Federal Court of Australia

Its Eco Pty Ltd v BPS Financial Limited [2022] FCA 842

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| File number: |  |
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| Judgment of: | **DERRINGTON J** |
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| Date of judgment: | 20 July 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for security for costs – class action – relevance of security for costs in class actions – relevance of those who stand behind lead applicants and who stand to benefit from the litigation |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth)*Corporations Act 2001* (Cth)*Federal Court of Australia Act 1976* (Cth)*Federal Court Rules 2011* (Cth) |
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| Cases cited: | *Abbott v Zoetis Australia Pty Ltd (No 2)* (2019) 369 ALR 512*Augusta Ventures Ltd v Mt Arthur Coal Pty Ltd* (2020) 283 FCR 123*Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1*Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317*De Jong v Carnival PLC* [2016] NSWSC 347*General Trade Industries Pty Ltd (in liq) v AGL Energy Ltd* [2020] FCA 1562*Harpur v Ariadne Australia Ltd* [1984] 2 Qd R 523*Jalpalm Pty Ltd v Hamilton Island Enterprises Pty Ltd* (1995) 16 ACSR 532*Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2020] FCA 1018*Kelly v Willmott Forests Ltd (in liq)* [2012] FCA 1446*Madgwick v Kelly* (2013) 212 FCR 1*Turner v Tesa Mining (NSW) Pty Ltd* (2019) 290 IR 388 |
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| Date of hearing: | 15 June 2022  |
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| Counsel for the Applicants: | Mr N Ferrett QC and Mr H Clift |
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| Solicitor for the Applicants: | Salerno Law |
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| Counsel for the First, Fourth and Fifth Respondents: | Mr J Peden QC and Ms D Bampton |
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| Solicitor for the First, Fourth and Fifth Respondents: | HWL Ebsworth |
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| Counsel for the Second Respondent: | Mr M Williams |
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| Solicitor for the Second Respondent: | Kennedys |
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| Counsel for the Third Respondent: | Mr B Kidston |
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| Solicitor for the Third Respondent: | Enyo Lawyers |
|  |  |
| Counsel for the Sixth Respondent: | The Sixth Respondent did not appear |
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| Counsel for the Seventh Respondent: | The Seventh Respondent did not appear |

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| **Table of Corrections** |  |
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| 21 July 2022 | In paragraph 74, “Ms Cook of Kennedys asserted that the cost of discovery for BPS was $56,000” has been replaced with “Ms Cook of Kennedys asserted that the cost of discovery for Billzy Pty Ltd was $56,000”. |

ORDERS

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|  | QUD 395 of 2021 |
|   |
| BETWEEN: | ITS ECO PTY LTD ACN 634 737 643First ApplicantBETHANY JOY MCMANUSSecond Applicant |
| AND: | BPS FINANCIAL LIMITED ACN 604 899 381First RespondentBILLZY PTY LTD ACN 602 796 298Second RespondentPNI FINANCIAL SERVICES PTY LTD ACN 151 551 076 (and others named in the Schedule)Third Respondent |

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| order made by: | DERRINGTON J |
| DATE OF ORDER: | 20 july 2022 |

THE COURT ORDERS THAT:

1. The applicants provide the first, fourth and fifth respondents with security for the costs of this action to the end of mediation in the amount of $350,000.
2. The security referred to in Order 1 hereof is to be provided by either:
	1. payment into Court of the amount of $350,000; or
	2. a bank guarantee in a form acceptable to the Queensland District Registrar.
3. The security referred to in Order 1 hereof is to be provided by 4.00pm on 7 October 2022.
4. The proceedings against the first, fourth and fifth respondents is stayed until the security referred to in Order 1 is provided.
5. The applicants provide the second respondent with security for the costs of this action to the end of mediation in the amount of $200,000.
6. The security referred to in Order 5 hereof is to be provided by either:
	1. payment into Court of the amount of $200,000; or
	2. a bank guarantee in a form acceptable to the Queensland District Registrar.
7. The security referred to in Order 5 hereof is to be provided by 4.00pm on 7 October 2022.
8. The proceedings against the second respondent is stayed until the security referred to in Order 5 is provided.
9. The applicants provide the third respondent with security for the costs of this action to the end of mediation in the amount of $200,000.
10. The security referred to in Order 9 hereof is to be provided by either:
	1. payment into Court of the amount of $200,000; or
	2. a bank guarantee in a form acceptable to the Queensland District Registrar.
11. The security referred to in Order 9 hereof is to be provided by 4.00pm on 7 October 2022.
12. The proceedings against the second respondent is stayed until the security referred to in Order 9 is provided.
13. The parties are to be heard on the question of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J:

## Introduction

1. These reasons deal with a number of applications by several respondents in these proceedings seeking orders for the provision of security for their costs of the action. Each application is brought pursuant to s 56 of the *Federal Court of Australia Act 1976* (Cth) (*Federal Court Act*), rule 19.01 of the *Federal Court Rules 2011* (Cth) (the *Rules*), and, in relation to the first applicant, s 1335 of the *Corporations Act 2001* (Cth) (*Corporations Act*).
2. The action is a representative proceedings under Part IVA of the *Federal Court Act* and is presently being pursued by Its Eco Pty Ltd (Its Eco) and Ms Bethany Joy McManus (Ms McManus) as the lead applicants. Although the detail of the claims are discussed below, in general it is asserted that the group members were induced by certain express and implied misrepresentations to acquire or invest in a cryptocurrency referred to as, “Qoin”, which is heretically pronounced “coin”. It is alleged that the cryptocurrency did not have the attributes which, so it is claimed, the members of the group were led to believe it had and, in particular, it is said that it was illiquid and neither capable of ready realisation into fiat currency nor useful for exchanging for goods or services. From this it is alleged that those who invested in or acquired Qoin suffered loss and damage.

## One of the lead applicants is a natural person as are members of the class

1. As a preliminary issue it is appropriate to note that Ms McManus is an individual and, so it might be assumed, will be many of the members of the class on whose behalf the action is being conducted. As a general rule orders for security for costs have not been made against individuals in “bilateral litigation”: *Harpur v Ariadne Australia Ltd* [1984] 2 Qd R 523: and there are good reasons of principle as to why that is so. However, those principles are inapt in the context of the modern phenomena of class actions. In particular, class actions are pursued on behalf of the group members who stand to gain from the litigation but who, by reason of s 43(1A) of the *Federal Court Act*, are immune from an order for costs if it is unsuccessful. Although the policy decision in s 43(1A) is to be respected it is, nevertheless, a significant factor in the Court’s exercise of discretion on the question of whether security for costs ought to be ordered. It necessarily creates asymmetrical opportunities for the recovery of costs in class actions. On one side of the record the applicants usually have recourse against the respondents or their insurers to substantial recovery in respect of their own claims and the claims of others as well as indemnity, either partial or whole, in respect of their costs. Those costs are usually massively increased because the litigation is being carried on for the benefit of a large number of class members or, perhaps more accurately, that is the proffered reason for the increase. In particular, a regular feature of class actions is the inordinate amount claimed for undertaking disclosure the cost of which, so it is said, is increased due to the large number of class members. On the other side of the litigation, the respondents are limited to recovering costs from the lead applicants to the extent to which their assets permit. This is an important contextual issue in which the discretion to order security for costs in class actions is to be exercised and it is more than sufficient to displace the Court’s natural reluctance to decline to order security for costs against individual litigants. Indeed, the fact that an impecunious individual brings a representative proceedings on behalf of a number of represented persons may well be a significant factor in favour of making an order for the provision of security: *Abbott v Zoetis Australia Pty Ltd (No 2)* (2019) 369 ALR 512, 517 [14] (*Abbott v Zoetis (No 2)*) *per* Lee J approving Beech-Jones J in *De Jong v Carnival PLC* [2016] NSWSC 347 [26].
2. In any event, the legislature has recognised that the operation of s 43(1A) of the *Federal Court Act* is not to be taken as inhibiting the making of an order for security for costs. By s 33ZG of that Act it is provided:

