

# FEDERAL COURT OF AUSTRALIA

## ACN 153 364 491 Ltd (in liq) v GP No 1 (in liq), in the matter of GP No 1 (in liq) [2018] FCA 1933

File number:	SAD 133 of 2018
Judge:	<b>BESANKO J</b>
Date of judgment:	6 December 2018
Catchwords:	<b>COSTS</b> – application by the defendants for an order that the plaintiff provide security for costs – application brought under s 1335 of the <i>Corporations Act 2001</i> (Cth) and r 19.01 of the <i>Federal Court Rules 2011</i> (Cth) – where principal order sought by the defendants is that the plaintiff provide security for costs in a fixed amount or some other amount as is determined by the Court – where defendants seek a further order that the proceeding be stayed until the amount sought is paid into Court and an order that if that is not done, the proceeding be dismissed with costs – whether power to order security for costs under s 1335(1) of the <i>Corporations Act</i> is engaged because there is credible evidence which establishes that there “is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence” – consideration of the timing of defendants’ application for security for costs – preliminary consideration of the merits of the plaintiff’s claim – whether plaintiff’s present impecuniosity is due to the defendants’ failure to pay – whether proceeding will be stifled if security is ordered
Legislation:	<i>Corporations Act 2001</i> (Cth) ss 556, 561, 1335; Sch 2, ss 90-10, 90-15 <i>Federal Court Rules 2011</i> (Cth) r 19.01

Cases cited:	<i>Powell, in the matter of Arafura Pearls Holdings Ltd (in liq)</i> [2017] FCA 1159 <i>Re Universal Distributing Co Ltd (in liq)</i> [1933] HCA 2; (1933) 48 CLR 171
Date of hearing:	20 September 2018
Date of last submissions:	5 October 2018
Registry:	South Australia
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	37
Counsel for the Plaintiff:	Mr T Castle
Solicitor for the Plaintiff:	LVA Legal
Counsel for the Defendants:	Ms G Walker
Solicitor for the Defendants:	Andreyev Lawyers

## ORDERS

<b>SAD 133 of 2018</b>	
<b>IN THE MATTER OF GP NO 1 PTY LTD (IN LIQUIDATION)</b>	
<b>BETWEEN:</b>	<b>ACN 153 364 491 LTD (IN LIQUIDATION)</b> <b>Plaintiff</b>

<b>AND:</b>	<b>GP NO 1 PTY LTD (IN LIQUIDATION)</b> <b>First Defendant</b>  <b>GAVIN MOSS</b> <b>Second Defendant</b>
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<b>JUDGE:</b>	<b>BESANKO J</b>
<b>DATE OF ORDER:</b>	<b>6 December 2018</b>

**THE COURT ORDERS THAT:**

1. The parties be heard as to the appropriate orders to be made in light of these reasons.

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

**REASONS FOR JUDGMENT**

**BESANKO J:**

## Introduction

1 This is an application by the defendants to this proceeding for an order that the plaintiff provide security for costs. On 12 June 2018, the plaintiff, ACN 153 364 491 Ltd (in liquidation), issued an Originating process against the defendants, GP No 1 Pty Ltd (in liquidation) (GP No 1) and Mr Gavin Moss. Mr Moss is the liquidator of GP No 1. The plaintiff was previously known as GP No 2 Pty Ltd (GP No 2) and I will refer to it in these reasons by that name. GP No 1 was the major shareholder in GP No 2 and, prior to entering into liquidation, GP No 2 was in a group of companies with GP No 1, and those companies were controlled by a common director.

2 GP No 2's application is made under ss 90-10 and 90-15 of the Insolvency Practice Schedule (Corporations) which is Schedule 2 to the *Corporations Act 2001* (Cth). In its application, GP No 2 seeks orders in relation to the external administration of GP No 1 by reason of a failure of Mr Moss to pay monies received by GP No 1 and Mr Moss to GP No 2 as a secured creditor. The monies are said "to arise from and are consequential upon" orders made by this Court in *Powell, in the matter of Arafura Pearls Holdings Ltd (in liq)* [2017] FCA 1159 (the *Powell* judgment). GP No 2 states that it also relies on its general law rights under and in relation to its security.

