SUPREME COURT OF QUEENSLAND

CITATION:	*Fimiston Investments Pty Ltd (in liq) v Pecker Maroo Pty Ltd & Ors* [2011] QSC 356
PARTIES:	**Fimiston Investments Pty Ltd (In Liquidation)** Plaintiff (Respondent) **v** **Pecker Maroo Pty Ltd** Defendant (Applicant) v **Wayne Ronald Luxford and Kathy Anne Luxford** Defendants added by Counterclaim (Respondents)
FILE NO/S:	S165 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Rockhampton
DELIVERED ON:	2 December 2011
DELIVERED AT:	Supreme Court Rockhampton
HEARING DATE:	21 November 2011
JUDGE:	McMeekin J
ORDER:	**1. Upon the applicant, by its solicitors, indicating to the registrar its consent to the vacation of the orders made on 21 November 2011 I vacate the orders made on that date;** **2. The applicant has leave *nunc pro tunc* to proceed against the plaintiff company in liquidation;** **3. Wayne Ronald Luxford is ordered to pay the amount of $31,383.50 together with interest pursuant to s47 of the *Supreme Court Act* 1995 on and from 28 April 2011 to 2 December 2011 to the applicant Pecker Maroo Pty Ltd.** **4. The application for directions is adjourned to be brought on, on the giving of 2 days notice;**

5. Unless submissions are received within 7 days of the making of this order:

(i) the respondent Wayne Ronald Luxford is ordered to pay the applicant's costs of the application seeking judgment limited to one day's hearing;

(ii) there is no order as to the costs of the application seeking leave to proceed.

CATCHWORDS: PROCEDURE – COSTS – SECURITY FOR COSTS – where security for costs in the form of a personal guarantee was given on behalf of plaintiff – where plaintiff subsequently went into liquidation – where defendant now seeks to enforce guarantee – where there are costs orders predating the order to give security for costs - whether leave required under s471B of *Corporations Act* 2001 – whether costs are due and payable

PROCEDURE – SUMMARY JUDGMENT – whether summary procedure appropriate – whether triable issues of fact are present

Corporations Act 2001 (Cth)

Property Law Act 1974 (Qld)

Uniform Civil Procedure Rules 1999 (Qld)

Clyne v Deputy Commissioner of Taxation (1981) 150 CLR 1

Di Carlo v Dubois [2003] QCA 415

Dwight v Federal Commissioner of Taxation (1992) 37 FCR 178

Ex parte Kemp; In Re Fastnedge (1874) LR 9 Ch App 383

Ex parte Walker (1982) 6 ACLR 423

Foots v Southern Cross Mine Management Pty Ltd [2007] HCA 56

Hancock v Williams (1942) 42 SR (NSW) 252

HJ Wigmore and Co v Rundle (1930) 44 CLR 222

Jet Corp Of Australia Pty Ltd (As Trustee Of The Jet Corp Australia Trust) v Petres Pty Ltd (In Its Own Right As Trustee Of The Schutt Unit Trust) [1985] FCA 163

La Trobe Wholesale Finance Pty Ltd v Silkwax Pty Ltd t/as AcVal Turner Valuers (in liq) [2011] FCA 1102

Mack v Comr of Stamp Duties (NSW) (1920) 28 CLR 373

Re Elgar Heights Pty Ltd [1985] VR 657

Sagacious Procurement Pty Ltd v Symbion Health Ltd [2007] NSWCA 205

Swaby v Lift Capital Partners Pty Ltd [2009] FCA 749

Theseus Exploration NL v Foyster (1972) 126 CLR 57

Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107

Vincent v Premo Enterprises (Voucher Sales) Ltd [1969] 2 QB 606

Yandil Holdings Pty Ltd v Insurance Company of North America (1986) 7 NSWLR 571

COUNSEL:	AM Arnold for the applicant
	No appearance for the respondent Fimiston Investments Pty Ltd (in liq)
	NM Cooke for the respondent Wayne Ronald Luxford
	The respondent Kathy Anne Luxford in person
SOLICITORS:	Purcell & Associates for the Applicant
	Macpherson Kelley Lawyers for the Respondent Wayne Ronald Luxford

[1] **McMeekin J:** There are two applications before me. In one the applicant, Pecker Maroo Pty Ltd, seeks leave to proceed against the plaintiff company, Fimiston Investments Pty Ltd, now in liquidation, pursuant to s 471B *Corporations Act* 2001. In the other the applicant seeks judgment against the defendant added by counter claim, Wayne Ronald Luxford.

