Supreme Court

New South Wales

Case Name:	Devine v Liu; Devine v Ho
Medium Neutral Citation:	[2018] NSWSC 1453
Hearing Date(s):	7 September 2018
Date of Orders:	28 September 2018
Decision Date:	28 September 2018
Jurisdiction:	Equity - Corporations List
Before:	Parker J
Decision:	The orders of the Court are: 1. Direct that within 21 days the defendants bring in Short Minutes of Order: a) giving effect to this judgment; and b) providing, in the event of any disagreement as to the form of those orders, for directions for the filing of any necessary evidence and submissions with a view to a hearing to be fixed by arrangement with my Associate.
Catchwords:	PRACTICE AND PROCEDURE – applications – pleadings and particulars – application to amend statement of claim – strike out and summary judgment application – statement of claim pleaded claim concerning a director's duty to prevent insolvent trading by company under Corporations Act 2001 (Cth), s 588G – where statement of claim did not plead how and when company incurred relevant debts – where statement of claim did not particularise the nature of reliance on the presumption of insolvency under Corporations Act 2001 (Cth), s 588E(4) PRACTICE AND PROCEDURE – applications – security for costs order – general principles as to

ordering security for costs against plaintiff liquidator – litigation funding – solicitors for the liquidator conducting proceedings on a “no win, no fee” basis

PRACTICE AND PROCEDURE – applications – security for costs order – general principles as to ordering security for costs against plaintiff liquidator – liquidator and company as co-plaintiffs – whether the company is a necessary party to voidable transaction and insolvent trading claims under the Corporations Act 2001 (Cth) – discussion of whether the joinder of a liquidator as co-plaintiff prevents the Court from ordering security even if co-plaintiff company is insolvent

PRACTICE AND PROCEDURE – costs – costs payable forthwith – difficulty in assessing costs in circumstances where statement of claim struck out but with leave for the plaintiff to re-plead claim

Legislation Cited:

Civil Procedure Act 2005 (NSW), s 58
Companies Act 1862 (UK), s 69
Companies Act 1981 (Cth), s 451
Companies (Winding Up) Act 1890 (UK), s 10
Corporations Act 2001 (Cth), ss 9, 95A, 286, 565, 588C, 588E, 588FA, 588FB, 588FE, 588FF, 588G, 588J, 588M, 1335
Supreme Court Act 1970 (NSW), s 23
Uniform Civil Procedure Rules 2005 (NSW), r 42.21
Winding Up Act, RSC 1886 (Can), c 129, s 31

Cases Cited:

Ariss v Express Interiors Pty Ltd (in liq) [1996] 2 VR 507
Australian Securities & Investments Commission v Plymin (2003) 175 FLR 124; [2003] VSC 123
Bell Wholesale Co Pty Ltd v Gates Export Corporation (1984) 2 FCR 1
Bibra Lake Holdings Pty Ltd v Firmadoor Australia Pty Ltd (1992) 7 WAR 1
Coulls v Bagot's Executor & Trustee Co Ltd (1967) 119 CLR 460; [1967] HCA 3
Cowell v Taylor (1885) 31 Ch D 34
Green v CGU Insurance Ltd (2008) 3 BFRA 133; [2008] NSWSC 449
Green v CGU Insurance Ltd (2008) 67 ACSR 105;

	[2008] NSWCA 148 Hession v Century 21 South Pacific Ltd (1992) 28 NSWLR 120 Horn v York Paper Co Ltd (1991) 23 NSWLR 622 Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd (2009) 239 CLR 75; [2009] HCA 43 John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1; [2010] HCA 19 Kent v La Communauté des Soeurs de Charité de la Providence [1903] AC 220 Longjing Pty Ltd v Perpetual Nominees Ltd [2017] NSWSC 1690 Malcolm v Hodgkinson (1873) LR 8 QB 209 Maples v Hughes [2002] NSWSC 617 Pleash v Tucker [2018] FCA 168 Re Kingston Cotton Mill Company (No 2) [1896] 1 Ch 331 Re Reid Murray Holdings Ltd (in liq) [1969] VR 315 Re Strand Wood Company Ltd [1904] 2 Ch 1 Re W Powell & Sons [1896] 1 Ch 681 Re Wilson Lovatt & Sons Ltd [1977] 1 All ER 274 Silvia v Brodyn Pty Ltd (2007) 25 ACLC 385; [2007] NSWCA 55 Street v Luna Park Sydney Pty Ltd [2006] NSWSC 1317 Woolworths Ltd v About Life Pty Ltd (No 2) [2018] NSWSC 1340
Category:	Procedural and other rulings
Parties:	2017/310165 Trent Andrew Devine (First Plaintiff) Palace Memories Pty Ltd (in liquidation) (Second Plaintiff) Judia Ling Suet Ho (Defendant) 2017/299088 Trent Andrew Devine (First Plaintiff) Palace Memories Pty Ltd (in liquidation) (Second Plaintiff) Tony Liu (First Defendant) Judia Ling Suet Ho (Fourth Defendant)
Representation:	Counsel: 2017/310165

A P Cheshire SC (First and Second Plaintiffs)
T D Castle / S Alexandre-Hughes (Defendant)

2017/299088
A P Cheshire SC (First and Second Plaintiffs)
D A Smallbone / D Ratnam (First Defendant)
T D Castle / S Alexandre-Hughes (Fourth Defendant)

Solicitors:
2017/310165
Mills Oakley (First and Second Plaintiffs)
Resolve Litigation Lawyers (Defendant)

2017/299088
Mills Oakley (First and Second Plaintiffs)
Maxwell & Co (First Defendant)
Resolve Litigation Lawyers (Fourth Defendant)

File Number(s): 2017/299088; 2017/310165

Publication Restriction: Nil

JUDGMENT

1 This judgment is concerned with four interlocutory applications in two actions pending in the Court. The actions are brought under the *Corporations Act 2001* (Cth), Part 5.7B, which concerns the recovery of property or compensation for the benefit of creditors of insolvent companies. Statutory references in the balance of this judgment are, unless otherwise stated, references to the Act.

2 Palace Memories Pty Ltd ("the Company") was incorporated in June 2011. Its business was to build and then to operate a restaurant called China Republic at World Square in Sydney. The restaurant opened in November 2013. The business failed. In October 2014 the directors appointed Trent Andrew Devine as administrator. In April 2015, the Court ordered the Company be wound up in insolvency and appointed Mr Devine as liquidator. Although the Company is also a party to the actions, I will for convenience refer to them as actions brought by Mr Devine.

3 Two of the directors of the Company were Tony Liu and Judia Ling Suet Ho. Australian Securities and Investments Commission filings show Mr Liu as

having been a director from the incorporation of the Company in June 2011 until the appointment of the administrator in October 2014. Ms Ho is recorded as having been a director from September 2013 (two months before the restaurant opened) until October 2014.

4 The first of the actions was commenced in this Court early in October last year. The action was initially commenced by Mr Devine as liquidator of the Company as sole plaintiff. Subsequently, the Company was joined as second plaintiff. Mr Liu is the first defendant and Ms Ho is the fourth defendant. The second and third defendants are other directors of the Company who have not been served and have not participated in the proceedings. The action alleges contraventions of the directors' duties to prevent insolvent trading (s 588G). The amount claimed (not including interest) is approximately $1.6 million (Mr Devine accepts that the claim against Ms Ho is limited to approximately $600,000 because she was a director for a lesser period).

5 The second action was commenced nine days later in the Local Court by Mr Devine in his capacity as liquidator of the Company as first plaintiff and the Company as second plaintiff. Ms Ho is the defendant. The action concerns five payments totalling $25,000 made by the Company to Ms Ho between 27 June and 11 August 2014. The action seeks to recover those payments as voidable transactions under s 588FE; the payments are said to have been unfair preferences (s 588FA) and also uncommercial transactions (s 588FB).

6 Mr Liu and Ms Ho were initially commonly represented. Subsequently the view was taken that a conflict, or potential conflict, had arisen which prevented them being commonly represented. Mr Liu retained new solicitors in late March this year.

7 The insolvent trading case was initially commenced by Originating Summons. The claim was based on s 588J. This was incorrect. The solicitors for Mr Liu and Ms Ho also contended that the claims should be pleaded. In January 2018, a Statement of Claim was filed on behalf of Mr Devine and the Company; the Originating Process was formally amended in February so as to join the Company as second plaintiff and so as to rely on s 588M rather than s 588J.

8 Pursuant to agreed directions, particulars were provided in March. The solicitors for Mr Liu were not satisfied, contending that the pleading and particularisation of the claims remained inadequate. Mr Devine's solicitors tried to head this off by proposing that the plaintiffs serve all of their lay evidence. Consent directions were made accordingly. The evidence was eventually served in June. Mr Devine's solicitors also propounded an amended version of the Statement of Claim which the solicitors for Mr Liu maintained was still inadequate.

9 An application has now been made on behalf of the plaintiffs to amend the Statement of Claim, by interlocutory process filed on 27 June. The interlocutory process names both Mr Liu and Ms Ho as respondents. A cross-application was made on behalf of Mr Liu to strike out the existing Statement of Claim and to have the proceedings summarily dismissed, by interlocutory process filed on 11 July. I will refer to these as the "pleading applications". No equivalent cross-application has been made on behalf of Ms Ho.

10 The third application with which I am concerned is an interlocutory process filed for Ms Ho on 26 June in which she sought to transfer the voidable transaction case from the Local Court into this Court. The transfer order was made, Mr Devine neither consenting nor opposing, on 12 July. The remaining issue under the interlocutory process concerns the costs of the application.

11 Finally there are two applications, by Mr Liu and Ms Ho respectively, for security for costs. An application for security was filed on their behalf on 8 February, when they were commonly represented. Separate applications by way of interlocutory process were filed on 14 July. In her security application, Ms Ho seeks security for her costs of the voidable transaction case as well as of the insolvent trading case.

Pleading applications

12 Mr Devine called for proofs of debt on being appointed as administrator of the Company in October 2014. Most of the proofs appear to have been lodged before the first meeting of creditors which took place on 19 November. Mr Devine ruled on the proofs for voting purposes, both at that meeting and

subsequent meetings. But he has not admitted that any of the debts claimed are proper liabilities of the company.