**33ZG Saving of rights, powers etc.**

Except as otherwise provided by this Part, nothing in this Part affects:

…

(c) the operation of any law relating to:

…

(v) security for costs.

1. This section preserves the power of the Court to exercise its discretion under s 56 of the Act to order security and, given its natural construction it operates independently of s 43(1A). As was said in *Madgwick v Kelly* (2013) 212 FCR 1, 11 [38] – [39] (*Madgwick v Kelly*):

38. Whilst at [81] of the reasons, the primary judge recognised that *Bray* was inconsistent with this earlier line of authority, he did say in [81] of the reasons, after referring to the earlier line of authority:

In my opinion the practical effect of the respondents’ arguments in the present proceedings is that this important protection is removed, or at least substantially reduced.

39. The “important protection” was that provided by s 43(1A). It is difficult to understand this part of his Honour’s reasons as other than a view, operative in the exercise of his discretion, that s 43(1A) would be undermined by the ordering of security. So understood, it is inconsistent with the Full Court in *Bray*. Both Carr J and Finkelstein J (with both of whose reasons on security for costs Branson J “substantially” agreed) expressed the view, in passages that were critical to their reasoning (at [141] and [250]) that an order for security did not affect the immunity of s 43(1A) and that there was no overlap between ss 43(1A) and 33ZG(c)(v), which operate independently. No party sought to challenge *Bray*, save in respect of the characterisation of solicitors in the position of Macpherson and Kelley.

## Its Eco is a corporate entity

1. The first of the lead applicants, Its Eco, is a corporation which has been shown to be relevantly impecunious, with the result that, *prima facie*, s 1335 of the *Corporations Act* is enlivened in relation to the application for security for costs against it.

## The principles relating to security for costs

1. Relevantly s 56 of the *Federal Court Act* provides:

**56 Security**

(1) The Court or a Judge may order an applicant in a proceeding in the Court, or an appellant in an appeal under Division 2 of Part III, to give security for the payment of costs that may be awarded against him or her.

1. In *Madgwick v Kelly* at 4 [6] the Full Court approved of the primary judge’s identification of the breadth of the power granted by s 56 to make orders for security for costs. In his decision: *Kelly v Willmott Forests Ltd (in liq)* [2012] FCA 1446 [12]: the primary judge had said:

12 It is established that the discretion conferred by s 56 is broad and unfettered. Many attempts to set limitations upon the discretion have been rejected by the Courts, and the only limitation is that it must be exercised judicially: *Bell Wholesale Co Pty Ltd v Gates Export Corporation* (1984) 2 FCR 1 … at 3 per Sheppard, Morling and Neaves JJ. It is a discretion to be exercised according to the merits of each case and without any particular predisposition: *Bryan E Fencott Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 … at 511 per French J. The discretion is to be exercised by reference to the particular circumstances arising in each case: *Woodhouse v McPhee* (1997) 80 FCR 529 … at 533 per Merkel J.

1. The Full Court also approved of the primary judge’s identification of a number of criteria which may be useful in the exercise of the Court’s discretion on such applications in class actions. They were identified by his Honour (at [13]) in the following manner:

13 The considerations relevant to the exercise of my discretion under s 56 in the context of a class action can be distilled from the various authorities I detail below. They were usefully summarised by Hollingworth J in *Hall v Finance Direct Ltd* [2005] VSC 306 (“*Hall*”) at [107] and they include the following:

(a) Whether there is reason to believe that the applicants will be unable to pay the respondents’ costs if so ordered, that is, whether the applicants are impecunious?

(b) Whether the applicants’ insufficiency of means is caused by the conduct which is the foundation for the action?

(c) The promptness of the application and the stage of the proceedings at which an application for security is brought.

(d) Whether the proceeding has become bogged down with “interminable and expensive interlocutory applications” for which the applicants bear responsibility?

(e) The strength and bona fides of the applicants’ claim for relief from the respondents.

(f) Whether the applicants have been deliberately selected as “persons of straw”, in order to immunise from costs orders group members of substantial means?

(g) Whether the proceeding is essentially defensive in nature?

(h) Whether the applicants are suing for someone else’s benefit?

(i) The characteristics of the group members. For example do they include corporations or natural persons, and are they rich or poor?

(j) Whether someone who stands to benefit from the litigation is funding the applicants?

(k) Whether security would have been ordered if separate actions had been brought by the group members?

(l) Whether an order for security would stifle the action and shut the applicants out from pursuing an arguable claim?

1. In the Full Court’s consideration of this last factor, attention was given to the ability of the members of the class to provide funds by which security for the respondent’s costs might be provided. In the course of that their Honours observed (at 20 [82]):

These considerations are especially apt to consider in a class action for the kinds of reasons referred to by the primary judge. The group members may or may not be willing to disclose their assets. They have no obligation to do so. The group members may be largely unidentified. The kinds of considerations to which the primary judge referred may not be sufficient to ground a defensible finding on likely stultification (to which question, we will come), but they are not irrelevant to the overall exercise of discretion. The generality of the discretion in s 56 should not be lost sight of. In *Dae Boong*, (although in the context of an application for security for costs pursuant to s 1335(1) of the *Corporations Act*) Hodgson JA went to the heart of the discussion in terms particularly apt for adoption in group proceedings when he said at [27]:

Ultimately it seems to me the question to be determined by the court is whether it is fair that the person being sued by the company should be in the position of having to incur substantial costs, in this case perhaps tens of thousands of dollars of costs, and being at risk of liability for the company’s costs, and yet have no real chance of recovering costs even if the action is unsuccessful, when there are persons who would benefit from the proceedings, who face no risk of liability for costs themselves and are either unwilling or unable to provide security.

