IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-001558
[2020] NZHC 1659

BETWEEN	MAINZEAL PROPERTY & CONSTRUCTION LIMITED (IN LIQUIDATION), ANDREW JAMES BETHELL and BRIAN MAYO-SMITH as liquidators of MAINZEAL PROPERTY & CONSTRUCTION LIMITED (IN LIQUIDATION) Judgment Creditors
AND	RICHARD CILIANG YAN Judgment Debtor

Hearing: 3 July 2020

Appearances: M D O'Brien QC and M D Pascariu for Judgment Creditors
D Chisholm QC and C Hadlee for Judgment Debtor

Judgment: 10 July 2020

JUDGMENT OF ASSOCIATE JUDGE P J ANDREW

This judgment was delivered by Associate Judge Andrew
on 10 July 2020 at 4.00 pm
pursuant to r 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date ……..

Introduction

[1] The judgment creditors, Mainzeal Property & Construction Ltd (in liq) (Mainzeal), apply for Mr Richard Yan, the judgment debtor, to be adjudicated bankrupt.

[2] The bankruptcy application is based on a judgment of this Court delivered by Cooke J on 26 February 2019, who found that Mr Yan and other Mainzeal directors had breached their duties under s 135 of the Companies Act 1993 (the judgment).[1] The directors were ordered to contribute $36m in total to Mainzeal's assets, to be distributed to creditors. Of this, Mr Yan is solely liable for $18m. Mr Yan and the directors were ordered to jointly pay costs to Mainzeal in excess of $2.3m.

[3] Mr Yan and the other directors have appealed the judgment to the Court of Appeal (the appeal). A hearing date is imminent – the hearing is scheduled to commence on 27 July 2020.

[4] There is no dispute that the requirements of s 13 of the Insolvency Act 2006 have been established by the judgment creditor. Mr Yan has committed an act of bankruptcy (he failed to comply with the Bankruptcy Notice); the judgment sum is immediately payable; and on his own evidence, Mr Yan is unable to pay the judgment debt.

[5] The critical issue I must determine is whether these bankruptcy proceedings should be halted, pursuant to s 42 of the Insolvency Act 2006, pending determination of the appeal- and, if so, whether a condition of that halt be that Mr Yan provide security greater than the relatively minimal amount he has offered thus far.

Factual background

[6] The salient facts underpinning the judgment are as follows:

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1 *Mainzeal Property & Construction Ltd (in liq) v Yan* [2019] NZHC 255.

(a) In May 1995, an investment vehicle controlled by Mr Yan acquired a 50.9 per cent stake in Mainzeal, then a listed entity in New Zealand.[2]

(b) In December 2003, Richina Pacific Ltd (RPL) was incorporated in Bermuda as a vehicle for investments in both New Zealand and the People's Republic of China (China).[3] RPL was listed on the NZX between 2003 and 2008 and was Mainzeal's parent until a group restructure was completed in 2008 – 2009.

(c) At all relevant times, RPL group was controlled by Mr Yan.[4]

(d) As the sole shareholder of Mainzeal, RPL was entitled to exercise any of the powers that otherwise would have fallen to be exercised by Mainzeal's board. Between 2004 and 2005, RPL called $26m of Mainzeal's funds to be advanced to related companies and used to acquire assets in China for the benefit of RPL.[5] By the end of 2008, the total related party debts owed to Mainzeal, with interest, were over $39m. These debts were irrecoverable by reason of the insolvency of the related companies which were responsible for repayment. The lending structure was deliberate.[6]

Reckless trading

(e) As a result, from 2005, Mainzeal had significant negative equity.[7] The issue became more acute following restructuring of the RPL group in 2008 and 2009. This resulted in the New Zealand Chinese assets being structurally separated.[8] Mainzeal was left vulnerable, as RPL, which retained the Chinese assets, ceased both to be listed on the NZX and to be Mainzeal's ultimate parent company.[9]

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2 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [13].
3 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [16].
4 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [16].
5 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [30].
6 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [25]-[38].
7 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [194]-[195].
8 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [44]-[45].
9 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [45].

