IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2012-409-2486
[2017] NZHC 1212

UNDER	the Companies Act 1993
IN THE MATTER	of the liquidation of Property Ventures Limited (in receivership and in liquidation)
BETWEEN	ROBERT BRUCE WALKER AND JOHN MARSHALL SCUTTER First Plaintiffs
	PROPERTY VENTURES LIMITED (in liquidation) Second Plaintiff
	FIVE MILE HOLDINGS LIMITED (in receivership and in liquidation) Third Plaintiff
	CASHEL VENTURES LIMITED Fourth Plaintiff
	TAY VENTURES LIMITED (in receivership and in liquidation) Fifth Plaintiff
	LIVINGSPACE PROPERTIES LIMITED (in receivership and in liquidation) Sixth Plaintiff
	BEECHNEST VENTURES LIMITED (in liquidation) Seventh Plaintiff
	TUAM VENTURES LIMITED (in receivership and in liquidation) Eighth Plaintiff
	CASTLE STREET VENTURES LIMITED (in receivership and in liquidation) Ninth Plaintiff

LICHFIELD VENTURES LIMITED
(in receivership and in liquidation)
Tenth Plaintiff

92 LICHFIELD LIMITED
(in receivership and in liquidation)
Eleventh Plaintiff

ST ASAPH VENTURES LIMITED
(in liquidation)
Twelfth Plaintiff

MONTECRISTO CONSTRUCTION COMPANY LIMITED
(in liquidation)
Thirteenth Plaintiff

AND

AUSTIN JOHN FORBES
First Defendant

ALISTER SPEDDING JOHNSTON
Second Defendant

GORDON LEWIS HANSEN
Third Defendant

DAVID IAN HENDERSON (a bankrupt)
Fourth Defendant

ADOLF de ROOS
Fifth Defendant

DANIEL JAMES GODDEN
Sixth Defendant

PwC (sued as a firm)
Seventh Defendant

VERO LIABILITY INSURANCE
Third Party

Hearing	8 and 9 May 2017
Appearances:	JBM Smith QC and N R Williams for Plaintiffs A C Hughes-Johnson QC and W Palmer for First Defendant J Moss for Second and Sixth Defendants R W Raymond QC and A L Sherriff for Third Defendant D Lester and C Child for Fourth Defendant M J Wallace for Fifth Defendant B D Gray QC, P M Fee and R M Stewart for Seventh Defendant
Judgment:	6 June 2017

JUDGMENT OF LANG J
[on application by defendants for order requiring plaintiffs to provide security for costs]

This judgment was delivered by me on 6 June 2017 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

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[1] This proceeding arises out of the collapse of a company called Property Ventures Ltd (PVL) and other corporate entities (the PVL group) associated with the fourth defendant, Mr David Henderson. The group collapsed in the aftermath of the 2008 global financial crisis, leaving in its wake significant debts and insufficient assets to meet those debts.

[2] The plaintiffs sue the former directors of the PVL group for a total sum of approximately $302 million. The plaintiffs claim that the companies in the PVL group suffered losses of that amount as a result of alleged breaches by the directors of statutory and common law duties they owed to companies in the group. The plaintiffs also sue PricewaterhouseCoopers (PWC), the seventh defendant, for the same sum in respect of breaches of duties it is alleged to have owed to the PVL group when auditing the financial statements of the group in respect of the 2006, 2007 and 2008 financial years. The plaintiffs seek an order under s 383 of the Companies Act 1993 that Mr Henderson be banned from holding any position as a company director for a period of five years.

[3] The proceeding has been allocated a trial of 12 weeks duration commencing in February 2018. The defendants now apply for an order that the plaintiffs provide security for their costs from the present point up to and including trial. The parties had earlier reached agreement regarding the security in respect of steps taken up to and including discovery. One aspect of these arrangements is the subject of discussion later in this judgment.[1]

The amounts for which security is sought

[4] The defendants seek security to cover their costs calculated for the most part on a Category 3 Band C basis. They anticipate, however, that costs calculated on that basis will be insufficient to reflect the actual time involved in taking some steps. In particular, they consider that costs calculated on a Band C basis will be insufficient to properly compensate them for the time involved in preparing briefs of evidence and submissions. In addition, those defendants who anticipate calling expert witnesses seek security in respect of the likely cost of doing so.

[1] At [81].

[5] During the hearing Mr Hughes-Johnson QC on behalf of the first defendant, Mr Forbes, produced a helpful chart setting out the costs that he considers will be payable in the event that his clients succeed at trial.[2] This demonstrated that costs likely to be awarded to his client would amount to $575,520. In addition, Mr Hughes-Johnson calculates that Mr Forbes is likely to incur costs totalling approximately $154,000 in respect of the three expert witnesses he may call to give evidence at trial. Mr Forbes therefore seeks security for costs in a total sum of approximately $729,000.

[6] Counsel for the remaining defendants adopted slightly different approaches. Mr Moss, who acts for both Mr Johnston and Mr Godden, the second and sixth defendants, calculates that his clients will each be entitled to recover approximately $261,000 in costs if they are successful. Neither of his clients proposes to call any expert witnesses.

[7] Mr Raymond QC advised me that the third defendant, Mr Hansen, is likely to be entitled to costs in the sum of approximately $417,000, and will incur expert witness costs in the sum of approximately $116,000. This produces a total claim for security in the sum of approximately $533,000.

[8] Mr Lester advised me that the fourth defendant, Mr Henderson, is likely to incur costs on a Category 3C basis totalling approximately $708,000. He confirmed that Mr Henderson will be calling more than 15 witnesses, but was unable to advise me whether any of these will be experts.

[9] Mr Wallace confirmed that the fifth defendant, Mr de Roos, will not be calling any expert witnesses. He estimates that costs on a Category 3C basis for his client will amount to approximately $330,000.

[10] Mr Gray QC for the seventh defendant, PWC, estimated that costs on a Category 3C basis in respect of his client will amount to approximately $540,000. He advised me that his client will be calling up to five expert witnesses, and that this

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[2] A copy of the chart is reproduced as Appendix A to this judgment.

will cost approximately $280,000. This produces a total sum of approximately $820,000.

[11] In total, therefore, the defendants seek security in the sum of approximately $3.642 million.