1. At this point it is useful to make some reference to the decision in *Abbott v Zoetis (No 2)* where the defendants in a class action were declined an order for security for costs. The matter was concerned with an equine vaccine which had been distributed by the defendant to the applicants, who were horse owners, for the purpose of immunising horses against the Hendra virus. It was alleged that the vaccine had caused serious side effects to be suffered by the horses to which it was administered, with the consequence that they significantly declined in value and became unsuitable for many tasks. In his reasons refusing the provision of security, Lee J (at 523 [33]) gave substantive weight to the nature of class actions as a mechanism to allow small or modest claims to be “bundled together” thereby giving those plaintiffs access to justice. He also gave weight to the fact that the persons constituting the class would most likely be individuals normally living in Australia who, if they brought their claims individually, would not be required to provide security for costs. Moreover, so his Honour held, the general passivity of group members set them apart from the usual litigant. In the circumstances before him he also considered that the making of an order for security prior to the ending of the opt-out period was inappropriate. As to the consideration of the stultification of the action his Honour held that it would be a mistake in the context of class actions to consider that such an issue would be determinative. He adopted the view (at 524 -525 [39]) that it would not be possible to prove that none of the class members had sufficient assets to proffer as security or that no group member with them would so pledge them. He continued:

Whatever be the case in the different context of unfunded closed classes or unfunded commercial class actions, to place that burden on an applicant in an unfunded mass tort or product liability open class action such as the present, would necessarily require a costly and time consuming interrogation of the financial position of a very large number of group members — most of whom, no doubt, have no other connexion with the applicant other than the happenstance of being named as group members (and hence being someone who may benefit from a positive determination in relation to the common questions). To contend that current authority developed in the context of ordinary, *inter partes* litigation requires such an approach, ignores, or at least diminishes: the breadth of the discretion exercised in security applications; the unusual nature of open class Part IVA proceedings; and the concern of the Court expressed in *Madgwick* (at [77]) that the Court’s approach in that case should not be taken as advocating that litigation funding should be put in place to avoid an order for security.

1. Lee J was also concerned (at 525 [40]) that orders for security for costs should not place obstacles in the way of plaintiffs seeking to prosecute proceedings under Part IVA in a cost effective way by self-funding.
2. His Honour later advanced that view in *Turner v Tesa Mining (NSW) Pty Ltd* (2019) 290 IR 388, 408 [71] where he observed in relation to applications for security for costs in unfunded class actions:

In the context of class actions, in *Abbott* at [31]-[38], I set out a series of considerations, which assume importance in applications for security for costs. I do not propose to repeat those considerations, but it is worth noting that if this had been an unfunded class action where group members were bearing the costs, or if the solicitors were working on a speculative basis, I do not consider that any proper exercise of discretion could have led to award security for costs against the applicant (even though non-parties, in the form of group members, were attempting to obtain a financial benefit out of the class action). For the reasons I discussed at length in *Abbott*, such a course would undermine the central purpose of Pt IVA proceedings of facilitating access to justice. Nor, in a class action seeking relief such as the present, could I conceive of circumstances where security would be awarded against an industrial organisation even if such an organisation provided assistance to its members in maintaining the litigation.

1. The Full Court overturned that decision in *Augusta Ventures Ltd v Mt Arthur Coal Pty Ltd* (2020) 283 FCR 123, although it made no specific comment in relation to his Honour’s *obiter* comments. If the observations of Lee J are intended to be taken as a statement of general principle that an order for security for costs should not be made in class actions which are unfunded or where the solicitors are working on a speculative basis, I would respectfully disagree. Although s 56 of the *Federal Court Act* moved away from earlier iterations of powers to grant security for costs in not requiring as a precondition that it be shown that the plaintiff had an inability to meet an order for costs at the conclusion of the action, the underlying rationale for the making of such orders should not be forgotten. The litigious process must be fair and be seen to be so. One side of the record in litigation ought not to be granted the luxury of litigating without risk of the consequences of a costs order should the litigation not result in their favour. That extends to those who stand behind one of the litigants and who may benefit from the successful outcome of the action. Such persons should not be allowed to enable others, whether that be corporate entities, trustees or lead applicants, to act as “stalking horses” in the litigation which will enure for their benefit.

## The considerations relevant to the exercise of the discretion

### The lead applicants are without means

1. It was not in doubt on any of the applications that neither of the lead applicants will be in a position to pay the respondents’ costs if the action does not succeed. No submission to the contrary was advanced.
2. The directors of Its Eco are Mr Maitra and Mr Nguyen. It has two shareholders, being Mr Nguyen and a company called Ventures Risk Enterprises Pty Ltd of which Mr Maitra is the sole director. Its shareholder is Kaas Family Holdings Pty Ltd, which is itself equally owned by Mr Maitra and Vu Guyen Maitra (although the ASIC company extract uses the spelling, “Vu Quyen Maitra”). It is established on the material that Its Eco has a deficiency of assets over liabilities and no retained profits such that, if the action were unsuccessful, it is clear that it would not be in a position to meet any of the respondents’ claims for costs. On the established principles, the inability of the corporate applicant to meet an order for costs must be a not insignificant factor weighing in favour of the making of an order for security whether pursuant to s 1335 of the *Corporations Act* or s 56 of the *Federal Court Act*: *General Trade Industries Pty Ltd (in liq) v AGL Energy Ltd* [2020] FCA 1562 [35] (*General Trade Industries*).
3. Ms McManus has deposed to her financial standing which discloses that she would also be unable to meet any adverse costs order were the action to be unsuccessful. She has a 1/5th interest in a family home, modest income and a small amount of savings. It is not doubted that she is properly regarded as being impecunious for the purposes of this application.
4. It is an undisputed aspect of the background of this matter that the solicitors who have the conduct of the proceedings on behalf of the applicants anticipated that they would obtain the assistance of a litigation funder. Had that occurred the funder would undoubtedly have been required to provide security for costs when it was inevitably sought. No such funder has emerged to underwrite the action and there is no evidence that any will be forthcoming. Although the respondents sought to rely upon that inability to secure a funder as an indication that the applicants’ claim was without substance, that is not an inference which can be drawn in the circumstances. There may be myriad reasons for the inability of the applicants’ solicitors to attract the interest of a funder and the Court should not speculate as to why that it is so. On the other hand, as is indicated below, on this application the applicants were not able to demonstrate that the claims sought to be advanced were strong.

### Whether there has been any delay in making the application for security for costs?

1. It is expected that applications for security for costs are made relatively soon after the proceedings have been commenced. This is sometimes referred to as a rule of practice and other times regarded as a discretionary factor. In this case, however, there has been no delay even though they were made some seven months after the action was started. As the respondents all submitted, the initial stages of this action have been disrupted and delayed due to the applicants’ inability to formulate their case and, indeed, by their inability to find suitable lead applicants. There is no need to detail the circumstances leading to the making of the current applications and it suffices to observe that the respondents indicated their intention to bring them shortly after being served with the Originating Application.

### The cause of the lead applicants’ impecuniosity

1. It is not suggested in this case that the lead applicants’ impecuniosity has been caused by any of the respondents and there is no evidence to that effect.

