

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : HUNTINGDALE VILLAGE PTY LTD (RECEIVERS
AND MANAGERS APPOINTED) ATF
HUNTINGDALE VILLAGE UNIT TRUST -v-
PERPETUAL NOMINEES LTD
[No 2] [2014] WASC 217

CORAM : LE MIERE J

HEARD : 21 & 23 MAY 2014

DELIVERED : 2 JULY 2014

FILE NO/S : COR 223 of 2009

BETWEEN : HUNTINGDALE VILLAGE PTY LTD (RECEIVERS
AND MANAGERS APPOINTED) ATF
HUNTINGDALE VILLAGE UNIT TRUST
First Plaintiff

SILKCHIME PTY LTD (RECEIVER AND
MANAGERS APPOINTED) ATF SILKCHIME UNIT
TRUST
Second Plaintiff

VANNIN PTY LTD (RECEIVER AND MANAGERS
APPOINTED) ATF HAY FAMILY TRUST
Third Plaintiff

WARWICK ENTERTAINMENT CENTRE PTY LTD
(RECEIVER AND MANAGERS APPOINTED) ATF
WARWICK ENTERTAINMENT UNIT TRUST
Fourth Plaintiff

PARAGON APARTMENTS LTD (RECEIVERS
AND MANAGERS APPOINTED)
Fifth Plaintiff

AND

PERPETUAL NOMINEES LTD
First Defendant

MARK ANTHONY KORDA
Second Defendant

DAVID JOHN WINTERBOTTOM
Third Defendant

WESTPOINT CORPORATION PTY LTD (IN LIQ)
Fourth Defendant

OREN ZOHAR
Fifth Defendant

Catchwords:

Application for security for costs - Appears by credible testimony that plaintiffs will be unable to meet adverse costs orders - Exercise of discretion - Nature of proceeding - No undue delay - Performance of Receivers' functions - Cause of plaintiffs' impecuniosity - Application is not oppressive - Application is not defensive - Receivers have indemnity - Balance of considerations favours order for security for costs

Security for costs - Quantum of costs - Plaintiffs should give security up to close of pleadings

Legislation:

Australian Securities and Investments Commission Act 2001 (Cth), s 12GD, s 12GF

Corporations Act 2001 (Cth), s 423, s 424, s 434, s 1317H, s 1324

Legal Practitioners (Supreme Court) (Contentious Business) Costs Determination 2012

Legal Profession Act 2008 (WA), s 280(2)

Rules of the Supreme Court 1971 (WA), O 25

Result:

Application granted

Category: B

Representation:

Counsel:

First Plaintiff	:	Mr A Metaxas
Second Plaintiff	:	Mr A Metaxas
Third Plaintiff	:	Mr A Metaxas
Fourth Plaintiff	:	Mr A Metaxas
Fifth Plaintiff	:	Mr A Metaxas
First Defendant	:	No appearance
Second Defendant	:	Mr C L Zelestis QC & Mr M J Feutrill
Third Defendant	:	Mr C L Zelestis QC & Mr M J Feutrill
Fourth Defendant	:	No appearance
Fifth Defendant	:	Mr C L Zelestis QC & Mr M J Feutrill

Solicitors:

First Plaintiff	:	Metaxas & Hager
Second Plaintiff	:	Metaxas & Hager
Third Plaintiff	:	Metaxas & Hager
Fourth Plaintiff	:	Metaxas & Hager
Fifth Plaintiff	:	Metaxas & Hager
First Defendant	:	No appearance
Second Defendant	:	King & Wood Mallesons
Third Defendant	:	King & Wood Mallesons
Fourth Defendant	:	No appearance
Fifth Defendant	:	King & Wood Mallesons

Case(s) referred to in judgment(s):

Carey v Korda & Winterbottom [2010] WASC 362
Carey v Korda & Winterbottom [No 2] [2011] WASC 220
Carey v Korda [2012] WASCA 228
Carey v Korda [2012] WASCA 228 (S)