[2] Mr Luxford, together with his now estranged wife[1], is the director of the plaintiff company. He caused proceedings to be brought in the name of the company against the applicant. The proceedings concerned a lease and a dispute over possession of a service station site. Two proceedings were brought, one by originating application and one by claim. On 18 February 2008, the originating application was dismissed with costs and in order to maintain the proceedings commenced by claim and prevent the imposition of a stay, the plaintiff company was ordered to "provide security for costs by filing a personal guarantee from Wayne Ronald Luxford in the sum of $50,000 in a form acceptable to the Registrar of the Court within 21 days from the date of this order".

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[1] Mrs Luxford was initially represented by the same solicitors as Mr Luxford. By the second hearing day she had withdrawn her instructions. She advised the Court that she was content to abide the orders of the court but supported generally the stance of Mr Luxford.

[3] Nine months later and pursuant to the order the plaintiff filed the following document ("the guarantee"):

> "I, Wayne Ronald Luxford, hereby guarantee that in the event Fimiston Investments Pty Ltd fails to meet any order for costs made by this Honourable Court in favour of the defendant Pecker Maroo Pty Ltd in proceedings numbered S163/06 and/or S165/07 I will pay to the defendant such amount of those costs up to and including the sum of $50,000.00 as remain unpaid after 28 days following such costs becoming due and payable by the plaintiff."

[4] The present applications concern an attempt by the applicant to enforce that security. The applicant effectively seeks summary judgment against Mr Luxford in the sum of $31,383.50 together with interest. The amount sought reflects the total of four orders that have been made for costs against the plaintiff company in favour of the applicant. The orders for costs were made both before and after the ordering of security. Following the making of the orders the costs were assessed and certificates of assessment were filed, two on 16 June 2010 and two on 26 July 2010. Eventually orders were made by the Registrar of the Court on 16 March 2011 pursuant to r 740 *Uniform Civil Procedure Rules* 1999. The plaintiff was placed in liquidation on 7 February 2011. Hence all assessments were made prior to that date and all of the final orders made subsequent to it.

[5] Mr Luxford argues that the security should not be enforced, indeed that it is unenforceable. His submissions are:

(a) That the orders made by the registrar on 16 March 2011 were made against the plaintiff company after it had been placed in liquidation. The orders were effectively to enforce costs orders previously made. The leave of the Court pursuant to s 471B of the *Corporations Act* 2001 was required before such orders could lawfully be made;

(b) By the terms of the guarantee Mr Luxford is not liable under it until 28 days after the costs become "due and payable" by the plaintiff. Once the company entered liquidation the costs could not become "due and payable" until a proof of debt had been filed with and accepted by the liquidator. As at the date of filing of the application that had not occurred;

(c) That the summary procedure adopted is inappropriate – rather the applicant should have brought an action by way of claim in the usual way and had it done so there were three triable issues – (i) the guarantee was one enforceable only by the plaintiff given as it was in favour of the plaintiff; (ii) insolvency of the plaintiff rendered the guarantee unenforceable as the circumstances had changed in which the guarantee had been offered; (iii) there was no consideration for the giving of the guarantee and it was not otherwise enforceable as it was not in the form of a Deed and it did not comply with s 45 of the *Property Law Act* 1974; and (iv) the applicant is not a party to the guarantee and hence there is no privity of contract.

(d) The guarantee, assuming it to be one, cannot relate back to orders for costs made before the order for security was made.

[6] The matter first came before me on 24 October 2011. It was adjourned at the applicant's request, and after some debate, to 21 November. The applicant took the opportunity to serve the liquidator with a proof of debt on 11 November 2011,

which was accepted by the liquidator, advice being given to that effect on 18 November 2011.

