FEDERAL COURT OF AUSTRALIA

ACN 153 364 491 Ltd (in liq) v GP No 1 Pty Ltd (in liq), in the matter of GP No 1 Pty Ltd (in liq) (No 3) [2020] FCA 694

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| File number: |  |
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| Judge: | **CHARLESWORTH J** |
|  |  |
| Date of judgment: | 22 May 2020 |
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| Catchwords: | **CORPORATIONS** – application for inquiry into administration of company in liquidation – where applicant claims to be a secured creditor of the company – where liquidator asserts equitable charge over company property in accordance with the principle stated in *In re Universal Distributing Company Limited (In Liquidation)* (1933) 48 CLR 171 – where applicant challenges quantum of the liquidator’s claim – where applicant’s claim against secured property subject to a higher ranking priority in the Australian Taxation Office in accordance with s 561 and s 556(1)(e) of the *Corporations Act 2001* (Cth) - where liquidator has neither accepted, reduced nor accepted proof of debt lodged by Australian Taxation Office – whether there should be an inquiry into the liquidator’s omission to reduce that debt– whether there should be an inquiry into the liquidator’s equiatable charge - consideration of the relevance of the lack of commercial utility in the proposed inquiry – consideration of the strength of allegations that the liquidator has not administered the company’s affairs in accordance with the law – consideration of the relevance of the circumstance that the applicant’s debt and security are disputed – consideration of the extent to which the applicant may avail itself of alternate remedies to vindicate its private rights – application dismissed  |
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| Legislation: | *Corporations Act 2001* (Cth) ss 90.10, 536, 553AB, 556, 561, Sch 2, Div 6 *Superannuation Guarantee (Administration) Act 1992* (Cth) ss 17, 19, 31, 32, 36, 42*Taxation Administration Act 1953* (Cth)*Corporations Regulations 2001* (Cth) reg 5.6.51  |
|  |  |
| Cases cited: | *Austin Securities Ltd v Northgate & English Stores Ltd* [1969] 1 WLR 529*Australian Securities and Investment Commission v Macks (No 2)* [2019] SASC 17*BL & GY International Co Ltd v Hypec Electronics Pty Ltd* (2010) 79 ACSR 558*Commissioner of Taxation of the Commonwealth of Australia v Futuris Corporation Limited* (2008) 237 CLR 146*Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473*Deputy Commissioner of Taxation v Buzadzic* [2019] VSCA 221*Foxhat Employment Service Pty Ltd v Deputy Commissioner of Taxation* [2014] VSC 218*Leslie, in the matter of the Aboriginal Councils and Associations Act 1976 v Hennessy* [2001] FCA 371*Powell, in the matter of Arafura Pearls Holdings Limited (in liq)* [2017] FCA 1159*In re Universal Distributing Company Limited (In Liquidation)* (1933) 48 CLR 171*Stewart v Atco Controls Pty Ltd (in Liquidation)* (2014) 252 CLR 307  |
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| Date of hearing: | 28 February 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Category: | Catchwords |
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ORDERS

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|  | SAD 133 of 2018 |
| IN THE MATTER OF GP NO 1 PTY LTD (IN LIQUIDATION)  |
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| BETWEEN: | ACN 153 364 491 LTD (IN LIQUIDATION)Plaintiff |
| AND: | GP NO1 PTY LTD (IN LIQUIDATION)First DefendantGAVIN MOSSSecond Defendant |

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| JUDGE: | CHARLESWORTH J |
| DATE OF ORDER: | 22 MAY 2020 |

THE COURT ORDERS THAT:

1. The originating application is dismissed.

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

REASONS FOR JUDGMENT

CHARLESWORTH J:

1. The plaintiff (GP2) and the first defendant (GP1) are companies in liquidation. The second defendant, Mr Moss, is the liquidator of GP1.
2. This Court may inquire into the external administration of a company on the application of a person with a financial interest in it: *Corporations Act 2001* (Cth) (CA), Sch 2, s 90.10. GP2 claims to be a secured creditor of GP1. It seeks an inquiry into whether Mr Moss has failed to duly administer the liquidation of GP1.
3. The proposed inquiry relates to two issues. The first is whether the fees and disbursements paid or reimbursed to Mr Moss exceed the sum to which he would be entitled in accordance with the principle stated in *In re* ***Universal Distributing*** *Company Limited (In Liquidation)* (1933) 48 CLR 171. The second is whether Mr Moss, as liquidator of GP1, should reject a proof of debt lodged by the Australian Taxation Office (ATO) in relation to the superannuation entitlements of GP1’s employees and object to the taxation assessment underpinning the proof.
4. For the reasons given below, I am not satisfied that there should be an inquiry in relation to either issue.
5. It is convenient to first examine the security interest asserted by GP2 and the operation of the CA in relation to it.

