IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-2342
[2022] NZHC 2292

BETWEEN	GAUTAM JINDAL Plaintiff
AND	LIQUIDATION MANAGEMENT LIMITED First Defendant
	IMRAN MOHAMMED KAMAL Second Defendant

Hearing: 24 August 2022 (by VMR)

Counsel: G Jindal self-represented Plaintiff
A Ho for Defendants

Judgment: 9 September 2022

JUDGMENT OF ASSOCIATE JUDGE LESTER
(Application for security for costs)

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[1] The defendants apply for security for costs and, in the event security is ordered, a stay until such time security is provided along with costs.

[2] The application is opposed, not on the ground the threshold for ordering security has not been satisfied, but on the basis the claim has merit and is brought in "the public interest". While the plaintiff has no personal pecuniary interest in the outcome of the proceeding, he says he brings it as a "watchdog".

Context and background

[3] This proceeding is the second iteration of the plaintiff's claim. Originally Mr Jindal sought leave to pursue what was in substance the present claim by way of an originating application. At that time the respondent was named as the Registrar of Companies, notwithstanding that the relief sought concerned the present defendants, Liquidation Management Ltd and Mr Kamal.

[4] In a decision of 1 December 2021, Associate Judge Taylor declined Mr Jindal's leave application.[1]

[5] In this proceeding, Mr Jindal alleges Mr Kamal (as liquidator) charged excessive fees in 133 liquidations in the months leading up to 31 August 2021. Mr Kamal brought those liquidations to an end within that relatively short period as he was no longer going to be able to practice as a liquidator. Other liquidations were referred to other liquidators.

[6] Mr Jindal alleges the Inland Revenue Department (**IRD**) was a creditor in almost all of the liquidations with receipts in the 133 liquidations totalling $3,521,000. Mr Jindal alleges Mr Kamal charged liquidator's fees and overheads of approximately $2,582,000.

[7] Mr Jindal alleges Mr Kamal's fees and expenses were unreasonable. Mr Jindal seeks an order that the fees and expenses charged by Mr Kamal be fixed at a reasonable level and any excess amount refunded. Further, an order is sought that any fee or

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1 *Jindal v Registrar of Companies* [2021] NZHC 3268.

amount Mr Kamal has paid to a company he controls for the provision of services by that company also be reviewed and fixed at a reasonable level.

[8] Three causes of action are alleged. The first, while not specifically referring to s 284 of the Companies Act 1993 (**the Act**), is advanced pursuant to that section and I will explain the reason why that is clear below.

[9] The second cause of action is headed "Breach of fiduciary duty" and alleges Mr Kamal owed a fiduciary duty to each of the 133 companies, their shareholders, directors and their creditors. The allegation is that by charging fees and expenses not reasonably incurred, Mr Kamal breached that duty. The same relief described at [7] is sought.

[10] The third cause of action is headed "Unjust enrichment at the cost of creditors and shareholders". In summary, the allegation is that through charging excessive or unreasonable fees, Mr Kamal has unjustifiably enriched himself at the cost of creditors and shareholders, particularly the IRD being the largest single creditor. The same relief is sought.

[11] Annexed to the statement of claim is a schedule of the 133 companies. The statement of claim contains no detail as to why Mr Kamal's fees were unreasonable or excessive either in respect of the rates charged, the overall fee, or the disbursements such as legal fees incurred. During submissions it became clear this is because Mr Jindal saw the onus being on Mr Kamal to justify his fees, rather than Mr Jindal having to prove the fees were excessive.

[12] In the claim considered by Associate Judge Taylor, the relief sought was that any excess fee be paid to the IRD. That is no longer the relief sought, which has practical significance as to whom any excess would be paid when all 133 companies have been removed from the Register.

Background

[13] The following is taken from Associate Judge Taylor's decision at [10]-[17]. At that time Mr Jindal's claim concerned 134 companies, not the present 133 companies.