3 GP No 2 seeks the following orders from GP No 1 and Mr Moss:

1. An order that the First and/or Second defendant pay to the Plaintiff the sum of \$223,769.27 pursuant to the Security Interest of the Plaintiff having PPSR Registration Number 201210190073661 registered on 19 October 2012 (**RSI**).
2. An order that the First and/or Second Defendant pay to the Plaintiff the amount of all other moneys recovered by the Second defendant in the course of the liquidation of the First Defendant pursuant to the RSI.
3. An order that the First and/or Second Defendant provide a full accounting to the Plaintiff for all moneys received in the liquidation of the First Defendant that are or would be secured under the RSI.
4. A declaration that the debt of the Plaintiff secured by the RSI, at the time the First Defendant first entered into external administration, has priority over all other debts and creditors owed by the First

defendant, including to the Second Defendant or any other person concerned in the external administration of the First Defendant.

4 Section 90-10 gives the Court the power to inquire into the external administration of a company upon the application of a person with a financial interest in the external administration of the company, and s 90-15 deals with orders the Court may make.

### **The Evidence**

5 GP No 2's application is supported by an affidavit of Mr Robert Jacobs sworn on 30 August 2018 who is the company's liquidator.

6 On 1 March 2013, Mr Jacobs was appointed as joint voluntary administrator of GP No 2 and, on 30 May 2013, he was appointed as the sole liquidator of the company. Mr Jacobs states that before being placed in voluntary liquidation, GP No 2 was involved in the business of farming, marketing and selling pearls. He states that the GP No 2's business owed its origins to the collapse of certain managed investment schemes in the pearling industry operated by Arafura Pearls Holdings Ltd (APHL) and related entities. Mr Jacobs states that in late 2011 or early 2012, APHL sold certain pearl farming assets to GP No 2 on certain terms and conditions, including in relation to the ongoing conduct, operation, supervision, management and maintenance of the pearl farm by APHL. Mr Jacobs states that in late 2011 or early 2012, GP No 1 was the majority shareholder in GP No 2.

7 Mr Jacobs states that in July 2012, GP No 2 entered into a transaction with, among others, GP No 1 pursuant to which, among other things, GP No 2 lent \$910,000 to GP No 1 on a secured basis. Mr Jacobs produced the Loan Agreement, the Heads of Agreement and the General Security Deed. The security interest was registered on the Personal Property Securities Register on 19 October 2012.

8 On 29 September 2017, the Court made orders on the application of the

liquidators of APHL in relation to the distribution of certain monies held by them. Mr Jacobs believes that as a consequence of that, GP No 1 and Mr Moss received a payment from APHL of \$223,769.27. Attached to GP No 1's annual report to creditors dated 24 November 2017 is a document entitled "Liquidator's Summary of Receipts and Payments to 24 November 2017". This document shows receipt of an amount of \$223,769.27 as "Recovery of Pre-Appointment Debtor" and receipt of an amount of \$24,288.25 for "Pre-Appointment – Legal Proceedings". Payments of \$65,831.81 for legal fees, \$130,665.78 for "Liquidator's Remuneration" and \$20,726.30 for "GST Paid (Received)" are shown.

9 GP No 2's complaint is that GP No 1 and Mr Moss have failed to pay to it the amount of \$223,769.27 and possibly other amounts.

10 The application brought by GP No 1 and Mr Moss for security for costs is brought under s 1335 of the Corporations Act and r 19.01 of the *Federal Court Rules 2011* (Cth) (the Rules). The principal order sought is that GP No 2 give security for their costs in the proceeding in the sum of \$15,000 or such other amount as is determined by the Court. GP No 1 and Mr Moss seek an order that the proceeding be stayed until the amount sought is paid into Court and an order that if that is not done, the proceeding be dismissed with costs. The application is supported by an affidavit of Mr Moss sworn on 1 August 2018.

11 Mr Moss states that the amount of \$223,769.27 sought by GP No 2 is the total amount of recoveries that he was able to make in the liquidation of GP No 1 from Arafura Pearls Holdings Ltd (Administrators Appointed). This amount was the recovery of unpaid service fees and, therefore, was a recovery of circulating assets. The funds were received by GP No 1 on 16 October 2017 to the company's liquidation bank account.