# SECURITY INTEREST

1. GP2 was placed into voluntary administration on 1 March 2013 and then into liquidation on 30 May 2013. Mr Robert Jacobs was appointed joint administrator and then sole liquidator. Mr Jacobs alleges that GP1 owes GP2 the sum of $910,000.00 pursuant to a **Loan Agreement** entered into between the two companies in July 2012. At that time GP1 was the majority shareholder in GP2. It is alleged that on 18 December 2012 GP2 and GP1 entered into a General **Security** **Deed**. Extracts from the Personal Security Securities Register (PPSR) show that a security interest was first registered against GP1 on 19 October 2012 and that another was registered on 18 December 2012, each in favour of GP2. There is some uncertainty in GP2’s case as to which of those securities is said to secure the obligation to repay any monies owing under the Loan Agreement. Both postdate the Loan Agreement by some months and the October registration predates the Security Deed. The PPSR identifies the securities as having been registered against “all present and after-acquired property – no exceptions”.
2. To the extent that the Security Deed comprises a floating charge, it is a “circulating security interest” as that term is defined in the CA.
3. Mr Jacobs has caused GP2 to lodge a proof of debt in GP1 in the sum of $910,000.00, being the amount said to be owing under the Loan Agreement. The proof was lodged on 4 July 2017, some five years after GP1 went into liquidation. On this application, no explanation was given as to why GP2 came into the liquidation at the time that it did. Nor were submissions made as to when any money advanced under the Loan Agreement was due to be repaid, nor as to the satisfaction of preconditions in the Loan Agreement conditioning the obligation to repay. For present purposes it is sufficient to note that GP1 and GP2 were not the only parties to the Loan Agreement and that it appears to have been entered into as one of a series of complex and interrelating transactions with multiple parties.
4. Mr Moss has neither accepted nor rejected GP2’s proof in the winding up of GP1. That is because, he says, there no secured property from which a secured debt can be paid and otherwise no money in the company to fund any examination of the issue. He has otherwise foreshadowed that should an inquiry be ordered, the existence of the debt and the validity of the Security Deed would be contentious issues.

# THE FEES ISSUE

1. GP1 and GP2 were successive owners in a business for the farming, marketing and selling of pearls. The assets of the business were acquired by GP2 after the collapse of a series of managed investment schemes operated by Arafura Pearls Holdings Ltd (APHL) and other entities. GP1 and GP2 conducted the business pursuant to a management agreement with APHL, then in liquidation.
2. In 2017, the joint liquidators and receivers of a number of entities, including APHL, made an application to this Court for directions concerning the distribution of the entities’ assets. GP1 was legally represented in that proceeding by a firm of solicitors and counsel. The hearing of the application proceeded for one day. Mr Moss caused GP1 to file a notice of appearance, but instructed counsel not to make any submissions or file any evidence. Counsel for GP1 informed the Court that GP1 neither opposed nor consented to the orders.
3. Besanko J delivered judgment on the directions application on 29 September 2017: ***Powell****, in the matter of Arafura Pearls Holdings Limited (in liq)* [2017] FCA 1159. His Honour’s orders provided for the payment of $223,769.27 to GP1. I will refer to that sum as the Fund.
4. Amounts totalling $36,576.95 have otherwise been recovered in the liquidation of GP1, including an amount of $24,288.25 recovered prior to the appointment of Mr Moss.
5. Mr Jacobs claims that the total sum recovered in the liquidation of GP1 is property comprised in or subject to GP2’s circulating security interest as provided for by the Loan Agreement and the Security Deed. I will refer to that sum as the Fund.
6. On the material before me, it appears that Mr Jacobs first corresponded with Mr Moss about the existence of the Security Deed in July 2017 when GP2’s proof of debt was lodged. Mr Jacobs submits that Mr Moss ought to have known that the property of GP1 was subject to a fixed and floating charge, the charge being registered on the PPSR.
7. It is common ground that if the Fund is property comprised in GP2’s security, Mr Moss is entitled to recover his costs and expenses in realising the Fund in priority over GP2’s interests in it. The principle was stated by Dixon J (as he then was) in *Universal Distributing* (at 174 – 175):