> [10] Mr Jindal is the director and sole shareholder of Orange Capital Ltd. The company is in liquidation. Mr Kamal was appointed as liquidator of the company on 27 June 2016 and resigned from that position on 31 August 2021. Mr Kamal's resignation as liquidator of Orange Capital Ltd and a large number of other companies was necessitated by his failure to acquire Restructuring Insolvency and Turnaround Association of New Zealand (RITANZ) membership as an insolvency practitioner under new governing legislation. RITANZ declined Mr Kamal's membership on the basis that he was not of good character.
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> [11] Mr Jindal alleges Mr Kamal engaged in underhanded billing practices in the liquidation of Orange Capital Ltd. He is said to have represented his fee as being fixed at $4,000, but later issued invoices of more than $20,000. Other allegations are that Mr Kamal pursued a non-existent shareholder account and fabricated liquidation accounts to show that the shareholder account was overdrawn. Mr Jindal also alleges that Mr Kamal refused to progress the liquidation until his fees were paid and that he repeatedly asked for money in settlement of the overdrawn shareholder account.
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> [12] After these experiences, Mr Jindal began to research other liquidations in which Mr Kamal had been involved. He identified that, between 6 July 2021 and 31 August 2021, Mr Kamal had placed notices in the New Zealand Gazette to remove 134 companies from the New Zealand Companies Register. Mr Jindal focussed his attention on this period because Gordon J's judgment dismissing Mr Kamal's application for judicial review of RITANZ's decision was issued on 2 July 2021. From that date on, Mr Jindal says, it would have been apparent to Mr Kamal that his time as a liquidator was coming to an end.
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> [13] Mr Jindal believes Mr Kamal advertised the notices of intention to remove the 134 companies from the Companies Register because he intended to claim all funds available in those companies as remuneration for himself. He alleges Mr Kamal wished to avoid his remuneration being scrutinised by an incoming liquidator, and so filed reports purporting that each of the 134 liquidations had been completed. Mr Jindal characterises this timing as "suspicious". He expresses serious doubts to many liquidations could be closed so quickly.
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> [14] Mr Jindal has analysed the liquidation reports for the 134 companies. He says they disclose credit claims of around $16.08 million; IRD claims as preferential creditor of $4.574 million; total receipts of $3.521 million; and liquidator's remuneration of approximately $2.582 million. Comparing these figures to those of other similar sized liquidations, he says Mr Kamal's liquidator's fees are "highly unusual and excessive". He says he has been unable to find examples of other liquidators filing so many company removal notices in such a short span of time.

[15] Mr Jindal characterises Mr Kamal as a "known tax fraud", and someone who RITANZ has deemed to be of poor character. He says he is concerned that with the liquidation of the 134 companies, Mr Kamal has "yet again been able to defraud the IRD and general public in millions of dollars by charging fictitious and excessive fee[s] when that money should have rightfully be[en] paid to the IRD as a preferential creditor or other creditors".

[16] From all this, Mr Jindal concludes that there is a basis for this Court to review and fix Mr Kamal's liquidator's remuneration. Otherwise, Mr Jindal says, Mr Kamal will be allowed to "walk away with a significant amount of funds, which he has defrauded from those to whom he owed fiduciary duties, without any checks, balances or remedial action".

[17] It is against this background that Mr Jindal proposes to bring his application for review of Mr Kamal's liquidator's remuneration by way of originating application.

(footnotes omitted)

Security for costs principles

[14] Rule 5.45 of the High Court Rules 2016 (**the Rules**) provides:

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

(ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and

(b) may stay the proceeding until the sum is paid or the security given.

(4) …

[15] An application under the above Rule follows four steps:

(i) has the threshold under r 5.45(1) been met;

(ii) how should the Court exercise its discretion under r 5.45(2);

(iii) what amount should security for costs be fixed at; and

(iv) should a stay be ordered.

The threshold

[16] Mr Jindal responsibly acknowledged in his written submissions and confirmed to me that he accepted the threshold under r 5.45(1) was satisfied. The real issue between the parties was whether the Court should exercise its discretion to order security.

Should security be ordered

[17] Mr Ho, counsel for the defendants, accepted an order for security was not an automatic consequence of impecuniosity. If the threshold is satisfied, whether security will be ordered is highly discretionary.[2] *McGechan on Procedure* notes that a broad assessment of the situation is called for when exercising the Court's discretion.[3] Balancing the interests of the plaintiff and the defendant is the overriding consideration.[4]

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2 *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).
3 Robert Osborne (ed) *McGechan on Procedure* (online ed, Thomson Reuters) at [HR5.45.03].
4 *Highgate on Broadway Ltd v Divine* [2012] NZHC 2288, [2013] NZAR 2017 at [24](c).