(f) Despite being insolvent, Mainzeal was able to continue trading by using its creditors' money as working capital. This was described in RPL's annual reports as an advantage of Mainzeal's business structure.[10]

(g) Between 2010 and 2012, Mr Yan provided multiple assurances to Mainzeal's directors and auditors that RPL would support Mainzeal financially when and as required.[11] However, when Mainzeal's bank required a significant equity injection in late 2012, as a condition of its continuing support, RPL declined to provide it. Consequently, Mainzeal was placed in receivership and liquidation in February 2013. The funds advanced by Mainzeal for the benefit of RPL were never repaid.[12]

(h) The extent of Mainzeal's insolvency and the risk created to its creditors was significant. Cooke J found that Mainzeal adopted a policy of insolvent trading.[13] The Judge also found that Mr Yan's promise of group support, in reliance of which he and his fellow directors continued trading through Mainzeal while insolvent, was not an assurance on which the directors could reasonably rely.[14] Accordingly, the Court held that the directors acted in breach of their duties under s 135.[15]

(i) The judgment recorded specific findings made against Mr Yan, including the fact that he had personally benefited very substantially from using Mainzeal's funds to assist RPL and acquiring substantial assets in China.[16]

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10 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [67].
11 *Mainzeal Property & Construction Ltd (in liq) v* Yan, above n 1, at [41].
12 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [545] and [546].
13 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [41].
14 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [204]–[236].
15 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [548].
16 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [453].

Creditors' losses

(j) Mainzeal's collapse resulted in 1,390 admitted unsecured creditor claims, in excess of $110m.[17] Of this sum, $45.4m was subcontractors' money, retained and used by Mainzeal as working capital.[18]

Procedural background

[7] Mr Yan has appealed separately from the other director defendants. The directors have provided security (via D & O Underwriters) of $18m and paid the costs awarded to Mainzeal. As one of the insured directors, Mr Yan agreed to the security being put up with payment of the liquidators' costs.

[8] On 19 June 2019, Mr Yan's solicitors advised the judgment creditors that he was not able to pay or provide security in the sum of $18m.

[9] A Bankruptcy Notice for the judgment sum was issued by this Court on 8 August 2019.

[10] On 12 September 2019, Mr Yan filed a protest to jurisdiction and an application to set aside the Bankruptcy Notice. His applications were opposed and dismissed by the Court on 27 November 2019.[19]

Relevant legal principles

[11] Section 38 of the Insolvency Act 2006 reads:

> **Court may halt application**
>
> (1) The Court may at any time halt the creditor's application for adjudication.
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> (2) The Court may halt the application on the terms and conditions (if any), and for the period, that the Court thinks appropriate.

[12] Section 42 reads:

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17 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [2].
18 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [203].
19 See *Re Yan, ex parte Mainzeal Property & Construction Ltd (in liq)* [2019] NZHC 3145.

Halt or refusal of application when judgment under appeal

(1) This section applies if the creditor's application for adjudication relies on 1 of the following acts of bankruptcy:

(a) the debtor failed to comply with a bankruptcy notice (*see* section 17):

(b) a judgment against the debtor for non-payment of trust money is not satisfied within 5 working days after the date of the judgment (*see* section 28).

(2) If the debtor has appealed against the judgment or order underlying the bankruptcy notice or the judgment for nonpayment of trust money, as the case may be, and the appeal is still to be decided, then the Court may –

(a) halt the creditor's application for adjudication; or

(b) refuse the application.

[13] The Court's discretion to grant a halt under s 42 is unfettered in the sense that the Act does not prescribe relevant factors or the weight to be accorded to them. In *Yeoh v Al Saffaf*, this Court held the following factors may be relevant:[20]

(a) The bona fides of the debtor in prosecuting the appeal;

(b) What stage the appeal has reached and whether there has been a delay in prosecuting the appeal;

(c) The merits of the appeal are generally not an appropriate matter for the Court to consider unless the Court is of the view that the appeal has absolutely no prospect of success;

(d) Whether the bankruptcy proceeding might render the appeal nugatory; and

(e) Whether the halt of the proceeding would unduly harm the creditors.

[14] Those factors were followed in *Re Pillay ex parte ANZ National Bank Ltd* where Faire AJ noted that the power to halt under s 42 involves a discretion similar to the power to give interim relief pending an appeal under the Court of Appeal (Civil)

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[20] *Yeoh v Al Saffaf*, HC Auckland CIV-2006-404-1164, 21 June 2006; as cited in *Re Pillay ex parte ANZ National Bank Ltd* HC Auckland CIV-2009-404-4175, 3 December 2009, at [10].

Rules.[21] His Honour noted other relevant factors include the effect on third parties, the novelty and importance of the question on appeal; the public interest in the proceedings; and the overall balance of convenience.[22]

Analysis and decision

[15] I address first the question of whether these bankruptcy proceedings should be halted under ss 38 and/or 42 of the Act. I then turn to address what I consider to be the truly significant issue in this case, namely, if a halt is to be granted, whether it should be subject to the condition that Mr Yan provide further security beyond that which he has already offered.

Issue 1 – Should the proceedings be halted?