If a creditor whose debt is secured over the assets of the company come in and have his rights decided in the winding up, he is entitled to be paid principal and interest out of the fund produced by the assets encumbered by his debt after the deduction of the costs, charges and expenses incidental to the realization of such assets (*In re Marine Mansions Co.*). The security is paramount to the general costs and expenses of the liquidation, but the expenses attendant upon the realization of the fund affected by the security must be borne by it (*In re Oriental Hotels Co.; Perry v. Oriental Hotels Co.*). The debenture-holders are creditors who have a specific right to the property for the purpose of paying their debts. But if it is realized in the winding up, a proceeding to which they are thus parties, the proceeds must bear the cost of the realization just as if they had begun a suit for its realization or had themselves realized it without suit (cf*. In re Regent’s Canal Ironworks Co.; Ex parte Grissell*; and see *Batten v. Wedgwood Coal and Iron Co.*).

In applying this principle, only those expenses appear to have been thrown against the fund belonging to the debenture-holders which have been reasonably incurred in the care, preservation and realization of the property. In the present case the liquidator has employed a material part of his time and energies in recovering moneys, both uncalled capital and debts, which enure for the debenture-holder, and in so far as these services increase the remuneration which he receives, I see no reason why the burden should not be thrown upon the proceeds. The question is not whether moneys available for unsecured creditors should be relieved at the expense of the security. In such a case it may be said that the service of collecting enough to discharge the debenture must in any event be performed in order that a surplus may then arise in which the unsecured creditors may participate. The question in the present case is whether the liquidator can charge against the fund passing through his hands as between himself and the person to whom it is payable, so much of the remuneration fixed for work done in the winding up as is referable to the calling in and conversion of the assets producing the fund. I see no reason why remuneration for work done for the exclusive purpose of raising the fund should not be charged upon it.

(footnotes omitted)

1. In *Stewart v Atco Controls Pty Ltd* *(in Liquidation)* (2014) 252 CLR 307 the High Court identified (at [23]) the circumstances in which the principle will apply:

… there is an insolvent company in liquidation; the liquidator has incurred expenses and rendered services in the realisation of an asset; the resulting fund is insufficient to meet both the liquidator’s costs and expenses of realisation and the debt due to a secured creditor; and the creditor claims the fund. In these circumstances, it is just that the liquidator be recompensed. To use the language of Deane J in *Hewett v Court*, it might be said that a secured creditor would be acting unconscientiously in taking the benefit of the liquidator’s work without the liquidator’s expenses being met. However, such a conclusion is avoided by the application of the principle stated in *Universal Distributing.*

1. Mr Moss claims an entitlement to be paid more than $130,000.00 in remuneration for his efforts in realising and preserving the Fund. He has also caused the first defendant to pay more than $65,000.00 in legal fees in connection with the proceedings in *Powell*. On the assumption that GP2’s security is valid, he asserts an equitable charge in accordance with the principle in *Universal Distributing* in an amount that now exceeds the Fund.
2. On 14 June 2017, Mr Moss issued a report to creditors outlining, among other things, the tasks that had been performed in connection with the *Powell* proceedings and the liquidation more generally. Creditors were notified that a meeting had been called for 30 June 2017 for the purposes of (among other things) considering and passing resolutions in relation to Mr Moss’s past and future remuneration. The report to creditors identified projected unsecured debts totalling more than $17 million. There was no secured creditor identified at that time. As at 30 June 2017, GP2 had not lodged any proof of debt nor asserted any existing entitlement to the property of GP1 under the Security Deed. The remuneration request was approved by a vote of GP1’s creditors (which did not include GP2) on 30 June 2017.
3. Mr Jacobs asserts that the sums claimed by Mr Moss in the liquidation of GP1 appear to be unreasonable having regard to the limited role played by GP1 in the *Powell* proceedings. He also alleges that the remuneration approval request made to creditors in July 2017 includes amounts that, going by their description, are not referable to the realisation, care or preservation of the Fund and so are not claimable under *Universal Distributing* principles.

# THE ATO ISSUE

1. Division 6 of the CA is titled “Proof and Ranking of Claims”. Subject to the other provisions of Div 6, s 556 of the CA ranks the debts and claims that must be made in priority to all other unsecured debts and claims. The claims of relevance to this proceeding are those specified in subs (a) and (e), namely:

(a) first, expenses (except deferred expenses) properly incurred by a relevant authority in preserving, realising or getting in property of the company, or in carrying on the company’s business;

…

(e) subject to subsection (1A)—next:

(i) wages, superannuation contributions and superannuation guarantee charge payable by the company in respect of services rendered to the company by employees before the relevant date; or

(ii) liabilities to pay the amounts of estimates under Division 268 in Schedule 1 to the *Taxation Administration Act 1953* of superannuation guarantee charge mentioned in subparagraph (i);

1. Section 561 of the CA provides:

**561 Priority of employees’ claims over circulating security interests**

So far as the property of a company available for payment of creditors other than secured creditors is insufficient to meet payment of:

(a) any debt referred to in paragraph 556(1)(e), (g) or (h); and

…

payment of that debt or amount must be made in priority over the claims of a secured party in relation to a circulating security interest created by the company and may be made accordingly out of any property comprised in or subject to the circulating security interest.

