

AUSTRALIA / JUDGMENT

# Antymniuk v Davies

**[2026] NSWSC 1139****COURT**

Supreme Court

**DECIDED**

21 September 2026

**BEFORE**

Richmond J

**CASE / FILE NUMBER**

2026/00031711

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## Source record

### Supreme Court

### New South Wales

**Medium Neutral Citation:** Antymniuk v Davies [2026] NSWSC 1139**Hearing dates:** 11 September 2026**Date of orders:** 21 September 2026**Decision date:** 21 September 2026**Jurisdiction:** Equity - Applications List**Before:** Richmond J

**Decision:**

(1) The first plaintiff to pay security for the first defendant's costs in the amount of \$30,000 and such security to be in the form of money paid into Court or of a bond or cash security approved by the Registrar.

(2) These proceedings be stayed as against the first defendant until the security referred to in order 1 has been provided.

(3) In the event that the security set out in order 1 is not provided within 28 days after the date of this judgment, leave is granted to the first defendant to apply for dismissal of the proceedings as against the first defendant, any such application to be made by notice of motion returnable in the Applications List.

(4) The costs of the notice of motion filed on 2 July 2026 be costs in the cause.

**Catchwords:**

COSTS — Security for costs — Relevant factors — Where first plaintiff's place of residence is out of jurisdiction — Where second plaintiff is an impecunious corporate trustee of a self-managed superannuation fund

COSTS — Security for costs — Quantum and form — Where amount claimed is disproportionate to the importance and complexity of the issues and solicitor's estimate of costs is unrealistic

**Legislation Cited:** Uniform Civil Procedure Rules 2005 (NSW) r 42.21

|                          |                                                                                                                                                                                                                                                                                                   |
|--------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Cases Cited:             | A W Ellis Engineering Pty Ltd v Malago Pty Ltd [2011] NSWSC 1623<br>Cornelius v Global Medical Solutions Australia Pty Ltd (2014) 98 ACSR 301; [2014] NSWCA 65<br>Haselhurst v Toyota Motor Corp Australia Ltd (t/as Toyota Australia) [2020] NSWSC 1607<br>Li v New South Wales [2013] NSWCA 165 |
| Texts Cited:             | G E Dal Pont, Law of Costs (5th ed, 2021, LexisNexis)                                                                                                                                                                                                                                             |
| Category:                | Procedural rulings                                                                                                                                                                                                                                                                                |
| Parties:                 | Brett Daneil Antymniuk (First Plaintiff)<br>Hot Air Balloon Ride Pty Ltd ATF Stockton Beach Camp Superannuation Fund (Second Plaintiff)<br>Tracey Anne Davies (First Defendant)<br>David Ovidi (Second Defendant)                                                                                 |
| Representation:          |                                                                                                                                                                                                                                                                                                   |
| Counsel:                 | D Eardley (Applicant/First Defendant)<br>P Horobin (Respondents/Plaintiffs)                                                                                                                                                                                                                       |
| Solicitors:              | Mackellars Lawyers (Applicant/First Defendant)<br>Cordato Partners Lawyers (Respondents/Plaintiffs)                                                                                                                                                                                               |
| File Number(s):          | 2026/00031711                                                                                                                                                                                                                                                                                     |
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## JUDGMENT

By a motion filed on 2 July 2026, Tracey Anne Davies (Ms Davies), the first defendant, seeks an order for security for costs in the sum of \$131,960 (or such other sum as the Court considers appropriate) within 28 days, and that the proceedings against the first defendant be stayed until the security has been provided. At the hearing, Mr Eardley, counsel for Ms Davies, indicated that the security is sought from both plaintiffs and the relevant sum is in the range of \$90,000 to \$100,000 rather than \$131,960.

## Background

These proceedings, which were commenced by a summons filed in Court on 23 January 2026 and pleaded by way of statement of claim filed on 29 April 2026, are a claim by Brett Antymniuk, the first plaintiff, for repayment of a loan of \$47,864 he made to Vincent Williams, the second defendant (Mr Williams), and a claim by ‘Stockton Beach Camp Superannuation Fund’, the second plaintiff, for the repayment of a loan of \$212,136 it made to Mr Williams. Each loan was made under a written loan agreement dated 4 September 2024 in which the plaintiffs are respectively expressed to be the relevant lender and Mr Williams is the borrower (2024 loan agreements). The second plaintiff is incorrectly named, and the plaintiffs filed a motion on 3 September 2026 seeking leave to amend the statement of claim to correct the name of the second plaintiff to Hot Air Balloon Ride Pty Ltd ATF Stockton Beach Camp Superannuation Fund. There

being no opposition to that amendment, leave was granted.

