[2015] WASCA 251 (S)

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	AUS ASIA MINERALS LTD -v- BALL [2015] WASCA 251 (S)
CORAM	**:**	MURPHY JA
HEARD	**:**	19 FEBRUARY 2016
DELIVERED	**:**	26 FEBRUARY 2016
FILE NO/S	**:**	CACV 159 of 2015
BETWEEN	**:**	AUS ASIA MINERALS LTD Appellant AND EVAN WILLIAM BALL Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	ACTING MASTER GETHING
Citation	**:**	AUS ASIA MINERALS LTD -v- BALL [2015] WASC 399
File No	**:**	COR 157 of 2015

Catchwords:

Practice and procedure - Security for costs - Appeal by company against dismissal of application to set aside statutory demand - Whether company is the 'defender' of the 'litigation' - Whether the 'litigation' for this purpose is the proceedings commenced by the institution of the appeal

Legislation:

Corporations Act 2001 (Cth), s 1335(1)

Result:

Application for security allowed

Category: B

Representation:

Counsel:

Appellant	:	Ms K J Levy
Respondent	:	Mr C R Bailey

Solicitors:

Appellant	:	Gadens Lawyers
Respondent	:	Williams & Hughes

Case(s) referred to in judgment(s):

Aquatown Pty Ltd v Holder Stroud Pty Ltd (1995) 18 ACSR 622
Aurora Networks Pty Ltd v Halbedi; In the Matter of Aurora Networks Pty Ltd [2013] FCA 632
Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA (1994) 13 ACSR 263
Dagenham Nominees Pty Ltd trading as Banwell Marine Service v Gary Shanks [2011] SASC 163; (2011) 110 SASR 577
Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd [No 2] [2014] WASCA 106
Sagacious Procurement Pty Ltd v Symbion Health Ltd [2007] NSWCA 205
Wise Energy Group Company Ltd v Rocke [2015] WASCA 192

1 **MURPHY JA**: This is an application by the respondent for security for costs dated 2 February 2016. The application is brought on various bases, including under s 1335(1) of the *Corporations Act 2001* (Cth) (the Act). It is sufficient for present purposes to address the application insofar as it is made under s 1335(1) of the Act. The principles applicable to s 1335(1) are well known. See, for example, ***Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd [No 2]***[1] and ***Wise Energy Group Company Ltd v Rocke***.[2]

2 The appellant resists the application on two principal bases. One is that the statutory threshold under s 1335(1) has not been met. The other is that the court should, in any event, dismiss the application as a matter of discretion as it is inappropriate to order a party to pay security for costs when that party is, in effect, defending an action.

3 The respondent relies on an affidavit sworn by Ms C Hagan on 1 February 2016. The affidavit annexes a number of financial documents in relation to the appellant.

4 The documents annexed to the affidavit include the appellant's audited accounts for the financial year ended 30 June 2015. The accounts indicate that:

(a) the appellant made a net loss of over $13 million in that financial year;

(b) the appellant had current liabilities exceeding current assets by approximately $4.6 million as at 30 June 2015;

(c) the appellant's total liabilities exceeded its total assets by approximately $2.7 million as at 30 June 2015;

(d) the appellant's assets principally comprise royalty and exploration assets in Indonesia;

(e) the appellant had deferred creditor payments until such time as the appellant had sufficient cash to make payments, and the appellant had also received a letter of support from a director;

(f) post-balance date events included payment of a sum of $434,800 in part payment of an overdue loan of $2,312,514 that had fallen due for payment by 30 June 2015, and the receipt of funds of

[1] ***Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd [No 2]*** [2014] WASCA 106 [16] - [21].
[2] ***Wise Energy Group Company Ltd v Rocke*** [2015] WASCA 192.

$365,000 intended to be converted into convertible notes subject to shareholder approval; and

(g) the appellant's ability to continue as a going concern was dependent, inter alia, upon it obtaining capital raising; negotiating a payment schedule for overdue debt; and generating positive cashflow from the operation of a mining project in Solok, West Sumatra.