13 The proofs of debt were exhibited to an affidavit of Mr Devine sworn in October 2017 and filed in support of the originating process. The proofs can be summarised as follows, using the classification adopted by Mr Devine:

Secured Creditor	One claim for $901,506
Employee (priority)	A claim from the Commission of Taxation for unpaid superannuation guarantee levy obligations of $141,571 together with thirty five individual claims from employees totalling $164,507
Employee (related party)	Three claims totalling $188,755
Ordinary unsecured Creditor	Twenty five claims totalling $2,139,685

14 Some supplementary documentary material has been obtained for some of the claimed debts and was exhibited to a further affidavit from Mr Devine in June 2018. No further lay evidence has been served in support of Mr Devine's case.

15 Among the claims by ordinary unsecured creditors, the largest was from Standard Constructions Pty Limited ("Standard"), the company which carried out the building work on the restaurant. Standard claimed $1,877,268, consisting of $987,250 in liquidated damages and the balance of $890,018.

16 Standard's proof of debt was supported by a statement of account dated 30 September 2014 which in turn referred to a payment claim dated November 2013, a credit for progress payment in February 2014 of $25,000 and a tax invoice for variation and extra works after 15 October 2013 for $15,565. Copies of the payment claim, the invoice and the credit were attached.

17 According to the payment claim, the original contract works figure was $2.12 million. The claim included $765,770 in variations less $141,351 in “negative” variations, plus the retention ($53,000), and interest ($128,810) against which were allowed payments under the contract totalling $2,098,800 and variation payments totalling $207,450. Standard’s proof of debt did not attach a copy of the building contract or any documents to substantiate the variation and interest claims.

18 At the time of the first meeting of creditors in November 2014, Standard had not lodged its formal proof of debt, which was not lodged until March 2015. An informal claim was lodged, which is not in evidence but which apparently contained slightly different figures from those in the later formal proof of debt. Mr Devine disallowed the liquidated damages and interest components of that claim for voting purposes, allowing it in the amount of $850,957.

19 I was not taken to any further evidence in support of Standard’s claim in the supplementary documents identified by Mr Devine. I was told that Mr Devine may have a couple of pages from the contract, but these were not in evidence.

20 The other claims by ordinary unsecured creditors were mainly for debts allegedly arising out of the supply of goods or services to the Company for the purposes of its business. The two largest were for power ($101,000) and gas ($29,000).

21 I was taken to three of the employee proofs of debt in the course of submissions. The debts claimed were identified as for wages and annual leave. The date of claim was shown as a range of dates extending over months and in some cases going back to 2012. One of the claims was for $41,799. It is unclear from the proofs whether the employees in question were claiming that the amounts allegedly due represented amounts which had not been paid at all or whether they were claiming they had been paid less than their legal entitlement for work done.

22 The proof of debt form provided for “substantive evidence” to be attached with a “yes/no” indication. In each case this was answered “yes (if bank statement & roster is needed)”. But the proofs evidence did not include any attachments and the wording of the answers suggests that in fact supporting documents

were not attached but the bank statement and roster were said to be available if necessary. There was no evidence to explain this. What is clear is that no statements were provided to verify that the employees had in fact worked, and had not been paid or paid in full, for the periods referred to. Nor was there any evidence of any relevant records of the Company which would support the claims.

23 I was also taken to two of the preferred employee claims. One was for $35,000 said to be for the six months from 1 September 2013 to February 2014. The "substantive evidence" question was answered "yes" but no attachments were included.

24 The other claim was for $129,450. There were three supporting documents. One was a letter on "China Republic" letterhead dated 17 March 2014 acknowledging a "wage" owed to the claimant of $112,492 and undertaking to repay $10,000 per month "[depending] on the financial situation". The second was a handwritten list said to be "unpaid wages". The third was a shareholder's agreement between Mr Liu, the claimant, the Company and another individual. There was nothing to indicate how these documents fitted together nor was there any submission on the subject from counsel for Mr Devine.

Incurring of debts

25 The relevant parts of s 588M are set out in full at [144] below. Critical elements of the cause of action are:

(1) a debt has been incurred by the company;

(2) the time the debt was incurred, the company was insolvent;

(3) the creditor has incurred loss or damage "in relation to" the incurring of the debt; and

(4) the director contravened s 588G(2) or s 588G(3).

26 Section 588G provides:

> **Director's duty to prevent insolvent trading by company**
>
> (1) This section applies if:
>
> (a) a person is a director of a company at the time when the company incurs a debt; and

(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and

(c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and

(d) that time is at or after the commencement of this Act.

(2) By failing to prevent the company from incurring the debt, the person contravenes this section if:

(a) the person is aware at that time that there are such grounds for so suspecting; or

(b) a reasonable person in a like position in a company in the company's circumstances would be so aware.

(3) A person commits an offence if:

(a) a company incurs a debt at a particular time; and

(aa) at that time, a person is a director of the company; and

(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and

(c) the person suspected at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts (as in paragraph (1)(b)); and

(d) the person's failure to prevent the company incurring the debt was dishonest.

27 The Statement of Claim pleads:

9. Between 1 November 2013 and 16 October 2014 (**Relevant Period**), the Company incurred debts to unsecured creditors in the sum of $1,643,390.00 which remain outstanding (**Debts**).

Particulars

(i) Schedule 2 contains a table listing the unsecured creditor claims as at 16 October 2014.

(ii) The plaintiffs rely on the proofs of debt submitted by creditors of the Company which are exhibited at pages 739 to 1051 of Exhibit TD-1 to the affidavit of Trent Andrew Devine sworn 3 October 2017.

28 Schedule 2 is a table setting out each creditor's classification, name and the amount of the alleged debt. The debts shown do not exactly reconcile with the proofs of debt in evidence, but they are sufficiently close for the purposes of this judgment.

29 After pleading the insolvency of the Company (addressed in more detail below) the Statement of Claim pleads the claim against Mr Liu in the following terms

(the pleading against Ms Ho is in the same terms except that it refers to the fourth defendant rather than the first defendant):

> 13. The first defendant:
>
> a) was a director of the Company at the time that the Debts were incurred by the Company;
>
> b) failed to prevent the Company from incurring the Debts; and
>
> c) was aware at the time that the Debts were incurred that there were reasonable grounds for suspecting that the Company was insolvent or would become so insolvent.
>
> 14. Further, or in the alternative to paragraph 13(c), a reasonable person in a like position to the first defendant in a company in the Company's circumstances would have been so aware that there were grounds for suspecting that the Company was insolvent or would become so insolvent.
>
> 15. By reason of the matters pleaded at paragraphs 13 and 14, the first defendant has contravened subsection 588G(2) of the Act.
>
> 16. Each of the creditors referred to in the table of the Debts listed in Schedule 2 has suffered loss or damage in relation to their debts because of the insolvency of the Company.
>
> **Particulars**
>
> The creditors listed in Schedule 2 have not been paid an amount equal to the amount of the Debts.
>
> 17. Each of the Debts was wholly or partly unsecured when the creditor suffered the loss or damage.
>
> 18. In the premises, pursuant to section 588M of the Act, the first plaintiff as liquidator of the Company may recover from the first defendant, as a debt due to the Company, an amount equal to the amount of the Debts.

30 The proposed Amended Statement of Claim pleads:

> 9. Between 28 June 2011 ~~1 November 2013~~ and 16 October 2014 (**Relevant Period**), the Company incurred debts to unsecured creditors in the sum of $1,643,390.00 which remain outstanding (**Debts**).
>
> **Particulars**
>
> (i) Schedule 2 contains a table listing the unsecured creditor claims as at 16 October 2014.
>
> (ii) The plaintiffs rely on the proofs of debt submitted by creditors of the Company which are exhibited at pages 739 to 1051 of Exhibit TD-1 to the affidavit of Trent Andrew Devine sworn 3 October 2017.
>
> (iii) Schedule 3 contains a table listing the unsecured creditor claims as at 16 October 2014 with respect to Debts that were incurred on or after 16 September 2013.

31 Schedule 3 is in the same form as the existing Schedule 2 but includes only some of the debts in Schedule 2. The allegations against Mr Liu and Ms Ho at

paragraphs [13] to [18] are unchanged, except that the allegations against Ms Ho now refer to Schedule 3, not Schedule 2.

32 In effect, the only two changes in the proposed amended pleading are to confirm that the claim against Mr Liu goes back to June 2011, and to identify and list separately the debts the subject of the claim against Ms Ho. The structure of, and level of detail in, the pleading are otherwise unchanged.

33 Counsel for Mr Liu argued that this form of pleading is inadequate to specify the relevant debts or (crucially) when such debts were incurred. In response, counsel for Mr Devine acknowledged a lack of detail but characterised it as a matter of detail which could be filled in later as the proceedings continued and further relevant documents came to light. Counsel referred to the possibility of issuing subpoenas.

34 Counsel for Mr Devine also forcefully submitted that Mr Devine had satisfied himself that the claim was a valid one and that the Court should not shut him out from pursuing it. Counsel repeatedly asserted that Mr Devine had considered the claim carefully and had determined to pursue it in accordance with his obligations as liquidator.

35 If by these submissions counsel was suggesting that the Court should defer to Mr Devine's judgment in considering the adequacy of the pleadings and particulars, I cannot agree. The Court is always sympathetic to the difficulties liquidators may have in trying to recover monies on behalf of creditors against recalcitrant or dishonest former officers of companies in liquidation. But when proceedings are brought by a liquidator on behalf of the company, the rules are the same as they are for any other litigant. It does not matter whether Mr Devine considers he is acting responsibly or not. The only question is whether Mr Devine's pleadings comply with the Court's rules.

36 Although each creditor's claim is pleaded in Schedule 2 as a single debt, the evidence makes it clear that this is incorrect. To take the most significant example, the claim by Standard includes multiple components each of which would be a debt in a separate amount and incurred at a separate time.