12 As at 21 June 2018, GP No 1 had \$394.12 on hand. Mr Moss produced a document entitled "Liquidator's Summary of Receipts and Payments to 21 June 2018". This document shows, relevantly, a receipt of \$223,769.27 for "Recovery of Pre-

Appointment Debtor” and a receipt of \$24,288.25 for “Pre-Appointment – Legal Proceedings”. Payments of \$159,665.78 for “Liquidators Remuneration”, \$65,831.81 for “Legal Fees” and \$23,626.30 for “GST Paid (Received)” are shown.

13 It is apparent from the evidence to this point that Mr Moss’ fees and the legal fees are the reason, having regard to the receipts and payments to date, there are not monies available to satisfy, or partly satisfy, GP No 1’s debt to GP No 2. It is also apparent that GP No 2 wishes to challenge Mr Moss’ entitlement to those fees. To this point, Mr Moss has not filed any evidence in support of his fees. Mr Moss’ counsel said that if an inquiry is ordered, he will go into detail about his remuneration and “he will be open and transparent with the court about it”. GP No 1 and Mr Moss submit that GP No 2 face a significant hurdle in obtaining an order for an inquiry, or the payment of any monies as a result of an inquiry, because there are other unpaid creditors who are, or may well be, entitled to payment before GP No 2. Those unpaid creditors are the Australian Taxation Office (the ATO) or employees who have claims in relation to superannuation and those claims (so it is submitted) rank ahead of GP No 2.

14 I return to Mr Moss’ affidavit with those observations in mind.

15 Mr Moss deposes to the fact that the ATO has lodged a proof of debt in the liquidation of GP No 1. On 22 June 2018, the ATO lodged an updated proof of debt in the amount of \$312,813.24 in respect of the Superannuation Guarantee Charge payable by GP No 1. This amount was said by the Commissioner of Taxation to be owing as at 9 October 2013 and the Superannuation Guarantee Charge was said to relate to the period from 1 July 2011 to 30 September 2012. The charge is said to be entitled to priority equal to other employee entitlements under s 556(1)(e) of the Corporations Act.

16 The Commissioner of Taxation’s proof of debt replaced an earlier proof of debt dated 25 October 2013 which claimed the amount of \$300,967.25 for the period from 1 July 2011 to 30 June 2013 and \$12,098.64 for a general interest charge to 9 October

2013. It was this proof of debt which was current when GP No 1 and Mr Moss received the payment of \$223,769.27.

17 Mr Moss states that there are numerous employees who have lodged proofs of debt in the liquidation of GP No 1 in respect of wages and superannuation. He produced a true copy of the current list of creditors prepared by his firm.

18 Mr Moss states that GP No 2 appears to be under the misapprehension that GP No 1 does not owe any funds to the ATO in respect of superannuation. He expresses the opinion that this misapprehension appears to stem from the issue of the periods to which the particular debts relate. He states that GP No 1 was incorporated to employ workers and provide labour services to the business conducted by APHL. GP No 1 commenced hiring employees for this purpose in June 2011 and ultimately employed about 94 people. GP No 1 continued to employ the employees until 1 July 2012 when the employees were purportedly transferred to GP No 2 by agreement. Mr Jacobs was appointed as the voluntary administrator of GP No 2 on 1 March 2013, and subsequently became the liquidator of the company on 30 May 2013. Through his lawyers, Mr Jacobs has indicated that through the liquidation of GP No 2, all employee entitlements relating to the employees for the period 1 July 2012 to 1 March 2013 have been paid to the ATO. Mr Moss makes the point that the superannuation debt claimed by the ATO in the liquidation of GP No 1 relates to the period from 1 July 2011 to 30 September 2012. Mr Moss makes the point that, in accordance with the ATO proof of debt, the superannuation proof of debt for the period 1 July 2011 to 30 June 2012 was not paid in the liquidation of GP No 2 and is properly owing by GP No 1.

19 Mr Moss states that he does not know the current financial position of GP No 2, except that it is a company in liquidation. On 29 June 2018, Mr Moss instructed his solicitors to write to GP No 2 seeking security for costs. No information about GP No 2's financial position was provided in response to that letter. Mr Moss states that given that there is \$394.12 on hand as at 21 June 2018 in the liquidation of GP No 1 and that he had



been joined to the proceeding personally, it may be necessary for him to expend his own personal funds in order to defend the claim. Mr Moss is concerned that he may not be able to recover any of his costs if he is successful in defending the proceeding and obtains an order for costs in his favour.