[18] In a passage from *McLachlan*, referred to by both counsel, the Court of Appeal said:[5]

> [15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the courts for a genuine plaintiff is not lightly to be denied.
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> [16] Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[19] The Court's broad discretion may be exercised to require security even if that may prevent a plaintiff from pursuing their claim but access to the Court for a genuine plaintiff is not likely to be denied.[6] It has been said that where ordering security would have the effect of terminating a proceeding, the threshold is similar to the threshold for the striking out of a proceeding.[7]

Merits

[20] As far as possible and bearing in mind the early stage of the proceeding, the Court will endeavour to assess the merits and prospects. *McGechan on Procedure* notes at [HR5.45.03(2)] that:[8]

> Only where a clear impression can be formed that the plaintiff's claim is altogether without merit – so that in the alternative it would be amenable to being struck out – would it be right for security to be ordered where to do so would bring the plaintiff's claim to a dead halt.

[21] Here delay is not a factor.

[22] In my view, the second and third causes of action relied on by Mr Jindal are hopeless. In relation to the claim for breach of fiduciary duty, Mr Jindal's own pleading is that the fiduciary duty was owed to the 133 companies, shareholders and

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5 *McLachlan v MEL Network Ltd*, above n 2.
6 *Lee v Lee* [2019] NZCA 345 at [20].
7 *Deliu v Chapman* [2020] NZHC 2100 at [5]-[6].
8 Citing *Highgate on Broadway Ltd v Divine*, above n 3 at [23](b); *Wright v Attorney-General* [2019] NZHC 3046 at [49].

creditors. Mr Jindal does not plead a duty owed by the defendants to him. Mr Jindal is a stranger to the 133 companies, that is, he is not a director, shareholder or creditor of those companies.

[23] I conclude the second cause of action as it is presently framed, has no prospect of success. That lack of merit supports the ordering of security.

[24] In my view, the third cause of action, unjust enrichment, will also fail as one of the elements of such a claim is that the enrichment complained of was gained at the claimant's expense.[9] This is an insurmountable hurdle to Mr Jindal's claim which is predicated on the unjust enrichment being at the cost of creditors and shareholders. Mr Jindal does not claim he has suffered loss. This conclusion also favours the ordering of security.

[25] As to the first cause of action, it is clear Mr Jindal wishes to rely on s 284 of the Act in his challenge to Mr Kamal's fees, as he has recently filed an interlocutory application seeking leave of the Court to proceed under s 284 of the Act. That application is not before me for determination but Associate Judge Taylor in his decision commented on Mr Jindal's standing to seek a review of liquidator's costs where Mr Jindal has no connection to the companies in question.

[26] Two decisions of this Court were addressed by Judge Taylor; the first being *Commissioner of Inland Revenue v Livingspace Properties Ltd*,[10] referred to by Judge Taylor as "the application decision" and the second decision being *Commissioner of Inland Revenue v Livingspace Properties Ltd*,[11] which Associate Judge Taylor referred to as "the review decision", it being Osborne J's review of the application decision.

[27] In the application decision, when it was held the Court retains a broad jurisdiction to prevent misconduct by its officers, including liquidators. That meant

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9 *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 93, [2013] 1 NZLR 140 at [92].

10 *Commissioner of Inland Revenue v Livingspace Properties Ltd* [2019] NZHC 2213, (2019) 25 PRNZ 124 (the application decision).

11 *Commissioner of Inland Revenue v Livingspace Properties Ltd (in rec and in liq)* [2021] 2 NZLR 252 (the review decision).

the court in its inherent jurisdiction could entertain applications for leave to apply for the removal of a liquidator, notwithstanding that the applicant did not fall into one of the prescribed categories of 'applicant' in s 284(1) of the Act.

[28] On review, Osborne J agreed that "Parliament [has not] clearly excluded the operation of the inherent jurisdiction in relation to the removal of liquidators." His Honour found Associate Judge Johnston had:[12]

> Correctly concluded that the Court retains its inherent jurisdiction to entertain applications for the removal of a liquidator, including by persons who do not fall within the categories identified in s 284(1) of the Act.