37 Furthermore, counsel for Mr Liu is plainly correct in submitting that the failure to plead when the debts were incurred is a fundamental flaw. The date on which the debt is incurred is an essential aspect of the claim. Unless that date is known, it is impossible to evaluate whether the Company was insolvent or whether the elements of contravention in s 588G are made out.

38 The question of when a debt is incurred may be a complex and contestable one. It is in my view essential that the Statement of Claim plead not only when it was that each debt was allegedly incurred but also how it was that the debt was incurred. The relevant contractual terms and the facts which give rise to the relevant debt should be pleaded so that they can be admitted or issue can be joined.

39 It is not always necessary that this should be lengthy. In a case of goods sold and delivered or services supplied the debt will, in many cases, arise at the date of delivery: *Australian Securities & Investments Commission v Plymin* (2003) 175 FLR 124; [2003] VSC 123 at [517]. It should be possible to group claims of this type together and plead the incurring of the debts by reference to the dates the goods were delivered or the services were supplied, as the case may be, in tabular form. Where, as in this case, there are multiple claims for the employee claims may be more complicated, especially if the employees are contending that they have been underpaid for work actually done. But there seems no reason in principle why these too could not be pleaded in a tabular form.

40 On the other hand, in my view it will be necessary to plead the incurring of the alleged debt(s) to Standard claim in some detail. This will include pleading the relevant clauses of the contract and the facts which give rise to the various different components of the claims, such as the undertaking of the building work. But that is no hardship. The amount being claimed is over $890,000. I do not see why Mr Devine should expect to plead a claim for this amount in less detail than would be required than if Standard were suing the Company on the contract.

41 In my view both the current version of the Statement of Claim and the Amended Statement of Claim are plainly inadequate in this regard. The deficiencies are matters of pleading not merely of particulars.

Insolvency

42 The other major complaint by counsel for Mr Liu concerned the allegation of insolvency. The Statement of Claim pleads:

> 10. Throughout the Relevant Period, the Company:
>
> (a) failed to keep financial records as required by subsection 286(1) of the Act; and/or
>
> (b) failed to retain financial records for the 7 years required by subsection 286(2) of the Act.
>
> 11. In the premises, the Company is presumed to have been insolvent throughout the Relevant Period pursuant to subsection 588E(4) of the Act.
>
> 12. Further, or in the alternative, the Company was insolvent within the meaning of section 95A of the Act at the time of incurring the Debts or became insolvent by incurring the Debts or by incurring at that time debts including the Debts.
>
> **Particulars**
>
> (i) The first plaintiff's investigations into the financial affairs of the Company have revealed that the Company was insolvent as at 1 November 2013 and continued to be insolvent until the date of the appointment of the first plaintiff as voluntary administrator on 16 October 2014.
>
> (ii) The plaintiffs rely on the affidavit of Trent Andrew Devine sworn 3 October 2017 with respect to the insolvency of the Company.
>
> (iii) Further particulars may be provided prior to trial.

43 As pleaded, the allegation of insolvency is put in two ways. First, there is an allegation of presumed insolvency in paragraphs 10 and 11 based on contravention of s 286. Alternatively, there is an allegation of actual insolvency within the meaning of the statutory definition in s 95A in paragraph 12. The allegation of presumed insolvency during the "Relevant Period" is defined as the period between 1 November 2013 and 16 October 2014 (see [27] above). The allegation of actual insolvency is not limited in time, although the particulars refer only to the period from 1 November 2013 to 16 October 2014.

44 The Amended Statement of Claim pleads insolvency in the same terms, except that in paragraph 12 the debts are identified as those listed in Schedule 3 (which are those allegedly incurred from 16 September 2013). The effect of the amendments overall is twofold. First (by amendment of the "Relevant Period"

defined in paragraph 9: see [27] above), the period of presumed insolvency is extended back from November 2013 to June 2011; and, second, the Company is alleged in fact to have been insolvent from 16 September 2013 onwards (albeit that the particulars continue to refer only to the period after 1 November 2013).

45 Section 95A provides:

> **Solvency and insolvency**
>
> (1) A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.
>
> (2) A person who is not solvent is insolvent.

46 Sub-section 588E(4) provides:

> (4) Subject to subsections (5) to (7), if it is proved that the company:
>
> (a) has failed to keep financial records in relation to a period as required by subsection 286(1);
>
> …
>
> the company is to be presumed to have been insolvent throughout the period.

47 Sub-section 286(1) provides:

> (1) A company, registered scheme or disclosing entity must keep written financial records that:
>
> (a) correctly record and explain its transactions and financial position and performance; and
>
> (b) would enable true and fair financial statements to be prepared and audited.
>
> The obligation to keep financial records of transactions extends to transactions undertaken as trustee.

48 The term “financial records” is defined in s 9 as follows:

> "**financial records**" includes:
>
> (a) invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and
>
> (b) documents of prime entry; and
>
> (c) working papers and other documents needed to explain:
>
> (i) the methods by which financial statements are made up; and
>
> (ii) adjustments to be made in preparing financial statements.

49 The following particulars were sought of the insolvency allegation:

2. Please identify each financial record which it is alleged the Company failed to keep and/or retain.

3. In respect of each financial record in answer to 2 above, please identify the basis upon which it is alleged that the Company failed to keep and/or retain that record.

50 The response was:

2. Our clients allege that the second plaintiff failed to keep and/or retain the following financial records for the period 28 June 2011 to 16 October 2014:

Cheque payment stubs;

Purchase orders;

Sales journal;

Tax return information;

Cashbooks;

Profit and loss trading statements;

Balance sheets;

Cash payment records;

Supplier invoices. Mr Devine has received approximately 21 supplier invoices;

Debtors' ledgers;

Other financial statements;

Bank deposit slips;

Purchase journals;

Any deeds or documents;

Plant register;

Creditors' ledgers. Mr Devine has received partial creditor records for 13 August 2013 to 28 February 2014;

Stock records;

Asset register; and/or

Documentation pertaining to any litigation or pending or potential litigation.

3. Despite requests made to your clients, the only financial records of the second plaintiff that have been provided to Mr Devine by your clients following his appointment as voluntary administrator are as follows:

Records of the fit-out costing;

Banking records;

Partial creditor records;

Some employee records;

Some supplier invoices;

Point of sale system records;

> Microsoft excel spreadsheets for monthly cost reports for the months of December 2013 to May 2014 inclusive; and
>
> Spreadsheets detailing accounts payable reports for the months of November 2013 to February 2014 inclusive.

51 Counsel for Mr Liu argued that the pleadings and particulars left Mr Liu to guess about the Company's case as to insolvency at any particular point. Counsel for Mr Devine again submitted that the issue was one of detail and what had been provided was adequate.

52 In my view, an allegation of actual insolvency under s 95A does not usually require any further particularisation. To sustain the allegation requires establishing that the company is unable to pay its debts as and when they fall due. But this would not usually require the particularisation, as at the date of alleged insolvency, of all of the Company's debts and the dates on which those debts fell due. These would usually be matters of evidence.

53 But clearly it was necessary to avoid surprise for Mr Devine to identify that he wished to rely on the presumption created by s 588E(4) because of alleged failure to comply with s 286. Strictly speaking, I do not think it was appropriate for that to be pleaded as a separate element of the claim. That was only an alternative way of sustaining the allegation of insolvency, which is the allegation to which the defendants are required to plead. The proper course would have been to allege that the Company was insolvent over the relevant period and to provide particulars invoking s 286 for part or all of that period.

54 This pleading detail does not matter to any great extent; the real question for present purposes is what particulars were required of the presumed insolvency allegation other than identifying the period over which it extended.

55 I think it is essential to remember that the allegation of insolvency in this case is not a single allegation; rather it is a series of allegations that the Company was insolvent on scores of dates between June 2011 and October 2014 when the debts the subject of the claim were allegedly incurred. If contested, insolvency must be considered separately for each of those dates.

56 It must also be remembered that the section is not contravened simply because the Company failed to maintain financial records over a period of time. The failure to keep records must have had one of the consequences specified

in the section. There are at least five possibilities. The Company may have failed to keep financial records which (a) correctly recorded and explained its transactions over the period; or (b) correctly recorded and explained its financial position over the period; or (c) correctly recorded and explained its financial performance over the period; or (d) would enable true and fair financial statements for the period to be prepared; or (e) would enable such statements to be audited.

57 In my view, proper particulars of the presumed insolvency allegation would require the identification of which of these alternatives are relied upon; and, for each alternative, the particular records whose absence is relied upon to sustain the allegation. The particulars so far provided are nothing more than a list of allegedly missing records which might or might not relate to one or other of these alternatives. Some other categories (for example, "documentation pertaining to any litigation or pending potential litigation") are completely obscure. In other cases, it is clear that Mr Devine has some records, but what is missing is not specified. Given that Mr Devine has the "banking records", it is not clear how other categories of records (for example, "cheque payment stubs") makes any difference. In my view the particulars are clearly inadequate.

Summary dismissal

58 Counsel for Mr Liu criticised Mr Devine's conduct in putting forward the claim in this form. Counsel submitted that the claim had not been properly considered by Mr Devine. Counsel referred to evidence which showed that he had charged $288,654.81 for the administration so far. Counsel asked why, in the light of that, the defendants have been presented with a whole series of unresolved debt claims and in effect told to work out for themselves what those claims mean.

59 Mr Devine's October 2017 affidavit shows that extensive work was done to reconstruct the Company's accounts and to investigate its solvency position, at least over the last year or so of the Company's operations. In the absence of detailed analysis of Mr Devine's charges, I would not be prepared to criticise him simply on the basis of the amount which he has spent.

60 But I do think that the complaints of the state of the insolvent trading case have force. Many of the debt claims are clearly unsustainable on the material currently before the Court. Counsel for Mr Devine accepted that the proofs of debt are not business records. Accordingly, the proofs of debt themselves do not prove that the employees are owed the monies they claim. If there are no available payroll records then the only way in which those claims can be proved would be by evidence from the employees themselves. Counsel eventually conceded that for those debt claims to be pursued in the insolvent trading case would require further lay evidence and accordingly that, contrary to the Court's direction, Mr Devine's lay evidence is incomplete.

