SUPREME COURT OF QUEENSLAND

CITATION:	*Rainmont Pty Ltd (in liquidation) v Seymour Whyte Constructions Pty Ltd* [2026] QSC 125
PARTIES:	**RAINMONT PTY LTD (IN LIQUIDATION)** ACN 160 314 394 (Plaintiff/Respondent) **v** **SEYMOUR WHYTE CONSTRUCTIONS PTY LTD** ACN 105 493 187 (Defendant/Applicant)
FILE NO/S:	BS 915/22
DIVISION:	Trial
PROCEEDING:	Claim (interlocutory application)
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	19 June 2026
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2026
JUDGE:	Freeburn J
ORDERS:	**1. Further security be given by the plaintiff by way of an indemnity from AmTrust Speciality Limited for $150,000 in substantially the same form as exhibit DS10 to Mr Stimpson's affidavit of 28 April 2026.** **2. The application be otherwise dismissed.** **3. I will hear the parties on costs and on a timetable for the progression of the proceeding.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – where the parties entered into subcontracts for the provision of works by the plaintiff to the defendant across six building and construction projects in 2015 – where the plaintiff was placed into administration in January 2016 and into liquidation in March 2016 – where the plaintiff commenced proceedings in January 2022 – where the plaintiff claims debts due and owing for work performed under the subcontracts, or alternatively specific performance of the subcontracts, or alternatively damages for breaches of the subcontracts – where the defendant pleads a collection of set-off claims outside the specific provision of the subcontracts and a limitation period defence – where the defendant filed its first application for security for costs in October 2024 – where the

first application was resolved by consent orders that the plaintiff provide $150,000 as security for the defendant's costs of the proceeding up until mediation in October 2025 – where the plaintiff paid that security – where mediation was unsuccessful – where the plaintiff sought to progress the litigation – where the defendant required the issue of further security to be resolved before either party took another step in the proceeding – where the defendant filed a second application in April 2026 for security for its costs in the proceeding from mediation up until the first day of trial — where there is prospect of a third application for security for the defendants' costs from the second day of trial up until judgment – where there has been significant delay in the progression of the litigation including by the defendant's preoccupation with security for its costs of the proceeding – where the plaintiff's litigation funder offered an indemnity of $150,000 to cover any further adverse costs orders that may be incurred – whether the plaintiff should be ordered to give further security for the defendant's costs having regard to the discretionary considerations under r 672 of the *Uniform Civil Procedure Rules 1999* (Qld) and the defendant's delay in bringing its second application for security for costs

Uniform Civil Procedure Rules 1999 (Qld) r 670, r 671, r 672

Christou v Stanton Partners Australasia Pty Ltd [2011] WASCA 176, applied
Buckley v Bennell Design & Constructions Pty Ltd (1974) 1 ACLR 301, cited
Ravi Nominees Pty Ltd v Phillips Fox (1992) 10 ACLC 1313, applied

COUNSEL:	S K Long (Counsel for the Plaintiff/Respondent) M A Taylor (Counsel for the Defendant/Applicant)
SOLICITORS:	Robinson Locke Litigation (Plaintiff/Respondent) Carter Newell Lawyers (Defendant/Applicant)

[1] The defendant, Seymour Whyte Constructions Pty Ltd, makes a further application for $300,000 in security for costs up to the first day of the trial. The plaintiff, Rainmont Pty Ltd (in liquidation), resists the application on nine grounds.

Principles

[2] On an application for security for costs pursuant to rule 670 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) or section 1335 of the *Corporations Act 2001* (Cth) (**the Act**) there are three broad issues:

(a) whether there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them;[1]

(b) whether, having regard to the discretionary considerations, the court should exercise its discretion to order security; and

(c) the appropriate value and form of security.

[3] In this case there was no contest about the first broad issue. Rainmont is in liquidation. It has previously been ordered to provide security. Instead, Rainmont relied on a number of discretionary considerations and contested the amount of security sought by Seymour Whyte.

[4] There was also no contest regarding the discretionary considerations. The discretionary considerations are listed in rule 672 of the UCPR, which provides a non-exhaustive list of discretionary factors which the court may consider when deciding whether to make an order for security of costs pursuant to rule 670.

[5] One of the discretionary factors to be considered is whether there has been any delay in bringing the application. Rule 672 of the UCPR lists only delay in bringing the proceedings as a discretionary factor. However, the authorities are clear that a discretionary factor is whether the application for security has been brought promptly.[2] In *Ravi Nominees Pty Ltd v Phillips Fox*, Master Bredmeyer said:

> *"…an application for security for costs should be brought promptly and prosecuted promptly so that if it is going to delay the plaintiffs' claim, while it is finding the security, or if it is going to frustrate the plaintiffs' claim completely and stop the action, it does so early on before the plaintiff has incurred too many costs."*[3]

[6] Similarly, in *Christou v Stanton Partners Australasia Pty Ltd*, Newnes JA (with whom Murphy JA agreed) said:

> *"It is, however, incumbent upon a defendant who wishes to obtain security for its costs to apply promptly for that relief once it is, or ought reasonably be, aware that the plaintiff would be unable to meet an order for costs.* ***Security for costs is not a card that a defendant can keep up its sleeve and play at its convenience****. Delay is an important consideration in the determination of an application for security for costs because it is capable of causing prejudice or unfairness to the plaintiff. A plaintiff is entitled to know at the earliest opportunity, before it has committed substantial resources to pursuing the litigation, whether it will be required to provide security. The later an application is made the greater the likelihood that it will cause substantial disruption or distraction in the conduct of the plaintiff's case, and if the plaintiff*

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1 There are other bases for jurisdiction specified in rule 671, but this is the relevant one for present purposes.

2 See, for example, *Queensland Civil Practice*, Thomson Reuters at [UCPR.672.25]: "*Although not one of the matters specifically referred to in r 672, the defendant's delay in making an application for security for costs may still be regarded as a relevant factor, see: Schneider v Alusa [2012] QSC 37 at [29]*".

3 (1992) 10 ACLC 1313 at 1315. This passage has been accepted in a number of cases and texts. See, for example, Dal Pont, *Law of Costs*, 5th ed at [29.124].

