IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
CORPORATIONS LIST

Not Restricted

S CI 2013 03929

ASCOT VALE SELF STORAGE CENTRE PTY LTD (RECEIVERS AND MANAGERS APPOINTED)(IN LIQUIDATION) — First Plaintiff

SIMON WALLACE-SMITH (IN HIS CAPACITY AS LIQUIDATOR OF ASCOT VALE SELF STORAGE CENTRE PTY LTD (RECEIVERS AND MANAGERS APPOINTED)(IN LIQUIDATION)) — Second Plaintiff

v

NOM DE PLUME NOMINEES PTY LTD — First Defendant

MR RICHARD JOHN LEGGO — Second Defendant

JUDGE:	Gardiner AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	10, 11 May 2018
DATE OF JUDGMENT:	3 May 2019
CASE MAY BE CITED AS:	Ascot Vale Self Storage Centre Pty Ltd & Anor v Nom De Plume Nominees Pty Ltd & Anor (No 2)
MEDIUM NEUTRAL CITATION:	[2019] VSC 285

Application pursuant to rule 23.01 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) to permanently stay proceeding – Court's inherent jurisdiction – Alternative application pursuant to r.62.04 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) or in exercise of the Court's inherent jurisdiction to dismiss proceeding for failure to give security or for want of prosecution – Alternative application pursuant to s 1335 of the *Corporations Act 2001* and r.62.02(1) of the Rules, or ss.45-1(1) or ss.90-15 of Schedule 2 that plaintiffs' claims be stayed until plaintiffs provide security for defendants' costs in an amount and on terms approved by the Court – Proceeding permanently stayed on the ground that it is an abuse of process.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D Williams QC with Ms R Zambelli	Piper Alderman
For the Defendant	Mr P Bick QC with Mr B Gibson	SBA Law

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HIS HONOUR:

1 This is an application by the defendants by summons filed 9 March 2018 in a proceeding brought by the second plaintiff, Simon Wallace-Smith ('Mr Wallace-Smith') in his capacity as liquidator of the first plaintiff, Ascot Vale Self Storage Centre Pty Ltd (receivers and managers appointed) (in liquidation) ('AVSS') against the first defendant, Nom De Plume Nominees Pty Ltd ('NDP') and the second defendant, Richard John Leggo ('Mr Leggo') ('the Proceeding').

2 The defendants' summons applies for the following orders.

> (1) Pursuant to r.23.01(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (the Rules) or in exercise of the Court's inherent jurisdiction, the proceeding be permanently stayed on the grounds that it is vexatious and an abuse of process.
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> (2) Alternatively, pursuant to r.62.04 of the Rules or in exercise of the Court's inherent jurisdiction, the proceeding be dismissed for failure to give security or for want of prosecution.
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> (3) Alternatively, pursuant to s.1335 of the *Corporations Act 2001* (the Act) and r.62.02(1) of the Rules, or ss.45-1(1) or ss.90-15 of Schedule 2 of the Act, or in exercise of the Court's inherent jurisdiction, the claims brought by Ascot Vale Self Storage Centre Ltd (AVSS) in the proceeding be stayed until such a time as AVSS gives sufficient security for the Defendants' costs of the proceeding, being security in an amount fixed by the Court and obtained from persons and on terms that have been approved by the Court.

3 For the reasons which follow, I consider that the Proceeding should be permanently stayed on the ground that it is an abuse of process. In the circumstances, it is not necessary for me to consider the relief sought in paragraphs 2 and 3 of the defendants' application.

4 As will be seen from the summary of the factual background which follows, the disputes between the parties have had a long history.

5 To place this application in context, by summons dated 11 June 2014, the defendants sought orders that AVSS provide security for their costs of the Proceeding.

6 On 19 June 2014, I made orders by consent that AVSS give security for the defendants' costs of the Proceeding. The quantum of such costs was to be agreed between the

parties on or before 25 July 2014 or, failing agreement, to be fixed by this Court. I also made orders that the Proceeding be stayed until the security was given.

7 Since the date of my order, no amount of security for costs has been fixed or provided to the defendants and indeed there was no approach to the Court in that regard until 1 March 2018, when the plaintiffs made application by way of summons for orders that the plaintiffs give security for the defendants' costs in an amount to be fixed by the Court and held by the plaintiffs' lawyers, Piper Alderman, in an investment account. If such an order was made, its effect would be to lift the stay of the Proceeding which has been in force by reason of the order made by me in June 2014.

8 On 9 March 2018, in reaction to the plaintiffs' application, the defendants made application for the relief set out in Paragraph 2.

9 The Proceeding was commenced by originating process filed on 1 August 2013 by Mr Wallace-Smith in his capacity as liquidator of AVSS. Other than filing the originating process and an affidavit in support on 1 August 2013 and subsequently filing its summons dated 1 March 2018, no step has been taken by Mr Wallace-Smith to advance the Proceeding save for two unsuccessful applications for funding approval by the plaintiffs, one of these made in the Proceeding, the other in a separate proceeding.

10 Prior to the hearing of this application, I determined that the defendants' application made 9 March 2018 to permanently stay the Proceeding should be heard and determined before the plaintiffs' application made 1 March 2018 was considered, and this was confirmed with both parties via email correspondence from the Court.[1] As a practical matter, however, I consider that the facts which arise for consideration on the question of whether the Proceeding should be permanently stayed or dismissed are very similar to those which would arise on a consideration of the plaintiffs' application to lift the stay currently in place. Both parties' submissions, in particular the defendants' submissions tended to conflate the two applications but I have been

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1 There was correspondence from the Associate to Gardiner AsJ on 23 February 2018 and responses from the parties on 26 February 2018 and 27 February 2018.

mindful of this in preparing these reasons when considering the application presently before me and in particular whether the plaintiffs have discharged the heavy onus required to establish that the Proceeding ought to be permanently stayed.

11 The defendants' submissions in substance placed most emphasis on the first ground in its summons that the proceeding should be permanently stayed on the grounds of process.

The parties' evidence relied upon in the application

12 The defendants relied upon two affidavits, the affidavit of Andrew Schnaider, solicitor for the defendants, affirmed 29 March 2018, and the affidavit of Samuel Maxwell Bond, also a solicitor for the defendants, affirmed 1 May 2018.

13 The defendants also relied on several affidavits of Mr Wallace-Smith sworn 31 July 2013, 19 August 2013 and 7 August 2014.[2]

14 As well as the affidavits of Mr Wallace-Smith referred to, the plaintiffs relied on affidavits of their solicitor, Michael Lheude sworn 27 April 2018 and 8 May 2018.

Factual background

15 Because of the nature and gravity of the relief sought by the defendants, it is necessary to set out in detail the history of the Proceeding. What follows is derived from a number of sources, including the judgment of Robson J in *Re Ascot Vale Self Storage Centre Pty Ltd (in liquidation)*[3] ('the First Funding Application')[4], the decision of Judd J in *Re Ascot Vale Self Storage Centre Pty Ltd (Recs and Mgrs Apptd) (In Liq) v Nom De Plume Nominees Pty Ltd*[5] ('the Second Funding Application'), the affidavits relied upon by the parties in the Proceeding as well the affidavits relied upon in the course of the First Funding Application and the Second Funding Application and the written

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2 See exhibits AS-3, AS-5 and AS-10 to Andrew Schnaider's Affidavit affirmed 29 March 2018.
3 (2014) 98 ACSR 243 ('the First Funding Application').
4 Note Robson J heard the First Funding Application on appeal from Randall AsJ.
5 [2015] VSC 751 ('the Second Funding Application').

submissions filed by the parties in the application filed 9 March 2018. The facts and the chronology of the Proceeding are not contentious.

16 In around 2000, Mr John Crozier, Mr Richard Leggo, Mr Anthony Melville, and Mr Geoffrey Turner agreed to undertake a joint venture to acquire and develop a property in Ascot Vale into an apartment complex. AVSS was incorporated on 1 May 2000 as Yarborough Holdings Pty Ltd and changed its name to AVSS on 27 November 2000. The joint venture was conducted through the medium of a unit trust, called the Ascot Vale Self-Storage Centre Unit Trust and AVSS was appointed trustee of that trust. Each of Messrs Crozier, Leggo, Melville and Turner or companies associated with them were the unit holders in the trust. Mr Robert McNab became a unit holder as to 10% in around December 2001.

17 From 2001 until around 30 April 2008, Mr Crozier was the sole director of AVSS. In or around August 2007, Mr Crozier and entities associated with him were experiencing financial difficulties and Mr Crozier approached insolvency practitioners for advice. In about October 2007, apparently acting on that advice, to the knowledge of Mr Turner and Mr Melville, but not Mr Leggo or Mr McNab,[6] Mr Crozier caused AVSS and another entity of which he was also sole director, Fingal Developments Pty Ltd ('Fingal'), to enter into a loan agreement whereby Fingal purported to advance funds to AVSS ('the Fingal loan') and take a third ranking security over the assets of AVSS to secure the Fingal loan ('the Fingal charge').

18 Mr Crozier executed the Fingal loan agreement and the Fingal charge on behalf of both companies,[7] in his capacity as sole director of both AVSS and Fingal. Mr Melville witnessed the execution of the Fingal loan agreement and the Fingal charge. Mr Crozier also executed a loan acknowledgement as at 31 March 2008 for the purpose of the Fingal loan agreement. Mr Leggo and Mr McNab claim that they were not

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6 *Fingal Developments Pty Ltd v Nom De Plume Nominees Pty Ltd* [2015] VSC 44 [75] ('the Fingal proceeding').

7 Ibid [74].

informed of, and that they did not consent to, the loans being secured under the Fingal charge.

19 Mr Leggo became a director of AVSS on 30 April 2008 and, following the bankruptcy of Mr Crozier, became the sole director of AVSS in about June 2009.

20 In about May 2008, NDP, then controlled by Mr Leggo, paid out the then second ranking loan facility, which was at that time held by DBR Corporation Pty Ltd ('DBR Corporation'), and took an assignment of the second ranking charge that DBR held over AVSS' assets. On 16 June 2010, the first ranking charge to SunCorp was discharged.

21 The development at Ascot Vale struggled and disputes arose between the joint venturers. The disputes were the subject of a deed dated 23 March 2009 between AVSS, NDP, Mr Leggo and others ('Deed of Settlement'). Fingal contends that, under the Deed of Settlement, it was agreed that NDP and Mr Leggo would, among other things, advance further funds to or for the benefit of AVSS as and when required to meet the cost of building the project.[8] Under the Deed of Settlement, the parties acknowledged that AVSS was indebted to NDP for some $2.5 million and agreed that that sum and further sums advanced by NDP to AVSS would be secured by the second ranking charge to NDP.[9] The Fingal charge was the third ranking charge.[10]

22 On 21 June 2010, Fingal appointed receivers and managers to AVSS under the Fingal charge. The following day, NDP appointed a receiver and manager to AVSS under the NDP charge.

23 These appointments led to several proceedings.[11] Those proceedings were withdrawn in December 2010 and March 2011, after Fingal redeemed the NDP charge. There then followed further proceedings against NDP commenced by the so-called Melville interests (a reference to Messrs Melville, Crozier and Turner) ('the Melville interests').

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8 See cl 3.1 to the Deed of Settlement, exhibit SWS-4 to Mr Wallace-Smith's affidavit sworn 31 July 2013.

9 See cl 2.1 to the Deed of Settlement, exhibit SWS-4 to Mr Wallace-Smith's affidavit sworn 31 July 2013.

10 These matters are referred to in the First Funding Application (n 3) [26]-[30].

11 Federal Court Proceedings VID510/2010 and VID 834/2010. Those proceedings were withdrawn in December 2010 and March 2011, after Fingal redeemed the NDP mortgage.

Those proceedings went to judgment at first instance and then on appeal.

24 On 26 November 2010, the developer of the Ascot Vale project, Galvin Constructions Pty Ltd ('Galvin Constructions'), made application to wind up AVSS. On 2 February 2011, AVSS was ordered to be wound up and Mr Wallace-Smith was appointed as liquidator.

25 On 8 March 2012, the Melville interests commenced a proceeding against NDP and AVSS ('the Fingal proceeding').[12] In the Fingal proceeding, Fingal alleged amongst other things that NDP had been a mortgagee in possession of AVSS and, in breach of its duties to Fingal as a later ranking charge holder, had caused AVSS to pay unsecured creditors ahead of Fingal. NDP sought a declaration by counterclaim that the Fingal charge was void and unenforceable because it did not secure any debt or had not secured any debt since February 2011 or since 4 April 2011. AVSS was eventually joined as a second defendant to the Fingal proceeding. Mr Leggo was not a defendant in the Fingal proceeding. I shall return to a discussion concerning the Fingal proceeding later in these reasons.

26 In about November 2012, Mr Melville approached Mr Wallace-Smith and indicated that he was interested in funding Mr Wallace-Smith and AVSS to commence various actions against Mr Leggo and NDP. Shortly afterwards, the Melville interests funded Mr Wallace-Smith to conduct a public examination under Part 5.9 of the *Corporations Act 2001* (Cth) ('the *Act*') of Mr Leggo. The examination was conducted before me on 15 April 2013. Mr Wallace-Smith did not apply to examine the other unit holders or past directors of AVSS, including Mr Melville and Mr Crozier, who apparently funded the conduct of the examination. The Melville interests also funded Mr Wallace-Smith to prepare an insolvency report of 31 July 2013 and a statement of claim and to commence the Proceeding against Mr Leggo and NDP. The plaintiffs say that other sources were relied upon.

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12 S CI 2012 1299.

27 The defendants contend that the insolvency report prepared by Mr Wallace-Smith solely relied on discussions with the Melville interests and information provided by them that Fingal was owed a secured debt of approximately $3.54 million by AVSS. The plaintiffs contend however that Mr Wallace-Smith relied upon additional sources in this regard.

28 The Proceeding was commenced on 1 August 2013 by AVSS and Mr Wallace-Smith. The plaintiffs sought an order by originating process that NDP and Mr Leggo, pay a sum not exceeding $6,246,821 or damages in the same sum pursuant to the Deed of Settlement. Mr Wallace-Smith made an alternative claim against Mr Leggo for the sum of $2,711,090 pursuant to s 588M(2) of the *Act* under the insolvent trading provisions of the *Act*.[13] The draft statement of claim which was exhibited to Mr Wallace-Smith's affidavit in support of the originating process seeks recovery from Mr Leggo of several debts, including the debt claimed by Fingal.

29 The draft statement of claim has not been filed in the Proceeding. The defendants observed that at a directions hearing on 25 July 2014 counsel for Mr Wallace-Smith said 'We are not entirely wedded to it. There will be some changes that will be made to it'. The proposed changes to the statement of claim have not been identified.

The First Funding Application

30 On 30 July 2013, Mr Wallace-Smith and the Melville interests (through a corporate entity Ryeland Nominees Pty Ltd) ('Ryeland') entered into a funding deed to prosecute the Proceedings ('the First Funding Agreement'). The terms of the First Funding Agreement included a provision that Mr Wallace-Smith agreed not to challenge the enforceability of the Fingal charge.

31 On 19 August 2013, Mr Wallace-Smith filed an originating process in proceeding S CI 2013 04313 seeking the Court's approval under s 477(2B) of the *Act* to enter into the First Funding Agreement with the Melville interests (represented in the agreement by Fingal and Ryeland). In his affidavit in support of that originating process,

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13 The Second Funding Application (n 5) [1].

Mr Wallace-Smith acknowledged that despite having committed not to dispute the validity of the Fingal charge or Fingal debt, he had not investigated in any detail the prospect of the Fingal charge being voidable at the time of entry into the First Funding Deed.

32 The originating process seeking approval for the First Funding Deed was heard on 11 September 2013 by Randall AsJ. On 27 September 2013, Randall AsJ approved of the entry by Mr Wallace-Smith into the First Funding Deed.[14] NDP and Mr Leggo appealed that decision and the appeal was heard by Robson J on 25 November 2013. The defendants opposed the application.

33 On 11 March 2014, Robson J allowed the appeal and set aside the orders of Randall AsJ.[15] At paragraphs 112 and 113, Robson J observed:

> In the AVSS proceeding, the liquidator sues both NDP and Mr Leggo. The litigation is being funded by Fingal and Ryeland. Fingal's sole director is one of Mr Leggo's joint venturers in the joint venture. One cause of action arises out of the settlement deed between the joint venturers. The other alleges that AVSS incurred debts whilst insolvent and under the management of Mr Leggo. In the AVSS proceeding, the beneficiary of any success may be Fingal as the secured creditor and thus the joint venturers and the Albury investors as beneficiaries of the trust in their favour, at the expense of Mr Leggo, one of the joint venturers (that is if Fingal succeeds in establishing the trust in the Fingal proceeding).
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> In my view, the two pieces of litigation are both manifestations of the dispute that has arisen between the joint venture parties.

34 Robson J was not satisfied that it was in the interests of creditors generally for Mr Wallace-Smith to surrender the opportunity to challenge the Fingal charge and the Fingal Loan Agreement under the voidable transaction provisions of the *Act*, more particularly ss 588FE and 588FF. At paragraph 147, Robson J stated:

> Another relevant factor in considering the liquidator's application for approval, is that the liquidator has frankly admitted that he has not investigated in any detail the allegation of Mr Leggo that the Fingal charge is voidable. The liquidator has not read the witness statements that have been filed in the Fingal proceeding as evidence against AVSS and NDP. The liquidator has not had the funds to do so. Accordingly, the Court has not

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14 *Ascot Vale Self Storage Centre Pty Ltd v Wallace-Smith* [2013] VSC 519.

