimated.

(*Foss Export Agency Pty Ltd v Trotman* (1949) 67 WN (NSW) 1 at 2); see also *Sunday Times Newspaper Company Ltd v McIntosh* (1933) SR (NSW) 371 at 373, per Long Innes J.

64 Counsel for LZI relied upon the well-known dictum of Fullagar J in *Brundza v Robbie & Co (No 2)* (1952) 88 CLR 171 that "the Court does not set out to give a complete and certain indemnity to a respondent". In that case his Honour was sitting as a single judge of the High Court to deal with an application for security for the costs of an appeal from the Victorian Supreme Court.

65 The application before Fullagar J was made under the *High Court Procedure Act 1903-1950* (Cth). Section 35 of that Act provided for security to be available only in a limited class of appeals. In such cases security was to be given "for the prosecution of the appeal without delay and for the payment of all such costs as may be awarded by the High Court to the party respondent": s 35(2). But the amount of the security was to be £50 unless otherwise ordered: s 35(3). Section 36 gave the Court the discretion to reduce or increase that amount. The respondent applied for an increased amount.

66 The full context for Fullagar J's dictum was as follows (at 185):

> It may be assumed that the statutory sum of £50 is inadequate to indemnify the respondent in respect of costs of the appeal, but it is material that security to this extent is already provided. It is also material that, in ordering security for costs, the Court does not set out to give a complete and certain indemnity to a respondent: see *Aberdare & Plymouth Co v Hankey*. It is not, of course, to be assumed that the appellant will fail.

67 The authority to which Fullagar J referred, *Aberdare & Plymouth Co v Hankey (No 2*) (1888) 32 SJ 644, was a decision of the English Court of Appeal on an application for security for the costs of an appeal. The application was made under RSC 1883, Ord 58, r 15, which relevantly provided:

> Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.

68 In *Aberdare*, the respondent to the appeal applied by notice of motion seeking £200, but the affidavits in support of the application stated that the costs of the appeal would amount to £500, and security for that amount was sought at the hearing. The application for security beyond £200 was rejected. According to the report:

> Cotton LJ [who gave the leading judgment] said that the court never ordered security to be given for such an amount as would entirely cover the costs of the appeal; they only ordered security to be given of a reasonable amount, and in the present case he thought £200 would be sufficient.

69 In the end, Fullagar J did not in *Brundza* embark on any assessment of quantum. He considered that the respondent to the appeal had delayed unreasonably in bringing the application for further security, and that this had prejudiced the appellant. He dismissed the application, albeit without prejudice to any further application which might be made if the appeal was not prosecuted with due diligence.

70 Fullagar J's dictum has been frequently referred to in later cases. But in my opinion, when understood in its context, it is an unlikely source of authority on the way in which the quantum of security should be determined for the purposes of CA s 1335(1). The application before Fullagar J was, as his Honour's reference to authority reflected, one for security for the costs of an appeal. It was not an application under the *Companies Act*. And in the end, his Honour decided the application on the basis of delay anyway.

71 Fullagar J observed that it was not to be assumed, for the purposes of the application before him, that the appeal would be unsuccessful. But under s 69 of the 1862 Act and its successors (including CA s 1335(1)) the court is, in terms, required to consider the grant of security on the assumption that the defendant will be successful. Furthermore there is the express reference in the *Companies Act* enactments to "sufficient" security. Ironically, it might have been argued that the terms of s 35(2) of the *High Court Procedure Act* required reference to the respondent's probable costs of the appeal. But because of the view Fullagar J took, he did not need to consider quantum at all and no such argument appears to have been made.

72 The authorities to which counsel for LZI referred are also complicated by the fact that in England, there was for a time a rule of practice, or supposed rule of practice, known as the "rule of two-thirds". Under this "rule", the court would take the defendant's estimate of party/party costs and automatically discount it to two-thirds of its value. Confusingly, the party/party costs figure was referred to as "indemnity", so that the effect of the "rule" was that security would be awarded in a sum representing two-thirds of "indemnity".