> *is unable to provide security, the greater the costs that will have been wasted."*[4] [emphasis added]

[7] Those principles are just as applicable where the security is initially sought in tranches or where, as in this case, the security has been provided by pegging the order to the costs estimated up to a specific stage of the proceedings.[5]

[8] I will return to the topic of delay shortly. First, it is convenient to examine the discretionary factors of the prospects, merits and genuineness of the proceedings.

Prospects, Merits & Genuineness

[9] Rules 672(b) and (c) of the UCPR provides that the court may have regard to the prospects of success or merits of the proceeding and the genuineness of the proceeding. In essence, Rainmont alleges that Seymour Whyte is attempting to avoid its contractual duties and obligations by using the court's processes to undertake a 'simulacrum' of the process that it should have performed on completion of each of the projects.[6]

[10] The pleadings are lengthy documents. Gaining a full understanding of the dispute is difficult.

[11] Rainmont was placed into administration on 25 January 2016 and into liquidation on 1 March 2016. Before its demise, Rainmont was a subcontractor specialising in traffic sign construction and maintenance works. Seymour Whyte is a major builder/contractor. The two parties worked on six projects.

Warrego Highway Project

[12] For a project on the Warrego Highway, Rainmont alleges that it performed work between 11 March 2015 and 25 January 2016 and then rendered two invoices/progress claims for $177,957 and $82,070. A further sum of $120,099 was held by Seymour Whyte as retention money under the subcontract.[7] Seymour Whyte's defence is that in January 2016, Rainmont committed an event of default (insolvency) which entitled Seymour Whyte to take the work out of Rainmont's hands.[8] Thus, clause 39.6 of the subcontract gave Seymour Whyte the following remedy:

> When work taken out of the Subcontractor's hands has been completed, the Subcontract Superintendent shall assess the cost thereby incurred and shall certify as moneys due and payable accordingly the difference between that cost (showing calculations therefor) and the amount which would otherwise have

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4 [2011] WASCA 176 at [20].

5 Dal Pont, *Law of Costs*, 5th ed at [28.40]. Note that Dal Pont remarks that there is a developing practice, at least in Victoria, for security for costs orders to be made for the estimated costs up to the date of a proposed mediation.

6 Plaintiff's amended outline of submissions at [32].

7 The retention of this sum is admitted by paragraph 11 of the amended defence.

8 There are other defences (e.g. a limitations defence for part of the claim) but it is proposed to concentrate on what appear to be the principal defences. The limitation defence may not have much prospect given that Seymour Whyte actually pleads that it was entitled to and did suspend payment.

> been paid to the Subcontractor if the work had been completed by the Subcontractor.[9]

[13] The evident purpose of that provision was to ensure that any additional cost incurred in completing the work was borne by the subcontractor. In its amended statement of claim, Rainmont pleads an alternative specific performance case that Seymour Whyte has failed to perform, and should be compelled to perform, its contractual obligation to assess the costs incurred to complete the works taken out of Rainmont's hands, and the costs of the work that would otherwise have been completed by Rainmont, pursuant to clause 39.6 of the subcontract.

[14] Except for a discrepancy of five days, Seymour Whyte does not seem to dispute that Rainmont carried out the work. In paragraph 10 of its amended statement of claim, Rainmont alleges that it performed the works on the Warrego Highway Subcontract between 11 March 2015 and 25 January 2016. As to that allegation, Seymour Whyte's defence pleads as follows:

> As to the matters alleged in paragraph 10 of the statement of claim:
>
> (a) [Seymour Whyte] denies that [Rainmont] performed works up to 25 January 2016 because [Rainmont] ceased provision of services to [Seymour Whyte] on **20 January 2016**;
>
> (b) **otherwise admits** the matters alleged therein. [emphasis added]

[15] Seymour Whyte's defence pleads that the work was taken out of Rainmont's hands and that another subcontractor, Public Lighting Solutions Pty Ltd trading as Integrated Services Electrical Contractors (**ISEC**), was engaged to complete the work. Oddly, rather than pleading the superintendent's assessment and certification of the difference in costs pursuant to the subcontract, Seymour Whyte pleads four different claims against Rainmont.

[16] The *first* of Seymour Whyte's claims is that, prior to its progress claim, Rainmont had overclaimed, and Seymour Whyte had overpaid, certain claims totalling $101,324.

[17] The *second* claim is that there are two errors in Rainmont's progress claims of $8,146 and $3,780. The claim is that, therefore, Rainmont was overpaid by those amounts.

[18] The *third* claim by Seymour Whyte against Rainmont is that, after taking the work out of Rainmont's hands, Seymour Whyte engaged ISEC to carry out certain works required to correct "*defects or deficiencies*" in Rainmont's work at a cost of $59,639.

[19] The *fourth* of Seymour Whyte's claims against Rainmont is that, by reason of Rainmont ceasing work, Seymour Whyte was delayed in its work by 7 days at a cost of $16,903 per day, a total of $118,319. That is not a claim pursuant to the terms of the subcontract but rather is, as Seymour Whyte expresses it, a claim for "*general damages for delay*".

[20] There are some odd aspects to Seymour Whyte's claims against Rainmont. One is that Seymour Whyte pleads that, on the proper interpretation of the subcontract, the work having been taken out of Rainmont's hands, Rainmont's exclusive remedy was

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9 This is clause 39.6 of the Warrego subcontract.

its right to payment under clause 39.6 (partly quoted above). However, clause 39.6 requires an assessment and certification by the Subcontract Superintendent. That certification might conceivably require money to be paid by Seymour Whyte to Rainmont or vice versa. However, there is no plea that the Subcontract Superintendent made such any such assessment or certified that any sum was owed by Rainmont or owed to Rainmont. Indeed, at least in the most recent version of the pleading, there is a specific concession that the superintendent did not issue a certification under clause 39.6.[10]

[21] Some observations can be made about the Warrego Highway project claims. Including retention, Rainmont claims $380,126 from Seymour Whyte. The claims by Seymour Whyte against Rainmont total $291,114. Seymour Whyte's claims against Rainmont for overpayments, defective work and delay damages are claimed as set-offs, but they have the character of counterclaims. Those set-offs are largely external to those processes contemplated by the contract. At least some of the set-offs were raised after Rainmont brought its claims. Rainmont's claims are for the work it carried out up to its liquidation. Seymour Whyte's claims are that previous claims were overpaid, and for defective work, and for delay damages.