15 The First Funding Application (n 3).

had the benefit of the liquidator's considered opinion on a possible claim that the Fingal charge and Fingal loan agreement are voidable transactions.

35 At paragraph 153, Robson J noted:

> The liquidator is not the sole plaintiff in the AVSS proceeding. AVSS is also a plaintiff and is seeking to enforce the very loan agreement and charge that the liquidator precludes himself from challenging under clause 12 of the Funding Deed. AVSS is also a party to the Funding Deed, and is therefore also bound by clause 12. The appellants say that AVSS is seeking to uphold the Fingal charge in the AVSS proceeding. They submit that it is unlikely that AVSS, in another proceeding, would be permitted to run a claim inconsistent with the AVSS proceeding.

36 At paragraph 156, Robson J stated:

> There is another aspect of the Funding Deed that I consider is a relevant factor to take into account in considering the liquidator's application for approval. The liquidator is to act for the benefit of all creditors without fear or favour. In this case, the joint venture parties have fallen out. The Fingal proceeding involves a claim by a company associated with Mr Melville (Fingal) against a company associated with Mr Leggo (NDP). Mr Melville, through his company, seeks to finance the liquidator of AVSS to pursue a claim against Mr Leggo and NDP for the primary benefit of Fingal, as Fingal will have priority rights as a secured creditor to any moneys recovered. A term of that finance is that the liquidator will not challenge the Fingal charge despite the possibility that AVSS was insolvent when the charge was created, and the possibility that the charge was created to defeat the interests of the unsecured creditors. Thus, Mr Melville (and those joint venturers siding with him) have been able to sue NDP directly in the Fingal proceeding, and put pressure on NDP and Mr Leggo through the liquidator suing them in the AVSS proceeding, while at the same time preventing an attack by the liquidator on the Fingal transactions which are the very securities that support the Fingal proceeding.

37 Robson J, exercising the discretion vested in him by s 477(2B) of the *Act* to decide whether or not to approve of AVSS entering into the First Funding Agreement, considered that it was not in the interests of the liquidation to approve the funding deed and upheld the appeal. He ordered that Mr Wallace-Smith pay the defendants' costs of the appeal and of the hearing before Randall AsJ.

38 Several months later, in June 2014, the defendants made application that AVSS provide security for their costs. The orders made by me on 19 June 2014 were made by consent of the parties and provided that the Proceeding was stayed until the security referred to was given.

The Fingal Proceeding

39 The Fingal proceeding was heard by Sifris J in September 2014 and judgment was delivered on 20 February 2015. Sifris J found in favour of Fingal and final orders were made on 23 April 2015. NDP appealed and the Court of Appeal heard the appeal on 8 and 9 October 2015.

40 On 14 July 2016, the Court of Appeal, constituted by Tate, McLeish JJA and Ginanne AJA, delivered its judgment allowing the appeal. Aside from a payment of less than $60,000 made by AVSS to marketing agents and around $70,000 in respect of fees which NDP itself identified during the course of the appeal had been paid in error, the Court of Appeal upheld the appeal and dismissed the claims against NDP.

41 In its judgment, the Court of Appeal also upheld part of NDP's appeal on the counterclaim. While upholding Sifris J's finding that NDP and AVSS were estopped from disputing the validity of the Fingal charge, it refused to declare the Fingal charge secured the loans made by the unit holders, rather it declared that the Fingal charge only secured amounts that had been advanced by Fingal in its capacity 'as lender'.

42 In their submissions, the defendants observe that this finding was critical as the most that could have been advanced by Fingal 'as lender' since the Fingal loan agreement was executed in October 2007 was approximately $141,500 that had been advanced by Mr Crozier between October and December 2007. The defendants observe that, despite this, by mid-2013 the Fingal receiver had recovered more than $1.9 million under the Fingal charge, more than $1.1 million of which had been distributed to Fingal. They observe that Mr Wallace-Smith, rather than seeking to recover from Fingal the nearly $2 million that the Fingal receiver has allegedly over-recovered to the detriment of unsecured creditors, has instead continued to seek funding from the Melville interests to prosecute the Proceeding and to recover more than $3.54 million on behalf of Fingal as a secured debt to be repaid ahead of all other creditors.

43 The defendants observe in their submissions that by the time judgment of the Court of Appeal was delivered in the Fingal proceeding in July 2016, the Proceeding had been stayed for two years pursuant to the orders made by me in July 2014. For six

months following the decision of the Court of Appeal, Mr Wallace-Smith took no steps to advance the Proceeding. In his affidavit sworn 23 January 2018, Mr Wallace-Smith states that in this time he 'commenced discussions' with Fingal and parties associated with it regarding entry into yet another funding agreement. Mr Wallace-Smith has not filed any evidence in regard to those discussions.

The Second Funding Agreement

44 In August 2014, the Melville interests again sought to fund Mr Wallace-Smith to prosecute the Proceeding. On 18 September 2014, Mr Wallace-Smith issued his first Report to Creditors in which he foreshadowed seeking the approval of the creditors for entry into a Second Funding Agreement with the Melville interests. Mr Wallace-Smith informed creditors that Fingal as secured creditor had applied the proceeds of sale of all apartments after repayment of prior secured debts against its own debt and that it continued to be owed $3.5 million. He indicated that there were no funds available for the benefit of unsecured creditors and that any return to unsecured creditors depended upon the success of legal actions against Mr Leggo and NDP.[16] He made reference to the public examination of Mr Leggo and informal interviews of Messrs Melville, Crozier and Turner. He stated that there were a number of actions involving AVSS that had been commenced by related parties, including the Fingal proceeding. He reported that the Court had refused entry into the first Funding Agreement with the Melville interests.

45 The defendants observe that Mr Wallace-Smith's 2014 Report to creditors purported to address an issue which was raised in Robson J's decision, namely Mr Wallace-Smith's failure to obtain advice and to consider claims that might have been brought against Fingal for the benefit of AVSS' creditors presumably because it was earmarked to fund the Proceeding, and his failure to form an opinion as to various claims in order to determine which actions would be in the best interests of creditors.

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16 Galvin Constructions, which was itself in liquidation, was not prepared to fund Mr Wallace-Smith to prosecute the Proceeding.

46 The defendants emphasise however that Mr Wallace-Smith's 2014 Report did not refer, as it should have, to Robson J's observations that the First Funding Agreement had not been in the interest of creditors as it had the potential to benefit Fingal above all other creditors and that the source of Mr Wallace-Smith's funding may have compromised his ability to act impartially on behalf of all of AVSS's creditors.[17] On my reading of the judgment, those matters were prominent considerations in Robson J's decision to reject the First Funding Agreement.

47 By that time, Mr Wallace-Smith had obtained approximately $60,000 in funding from the Melville interests to prepare his insolvency report and a further $200,000 from the Melville interests to prosecute the Proceeding. Approximately $100,000 of the $200,000 provided by the Melville interests to prosecute the Proceeding had been incurred for legal fees, costs and disbursements paid in relation to the funding deeds dated 31 July and 27 September 2013.[18] Mr Wallace-Smith had indicated to creditors that the balance was not available for the benefit of unsecured creditors.

48 In their submissions, the defendants observe that despite having taken no steps in the Proceeding other than issuing the originating process, Mr Wallace-Smith had incurred litigation expenses of $220,000 and sought approval for a further $70,000 from creditors to fund the remainder of the litigation.[19] Mr Wallace-Smith stated to creditors in his report that:

> Creditors should note that notwithstanding seeking their approval of the above, I will also be seeking approval of the Court. In this regard, Nom De Plume and Leggo have strenuously opposed my entering into such a funding arrangement and having regard to the interrelationships I am of the opinion that the consent of the Court should first be acquired to obviate any subsequent challenge and the uncertainty that might otherwise exist in such a case.[20]

49 The creditors of AVSS voted in favour of the Second Funding Agreement at a meeting of creditors on 2 October 2014.

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17 See the First Funding Application (n 3) [145]-[148], [156], and as extracted above.

18 See exhibit AS-9 to Mr Schnaider's affidavit affirmed 29 March 2018 page 16, [7.1].

19 See exhibit AS-9 to Mr Schnaider's affidavit affirmed 29 March 2018, part 3 of the Remuneration Report. Note the amounts specified for 'investigation/ litigation' of $160,806.80 and $57,366.40 for preparation of the funding deed.

20 Exhibit AS-9 to Mr Schnaider's affidavit affirmed 29 March 2018 page 14, [6.8.1]

The Second Funding Application

50 On 8 August 2015, as foreshadowed in Mr Wallace-Smith's report to creditors, Mr Wallace-Smith filed the Second Funding Application seeking approval of the Second Funding Agreement. The application was made under s 477(2B) of the *Act*. The Second Funding Application was heard by Judd J on 29 October 2015 and again the defendants opposed the application.

51 Counsel for Mr Wallace-Smith urged Judd J to refuse to hear the defendants on the basis that they had no standing to oppose the application for funding approval. Judd J delivered his judgment in the Second Funding Application on 22 December 2015 and observed on the question of standing that:

(a) the defendants had a real interest in the performance by Mr Wallace-Smith of his duty to the company and unsecured creditors, in the validity of the Fingal charge, in the status of Fingal as a secured creditor and in ensuring that a proceeding brought against them was not an abuse of process;[21]

(b) the issues on the application were contentious and the Court was assisted by a contradictor;[22]

(c) the defendants had raised a number of important matters which but for the defendants may not been brought to the court's attention';[23] and

(d) that while it was not necessary to decide the question, it was at least arguable that Mr Wallace-Smith's proceeding was an abuse of process given there was a 'substantial overlap' between the claims advanced by Fingal in the Fingal proceeding and the claims advanced by Fingal 'through the liquidator' in the Proceeding, and the defendants had 'every right' to raise objection.[24]

52 As to the substantive application for the approval of the agreement, Judd J observed at paragraph 11 (footnotes omitted):

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21 The Second Funding Application (n 5) [24].
22 Ibid.
23 Ibid [22].
24 Ibid [23].

Having regard to the decision of Sifris J in the Fingal proceeding, any further opportunity to challenge the Fingal charge must be limited. Nevertheless, the liquidator proposed to enter into an agreement under which the holder of the contentious charge, and former joint venture partner of Mr Leggo, remained in a position to control the nature and scope of future litigation through the power of approval and termination. The liquidator is unable to function at 'arm's length' from the litigation funders, whose purpose is not confined to profit from a commercial transaction. The ability of Mr Melville to control the litigation commenced by the liquidator compromises the liquidator's duty to the company and unsecured creditors. I would refuse the application on this basis alone.

53 At paragraph 17 and following, Judd J stated:

> 17. At the threshold of its application, the liquidator urged the court to refuse to hear the defendants on this application. He argued that the defendants had no standing before the court to oppose the application for approval. He acknowledged that the defendants had been given notice of the application, and had participated in all directions hearings. They had filed material in opposition. The liquidator conceded that he had only recently become aware of the opportunity to exclude the defendants from participating at this hearing on the ground that they lacked standing.
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> 18. In my opinion, the stated rationale for the belated application was opportunistic, flawed, and is rejected. The liquidator did not require court approval under s 477(2B), but submitted that he was unwilling to proceed with the proposed funding arrangement, based only on approval by the creditors. In his opinion there was a risk that one or other of the defendants, as a contributory or creditor of the company, would challenge the decision under s 477(6). He hoped to sidestep that possibility by making application for court approval, while attempting to exclude the defendants from participation on the basis that they had no relevant right, interest or expectation to support their participation.
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> 20. It is disappointing that a liquidator would find it necessary to resort to such a strategy. Furthermore, the objection to the standing of the defendants is entirely without merit. Putting to one side service of the interlocutory process on the defendants, their consensual participation in directions made for the purpose of this application, the fact that they filed affidavits without objection, and the assistance they might provide as a contradictor, I am satisfied that the defendants have a relevant interest in the application and its outcome. Nom De Plume is a creditor, and Mr Leggo is a contributory in the company. Both have standing under s 477(6) to make application to challenge the conduct of a liquidator in the exercise of a power. The liquidator seems to contend that this right ceases to exist when application for approval is made under s 477(2B).
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> 23. The defendants went further and contended that this proceeding is an

> abuse of process, because it involves the use by Fingal of a separate proceeding, through the liquidator, to obtain a remedy, should it have one, available to it in the Fingal proceeding. While the matter was not fully explored on this application, there is a substantial overlap between the purpose and claims in the Fingal proceeding and the purpose and claims in this proceeding. Both seek to recover the same amount claimed to be due to Fingal. Then there are the alternate claims against Mr Leggo. Those claims are predicated on proof of insolvency which, if established by the liquidator, may provide him with an opportunity to advance the interests of unsecured creditors by challenging the Fingal charge. There is no need to resolve the consequence of overlap between the proceedings, and the question of whether this proceeding is an abuse of process, on this application. The allegations are at least arguable, and the defendants have every right to raise them by way of objection to the liquidator's application for approval.

54 Judd J, in refusing the Second Funding Application considered that the independence of Mr Wallace-Smith had been compromised and was not persuaded the Second Funding Agreement was for the benefit of unsecured creditors. Judd J observed at [40]-[41]:

> While the draft funding deed no longer contains a provision binding the liquidator not to challenge the Fingal charge, it is impossible to ignore the fact that Ryeland must approve any proceeding and can terminate the agreement. They are motivated to generate funds for the benefit of Fingal, which at present has the advantage of a judgment of this court supporting the validity of its Charge. The independence of the liquidator is compromised by the ability of the litigation funder to control the litigation.
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> I am not persuaded that the proposed funding agreement is for the benefit of unsecured creditors. The application is refused.

55 Judd J also ordered that AVSS and Mr Wallace-Smith pay the defendants' costs of the application.

The second meeting of creditors of AVSS

56 On 2 December 2016, almost one year after Judd J handed down his decision in the Second Funding Application, Mr Wallace-Smith issued a second report to creditors of AVSS seeking creditor approval for entry into the Third Funding Agreement at a meeting of creditors. The defendants contend that while the report noted that the decision of Sifris J in the Fingal proceeding had been set aside by the Court of Appeal, it nevertheless emphasised the findings made at first instance by Sifris J along with

only those parts of the decision of the Court of Appeal that were in Fingal's favour. There was no reference to the balance of the Court of Appeal's decision including the refusal to declare that the Fingal charge secured monies advanced by unit holders and others, and the declaration that the Fingal charge only secured amounts advanced by Fingal 'as lender'. There was no reference to the amount that was likely to be secured by the Fingal charge or the amount that Fingal had recovered or claims that it was owed. Further, no mention was made by Mr Wallace-Smith of the Court of Appeal's order that Fingal was required to pay 80%of the appellant's costs of and incidental to the appeal and received only 40% of its costs of the decision at first instance.

57 Mr Wallace-Smith's second report observed that despite having obtained creditor approval on the last occasion he 'considered it prudent to also seek the approval of the Court' for the previous funding deed and that after argument, Judd J had refused to approve the entry by him into the Second Funding Agreement.

58 The defendants observe that there was no reference by Mr Wallace-Smith in his report to the refusal by Robson J to approve entry into the First Funding Agreement. In his report, Mr Wallace-Smith observed that he had been unable to obtain funding from any arm's length entities but that the Melville interests were agreeable to funding his remuneration and costs, including 'adverse costs', in conducting the Proceeding, in return for Mr Wallace-Smith agreeing to support an application by those interests for priority dividends under s 564 of the *Act*.[25] The 'adverse costs' included the legal costs incurred for the two unsuccessful funding applications.

59 In his second report to creditors Mr Wallace-Smith provided no estimate of future legal costs and informed the creditors that:

(a) he had received $60,500 in remuneration and had incurred a further unpaid remuneration of $322,939.50, most of which related to the conduct of the Proceeding;

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25 Section 564 of the *Act* gives the court jurisdiction to make an order that certain creditors may be favoured over others where in any winding up property or expenses have been recovered under an indemnity for costs of litigation given by those creditors.

(b) the solicitors for Mr Wallace-Smith had received $150,416.63 in legal fees and had accrued further uncharged fees of more than $450,000; and

(c) in the event of a successful outcome, the solicitor had a right to charge an uplift fee of 25%; this had not been disclosed in the previous report to creditors of September 2014.

60 Mr Wallace-Smith also sought approval for future remuneration of $125,000.

61 The defendants observe that these amounts for costs and remuneration were incurred in the context of there having been no further steps taken in the Proceeding since it was issued in August 2013, save for the Second Funding Application which was initiated by an interlocutory process filed on 19 August 2014.

62 In his second report to creditors, Mr Wallace-Smith informed creditors that any dividend of the creditors of AVSS would be dependent on the success of the Proceeding and that he was confident that creditors would receive a dividend. The defendants observe however that the basis of this opinion was not disclosed despite the observation of Judd J at paragraph 29 in the Second Funding Application decision that:

> ...Mr Wallace-Smith was reluctant to go into detail about negotiations, or the basis upon which he calculated the estimated return for unsecured creditors. His reluctance in this regard was unhelpful.

The Third Funding Agreement

63 On 19 December 2016, Mr Wallace-Smith put a resolution to the meeting of AVSS' creditors in respect of a further funding agreement ('the Third Funding Agreement'). Based on the information contained in the second report to creditors, three unsecured creditors of AVSS, Galvin Constructions, Melbourne Business and Investment Corporation and the Australian Taxation Office voted in favour of the resolution. The Australian Taxation Office had written off its debt and indicated that it did not wish to fund Mr Wallace-Smith to conduct investigations or to prosecute the Proceeding.

