IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2021 04727

FAÇADE DESIGNS INTERNATIONAL PTY LTD (ACN 099 706 859) — Plaintiff

v

YUANDA VIC PTY LTD (ACN 166 473 089) — Defendant

JUDGE:	DELANY J
WHERE HELD:	Melbourne
DATE OF HEARING:	7 March 2022
DATE OF RULING:	15 March 2022
CASE MAY BE CITED AS:	*Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* (Unreported, Supreme Court of Victoria, Delany J, 15 March 2022)

APPEARANCES:	Counsel	Solicitors
For the Plaintiff and Piper Alderman	Mr L Connolly	DLA Piper (for Piper Alderman) Piper Alderman (for the Plaintiff)
For the Defendant	Mr R Fenwick Elliott with Mr H Fielder	Fusion Legal
For Mr Roberts QC	Ms P Neskovcin QC	

HIS HONOUR:

Background

1 This proceeding was issued by Facade Designs International Pty Ltd ('FDI') against Yuanda Vic Pty Ltd ('Yuanda') on 15 December 2021.

2 Piper Alderman are the solicitors acting on behalf of FDI in the proceeding. The individual practitioner whose name appears on the writ as Yuanda's solicitor is Geoffrey Michael Emmett, a partner of the firm's Melbourne office. The statement of claim is signed by MG Roberts QC of counsel.

3 Yuanda filed an appearance in the proceeding on 29 December 2021. Yuanda has not yet filed and served its defence to the statement of claim. Yuanda contends that it should not be required to do so until three matters are appropriately dealt with by the Court.

4 The first matter to be dealt with is that Yuanda contends that Piper Alderman should be restrained from acting as FDI's solicitors in the proceeding. Alternatively, Yuanda contends that the proceeding should be stayed unless and until suitable information barriers are put in place to restrain Mr Fitzpatrick from any participation in these proceedings on behalf of FDI. Mr Fitzpatrick is a partner in the Sydney office of Piper Alderman who, when previously a solicitor at another firm, acted for companies related to Yuanda.

5 Yuanda is a wholly-owned subsidiary of Yuanda Australia Pty Ltd ('Yuanda Parent'). The Yuanda Parent is in turn a wholly-owned subsidiary of Chinese parent companies. The business of the Yuanda Parent and of Yuanda is the manufacture and installation of composite panels used on high-rise commercial buildings. Yuanda subcontracts the installation of the panels it produces to local installers. FDI is an installer of such panels.

6 The second matter to be dealt with concerns security for Yuanda's costs of the proceeding. Yuanda seeks an order that the proceeding be stayed until FDI provides $2.2 million as security for its costs. It contends that the business of FDI is 'moribund',

that it is impecunious, and that the criteria in s 1335 of the *Corporations Act 2001* (Cth) ('Corporations Act') are satisfied.

7 The third matter concerns criticisms of the statement of claim by Yuanda. Yuanda contends that until such pleading issues are resolved, it should not be ordered to file and serve its defence.

8 This ruling concerns the first and second matters. The parties are now agreed that further directions are required before any disposition by the Court regarding issues relating to the statement of claim, if any. However, for the purposes of dealing with the first two issues, it is necessary to identify the allegations in the statement of claim which include references to earlier litigation between FDI and Yuanda that relate to the same contract and raise similar issues to those in the present proceeding.

The allegations in the statement of claim

9 The statement of claim alleges that on 10 October 2017, Yuanda entered into an agreement with Multiplex Constructions Pty Ltd ('Multiplex') to manufacture supply and install the facade elements required as part of the design and construction by Multiplex of two towers: one residential and one commercial, at 447 Collins Street, Melbourne, Victoria ('the Project').[1]

10 It alleges that on 13 April 2018, FDI and Yuanda entered into a supply and installation subcontract agreement which was partly in writing and partly to be implied relating to work on the Project ('the Subcontract').[2]

11 FDI alleges that the Subcontract provided that, in consideration of Yuanda agreeing to pay it $14.5 million plus GST subject to adjustments (including in respect of variations), FDI would perform work relating to the installation of the window-wall system for the Project – manufactured, supplied, and delivered to the site by Yuanda ('Installation Work').[3]

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1 Plaintiff, statement of claim dated 15 December 2021 ('SoC'), [3].
2 SoC, [4].
3 SoC [4].

12 The statement of claim alleges that the Subcontract is a construction contract within the meaning of s 1 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('SOP Act'). The work carried out by FDI for the purposes of the SOP Act was the Installation Work.[4]

13 FDI alleges the construction period on the Project was between commencement in late August 2018 until it suspended work on 13 November 2019.[5]

14 FDI alleges that construction on the Project did not progress as planned by Multiplex or Yuanda, resulting in a delay of approximately four months; from the forecast commencement date of 30 April 2018, until works commenced in late August 2018.[6]

15 It is further alleged that during the construction period there were numerous variations to the installation work as described in the subcontract.[7] Amongst other things, FDI alleges that it claimed additional payment for variations, including a variation to the installation works caused by the non-provision by Multiplex of compliant safety screens on a number of levels on the east tower of the Project, requiring significant parts of the installation work to be carried out in a 'live' or 'semi-live' environment. FDI alleges that this variation resulted in the need for additional equipment training for crew, and resulted in interruption to workflow because the installation work had to progress from floors without sufficient space for access, and had to proceed as out of sequence works ('Live Edge Variation').[8]

16 The statement of claim alleges that FDI made various payment claims against Yuanda under the SOP Act.[9]

17 It alleges that from 30 October 2019, because Yuanda had failed to pay an amount of $3,469,365.68 inclusive of GST ('the unpaid amount'), s 16(1) of the SOP Act applied.[10]

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4 SoC [4].
5 SoC [8].
6 SoC [7].
7 SoC [9].
8 SoC [9]-[10].
9 SoC [12]-[19].
10 SoC [19].

18 On 6 November 2019, FDI served notice on Yuanda of its intention to suspend the carrying out of work under the contract, relying on s 16(2)(b) of the SOP Act.[11]

19 FDI alleges that pursuant to s 29(1) of the SOP Act, it was entitled to suspend the works under the Subcontract because at least three business days had passed since it gave notice to Yuanda of its intention to suspend works for failure to pay an outstanding progress claim, which default remained not remedied.[12]

20 On 8 November 2019, FDI served a further payment claim under the SOP Act claiming payment of the unpaid amount of $1,192,719.01 ('October 2019 payment claim').[13]

21 On 13 November 2019, FDI suspended construction work under the Subcontract. It did so relying on the failure by Yuanda to pay the unpaid amount or any part thereof and its earlier notice of intention to do so given on 6 November 2019.[14] On the same day, FDI commenced proceedings seeking judgment under s 16(2)(a)(i) of the SOP Act for the unpaid amount.[15]

22 FDI alleges that:

(a) pursuant to s 29(3) of the SOP Act, the suspension of work was in accordance with s 29 of the SOP Act and did not constitute a breach of the Subcontract;

(b) pursuant to s 29(4) of the SOP Act, Yuanda is liable to pay FDI the amount of loss or expense suffered by it;

(c) pursuant to s 29(5) of the SOP Act, FDI is not liable for any loss or damage suffered by Yuanda as a result of the suspension.[16]

23 On 14 November 2019, Yuanda served FDI with notice of termination of the Subcontract. The notice alleged that:

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11 SoC [20].
12 SoC [21].
13 SoC [22].
14 SoC [23].
15 SoC [25].
16 SoC [24].