Jurisdiction

[12] The principles relating to the provision of security for costs are well established. The jurisdiction to require a plaintiff to provide security is contained in r 5.45 of the High Court Rules, which relevantly provides:

> **5.45 Order for security of costs**
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> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
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> (a) that a plaintiff—
>
> (i) is resident out of New Zealand; or
>
> (ii) is a corporation incorporated outside New Zealand; or
>
> (iii) is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or
>
> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
>
> (3) An order under subclause (2)—
>
> (a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—
>
> (i) by paying that sum into court; or
>
> (ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and
>
> (b) may stay the proceeding until the sum is paid or the security given.
>
> …

[13] In order to determine an application for security in the context of a case such as the present, the Court is required to consider the following issues:[3]

(a) Has the applicant satisfied the Court there is reason to believe that the plaintiffs will be unable to pay the defendants' costs if the claim is unsuccessful?

(b) How should the Court exercise its discretion?

(c) If security is to be ordered, what amount is appropriate and when should it be provided?

(d) Should the Court stay the proceeding until such time as security has been provided?

Is there reason to believe the plaintiffs will be unable to pay the defendants' costs if the claim is unsuccessful?

[14] There is no dispute in the present case that, without third party assistance, the plaintiffs would be unable to meet the awards of costs that would inevitably be made in the event that their claims are unsuccessful. The corporate plaintiffs are all in liquidation and there is no evidence that the first plaintiffs, the liquidators of companies in the PVL group, have obtained funding from creditors to enable them to pursue the claims against the defendants and/or to meet any adverse award of costs.

[15] The liquidators have instead acknowledged they are funding the proceeding with the assistance of a litigation funder. A litigation funder is a third party who agrees to meet the costs of a proceeding in return for receiving a share of any funds that it might produce by way of settlement or judgment. The litigation funder is not a party to the proceeding, and has no direct interest in it other than the right to share in the proceeds of a successful outcome.

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[3] *Busch v Zion Wildlife Gardens Ltd (in rec and liq)* [2012] NZHC 17 and *AS McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

[16] It follows that I am satisfied there is reason to believe that, without assistance from the litigation funder, the plaintiffs will be unable to meet an adverse award of costs in the event that their claims should be unsuccessful.

How should the discretion be exercised?

[17] Two factors are particularly relevant to the exercise of the discretion in the present case. From the standpoint of the defendants, the fact that a litigation funder is funding the plaintiffs' claims is a matter of considerable if not overriding importance. From the perspective of the plaintiffs, the alleged merits of their claims are to the forefront.

The involvement of a litigation funder

Background

[18] The involvement of litigation funders in complex commercial litigation is a relatively new development in New Zealand law. The litigation funder in the present case is a company called SPF No 10 Limited (SPF). As its name suggests, SPF is a shelf company incorporated for the sole purpose of providing litigation funding for the present proceeding. SPF also holds a first ranking charge over the assets of PVL by virtue of a general security agreement (GSA) that it holds over those assets.

[19] The circumstances in which SPF came to acquire the GSA are somewhat complicated. The third plaintiff, Five Mile Holdings Ltd, is a wholly owned subsidiary of Property Ventures. In 2006 it borrowed a very large sum of money from Hanover Finance Ltd (Hanover) to assist it in completing the development of a large parcel of commercial land situated just outside Queenstown. Property Ventures provided security for the advance by means of a general security agreement in Hanover's favour. This gave Hanover a first ranking security over various assets of the companies in the PVL group, including any cause of action that companies in the group might have against third parties. Allied Farmers Investments Ltd (Allied) subsequently obtained an assignment of the security when it acquired Hanover's assets in late 2009.

[20] In March 2013 Allied assigned the GSA to SPF. By that stage SPF had already entered into the litigation funding arrangement with the plaintiffs. This prompted PWC to apply for the plaintiffs' claim to be stayed on the ground that it was an abuse of process for the plaintiffs to pursue a claim that was for the sole benefit of the SPF. The application failed at first instance,[4] and the Court of Appeal upheld that decision.[5] The Supreme Court has granted leave to PWC to appeal to that Court, but the appeal has not yet been heard.[6]

The litigation funding arrangement in this case

[21] The litigation funding arrangement in the present case is set out in an agreement dated 31 October 2012 between the second plaintiff, Property Ventures Ltd (in liquidation), and SPF.

[22] The agreement requires SPF to fund the cost of the litigation, including any sum the plaintiffs might be required to provide by way of security for costs. SPF will also fund any adverse award of costs arising during the proceeding and any subsequent appeal. The agreement refers to the funding costs as "Project Costs". These will attract interest at the rate of 21.5 per cent per annum. In return for meeting the project costs SPF will receive 42.5 per cent of any proceeds of the proceeding or a sum equivalent to twice the amount expended by way of project costs, whichever is the greater.

[23] SPF must approve all expenditure to be made under the agreement and it must also approve any proposed settlement. Furthermore, SPF has the right to terminate the agreement at any time either with or without cause. In that event SPF will remain liable to pay all sums it has become liable to pay under the agreement up until the date of termination. Following termination, however, SPF will not be liable for any adverse award of costs. The only exception to this will be costs awarded upon discontinuance of the proceeding caused directly by SPF terminating the agreement.

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4 *Walker v Forbes* [2015] NZHC 1730, [2015] 3 NZLR 831.
5 *PricewaterhouseCoopers v Walker* [2016] NZCA 338.
6 *PricewaterhouseCoopers v Walker* [2016] NZSC 165.

Litigation funders: relevant principles

[24] The most helpful authority in the present context is that of *Saunders v Houghton*, the litigation involving representative claims by shareholders of Feltex Carpets Ltd against parties associated with that failed company.[7] The High Court refused in that case to strike out the plaintiffs' claims and also refused to stay the proceeding on the ground that the involvement of a litigation funder constituted an abuse of process.[8] The Court of Appeal confirmed that the plaintiffs were entitled to sue in a representative capacity, and also that the involvement of a litigation funder did not result in the plaintiffs committing the common law torts of maintenance and champerty.[9] In contrast to many other countries, New Zealand's legislature has not thus far seen fit to abolish these ancient torts.