64 The debt owed by AVSS to Galvin Constructions was apparently assigned after the creditors meeting on 19 December 2016. The debt owed by AVSS to Melbourne Business and Investment Corporation had also been assigned to the Melville interests. As of 18 September 2014 the debt to Galvin Constructions stood at $1,365,414. It is understood by reason of enquiries made by the defendants of the liquidator of Galvin Constructions that the Melville interests, through Fingal acquired that debt for approximately $20,000. The debt to Melbourne Business and Investment Corporation stood at $127,690 as at 18 September 2014 but Mr Wallace-Smith has not disclosed what consideration Fingal paid for it.

65 From the time between the approval by the creditors of the Third Funding Agreement on 19 December 2016 and May 2017 when the Third Funding Agreement was formally entered into, Mr Wallace-Smith took no steps in the Proceeding, which continued to be stayed by my order of 19 June 2014.

66 Between 8 May 2017 and 3 November 2017, Mr Wallace-Smith obtained a report from a costs consultant on the likely quantum of security required, up to and including trial, for the defendants' costs and notified the defendants that he had obtained funding and wished to reinstate the Proceeding by giving security for costs.

67 On 3 November 2017, the solicitors for Mr Wallace-Smith wrote to the defendants offering provision of security for their costs and enquiring whether the defendants would consent to orders that that security be provided by way of a bank guarantee for $411,500. In their submissions, the defendants observe that this offer was made:

(a) more than 16 years after Messrs Melville, Crozier and Turner entered into the project at Ascot Vale;

(b) more than seven years after the events the subject of Mr Wallace-Smith's draft proposed statement of claim;

(c) more than four years after the Proceeding was commenced;

(d) more than three years after the Proceeding was stayed;

(e) almost 16 months after the Court of Appeal had delivered its decision from the decision of Sifris J in the Fingal proceeding; and

(f) nearly a year after creditors had approved entry into the Funding Deed.

68 After receiving this letter, the solicitor for the defendants, Mr Schnaider, telephoned Mr Lhuede, the solicitor for Mr Wallace-Smith, and enquired, amongst other matters, where Mr Wallace-Smith had obtained funding from. In response, on 17 November 2017, Mr Lhuede stated in a letter to Mr Schnaider that Mr Wallace-Smith had entered into a funding agreement with 'a creditor of AVSS and others to fund the Proceeding'. Mr Lhuede stated that the contents of the Funding Agreement were confidential and privileged, a position that was maintained until the eve of the hearing of this application.

69 The defendants note that Mr Lheude did not disclose that the source of the funding was the Melville interests or that the Melville interests had acquired, apparently for a fraction of their face value, the debts of all unsecured creditors of AVSS save for the Australian Taxation Office.

70 On the same day, the defendants' solicitors wrote to the solicitors for Mr Wallace-Smith enquiring as to why the Court's approval had not been sought to enter into the Third Funding Agreement, as was the case with the two previous agreements. Mr Lhuede responded by letter dated 22 November 2017 stating that Mr Wallace-Smith was not required to obtain the Court's approval to enter into the Third Funding Agreement.

71 On 19 December 2017, the defendants' solicitors responded that they did not consent to the stay of the Proceeding being lifted as the time for the plaintiffs to provide security for costs had long since passed and that the source of the security and the manner in which it had been obtained raised real questions about Mr Wallace-Smith's independence.

72 On 23 February 2018, I ordered that given more than four years had passed since the defendants had filed their summons seeking security for costs, the plaintiffs should file a fresh summons seeking any relief that they now sought.

73 The plaintiffs' summons seeking to reinstate the Proceeding on the provision of security for costs was filed on 1 March 2018 and the defendant's application seeking to permanently stay or dismiss the Proceeding was filed on 9 March 2018.

74 As I have already remarked, the foregoing chronicle, drawn from various sources but predominantly from the defendant's written submissions, is essentially uncontroversial.

The defendants' submissions

75 In their written submissions, the defendants pose several questions which they contend require the Court's determination. The first is whether the Court should exercise its discretion to lift the stay of the Proceeding imposed on 19 June 2014 on the provision of security for costs by AVSS in an amount determined by the Court. The defendants submit that the stay should not be lifted but rather the Proceeding should be permanently stayed on the basis that the Proceeding is vexatious or an abuse of process. As I have said earlier in these reasons I am mindful that this is an application by the defendants for a permanent stay of the Proceeding, not a hearing on the plaintiff's application to lift the stay.

76 The defendants submit that the Court has statutory power under r 23.01(l)(b) of the *Supreme Court (General Civil Procedure) Rules 2015* ('the Rules') to permanently stay proceedings that constitute an abuse of process. This statutory power reflects the Court's inherent power to stay or dismiss a proceeding which is an abuse of the process of the court.[26] It is only in exceptional circumstances that a Proceeding will be stayed permanently on the ground that it constitutes an abuse of process.[27]

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26 *Tampion v Anderson* [1973] VR 321; *Brinson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937, 944.

27 *Dey v Victorian Railways Commissioner* (1948) 78 CLR 62, 92.

77 The categories of conduct that may amount to an abuse of process are not closed[28] although abuses of process usually fall into one of the following categories:

(a) the court's processes being invoked for an illegitimate or collateral purpose;

(b) the use of the court's procedures being unjustifiably oppressive to a party; or

(c) the use of the court's procedures bringing the administration of justice into disrepute.[29]

78 The court must ensure that its processes are used fairly as between the parties to the litigation and that the court must avoid the erosion of public confidence through concern that its procedures may lend themselves to oppression and injustice.[30]

79 In *Ridgeway v The Queen,* the Court stated:

> The powers to prevent an abuse of process have traditionally been seen as including a power to stay proceedings instituted for an improper purpose, as well as proceedings that are frivolous, vexatious or oppressive ... it is clear that [abuse of process also] extends to proceedings that are 'seriously and unfairly burdensome, prejudicial or damaging' or 'productive of serious and unjustified trouble and harassment'.[31]

80 It is not necessary for a party seeking relief against what it claims is an abuse of process to show 'misconduct' of some kind on the part of the plaintiff.[32] It is sufficient that the continuation of the proceedings would be fundamentally unfair to another party.[33]

81 Any procedural step in a proceeding is capable of being an abuse of the court's process.[34] This includes delay in the conduct of proceedings.[35]

82 The defendants submit that Mr Wallace-Smith's conduct in funding the proceeding by provision of security for costs from funds provided by the Melville interests

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28 *Batistatios v Roads and Traffic Authority of New South Wales* (2006) 225 CLR 256, 265 [9].
29 *Rogers v The Queen* (1994) 181 CLR 251, 286.
30 Ibid.
31 *Ridgeway v The Queen* (1995) 184 CLR 19 74-5, (Gaudron J).
32 Ibid [137].
33 Ibid [141].
34 *Rogers v The Queen* (1994) 181 CLR 251, 286.
35 *Batistatios v Roads and Traffic Authority of New South Wales* (2006) 225 CLR 256, 267 [15].

without court approval is an abuse of process.

83 The defendants say in this regard it is open to the Court to find, and the Court should find, that by his application the liquidator seeks to invoke the Court's processes for an illegitimate or collateral purpose namely:

(a) to safeguard or further the interests of the Melville interests, and the Melville interests alone, in the context of a court-supervised independent liquidation. Funding having been provided by the Melville interests, in circumstances where Mr Wallace-Smith has conceded in the past that the Melville interests would 'almost certainly' terminate the funding if their interests were challenged and where the court has twice rejected seemingly similar funding agreements as not in the interests of creditors;[36]

(b) to enable the Melville interests to prosecute claims indirectly, 'through the liquidator', against the defendants, in circumstances where the Melville interests had already directly (albeit largely unsuccessfully) prosecuted claims against the defendants in the Fingal proceeding. Judd J observed at [23] and [35] of his judgment that the Court had found that there was a 'substantial overlap' between the purpose and claims in the Fingal proceeding and the current Proceeding; and

(c) for Mr Wallace-Smith to recover on his own behalf unpaid remuneration of $322,393.50, and on his solicitor's behalf unpaid legal fees of more than $450,000 (accrued on a speculative basis) as of 2 December 2016 despite no substantive steps being taken in the Proceeding.

84 The defendants assert that the manner in which the Proceeding has been prosecuted by Mr Wallace-Smith brings the administration of justice into disrepute. Mr Wallace-Smith, in accepting funding from the Melville interests without Court approval, has wilfully disregarded two judgments of this Court in which approval for funding from the Melville interests has been explicitly refused. They say that public confidence in

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36 The First Funding Application (n 3) [121]-[159]; The Second Funding Application (n 5) [37]-[41].

the administration of justice would be greatly diminished if parties were permitted to effectively ignore judicial pronouncement as to the appropriateness or otherwise of their conduct by relying on legal technicalities. They say that this is particularly so where:

(a) the party in question is a court appointed external administrator, who is an officer of the Court, purporting to exercise statutory powers and is the subject of the court's supervisory jurisdiction;[37]

(b) despite Judd J having stressed in the Second Funding Application the importance of full and proper scrutiny of the terms of the funding agreement with the benefit of a contradictor, Mr Wallace-Smith asserted privilege over the terms of his agreement with the Melville interests to preclude any scrutiny of the terms of the agreement by the Court and the defendants;

(c) none of the assurances provided by Mr Wallace-Smith indicate that the current agreement is on materially different terms to the Second Funding Agreement which was rejected. Indeed, it is likely that any funding agreement with the Melville interests would properly be refused.

85 Judd J had observed, in the second funding approval decision, that it was 'at least arguable' that prosecuting the Proceeding with funding from the Melville interests was an 'abuse of process'.[38]

86 The defendants contend that in such circumstances, the Court should refuse the plaintiff's application and exercise its power under r 23.01(1)(b) and/or its inherent jurisdiction to permanently stay the Proceeding as an abuse of process.

87 In the alternative, the defendants contend that the Proceeding should be dismissed pursuant to r 62.04 of the Rules by reason of AVSS' failure to give security as required by my order of 19 June 2014. Alternatively, the defendants say that the Proceeding

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37 See *Corporations Act 2001* (Cth) Sch 2, Div 90; *Palmer v Ayres* (2017) 259 CLR 478, 511 [85], [88] (Gageler J).

38 The Second Funding Application (n 5) [23].

should be stayed under s 1335 or Schedule 42, 45-1(1) or 90-15 of the *Act* or r 62.02 of the Rules, until the security for costs is obtained from the plaintiffs in an amount and on terms that have been approved by the Court. As I have stated earlier in my reasons, because I have decided to permanently stay the Proceeding as an abuse of process, I do not consider it necessary to address these grounds of the defendants' application.

88 The defendants' submissions observe that the Court has a discretion to order a party to provide security for costs and to stay the Proceeding until the security the subject of that order is given. There is also an additional power to order security for costs as part of the inherent jurisdiction of the Court to regulate its own procedure.[39]

89 The defendants submit that where, as here, a proceeding has been stayed because of a failure to give security, the Court has an unfettered discretion as to whether to vary or lift the stay.[40] The defendants contend that the discretion in respect of security for costs are to be exercised in accordance with ss 7 and 8 of the *Civil Procedure Act 2010* (Vic) ('*CPA*') which require, as an overarching purpose of civil litigation, the facilitation of the just, efficient, timely and cost effective resolution of the real issues in dispute.

90 In this regard, s 9 of the *CPA* provides that in furtherance of the overarching purpose, the Court must have regard to the following objects:

(i) the just determination of the civil proceeding;

(ii) the efficient conduct of the business of the Court;

(iii) the efficient use of judicial and administrative resources;

(iv) minimising any delay between the commencement of a civil proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for:

(v) the fair and just determination of the real issues in dispute; and

(vi) the preparation of the case for trial.

(vii) the timely determination of the civil proceeding;

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39 *Lines v Tana Pty Ltd* (1987) VR 641.

40 *Body Bronze International Pty Ltd & Ors v Fehcorp Pty Ltd* [2010] VSCA 72 [5].

(vii) dealing with a civil proceeding in a manner proportionate to –

(i) the complexity or importance of the issues in dispute; and

(ii) the amount in dispute.

91 Section 9, sub-section (2)(c), (d), (e) and (f) of the *CPA* respectively provide that the Court may also have regard to:

> (a) the degree of promptness with which parties have conducted the Proceeding, including the degree to which each party has been timely in undertaking interlocutory steps in relation to the Proceeding;
>
> (b) the degree to which any lack of promptness by a party in undertaking the Proceeding has arisen from circumstances beyond the control of that party;
>
> (c) the degree to which each person to whom the overarching obligations apply has complied with the overarching obligations in relation to the Proceeding; and
>
> (d) any prejudice that may be suffered by a party as a consequence of any order proposed to be made or direction proposed to be given by the Court.

92 The defendants observe that the overarching obligations to which the parties and the Court must have regard include the obligation to minimise delay and ensure that costs are reasonable and proportionate.[41] In *University of Sydney v ObjectiVision Pty Ltd ('ObjectiVision')*,[42] Burley J described other relevant considerations to be applied in the exercise of the court's discretion to lift the stay as including:

(a) whether the claims brought by the plaintiffs are bona fide;[43]

(b) the amount of time that has passed since the making of the security order;[44]

(c) the explanation for the delay in complying with the order;[45]

(d) any prejudice occasioned by the continuation of the litigation;[46] and

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41 *Civil Procedure Act 2010* ss 24-25.
42 [2016] FCA 1199 (*'ObjectiVision'*).
43 Ibid [127].
44 Ibid [130].
45 Ibid [130].
46 Ibid [134].

(e) whether costs would adequately compensate the defendants for any loss suffered as a result of the non-compliance with the order.[47]

93 In *Yara Australia Ltd v Oswal*,[48] the Court of Appeal, comprised of Redlich, Priest JJA and Macaulay AJA observed that in exercising its discretion as to security for costs the ultimate question is how justice can be served in the circumstances of the case.[49] The defendants contend that as the jurisdiction being invoked by both the defendants' and the plaintiffs' applications is a protective one, the onus is on Mr Wallace-Smith to satisfy the Court that in exercising its discretion to reinstate the Proceeding, the provision of security from the Melville interests would be in the interests of justice and would not unreasonably disadvantage the defendants.

94 The defendants contend that these considerations strongly militate against reinstating the Proceeding. They emphasise that this is particularly so where the security for costs to be provided pursuant to the Third Funding Agreement is:

(a) to be sourced from related parties with whom the defendants have been in litigation for many years and to whom the Court has twice refused to approve funding from;

(b) offered nearly four years after it was ordered and provided in circumstances contrary to the overarching obligations of the *CPA;*

(c) provided in circumstances that would unreasonably disadvantage the defendants; and

(d) to be sourced pursuant to the Third Funding Agreement which, having regard to the outcome of two previous applications in respect of the funding agreements that were in very similar terms to the one now proposed to be used to obtain funding, would likely not receive the Court's approval if put before the Court for that purpose.

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47 Ibid [135].

48 (2013) 41 VR 245, 249, 269.

49 See also *Australian Property Custodian Holdings Ltd (in liq) v Pitcher Partners* [2015] VSC 513 [42]-[43].

95 The defendants in their submissions sharply criticised Mr Wallace-Smith for choosing to accept funding from the Melville interests without seeking the approval of the Court. The terms of the Third Funding Agreement were only disclosed very shortly before the hearing of this application. The plaintiffs had until then maintained that the terms of the Third Funding Agreement were confidential and privileged. The defendants say that this raises serious questions about the judgment, independence and objectivity of Mr Wallace-Smith. They say that in choosing to adopt this strategy, Mr Wallace-Smith raises grave doubts as to whether the Third Funding Agreement is in the interests of creditors and is contrary to Mr Wallace-Smith's duty to act independently or is an abuse of process. The defendants contend that these concerns and doubts are not answered by Mr Wallace-Smith having obtained creditor approval because the debts of all creditors save for the ATO have been acquired by the Melville interests, via Fingal. Further, the information that was provided to the creditors on 2 December 2016 by Mr Wallace-Smith in his report to creditors in order to obtain their approval was inadequate and misleading, particularly in regard to the amount secured by the Fingal charge and recovered by Fingal to date.

96 The defendants contend that having regard to the contentious history of the Proceeding revealed by the summary of the factual background set out above and the near certainty that there would be a complaint if Mr Wallace-Smith accepted funding from the Melville interests, it would have been appropriate for Mr Wallace-Smith to seek the Court's approval as he had sought to on two occasions in the past before entering into any funding agreement with the Melville interests; in fact, the defendants observe that Mr Wallace-Smith previously acknowledged that it would be appropriate to seek the Court's approval in the first and second reports to creditors.