(a) FDI had engaged family members of Yuanda's staff in a way that gravely contravened the Subcontract provisions as to probity;

(b) FDI had evinced an intention to no longer be bound by the terms of the Subcontract; and

(c) Yuanda gave notice that it accepted the repudiatory conduct of FDI as bringing the Subcontract to an end and terminated the Subcontract by reason thereof.[17]

24 On 13 November 2019, FDI commenced Supreme Court proceeding S ECI 2019 05113 in respect of the September 2019 payment claim ('the 2019 proceeding').[18]

25 On 15 September 2020, following an eight day trial of the 2019 proceeding, Riordan J found:[19]

(a) the September 2019 payment claim was a valid claim under s 14 of the SOP Act;

(b) Yuanda had failed to provide any valid payment schedule in response to that claim; and

(c) the works the subject of each disputed variation claim, except for one relating to interest, were not excluded amounts under the SOP Act.

26 On 5 March 2021, the Court of Appeal allowed an appeal (in part) from that decision.[20] The Court of Appeal did not disturb the findings of Riordan J at trial in relation to the matters referred to in paragraph 25.[21]

27 In this proceeding, FDI alleges:

(a) that it suffered loss and damage as a result of termination of the Subcontract by Yuanda;

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17 SoC [26].
18 SoC [31].
19 [2020] VSC 570 [32]-[33].
20 [2021] VSCA 44 (McLeish, Niall and Sifris JJA).
21 SoC [34]-[36].

(b) that its suspension of works was valid and lawful under the SOP Act;

(c) that Yuanda wrongfully repudiated the Subcontract entitling FDI to terminate the Subcontract as it did on 15 November 2019; and

(d) an entitlement to damages under the Subcontract for works performed, together with damages as a result of the invalid termination of the Subcontract.[22]

28 Amongst other relief, FDI seeks a declaration that Yuanda's termination of the Subcontract on 14 November 2019 is invalid.

29 FDI claims damages of $6,079,789.96, or such other amount as assessed by the Court in respect of works and services performed under the Subcontract.

The foreshadowed defences

30 Although Yuanda has not filed a defence, it is clear from its submissions and from evidence upon which it relies that it intends to contest the FDI claims.

31 In its submissions, Yuanda contends that by mid-2019, FDI had been significantly overpaid for its work on the Project. The asserted reason for this is that Yuanda's contract manager, Walter Bond, was, unbeknownst to Yuanda, a long-standing friend and business associate of Anthony Callipari, the managing director of FDI. Yuanda alleges that Mr Bond was overvaluing FDI's work.

32 The Yuanda submissions assert that on 5 August 2019, Mr Bond signed a document prepared by Piper Alderman referred to as the 'settlement agreement', purporting to bind Yuanda. If valid, pursuant to the settlement agreement, FDI was entitled to a substantial additional payment in the sum of $724,260.76. This is an amount seemingly brought to account by FDI in calculating its claim for damages of $6,079,789.96.

33 Amongst other things, Yuanda asserts that the 'settlement agreement' was

22 SoC [37]-[38].

fraudulently backdated to 10 July 2019.

34 Yuanda asserts that Mr Bond left his employment at Yuanda. It contends that it was in the hiatus left behind by Mr Bond's departure that it failed to serve a payment schedule in response to 'a massive payment claim' on 30 September 2019, as required by the SOP Act. In turn, its failure to do so led FDI to suspend its work, purportedly pursuant to the provisions of the SOP Act and to issue the 2019 proceedings relying on s 16(2)(a)(i), rather than afford Yuanda a 'second chance' to provide a payment schedule pursuant to s 18(2)(b) of that Act.

35 Yuanda submitted that, due to falsification of the settlement agreement, it is entitled to set off the sum of $724,260.76 (the amount the subject of the settlement agreement) against any claims that FDI might otherwise have against it.

36 Separately, in its submissions, Yuanda referred to clause 8(e) of the Subcontract. That clause provides, in substance, that if FDI proceeds with work the subject of an instruction without Yuanda's written direction as to the variation, FDI shall have no entitlement to any adjustment to the Contract Price (as defined in the Subcontract). Yuanda submitted there never were any variations in writing and for that reason FDI's variation claims, including the claim for the Live Edge Variation, must fail.

37 In its written submissions and in the affidavits on which it relies, Yuanda foreshadowed an intention to raise set-offs and various cross-claims against FDI. Such cross-claims include cross-claims for FDI's defective work and for its asserted failure to complete the Subcontract works on time.

The material relied upon

38 There has been a history of litigation between these parties under the SOP Act. Part of that history is relevant to and relied on in the statement of claim. The material relied on by Yuanda both in support of its application to restrain Piper Alderman and in support of its application for security for costs draws on that history.

39 It is appropriate to briefly refer to the history of the earlier litigation before listing the material relied upon on the two applications.

40 On 1 October 2019, Riordan J stayed execution of his judgment in favour of FDI in the 2019 proceeding pending the matter coming before the Court of Appeal.

41 On 9 October 2019, the Court of Appeal stayed execution of the orders of Riordan J pending the hearing and determination of the appeal.[23] In its written submissions, Yuanda submits the Court of Appeal did so because there was a real risk FDI would be unable to repay the judgment sum of $3.357 million if the appeal was successful.

42 As noted above, the Court of Appeal allowed the appeal (in part) on 5 March 2021.[24]

43 On 1 April 2021, the Court of Appeal ordered FDI pay 70% of Yuanda's costs of the appeal.[25] Those costs of $107,000 were paid on 10 February 2022.

44 On 15 October 2021, the High Court refused special leave to appeal and ordered FDI to pay Yuanda's costs.[26] Those costs are yet to be fixed. The amount claimed by Yuanda in the special leave application is $83,382.26.

45 On 26 October 2021, Mr Fitzpatrick, on behalf of FDI, referring to the dispute resolution provisions in the written Subcontract requiring mediation, invited Yuanda to suggest a mediator. On 11 November 2021, Toby Shnookal QC was appointed mediator.