[7] On the adjourned hearing the application was made for leave to proceed against the plaintiff in liquidation pursuant to s 471 B *Corporations Act* 2001. On the adjourned hearing date, and without determining the disputed issues, I gave the applicant leave to proceed against the plaintiff in liquidation, the liquidator not opposing that course, and I made the orders that the Registrar had previously made on 16 March 2011. The point of this approach was to enable the 28 day period required by the disputed "guarantee" to commence to run without deciding whether that had already occurred or was necessary.

Was Leave Required?

[8] Section 471B *Corporations Act* 2001 provides:

> "While a company is being wound up in insolvency or by the Court… a person cannot begin or proceed with:
>
> (a) a proceeding in a Court against the company or in relation to the property of the Company; or
>
> (b) enforcement process in relation to such property;
>
> except with the leave of the Court and in accordance with such terms (if any) as the Court imposes."

[9] The applicant argues that the nature of the Order made by the Registrar under r 740 UCPR is not an "enforcement process" within the meaning of s 471B. The applicant points to the fact that the rule does not allow for the exercise of any discretion by the registrar. Subrule 740(1) is in these terms: "After a certificate of assessment is filed the registrar of the court **must** make the appropriate order having regard to the certificate". (emphasis added)

[10] When a court orders a party to a proceeding to pay costs then it is only enforceable, absent some special order, by engaging the process laid down in the rules. Rule 680 makes so much plain: "A party to a proceeding cannot recover any costs of the proceeding from another party other than under these rules or an order of the court." The difficulty with the applicant's submission is that r 740 is an integral part of that enforcement process. The rules require, absent some agreement between the parties, that to be enforceable an assessment must be performed and a certificate of that assessment filed (r 737(2)) and only then is the registrar empowered to make the necessary order (r 740(1)) which takes effect as a judgment of the Court (r 740(2)), enforceable only after a stay of 14 days (r 740(3)).

[11] Further there seems to me to be good reason why the process envisaged for the enforcement of costs orders should be stayed under r 471B. One of the liquidator's primary functions is to come to a speedy appreciation of the debts of the company. He may have an obligation to take advantage of the 14 day stay on enforcement of the registrar's order made under r 740. It is quite possible that a liquidator, if not alerted by an application for leave to proceed, would remain ignorant of the order until the stay period had passed.

[12] Thus in my view it was necessary that the applicant obtain the leave of the court before proceeding under r 740 to enforce the costs orders previously obtained.

Ought Leave be Granted?

[13] Where a party commences or continues a proceeding against a company in liquidation the court can give leave to proceed under s 471B *"nunc pro tunc".* In *Ex parte Walker* (1982) 6 ACLR 423 at 426 Master Lee QC, as he then was, summarised the principles relevant to the grant of leave as follows:

> "1. An application for leave nunc pro tunc to commence any action or to continue any action which was commenced without obtaining leave may be given if good cause is shown on the merits: Australian Company Law and Practice (Wallace and Young) at p 654.
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> 2. Section 230(3) ensures that assets of the company in liquidation will be administered in accordance with the Act and that no person obtains an advantage to which, under the Act, he is not properly entitled. It enables the court effectively to supervise all claims brought against the company: *Re Sydney Formworks Pty Ltd (in liq)*, supra.
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> 3. There must be no prejudice to the creditors or to the orderly winding up of the company if the action is allowed to proceed: *Re Sydney Formworks Pty Ltd*, supra; *Re A J Benjamin Ltd (in liq)* , supra and the Companies Act.
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> 4. The applicant's claim must be of a type which should proceed by action to judgment, rather than one which is capable of being dealt with in an ordinary way by proof of winding up: *Century Mercantile Co v Auckland Provincial Fruitgrowers Society* [1921] NZLR 272; *Battiston v Maiella Constructions Pty Ltd* [1967] VR 349.
>
> 5. Leave is more likely to be granted where there is an insurance company standing behind the company to pay any judgment which the plaintiff might obtain against it. If successful, such an action is unlikely to prejudice the creditors or the company: *Re Sydney Formworks Pty Ltd (in liq)*, supra; *Re A J Benjamin (in liq)*, supra, the section is not designed to protect an insurer.
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> 6. A condition is often imposed that the plaintiff will not enforce any judgment against the company without the leave of the court. This ensures that the court retains ultimate control: *Re Sydney Formworks Pty Ltd (in liq)*, supra, and *Re A J Benjamin Ltd (in liq)*, supra.
>
> 7. Mere delay itself in applying for leave will not prevent leave being granted. Leave is not to be withheld simply and solely as a punishment: *Re A J Benjamin Ltd (in liq)*,supra.
>
> 8. Leave may be granted after the expiry of the relevant period of limitation, to continue an action commenced within the limitation period without the leave of the court.