97 The defendants contend that this is particularly so where:

(a) on the two prior occasions on which the Court's approval was sought in the First Funding Application and the Second Funding Application to enter into a funding agreement with the Melville interests, the Court refused to approve entry into the agreements on the basis that it was not in the interests of creditors

and was incompatible with the liquidator's duty to act independently;[50]

(b) further, in the reasons for judgment of Robson J and Judd J the Court stressed the importance of Mr Wallace-Smith acting in the interests of all creditors rather than just a single creditor. Both Robson J and Judd J questioned whether the independence of Mr Wallace-Smith had been compromised by entry into the agreements.[51] Additionally, Judd J considered that the defendants had a real interest in the performance by Mr Wallace-Smith of his duties to AVSS and the unsecured creditors and to ensure that the Proceeding was not an abuse of process.[52] Judd J strongly criticised Mr Wallace-Smith for resorting to strategies that were directed at denying the defendants the opportunity to be heard or to challenge his decision to enter into the funding agreement with the Melville interests.[53] Further, the Court criticised Mr Wallace-Smith's reluctance to disclose information, even on a confidential basis, that would assist the Court in determining whether a funding agreement would be in the interests of creditors as a whole.[54] The Court also questioned the appropriateness of any fee paid to the Melville interests in return for funding as they were not arm's length funders;[55]

(c) the Court also expressed concerns about the judgment of Mr Wallace-Smith in commencing the Proceeding and seeking to enter into funding agreements with the Melville interests.[56] Judd J found that it was least arguable that Fingal bringing the Proceeding, through Mr Wallace-Smith, was an abuse of process.[57] Finally, Mr Wallace-Smith and his solicitor each have a personal interest in obtaining funding to prosecute the Proceeding from any source and on any

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50 See the reasons of Robson J in the First Funding Application (n 3), [156], and the reasons of Judd J in the Second Funding Application (n 5), [39], [41].
51 See the First Funding Application (n 3), 156; the Second Funding Application (n 5).
52 The Second Funding Application (n 5), [24].
53 See Ibid [20], [24].
54 Ibid [29], [38].
55 Ibid [37].
56 Ibid [36].
57 Ibid [23].

terms in order to recover their unpaid fees of $770,000, for which there is no other source for payment.

98 The defendants observe that the lengths to which Mr Wallace-Smith has gone to in order to avoid judicial scrutiny of his conduct in accepting funding from the Melville interests to prosecute the claims against the defendants are not limited to the decision by Mr Wallace-Smith to abandon obtaining court approval before accepting such a finding.

99 In this regard, they observe that Mr Wallace-Smith also elected, up until the eve of the hearing of this application, not to disclose to both the defendants and the Court the identity of the persons from whom security for costs and funding has been obtained, save to say that it has been obtained from 'Fingal and parties associated with it'. Mr Wallace-Smith has also not made available the final form of any statement of claim that Mr Wallace-Smith proposes to file, save that 'the nature' of Mr Wallace-Smith's claim is set out in the draft statement of claim that was exhibited to the affidavit filed in support of the originating process; Mr Wallace-Smith has had more than five years to finalise the form of this document.

100 The defendants contend that Mr Wallace-Smith's decision to conceal from the Court the precise claim sought to be advanced impairs the Court's ability to determine whether:

(a) reinstating the Proceeding, on the payment of security obtained from the Melville interests is in the interests of justice;

(b) permitting Mr Wallace-Smith and AVSS to prosecute claims against the defendants with funding from the Melville Interest is in the interests of justice;

(c) providing security or prosecuting claims against the defendants, with funding from the Melville interests, is an abuse of process; or

(d) whether Mr Wallace-Smith has complied with his obligation to abide the outcome of the Fingal proceeding and appeal by amending any claims to reflect

the outcome of the Fingal proceeding and appeal.

101 In addition, the defendants observe that Mr Lhuede continues to refer to Mr Wallace-Smith's proposed claim by reference to the draft statement of claim exhibited to the originating process on 1 August 2013, well before the Fingal proceeding and appeal were determined. Further the defendants say that Mr Lhuede continues to refer to the Fingal debt and the amounts secured by the Fingal charge in terms that are inconsistent with the findings of the Court of Appeal. Both Mr Lhuede and Mr Wallace-Smith, the defendants contend, are proceeding on the false assumption that Mr Leggo is estopped from disputing the validity of the Fingal charge, including when assessing the prejudice suffered by the defendants as a result of the liquidator's delay. This assumption, the defendants say, is inconsistent with the findings of the Court of Appeal. Further, there is no means by which the Court is able to determine whether Mr Wallace-Smith has considered or amended his claim to include claims that may be made against Fingal for the benefit of unsecured creditors. This includes:

(a) consideration of the amount secured by the Fingal charge following the decision of the Court of Appeal and whether claims may be brought against Fingal to recover amounts that have been recovered in excess of Fingal's entitlements by the Fingal receiver for the benefit of unsecured creditors;

(b) consideration of the extent to which the insolvency of AVSS was caused by the Melville interests purporting to convert the equity of the unit holders in the development to secured debt by the Fingal loan and charge at a time when AVSS was experiencing financial difficulties and where claims may be brought against the Melville interests including Mr Crozier to recover resultant losses; and

(c) consideration of the extent to which AVSS became insolvent was caused by the Melville interests appointing a receiver to AVSS which precluded further funds being advanced to pay unsecured creditors and where, in the circumstances, it would be an abuse of process for a liquidator to seek to recover the losses

caused by the Melville Interest from Mr Leggo with funding from and for the benefit of the Melville interests.

102 The defendants observe that given Mr Wallace-Smith's past reluctance to investigate any claim that is contrary to the interests of the Melville interests, the Court should be reticent to assume, absent evidence, that Mr Wallace-Smith has investigated any of these matters.

103 The defendants submit that the interests of justice are best served when (a) liquidators, who are officers of the Court, discharge their statutory functions independently and transparently under the supervision of the Court; (b) where those who may be adversely affected by decisions of those officers have the right to be heard and to challenge those decisions; (c) and where any dispute as to the validity of such decisions is determined by the Court, by reference to all relevant information.

104 The defendants observe that, in circumstances where Mr Wallace-Smith has engaged in two unsuccessful attempts to obtain Court approval and now elects not to seek Court approval to enter into the funding agreement with the Melville interests, and until shortly before the hearing of this application, asserted privilege over the terms of the agreement to conceal from the Court the terms in which the funding has been obtained, the Court cannot be satisfied that reinstating the Proceeding would be in the interests of justice or would not unreasonably disadvantage the defendants. Such conduct and strategies were, they say, the subject of criticism by Judd J in his decision rejecting the approach for approval of Second Funding Agreement.[58] The defendants submit that these factors alone are sufficient reason to dismiss the plaintiff's application to reinstate the Proceeding. Moreover, it is submitted that there is every reason to believe that reinstating the Proceeding on the provision of security obtained from the Melville interests such a lengthy period after the stay came into operation would be contrary to the interests of justice.

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58 See the Second Funding Application (n 5), [17]-[24], [29], [38], [40].

105 The defendants' written submissions were prepared at a time when the plaintiffs were maintaining privilege and confidentiality over the Third Funding Agreement. In their further written submissions filed after the plaintiffs put the Third Funding Agreement into evidence, the defendants detail their criticism of the Third Funding Agreement. While these further submissions were filed as submissions in reply, it is convenient to outline the criticisms as to the Third Funding Agreement at this point. The balance of the defendants submissions in reply will be referred to later in these reasons.

106 The defendants submit that the Third Funding Deed entered into by Mr Wallace-Smith without the Court's approval is not in the interests of creditors and is inconsistent with Mr Wallace-Smith's duty to act impartially in the interests of all creditors.

107 The defendants submit specifically:

(a) the funding has (again) sought to be obtained from the Melville interests who have a personal interest in the outcome of the Proceeding. The Court's attitude to Mr Wallace-Smith obtaining funding from the Melville interests, regardless of the terms of the funding, is evident from the exchange between Judd J and Counsel for the plaintiffs at the hearing on 27 August 2014, to the effect that it in Judd J's opinion that the concept of a person with significant interest in a contentious issue between the parties funding the litigation under an agreement by which they derive a premium is not a litigation funder which is likely to be approved of by the Court.

(b) the Third Funding Deed requires Mr Wallace-Smith and AVSS to act in Fingal's interests, and recover the alleged Fingal Debt, in priority to unsecured creditors, whilst precluding Mr Wallace-Smith from disputing the amount secured by the Fingal charge, or taking any position that is contrary to Fingal's interest regardless of whether that position is in the interests of the creditors as a whole. In particular, the Third Funding Agreement:

(i) expressly acknowledges and seeks to preserve Fingal's rights as a secured creditor without consideration as to whether Fingal has recovered more than that which is secured by its Charge.[59]

(ii) requires Mr Wallace-Smith and AVSS to prosecute the actions and enforce, recover and prosecute any final judgment or orders.[60] This commits AVSS to prosecuting the claim to recover the amounts Fingal contends are secured by the Fingal charge, in priority to unsecured creditors, and will preclude Mr Wallace-Smith and AVSS by reason of the doctrine of election, from ever seeking to recover more than $2m already paid to Fingal under is security. Mr Wallace-Smith appears not to have considered whether this election is in the interests of creditors in light of the decision of the Court of Appeal in the Fingal proceeding.

(iii) acknowledges that AVSS and Mr Wallace-Smith are unable to fund any proceedings he chooses, but provides funding only to prosecute the Proceeding against NDP and Leggo and any other proceeding 'to which the Funder has consented to issue'. The practical effect of these provisions is that Mr Wallace-Smith can only prosecute claims that are approved by the Melville interests.

(c) the Third Funding Agreement gives the Melville interests effective control of the Proceeding. In particular:

(i) The Third Funding Agreement requires Mr Wallace-Smith to inform the Melville interests in relation to all aspects of the actions.[61]

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59 See cls 12 and 13.2 to the Third Funding Agreement at exhibit MEL-1 to Mr Lhuede's affidavit sworn 8 May 2018.

60 See cl 7.1(a), (b) to the Third Funding Agreement at exhibit MEL-1 to Mr Lhuede's affidavit sworn 8 May 2018.

61 See cls 5.2(a),(c) 6 to the Third Funding Agreement at exhibit MEL-1 to Mr Lhuede's affidavit sworn 8 May 2018.

(ii) While the Third Funding Agreement purports to leave Mr Wallace-Smith with control of the action, in reality, the Melville interests are free to terminate the Third Funding Agreement at any time should Mr Wallace-Smith not comply with their wishes. On termination, the Melville interests cease to be liable to indemnify Mr Wallace-Smith from the date of termination.[62] In circumstances where Mr Wallace-Smith is owed more than $400,000 in unpaid fees and expects to earn further fees of an amount that has not been disclosed, there can be no doubt that the Third Funding Agreement leaves Mr Wallace-Smith beholden to the Melville interests.

(d) The Third Funding Agreement stands to benefit the Melville interests ahead of other creditors. Specifically, the Third Funding Agreement requires Mr Wallace-Smith to consent to an order being made under s.564 of the *Act* giving the Melville interests an advantage over other creditors when it comes to the distribution of property recovered in the Proceeding, regardless of whether this is in the interests of creditors.[63] This is in addition to the benefits the Melville interests may receive by: (i) having recovered nearly $2 million more than may be secured by the Fingal charge; (ii) recovering more than $3.5m plus interest claimed still to be owing under the Charge and (iii) recovering the debt of Galvin Constructions with a face value of more than $1 million, which it acquired for only $20,000.

(e) The Third Funding Agreement requires unsecured creditors to bear the costs of the two unsuccessful attempts to fund Mr Wallace-Smith, which were disapproved of by the Court. Specifically, the Third Funding Agreement provides that payments of more than $500,000 said to have been made by the Melville interests to Mr Wallace-Smith to date (defined as 'Funding Costs to Date'), including the costs of bringing the two unsuccessful funding approval

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62 See cls 4.1, 4.3, 4.3(b), 5.2(a),(b), 6.5 to the Third Funding Agreement at exhibit MEL-1 to Mr Lhuede's affidavit sworn 8 May 2018.

63 See cls 1.9.5, p.12; c1.13.2 to the Third Funding Agreement at exhibit MEL-1 to Mr Lhuede's affidavit sworn 8 May 2018.

applications that the Court has refused on the basis that the agreements were not in the interests of creditors, are to be repaid to Fingal in priority to unsecured creditors. This includes recovering adverse costs orders made against Mr Wallace-Smith on each occasion.[64] It cannot be in the interests of unsecured creditors for them to bear the full costs of both sides of unsuccessful applications that the Court has found were not made in their interests while the parties who stood to gain personally from the applications bear no costs.

(f) The Third Funding Agreement postpones recovery by unsecured creditors to the repayment of approximately $1.7 million to date to the Melville interests, Mr Wallace-Smith and his solicitors in circumstances where no substantive step has been taken in the Proceeding since it was commenced in 2013.[65] The sums said to be owing are:

(iii) $552,445.28 in funding costs to date said to be owed to the Melville interests (including on account of the unsuccessful funding approval applications);

(iv) $411,746.61 said to be owing to Mr Wallace-Smith in unpaid remuneration to date; and

(v) $766,412.55 said to be owing to Mr Wallace-Smith's solicitors in unpaid fees to date (including an uplift fee of 25%).[66]

(g) The Third Funding Agreement offers no apparent benefit to unsecured creditors who, after the fees incurred and priority distributions are unlikely to receive any return. Indeed, the Third Funding Agreement expressly

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64 See Recital G; Definition of 'Actions' (b), 'Action Costs' and 'Adverse Costs' p 3 and 'Funding Costs to Date' p 4; cl 9.1, p ll; cl 9.3(a) and (c) p 12 to the Third Funding Agreement at exhibit MEL-1 to Mr Lhuede's affidavit sworn 8 May 2018.

65 See cl 9.3 to Recital G; Definition of 'Actions' (b), 'Action Costs' and 'Adverse Costs' p 3 and 'Funding Costs to Date' p 4; cl 9.1, p ll; cl 9.3(a) and (c) p 12.

66 See Attachment A to the Third Funding Agreement at exhibit MEL-1 to Mr Lhuede's affidavit sworn 8 May 2018.

contemplates that after repayment of the Funder, Mr Wallace-Smith and his solicitor, there may be insufficient funds to pay unsecured creditors.[67]

108 In regard to the sums thus far spent in the litigation, there is attached to the Third Funding Agreement a document titled 'Attachment A' which sets out those sums. Mr Wallace-Smith's lawyers, Piper Alderman, are noted as having uncharged fees to date of $557,391, together with an uplift fee of $139,347.75, a total of $696,738.75 which, with GST, amounts to $766,412.55. Mr Wallace-Smith's remuneration up to 10 November 2016 amounts to $422,348, plus a small addition of $7,000, of which only $55,000 has been paid. The table in paragraph (b) of Attachment A, which is titled 'Paragraph B - Schedule re Priority - Clause 9.3 of Funding Deed (Inclusive of GST) sets out priority payments to be payable under clause 9.3 of the Deed. These include funding costs of $552,445.28; Piper Alderman's priority capped uncharged fees to date of $500,000; Deloitte's uncharged fees to date of $374,315, an amount for what is described as Piper Alderman fee subordination amount of $57,391; and Piper Alderman's uplift on fees of $139,347.75.

109 Mr Bick, senior counsel for the defendants, observed that these figures illustrate that there is a strong incentive for Mr Wallace-Smith to get funding for unfunded and unpaid past fees; the incentive for both Mr Wallace-Smith and Piper Alderman is to get their fees paid up to date and then paid into the future to the end of the Proceeding. He remarked that all of that process can be brought to an end on 28 days' notice by the funder, if the funder, for any reason, is not content with Mr Wallace-Smith's conduct of the Proceeding. In return, the incentive for Mr Wallace-Smith is to pursue the Proceeding. Mr Wallace-Smith cannot commence any other proceeding unless he obtains the consent of the funder. Mr Bick remarked that the Third Funding Agreement still raises the same matters which caused Judd J to reject the Second Funding Application and which gave rise to Robson J's concerns in connection with the First Funding Application. He stated that the terms of the Third Funding Agreement suggest as a matter of commercial reality Mr Wallace-Smith will be very

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67 See cls 9.3(d), 9.4 to the Third Funding Agreement at exhibit MEL-1 to Mr Lhuede's affidavit sworn 8 May 2018.

closely controlled to pursue the claims of the Melville interests and no other claims, and certainly no claims which might harm the interests of the Melville camp and Fingal, including what is secured under the Fingal debenture.

110 It follows that, had Mr Wallace-Smith sought the Court's approval to enter into the Funding Deed, the approval would (again) have been refused for the reasons set out by Judd J and the plaintiffs would continue to be unable to give security to prosecute the Proceeding.

111 The defendants submit that as an officer of the Court, subject to Court's supervisory jurisdiction, Mr Wallace-Smith should be in no better position than he would have been if the Court's approval was sought. Mr Wallace-Smith is bound to act in the interests of all creditors without fear or favour.

112 It was contended that the Court should be reluctant to exercise discretion to reinstate the Proceeding, on the provision of security, from a source and on terms that are not in the interests of creditors and would not have been approved by the Court, merely because Mr Wallace-Smith sought to bypass the Court's approval, in favour of obtaining creditor approval. *A fortiori* where that approval was little more than the approval of the funder itself and full disclosure was not made to the ATO.

113 The defendants submit that in any event, even if the Proceeding was reinstated, on the provision of security for costs sourced from the Melville interests under the Third Funding Agreement, the Court cannot be satisfied that Mr Wallace-Smith will be able to prosecute the Proceeding to its conclusion in an efficient, timely and cost-effective manner as required by ss 7 and 25 of the *CPA*.