[25] The Court of Appeal also held that the common law of New Zealand should not condemn litigation funding arrangements as being tortious or otherwise unlawful provided certain conditions are met. First, the Court must be satisfied that there is an arguable case for rights that warrant vindicating. Secondly, there must not be any abuse of process. Thirdly, the proposal must be approved by the Court.[10]

[26] In rejecting PWC's challenge to the litigation funding arrangement in the present case, the Court of Appeal observed that in *Waterhouse v Contractors Bonding Ltd* the Supreme Court had taken "a cautiously permissive stance" toward litigation funding.[11] Furthermore, the arrangement between the plaintiffs and SPF did not result in SPF taking a bare assignment of any claim that the plaintiffs and companies in the PVL group might have against PWC and the remaining defendants. That would have been unlawful. Rather, the assignment transferred the debt that was formerly owing to Allied, together with any securities held by Allied in respect of that debt. Any claims remained with the plaintiffs and with the companies in liquidation. Furthermore, the assignment did not alter the terms of the litigation funding agreement, which PWC acknowledged was not objectionable in its own right. In addition, the requirement that the plaintiffs must account to Allied for the

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7 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331.
8 *Houghton v Saunders* (2011) 20 PRNZ 509 (HC).
9 At [93]-[94].
10 At [94].
11 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

net proceeds of the claim flows from the fact that SPF is now the owner of the Allied debt and holds a first ranking security in respect of that debt.

The arguments

[27] In seeking security the defendants do not suggest the Court should prohibit the plaintiffs from funding the proceeding through the medium of a litigation funder. That is not surprising given the fact that the earlier appeal to the Court of Appeal proceeded on the basis that the litigation funding arrangement was unobjectionable in principle. They contend, however, that the involvement of a litigation funder means that the principles usually informing the exercise of the discretion to order security for costs do not apply. In particular, the Court is not required to consider whether failure to order security may prevent the plaintiffs from bringing an unmeritorious claim. Nor should the Court enquire too deeply into the merits. Furthermore, they submit that the involvement of a litigation funder is a factor that justifies the Court making a significantly larger order for security than might otherwise be the case.

[28] The defendants rely upon the following observations made by the Court of Appeal in *Saunders v Houghton*:[12]

> [36] The making of orders for both representation and admission of a funder substantially alters the balance between plaintiffs and defendants. We consider that the change is so radical as to justify the High Court, in exercise of its inherent jurisdiction under s 16 of the Judicature Act 1908, to consider ordering security as a term of such orders, even where numerous natural persons are among the plaintiffs, as the price of the privilege to employ such a procedure. That is in order to protect the defendant against the effect of a procedure which could otherwise be oppressive. **The facts that the funder has no personal right at stake, that it takes part of the proceeds of any claim, and that it is motivated by the financial considerations that gave rise to the common law prohibition of champerty point to the need for the funder to provide security for costs in most cases.**
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> **…**
>
> (Emphasis added)

[29] The plaintiffs acknowledge the position taken by the Court of Appeal, but say that the merits of the case are still important. They say that when these are taken into

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[12] *Saunders v Houghton*, above n 7.

account the argument in favour of a significant award of security is greatly weakened.

Decision

[30] After the Court of Appeal delivered its decision in *Saunders v Houghton* the proceeding returned to the High Court, where Dobson J was required to determine an application by the defendants for security for costs in respect of the steps leading up to and including the trial.

[31] When considering the weight to be given to the fact that a litigation funder was involved, Dobson J referred[13] to the approach taken by the New South Wales Court of Appeal in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd.*[14] In that case a liquidator had commenced proceedings against the former directors of a company in liquidation and also against their insurer. The proceeding was funded by a litigation funder. Dealing with that issue, Hodgson JA observed:[15]

> However, in my opinion a court should be readier to order security for costs where the non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated, as would be a shareholder or creditor of a plaintiff corporation, but rather is a person whose interest is solely to make a commercial profit from funding the litigation … and in my opinion, courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails.

[32] After citing this passage Dobson J said:[16]

> [107] I respectfully adopt the points made as influencing the exercise of the discretion as to whether security for costs is appropriate. Within the context of this case, I am satisfied that the defendants deserve to be adequately protected by a meaningful order for security for costs, against the contingency that they succeed and seek to enforce an award of costs.

[33] I take a similar approach. The existence of a litigation funder in the present case is an important factor that influences the exercise of the discretion for several reasons. The first of these is that the plaintiffs will not be precluded from continuing

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13 *Houghton v Saunders* [2013] NZHC 1824 at [106].

14 *Green (as liquidator of Arimco Mining Pty Ltd v CGU Insurance Ltd)* [2008] NSWCA 148, (2008) 67 ACSR 105.

15 At [51].

16 *Houghton v Saunders*, above n 13.

with their claims if a significant order for security is made. Furthermore, SPF stands to receive most, if not all, of the proceeds of any successful claim. It has no interest in the litigation beyond the profit it hopes to derive from what it clearly regards as a commercial venture. Commercial ventures generally require an investor to take risks and to incur expenditure as the price to be paid for the chance of success. SPF should therefore be required, as a matter of policy, to contribute significantly to the defendants' costs if the claims are unsuccessful.

[34] Furthermore, SPF has elected to fund the plaintiffs' claims in the knowledge that security may well be ordered. That fact is plain from the provision in the litigation funding agreement requiring SPF to meet, as part of the project costs, any order for security that the plaintiffs may be required to provide.

The merits of the plaintiffs' claims

Approach

[35] It has long been accepted that the merits of a plaintiff's case may be taken into account in determining how the discretion to require security to be provided is to be exercised. The courts have emphasised, however, that care must be taken when undertaking this exercise. As the Court of Appeal emphasised in *A S McLachlan Ltd v MEL Network Ltd*, any assessment of the merits at an interlocutory stage can be no more than an impression.[17] It cannot be an indicator of the ultimate outcome after trial. The evidence before the Court at an interlocutory stage is necessarily incomplete, and it is not appropriate to engage in a form of mini-trial in which the Court reaches preliminary conclusions in relation to disputed issues of fact.

[36] In *Saunders v Houghton*, the Court of Appeal confirmed that the merits may still be relevant even in cases where a litigation funder is involved. The Court observed:[18]

> [37] *McGechan on Procedure* records at [HR5.45.03](2) that in considering applications for security the court will try as far as possible to assess the merits and prospects even though in a case of any complexity that will be no more than an impression. It must do its best with what is before

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17 *A S McLachlan Ltd v MEL Network Ltd*, above n 3, at [21].

18 *Saunders v Houghton*, above n 7.

> it. Security for costs can be a matter for continuous review, with a staged process for reappraisal which might increase or reduce security as more is learned about the case. There is a sliding scale: a case with slight merits may warrant a substantial order for security at least for an initial stage and may extend to provide indemnity to the opposing party. An apparently strong case may warrant reduced or no security. There will be cases where an order under r 7.70 for interim payment by the defendant is justified.