5 The auditors in their report stated, in effect, that the accounts gave a true and fair view of the company's position, but added:

> **Emphasis of Matter**
>
> Without qualifying our opinion, we draw attention to Note 1 in the financial report which indicates that the Consolidated Entity incurred a loss of $13,158,516 during the year ended 30 June 2015. This condition, along with other matters as set forth in Note 1, indicate the existence of a material uncertainty which may cast significant doubt about the ability of the Consolidated Entity to continue as a going concern and whether it will realise its assets and extinguish its liabilities in the normal course of business and at the amounts stated in the financial report.

6 Ms Hagan's affidavit also indicates that on 18 January 2016, the appellant made an announcement to ASX Ltd, including a statement to the effect that the appellant had 'suspended operations under the Solok project until there is a market for its iron ore resources'. The announcement also stated that due to trading difficulties, the appellant had 'stopped all expenditure, including salaries' and all creditors were being contacted to 'seek their support and to seek agreements regarding the outstanding amounts'.

7 The appellant's evidence principally comprised an affidavit sworn by Mr Swarbrick, a director of the appellant, dated 17 February 2016. Mr Swarbrick annexed a copy of a convertible note agreement under which a lender could advance up to $500,000 'at its sole discretion' for the purpose of the appellant's working capital requirements for certain Indonesian projects. The evidence indicates that the lender has advanced $280,000 and that a variation to the agreement involved the payment of a corporate access fee by the appellant of $100,000. The appellant also tendered a 'letter of support' from Mr Swarbrick dated 15 March 2015 by which he informed the directors of the appellant that he would 'continue to provide financial support … if required over a period of at least 12 months from the date of signing the 31 December 2014 half-year financial report, as and when required in order for the company to continue as a going

concern and pay its debts as and when they fall due'. The letter also stated, in effect, that he would not call on any interest, consulting fees or loan repayments within 12 months of signing the financial report or until sufficient funding had been obtained.

8 Mr Swarbrick, in his affidavit of 17 February 2016, said, in effect, that this 'statement of support … remains in place'.

9 The duration of the support referred to by Mr Swarbrick in his letter dated 15 March 2015 is difficult to discern as there was no evidence of when the 31 December 2014 half-year financial report of the appellant was signed. Further, in this regard, the terms of the letter dated 15 March 2015 are at variance with the notes to the accounts for the year ended 30 June 2015, which refer to a letter of support for 12 months from the date of signing 'this report', ie, the report to the 30 June 2015 accounts. That report was signed on 30 September 2015. The evidence, in the end, is unsatisfactory as to the duration of any letter of support. Moreover, in any event, there is no evidence from Mr Swarbrick as to his assets and liabilities and thereby as to the value of the 'letter of support'.

10 Having regard to the evidence as a whole, there is good justification to conclude that it appears by credible testimony that there is a reason to believe that the appellant will be unable to pay the costs of the respondent. The statutory threshold under s 1335(1) of the Act has been met. That in itself also provides a significant discretionary factor in favour of an order for security.

11 The appellant contended that it has an arguable case on appeal, which I accept. The principal discretionary issue on which the appellant contested the application is that there is a line of authority said to support the view that orders for security for costs will not be made where the party against whom the order is sought is genuinely defending the primary action, and that only in the rarest of cases would a court order that an applicant seeking to set aside a creditor's statutory demand give security for the other party's costs. Reference was made to cases including ***Aquatown Pty Ltd v Holder Stroud Pty Ltd***;[3] ***Aurora Networks Pty Ltd v Halbedi; In the Matter of Aurora Networks Pty Ltd***;[4] and ***Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA***.[5] The appellant contends that non-compliance with the statutory demand gives rise to a ground upon which the company can be wound-up and that in a practical

[3] ***Aquatown Pty Ltd v Holder Stroud Pty Ltd*** (1995) 18 ACSR 622.
[4] ***Aurora Networks Pty Ltd v Halbedi; In the Matter of Aurora Networks Pty Ltd*** [2013] FCA 632
[5] ***Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA*** (1994) 13 ACSR 263.

sense, the appellant in those circumstances is forced by the respondent to take legal action.