114 To the contrary, the defendants submitted that despite the inordinate delay in prosecuting the Proceeding, and Mr Wallace-Smith's submission that he now has funding to do so, the Third Funding Agreement offers no guarantee that the he will be funded to prosecute the Proceeding to its conclusion. Specifically:

(a) the Third Funding Agreement acknowledges that, other than the funding, Mr Wallace-Smith and AVSS have no means to prosecute the Proceeding[68]

(b) the indemnity provided under the Third Funding Agreement is limited to a maximum sum for each stage of the action, which sum is to be agreed between Mr Wallace-Smith and the funder or fixed in accordance with clauses 3.2 to 3.4.[69] If the Action Costs exceed that sum for any stage of the Action Mr Wallace-Smith will cease to be indemnified;

(c) the funding provided under the Third Funding Agreement is limited. The Melville interests have only agreed to fund Mr Wallace-Smith's remuneration up to the conclusion of a mediation of the Proceeding. After that, funding will be fixed in accordance with clause 3.5. If Mr Wallace-Smith's remuneration exceeds that agreed estimate Mr Wallace-Smith will cease to be funded; and

(d) the Melville interests can, at any time, terminate the Third Funding Agreement.[70]

115 The defendants contend that while the provision of security for costs may mitigate the financial costs to the defendants if the Proceeding was reinstated but not prosecuted to its conclusion, this will not compensate the defendants for the personal toll, especially on Mr Leggo, that protracted litigation inevitably has on them.

116 The defendants contend that it would be inconsistent with the efficient, timely and cost-effective resolution of civil proceedings[71] to reinstate a proceeding that has been inactive since July 2013, and only delayed by the aforementioned circumstances.

117 The defendants also say that it would be inconsistent with the just resolution of civil proceedings to reinstate the Proceeding to enable the Melville interests, who have,

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68 See Recital E to Third Funding Agreement at exhibit MEL-1 to Mr Lhuede's affidavit sworn 8 May 2018.

69 See cl 3.1 to Third Funding Agreement at exhibit MEL-1 to Mr Lhuede's affidavit sworn 8 May 2018.

70 See cl 4.1 to Third Funding Agreement at exhibit MEL-1 to Mr Lhuede's affidavit sworn 8 May 2018.

71 *Civil Procedure Act 2010* ss 7, 8.

over the past several years (largely) unsuccessfully prosecuted their own claims against the defendants, to prosecute further claims against the defendants, indirectly, through Mr Wallace-Smith, in respect of events that took place more than nine and as much as 18 years ago.

118 The defendants submit this is particularly so where the Court has refused to approve Mr Wallace-Smith entering into funding agreements with the Melville interests on each occasion on which approval has been sought, and Mr Wallace-Smith now seeks to sidestep the Court's approval and to obtain funding from the Melville interests on very similar terms to the funding agreement for which approval was refused by Robson J and Judd J.

119 The defendants submit that in the circumstances, reinstating the Proceeding would also be inconsistent with the objects of the efficient conduct of business of the court, the efficient use of judicial resources, and minimising delay beyond that which is reasonably required to prepare the matter for trial or the timely determination of the Proceeding.[72]

120 The defendants submit that Mr Wallace-Smith has taken no substantive step in the Proceeding since its inception but, together with his solicitors, has incurred more than $770,000 in unpaid legal fees in the Proceeding on a speculative basis, which is contrary to the overarching obligation(s) to minimise delay and ensure that costs are reasonable and proportionate.[73]

121 The defendants contend that these contraventions of the *CPA* are matters that the Court is obliged to consider in deciding whether to exercise the Court's discretion to lift the stay and reinstate the Proceeding.[74]

122 The defendants, while accepting that the Court considering this issue may have regard to the degree to which Mr Wallace-Smith's lack of progress in the matter has arisen

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72 Ibid s 9(c),(d),(e),(f).
73 *Civil Procedure Act 2010* ss 24-25.
74 *Civil Procedure Act 2010* s 9(2)(e).

from circumstances beyond his control,[75] say, however, when considering Mr Wallace-Smith's failure to promptly prosecute the Proceeding that his delay has not been caused by any circumstance beyond his control, rather, it has been caused by his own conduct. In particular, the defendants contend that it was incumbent on Mr Wallace-Smith not to commence proceedings that he did not have the ability to prosecute promptly, efficiently and in a timely fashion and without causing an inordinate delay. They draw upon the observations of Sifris J who observed at a directions hearing in the matter on 2 May 2014:

> It is unacceptable for a liquidator ... to continue in office for months and months in the hope of getting funding to continue with a proceeding.

123 The defendants observe that several years have passed since His Honour made those comments. Mr Wallace-Smith commenced the Proceeding at the behest of the Melville interests but with no financial means to prosecute the Proceeding. Having done so, the only circumstance that has delayed Mr Wallace-Smith from promptly prosecuting the Proceeding has been his inability to either obtain funding from an arm's length third party to prosecute the Proceeding or to obtain the Court's approval to enter into a funding agreement with the Melville interests. In this regard, despite the time which has elapsed since the Proceeding was commenced in July 2013, neither circumstance has changed: Mr Wallace-Smith remains unable to obtain funding from any arm's length funder or to obtain court approval to enter into a funding agreement with the Melville interests.

124 The defendants emphasise that all that has changed since the Proceeding was commenced is Mr Wallace-Smith's preparedness to take funding from the Melville interests to prosecute the Proceeding but at this juncture without the Court's approval. The defendants contend that that highly questionable change in values, on the part of Mr Wallace-Smith, is not a circumstance that is either outside his control or that would warrant reinstating the Proceeding.

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75 See Ibid ss 9(2)(c),(d).

125 This has occurred in the context that funding from the Melville interests has been on offer to Mr Wallace-Smith since at least November 2012. The defendants submit that if, as Mr Wallace-Smith now contends, it was appropriate for him to accept funding from the Melville interests without the Court's approval, then he could have done so at any time and they say it follows that there is no credible explanation for the delay in prosecuting the Proceeding.

126 The defendants also contend that Mr Wallace-Smith's explanation for the delay, that Mr Wallace-Smith was in effect awaiting the outcome of the Fingal proceeding, is disingenuous and should be rejected. The defendants submit that, to the contrary, the Fingal proceeding has had no impact whatsoever on the claims now sought to be prosecuted by Mr Wallace-Smith, which remain unchanged from the draft that was exhibited to the affidavit filed in support of the originating process in the Proceeding in July 2013, despite findings of the Court of Appeal to the contrary.

127 In this regard, the defendants submit that Mr Wallace-Smith's reliance on statements made by Judd J in the Second Funding Application, to the effect that any further application for funding approval should await the outcome of the appeal in the Fingal proceeding, cannot assist Mr Wallace-Smith. Mr Wallace-Smith did not await the outcome of the Fingal proceeding to bring the Second Funding Application. To the contrary, he now eschews the need to obtain the Court's approval and seeks to prosecute the Proceeding with funds obtained from the Melville interests without the Court's approval.

128 The defendants say that such a strategy was not one contemplated by Judd J and most probably would have been disapproved of as Judd J did, of Mr Wallace-Smith's last attempt to prevent the defendants from challenging Mr Wallace-Smith's decision to take funding from the Melville interests.[76]

129 The defendants state that the fact that the Proceeding has been adjourned, including several times by consent, while a decision of the Court and the Court of Appeal in the

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76 The Second Funding Application (n 5), [17]-[24].

Fingal proceeding were reserved does not excuse Mr Wallace-Smith's delay. The defendants say that to the contrary, it was Mr Wallace-Smith's delay in instituting, preparing and prosecuting the Proceeding, which prevented the Proceeding being heard together with the Fingal proceeding, that necessitated the adjournments. The defendants say that ex post facto consent to adjourn the Proceeding, given after the Proceeding was delayed and the Fingal proceeding had been heard and reserved, did not amount to an acceptance of Mr Wallace-Smith's delay in bringing or prosecuting the Proceeding. To the contrary, the defendants contend that their position was (and remains) as submitted by Mr Gibson, junior counsel for the defendants at a directions hearing in the Fingal proceeding before Sifris J on 23 April 2013 as follows:

> We strenuously object to the idea that we continue along the course in [the Fingal proceeding], putting on our evidence, only to have the liquidator come at some later point in time and bring claims that are so closely related to the claims in this proceeding, that we've put on evidence before having seen them.
>
> On top of which, the liquidator has been in a position since at least the end of the last year, to identify the potential claims that it will bring. So far, it's identified some of the claims that exist in this proceeding already, and a claim for insolvent trading. The liquidator has had the documents, been a party to this proceeding, conducted the liquidator's examination and is in a perfectly good position to put on that claim now ...
>
> In our submission, the current timetable should be amended to include the liquidator so that the liquidator can bring his claim, and it should be done in a timeframe that allows us to keep the current trial date. It is not appropriate to have a separate proceeding, even one that is later joined by the liquidator, in circumstances where the parties are the same ...
>
> My client is very keen to keep the existing trial date and to work the liquidator and his claims into a timetable that allows both matters to be dealt with at that time ... I accept that the timetable doesn't allow much time for the liquidator to put on his claim, but it is done on the basis that the liquidator has fully articulated to us at the end of last [year], each of the claims that he might bring and the documents that he intended to rely on. He has now had a liquidator's examination, he should know which of those claims he can bring and he should be able to put on a claim in a relatively short period of time, and then the parties can get about putting on evidence to meet that claim ...

130 Sifris J rejected Mr Gibson's submission observing that 'experience suggests that waiting for a liquidator to do anything is not a desirable course'.

131 It was said by the defendants that even if, contrary to these submissions, Mr Wallace-Smith was somehow justified in awaiting the outcome of the Fingal proceeding and appeal before prosecuting the Proceeding with funding from the Melville interests without Court approval, the decision of the Court of Appeal was delivered on 14 July 2016.

132 Further, the defendants contend that Mr Wallace-Smith's contention that it has taken this long to execute a funding agreement with the Melville interests and obtain a report from a costs assessor is not credible. Even if it was, the delay is not reasonable and reinstating the Proceeding would be contrary to the overarching purpose of the *CPA* and the application to do so should be refused.

133 The defendants also say that the granting of the application to provide the proposed security would unreasonably disadvantage them. The defendants contend that in determining whether the defendants will be unreasonably disadvantaged by the security for costs provided, the Court can consider both the actual circumstances, as set out above, as well as the possibility that the security is to be provided from funding obtained on terms or in circumstances that are contrary to the interests of creditors, in breach of Mr Wallace-Smith's duty to act impartially or which constitute an abuse of process.

134 The defendants contend that this possibility should not be discounted given the Court has on two occasions refused to approve Mr Wallace-Smith entering into funding agreements with the Melville interests on this basis and Mr Wallace-Smith now proposes obtaining funding for the current funding agreement on terms that are in substance as offered to the two earlier rejected funding agreements. They also contend that the reasoning of Judd J and Robson J, as it related to the independence of Mr Wallace-Smith and to issues with obtaining funding from the Melville interests, is likely to apply with equal force to the present agreement with the Melville interests regardless of the terms on which the funding has been obtained.

135 The defendants contend that it is only if the Court is satisfied that the security has been obtained on terms that are not contrary to the interests of creditors, in breach of Mr Wallace-Smith's duty to act independently or an abuse of process, and is in the interests of justice, that the Court should find that the security given by the first plaintiff is 'sufficient' to reinstate the Proceeding.

136 The defendants identify various factors as to how they will be unreasonably disadvantaged if the Proceeding is reinstated at this point. They say that if the Proceeding is reinstated on the provision of security obtained from the Melville interests it would:

(a) deny the defendants the right to have issues raised against them (issues which first arose in 2010) resolved in a just, efficient, timely and cost-effective manner and without undue delay;

(b) subject the defendants to years of further costs and stress of litigation, arising from events that have long since passed, in circumstances where the defendants have already endured the stress and costs of successfully defending the Fingal proceeding over the past six years. The defendants have simultaneously had to endure the stress and uncertainty arising from this collateral litigation since the Proceeding was instituted in 2013;

(c) prejudice the defendants' ability to defend the Proceeding, as the events in issue occurred in 2010, and going back several years before that, and the contemporaneous records have been held respectively by Mr Wallace-Smith and/or the Fingal receiver since their appointment in 2010 and 2011;

(d) deny the defendants the right to have the Proceeding conducted in a manner that would keep costs proportionate to the complexity of the issues or amount in dispute as Mr Wallace-Smith and his solicitor have already incurred, and may seek to recover, fees that are grossly disproportionate to the issues and amount in dispute, having regard to the stage of the Proceeding and steps taken to date;

(e) subject the defendants to collateral claims brought, through the liquidator, by the Melville interests, who stand to obtain a financial windfall for the funds that have been 'over-recovered' and recovering debts they have acquired for a small fraction of their face value if the claims are successful;

(f) deny the defendants the protection, from oppression, that would be available had Mr Wallace-Smith sought funding approval from the Court, as outlined on two previous occasions when their position was vindicated by Robson J and Judd J;

(g) deny the defendants the opportunity to be heard or to challenge the decision of Mr Wallace-Smith to enter into a funding agreement with the Melville interests. This is particularly relevant in the circumstances, as the Court has previously found that the defendants have a real interest in the performance by Mr Wallace-Smith of his duty to the company and unsecured creditors, and in ensuring that the Proceeding brought against them is not an abuse of process. The Court previously criticised the liquidator for resorting to strategies that were directed at denying the defendants that opportunity;[77] and

(h) subvert the Court's supervisory jurisdiction over the external administration of corporations,[78] including the Court's power to ensure that the conduct of liquidators is not oppressive, prejudicial or an abuse of process, and would deny the defendants the benefits of that protection.

137 It is contended by the defendants that prejudice to them of reinstating the Proceeding may have been mitigated, to some extent, if Mr Wallace-Smith had sought and obtained funding approval from the Court as he would have to have satisfied the Court, among other things, that he had reasonable prospects of succeeding in the litigation, that the funding was in the interests of creditors, that the terms of the

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77 The Second Funding Application (n 5) [24].

78 Division 90 of Schedule 2 of the *Corporations Act 2001* (Cth); *Palmer v Ayres* (2017) 259 CLR 478, 511 [85], [88] (Gageler J).

proposed funding were appropriate and, most importantly that the Proceedings would not be oppressive, in order to obtain that approval.[79]

138 However, the defendants contend that they have every reason to believe that had Mr Wallace-Smith sought the Court's approval for the funding arrangement, it would not have been approved for a number of reasons. The first of these relate to the prospects of success of Mr Wallace-Smith and AVSS in the Proceeding. The defendants observe that:

(a) where Mr Wallace-Smith has not filed a statement of claim in the Proceeding and has said that he is *'not entirely wedded to'* the draft claim from 2013 and that *'there will be some changes that will be made to it'*, which changes have not been identified, it is said the Court cannot make any informed assessment as to the likelihood of any claim succeeding,

(b) it is said that in any event, the claims can have no better prospect of succeeding than was the case before Robson J and Judd J, when the past two funding approval applications were rejected; and

(c) the defendants contend that the draft claim is premised on a highly questionable construction of the Deed of Settlement, to the effect that clause 3.1 of the Deed requires NDP to advance funds to meet any and all costs of the development, which construction ignores clauses 3.2 and 3.5, as well as the terms of the facility agreement, and which the defendants submit is highly unlikely to succeed. This is said to be particularly so in relation to amounts claimed to have been advanced by Fingal.

139 The defendants observe that the draft statement of claim is premised on the Fingal charge being both valid and enforceable and securing the amount claimed by Fingal which is highly doubtful in light of the Court of Appeal's decision. In this regard, the defendants make reference to the following matters:

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79 *Corporations Act 2001* (Cth), s 477(2B); *Re ACN 076 673 875 Ltd* (2002) 42 ACSR 296.

(a) as to the validity of the Fingal charge, contrary to Mr Lhuede's affidavit sworn 27 April 2018 at [45], there was no declaration by the trial judge or by the Court of Appeal in the Fingal proceeding that Mr Leggo was estopped from disputing the validity of the Fingal charge. To the contrary, Mr Leggo was not a defendant to that proceeding and will dispute the validity of the Charge;

(b) as to the amount secured, contrary to paragraph [45] of the Lhuede affidavit, the defendants dispute not only the validity of the Fingal charge but also the amount(s) said to be secured by it;

(c) contrary to paragraph [46] of the Lhuede affidavit, the Court of Appeal did address this question and refused to declare that the Fingal charge secured moneys that had been advanced by unitholders and the Albury Lenders (which are the amounts the liquidator continues to assert are secured) and declared instead that the Charge only secured amounts that had been advanced 'by Fingal' in its capacity 'as lender'. Contrary to [47] of the Lhuede affidavit, this could be as little as $141,500 as set out at paragraph 37 above;

(d) contrary to the suggestion in paragraph [48] of the Lhuede affidavit, Mr Leggo did not concede that the payments referred to were costs within the meaning of clause 3.1 of the Deed or that NDP was obliged to meet those costs. To the contrary, Mr Leggo contended that construction of the agreement was a question of law and that clause 3.1 of the Deed was not an 'open cheque' to meet all costs of the development; and

(e) contrary to the statement in paragraph [48] of the Lhuede affidavit, Mr Leggo did not concede that he knew there would be insufficient funds to pay creditors in full in December 2009. To the contrary, Mr Leggo's evidence was that he received a document on 22 December 2009, more than seven months after the date of insolvency contended by Mr Wallace-Smith, that estimated there would be a loss at the end of the development in May 2010, which meant that unitholders, whose investments were to be repaid from any surplus, may not

be repaid their investments plus interest in full. In respect of the creditors Mr Leggo said *'I looked at this and thought ... there was still a healthy balance, a healthy buffer to ensure that the company would be able to meet all of its debts'*.

140 Next the defendants contend that the Third Funding Agreement would not have been approved by the Court had Mr Wallace-Smith sought its approval because the Proceeding is not in the interest of creditors. In this regard, the defendants contend:

(a) that it is contrary to the interests of creditors for Mr Wallace-Smith to accept that Fingal has a secured debt of over $5.5 million, without any independent verification of the amount actually secured by the Fingal charge following the decision of the Court of Appeal;[80] and

(b) further it is contrary to the interests of creditors for Mr Wallace-Smith to seek to recover this amount, as a secured debt, for the benefit of Fingal, and in doing so abandon the right to recover nearly $2 million that has been over paid to Fingal to date.