[14] Those "principles" are not exhaustive. Different circumstances can give rise to different requirements. Ultimately it is a matter of the exercise of a discretion.[2]

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[2] *La Trobe Wholesale Finance Pty Ltd v Silkwax Pty Ltd t/as AcVal Turner Valuers (in liq)* [2011] FCA 1102 at [20] per Dodds-Streeton J.

[15] Here there are several significant matters that justify the granting of leave to proceed *nunc pro tunc*. First, the "leave to proceed" is sought not for the purpose of pursuing the plaintiff company, but rather to trigger the 28 day period under the guarantee. The plaintiff's presence is, in a sense, formal. Effectively the applicant seeks to reach the person standing behind the plaintiff company, as the original order requiring the guarantee intended. This case is, in that sense, akin to the cases where an insurer stands behind the company in liquidation.

[16] Secondly, the applicant has already obtained its orders for costs and had them assessed long before the company went into liquidation. The plaintiff company had an opportunity to be heard on that assessment (rr 706, 709). There will be no advantage given to the applicant to which it is not entitled. The making of the orders under r 740 is a formal step in the fixing of the proper amount of those costs.

[17] Thirdly, by accepting the outstanding costs orders in the proof of debt process and in not opposing the grant of leave it seems evident that the liquidator is not minded to contest the amount so fixed.

[18] Each of these matters shows that the creditors of the company will not be prejudiced.

[19] As well there is no prospect here of the liquidator's attention and resources being diverted or the proof of debt process being in some way simpler, two reasons commonly given for refusing leave.[3] The making of the orders sought would bring to an end the process of identifying the amount of costs payable. If anything such orders would facilitate the liquidator's task of identifying the companies' obligations.

[20] On the other hand the applicant would be prejudiced if the order was not made and effectively the order of the court that security for cost be provided would be frustrated in the very circumstance in which it was intended to operate.

[21] While there has been delay it seems likely that that has come about, at least in part, as a result of Mr Luxford's initial acceptance of an obligation to pay the costs ordered by the registrar as recorded in his solicitor's letter of 19 April 2011.[4]

[22] In all the circumstances it is appropriate that leave to proceed be given *nunc pro tunc*. This order has the effect that the orders made by the registrar on 16 March 2011 were lawfully made.

[23] That renders otiose the orders that I made on 21 November 2011 to the same effect as the registrar's orders. The orders were for the benefit of the applicant. If that party consents then I can set aside those orders: r 667(2)(e).

Are the Costs 'due and payable'?

[24] This leaves the question of when the costs that, at various times, had been ordered to be paid, became "due and payable" within the terms of the proffered guarantee.

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3 *Swaby v Lift Capital Partners Pty Ltd* [2009] FCA 749 per Gilmour J at [32]

4 Ex ND4 to affidavit of Downs filed 17 October 2011

[25] The applicant argued that the orders had effect from when they were made and that all that then followed was the perfecting of the existing obligation.

[26] Upon the making of the various initial orders that the plaintiff pay costs the plaintiff then came under an obligation to pay costs[5] but in a sense that remained a contingent liability to pay an amount of money to the defendant. Until the amount of those costs were fixed they were not "due and payable" in the ordinary sense of those words, which I take to be, in this context, in the sense of entitling the creditor to sue the debtor to judgment immediately and without any intervening act or event.