1. In light of these provisions, and on the assumption that there is a secured debt owing to GP2 under the Loan Agreement, the competing claims on the property of GP1 are to be ranked as follows: *first,* amounts owing to Mr Moss in respect of his equitable charge under *Universal Distributing* principles; *second,* the amount owing to the ATO in repayment of the debt referred to in s 556(1)(e) of the CA as provided for by s 561; *third,* repayment of the secured debt owing to GP2; *fourth* (if there be excess and no other secured creditors) any claims of unsecured creditors prioritised in s 556 of the CA, and; *fifth* distribution *pari passu* among GP1’s other unsecured creditors. The parties are in dispute as to the ranking of any claim by Mr Moss for expenses that may be associated with the assessment of the ATO’s proof. I will return to that question later in these reasons.
2. On 28 October 2013 the ATO lodged a proof of debt for the total amount of $469,794.20, said to represent GP1’s running account Business Activity Statement liabilities and its superannuation guarantee charges for the period 1 July 2011 to 30 June 2013 together with interest and penalties.
3. The proof lodged in 2013 wrongly included a significant period in which the employees were no longer employed by GP1.
4. The ATO lodged a substituted proof of debt in the winding up of GP1 on 22 June 2018, in the amount of $418,870.10. Of that amount, $312,813.24 was attributable to a superannuation guarantee charge relating to the period 1 July 2011 to 30 September 2012.
5. Counsel for GP1 told the Court that the ATO’s proof of debt is underpinned by an assessment made by the ATO and Mr Jacobs has conceded that to be the case. The formal assessment is not in evidence on this application.
6. Mr Jacobs acknowledges that a debt owing to the ATO in respect of GP1’s superannuation guarantee liability is to be paid in priority to any sum payable to GP1 in accordance with s 561 of the CA. However, he alleges that the proof lodged by the ATO exceeds that in fact owing by GP1 by approximately $170,000.00. He alleges that the amount payable to the ATO under ss 556(1)(e) and s 561 of the CA is $135,861.13.
7. Mr Jacobs submits that the amounts claimed by the ATO are inconsistent with books (in the form of MYOB records) that have been provided to him by the former bookkeeper of GP1, GP2 and APHL, Ms Annie Richardson. He relies on Ms Richardson’s employment circumstances as an example to demonstrate that the ATO’s proof includes a superannuation guarantee charge payable in respect of Ms Richardson, notwithstanding that she claims to have been paid her superannuation entitlements by GP1.
8. Mr Jacobs has caused a schedule to be prepared which, he says, evidences that the ATO has failed to take into account superannuation payments that had already been made by GP1 to or in respect of its employees. He nonetheless accepts that should Mr Moss reject the proof, and should the ATO commence an appeal from that decision, the ATO would be entitled to rely on its assessments as conclusive evidence of the existence of the debt: *Foxhat Employment Service Pty Ltd v Deputy Commissioner of Taxation* [2014] VSC 218; *Deputy Commissioner of Taxation v Buzadzic* [2019] VSCA 221; *Commissioner of Taxation of the Commonwealth of Australia v Futuris Corporation Limited* (2008) 237 CLR 146 at [21] – [ 25] and [64] – [ 67] and *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at [26]. Argument before me proceeded on the basis that for Mr Moss to succeed on any contested appeal about the amount of the claimed debt, it would be necessary for him to invoke objection and review processes under the *Taxation Administration Act 1953* (Cth) in order to have the assessment set aside: see *Superannuation Guarantee (Administration) Act 1992* (Cth) (SG Act), s 42. In light of these provisions, it is reasonable to infer that a contest between the ATO and Mr Moss as liquidator of GP1 in relation to ATO’s proof may be a costly and protracted exercise.
9. Former employees of GP1 have also lodged proofs of debt in the liquidation in respect of their superannuation entitlements, each of them pointing to the MYOB reports to quantify their claims. However, the employees’ claimed entitlements are not to be admissible to proof against GP1 if a debt by way of a superannuation guarantee charge has been paid or is admissible to proof against the company: CA, s 553AB.
10. The ATO has sought and obtained statements from Mr Moss itemising the remuneration paid to him in the liquidation. The consequence of that remuneration is that there is little or no money in the liquidation available to pay any part of the debt claimed in the ATO’s proof. Given the financial position of the company, Mr Moss has neither accepted nor rejected the ATO’s proof.