Kabra Holdings Road Project

[22] Rainmont alleges that between 11 March 2015 and 4 September 2015, Rainmont performed works for Seymour Whyte pursuant to the Kabra Holdings subcontract. It is alleged that the subcontract reached practical completion on 4 September 2015 – more than three months before Rainmont went into administration.

[23] Rainmont's pleading alleges that one half of the retention money has been repaid to Rainmont but $15,378 remains outstanding. Again, Rainmont alleges a failure by Seymour Whyte to properly account for the monies. This time the allegation is of a failure by Seymour Whyte to perform its contractual obligation to issue a final certificate evidencing the monies due and payable in accordance with clause 37.4 of the Kabra subcontract.

[24] Seymour Whyte admits that the work was performed by Rainmont, and that one half of the retention was released. It seemingly claims an entitlement to retain the other half because Rainmont has not issued a final payment claim and therefore the Subcontract Superintendent has not issued a final certificate. Seymour Whyte relies on a limitations defence.

TRR4 Minor Works Subcontract (Townsville Ring Road)

[25] Rainmont alleges that between 25 May 2015 and 25 September 2015, again well before Rainmont's administration, Rainmont performed works for Seymour Whyte pursuant to the TRR4 Minor Works subcontract. Rainmont's allegation is that Seymour Whyte withheld $13,742 in retention money.

[26] Seymour Whyte defends on the basis that, pursuant to the subcontract, Seymour Whyte is only obliged to return the retention money on the later of the issue of a payment certificate and 10 business days after the date of receipt by it of a deed of release in the form in Annexure F. Alternatively, Seymour Whyte alleges that, on the

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10 Paragraph 30A(a) of the amended defence.

proper interpretation of clause 20.4 of the TRR4 Minor Works subcontract, Rainmont was required to issue a payment claim at the end of the defects liability period to recover the retentions, which must be accompanied by a deed of release in the form in Annexure F.

[27] As with the Kabra Holdings subcontract retention moneys claim, this looks to be a rather technical basis for withholding Rainmont's retention moneys.

TRR4 Major Works Subcontract

[28] Rainmont alleges that between on or about 18 July 2015 and about 25 January 2016, Rainmont performed works pursuant to the TRR4 Major Works Subcontract. Rainmont alleges that it made a progress claim of $411,355 on 15 December 2015 and a further invoice of $262,734 on 25 January 2016 – three days before Seymour Whyte elected to take the remaining TRR4 major works out of Rainmont's hands. Again, there is a claim for retention moneys of $42,136. The total is $716,225.

[29] Here, again, the work is largely admitted except for the five days between 20 and 25 January 2016. However, Seymour Whyte contends that the progress claims did not constitute payment claims in accordance with the subcontract because clause 20.4(c) required "*the provision of specified documentation therewith*".[11] Again, the retention money is said to be held for the technical reasons pleaded in relation to the TRR4 Minor Works subcontract.

[30] Seymour Whyte's defence also alleges that in about September 2015 the parties agreed that Seymour Whyte would advance to Rainmont $241,505 as an advance for materials to be supplied as provisional sum items. Seymour Whyte alleges, in effect, that Rainmont did not properly account for that advance payment.

[31] Seymour Whyte alleges 'overclaims' of $282,953.

[32] Seymour Whyte again pleads a limitation defence. In respect of the progress claim for $411,355 made on 15 December 2015 there is a reasonable argument that the claim became statute-barred on 15 January 2022, about a week before proceedings were issued, but much will depend on when the sum became properly due and payable on a proper interpretation of the subcontract. At least one interpretation issue is the effect of Seymour Whyte's suspension of payments because of the act of insolvency. Seymour Whyte's correspondence suggests that it was suspending all payments until the work was completed by others and there was a reconciliation. Similarly, Seymour Whyte's pleading suggest that the suspension operates to suspend all monies then due or that became payable.[12]

Exit 54 Upgrade – Coomera Interchange

[33] For the Exit 54 Upgrade subcontract, Rainmont alleges that the work was performed between about 30 September 2015 and 25 January 2016 and that a progress claim of $127,463 was made on 15 December 2015. The pleading alleges that, in response, Seymour Whyte's payment schedule of 12 January 2016 agreed to pay the full amount

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11 Amended defence at [57(b)] and [58(c)]. The latter also alleges that the progress claim lacked a statutory declaration as required by clause 20.4(c).

12 See, for example, paragraph 74A of the amended defence.

of the progress claim. On or soon after 25 January 2016, Rainmont issued a further progress claim for $60,242. It is also alleged that Seymour Whyte holds $15,738 in retention moneys.

[34] Again, it is alleged that on 28 January 2016 Seymour Whyte suspended payment because of the occurrence of an insolvency event and, again, it is alleged that there has been no accounting.[13]

[35] Seymour Whyte's defence again largely admits that the work was performed by Rainmont, except for the five day period between 20 and 25 January 2016. Seymour Whyte alleges that the progress claim on 15 December 2015 did not constitute a payment claim because clause 20.4(c) of the subcontract "*requires the provision of specified documentation therewith*". The pleading does not identify what documents were obliged to be provided but were not.

[36] Oddly, Seymour Whyte pleads a non-admission in response to Rainmont's allegation that Seymour Whyte's payment schedule of 12 January 2016 agreed to pay the full amount of the 15 December 2015 progress claim.

[37] In respect of the progress claim made on or about 25 January 2016, Seymour Whyte again alleges that the progress claim did not constitute a payment claim because clause 20.4(c) of the subcontract "*requires the provision of specified documentation therewith*" and the progress claim did not include a statutory declaration. Seymour Whyte therefore says that the progress claim was not payable. That is a surprising consequence of a technical problem.