Under clause 6 of each 2024 loan agreement, Mr Williams agreed to provide security over an identified property in Swansea, New South Wales (Swansea property). It is said in that clause, in respect to the Swansea property, that he 'is currently in the process of transferring ownership of the said property into [his] name'. The clause goes on to provide: 'Pending transfer of such ownership of the said property, Tracey Anne Davies hereby consents in providing security to the Lender by way of a charge over the property at ## Road, Hazelbrook (Folio identifier ##)' (Hazelbrook property).

While Ms Davies is not named as a party to either loan agreement, there is an execution clause which purports to show that she signed the document in the presence of a witness, Mr Russell Wade (Mr Wade).

It is not in dispute that each plaintiff entered into a further loan agreement with Mr Williams on 1 July 2025 relating to the debts arising under the earlier 2024 loan agreements (2025 loan agreements), and that the 2025 loan agreements each contain a clause providing that it embodies the entire understanding and agreement between the parties in respect of the loan and all previous negotiations, memoranda and understandings are superseded by the document. The 2025 loan agreements do not include any security by Ms Davies in favour of either plaintiff and are not signed by her. The claim against her is for a declaration that the plaintiffs each have a valid equitable charge over the Hazelbrook property.

The first plaintiff registered a caveat over the Hazelbrook property on 7 August 2025 in respect of the charge arising under his 2024 loan agreement and, following the issue of a lapsing notice in respect of the caveat in early January 2026, these proceedings were commenced. By consent orders made on 28 January 2026, the caveat has been extended until further order.

The evidence on the motion comprises, for the plaintiffs: the first plaintiff's affidavit dated 23 January 2026 and his two affidavits dated 22 July 2026; the affidavit of his wife, Ms Maria Dagh, dated 22 July 2026, and the affidavit of his accountant, Mr Jeremy Iannuzzelli, dated 21 July 2026; and for the first defendant: her affidavit dated 1 July 2026, the affidavit of Mr Williams dated 15 June 2026, and the affidavit of her solicitor, Mr Atticus Busby (Mr Busby), dated 1 July 2026.

On the pleadings, it is not in dispute that the second defendant is liable to repay the principal amount advanced by each plaintiff, and that his defence is that the terms and conditions of the loan agreements were harsh and unconscionable and in breach of the National Consumer Credit Protection Act 2009 (Cth) and National Credit Code. What this amounts to, in substance, is that the second defendant disputes only his liability to pay the interest charged and not his liability to repay the principal amount of each loan.

In so far as the second defendant is concerned, she denies, both in her defence and in her affidavits filed in the proceedings, that she granted a charge over the Hazelbrook property on the terms of clause 6 of the 2024 loan agreements because she did not sign either of those agreements. In other words, she alleges a fraud by the second defendant. She admits in her

defence that she is married to him but says that they are separated, although they ‘remain living under the same roof’. There is also a dispute whether, even if she did sign the 2024 loan agreements, the charges purportedly given by her under clause 6 of each of those agreements over the Hazelbrook property have ceased to operate because the Swansea property was ultimately transferred to the second defendant, or because the 2024 loan agreements were superseded by the 2025 loan agreements.

### Relevant principles

The application for security for costs is brought under r 42.21 of the Uniform Civil Procedure Rules 2005 (NSW). Such an order is directed at preventing injustice to a defendant arising from an inability to recover his or her costs from an unsuccessful plaintiff.

It is not in dispute that the jurisdictional threshold requirements in r 42.21(1) are satisfied (T14.40). This is because the first plaintiff is ordinarily a resident outside Australia (r 42.21(1)(a)) and there is reason to believe that the second plaintiff, being a corporation, will be unable to pay the costs of the first defendant if ordered to do so (r 42.21(1)(d)). As to the latter, the second plaintiff is the trustee of the self-managed superannuation fund of the first plaintiff and his wife, and while it would prima facie have a right of indemnity against the fund for costs incurred in the proceedings, the only significant asset of the fund which could support that indemnity is the debt owing to it by the second defendant. It is not in dispute that the only realistic prospect of that debt being repaid is if the second plaintiff succeeds in establishing a charge over the Hazelbrook property under clause 6 of its loan agreement dated 4 September 2024. An adverse costs order could be expected to be made against the second plaintiff in favour of the first defendant if it fails to establish that charge, and the second defendant’s inability to pay the debt gives reason to believe the second plaintiff will not be able to pay the first defendant’s costs pursuant to that order.