[16] It is clear the appeal is imminent and that it involves questions of general public importance. The preparation is complete and it is undisputed that Mr Yan has prosecuted the appeal with due diligence. I note that the appeal hearing was originally scheduled for April 2020, but obviously, in light of COVID-19 level 4, was re-scheduled.

[17] This is clearly not a case where I may conclude the appeal lacks substance. As Bell AJ noted in his judgment of 27 November 2019, it is up to the Court of Appeal as to whether Cooke J had improperly adopted a new way of finding liability and losses, and whether the way he had gone about the case was not within the plaintiff's pleadings.[23] The appeal is obviously not frivolous or vexatious and I note that it includes allegations of breaches of natural justice.

[18] I also find that there is a real risk that if the proceedings were not halted at this stage, that Mr Yan's right to pursue the appeal might be rendered nugatory. Mr O'Brien submitted that if Mr Yan's appeal has merit, the Official Assignee could pursue it, or either Mr Yan or his associates could fund the appeal in much the same

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21 *Re Pillay ex parte ANZ National Bank Ltd*, above n 20.

22 At [11]. See also the observations of Lang J in *Re Wright ex parte Health Distributors Ltd* CIV-2010-419-121, 4 November 2010 at [13] where "context is everything".

23 *Re Yan, ex parte Mainzeal Property & Construction Ltd (in liq)*, above n 19, at [24]. I note also that Bell AJ concluded that there is public interest in the appeal at [25].

way as he is currently funding it, but through the Official Assignee, if the bankruptcy were to proceed. However, I do not accept in this context that I may confidently place any reliance on those factors. The appeal hearing is imminent and, in my view, it would be quite unrealistic for the Official Assignee to come to any position on the appeal within the next few weeks.

[19] I accept there may be some prejudice to the judgment creditor in deciding to halt the proceedings, including a delay in any possible investigation by the Official Assignee. I also acknowledge that the creditors of Mainzeal will obviously be anxiously waiting for some effective solution, including the need for the defendant directors to be held to account for their actions. However, any decision to halt at this stage will not mean that the bankruptcy application will ultimately fail, and as Mr Chisholm QC submitted, the time for the claw-back procedures in subpart 7 of the Act has already commenced.[24]

[20] In terms of the issue of prejudice, I acknowledge Mr Chisholm's submission that, practically speaking, any bankruptcy order now made would likely be annulled should Mr Yan succeed on appeal. Furthermore, the parties' expert evidence on Chinese law indicates that the courts of China will not recognise or enforce a New Zealand bankruptcy order, and any delay in the proceedings is unlikely to change that situation.

[21] For all these reasons, I conclude that Mr Yan has established a proper basis for the exercise of my discretion under s 42 of the Act to halt the proceedings pending the determination of the appeal.

[22] In reaching that conclusion, I reject Mr Chisholm's criticism of the judgment creditors that they are oppressively and improperly using these bankruptcy proceedings as a debt collection mechanism and the liquidators could have sought to examine Mr Yan under Part 17 of the High Court Rules 2016. On Mr Yan's own evidence, he is insolvent (at least in New Zealand), and in the circumstances it is understandable that the liquidators, acting in the interests of creditors, would wish to have the Official Assignee investigate Mr Yan.

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[24] *Re Yan, ex parte Mainzeal Property & Construction Ltd (in liq)*, above n 19, at [26].

[23] I now turn to address the ultimate question of the overall balance of convenience. In this case, that is to be determined by addressing the question of whether as a condition of any order to halt, Mr Yan should be required to provide security.

Issue 2 – Can and should security be ordered as a condition of any order to halt?

[24] The judgment debtor contends that Mr Yan has made no attempt to pay or secure the judgment sum and that his actions are not those of a debtor acting bona fide. While the other directors of Mainzeal have provided security for $18M, no security has been provided for the balance of the $18M for which Mr Yan is solely liable.

[25] The judgment creditor further submits that there are no good reasons for the Court to depart from the general principle that in enforcement of monetary judgments, a stay or halt will only be granted if the judgment is paid or secured. Mr O'Brien referred to a long-established authority, *McLeod v New Zealand Pine Co Ltd* where Williams J held:[25]

> The ordinary course here has been that where an unsuccessful litigant in this Court asks for a stay of execution pending an appeal, an order has been made staying execution on his giving security.

[26] His Honour further held:[26]

> The right of the plaintiff in the present case is an absolute right to have his money at once. The right of defendants is the right of appeal, and the right in some way or other to have it made certain by this Court that the appeal shall not be fruitless. The duty of this Court is, I think, to reconcile as far as possible the conflicting rights of the plaintiff and the defendants. The way to do that is to follow the English cases, and to say that an order staying proceedings shall be made on payment by the defendants to the plaintiff of the money in question, the plaintiff giving security for the repayment.

