FEDERAL COURT OF AUSTRALIA

Hill v Zhang [2019] FCA 1562

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| File number: | ACD 50 of 2019 |
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| Judge: | **GRIFFITHS J** |
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| Date of judgment: | 25 September 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** - application for security for costs - where proceedings involve a substantial degree of overlap between claims brought by both an individual and corporate applicant - assessment of the individual’s capacity to meet a potential costs order against the corporate applicant - security ordered**PRACTICE AND PROCEDURE** - application for strike out of statement of claim under r 16.21(1)(c) of the *Federal Court Rules 2011* (Cth) - where the pleading contains a number of ambiguities about material facts - statement of claim struck out |
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| Legislation: | *Corporations Act 2001* (Cth) s 1335*Federal Court of Australia Act 1976* (Cth) s 56*Federal Court Rules 2011* (Cth) rr 16.21, 19.01  |
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| Cases cited: | *Australian Law Company Pty Ltd v Initiative Holdings Pty Ltd* [2019] FCA 1561*Brecher v Barrack Investments Pty Ltd* [2018] FCA 472*Equity Access Ltd v Westpac Banking Corporation* (1989) ATPR 40-972*Fiduciary Ltd v Morningstar Research* [2004] NSWSC 664; 208 ALR 564*Harpur Pty Ltd v Ariadne Australia Ltd (No 2)* [1984] 2 Qd R 523*Hill v The Council of the Law Society of the ACT* [2019] ACTSC 79*Interwest Ltd v Tricontinental Corporation Ltd* (1991) 5 ACSR 621*Jodast Pty Ltd v A & J Blattner Pty Ltd* (1991) 104 ALR 248*Lim v Comcare* [2016] FCA 1346*Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 1317  |
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| Date of hearing: | 24 September 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Category: | Catchwords |
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| Counsel for the Respondents: | K Pattenden |
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ORDERS

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|  | ACD 50 of 2019 |
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| BETWEEN: | ALAN HILLFirst ApplicantINITIATIVE HOLDINGS PTY LTDSecond Applicant |
| AND: | KAI ZHANGFirst RespondentTHE AUSTRALIAN LAW COMPANYSecond Respondent |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 25 SEPTEMBER 2019 |

THE COURT ORDERS THAT:

1. The applicants are jointly and severally liable to give security for the respondents’ costs in the amount of $50,000 (exclusive of GST).
2. The security is to be given in the form of a bank guarantee (or in such other form as is acceptable to the Registrar) and is to be lodged with the Registrar and a copy of which is to be served promptly on the solicitor for the respondents.
3. The bank guarantee (or other approved form) required by Orders 1 and 2 be lodged with the Registrar within 21 days hereof.
4. The proceedings are stayed until security for costs has been provided as required by the above orders.
5. Pursuant to r 16.21(1) of the *Federal Court Rules 2011* (Cth), the originating application and statement of claim be struck out.
6. The respondents have leave to file an amended originating application and amended statement of claim within 14 days after compliance with Orders 1 to 3 above.
7. Liberty to apply on the giving of 48 hours’ notice.
8. By 5:00 pm 2 October 2019, the parties are to seek to agree the terms of an order for costs in respect of the interlocutory application. If they cannot agree, within that time, each is to file and serve an outline of submissions, not exceeding three pages in length, setting out the order they seek and supporting reasons. The issue of costs will then be determined on the papers and without a further hearing.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GRIFFITHS J:

1. By an interlocutory application filed on 13 August 2019, the respondents seek security for costs in the amount of $50,000 against the first and second applicants jointly and severally. They also seek an order under r 16.21(1) of the *Federal Court Rules 2011* (Cth) (***2011 FCRs***) that the originating application and statement of claim be struck out. The respondents do not press that part of their interlocutory application which sought the summary dismissal of the proceeding by summary judgment.