# THE ORIGINATING APPLICATION

1. By [1] of its amended originating application, GP2 seeks an order that there be an inquiry into whether Mr Moss has failed to duly administer the liquidation of GP1 by:

(a) Failing to take any, or any sufficient, steps to recognise and protect the interests of the Plaintiff in respect of the proceeds of $223,769.27 (**Fund**) paid to the First Defendant as a consequence of the judgment in *Powell, in the matter of Arafura Pearls Holdings Ltd* [2017] FCA 1159.

(b) Failing to properly investigate what, if any, basis exists for objecting to the assessment of the Australian Taxation Office (**ATO**) of 25 October 2013 on the basis of which it has lodged a proof of debt in the liquidation of the First Defendant;

(c) Applying the Fund to pay remuneration to himself, rather than applying the Fund to pay the ATO under s.561 of the *Corporations Act* (**Act**) and/or the Plaintiff as secured creditor, less an appropriate deduction for that part of his fees and expenses for recovering the Fund in accordance with *Re Universal Distributing Co Ltd* (I 933) 48 CLR 171;

(d) As a consequence of (a)-(c) above, causing the Plaintiff to incur costs and expenses which it would not have otherwise incurred if the Second Defendant had duly and properly administered the liquidation of GP1.

1. The assessment referred to in (b) has since been replaced by the assessment underpinning the revised proof of debt lodged by the ATO in 2018.
2. There is a claim for financial relief in the form of orders to be made at the conclusion of any investigation. It is expressed (at [2]) as follows:

An order that the First and/or Second Defendant pay to the Plaintiff so much of the sum of $223,769.27 that comprises the Fund pursuant to the Security Interest of the Plaintiff having PPSR Registration Number 201210190073661 registered on 19 October 2012 (RSI) as is available after paying:

(a) Such amount of fees and expenses as is properly payable to the Second Defendant for recovering the Fund in accordance with *Re Universal Distributing Co Ltd* ( 1933) 48 CLR 171;

(b) Such amount as is properly payable to the ATO in respect of priority employee claims under s.561 of the *Corporations Act 2001* in priority to the secured debt owed by the First Defendant to the Plaintiff.

1. The “RSI” there referred to is the security interest first registered on the PPSR on 19 October 2012.
2. In addition, orders are sought to require Mr Moss to “take all necessary steps to review, and if so advised, challenge the assessment or assessments relied on for the purpose of the ATO’s Proofs of Debt lodged in relation to the First Defendant … in conjunction with” GP2. Alternatively, GP2 seeks an order requiring Mr Moss and GP1 to authorise Mr Jacobs to conduct all necessary communications with the ATO on behalf of GP1 in relation to its proof of debt and the underlying assessment.
3. GP2 seeks further orders to the effect that GP1 “and/or” Mr Moss pay to GP2 all other money recovered by Mr Moss in the liquidation of GP1 and that Mr Moss fully account to GP2 for all monies received in the liquidation that are or would be comprised in its security.
4. There is also a claim for declaratory relief to the effect that the debt secured by the Security Deed has priority over all other debts owed by GP1 to any creditor (including Mr Moss) other than the debts referred to in [2] of the amended originating application. Presumably that declaration is considered necessary because Mr Moss has not admitted GP2’s proof of debt, nor has he accepted the validity of the security.

# the power to INVESTIGATE

1. The power to order an inquiry under s 90.10 of Sch 2 of the CA has its predecessor in s 536. In its previous iteration, the power was enlivened where (relevantly) “it appeared to the Court that” a liquidator was not faithfully performing his or her duties or observing certain legal requirements in the winding up. In *Leslie, in the matter of* *the Aboriginal Councils and Associations Act 1976 v* ***Hennessy*** [2001] FCA 371 the Full Court (Ryan, Dowsett and Hely JJ) said, of s 536 (at [6]):

… an applicant must show a sufficient basis for making an order, that there is something which requires inquiry. The Court then has a discretion which it must exercise. Many factors will be relevant to that exercise. They include the strength and nature of the allegations, any answers offered by the liquidator, other available remedies, the stage to which the liquidation has progressed, the likely amounts of money involved, the availability of funds to pay for any inquiry, the likely benefit to be derived from it and the legitimate ‘interest’ of the applicant in the outcome.