[38] Further, Seymour Whyte alleges that it was entitled to and did withhold payment of all monies then due and becoming payable until the completion of a 'take out adjustment' or accounting under clause 22.3(e) of the subcontract. Oddly, Seymour Whyte does not say that such a 'take out adjustment' or accounting was performed under clause 22.3(e). Seymour Whyte also pleads variations valued at $13,041, and some defects in Rainmont's works, and liquidated damages of $361,790 by reason of causing 26 days delay.

[39] That claim for liquidated damages looks to have little or no prospects of success. The clause specifies that liquidated damages are payable at a rate of $12,650 per day where practical completion is not achieved by the date for practical completion. That date was 5 September 2016. But Seymour Whyte elected to take the work out of Rainmont's hands on 28 January 2016. From that point the parties' rights were to be determined in accordance with an accounting under clause 22.3. Seymour Whyte's rights under that clause included costs, expenses, losses and damages it suffered or incurred in completing the work.

Yellow Gin Creek Bridge subcontract

[40] The claims are similar under the Yellow Gin Creek Bridge subcontract. Rainmont pleads that it performed the work under that subcontract between 22 October 2015 and 25 January 2016. It says a progress claim was issued for $9,140 on 15 December

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[13] This subcontract called for a valuation and an adjustment of the contract sum in respect of costs, expenses and damage suffered or incurred by Seymour Whyte. The exercise is likely to be the same or similar to the comparison required by the other subcontracts.

2015. Rainmont further alleges that a payment schedule was issued by Seymour Whyte on or about 12 January 2016 which, in effect, recorded Seymour Whyte's agreement to pay the full amount claimed.

[41] Seymour Whyte's defence broadly follows its defence in relation to the subcontract for the Exit 54 Upgrade – Coomera Interchange.

Summary – All subcontracts

[42] And so, the nature of Rainmont's claims against Seymour Whyte are relatively simple claims for its work pursuant to the contracts and for the return of retention moneys totalling $205,458 over the six projects. And Seymour Whyte does not contest that the work was actually performed by Rainmont, except for the five days between 20 and 25 January 2016 – a period which spans a weekend. For two of the progress claims Seymour Whyte has issued payment schedules which, in effect, admit the indebtedness.

[43] Most of the work performed by Rainmont preceded Rainmont's fall into administration by some months. That can be illustrated by the following table:

Project	**Work Period**	**Progress Claim**	**Retention**
Warrego Highway	March 2015 to January 2016	$177,957 & $82,070	$120,099
Kabra Holdings	March 2015 to September 2015		$15,378
TRR4 Minor Works	May 2015 to September 2015		$13,742
TRR4 Major Works	July 2015 to January 2016	$411,355 & $262,734	$42,136
Exit 54 Upgrade	September 2015 to January 2016	$127,463[14] & $60,242	$15,738
Yellow Gin Creek	October 2015 to January 2016	$9,140[15]	

[44] The subcontracts contemplated that, where Seymour Whyte takes the work out of Rainmont's hands, a proper assessment, valuation or accounting assessment is to be performed by the superintendent or Seymour Whyte. No such assessment, valuation or accounting appears in Seymour Whyte's pleading. Instead, Seymour Whyte relies on a collection of set-off claims outside the specific provision of the subcontracts.

[45] In each case Seymour Whyte pleads a limitation period defence. At least one problem with the limitation defence may be that Seymour Whyte itself contends that pursuant to the subcontracts, it exercised its right to take the work out of Rainmont's hands and that Seymour Whyte thereby suspended all amounts that were then due or payable. Indeed, the submissions of counsel for Seymour Whyte were rather lukewarm about

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14 This is an amount with a payment schedule, seemingly admitting the debt at least on a provisional basis.

15 This amount is also the subject of a payment schedule.

the limitation point: "*Whether or not parts of the proceeding are time-barred, it was at best started six years after the work was undertaken, and on the verge of the limitation period*".

[46] It is not accurate to say that Rainmont is in the position of a defendant. Seymour Whyte points out that it has no counterclaim. And so, its stance is defensive. But each party has claims against the other which they wish to agitate. Rainmont's claims look to be relatively simple claims for work done pursuant to the subcontracts and for the return of retention money. On the other hand, Seymour Whyte's claims do not adopt the regime in the subcontracts where the work is taken out of the subcontractor's hands. The likelihood is that Seymour Whyte's set-off claims, in particular its delay and defective work claims, will be costly and difficult to litigate.

[47] From this distance there are really no clearcut conclusions that can be drawn on the prospects of success or the merits of the proceeding. The claim and set-off claims appear to be genuine. Rainmont's claims are all the more powerful because Rainmont is seeking to have progress claims paid, that claim for work performed several months before Rainmont fell into administration. And Rainmont seeks the recovery of retention money.

[48] On the other hand, Seymour Whyte's claims to set-offs have three unattractive features. The *first* is that, for reasons that are not satisfactorily explained, Seymour Whyte does not employ the reconciliation or accounting procedure authorised by the subcontracts and identify the additional cost it has incurred to complete the work contemplated by each subcontract. The *second* is that Seymour Whyte stopped even those claims that were 'in the pipeline' in the sense that Seymour Whyte had issued payment schedules which raised no issue or dispute. That factor, together with the absence of any reconciliation or accounting in accordance with the subcontracts, means that there is an arbitrary element to Seymour Whyte's decision to cease payments.[16] The *third* is that those claims to set-offs are likely to impose a greater costs burden on the parties than Rainmont's claims for work done pursuant to the subcontracts.

[49] And so, whilst I do not accept that Rainmont is in the position of a defendant, it is far too simplistic to portray Rainmont as the attacker and Seymour Whyte as adopting a purely defensive stance.[17] Rainmont makes what appear to be strong claims for work performed in some cases many months before it fell into administration. Two of the claims were not disputed by Seymour Whyte's payment schedules. A significant sum is claimed for retention moneys. On the other hand, Seymour Whyte's stance appears to be based on its decision not to make any payment at all under the subcontracts once Rainmont fell into administration. In the absence of some reconciliation or accounting under the subcontracts, including an assessment of the cost to complete, Seymour Whyte has no claim to a set-off under the subcontracts but instead seeks to make other set-off claims that are certainly not straight-forward.