141 The defendants submit that given Mr Wallace-Smith's own fees and that of his solicitors, his treatment of Fingal as a secured creditor for the full amount of its asserted debt, and his agreement to support an application by the Melville interests for priority dividends under s 564 of the *Act* in return for funding, it is highly doubtful that unsecured creditors will receive any return from the Proceeding. In this regard, they draw attention to the remarks of Judd J in paragraph 29 of his judgment where he expressed the view that there is 'great pessimism' regarding the prospects of unsecured creditors receiving a dividend when considering the Second Funding Agreement.

142 Any pro rata return to creditors other than the Melville interests would also be highly diluted by the Melville interests having acquired debts of other unsecured creditors for a fraction of their face value. By contrast the defendants say that recovering the

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80 See *Nom de Plume Nominees Pty Ltd v Fingal Developments Pty Ltd* (2016) 337 ALR 303 [211]-[212].

$2 million from Fingal would see an immediate return to unsecured creditors. It was for similar reasons that funding approval was refused on two prior occasions.[81]

143 The defendants say that the Third Funding Agreement is unlikely to obtain approval if put before the Court by reason that prosecuting the Proceeding is oppressive to the defendants. The defendants submit that permitting the Melville interests to fund the Proceeding gives the Melville interests considerable control over the Proceeding, in which they have a vested interest.

144 Judd J considered this sufficient reason to refuse the second funding application.[82]

145 The defendants say it is no answer for Mr Wallace-Smith to assert that under the current funding agreement he 'retains the discretion' to advance or withhold funds or terminate the funding agreement if his discretion is not exercised in accordance with its wishes. Indeed, the defendants observe counsel for Mr Wallace-Smith conceded at the hearing of the Second Funding Application before Judd J that the Melville interests would almost certainly terminate the funding agreement if Mr Wallace-Smith decided to challenge the Fingal charge.[83] The defendants say there is no reason to believe that the position would be any different if Mr Wallace-Smith disputed the amount secured by the charge or sought to recover the amount of any overpayment from Fingal.

146 The defendants say it would be oppressive to permit the Melville interests to use Mr Wallace-Smith as a 'stalking horse' to litigate the defendants, when Fingal's own claims against them have been heard and determined and, to a large extent, dismissed.

The plaintiffs' submissions

147 In their submissions, the plaintiffs begin with a survey of the principles to be applied by the Court in determining the extent of the Court's power to dismiss or grant a permanent stay of a proceeding. They contend that the Court of Appeal in this State has applied the same criteria to such applications whether founded on general

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81 The First Funding Application (n 3); the Second Funding Application (n 5).
82 The Second Funding Application (n 5) [11].
83 See Ibid [10].

principles of abuse of process (as is found in r 23.01(1)), or the more specific category of want of prosecution, that is, 'whether there is a substantial risk that the defendant will be unable to obtain a fair trial in the circumstances of the case'.[84] In this regard they referred to the decision of the Court of Appeal in Queensland in *Tyler v Custom Credit Corp Limited*,[85] which identified the following factors:

> (1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;
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> (2) how long ago the litigation was commenced or causes of action were added;
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> (3) what prospects the plaintiff has of success in the action;
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> (4) whether or not there has been disobedience of Court orders or directions;
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> (5) whether or not the litigation has been characterised by periods of delay;
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> (6) whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant;
>
> (7) whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity;
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> (8) whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim;
>
> (9) how far the litigation has progressed;
>
> (10) whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client but it may be. Delay for which an applicant for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers;
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> (11) whether there is a satisfactory explanation for the delay; and
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> (12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.[86]

148 The plaintiffs contended that these considerations can be classified into categories of delay, prospects of success and prejudice. These were addressed in turn.

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84 *R v Investments (Aust) Pty Ltd* [2014] VSCA 210 [9].

85 [2000] QCA 178.

86 Ibid [2].

149 The plaintiffs placed emphasis on certain aspects of the chronology. The plaintiffs say that after commencement of the Proceeding in July 2013 the Proceeding progressed with the hearing of the First Funding Application and the subsequent appeal.[87] As has been seen, this culminated in the decision of Robson J on 11 March 2014. On 2 May 2014, the directions hearing in the Proceeding was adjourned by Sifris J for further directions on 25 July 2014. On 11 June 2014, the defendants filed a summons for a stay of proceeding pending AVSS giving security, supported by an affidavit which sought $97,900 for the defendants' costs. Orders were then made by consent of the parties by me on 19 June 2014 staying the Proceeding, pending the provision of security in an amount to be agreed between the parties.

150 At the directions hearing conducted before Sifris J on 25 July 2014, the defendants' counsel submitted that the Proceeding should not be remitted back to me 'until the funding issue is determined'. Sifris J made no orders in the Proceeding that day. The plaintiffs say that more recently, following the securing of funding the plaintiffs sought the defendants' agreement to the provision of security for their costs in the sum of $411,500. However, that has been declined and the plaintiffs say that the current summons was issued only after the plaintiffs expressed their willingness and immediate ability to provide security.

151 The plaintiffs contend that the Proceeding has been 'punctuated' by delay on account of numerous adjournments made by consent, including at the defendants' instigation. By way of example, they say that:

(a) on 29 October 2014, the defendants' solicitors SBA Law wrote to the plaintiffs' solicitors Piper Alderman suggesting an adjournment, which was ordered by Judd J by consent, adjourning the Proceeding to 5 February 2015;

(b) on 2 February 2015, Judd J made orders on the papers by consent adjourning the Proceeding pending judgment in the Fingal proceeding;

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87 The First Funding Application was made in a separate proceeding commenced by originating process (No S CI 2013 04313) and the subsequent appeal before Robson J.

(c) on 18 March 2015, Judd J made orders on the papers by consent adjourning the Proceeding pending the costs hearing in the Fingal proceeding;

(d) on 14 May 2015, Judd J made orders on the papers by consent adjourning the Proceeding pending a foreshadowed appeal in the Fingal proceeding; and

(e) on 7 July 2015, SBA Law wrote to Piper Alderman suggesting the Proceeding be adjourned until mid-November 2015. Instead, at the directions hearing on 10 July 2015 Judd J listed the hearing of the Second Funding Application in the Proceeding on 29 October 2015. His Honour delivered judgment on 22 December 2015, rejecting the Second Funding Application. It was contended by the plaintiffs that it was rejected on the basis it was premature given the pending appeal in the Fingal proceeding (and that it was not for the benefit of creditors generally). I do not agree with that characterisation. In my view, the extracts of Judd J's reasons reveal, the application was rejected on several grounds and the Fingal Proceeding (and appeal) was somewhat peripheral to his consideration. There was sharp criticism by Judd J of a number of aspects of the plaintiffs' application.[88]

152 The plaintiffs contend that following the 2014 and 2015 adjournments referred to above, during 2016:

(a) on 14 July 2016, the Court of Appeal delivered judgment in the Fingal proceeding,[89] which Mr Wallace-Smith had been awaiting, and following which he renewed his efforts to obtain funding of the Proceeding;

(b) on 6 October 2016, the Court of Appeal issued its final orders in the Fingal proceeding;[90] and

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88 The Second Funding Application (no 5) [22], [38].

89 *Nom De Plume Nominees Pty Ltd v Fingal Developments Pty Ltd* (2016) 337 ALR 303; Lhuede Affidavit [31]; Liquidator's Fourth Affidavit [10].

90 *Nom De Plume Nominees Pty Ltd v Fingal Developments Pty Ltd* [2016] VSCA 233. Lhuede Affidavit, [32]; Liquidator's Fourth Affidavit and exhibit SWS-2 [11].

(c) on 19 December 2016, AVSS' creditors passed a resolution approving the Third Funding Agreement negotiated by Mr Wallace-Smith.

153 The plaintiffs say that during 2017:

(a) Mr Wallace-Smith continued discussions with the litigation funder,

(b) Mr Wallace-Smith negotiated and then signed the Third Funding Agreement on 8 May 2017;

(c) Piper Alderman engaged with multiple cost consultants for the production of a report informing the quantum of appropriate security for the defendants' costs of the Proceeding, which process was delayed by the workload of those consultants - culminating in the production of a report on 25 August 2017; and

(d) in November and December 2017 Piper Alderman corresponded with SBA Law about the form of security by way of a bank guarantee, and the quantum of security.

154 The plaintiffs submit that because there was no consent, SBA Law, the solicitors for the defendants, contacted the Court in January 2018 seeking a directions hearing which was listed on 23 February 2018 at which time orders were made listing the hearing of the defendants' summons on 10 May 2018.

155 The plaintiffs state that there have been three distinct periods of delay in the Proceeding since it was issued in July 2013:

(a) first, from July 2013 to the end of 2015, by consent, pending progress of the Fingal proceeding and Mr Wallace-Smith's funding applications;

(b) secondly, during 2016 pending final outcome of the appeal in the Fingal proceeding; and

(c) thirdly, during 2017 whilst Mr Wallace-Smith obtained funding and Piper Alderman obtained an assessment of the costs being sought in the

defendants' summons for security.

156 The plaintiffs submitted that throughout each period, the parties' solicitors have been in communication and the defendants have been kept appraised of Mr Wallace-Smith's intent to fund and then pursue the claims in the Proceeding.

157 The plaintiffs say that the only period in respect of which the defendants have any reasonable basis to now complain is the third period during 2017 while Mr Wallace-Smith obtained funding and assessed the defendants' costs for security. However, they contend that is a relatively short period. Further, they contend in circumstances where AVSS is insolvent due to the defendants' failure to pay amounts they owe under the Deed of Settlement, it is inappropriate for those defendants to now seek to characterise the time and effort of Mr Wallace-Smith to secure the funding of the Proceeding as having unreasonably caused delay.

158 The defendants contend that the slow pace of the litigation in 2017 can be attributed to AVSS' impecuniosity for which they contend the defendants are responsible and which they say is a factor telling against the granting of a stay of the Proceeding. The plaintiffs refer to the decision of the Court of Appeal in *AMP General Insurance Limited v Victorian WorkCover Authority*,[91] where Maxwell P and Neave J described the applicable test for where an applicant seeks dismissal of a claim for delay. They stated, 'For want of prosecution, the defendant will need to show that the plaintiff's delay was 'inordinate and inexcusable'. The plaintiffs submit that in this case the delay of which the defendants complain is neither inordinate nor inexcusable, and the significant period of it occurred either at the defendants' instigation or with their consent.

159 The plaintiffs' submissions then move to the prospects of success of the Proceeding. The plaintiffs say that although the Proceeding was commenced by originating motion, the plaintiffs' case is set out in some detail in a proposed statement of claim

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91 (2006) 15 VR 175 [40].

to which reference has been made above, pending orders that the proceeding continue by way of pleading.

160 In the Proceeding, Mr Wallace-Smith sues on the Deed of Settlement seeking payment for funding shortfall which by the terms of the deed of settlement the defendants promised to fund. The plaintiffs say that if the defendants adopt the position that they were not bound by the Deed of Settlement and were not obliged to fund the development of the residential complex, then AVSS has an alternative claim. On that scenario, AVSS would have been hopelessly insolvent and the second defendant, Mr Leggo, would be liable for an insolvent trading as a director of AVSS. Thus, the plaintiffs say, AVSS' case is that it must succeed in this Proceeding 'one way or the other'. In this regard the primary claim pursuant to the Deed of Settlement comprises $2,365,931 (owed by AVSS to third party creditors) and $3,341.076.70 plus interest (said to be owed by AVSS to Fingal), which together total $5,707,007.70 plus interest. Mr Wallace-Smith contends that in the alternative, Mr Wallace-Smith has a claim against Mr Leggo for insolvent trading in the sum of $2,365,931 in relation to debts incurred by AVSS when it was alleged to be insolvent.

161 The plaintiffs contend that by their refusal to provide the shortfall under the Deed of Settlement, the defendants are responsible for AVSS' impecuniosity and complain that the defendants have not yet articulated any defence nor taken an election as to whether they say they are bound by the deed of settlement or not. Instead they sought an early stay of the Proceeding and have resisted 'showing their hand' in any respect until such time as the plaintiffs provide security for their costs. It is said that even if the defendants allege that the Deed of Settlement was not binding and succeed in that defence, on the insolvent trading claim against Mr Leggo, he has admitted:

(a) that the third party creditor claims are costs incurred by AVSS in accordance with the Deed of Settlement; and

(b) that he knew AVSS was insolvent at the time when he allowed it to continue to trade.

162 The plaintiffs assert that on the information presently available to Mr Wallace-Smith there is no basis for any defence to the primary claim against the defendants pursuant to the deed of settlement or, failing that, the alternative claim against Mr Leggo for insolvent trading. Mr Wallace-Smith has received advice from his solicitors, counsel and independent counsel that he has good prospects of success in the Proceeding. They say that even senior counsel for the defendants conceded that Mr Wallace-Smith's claims have 'real merit' during a directions hearing on 25 July 2014.

163 As regards the provision of security for costs, the plaintiffs say that having obtained creditor approval of the funding agreement by the creditors pursuant to s 477(2B) of the *Act*, Mr Wallace-Smith entered into the Third Funding Agreement on 8 May 2017. His solicitors, Piper Alderman, then obtained a report from Ethical Costing and Legal Services quantifying the defendants' costs in the sum of $411,485.14 based on the six day trial. Mr Wallace-Smith sought the defendants' consent to the security for costs being fixed in that sum. However, consent was refused and instead the defendants queried the basis on which the creditors approved the Third Funding Agreement rather than obtain court approval.

164 The plaintiffs contend that the defendants' concerns as to the Third Funding Agreement are unfounded, and drew on a comment made by Judd J at a directions hearing on 27 August 2014 where his Honour stated:

> It seems to me that the approval of the court should only be sought for an agreement of this kind where there is some reason why the approval cannot be dealt with reasonably by a committee of inspection or resolution of creditors.

165 The plaintiffs say that since November 2017 Piper Alderman has held funds on trust on account of the defendants' costs in excess of the sum quantified by Ethical Costing and Legal Services, an amount which was more than four times the amount originally sought by the defendants in their summons of 11 June 2014. The defendants however have refused to accept that security and instead brought their application for the Proceeding to be permanently stayed or dismissed, or in the alternative, that the Proceeding be stayed until AVSS gives security 'in a sum fixed by the Court and obtained on terms approved by the Court'.

166 As to the issue of prejudice to the defendants, the plaintiffs say that the defendants have been aware of Mr Wallace-Smith's claim since the commencement of the Proceeding in 2013. Since then they have actively participated in the deferral of those claims, including pending final outcome of the Fingal proceeding and to demand security for their costs which the plaintiffs contend Mr Wallace-Smith has been in a position to provide for some time. The plaintiffs contend that Mr Wallace-Smith's claims against the defendants are clear and precise. Mr Wallace-Smith has not shied away from prosecuting these claims, merely deferred active steps pending the Fingal proceeding and sought funding to continue the Proceeding once the appeal on that related action had concluded. They say that while the defendants may be motivated in this application by the opportunity to now 'wash their hands' of the claims, it is difficult to see what prejudice, if any, they have suffered in all the circumstances.

167 The plaintiffs submit that the trial of the Proceeding will largely turn on documentary evidence and that that unlike many of the case where a Proceeding regarding personal injury is dismissed for delay, this is not a matter where evidence will turn on the strength of witnesses' memories. The plaintiffs submit that so far as witness evidence will be called, the key players have recently given evidence in the related Fingal proceeding, having thereby refreshed their memories. The plaintiffs submit that the relevant documents will have naturally been retained by the defendants since they were put on notice of the liquidator's claim in 2013. In addition, the defendants have already incurred the cost of discovery in the collation and revue of the documents in the Fingal proceeding such that minimal additional costs should be required.

168 The plaintiffs say there is no evidence of prejudice to the defendants or their ability to obtain a fair trial in the circumstances. They have consented to (and often agitated for) much of the delay of which they now complain. The plaintiffs submit there has been no dereliction or disregard of the Court's orders by any party, simply slow progress for the reasons deposed by Mr Wallace-Smith and Mr Lhuede. The plaintiffs submit that the most recent delay, in 2017, arose from Mr Wallace-Smith's efforts to secure funding and provide security demanded by the defendants. Mr Wallace-Smith

has now done so and the plaintiffs are ready to proceed as they have been since November 2017.

169 In his oral submissions, Mr Williams, Senior Counsel for the plaintiff criticised the defendants as attempting to 'run together' the plaintiffs application to lift the stay of the Proceeding, and the defendants' application to permanently stay or dismiss the Proceeding. It was submitted by Mr Williams that the Court is required to first determine the defendants' application ahead of the plaintiffs' application. Mr Williams submitted that the distinction is important as for the defendants to be successful in their application a heavy onus must be discharged.

170 Mr Williams also criticised the defendants for what he described as attempting to run a 'de facto funding application opposition' in circumstances where a funding application is not required. Mr Williams submitted that the application before the Court is not one which invokes the Court's jurisdiction to supervise the conduct of Mr Wallace-Smith.

171 Mr Williams placed heavy reliance on the fact that the Fingal proceeding, heard first by Sifris J, and then by the Court of Appeal, has now concluded. He submitted that the fact that the Fingal charge was in issue at that time was a factor which led to the Court's decision to reject the two previous funding applications. As I have observed, on my reading of the judgment of Robson J and Judd J, the Fingal proceeding was a peripheral consideration.