Emanuel Management Pty Ltd (in liq) v Fosters Brewing Group Ltd [2003]
QCA 552

Huntingdale Village Pty Ltd (Receivers and Managers Appointed) ATF
Huntingdale Village Unit Trust v Perpetual Nominees Ltd [2013] WASC
352

Living Spring Pty Ltd v Kliger Partners [2008] 20 VR 377

Oswal v Carson [2012] FCA 341

Unified Pty Ltd v The Cancer Council of Western Australia Inc [2010] WASC
55

Western Areas Exploration Pty Ltd v Streeter [No 2] [2008] WASC 217

Willey v Synan (1935) 54 CLR 175

- 1 **LE MIERE J:** The second, third and fifth defendants, who I will refer to as the Receivers, are the receivers and managers of each of the plaintiff companies. The Receivers have applied for security for their costs of this proceeding. It is convenient to start by identifying the plaintiff companies and the receiverships which give rise to this proceeding.

The Westpoint Group

- 2 Norman Carey is the founder of the Westpoint Group of companies which include the first plaintiffs, Huntingdale Village Pty Ltd, Silkchime Pty Ltd, Vannin Pty Ltd, Warwick Entertainment Centre Pty Ltd and Paragon Apartments Ltd and the fourth defendant, Westpoint Corporation Pty Ltd. Mr Carey is a director of each of the plaintiff companies.

- 3 In September 2005 the first defendant, Perpetual Nominees Ltd as custodian of the ING Mortgage Pool for ING Funds Management Ltd as the Responsible Entity of the ING Mortgage Pool as lender (Lender), and Westpoint Corporation and the plaintiffs, other than Paragon, as borrower (Borrower) entered into a loan agreement (Loan Agreement). At the same time Perpetual Nominees as lender and Mr Carey and companies in the Westpoint Group as guarantor entered into a guarantee and indemnity (Guarantee) by which the guarantor guaranteed to the Lender the payment to it by the Borrower under the Loan Agreement of the Guaranteed Money, that is all money and damages which the Borrower is liable to pay to the Lender. By way of materially identical instruments of fixed and floating charge (Charge Instruments), each of the Borrowers and each of the corporate guarantors granted a fixed and floating charge in favour of Perpetual Nominees over the whole of their assets and undertaking or, in the case of Silkchime, specific assets, to secure the borrowings under the Loan Agreement.

- 4 Each of the plaintiff companies committed an act of default and on 24 January 2006, acting pursuant to the Charge Instruments, Perpetual Nominees appointed the Receivers as receivers and managers of the chargors, including each of the plaintiff companies. Since 24 January 2006, acting pursuant to the Charge Instruments the Receivers have realised assets and caused the chargors to repay amounts due to Perpetual Nominees. Westpoint Corporation is and has been since 2006 in liquidation.

- 5 This is one of a number of proceedings in this court which arise out of, or are related to, the financial collapse of the Westpoint Group of companies and the appointment of the Receivers as receivers and managers of companies in the group. On 4 September 2009 the plaintiffs

commenced proceedings in the Federal Court against Perpetual Nominees, the Receivers and Westpoint Corporation (in liq) in respect of the conduct of the receiverships by the Receivers. The originating process in the Federal Court stated that the application is principally a complaint about receivers made under s 423, s 434, s 1317H and s 1324 of the *Corporations Act 2001* (Cth) and s 12GD and s 12F of the *Australian Securities and Investments Commission Act 2001* (Cth). Subsequently the Federal Court ordered that the proceeding be transferred to this court and is now this proceeding.

6 On 2 December 2009 with the consent of the parties I ordered that the plaintiffs should file a statement of claim and the defendants should file a defence. The plaintiffs subsequently filed a statement of claim and an amended statement of claim. The defendants filed a defence. In December 2010 the defendants applied to disallow amendments to a large number of the paragraphs of the plaintiffs' re-amended statement of claim. No substantial step was taken in the proceeding between December 2010 until August 2013 whilst the parties litigated COR 147 of 2010 in this court.

