FEDERAL COURT OF AUSTRALIA

Deputy Commissioner of Taxation v ACN 154 520 199 Pty Ltd (In Liq), in the matter of ACN 154 520 199 Pty Ltd (In Liq) [2020] FCA 609

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| File number: |  |
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| Judge: | **JAGOT J** |
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| Date of judgment: | 11 May 2020 |
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| Catchwords: | **COSTS** – application for special costs following unsuccessful application by general purpose liquidator (**GPL**) to review conduct of special purpose liquidator – where GPL’s actions based on unfounded suspicion – GPL’s conduct unreasonable – GPL personally liable for costs – costs awarded |
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| Cases cited: | *Re Azmac Pty Ltd (In Liq)* *(No 2)* [2020] NSWSC 363  *Re Lonnex Pty Ltd (in liq) (No 2)* [2019] VSCA 62; 57 VR 238 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 24 February 2020 (Applicant)  1 May 2020 (Respondent) |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 12 |
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| Solicitors for the Costs Applicant: | Quinn Emanuel Urquhart & Sullivan LLP |
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| Counsel for the Costs Respondent: | R Marshall SC |
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| Solicitors for the Costs Respondent: | Hammond Nguyen Turnbull |

ORDERS

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|  | | NSD 74 of 2017 |
| IN THE MATTER OF ACN 154 520 199 PTY LTD (IN LIQUIDATION) (ACN 154 520 199) | | |
| BETWEEN: | DEPUTY COMMISSIONER OF TAXATION  Plaintiff | |
| AND: | ACN 154 520 199 PTY LTD (IN LIQUIDATION) (ACN 154 520 199)  First Defendant  SCHON GREGORY CONDON IN HIS CAPACITY AS (GENERAL PURPOSE) LIQUIDATOR OF ACN 154 520 199 PTY LTD (IN LIQUIDATION) (ACN 154 520 199)  Second Defendant | |
| IN THE SPECIAL COSTS APPLICATION | RAHUL GOYAL AND JENNIFER ANNE NETTLETON AS JOINT AND SEVERAL (SPECIAL PURPOSE) LIQUIDATORS OF ACN 154 520 199 PTY LTD (IN LIQUIDATION) (ACN 154 520 199)  Applicant on the Special Costs Submission | |
|  | SCHON GREGORY CONDON IN HIS CAPACITY AS (GENERAL PURPOSE) LIQUIDATOR OF ACN 154 520 199 (IN LIQUIDATION) (ACN 154 520 199)  Respondent on the Special Costs Submission | |

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| JUDGE: | JAGOT J |
| DATE OF ORDER: | 11 MAY 2020 |

THE COURT ORDERS THAT:

1. Order 10 of the orders made on 10 February 2020 be substituted as follows:

(10)(a) The General Purpose Liquidator is to pay the costs of the Special Purpose Liquidators of and incidental to the GPL Application, including the costs of and incidental to the notice to produce filed 6 February 2020, on the usual basis up to 16 October 2019 and on an indemnity basis thereafter, such costs to be as agreed or as taxed.

(10)(b) The General Purpose Liquidator pay the costs in order (10)(a) above personally.

(10)(c) The General Purpose Liquidator is not entitled to an indemnity from the defendant or any third party in respect of those costs.

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

REASONS FOR JUDGMENT

JAGOT J:

1. On 10 February 2020 I made an order for costs against the general purpose liquidator for the defendant (**GPL**) in relation to the GPL’s unsuccessful application for an inquiry into the conduct of the special purpose liquidators (**SPL**) and to obtain discovery from the SPL in the SPL’s application for approval of his remuneration (the **GPL Application**). I reserved liberty to the SPL to apply for a special costs order against the GPL in respect of the GPL Application. The SPL now seeks orders that:
2. the GPL should pay the costs of the GPL Application, and an associated notice to produce on an indemnity basis from either 11 October 2019, 16 October 2019 or 4 February 2020;
3. the GPL should pay those costs personally; and
4. the GPL should not be entitled to an indemnity from the defendant, or any third party, in respect of those costs.
5. The facts may be stated briefly. On 11 October 2019 the GPL requested a copy of a short chain of emails between the solicitors for the plaintiff and the SPL which had been referred to in time sheets accompanying the SPL’s remuneration application. On 16 October 2019 the SPL disclosed the content of the documents in question but declined to produce the documents. The GPL applied to a Registrar for production but this was refused. The GPL did not appeal the Registrar’s decision. Instead the GPL wrote again to the SPL seeking the emails. After further correspondence the GPL filed the GPL Application on 25 October 2019. On 4 February 2020 the SPL wrote to the GPL providing copies of the emails and invited the GPL to withdraw the GPL Application. The GPL instead issued a notice to produce on 6 February 2020 seeking, amongst other things, copies of the emails, any file notes of any conversations on or around 12 September 2018 and all reports provided to the plaintiff by the SPL.
6. According to the SPL the GPL Application was brought on the basis of the GPL speculating that the SPL had acted improperly, including in a serious manner by breach of fiduciary duty, and that this impropriety warranted investigation by the Court. However, there was no basis for the GPL’s speculation. Any such speculation ought to have been put to rest when the SPL disclosed the content of the email communications to the GPL on 16 October 2019. That should have been the end of the matter as there was no probative evidence to support the serious allegations of misconduct. This was demonstrated by the fact that the GPL wanted to obtain documents under the notice to produce to enable it to make an informed decision as to whether to proceed with the GPL Application. This inverts the proper process and involved an abuse of the process of the Court. The allegation in the GPL Application should never have been made as there was no evidence of improper assistance by the SPL to the solicitors for the plaintiff.
7. According to the SPL the GPL’s conduct warrants the making of an indemnity costs order on the basis that the GPL Application had no prospects of success and involved a waste of time of the Court, amounting to a form of abuse of process. The email correspondence provided no support for the claims of misconduct by the SPL. The GPL’s course of conduct was wholly unsatisfactory. In particular:
8. the allegation was first made on 11 October 2019;
9. by 16 October 2019 the substance of the email correspondence had been accurately revealed;
10. nevertheless, the GPL raised this matter before a Registrar of this Court on that same day– which was dismissed;
11. further correspondence ensued up to 25 October 2019 and, despite a reasonable request, no proper legal basis for the request for the email correspondence was ever identified;
12. the GPL Application was filed on 25 October 2019;
13. the email correspondence was disclosed in full on 4 February 2020; and
14. the GPL’s notice to produce was issued on 6 February 2020.
15. The GPL Application and GPL notice to produce were both dismissed. The usual rule is that a liquidator is personally liable for the costs of proceedings. According to the SPL it is for the GPL to establish that he should be able to resort to an indemnity from a third party by demonstrating that his conduct was reasonable. The GPL has not done so and, submitted the SPL, it is apparent from the above that the GPL’s conduct was not reasonable.
16. The GPL agreed to the making of an indemnity costs order against him from 4 February 2020 and accepted that he should have no right of indemnity from the assets of the defendant. However, the GPL rejected the SPL’s assertion that the GPL should be denied the opportunity to rely on any indemnity from a third party.
17. The GPL contended that the date of 4 February 2020 was appropriate for the indemnity costs order because:

(a) from what Mr Condon knew in October 2019 Mr Goyal gave assistance to the lawyers acting against the Company, a fact that cannot be denied and has not been denied by Mr Goyal: Mr Goyal searched the Relativity database to look for the two documents Mr Morris wanted to presumably use against the Company in the AAT appeal;

(b) Mr Condon made three basic requests (on 11 October 2019, 16 October 2019, 18 October 2019) of My [sic] Goyal to be satisfied that nothing improper had taken place on 12 September 2018;

(c) Mr Condon received evasive answers in response – 3 times; and

(d) in those circumstances Mr Condon should be excused for thinking what had apparently occurred was improper in two respects: Mr Goyal’s terms of reference from the Court do not include giving such assistance; and it appeared to be an in principle breach of the fiduciary duty of Mr Goyal owed the Company.

1. The email chain was finally produced on 4 February 2020 making this the appropriate date from which an order for indemnity costs should operate.
2. The GPL accepted that the Court could order that the GPL not be indemnified from the assets of the company. However, the GPL submitted that the proposition that a liquidator could not rely on other rights of indemnity was wrong. According to the GPL neither *Re Lonnex Pty Ltd (in liq) (No 2)* [2019] VSCA 62; 57 VR 238 at [31] nor *Re Azmac Pty Ltd (In Liq)* *(No 2)* [2020] NSWSC 363 (***Azmac***)supported this proposition. Further, the GPL said the purpose of a costs order is compensatory and not to punish the GPL.
3. The relevant principles are conveniently summarised in *Azmac*:
4. if a liquidator brings unsuccessful proceedings the liquidator will ordinarily be subject to a personal costs order.
5. if a liquidator unsuccessfully defends proceedings then ordinarily a costs order will not be made imposing personal liability on the liquidator unless there are exceptional circumstances. Exceptional circumstances involves some improper conduct by the liquidator.
6. In the present case I consider the GPL’s conduct from 16 October 2019 onwards, when the substance of the email correspondence was disclosed, to have been unreasonable. The substance of the email communications did not provide a proper basis for the GPL Application and notice to produce. The GPL was acting on the basis of mere suspicion that something mere might exist in the SPL’s dealings with the plaintiff than the innocuous email correspondence. However, there was no proper foundation for this suspicion and the GPL’s actions after 16 October 2019 were based on this unfounded suspicion.
7. In circumstances where I consider the GPL’s conduct to have been unreasonable from 16 October 2019 onwards it is appropriate to make an order for indemnity costs from that date onwards and for the GPL to be personally liable for those costs. The purpose of such an order is not to punish the GPL but is to give effect to the finding of unreasonable conduct of the GPL on and from that date. Having reached the conclusion I have, as to unreasonable conduct by the GPL, it would be inappropriate for the GPL not to be personally liable for the costs and, to that end, not to be able to have recourse to any right of indemnity the GPL might have excluding such rights in relation to the defendant.

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| I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot. |

Associate:

Dated: 11 May 2020