46 In mid-November 2021, the Yuanda parent and Yuanda realised for the first time that Mr Fitzpatrick, who had acted for FDI throughout the 2019 proceeding, the Court of Appeal proceeding and application to the High Court, was the same Mr Fitzpatrick who, when at another law firm, had previously acted for companies in the Yuanda group. On 16 November 2021, Yuanda's solicitors wrote to Piper Alderman informing the firm of the conflict of interest issues and requesting Piper Alderman put in place an appropriate information barrier arrangement. On 21 November 2021, Yuanda provided its solicitors with 11 email correspondences, dated between June 2012 and

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23 [2020] VSCA 269 (McLeish, Niall and Sifris JJA).
24 [2021] VSCA 44 (McLeish, Niall and Sifris JJA).
25 [2021] VSCA 85 (McLeish, Niall and Sifris JJA).
26 Transcript of Proceedings, *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2021] HCA Trans 169.

December 2015, relating to matters where Mr Fitzpatrick had previously acted for companies related to Yuanda and the Yuanda Parent.

47 On 17 November 2021, issues of conflict of interest having been raised, both parties agreed that the mediation preconference proposed to be held by Mr Shnookal should be postponed.

48 Between 14 December 2021 and 18 January 2022, there were communications with the mediator concerning Mr Fitzpatrick's involvement in the mediation of the matter and it was agreed that the mediation should continue to be suspended.

49 Those communications and further communications in which Yuanda, by its solicitors, pressed Piper Alderman to put in place an acceptable information barrier, occurred over a period that included 15 December 2021, the date these proceedings were issued.

50 Although engaged actively in communications with Dr Malcolm Quirey, General Counsel of Piper Alderman, concerning the conflict issue, Yuanda was not informed of the issuing of these proceedings. That it was not so informed despite ongoing discussions between solicitors at the time regarding conflicts of interest is most unsatisfactory.

The summons and the affidavit evidence

51 By its amended summons dated 16 February 2022, Yuanda seeks the following orders:

> That Piper Alderman be restrained from taking any further steps on behalf the plaintiff in these proceedings, save in relation to the security for costs application made in the next following paragraph, unless and until Piper Alderman shall have put in place an information barrier in full compliance with the Information Barrier Guidelines adopted by the Council of the Law Institute of Victoria on 20 April 2006. For the purpose of such restrain, such compliance shall be treated as achieved if:
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> a. agreed by the defendant by the defendant by written acknowledgement of its solicitors, or
>
> b. the information barrier arrangements proposed by Piper Alderman shall be approved by order of this court.

52 In support of its application, Yuanda relies upon affidavits of the following:

(a) Zhijun Liu, managing director of Yuanda and other companies in the Yuanda group (two affidavits dated 29 September 2020 and 23 February 2022 respectively);

(b) Stanley Zi-jun Yee, solicitor (two affidavits dated 17 February 2022 and 23 February 2022 respectively);

(c) Tao Chen, tender manager of Yuanda (dated 23 February 2022); and

(d) Bo Yu Chi, solicitor (dated 9 October 2020).

53 The Court received correspondence on 2 March 2022 that Piper Alderman had retained DLA Piper and sought to be heard in its own capacity on the conflict of interest issue. At the hearing, both Piper Alderman (instructed by DLA Piper) and FDI (instructed by Piper Alderman) retained Mr Connolly, of counsel.

54 In opposition to the application, FDI and Piper Alderman rely on affidavits of:

(a) Dr Quirey (dated 3 March 2022); and

(b) Anthony Callipari (two affidavits dated 5 October 2020 and 2 March 2022 respectively).

Restraining a legal practitioner: the Principles

55 As discussed by Beach J in *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd*,[27] there are three potential bases that might justify the exercise of jurisdiction to restrain a solicitor from acting against a former client. The first, and the usual basis, is that there is a 'real and sensible possibility of the misuse of confidential information'.[28] The first basis is usually seen as founded upon a contractual or equitable duty to preserve the client's confidential information, which survives the termination of the retainer.[29] The second potential basis for restraining a solicitor from acting against a former client, where the client has terminated the retainer or the

27 [2014] FCA 1065; (2014) 228 FCR 252.

28 *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1, 5 (Hayne J); see also *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 ('*Prince Bolkiah*'), 237 (Lord Millett).

29 *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 234-235 (Lord Millett).

subject matter of the retainer has been completed, is said to arise out of a duty of loyalty owed by the solicitor to the former client. This surviving duty of loyalty is characterised as a fiduciary obligation owed by the solicitor that is said to survive termination of the retainer.[30] The third potential basis arises from the Court's inherent jurisdiction to ensure the due administration of justice; to protect the integrity of the judicial process and to restrain solicitors from acting in a particular case as part of its supervisory jurisdiction.[31] In that context, the test to be applied is: [32]

> whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required that [the solicitors] be so prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of [solicitors] without good cause.

56 In *Dugan v Process Holdings Pty Ltd*,[33] Lyons J provided a convenient and helpful summary of the principles to be applied on an application to restrain solicitors from acting, relying on the inherent jurisdiction:[34]

> 61. The principles to be applied in determining whether to exercise the Court's inherent jurisdiction to restrain solicitors from acting in the administration of justice were generally not in dispute. Those principles were summarised in *Kallinicos v Hunt* ('*Kallinicos*') as follows:
>
> (1) the Court always has inherent jurisdiction to restrain solicitors from acting in a particular case as an incident of its inherent jurisdiction over its officers and to control its processes in aid of the administration of justice;
>
> (2) the test to be applied is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a lawyer should be prevented from acting, in the interest of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice;
>
> (3) the jurisdiction is exceptional and is to be exercised with caution;
>
> (4) due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without

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30 *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248, (2001) 4 VR 501 ('*Spincode*') [59]-[60] (Brooking JA).

31 *Grimwade v Meagher* [1995] 1 VR 446, 452 (Mandie J) and fortified by Brooking JA in *Spincode* at [32]-[44], [48] and [60].

32 Ibid, 452 (Mandie J).

33 [2021] VSC 555.

34 Ibid [61]-[64].

good cause; and

(5) the timing of the application may be relevant, in that the cost, inconvenience and impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief.

62. The mere prospect of a solicitor being called to give evidence as a material witness, even on controversial matters, is not enough to invoke the jurisdiction of the Court to restrain the solicitor from acting……

63. Further, the Court's inherent jurisdiction to restrain a solicitor from acting is discretionary. In exercising that discretion, the Court must take into account the prima facie right of a party to be represented by the lawyer of his or her choice, the inconvenience, cost and disruption which might be caused in requiring a party to change lawyers, and the exceptional nature of the Court's jurisdiction.

64. Finally, it is important to bear in mind that the conclusion that must be reached is that the administration of justice, including the appearance of its administration, 'requires' that the solicitor should be prevented from continuing to act. This point was emphasised by Pagone J in *Premier Capital (China) Ltd v Sandhurst Trustees Ltd*. As noted by his Honour, there may be circumstances where a fair-minded reasonably informed member of the public may conclude that it would be prudent that a solicitor not act in a proceeding. However, the test is whether the administration of justice 'requires' that the solicitor be prevented from continuing to act.

