SUPREME COURT OF QUEENSLAND

CITATION:	*Burleigh Connect One Pty Ltd v 6E1 Pty Ltd* [2026] QSC 170
PARTIES:	**BURLEIGH CONNECT ONE PTY LTD** ACN 632 111 623 (plaintiff) **v** **6E1 PTY LTD** ACN 669 887 272 **AS TRUSTEE FOR THE 6E1 TRUST** (first defendant) **6E2 PTY LTD** ACN 669 888 279 **AS TRUSTEE FOR THE 6E2 TRUST** (second defendant) **6E3 PTY LTD** ACN 669 888 331 **AS TRUSTEE FOR THE 6E3 TRUST** (third defendant) **6E4 PTY LTD** ACN 669 888 402 **AS TRUSTEE FOR THE 6E4 TRUST** (fourth defendant)
FILE NO:	4586 of 2025
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 July 2026
DELIVERED AT:	Brisbane
HEARING DATE:	5 May 2026
JUDGE:	Muir J
ORDER:	**1. The plaintiff's application for leave to deliver a further amended claim and statement of claim, and for the joinder of Mr Telecican as the fifth defendant in the form attached to the affidavit of Duane Williams (CF D 19) filed 20 April 2026 is refused.** **2. The plaintiff is given leave to file and serve a further amended claim and statement of claim which includes Mr Telecican being joined as the fifth defendant by 4.00pm Friday 14 August 2026.**

3. **The defendants' application for release of undertakings filed on 20 April 2026 is dismissed.**
4. **By 4.00pm Friday 14 August 2026, the plaintiff is to provide security in the form of a bank guarantee or payment into Court in the sum of $105,000 as security for the defendants' past, present and future costs up until the close of pleadings.**
5. **The defendants' application for security for costs filed 20 April 2026 is adjourned to date to be fixed.**
6. **The parties are directed to exchange written submissions as to costs by 4.00pm 24 July 2026. These submissions (or any consent orders as to costs) are to be forwarded by email to my Associate by this date. If necessary, the issue of costs will be listed for a short oral hearing at a date and time in the week of 17 August 2026 to be notified by my Associate to the parties. Otherwise, the costs orders foreshadowed in paragraph 98 of these reasons will be made.**
7. **The proceeding is listed for a further review before Muir J on 28 August 2026 at 9.30am.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – GENERALLY – where the plaintiff has applied to the Court for leave to file a further amended claim and statement of claim and joinder of the fifth defendant Mr Telecican to the proceeding – where the plaintiff has amended its case to seek rectification for common mistake as part of its claim for misleading or deceptive conduct

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the defendants oppose the application for leave principally on the basis that the proposed amended pleadings are defective and liable to strike-out

PROCEDURE – MISCELLANEOUS PROCEDRUAL MATTERS – UNDERTAKING IN COURSE OF LEGAL PROCEEGINGS – where the defendants have applied to the Court to be released from an inter-party undertaking and payment of monies held in trust in substitution of a different undertaking – where the application is opposed by the plaintiff on two grounds – whether the Court has jurisdiction to vary an undertaking where the undertaking was pursuant to an agreement between parties – whether the Court should exercise any discretion as the proposed replacement undertaking is not a substitute for the monies being held in trust

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS –

POWER TO ORDER – where the defendants have applied to the Court to order the plaintiff to provide security for the defendants' costs in the form of a bank guarantee or payment into Court of $551,430 pursuant to UCPR rule 670 – where the application is opposed by the plaintiff primarily on the basis that the application has been brought before the close of pleadings – where the alternate position of the plaintiff is that security should be fixed at $250,000 for the defendants' costs from the date of the application to the first day of trial – whether the Court should exercise its discretion to order security for costs in a way which best suits the interests of justice in the circumstances of the case

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – FACTORS RELEVANT TO EXERCISE OF DISCRETION – – where the Court was required to consider the discretionary factors under UCPR rule 672 – where the plaintiff had adduced no evidence of its financial position or the means of those standing to benefit from the litigation – whether delay is relevant– where the Court was required to consider the extent to which the merits of the claim should be examined on an application for security for costs – whether the discretion to order security for costs should be exercised

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 135, r 149, r 171, r 444, r 670, r 671, r 672

ACN 006 577 162 Pty Ltd (formerly Harrop Engineering Australia Pty Ltd) as trustee for Harrop Family Trust v Beauville Pty Ltd [2014] VSC 298
Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170
Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd [2011] QCA 252
Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd [2012] QCA 114
Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd (1987) 16 FCR 497
DGR Global v P.T. Limited [2025] QCA 122
Earthtec Pty Ltd v Livingstone Shire Council [2023] QSC 22
Equititrust Limited v Tucker and Others (No 2) [2019] QSC 248
Gould and Birheck and Bacon v Mount Oxide Mines Ltd (in liq) (1916) 22 CLR 490
McShelly Pty Ltd & anor v VHS Holding Company Pty Ltd & ors [2025] QSC 159
Milglade Pty Ltd v Harrison [2008] QSC 359
Mio Art Pty Ltd v Macequest Pty Ltd (2013) 95 ACSR 583
Nakad v Nakad [2023] NSWSC 228
Pearson v ING Bank (Australia) Ltd (2023) 14 QR 170

	QNI Resources Pty Ltd & Qrs v Park & Ors (2016) ACSR 321 *Robert Bax & Associates v Cavenham Pty Ltd* [2011] QCA 53 *Zhao & ors v CN-AU Capital Pty Ltd & ors; In the matter of CN-AU Capital Pty Ltd ACN 625 191 246* [2025] QSC 290
COUNSEL:	G Handran KC with L Copley and G Moore for the plaintiff M Jones KC with J Dudley for the defendants
SOLICITORS:	MBA Lawyers Pty Ltd for the plaintiff Cowen Schwarz Marschke Lawyers for the defendants

Introduction

[1] This dispute emanates from the plaintiff's sale of two vacant lots of land at 2/6 Ern Harley Drive (the **Land**) to the defendants on 26 August 2025. The Land is now the site of a Tesla dealership subsequently constructed by the defendants (or related entities).