[37] Mr Smith QC for the plaintiffs points out that the parties have now completed discovery and inspection. The plaintiffs have also filed extensive evidence in opposition to the present applications so as to enable the Court to assess the merits of their claims. As a result, he submits that the Court is in a far better position to undertake that exercise than would have been the case at an earlier stage of the proceeding. Mr Smith contends that the evidence filed in opposition to the applications demonstrate that the plaintiffs' claims have considerable merit. This supports his submission that any order for security must be modest.

[38] Mr Smith also contends that the defendants have failed to engage on the merits notwithstanding the extensive evidence provided by the plaintiffs. He asks the Court to infer from this that the defendants acknowledge the weakness of their position on the merits.

[39] The defendants take a different view. They say it is far too early for the Court to engage in any meaningful way in an examination of the merits of the plaintiffs' claims. They point out that the plaintiffs have not yet served their briefs of evidence, so there is no way of knowing whether they can establish the allegations contained in the current version of the statement of claim. Furthermore, the defendants have not been told how the plaintiffs have quantified their claims. For that reason issues of causation and quantum remain highly speculative at this stage.

Summary of the claims

[40] The current version of the statement of claim spans more than 120 pages and would be impossible to summarise in any detail. I propose to consider what I perceive to be the principal claims against the defendants in order to determine whether it is possible to gain an impression of their strength.

The claims against PWC

[41] I deal with the claims against PWC first because of the prominence they assumed in Mr Smith's submissions in opposition to the applications for security.

[42] As I have already observed, PWC produced audit opinions in respect of the financial statements of the PVL group for the years ended 31 March 2006 and 2007. PWC had begun the audit process in respect of the 2008 financial year, but never provided an opinion in respect of any financial statements that may have been produced in respect of that year.

[43] The plaintiffs' claims against PWC are described in some detail in several affidavits filed by Mr Walker in opposition to the present application. They allege that, from the point at which PWC was engaged, it became aware or ought to have been aware that the PVL group had significant solvency issues. Furthermore, the manner in which PVL conducted its business was such that PWC ought to have viewed the accuracy of PVL's financial statements for the 2006 and 2007 years with a far greater degree of scepticism than it did. Had PWC done so, it would have qualified its opinion by saying that several factors prevented it from giving an opinion as to whether the financial statements gave a true and fair view of the financial position of the group. Alternatively, PWC came into possession of information that it should have passed on to PVL's trustee under s 50 of the Securities Act 1978.[19]

[44] Had PWC taken either of those steps, the plaintiffs allege that secured lenders would have acted more quickly to realise securities and to appoint receivers. This would have enabled PVL's assets to be sold for a much greater value than was ultimately the case. The plaintiffs therefore seek damages in respect of the difference between the amount actually obtained from the sale of the group's assets and the amount that would have been obtained if those assets had been sold during 2006 or 2007.

[45] The factors upon which the plaintiffs rely can be summarised as follows:

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[19] PVL was an issuer of securities in terms of the Securities Act 1978 because it raised money from investors by issuing mandatory convertible notes.

(a) At the commencement of the 2006 audit PWC failed to properly review the working papers of the previous auditors as required by the applicable accounting standards and PWC's own audit guides. These would have shown that the previous auditors had serious concerns about the PVL group as a going concern.

(b) PWC ignored, or failed to acknowledge, obvious indications of serious cash flow problems that affected the PVL group from the beginning of PWC's engagement and continued through until 2008.

(c) PWC failed to appreciate that valuations obtained in respect of PVL's key assets were likely to be unrealistic and needed to be independently assessed.

(d) PWC knew from the outset that Mr Henderson was well known for his dominant and autocratic management style. Despite that knowledge PWC failed to properly assess the adequacy of internal controls that were or should have been put in place to protect PVL from being exposed to risk from Mr Henderson's activities. Furthermore, PWC's approach assisted Mr Henderson to continue to dominate the manner in which the activities of the group were conducted.

(e) PWC is alleged to have assisted PVL to avoid a major GST liability relating to a property development in Te Anau that was being undertaken by Te Anau Ventures Ltd (Ventures), one of the companies in the PVL group. During 2004 Mr Henderson had given instructions that deposits held on trust on behalf of purchasers of sections within the development were to be used for Ventures' own purposes even though the purchases in respect of which the deposits had been paid were still conditional. This immediately rendered Ventures liable to pay GST in respect of those sales amounting to more than $1.228 million. PWC is alleged to have incorrectly advised Ventures that it

was not required to pay the GST in 2004 because Ventures' solicitors had released the deposits in breach of trust.

(f) The transactions referred to in (e) ought to have put PWC on notice both that the PVL group had liquidity issues and that Mr Henderson and the company's solicitors were prepared to assist it in an unethical way. This should have enhanced the vigilance with which PWC audited PVL's financial statements.

(g) PWC is alleged to have advised the PVL group to transition from the Generally Accepted Accounting Practices (GAAPS) standards to the International Financial Reporting Standards (IFRS) in preparing its 2006 financial statements, a year before it was required to do so. PWC is further alleged to have encouraged the group to take this step for the express purpose of making the financial statements look better. Such advice was inappropriate given the requirement that, as the group's auditor, PWC was required to remain independent. As Mr Smith put it in his submissions, PWC assisted the group to mask its underlying problems "through the cross selling of other services"

(h) PWC is said to have known about, and provided advice in respect of, transactions described as "loan washing". PVL arranged for companies to be formed for the purpose of obtaining new loans that were then used by the wider group to pay off existing loans in default. This enabled PVL to avoid advising the market about the loans in default. It also enabled PVL to borrow funds without breaching restrictions imposed by lenders to limit their exposure to excessive borrowing by the group.

(i) PWC is alleged to have known by June 2008 that PVL's cash position would be poor by October, and that it was likely to be unable to fund developments and pay creditors. At or about the same time Mr Noone of PWC's audit team is said to have told Mr John McPherson, a representative of the Companies Office who was investigating PVL's

affairs, that Mr John Waller, a senior member of PWC's staff, was providing PVL with advice and assistance regarding its financial, liquidity and cash flow issues. Mr Noone is also said to have told Mr McPherson that PWC was about to commence the 2008 audit. Based on these assurances the Companies Office allegedly took no further steps to investigate PVL's activities.