57 During the hearing, Piper Alderman drew attention to the decision of Anderson J in *Nash v Timbercorp Finance Pty Ltd (in liq), in the matter of the bankrupt estate of Nash*,[35] submitting that the circumstances in that case were very similar to those in the present case. Further, Piper Alderman submitted that a similar disposition that, as adopted by Anderson J in *Nash* is appropriate on this application:[36]

86. For a legal practitioner to be restrained from acting against a former client on this basis, the legal practitioner must be "in possession of" the confidential information in the relevant sense. For physical and electronic documents, this is ordinarily simple to determine. ...

87. Mills Oakley, as a firm, does not, however, have possession of the "get to know you factors". Unless recorded in written form, that form of information is not capable of communal possession. It is instead knowledge and experience contained within the mind of an individual solicitor. And, importantly, one legal practitioner's knowledge cannot be imputed to his or her firm, or other solicitors within that firm. …

88. In this case, it may be accepted that the Continuing Lawyers, as individuals, compiled a degree of understanding about Mr Nash by

35 ('*Nash*') [2019] FCA 957; (2019) 137 ACSR 189.
36 Ibid [86]-[88], [124]-[127].

acting on the Previous Matters. Some may have built an understanding of Mr Nash more than others. It is not possible to identify with precision who knows what about Mr Nash without evidence from each of those Continuing Lawyers. However, for current purposes, it is sufficient that these solicitors had more than trivial interaction with Mr Nash through the course of those matters. Each of these Continuing Lawyers are "in possession of" the "get to know you factors" for current purposes.

...

124. The third and final basis for Mr Nash's contention that Mills Oakley should be restrained arises from the Court's inherent jurisdiction to ensure the due administration of justice, to protect the integrity of the judicial process and restrain solicitors from acting in a particular case as part of its supervisory jurisdiction. … The test to be applied is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that the solicitor be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice. This basis for disqualification is an "exceptional one" and "to be exercised with appropriate caution", with due weight to be given "to the public interest in the client not being deprived of the solicitor of its choice": …

125. … I am satisfied that there is a real risk of misuse of confidential information if the Restrained Persons … are not restrained from continuing to act for, or give advice to, the liquidators for the remainder of the examination of Mr Nash. A fair-minded, reasonably informed member of the public would, in my opinion, conclude that the proper administration of justice would be brought into disrepute if they were not restrained.

126. However, provided the liquidators are restrained from retaining the Restrained Persons to act or advise in relation to the examination of Mr Nash, I am of the opinion that there is no proper basis to restrain the other Examination Lawyers from acting and advising in relation to the examination. That is for the following reasons:

    (1) the solicitors and law clerks previously involved in acting for, and advising, Mr Nash … have no involvement in the examination of Mr Nash;

    (2) each of the Continuing Lawyers are prepared to give undertakings to the Court not to divulge any information they may have relating to Mr Nash …;

    (3) none of the Examination Lawyers, other than Mr Lewin, were employed by Mills Oakley during the period Mills Oakley acted for Mr Nash …;

    (4) the Examination Lawyers were not involved in the Previous Matters;

    (5) the Examination Lawyers (other than the Restrained Persons) will undertake to the Court not to seek to obtain any information from the Continuing Lawyers;

(6) …

(7) Mr Nash ceased to utilise the services of Mills Oakley 10 years ago and made his own commercial decision to retain new solicitors to undertake his legal work from time to time;

…

127. On the basis of the restraint of the Restrained Persons, there is no foundation to suggest that Mills Oakley acting for the liquidators "brings the legal profession and the system which it administers justice into disrepute" …

58 Yuanda submitted that the interests of justice require that Piper Alderman be restrained. Yuanda relied first on the history of Piper Alderman's retainer with FDI and its very slow response to putting suitable information barriers in place when issues concerning the continued involvement of Mr Fitzpatrick were drawn to its attention. Secondly, Yuanda contended that although Dr Quirey was the person nominated to ensure compliance with such information barriers, he was 'kept out of the loop' such that the Court can have no confidence the proposed information barriers, as agreed to be modified, will be effective. One example which Yuanda relied on was the issue of this proceeding (alleged to be without the knowledge of Dr Quirey) at a time when Dr Quirey was seeking to resolve the conflicts issue. Thirdly, Yuanda submitted that the 'Chinese wall' remains incomplete.

Mr Roberts QC of Counsel

59 In its submissions filed for the hearing on 18 February 2021, Yuanda submitted that Michael Roberts QC, who appeared on behalf of FDI in the 2019 proceedings and 'clearly worked closely with Mr Fitzpatrick', should be treated as a 'screened person' and, although an independent member of the Bar, should play no further part of the proceedings.

60 In its submissions filed on 23 February 2022, Yuanda stated that it no longer sought relief against Mr Roberts, but was content to rely on his judgment following the outcome of the application. In those circumstances, it is unnecessary to say anything further concerning Mr Roberts.

The restraint application: disposition

61 The amended summons dated 16 February 2022 made it clear that orders were sought restraining Piper Alderman unless and until the firm shall have put in place an acceptable information barrier, and that for the purpose of any such restraint, compliance shall be treated as achieved if the information barrier arrangements proposed shall be approved by order of the Court.

62 During the hearing, that position changed to one where Yuanda submitted that Piper Alderman should be restrained from acting in any case, as to permit it to continue to do so would be to bring the interests of justice into disrepute. In support of that submission, Yuanda contended that 'getting to know you' factors concerning Mr Fitzpatrick meant that the interests of justice would be brought into disrepute unless there was such a restraint.

63 On 3 February 2022, Yuanda's solicitors provided a copy of a memorandum of advice prepared by Mr Fenwick Elliot regarding '[Piper Alderman's] Chinese wall protocol for your consideration and feedback'.[37] The advice identified a number of matters which it was said needed to be put in place in order for an information barrier sufficient to preclude Mr Fitzpatrick and others that had previously been involved with him in acting for FDI (the 'screened persons') from further involvement in doing so. Consistent with the amended summons, the advice recorded that Yuanda's position was that it would lift its objection to Piper Alderman acting if, but only if, the information barrier arrangements put in place concerning the screened persons were effective. What was said to be necessary to ensure that to be the case was set out in the advice.

64 Between 3 February 2022 and the hearing, there was gradual movement on the part of Piper Alderman and those who were to be screened towards satisfaction of the matters identified in the advice. The movement towards complete agreement continued when the affidavit of Dr Quirey was filed and served on 3 March 2022.

65 From that time on, there remained very few differences between the protocols

[37] Defendant, affidavit of Stanley Zi-Jun Yee affirmed 17 February 2022, exhibit "SY-1", 142.

proposed in Dr Quirey's affidavit and those which counsel for Yuanda had advised were necessary in order to ensure an appropriate information barrier was in place.