61 Likewise it is clear that the material provided in support of Standard's debt claim falls far short of what is necessary to prove the claim. It is absurd to think that such a claim could succeed without proving the terms of the contract itself. Of course it may be possible for Mr Devine later to subpoena the contract but if he does not have it now how does he even know that the claim is justified?

62 Mr Devine is not dependent upon issuing subpoenas to obtain documents in support of the claim. He can require material to be lodged in support of the proofs of debt. In an appropriate case this would include not only supporting documents but also statutory declarations dealing with any factual matters necessary to establish the incurring of the debt and the date it was incurred. Should this information not be forthcoming Mr Devine is within his rights to reject the proof.

63 In my view a liquidator should not use an insolvent trading action to dump a set of inadequate proofs of debt on a defendant for the defendant to work out which of the debts are valid and when they were incurred. Judgment should be exercised before claims are made against defendants for compensation for losses suffered by alleged creditors, rather than afterwards. Claims which are try-ons should be weeded out and if creditors are not prepared to provide the information necessary to justify the claim, then those claims should fall by the way-side.

64 Despite the unsatisfactory state of affairs, I am not prepared to dismiss Mr Devine's claim summarily. There are substantial claims for supplies of goods

and services which should require little work to be adequately pleaded. There may well be other valid claims. But except for claims for goods and services which are simple in nature, Mr Devine and his solicitors will need to go beyond the proofs, and make an analysis of what information is required to sustain the claims; if those claims are to be pursued they will need to be properly pleaded. In effect, the process will need to start again.

65 What I will do is strike out the existing Statement of Claim and dismiss the application to amend in terms of the existing proposed Amended Statement of Claim but make directions which will permit the liquidator to reconsider the insolvent trading case and, to the extent that he wishes to press it, to reformulate the case with a fresh pleading. Given the scale of the task, and given that Mr Devine may need to go back to the creditors to obtain further information in support of the claim, I will propose to allow at least three months for this to happen.

66 The costs of the pleading applications must follow the event. In addition, I propose to order that the plaintiff pay Mr Liu's and Ms Ho's general costs of the proceedings from the entry of an appearance on his behalf onwards, to reflect the fact that all of the work so far done on the proceedings has effectively been lost.

67 Counsel for Mr Liu sought orders that the costs be assessable forthwith. I deal with this question, and the related question of the imposition of terms on the leave to amend, below.

Costs of transfer application

68 The transfer application followed correspondence between Mr Hing of Resolve Litigation Lawyers on behalf of Ms Ho and Mr Hodges of Moray & Agnew on behalf of Mr Devine. On 29 May Mr Hing wrote to Mr Hodges drawing attention to the factual overlap between the claims against Ms Ho in the insolvent trading action and the claims against Ms Ho in the voidable transaction action. Mr Hing referred in particular to the issue as to whether the company was insolvent at relevant times. He suggested that the overlap could be eliminated by abandoning the allegation that the payments in question were uncommercial

transactions for the purposes of s 588FB, but said that if this was not agreed an application would be made to transfer the proceedings to this Court.

69 In suggesting that the overlap could be eliminated by abandoning the uncommercial transaction litigation, Mr Hing was incorrect. Insolvency is an element of an unfair preference claim under s 588FA as well (see ss 588C and 588E(2)). Mr Hodges pointed this out in his response on 31 May. He also wrote:

> Our clients deny that:
>
> the facts which are relevant to our clients' claims in the Supreme Court Proceedings and the Local Court Proceedings substantially overlap;
>
> running the Supreme Court Proceedings and the Local Court Proceedings concurrently constitutes an abuse of process; and
>
> it is appropriate for the Local Court Proceedings to be transferred to the Supreme Court.
>
> …
>
> Our clients accept that there is a common issue of the Company's insolvency in both proceedings, however, it is our clients' position that the factual matrices of the two proceedings do not otherwise substantially overlap.
>
> …

70 Despite the position taken by Mr Hodges in correspondence, Mr Devine's solicitors did not in fact oppose the making of a transfer order. In my view that was clearly right. The issues in the insolvent trading action encompass the issues in the voidable transaction action. They should plainly be heard together.

71 Counsel for Mr Devine argued, in connection with costs, that it had been reasonable to commence the proceedings. Counsel pointed to the fact that the insolvent trading action involved a much greater sum of money and its factual substratum was far more extensive than that of the voidable transaction action which concerned payments over a period of six weeks totalling only $25,000. But the question is not whether it was legitimate to commence the proceedings in the Local Court. It may well have been appropriate to do so, at least until it was clear what defences were to be raised. But once it was clear that Ms Ho was defending both proceedings, and in particular would be contesting insolvency, the transfer should have happened by consent. Ms Ho was forced

to make a formal application for a transfer order and obtained one. Costs should follow the event.

72 Counsel for Ms Ho sought an order that the costs be payable forthwith. I will return to this issue below.

Security for costs

73 The applications seek orders that security be provided both by Mr Devine as liquidator and by the Company itself. So far as the Company is concerned, the applications are based on the *Corporations Act 2001* (Cth), s 1335. Section 1335 provides that where a corporation is plaintiff and 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, the Court may order security. There is a provision in similar terms in the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR") r 42.21(1)(d).

74 As against Mr Devine, security is sought under UCPR r 42.21(1)(e) which provides:

> (1) If, in any proceedings, it appears to the court on the application of a defendant:
>
> …
>
> (e) that a plaintiff is suing, not for his or her own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so, or
>
> …

75 Counsel for Mr Liu and Ms Ho also contended that the Court has inherent power to order security against Mr Devine under the *Supreme Court Act 1970* (NSW), s 23. Counsel for Ms Ho contended that the *Civil Procedure Act 2005* (NSW), s 58, was a further source of power to do so, and also that if the power under s 1335 were enlivened, s 1335 was wide enough to encompass an order against both the Company and Mr Devine collectively.

76 There is evidence before the Court that Mr Liu has incurred costs up to 28 August in the amount of $55,000. Ms Ho has incurred costs of $57,000 in the insolvent trading action and $27,000 in the voidable transaction action.

77 There is also evidence of Mr Liu's estimated costs for the remainder of the proceedings. The range given is $260,000 to $360,000. An estimate was

provided for Ms Ho's costs up to and including the hearing of these applications only. The estimate given was $32,000.

78 Estimating the future costs of the proceedings is more difficult than usual because, having regard to the outcome of the pleading applications, it is impossible to know at this stage what the future shape of the case will be. In the light of this, all parties agreed that if I considered that security for costs should be awarded, I should fix an amount now by reference to the costs so far incurred and allow the defendants to "top up" the amount of the security at a later stage when the future shape of the case is clearer. Any future top up hearing would be before a Registrar and it would not be open to the plaintiffs to re-agitate the question of entitlement to security.

79 The most recent accounts filed by the liquidator (which cover the period up to April 2018) disclose cash at bank of only approximately $51,000. There is an estimated recovery of $890,000 but this is from the claims against Mr Liu and Ms Ho. The liquidator's estimated own costs of the proceedings and further fees total $260,000.

80 On these figures, it is plain that if an order for costs is made against the Company in favour of Mr Liu or Ms Ho in these proceedings, the Company will not be able to meet it. It was not suggested that requiring security would stultify these proceedings. If this were a claim by the Company and nothing more, it would be a clear case for orders for security in favour of Mr Liu and Ms Ho. The question is what effect the liquidator's involvement in the proceedings has.

Authorities

81 The authorities in this area can be traced back to *Cowell v Taylor* (1885) 31 Ch D 34, a decision of the English Court of Appeal. The case concerned a claim by a trustee in bankruptcy to recover property under an agreement which had been made between the bankrupt and the defendant for the purchase of that property. The evidence showed that the trustee would be unable to meet an award of costs in the defendant's favour. An application by the defendant for security was refused, and this was upheld by the Court of Appeal.

82 Counsel for the appellant contended that security was required where an insolvent person was suing as trustee for another. Counsel relied on a

statement in these terms by Lord Blackburn in *Malcolm v Hodgkinson* (1873) LR 8 QB 209.

83 This proposition was rejected by the Court of Appeal. All of the members of the court emphasised that poverty was in general no bar to a litigant and security could not be required of an insolvent person. There was an exception to this, but the terms were not as broad as those stated in the abstract by Lord Blackburn. Bowen LJ referred to an exception in the case of appeals. He added (at 38):

> There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow. The two most familiar classes of cases of this kind are cases where a person has divested himself of his interest and handed it over to some one else that the transferee may sue for him, and cases where a person who has commenced a suit divests himself of his interest during the course of the suit in order that another person may carry it on for this benefit. Those are the common cases, I do not say that there may not be others.

84 His Lordship pointed out that, on the facts, the plaintiff in *Malcolm v Hodgkinson* had been a mere nominal plaintiff in this sense. The other members of the court agreed, and the appeal was dismissed.

85 This decision of course concerned recovery proceedings in bankruptcy rather than in company liquidation. In *Re W Powell & Sons* [1896] 1 Ch 681 the question of security was raised in proceedings under the *Companies (Winding Up) Act 1890* (UK), s 10. Section 10 relevantly provided:

> (1) Where in the course of the winding up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the Company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the court thinks just.
>
> …

86 The official receiver took out a misfeasance summons claiming recovery of large sums against directors and auditors of the company. There was evidence that certain trade creditors of the company had indemnified the official receiver against his costs of the proceedings.

87 Counsel for the applicants pointed out that the claims could have been made by the company in an action brought in its own name and that the misfeasance summons procedure was simply a convenient alternative to such an action. Counsel also submitted that the liability of the official receiver for costs might ultimately be limited to the assets of the company. In this regard, counsel referred to earlier authority in which a liquidator's liability had been limited in that way on the ground that he had only been doing his duty as liquidator in bringing the proceedings: *Re Kingston Cotton Mill Company (No 2)* [1896] 1 Ch 331 at 350.