12 The appellant has been unable to refer to any cases in the appellate area where those principles have been applied in relation to security for costs in relation to an appeal commenced by a company.

13 The respondent relied upon the decision of ***Dagenham Nominees Pty Ltd trading as Banwell Marine Service v Gary Shanks***[6] for the proposition that, in essence, the position of the parties at first instance is irrelevant and a respondent to an appeal may still be granted security for costs even though they were originally the aggressor.[7] ***Dagenham Nominees*** was a case in which a corporate trustee (the plaintiff at first instance) brought a claim for the recovery of money and the respondent (the defendant at first instance) counterclaimed for a significantly larger sum for breach of contract. The court at first instance found in favour of the respondent and the corporate trustee filed a notice of appeal. The respondent applied for security for costs, arguing that the corporate trustee was a 'plaintiff' within the meaning of and for the purposes of s 1335(1) of the Act in respect of the appeal proceeding. The corporate trustee argued that an appellant is only a 'plaintiff' within the meaning of s 1335 when it was the plaintiff at first instance and that, in substance, the corporate trustee was the defendant in the primary proceedings, because there was no real dispute about its modest claim and the trial was devoted to the counterclaim. Blue J found that the corporate trustee was a 'plaintiff' for the purposes of the appeal. His Honour observed that:

> the purpose of s 1335 appears to encompass a situation in which the applicant for security is the respondent to an appeal, regardless of the position of the parties at first instance.[8]

14 Accepting for present purposes that a company seeking to set aside a statutory demand would generally not be ordered to give security at first instance, that approach appears, at least ordinarily, inapplicable where the issue has been resolved at first instance against the company. In the present context, it seems to me that the company which is instituting the appeal against the first instance decision is not, in any sense, properly characterised as the defender of the litigation constituted by the appeal proceedings.

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[6] ***Dagenham Nominees Pty Ltd trading as Banwell Marine Service v Gary Shanks*** [2011] SASC 163; (2011) 110 SASR 577.
[7] ts 55.
[8] ***Dagenham Nominees*** [25].

15 In all the circumstances of this case, I am satisfied that it is appropriate to make an order for security for costs.

16 The respondent seeks security in the sum of $20,000, or such other amount as the court considers appropriate. Annexed to Ms Hagan's affidavit is a draft bill of costs in the sum of $37,542.20. The appellant had made no written submissions directed to quantum in the event that security were ordered. However, in oral submissions, the appellant contended, in effect, that any security ordered should not cover past costs given that the respondent had, it said, delayed in making the application. The respondent, however, said that the application was made as soon as it became clear from the announcement to the stock exchange on 18 January 2016 that the matters upon which the appellant relied to continue trading as a going concern were put in significant doubt. The respondent also referred to the observations in ***Sagacious Procurement Pty Ltd v Symbion Health Ltd***.[9]

17 The appellant in oral submissions also indicated that there were aspects of the respondent's draft bill of costs which appeared to overstate the quantum claimed and that a more appropriate sum would be in the sum of $10,000. The appellant also submitted, as is the case, that security for costs is not intended to provide a complete indemnity to the applicant seeking security.

18 Although the application for security might arguably have been brought earlier, following the publication of the appellant's accounts for the year ended 30 June 2015, I accept that it was not unreasonable for the respondent to have made the application for security when it did, following the appellant's announcement to the stock exchange on 18 January 2016. It was that announcement, read in the context of the 30 June 2015 accounts, which provided compelling evidence that there was then reason to believe that the appellant would be unable to pay the costs of the respondent. Further, having considered the scope and content of the issues in the appeal, and taking everything into account, it appears to me that a sum of $18,000 is reasonable in the circumstances.

[9] ***Sagacious Procurement Pty Ltd v Symbion Health Ltd*** [2007] NSWCA 205 [52].