66 The undertaking signed by Mr Fitzpatrick and four others, exhibited to Dr Quirey's affidavit, included the following:[38]

> 8. In connection with the First Matters and also until completion of the New Matter I undertake not to communicate with PA partner Geoff Emmett or any of Mr Emmett's team (or any other person whom I may be directed by Dr Malcolm Quirey not to communicate with) whether regarding the New Matter or any other matters relating to Yuanda Vic Pty Ltd and I also confirm that since 5 January 2022 I have not been involved in any such communications.
>
> 9. In connection with the First Matters and until completion of the New Matter I also undertake not to communicate with Mr Anthony Callipari, or anyone else who to my knowledge is authorised by Façade Designs International Pty Ltd to give or take instructions in relation to any matters involving Yuanda Vic Pty Ltd and I confirm that since 5 January 2022, I have not been involved in any such communications.

67 During the hearing, counsel for Yuanda identified a shortcoming in those paragraphs of the undertakings. Mr Fitzpatrick had previously acted for companies related to Yuanda and the Yuanda Parent. The undertaking only referred to Yuanda, counsel submitted it should extend to Yuanda group companies. After this matter was raised, counsel for Piper Alderman informed the Court he had instructions that those amendments would be made, subject to a list of the Yuanda group companies being provided so that they could be appropriately identified in an annexure to the statutory declaration by Mr Fitzpatrick and the other screened persons.

68 Yuanda submitted that Piper Alderman, the firm, should nonetheless be restrained unless it provided an undertaking to the Court that files of the firm relating to the 2019 proceedings and acting on behalf of FDI should be quarantined from Mr Emmett and his team. The affidavit of Dr Quirey confirmed that none of the persons approved to work on the current proceeding are able to access files relating to the 2019 proceeding including related appeals and the special leave application. Further the affidavit of Dr Quirey states that as part of the information barrier arrangements put in place by

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38 Plaintiff, affidavit of Dr Malcolm Quirey affirmed 3 March 2022, exhibit "MQ-1", 6.

Piper Alderman, a sub-file containing all of the relevant court documents and discovery has been created and made available to those who are working on, or may in the future work on the current proceeding ('the sub-file').

69 Yuanda contended for an undertaking from Piper Alderman to the Court to the effect that only the sub-file would be provided to those, including Mr Emmett, hereafter engaged in the proceeding on behalf of FDI and that no access would be provided to the previous files. Upon that issue having been raised, counsel for Piper Alderman informed the Court that such an undertaking would be provided.

70 Notwithstanding the offer of those modified undertakings and notwithstanding the terms of the amended summons, counsel for Yuanda nevertheless pressed the Court for an order that Piper Alderman be restrained from acting in the proceeding.

71 Although there were considerable delays in Piper Alderman moving to put in place information barriers considered appropriate by counsel for Yuanda, I do not consider those delays provide a proper basis for restraining the firm from acting.

72 The information barriers that have now been established as described in Dr Quirey's affidavit, the undertakings by Mr Fitzpatrick and the screened persons (in terms which correspond to those which Yuanda previously said it was prepared to accept as a basis of permitting the firm to act) and the firm's own undertaking to the Court satisfactorily deal with Yuanda's submission that Piper Alderman's information barrier arrangements remain incomplete.

73 I do not consider that there is any force behind the submission that Piper Alderman ought to be restrained because Dr Quirey, as general counsel of Piper Alderman, may be 'kept out of the loop' by the solicitors with carriage of this proceeding and/or the screened persons. There is no reason to anticipate that, notwithstanding what occurred in the past when the proceeding was issued, that in the future Dr Quirey will not be able to appropriately supervise or maintain the updated information barrier arrangements such that the interests of justice demand that Piper Alderman be restrained.

74 On the basis of the above,

75 In the order disposing of this application, the 'Other Matters' will reference the undertakings given in writing (but not to the Court) by Mr Fitzpatrick and the screened persons being the modified form of statutory declaration in the form referred to in paragraph 67. In addition, the undertaking given to the Court by Piper Alderman by its counsel referred to in paragraph 69 will be recorded.

76 I do not accept that in the circumstances of such undertakings it is either necessary or appropriate to restrain Piper Alderman from acting.

77 In this case, no specific confidential information has been identified. The managing director of Yuanda who has given evidence in support of restraint does not say that he ever dealt with Mr Fitzpatrick. The evidence discloses that Mr Fitzpatrick previously acted for companies in the Yuanda group of which the Yuanda Parent is apparently the holding company, most recently in 2015 or perhaps, at the latest, in 2016. The evidence discloses that previous in-house legal counsel and the previous in-house general manager at the time that Mr Fitzpatrick was acting for those companies, are no longer employees of the group.

78 These facts are relevant because the application to restrain relied on the 'getting to know you' factors discussed, amongst other judgments, by Anderson J in *Nash*. There is no evidence that those who Mr Fitzpatrick 'got to know' includes any person who is now either providing instructions or likely to provide instructions to Yuanda in relation to this dispute. Nor do those persons include any person who is, or is likely to be, a witness called on behalf of Yuanda in relation to this dispute.

79 I accept the submission on behalf of Piper Alderman that the factual circumstances here are very similar to those in *Nash*. If any person were to be restrained from acting by Court order, it would be Mr Fitzpatrick and perhaps also the screened persons. However, Mr Fitzpatrick has agreed to stand aside and he and the screened persons have agreed to give undertakings. In those circumstances, there is no proper basis to restrain others at Piper Alderman, including Mr Emmett, from continuing to act for or

give advice to FDI.

80 The test to be applied is that identified in *Nash* at [124], namely:[39]

> 124. … whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that the solicitor be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice. This basis for disqualification is an "exceptional one" and "to be exercised with appropriate caution", with due weight to be given "to the public interest in the client not being deprived of the solicitor of its choice": …

81 It was submitted on behalf of Yuanda that the Court should infer that FDI and its director deliberately sought out Mr Fitzpatrick to act for them, knowing he had previously acted for Yuanda and hoping to secure some forensic or other advantage due to Mr Fitzpatrick's conflict of interest. I do not consider such an inference should be drawn. What is asserted may or may not have been the case, but there is no evidence that it was the case.

82 I was not referred to any authority that considered how, if the 'new client' had sought to take advantage of information held by the solicitor concerning the 'old client', such a course of conduct should impact upon the consideration that the client should not, except in exceptional circumstances, be deprived of the solicitor of its choice.

83 However, these issues do not arise for consideration in this case. The undertakings offered mean that in any case FDI is deprived of its solicitor of choice, Mr Fitzpatrick. It is not prevented from continuing to retain Piper Alderman, but as submitted by counsel for Yuanda, it was Mr Fitzpatrick and not the firm who was FDI's solicitor of choice.

84 In this case, as in *Nash*, with the undertakings having been given or agreed to be given, and the information barrier in place, those at Piper Alderman who will now have the carriage of the proceeding, or indeed are working on the proceeding (including Mr Emmett) were not involved in the earlier proceedings. They are not persons who have 'got to know' Yuanda or companies related to it. The protection of the integrity of the

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[39] *Nash v Timbercorp Finance Pty Ltd (in liq), in the matter of the bankrupt estate of Nash* [2019] FCA 957; (2019) 137 ACSR 189 [124] (Anderson J).

judicial process and the appearance of justice does not require that such persons be restrained.