[2] By a claim and statement of claim filed in early October last year, the plaintiff claims the sum of $3,376,430.55 from the defendants (on various bases). The defendants have not yet filed a defence (and the plaintiff has not yet insisted on one) due to ongoing arguments about the deficiencies in the plaintiff's pleaded case.

[3] There are currently three applications for the Court's determination:

(a) First, the plaintiff's application for leave to file a further amended claim and statement of claim, and for the joinder of Mr Telecican, (the director of each of the first to fourth defendants) as the fifth defendant.

(b) Second, the defendants' application for the release and replacement of cash undertakings with alternate undertakings preserving equivalent security and real property; and

(c) Third, the defendants' application for security for costs.

[4] As the defendants have not filed a defence, they require leave under r 135(1) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) to take a step. Leave is not opposed by the plaintiff. Given the nature of the applications, it is appropriate for leave to be granted.

[5] All the applications are contested and dealt with in turn below. But before doing so, it is instructive to understand some of the background to the sale of the Land and the chronology of the proceedings to date.

Background leading up to the sale of the Property.

[6] The process of the sale was protracted and convoluted, with the First Contract dated 18 July 2023 being between the plaintiff and LT Build Pty Ltd. Mr Telecican is the sole director of LT Build. The original works under the First Contract were substantially completed by about September 2023 and, on the plaintiff's case, capable

of settlement in late January 2024 but no later than 30 June 2024. But around September 2023, LT Build (through Mr Telecican) requested the plaintiff stop the original works and instead facilitate different approvals and different works suited to a proposed tenant and different intended use. The plaintiff then apparently proceeded with that Varied Work based on assurances from Mr Telecican that the costs of the Varied Works and the resulting holding costs would be paid by the defendants.

[7] The First Contract - which contained a nomination clause - was subsequently replaced by the Second Contract dated 22 February 2024, which nominated the defendants as the buyers.

[8] Pursuant to the Second Contract, settlement of the sale of the Land was to occur on 25 August 2025. The Second Contract also obliged the plaintiff (at its cost) to take all reasonable steps to subdivide and register the Land in time for settlement and by no later than 30 June 2024.

[9] The Second Contract was subsequently varied twice by deeds dated 6 June 2024 and 9 September 2024, to extend completion and allow the plaintiff to undertake certain "agreed works" on the Land for the defendants in anticipation of settlement. The First Variation Deed [of 6 June] expressly "capped" payment for the works at $500,000. It is uncontroversial that this deed wrongly refers to varying the First Contract and not the Second Contract.

[10] The Second Variation Deed [of 9 September] expressly limited payment to a further $133,650.

[11] Both deeds:

(a) were prepared by the parties with the assistance of their respective solicitors;

(b) required any further works to be agreed by a further variation to the contract; and

(c) could only be altered by signed written agreement.

[12] On 26 November 2024, the plaintiff's solicitors wrote to the defendants' solicitors alleging that the defendants had:

> "…previously agreed to reimburse the [plaintiff] for all holding costs incurred from 1 October 2023 to the settlement date including, but not limited to the [plaintiff's]:
>
> a. additional interest and line fees;
>
> b. additional fees and expenses from its financier;
>
> c. construction site holding costs to be advised by IMF and [the plaintiff] and
>
> d. additional legal fees.
>
> As of 17 October 2024, the known holding costs is approximately $2,153,998.70…"

[13] From this time until August 2025, and in the context of seeking urgent settlement, the defendants' solicitors corresponded with the plaintiff's solicitors on numerous occasions requesting clarification of the source of the alleged liability.

[14] On 4 March 2025, the plaintiff's solicitors sent a draft settlement statement to the defendants solicitors, stating that the holding costs had now risen to $2,924,935.20.

[15] On 16 April 2025, the plaintiff's solicitors alleged (without particularity) that both deeds expressly provided for the defendants' liability to pay the holding costs.

[16] On 9 May 2025, the plaintiff's solicitors clarified that the liability arose from cl 2.4 of the Second Variation Deed only.

[17] On 23 July 2025 and 30 July 2025, the plaintiff's solicitors reiterated that the liability for holding costs arose under the Second Variation Deed and alleged that these costs would exceed $4 million by 25 August 2025.

[18] On 25 August 2025 (after some to-ing and fro-ing), the defendants agreed to pay $54,035,650.47 (being the then alleged quantum of the holding costs) into their solicitors' trust account, to be returned if the plaintiff failed to bring a claim for those alleged costs within 45 days, or if otherwise agreed in writing or ordered by the Court. This agreement is discussed in more detail under the defendants' application for release of undertakings.

[19] Settlement of the Land occurred pursuant to the Second Contract on 25 August 2025.

Chronology of the proceedings to date

[20] On 9 October 2025, the plaintiff commenced the current proceedings alleging that on a proper construction of the First and Second Variation Deeds, the defendants are required to pay the holding costs as listed in a schedule said to be incorporated into those deeds by a partly oral/partly conduct agreement defined as the Costs Agreement. The consequential relief sought was damages for breach of the Costs Agreement.