Mr Horobin, counsel for the plaintiffs, did raise in oral submissions the prospect of a ‘Sanderson order’ being made against the second defendant requiring him to pay the first defendant’s costs if she succeeds in her fraud defence because the conduct of the second defendant would make it fair that he bear the burden of her costs rather than the plaintiffs. However, in my view it is premature at this stage to address the prospects of such an order being made, particularly as costs orders are a matter of discretion and a Sanderson order is unlikely in circumstances where the unsuccessful defendant is insolvent: see *G E Dal Pont*, *Law of Costs* (5th ed, 2021 LexisNexis) at [11.14].

Consequently, the issue is whether the Court should exercise its discretion to order security. While the first defendant bears the legal burden of proof, as the jurisdictional threshold is met, the plaintiffs have an evidential onus of raising matters that favour the exercise of the discretion in their favour, both as to why security should be refused or should be of a lesser amount than sought by the first defendant: *Cornelius v Global Medical Solutions Australia Pty Ltd* (2014) 98 ACSR 301; [2014] NSWCA 65 at [18]–[20]. Under r 42.21(1A), in exercising the discretion, the Court may have regard to the following matters and such other matters as it considers relevant:

- (a) the prospects of success or merits of the proceedings,
- (b) the genuineness of the proceedings,
- (c) the impecuniosity of the plaintiff,
- (d) whether the plaintiff's impecuniosity is attributable to the defendant's conduct,
- (e) whether the plaintiff is effectively in the position of a defendant,
- (f) whether an order for security for costs would stifle the proceedings,
- (g) whether the proceedings involves a matter of public importance,
- (h) whether there has been an admission or payment in court,
- (i) whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant,
- (j) the costs of the proceedings,
- (k) whether the security sought is proportionate to the importance and complexity of the subject matter in dispute,
- (l) the timing of the application for security for costs,
- (m) whether an order for costs made against the plaintiff would be enforceable within Australia,
- (n) the ease and convenience or otherwise of enforcing a New South Wales court judgment or order in the country of a non-resident plaintiff.

In relation to the quantum of security for costs, where it is determined that security is appropriate, the required approach was summarised by Sackar J in *Haselhurst v Toyota Motor Corp Australia Ltd (t/as Toyota Australia)* [2020] NSWSC 1607 at [12]–[16] as follows:

- [12] In determining the quantum of an order for security the Court does not set out to give a complete and certain indemnity to a defendant and there is no principle that entitles a defendant to be given security for the whole of its recoverable costs (*CBX2 Pty Ltd v National Australia Bank (No 2)* [2015] NSWSC 1969 at [54] and [55]).
- [13] Rather the Court embarks on a process of estimation which embodies to a considerable extent, necessary reliance on the 'feel' of the case after considering relevant factors (see, eg, *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 515 (French J)).
- [14] Whilst the Court requires some evidentiary basis for the estimate of costs, a precise estimate is not required. The Court is not fixing a gross sum amount, and should not decline to act on the evidence before it because the evidence was not the 'best evidence' available to support the application (*Pathway Investments Pty Ltd v National Australia Bank Ltd* [2012] VSC 97 at [35]–[38]; *DIF III Global CoInvestment Fund LP v BBLP LLC* [2015] VSC 484). Although a discount for exigencies may be required (see, eg, *Pathway Investments Pty Ltd v National Australia Bank Ltd* [2012] VSC 97 at [55]).