The security for costs application

85 The power of the Court to award security for costs arises under Order 62 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('Rules'), s 1335 of the Corporations Act and also in the inherent jurisdiction of the Court.

86 The present application by Yuanda is against FDI, a corporate plaintiff. It is sufficient in those circumstances to deal with the application by reference to s 1335 of the Corporations Act. That section provides:

> **Costs**
>
> (1) Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

87 As appears from the language of the section, the jurisdiction of the Court to make an order for security for costs is enlivened only where there is credible evidence that there is reason to believe the corporation in question will be unable to pay the costs of the defendant if that party is successful in their defence. In *Epping Plaza Fresh Fruit & Vegetables Pty Ltd v Bevendale Pty Ltd*,[40] Winneke P and Phillips JA said as follows concerning the power to order security for costs against a corporate plaintiff:

> 14. It is thus apparent that the justification for the statutory rule is that the defendant, not being a voluntary litigant, deserves to be protected from the consequences of limited liability. Those who seek to conduct their businesses through limited liability companies expect to receive the benefits which such liability attracts. It seems to us a necessary corollary that they should be prepared to accept the strictures imposed by the section if the company embarks upon litigation: *Buckley v Bennell Design & Construction Pty Ltd* (1974) 1 ACLR 301 at 304 (CA. NSW).
>
> 15. It has not been, and could not be, suggested that the section compels the court to order security against an impecunious corporate plaintiff. The court is given an unfettered discretion to do what is justly required by the circumstances of each case. Street, CJ made this point in *Buckley*

[40] [1999] VSCA 43; [1999] 2 VR 191 [14]-[15].

when he said, at 305:

> "It seems to me that the discretion could properly be regarded as ordinarily exercisable so as to protect a defendant sued by an impecunious company, but that, if the court in any case takes the view that this protection should not be afforded to the defendant, it has an unlimited and unrestricted discretion to give effect to such view without having to look for special circumstances."

88 It is well established, as stated by Street CJ in *Buckley v Bennell Design & Construction Pty Ltd,*[41] that once the jurisdiction is invoked, the discretion to order security for costs is unfettered. Whilst that is so, the discretion must be exercised judicially, having regard to the particular circumstances of the case, the overarching purpose and the overarching obligations in the *Civil Procedure Act 2010* (Vic) ('the CPA'), including the obligation in s 24 to ensure costs are reasonable and proportionate.

89 The impecuniosity of the a plaintiff provides both an occasion for the exercise of the discretion and informs the exercise of that discretion.[42] Recently in *Wu v Bi*,[43] the Court of Appeal identified the principles relevant to determining whether, in that case, an applicant for leave to appeal is impecunious:[44]

> 13. First, the onus remains on the respondent to establish the applicant's impecuniosity, even where proof of an applicant's ability to satisfy a costs order lies in their own hands.
>
> 14. Secondly, sometimes (but not always) an inference that the applicant is impecunious may be at least partially founded on an applicant's refusal to provide to the respondent requested evidence as to their financial position and ability to meet an adverse costs order. But the fact that the applicant declines such a request does not mean that the inference must be drawn. The inference may be more readily drawn where other evidence suggests the applicant's refusal to disclose is motivated by a wish to hide an insufficiency of assets. But it will be less readily drawn if there is a benign alternative explanation for the refusal to disclose, or if there is other evidence inconsistent with impecuniosity.
>
> 15. Thirdly, an inference that an applicant is impecunious may also be supported by their failure to satisfy final costs orders. But again, such a failure does not mean that the inference must be drawn. It will be less readily drawn if there is other evidence suggesting that impecuniosity was not the cause of the failure to pay — for example, evidence that the

41 (1974) 1 ACLR 301.
42 See, for example, *Kenyon v Akeroyd* [2007] VSCA 50 [13].
43 [2022] VSCA 22 (McLeish and Emerton JJA).
44 Ibid [13]-[16] (citations omitted).

applicant has assets sufficient to meet their costs liability.

16. Fourthly, it will typically be difficult to establish an applicant's impecuniosity where evidence discloses that the applicant owns unencumbered real property the value of which might reasonably be supposed (even absent valuation evidence) to exceed the amount of a prospective adverse costs order. The position is different if the property is, as it is here, encumbered.

90 In support of its contention that FDI is impecunious, Yuanda relied on findings made by the Court of Appeal when it determined to grant a stay of the order of Riordan J in favour of payments of the amount of $3,357,664.67, plus interest, until the hearing and determination of the leave application and, if leave were granted, of the appeal from his Honour's decision. The reasons of the Court of Appeal include the following:[45]

28. The critical allegations made in the Liu Affidavit are as follows:

The respondent walked off the Project site on 15 November 2019;

(a) Mr Liu has been informed by his tender manager, Tao Chen, that he is unaware of any other substantial work that the respondent has been awarded (other than the Project the subject of this proceeding) since March 2020 and believes that it does not presently have any other live projects;

(b) based on his dealings with Mr Callipari, Mr Liu believes that the respondent did not have any other substantial projects lined up as at November 2019, does not have any significant assets and is not carrying on business;

…

29. The critical allegations made in the Oakley Affidavit are as follows:

(a) Mr Oakley is informed by a number of the respondent's employees that the respondent has 'dismantled the complete workforces on 447 Collins Street';

…

(e) Mr Oakley's present employer, Colab Façade, hired and continued to pay the respondent's unpaid employees;

(f) Mr Oakley calculated that as at 18 November 2019, the total amount of unpaid annual and sick leave entitlements owed by the respondent was $349,847.62, which amount was subsequently paid by Colab Façade and which it is seeking to recover from the respondent;

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45 *Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd* [2020] VSCA 269 [28]-[35].

…

…

31. Mr Callipari deposes to the following matters …:

(a) the applicant failed to provide any payment schedule in response to the Payment Claim and defended this proceeding at substantial cost, expense and delay to the respondent;

(b) the respondent did not walk off the Project site but was excluded from the site by the applicant which had terminated the subcontract on 14 November 2019, a day after the respondent had suspended work due to non-payment of the Payment Claim;

(c) on or about 15 November 2019, Multiplex agreed with the respondent to take over the employee entitlements, and following termination of the Contract, the respondent's roughly 55 employees were transferred to the new installation contractor, Colab Façade. Neither Multiplex nor Colab Façade have approached the respondent for payment for the employee entitlements;

(d) the respondent has assets exceeding the Judgment Debt, including cash, equipment and properties;

(e) the respondent has not ceased trading but has continued to trade throughout the litigation. In particular, the respondent has:

- issued tenders and performed works for Built Pty Ltd ('Built)';
- secured two upcoming fire re-cladding projects in Melbourne valued at $12 million and $1.5 million respectively;
- received Built's confirmation that it is a preferred façade and cladding installer to be engaged on future re-cladding projects. Mr Callipari deposes that Built is 'a major Tier 2 construction firm, and the pipeline of re-cladding work is significant, particularly given the substantial Victorian government investment in the re-cladding projects';
- ongoing work with Fairlite Glass Walls on the 'West Side Place' project with work having recommenced on 28 September 2020 following the lifting of Stage 4 Covid-19 restrictions;

(f) although the respondent has scaled down the number of its employees since November 2019 in response to the termination of the Contract and the impact of Covid-19, it will be in a position to rapidly scale up the number of employees to work

on large projects it expects to be awarded following the further lifting of Covid-19 restrictions; and

(g) in the four years prior to November 2019, it did work exclusively for the applicant. The applicant is the respondent's sole significant trade debtor. In addition to the Judgment Debt, the respondent has a separate claim against the applicant of about $3.5m to $4m which it intends to pursue. A significant part of the amount owing by the applicant relates to wages.