## Summary of background matters

1. The substantive proceedings were commenced by the first and second applicants on 12 July 2019. Mr Hill is the first applicant. The second applicant is the trustee of a service trust called Trustee of the Hill & Rummery Service Trust. As trustee of the service trust, the second applicant owned the goods, chattels, plant and equipment used in a law practice known as Hill & Rummery Barristers & Solicitors and employed Mr Hill and other employees of the law practice. The substantive proceeding concerns disputes which have arisen between the parties concerning the purchase of that law practice. The purchase of the law practice by the second respondent is reflected in two separate agreements, known as the 2015 Agreement and the 2018 Agreement respectively. The 2018 Agreement was made after it was discovered that there was a common mistake that Mr Hill and not the previous vendor owned and operated the law practice.
2. The present proceeding is related to an earlier proceeding in *The Australian Law Company Pty Ltd v Initiative Holdings Pty Ltd* (ACD14/2019), which involved the setting aside of a statutory demand. The statutory demand was ultimately withdrawn. Reasons for judgment in respect of the issue of costs in that proceeding were published in *Australian Law Company Pty Ltd v Initiative Holdings Pty Ltd* [2019] FCA 1561. Some of the relevant background facts which are common to this proceeding are set out in [3] to [11] of that judgment.
3. In the present substantive proceeding, the applicants seek a declaration that the respondents are jointly and severally liable to pay $120,000 to Mr Hill under the terms of the 2018 Agreement. The applicants also seek orders requiring the respondents to return goods in their possession which were not transferred pursuant to the 2015 or 2018 Agreements. They seek damages in favour of the service trust for breach of the 2018 Agreement, including damages for non-payment of rent and expenses of the law practice. They seek compensation for Mr Hill for work allegedly done by him for the second respondent as an independent contractor. Mr Zhang is the sole director of the second respondent. Mr Zhang met Mr Hill in 2013 and they both worked as solicitors at Hill & Rummery.
4. In support of their application for security for costs, the respondents rely upon two affidavits, one affirmed by their instructing solicitor (Ms Erin Taylor) on 13 August 2019 and the other affirmed by Mr Zhang on the same day. The respondents also sought to rely upon an affidavit of Mr Ben Aulich affirmed on 23 September 2019. The Court upheld the applicants’ objection to this affidavit being read and refused the respondents leave to rely upon it in circumstances where it was filed and served only the day before the hearing and the respondents did not have sufficient time to respond to it.
5. The applicants rely upon an affidavit affirmed on 27 August 2019 by their instructing solicitor, Mr James Colquhoun, who is also a director of Nelson & Co Pty Limited, trading as Nelson & Hill Lawyers (who are the solicitors on the record for the applicants). Mr Colquhoun states that Mr Hill is engaged as an independent contractor to that law firm under contractual terms which are commercial in confidence, however, he states that Mr Hill is paid on the basis of invoices for services rendered by him. No information is provided as to the quantum of any income received by Mr Hill under this arrangement. Mr Colquhoun deposes that he believes that Mr Hill holds an ACT Law Society Practising Certificate and does not suffer an impecuniosity. The bases for these beliefs are not stated. Mr Hill did not give evidence in the proceedings.
6. It might be noted that Mr Colquhoun’s affidavit is silent on the issue of the solvency of the second applicant.
7. I will address the security for costs issue, before determining the adequacy of applicants’ pleadings.