COR 147 of 2010

7 On 30 August 2010 Mr Carey commenced proceedings in this court (COR 147 of 2010) against the Receivers and Perpetual Nominees in which he claimed relief relating to the inspection and copying of financial records relating to the Westpoint companies. I ordered that a number of issues be tried separately and heard and determined those issues: *Carey v Korda & Winterbottom* [2010] WASC 362 (*Carey No 1*). I subsequently ordered that the Receivers claim of legal professional privilege be referred to another judge for determination. Edelman J heard and determined the privilege argument: *Carey v Korda & Winterbottom [No 2]* [2011] WASC 220. An appeal to the Court of Appeal was allowed in part on 15 November 2012: *Carey v Korda* [2012] WASCA 228. The Court of Appeal delivered supplementary reasons and made orders on 6 February 2013: *Carey v Korda* [2012] WASCA 228 (S).

This action proceeds

8 The Receivers then sought to proceed with this proceeding. That was resisted by the plaintiffs. I determined that the Receivers' application to disallow amendments to the re-amended statement of claim should proceed and heard that application on 28 August 2013. On 26 September 2013 I delivered reasons for decision that a substantial number of paragraphs of the re-amended statement of claim should be struck out:

Huntingdale Village Pty Ltd (Receivers and Managers Appointed) ATF Huntingdale Village Unit Trust v Perpetual Nominees Ltd [2013] WASC 352. The plaintiffs have subsequently filed a further amended statement of claim pursuant to leave.

- 9 On 20 December 2010 the Receivers filed and served their application for security for costs. The application did not proceed until COR 147 of 2010 had been resolved and the disallowance application in this proceeding determined.

Test for security for costs

- 10 *Corporations Act 2001* (Cth) s 1335(1) provides that:

Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

The threshold requirement is that it appears by credible testimony that there is reason to believe that the plaintiffs will be unable to pay the costs of the Receivers if the Receivers are successful. The court also has power to order security for costs under O 25 of the *Rules of the Supreme Court 1971* (WA) and the court's inherent jurisdiction.

- 11 The defendant is not required to prove that the plaintiff would not be able to meet a costs order. A risk assessment is required, which involves a practical, common sense approach to the examination of the corporation's financial affairs: ***Living Spring Pty Ltd v Kliger Partners*** [2008] 20 VR 377, 382; ***Western Areas Exploration Pty Ltd v Streeter [No 2]*** [2008] WASC 217 [36].

Threshold met

- 12 The Receivers submit, and I accept, that there is a rational basis for the belief that the plaintiffs will not be able to meet adverse costs orders because of the following matters:

- (a) all of the assets of the plaintiffs, save for some assets of Silkchime, are under the control of the Receivers. Huntingdale, Vannin, Warwick Entertainment Centre and Paragon do not currently have control of any assets;

- (b) in addition to the secured debt owed to ING, each of Huntingdale, Vannin, Warwick Entertainment Centre and Paragon owes substantial debts to other creditors;
- (c) apart from the judgment debt owed to Warwick Entertainment Centre by Silkchime, the only other assets of Huntingdale, Vannin, Warwick Entertainment Centre and Paragon are assets of Warwick Entertainment Centre and Vannin which consist of claims against entities within the Westpoint Group of companies and units in Warwick Cinema Syndicate Trust. Those assets are subject to ING's security and remain under the control of the Receivers; and
- (d) those assets of Silkchime that are not under the control of Receivers are insufficient to satisfy the judgment debt it owes Warwick Entertainment Centre and the claims of other unsecured creditors.

Whilst not formally conceding that there was reason to believe that they would not be able to meet adverse cost orders, the plaintiffs did not mount any case that they are likely to be able to meet such costs. I find that it appears by credible testimony that there is reason to believe that the plaintiffs will be unable to pay the costs of the Receivers if successful in their defence.