[27] The right to obtain an enforceable order depends on the party with the benefit of the order itself complying with the rules and providing a costs statement. A failure to do so may result in the benefit of the order being lost: r 709A. Rule 740(3) makes plain that even after the order is made by the registrar "having regard to the certificate" the amount of costs is still not enforceable and may not be payable – there is a 14 day stay on any enforcement during which time the court can review the assessment (r 742). Even when fixed the costs may not be "due and payable" in the sense that a court would enforce their payment. Thus in *Di Carlo v Dubois* [2003] QCA 415 Jerrard JA permitted a stay in respect of the fixed costs order which the plaintiff had the benefit of against the defendants in respect of an abandoned first trial where the plaintiff then failed entirely against the defendants at the conclusion of the second trial, and the defendants anticipated costs orders being made in their favour (although costs orders had not yet been made). He did so because costs can be set off where each party has the benefit of an order (r 741).

[28] But irrespective of those considerations an amount it seems cannot be "due"[6] let alone "payable" if it is not yet ascertained. A useful discussion[7] of the definition and one referred to with apparent approval at the highest level[8] is that of Sir George Mellish LJ in *Ex parte Kemp; In Re Fastnedge* (1874) LR 9 Ch App 383, at pp. 387-8:

> "Now, the words 'debt due to him' are certainly words which are capable of a wide or a narrow construction. I think that prima facie, and if there be nothing in the context to give them a different construction, **they would include all sums certain which any person is legally liable to pay**, whether such sums had become actually payable or not. On the other hand, there can be no doubt that the word 'due' is constantly used in the sense of 'payable', and if it is used in that sense, then no debts which had not actually become payable when the act of bankruptcy was committed would be included. Lastly, the expression 'debts due' is sometimes used in bankruptcy proceedings to include all demands which can be proved against a bankrupt's estate, although some of them may not be strictly debts at all" (emphasis added)

[29] In the context here of a guarantee proffered in respect of a potential liability for costs it seems evident that the intended meaning is that no liability is incurred by the guarantor until the plaintiff company is itself under a present obligation to pay the

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5 *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56 at [65]-[67] per Gleeson CJ, Gummow, Hayne and Crennan JJ

6 The meaning of which can be equivocal: *HJ Wigmore and Co v Rundle* (1930) 44 CLR 222, at p. 228, per Gavan Duffy, Rich Starke, and Dixon JJ: "The word 'due' is not unequivocal. It is capable of referring to the time of payment or to the existence of indebtedness…"

7 Described as "best known" by Ormiston J in *Re Elgar Heights Pty Ltd* [1985] VR 657 at 664

8 Cited with approval by Isaacs J in *Mack v Comr of Stamp Duties (NSW)* (1920) 28 CLR 373 at 382 and accepted as accurate, implicitly at least, by Mason J in *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 15.

costs. That cannot be until the sum due has been ascertained. Under the rules of court that govern the recovery of costs that cannot occur until the procedure laid down in the rules has been complied with.

[30] In accordance with r 740(3) the costs in my view became "due and payable", within the meaning of the guarantee, 14 days after the registrar's orders were made on 16 March 2011 – that is on 30 March 2011.

Triable Issue

[31] This then brings me to the third category of submissions advanced by Mr Luxford. Effectively it is argued that the summary procedure adopted here is quite inappropriate. There are triable issues, it is said, and that being so there ought to be pleadings and a trial.

[32] Proceedings may be started by application where there is no substantial dispute of fact: r 11(a) UCPR. If it turns out that there is such an issue then the court can give appropriate directions: r 14 UCPR.

[33] The three matters agitated all depend on a view of the guarantee that appears to ignore the circumstances in which it came into existence.

[34] I will deal with each of the matters raised in turn.

