

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v United Global Capital Pty Ltd [2024] FCA 1215

File number(s): VID 558 of 2024

Judgment of: NESKOVCIN J

Date of judgment: 3 October 2024

Date of publication of reasons: 21 October 2024

Catchwords: **CORPORATIONS** – application for winding up order on just and equitable grounds pursuant to s 461(1)(k) of the *Corporations Act 2001* (Cth) – where there is a lack of confidence in the conduct and management of the company’s affairs – winding up ordered

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) s 13
Corporations Act 2001 (Cth) ss 461(1)(k), 466(2), 912A, 961B, 961G, 961K, 961L, 992A, 992AA, 1308
Federal Court of Australia Act 1976 (Cth) s 43

Cases cited: *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405
ASIC v Aviation [2019] FCA 377
ASIC v Brite Advisors Pty Ltd [2024] FCA 69
ASIC v Groves & Ors [2009] FCA 915
ASIC v M101 Nominees Pty Ltd [2021] FCA 62
ASIC v PayPal Australia Pty Ltd [2024] FCA 762
ASIC v Secure Investments Pty Ltd (No 2) (2020) 148 ACSR 154; [2020] FCA 1463
Australian Securities and Investments Commission v Activesuper Pty Ltd (No 2) (2013) ACSR 189; [2013] FCA 234
EEU20 v Meat Industry Employees’ Superannuation Fund Pty Ltd (Trustee) (No 2) [2020] FCA 1536
One Tel Ltd v Deputy Commissioner of Taxation (2000) 101 FCR 548; [2000] FCA 270
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11

Re Minister for Immigration; Ex parte Lai Qin (1997) 186
CLR 622; [1997] HCA 6

*Thomson Australian Holdings Pty Ltd v The Trade Practices
Commission* (1981) 148 CLR at 164; [1981] HCA 48

Division: General Division

Registry: Victoria

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Sub-area: General and Personal Insolvency

Number of paragraphs: 46

Date of hearing: 3 October 2024

Counsel for the Applicant: Dr J Moore KC and Ms S Hooper

Solicitor for the Applicant: Johnson Winter Slattery

Counsel for the Respondents: Mr S Maiden KC and Ms V Bell

Solicitor for the
Respondents: Gadens

ORDERS

VID 558 of 2024

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Applicant

AND: **UNITED GLOBAL CAPITAL PTY LTD**
First Respondent

GLOBAL CAPITAL PROPERTY FUND PTY LTD
Second Respondent

ORDER MADE BY: NESKOVCIN J

DATE OF ORDER: 3 OCTOBER 2024

THE COURT ORDERS BY CONSENT THAT:

Winding up on just and equitable grounds

1. Pursuant to section 461(1)(k) of the *Corporations Act 2001* (Cth), the Second Defendant, Global Capital Property Fund Limited (GCPF), be wound up.
2. Ross Andrew Blakeley and Kelly-Anne Lavina Trenfield of FTI Consulting be appointed as joint and several liquidators of GCPF.
3. ASIC are to provide the joint and several liquidators with copies of such books and records relating to GCPF which have been obtained by ASIC under Part 3, Division 3 of the *Australian Securities and Investments Act 2001* (Cth), that the joint and several liquidators reasonably request in writing for the purpose of performing their duties.

Non-Publication Orders

4. Orders 8 and 9 of the orders made on 20 June 2024 and Order 1 of the orders made on 25 June 2024 (relating to non-publication of material filed by ASIC in this proceeding) are vacated.

Freezing Orders

5. Paragraph 13 of the orders made on 20 June 2024 (commencing with the words ‘The order in paragraph 12 above shall not prevent’) is varied to add the following subparagraph:

- (a) Ross Andrew Blakeley and Kelly-Anne Lavina Trenfield of FTI Consulting in their capacity as joint and several liquidators of the second defendant, or anyone authorised by them, from taking any action in relation to the Property of the Second Defendant.