Exercise of discretion

- 13 Once the power to order security for costs is enlivened, the court must consider whether it is appropriate to exercise its power in the circumstances. The court's discretion is unfettered. It must be exercised with a view to determining the justice of the matter. The court must strike a balance between ensuring adequate and fair protection to the defendants and avoiding injustice to an impecunious plaintiff by unnecessarily shutting it out of proceedings. Where jurisdiction to award security is made out, ie where the court is satisfied that there is reason to believe that the plaintiff will be unable to pay the defendant's costs if its action is ultimately unsuccessful, this in itself provides a substantial factor in the exercise of discretion in favour of the applicant: *Unified Pty Ltd v The Cancer Council of Western Australia Inc* [2010] WASC 55 [6] (Murphy J) and the cases there cited.

Discretionary factors

- 14 The plaintiffs say that it is inappropriate to order security for costs for three broad reasons. The first reason is that the proceeding is an

application for the court to order, pursuant to the *Corporations Act* s 423, an inquiry into the conduct of the receivers. The second reason is that the Receivers have delayed in prosecuting their application for security for costs. The third reason is that the plaintiffs have adduced evidence that the Receivers have not faithfully performed their functions as receivers. Fourthly, the plaintiffs' impecuniosity was caused by the Receivers' conduct. Fifthly, the Receivers' application is oppressive. Sixthly, the plaintiffs' application is essentially defensive. Seventhly, the Receivers have an indemnity from ING and they should wait until it is determined if the indemnity is enforceable. I will consider each of these matters in turn.

Nature of proceeding

15 The first matter relied on by the plaintiffs is the nature of a proceeding under the *Corporations Act* s 423. The plaintiffs submit that their application is of a special kind, it seeks no more than that the court conduct an inquiry. By accepting appointment as a receiver, a person assumes obligations and should know that his conduct may be the subject of an application to a court some time. This accountability mechanism would be rendered illusory if the receiver could insist on security for his costs.

16 A similar argument was mounted before Siopis J in *Oswal v Carson* [2012] FCA 341. Siopis J held that there was substance in the contention that there is a public interest element to *Corporations Act* s 423 but it does not follow that the court should not order the unsuccessful party to pay the costs of an application for an inquiry. I agree. In my view the nature of an application pursuant to s 423 of the *Corporations Act* is not of itself a factor against ordering security for costs.

Delay

17 The plaintiffs submit, and I accept, that an application for security for costs should be made promptly and a failure to do so is a factor against ordering security for costs. There are two relevant periods of delay. First, the application for security for costs was filed on 20 December 2010, which was about 15 months after the proceeding was commenced. Secondly, the Receivers did not press the application to a hearing until May 2014, a period of more than three years.

18 I find there was no undue delay by the Receivers in informing the plaintiffs that they required security for their costs. I have set out earlier in these reasons that the proceeding was commenced in September 2009 in the Federal Court and the Receivers did not inform the plaintiffs that

they required security for their costs until 4 August 2010. That delay must be viewed in the context of this proceeding and other related proceedings.

19 Between January and March 2010 there were communications between the plaintiffs' solicitors and the Receivers' solicitors, Corrs Chambers Westgarth (Corrs), concerning the Receivers applying to strike out the statement of claim and the plaintiffs amending their statement of claim. On 30 March 2010 Corrs informed the plaintiffs' solicitors that in their view there was no utility in progressing this action until I had delivered judgment in COR 173 of 2009. In that proceeding the Receivers applied under s 424 of the *Corporations Act* for directions in relation to matters arising in connection with the performance or exercise of their functions and powers as receivers and declarations. Amongst other things, the Receivers sought a direction that they were not obliged to retire as receivers at a time when the principal amount which was borrowed, and interest on that principal amount, had been repaid to ING but there was litigation threatened against the Receivers and ING in respect of the Receivers' conduct of the receiverships and the costs and fees charged by the Receivers. The threatened proceedings included this current proceeding. The plaintiffs did not press for this action to proceed or take any steps in the proceeding until filing a re-amended statement of claim on 24 August 2010. That was after the Receivers, on 4 August 2010, had requested that the plaintiffs make arrangement for security for costs to be provided to the Receivers.