88 Romer J (as his Lordship then was) said (at 683):

> I desire to express my opinion that a liquidator who initiates proceedings of this class is at the mercy of the Court as regards being ordered to pay costs at the hearing of the misfeasance summons. This Court undoubtedly has jurisdiction in a case like that to order a liquidator personally to pay costs and in my opinion the Court would do so in any case where it would be just that the liquidator should be ordered to pay the costs. And I think that the Court, in considering whether the liquidator ought or ought not to be ordered to pay the costs personally, would have regard to the fact that an application for an order that he should give security for costs had been made and had been opposed, and that the Court had refused to order security for costs on the ground that there would be jurisdiction at the trial to order him to pay them. It is on that ground and on that ground alone that I refuse in the present case to order the liquidator to give security for costs.

89 *Re Strand Wood Company Ltd* [1904] 2 Ch 1 was a case of voluntary liquidation for the purposes of a reconstruction. The assets and undertaking of the company in liquidation were transferred to a new company which undertook to satisfy the debts and liabilities of the company in liquidation and to indemnify the company, its liquidator and contributories against the costs of legal proceedings and costs and expenses of or incidental to the winding up. The liquidator took out a misfeasance summons against former officers of the company claiming substantial sums of money. The defendants applied for security on the ground that the liquidator would be unable to meet their costs. The application was refused and the defendants appealed.

90 Counsel for the defendants argued that jurisdiction to make an order for security had been accepted in *Powell* but Romer LJ (as he now was) responded in argument that *Cowell* was authority which was opposed to the application. His Lordship added that although it had not occurred to him at the time, he might have decided *Powell* on a ground of want of jurisdiction. Counsel argued in the alternative that the liquidator was a "mere shadow" because the company in liquidation had sold its undertaking to the new company and that this brought the case within the exception stated in *Cowell*. Counsel pointed out that had the proceedings been brought as an action by the company, security would have been required under the then *Companies Act 1862* (UK), s 69 (the forerunner of s 1335).

91 Vaughan Williams LJ said (at 3):

> I am afraid that the practice of the Court is against the appellants and the appeal fails. I wish to say for myself that I personally, while acting as the judge in company matters, have seen many instances of an abuse of the present state of the law, and if this were a new matter I should not be sorry if the Court had power to order security in cases in which it thought that the circumstances were such that security ought to be ordered. The authorities are, however, too strong for me, and we must be content with the practice as it stands.

92 Romer LJ said (at 3):

> I also think that this appeal ought to be dismissed. The liquidator is coming here under a power expressly conferred upon him by Act of Parliament and in the exercise of his statutory duties. It is not suggested that these proceedings by the liquidator are frivolous or improperly taken, and in that state of things, according to the practice of this Court, the liquidator is not bound to give security for costs.

93 Cozens-Hardy LJ said (at 3-4):

> I agree. I think it clear that this case does not come within s. 69 of the Companies Act, 1862. This is not a case of an action by the company; but it is argued that by analogy, where the liquidator comes to the Court under the express provisions of s. 10 of the Companies Act, 1890, we ought to treat him as being in the same position as a plaintiff company. I cannot follow that. The general rule is settled by *Cowell v Taylor* and other cases. It seems to me that we should be going contrary to authority if we required the liquidator to give security for costs in this case. I desire to emphasize what was said by Romer J in *In re W. Powell & Sons*, that the Court will not have the slightest hesitation in making a personal order for costs against the liquidator on a misfeasance summons if the circumstances require it.

94 In *Hession v Century 21 South Pacific Ltd* (1992) 28 NSWLR 120 proceedings were brought in the District Court in the name of a company in liquidation for

amounts claimed to be due to the company under a franchise agreement. The District Court Judge refused to order security. An appeal was allowed. Meagher JA said (at 123):

> A distinction must be made between cases in which the liquidator personally is the plaintiff, and those when the company (albeit by its agent, the liquidator) is the plaintiff, a distinction which his Honour regarded as pedantic. In the former case — a prototype of which is the misfeasance summons — if the proceeding fails costs will be awarded against the liquidator personally (*Re W Powell and Sons* [1896] 1 Ch 681), but no order for security for costs will be made against him (*Re Strand Wood*), apparently on the ground that he is exercising a statutory power vested in him personally. Where the company in liquidation is the plaintiff, things are otherwise. In this case, obviously the Court has jurisdiction to order security for costs: that is what s 1335 says. The fact that the company has a deficiency of assets compared to liabilities (a not uncommon feature of companies in liquidation) is evidence of entitlement under the section to an order (*Northampton Coal, Iron, and Waggon Co v Midland Waggon Co* (1878) 7 Ch D 500 at 503), not (as his Honour seemed to imagine) evidence of immunity from an order. In this regard, it should also be noted that where a company in liquidation sues and fails, there is no jurisdiction in the Court to order the liquidators personally to pay the defendant's costs. Further, a company in liquidation against whom an order for security for costs is sought cannot successfully resist such an order merely by proving that it cannot fund the litigation from its own resources if an order for security is made; it must prove that it cannot do so even if it relies on the other resources available to it (the company's shareholders or creditors): *Bell Wholesale Co Pty Ltd v Gates Export Corporation* (1984) 2 FCR 1; 52 ALR 176.

95 In *Green v CGU Insurance Ltd* (2008) 3 BFRA 133; [2008] NSWSC 449 an application was made for security for costs in an insolvent trading action. The action was brought by the liquidator with the assistance of litigation funding. Einstein J said (at [12.7]):

> The plaintiff's position as a liquidator does not *of itself* prevent the making of an order for the provision of security for costs. Whilst there were statements in some cases, starting with *Re Strand Wood Co Ltd* [1904] 2 Ch 1, to the effect that liquidators are not required to provide security, these were an application of the general approach then taken, and exemplified in *Cowell v Taylor* (1885) 31 Ch D 34, that proceedings brought by a trustee in bankruptcy ought not be stultified by reason of his impecuniosity. See also *Greener v E Kahn & Co Ltd* [1906] 2 KB 374 at 376; *Cory-Wright and Salmon Ltd v KPMG Peat Marwick* [1993] 2 NZLR 701 at 705 and *Timbertown Community Enterprises Ltd v Holiday Coast Credit Union Ltd* (1997) 15 ACLC 1679.

96 Einstein J concluded that, on the *Bell Wholesale Co Pty Ltd v Gates Export Corporation* (1984) 2 FCR 1 test, stultification was not made out and security

should be ordered. He said that what Meagher JA said in *Hession* was (at [25]):

> …clearly obiter, coming in the context of a general affirmation of the general principle in *Bell Wholesale Co*. Having come to their decision on the basis of the particular facts, the Court in *Hession* was not required to consider whether the principle expressed in *Re Strand Wood* could be applied in those instances where the imposition of an order for security for costs on a liquidator in person does not carry with it the risk of stultification of the proceedings.

97 The liquidator appealed. In the Court of Appeal (*Green v CGU Insurance Ltd* (2008) 67 ACSR 105; [2008] NSWCA 148) the leading judgment was given by Hodgson JA, with whom Campbell JA agreed. After reviewing the authorities, including *Cowell*, *Strand Wood* and *Hession*, Hodgson JA stated the law in the following propositions (at [45]):

> In my opinion … a court considering applications for security for costs against liquidators should not treat the matter as being entirely at large, but should have regard to guidelines, which I would express as follows:
>
> > (1) Liquidators suing personally are generally to be treated in the same way as natural persons, so that, on the one hand, costs orders will be made against them if proceedings fail, and, on the other hand, security for costs may be ordered against them when the conditions set out in UCPR 42.21 are satisfied or (on appeal) there are "special circumstances" within UCPR 51.50. Although security for costs can be ordered (at first instance only) in other circumstances, this is not the usual or normal course; and it is relevant that, in order that security for costs be ordered in other circumstances on an appeal, where at general law security was more readily granted, "special circumstances" are required. It is to be noted also that mere inability to meet costs orders does not amount to special circumstances (*Transglobal Capital Pty Ltd v Yolarno Pty Ltd* [2004] NSWCA 136) and thus does not of itself put an onus on an appellant to prove that an order for security would stultify the appeal.
> >
> > (2) Where the plaintiff is a company in liquidation, and not the liquidator, then security for costs will more readily be ordered, although the court's discretion is unfettered (*Bell Wholesale P/L v Gates Export Corporation (No 2)* (1984) 8 ACLR 588) and there is no presupposition in favour of granting security (*Bryan E Fencott P/L v Eretta P/L* (1987) 16 FCR 497). However, the court will not refuse to order security on the ground that this will frustrate the litigation unless the company proves that those who stand behind the company and would benefit from the litigation are unable to provide security (*Bell Wholesale*).
> >
> > (3) Cases in which security for costs might be ordered against a natural person or a liquidator outside those provided for in UCPR 42.21 include cases where (in addition to proof that there is reason to believe the plaintiff will be unable to pay the defendant's costs) the plaintiff has dissipated assets and/or has not paid previous costs orders (especially if those costs orders were in favour of the defendant) and/or brings a weak case to harass the defendant and/or brings a case for the benefit

> of others (albeit not solely for their benefit as apparently required by UCPR 42.21(1)(e)). There is of course a sense in which a liquidator is suing for the benefit of others; but what was decided in *Cowell* and *Strand Wood* was that this was not of itself sufficient to justify security for costs in relation to a person who has the statutory right and duty to do this.

98 Hodgson JA did not accept the approach taken by Einstein J at first instance. He said (at [46]):

> In my opinion, it would be an oversimplification to say that underlying these guidelines is a broader principle that defendants should be protected against being unable to collect costs ordered against plaintiffs unless this would stultify the litigation. Certainly, these are relevant considerations; but in my opinion also relevant are the considerations that there should not be undue inhibitions on less wealthy persons from seeking vindication of their rights against more wealthy persons, and that there could be such inhibitions if it was in every case open to defendants to apply for security for costs on the basis of some evidence (or even on the basis of fishing notices to produce) suggesting inability to pay costs, and to claim that security should be given unless the plaintiff can prove it would stultify the litigation. In my opinion these considerations make it desirable that guidelines be adhered to, even though the question is ultimately for the court's discretion.