### Whether the proceeding has become bogged down as a result of the applicants’ conduct?

1. The respondents assert, and not without a degree of force, that to date the action has not proceeded with appropriate promptitude. They point to the applicants having amended the statement of claim on three occasions and having made an application to replace the original lead applicant, Appzoola Pty Ltd. That company ought never have been a party to the action because, at no time, had it acquired any of the Qoin cryptocurrency. The submission made by the respondents that the inappropriate naming of Appzoola Pty Ltd as the original lead applicant caused some not insignificant delays in the progress of these proceedings, should be accepted.
2. The result of the above is that the action is seven months old and the applicants have only recently delivered the pleading on which they intend to proceed to trial. This original delay is relevant to the question of whether security should be ordered, although it is far from the most important of considerations.

### Strength and bona fides of the applicants’ claim

1. The consideration of the strength of the applicants’ claim on the question of whether security for costs should be awarded is necessarily a factor of variable weight. It will carry greater weight one way or the other where the claims made are less complex and their veracity or lack thereof is capable of being demonstrated with some relative ease. Conversely, where the claims are more intricate and turn on matters of disputed evidence, nuanced fact-finding or difficult questions of law, less weight can be accorded. In order to achieve any level of confidence about the merits of such a case, a mini-trial would need to be undertaken. That is, necessarily, inappropriate on interlocutory applications.
2. By reason of the change in the identity of the lead applicants the statement of claim has undergone significant alterations although the gravamen of the allegations remains substantially the same. In general terms it is alleged that:
3. The respondents were involved in various ways in the provision of the cryptocurrency, Qoin, and the facilities by which it is obtained, stored and used.
4. The respondents, or some of them, were responsible for the making of representations as to the attributes or qualities of Qoin as an investment or medium of exchange, including as to its exchangeability for fiat currency.
5. Inconsistently with the representations, Qoin was not a liquid cryptocurrency in that it was difficult or impossible to exchange for fiat currency or for goods and services or, at least, it developed those characteristics from March 2021.
6. Its Eco, by Mr Maitra, acted on the representations and spent $25,000 acquiring or investing in Qoin which is now worthless;
7. Similarly, Ms McManus acquired Qoin as a result of the representations or certain non-disclosures and the Qoin purchased by her is not saleable or capable of being used as a medium of exchange.
8. The conduct in relation to Its Eco and Ms McManus was misleading or deceptive or unconscionable within the meaning of the *Australian Consumer Law,* the *Australian Securities and Investments Commission Act 2001* (Cth)and the *Corporations Act*.
9. In various ways, the respondents are liable under those Acts for the losses sustained by Its Eco and Ms McManus.
10. In the material filed on behalf of the respondents an attempt was made to demonstrate that the lead applicants had not suffered loss or damage. They sought to show that Its Eco is currently not in a “loss position” in relation to its investment, and that the value of the Qoin acquired by it has increased in value to a not inconsiderable extent. This submission was made on the basis that the “value” of Qoin as at 26 May 2022 had increased since Its Eco had made its acquisitions. However, the assertion of the absence of loss can only be maintained if the Qoin was actually capable of sale at the values identified. Whilst some small sales have been identified, there was no evidence that if Its Eco sought to sell its current holdings there would be willing buyers for it at the identified prices. In this context it is relevant that the evidence reveals that the last sales of Qoin for fiat currency by the applicants occurred in March 2021. There is no evidence that they have been able to convert Qoin since that time. Although there is some evidence of the later sales, the volume of sales was very small, being around $1,000 in a 24 hour period. Overall, it is sufficient on the material to conclude that the liquidity of Qoin is a matter of which there is a real question. If the respondents are able to establish the values they assert are true market values which are freely obtainable, the foundation for the class action will fall away. Conversely, if its illiquidity is proven, the applicants may well establish a right to substantial damages. For the purposes of the present application it is not possible to reach any firm conclusion that the action is without merit because Qoin has not lost its value.
11. Mr Peden QC for the first, fourth and fifth respondents submitted that the evidence that Qoin had some value demonstrated that the applicants’ claims must fail because they are founded upon the assertion that Qoin has no value at all. However, the claims made in the statement of claim are not shown to be irregularly pleaded and, even if the applicants are not able to demonstrate that the whole of their investment was lost, they may still recover damages based on the loss which they can establish. It would be inappropriate on an application of this nature to construe the pleaded claims too strictly.
12. Similar submissions were made in relation to Ms McManus. Her claim is that she was induced to acquire Qoin and has since been unable to trade them for goods or services and otherwise unable to exchange them for fiat currency. As absolute statements these were shown to be unsustainable. The unchallenged evidence shows that Ms McManus did sell some of her Qoin for fiat currency and otherwise used it for the purposes of buying and selling products in the course of her business. More precisely, it shows that she made purchases using Qoin on 23 occasions between 24 February 2021 and 13 August 2021, and made sales using Qoin 25 times between 19 December 2020 and 29 May 2021. It is also apparent that she sold Qoin through the Block Trade Exchange (BTX), thereby exchanging it for fiat currency, on nine occasions. Whilst this evidence can be accepted and is a powerful factor on this application, it perhaps does not cover the entirety of the nature of the allegations made, in that there may well have been other occasions on which Ms McManus attempted to use Qoin but was unable to do so. In particular, it is apparent that much of the applicants’ concerns centre around the allegation that the currency became illiquid in March or August 2021.
13. A further difficulty for Ms McManus’ claim is said to be that she has made certain statements on social media which are inconsistent with the allegations in the statement of claim. On her behalf it is pleaded that, as a result of her inability to deal with Qoin, she was forced to close her business. The respondents have adduced evidence of what is said to be a Facebook post by Ms McManus to the effect that she was taking her website “offline” to focus on her physical shop and to keep her household functioning, and that she later indicated that she proposed to scale back her business to focus upon her full-time occupation. That latter statement appears to assume that she has not closed her business at all. Whilst there is obvious tension between the two statements they are not entirely incapable of explanation and, whilst Ms McManus will have to explain it in the course of her evidence, it does not establish that her claim is without merit.
14. On the basis of the evidence adduced at the hearing of the applications there are not inconsiderable questions for the lead applicants to answer in relation to their claims. The causes of action advanced in the pleading appear to have some basis in the sense that there is, *prima facie*, merit in the view that people would not be likely to invest in a cryptocurrency unless they were of the understanding that the investment might be redeemed as required or that there was some ability to use it for commerce. However, the respondents’ evidence on the interlocutory application does demonstrate that if the lead applicants have claims, they are of questionable strength. It is not irrelevant that the lead applicants did not adduce any evidence as to the loss which they claim to have suffered, although they submitted that this was not the occasion to do so. Nevertheless, on these applications the respondents put fairly in issue that the lead applicants appeared not to have suffered any loss and that this was relevant to the strength or merits of the claims sought be advanced. Whilst the applicants are not required to prove their case to the level required at a trial, in the circumstances there was a persuasive onus on them to demonstrate, at least to some degree, that they had suffered loss or that it is likely that they did. They chose not to respond which is telling and indicates that the Court cannot reach the conclusion that the lead applicants have a strong case or anything near it. It follows that the consideration of the veracity or strength of the claims in the proceedings weighs in favour of granting security.
15. It was also submitted that there was little evidence that the class members as a whole suffered loss or damage as a result of acquiring Qoin. In the course of the hearing Mr Phillips, a solicitor of the firm acting for the applicants, was cross-examined as to the amount of the loss which has been allegedly suffered by the class members. He identified in excess of 300 persons who had acquired Qoin and ascertained that their combined investment exceeded $4.3m, with the average investment being around $17,200. However, he acknowledged that he had not identified the loss, if any, sustained by each of those persons or by the group collectively. This was significant as the applicants are seeking to pursue a claim which will involve the expenditure of a substantial amount of money by all parties in circumstances where the amount of any loss is not capable of quantification, even in a broad and general sense. In these circumstances it is relevant that it cannot be said that the anticipated costs of the proceedings will be less than the total amount of any loss sustained. Whilst it can be said that it is premature to seek to calculate the amount which might be recovered prior to the closing of the class, where the applicants are confronted with an application for security for costs in which the issue of whether any substantial damage was sustained was fairly raised, the Court is entitled to expect that some recoverable damage be demonstrated to at least some degree. Again, this issue weighs in favour of making an order for security for costs.
16. Another aspect of the issue of the strength or merits of the case advanced raised by the respondents was the suggestion that the lead applicants did not, themselves, have any faith in it. From the affidavits of Mr Maitra and Ms McManus it is apparent that both agreed to participate in the action on the basis that it was being conducted by Salerno Law on a no-win, no-fee basis until litigation funding was secured. They each indicated that they were involved in the proceedings on the basis that it would be funded and that they were not willing to contribute funds or provide security for costs. There was also some evidence to suggest that some group members were uninterested in proceeding with the action if the professional fees were not indemnified. It is now apparent that no litigation funder has emerged to underwrite the action and the submission was made that there must be real doubt as to whether the action will proceed at all. Whilst there is some force in the respondents’ submission in the above respect and there exists the possibility that the action will not progress in the absence of a funder, that does not appear to be relevant to the issue of whether an order for security should be made. Whether the action lapses for lack of funding is wholly collateral to the issue of whether security should be provided for the costs which might be incurred if it does. It is certainly not a matter which goes to the bona fides and merits of the claim.