20 Little had been done to progress the action before 4 August 2010. There is no evidence of the costs incurred by the plaintiffs between November 2009 and August 2010 and no evidence that, or from which it can be inferred, that the plaintiffs would not have proceeded with this action if the Receivers had made demand for security for their costs before 4 August 2010.

21 The application for security for costs was not filed until December 2010. There was nothing about the Receivers' conduct between August and December 2010 that could reasonably have led the plaintiffs to believe that the Receivers were not pressing their demand for security for costs. To the contrary, the Receivers' solicitors confirmed during that period that they pressed their demand for security for costs. In those circumstances, there was no undue delay by the Receivers in filing their application for security for costs nor any unfairness to the plaintiffs in ordering them to make security for costs notwithstanding that the application was not filed until December 2010.

22 The Receivers' application having been filed on 20 December 2010, it was not heard until May 2014. That is explained by the fact that no substantive steps were taken in this proceeding until the disallowance application was heard on 28 August 2013. As I have said, Mr Carey commenced COR 147 of 2010 on 30 August 2010. That matter was case managed together with this proceeding. The plaintiffs submitted that the disallowance application in this action should not be heard until COR 147 of 2010 had been resolved because the documents which Mr Carey expected to gain access to in that proceeding, and make available to the plaintiffs for the purposes of this proceeding, would enable the plaintiffs to more fully or properly plead their case. I acceded to that submission until directing that the disallowance application be heard on 28 August 2013. Between December 2010 and August 2013 the proceeding was, in effect, stayed pending the resolution of COR 147 of 2010. After I delivered judgment on the disallowance application on 26 September 2013 I deferred making orders at the request of the plaintiffs. Orders were not made until 22 October 2013 at which time I ordered that the plaintiffs file and serve any further re-amended statement of claim by 25 November 2013. Subsequently the Receivers' applications for costs of the disallowance application and that the plaintiffs give security for the Receivers' costs of the action were directed to be heard. Those applications were not able to be heard until 21 May 2014.

23 There was nothing about the conduct of the Receivers between December 2010 and the hearing of the security for costs' application which could reasonably have led the plaintiffs to believe that the Receivers did not press their application for security for costs. The delay in hearing the application occurred because, principally at the instigation of the plaintiffs, I deferred further steps being taken in this action until the resolution of COR 147 of 2010. In those circumstances there is no undue delay by the Receivers in progressing their application for security for costs and no unfairness to the plaintiffs in now ordering them to make security for the Receivers' costs.

Performance of Receivers' functions

24 The plaintiffs submit that the Receivers have offered no evidence as regards the merits of the plaintiffs' application that an inquiry should be ordered and further that the plaintiffs' evidence shows that the Receivers used the plaintiffs' assets to inappropriately pay for expenses in the course of the receivership. The Receivers deny that they have charged excessive fees or wrongly reimbursed themselves expenses. Those are not matters which I am able to, or should, determine in the course of this application

for security for costs. Those are matters to be determined at trial. For the purposes of this application I accept that the plaintiffs have raised a serious case for an enquiry but am otherwise not able to make any assessment of the relative strengths of the plaintiffs' and Receivers' cases.

Cause of plaintiffs' impecuniosity

25 The plaintiffs say that their impecuniosity was caused by the Receivers' conduct. The plaintiffs say, in effect, that if the Receivers had retired in January 2008 and if they had charged less fees and incurred less in legal costs then the plaintiffs may have had a surplus.

26 The plaintiffs' assertions depend upon a number of assumptions and unknowns. I am not satisfied that the plaintiffs have established that they would have surplus funds if it was not for wrongful conduct of the Receivers complained of in this proceeding and that that surplus would have been sufficient to meet the legal costs incurred and to be incurred in this proceeding.

Application is not oppressive

27 The plaintiffs say that the Receivers' application is oppressive and that the Receivers have sought to frustrate and delay the progress of actions against them. The plaintiffs refer in particular to the Receivers' conduct in relation to COR 173 of 2009 and COR 147 of 2010. The plaintiffs say that if an order for security for costs is now made it will stifle the genuine claims now pleaded against the Receivers.