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16 With each of the subcontracts, it may be that too much has been paid or too little. A great deal depends on the cost to complete the work. But that detail is not put forward by Seymour Whyte pursuant to the subcontracts.

17 See the useful discussion of this topic in Dal Pont, *Law of Costs*, 5th ed at [28.55]-[28.57].

[50] Appreciating the limits of the exercise, the strength of Rainmont's claims and the difficulties confronting Seymour Whyte are, in my view, a modest factor against ordering security.

Stifle the Proceeding?

[51] The liquidator states that any additional security sought by the defendant will likely stifle the progression of this proceeding. However, in the circumstances of this case that is not a factor of much weight against an order for security. As Muir JA said in *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd*:

> "*A corporate plaintiff wishing to avoid an order that it give security for costs on the ground that the making of the order will prevent the continuation of the litigation, at least as a general proposition, must establish that those 'who stand behind it and who will benefit from the litigation if it is successful are also without means*'."[18]

[52] As counsel for Seymour Whyte points out, there are more than $11 million in creditors who have an interest in Rainmont's liquidation. Of those, there are 5 secured creditors comprising roughly $2.4 million and 281 unsecured creditors (excluding employee creditors) with debts totalling $9.455 million.[19]

[53] In those circumstances, it is hard to conclude that those who stand to benefit are without means. This is a discretionary factor that can be put aside.

Delay and the Procedural History

[54] Both parties relied on the delay of the other. And so, in balancing the discretionary factors in this case, it is relevant to look at how the claims came to be litigated and the procedural history, the basics of which was described by counsel for Rainmont.[20]

[55] Rainmont was placed into administration on 25 January 2016.[21] Three days later, pursuant to each of the subcontracts, Seymour Whyte exercised its contractual right to take the work out of Rainmont's hands.

[56] On 10 February 2016, Rainmont's administrators wrote to Seymour Whyte identifying the amounts owing on all six subcontracts, a total of $1,361,370.[22] They recorded that no disputes concerning the works had been raised and that no negative payment certificates had been raised until after negotiations began on a replacement subcontractor. They recorded that Rainmont's November 2015 invoicing had been paid in early December 2015, but the December 2015 invoicing had not been paid in January 2016.

[57] On 17 February 2016, the solicitors for Seymour Whyte wrote to Rainmont's administrator saying that there were no amounts owing to Rainmont. They pointed

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18 [2010] 2 Qd R 85; [2009] QCA 254 at [45]. The quote within the quote is from *Bell Wholesale Co Pty Ltd v Gates Export Corporation* (1984) 2 FCR 1; [1984] FCA 34 at 4.

19 Fourth Affidavit of Mr D J Rodighiero sworn 9 April 2026 (CFI#40), Exhibit DJR-4 at page.

20 This part of the chronology is usefully explained in Rainmont's submissions at [3]-[16], which rely on the Affidavit of Mr D Stimson affirmed 28 April 2026.

21 Rainmont was placed into liquidation a short time later – on 1 March 2016.

22 The amount claimed is different in the most recent version of the pleading.

out that the subcontracts were entire contracts and that Rainmont had failed to complete those subcontracts.[23] They pointed to the fact that the work had been taken out of Rainmont's hands and that Seymour Whyte's obligation to pay was suspended. Seymour Whyte's solicitors asserted that Rainmont's failure or inability to complete had caused and was causing costs, losses, damages and expenses. They foreshadowed that their client would provide a reconciliation of the completion costs in accordance with the provisions of the subcontracts on completion of the work by the replacement subcontractor. They said they were happy to keep the administrator informed on the status of the completion works and the costs incurred in connection with completion.

[58] Some four years later, on 30 April 2020, Rainmont's liquidator wrote to Seymour Whyte and sought a full accounting of the costs to complete the works or the cost of any alleged defects. On 19 May 2020, Seymour Whyte advised Rainmont's liquidator that a response would be provided. However, no further response was provided. The defendant did not perform the reconciliation nor keep the liquidator informed as to the status of completion of the projects.[24]

[59] In the absence of a response, the liquidators commenced proceedings in January 2022.

[60] Two points can be noted here. The *first* is that the dispute, if it can be called that, has moved at a glacial pace. The *second* is that, even though proceedings had been commenced, there has been no proper dialogue between the parties with each putting their views on the correct accounting between them. That is largely because Seymour Whyte chose not to respond in a meaningful way to Rainmont's liquidators. And so, Rainmont's claims under the six subcontracts were largely claims for work done pursuant to those subcontracts, without any specific information on what costs Seymour Whyte may have incurred in completing each subcontract.[25]

The first security for costs application and the orders

[61] Rainmont commenced the proceedings in January 2022. Almost immediately, in February 2022, Seymour Whyte's solicitors enquired about Rainmont providing security for costs.

[62] A year later, in March 2023, two things happened. Rainmont amended its statement of claim. And Seymour Whyte's solicitor said that they had instructions to bring an application for security for costs. In June 2023, Seymour Whyte filed and served its defence.[26] In August 2023, the solicitors for Seymour Whyte sought security for their client's costs in the sum of $652,171.[27] Almost immediately, Rainmont's solicitors refused to provide security for costs. They said their client declined to provide security because:

(a) the proceeding was genuine and had good prospects;

(b) Rainmont's impecuniosity was attributable to Seymour Whyte's conduct;

(c) an order for security would be oppressive and would stifle the proceeding; and

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23 This is undoubtedly true. The progress payments under the subcontracts were, as is usual, on account. But, of course, that does not mean there was no value in the work performed.

24 Rainmont's submissions at [7].

25 As explained, there were also claims to retention moneys.

26 Rainmont's submissions at [8]-[11].

27 The costs incurred 'to date' (i.e. as at 7 August 2023) were $49,882.

(d) there was delay in applying for security for costs.

[63] The very slow pace of the litigation continued. Nothing significant happened until a year later. On 2 August 2024, Rainmont gave notice of its intention to take a further step in the proceeding.

[64] On or about 6 September 2024, Rainmont served its list of documents on Seymour Whyte. On 19 September 2024, Rainmont put Seymour Whyte on notice that it had not complied with its disclosure obligations.