[29] In discussing this issue, Associate Judge Taylor in his December 2021 said:[13]

> [41] A few points can be made. First, both Associate Judge Johnston and Osborne J's conclusions expressly concerned the Court's inherent jurisdiction in respect of the *removal* of liquidators. Osborne J went so far as to "deliberately refrain from drawing a parallel conclusion in relation to the general supervision of the process of liquidation, which was the express subject-matter of s 284. Secondly, Associate Judge Johnston's remarks were implicitly confined to those applicants **who could show that their interests were affected by the actions of the liquidator in the same sense as the potential applicants identified in s 284(1).** [my emphasis]
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> [42] Accordingly, it remains unclear whether the Court may, in its inherent jurisdiction, entertain applications for orders not involving the removal of a liquidator by applicants not falling into one of the categories in s 248(1). Even if the Court could entertain such applications, it is doubtful Mr Jindal can demonstrate that his interests are affected by Mr Kamal's actions as liquidator of the 134 companies in which he had no interest.
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> (footnotes omitted)

[30] I was advised by Mr Ho that all 133 liquidations subject to this proceeding were voluntary liquidations. Mr Jindal did not take issue with that. Liquidators adopted by shareholders are subject to the same jurisdiction as court appointed liquidators.[14]

[31] Here, the principal difficulty for Mr Jindal is that he has no personal interest at stake in the present litigation. Mr Jindal seeks to meet this point by saying that he is

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12 *The review decision*, above n 11, at [189].
13 *Jindal v Registrar of Companies*, above n 1 at [41]-[42].
14 *ANZ National Bank Ltd v Sheehan* [2012] NZHC 3037 [2013] 1 NZLR 674 at [137].

acting as a "watchdog". What Mr Jindal characterises as him acting as a "watchdog", Mr Ho characterised as Mr Jindal conducting a crusade against Mr Kamal because of their prior history.

[32] Mr Jindal has brought his current proceeding to the attention of the IRD. As Mr Ho notes, the Commissioner is well able to protect her own interests. In the past, the IRD has commenced proceedings against Mr Kamal under the Act in relation to Mr Kamal's fees. If the Commissioner was concerned about Mr Kamal's fees in issue here, the Commissioner could commence her own proceedings to protect her interests. Further, the shareholders who appointed Mr Kamal would be aware of the outcome of the liquidations of their own companies and if they had an issue with the fees charged they could have brought their own applications.

[33] The present state of the proceeding includes some 60 companies where the fees charged by Mr Kamal ranged from nil to approximately $7,500. During the hearing Mr Jindal indicated he would be removing those claims from his proceeding.

[34] A further practical point raised by Mr Ho is to whom the excess fees would be paid if all other aspects of Mr Jindal's proceeding were successful. As the companies have been removed from the Register, they would have to be restored to the Register involving the cancellation of the liquidator's final report[15] and the appointment of a new liquidator (Mr Kamal being unable to resume that role) who would then distribute any excess less the liquidator's costs and the costs of restoring the company to the Register. Any replacement liquidator would only agree to appointment if they were able to take their fees in the usual way.

[35] In my view, the prospects of Mr Jindal being able to successfully seek leave to pursue this proceeding are extremely low. There is simply no need for him to adopt a "watchdog" approach. The creditors and shareholders whose funds were at issue have their own rights.

[36] Mr Jindal sought to characterise his litigation as having a public interest element, however, even if the "watchdog" principle applicable, that is not a barrier to

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15 *Registrar of Companies v Body Corporate 307730* [2013] NZCA 659, [2014] 2 NZLR 623 (CA).

security being awarded.[16] The public interest element normally arises in litigation involving judicial review or when there is some public law element.

[37] The idea that there is a genuine public interest requiring Mr Jindal to protect the IRD's interests as a creditor, is in my view, misguided. The IRD is well able to protect its own interests. Indeed, given the IRD's experience, resources and expertise in relation to the liquidation of companies, the fact the IRD has not sought to challenge any of Mr Kamal's fees in respect of the 133 liquidations in issue is some indication that the fees in issue did not warrant challenge from an economic and/or merits perspective.

[38] Mr Kamal is no longer an insolvency practitioner and so there is no wider public interest in terms of his continued involvement in the insolvency field. In any event, if Mr Kamal was to seek to resume practice, he would have to meet the requirements of the Insolvency Practitioners Regulation Act 2019.

Decision

[39] I am far from persuaded there is an inherent jurisdiction of the Court that permits a person with nothing at stake in relation to a liquidation to seek the review of liquidator's fees. In *Commissioner of Inland Revenue v Livingspace Properties Ltd*, the standing the applicants asserted was that they were each the subject of the liquidator's applications.

[40] Assuming, without deciding that the Court retains an inherent jurisdiction in respect of all of the matters covered by s 284 of the Act, in my view, it is highly doubtful Mr Jindal has standing to seek leave to apply to review the defendants' costs. Mr Jindal has no connection or interest to the liquidations. If he has standing to challenge this liquidator's fees then he has standing to challenge the fees of any liquidator and so does the whole world.