- [15] Further the Court is to stand back from the amounts claimed and the precise assessment of costs to consider the case on its particular facts and will make an order that is just and reasonable in the circumstances (*Wollongong City Council v FPM Constructions Pty Ltd* [2004] NSWSC 523 at [50]).
- [16] In embarking on such a process the Court is not required to attempt its own detailed costs assessment but can take a 'broad brush' approach having regard to the information before it, seeking to prevent (on the one hand) prejudice to the party paying costs by overestimating the costs and (on the other hand) injustice to the party recovering costs by adopting an arbitrary 'fail safe' discount across the board on the costs claimed (see, eg, *Allstate Life Insurance Co v ANZ Banking Group Ltd* (1995) 134 ALR 187 at 199–201; *Ashington Capital Pty Ltd v Parissen Capital (Project X) Pty Ltd* [2012] NSWSC 410 at [17]–[18]; *Pathway Investments Pty Ltd v National Australia Bank Ltd* [2012] VSC 97 at [25]).

## Submissions

Mr Eardley, counsel for the first defendant, submitted that: (a) while care needs to be taken in assessing the strength of the parties' cases at this early stage, each plaintiff's case against the first defendant had poor prospects; (b) the first plaintiff has no assets in Australia and any judgment for costs against him would need to be enforced in Sweden in circumstances where there is no bilateral treaty or reciprocal enforcement arrangement for the enforcement of civil costs orders; (c) the first defendant has not contributed to the impecuniosity of the second plaintiff; and (d) the absence of an individual plaintiff against which a costs order can be made in the ordinary course weighs heavily favour of exercising the jurisdiction to make an order for security of costs: *A W Ellis Engineering Pty Ltd v Malago Pty Ltd* [2011] NSWSC 1623 at [4]–[5].

Mr Horobin submitted for the plaintiffs that: (a) while accepting that the Court should not engage in a mini-trial, a number of matters indicate that the first defendant's defence based on an alleged fraud by her husband involves disputed questions of fact, and that the plaintiffs' prospects should be assessed as good; (b) the second plaintiff's impecuniosity is directly attributable to the second defendant's conduct and, while the first defendant asserts that she knew nothing about the 2024 loan agreements made by the second defendant, the plaintiffs' evidence discloses that she had been a co-borrower for a number of previous loans by the plaintiffs from which she benefited; (c) the plaintiffs' claims are essentially defensive in nature because they have loan deeds in their favour and, without any prior notice, the first defendant issued a lapsing notice for the caveat lodged by the plaintiffs over the Hazelbrook property; (d) the security sought appears to be a full indemnity for past and future costs which is liable to stifle a legitimate claim and is wholly disproportionate to the claims brought; and (e) there is no evidence to suggest that a costs order would be unenforceable against the first plaintiff in Sweden.

In so far as quantum of the security is concerned, the first defendant relies on the affidavit of her solicitor, Mr Busby, dated 1 July 2026, which attaches a table in which he identifies, by reference to estimates of the hourly rates of a 'partner' and 'counsel', the following costs of the work to be

undertaken: (a) for interlocutory steps, defences, security for costs application and discovery, \$17,380; (b) for preparation of evidence, \$31,260; (c) for miscellaneous matters (directions, briefing counsel, advice to clients, attendances on plaintiff's solicitors), \$38,520; and (d) for preparation for and attending a two-day hearing, \$44,800; giving a total of \$131,960.

Mr Horobin submitted that the schedule provided by Mr Busby in his affidavit is defective in a number of respects including:

the table refers to an 'appellant' and a contingency for a 'cross-claim' which suggests that the schedule has been prepared for another matter (there being no suggestion to date that the first defendant will bring a cross claim in these proceedings);

it includes estimates for work already done;

it claims the costs of this motion, which are a separate cost question;

though only the first defendant seeks security, the costs seem to relate to the whole of the proceedings against both defendants;

it assumes a two-day hearing, when one is more likely, and also a separate mediation and three directions hearings which is unrealistic;

the rates used are for a partner at \$550 per hour and counsel at \$6,050 per day, although there is no evidence that those rates are actual or only an estimate.

## Consideration

In considering whether an order for security should be made, I have focused on the matters set out in r 42.21(1A) which were identified by the parties as of particular relevance.

As to paragraphs (a) and (b) of r 42.21(1A), there are a number of factual disputes which make it difficult and inappropriate to assess the parties' prospects at this interlocutory stage. I note that there is currently no evidence from Mr Wade who apparently witnessed the signature of the first defendant to each of the 2024 loan agreements as to whether he in fact did so, and he will be an important witness if the first defendant is to establish the fraud she asserts. If she did sign the agreements, there is an issue whether the charges arising from clause 6 of the 2024 loan agreements ceased to operate (either due to the execution of the 2025 loan agreements or the transfer of title to the Swansea property to the second defendant). While I am satisfied that the plaintiffs' case against the first defendant is arguable and brought bona fide, it is attended with some difficulty.