99 See also per Basten JA at [73], rejecting the suggestion that what Meagher JA said in *Hession* was obiter.

100 Hodgson JA concluded that Einstein J had made an error of principle. The discretion therefore had to be re-exercised; but his Honour concluded that, despite the error, the appeal failed. He said (at [60]-[61]):

> 60. However, in my opinion, the very heavy costs of this case, together with the involvement of the litigation funder, combined with the primary judge's finding that the liquidator himself would or may be unable to meet an adverse costs order (a finding not challenged on this appeal) are together sufficient to justify the order for security that the primary judge made, limited as it was to future costs.
>
> 61. I think it is right that the court should be concerned to ensure that a litigation funder, involved in the litigation purely for commercial profit, should not be able to avoid responsibility for costs if the litigation fails, or be in a position where there may be obstacles in the way of a successful defendant obtaining costs from such a funder. I think this is enough to take this case outside the normal position in which a liquidator suing personally is assimilated to the position of an ordinary natural plaintiff and thus generally liable to an order for security for costs only in the circumstances set out in the UCPR.

Personal liability of liquidator for costs

101 Before the application for security was made, correspondence took place between Mr Hing (then acting for both Mr Liu and Ms Ho) and Mr Hodges acting for Mr Devine. On 23 January 2018 Mr Hing wrote:

So that our clients may decide whether or not to file any application seeking security for their costs in either proceedings, please inform us:

1. Whether Mr Devine agrees he is suing in both proceedings personally and therefore he accepts he is personally liable for any adverse costs order. Please let us know Mr Devine's position with respect of both proceedings.

2. If Mr Devine undertakes to be personally liable for any adverse costs order, please let us know if Mr Devine is being funded by a commercial funder or any other entity or natural person who stands to receive a portion of the proceeds of the litigation. We note the comments of the Court of Appeal in *Green v CGU Insurance* [2008] NSWCA 148 at [51 ff].

102 Mr Hodges responded on 31 January:

1. …

In both proceedings, Mr Devine is suing your clients personally, albeit in his capacity as liquidator of [the Company], pursuant to his statutory rights under sections 588FF and 588M of the *Corporations Act 2001* (Cth) respectively. From our clients' perspective, this position is unambiguous.

…

It is our clients' position that the Court will generally not order security for costs against a liquidator unless the conditions in Reg. 42.21 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) are satisfied. We note that your letter does not seek to address the conditions in Reg. 42.21 of the UCPR. In any event, it is our clients' position that those conditions could not be satisfied in respect of Mr Devine.

Furthermore, it is our clients' position that the award of any costs order is a matter that is ultimately at the discretion of the Court. Accordingly, Mr Devine does not accept personal liability for any adverse costs order unless and until the Court makes such an order.

2. We reiterate the response to point 1 above and say further that Mr Devine provides no such undertaking to be personally liable for any adverse costs order.

103 On 6 February Mr Hing replied:

We can only assume from your letter that your client is reserving the right to argue at the hearing that the only costs order should be made against the Company. If such an argument was to succeed, then our clients would suffer a loss given that the Company is being wound-up.

In light of the above, we request that Mr Devine expressly undertakes personally to pay any adverse costs order made against the Company in either proceedings. If Mr Devine does not provide this undertaking then our clients will have no alternative other than to seek security for their costs without further notice to you.

104 Mr Hodges responded on the following day, stating that the plaintiff's position remained as stated in his letter of 31 January. His response continued:

Furthermore, rather than making a genuine attempt to engage with our clients on the issue of security for costs as governed by Reg. 42.21 of the *Uniform*

> *Civil Procedure Rules 2005* (NSW), it appears that [your letters] are an attempt by your clients to subvert the Court's discretion to award costs at the conclusion of both Proceedings. Our clients consider this approach to the matter of costs to be wholly inappropriate.

105 Counsel for Ms Ho argued that Mr Devine's position, as disclosed in the correspondence, raised a doubt as to whether he was accepting personal liability for costs even if he proved unsuccessful in the proceedings. Counsel submitted that there was a possibility that, even if Mr Devine failed in his claims, he might be able to escape an order for costs. In particular, it was suggested, it might be open to Mr Devine to escape liability by arguing that his claims, although unsuccessful, had been reasonably brought. Counsel referred in this regard to the decision of the Court of Appeal in *Silvia v Brodyn Pty Ltd* (2007) 25 ACLC 385; [2007] NSWCA 55.

106 Counsel argued that, in these circumstances, there was a risk of Ms Ho succeeding but being left with a worthless costs order against the Company. The contention was that this was unacceptable and the risk should be ameliorated by making an order for security.

107 Counsel referred to the recent Federal Court decision in *Pleash v Tucker* [2018] FCA 168. In that case, the applicants (plaintiffs) were liquidators. In correspondence, the respondents (defendants) sought security. The liquidators offered $55,000. The respondents intimated that this figure would be acceptable if the liquidators acknowledged they would be personally liable for the shortfall between the amount offered and any costs awarded. In response, the liquidators acknowledged that "generally" a costs order would be made against a liquidator if unsuccessful but said it was "not an absolute rule".

108 The respondents then made an application to the Court for security. At the hearing, counsel for the liquidators accepted that they would be personally liable for the costs of the proceedings. As a result, the respondents did not press the application for security. Greenwood J awarded the costs of the application in favour of the respondents. He said (at [38], emphasis in original):

> Had the liquidators made it plain in an *unqualified* way that they accepted personal liability in respect of any order made by the Court in favour of the respondents in the principal proceeding rather than resting on the "general rule", the application for security would not have been necessary because there would have been *no reason* to test the contentious question of the

> quantum in issue because the offer of $55,000.00 *coupled with* the unqualified acceptance of personal liability for the balance (if any) would have *prevailed*.

109 *Silvia* arose out of an appeal from an administrator's decision to refuse to admit a creditor's proof of debt. The creditor's appeal to this Court succeeded. The primary judge ordered the administrator, as well as the company, to pay the creditor's costs. The administrator appealed.

110 In the Court of Appeal, the leading judgment was given by Hodgson JA. His Honour quoted the following statement of principle from Oliver J (as his Lordship then was) in *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 (at 285):

> I cannot at the moment see why it should be contended that a liquidator who takes it on himself to institute proceedings, to bring parties before the court, to subject them to costs, and as against whom it is quite clearly established that no order for security can be made, should then be entitled to plead that he is not responsible beyond the extent of the assets in his hands. I can see no reason at all why a liquidator should be entitled to an immunity which is not conferred on other litigants.

111 His Honour said that the primary judge's statement that an unsuccessful liquidator or administrator ordinarily pays costs to the successful party was incorrect "at least in relation to a defendant/administrator" (at [56]). His Honour considered that the usual practice should govern and the administrator should not be ordered personally to pay the creditor's costs, except for a period of time where the administrator's resistance to the appeal had been unreasonable. The costs order was varied accordingly.

112 Meagher JA in *Hession* stated bluntly that where a liquidator is plaintiff and fails he or she will be ordered to pay costs in the ordinary way (see [94] above). I do not see *Silvia* as contrary to this. The critical factor in that case was that the liquidator was the defendant. The case gives little, if any, support to the idea that the costs liability of a liquidator who commences proceedings and is unsuccessful will be limited to the assets in the administration.

113 I think the correspondence between the solicitors in this case, especially the references to discretion, involved a degree of miscommunication and, perhaps, confusion. Security is awarded against the possibility that costs will be awarded against the plaintiff. Costs usually follow the event, but there are rare circumstances in which costs will not be awarded against an unsuccessful

plaintiff, either in whole or in part. The award of costs is ultimately discretionary in the sense that it is always open for a plaintiff, if unsuccessful, to make an application to be relieved against the usual consequence of failure. If security is awarded and the plaintiff is successful in such an application, then there will ultimately be no costs order to which the security attaches. In my view, although there is a possibility of a successful defendant being left out of pocket, this produces no relevant unfairness. The defendant will only be left out of pocket if the Court decides, in the exercise of its discretion, that costs should not be awarded in the defendant's favour. No complaint can legitimately be made about the plaintiff reserving the opportunity to make such an application.

114 What was being considered in *Silvia* was the exercise of a quite different discretion. Under an order of the type made in *Silvia*, the liquidator remains personally liable but the liquidator's liability is limited to the assets in the company in liquidation.

115 If costs are awarded against Mr Devine, then they will be awarded against him personally. The real question was whether Mr Devine might seek an order limiting the personal costs liability to the assets under administration. It may be thought unlikely, in light of *Hession* and *Silvia*, that he would obtain such an order if he sought it. But while the correspondence is not very clear, I think it was open to interpret Mr Hodges' letters as showing an intention to keep all possibilities, including this one, open.

116 That does not mean that Ms Ho was necessarily entitled to security. Her counsel's argument really invites the Court to take the approach taken by Romer J in *Powell*. As such, it would need to overcome his Lordship's change of heart in *Strand Wood*.

117 It is not necessary to determine in this case whether the approach in *Powell* is still open. At the hearing, counsel for Mr Devine expressly stated that no application would be made to limit any costs order which might be made against Mr Devine to the amount in the administration. The basis for the submission by counsel for Ms Ho thus fell away. Initially it appeared that this would resolve Ms Ho's application and the only remaining issue would be costs. But I was subsequently told by counsel for Ms Ho that the application for

an order for security was pressed on the wider ground which had been advanced by counsel for Mr Liu, to which I now turn.

Order for security against liquidator in exceptional circumstances

118 Counsel for Mr Liu contended that the law as laid down in *Green* does not leave a liquidator completely immune from an order for security. The Court retains power to order security against a liquidator in cases where some other factor was present which justifies doing so. One such factor is the circumstance that the proceedings are funded by a third party litigation funder, but the categories are not closed. In the present case, there is no litigation funding agreement currently in place. But the fee agreement between Mr Devine and Moray & Agnew was produced at the hearing and tendered, and it showed that Moray & Agnew are conducting the proceedings on a "no win, no fee" basis. Counsel for Mr Liu argued that this was a sufficient reason to order security in the present case.

119 Counsel for Mr Liu relied for this argument on the Court's power under UCPR r 42.21(e). Counsel emphasised that Hodgson JA only stated that liquidators suing personally are "generally" to be treated in the same way as natural persons: see guideline (1), quoted at [97] above.