28 Merely because ordering security for costs will frustrate the plaintiffs' right to pursue its claim because of their impecuniosity does not automatically lead to the refusal of an order, but it is a relevant factor in the exercise of the court's discretion. It is relevant for the court to consider whether or not the plaintiffs will be prevented from proceeding if security for costs is ordered. In the case of corporate plaintiffs, evidence as to the means of persons behind the company and who stand to benefit from the action if it is successful is relevant. It is also relevant whether the plaintiff has been assisted financially. In this case Mr Carey stands behind the plaintiffs. It is he who instructs the plaintiffs' solicitors on their behalf and he stands to benefit from the litigation. Mr Carey has sworn that '[t]hus far about \$1.4 million has been spent by the plaintiffs for legal costs for its solicitors primarily in this application'. It is not clear what legal costs have been incurred by the plaintiffs in this proceeding as distinct from COR 173 of 2009, COR 147 of 2010 or any other related proceeding. Mr Carey says in his affidavit of 16 May 2014:

If a substantial order for security for costs is made the plaintiffs will not proceed, without external funding from a litigation fund, because having already spent about \$1.4 million the plaintiffs could not contemplate making a significant further commitment against the Receivers who have thus far demonstrated a preparedness to engage in inappropriate behaviour to resist scrutiny as evidenced by their conduct in COR 147 of 2010 and particularly since there is no certainty that an inquiry will be ordered, and if so ordered, when it will take place.

Mr Carey does not say that he could not raise the funds to meet an order for security for costs.

- 29 The timing of the application for security is relevant. Where an applicant for security knows of the plaintiff's impecuniosity but delays in applying for security for costs, the applicant may be seen to adopt a tactical manoeuvre to encourage the plaintiff to exhaust whatever funds it has in preparing the litigation and then be met with a requirement to put up security that threatens to stifle the plaintiff's proceeding all together. However, in this case the Receivers gave notice of their demand for security for costs in August 2010 which, as I have found, did not involve any undue or unfair delay. The Receivers' application is not in all the circumstances unfair or oppressive.

Plaintiffs' application is not defensive

- 30 The plaintiffs submit that security will not be ordered against a person who is really defending itself against the defendant's prior action, even if it is nominally a plaintiff: *Willey v Synan* (1935) 54 CLR 175, 185, 187. The plaintiffs submit that the Receivers' misconduct has depleted the plaintiffs' assets and the only means by which the plaintiffs can protect their position in relation to the Receivers' prior action is to ask the court to order an inquiry which is what they have done.

- 31 In *Oswal v Carson* Siopis J held that the applicant's application for an inquiry under s 423 of the *Corporations Act* was offensive, not defensive, and security for costs should be ordered. Siopis J said:

The plaintiff in this proceeding is, in my view, engaging in an offensive proceeding. The plaintiff does seek relief in this case, and is not simply bringing matters to the attention of the Court. The plaintiff by his application seeks specific relief, namely, the Court exercised its discretion in favour of making orders for an inquiry. The fact that the plaintiff does not seek further orders to remedy any wrong which has been done to the plaintiff, or any other party, in my view, does not affect the characterisation of the proceeding as offensive.

However, in any event, even if I am wrong in the way that I have characterised the proceeding as offensive, it would be my view that a proceeding of this nature seeking, as it does, the convening of an inquiry into the conduct of the defendants, falls into a separate sui generis category of proceedings. This means that the proceeding would not be classified, in any event, as a defensive proceeding within that classification as referred to in the cases [36] - [37].

I agree with Siopis J that an application for an inquiry under s 423 of the *Corporations Act* is not defensive in nature.

Receivers have indemnity from ING

32 The plaintiffs say that the Receivers have an indemnity from ING and so they should wait until it is determined if the indemnity is enforceable. I do not accept that argument. It is no answer to an application by a defendant, who is a receiver and manager of property, that if the defendant cannot recover his costs from the plaintiff he can recover them from the secured creditor who appointed him as receiver.