73 The "rule" appeared in the *Supreme Court Practice* (the White Book) from 1964 onwards. It was stated as applying generally in the Queen's Bench Division; although not, it seems, in the Commercial Court.

74 In *Procon (GB) Ltd v Provincial Building Co Ltd* [1984] 2 All ER 368, the "rule" came before the English Court of Appeal for consideration in a huge building case which, because it was a building case, was being heard in the Queen's Bench Division rather than the Commercial Court. The trial judge (Bingham J, as his Lordship then was), had declined to apply the "rule" and had followed the Commercial Court practice of fixing the amount of security by reference to the estimated recoverable party-party costs, as estimated by the defendant's solicitors. The plaintiff appealed, arguing that the "rule" had to be applied.

75 The Court of Appeal concluded that if the "rule" existed at all, it should no longer be followed, whether in the Queen's Bench Division or anywhere else. In his concurring judgment, Griffiths LJ stated:

> I can see no sensible reason why the court should not order security in the sum which it considers the applicant would be likely to recover on taxation on a party and party basis if the court considers it just to do so.

76 His Lordship went on to refer to some practical considerations:

> In the normal course of things, it is to be expected that the court will, to some extent, discount the figure it is asked to award. Allowance will have to be made for the unquenchable fire of human optimism and the likelihood that the figure of taxed costs put forward would not emerge unscathed after taxation. … If the estimate includes future costs, these discounts may be large to allow for the possibility of the settlement of the litigation and this will be particularly so if application is made at the commencement of the litigation and costs are assessed on the assumption that the litigation will proceed to a final trial. …
>
> Furthermore, if very little information is put before the court on which it can estimate costs, then again it will be reasonable to make a large discount, particularly when it is borne in mind that, if the security proves inadequate as litigation progresses, it is always possible for a further application to be made for more security.

77 After *Procon* was decided, Australian courts were freed from any influence of the "rule" as it had appeared in the White Book. In *Farmitalia Carlo Erba SrL v Delat West Pty Ltd* (1994) 28 IPR 336, Heerey J reviewed the authorities and declared that the "rule" had "no justification in law or logic". His Honour added, however, that the decision on quantum remained discretionary and there might be justifications for discounting the amount claimed. He referred in particular to what Griffiths LJ said in *Procon* about the possibility of settlement.

78 In *Pioneer Park Pty Ltd v Australian and New Zealand Banking Group Limited* [2007] NSWCA 344, the Court of Appeal considered an application for security for costs by the respondent against an impecunious corporate appellant. The Court concluded that CA s 1335(1) applied to the appeal proceedings and, as a Commonwealth statute, displaced the more restrictive provisions in the Rules (UCPR 51.50, which retains the "special circumstances" requirement derived from RSC 1883, Ord 58, r 15). So far as quantum was concerned, Basten JA said (at [66]):

> it is usual to fix an amount by way of security which is below the applicant's estimation, so as not to impose an undue burden on the corporate appellant or plaintiff and so that the applicant will bear the risk of over-estimation. The interests of justice would be best served in this case by making an order for the provision of security for costs in an amount of $100,000.

79 Counsel for LZI relied on his Honour's statement. But on this issue Basten JA was in the minority. The majority (Tobias JA, with whom McColl JA agreed) fixed the amount of security at $150,000. Tobias JA said at [8]:

> Further, although I accept that it is common practice in accordance with authority to make an appropriate reduction for uncertainties such as a trial concluding earlier than anticipated or for changes in the approach of one or other of the parties to the litigation (such as settlement), those factors are less likely to occur on an appeal of limited duration.

80 Counsel for LZI also referred to various decisions in the Federal Court in which the Court fixed the amount of security by taking the amount claimed and discounting it by an overall percentage, in some cases, up to fifty per cent. Among the cases to which counsel referred were *Norcast S.árL v Bradken Limited* [2012] FCA 765 and *Voxson*.