[27] However, I accept the submission of Mr Chisholm that where an appeal or application to set aside a judgment has been brought that is bona fide, it is not

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25 *McLeod v New Zealand Pine Co Ltd* (1892) 11 NZLR 493 (SC) at 494.
26 *McLeod v New Zealand Pine Co Ltd*, above n 25, at 495.

uncommon for the Court simply to adjourn or halt the bankruptcy for a period of time.[27]

[28] I also accept, in principle, that bankruptcy is not a debt collection exercise and that a distinction can properly be drawn between providing security as a condition of a stay of execution on the one hand, and security to halt a bankruptcy proceeding.[28]

[29] Nevertheless, I interpret the statutory scheme of ss 38 and 42 of the Act as conferring a wide discretion on the Court. Its exercise might, in an appropriate case, include the provision of security as a condition of a halt. The Court has a discretion, and care must be taken in creating hard-and-fast rules when exercising that discretion, in the interests of justice. Having said that, in the ordinary run of cases, it would likely be unusual and perhaps exceptional to order security as a condition of a halt under s 42 – and even if the provision of security might be of relevance to an assessment of whether the appeal is a bona fide one. Furthermore, in complex litigation of the kind here, security is best considered in the appeal process, where, as appropriate, it can be controlled either by the trial judge and/or the appellate court.

[30] It is clear that a judgment debtor seeking the indulgence of the Court to have a discretion exercised in their favour under either ss 38 or 42 of the Act needs to be candid about their financial circumstances.[29]

[31] In determining whether I should order security as a condition of a halt in this case, a critical issue arises as to whether Mr Yan has been transparent and candid about his financial means. The judgment creditor contends that he has only provided evidence of a high-level position and that the evidence he has provided is inconsistent with evidence given by Mr Yan at trial, as well as the findings of Cooke J in his judgment.

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27 See for example *Featherston Park v Bradley* [2012] NZHC 300 at [8] and [30]–[36]. See also *Pulman v The Hire Company Ltd* HC Auckland, CIV-2006-404-4697, 20 April 2007, Lang J at [8].

28 Paul Heath & Mike Whale *Insolvency Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) at 59-60; *Lawson v Perkins* HC Auckland, CIV-2008-404-2473, 20 November 2008, Asher J at [18] – [20]; *Body Corporate 68792 v Memelink* [2019] NZAR 127 (CA) at [18]; see also *Re Sullivan ex parte Clode* [2017] NZHC 1973 at [34] where Bell AJ noted that there is a difference between execution of judgment and applying for adjudication in bankruptcy because of insolvency.

29 *Yeoh v Al Saffaf*, above n 20, at [33].

[32] For his part, Mr Yan says that since the outset of these bankruptcy proceedings he has offered to undertake not to deal with the only substantial asset owned by him, pending the appeal, namely, the historic property at Campbell Park, Oamaru (owned by Richina Ltd, the shares of which are owned by Mr Yan). More recently, as part of continuing attempts to achieve a pragmatic solution, he has offered the judgment creditors security of the shares in Richina Ltd.

[33] Mr Yan says that there are no other assets available to the judgment creditors, either in China, New Zealand, or any other jurisdiction.

[34] The judgment creditors have referred to two properties in Auckland, one at Lucerne Road; and the other at Margot Street (with an estimated combined total value of approximately NZ$10m; but Mr Yan submits that both of those properties are held in family trusts. While Mr Yan is a trustee of both trusts (together with his wife and an independent trustee), he has no vested beneficial interest in either trust. He is a discretionary beneficiary of only one of them.

[35] Mr Yan further says that he has insufficient personal assets in China to meet the judgment sum relied on in the Bankruptcy Notice. He says that the only shares in RPL (which in turn owns assets in China) he holds are shares allowing control, but otherwise have no economic interest. He does not have any interests, legal or beneficial, directly or indirectly, in those assets.

[36] In the affidavits before me, Mr Yan, who is a Harvard business graduate, says he now lives in an apartment in Shanghai, together with his father, having moved back there in 2016. He travels a lot for business, to Fuxin (also in China), Europe, and the USA. He says there are three full-time carers living with them in Shanghai which gives him the comfort that there is always somebody home who is able to care for his father. He spends approximately 40 per cent of his time in China, between Shanghai and Fuxin, where "our Chinese leather business" has a large factory, and where he also has residence. The other 60 per cent of the time, he says, he spends travelling primarily for business, in Asia, South America, Europe and the USA. The only time he comes to New Zealand these days is to visit his wife and his youngest son, who is still at school here. His wife and his children are all citizens of the USA and his two oldest

children have decided to study in the USA. Once the youngest son leaves school in New Zealand it is intended he will go to university in the US where the wife will also move to be closer to all of their children.