## (a) Security for costs

### (i) Respondents’ submissions summarised

1. The respondents submitted that the purpose of an order for security for costs is to ensure a respondent who succeeds in defending proceedings is able to obtain its costs ordered by the Court. They submit the Court’s discretion is unfettered but has to be exercised judicially and according to the circumstances of the particular case. The relevant considerations here included the impecuniosity of the applicants, the strength and *bona fides* of their claims, their conduct and the level of risk that the applicants could not satisfy a costs order, citing *Jodast Pty Ltd v A & J Blattner Pty Ltd* (1991) 104 ALR 248 at 242.
2. The respondents claim that Mr Hill is impecunious because:
3. Mr Hill is the sole director of the second applicant and will be personally liable for debts which are allegedly owed by the second applicant to the Australia Taxation Office (**ATO**) if they are not paid by the company;
4. Mr Hill is exposed to the risk of a personal costs order in the related proceedings in ACD14/2019;
5. it is alleged that Mr Hill is no longer entitled to practice as a partner of any law firm because he lost his unrestricted practising certificate;
6. Mr Hill is currently the subject of an order of the Supreme Court of the Australian Capital Territory (which may be under appeal) to pay approximately $155,000 in costs paid by the ACT Law Society to a manager who was appointed to Mr Hill’s law practice, as well as the Law Society’s costs of that proceeding;
7. the respondents understand that Mr Hill is currently funding an appeal against the findings in *Hill v The Council of the Law Society of the ACT* [2019] ACTSC 79;
8. Mr Hill owns three properties which are the subject of caveats; and
9. Mr Hill and the second applicant declined to provide an undertaking to hold $50,000 in trust pending the outcome of the proceedings.
10. As to the second applicant, the respondents say that it is impecunious because:
11. it has only $2.00 of paid up share capital;
12. it is the service trust of a law practice which no longer operates;
13. it faces exposure to a costs order, including potentially an indemnity costs order, in the related proceedings in ACD14/2019; and
14. Mr Zhang’s understanding, based on his time working at the law practice, is that the second applicant owes debts in an unspecified amount to the ATO in respect of unpaid superannuation and PAYG instalments.
15. The respondents referred to Mr Zhang’s affidavit in support of their concerns regarding the applicants’ impecuniosity. Noting that the second applicant is a trustee, the respondents submitted that the trustee would only be able to satisfy a costs order if it could have recourse to property or assets held by it on trust. They submitted that the second applicant had led no evidence concerning its ability to satisfy a costs order, even though it had been requested to do so by the respondents.
16. As to the applicants’ conduct, the respondents claimed that three separate proceedings had previously been commenced by the applicants in relation to the subject matter of the present proceedings, including in the ACT Civil and Administrative Tribunal (**ACAT)**. The respondents say that the applicants also caused them to commence a separate proceeding in ACD14/2019 regarding the statutory demand. The respondents submitted that it was relevant that they had already incurred significant costs in defending the other proceedings and the current proceedings are an attempt to relitigate many of the issues in those proceedings.
17. The respondents say that to date they have incurred approximately $130,000 in costs and disbursements in respect of the various disputes, including an amount of more than $20,000 in the current proceeding. They rely on their solicitor’s estimate that an amount in the range of approximately $35,000 to $50,000 is likely to be incurred in defending the present proceeding.
18. As to the strength or weakness of the applicants’ claim, the respondents claim that similar issues have been raised by the applicants in pending proceedings in ACAT.
19. They also say that the current pleading is incomprehensible or deficient, including because:
20. despite the claim regarding unpaid rent, there is no pleading which establishes how the second respondent has any liability to pay rent to the second applicant, in circumstances where the 2018 Agreement is between the first applicant and the second respondent;
21. although the applicants seek declaratory relief that a debt of $120,000 is outstanding, they also contend that the contract under which it is outstanding has been repudiated;
22. there is no particularisation of the goods which have been said to have been transferred; and
23. as to the claimed fees owing under an independent contract, the applicants have not pleaded any of the terms of that contract or outlined how the fees are claimed or calculated.
24. Finally, the respondents invite the Court to conclude that Mr Hill caused the statutory demand referred to above to be issued for the improper purpose of attempting to secure a resolution of the dispute concerning the 2018 Agreement, in circumstances where he is the sole director, secretary and shareholder of the second applicant.

### (ii) The applicants’ response on security

1. The applicants’ submissions on security may be summarised as follows.
2. First, noting that the second respondent accepted that the 2018 Agreement is valid and that $120,000 is payable under it, the applicants say that this supports their claim for relief in prayer A of the originating application. They contend that their case is strong because they claim that the respondents apparently agree with its basic elements. The applicants also rely on the respondents’ contractual obligation under the 2018 Agreement to indemnify Mr Hill for legal costs arising in connection with that Agreement, including its enforcement.
3. Secondly, as to the claims of impecuniosity, they submit that the respondents have failed to discharge their evidentiary onus. They say that Mr Hill is working as a solicitor pursuant to an independent contractor arrangement and is paid for that work. They also claim that there is no evidence to support the “relatively modest quantum” estimated by the respondents.
4. The respondents say that, where natural and corporate applicants have overlapping interests such that any adverse costs order would be made on a joint and several basis, courts have declined to order security for costs where the natural person is not impecunious, citing ***Harpur*** *Pty Ltd v Ariadne Australia Ltd (No 2)* [1984] 2 Qd R 523 at 532 and ***Fiduciary*** *v Morningstar Research* [2004] NSWSC 664; 208 ALR 564 at [55]-[63]. They say that the relief sought by both Mr Hill and the second applicant are based upon promises in the 2018 Agreement. They say that both their claims will either succeed or fail together and that the Court should not order security for costs given that Mr Hill is not impecunious.
5. Thirdly, as to the parties’ conduct, the applicants claim that the present proceeding was commenced so as to consolidate the various disputes on foot, including those in ACAT, which is a no costs jurisdiction and where, therefore, costs could not have been recovered by the respondents.
6. As to the costs in ACD14/2019, the applicants contend that they are not relevant to the consideration and determination of the application for security for costs in the present proceeding.
7. The applicants asked to be heard on the issue of the costs of the interlocutory application.