[21] On 28 October 2025, the defendants wrote to the plaintiff pursuant to r 444 of the UCPR complaining that the pleading was defective. The plaintiff disagreed and refused to amend its pleading.

[22] On 6 November 2025, the defendants filed an application to strike out the statement of claim. On the eve of the hearing, the plaintiff agreed to amend its pleading. On the return date of the application (4 December 2025), consent orders were made adjourning the application and directing the plaintiff to file an amended claim and statement of claim by 18 December 2025.

[23] In breach of the direction, the plaintiff filed an amended pleading on 23 December 2025. The second version of the statement of claim reduced the quantum of the claim by nearly $700,000, to about $3.38 million. But again alleged that further costs were payable by the defendants as set out in schedules said to be incorporated into the two deeds of variation. The relief claimed was damages for breach of contract or alternatively money due and owing pursuant to the First and Second Deed[s] of Variation.

[24] On 19 January 2026, the defendants wrote to the plaintiff complaining that the pleading was still defective. The plaintiff agreed to amend its pleading further.

[25] On 2 February 2026, consent orders directing the plaintiff to file any further amended pleading by 13 February 2026 were made. The plaintiff did not comply with that direction. But on 23 February 2026, the plaintiff wrote to the defendants requesting an extension for the filing of their amended pleading on the basis that King's Counsel had been briefed, and that further instructions were needed to settle the pleading. The defendants agreed to this extension and on 25 February 2026, consent orders were made extending the time for the plaintiff to file a further pleading to 6 March 2026. The plaintiff did not comply with that direction.

[26] On 18 March 2026, the plaintiff advised the defendants (for the first time) of its intention to plead a rectification case but that it could not do so for at least two weeks because counsel had not yet been briefed.

[27] On 23 March 2026, the plaintiff was directed to deliver its further proposed amended pleading by 2 April 2026 and the plaintiff was ordered to pay the defendants' costs of their application for strike out, reserved costs, and costs thrown away by the amendments. On the same day consent orders were made varying the sum of $4,035,640.47 to be held in the defendants' solicitors trust account pursuant to the agreement of the parties on 25 August 2025 to $3,376,430.55, with the balance (with interest) authorised to be remitted back to the defendants. This reflected the plaintiff's concession that its claim for holding costs had been quantified for that lesser amount. This consent order is discussed as part of the defendants' application for release of undertakings.

[28] On 2 April 2026, the plaintiff delivered a third version of its (proposed) pleading. The defendants maintain that this version is both defective and incomplete for various reasons, including that it:

(a) does not plead the material facts necessary to support the alleged "common intention" and "mistake" needed for rectification; and

(b) made unparticularised allegations of the defendants' knowledge and adoption of the alleged representations.

[29] On 14 April 2026, the plaintiff provided a revised further amended claim and further amended statement of claim. This fourth version is the Current Proposed Pleading which the plaintiff seeks leave to file.

What is the case that the plaintiff now seeks to advance?

[30] The Current Proposed Pleading seeks to join the defendants' director Mr Telecican to the proceeding as part of the plaintiff's claim of misleading or deceptive conduct. By this pleading, the plaintiff seeks rectification for common mistake. In the alternative, it also pleads claims in estoppel, restitution, and misleading or deceptive conduct under the *Australian Consumer Law.*

[31] The plaintiff's case as now alleged is that:

(a) by as early as October 2023, LT Build (by Mr Telecican) orally represented that it would be liable for the plaintiff's holding costs: [18]-[19];

(b) in February 2024, as an "inducement" to enter the Second Contract with the defendants [in replacement of the First Contract with LT Build], the defendants (by Mr Telecican) orally represented or agreed to assume LT Build's obligation for the unquantified holding costs to date: [26]-[28]; and

(c) on 6 June 2024 and on 9 September 2024, the parties executed the First and Second Deeds of Variation which limited payment for agreed works to $633,650 and did not refer to any holding costs. It is now alleged that this was a mistake and the common intention of the parties was for the deeds to provide for a part-payment of the holding costs liability said to arise from the prior oral agreement: [59]-[63].

The defendants' main complaints about the Current Proposed Pleading

[32] The defendants oppose leave being granted and make two main complaints about the Current Proposed Pleading. The first is with the way the mistake case has been pleaded, particularly as it concerns the "defendants' knowledge" or "common intention". The second is with the way the defendants' alleged liability for "holding costs" is maintained.

[33] The defendants submit that insufficient material facts have been pleaded necessary to sustain these aspects of the plaintiff's case and that this inadequacy infects the rest of the plaintiff's case as it concerns acquiescence, estoppel and misleading and deceptive conduct. The defendants' position is that leave should not be granted for the plaintiff to deliver the pleading in its current form, or alternatively that leave should be given on the condition that the deficiencies identified be addressed in a further amended pleading. The defendants effectively seek to strike out the Current Proposed Pleading (but with leave to re-plead).

Legal principles applicable to whether leave should be granted

[34] Rule 171 of the UCPR permits the court to strike out a pleading if it discloses no reasonable cause of action or has a tendency to prejudice or delay a fair trial. The parties agreed (and I accept as a general proposition) that leave should not be given to file a pleading which is liable to be struck out.

[35] The two overriding functions of a pleading are to state the case with sufficient clarity to ensure procedural fairness and to define the issues for decision: *Gould and Birheck and Bacon v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490, 517. A pleading may be struck out under r 171 of the UCPR as having a tendency to prejudice or delay a fair trial if it fails to fulfil these two overriding functions: *Equititrust Limited v Tucker and Others (No 2)* [2019] QSC 248, [13].