...

34. The applicant contends that this evidence is general, vague and unsupported in numerous respects:

(a) there are no financial statements or management accounts;

(b) the unpaid employee entitlements were not paid when due and represent a significant potential liability;[46]

(c) there are no bank statements disclosing any credit balances;

(d) there are no valuations of the respondent's interests in the properties;[47]

(e) there are no valuations of any of the other assets;

(f) the current work in the pipeline was not work in hand but an expectation;[48]

(g) the statement of accounts payable and accounts receivable, which reflect minimal activity, are not consistent with and do not evidence any ongoing business;

(h) the project with Fairlite Glass Walls is a small project; and

(i) the overall picture is of a moribund company.

35. There is force in this contention. The evidence of the respondent's financial position and its ongoing operations is general, vague and not supported to the extent required to displace the evidence of the applicant, notwithstanding that the latter evidence is itself general and substantially hearsay. To the contrary, for the reasons advanced by the applicant, the respondent's evidence tended to raise doubts about its

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46 The minutes of the meeting with Multiplex held on 15 November 2019 record that '[Façade] have no funds due to Yuanda not paying and therefore cannot fund the termination entitlement payments' and that '[Multiplex] will ensure the guys are paid their entitlements'.

47 The Certificates of Title to three properties are exhibited to the Callipari Affidavit. In respect of two of the three properties Façade holds a one-third interest as a tenant in common. In relation to the third of the properties Façade holds 19 of the 20 undivided shares. This property appears to be a residential address in Sunshine West, Victoria. There is no valuation or any estimate of the value of the properties.

48 In a letter dated 2 October 2020 and addressed 'to whom it may concern', Marius van Greuning, commercial manager of Built, refers to the two projects identified by Mr Callipari, but gives no timeline and indication of the value of the projects to Façade. It appears that the $12 million and $1.5 million figures are the value of the projects to Built.

> viability as a going concern. Assessing the evidence as best we can, we consider that there is a real risk, beyond the usual commercial risk, that the respondent will be unable to restore the applicant substantially to its former position if the applicant is successful, and that the appeal will be rendered nugatory to that extent. The cases show that this constitutes special or exceptional circumstances that may justify a stay pending appeal.

91 It is appropriate to set out those references to the evidence before the Court of Appeal, and to refer to the Court's finding because, some 18 months since the hearing of the Court of Appeal proceeding, the evidence on the present application bears a striking resemblance to the evidence to which the Court of Appeal referred.

92 Mr Callipari made an affidavit in the Court of Appeal proceeding in opposition to the stay application, in which he sought to refute an allegation that FDI had ceased trading. No financial statements or management accounts were exhibited to that affidavit. In this application, the same is the case.

93 Yuanda submitted once again, as it had in the Court of Appeal, that FDI was a moribund company. In support of that contention, it exhibited a credit inquiry report which noted very few inquiries over the last two years. This was said to be consistent with the company undertaking no significant level of business. A flat credit score was referred to, said to be consistent with FDI having very little business. Yuanda relied on an affidavit from Mr Chen, who gave evidence that he monitors tenders for the type of work in which FDI is involved, and that he found no evidence of any major projects in the last two years.

94 There are limits to the reliance that can be placed on evidence and findings made by the Court of Appeal in 2020 when considering this application approximately 18 months later. The tests are not the same. The Court of Appeal was considering an application for a stay, supported by an offer to pay the judgment sum of $3.3 million into Court. There is no such balancing offer by Yuanda on this application, and nor would such an offer be expected.

95 On this application, Yuanda submits that an order should be made for security for costs in the sum of $2.2 million, being its estimated solicitor/client costs from the

commencement of the proceeding until the conclusion of trial. Exhibited to the affidavit of Mr Yee affirmed 23 February 2022 is a breakdown of the estimate of legal costs in this proceeding on behalf of Yuanda. It is instructive to set out an extract from this table:[49]

Remaining Stages to hearing			Costs estimate total (excluding GST)
Stage 1	Preliminary preparation and pleadings, including this application		$386,064.00
Stage 2	On-Going Obligations in course of proceedings	Document Production / Discovery / Preparation of evidence	$854,230.00
Stage 3	Hearing Preparation	Prepare for hearing (say 4 weeks)	$489,761.00
Stage 4	Attendance at Hearing	Hearing (4 weeks)	$469,761.00
Total (excluding GST)			**$2,217,816.00**

96 While the considerations on this application are not the same as those on a stay application, aspects of the earlier evidence, or lack thereof, remain relevant. First, when regard is had to Mr Callipari's 2 March 2022 affidavit, it is clear that the 'work pipeline' of the company has not expanded beyond the projects referred to at [31(e)] of the Court of Appeal's decision.[50] Second, Mr Callipari's current estimate of the value of the 'work pipeline' constituted by existing projects is one contract of approximately $500,000 and one of $150,000. Third, such accounting records as are exhibited to Mr Callipari's 2020 affidavit show accounts for work relating to those projects has remained unpaid for three months and more. There is no explanation why that is so.

97 The gaps in the evidence in this application relating to FDI cannot be ignored in determining whether the jurisdictional requirement is made out. Although the evidence of Mr Callipari includes evidence of a term deposit of over $1 million and of interests in real property (the same real property owned by FDI at the time of the Court

[49] Defendant, affidavit of Stanley Zi-Jun Yee affirmed 23 February 2022, exhibit "SY-2", 2.
[50] [2020] VSCA 269.

of Appeal proceeding) there is no evidence whatsoever of the liabilities of FDI. There is no balance sheet or profit and loss statement, whether for the 2020 or 2021 financial years. There is no evidence of BAS statements from which the more recent income, expenses and turnover of FDI might be gleaned and no evidence of management accounts since the end of the 2021 financial year.

98 The evidence relied on by FDI on this application, particularly regarding the absence of accounts, continues to meet the description adopted by the Court of Appeal:[51]

> The evidence of the respondent's financial position and its ongoing operations is general, vague and not supported to the extent required to displace the evidence of the applicant, notwithstanding that the latter evidence is itself general and substantially hearsay.