## Consideration and determination on security

### (a) Summary of legal principles

1. The application for security for costs is made pursuant to s 56 of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***), r 19.01 of the *2011 FCRs* and s 1335 of the *Corporations Act 2001* (Cth) (the ***Act***).
2. The Court has a discretion under s 56 of the *FCA Act* and r 19.01 of the *2011 FCRs* to order an applicant to give a security for the payment of costs that may be awarded against it. Further, s 56(2) provides that the security shall be of such amount, and given at such time and in such manner and form, as the Court directs.
3. It is well settled that the Court’s discretion under s 56 is broad and unfettered, but it must be exercised judicially (and with close attention to the circumstances of the particular case (see ***Lim*** *v Comcare* [2016] FCA 1346 at [18] per Wigney J).
4. At [19] of *Lim*, Wigney J said:

The various considerations that may bear upon the making of an order have been considered in numerous authorities. Those considerations include: the appellant’s prospects of success; the extent of the risk that a costs order against the appellant will not be met if the appeal is unsuccessful; whether the making of an order for security for costs would be oppressive, in that it would stifle a reasonably arguable claim; whether any impecuniosity of the appellant arises out of the conduct complained of; whether there are other aspects of the public interest that weigh in the balance against the making of an order for security; and whether there are any particular discretionary matters peculiar to the circumstances of the case: see generally *Equity Access Ltd v Westpac Banking Corporation* [1989] FCA 520; (1989) ATPR 40-972 at 50,635 [24]; *Soh v Commonwealth of Australia* [2008] FCA 1524 at [10]; *Clack v Collins (No 1)* [2010] FCA 513 at [13].

1. Under s 1335 of the *Act*, the Court has a discretion to order a corporation, which is a plaintiff in any action or other legal proceeding in which the Court has jurisdiction, to order security for costs “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 the defendant succeeds.
2. The purpose for making an order for security for costs is to protect the respondent against the possibility that the applicant, if unsuccessful, will be unable to meet an order for costs. Where an application for security for costs is made in respect of a corporate applicant, the following three issues usually rise (see *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 1317 at [5] per Brereton J):
3. whether the “jurisdictional issue” is established, namely that credible testimony demonstrates that the applicant corporation is unable to pay the respondent’s costs, in which event the Court’s discretion to order security for costs is enlivened;
4. where the jurisdictional issue is established, whether an order for security should be made as a matter of discretion; and
5. the quantum and terms of security to be given.
6. On the first of those matters, Thawley J recently observed in ***Brecher*** *v Barrack Investments Pty Ltd* [2018] FCA 472 at [18] that there are two features:
7. the likely quantum of costs of the respondent; and
8. the ability of the applicant corporation to pay costs in that amount.
9. If the corporate applicant has no capacity to meet a costs order because, for example, it has no assets or other means of meeting any such order, the jurisdictional issue may be able to be determined without reference to the likely quantum of costs. Where, however, the corporate applicant has some capacity to meet a costs order, the position is less straightforward (see *Brecher* at [18]).
10. A respondent who seeks security has the evidentiary onus of satisfying the Court that a corporate applicant will be unable to meet the respondent’s reasonable costs if the respondent succeeds in its defence. If that jurisdictional issue is satisfied, the evidentiary burden then shifts to the corporate applicant to satisfy the Court that, taking into account all relevant factors, the Court’s discretion should be exercised by refusing to order security or by ordering security of a lesser amount than that sought (see *Fiduciary* at [36] per Austin J).
11. The position is more complex where, in a case such as the present, there are overlapping claims as between individual and corporate applicants. This is a matter which is emphasised by the applicants here in opposing security.
12. *Fiduciary* contains a helpful discussion of the principles and their application in a case where security is sought against a corporate applicant where a person who controls the corporation is also an applicant, which is the case here. The issue is whether the presence of an individual applicant prevents the Court from ordering the corporate applicant to provide security. It was contended there that no such order should be made against corporate plaintiffs in circumstances where, in accordance with the general (but not absolute) rule that security would not be required from an individual plaintiff who is impecunious because poverty is no bar to a litigant. After discussing some relevant cases, both local and foreign (including *Harpur* and *Interwest Ltd v Tricontinental Corporation Ltd* (1991) 5 ACSR 621), Austin J described at [62] the effect of those cases as being that:

… the presence of an individual plaintiff, alongside the corporate plaintiffs against whom security is sought, is to be taken into account in the weighing up of discretionary considerations, but it is not an absolute bar to the ordering of security…

1. Justice Austin stated that it was relevant to consider whether the causes of action asserted by the various applicants are sufficiently distinct such that, if they are unsuccessful, the Court is unlikely to make the individual applicant responsible for failure of the claims made by the corporate applicants. In that case, it is likely that the respondents, if successful against the corporate applicants, will be forced to look to the corporate alone for recovery of costs in respect of that success, such that the normal rules for corporations to apply security should apply.
2. Justice Austin found in *Fiduciary* that, in the particular circumstances, there was a substantial degree of overlap in both the causes of action and underlying factual grounds for the individual and corporate applicants. His Honour stated at [68] that while it was strictly possible for the individual applicant there to succeed and for the corporate applicants to fail (and vice versa) “there is such a high degree of overlapping of the factual grounds of the claims that the probability, should the defendants be successful, of a separate order for costs against the corporate plaintiffs is very low”. His Honour concluded that there was “a high probability” that all the applicants would be made jointly and severally liable to pay the respondents’ costs, if the respondents succeeded.
3. Justice Austin then stated at [69] that, once the likelihood of a joint and several costs orders is established, the financial capacity of the individual applicant to meet an adverse costs order which the corporate applicants could not pay had to be considered. He added that, as was the case in *Harpur*, if the individual applicant has adequate financial means, it is likely that an order for security will be denied.

### (b) Application of principles to the circumstances here

#### (i) Have the respondents satisfied the jurisdictional issue under s 1335 of the Act?

1. I am satisfied that the respondents have, by credible testimony, established that the second applicant corporation is unable to pay their costs if they succeed in their defence. I accept their submission and supporting evidence to the effect that the second applicant only has $2.00 of paid up share capital; it no longer provides a service trust to the previous law practice which has ceased to operate, and it is exposed to a costs order in ACD14/2019. These matters are sufficient to discharge the relevant evidentiary burden carried by the respondents. It is unnecessary to make a finding whether or not the second applicant owes debts to the ATO, as alleged by the respondents.

#### (ii) Assessment of the strength of the applicants’ case.

1. The general principle is that, in determining an application for security for costs, the Court should not embark upon a detailed consideration of the merits of the applicants’ case where it is evident that the applicants’ claims are *bona fide* and arguable (see, for example, *Equity Access Ltd v Westpac Banking Corporation* (1989) ATPR 40-972 at 50-636 per Hill J and *Fiduciary* at [37] per Austin J).
2. It is to be noted that the respondents are yet to file a defence to the statement of claim. Although they claim that the proceedings are an abuse, I am prepared to proceed at present on the basis that the gravamen of the applicants’ claims are *bona fide* and have a reasonable prospect of success even though they need to be repleaded (as will shortly emerge)*.* It is unnecessary to go any further and conduct a detailed assessment of the strength of the applicants’ case.

#### (iii) The applicants’ arguments against an order for security

1. As noted, the primary arguments advanced by the applicants relate to the following matters:
2. Mr Hill’s status as an individual applicant alongside the second applicant (**personal applicant argument**);
3. they have a strong case;
4. there is a contractual liability to indemnify Mr Hill for legal costs relating to the 2018 Agreement;
5. Mr Hill is not impecunious;
6. the respondents have failed to provide sufficient evidence to support the amount they claim as security; and
7. they have acted responsibly in consolidating the various disputes in this proceeding and the award of costs against them in ACD14/2019 is irrelevant.
8. I will now address those matters.