(j) The plaintiffs allege that PWC ignored the fact that from mid-2006 at least one senior member of its technical staff was raising serious issues about the accuracy of several aspects of PVL's financial statements, and in particular valuation assumptions, in respect of the 2006 financial year.

[46] In assessing the likely strength of the plaintiffs' claims I can do no more than set out the overall impression that I gain from the material filed in relation to the present application. It is not possible to gain any impression in respect of some aspects of the plaintiffs' case because PWC denies that the conduct upon which those claims are based occurred. By way of example, PWC denies that it provided the PVL group with any advice regarding the transition to IFRS accounting standards.

[47] Furthermore, it is difficult to see how the GST issues surrounding Te Anau Ventures can be of relevance for present purposes because that company is not one of the plaintiffs in the present proceeding.

[48] In seeking to gain an impression of the strength of the claims against PWC it is also necessary to bear in mind the nature of the business in which PVL was involved. Large scale commercial property development involves a significant degree of financial risk by its very nature. Cash flow may often be tight as the costs of the development, which are often very substantial, must be absorbed for a considerable period before there is any ability to generate income. Until the property can be sold the developer must fund its activities by borrowing funds or obtaining them from investors. A temporary lack of liquidity is by no means an uncommon feature of this particular industry, and it may not necessarily mean that the company is insolvent or that its auditors should report the company to the regulatory

authorities. As the 2008 global financial crisis demonstrated, the profitability and financial wellbeing of a property development company can also be eroded and destroyed within a very short space of time by events over which the company has virtually no control.

[49] In order to properly assess the manner in which PWC responded to any liquidity issues that PVL experienced it is also necessary to understand the context and background against which those issues arose. In particular, it is necessary to look at the overall financial position of the PVL group during the period in question and the avenues available to it to address the issues it encountered. The material before me does not permit me to make any meaningful assessment of those factors. For that reason I am not prepared for present purposes to place weight on the allegations that PWC ought to have responded differently if and when it became aware that the PVL group was experiencing cashflow problems.

[50] Furthermore, PWC contends that claims by PVL's subsidiaries, the 4th to 13th plaintiffs, are time barred. It will also defend any claim in relation to the 2006 audit on the basis that it is time barred because of a contractual limitation period of four years.

[51] Even if I was to proceed on the basis that the plaintiffs can prove the bulk of their claims based on alleged failure to provide warnings in respect of impending insolvency, it is not possible on the material presently available to determine whether those failures are likely to have caused losses for secured creditors. It is reasonable to assume that, if PWC had qualified the audit opinions that it gave in respect of the 2006 and/or 2007 financial statements, secured creditors may have taken steps to realise securities and/or appoint receivers in the latter part of 2006 or 2007. I have no way of knowing, however, whether PVL's assets would have realised more if they had been sold in late 2006 or 2007 than was the case when they were ultimately sold following the collapse of the group.

[52] By way of example, I have no way of knowing whether the large parcel of minimally developed land that was the subject of the Queenstown project would have sold for more in 2006 and 2007 than it ultimately realised. Presumably the

plaintiffs will be adducing expert evidence to address this issue when they serve their briefs of evidence. As matters currently stand, however, that issue remains at large.

[53] My overall impression is PWC may have two areas of potential vulnerability. The first may lie in the alleged failure to ensure that valuations ascribed to PVL's key assets were robust and could be relied upon. That is particularly the case in respect of assets that remained in a relatively undeveloped state. Those assets were likely to take some time and considerable expense to provide a return. If PWC was placed on notice that PVL's valuations were questionable, it may be at risk of liability in some form for not drawing attention to this issue in its audit opinion.

[54] Similarly, it is clear from the material I have seen that Mr Henderson was a very influential, if not dominant, figure within the PVL group. As I discuss later in this judgment,[20] it appears that Mr Henderson and his companies owed PVL approximately $7.5 million by early 2008. If that is the case, logic suggests that PVL's auditors ought to have scrutinised the arrangements that led to this indebtedness with particular care. The robustness of internal controls to deal with such issues would also have been an area of scrutiny. My impression is that this is another area of risk for PWC, although it could only form a very small part of the overall claim for $302 million.

[55] Other than in respect of the two areas I have identified, however, I regard the merits of the claims against PWC as being largely a neutral factor for present purposes.

The claims against the directors

[56] The claims against the directors are not as detailed as those relating to PWC. They can be summarised as follows:

(a) The directors permitted PVL to continue to trade notwithstanding their knowledge of factors suggesting it was insolvent.

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[20] At [70].

(b) The remaining directors permitted Mr Henderson to use PVL to serve his own interests.

(c) The remaining directors were complicit in Mr Henderson's activities to the detriment of the group as a whole.

Trading whilst insolvent

[57] In support of the argument based on alleged insolvency Mr Smith took me to several documents suggesting that PVL was encountering liquidity issues throughout 2006. There are real dangers, however, in placing too much weight on individual documents such as those to which I have just referred. In order to properly assess the weight to be given to such material it is necessary to understand the wider context in which it came to be created. In particular, it is necessary to understand the purpose for which such material was created, as well as the events that occurred both before and after it came into existence.

[58] As in the case of PWC, the evidence is so incomplete that it would be inappropriate for me to attempt to gain any impression regarding the strength of this aspect of the plaintiffs' claim.

Permitting Mr Henderson to use PVL to serve his own interests and being complicit in Mr Henderson's activities

[59] The allegation that the remaining directors permitted Mr Henderson to use PVL to serve his own interests is based at least to some extent on references in Board Minutes and memoranda written by individual directors. Some of these suggest that the directors were concerned that their ability to carry out their functions was being compromised by Mr Henderson's stature and influence within the group.

[60] With two exceptions, however, these documents do not assist the plaintiffs greatly in the present context. The two exceptions are a file note created by Mr Forbes on 17 December 2007 and a memorandum that Mr Henderson sent to Mr Forbes and Mr Johnston on 25 February 2008. Taken together, these show that Mr Hansen, Mr Forbes and Mr Johnston all held concerns by February 2008 regarding

PVL's exposure to Mr Henderson's companies and businesses. They were also concerned at the amount of time Mr Henderson was spending on his own projects rather than those relating to PVL. Secondly, it shows they were aware of some recent transactions that might be regarded as unconventional. Thirdly, the fact that overseas note holders were unlikely to be paid before January 2008 gave rise to concerns regarding certificates as to solvency that PVL had given in relation to borrowings. Fourthly, it shows that these three directors were aware that the finance environment had changed markedly in the last six months and that this was likely to have significant ramifications for PVL, particularly in relation to the Queenstown project. Fifthly, it shows that there were rumours in the market place by this stage that PVL was in some difficulty. Finally, the penultimate paragraph of Mr Forbes' file note demonstrates his appreciation of the need for care when discussing sensitive topics such as these with Mr Henderson.