20 GP No 1 and Mr Moss also rely on an affidavit of their solicitors which estimates the costs of the proceeding, including a hearing, to be in the region of \$19,525 plus GST and \$21,477.50 inclusive of GST. GP No 2 made no submissions on quantum.

21 GP No 1 and Mr Moss also rely on an affidavit of Mr Henry Kowk who is a registered liquidator. He works for Mr Moss' firm. He produced proofs of debt lodged in the liquidation of GP No 1 by employees claimed to be owed unpaid superannuation. He states that his firm has requested further documentation from the ATO in relation to the superannuation owed by the GP No 1, but his firm is yet to receive the documentation.

22 GP No 2 has filed two affidavits in response to the application.

23 In his affidavit, Mr Jacobs states that at the time of his appointment as administrator of GP No 2 on 1 March 2013, there were a group of workers employed by GP No 2 who he believed included the employees whose proofs of debt are attached to Mr Kwok's affidavit and in respect of whom there were unpaid superannuation entitlements at one stage owing to the ATO. Mr Jacobs states that prior to his administration of GP No 2, the employees were transferred from GP No 1 to GP No 2 as a result of which he was responsible for the payment of their then unpaid employee entitlements. Mr Jacobs states that it was his understanding at the time of taking up the administration of GP No 2 that all employee entitlements owing to the employees had been paid, other than certain unpaid superannuation due in respect of the employees. After Mr Jacobs became the liquidator of GP No 2, he received a proof of debt from the ATO which set out the amounts owing to the ATO in respect of the unpaid superannuation entitlements of the employees. On 22 October 2013, Mr Jacobs sent a letter to the ATO

confirming that he had received a proof of debt from the ATO for the Superannuation Guarantee Charge for the period 1 July 2012 to 30 May 2013 of \$176,836.10. Mr Jacobs said that GP No 2 paid that amount which he understood to be the payment of all unpaid superannuation entitlements of the employees. He understood that by making the payment there were no longer any debts owed in respect of the employees for any employee entitlements whether as employees of GP No 2, GP No 1 or any related entity. He states that in light of those matters, he does not understand how it is that the ATO claims any amount is owing by GP No 1 or any related entity in respect of unpaid superannuation for employees. Mr Jacobs states that he has sought to clarify the position with the ATO, but without success. He sets out the steps which he has taken.

24 Mr Jacobs refers to the distributions apparently made to Mr Moss. He states that no part of the recovery of \$223,769.27 has been paid to the ATO or creditors. In particular, he refers to the amount of \$159,665.78 by way of liquidator's remuneration, the amount of \$65,831.81 by way of legal fees, and an amount of \$9,090.91 identified as a payment for "professional fees". Mr Jacobs states that, in his opinion, the issue raised in this case is whether Mr Moss should have paid himself some or all of that money in respect of the proceedings in the *Powell* judgment, or whether that money ought to have been paid to him as liquidator of GP No 2.

25 Mr Jacobs states that GP No 2 currently has no funds available to it and that, if he is required to provide security for costs, he will not be able to proceed with the matter unless he funds it from his firm's resources. He states that, in his opinion, the reason why GP No 2 is in this position of impecuniosity is that it has not received the payment which he believes is due to it from the *Powell* judgment under GP No 2's security.

26 In a further affidavit sworn on 28 September 2018, Mr Jacobs states that he sold the business of GP No 2 on 30 May 2013 for \$5 million, of which approximately \$3.5 million was paid to secured creditors and the balance was used to pay administration creditors, employee entitlements and stamp duty of approximately \$0.5 million to the

Northern Territory government for the previous sale of the business from GP No 1 to GP No 2. Mr Jacobs states that as at 22 February 2013, according to the records of GP No 2, there were 45 unsecured creditors said to be owed \$403,092.19. Mr Jacobs states that he has not called for proofs of debt from the unsecured creditors at this time as there were insufficient funds realised from the sale to pay a dividend to them. He noted that eight of the 45 creditors are said to have been paid out by Ellies Pearling Company Ltd (in liquidation) and that there is a column entitled “Statement of Claim” that shows a reduced total amount of \$388,209.01. Mr Jacobs states that until he calls for proofs of debt, he is unable to advise the Court further in relation to the amount of the unsecured creditors.