Unenforceable at the Instance of the Defendant

[35] Contrary to the submission made by Mr Luxford, by its terms and in the context in which the guarantee came to be proffered, the guarantee was not one given in favour of the plaintiff. It enabled the plaintiff to continue its action and so the plaintiff derived a benefit. But it was always intended that it be enforceable at the instance of the defendant, not the plaintiff who, it could be anticipated, would be under the control of Mr Luxford and hence reluctant to enforce the obligation against himself. To construe it as Mr Luxford submits would be to destroy the effectiveness of the guarantee as a security for the liability to pay costs to the defendant that the plaintiff incurred, the very purpose for which it was brought into existence. It would be surprising, to say the least, that a guarantee ordered to be provided to protect the interests of one party was enforceable only at the suit of those uninterested in its performance and unenforceable at the suit of the party intended to be protected.[9]

Material Change in Circumstances

[36] In some cases a material change in circumstances will have the effect of discharging a guarantor from liability under the guarantee. That is so for example where a creditor by its conduct towards the principal materially alters the prospective obligations of the guarantor.[10] Here the argument is that by going into liquidation and the liquidator abandoning the proceedings there has been a material change in circumstance. No authority was cited for the proposition that such an event of itself discharges a guarantor's liability. The very time when it was likely that this guarantee would be called on is when the company found itself unable to pay its debts and in liquidation - the circumstances that now prevail. There is no warrant to

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9 Cf. *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107

10 *Hancock v Williams* (1942) 42 SR (NSW) 252 at 255 per Jordan CJ

import a condition into the guarantee that it be available only in circumstances where the primary creditor remained solvent and the litigation on foot. That is particularly so where Mr Luxford could obtain an assignment of the chose in action if he was so minded and considered it to be a valuable one.[11]

Neither Deed nor Contract

[37] The submission is that to be enforceable the guarantee must either be in the form of a deed, with the consequent need that it comply with s 45 of the *Property Law Act* 1974, or that it be an enforceable contract. If this was a commercial arrangement arrived at in the market place the submission would be plainly right.

[38] It is said that the form of the guarantee here is plainly not a deed and there is no consideration to support a contract.

[39] It can be accepted that the document eventually filed in the Court and setting out Mr Luxford's guarantee is not a deed. It bears none of the indicia of a deed. Hence the applicant cannot take advantage of the signing and delivery of it (if that occurred) as resulting in a binding obligation on Mr Luxford.[12]

[40] However it is not right that the guarantee is thereby unenforceable even if there be no consideration. Mr Luxford was not engaging in some commercial endeavour when he provided the guarantee. Rather he did so pursuant to the order of the court. In my view it is entirely irrelevant whether there be consideration or not. Matters relevant to a contractual dispute are not here relevant. That disposes of the privity of contract point.

[41] Further even if it were relevant, it is not accurate to assert that there is no consideration here. Valuable consideration may been defined as "some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment loss, or responsibility, given or suffered or undertaken by the other at his request".[13] In the context of a guarantee it is almost axiomatic that there will be no necessary advantage to the guarantor. Rather the consideration, which must move from the creditor, will be in the form of "incurring some detriment in reliance on the promise to guarantee".[14]

[42] While it is difficult to speak of valuable consideration in the usual way where what is in issue is compliance with an order of the court that an enforceable guarantee from a named individual be provided, there was clearly a disadvantage suffered by the applicant as, by its acceptance of the security proffered, it suffered the continued detriment, involving trouble and expense, of facing ongoing litigation which it maintains was unmeritorious. It had before the court an application for a stay of the proceedings based on the impecuniosity of the plaintiff company. That application was avoided by the proffering of the guarantee of the man who stood behind the company. As well there was an advantage gained by the plaintiff company – and those who stood behind it such as Mr Luxford – with the continuation of its suit in the face of an imminent imposition of a stay.