AND THE COURT ORDERS THAT:

Costs

6. GCPF pay ASIC's costs of GCPF's interlocutory application filed on 29 August 2024.
7. GCPF pay ASIC's costs of the winding up application filed on 9 September 2024 to be agreed, or failing agreement, to be taxed.
8. ASIC's costs of the winding up application be paid out of the property of GCPF in accordance with s 466(2) of the Corporations Act.
9. GCPF otherwise pay ASIC's costs of the proceeding as against it.

Other matters

10. Liberty to apply.

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

REASONS FOR JUDGMENT

NESKOVCIN J:

INTRODUCTION

1 By amended originating process dated 9 September 2024, the plaintiff (**ASIC**) sought orders winding up the second defendant, Global Capital Property Fund Ltd (**GCPF**), on just and equitable grounds pursuant to s 461(1)(k) of the *Corporations Act 2001* (Cth) (**Act**).

2 ASIC relied on the following affidavits:

- (a) an affidavit dated 9 September 2024 of Susanne Harris, Acting Senior Manager in ASIC’s Investigation and Enforcement Action team, which outlined ASIC’s concerns in relation to the wrongful conduct of the first defendant, United Global Capital Pty Ltd (**UGC**), GCPF’s awareness of and participation in that conduct and its relevance to how GCPF’s shareholders came to learn about and acquire shares in GCPF (**First Harris Affidavit**);
- (b) an affidavit dated 26 September 2024 of Christopher Sones, a solicitor at Johnson Winter Slattery, who act for ASIC, regarding the steps taken in the winding up application; and
- (c) a supplementary affidavit of Ms Harris made 2 October 2024 which clarified certain matters in the First Harris affidavit.

3 At the hearing, GCPF consented to the winding up order on a ‘no admissions’ basis. GCPF filed an affidavit of Katarzyna Jaruzelska, a solicitor at Gadens, who act for GCPF, which explained the basis for GCPF’s consent to the winding up order and GCPF’s position that the parties should bear their own costs of the proceeding.

4 ASIC submitted that the Court is entitled to treat GCPF’s consent to the winding up orders as an admission of all facts necessary or appropriate to grant that relief: see, for example, *Thomson Australian Holdings Pty Ltd v The Trade Practices Commission* (1981) 148 CLR at 164; [1981] HCA 48 (Gibbs CJ, Stephen, Mason and Wilson JJ); *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at [73] (Gordon J); *ASIC v PayPal Australia Pty Ltd* [2024] FCA 762 at [45(e)] (Moshinsky J). However, when deciding whether to make orders that are consented to by the parties, the Court must be satisfied that it has the power to make the orders proposed and that the orders are appropriate: *Coles* at [71] (Gordon J).

5 At the hearing, I was satisfied that it was appropriate to make the winding up orders and I made orders substantially in the form sought by ASIC. These are my reasons for doing so.

THE PROCEEDING

6 This proceeding was commenced by originating process dated 20 June 2024, seeking the appointment of receivers to the property of UGC and GCPF and, in the alternative, freezing orders restraining UGC and GCPF from dealing with their property.

7 On 20 June 2024, O’Callaghan J granted interim relief on an *ex parte* basis, including freezing orders restraining UGC and GCPF from removing any of their real or personal property from Australia, disposing of or diminishing the value of any of their property and incurring new liabilities.

8 On 9 August 2024, the creditors of UGC resolved to place UGC into liquidation and liquidators were appointed.

9 On 29 August 2024, GCPF filed an interlocutory application seeking to vary the freezing orders made on 20 June 2024, to enable it to enter into certain transaction documents. The parties subsequently agreed to orders dismissing the application.

10 On 9 September 2024, ASIC filed an amended originating application and supporting affidavit seeking the winding up of GCPF on just and equitable grounds, pursuant to s 461(1)(k) of the Act.