27 Mr Jacobs states that following the sale of GP No 2’s business, the only remaining matter in the liquidation of the company has been the recovery of the debt owed by GP No 1 to the company which is the subject of this proceeding and the distribution of those funds to the unsecured creditors.

28 Mr Jacobs states that in relation to his fees as liquidator, following the sale of GP No 2’s business on 30 May 2013, and payment to employees, ATO and secured creditors, there were no fees outstanding to him or his firm. He states that since about 27 February 2017, he has been monitoring the progress of the application by the liquidators of Arafura Pearling Company Ltd to distribute the management investment scheme funds in the event that any funds were paid to GP No 1 and were recoverable by GP No 2 under its security interest, as well as corresponding with GP No 1 and Mr Moss about that recovery. He states that, as a result of this process, he has accrued fees in relation to the security recovery since 21 February 2017 of \$65,463.62, including GST comprised of fees owing to him of \$39,957.50, solicitors’ fees of \$15,592.50, and counsel fees of \$9,913.62.

### **The Application**

29 Under s 1335(1) of the Corporations Act, the power to order security for costs is engaged if there is credible evidence which establishes that there “is reason to believe

that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence”.

30 GP No 2 is in liquidation and has no funds available to it. GP No 2 accepts that it has no funds available to meet a costs order. There is no need to consider r 19.01 of the Rules. The power to order security for costs is engaged.

31 The application for security for costs was made about six weeks after the Originating process was issued. It has been made promptly.

32 With respect to the merits of the claim, GP No 2 submits that it has a strong claim. It is a secured creditor. It submits that the defendants’ reference to possible employee entitlements and superannuation is irrelevant for three reasons. First, it submits that it has a fixed charge over the amount of \$223,769.27 paid to GP No 1. I was taken to the General Security Agreement and submissions were made as to the effect of its provisions. I am not prepared to make a final decision on the effect of those provisions at this stage. If anything, I would be disposed to accept the submissions of GP No 1 and Mr Moss that “s 561 creditors” would have priority over GP No 2’s secured interest. Secondly, GP No 2 submits that the funds received by GP No 1 were not in fact paid to “s 561 creditors”, but to Mr Moss and his lawyers. That is true, but it does not meet the point that the Court may not order an inquiry at GP No 2’s request if it will not, or may well not, result in any recovery of monies by GP No 2. Thirdly, GP No 2 submits that the Court should act on Mr Jacobs’ statement that there are no outstanding employee debts. Mr Jacobs does say that, but in view of the letters from the ATO and employee claims, I would not be prepared to so find on the evidence as it presently stands.

33 GP No 2’s claim faces the hurdle identified by GP No 1 and Mr Moss. As the evidence presently stands, GP No 2’s case appears stronger at the next level, that is, assuming it overcomes the hurdle previously identified. GP No 2 accepts that Mr Moss is entitled to reimbursement and a lien to secure reimbursement for the cost of his time and

any outgoings associated with the creation of a fund for the benefit of creditors in accordance with the well-known principle in *Re Universal Distributing Co Ltd (in liq)* [1933] HCA 2; (1933) 48 CLR 171. However, it submits that there is no evidence that expenditure, or substantial expenditure, by Mr Moss was required. GP No 2 refers to GP No 1's very limited role in the proceeding which is the subject of my reasons in the *Powell* judgment (at [3]-[5]).

34 At one level, it is correct to say that GP No 2's present impecuniosity is due to the failure to pay by GP No 1 and Mr Moss.

35 With respect to whether the proceeding will be stifled if security is ordered, it is clear that GP No 2 does not have the funds to provide security and it would seem unlikely the unsecured creditors could be persuaded to advance funds in light of the relatively small amount involved and the monies which would first need to be paid to Mr Jacobs and GP No 2's solicitors. It seems to me that if security is ordered, then this proceeding will proceed only if Mr Jacobs decides to fund it.

36 Nevertheless, I have decided that security for costs in the mount of \$15,000 should be provided. In my opinion, GP No 1 and Mr Moss should not be required to defend the proceeding in the knowledge that even if successful, they will not recover their costs.

### **Conclusion**

37 GP No 2 should provide security for costs in the amount of \$15,000. I will hear the parties as to the appropriate orders.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate:

Dated: 6 December 2018