Accordingly, the evidence on this application provides a proper basis to infer that the refusal to disclose by FDI, is motivated by a wish not to reveal liabilities, as to do so would likely confirm impecuniosity.[52]

99 There is evidence that, recently, FDI paid outstanding costs of $107,000 in satisfaction of the costs order in the Court of Appeal. However, there is no evidence about how those costs were funded. Although the exhibits to Mr Callipari's affidavit include evidence that on 1 March 2022 a trading account at the Commonwealth Bank had a balance of $77,486.26, the transaction history of that account, from which it might have been established the previous costs order was paid, was not exhibited.

100 There is evidence of a cash term deposit of $1,637,620.40, but the affidavit is silent about whether or not that term deposit stands as security for liabilities of FDI or of others such as its director, Mr Callipari.

101 There is evidence of the unencumbered value of real properties: FDI's interest in ⅓ of the Yarraville and 19⁄20 of the Sunshine properties. The estimated market value of these properties may be as high as $1.31 million and $710,000 respectively. Taken in isolation, the value of such assets is substantial, but it is very difficult to assess how

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51 Ibid, [35].

52 *Wu v Bi* [2022] VSCA 22, [14] (McLeish and Emerton JJA)

the presence of those real property assets fits into the overall position of FDI without a balance sheet.

102 Without any information about FDI's potential liabilities, the value of FDI's real property interests cannot displace the inference which I have drawn about FDI's impecuniosity. The fourth principle elucidated by the Court of Appeal in *Wu v Bi* is that:[53]

> … it will typically be difficult to establish an applicant's impecuniosity where evidence discloses that the applicant owns unencumbered real property the value of which might reasonably be supposed (even absent valuation evidence) to exceed the amount of a prospective adverse costs order.

In the present case, given the lack of information about FDI's liabilities it cannot be reasonably supposed that the value of FDI's real property may exceed the amount of a prospective adverse costs order.

103 The ASIC search of FDI reveals that it was incorporated in 2002; it has a paid up capital of $6. Mr Callipari is the sole director and the holder of all six shares. It could not have been difficult for Mr Callipari to have put forward financial information about the company that would have revealed its liabilities as well as its assets. FDI is bound by s 286(1) of the Corporations Act to maintain proper books and records. The proper inference to be drawn is that such accounting records would not have assisted FDI to refute the allegation of insolvency, or more accurately, the allegation that there exists credible grounds to believe that FDI may not be in a position to pay Yuanda's costs of the proceeding if ordered to do so.

104 For the reasons discussed, I consider the jurisdiction is enlivened. The discretion to order security for costs is unfettered. There is also flexibility about the form of the security to be provided. The usual form of order is to determine an amount of security which is to be provided and to order that security be provided in a form acceptable to the Prothonotary.

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53 *Wu v Bi* [2022] VSCA 22, [16] (McLeish and Emerton JJA), citing *Bria v Wilson* [2020] VSCA 338 [9]-[12] (Emerton and Sifris JJA); *Koshani v Gao* [2019] VSCA 141 [28] (Kyrou and T Forrest JJA).

105 In support of the discretion to order security, Yuanda placed significant reliance on the fact that notices in relation to a variation were required, but not given, under the Subcontract, and that therefore the Court must assess FDI's prospects of success as weak. In the absence of any defence and at such an early stage in the proceeding, with the statement of claim having the potential to be revised, it is not prudent to place weight on untested but competing views as to the merits of the proceeding.

106 Opposing the application, FDI submitted that the onus of proof remains with Yuanda; that the assertion of impecuniosity overlooks evidence of the term deposits and real property assets, and the fact that FDI has paid legal costs of the Court of Appeal and did so promptly. These matters have been discussed earlier. The evidence is one-sided only, assets are listed without liabilities being disclosed and, as a result, the evidence not persuasive that FDI is likely to be in a position to pay Yuanda's costs if ordered to do so.

107 As discussed in the course of the hearing, to order security for costs in the sum of $2.2 million, being the cost estimate prepared on a very rudimentary basis of solicitor/client costs of Yuanda to the end of the trial, would be oppressive to FDI. That is so notwithstanding on the face of the evidence it has over $1 million in term deposits and over $1 million in real property.

108 The parties have agreed to mediate. A mediator has been appointed, but the mediation is presently on hold. With the determination of the conflicts issue, the mediation can now proceed.

109 At present, as briefly canvassed at the hearing of the present application, the statement of claim is to undergo a review process. There may be amendments by FDI.

110 The costs estimate on behalf of Yuanda for costs of this application and up to and including the completion of the pleadings, described as 'Stage One' of the proceeding, is $386,000. The evidence of quantum is unsatisfactory. There is no evidence of a costs consultant, but also no detailed breakdown of the work to be performed in stage one by task, only the hourly rates of the practitioners involved, solicitors and counsel, and

'ball park' estimates of the hours of work involved.

111 Unlike FDI, whose solicitors will need to start afresh due to the issues involving Mr Fitzpatrick, Yuanda can approach its defence and any counterclaim in this proceeding with full access to work previously carried out in relation to the earlier proceedings. While those proceedings were proceedings concerned with claims under the SOP Act, when regard is had to the statement of claim and to the fact the SOP Act trial extended over eight days, it is reasonable to infer that there is at least some overlap between work previously performed and work which will need to be performed on behalf of Yuanda in responding to FDI's claim.

112 I consider that the sum of $200,000 should be ordered as security for Yuanda's costs up to and including the completion of Stage One (being the completion of all pleadings and the completion of the mediation which is presently being undertaken). The sum of $200,000 includes security for Yuanda's costs concerning the present two applications.

113 Section 24 of the CPA is in the following terms:

> **Overarching obligation to ensure costs are reasonable and proportionate**
>
> A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—
>
> (a) the complexity or importance of the issues in dispute; and
>
> (b) the amount in dispute.

114 The amount of $200,000 to be ordered as security for Yuanda's costs to the end of Stage One is informed by the overarching obligation in s 24 of the CPA. It is arrived at taking into account both the likelihood that previous legal work performed on behalf of Yuanda and available to it in relation to this proceeding will mean the scope of work required will be less than would otherwise be the case, and also taking into account the obligation upon the legal advisers to Yuanda, and upon Yuanda itself, to ensure that the costs of work performed are both reasonable and proportionate.

115 I will order that FDI provide security for Yuanda's costs up to and including completion of Stage One of the litigation in the sum of $200,000 in a form acceptable to the Prothonotary.

116 The order to be authenticated following these reasons should record in 'Other Matters' that the provision of a bank guarantee is a form of security that is acceptable. Given the existence of the substantial term deposit and the unencumbered interests in real property, unless the undisclosed liabilities of FDI are such that its financial position is dire, there would seem little risk that the making of such an order will stultify the litigation (in any case, FDI did not submit that it would).

CERTIFICATE

I certify that this and the 30 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Delany of the Supreme Court of Victoria delivered on 15 March 2022.

DATED this fifteenth day of March 2022.