BACKGROUND FACTS

11 In May 2022, ASIC commenced an investigation under s 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) in relation to suspected contraventions by UGC and/or its officers and representatives of ss 912A, 961B, 961G, 961K, 961L, 992A, 992AA, and/or 1308 of the Act. ASIC’s investigation is ongoing. Through its investigation, ASIC obtained the information set out in the affidavits relied upon in support of the winding up order. GCPF did not seek to challenge that evidence. The findings below are based on the affidavits relied upon by ASIC.

12 GCPF is an unlisted public company, which was incorporated on 15 August 2019. It has 538 shareholders, from whom it has raised around \$85 million in share capital, and approximately 82 million shares on issue.

- 13 At the relevant times, the directors of GCPF were **Mr Joel Hewish, Mr Brett Dickinson and Mr Chris Pappas**. Mr Hewish resigned on 12 August 2024, shortly after ASIC made a banning order against Mr Hewish, banning him from participating in the financial services industry. Since Mr Hewish’s resignation, GCPF has had only two directors and has been unsuccessful in locating and appointing a third director to fill the vacancy left by Mr Hewish’s resignation.
- 14 Mr Hewish was also the sole director of UGC. The shareholders of UGC are Mr and Mrs Hewish. According to GCPF’s financial statements for the year ending 30 June 2023, Mr Dickinson was UGC’s Compliance Officer.
- 15 UGC carried on a financial services business. UGC held an Australian Financial Services Licence (**AFSL**) that authorised it to provide financial product advice to retail and wholesale clients and to provide specified financial products. The AFSL did not authorise UGC to issue financial products. UGC’s AFSL was cancelled by ASIC on 31 May 2024.
- 16 GCPF is a property development investment company. The vast majority of GCPF’s shareholders came to acquire their shares in GCPF through referrals from UGC or its corporate authorised representatives (**CARs**) under what ASIC described as the “**UGC Advice Model**”. In summary, UGC ran promotional campaigns offering prospective clients the opportunity to win an iPhone or similar prize. UGC’s representatives used the contact details provided to contact the prospective clients to offer a “free general superannuation health check”. The prospective clients were asked certain questions to ascertain if they were suitable to be referred to UGC. Under the UGC Advice Model, the CARs called prospective clients to ascertain their superannuation balance, the fund it was held in, whether they were working and their age. Next, a “super specialist” gave a presentation to prospective clients, the effect of which was to recommend that the prospective clients transfer their retirement savings from their regular superannuation accounts into a self-managed superannuation fund (**SMSF**) and invest in related entities, such as GCPF, through the SMSF.
- 17 From January 2020 to 21 June 2022, GCPF issued three prospectuses and four replacement prospectuses seeking to raise around \$490 million from retail and wholesale investors. GCPF has raised funds from the sale of its shares to the public via the prospectuses. Neither GCPF nor UGC held an AFSL (or authorisation from an AFSL-holder) authorising it to issue share capital. ASIC alleges that GCPF therefore carried on a financial services business for which it was not licensed, or authorised, in contravention of s 911 of the Act.

- 18 GCPF has raised approximately \$85 million in share capital. The vast majority of GCPF's shareholders came to acquire their shares in GCPF via the UGC Advice Model and, as a consequence, the money invested in GCPF primarily comprises investors' retirement savings rolled over from their regular superannuation accounts into SMSFs and thereafter invested in GCPF shares.
- 19 In mid-2022, ASIC issued three stop orders to GCPF which prevents GCPF from raising further funds from retail investors.
- 20 GCPF has used funds raised from shareholders to indirectly invest in 15 property development projects. The investments have been made by loaning and/or advancing funds to, or taking an equity interest in, special purpose vehicles (**SPVs**) which own the land on which the projects are being undertaken, or which at the time of the investment proposed, to acquire the land. Five of the 14 projects are being undertaken by SPVs related to GCPF.
- 21 The ability of each of the SPVs to repay GCPF's investments is contingent on the relevant projects turning a profit. Most of the projects have been delayed. Only one of the projects has been completed and 14 are ongoing (or less, if one discounts the projects which GCPF has decided are not viable). Some of the projects are likely to realise a loss to GCPF and, therefore, result in nil return to shareholders.
- 22 Since June 2021, GCPF has incurred monthly "management fees" owed to a related entity, **GCPF Management** Pty Ltd, to manage its portfolio of assets. The directors of GCPF Management are Mr Hewish, Mr Dickinson and Mr Pappas and the shareholders of GCPF Management are entities associated with Mr Hewish (25%), Mr Dickinson (25%) and Mr Pappas (50%). The monthly "management fee" is calculated by reference to GCPF Management's assessment of the value of the portfolio each month.