[36] Each case, of course, turns on its facts.

[37] The principles to be applied in determining whether a pleading ought to be struck out for not meeting its function can be conveniently summarised as follows:

(a) A plaintiff must plead all the material facts necessary to succeed on the cause of action. If the plaintiff does not do so, the pleading is at risk of being struck out for failing to disclose a reasonable cause of action: *Mio Art Pty Ltd v Macequest Pty Ltd* (2013) 95 ACSR 583, [65];

(b) A party must plead those facts which will be relied upon as material to sustaining an inference or which would take the other party by surprise if not pleaded; UCPR r 149;

(c) In the context of pleading as to a state of mind, the pleading "…must not oppress a defendant by vague or uncertain allegations, lacking particularity..."; *Mio Art*, [70];

(d) A party faced with a pleading that does not coherently articulate the case against it is denied procedural fairness; *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252, [22];

(e) if the pleading is "difficult to follow or objectively ambiguous or creates difficulty for the opposite party insofar as the pleading contains inconsistencies", it is liable to strike out for having a tendency to prejudice or delay a fair trial; *Robert Bax & Associates v Cavenham Pty Ltd* [2011] QCA 53 [16].

[38] These principles are to be applied bearing in mind:

(a) the purpose of the UCPR as enunciated by r 5 is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense; and

(b) considerations of modern case management suggest that a Court ought to be reluctant to spend extensive time and resources debating an application of technical pleading rules. It is only where the criticisms of a pleading significantly impact on the proper preparation and presentation of the case that those criticisms should be seriously entertained; *McShelly Pty Ltd & anor v VHS Holding Company Pty Ltd & ors* [2025] QSC 159, [5] - [10].

Has the issue of "common intention" been adequately pleaded?

[39] The plaintiff's case that the defendants are liable for payment of $3,376,430.55 pursuant to the two deeds of variation is not a particularly strong one. Senior Counsel for the plaintiff appeared to accept this when he described the plaintiff's case as follows:

> "So that the gist of the case that we seek leave to advance is that, if the deeds are not read on their face as covering other prolongation or run-on costs – holding costs – that **the deeds need to be rectified based on the common intention that they ought have expressly provided for those costs to be paid, and that common intention consists of, or is to be inferred from, the matters that I took your Honour to.** Now, the defendants say that the deeds are conclusive and need to be read in a particular way, and **we understand how they might intend to meet the construction case,** but a pleading doesn't become embarrassing or defective because the other side think they've got a strong point to raise against it."
>
> [emphasis added]

[40] The "matters" the Court was taken to are those matters pleaded in paragraph 62 of the Current Proposed Pleading as follows:

> "The common intention pleaded above consisted of or is to be inferred from the following communications and dealings between the parties:
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> (a) the Agreed Payment Representation pleaded in paragraphs 18 to 22;
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> (b) the Costs Agreement pleaded in paragraphs 25 to 27;
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> (c) the adoption and affirmation pleaded in paragraph 28;
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> (d) the communications and dealings preceding execution of the First Deed of Variation pleaded in paragraphs 11 to 16, 19 and 26, to the effect that:
>
> (i) the Plaintiff was not prepared to continue funding costs incurred for the sole benefit of the First to Fourth Defendants;
>
> (ii) the Plaintiff required deposit monies to be released on account to enable the Varied Works to continue;
>
> (iii) a further release from the deposit was required on account for the same reason;
>
> (e) the provision by Law Shared, the lawyers then acting for the First to Fourth Defendants of a proposed deed of variation that had the effect of releasing the $500,000 deposit as a part payment only, without any reference to a cap of any kind; and
>
> (f) the further payments made on account of the Agreed Words and as pleaded at paragraph 39 herein…"

[41] The defendants submit that there must be other facts which the plaintiff will rely upon to establish two things:

(a) First, the extreme commercial naivety or recklessness or desperation of Mr Telecican; and

(b) Second, how the defendants' lawyers came to participate in the finalisation of the two deeds of variation where such a commercially improbable outcome (that the defendants agreed to be liable for unlimited holding costs) was intended, but where the deeds did not refer to that liability at all.

[42] The plaintiff was emphatic that there are no other material facts that it could point to upon which it was to be inferred that it was the parties common intention that the holding costs were to be included in the two deeds of variation. That might be so. But the plaintiff's case is that the contracting parties, acting through the identified individuals, had the pleaded intention about payment of the holding costs and that the two deeds of variation prepared with the assistance of lawyers failed by mistake to record it. In this sense it is curious that the plaintiff described the involvement and understanding of the legal representatives as "evidentially important"; but to date have not pleaded any material facts to support such an important issue.

[43] The plaintiff submitted that the absence of a more detailed pleading about the lawyers' states of mind is not, at this stage, enough to demonstrate futility. I accept that submission. But the lack of pleading about the lawyers' state of mind remains

significant and impacts on the proper preparation of the case. The defendants ought not be kept guessing or taken by surprise as to the material facts underpinning the plaintiff's case about the involvement and understanding of the legal representatives. The facts which are relied upon to establish the common intention of the defendants (which would necessarily include its lawyers) are part of the plaintiff's case and should be pleaded.

[44] I accept the defendants' submission that the mechanism by which the mistake was made has not been adequately pleaded in the Current Proposed Pleading. This includes the material facts upon which it is alleged that the mistake was made and how it was made.