As to paragraphs (c) and (d), while the second plaintiff is impecunious, it is not clear that any conduct of the first defendant has contributed to that state. The previous loans made by the plaintiffs to the defendants had been repaid in full before the 2024 agreements were entered into. There is no evidence regarding the first plaintiff's financial position, but he gives evidence that he is employed as an engineer for a renewable energy company based in Stockholm. There is no suggestion in the evidence that he is impecunious.

As to paragraph (e), I do not accept that the plaintiffs are effectively in the position of a defendant. They brought these proceedings to recover a debt and enforce the security for that debt.

As to paragraph (f), in my view, an order for security against the second plaintiff would stifle the proceedings brought by it and that is a strong factor against an order that it do so. However, there is no evidence to suggest that an order for security for costs against the first plaintiff would stifle the proceedings.

As to paragraph (k), the amount claimed for security by the first defendant, being between \$90,000 and \$100,000, is disproportionate to the importance and complexity of the issues in the case against her, which is simply whether she signed the 2024 loan agreements and, if so, whether clause 6 of each of the 2024 loan agreements currently operates to create a charge over the Hazelbrook property in favour of the plaintiffs as security for the debts owed by the second defendant. While expert evidence may potentially be necessary to prove that her signature on the loan agreements is not genuine, Mr Busby's schedule does not identify any need for expert evidence and, in any event, the first approach to that question would be to obtain an affidavit from the witness to her signature, Mr Wade, which has not been done.

As to paragraphs (m) and (n), the evidence indicates that the first plaintiff has no assets in Australia and there is no evidence as to his assets in Sweden. There is no evidence to suggest that a final costs order could be enforced by the first defendant against the first plaintiff in Sweden as readily as if he was resident in New South Wales. In *Li v New South Wales* [2013] NSWCA 165 at [24], Ward JA (with whom Macfarlan and Gleeson JJA agreed) said (footnotes omitted):

While there remains a discretion to be exercised having regard to all the circumstances of the particular case, Dal Pont [Law of Costs, 2nd ed, LexisNexis Butterworths, 2009] comments (at [29.69]) that the trend of the cases (referring there to *Jalfox Pty Ltd v Motel Association of New Zealand Inc*; *Nasser v United Bank of Kuwait*) is that the ease and convenience of enforcement procedures in the plaintiff's country of residence will ordinarily be a primary consideration and that, conversely, the fact that a judgment would be simple to enforce is a powerful factor against the making of such an order (there referring to *Knott v Signature Security Group Pty Ltd*).

I consider the absence of evidence that a judgment for costs would be as simple to enforce in Sweden as in New South Wales is a factor weighing in favour of the grant of security against the first plaintiff.

Taking all of the relevant matters into account, I consider that it is appropriate that an order for security for costs be made against the first plaintiff, although not for the amount claimed.

I am not satisfied that the estimate of the first defendant's costs provided by the first defendant's solicitor is reliable. I accept Mr Horobin's criticisms of the table prepared by Mr Busby and I consider that, in view of the nature of the claims brought against the first defendant, an estimate of costs of \$90,000 to \$100,000 is entirely unrealistic. Taking a broad brush approach, I have concluded that the first plaintiff should pay security for the costs of the first defendant in the amount of \$30,000.

## Conclusion

For the reasons given, I have concluded that the first plaintiff should provide the first defendant with security for costs in the amount of \$30,000.

I consider that the appropriate order as to costs is that the costs of the motion filed on 2 July 2026 be costs in the cause because in that way whichever party is ultimately successful in the proceedings will recover its costs of the motion.

The Court will make the following orders:

The first plaintiff to pay security for the first defendant's costs in the amount of \$30,000 and such security to be in the form of money paid into Court or of a bond or cash security approved by the Registrar.

These proceedings be stayed as against the first defendant until the security referred to in order 1 has been provided.

In the event that the security set out in order 1 is not provided within 28 days after the date of this judgment, leave is granted to the first defendant to apply for dismissal of the proceedings as against the first defendant, any such application to be made by notice of motion returnable in the Applications List.

The costs of the notice of motion filed on 2 July 2026 be costs in the cause.

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