Security for costs should be ordered

33 In exercising its discretion whether to order security for costs the court must balance the interests of the litigants and determine whether the balance of the relevant considerations favours an order for security. There is reason to believe that the plaintiffs will be unable to pay the Receivers' costs if they are successful. This in itself provides a substantial factor in the exercise of discretion in favour of ordering security for costs. The discretionary factors advanced by the plaintiffs do not outweigh that consideration. In the exercise of my discretion I will order that the plaintiffs give security for the Receivers' costs.

Quantum of costs - legal principles

34 The quantum of security is the amount the court thinks just, having regard to all the circumstances of the case. The court should have regard to the probable costs which the Receivers will be put to in defending the action, so far as that can be ascertained. In the usual case in ordering security for costs, the court does not seek to give a complete indemnity to a defendant. In *Emanuel Management Pty Ltd (in liq) v Fosters Brewing Group Ltd* [2003] QCA 552 Dutney J, with whom Gerrard JA and Philippides J agreed said that:

Courts have traditionally be conservative in relation to the quantum of orders for security for costs [16].

Evidence of likely quantum of costs

35 The Receivers rely on an affidavit of Roger Forbes sworn on 30 April 2014 as to the appropriate quantum of security. Mr Forbes is a partner of King & Wood Mallesons and has the conduct of this proceeding on behalf of the Receivers. Mr Forbes is an experienced solicitor. He was first admitted as a solicitor in 1985 and has been a partner of Mallesons since 1995.

36 Mr Forbes provides a detailed estimate of the costs likely to be incurred in the proceedings. Mr Forbes has caused to be prepared a draft bill of costs on a party/party basis in respect of the period up to, but not including trial. The draft bill is calculated on the basis that the Receivers obtain a special order for costs, that is an order that the Receivers' costs be taxed without regard to the limits imposed under the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012* (the Determination). The draft bill contains the following items:

Item	Description	Scale	Approx Amount (\$)
1	Consent orders including conferral and preparation of orders (5)	10(c)	2,000
2	Defence	3(b)	250,000
3	Reply	4	10,000
4	Directions Hearings	24(a)	30,000
5	Possible further interlocutory applications	10(a)	100,000
6	Discovery (including document review)	7(b)	380,000
7	Mediation	24	35,000
8	Preparation of case including <ul style="list-style-type: none"> research as required; briefing Senior and junior counsel (not otherwise allowed for); conferences with counsel (not otherwise allowed for); considering plaintiffs' affidavits (2) and expert reports; preparing affidavits, briefing and 	17	805,000

	attendances upon experts, review of draft reports and related document collation		
	Total estimate of anticipated costs up to, but not including, trial		1,612,000
9	Disbursements		
	Counsels' fees	34	501,925
	Experts' fees	34	250,000
	Witness expenses	34	70,000
	Approximate TOTAL CLAIMED (Subject to change in future in respect of actual bill of costs after judgment and any further applications for tranches of security for costs)		\$2,433,925

37 In his affidavit Mr Forbes says that he expects that on taxation a taxing officer may reduce the allowance for solicitors' professional fees in any bill of costs filed by approximately 20% and may reduce amounts claimed in respect of counsel fees by up to 15%. On that basis Mr Forbes presented the following table which summarises the amount sought by way of security for costs:

	Costs incurred to date	Party/Party legal costs to be incurred up to trial	Total amount
CCW	\$38,905.50	-	
Mallesons	\$54,164.53	1,289,600	
Counsel	\$109,702.50	426,636.25	
Other disbursements	-	320,000	
Total	\$202,772.53	\$2,036.236	2,239,008.53

38 Mr Forbes says that the work which has been, and will be, performed by him and the solicitors employed by King & Wood Mallesons who are assisting him in the matter will be charged at an hourly rate. The hourly rates for Mr Forbes and other solicitors, together with the hourly rate allowed under the Determination is as follows:

Name	Role	Hourly rate	Scale rate
Roger Forbes	Partner	\$665.00	\$451.00
Michelle Dean	Senior Associate	\$570.00	\$451.00
Stephanie Puris	Solicitor	\$405.00	\$319.00
-	Graduate Solicitor	\$280.00	\$220.00 - \$319.00
-	Applied Legal Technology Analyst	\$300.00	\$220.00

The hourly rates charged for solicitors and senior solicitors are between 27% and 47% above the scale rate. Mr Forbes has calculated counsel fees on the basis of an hourly rate of \$475 per hour or \$4,750 per day, which is about 31% above scale and an amount of \$750 per hour or \$7,500 per day for senior counsel which is approximately 18% above scale.