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11 So much was evidently contemplated at one point: see Ex ND4 to affidavit of Downs filed 17 October 2011

12 *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 606

13 Halsb vol 9 para 310 (4th edn)

14 *The Modern Contract of Guarantee* by Donovan & Phillips at p39

Summary Procedure Appropriate

[43] I am not persuaded that there is any triable issue making the summary procedure adopted here inappropriate. There appears to be no issue of fact at all and no issue of law of sufficient complexity requiring that there be a trial.[15]

[44] There remains the fundamental objection that Mr Luxford urges and that is that the rules require that the proceedings be commenced by claim if advantage is to be taken of what is in effect a summary judgment procedure. Assuming that the applicant is, in this context, the plaintiff, and Mr Luxford the defendant, then r 292(1) UCPR, which provides the source of the court's power to award summary judgment, requires, as a precondition, the filing of a defence, which can only occur in a proceeding commenced by claim.

[45] The applicant's response to this is to assert that what is truly in issue is the enforcement of a security for costs proffered in a pending proceeding and hence it is entirely appropriate that it proceed by way of application in those proceedings.

[46] Rule 676 appears to be the only rule touching on the enforcement of security for costs when ordered. It provides, so far as is relevant:

> **"676 Finalising security**
> (1) This rule applies if, in a proceeding, security for costs has been given by a party under an order made under this chapter.
> (2) If judgment is given requiring the party to pay all or part of the costs of the proceeding, the security may be applied in satisfaction of those costs…."

[47] Here the requirements of r 676(1) and (2) have been satisfied. "Security for costs [have] been given by a party under an order made under this chapter" and "judgment [has been] given requiring the party to pay all or part of the costs of the proceeding". In those circumstances the security "may be applied in satisfaction of those costs". This is the rule under which the applicant was entitled to proceed and should be seen to be proceeding. As Mr Arnold, for the applicant, submitted a consideration of the terms of the rule shows that in fact what the applicant seeks is not summary judgment against Mr Luxford but an application of a proffered security to satisfy a costs order. I see no reason why that cannot and should not be done by way of a summary procedure.

[48] The argument advanced by Mr Luxford effectively is that a distinction is to be drawn between security provided by way of a personal guarantee and security in other forms. It has been long accepted, and well prior to the introduction of the UCPR in 1999, that a personal guarantee can be appropriate security.[16] There is nothing in the rules to suggest that any different approach was intended to the enforcement of such security. Conversely, it would work a mischief if a different approach was allowed.

Costs Orders Predating the Order for Security

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15 Cf. *Theseus Exploration NL v Foyster* (1972) 126 CLR 57

16 *Dwight v Federal Commissioner of Taxation* (1992) 37 FCR 178 at 187; *Yandil Holdings Pty Ltd v Insurance Company of North America* (1986) 7 NSWLR 571

[49] The final objection that Mr Luxford raises is that the order should not apply to costs awarded prior to the making of the order for security for costs. I took the submission to be that the terms of the order were not sufficiently wide to encompass past costs.

[50] The terms of the order itself are silent as to whether they extend to costs already incurred. I made the order. According to my notebook the order made reflected the submissions advanced by the applicant's counsel and after argument. I have made no note of any argument concerning past costs.

[51] I understand that two of the orders that are the subject of the application were made subsequent to 18 February 2008 and two made on that day and indeed in the same form of order.

[52] The wording of the guarantee, which was presumably acceptable to all parties, refers to the guarantee extending to "any order for costs" without temporal restriction. Significantly the guarantee refers to Mr Luxford meeting the costs ordered in "proceedings numbered 163/06" as well as in proceedings 165/07. One of the orders made on 18 February 2008 was to dismiss proceedings 163/06 with costs. Hence the guarantee, to the extent it applied to those proceedings, could only refer to costs already incurred and what is more to costs already ordered to be paid by the time the guarantee was filed. There is no textual reason why it should not be similarly construed in relation to the later proceedings.

[53] It is plain that there is power to order security in respect of past costs, although perhaps not where orders have already been made. Professor Dal Pont in his work on the *Law of Costs* states:[17]

> "The court's jurisdiction is not restricted to making an order for security in respect of only future costs that may be incurred. It is wide enough to extend to an order in respect of costs *already incurred*, provided that those costs are not the subject of an existing costs order. Although this overcomes one of the concerns in quantifying an order for security, that of uncertainty, a court is nonetheless reticent to make such an order, for in the ordinary case the defendant has chosen to incur those costs without seeking the protection of an order for security. The outcome may be otherwise where, assuming no lack of diligence on the defendant's behalf, the plaintiff's impecuniosity has only just come to the defendant's knowledge."