RELEVANT PRINCIPLES

- 23 In *Australian Securities and Investments Commission v Activesuper Pty Ltd (No 2)* (2013) ACSR 189; [2013] FCA 234, Gordon J summarised many of the principles that are applicable to an application similar to the present application for a winding up order on just and equitable grounds under s 461(1)(k) of the Act (at [19]-[24]):

[19] In the present case, the appointment of a provisional liquidator is sought where the winding up is sought on the just and equitable ground under s 461(1)(k) of the Act. There is no dispute that ASIC has standing to bring an application to wind up a company on the statutory just and equitable ground: ss 462(2) and 464 of the Act. The

classes of conduct which justify the winding up of a company on the just and equitable ground are not closed, and each application will depend upon the circumstances of the particular case: *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 374 and 376-379; *Australian Securities and Investment Commission v Kingsley Brown Properties Pty Ltd* [2005] VSC 506 at [95]-[97]; *Nilant v RL & KW Nominees Pty Ltd* [2007] WASC 105 at [117]. Nevertheless, it is possible to discern some guiding principles from the authorities.

[20] It has long been established that a company may be wound up where there is “a justifiable lack of confidence in the conduct and management of the company’s affairs” and thus a risk to the public interest that warrants protection: *Loch v John Blackwood Ltd* [1924] AC 783 at 788. In *Australian Securities and Investments Commission v ABC Fund Managers* (2001) 39 ACSR 443 at [119], Warren J (as her Honour then was) set out three “general fundamental principles”:

First, there needs to be a lack of confidence in the conduct and management of the affairs of the company ... Second, in these types of circumstances it needs to be demonstrated that there is a risk to the public interest that warrants protection. Third, there is a reluctance on the part of the courts to wind up a solvent company.

(Citation omitted.)

[21] In relation to the first, a lack of confidence may arise where, “after examining the entire conduct of the affairs of the company” the Court cannot have confidence in “the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company”: *Galanopoulos v Moustafa* [2010] VSC 380 at [32]; see also *Australian Securities Commission v AS Nominees Limited* (1995) 62 FCR 504 at 532-3; *ABC Fund Managers* at [117]-[118]; *Australian Securities and Investments Commission v International Unity Insurance Pty Ltd* (2004) 22 ACLC 1416 at [135]-[139].

...

[23] In relation to the second, a risk to the public interest may take several forms. For example, a winding up order may be necessary to ensure investor protection or where a company has not carried on its business candidly and in a straightforward manner with the public: *International Unity Insurance* at [138]; see also *Australian Securities and Investments Commission v Finchley Central Funds Management Ltd* [2009] FCA 1110 at [3]. Alternatively, it might be justified in order to prevent and condemn repeated breaches of the law: *Kingsley Brown Properties* at [96]; see also *AS Nominees* at 527; *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* (2001) 36 ACSR 778 at 793. Again, there is an overlap between matters which would pose a risk to the public interest for the purpose of s 461(1)(k) and which are relevant to the appointment of a provisional liquidator.

[24] In relation to the third, it has been said that “a stronger case might be required where the company was prosperous, or at least solvent”: *Kingsley Brown Properties* at [96]. Solvency, however, is not a bar to the appointment of a liquidator on the just and equitable ground, particularly where there have been serious and ongoing breaches of the Act: *ABC Fund Managers* at [124]-[130].