[41] Out of the 133 companies listed, Mr Jindal has only raised specific allegations of excessive fees in relation to two companies. In relation to one of the instances

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16 *Ratepayers and Residents Action Association Inc v Auckland Council* [1986] 1 NZLR 746 (CA).

raised, Mr Kamal has said in respect of the matter raised by Mr Jindal that it is the result of his report containing a typographical error.

[42] I am in no position to rule on the two matters raised by Mr Jindal, but that he can only point to two specific instances of what he characterises as misconduct is telling. In part, this may be because Mr Jindal had approached matters on the basis it is for the liquidator to justify the reasonableness of his fees. Relying on *Re Roslea Path Ltd (in liquidation)*,[17] Mr Jindal said: "the sole onus of proving the fee is reasonable rests upon Mr Kamal." However, *Re Roslea* concerned the principles applicable where Court appointed liquidators apply to the Court to have their fees approved. A liquidator making such an application has to put material before the Court explaining their fees. Here, as Mr Jindal makes serious allegations against Mr Kamal in relation to the charging of fees, it is for Mr Jindal to particularise and prove those allegations. The old adage of "he who asserts must prove" applies. The present statement of claim does not particularise at all how Mr Kamal's fees were unreasonable.

[43] Mr Jindal approaches the issue of onus from the starting point there is evidence Mr Kamal is "… an errant fiduciary who has made an unwarranted gain …" and therefore the onus is on Mr Kamal to justify why he should retain that gain. This submission is circular. While Mr Jindal has pleaded Mr Kamal has taken unreasonable fees, those allegations have not been particularised, let alone established. Mr Jindal's position amounts to saying the fact he has made what in all but two companies is a bare allegation that excess fees have been taken puts the onus on Mr Kamal to disprove that allegation. I reject that submission.

[44] I am satisfied Mr Jindal's claim is sufficiently lacking in merit as to have little to no prospect of success and therefore an order for security is appropriate. The issue is quantum.

[45] I am mindful Mr Jindal has filed an application for leave which, in a practical sense, if declined will conclude this proceeding. While I have expressed serious misgivings about leave being granted, even if such a jurisdiction exists, I am not

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[17] *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 (HC) at 246.

deciding Mr Jindal's application for leave. Having concluded security is warranted, such should be set at a level that will not preclude Mr Jindal from having his leave application determined. Accordingly, staged security is called for. However, it is appropriate that security be paid now to protect the defendants in respect of Mr Jindal's leave application.

[46] I fix security in the sum of $7,500. Unless that sum is paid, Mr Jindal's application will be stayed, including his application for leave. If the security is paid then Mr Jindal's application for leave may proceed subject to para [50]. If the application for leave fails, that will bring the proceeding to an end.

[47] Accordingly, security is fixed only in respect of the application for standing. That will allow a full merits based hearing on the key issue of leave. If leave is granted then further security is appropriate to take the matter through to the completion of discovery. Discovery here will be substantial. The exact scope of discovery will have to be finalised upon Mr Jindal following through on his advice to the Court that he will remove from the list of 133 companies those companies where fees were less than $7,500. Mr Jindal's claim is that only excess fees will be have to be repaid. Given the costs that would follow from success in respect of an individual company discussed at [34], to make that exercise worthwhile any excess would have to be such that those costs could be met *and* a distribution to creditors made that makes restoration of a particular company worthwhile. That is likely to require any *excess fee*, on a rough and ready assessment, to be $15,000 to $20,000.

[48] Discovery in respect of the remaining approximately 70 files will be substantial. I fix security through to the end of discovery in the sum of a further $40,000. While that amount is significantly greater than scale costs on a 2B basis, it reflects the reality of the task in providing discovery for approximately 70 liquidation files. Inevitably during that time there will be further case management attendances along with an amended statement of claim to remove the companies with fees of less than $7,500. Leave is reserved for this figure to be revisited depending on the final number of companies in issue.

[49] I do not fix security beyond the completion of discovery, but leave is reserved to the defendants to apply for further security to be fixed for steps thereafter when the shape of the case will be better known, assuming it does proceed. Security for the expert fees was requested but is deferred until after discovery.

Costs

[50] As to the costs of this application, there is no reason why costs should not follow the event on a 2B basis in favour of the defendants. It is a condition of Mr Jindal taking further steps in this proceeding (including the setting down of his leave application) that those costs are paid.

Associate Judge Lester

Solicitors:
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Copy to:
Mr G Jindal (self-represented Plaintiff)