[61] I accept that the issues raised in these two documents need to be balanced against the fact the documents were created relatively late in the piece. By that stage PVL was committed to the Queenstown project but it had apparently not progressed very far in practical terms. The effects of the global financial crisis were also obviously beginning to be felt. The issue at trial will be whether and to what extent the directors ought to have acted differently during the years and months leading up to and following December 2007.

The positions of individual defendants

[62] Thus far I have considered the claims against the directors largely on the basis that they apply equally to all directors. It is now necessary to consider briefly the position of individual directors.

[63] Mr Forbes was the Chairman of the Board between October 2004 and October 2008. As such he could be expected to be aware of all material issues affecting PVL and its financial wellbeing. He was certainly in a position to keep abreast of PVL's financial position and factors that might affect it adversely. Furthermore, he clearly knew Mr Henderson well and would have been aware of Mr Henderson's strengths and weaknesses. As an experienced barrister he would

obviously have been well aware of the need for the directors to ensure that PVL entered into financial transactions with Mr Henderson and his companies on an arms length basis. He would also have been cognisant of the fact that issues that threatened PVL's solvency would need to be addressed as a matter of urgency. The memorandum that he created on 17 December 2007 confirms all of these things.

[64] Mr Hansen and Mr Johnston appear to have been in a similar position to Mr Forbes. Mr Hansen was a director of PVL between November 1997 and April 2008 whilst Mr Johnston became a director in April 2004 and resigned in October 2008. They were obviously fully abreast of events that were occurring in late 2007 and early 2008. It is reasonable to assume they would have been similarly placed from the point at which they became directors.

[65] For present purposes the position is different so far as Mr Henderson is concerned because, as I understand the current position, the plaintiffs do not seek damages against him for breaches of his duty as a director. The plaintiffs' stance in this regard is no doubt dictated by the fact that Mr Henderson was adjudicated bankrupt in November 2010. Rather, the plaintiffs seek only a banning order against Mr Henderson under s 383 of the Companies Act 1993. I therefore deal with his position later in this judgment.[21]

[66] The fifth defendant, Dr de Roos, lives in the United States. He does not appear to have attended many Board meetings for that reason. The plaintiffs' case against Dr de Roos is no doubt based on an allegation that he ought to have played a greater role in the management of PVL's affairs, and that he breached his duty to the company in failing to do so.

[67] The sixth defendant, Mr Godden, was a manager employed by PVL between 2006 and 2009. For at least part of that time he was the company's business development manager. He was also an alternate director of PVL, but the evidence suggests he was only required to act as a director on a limited number of occasions. The current version of the statement of claim also alleges Mr Godden was a director

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[21] At [97]-[101].

of other companies that held shares in PVL. He was also a director of Five Mile Holdings Ltd, the company responsible for undertaking the Queenstown project.

Conclusion

[68] For reasons I have already outlined, I am not prepared at this stage to express any view regarding the strength of the plaintiffs' claims against the director defendants based on allegations that they permitted the PVL group to trade whilst insolvent. The evidence on that issue is so incomplete that it would be inappropriate to do so. Those claims are also likely to raise very complex questions of causation and quantum. I therefore regard the merits of those claims as being a neutral factor for present purposes.

[69] As a matter of general impression, however, the plaintiffs may be on stronger ground in respect of the claims based on PVL's exposure to borrowings and other forms of liability on the part of Mr Henderson and his companies. These would always have been areas of risk for PVL, and the directors ought to have been well aware of them from the outset. The directors therefore needed to ensure that PVL dealt with Mr Henderson and his companies on a strictly arms length basis. If they did not, the plaintiffs' claims may have some strength. In saying that, however, I am conscious that I do not have the benefit of evidence from the directors regarding this particular issue.

[70] That aspect of the plaintiffs' claim may not, however, be particularly significant viewed against the total amount claimed. If Mr Godden's memorandum dated 25 February 2008 is correct, Mr Henderson's companies owed PVL the sum of approximately $7.5 million as at that date. Assuming that those debts remain outstanding, interest will have continued to accrue over the last nine years. In that event the debt is now likely to be well in excess of $10 million but well short of the plaintiffs' current claim for $302 million.

Conclusion

[71] I propose to exercise my discretion on the basis that the existence of a litigation funder is a very significant factor that influences the exercise of the

discretion in favour of making a substantial order for security. The merits of the claims against the defendants are largely neutral in this context, although I propose to make a small adjustment to reflect the areas in respect of which I have gained an impression that the plaintiffs' claims may have some strength.

[72] Before turning to consider the extent to which I should order security to be provided, it is appropriate to consider the offers the plaintiffs have made.

The offers made by the plaintiffs

[73] The plaintiffs have put forward two offers in an effort to meet the defendants' concerns regarding security. First, they have offered each of the director defendants other than Mr Henderson, and jointly in the case of Messrs Johnston and Godden, the sum of $150,000 to be secured by way of bank guarantee. I consider that offer to be manifestly inadequate given the complexity of the case and the likely duration of the trial.

[74] The plaintiffs have offered to provide security in the sum of $475,000 in respect of PWC's costs. That sum is obviously much closer to what would be acceptable in the context of this case.

[75] The second offer is contained in an affidavit that the plaintiffs filed on the morning of the hearing. The affidavit was sworn by Mr Jonathan Woodhams, the Executive Director of LPF Group Ltd. SPF is a wholly owned subsidiary of that company.

[76] Mr Woodhams deposes that LPF is privately owned, and is the largest locally based litigation funder in the New Zealand market. He describes LPF as "a business collaboration between successful New Zealand business and legal people". He does not, however, disclose who those persons are. Mr Woodhams then goes on to say:

> …
>
> (b) LPF invests in a growing and balanced portfolio of litigation funding cases, principally in New Zealand. These investments are in a variety of areas including insolvency related matters, construction litigation and commercial litigation. LPF provides funding to

plaintiffs to enable worthy cases to be brought with appropriate litigation funding resources and expertise.