..

1. As Barrett J observed at [41] in *BL & GY International Co Ltd v Hypec Electronics Pty Ltd* (2010) 79 ACSR 558 the emphasis was upon “regulation, supervision, discipline and correction of liquidators in the interests of honest and efficient administration of the estates of companies subject to winding-up”. His Honour said:

…  The interest to be served is a public interest. The section is not concerned in any direct way with vindication of private rights. Rather and as Steytler J said in *GIS Electrical Pty Ltd v Melsom* (2002) 43 ACSR 481; 172 FLR 218 [2002] WASCA 302 at [49] echoing an observation of McLelland CJ in Eq in *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434 at 438; 1 ACSR 79 at 83, it ‘is concerned with aspects of the conduct of liquidators which are liable to attract sanctions or control for what might be broadly described as disciplinary reasons’. The preoccupation is, as I put it in *Re Bauhaus Pyrmont Pty Ltd* [2006] NSWSC 742 at [4], with ‘the broader question of due administration of the winding up in the public interest’.

1. These observations apply equally to the power conferred by s 90.10 of Sch 2. Whilst the existence of some subject matter appearing to warrant an inquiry is no longer an express precondition to the exercise of the power, it will be a factor to be weighed in the Court’s discretion together with other considerations of the kind referred to by the Full Court in *Hennessy*.
2. Like s 536, an inquiry under s 90.10 of Sch 2 ordinarily involves three stages. They are conveniently explained by Doyle J in *Australian Securities and Investment Commission v Macks (No 2)* [2019] SASC 17 (at [52]):

Authority suggests that proceedings under s 536 will normally involve three stages. The first stage involves the Court deciding, upon an application being made, whether an inquiry into a liquidator’s conduct is warranted. If found to be warranted, an inquiry is ordered to take place. The task of the Court at the second stage is to make a judgment about the liquidator’s conduct, viewed in light of the whole of the circumstances relevant to the particular winding up and liquidator. If the Court decides that the liquidator’s conduct was in some way deficient, it then embarks upon the third stage and decides whether or not to make an order in respect of that conduct.

(footnote omitted)

1. As to the nature and scope of the inquiry and his Honour said (at [57]):

… the Court retains a broad discretion as to the procedure to be adopted. While pleadings, and other processes akin to those commonly utilised in ‘ordinary’ *inter partes* litigation, will sometimes be appropriate, that may not always be so. What is appropriate in respect of any particular inquiry will depend very much upon the particular circumstances, including the nature of the conduct to be inquired into, and the nature and extent of the available evidence and any previous investigation or consideration of that conduct.

(footnotes omitted)

# CONSIDERATION

1. The submissions of GP2 are to the broad effect that there is both private and public utility in the inquiry. Counsel submitted that Mr Moss has a duty to make a proper assessment of the ATO’s proof. In the words of Lord Denning in ***Austin Securities*** *Ltd v Northgate & English Stores Ltd* [1969] 1 WLR 529 at 532:

It is the duty of a liquidator to inquire into all claims, to see whether they are well founded or not, to pay the good claims, to reject the bad, to settle the doubtful, or, if need be, to contest them. It is only in this way that a liquidator can fulfil his duty ... of seeing that the property of the company is applied in satisfaction of its liabilities pari passu.