### Whether the applicants have been deliberately selected as ‘persons of straw’?

1. It is unclear whether the lead applicants have been chosen because they are without means. Certainly, there is no evidence either way on this issue. In the circumstances this factor is neutral in the exercise of the discretion. On the other hand it might well be difficult for a respondent ever to prove that a lead applicant was chosen because of their impecuniosity as usually all matters relevant to that issue will be subject to legal professional privilege.

### Whether the proceeding is essentially defensive in nature?

1. The proceedings are not defensive in nature. The applicants seek to recover damages from the respondents to which they say they are entitled consequent upon their having invested in the Qoin system in the hope of securing a financial advantage.

### Whether the applicants are suing for someone else’s benefit?

1. It is self-evident that each of the lead applicants pursue the action for their own benefit. There is no evidence that either are trustees pursuing claims for the benefit of beneficiaries.
2. On the other hand, as a corporate entity, Its Eco’s business ultimately benefits its shareholders, being Mr Nguyen and Ventures Risk Enterprises Pty Ltd, the latter of which is owned by Kaas Family Holdings Pty Ltd of which the shareholding is held equally by Mr Maitra and Vu Guyen Maitra. For the purposes of the present application those who stand behind Its Eco and who stand to benefit from the litigation are Mr Nguyen, Ventures Risk Enterprises Pty Ltd, Kaas Family Holdings Pty Ltd, Mr Maitra, and Vu Guyen Maitra, although it is accepted that the interest of the latter three is derivative on the interests of Venture Risk Enterprises Pty Ltd. As is discussed below none of those persons who stand behind Its Eco are prepared to expose their assets to the risk of an adverse costs order or to contribute to the provision of any security.
3. More importantly, Its Eco and Ms McManus prosecute the class action on behalf of a large number of class members. The evidence shows that there are 38,000 entities who hold Qoin although not all will fall within the class definition. It appears that the solicitors for the applicants have sought to make contact with those who do come within the class. They have obtained responses from some 308 persons whose circumstances may result in them being class members. Whilst it is presently unclear how many persons might stand to benefit from the prosecution of the class action, it can be accepted that there may well be many.
4. In the circumstances, the lead applicants are impecunious in the sense that they are not in a position to meet an order for the costs of the proceeding if they were to be unsuccessful. On the other hand, the action which they seek to advance, if successful, will benefit a substantial number of other persons whose assets are not presently exposed to an adverse costs order. This, by itself, is a significant factor in favour of making an order for the provision of security.
5. Although it is not necessary to decide, there are strong policy reasons for Courts adopting a predisposition in favour of making an order for security for costs in class actions where the lead applicants are impecunious in the sense that they are not in a position to meet an adverse order for the costs of the application. Not only do the lead applicants seek to recover an amount which is, in terms of quantum, usually more for the benefit of others than themselves, they incur costs vastly in excess of the amount which is usually incurred in bilateral litigation. This latter point is significant. In the course of class action litigation, the costs incurred by the lead applicants include the costs claimed by their solicitors in dealing with the members of the class, including advertising the class action, contacting the potential class members, obtaining information from them, and providing them with details about the litigation. The size of discovery and the cost involved in it are greatly increased by reason of the existence of the class members. Experience reveals that the fees generated by the applicants’ solicitors are greater by orders of magnitude than those which might be incurred in the course of ordinary litigation and the costs of dealing with the class members is provided as the justification for it. It follows that, although the lead applicants are the only persons against whom a costs order might be made, the litigation is carried on for the benefit of others in respect of whom substantial costs are incurred, and which costs may be recovered from the respondents. Although it is said that there is a relative passivity to the role of the class members, that does not alter the fact that the costs of the proceedings are greatly increased by reason of their presence.
6. Necessarily, such circumstances strengthen the justification for making an order for security for costs as, not only is the action carried on for the class members who might recover judgment, additional costs are incurred for their benefit, yet they remain immune from an adverse costs order. As this particular point was not raised in the course of the hearing, it is not one which is taken into account in the exercise of the discretion.

### The characteristics of the group members

1. It was submitted, and not contested, that the characteristics of the group members is a relevant consideration in determining whether an order for security should be made. The respondents referred to the observations in *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, 374 [252] where Finkelstein J observed:

Dependent upon the type of proceeding, the represented group may be quite diverse. The group may include corporations as well as natural persons. The members of the group, whether corporate or not, may be rich or poor. In my view, the characteristics of the group should be taken into account on an application for security. Accordingly, if there is still a rule that an order for security should not be made against an impecunious natural person (for a criticism of the absoluteness of this rule see *Melville v Craig Nowlan & Assocs Pty Ltd* (2002) 54 NSWLR 82), the rule may have little application to many class actions.