(c) I consider the prior conduct of litigation and funding matters in New Zealand by LPF and its relevant subsidiaries demonstrates an exemplary history of appropriate conduct by a litigation funder.

(d) LPF, which is SPF No. 10 Limited's parent, is prepared to give and will give a parent company guarantee to discharge any liability with SPF may have in costs to the defendants:

(i) either directly as a funder liable as a third party for costs against the funded plaintiffs as parties; or

(ii) indirectly as a funder liable to indemnify the plaintiffs for adverse costs, the proceedings of the discharge of that indemnity being payable by the plaintiffs to discharge their own liability.

(e) I can also confirm that LPF has more than sufficient net assets and has access to funding more than sufficient to meet any likely costs order against the plaintiffs and to meet any adverse award of costs.

[77] The guarantee proposed by Mr Woodhams is obviously a simpler solution for the Court and plaintiffs than a requirement that security be provided in some other form. It would not require the Court to quantify the amount for which security is to be provided because the guarantee would relate to all costs ultimately awarded to the defendants by the Court. In addition, it would not require the litigation funder to find the necessary cash or bank guarantee to provide any security that might be ordered.

[78] I consider, however, that the proposal has several inherent difficulties. First, Mr Woodhams has not provided a great deal of information about LPF's ability to satisfy any guarantee that it might provide. He has not given any details of LPF's current and likely future financial position. In particular, he has not provided details of any litigation that LPF is currently funding. Each such investment brings with it the risk of an adverse award of costs. The outcome in *Houghton v Saunders* is a salutary reminder of the financial hazards of this particular form of investment. Furthermore, Mr Woodhams has not provided details of cases that LPF has funded to date. That information would assist in assessing the weight to be given to his assertion that LPF would not default on its obligations under the guarantee because of the damage that would do to its reputation in the litigation funding marketplace.

[79] In addition, the defendants would be required to enforce any claims they might have under the guarantee in the event that they succeed at trial. Security for costs avoids the need for this because the amount for which the security is given can be apportioned and distributed by the Court without the need for further enforcement procedures.

[80] For those reasons I have concluded that the offer of the guarantee does not provide an acceptable solution in the present case.

What level of security should the plaintiffs be required to provide?

The defendants other than Mr Henderson

[81] As at the date of the hearing the plaintiffs had not provided the initial security they had agreed to provide to Mr Johnston and Mr Godden. The plaintiffs have not provided any explanation for this omission, and Mr Smith advised me during his oral submissions that the security would be provided forthwith. I therefore anticipate that the security has now been provided. If it has not, the proceeding will be stayed against those defendants unless the outstanding security is provided within seven days of the date of delivery of this judgment.

[82] Before determining the level of security I propose to make some observations regarding the estimates of likely costs that counsel have made. I use Mr Hughes-Johnson's schedule as a reference point in this context.[22]

[83] First, I accept that all defendants should be entitled to separate representation even though some of the issues will be common to all. These are likely to include the issues of causation and remoteness. Each defendant is in a sufficiently distinct position to warrant separate representation. Having said that, I acknowledge that Mr Johnston and Mr Godden intend to have the same counsel represent them. This produces a degree of cost saving but I accept that the defences for each will be different.

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[22] See Appendix A.

[84] I also consider it is unrealistic at this stage for the plaintiffs to suggest, as Mr Smith did in his written submissions, that there will be large periods during the trial when individual defendants will not need to have their counsel present. That is conjecture at this stage. I proceed on the basis that each defendant is entitled to be represented by counsel on each day of the trial.

[85] I do not, however, consider that senior counsel for any defendant will be required to attend on every day of the trial. There are likely to be many days on which the evidence will not be of sufficient relevance to an individual defendant to justify the presence of senior counsel. I very much doubt that senior counsel will be required for more than 40 days of the trial. This reduces the likely scale costs for those defendants who have instructed senior counsel by $66,000.

[86] Thirdly, the plaintiffs will assume primary responsibility for preparation of the trial bundle, lists of issues and bundles of authorities. The defendants will obviously have input into that process, but I consider it unlikely that counsel for the defendants will require eight days for this purpose. I consider it should be able to be completed within five days. This should reduce the likely costs by the further sum of approximately $10,000. It follows that I consider costs awarded on a Category 3C basis with appropriate increases for preparation of submissions and briefs of evidence are likely to be in the region of $490,000 for those defendants who are represented by senior counsel. This does not include an allowance for the costs incurred in calling expert witnesses.

[87] Fourthly, I consider that the current estimates of counsel for the second and fourth defendants are likely to be unrealistic because they significantly underestimate the likely cost of preparing briefs of evidence and submissions.

[88] Fifthly, I accept Mr Smith's submission that the defendants can be expected to co-operate regarding the instruction and briefing of experts. Present indications are, however, that this will occur. Counsel for Mr Forbes appears to be taking the lead in this regard, with up to three expert witnesses possibly to be called on his client's behalf. Counsel for Mr Hansen has indicated he may be calling one expert

whilst counsel for Messrs Hansen, Godden and de Roos do not propose to instruct experts. They propose to rely instead on experts called by the other defendants.

[89] I place PWC in a separate category in terms of expert witnesses because, contrary to submissions made by Mr Smith, I consider the issues it will be required to respond to are likely to be significantly different from those affecting the remaining defendants.

[90] Finally, I consider that it is appropriate to make a global order rather than to order separate security in respect of individual defendants. Dobson J adopted a slightly different approach in *Houghton v Saunders.* He directed that the plaintiffs were to provide security in the total sum of $2 million but he allocated a percentage of that sum to each group of defendants.[23]

[91] I consider a global order to be more appropriate than individual orders because it provides the Court with greater flexibility if and when it is required to allocate the disbursement of secured funds to successful defendants. With a global order there is no guarantee that secured funds will ultimately be distributed to successful defendants in any particular proportion. The calculations I have made when fixing the level of security are relevant only to ensure that sufficient security is available in the event that all defendants are successful at trial. Furthermore, the fact that the Court has the ability to adjust the ultimate disbursement of secured funds will enable it to provide recognition to successful defendants who have conducted their cases in a cost effective and economic manner.

