

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted



IUIM PTY LTD

Plaintiff

v

GRANDTRA INVESTMENTS PTY LTD

Defendant

NUTRITIONAL CHOICE AUSTRALIA PTY LTD

JUDGE: Nichols J
WHERE HELD: Melbourne
DATE OF HEARING: Written submissions filed 24 April 2020; further affidavit
filed on 28 May 2020
DATE OF JUDGMENT: 23 December 2020

PRACTICE AND PROCEDURE - Security for costs - plaintiff corporation - reason to believe plaintiff would be unable to pay the costs of the defendants - *Supreme Court (General Civil Procedure) Rules 2015 (Vic), r 62.02(1) - Corporations Act 2001 (Cth), s 1335(1) - Livingspring v Kliger Partners (2008) 20 VR 377 - US Realty Investments LLC #1 v Need [2013] VSC 590.*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	No appearance	Not represented
For the Defendant	Mr A C Blair	Tahota Law

HER HONOUR:

1 The defendants, by their summons of 3 April 2020, seek that the plaintiff pay \$10,000
as security for the defendants' costs, pursuant to r 62.02(1) of the *Supreme Court
(General Civil Procedure) Rules 2015* (Vic) (the **Rules**) and s 1335(1) of the *Corporations
Act 2001 (Cth)* (**Corporations Act**).

2 The plaintiff, an unrepresented corporation, has not responded to the defendants'
application and has ceased to engaged in the proceeding.

3 For the reasons that follow I will order the security sought by the defendants.

Principles

4 The tests for whether security for costs ought be ordered are well understood.¹

5 Jurisdiction is enlivened if there is reason to believe the plaintiff corporation would be
unable to pay the costs of the defendant, if so ordered.² The tests, although expressed
differently in each of r 62.02(1) and s 1335(1), are subject to the same principles.³ The
defendant need only show there is a rational basis, or a *prima facie* case, for the belief
that the defendant would be unable to meet an adverse costs order.⁴

6 Once jurisdiction is enlivened, the Court has an unfettered discretion to decide
whether to order security for the defendant's costs.⁵ The Court must consider the
relevant discretionary factors and balance injustice to the plaintiff if it is prevented
from pursuing a proper claim by an order for security against the injustice to the
defendant if no security is ordered.⁶

7 The defendant bears the onus of persuading the Court that security ought be ordered,
with respect to both the jurisdictional threshold and the discretionary factors.⁷

¹ *Trailer Trash Franchise Systems Pty Ltd v GM Fascia & Gutter Pty Ltd* [2017] VSCA 293 (*Trailer Trash*)
(Tate & Kyrou JJA); *LivingSpring v Kliger Partners* (2008) 20 VR 377 (*LivingSpring*) (Maxwell P and
Buchanan JA); *US Realty Investments LLC #1 v Need* [2013] VSC 590 (*US Realty*) (Derham As J).

² *LivingSpring* at 381 [11].

³ *LivingSpring* at 381 [10].

⁴ *LivingSpring* at 382, [15].

⁵ *US Realty*, [21].

⁶ *US Realty*, [22], [23].

⁷ *US Realty*, [24]; *LivingSpring*, 383-4 [18]-[20].

Background

- 8 The plaintiff, **IUIM Pty Ltd**, is the minority shareholder in the second defendant, **Nutritional Choice Australia Pty Ltd (NCA)**. The first defendant, **Grandtra Pty Ltd**, is the majority shareholder. IUIM issued the present proceeding in December 2018. By its claim IUIM pleads that removal of its sole director and shareholder, Ms Yunling Huang, as a director of NCA in June 2018 was unlawful (contrary to the Shareholders' Deed between IUIM, Grandtra and NCA, and the Corporations Act) and Grandtra's subsequent conduct of the business of NCA has been oppressive of, unfairly prejudicial or unfairly discriminatory to IUIM.
- 9 By its defence, the defendants plead that in May 2018, Mr Chu, who is the sole director and shareholder of Grandtra became aware that Ms Huang had breached her duties owed as a director to NCA, including by using the working capital of NCA to fund personal expenses, salaries and wages paid to relatives and associates of Huang employed by NCA while it was not carrying on a manufacturing business, paid legal expenses incurred by Huang, and other companies associated with her, and without board approval granted M+K Lawyers security over NCA assets to pay Huang's personal legal expenses and falsely purported to have lent NCA \$4.8m.
- 10 The defendants plead that since at least 31 January 2018, NCA has not conducted any business activities, and instead has been engaged in defending a related proceeding in the Federal Court of Australia, *Aucare Dairy (Aust) Pty Ltd v Huang* VID674/2016, funded by Grandtra (**Aucare proceeding**). The Aucare proceeding was filed in June 2016 by Aucare and its director, against Ms Huang and another company controlled by her, *Noiyer Pty Ltd*, with which companies Aucare entered into a joint venture. Huang, *Noiyer*, a number of other companies incorporated and controlled by Huang and people who were associates of Huang were the defendants in the Aucare proceeding. In March 2019, Davies J delivered judgment. Her Honour found that Ms Huang engineered and implemented a fraudulent scheme to deprive the Aucare plaintiffs of the entire joint enterprise. In that proceeding, the Court ruled that NCA, the seventh respondent, and Grandtra and Mr Chu, who were not parties to the Aucare proceeding, had played no part in Ms Huang's fraudulent scheme. On 4