GROUNDINGS FOR WINDING UP

24 ASIC submitted that GCPF should be wound up under s 461(1)(k) because there is a lack of confidence in the conduct and management of GCPF's affairs and a risk to the public interest that warrants protection. The principal matters relied upon by ASIC were that:

- (a) the vast majority, if not all, shareholders of GCPF were misled into purchasing shares in GCPF and/or purchased their shares – almost invariably using sizable portions or all of their retirement savings – based on inappropriate and conflicted advice provided by UGC, and/or its CARs, pursuant to the UGC Advice Model, which operated in breach of the Act and saw retirement savings of hundreds of UGC clients imperilled by investment in GCPF, which in turn invested in SPVs undertaking high-risk property development projects;
- (b) the investments in GCPF occurred via prospectuses and the issues of shares in GCPF in circumstances where GCPF did not have an AFSL, or authorisation from an AFSL-holder, to sell its shares to the public;
- (c) GCPF is riddled with conflicts of interest and its investments have been improperly managed, are inadequately secured or entirely unsecured, are poorly documented, in disarray and appear in many instances to be loss making;
- (d) GCPF has never declared dividends or offered to buy back shares and, absent a winding up, shareholders' capital will continue to be locked up in GCPF; and
- (e) GCPF does not have the minimum number of directors required of a public company.

CONSIDERATION

UGC Advice Model

25 The UGC Advice Model involved UGC and/or its CARs cold calling consumers and encouraging consumers with low to medium sized superannuation balances to establish SMSFs, rollover most or all of their superannuation balances to those SMSFs and invest their retirement savings, via their SMSFs, in related-party products, including shares in GCPF.

26 In the determination to cancel UGC's AFSL, a delegate of ASIC made the following adverse determinations against UGC in relation to the UGC Advice Model:

- 139 To summarise, I am satisfied that UGC acted dishonestly and unfairly by using the client onboarding process because the prospective client - who wanted to win an iPhone - was lured into receiving a free superannuation health check which was nothing of the sort. Rather, the superannuation health check was a

mechanism used by UGC to determine whether the prospective client was worth pursuing or not, and if they were, they were sold an SMSF with most of their retirement savings invested in the highly speculative GCPF or the speculative Pivotal.

140 UGC's submission is that its conduct was the result of inadvertence; I disagree and am satisfied that this dishonest and unfair element of its financial services business was undertaken deliberately.

27 The delegate also made adverse determinations regarding Mr Hewish, finding that he had demonstrated a lack of fairness, honesty, trustworthiness, professionalism and judgement.

Management of GCPF's affairs

28 Mr Hewish is the subject of adverse determinations made by a delegate of ASIC in reaching the determination to make the banning order. He is no longer a director of GCPF, which has only two remaining directors: Mr Dickinson and Mr Pappas. Although Mr Hewish has resigned as a director of GCPF, he remains a director of GCPF Management, a company which is owned by entities controlled by Mr Hewish, Mr Dickinson and Mr Pappas and ultimately benefits from the management fees paid to it by GCPF.

29 Since 1 July 2021, GCPF has paid over \$4.5 million in management fees to GCPF Management. The most recent management fee paid to GCPF Management was a lump sum of \$1,428,439.05 on 7 March 2024. ASIC requested a copy of the Management Agreement and notes that an executed version of the Management Agreement has not been produced.

30 The management fee is calculated as a percentage of GCPF's "Portfolio Value" each month, which GCPF Management is responsible for calculating. ASIC is unclear as to precisely how the "Portfolio Value" has been calculated by GCPF Management, however, it appears to be based on the value of all assets of GCPF, including capital contributed by shareholders, rather than improvement in the net asset value of GCPF per share. As a result, the more capital contributed by investors, the higher GCPF Management's management fee.

31 Over 50% of the management fee paid to GCPF Management has been disbursed to companies controlled by Mr Hewish, Mr Dickinson and Mr Pappas. One week after ASIC commenced this proceeding, GCPF Management transferred \$808,535 out of its bank account to companies controlled by Mr Hewish, Mr Dickinson and Mr Pappas. The bank statements for GCPF Management described the transaction as "management fees".