1. There were no submissions as to the correctness of this proposition nor as to its extent. Whilst this Court is bound by the indication in *Madgwick v Kelly* that this issue is relevant, it is not precisely clear how it is to be applied. Does it mean that if the members of the class are predominantly of insubstantial means security will not be ordered? If less than 50% are identified as being poor does the same rule apply? What is the degree of relative impecuniosity that is required in order to favour the interests of the class members over the respondents? Is the position different if some members of the class are corporate entities and, if so, what proportion is required to negate the predisposition in favour of the class members? Is a differential application of the law to be also condoned on the basis of inequalities in education, social status or some other attribute held by members of a particular group? None of these questions are answered by reference to the statements in *Bray v F Hoffman-La Roche Ltd* or in *Madgwick v Kelly*. Neither is there any identification of the metric which is to be applied to differentiate between those whose characteristics warrant relief from the usual rules about security for costs and those who are not entitled to that benefit.
2. In the absence of any submissions as to the nature of this criterion there is no need to reach any conclusions as to it. Further, in the absence of any evidence as to the constitution of the class members, it is not a factor which carries any significant weight. The definition of the class in the amended statement of claim is broad and encompasses persons, firms or corporations who, since 1 October 2019, purchased one or more Qoin tokens or accepted them in exchange for goods or services and who have suffered loss as a consequence of the conduct of the respondents as alleged. Whilst there may be some 38,000 so-called “merchants” who hold Qoin wallets, being persons who would accept the cryptocurrency, it is unclear how many of those might fall within the class. More relevantly, there is no evidence as to the financial standing of the persons who might come within the class and, in particular, that they or the persons who stand behind them, are unable to or unwilling to contribute to a fund to provide security for costs.
3. It was submitted on behalf of the first, fourth and fifth respondents that “the Court can readily accept that the group is likely to be made up of bodies corporate and natural persons, with varying levels of wealth” such that this “consideration weighs in favour of an order for security being made.” However, to infer that the members of the class have varying levels of wealth is less than informative in this context. It is necessary to know the relative proportions of the class which fall within the varying levels of income and what those levels are. Whilst there may be members of the class with modest means, there may also be members who have not insubstantial wealth. However, given the nature of the business it might be possible to infer that Qoin would appeal to the less sophisticated investor who is not inclined to ascertain or question the veracity of the investment prior to involving themselves. History and experience tends to demonstrate that non-fiat currency trading or bartering schemes are generally more attractive to persons or businesses of lower economic standing. However, such inferences are, perhaps, too abstract to be useful in the current circumstances. In the absence of any sufficient evidence on which to ascertain, even to a limited degree, the financial characteristics of the class members, this factor is of no relevance to the exercise of discretion.
4. Perhaps the most that might be said of this factor is that the members of the class are persons who sought to invest in a financial product in the hope of a positive return at some time in the future. In this sense they are quite unlike persons employed by a particular employer who have been underpaid their just entitlements pursuant to a relevant enterprise bargaining agreement: cf *Turner v Tesa Mining (NSW) Pty Ltd*.

### Existence of a funder

1. This factor is neutral in the circumstances of the present case where no funder has offered to underwrite the action.

### Whether security would have been ordered if there were separate actions?

1. This factor is also somewhat ambiguous. The application is for security in the context of a class action where the lead applicants bring the proceedings for the benefit of themselves and the other members of the class. The nature of the proceedings has the consequence that the costs burden and potential risk of costs on the respondents is vastly increased by reason of the existence of the class members. In such circumstances there is some difficulty in ascertaining the relevance of considering what the position would be if the proceedings were not a class action. Given it is a class action, it carries with it all the additional burdens on the defendant peculiar to that form of litigation. Nevertheless, this factor was accorded relevance in *Madgwick v Kelly* and therefore some attention must be given to it.
2. Had Its Eco commenced its claim against the respondents there is high degree of likelihood that security for costs would have been ordered. Its Eco is an impecunious corporation with persons of some means who stand behind it and may benefit from the litigation. These are powerful grounds for the making of an order for security. The same would apply to any corporate entity within the members of the class.
3. Conversely, there is nothing which would suggest that an order would be made against Ms McManus or any natural person if they brought the proceedings on their own behalf. In the ordinary course, impecuniosity is not a bar to the Courts for individual claimants, and that has the correlative rule that security will not usually be ordered against such persons.
4. It follows that if the only two applicants were Its Eco and Ms McManus, an order for security for costs would be ordered against the former but not the latter.

### Whether security for costs will stifle litigation?

1. One of the more significant considerations in this case was whether the making of an order for security would stifle the action. It was submitted on behalf of the lead applicants that were an order for security to be made it would not be provided and the action will eventually be dismissed. This was not only because neither Ms McManus nor Its Eco would not provide security, but because those who stand behind Its Eco and the class members would not provide it either.
2. In relation to Its Eco, its shareholder, Ventures Risk Enterprises Pty Ltd, has chosen not to disclose its assets or financial position and nor has its shareholder, Kaas Family Holdings Pty Ltd. It is possible that either of those companies may have sufficient assets to meet any order for costs, but there is simply no evidence about that topic. In ordinary circumstances that would normally negate the factor that the making of an order for security would stifle the litigation. This principle was articulated in *Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1, 4:

In our opinion a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means. It is not for the party seeking security to raise the matter; it is an essential part of the case of a company seeking to resist an order for security on the ground that the granting of security will frustrate the litigation to raise the issue of the impecuniosity of those whom the litigation will benefit and to prove the necessary facts.

1. The concept of those who stand behind a litigant and who will benefit from the litigation is broad. For example, it would extend to creditors of an insolvent company. In *Jalpalm Pty Ltd v Hamilton Island Enterprises Pty Ltd* (1995) 16 ACSR 532, when the applicant, an insolvent trustee corporation was faced with an application for security for costs its directors, shareholders and the beneficiaries of the trust offered their undertakings to meet any costs order. However, those persons were also without means and no such undertaking had been offered by the company’s creditors who were the only ones who would directly benefit from any judgment obtained. Kiefel J observed (at 535):

The threshold question then is, for whose benefit, in reality, is this litigation being conducted? Whilst I do not deny [the director] has a genuine interest in the litigation and no doubt has a strong sense of personal grievance, the only financial interest to be benefitted is that of the creditors and it is not suggested that they, and in particular the bank, are without means. I am therefore unable to conclude that an order for security would necessarily stifle the litigation. That is a matter within the creditors’ power.