December 2019, Moshinsky J rejected an application made by all the Aucare defendants, save for NCA, for an extension of time in which to file a notice of appeal of the judgment of Davies J.

- 11 The procedural steps that have been taken in the present proceeding since it was issued in December 2018 have been limited, while the Federal Court proceedings took their course. The plaintiff filed an amended statement of claim in February 2019, defences were filed in September 2019 and a judicial mediation ordered to take place in November 2019 did not occur.

The present application

- 12 The defendants rely on affidavits affirmed by their solicitors, Yijing Hua (affirmed on 20 March 2020 and 24 April 2020) and Can Dong (affirmed on 28 May 2020) and written submissions filed on 24 April 2020.
- 13 The plaintiff is not represented and has taken no part in this application. The former solicitors for the plaintiff indicated, at a directions hearing on 14 February 2020, they were no longer receiving instructions from the plaintiff. They filed a notice of ceasing to act on 20 February 2020.
- 14 By orders made on 6 April 2020, the defendants were to file their material in support of the summons, to serve that material on the plaintiff and to file an affidavit deposing to such service. The plaintiff, being a corporation without legal representation, was ordered to apply to take a step in the proceeding within 14 days of service. By his affidavit of 24 April 2020, Mr Dong deposed to service effected at the plaintiff's registered place of business on or about 12 May 2020. The plaintiff has made no application - or contact of any kind - with the Court, either in response to service or in response to email correspondence sent to the email address of the plaintiff's director included in the notice of ceasing to act from both my chambers and the solicitors for the defendants.

Assets of the plaintiff

15 Searches of the Australian Securities and Investment Commission register, the Victorian Land Titles register and the Personal Property Securities register reveal that the plaintiff has a paid up capital of \$199, no real property in Victoria and no other discernible assets.

16 This evidence founds a reasonable belief that the plaintiff would be unable to meet an adverse costs order.

Discretionary factors

17 With jurisdiction thus enlivened, I must consider the discretionary factors relevant to the present facts.

Delay

18 A plaintiff company is entitled to know its position in relation to security from the outset, before it makes a substantial financial commitment to litigating its claim.⁸ In the present case, the application for security was made more than 12 months after the proceedings were issued. However, in that time the proceeding progressed little and has not gone beyond the parties' filing their pleadings. In these circumstances, I accept the defendants' submission that delay with respect to the present application is delay in the proceeding generally and that it is unlikely the plaintiff has undertaken any substantial financial commitment in the proceeding generally.

Stultification

19 The Court may decline to order security for costs where such an order would operate to stultify an arguable case legitimately instituted by the plaintiff.⁹ I accept the defendants' submission that, since the plaintiff has ceased to engage in the proceeding there is no evidence to support the view that an order for security would stultify the plaintiff's pursuit of its claim.

⁸ *Hera Project Pty Ltd v Bisognin* [2017] VSC 112 (*Hera*), [6](c) (Matthews JR); *Oswal v Australia and New Zealand Banking Group* [2016] VSC 52 (*Oswal*), [44](a) (Sifris J).

⁹ *US Realty Investments LLC #1 v Need* [2013] VSC 590 (*US Realty*), [29] (Derham As J).

Quantum

- 20 The defendants' solicitor deposes to her clients having expended \$11,577.66 in the costs of defending the proceeding thus far. Ms Hua estimates that her clients would incur a further \$204,800 if they were to defend the proceeding to its conclusion.
- 21 In these circumstances, I am satisfied that the \$10,000 sought for security, is an appropriate amount.