Has the defendants liability of the holding costs been adequately pleaded?

[45] Senior Counsel for the plaintiff addressed the defendants' complaints about the plaintiff's claim for "unlimited" holding costs in the following way:[1]

> "…we don't contend that the defendants intended or agreed to assume unlimited, abstract or unknown liability. **We carefully define in the pleading, so as to narrow the allegation, what it is that we say the category of expenses was that the defendants agreed to pay and that that agreement and the assurances that were given were given by the defendants, acting through their director, the effect of which is that the specified sum in the deed was not, and was never intended to be, a cap controlling the upper limit of the amount of money that the defendants would pay in respect of the altered development project.** But we don't go so far as to say that their liability was boundless. We say that it's limited by the subject matter, cause and time of the costs, that is, the interest and related components."
>
> [emphasis added]

[46] The defendants submit that the plaintiff's pleading as to the component items, the precise communications by which liability was said to be assumed and the temporal development of the pleaded amount, are inadequate. The plaintiff submitted that the defendants complaints about the "holding costs" pleading are matters "for particularity and disciplined pleading". I accept that submission.

[47] First, the Current Proposed Pleading defines "holding costs" to mean "interest, line fees, financier charges, legal fees and other carrying costs incurred by reason of the delay to settlement, as particularised in Annexure A". But it is difficult to see how the definition has been carefully defined to narrow the allegation as the plaintiff contends. For example, the expression "other carrying costs" is vague and otherwise not referred to or defined in the pleading.

[48] Second, the pleading as it centres around the definition of holding costs is confusing and embarrassing, with the defendants variously agreeing to apparently pay "consequential holding costs caused by the delay to settlement", "associated holding costs" of the Varied Works, "additional costs" in carrying out the Varied Works and "other holding costs".

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1 T1-21 ll 2-12.

[49] Third, there is a disconnect between the term “holding costs” as it is defined and the items as they are claimed in Schedule A. For example, there are several items (such as land development costs, insurance and fence hire) which do not appear to fall within the defined meaning of “holding costs”.

[50] Fourth, the representations and communications about the holding costs (as defined) being agreed to be paid are in effect conclusionary statements. In the context of this case, the representations are vague and insufficiently particularised. For example, as best as can be discerned, none of the items as defined as falling within the meaning of holding costs are referenced as part of the Agreed Payment Representation, the Costs Agreement or elsewhere in the pleading. The defendants are entitled to know the material facts (as opposed to the particulars) underpinning the defendants alleged liability for each and every amount of the items which form the precise amounts (or holding costs) the defendants are said to have expressly agreed to pay at various times over a period of nine months.

[51] The plaintiff submitted that the defendants’ complaints about the “holding costs” do not mean that the proposed amendments are hopeless and ought not be permitted to be made. I accept that the proposed amendments are not necessarily hopeless, but in their current form the plaintiff’s case is not sufficiently clear, has the tendency to prejudice or delay a fair trial and is liable to be struck out.

[52] The question becomes then what form of orders should be made on the application for leave.

What form of order for leave should be granted?

[53] The plaintiff frankly conceded at the outset that its pleading required “tighter formulation, better particularity, and disciplined repleading”. That is true. There is no suggestion by the defendants that the plaintiff ought not be given the opportunity to address the identified deficiencies. Given the way the case was argued before me, I am not satisfied the proposed amendments should be permitted to be made in the form of the Current Proposed Pleadings. The rulings I have made infect all the causes of action which rely on the defendants’ state of mind and the defendants’ liability for holding costs; *Mio Art Pty Ltd v Macequest Pty Ltd* (2013) ACSR 583, [65].

[54] In the unique circumstances of this case, the appropriate course is for the plaintiff to be refused leave to deliver the Current Proposed Pleading but be granted leave to file and serve a further pleading (within 28 days) addressing the rulings I have made. This grant of leave extends to Mr Telecican being joined as a fifth defendant. It will be a matter for the defendants as to whether they apply to strike out all or parts of that further pleading or file a defence and move forward with the proceeding in the usual course.

[55] The defendants also maintained ten other more minor complaints. These matters were not developed in the hearing before me. For that reason, and because of my findings about the consequences of the core complaints being established, it is unnecessary for me to deal with each of these complaints. Although to the extent the plaintiff accepts that any of them have merit, I expect they will be addressed in the next iteration of the plaintiff’s pleading.

[56] Turning then to the defendants’ application for release of the undertakings.

Defendants' application for release of the undertakings

[57] So that settlement of the Land could proceed on 25 August 2025 (in the face of the controversary about the holding costs), the parties agreed in writing that the sum of $4,035,640.47 would be held on trust in the defendants' solicitors trust account. The terms of that agreement are contained in letter of offer from the defendants' solicitors to the plaintiff's solicitors [of 25 August 2025] (which was accepted by the plaintiff's solicitors on the same day) as follows:

> "…Our client has instructed us to make the following proposal, to allow settlement to take place today:
>
> 1. Your client agrees to settle the Contract today without requiring payment of any of the alleged holding costs at settlement (including the alleged site possession fees and the interest/fees on your client's loan). The settlement statement is agreed to be as per the draft settlement statement enclosed[2], with a payment to be made for the agreed works at settlement in the sum of $633,650;
>
> 2. The duty amounts are to be assessed by Mr Taylor of Law Shared - your client agrees to accept Mr Taylor's assessment of duty for the purposes of settling the Contract but reserves its rights under the Contract to seek indemnity from our clients with respect to any duty payable under the Contract or Deeds of Variation
>
> **3. The sum of $4,035,640.47 (being the amount proposed in your letter of 23 July 2025) is to be paid into our firm's trust account. The parties agree that this sum shall be held on trust and be invested with CBA (for successive term deposits of one months duration unless otherwise agreed), pending:**
>
> **(a) if your client does not commence a proceeding in Court making a claim for the holding costs within 45 days, the funds are to be immediately thereafter returned to our client; or**
>
> **(b) written agreement of the parties; or**
>
> **(c) otherwise, court order of a Court of competent jurisdiction…**"
>
> [emphasis added]

[58] Up until this point, the plaintiff had rejected undertakings offered by the defendants (I assume to an equivalent amount), said to be supported by there being sufficient equity in the Land.