#### A. The personal applicant argument

1. There is a substantial overlap in the claims raised by both the first and second applicants, relating as they do to either or both the 2015 and 2018 Agreements. It is possible, however, that Mr Hill might succeed while the second applicant could fail and *vice versa*. For example, Mr Hill has a personal claim seeking restitution or compensation for the work he allegedly did as an independent contractor for the second respondent. But in view of the substantial overlap in the applicants’ claims, there is only a low probability that a separate order for costs will be made against the second applicant in the event that the respondents were successful. Rather, there is a high probability that both applicants will be made jointly and severally liable to pay the respondents’ costs if the respondents succeed.
2. Given the likelihood of the making of a joint and several costs order, consideration needs to be given to the financial capacity of Mr Hill to meet an adverse costs order in circumstances where the second applicant is impecunious. As *Harpur* illustrates, an order for security is unlikely to be made if the individual applicant has adequate financial means and stands behind the corporate applicant.
3. As noted above, the respondents claim that Mr Hill is impecunious for the reasons set out at [9] above. On the other hand, Mr Colquhoun has given hearsay evidence, which is admissible in an interlocutory hearing such as this, that he believes that Mr Colquhoun continues to hold a practicing certificate and does not suffer an impecuniosity. At this stage of the proceeding, and based on the somewhat limited evidence before the Court, I am prepared to find that Mr Hill is not impecunious. He has elected, however, not to provide any detailed evidence by which an assessment could be made of the extent of his assets and income position. Nor has Mr Hill provided an undertaking to submit to an order to pay any costs that the second applicant might be ordered to pay to the respondents (in contrast with the position in *Brecher*). I consider that this case is far removed from the circumstances in either *Harpur* (where there was evidence that the individual applicant had considerable means) or *Brecher*. I reject the personal applicant argument raised by the applicants.

#### B. The applicants’ remaining contentions against security

1. There is an unusual complication in this case. It relates to the fact that, as will shortly emerge, the Court will order that the originating application and statement of claim be struck out and repleaded. For the purposes of consideration of the application for security, however, I am prepared to accept that the applicants’ fundamental claims are *bona fide*. They need, however, to be repleaded so that the applicants have a full and proper understanding of the case they have to meet.
2. I have addressed above the applicants’ submission that Mr Hill is not impecunious.
3. As to the liability under the 2018 Agreement to indemnify Mr Hill for legal costs relating to the enforcement of that Agreement, that is not a complete answer given that the applicants’ seek to enforce both the 2015 and 2018 Agreements. Furthermore, the relevant clause of the 2018 Agreement states that the indemnity is to operate by reference to “any breach or non-performance of the Buyer of (1) the obligations of the Buyer, whether express or implied under this Agreement”. In the scenario where the applicants’ claims fail and they are exposed to a costs order, given the subject matter of the dispute it is likely that the Court would have found that the second respondent did not breach its obligations under the 2018 Agreement or, at least, did not breach them to the extent alleged by the applicants. In those circumstances, it is questionable whether the indemnity would apply.
4. As to the applicants’ claims regarding the consolidation of disputes in the present proceeding, even if the present proceeding be characterised in that way, the fact remains that the other disputes referred to above have caused the respondents to incur substantial costs which are unlikely to be recovered in those other proceedings and which will be increased if the respondents are unable to recover their costs from the applicants in the event that they succeed in their defence.
5. Finally, as to the adequacy of the respondent’s evidence in support of their claim for security in the amount of $50,000, there is some force in the applicants’ contention that the respondents’ evidence on quantum is thin. The evidence, such as it is, is to be found in Ms Taylor’s letter dated 25 July 2019, in which she estimated costs on a party-party basis in the range of approximately $35,000 plus GST to $50,000 plus GST. She said that this estimate is based on previous litigation between the parties. Normally, such evidence would be inadequate to demonstrate quantum. In the unusual circumstances here, however, where there have been several previous proceedings between various of the parties, including in ACAT, I accept that Ms Taylor is entitled to rely upon the history of those matters and the costs incurred there in estimating the likely costs here. Her estimate produces a relatively modest estimate of costs, as the applicants themselves acknowledged in their outline of written submissions. Finally, I also note that in his affidavit affirmed 13 August 2019, Mr Zhang deposed that Ms Taylor had sent him a costs agreement in the matter which estimated the fees to be in the vicinity of approximately $35,000 to $50,000 plus GST, which provides further limited support for Ms Taylor’s estimate.
6. For completeness, it should also be noted that the respondents’ opposition to security did not raise any issue concerning incremental costs (see *Brecher* at [19]). Accordingly, I have not addressed that issue.