39 Mr Forbes has calculated an amount of \$250,000 for experts' fees. The experts have not yet been retained. Mr Forbes assumes that expert reports will be prepared 'on content and discharge of the Receivers' duties, on quantification of Receivers' costs and disbursements and quantification of CCW cost and disbursements, including pursuant to relevant scales in respect of all costs and disbursements from January 2006'.

40 The plaintiffs' counsel stated at the hearing of this application that they will amend their statement of claim so that the only relief to be claimed will be an inquiry under *Corporations Act* s 423. It is not clear whether or not that will limit the issues in the current proceeding or cause any reduction in the work to be undertaken by the Receivers in defending the proceeding. The plaintiffs say that there is no basis for the quantum sought or the estimate made by Mr Forbes. The plaintiffs say that the assumptions made by Mr Forbes are all just speculation.

41 I accept that Mr Forbes has made a conscientious effort to estimate as best he can the Receivers' likely costs in defending the action. However, at this stage of the proceeding estimating the costs beyond the close of pleadings and in particular the cost of giving discovery and getting up the case for trial is little more than speculation. For example, the Receivers estimate the costs of discovery to be \$380,000. That is 84 times the scale allowance. It is not appropriate to order security for costs in that amount unless and until the Receivers are able to provide a more

detailed account of the work required to give discovery, who is likely to carry out each part of that work and the number of hours or days each such person is likely to be so engaged. That will require an outline of the likely volume of documents that will need to be searched, whether they are electronic or hard copy, their location and any other matters relevant to the amount of work that will be required to give discovery.

42 Mr Forbes estimates experts' fees of \$250,000 but at this time the Receivers have not engaged any expert and have referred to the nature of the likely expert evidence in the most general of terms. It is not appropriate to order security for costs in amounts hugely in excess of the scale amounts based on necessarily speculative estimates. I consider the appropriate course is to order security for costs up to the close of pleadings with liberty to apply for further security for costs after that.

43 The Receivers have incurred costs of \$202,772.53 in defending the action to date. Those costs include the costs incurred in respect of the disallowance application. The costs in respect of the disallowance application are \$160,417. The scale amount for such an application is \$10,560. The Receivers have sought a costs order under *Legal Profession Act 2008* (WA) s 280(2) removing the limits on costs fixed in the Determination. I have determined that the limits should be raised but subject to a cap of \$50,000. Having regard to that decision, the amount of security should include an amount of \$70,000 for costs incurred to date.

44 The amount of security should include a further \$80,000, inclusive of counsel fees, for costs up to the close of pleadings. Mr Forbes estimates solicitors' fees of \$250,000 and counsel fees of \$75,000 for preparing and settling the defence. That is 72 times the scale allowance. I accept that the scale allowance for preparing and settling the defence is inadequate because of the complexity and importance of the matter. However, as I have said, in ordering security for costs the court does not seek to give a complete indemnity to a defendant. The Receivers should be given security in an amount which represents a reasonable and proper indemnity for their costs but not a complete indemnity. An amount of \$325,000, or approximately \$265,000 allowing a 20% discount on solicitors' fees and 15% on counsel fees, is disproportionate to the nature and subject matter of the proceeding.

Conclusion

45 The plaintiffs should give security for the Receivers' costs up to the close of pleadings in the sum of \$150,000. The Receivers may apply for further security for costs after the pleadings are closed. The proceedings

should be stayed until security is provided by payment into court, the provision of a bank guarantee or some other means agreed by the Receivers.