[92] In other respects I intend to adopt a similar approach to that taken in *Houghton v Saunders.* When Dobson J fixed security in that case, he observed that security for a funded claimant "should tend towards relatively full security".[24] Notwithstanding His Honour's aspirations, it ultimately transpired that the amount for which security was ordered was one-third less than the costs ultimately awarded to the successful defendants following trial.[25]

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23 *Houghton v Saunders*, above n 13, at [129].
24 At [125].
25 *Houghton v Saunders* [2015] NZHC 548

[93] Based on my impression thus far, I consider the present case is likely to raise issues that are at least as complex as those raised in *Houghton v Saunders*. Bearing in mind the lesson to be learned from that case, I propose to endeavour to ensure that the amount for which security is provided is reasonably close to the amount that would be payable in the event that a defendant succeeds at trial.

[94] Making a modest allowance for the likely merits I have identified, I consider a global order of costs in the sum of $2.180 million to be appropriate. Although I do not apportion that sum between the defendants, I record that I have calculated it by allowing the sum of $460,000 for the first, third and seventh defendants. All of those defendants will be represented by senior counsel at the trial. I have allowed the sums of $250,000 each for the second and sixth defendants and $300,000 for the fifth defendant. These are based on the cost estimates provided by their counsel at the hearing as adjusted to reflect my impression of the merits and the other factors I have identified in relation to the second and sixth defendants.

[95] Given that this is a global order and there is obvious uncertainty about the length of the trial and the actual costs that may be awarded, the plaintiffs should not expect that settlement or discontinuance against one or more defendants will necessarily result in any reduction or refund of the security that has been ordered.

[96] So far as experts are concerned, I propose to make a global order requiring the plaintiffs to provide security in the sum of $450,000. This is calculated on the basis of $50,000 per expert.

Mr Henderson

[97] Mr Henderson is in a different position because of the limited nature of the claim that he faces.

[98] During the hearing Mr Lester advised me that he believed the claim against Mr Henderson alone will require four weeks of evidence. I find that difficult to accept because Mr Henderson has already been the subject of a very lengthy public examination conducted before an Associate Judge. Counsel ought to be able to reach agreement regarding the manner in which that evidence can be placed before the

Court. The plaintiffs should be able to rely largely on that evidence together with the other evidence they propose to adduce at trial in relation to the remaining defendants. They should not need to place a great deal of other evidence before the Court in relation to the claim against Mr Henderson.

[99] Mr Lester advised me that Mr Henderson may call up to 20 witnesses in his defence. That may be so, but I would anticipate most of these would be relatively brief. If not, a means will need to be found to ensure that counsel for the remaining defendants are not required to be present during this aspect of the case. One possibility would be to hear the evidence for Mr Henderson after the remaining defendants have concluded their cases and whilst counsel for those parties are preparing their closing submissions. That will be an issue for the trial Judge to determine.

[100] At present it is not possible for me to meaningfully assess the strength of the plaintiffs' case in relation to the banning order that they seek against Mr Henderson. It is clear from what I have seen thus far, however, that he was a central figure throughout PVL's existence. It follows that, if culpability is shown to exist in relation to PVL's demise, it is likely that at least some of that will be sheeted home to Mr Henderson. Whether it is ultimately sufficient to justify the order that the plaintiffs seek can only be determined at trial.

[101] I acknowledge that the plaintiffs advance this aspect of their claim on the basis that it is in the interests of the commercial community that the order be made. For that reason I do not consider a significant order for security is appropriate. Furthermore, Mr Henderson and his counsel require an incentive to ensure they present their case in the most efficient way possible. I therefore require the plaintiffs to provide security for Mr Henderson's costs in the sum of $150,000.

When should the plaintiffs be required to provide security?

[102] I accept that the plaintiffs will require a short period of time to make the necessary arrangements to provide the security I propose to order. They must have anticipated, however, the possibility that they would be required to provide security in a reasonably significant sum. The plaintiffs are therefore to provide security in the

sum of $1.5 million no later than 31 July 2017. They are to provide the balance no later than 15 October 2017. It will be for the plaintiffs to reach agreement with the Registrar regarding the form of the security to be provided. Should any issue arise in relation to this I will reserve leave to the parties and the Registrar to seek further directions from me.

Should the proceeding be stayed pending provision of security?

[103] I did not take any counsel to suggest that the proceeding should be stayed at this point. Timetable orders are currently in place for the service of briefs of evidence, and a stay would interfere with that process. A stay at this stage would be problematic because all parties are anxious to maintain the current trial date.

[104] For that reason I make no order staying the proceeding at this stage. The defendants will have leave to file memoranda in relation to that issue if the plaintiffs fail to comply with any of the orders that the Court now makes.

Orders

[105] I now direct:

(a) The plaintiffs are required to provide security for the costs and expert witness expenses of the defendants other than Mr Henderson in the global sum of $2,630,000.

(b) The plaintiffs are required to provide security for Mr Henderson's costs in the sum of $150,000.

(c) Security in the sum of $1.5 million is to be provided to the satisfaction of the Registrar no later than 31 July 2017.

(d) The balance of the security is to be provided no later than 15 October 2017.

(e) I reserve leave to the plaintiffs to file memoranda seeking further directions in the event that they are unable to reach agreement with the Registrar regarding the form of security to be provided.

(f) I reserve leave to the defendants to seek further directions, including a stay of the proceeding, in the event that the plaintiffs fail to provide security as directed.

Costs

[106] If the parties cannot reach agreement regarding costs I will receive concise memoranda from any party seeking costs provided they are filed and served within 21 days of the date of this judgment. I will then give further directions for the filing and service of memoranda in response and reply.

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Lang J

APPENDIX A

HIGH COURT RULES COSTS SCHEDULE

Scale of Costs on 3C basis (for trial preparation and appearance)

Step	Description	Days band C
9	Pleading in response to amended pleading yet to be filed	2
11	Filing memoranda for case management conference (assume 3)	2 x 0.4 (band B) = 0.8
13	Appearance at case management conferences (assume 2)	2 x 0.3 (band B) = 0.6
14	Preparation for and appearance at issues conference (assume 1)	1
15	Preparation for and appearance at pre-trial conference (assume 2)	2
24	Preparation of written submissions (assume 2) (opening and closing)	20
30	Defendant's preparation of briefs (first defendant and estimate of 3 experts)	30
32	Defendant's preparation of list of issues, authorities, and common bundle	8
33	Preparation for hearing	20
34	Appearance at hearing for principal counsel	60
35	Second appearance at hearing for second counsel	30
	Total days to end of trial:	174.4
Total	**Base calculation Category 3C costs – 174.4 days at $3,300 per day**	$575,520