## Conclusion on security

1. For these reasons, the Court will order that the first and second applicants be jointly and severally liable to give security for the respondents’ costs in the amount of $50,000 (exclusive of GST). That amount should be paid in the form of a bank guarantee (or in such other form as is acceptable to the Registrar) to be lodged with the Registrar and a copy of which is to be served on the solicitor for the respondents. The bank guarantee (or other acceptable form of security) is to be lodged with the Registrar within 21 days hereof. The proceedings will be stayed until security for costs has been provided as required by the orders.
2. In the event that the applicants fail to comply with these orders, there will be liberty to apply on the giving of 48 hours’ notice.

## (b) Adequacy of applicants’ pleading

1. The respondents apply under r 16.21(1) of the *2011 FCRs* to strike out the applicants’ pleading:

**16.21 Application to strike out pleadings**

 (1) A party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading:

(a) contains scandalous material; or

(b) contains frivolous or vexatious material; or

(c) is evasive or ambiguous; or

(d) is likely to cause prejudice, embarrassment or delay in the proceeding; or

(e) fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading; or

(f) is otherwise an abuse of the process of the Court.

1. The Court was informed that there has been an exchange of correspondence between the parties on the issue of the adequacy of the applicants’ originating application and statement of claim. The completing views are recorded in two letters by their respective solicitors, both letters being dated 11 September 2019 and which together became Exhibit A.
2. The respondents’ letter was written with an invitation for the applicants to amend their pleadings and, if they did so, costs thrown away would not be sought. The applicants did not avail themselves of that offer. Instead, they responded in a four page letter dated 11 September 2019 and invited the respondents to treat their response as particulars of the originating application and statement of claim.
3. Having heard argument, I am satisfied that the present originating application and statement of claim should be struck out and repleaded. As matters stand at present, there are too many uncertainties about the pleadings to enable the respondents to know the case which they have to meet. The need for certainty is highlighted in this case having regard to its history and the altered position taken by one or other of the applicants on several key issues. It is sufficient to refer to the differences between the contents of the affidavit sworn by Mr Hill in support of the statutory demand in the proceedings in ACD14/2019 (see *Australian Law Company Ltd v Initiative Holdings Pty Ltd* [2019] FCA 1561 at [11]) and the terms of the 2018 Agreement, and to the need for the applicants to plead the status and relationship of the 2015 and 2018 Agreements.
4. I accept the respondents’ submission that the originating application and statement of claim do not adequately distinguish between the first and second applicants. There are numerous references to “the Applicants” without any clear distinction being drawn between them. The distinction is not unimportant having regard to the different causes of action raised by both the first and second applicants, as well as the ambiguity in prayers B and C of the statement of claim.
5. I also accept the respondents’ submission that greater clarity is required in respect of [14] of the statement of claim. This is a matter which was appropriately raised in Ms Taylor’s letter dated 11 September 2019 and to which no sufficient response was given. A further matter which highlights the need for repleading relates to paragraph 33 of the statement of claim. Ms Taylor requested that material facts be pleaded in respect of the lease which is the subject of this paragraph. The response she received on this request is inadequate. All material facts should be pleaded in support of paragraph 33. There is also need to plead with greater clarity the claims relating to “goods” and the claim for “[d]amages in the First Applicant’s favour … on a quantum meruit basis for work done for the Second Respondent as an independent contractor”. If the quantum meruit claim is for a contract implied in fact from the surrounding circumstances, as Ms Taylor pointed out, neither the relevant terms of the contract nor the basis for calculating damages is identified adequately. On the other hand, it may be that the first applicant intended to plead a claim for restitution for work performed at the second respondent’s request. In that case the description of the first applicant as an independent contractor creates further confusion. On any view, the present pleading is inadequate as it leaves it unclear on which basis the claim is put.
6. The matters set out above are merely examples of many deficiencies in the originating application and statement of claim, as highlighted by Ms Taylor’s letter. The originating application and statement of claim will be struck out, but I will grant leave to the applicants to replead their case. In doing so, they should pay close attention to Ms Taylor’s letter dated 11 September 2019.

## Conclusion on strike-out

1. For these reasons, the originating application and statement of claim will be struck out. The applicants have leave to replead within 14 days of compliance with the orders concerning security for costs.

## Costs

1. As requested, I will hear the applicants on the costs of this application. I will do so by providing them with an opportunity over the next 7 days to agree on costs and, if they are unable to do so, to provide brief submissions in support of their respective positions. The matter of costs will then be determined on the papers and without a further oral hearing.

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| I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths. |

Associate:

Dated: 25 September 2019