[37] Mr Yan further says that his wife owns another apartment in Shanghai and that the apartment he and his father live in is owned by the company Richina Pacific (China) Investment Ltd. Mr Yan is the director of that company.

[38] In contending that the security offered thus far by Mr Yan is woefully inadequate, the judgment creditors place some emphasis and reliance on the following findings of Cooke J. His Honour found that between 2004 and 2005, RPL, at Mr Yan's direction, extracted approximately $20m from its wholly owned subsidiary, Mainzeal Property & Construction Ltd (in liq). Those funds were used to purchase substantial assets in China. Mr Yan and his family benefited considerably from this as the value of the Chinese assets acquired increased substantially. The increase may have been as much as 145 times the acquisition price. In any event, the assets acquired with the help of Mainzeal funds were, by the time of trial, "a very valuable holding".[30]

[39] Mr Yan challenges the relevance of those findings saying that those events pre-date those in the causes of action relied upon by the judgment creditors. However, that is not an issue I can determine (that is a matter for the Court of Appeal) and, in any event, the findings of Cooke J provide a very clear basis for concluding that Mr Yan and his family are, by New Zealand standards, very wealthy.[31] They clearly have the privilege, including the financial means, to live in the jurisdiction of their choice, whether that be New Zealand, China, or the USA.

[40] I accept that Mr Yan's solicitors have diligently sought to answer questions posed by the judgment creditors as to Mr Yan's financial means. I acknowledge there are difficulties for Mr Yan in transferring funds out of China because of its Safe Regulations. I also note that the personal wealth of Mr Yan was not directly at issue before Cooke J. I likewise accept that in cases of this kind some care needs to be taken not to unfairly draw adverse inferences from the "flavour" of the evidence.

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30 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [27].
31 *Mainzeal Property & Construction Ltd (in liq) v Yan*, above n 1, at [432] and [453].

[41] However, Mr Yan has provided very little information as to his current remuneration. In the circumstances, it would be surprising if it was not substantial. Furthermore, it is not entirely clear from his evidence whether he might be in a position to provide security in a sum less than $18m and, if so, how much. The emphasis in the evidence is placed on the inability to meet that sum rather than a lesser amount. There was also little explanation given, apart from reference to China's Safe Regulations, as to why Mr Yan could not provide security over assets in China. (I note that the judgment creditors have previously confirmed that security by recourse to Chinese assets would be acceptable to them).

[42] Mr O'Brien submitted that it is apparent that Mr Yan's asserted financial predicament was caused by the asset protection measures he elected to implement. Clearly, he contended, Mr Yan's family could secure the judgment sum and, to avoid bankruptcy and enable him to prosecute the appeal, his family might agree to secure the judgment sum by recourse to assets in New Zealand or China.

[43] In my view, there is force in that submission. However, it would appear from the evidence before me that Mr Yan's family is not prepared to provide such security. I note that Mr Yan's wife has already confirmed that she will not agree to provide security over the trust assets, namely, the two Auckland properties.

[44] In viewing the evidence as a whole, I am left with some doubt and reservation as to whether Mr Yan really is unable to provide security beyond that which he has offered thus far. I also note this is in the context of litigation where accountability is an important issue. However, the appeal hearing is imminent, and the Court of Appeal remains seized of the underlying substantive proceedings, including all procedural issues associated with the appeal, such as security (specifically, under r 12 of the Court of Appeal (Civil) Rules 2005). In these circumstances, I find it would not be appropriate at this very late stage to impose security on Mr Yan personally as a condition of an order halting the bankruptcy proceedings. In my view, it is essential that the appeal proceed, as scheduled, without the late imposition of conditions which might interfere with or disrupt the appeal process. If there is a further appeal beyond the Court of Appeal, the rules provide for further consideration of security at that stage.

[45] For all these reasons, I decline to require any additional security from Mr Yan, beyond what he has already offered to the judgment creditors.

Result

[46] I grant an order pursuant to s 42 of the Insolvency Act 2006 halting these bankruptcy proceedings, pending the determination of the appeal to the Court of Appeal.

[47] The proceedings are accordingly adjourned to the Bankruptcy List on a date in December 2020 (at a time and date to be advised by the Registry) for review.

[48] I am of the preliminary view that there should be no order as to costs. If the parties cannot agree, then memoranda are to be filed (no more than three pages) within 14 days.

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Associate Judge P J Andrew