2 The footnote from this letter reads: "The provision in the settlement statement for the sum of $4,035,640.47 to be paid into our trust account on the terms set out in this letter pending determination or resolution of your client's claim for holding costs (which is disputed by our clients) only applies if this offer is accepted."

[59] The amount held in the defendants' solicitors trust account pursuant to paragraph 3 of the 25 August 2025 agreement was subsequently varied by a consent order made by me at a Commercial List Review on 23 March 2026 as follows:

> "1. The undertakings by the defendants to hold the sum of $4,035,640.47 in the trust account of CSM Lawyers be varied to $3,376,430.55, such that that firm is authorised to remit the balance of that sum plus interest thereon up to 12 April 2026 to the defendants."

[60] It is against this background that the defendants have applied to be released from what they describe as their undertaking to retain monies in trust, upon the provision of alternative undertakings:

(a) not to sell or transfer, or contract to sell or transfer, the Land without first giving 14 days prior written notice to the plaintiff; and

(b) to ensure that the total sums owing pursuant to any loan facilities secured against the Land do not exceed $37 million or $35 million. The latter figure proffered to allow some wriggle room in an uncertain economic climate. These figures are based on an estimate that the Land is currently valued at around $41 million.

[61] The plaintiff opposes the application on two grounds.

[62] First, that the Court has no jurisdiction to grant the relief sought.

[63] Second, that even if it did, the Court would not exercise its discretion because the undertaking is not a substitute for the monies being held in trust.

[64] The defendants maintain that the power exists even where an undertaking was pursuant to an agreement between the parties; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 176-8; *Milglade Pty Ltd v Harrison* [2008] QSC 359, [14]. But the plaintiff submits that this Court's jurisdiction is not enlivened because no undertaking was ever given to the Court; *Nakad v Nakad* [2023] NSWSC 228.

[65] There is some force to the plaintiff's submission. The payment of the monies into the solicitor's trust account was not made pursuant to any undertaking to the Court but rather pursuant to an agreement between the parties on 25 August 2025. The fact that the parties consented to a variation of the amount the subject of that agreement does not necessarily give this Court jurisdiction. That the parties might agree to such a variation is within the express contemplation of paragraph 3(b) of the 25 August 2025 agreement.

[66] The defendants' submission that this Court has jurisdiction is not however completely devoid of merit. On any view, when read as a whole, the terms of paragraph (3) of the 25 August 2025 agreement are ambiguous. For example, it is not clear whether "pending…court order" is a reference to a final or an interim order being made.

[67] But it is unnecessary for me to resolve this quandary because even if I was persuaded that I had the power, I am not satisfied that any such discretion ought to be exercised in the defendants' favour.

[68] First, the defendants point to a change of circumstance by way of the delay in the prosecution of the plaintiff's case and the increase in complexity of the case since the agreement was made, as weighing in their favour. But I am not convinced these factors are relevant to the exercise of the discretion or even if they are, that little, if any, weight ought to be given to them. Even a cursory review of the correspondence in evidence reveals that from the outset, the parties' business interactions with each other were convoluted and consequentially the ensuing dispute would most likely be ongoing, complex and hard fought.

[69] Second, I do not accept that the defendants' submission that they have proffered a valuable substitute undertaking; "more valuable" than the existing undertaking. A bird in the hand is worth two in the bush. The proposed undertaking is far less tangible than the monies being held in trust. Further, the proposed replacement undertaking would place a significant burden on the plaintiff should the plaintiff be required to enforce it. There would be inevitable costs, including legal fees and potentially further proceedings necessary to turn any equity in the Land into a liquidated amount available to the plaintiff.

[70] Third, I do not accept the defendants' characterisation that the monies paid into trust are "in law" the defendants. The amount of $3,376,430.55, is currently held on trust for the benefit of both the plaintiff and defendants. There is a strong argument that it ceased being the defendants' money when it was tendered as contested consideration at settlement of the Land on 25 August 2025. At present, and until there is an agreement or an order of the Court determining the proper entitlement to the funds in trust, the monies cannot be released to either of the plaintiff or defendants. Regardless, the plaintiff arguably has a proprietary interest in the monies held in trust by virtue of its vendor's lien; *QNI Resources Pty Ltd & Qrs v. Park & Ors* (2016) QSC 222, [59] - [64].

[71] Fourth, no satisfactory basis has been established by the defendants as to why it is appropriate or necessary for the trust monies to be released in exchange for an undertaking not to encumber the Land over $37 million or $35 million. There is no evidence why they can't merely encumber the Land up to the value of $41 million while the proceedings remain on foot. The fact that Mr Telecican wants to resile from the agreement and "use the money in trust for other investments" (T1-43 l 46) is hardly a persuasive factor in his favour.

[72] Fifth, the defendants are not prejudiced in their ability to defend because the monies are held in trust.