172 Mr Williams submitted that while Mr Wallace-Smith previously believed Court approval of the funding agreement was appropriate, due to the interrelationships between the parties to the proposed funding agreements and the Fingal proceeding, this factor, Mr Williams submitted, now no longer exists. Mr Williams did not to my mind effectively elaborate and explain as to why that is so and I found that the explanation given that Mr Wallace-Smith had only recently been made aware that he could obtain approval from the creditors, to be most unconvincing.

173 Mr Williams contended that there were three factors which resulted in the rejection of the application for the approval of the two previous funding agreements: (i) the enforceability of the Fingal charge and the quantum secured by it was in issue; (ii) the parties to the Fingal proceeding were the same parties to the Proceeding and might be attempting to obtain a collateral advantage by ensuring the Fingal charge is not challenged; (iii) the ability to set aside the Fingal charge as an insolvent transaction is no longer available.

174 Mr Williams submitted that what troubled Judd J about the Second Funding Application was the fact that the proposed funders, who had the benefit of the charge, might be trying to obtain a collateral advantage by its funding of this Proceeding by requiring Mr Wallace-Smith not to challenge the charge. He also submitted that Judd J considered there to be a 'conflict' arising out of the fact that the Fingal charge was being litigated in the Fingal proceeding. Mr Williams said that these issues no longer prevail as the efficacy of the Fingal charge has now been determined. Mr Williams submitted that there can be no 'collateral advantage' obtained by the Melville interests in relation to the Fingal charge by funding the Proceeding as factors which might constitute such a 'collateral advantage' are now 'dead'.

175 Mr Williams did not address the plaintiffs' contention that Mr Leggo was not a party to the Fingal Proceeding and is therefore not estopped from challenging the Fingal charge. It seems clear that if the Proceeding goes to trial the Fingal charge will certainly be the subject of challenge by Mr Leggo of its efficacy and the amount secured by it.

176 Mr Williams also observed that there is no provision for a premium in the Third Funding Agreement, which he said is a factor which had influenced Judd J in the Second Funding Application. There is, he submitted, the potential for the funding creditor to apply to the Court for approval of a priority, but that is at the Court's discretion.

177 Mr Williams placed emphasis on the fact that the creditors in the Proceeding are not unsophisticated and that the decision to enter into the Third Funding Agreement was made by very sophisticated litigants. He states that when the Third Funding Agreement was approved, prior to the assignment of the Galvin Constructions debt, there were three creditors; the ATO, Galvin Constructions and Fingal.

178 Mr Williams submitted that Mr Wallace-Smith is not dealing preferentially with Fingal, but that he is content to be funded by anyone willing to fund the Proceeding.

179 Mr Williams, in response to the defendants' contention that Mr Wallace-Smith did not adequately detail the 'negative outcome' of the Court of Appeal's decision in the Fingal proceeding in its report to creditors of 2 December 2016, states that the plaintiffs had a 'relatively passive' approach to the trial before Sifris J and virtually a 'completely passive' approach during the appeal. He contended that it was neither a victory nor a defeat for Fingal. Mr Williams also submitted that the defendants' criticism of Mr Wallace-Smith's opinion that entry into the Third Funding Agreement was in the interests of all creditors was unfounded and that the propositions made to the creditors were all correct. Mr Williams submitted that any rational creditor would take a path with a prospect for success over a path with no prospect for success.

180 In response to the defendants' criticism of the amount of costs incurred in the Proceeding, despite its lack of progress, Mr Williams submitted that there has been progress including Mr Wallace-Smith's special purpose report, preparation of the draft statement of claim, the commencement of the Proceeding and the steps required in preparing the funding applications.

181 Mr Williams submitted that the costs incurred to improve the asset position of the company were proper costs incurred in the liquidation. He also remarked that the fact that everything in this Proceeding has been so vigorously contested has contributed to the high quantum of expenses incurred. Mr Williams submitted, in response to the defendants' contention that the costs of the Proceeding may be 'visited upon' the defendants if ultimately the Plaintiffs are successful in the Proceeding, that

it would be difficult to see how this could be the case given the adverse costs awarded against the plaintiffs due to the failure of the previous funding applications.

182 In respect of the costs, Mr Williams referred me to the decision of *Sakr Nominees v Sakr*[92] for authority for the proposition that even an unsuccessful attempt to recover costs is a proper expense in the liquidation.

183 Mr Williams addressed the defendants' submission that the definition of 'Actions' in the Third Funding Agreement has the effect of allowing the funder a right of veto over the other actions and might prevent Mr Wallace-Smith from undertaking certain actions. Mr Williams submitted that the Third Funding Agreement does not prohibit Mr Wallace-Smith from obtaining further funding from another party to pursue whichever actions he likes, and that there is nothing unremarkable about the fact that the Third Funding Agreement naturally prevents Mr Wallace-Smith from going off and commencing any proceeding that he chooses.

184 Mr Williams further submitted that there is nothing unremarkable about the imposition of 'Actions Costs' and other reimbursements and the references to 'Adverse Costs' and indemnity costs as provided for in the Third Funding Agreement. In this regard, Mr Williams submits that the clauses which facilitate payment of Mr Wallace-Smith's costs merely reflect the priorities prescribed in the *Act*. He further submitted there is nothing unusual about the funding stages. Mr Williams submitted that there is no need for the Court to have regard to the unredacted version of the Third Funding Agreement.

185 Mr Williams submitted, that there is nothing unremarkable about the 'Termination' clause and that it is standard for such an agreement to provide for the possibility of termination. Mr Williams submitted that should the termination occur, there are sufficient protections for others involved, as set out at cl 4.3 of the Third Funding Agreement which provides effectively that notwithstanding termination of the parties' obligations, the funder will still provide indemnity for Adverse Costs.

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92 [2017] NSWCA 38 [58].

Mr Williams observed that the funder is still liable for any adverse costs incurred up to 45 days after termination. Further, pursuant to cl 4.4 of the Third Funding Agreement, Mr Wallace-Smith may continue to hold and apply any security provided to him pursuant to the terms of the Third Funding Agreement notwithstanding termination.

186 Mr Williams emphasised that the Third Funding Agreement does not, contrary to the defendants' submission, give the Melville interests an unreasonable amount of control over the Proceeding. First, he submitted that Mr Wallace-Smith is free, pursuant to cl 4.3 of the Third Funding Agreement to obtain Funding from another source to pursue any action he desires. He submitted that this ensures the Melville interests do not have 'absolute control'. He submitted that it is substantially unlikely that the Melville interests will, at any juncture terminated funding in the Proceeding given the funding it has contributed to date. Mr Williams submitted that he considered what troubled Judd J about the Second Funding Application was the possibility that Fingal would terminate the funding if circumstances arose in the Fingal proceeding which warranted the need to terminate funding in this Proceeding.

187 Mr Williams submitted that Mr Wallace-Smith, if successful in the Proceeding, will need to determine the quantum of the Fingal charge and will take whatever steps are appropriate at that time. Mr Williams submitted that the fact the ATO will be the other remaining creditor at that point is significant, as the ATO is a sophisticated creditor capable of exercising their rights if necessary. I note however that the ATO have shown very little interest in the administration and have declined to fund the Proceeding. It is the only 'arm's length' creditor after the assignment of the debt of Galvin Constructions and Melbourne Business & Investment Corporation.

188 Mr Williams submitted that there is nothing unusual about the definition of 'secured creditor'. Mr Williams addressed the defendants' contention that there was something sinister about cl 12.2 wherein it states 'nothing in this deed will be taken or construed to prejudice the right to the funder pursuant to the Fingal charge'. Mr Williams submitted that cl 12.2 does not to reinforce or bolster the funders rights, and is

preceded by a consent by the funder for Mr Wallace-Smith to take control of the action.

189 Mr Williams submitted that, unless Mr Wallace-Smith was given permission by the chargee to pursue that charge , the chargee would be entitled to otherwise control the litigation through a receiver or otherwise but cl 12.1 confers the power on Mr Wallace-Smith. In this regard, he submitted that all cl 12.2 does is reflect the fact that the funder happens to also be a charge holder, which he submitted is not uncommon.

190 Mr Williams then addressed attachment A to the Third Funding Agreement, and submitted that the plaintiff should not be required to disclose to the defendants what Mr Wallace-Smith's budget is for the Proceeding. Mr Williams submitted, again, that the Proceeding is not a funding application in any event.

191 Mr Williams submitted that the defendants wrongfully criticised the report to creditors dated 18 September 2014, at section 4.2.1.3 wherein Mr Wallace-Smith makes reference to his 'discussions with the directors of Fingal' which led Mr Wallace-Smith to believe that Fingal was owed money by AVSS. Mr Williams submitted that, contrary to the defendants' criticism that the discussions with the Fingal directors was Mr Wallace-Smith's only source of information used to form his conclusion that Fingal was owed money, Mr Wallace-Smith had access to the books and records of AVSS. Mr Williams also referred to paragraphs 141 and 142 of Sifris J's judgment in which his Honour found that NDP, AVSS and Leggo are all estopped from asserting that the Fingal charge is not effective to secure the loans it purports to secure, and that the key documents such as the draft deed of priority, Loan Acknowledgement dated 31 March 2008 and executed deed of priority clearly underpin the estoppel claim. Mr Williams also submitted that the defendants have not asserted that any of the amounts owed pursuant to the Fingal charge are not owed to any creditor at all.

192 Mr Williams submitted that Mr Wallace-Smith's decision to pursue recovery of the Fingal debt, and any arguments as to the quantum of that debt, is justified by Mr Wallace-Smith in his report dated 31 July 2013, in which he sets out his findings as to AVSS' solvency.

193 Mr Williams again submitted that the Court's supervisory jurisdiction to approve the Third Funding Agreement and to assess Mr Wallace-Smith has not been invoked. Even if it were invoked, Mr Williams submitted that in the two previous funding applications there has been no finding of misconduct on behalf of Mr Wallace-Smith.

194 Mr Williams submitted that the claims proposed by Mr Wallace-Smith are sound and that AVSS was only solvent because it had the surety of the Deed of Settlement to ensure that it could meet its liabilities as and when they fell due.

195 Mr Williams then addressed the defendants' submissions as to why the stay should not be lifted. Mr Williams submitted that the plaintiffs never issued a 'holding proceeding' as was put by the defendants and that funding was available but ultimately not approved by the Court. He submitted that it was not the case that the plaintiffs had sought to issue a Proceeding and then decide what to do later on as was the case in *Limin James Chen v Kevin McNamara & Son Pty Ltd.*[93] Mr Williams further submitted that the plaintiffs, though unsuccessful in the first two funding applications, cannot be said to have acted in contravention of the *CPA*. Mr Williams then referred to his interpretation of Judd J's decision to refuse the Second Funding Application which was effectively that his Honour's position was that if the plaintiffs sought funding from Fingal then Mr Wallace-Smith would be required to wait until final determination of the Fingal proceeding. Mr Williams also submitted that Judd J criticised the Second Funding Application because it was not possible to be satisfied as to what the return to unsecured creditors might be, and while Mr Williams submitted this may be true, he contended it is not a reason to refuse the Proceeding to continue. He submitted that the unsecured creditors have made a judgment themselves when they approved the Third Funding Agreement.

196 Mr Williams submitted, in response to the defendants' submissions that the independence of Mr Wallace-Smith is compromised as he and his solicitors have a personal interest in the running the Proceeding, that there is nothing unusual about Mr Wallace-Smith having undertaken work on a speculative basis prior to obtaining

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93 [2013] VSC 539 [76].

funding. Mr Williams submitted that given there is now no ability for Mr Wallace-Smith to challenge the Fingal charge or to recover the amount of any overpayment.

197 Mr Williams also addressed the notion that there is a prejudice to Mr Leggo due to the delay. Mr Williams submitted that there has been no real prejudice in the sense that Mr Leggo has not had to answer any case put to him thus far.

Defendants' submissions in reply

198 On 10 May 2018, the defendants filed submissions in reply to the plaintiff's submissions filed 3 May 2018. The submissions also addressed the Third Funding Agreement which was exhibited to the affidavit of Michael Lhuede sworn 8 May 2018. The defendants highlight that that affidavit was filed out of time and without leave shortly before the hearing and after the defendants had filed their submissions. The balance of the defendants submissions in reply address a number of contentions made by the plaintiffs.

199 The defendants submit that s 7 of the *CPA* requires civil proceedings be prosecuted in an efficient and timely manner, and s 25 of the *CPA* requires a claimant to act promptly and minimise delay in conducting civil proceedings.

200 The defendants submit that the Plaintiffs contention that the reason the defendants have 'not yet articulated any defence' and have 'not taken an election as to whether they say they are bound by the Deed or not' is because the defendants have 'resisted showing their hand' is disingenuous. The defendants have not filed a defence in the proceeding as the plaintiffs have not filed any claim in the proceeding. The proceeding has been stayed since 2014

201 The defendants say that in the circumstances, where no pleadings have been filed, the plaintiffs submission that 'there is no basis for any defence to the primary claim against the defendants pursuant to the Deed or, failing that, the alternative claim against Mr Leggo for insolvent trading' can be no more than pure speculation. To the extent that the plaintiffs purport to rely on legal advice as to the prospects of

succeeding, that advice, which must be speculative also, has not been produced and cannot be tested.

202 The defendants contend that despite these obligations the plaintiffs concede that there were not in a position to prosecute the Proceeding until November 2017, more than four years after the Proceeding was commenced, giving the plaintiffs' originating process the character of a 'holding' originating process. The defendants assert it is no longer appropriate to file a 'holding' originating process since the advent of the *CPA* and is inconsistent with the obligations imposed by ss 7 and 25 of the *CPA*.[94]

203 The defendants referred to the decision of *Kuek v Devflan Pty Ltd* ('*Kuek*')[95] in which Kyrou J states that the *CPA* does not deal with 'abstract concepts of justice' rather it imposes 'specific statutory obligations' and that in an appropriate case the Court is entitled to curtail the rights of a party which exercises its rights in a manner which is antithetical to the overarching purpose and the party's overarching obligations.[96]

204 The defendants submit that had the Proceeding been brought at the time Mr Wallace-Smith concedes he was ready to prosecute the claims, it would have been statute barred by virtue of s 5(1) of the *Limitations of Actions Act 1958* (Vic) and s 588M(4) of the *Act*. The defendants submit that the fact that the plaintiffs were never in a position to prosecute their claims within the time prescribed is evidence that the delay was inordinate.

205 The defendants submit the plaintiff should be in no better position than the position they ought to be in had they commenced the Proceeding in the manner required by the *CPA* and were it to be otherwise, the plaintiffs would be rewarded for their decision to file a 'holding' originating process.

206 The defendants submit that cause of the plaintiffs inability to prosecute the Proceeding once it had been commenced was Mr Wallace-Smith's inability to obtain appropriate

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94 *Limin James Chen v Kevin McNamara & Son Pty Ltd* [2013] VSC 539, [75]-[78]. The defendants also refer to the comments of Sifris J at the directions hearing of 2 May 2014, contained in Exhibit SMB-1 at 8-9.

95 [2012] VSC 571.

96 Ibid [78]-[79].

funding from any arm's length funder or to obtain Court approval to enter into a funding agreement with the Melville interests, the plaintiffs are to this day unable to obtain arm's length funding or Court approval and instead has elected to enter into the Third Funding Deed with the Melville interests without Court approval while disingenuously blaming other proceedings and the defendants for the delay.

207 Mr Wallace-Smith's contention that: it is 'difficult to see' what prejudice (if any) the defendants have suffered as a result of the plaintiff's delay should be rejected.

208 The defendants submit that, to the contrary, while it is not possible to determine precisely what oral or documentary evidence will be required, should the proceeding be reinstated, as no pleadings have been filed, it is likely that:

(a) the trial of the proceeding will not turn largely on documentary evidence;

(b) to the contrary the insolvent trading claim, in particular, will likely turn on whether (and if so, when) AVSS became insolvent (including the validity of the Fingal Loan and Charge and the amounts it secures); when the debts in question were incurred; whether Mr Leggo knew or ought to have known that AVSS was insolvent; whether Mr Leggo had reasonable grounds to expect that AVSS was solvent and would continue to be solvent; whether Mr Leggo had relied on information provided by professional advisors as to the solvency of the company; the steps Mr Leggo took to prevent the company from incurring the debts in question and whether the debts were incurred in connection with a course of action likely to lead to a better outcome for the company (ss 588G, 588GA, 588H);

(c) a significant amount of this evidence will turn on the recollection of witnesses including Mr Leggo who has not had access to the contemporaneous documents of AVSS for around eight years.

209 In this regard, the defendants observe that no witness gave evidence in the Fingal proceeding as to the solvency of AVSS or liability of NDP under the Deed or

Settlement, nor did all relevant witnesses give evidence. For example, Mr McNab and the Albury lenders, who can give evidence as to the amounts advanced 'by Fingal' 'as lender' and the terms of the initial investments, did not give evidence. Those, such as Melville, Crozier and Leggo, that did give evidence in the Fingal proceeding, did not give evidence in respect of the issues in this proceeding (including insolvency or operation of the Deed of Settlement).