1. It was submitted that an inquiry is necessary to supervise the discharge of that duty, given that Mr Moss has demonstrated his unwillingness to take any further steps in respect of the assessment of the ATO’s proof notwithstanding the disparity between the debt claimed and GP1’s MYOB records. Counsel submitted that Mr Moss was “hiding behind” the ATO’s inflated proof of debt as the basis for suggesting there was nothing to be gained by GP2 in an inquiry into the quantum of his *Universal Distributing* claim and so avoid scrutiny of that claim.
2. GP2’s contention that the ATO’s claimed debt may be inflated is based on an assumption that the amount payable to the ATO equates to the superannuation payments owing to GP1’s employees. However, that calculation does not address the provisions of the SG Act which define an employer’s superannuation guarantee charge to attach not only to an amount equivalent to the superannuation payable to the employee, but also to a nominal interest component and an administration component: SG Act, ss 17, 19, 31 and 32. The superannuation guarantee charge referred to in s 556(e)(i) of the CA will in all cases be a sum that exceeds the employees superannuation entitlements, in some cases considerably so.
3. Nor have the submissions addressed the circumstance that the superannuation guarantee charge is the result of a default assessment, apparently made under s 36 of the SG Act. Such an assessment may be made where an employer has not lodged a superannuation guarantee statement for a quarter. For the purposes of making such an assessment, the guarantee shortfall (to which the charge attaches) is “taken to be the amount that in the Commissioner’s opinion might reasonably be expected to be the shortfall”. The resulting debt is the result of a subjective estimate by the Commissioner rather than mathematical exactitude.
4. In light of those circumstances, the fact that there is considerable disparity between GP1’s MYOB records and the amount of the ATO default assessment does not of itself signal that the ATO’s proof is not a true reflection of the debt. Much may depend on the interest and administrative components of the charge accrued over more than six years between the cessation of the employment relationships and the ATO’s latest revised assessment.
5. To the extent that there is any disparity properly warranting investigation (which has not been established) it is to be remembered that the subject of the inquiry would be Mr Moss’s conduct in neither admitting, reducing nor rejecting the ATO’s proof. Whether an inquiry should be ordered into the appropriateness of that omission must depend on the surrounding context.
6. The present context is one in which Mr Moss has taken steps to realise the company’s property and there is no suggestion that there are any prospects of further property being recovered. There is no doubt that Mr Moss has an equitable charge over the Fund, although there is a dispute as to the value of that claim.
7. Lord Denning’s statement in *Austin Securities* does not speak of a situation in which there is no property remaining in the company for distribution after proper allowance is made for a liquidator’s equitable charge under *Universal Distributing* principles. The duty to examine creditors’ proofs of debt and to either admit or reject them does not necessarily extend to a case where there is no property available for distribution to the creditors after the payment of properly assessed higher ranking claims..
8. And Dixon J’s statement in *Universal Distributing* does not speak of a case in which there is a statutory priority outranking the interests of the secured creditor in the company’s property, such as that provided for under s 561 of the CA. When asked how Mr Moss might be remunerated for the costs associated with a contest in relation to the ATO’s proof, Counsel for Mr Jacobs submitted that he must perform the task unpaid and otherwise meet the expenses from his own pocket. That submission must be rejected. The liquidator’s charge under *Universal Distributing* principles extends not only to the costs of realising the Fund but to its care and preservation in the winding up. If the Fund was more than sufficient to pay both the liquidator’s charge (properly quantified) and the debt properly owing to the ATO, then the duty to scrutinise the ATO’s proof would seem to me to arise as an incident of the liquidator’s duty to preserve the Fund to the benefit of GP2, specifically by protecting it from claims wrongly made under s 556(1)(e) of the CA. Having come into the liquidation by lodging a proof of debt and asserting its interests as a secured creditor in the winding up of GP1, GP2 could not conscientiously deny Mr Moss the costs and expenses of assessing higher ranking priorities under s 561 so as to protect the Fund from any inflated claims.
9. All of that goes to the financial utility of the proposed inquiry. If the Fund were not already exhausted, in my view it would very quickly be exceeded by Mr Moss’s costs of taking any further steps in assessing the ATO proof, deciding to reject or reduce it and defending any appeal from his decision (which would include the costs of objecting to the ATO’s assessment).
10. Moreover, if Mr Moss is entitled to the expenses he has claimed in the liquidation of GP1 (which have exhausted the Fund), there is no basis to assert that he is obliged to give any further consideration to the ATO’s proof. That is because there is no property in the company (whether subject to a circulating security interests or otherwise) from which the debt owing to ATO could be paid.
11. On the basis of the request for approval of his remuneration, it does appear that Mr Moss has been paid for tasks that are not directly related to the participation of GP1 in the *Powell* proceeding and that more closely resemble the general tasks arising in the winding up of a company. However, it does not necessarily follow that the costs of those tasks cannot be the subject of the liquidator’s equitable charge.