[65] On 27 September 2024, Seymour Whyte's solicitors wrote a lengthy letter that propounded the merits of its defence, identified the hurdles Rainmont needed to overcome, and made an offer to settle. At the end of the letter, Seymour Whyte's solicitors advised that, if the offer was not accepted then the offer would be produced on the issue of costs, and they said they held instructions to apply for security for costs without further notice.[28]

[66] The offer was not accepted. Seymour Whyte's first application for security for costs was filed on 22 October 2024. In their affidavit in support of that application Seymour Whyte's solicitors estimated their client's costs at $836,009. It is not clear why that estimate was significantly greater than the original August 2023 costs estimate of $652,171.[29] And, in passing, I note that those figures compare with their costs expert's recent estimate of recoverable costs on the standard basis of $308,965.[30]

[67] The proceeding then entered a stalemate from October 2024 until March 2025. The stalemate occurred in this way.

[68] On 4 November 2024, Seymour Whyte's application for security was adjourned by consent to 19 November 2024. Then it was further adjourned by consent to 20 December 2024.[31] Then the application was further adjourned to 21 January 2025. On 23 December 2024, Rainmont brought a cross-application to strike out certain paragraphs of the defence. On 20 January 2025, by consent, Wilson J ordered that both applications be heard in the civil list for a one day on 19 February 2025.[32]

[69] On 19 February 2025, Wilson J made a number of orders by consent, including the following:

(a) Rainmont have leave to further amend its claim and statement of claim;

(b) for the purposes of the *Limitation of Actions Act 1974*, those amendments only take effect from the date of their filing;

(c) Rainmont give security for costs for Seymour Whyte's costs of the proceeding up to the date of the proposed mediation in the sum of $150,000; and

(d) Rainmont be at liberty to apply for further security after the mediation.

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28 Neither party sought to exclude this correspondence on the basis of 'without prejudice' privilege.
29 The costs incurred 'to date' (i.e. as at October 2024) were $60,754.
30 Affidavit of A D Bloom affirmed 17 March 2026 (CFI#42), Exhibit ADB1 at page 15.
31 Rainmont agreed to pay Seymour Whyte's costs of the adjournment fixed at $1,500.
32 Again, Rainmont agreed to pay Seymour Whyte's costs of the adjournment fixed at $1,500.

[70] On 13 March 2025, Rainmont paid $150,000 into court pursuant to the order of Wilson J.

Delay in bringing the first application for security

[71] There is little doubt that Seymour Whyte promptly gave notice that it would require security for costs. And the proceeding seems to have a delayed start. Rainmont only appears to have been seriously pursuing the case from about September 2024. For that reason, it cannot be concluded that there was any delay in the bringing of the first application for security in October 2024.

[72] But from that point onward the case did not proceed at all except for the application for security.

The chronology leading to the second application for security

[73] In March 2025, pursuant to the consent orders made by Wilson J on 19 February 2025, Rainmont:

(a) filed and served its further amended claim and statement of claim; and

(b) provided $150,000 in security for costs.

[74] Under the fairly leisurely timetable established by the consent orders made by Wilson J on 19 February 2025, Seymour Whyte's amended defence was due 42 days after the security was provided. That means Seymour Whyte's amended defence was due by 24 April 2025. Seymour Whyte did not file and serve its amended defence until 5 months later – in September 2025. There is no explanation for why Seymour Whyte was so tardy in complying with what was both an agreed timetable and a court order.

[75] On 13 October 2025, the parties participated in an unsuccessful mediation.

[76] Later that month Rainmont's solicitors sent to Seymour Whyte's solicitors a lengthy request for particulars and for copies of documents pursuant to rule 222 of the UCPR. This was an attempt by Rainmont to proceed with the litigation. It was unsuccessful.

[77] On 7 November 2025, the solicitors for Seymour Whyte put their opponents on notice that they would be applying for further security for their costs. However, despite putting Rainmont's solicitors on notice, nothing significant happened for some time.[33] Then, on 25 February 2026, Rainmont's solicitors wrote to Seymour Whyte's solicitors pursuant to rule 444 of the UCPR chasing up Seymour Whyte's failure to disclose and failure to supply the particulars and documents pursuant to rule 222.

[78] On 3 March 2026, the solicitors for Seymour Whyte responded. They contended that the rule 444 letter was a 'purported letter pursuant to rule 444' because of inaccuracies, because of its failure to specify a nominated time for a response and because, in so far as a time for compliance was specified, it was an unreasonable timeframe.

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[33] Some events were happening behind the scenes. For example, Seymour Whyte had retained an expert costs assessor.

[79] Seymour Whyte's solicitors stated that Rainmont's solicitors had failed to mention "*relevant facts*", namely that by their letter on 7 November 2025 Seymour Whyte had put Rainmont "*squarely on notice*" that Seymour Whyte's recoverable costs had exceeded the existing security, that Seymour Whyte required additional security, and that Seymour Whyte's solicitors had retained a costs assessor to provide a report on costs. Seymour Whyte's solicitors said that:

> "…security for [Seymour Whyte's] costs of defending [Rainmont's] claim from mediation until the first day of trial is a matter that should be resolved before the parties embark on future procedural steps and incur more unrecoverable costs."

[80] Seymour Whyte's solicitors said that pursuant to rule 445 of the UCPR, and to the extent that the letter of 25 February 2026 complied with rule 444, Seymour Whyte will take the further steps required within 14 days of Rainmont providing further security for costs.

[81] On 9 April 2026, Seymour Whyte filed and served its application for further security. That application was to be heard on 16 April 2026. By consent, that application was adjourned to 29 April 2026. On 22 April 2026, Rainmont filed and served its cross-application for disclosure and particulars. That cross-application was returnable on 13 May 2026.

[82] Seymour Whyte's application for further security was heard by me on 29 April 2026. Seymour Whyte's stance was that it objected to the court dealing with Rainmont's cross-application until the application for further security was determined and that further security was paid.

[83] It can be seen that there was, again, a stalemate from October 2025 until April 2026. Rainmont wished to progress with the proceeding. Seymour Whyte was refusing to proceed unless and until Rainmont provided further security.