[54] The authority cited by Professor Dal Pont for the proposition that an order cannot be made for security in respect of costs where an order for costs had already been made, as opposed to where costs simply having been incurred, in fact does not deal with the point: see *Jet Corporation of Australia Pty Ltd v Petres Pty Ltd* (1985) 10 FCR 289 per Norhtrop J. The authority intended is *Jet Corp Of Australia Pty Ltd (As Trustee Of The Jet Corp Australia Trust) v Petres Pty Ltd (In Its Own Right As Trustee Of The Schutt Unit Trust)* [1985] FCA 163, a decision made earlier in the litigation between the same parties, where Norhtrop J said:

> "The essential feature of an order for security for costs is that the security is to be given with respect to costs which have not been ordered to be paid by the plaintiff. The costs may include costs already incurred by the defendant as well as costs that will be incurred in the future. If an order for costs has been made in favour of a defendant before any order for security for costs has been

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17 Australia, Butterworths, 2009, (2nd edn) para 28.37 (footnotes omitted)

made, the defendant is able to enforce that order for costs according to normal procedures. It would be ludicrous to suggest that where an order for the payment of costs has been made and is unsatisfied, a defendant should seek an order for security for costs and then seek a further order that the costs which had previously been ordered to be paid, be paid out of that security. In the present case it is to be remembered that the orders for costs were made before the security for costs was ordered."

[55] I do not accept that the expression of principle is necessarily correct – it might be very rare where such an order would be made but to say that it is beyond the jurisdiction of the court to make such an order where there is no such express restriction and the discretion expressed in very broad terms[18] seems to me to go too far. But it is not necessary to reach a decision on that point here. The case here is different. The order for security and the orders for costs were all made at the same time. I plainly had the power to award security for costs already incurred.[19] Immediately prior to the filing of the compendious order on 18 February 2008 there were no outstanding orders for costs that are now pursued. The order was not expressed to exclude costs already incurred or ordered to be paid that day. The guarantee filed shows that the parties have proceeded on the basis that the order was intended to cover costs ordered to be paid on that day. In all the circumstances I cannot see any reason for limiting the provision of the guarantee as now suggested.

Conclusion

[56] In the end result the various orders relating to costs became due and payable on 30 March 2011. The 28 day period mentioned in the guarantee expired on 27 April 2011. From that time forward Mr Luxford became liable under the guarantee to pay the costs ordered to be paid by the plaintiff. Demand had been made prior to that time which he had responded to initially by indicating that he would meet the orders under his guarantee. Appropriate orders enforcing the guarantee should be made.

[57] The application also seeks directions as to the further conduct of the proceedings between the applicant and Mr and Mrs Luxford. No submissions were made by either party on that subject. To that extent the application is adjourned to be brought on, on the giving of 2 days notice.

[58] The orders will be:

(a) Upon the applicant, by its solicitors, indicating to the registrar its consent to the vacation of the orders made on 21 November 2011 I vacate the orders made on that date;

(b) The applicant has leave *nunc pro tunc* to proceed against the plaintiff company in liquidation;

(c) Wayne Ronald Luxford is ordered to pay the amount of $31,383.50 together with interest pursuant to s 47 *Supreme Court Act* 1995 from 28 April 2011 to the applicant Pecker Maroo Pty Ltd.

(d) The application for directions is adjourned to be brought on, on the giving of 2 days notice;

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18 See r 671(h) UCPR – an order for security may be made where "the justice of the case requires the making of an order"; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2000] QSC 220

19 *Sagacious Procurement Pty Ltd v Symbion Health Ltd* [2007] NSWCA 205 per Mason P at [49]–[50].

(e) Unless submissions are received within 7 days of the making of this order:

(i) the respondent Wayne Ronald Luxford is ordered to pay the applicant's costs of the application seeking judgement limited to one day's hearing;

(ii) there is no order as to the costs of the application seeking leave to proceed.