210 The defendants note that the evidence that was given was given in September 2014, nearly four years ago., not 'recently' as the plaintiffs contend:

(a) while the defendants have been on notice of the liquidator's proposed claim since 2013, the relevant documents have not been retained by them;

(b) as the plaintiffs well know, almost all contemporaneous records of AVSS have been in the possession of the Fingal Receiver and Liquidator since their appointment in June 2010 and February 2011. The defendants do not have these documents;

(c) there has been no discovery in this proceeding (or in respect of the issues in this proceeding) and the assertion that there need only be minimal additional costs of discovery is entirely without foundation;

(d) to the contrary, determining when AVSS became insolvent and the cause of that insolvency will require extensive discovery into every aspect of the development, which will impose a considerable cost;

(e) the contention that, by consenting to or 'agitating for', adjournments the defendants have somehow caused the liquidator's delay is false and disingenuous.

(f) not only did the defendants strenuously oppose the delay, but the liquidator's own submissions acknowledge that the plaintiffs were not ready to proceed until November 2017.

211 The defendants observe that in the context of the Proceeding:

(a) the events the subject of the plaintiffs' draft claim took place between nine and seventeen years ago;

(b) the Melville interests have been looking to fund Mr Wallace-Smith to prosecute claims against the defendants since at least November 2012;

(c) the Proceeding was commenced by Mr Wallace-Smith in July 2013, with funding from the Melville interests;

(d) at the time the Proceeding was commenced, Mr Wallace-Smith did not have funds to institute or prosecute the Proceeding, save for the funds that had been obtained from the Melville interests;

(e) given the history of litigation and disputes between the Melville interests and Mr Leggo, in August 2013 Mr Wallace-Smith rightly sought Court approval to obtain funding under the First Funding Agreement from the Melville interests to prosecute the Proceeding;

(f) that approval was refused on appeal by Robson J;

(g) as a result, the Proceeding has been stayed since 19 June 2014;

(h) on 2 October 2014, Mr Wallace-Smith obtained creditor approval to obtain funding from the Melville interests under the First Funding Agreement;

(i) despite this, given the contentious source of funding, Mr Wallace-Smith again sought the Court's approval to enter into that funding agreement;

(j) again, approval was refused, on this occasion by Judd J;

(k) Mr Wallace-Smith remains unable to obtain funding from any person, save for the Melville interests, to prosecute the Proceeding;

(l) at some point before December 2016, Mr Wallace-Smith decided to accept

funding from the Melville interests to prosecute the Proceeding without Court approval. Mr Wallace-Smith asserted confidentiality and privilege over the terms of that funding until shortly before the hearing of this application;

(m) a resolution of creditors was sought and obtained in December 2016, before the plaintiffs' application was filed on 1 March 2018. It appears that the debts of these creditors, save for one, have been purchased by the Melville interests for a very small fraction of their face value;

(n) Mr Wallace-Smith now wishes to use funding from the Melville interests to prosecute the same claims as were exhibited to his affidavit filed in support of the originating process filed in July 2013.

212 The defendants also contend that another reason that the agreement is not likely to be approved if put before the Court is that the independence of Mr Wallace-Smith has been compromised. In this regard they observe that:

(a) the conduct of Mr Wallace-Smith in accepting funding from the Melville interests without Court approval also raises serious questions as to whether Mr Wallace-Smith is acting impartially in the interests of all creditors;

(b) this is particularly so where the liquidator and his solicitors have a personal interest in running the proceeding in order to recover more than $770,000 in unpaid fees which cannot otherwise be recovered.

(c) Mr Wallace-Smith and his solicitors have a personal interest in running the Proceeding in order to recover more than $770,000 in unpaid fees which cannot otherwise be recovered;

(d) the report to creditors was substantially flawed in relation to its description of the findings of the Court of Appeal in the Fingal Appeal that go to the heart of Mr Wallace-Smith's proposed claim. The defendants observe that the amount of the Fingal debt is central to Mr Wallace-Smith's claim for breach of contract and for insolvent trading; and

(e) such omissions, as well as Mr Wallace-Smith's decision to emphasise only those parts of the judgments in the Fingal proceeding and appeal that were in Fingal's favour, and failure to give a full and frank assessment of the prospects of succeeding in the current Proceeding, when seeking creditor approval, give rise to further questions about the impartiality of Mr Wallace-Smith. The defendants say that in any event, Mr Wallace-Smith's decision not to seek Court approval and to assert privilege over the terms of the funding agreement prevent the Court from determining those questions or from satisfying itself which is in very similar terms to the two previously rejected applications such that the Court's past concerns about the nature of the Third Funding Agreement and the relationship between him and the Melville interests have not been properly addressed.

213 While it is common ground that the impecuniosity of AVSS and Mr Wallace-Smith's inability to obtain funding is responsible for the delay in the litigation, the defendants submit that the plaintiffs' submission that the defendants are responsible for this impecuniosity is specious and should be rejected.

214 They say that, first, it is not open to the Court to find that the defendants' caused AVSS's impecuniosity without first determining, at least provisionally, the substantive issues of whether and when AVSS became insolvent and whether the defendants' acts or omissions caused that insolvency and the Court should be reluctant to do so on the interlocutory applications before it.[97] They submit that even if the Court was prepared to determine these issues, the plaintiffs contention should be rejected.

215 The defendants submit that where a plaintiff contends that a defendant has caused its impecuniosity there is a heavy onus on the plaintiff to prove this.[98] The Court should only accept the plaintiffs submission if it is satisfied, on reasonable grounds, that the submission is correct. Mere assertions that the defendants caused the plaintiffs

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97 *Re Fat-Set Pty Ltd v Brambles Holdings Ltd* 3 ACLC 312 [11].

98 *Impex v Pty Ltd v Crowner Products Ltd* (1994) 13 ACSR 440, 445.

impecuniosity, unsupported by evidence, will not suffice; rather, the contention must be supported by 'relatively straightforward' and 'unambiguous' evidence of a 'compelling nature'; evidence of the plaintiffs financial position before and after the alleged conduct.[99]

216 Where a plaintiff was in a poor financial position before the alleged wrongdoing it will be incredibly difficult for the plaintiff to prove that the defendant caused its impecuniosity and the Court will be reluctant to make such a finding.[100] Likewise, where there are multiple causes of the impecuniosity.[101]

217 In this case, the defendants submit that there is no evidence before the Court that would support the plaintiffs contention that the defendants caused AVSS to become insolvent. Indeed, this contention is contrary to the plaintiffs own case. Specifically, the draft claim by AVSS against Mr Leggo is for insolvent trading. That claim is premised on AVSS having been insolvent from at least March 2009 and that Mr Leggo '*failed to prevent AVSS from incurring each of the Post-March Debts*'. It is not contended that Mr Leggo caused AVSS's insolvency.

218 The defendants submit that as to the claim against NDP, the liquidator contends that, absent funds from NDP, AVSS would have been 'hopelessly insolvent'. Contrary to the liquidator's submission this insolvency cannot have been caused by NDP or its failure to advance further funds. NDP was not a debtor of AVSS; it was a secured lender. The proposed claim against NDP alleges a failure to make further advances to AVSS, which advances, the plaintiffs contend, would have enabled AVSS to discharge various other unsecured debts of the development. Nowhere is it contended that, if such advances were made, the development would then have generated any additional revenue, or sufficient revenue to repay NDP. In the circumstances, the failure of a secured lender to loan further funds to what is said to

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99 *BPM Pty v HPM Pty Ltd* (1996) 14 ACLC 857.

100 *Impex v Pty Ltd v Crowner Products Ltd* (1994) 13 ACSR 440.

101 *Haskins Contractors Pty Ltd v Sydney Airport Corporation Ltd; Sabaza Pty Ltd v AMP Society.*

be an insolvent company cannot be, as a matter of causation, be responsible for the company's insolvency.

219 Furthermore, Mr Leggo will contend in the proceeding that if AVSS was insolvent, it was insolvent as a result of the Melville interests causing AVSS to enter into the Fingal Loan and Charge (thereby converting the only equity in the development to secured debt).

220 The defendants say that the plaintiffs 'mere assertions' that the Defendant caused AVSS's impecuniosity, which are unsupported by evidence, let alone evidence that is 'straightforward' or 'compelling' or would be sufficient to make such a finding on an interlocutory application, should be rejected. *A fortiori* where the submissions are contrary to the plaintiffs own case and there is a real question whether the impecuniosity was caused not by the defendants but by those proposing to fund the liquidator.

Consideration

221 In my view, there are a number of features of this matter which lead me to the firm conclusion that the Proceeding should be permanently stayed pursuant to rule 23.01(1)(b) of the Rules on the ground that the Proceeding is an abuse of process. It seems clear to me that the Proceeding is litigation by proxy being conducted through the medium of the liquidation of AVSS by the Melville Interests. The Proceeding, to the extent that it has been funded at all, has been solely financially supported by the Melville interests. To my mind, it certainly is not litigation being undertaken for the benefit of the general body of creditors of AVSS, rather, it is being undertaken solely for the benefit of the Melville interests.

222 The Melville interests, including Fingal pursued the Leggo interests in the Fingal proceeding resulting in what would be described as an unsatisfactory outcome for them when the matter was the subject of consideration by the Court of Appeal. The Proceeding, to my mind, has been fashioned by the Melville Interests in a quest to recover for their interests the claims that they were unsuccessful in recovering in the

Fingal proceeding. In going about the attempts to fund the Proceeding there has been, as has been described in some detail, two unsuccessful applications for funding. The reasons of Robson J and Judd J go much further than merely dismissing such applications; as the passages of those reasons set out above reveal, they sharply criticise Mr Wallace-Smith and implicitly the Melville interests.

223 This application is not of course, as Mr Williams has emphasised, an application for approval of the funding agreement; it is one whether in all the circumstances of the case the position has now been reached when the Proceeding should permanently stayed. It is relevant in considering the application, however, to have regard to the terms of the Third Funding Agreement and when one does, in substance in contains the features by reason of which Robson J and Judd J dismissed the previous applications. I regard the explanation as to why Mr Wallace-Smith will not seek the approval of the Third Funding Agreement as being quite disingenuous and most unconvincing. The position has not changed since the making of the first two applications when Mr Wallace-Smith considered it appropriate to approach the Court by reason of the relationships between the respective parties. There is no significant change, to my mind, in the position in that regard; if anything, the rejection of the two previous funding agreements made it more compelling for the Court's approval to be obtained.

224 Another feature of the matter is the obtaining by an assignment of debts the debts owed by two significant unsecured creditors for what would be described as derisory sums when regard is had to their face value. This gave the Melville interests effective control over creditors' meetings of AVSS and in large part enabled the passing of the Third Funding Agreement.

225 The Melville interests, through the medium of funding Mr Wallace-Smith will have defacto control of the liquidation and, in particular, the Proceeding. The terms of the Third Funding Agreement which were the subject of detailed submissions by Mr Bick are such that for practical purposes the Melville interests would, if the Third Funding Agreement was permitted to be implemented, control the course of the Proceeding

and its various stages. The Melville Interests could, at their whim, withdraw funding support at quite short notice if they were not content with Mr Wallace-Smith's conduct of the Proceeding or indeed the liquidation of AVSS generally.

226 In my view, it is fanciful to suggest that Mr Wallace-Smith would of his own volition conduct an unfunded enquiry into the efficacy of the Fingal charge and the amount secured by it. He is without funding to do so and it is highly likely in my view that if he did, the Melville Interests would terminate the Third Funding Agreement.

227 Another feature of this proceeding revealed by the evidence in this application is the extraordinary sums which have been incurred by the plaintiffs thus far for legal costs and Mr Wallace-Smith's remuneration. They are detailed in these reasons and are, in my view, quite breathtaking particularly in view of the fact, that aside from the two unsuccessful funding applications, no progress has occurred in the Proceeding since 2013. The amounts cited do not appear to include the defendants' costs of the plaintiffs' two unsuccessful applications for funding and those costs will be very considerable. Furthermore, the legal costs described, together with an uplift fee and the remuneration of Mr Wallace-Smith which has been unpaid are afforded priority if the plaintiffs are successful in the Proceeding. That is, the legal costs and presumably a large part of the remuneration in respect of two unsuccessful applications for approval of the first two funding agreements will be visited upon the creditors and reimbursed to Mr Wallace-Smith and his solicitors despite the sharp criticism made in the judgments of Robson J and Judd J.

228 One sees substantial figures for costs being cited in commercial litigation but to my mind the amounts incurred are extraordinary and to my mind bring the court's procedures into disrepute. Further, the provision for reimbursement and payment in priority give rise, in my view, to a very strong incentive for Mr Wallace-Smith and his solicitors to obtain payment of the fees they are said to be owed up to date and then into the future to the end of the prosecution of the proceeding and Mr Wallace-Smith cannot commence any other proceeding without the consent of the Melville interests.

229 I am not at all attracted by Mr Williams' submission that there had been progress in the Proceeding justifying the costs by reason that there had been an insolvency report prepared together with a draft statement of claim and the making of the two funding applications. The plaintiffs have little or nothing to show for the extraordinary fees and remuneration incurred. Despite such sums being incurred, no benefit has been obtained at all from it. There has not been, as Mr Williams would have it, any 'improvement in the asset position of AVSS'. As part of the explanation for such high expenditure, Mr Williams contended that the defendants have vigorously contested the Proceeding thus far. It appears that course was justified having regard to the judgments of Robson J and Judd J.

230 Although I am not ordering a permanent stay of the proceeding by reason of there having been an inordinate delay, the explanation in the plaintiff's submissions as to the length of time that has elapsed since the commencement of this proceeding without any substantial progress are relevant for consideration. The reason for this is, in my view, a simple one that Mr Wallace-Smith was not in a position to obtain funding on terms that were acceptable to Robson J and Judd J. There then ensued a further period in which the Third Funding Agreement was negotiated and these applications were brought on. It is to be remembered that the original orders giving the defendants security for costs were made by consent. There then ensued several adjournments, a number it seems sought by reason of the hearing of the Fingal proceeding and the subsequent appeal.

231 The plaintiffs criticise the defendants for their reaction when the approach was made in late 2017 about whether the defendants would accept security. The defendants' refusal was in the context of there being two unsuccessful applications for funding and a stay of the proceeding having being in force since June 2014. When the defendants' solicitor enquired as to the source of funding, they were met with the response that the terms of the funding were confidential and privileged and would not be disclosed. Further, it was indicated that Mr Wallace-Smith would not be

applying has he had on previous occasions for the approval of the Third Funding Agreement by the Court.

232 It was for the plaintiffs to press on with their proceeding, not for the defendants to pursue them for the lack of progress, particularly as the proceeding was stayed by force of my order made in 2014. So far as the defendants were concerned, they had no motive in the Proceeding being brought back to life.

233 The making of the application for security for costs at a relatively early juncture in a proceeding was said by Mr Williams to result in some delay. To my mind, it was a perfectly unremarkable and conventional application to make and, with the benefit of hindsight, well founded given the inability of the plaintiffs to obtain acceptable funding. It is said by the plaintiffs that throughout the periods of delay which are the subject of the plaintiff's submissions that their solicitors were in communication with the defendants and kept them appraised of Mr Wallace-Smith's intent to fund and then pursue the claims in the proceeding. I am not at all persuaded by that submission particularly in the context of the time which has elapsed since the commencement of the Proceeding, of there being two unsuccessful applications for funding and the stay of the Proceeding.

234 I also do not accept that the delay in the litigation can be attributed to the defendants by reason that they are responsible for causing AVSS' impecuniosity. I agree with the submission of Mr Bick that the plaintiff's submission in that regard is specious and should be rejected. The plaintiff's submissions on this ground do not rise above mere assertions.

235 I also reject the submission that the defendants will suffer no prejudice if I determine not to order a permanent stay of the proceeding. Involvement in litigation is stressful and, even for those with sufficient resources able to fund it, a huge drain on financial resources. The Proceeding is in its infancy and will involve significant resources and expenditure if it is required to be made ready for trial. I am not all convinced that the evidence in the Fingal proceeding is of great utility in shortening the length of the trial

of the proceeding. The defendants are not in control of relevant documents. There has been no discovery in the proceeding which it seems will be quite extensive and the trial of the Fingal proceeding was conducted several years ago which it seems will be quite extensive. The trial of the Fingal proceeding was conducted several years ago.

236 I also agree with Mr Bick's submissions that is not open on the evidence to find that the plaintiff's claims are strong or that there is no defence. It is just not possible or appropriate in an application of this type to express a view in that regard and the defendants have, despite the time which has passed since the commencement of the Proceeding, not been obliged to file a defence. One thing is clear and that is that the Proceeding will be vigorously defended.

237 In my view, the position has been reached in which it can be concluded by reason of the various of the matters to which I have referred that the proceeding is an abuse of process and should be permanently stayed. The Court, as well as the litigants, have responsibilities under the *Civil Procedure Act* which were referred to in these reasons. Section 7 and 8 of the *CPA* requires as an overarching purpose of civil litigation the facilitation of the just, efficient, timely and cost effective resolution of the real issues in dispute. If one imposes that template over the conduct of this Proceeding, it is seriously wanting. The Proceeding was stayed in 2014, attempts to resuscitate it were made in the two unsuccessful funding applications and the plaintiffs now attempt for a third time to rejuvenate it. This in the context of what are, to my mind, extraordinary sums of money being expended thus far for no progress in the resolution of the 'real issues in dispute'.

238 I will order that the Proceeding be permanently stayed pursuant to rule 23.01(1)(b) of the Rules. I will hear the parties on the question of costs at a date to be appointed, if there is no agreement as to the appropriate order to be made in that regard.

CERTIFICATE

I certify that this and the 78 preceding pages are a true copy of the reasons for Judgment of Gardiner AsJ of the Supreme Court of Victoria delivered on 3 May 2019.

DATED this third day of May 2019.

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Associate