[73] Finally, I consider that it would be unjust and contrary to the interest of justice to effectively unilaterally vary the defendants' obligations under an agreement which the defendants have taken and enjoyed the benefit of (i.e. the transfer of the Land and in a state fit to lease to Tesla) to the plaintiff's detriment.

[74] It follows that the defendants' application to vary the undertaking is dismissed.

Defendants' application for security for costs

[75] Rule 670(1) of the UCPR confers a broad discretion to order that a plaintiff provide security the Court considers appropriate for a defendant's costs. The discretion must be exercised subject to the UCPR, particularly rr 671 and 672: r 670(2); *Zhao & ors*

v CN-AU Capital Pty Ltd & ors; In the matter of CN-AU Capital Pty Ltd ACN 625 191 246 [2025] QSC 290, [9] - [19].

[76] The defendants concede that the threshold under UCPR r 671 is met. This being so, the discretion to order security costs is an unfettered one. To be exercised judicially in a way which best suits the interests of justice in the circumstances of the case; *Pearson v ING Bank (Australia) Ltd* (2023) 14 QR 170, 182 [40].

[77] The onus on establishing an entitlement to an order for security for costs rests continually with the defendants but there is an evidential burden of raising or identifying the relevant and shifting factors on the plaintiff; *DGR Global v P.T. Limited* [2025] QCA 122, [65]-[66].

[78] The plaintiff's primary position is that the application for security for costs has been made before the real issues have been identified (by the close of pleadings), and for an overstated amount, and therefore should be adjourned to a date to be fixed. The plaintiff's alternate position is that security should be fixed at $250,000 premised on an assessment by a costs assessor, Mr Adrian, of the future costs payable up to day one of the trial. The plaintiff's offer to pay this sum (in stages) was rejected by the defendants on 28 April 2026.

[79] The defendants seek an amount of $551,430 be fixed as security for costs (up to day one of the trial) to be paid in stages. This sum is premised on an assessment by the defendants' costs assessor, Mr Bloom, and includes amounts for past costs incurred and the costs of the current three applications. Those past costs are the subject of unpaid and yet to be assessed costs orders (in the defendants' favour) made by me on 23 March 2026.

Should the discretion to order security for costs be exercised?

[80] The discretionary factors which the Court may have regard to in deciding whether to make an order as to security for costs are set out in UCPR r 672. These factors are not prescriptive nor exhaustive. In determining whether to exercise the discretion, the Court is required to balance these (some of which may be overlapping) and any other relevant factors depending on the case; *Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd* [2012] QCA 114, [18].

[81] Turning then to the discretionary factors relevant to the present facts.

[82] The plaintiff has provided no evidence of its financial position or any undertaking or guarantee from its directors to be liable for costs. There is nothing to demonstrate that those who stand to benefit from the litigation are also without means; [UCPR r 672(a)]. There is also no suggestion that an order for security would stifle the proceeding or that an order for security would be oppressive; [UCPR rr 672 (g) and (h)].

[83] The strength and bona fides of the plaintiff's case are a relevant factor; [UCPR rr 672 (b) and (c).] Although, I accept, that ordinarily the Court should proceed on the basis that the claim is both bona fide, has reasonable prospects and should not go into the merits in detail unless it can be demonstrated that there is "a high degree of probability of success or failure"; *ACN 006 577 162 Pty Ltd (formerly Harrop Engineering Australia Pty Ltd) as trustee for Harrop Family Trust v Beauville Pty Ltd* [2014] VSC

298, [8]. I accept that the plaintiff's case is a genuine, bona fide one. It incurred about $3.7 million in additional expense to deliver the Land in the form required by the defendants (for their tenant, Tesla) and the defendants then refused to pay those monies at settlement. The unpaid balance became the contested purchase price now held in trust. In that sense, and as a side, it is reasonable to infer that the plaintiff's financial position is connected to the defendant's conduct [UCPR r 672(e)].

[84] Having heard the contested application for leave, this Court is in a better position to make a realistic assessment of the plaintiff's prospects (than it might be in some other cases). This is particularly so where the plaintiff is only now, nine months or so after settlement of the Land, on the precipice of being able to formulate a case that might not be exposed to being struck out as disclosing no reasonable cause of action; one that might lead to a defence being filed and the proceeding moving forward. The success of the plaintiff's case hinges largely upon proving that relatively sophisticated, legally represented commercial parties orally assumed an unknown, undefined liability for holding costs inconsistent with two written and contemporaneous deeds to the contrary.

[85] I am satisfied that the plaintiff's claim is one that can be fairly categorised as having a reasonably high risk of failure. Though it is certainly not hopeless.

[86] On the one hand, the plaintiff pointed to the delay of the defendants' in bringing its security for costs application as being relevant and apparently in its favour. That submission was premised on the application not being filed until 20 April 2026 when the claim had been filed in October 2025. This is a surprising submission, given that on the other hand the plaintiff maintains that the application for security was premature. Regardless, I am not satisfied that there has been any relevant delay. It is early days. There is no defence filed due to the plaintiff still being in the process of formulating its statement of claim. An application for security was foreshadowed in late October 2025 and over the ensuing months, the plaintiff refused to confirm its financial position but advised in January 2026, that the application was premature and ought to be heard after the close of pleadings. This is not a case where a defendant has allowed the plaintiff to work on its case and incur significant expense unfairly; *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, [515].

[87] The balance clearly weighs in favour of security being ordered.