12. GP2 submits that for so long as a secured debt remains unpaid to it, every step in the liquidation of GP1 must be directly referrable to getting in and preserving the property of the company for GP2’s benefit and Mr Moss must otherwise take steps to comply with (for example) the reporting requirements of the CA at his own expense. I cannot accept that submission. The value of the equitable charge will depend on which steps taken in the course of the winding up are steps taken for the benefit of the secured creditor such that the secured creditor would be acting unconscientiously to deprive the liquidator his proper remuneration for taking them. To say that is not to finally decide the questions that may arise on an inquiry should one be ordered. It is simply to reject the contention that no task performed in the winding up of GP1 can be the subject of Mr Moss’s charge unless it is directly related to GP1’s participation in the *Powell* proceeding.
13. Similar observations may be made of the reasonableness of the costs claimed in relation to the *Powell* proceeding itself. The fact that GP1 did not participate as an active contradictor in that proceeding does not necessarily suggest unreasonableness in the legal costs incurred. Mr Moss and his legal representatives might reasonably have incurred considerable expenses comprehending the subject matter of the proceedings so as to satisfy himself that it was appropriate not to contest the orders. I accept that whether that is so is the subject of the inquiry sought by GP2. But in my view, the circumstances are not sufficiently suggestive of wrongdoing to justify the significant costs and other resources entailed by an inquiry into the subject matter.
14. The creditors of both GP1 and GP2 have a financial interest in the proper administration of the winding up of GP1. In that regard, Counsel for GP2 submitted that there may be a payment to the creditors of GP2 in the event that both the ATO claim and the claim under *Universal Distributing* are reduced. But the prospects of that occurring are very unlikely indeed. Even on Mr Jacobs’ best calculations, there is a debt owing to the ATO of nearly $136,000.00 not including interest and administration components. That of itself would account for more than half of the Fund. It is very unlikely that a reduction in the ATO’s proof would come at no cost. Both liquidators have corresponded with the ATO. The ATO changed its position in 2018 but may not do so again. As I have said, given that the ATO’s assessment underpinning the proof is conclusive evidence of the debt, the steps that must then be taken by Mr Moss to succeed on any appeal by the ATO may be considerable and costly. As explained above, they are costs that may be thrown against the Fund. Even if Mr Moss’s current claim on the Fund were to be halved, the costs of dealing with the ATO’s proof would offset any benefit that might otherwise have flowed to GP2.
15. Even if a benefit were to flow to GP2, that sum would in all likelihood be applied to cover Mr Jacob’s own expenses in the liquidation of GP2 under s 556(1)(a) of the CA such that no benefit would ultimately flow to that company’s creditors.
16. I have not overlooked that an inquiry into Mr Moss’s remuneration may serve to advance the interests of GP1’s employees: the greater the reduction in his remuneration, the greater the sum available to be paid to the ATO under s 561 of the CA to their ultimate benefit. Weighing against that consideration is the circumstance that the ATO has been provided with a breakdown of Mr Moss’s remuneration and expenses. It has obtained legal advice and has not availed itself of an opportunity to intervene in the proceedings.
17. As with all companies in liquidation, there is a public interest in the property of GP2 being applied to the discharge of its liabilities in accordance with the law. I afford that factor considerable weight. However, GP2 has not sought any inquiry other than one that will ultimately yield a commercial benefit to itself (or perhaps to its liquidator depending on the ranking of claims under s 556 of the CA).
18. The suggestion of the wrongful claim under *Universal Distributing* principles cannot be made good, even on a *prima facie* basis, without GP2 first establishing its status as a secured creditor having rights in the Fund. It is significant that GP2 seeks an inquiry into the validity of its own security and the existence of its debt, and a declaration of those rights on the face of its amended originating application. Those are essentially matters going to the vindication of GP2’s private rights *vis a vis* GP1. Assessed against the public interest, Mr Moss’s conduct in neither accepting nor rejecting GP2’s proof of debt or recognising the validity of the security is not suggestive of impropriety. Given the complexity of the transactions, there is a sufficient basis for Mr Moss not to accept the proof of debt in the absence of further evidence from GP2. Having lodged the proof of debt, it would ordinarily be for GP2 to make good its proof at its own expense: reg 5.6.51 of the *Corporations Regulations 2001* (Cth). In all of the circumstances I have described, I do not consider it an appropriate use of the power conferred by s 90.10 of Sch 2 of the CA to inquire into GP2’s asserted status as a secured creditor of GP1. If GP2 considers there to be utility in a declaration of its status as a secured creditor, it may seek that declaration as a private remedy.
19. The case is one in which the lack of commercial utility in the proposed inquiry may legitimately inform the question of where the public interest might lie. As identified above, GP1 appears to have unsecured creditors owed amounts exceeding $17m. They have no prospects of being paid on any possible outcome of the proposed inquiry. As I have said, the prospect of any benefit flowing to the creditors of GP2 is very low indeed. Whilst I accept that Mr Jacobs has a genuine interest in having Mr Moss’s claimed equitable charge scrutinised, in my discretion, and having regard to all of the circumstances, I conclude that an inquiry into the subject matter referred to in the amended originating application should not be ordered.
20. I will hear the parties as to costs.

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| I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Charlesworth. |

Associate:

Dated: 22 May 2020