

Article Information

Authors: Mike Hayes, Antony Disciscio

Service: Dispute Resolution & Litigation, Restructuring & Insolvency

Litigation cannot proceed as a stalking horse for those who stand behind it ... without at least a spark of security.

The Federal Court ordered the applicant company (in liquidation) to provide security for costs where it found that there was no evidence that those who stood behind the company, and who ultimately may benefit from the litigation, were willing to provide funding and had the means to do so: *General Trade Industries Pty Ltd (in liquidation) v AGL Energy Limited* [2020] FCA 1562

Background:

The Applicant, General Trade Industries Pty Ltd (In Liquidation) (**General Trade**) brought proceedings against AGL Energy Ltd (**AGL**) in the Federal Court of Australia. General Trade was in liquidation at the time of the commencement of the proceedings and had been since 20 October 2015.

The dispute arose out of a building construction contract entered into by the parties on 20 December 2013 in relation to AGL's Wullumbilla LPG Plant and Silver Springs Plant in which General Trade agreed to carry out civil, mechanical and electrical work for AGL (**Construction Contract**).

In the proceedings, General Trade sought, amongst other things, payment of the amount of \$3,474,074.83 from AGL in regard to an unpaid progress claim arising out of the Construction Contract and further loss and damage arising out of the alleged conduct of AGL.

The causes of action General Trade pleaded extended beyond breaches of the Construction Contract and included unconscionable conduct in breach of sections 20 and 21 of the *Australian Consumer Law (ACL)* and further, misleading or deceptive conduct in breach of section 18 of the ACL.

AGL disputed any liability and, amongst other things, relied upon the terms of a release contained within a Deed of Release entered into by the parties following an earlier dispute relating to the Construction Contract.

The Federal Court was not pleased with the state of the pleadings in this matter and stated at [13] that "*neither the statement of claim nor the defence are prime examples of the art of pleading.*"

The judgment does not pertain to final relief in respect of the proceedings but the outcome of an application for security for costs by AGL against General Trade. General Trade resisted the making of any order for security.

Decision:

Derrington J ultimately determined that an order for security for costs was necessary but not before carefully balancing the appropriate considerations for such an application.

In this matter, AGL sought security for costs pursuant to section 1335 of the *Corporations Act 2001* (Cth), section 56 of the *Federal Court of Australia Act 1976* and rule 19.01(1)(a) of the *Federal Court Rules 2011*.

Derrington J helpfully summarised the applicable law and principles in regard to such an application at [29] to [34] of the Judgment. In summary, although the Court has an unfettered discretion in determining such an application, there are a number of well-established factors relevant to the exercise of its discretion including a consideration of:

- the applicant's impecuniosity and the resources of any persons standing behind it;
- the cause of the applicant's impecuniosity;
- the strength and *bona fides* of the applicant's case; and
- the possibility that an order for security for costs would unjustly stifle the action.

Impecuniosity of General Trade

General Trade did not dispute that it was impecunious or insolvent. Its liquidation had been on foot for five years and the liquidator opined that the only remaining source of revenue is the amount it may receive if it was successful in the proceedings (or a favourable settlement with AGL). It had no assets to meet any costs order (if unsuccessful in the proceedings).

Interestingly, the Court was critical of solicitors expressing opinions in regard to costs without complying with the Federal Court Practice Note relating to expert evidence (GPN-EXPT). A further point of interest is that the Court noted the difficulties that may arise in further applications for security if a party does not indicate the period for which security is required – AGL did not do so.

Cause of the impecuniosity

The liquidator submitted that AGL caused the impecuniosity of General Trade and, in particular, by reason of AGL's refusal to pay an unpaid progress claim, the subject of the proceedings.

Ultimately, the Court was not satisfied with the evidence on the cause of the impecuniosity of General Trade as its determination went to the heart of the dispute.

In any event, Derrington J held that even assuming that AGL's conduct was causative of General Trade's impecuniosity and inability to provide security, it was not a matter of great, if any, weight in circumstances where it had not been established by the General Trade that the action would be stifled by requiring the provision of security (discussed further below).

Stifle the action

General Trade submitted that the making of an order for any amount of security would stifle the litigation. The Court considered that this issue was only of significance if it was demonstrated that those who stood behind General Trade and stood to benefit from the litigation were also without means.

The entities who stood behind General Trade and stood to benefit from the litigation (if successful) were its creditors and shareholders. The Court was critical of the lack of evidence in demonstrating that they were without means. Consequently, the Court was not satisfied that the making of an order for the provision of security would stifle the proceedings.

Significantly, Derrington J at [96] of the Judgment stated “[t]here are a large number of entities behind it who stand to benefit if the litigation is successful, and it has not been shown that they are without means to provide security. Those entities are prepared to allow the litigation to be conducted as a stalking horse for their benefit, even if they are not actively involved in prosecuting it.”

In balancing the above considerations, Derrington J placed significant reliance on the fact that General Trade had no funds with which to meet any order for costs (if unsuccessful) and the unfairness for AGL that followed if General Trade was unsuccessful and significantly that General Trade had *not* satisfied the Court that the making of the order for security would stifle the action.

Takeaways:

- A liquidator seeking to resist an application for security for costs, in circumstances where proceedings are the only potential source of revenue, should consider carefully the available evidence to resist such an application prior to issuing proceedings.
- A liquidator asserting that litigation will be stifled by an order for security carries the onus of showing that those standing to benefit from the litigation (shareholders and creditors) are without means to provide security. A failure to do so may result in a finding that an order for security will not stifle proceedings.
- A liquidator asserting that impecuniosity was caused by the conduct of the party seeking security carries the onus of showing a factual basis for any such assertion with “*relatively straightforward and unambiguous evidence of a fairly compelling nature*”.