1. In this case, to the extent to which Its Eco is an applicant, the litigation is carried on for the benefit of all that stand behind it. In the absence of any evidence as to whether Ventures Risk Enterprises Pty Ltd and Kaas Family Holdings Pty Ltd are without means, it is not possible for this criterion to weigh in favour of refusing security.
2. In addition, the evidence discloses that Mr Maitra has net assets of approximately $1.25m which, if offered as being available to meet any adverse costs order against Its Eco, would possibly suffice at this stage of the proceedings to justify the refusal of an order that some other form of security be provided. However, neither he nor Vu Guyen Maitra have offered their assets as security. Mr Maitra has indicated that he is not willing to provide security for costs nor has he offered to expose his assets to the risk of the litigation. Again, this is not an insignificant reason for requiring the provision of security, and it negates the concern that such an order might stifle the litigation.
3. For these reasons the lead applicants have not established that the fact that the litigation might be stifled if an order was made is relevant to the Court’s discretion.
4. Further, in class actions it must necessarily be relevant whether members of the class are willing to provide security for the respondent’s costs. They are, undoubtedly, persons for whose benefit the litigation is, in reality, being carried on and their presence as class members has the consequence that the costs of the proceedings are greatly increased. It has not been shown that the class members are unable or unprepared to contribute to a fund to meet any order for security for costs and, for this reason also, this consideration cannot be called in support of refusing an order.
5. The applicants submitted that the application for security is premature because the class remains open such that the identity of those who intend to remain in the action are not known. Whilst that may be so, it is apparent that the solicitors acting for the applicants have had some degree of contact with over 300 class members for the purposes of ascertaining the amounts of their investments. There is no reason why those persons could not be contacted for the purpose of ascertaining whether they were willing to contribute to a fund for the purposes of providing security. Further, if an order is made for the provision of security and a lengthy period granted for its provision, the potential members of the class can be contacted and informed of the opportunity to contribute to it well prior to the time for its provision.

## Exercise of the discretion

1. As is apparent from the above discussion, the considerations referred to generally fall heavily in favour of the making of an order for security for costs. In particular, the action is pursued for the benefit of an apparently large number of persons who stand to gain from its success, both in terms of recovering judgment and an order for costs, but whom are protected from an adverse costs order and are not shown to be without means. Conversely, the respondents who are at risk of a substantial costs order in the proceedings have no opportunity to recover costs if the claim is unsuccessful. The unfairness is palpable: *General Trade Industries* [37].
2. It was submitted on behalf of the applicants that the making of an order for security for costs was antithetical to the nature of class actions in the sense identified by Lee J in *Abbott v Zoetis (No 2)* at 523 [33] where his Honour said:

First, like in *Madgwick*, the nature of the claim advanced in this class action is highly relevant. This proceeding is precisely the sort of case contemplated by the *Australia Law Reform Commission* when it produced its landmark report, *Grouped Proceedings in the Federal Court*, Report 46 (Australian Government Publishing Service, 1998) at 165. This report, published prior to the development of the modern market of litigation funding, contemplated that the proposed legislative scheme would provide an effective mechanism for persons with small or relatively modest claims to obtain access to justice. The class action procedure was seen as a mechanism to allow small or modest claims to be “bundled together” (at 45 [94], 49 [106]). An obvious example of the type of case which could employ such a procedure was mass torts or product liability cases where there were likely to be a small number of complex common issues, the determination of which, was critical for a large number of small or modest claims. The current proceeding, if properly advanced, is an exemplar of such a case.

1. Whilst his Honour’s comments can be accepted, there is nothing in the Australian Law Reform Commission report or those which have followed which have suggested that there ought to be a radical departure from the orthodox costs regime as between parties to litigation. If it had been the intention of the legislature to reach a position whereby class members may litigate solely at the risk of the respondent in relation to costs, such a policy outcome would surely have found clear expression in Part IVA itself. Whilst the class action procedure affords substantial benefits to the class members there is nothing to suggest that the usual rules in relation to security for costs should not apply.
2. To the above fundamental feature it can be added that the lead applicants are impecunious and, at least in relation to Its Eco, those who stand directly behind it and who may benefit from the litigation are unwilling to expose their assets to an adverse order for costs. Moreover, they are not shown to be without means. Whilst the likelihood that the claims of most class members will be of a modest size has relevance, the consequence of the accumulation of a large number of such claims in the one proceeding substantially increases the quantum of the costs which will be incurred. It is also relevant, albeit to a lesser degree, that the extent to which the proceedings have not progressed is due to the difficulties faced by the applicants and not a consequence of any conduct by the respondents.
3. It is not insignificant that the claims sought to be advanced have not been shown to be of any great substance. Even if the applicants and other class members were induced by misleading or deceptive conduct or by unconscionable conduct to invest in Qoin, it is far from evident that they have suffered substantial loss or damage. To at least some degree, the respondents have demonstrated that the claims advanced in the statement of claim cannot be maintained in the absolute terms on which they are made. Whilst it may be that some lesser claims might succeed, even that has been shown to be questionable. This case is far from one in respect of which it might be said there are strong prospects of success.
4. It is correct that the making of an order for security for costs will have the effect of requiring that it be provided by an individual, in Ms McManus, and that is a reason for not making it. However, that factor is not substantial given the countervailing weight of those factors which favour its making. Importantly, it cannot be said that the making of the order would stifle the litigation in the sense used in the authorities.
5. In these circumstances it is appropriate that the lead applicants provide security for the costs of the respondents.

### Special circumstances of the second and third respondents

1. The second respondent is a company called Billzy Pty Ltd and the third is a company called PNI Financial Services Pty Ltd (PNI). Neither of these entities had direct contact with the applicants or the members of the class. Each was the holder of an Australian Financial Services Licence (AFSL) and the first respondent, BPS Financial Limited (BPS), was at different times the authorised representative of each. The first respondent was the authorised agent of Billzy Pty Ltd from 18 December 2019 to 4 November 2020 and from 1 September 2021 to the commencement of these proceedings. It was the authorised agent of PNI from 5 November 2020 to about 31 August 2021. The claims alleged against the second and third respondents is that they are liable for the conduct of the first respondent in its capacity as their authorised representative.
2. However, as was submitted on behalf of PNI, the claim advanced against it was that it permitted the first respondent to issue Qoin wallets. The “wallet” is an electronic facility for organising the holding of cryptocurrency and allows the user to identify the nature and extent of their holdings at any one time. It was submitted that the allegations made in the statement of claim do not concern the functionality or performance of the Qoin wallet. To the contrary, the allegations concern the nature of Qoin itself including the ability to use it or convert it to fiat currency. The closest that the amended statement of claim comes to making an allegation about the Qoin wallet is in paragraph 28 where it is alleged that the first respondent was required to obtain a wallet in order to participate in the Qoin market. It was then submitted by PNI and BPS that there is no allegation that this particular representation was misleading or deceptive or that, if it were, it resulted in some loss or damage.
3. There is force in the above submissions and it is very difficult to identify how any conduct of the first respondent, for which the second and third respondents could be responsible, has caused the applicants loss or damage. The alleged conduct which induced the making of investments by the lead applicants does not appear to include any matter referable to the issuing of the Qoin wallet which is the conduct allegedly authorised by the AFSL holders. Conversely, the conduct which is alleged to have caused the applicants loss and damage is unconnected with the issuing of the wallets.
4. In response, Mr Ferrett QC for the applicants submitted that the liability of the holder of an AFSL for an authorised representative was wide and that is emphasised by s 917A(1)(a) of the *Corporations Act* which states that the Division applies to any conduct of a representative of a financial services licensee that “relates to the provision of a financial service”. He submitted that the representations of the first respondent about the nature and quality of Qoin currency related to the issuing of the wallets which were necessary in order to hold the currency. Whilst the response to the submissions on behalf of PNI and BPS was not sufficient, it should be observed that those submissions had not been made or referred to at all in the written submissions which had been filed in accordance with the directions made for the hearing of the applications. The directions for the filing of submissions are intended to identify for the Court and the opposing party the arguments intended to be advanced at the hearing so that the issues will be crystallised during the course of the oral argument. Their purpose is rendered nugatory if the real arguments on which a party relies are held back until the hearing, and such conduct denies the other party an appropriate opportunity to respond. Such conduct when it occurs deserves the strongest reproach and opprobrium the Court can muster. In the present case the main submissions relied upon by PNI and BPS were not made known in advance. Indeed, they were not even hinted at in the filed written submissions. In the circumstances I do not propose to entertain them and I refrain from making any finding as to whether the omission of those submissions was intentional.
5. Despite that, PNI and BPS are entitled to an order for security for costs for the more general reasons which have been referred to above.