Delay in bringing the second application for security

[84] Seymour Whyte contends there has been no delay in making this further application for security. Seymour Whyte's submission was put in this way:

> "…an application for further security has been available to the defendant since completion of the mediation in October 2025. The defendant advised the plaintiff of their intention to seek further security on 7 November 2025, and briefed a costs assessor on 4 December 2025 in order to determine the appropriate quantum of this application. The defendant served a copy of that report on the plaintiff on 20 March 2026, four days after the defendant had received it. This application [filed and served on 9 April 2026] followed after a reasonable time for the plaintiff to respond. There is no delay by the defendant."[34]

[85] I reject the proposition that there has been no delay in making this application for further security. There was a gap of six months between the mediation in October 2025 and the filing and service of the application for further security in April 2026.

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34 Paragraph 15(b) of Seymour Whyte's submissions.

Litigation in this State is not so leisurely conducted that the failure to take a substantive step for six months, at least in litigation of this scale, can properly be regarded as a case proceeding without delay or interruption.

[86] I accept the submission of counsel for Rainmont that Seymour Whyte has not provided an adequate explanation for the delay between September 2025 and April 2026 in making its further application for security for costs.[35] And I accept counsel for Rainmont's submission that there were other delays on the part of Seymour Whyte, such as the 5 month delay in filing and service of its amended defence without any explanation.

Security as a weapon

[87] Importantly, shortly after the mediation in October 2025, Rainmont pressed for Seymour Whyte's particulars and documents. Rainmont sought to proceed with the case. Rather than providing those particulars and documents, and rather than proceeding with the litigation, Seymour Whyte chose to put Rainmont's solicitors on notice that they would be applying for further security. Seymour Whyte might have applied promptly for additional security. Or it may have *both* proceeded with the case and proceeded with its application for further security. Instead, Seymour Whyte, through its solicitors, chose to utilise the application for further security as, in effect, a weapon to halt any further progress in the proceeding.

[88] Seymour Whyte's solicitors explicitly stated that they required the issue of further security to be resolved *before* the parties embarked on any further procedural steps. Indeed, there is no evidence or suggestion that, after the mediation, the solicitors for Seymour Whyte carried out any legal work on the proceeding at all, other than work devoted to prosecuting the application for additional security for costs.

[89] As Moffitt P explained in *Buckley v Bennell Design & Constructions Pty Ltd*:

> "*The right to seek security for costs and to stay proceedings, with the possible result that a claim for damages is frustrated, is a* ***powerful weapon****. Therefore, the litigant who seeks to use it against his opponent is at risk of not having it available, unless the application is made and persevered with in circumstances involving the least oppression of his opponent*."[36] [emphasis added]

[90] To that I would add that the right to seek security for costs should be exercised by a party to litigation in a manner that is consistent with the objectives of rule 5 of the UCPR, namely, to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. It is not consistent with rule 5 for a party to, in effect, bring on-going litigation to a halt for an extended period until its application for further security is resolved.

[91] Whilst an application for security for costs is a powerful weapon, and can be used for legitimate tactical reasons, it is also important to bear in mind that, unlike other interlocutory applications,[37] an application for security does not progress the litigation at all. That is no doubt one of the reasons why the authorities discussed

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35 As explained, counsel for Seymour Whyte denied that there was any delay.

36 (1974) 1 ACLR 301 at 309.

37 Even an application for particulars or for disclosure resolves a dispute and enables the case to proceed.

above emphasise that it is incumbent on a defendant who wishes to obtain security for its costs to apply promptly for that relief. As Newnes JA remarked *in Christou v Stanton Partners Australasia Pty Ltd*, security for costs is "*not a card that a defendant can keep up its sleeve and play at its convenience*".[38]

[92] Another, related, consideration is the danger of counterproductivity. To use this case as an example, the likelihood is that a sizeable proportion of the parties' costs are costs entirely referrable to the two applications for security for costs. In particular, the likelihood is that all or most of the parties' costs since the mediation in October 2025 are costs directly related to the issue of further security.[39] Seymour Whyte seeks security for its costs from the date of the mediation. And so, any order for security for costs will be circular because, at least to some extent, the objective is to quarantine a fund designed to secure the costs of applying for security of costs.

[93] There is a further problem. Security for costs was given for the period up to the mediation. Now, Seymour Whyte seeks security for its costs of the proceeding from the mediation until the first day of the trial. That means that Seymour Whyte envisages a third application for security for costs shortly before the trial or at trial. That third application for security will presumably cover the period from the first day of the trial to judgment. The costs of three applications for security are likely to be significant. And, presumably, the costs of each of those three applications will need to be part of the secured costs.

[94] In his oral submissions, counsel for Seymour Whyte acknowledged the very longstanding tradition that, at the beginning of the case a defendant seeks security until the first day of the trial. Here, however, counsel pointed out that the parties consented to an order of Wilson J that Rainmont give $150,000 in security for costs up to the mediation and that Seymour Whyte be at liberty to apply for further security after the mediation. Counsel argued that, because the court made the consent order, there should be no negative influence on the exercise of the discretion.

[95] It is certainly true that the court order expressly provides that Seymour Whyte is "*at liberty*" to apply for further security after the mediation. It is also true that the consent order records an agreement by the parties to compromise the first claim for security by agreeing to give partial security – until the mediation. But all the 'at liberty' order specified was that Seymour Whyte was free to make such an application. It did not dictate the fate of any such application. And, of course, the application here contemplates yet another application for security before trial – a total of three applications for security.

[96] Security for costs has been a preoccupation in this litigation. It has caused lengthy delays. And it has been used as a blockade to further progress in the proceeding. There is the prospect of a further application for security and therefore another blockade and further costs. Those are strong discretionary reasons against an order for further security.

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38 [2011] WASCA 176 at [20].

39 As explained, there is no evidence or suggestion that Seymour Whyte's costs since October 2025 have involved any work other than preparing for its application for security. Since October 2025, the case has been in a stalemate.