32 Entities related to each of the directors are shareholders in five of the SPVs that own the projects. In relation to these related-party SPVs:

- (a) GCPF has failed to secure or adequately secure its investment in all of the relevant projects;
- (b) GCPF has advanced (or was proposing to advance) further funds to these related party SPVs in excess of contractually committed amounts; and
- (c) in respect of the “Point Bay Development” which reached completion and was sold in March 2024 for nearly \$50 million, GCPF was to receive \$29,860,000 from the settlement and announced to investors that “approximately \$29 million [was paid] to the company”. However, GCPF received only \$23 million in its bank account, which was less than the principal it had advanced, of \$23.5 million. This seems inexplicable in light of GCPF’s announcement that approximately \$29 million had been paid to it. A further troubling matter is that GCPF held a registered mortgage over the project land and it is unclear why GCPF released the mortgage at settlement, allowing the settlement to go through without GCPF receiving the funds advanced on the project.

33 ASIC contends that the projects are poorly documented and in disarray. Only one of the projects has reached completion and some of the projects are loss making. For example, “The Carlile” project will result in a loss for GCPF of approximately \$5.8 million. The “Fulham Living Development” is no longer viable and GCPF and the SPV are looking to sell the project site, which will likely result in a loss to GCPF of between \$950,000 to \$2,185,478. The “Kooyongkoot House Development” has been ongoing for years, but has not yet reached the construction stage, and the anticipated profit for GCPF is only 3% over a six year period. GCPF has decided to step away from the “River Glen Development” and anticipates a profit of \$4,705 on an investment of over \$5 million. GCPF has made significant investments in other projects, however, some of the projects will require further advances, in excess of existing commitments. Due to the stop order, GCPF is unable to raise further funds from investors.

Risk to the public interest that warrants protection

34 The vast majority of GCPF’s shareholders came to acquire their shares in GCPF as a result of advice from UGC and/or its CARs that involved investors setting up SMSFs, rolling over their superannuation balances to the SMSFs and investing in GCPF, whose shares are illiquid.

35 ASIC submitted, and I accept, that GCPF’s investments are highly speculative and some are likely to be loss making. The profitability of the projects in which GCPF invested will determine the return to shareholders, who have not yet received any return on their investments

and whose capital is locked up in GCPF. Decisions will need to be made in relation to further funding for some of the projects and in relation to the future of the projects that are no longer viable. ASIC submitted, and I accept, that the directors of GCPF are hopelessly conflicted. Moreover, there is a risk of ongoing dissipation of funds to related entities, which may adversely affect the profitability of the projects and ongoing expenses of GCPF, to the detriment of shareholders.

Conclusion

36 The affairs of GCPF are in an unsatisfactory state. There is a justifiable lack of confidence in the conduct and management of GCPF's affairs and a risk to the public interest that warrants protection. I am therefore satisfied that it is appropriate for a winding up order to be made.

COSTS

37 ASIC sought the costs of the winding up proceeding against GCPF, including in respect of the interlocutory application filed by GCPF to vary the freezing orders. ASIC also sought an order that its costs of the winding up application be costs of the winding up, to be paid out of the property of GCPF pursuant to s 466(2) of the Act.

38 ASIC relied on authorities where it was the successful party in a winding up application and was granted its costs of the application, including an order that the costs of the winding up application be costs of the winding up pursuant to s 466(2) of the Act: see, *ASIC v Brite Advisors Pty Ltd* [2024] FCA 69 at [68] (O'Sullivan J); *ASIC v M101 Nominees Pty Ltd* [2021] FCA 62 at [7] (Anderson J); *ASIC v Secure Investments Pty Ltd (No 2)* (2020) 148 ACSR 154; [2020] FCA 1463 at [110] (Derrington J) and *ASIC v Aviation* [2019] FCA 377 at [227] (O'Callaghan J).