[88] The question is whether the discretion to order security should be ordered up until day one of the trial or up until an earlier point. It is obvious it ought to be the latter. It is very difficult - nigh impossible - for the Court to assess security up until trial at this stage. The issues are not defined in any way. The defendants expect to file a defence and a counterclaim which will again broaden the scope of the proceeding. The extent of disclosure, the necessity of expert evidence - let alone a trial plan - are all unknown. During oral argument on this issue, both Senior Counsel for the plaintiff and the defendants accepted the difficulties for the Court in realistically assessing costs up until trial.

[89] There is no prejudice to either party with this approach. The plaintiff frankly and correctly accepted that the defendants were not precluded from applying for further security at the next stage. To that end, it is appropriate that the application for security be otherwise adjourned to a date to be fixed.

What costs should the order for security cover?

[90] The issue then becomes the starting and end point for the order for security to be made at the time.

[91] The defendants seek security for their past costs which include their application to strike out of 6 November 2025, other orders for reserved costs of 4 December 2025 and 2 February 2026 and their costs thrown away by the amendments of the statement of claim up until 23 March 2026. Those costs are subject to existing cost orders in the defendants' favour – yet to go through the formal assessment process. Mr Bloom allowed $87,955.27 for these costs (being half of the actual costs incurred). Mr Adrian allowed no amount. The plaintiff submits that as these costs can be pursued by the defendants in the ordinary course they cannot or ought not, be part of any order for security for costs. I do not accept this submission.

[92] An order for security can in the circumstances of the case include an amount to reflect the quantum of future costs as well as costs already incurred. Particularly when the proceeding is at an early stage and a party has acted promptly in seeking security for those costs (as the defendants have done in this case); *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, [515]; *Earthtec Pty Ltd v Livingstone Shire Council* [2023] QSC 22, [291]. Upon reflection, having been sceptical during oral argument, I do not consider that the obtaining of cost orders should be treated as disentitling conduct on an application for security for those past costs. Rather, the position is arguably stronger as there is no dispute that the plaintiff is liable for those costs.

[93] In the circumstances of this case, I consider that it is appropriate that an amount for security include an amount for these past costs. I do not apprehend any difficulty with this approach. Any concern about the practicalities of including these costs was allayed by Senior Counsel for the defendants as follows [T1-53 ll 5-11]:

> "But we couldn't double dip. We would – to call on the security, we would not be able to take in excess of an entitlement. They would have to pay – there wouldn't be a need for the plaintiff to pay twice. The plaintiff would pay the security. Then, when that costs order was assessed, part of the security can be drawn down to meet part of that liability and if there's any difference between the security amount and the amount that was assessed, that would be the subject of an additional payment by the plaintiff in due course, if it has the capacity to pay it."

[94] The other security costs sought by the defendants (discrete from future costs) are the costs of the current three applications. Mr Bloom allowed $41,808 for these costs and Mr Adrian allowed the $6,000 costs assessor fee but not the professional fees and outlays of the lawyers. I am satisfied that some security for the costs of the application for leave ought to be included, together with some allowance for the costs of having to bring the application for security. But I am not prepared to allow any security for the costs of the defendants' unsuccessful application to discharge the undertaking.

[95] In terms of future costs, I am satisfied that the appropriate course is to allow security up until the close of pleadings. Mr Bloom estimated those costs to be $29,000 and Mr

Adrian $13,301. I accept the defendants' submission that Mr Adrian's estimate does not allow sufficiently for a fact-heavy issues pleading (settled by three counsel).

Quantum

[96] Applying the well-used "broad brush" approach to the assessment of quantum but guided by the estimates of Mr Bloom and Mr Adrian, I am satisfied that security for past and future costs up until the close of pleadings should be fixed at $105,000, calculated as follows:

(a) Past costs: $50,000.

(b) Plaintiff's application for leave ($20,000); defendant's application for security ($15,000): Total $30,000.

(c) Pleadings: $25,000.

Orders

[97] I order that:

1. The plaintiff's application for leave to deliver a further amended claim and statement of claim, and for the joinder of Mr Telecican as the fifth defendant in the form attached to the affidavit of Duane Williams (CF D 19) filed 20 April 2026 is refused.

2. The plaintiff is given leave to file and serve a further amended claim and statement of claim which includes Mr Telecican being joined as the fifth defendant, by 4.00pm Friday 14 August 2026.

3. The defendants' application for release of undertakings filed on 20 April 2026 is dismissed.

4. By 4.00pm Friday 14 August 2026, the plaintiff is to provide security in the form of a bank guarantee or payment into Court in the sum of $105,000 as security for the defendants' past, present and future costs up until the close of pleadings.

5. The defendants' application for security for costs filed 20 April 2026 is adjourned to date to be fixed.

6. The proceeding is listed for a further review before Muir J on 28 August 2026 at 9.30am.

[98] Ordinarily costs follow the event. Therefore, my present view is that the appropriate orders as to costs are that:

(a) The plaintiff is to pay the defendants' costs of the application for leave.

(b) The defendants are to pay the plaintiff's cost of the application for release of undertakings.

(c) The plaintiff is to pay the defendants costs of the application for security.

[99] But I will allow the parties the opportunity to be heard on this issue. The parties are directed to exchange written submissions by 4.00pm 24 July 2026. These submissions (or any consent orders as to costs) are to be forwarded by email to my Associate by this date. If necessary, the issue of costs will be listed for a short oral hearing at a date and time in the week of 17 August 2026 to be notified by my Associate to the parties. Otherwise, the costs orders foreshadowed in paragraph 98 above will be made.