81 But analysis of those decisions shows two things. First, the adoption of such an approach was only one of the permissible ways in which the amount could have been fixed (*Norcast* at [17]-[18]; *Voxson* at [14]). Secondly, and more importantly, what was being discounted was the actual (solicitor/client) costs, as incurred or estimated. The discount was designed to reflect the deduction on taxation, as well as other factors such as those referred to in *Procon* and *Farmitalia* (*Norcast* at [19], [28]; *Voxson* at [17]).

82 In these circumstances, I respectfully question whether Fullagar J's dictum in *Brundza* has any real significance for applications under CA s 1335(1), except to support the obvious proposition that the Court should not simply award whatever the defendant asks for. Whether the dictum applies to other types of security application will depend upon the particular language of the enactment or rule of court under which security is sought.

83 The authorities do suggest that in an application under CA s 1335(1), it is open to the court to discount the amount ordered to reflect the possibility of settlement, and perhaps other "vicissitudes". But they also show how limited the circumstances are in which it would be appropriate to make such a discount.

84 As Griffiths LJ observed in *Procon*, there can be no standard "tariff". Whether to make a discount for the possibility of settlement at all, and if so by how

much, would need to be established on the facts of the particular case. And it would seem that such a discount would only be called for if the quantum of security were fixed on a "once and for all" basis.

85 Obviously any such discount can be put to one side in the present case where security is being ordered in tranches as the litigation proceeds. Even if there were some reason to think that the case is likely to settle (and that was not suggested) that would be no reason to discount the security attributable to work which is now complete, or virtually so: *Norcast* at [29].

86 I think this review of authority confirms that, in an application under CA s 1335(1), there would be no justification for the court, in fixing the amount of security, to adopt the general approach of aiming for a figure less than the amount which the defendant is likely to recover on assessment, or even of aiming at the low end of the range. That would be contrary to what the language of s 1335(1) requires. Still less would there be any justification for adopting such a general approach in commercial litigation of the present type.

*Quantum and timing of provision of security determined*

87 Against this background, I thought that Mr Light convincingly answered the questions raised by Mr Cohen in his affidavit about the manner in which the defence generally, and the discovery task in particular, was being conducted. It is true that twenty-five Allens' personnel have worked on the matter, but many of them are junior and most have billed relatively small amounts to the file. I did not find it at all unexpected that a substantial team was needed in order to complete the discovery in accordance with the timetable. I also accepted Mr Light's evidence that, contrary to Mr Cohen's suggestion, appropriate use was made of technology to limit the extent to which physical review of documents was necessary. The amount sought for discovery was large but that did not strike me as surprising when 120,000 documents had to be individually reviewed.

88 Both parties invited me to approach the task of fixing the security amount with a broad brush and I did so. For this purpose, I bore in mind the general comments that I have already made about the nature of the litigation. I also took into account the fact that, if Whitehaven succeeds in the proceedings, it

can be expected to be entitled to interest on its costs from the date of payment: *Civil Procedure Act 2005* (NSW), s 101(4). I also bore in mind that I proposed to order that this tranche of security be provided in instalments over the next few months. This will inevitably delay any application for security for the next stage of the litigation, so there will be a period of time when Whitehaven will be exposed.

89 Another factor I took into account was that security for the proceedings is being provided in tranches. As I have already explained, I approached this application on the basis that the first two tranches represented instalments of the total amount of security, calculated by reference to the total costs incurred, and to be incurred, to bring the case to conclusion. If, as I assume, that approach is followed for later security applications, it will allow reconsideration of the amount actually expended on undertaking the discovery task. Once the discovery has been provided, it will be much easier to judge whether it has been excessive. If so, it will be open to LZI to contend that that should be taken into account in fixing a later tranche or tranches of security.

90 Taking all of these factors together, I decided to order a further $750,000 in security.

91 Counsel for Whitehaven invited me to order that the security be paid within seven days. Counsel pointed out that the security task was almost completed. For his part, counsel for the plaintiff invited me to order that the security be provided in instalments, with the first instalment to be provided within 28 days.