The late commencement of the proceeding

[97] Counsel for Seymour Whyte submits that when a party starts proceedings at the very end of the limitation period, there is an obligation to proceed with due expedition, and any later delay is less likely to be excused. He points out that the potential for prejudice from loss of witnesses and documents is recognised by the law.

[98] That is a legitimate point. The litigation *was* commenced very late and towards the end of the limitation period. There is no adequate explanation for that delay from Rainmont or its liquidator. Certainly, Seymour Whyte's failure to keep the administrator informed in the four years period between 2016 and 2020 can hardly be a proper excuse for the delay. And there were significant delays after that time.

[99] However, if the proceeding is commenced within the limitation period, as seems likely here, the parties are both obliged to apply appropriate expedition to the conduct of the case. That is what rule 5 requires. Here, at least from 2024, Seymour Whyte has been preoccupied with security and has used that procedure to impede the progress of the case. There was a stalemate from October 2024 until March 2025 prior to security being provided in response to the first application. And then there was another stalemate from October 2025 until May 2026 as a result of this second application for security. The period in between those two stalemates could have been meaningfully used to progress the proceeding. But a large part of that period was consumed by Seymour Whyte's failure to deliver its amended defence by 24 April 2025, the date it was due pursuant to the consent order made on 19 February 2025. Instead, for reasons that are not explained, Seymour Whyte left it until September 2025 to file and serve its amended defence.

[100] Counsel for Seymour Whyte made this submission:

> "*Here, it is more than a decade after the relevant events, much of which is attributable to the plaintiff's extraordinary delay prior to* ***and in the course of the proceeding****. It is submitted that these bring into question the* ***genuineness of the proceeding****. It is submitted that substantial prejudice arises to the defendant as a result. An officer of the defendant has previously deposed that it will face prejudice and increased cost in having staff and ex-staff members recall events at such a distance, and in securing evidence from former staff who are no longer employed by the defendant.*"[40] [emphasis added]

[101] Later in his submissions counsel goes even further:

> "*…the long delay in bringing this claim and* ***the excessive delay in its progression*** *raise questions about the* ***bona fides*** *of the plaintiff in pursuing this proceeding, or at least demonstrate prejudice to the defendant arising from that delay…*"[41] [emphasis added]

[102] Those are strong submissions. I do not accept that Rainmont has been guilty of extraordinary delay in the course of the proceeding – at least from 2024 until now. I do not accept that there is a lack of genuineness or a lack of bona fides. There is no proper evidence that support those strong submissions. Similarly, I do not conclude

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40 Seymour Whyte's submissions at [21].

41 Seymour Whyte's submissions at [26(a)].

that Seymour Whyte's conduct of the case since 2024 has a nefarious motivation. Seymour Whyte has plainly been preoccupied with security, but that preoccupation has had a consequence for the progression of the case.

[103] In short, the progress of the case has been far from satisfactory and both parties have contributed to the delays.

The offer of further security

[104] Shortly before the mediation, in September 2025, Rainmont's liquidator arranged for Rainmont to enter into a litigation funding agreement with NR Funding Solutions to fund this litigation.

[105] NR Funding, through its London insurer, AmTrust Speciality Limited, has proposed a draft deed of indemnity to cover any further adverse costs orders that may be incurred. Based on the current certificate of insurance, it appears that the indemnity will provide cover of $150,000 in addition to the security that is current held in court.

[106] The proposed form of indemnity requires that AmTrust pay Seymour Whyte within 14 days of a notice. Thus, in the event that the indemnity is called on, the amount is required to be paid to Seymour Whyte in Australia. That means that the contract constituted by the indemnity is to be at least partly performed in Australia. Therefore, rule 125 of the UCPR permits service of any proceedings outside Australia. Further, clause 12 provides that if AmTrust fails to pay in accordance with a notice then AmTrust will consent to a judgment in Australia and to that Australian judgment being registered in the High Court of Justice of England and Wales.

[107] In short, the offer of an indemnity of $150,000 by a London insurer is sufficiently meaningful to be regarded as a reasonable offer of security for Seymour Whyte's costs.

[108] The offer is at an appropriate amount given the existing security comprises a payment into court of $150,000, the rather variable estimates of costs, and the fact that an order for security for costs is not intended to give a complete and certain indemnity to a defendant.[42]

[109] In the circumstances, that offer is a significant and appropriate offer.

Conclusions

[110] Balancing the discretionary factors involves these considerations:

(a) Both the claims and claimed set-offs are likely to be genuine claims and genuine claimed set-offs.

(b) Rainmont makes what appear to be strong claims for work performed, in some cases many months before it fell into administration.

(c) Two of the claims were not disputed by payment schedules.

(d) A significant sum is claimed for retention moneys.

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42 *Brundza v Robbie & Co (No 2)* (1952) 88 CLR 171; [1952] HCA 49 at 175; *Menhaden v Citibank NA* (1984) 1 FCR 542 at 547.

(e) On the other hand, Seymour Whyte's stance appears to be based on its decision not to make any payment at all under the subcontracts once Rainmont fell into administration.

(f) In the absence of some reconciliation or accounting under the subcontracts, including an assessment of the costs to complete works by other subcontractors, Seymour Whyte has no claim to a set-off under the subcontracts but instead seeks to make other set-off claims that are certainly not straight-forward.

(g) The court should not draw the conclusion that an order for security is likely stifle the progression of this proceeding.

(h) Rainmont commenced the proceeding at the outer limits of the likely limitation period.

(i) Rainmont further delayed after commencement.

(j) However, Seymour Whyte has been preoccupied with the issue of security and has used that procedure to impede the progress of the case from October 2024 until March 2025 (leading to the first application for security) and then again from October 2025 until May 2026 (leading to this second application for security).

(k) Even during the period in between those two stalemates, Seymour Whyte delayed in filing and serving its amended defence and that delay is not adequately explained.

(l) Rainmont has made a reasonable offer of further security.

[111] For those reasons, I will order that further security be given for $150,000 by means of an indemnity from AmTrust Speciality Limited in substantially the same form as exhibit DS10 to Mr Stimpson's affidavit of 28 April 2026, but that the application otherwise be dismissed. I will hear the parties on costs and on a timetable for the progression of the proceeding.