120 Counsel for Mr Devine presented a different interpretation of Hodgson JA's judgment. Counsel relied on the statement that it had been decided that a liquidator suing personally is not relevantly suing for the benefit of others: see guideline (3), quoted at [97] above. According to this argument, the security order was sustained in *Green* not on the basis of UCPR r 42.21(1)(e), but on the basis of the court's inherent jurisdiction to order security in cases of abuse of process. Counsel submitted that this could not extend to the conduct of proceedings on a "spec" basis which on no view was an abuse of process.

121 In *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75; [2009] HCA 43, which post-dates *Green,* the High Court held that merely to fund litigation without accepting responsibility for the plaintiff's costs was not, of itself, an abuse of process. The decision, however, may be explained on the basis that it concerned the phrase "abuse of process" in the Rules of Court which then governed the making of a costs order against third parties. At all

events, counsel for Mr Devine did not suggest that the High Court decision had overruled or restricted the Court of Appeal decision in *Green*.

122 Basten JA has in *Green* (at [67]) described a conditional costs agreement as a form of "indirect" litigation funding. I made additional references to the parallels in *Longjing Pty Ltd v Perpetual Nominees Ltd* [2017] NSWSC 1690 at [48]. In these circumstances, I think that the argument that an award of security may be justified by way of application or extension of *Green* in a case where the solicitors are conducting the litigation on a "no win, no fee" basis may merit consideration, in a case where the argument is open.

123 In *Green* Hodgson JA relied on the unchallenged finding that the liquidator "would or may" be unable to meet the defendant's costs in support of his conclusion that the award of security should be sustained (see at [60], quoted at [100] above). This suggests that the order could have been based on UCPR 42.21(1)(e). On the other hand, Campbell JA's remarks at [83]-[84] suggest that he thought the Court's inherent jurisdiction which was being invoked. In any event, counsel for Mr Liu accepted that the application in this case could not succeed unless the evidence established that there was reason to believe that Mr Devine personally would be unable to meet Mr Liu's costs.

124 On behalf of Mr Liu, some evidence going to Mr Devine's financial position was put before the Court. Mr Devine practises as a member of a firm of insolvency practitioners known as Jirsch Sutherland. A search of the Australian Business Number used by the firm is in evidence. It shows that the firm is structured as a partnership and identifies at least three other persons, apart from Mr Devine, as proprietors. Some of those persons are described as acting as trustees.

125 The evidence shows that Mr Devine owns no real property in NSW. He is registered as the proprietor of shares in four proprietary companies. One of those companies is Jirsch Sutherland Services Pty Limited. Another of the companies holds shares in another proprietary company as trustee. There is no evidence about the activities of these companies or the value of Mr Devine's shareholdings in them. None of them hold any property in New South Wales (apart from Jirsch Sutherland Services Pty Limited, about which there is no evidence one way or another).

126 Counsel for Mr Liu submitted that this was enough to establish that there was "reason to believe" that Mr Devine would be unable to meet an adverse costs order if made in these proceedings. Counsel emphasised that the test is not an especially demanding one: see *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 1317 at [7]. In response, counsel for Mr Devine argued that there was no evidence of any financial distress on his part. Counsel submitted that the evidence did not go very far, and suggested that more specific evidence about Mr Devine's financial information could and should have been obtained by way of notice to produce or subpoena. Counsel submitted that the Court should not be satisfied that he lacked the means necessary to meet a costs order if made.

127 I think the resolution of this question is finely balanced. I do not find the suggestion by counsel for Mr Devine that more effort should have been made to obtain documents concerning Mr Devine's financial position particularly persuasive. The issue was clearly raised in advance of the hearing and it was open to Mr Devine to present evidence on the subject himself. I find myself wondering whether, had Mr Devine, his accountants and financiers been required by notice to produce and subpoena to produce all the records they hold concerning his financial affairs over the last ten years, I might not have been told that this was highly intrusive.

128 But in the end, the evidence shows that Mr Devine is an established professional liquidator and a member of an apparently substantial firm. If a costs order were made against him in these proceedings which he was unable to satisfy he would be faced with bankruptcy, which would end his professional career. It would also cause immense difficulties for his partners who would be liable for the costs as liabilities incurred by Mr Devine in the course of the partnership business. I think I can infer that in these circumstances Mr Devine would do what he could to avoid bankruptcy and that his partners would do what they could to assist him to do so. On the estimates of costs in these proceedings, Mr Devine's liability would be in the hundreds of thousands of dollars, not the millions. On balance I am not satisfied that there is reason to believe he will be unable to meet an adverse costs order. It is not necessary to consider the issue of principle posed by counsel's submission.

Award of security against company

129 It was argued on behalf of both Mr Liu and Ms Ho that, even if security could not be awarded against Mr Devine, the Court's power to order security was still engaged because of the Company being the second plaintiff. This, it was argued, would empower the Court to make an award of security against the Company so that the proceedings by the Company could be stayed if it were not provided. Counsel for Ms Ho went further and argued that s 1335 was wide enough that once it was engaged, an order for security could be made against both plaintiffs.

130 On the face of it, the wording of s 1335 might allow for this. The Court's power is enlivened once "the corporation" is unable to meet the defendant's costs. But the Court's power, once enlivened, is to make an order that "security be given" for the defendant's costs, and to stay "all proceedings" if the security is not provided.

131 In response, counsel for Mr Devine pointed out that when the insolvent trading case began Mr Devine was the sole plaintiff. The Company had only been joined as an additional plaintiff at the defendants' request; and the joinder, so counsel submitted, had been strictly speaking unnecessary. Counsel argued that if the insolvent trading case could be maintained by Mr Devine on his own without providing security the unnecessary joinder of the Company should make no difference (or could be reversed). Although not expressly developed by counsel, the same argument would, if valid, apply to the voidable transactions case.

132 Counsel for Ms Ho and Mr Liu submitted that the Company was a necessary plaintiff in both cases. Counsel for Ms Ho relied upon the general principle stated in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19 (at [131]):

> ... where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined.

133 Counsel for Ms Ho pointed to the practical difficulties which might arise if the Company were not a party to the proceedings. Counsel referred to difficulties with enforcement of the judgment which might arise if the Company were not a

party. In particular it was asked, how could a bankruptcy notice be issued in the Company's favour if the judgment in its favour were not satisfied?

134 In my view, the general statement in *John Alexander's Clubs* is of no direct assistance in resolving this present dispute. In each case the cause of action is statutory and the identification of necessary parties must depend upon an analysis of the relevant provisions of the Act.

135 In *Kent v La Communauté des Soeurs de Charité de la Providence* [1903] AC 220 an action was brought by the liquidators of a Canadian company on bills of exchange held by the company. The action was brought by the liquidators in their personal name in their character as liquidators, and was dismissed on the ground that the company itself should have been named as plaintiff. The *Winding Up Act*, RSC 1886 (Can), c 129, s 31 empowered the liquidator to bring or defend any legal proceedings in his own name as liquidator or in the name or on behalf of the company as the case might be. Lord Davey on behalf of the Privy Council said (at 225-226):

> The words which have been quoted from the 31st section do not, in the opinion of their Lordships, confer upon the liquidator or the Court a discretion as to the mode in which he shall sue, but enable him to bring the action either in his own name or in that of the company as may be appropriate to the particular action. The office of the liquidator has in fact a double aspect. On the one hand he wields the powers of the company, and on the other hand he is the representative for some purposes of the creditors and contributories. There are therefore many cases in which he may sue in his own name, as, e.g., to impeach some act or deed of the company before winding-up which is made voidable in the interest of the creditors and contributories. But their Lordships think that wherever the object of the action is to recover a debt, or to recover or protect property the title to which is in the company, the action should be brought in the name of the company.

136 English and Australian companies legislation has always contained an equivalent to s 31. Despite variations in the language of that provision between jurisdictions and over time, the statement of principle in *Kent* has been accepted as authoritative. The question is how it applies to the claims in the insolvent trading and voidable transactions cases.

137 The voidable transaction case is brought under s 588FF. That section relevantly provides:

> **Courts may make orders about voidable transactions**

(1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:

(a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;

(b) an order directing a person to transfer to the company property that the company has transferred under the transaction;

(c) an order requiring a person to pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction;

(d) an order requiring a person to transfer to the company property that, in the court's opinion, fairly represents the application of either or both of the following:

(i) money that the company has paid under the transaction;

(ii) proceeds of property that the company has transferred under the transaction;

(e) an order releasing or discharging, wholly or partly, a debt incurred, or a security or guarantee given, by the company under or in connection with the transaction;

(f) if the transaction is an unfair loan and such a debt, security or guarantee has been assigned--an order directing a person to indemnify the company in respect of some or all of its liability to the assignee;

(g) an order providing for the extent to which, and the terms on which, a debt that arose under, or was released or discharged to any extent by or under, the transaction may be proved in a winding up of the company;

(h) an order declaring an agreement constituting, forming part of, or relating to, the transaction, or specified provisions of such an agreement, to have been void at and after the time when the agreement was made, or at and after a specified later time;

(i) an order varying such an agreement as specified in the order and, if the Court thinks fit, declaring the agreement to have had effect, as so varied, at and after the time when the agreement was made, or at and after a specified later time;

(j) an order declaring such an agreement, or specified provisions of such an agreement, to be unenforceable.

(2) Nothing in subsection (1) limits the generality of anything else in it.

(3) An application under subsection (1) may only be made:

(a) during the period beginning on the relation-back day and ending:

(i) 3 years after the relation-back day; or

(ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;

whichever is the later; or

> (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.

138 The predecessor to s 588FF was s 565 (which still applies to transactions before 23 June 1993). Section 565 in turn was based on the former s 451 of the *Companies Code.* In *Horn v York Paper Co Ltd* (1991) 23 NSWLR 622 McLelland J said (at 623):

> Where a transaction is avoided as against a liquidator by virtue of the operation of s 451 of the *Companies (New South Wales) Code* (or s 565 of the *Corporations Law*) the liquidator is a necessary party to proceedings for the recovery of property or money based on such avoidance: see *Kent v La Communauté des Soeurs de Charité de la Providence* [1903] AC 220 at 226. This is because the transaction is avoided only against the liquidator, and the proceeds of recovery do not necessarily form part of the general assets of the company: see *Re Quality Camera Co* (1965) 83 WN (Pt 1) 226 and *N A Kratzman Pty Ltd (in liq) v Tucker [No 2]* (1968) 123 CLR 295.