92 In principle, a defendant should receive security before undertaking the work to which the security relates, so that if the plaintiff does not provide the security and the proceedings are dismissed, the defendant is not left out of pocket. But even if I had ordered that security be provided within 7 days of delivering my decision, that would have been no use to Whitehaven because the discovery task was due to be completed before then. I therefore decided, in recognition of the substantial amount being awarded, and the lack of any additional prejudice to Whitehaven, to order that the amount of security be payable in three instalments of $250,000, at 4, 8 and 12 weeks from the date of my decision.

**Costs of security application**

93 After announcing this decision, I sought further submissions from the parties on the costs of the application. There were three issues debated.

94 The first issue concerned the incidence of costs. Counsel for Whitehaven sought an order that LZI pay the costs of the application, on the basis that the application had been substantially successful. Counsel for LZI disputed this characterisation, pointing out initially more than $900,000 in security had been sought. But I was clearly of the opinion that, although Whitehaven did not obtain all of the security which it sought, it was substantially successful on the application. As already noted, the amount which LZI was prepared to concede was only $250,000.

95 The second issue arose out of a letter of offer made by Whitehaven's solicitors to LZI's solicitors in the course of preparing the application for hearing. The letter was sent on 13 July and offered to accept security in the sum of $750,000. Counsel for Whitehaven pointed out that the amount offered was the amount which I in fact ordered and sought an order that LZI pay Whitehaven's post-offer costs of the application on an indemnity basis.

96 But I was not persuaded to make such an indemnity costs order. Part of my reluctance stemmed from the sheer inconvenience which would result from isolating the costs of the application from the other costs of the proceedings, and then identifying the additional indemnity component for part of those costs. I thought that the expense and effort of doing this was likely to be disproportionate, particularly given the scale of the litigation. The offer also required the security to be provided by 31 July, whereas I have ordered it in instalments.

97 The third question debated was what to do with the fact that the costs of the security application had been excluded from the calculation of the amount ordered. Having concluded that Whitehaven was entitled to a costs order in its favour for the costs of the application, it should not be out of pocket for those costs if it eventually succeeds in its defence.

98 Two potential solutions to this problem presented themselves. One was to allow Whitehaven to proceed to assessment of its costs of the application, and

enforcement of payment, without having to wait until the end of the proceedings. The other was to increase the amount of security so as to cover the costs of both parties. In my view the latter approach was clearly preferable. As with the costs of the transfer application, I think that it would be undesirable to require Whitehaven to assess the costs of the application separately.

99 In the end, I decided to increase the amount of security by $50,000. I was aware that Whitehaven has quantified its costs of the security application at $150,000 (see above) and this figure might not have included all the solicitors' costs, or counsel's fees. But I thought that, on the face of it, this was quite a high figure for an application which was only contested on quantum.

100 But although I was not prepared to go beyond $50,000 at this point, it should be clear that the costs awarded under my order are not limited to $50,000, and when the time comes for the fixing of the next tranche of security, I regard it as open to Whitehaven to seek to have the figure topped up, if it can show that its reasonable recoverable costs of the security application will exceed the $50,000 I ordered.

**Orders**

101 The orders made by the Court on 5 August were:

1. The plaintiff provide, by way of bank guarantee or by payment into Court, a second tranche of security for the defendant's costs in the amount of $800,000.00, payable in the following instalments:

a. $300,000.00 payable on 28 August 2020; and

b. $250,000.00 payable on 25 September 2020; and

c. $250,000.00 payable on 23 October 2020.

2. That, in the event that the security set out in orders 1(a), (b) or (c) is not provided by the respective dates in those orders, the proceedings be stayed.

3. The plaintiff pay the defendant's costs of the defendant's notice of motion filed on 26 May 2020.

4. Matter to be listed for further directions on 25 August 2020.

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## Amendments

31 May 2022 - make minor typographical amendments

18 July 2022 - [47] change "and" to "in"