## Form and quantum of the amount of security to be provided

### Form of security

1. It is undoubted that the form of the security ordered must provide adequate and fair protection to the respondents. In many cases the appropriate form of security is the payment of money into Court or the provision of a bank guarantee in terms acceptable to the Registrar. In the absence of any submission from the lead applicants identifying a more appropriate form of security, either of those types of security should be provided in this case.

### Quantum

1. The first, fourth and fifth respondents relied upon an expert report by Mr Graham Robinson dated 11 April 2022 as to the quantum of the anticipated costs of the litigation up to the completion of a mediation. Mr Robinson is a well-known and respected Barrister who has undoubted proficiency in relation to the question of costs in litigation. There was no disputing his expertise on the issue in respect of which he gave his evidence. He was not cross-examined on his report.
2. During the course of the hearing an issue arose as to whether there was sufficient evidence of the nature and extent of the work which might be required to be undertaken by the respondents’ solicitors in the course of the litigation or, at least, to the end of a mediation. It was submitted that the absence of such evidence had the result that there was no factual foundation for Mr Robinson’s opinions. However, that potential lacuna was filled by a late affidavit which was relatively uncontroversial. To a large extent there is nothing unusual about the present case which might render the estimation of costs more difficult than might usually be the case. It is apparent that in his report Mr Robinson identified and valued the legal work which would be undertaken in a matter of this nature. It is clear that he was aware of the relevant issues in the litigation and his experience could have been relied upon to identify the nature of the steps to be taken in the action to address them. Mr Robinson concluded that the quantum of the party and party costs which will be incurred by the first, fourth and fifth respondents to the date of mediation is $664,003.
3. The third respondent, PNI, also obtained a report from Mr Robinson. In it Mr Robinson reached the opinion that the likely costs to be incurred by that respondent to the end of the mediation was $312,849. There was no cross-examination of Mr Robinson on this report either. The second respondent, Billzy Pty Ltd, sought to rely upon that report on the basis that it was in the same position as the third respondent. It also relied upon two affidavits from a solicitor of the firm which it instructed in which the amount of party and party costs was estimated to be $364,500. One of the reasons for the higher fees was that it included an additional amount of approximately $50,000 on account of Silk’s fees. There was no cross-examination of the solicitor on the affidavit in which the assessment of fees was made.
4. In general terms, the amounts claimed by the respondents as being the party and party costs of the action until the completion of mediation are within the range that might be expected, albeit towards the higher end. Perhaps the matter of most concern are the claims in relation to the costs of undertaking discovery. Mr Robinson opined that the costs of discovery in relation to the first, fourth and fifth respondents, which he assumed to be standard discovery, will include the establishing of a database and the ongoing fees payable in respect of it. This was said to involve costs of $135,635 for the first eight months with recurring fees of approximately $11,000 per month thereafter. In relation to solicitors’ costs for discovery, Mr Robinson also allowed the sum of $36,000. He allowed not dissimilar amounts in respect of his assessment of the amount claimed by the third respondent, PNI. Ms Cook of Kennedys asserted that the cost of discovery for Billzy Pty Ltd was $56,000. It is assumed that she also perceived that standard discovery is required. The amounts so claimed appear to assume that discovery in relation to all class members will occur on the one occasion.
5. With respect, the amounts claimed for discovery greatly exceed those which are required to allow the matter to proceed to a mediation. In accordance with the principles in Part 20 of the Rules, there is no assurance that an order for standard discovery will be made or, if it is, whether it will be made in relation to all members of the class. There exists real potential to restrict discovery in the first instance to a limited number of class members who are selected on the basis that they are representative of the making of the particular types of representation alleged. Alternatively, there is scope for limiting discovery to specific categories of documents which will considerably reduce the expense of the process. There is no warrant for accepting the amounts sought by the respondents in respect of discovery at this stage. In each case that will reduce the amount of security required by a considerable amount.
6. Further, it is well accepted that the amount of security ordered on an application for security for costs should not equal the amount which the respondents might actually recover if an order for costs were made in their favour. Reference was made by Mr Ferrett QC to the decision in *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2020] FCA 1018 [119] where it was held:

119 The respondents did not contest that once a figure for party-party costs is ascertained, the court can and should further discount the amount to be provided as security. It was accepted that the amount ordered to be paid is not to be a full indemnity in respect of the recoverable costs but a reasonable amount of security: *Brundza v Robbie & Co (No 2)* (1952) 88 CLR 171, 175. There is no specific formula to be applied to the discounting in this respect although it is necessary to gain an appreciation of the nature of the litigation. In this, considerations such as the chances of the matter settling, the possibility of substantial amounts being “taxed off” any claimed bill of costs, and any off-setting amount or costs orders are all relevant.

1. Here, the respondents did not suggest that this process should not apply in the circumstances of the present case.
2. At a relatively impressionistic level, it can be observed that the claims in relation to costs are at the higher end of the range and the amounts claimed in respect of discovery are inappropriate in the context of case managed litigation. In relation to the first, fourth and fifth respondents, after deducting from the amount of $664,003 the amounts claimed in respect of discovery and discounting to an amount that is reasonable, the sum of $350,000 should be allowed as security for costs until the end of the mediation. In relation to each of the second and third respondents, by adopting a similar approach, an amount of $200,000 each should be allowed. These sums will provide a reasonable indemnity in relation to the costs which have and are to be incurred until the mediation can be completed.

## Costs

1. The parties are to be heard on the question of costs.

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| I certify that the preceding seventy-nine (79) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 20 July 2022

SCHEDULE OF PARTIES

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| Respondents |  |
| Fourth Respondent: | BLOCK TRADE EXCHANGE PTY LTD ACN 604 087 407 |
| Fifth Respondent: | QOIN ASSOCIATION LTD ACN 605 853 441 |
| Sixth Respondent: | RAJESH KUMAR PATHAK |
| Seventh Respondent: | ANTONIE HENDRIK JAKOBUS WIESE |