39 GCPF submitted that the parties should bear their own costs in the proceeding because it had acted reasonably and consented to ASIC's application promptly, on a 'no admissions' basis. It also submitted that investors should not be required to bear ASIC's costs.

40 GCPF further submitted that the usual practice that costs follow the event does not apply where proceedings resolve and do not continue to trial: *Re Minister for Immigration; Ex parte Lai Qin* (1997) 186 CLR 622; [1997] HCA 6 at 624 (McHugh J). GCPF submitted that where orders are made by consent, the Court may order that the parties bear their own costs, relying by way of analogy on cases such as *ASIC v Groves & Ors* [2009] FCA 915 at [54] (Lindgren J)

and *EEU20 v Meat Industry Employees' Superannuation Fund Pty Ltd (Trustee) (No 2)* [2020] FCA 1536 at [25] (Mortimer J, as her Honour then was).

41 ASIC submitted that because GCPF consented to the winding up order on a limited basis, it was required to put on substantial material for the Court to consider the application on its merits. ASIC submitted that GCPF had effectively surrendered and it relied on the observation of Burchett J in *One Tel Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548; [2000] FCA 270 at [6] that, in such circumstances, “there will commonly be lacking any basis for an exercise of the Court’s discretion otherwise than by an award of costs to the successful party”.

42 The disposition of costs is in the Court’s discretion and that discretion must be exercised judicially, having regard to the applicable principles and the justice of the case in all the circumstances: s 43 of the *Federal Court of Australia Act 1976* (Cth). The usual position is that costs follow the event, meaning that the successful party will ordinarily be entitled to its costs: *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11 at [35] (Gaudron and Gummow JJ).

43 GCPF initially opposed the winding up application, on the basis that it considered it to be an expensive way of achieving the same outcome it was trying to achieve, namely, an orderly wind-down. GCPF also filed an interlocutory application seeking to vary the freezing orders. However, GCPF stated that the impact of the freezing orders, ASIC’s ongoing investigation and ASIC’s application for winding up orders ultimately made an orderly wind-down too difficult to execute and, in those circumstances, the directors of GCPF determined that it was in the best interests of GCPF for liquidators to be appointed. Having made that determination, the directors of GCPF also decided to withdraw the interlocutory application to vary the freezing orders.

44 GCPF relied on *EEU20* at [25], where Mortimer J (as her Honour then was) observed that the “‘usual’ practice of costs following the event is generally applied where a proceeding is actively contested, not where parties have filed submitting notices”. The full passage at [25] is as follows:

I accept that the applicants have had to incur legal costs in order to challenge the Tribunal’s decision and that, having been successful, the usual practice in an adversarial and costs-based jurisdiction is that they would not have to bear those costs. **The fact that they have been successful is a matter to weigh in the balance in the exercise of the broad discretion the Court has concerning costs.** Nevertheless, that “‘usual’ practice of costs following the event is generally applied where a proceeding is actively contested, not where parties have filed submitting notices. Each case must

be considered on its own facts, but in the circumstances of this proceeding, and taking into account the matters to which I have referred, the appropriate order is that each party bear its own costs of the proceeding.

[Emphasis added]

- 45 *EEU20* is not apposite to GCPF's position and assists ASIC. GCPF did not file a submitting appearance. Ultimately, GCPF consented to the winding up order on a 'no admissions' basis. As Senior Counsel for GCPF submitted, GCPF's consent to the winding up order did not constitute acceptance of the allegations of fact made by ASIC. ASIC was required to satisfy the Court that the orders sought were appropriate: *Coles* at [71] (Gordon J). I was satisfied that it was appropriate for winding up orders to be made and ASIC was successful in obtaining the relief sought.
- 46 ASIC should have its costs and the costs of the winding up application, which should be paid out of the property of GCPF pursuant to s 466(2) of the Act.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Neskovicin.

Associate:



Dated: 21 October 2024