139 His Honour's conclusions are consistent with the decision of Adam J in *Re Reid Murray Holdings Ltd (in liq)* [1969] VR 315*.* They were approved by the Full Court of the Supreme Court of Western Australia in *Bibra Lake Holdings Pty Ltd v Firmadoor Australia Pty Ltd* (1992) 7 WAR 1.

140 Section 565 and its predecessors provided for a preference to be "void against" the liquidator. Section 588FF now expressly provides for relief in voidable transaction proceedings to be granted by the Court "on the application of" the liquidator. There would seem to be no doubt that the liquidator continues to be a necessary party.

141 In *Horn* McLelland J continued (at 623), after the passage quoted at [138] above:

> However, I should also add that in my view except in the case of a summary application within the winding up proceedings themselves (see *Re Gapes Interstate Transport Pty Ltd* (1970) 92 WN (NSW) 169; [1970] 2 NSWR 365), it is appropriate to join the company itself as co-plaintiff with the liquidator, since the rights of the company will be directly affected by a judicial determination that the relevant transaction is avoided.

142 Section 588FF contains a suite of potential orders which may be used to reverse the effect of a voidable transaction, including orders requiring payment of monies received back to the Company. But it is not unknown, in litigation between A and B for the Court to order, at the suit of A, that B pay a sum of money to C. Counsel for Mr Liu conceded that such an order could be made in

the case of a third party contract as contemplated by Windeyer J in *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460; [1967] HCA 3 at 499, 501-502. In principle, it would seem that such an order can be made at the suit of A against B for the benefit of C without C necessarily being joined.

143 Difficulties with enforcement of the type referred to by counsel for Mr Ho may be a reason why the company is a proper party in many cases. But it does not mean that the company is a necessary party in every case.

144 The insolvent trading case is brought under s 588M. That section provides:

> **Recovery of compensation for loss resulting from insolvent trading**
>
> (1) This section applies where:
>
> (a) a person (in this section called the ***director***) has contravened subsection 588G(2) or (3) in relation to the incurring of a debt by a company; and
>
> (b) the person (in this section called the ***creditor***) to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency; and
>
> (c) the debt was wholly or partly unsecured when the loss or damage was suffered; and
>
> (d) the company is being wound up;
>
> whether or not:
>
> (e) the director has been convicted of an offence in relation to the contravention; or
>
> (f) a civil penalty order has been made against the director in relation to the contravention.
>
> (2) The company's liquidator may recover from the director, as a debt due to the company, an amount equal to the amount of the loss or damage.
>
> (3) The creditor may, as provided in Subdivision B but not otherwise, recover from the director, as a debt due to the creditor, an amount equal to the amount of the loss or damage.
>
> (4) Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

145 *Green* was an insolvent trading claim which was brought in the name of the liquidator personally, as sole plaintiff. On the other hand, in *Ariss v Express Interiors Pty Ltd (in liq)* [1996] 2 VR 507 an insolvent trading claim was brought in the name of the company in question. Security for costs was refused at first instance, but granted on appeal. Phillips JA, who gave the leading judgment,

applied the principles applicable generally to claims by insolvent companies. But his Honour noted (at 519):

> The director's duty to prevent insolvent trading is found in s 588G but, it would seem, it is s 588M(2) that justifies this proceeding. Yet that subsection speaks of the company's liquidator bringing proceedings. On the other hand, as was pointed out in argument, the proceedings which are authorised are to recover loss and damage from a director "as a debt due to the company", an expression which perhaps suggests that the proceedings should be brought in the name of the company. As at present advised, I incline to the latter view but it is unnecessary to express any final opinion, if only because we were not invited to resolve the issue by either side.

146 Although not referred to by Phillips JA, what the Privy Council said in *Kent* tends to support this tentative conclusion. The Privy Council referred to proceedings to “recover a debt” and that is precisely what s 588M(2) provides for.

147 Counsel for Mr Devine argued, however, that the presence of Mr Devine as a plaintiff would prevent the Court from ordering security even if the presence of the Company as an insolvent plaintiff would otherwise lead the Court to do so. Counsel relied on the proposition that, where an insolvent company and an individual are co-plaintiffs, the fact that security cannot be awarded against the individual means that it should not be awarded against the company either, at least if there is a sufficiently substantial overlap between the claims made by the individual and the claims made by the company, *even if the individual is also unable to meet the defendant’s costs*. In the present case, of course, there is only a single cause of action, and there is no question of Mr Devine and the Company having differing interests in the proceedings.

148 I considered this proposition in *Woolworths Ltd v About Life Pty Ltd (No 2)* [2018] NSWSC 1340. In summary, I concluded that there is judicial disagreement at intermediate appellate court level about whether the proposition is valid at all. Even if the proposition is valid, it generally does not operate unless all persons who stand to benefit from the claim are exposed to personal liability. If the proposition is valid, however, there may be scope for an exception to the requirement that all persons who stand to benefit from the litigation must be exposed to personal liability, where it is unreasonable to require that; and if the person or persons who are liable would be capable from

their own resources of meeting any order for costs made, then it might not be necessary to require all those who stand to benefit to become personally liable.

149 In *Green* Hodgson JA said, in addressing the unsuccessful argument that Einstein J had heard by taking into account the fact that the liquidator was receiving litigation funding (at 50):

> …I note…that, in cases where both a liquidator and the company in liquidation are plaintiffs, security for costs will generally not be ordered against the company, assuming the claims coincide or overlap to an extent such that failure would attract an order for costs against the natural plaintiff: *Maples v Hughes* [2002] NSWSC 617 at [14]-[15].

150 These observations were not necessary to the decision in that case, because Hodgson JA found for other reasons that Einstein J's decision had miscarried. Nor did Hodgson JA refer to the dispute between intermediate appellate court judges to which I referred in *Woolworths*. Nor was the question addressed in *Maples v Hughes* [2002] NSWSC 617 (see *Woolworths* at [51]). But there is no reason to think that where an individual and an impecunious company are co-plaintiffs, security should be awarded where the individual is not shown to be unable to meet the defendant's costs. On my findings, that is the case here.

151 It would be open to the defendants, should they wish to force the issue, to apply to have Mr Devine removed as a plaintiff in the insolvent trading case and, if successful, to pursue an application for security on the basis that the Company would then be the sole plaintiff. Of course, in doing so, they would lose the benefit of Mr Devine's personal liability for the costs of the proceedings. Whether they wish to take this course is a matter for them. If they do, the question of whether Mr Devine is a necessary or appropriate party to the insolvent trading case would squarely fall for decision.

Conclusion

152 For these reasons, the applications for security for costs fail and must be dismissed. There is no reason why costs should not follow the event.

153 As I have noted, it is not proved necessary in this case to consider the issue of principle raised by Mr Liu's application concerning the availability of security where a liquidator is being represented by solicitors under a conditional costs agreement. Before parting with this aspect of the case, I think it is worth

mentioning that should a case arise where there is reason to believe that such a liquidator would be personally unable to meet the costs, wider issues of principle may arise.

154 The law as it is currently understood appears to create a distinction between an action by a company in liquidation for breach of obligations owed to the company, such as an action for breach of director's duties, on the one hand, and certain types of action for recovery of property, such as voidable transaction claims and (possibly) insolvent trading claims, on the other. In the first type of claim, the company is the plaintiff and security will generally be ordered if it is unable to meet the defendant's costs. In the second type of claim, the liquidator is the plaintiff, or is co-plaintiff with the company, and generally security will not be ordered even if the liquidator is unable to meet the defendant's costs.

155 It might be asked why, as a matter of principle, such a distinction should exist. Both types of claim are made for the benefit of the company's creditors. Both types of claim are directed by the liquidator. The factual bases for different types of claim may even overlap (as for instance in a case where it is alleged that the directors of a company breached their duties in causing the company to incur obligations to third parties).

156 It might also be asked why the reasoning which has led to the distinction, which goes back to *Strand Wood,* should be regarded as authoritative today. It seems strange to say that a liquidator is not suing for the benefit of other persons for the purposes of UCPR r 42.21(1)(e). *Strand Wood* was based on the practice which had developed before litigation by liquidators became commonplace, and before r 42.21(1)(e) (or indeed any rules of court governing orders for security) were introduced. Even at the time, the outcome was seen by Vaughan Williams LJ, at least, as regrettable. But if these questions are to be raised at all, that is for another day.

Payment of costs forthwith

157 As already mentioned, each of the defendants sought an order that the costs awarded in their favour on the pleading applications be assessable forthwith. Because the insolvent trading case in effect is starting again, and resolution of

the proceedings is now some way off this would be an appropriate case for such an order. But the difficulty with such an order is that it encourages an assessment which may ultimately prove to be unnecessary (because the defendants may succeed in any event so separating out the costs the subject of the order from other costs may not prove necessary, and it may well prove a distraction).

158 What I propose to do is to require that Mr Devine pay a sum of money on account of the costs which are the subject of the order. If the parties cannot agree on the amount, I will make a determination. This will give Mr Liu and Ms Ho a sum of money to cover costs that have been wasted so far without the complication of having to conduct an assessment. It will be a term of the leave to re-plead that this amount be paid within a suitable period, say 28 days, as a condition of any grant for leave to re-plead. That order will also include, in Ms Ho's case, the costs of the transfer application and the sum to be paid by the liquidator will need to reflect that.

159 Given the mixed success of the parties on the various applications, it will be necessary to make an assessment of what percentage of the costs common to the combined hearing should be allocated to the different applications. I will also hear the parties on this question if they are unable to agree.

Orders

160 The orders of the Court are:

1. Direct that within 21 days the defendants bring in Short Minutes of Order:

    (a) giving effect to this judgment; and

    (b) providing, in the event of any disagreement as to the form of those orders, for directions for the filing of any necessary evidence and submissions with a view to a hearing to be fixed by arrangement with my Associate.

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