FEDERAL COURT OF AUSTRALIA

Dudley (Liquidator) v RHG Construction Fitout & Maintenance Pty Ltd (No 2) [2019] FCA 1723

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| File number: | WAD 238 of 2019 |
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| Judge: | **JACKSON J** |
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| Date of judgment: | 18 October 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** - 'mothership' unfair preference proceeding against multiple unrelated defendants - irregularity in commencing proceeding - declaration under s 51(2) of *Federal Court of Australia Act* *1976* (Cth) - dispensation from requirement that relief claimed arise out of same transaction or event or series of transactions or events |
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| Legislation: | *Corporations Act 2001* (Cth) s 588FF*Federal Court of Australia Act 1976* (Cth) s 51*Federal Court Rules 2011* (Cth) rr 1.34, 9.02, 9.05 |
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| Cases cited: | *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322*Dowling v Fairfax Media Publications Pty Ltd (No 2)* [2010] FCAFC 28*Dudley (Liquidator) v RHG Construction Fitout and Maintenance Pty Ltd* [2019] FCA 1355 |
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| Date of hearing: | Determined on the papers |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 19 |
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ORDERS

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|  | WAD 238 of 2019 |
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| BETWEEN: | GREGORY BRUCE DUDLEY & NEIL RAYMOND CRIBB AS JOINT AND SEVERAL LIQUIDATORS OF PRECISION CATERING & EQUIPMENT PTY LTD (IN LIQ) (ACN 126 255 936)Plaintiff |
| AND: | RHG CONSTRUCTION FITOUT & MAINTENANCE PTY LTD FORMERLY KNOWN AS RHG CONTRACTORS PTY LTD (ACN 159 703 349)First DefendantMTS ELECTRICAL CONTRACTING PTY LTD (ACN 136 656 829)Second DefendantWESCO ELECTRICS (1966) PTY LTD (ACN 008 700 025) (and others named in the Schedule)Third Defendant |

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| JUDGE: | JACKSON J |
| DATE OF ORDER: | 18 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. Pursuant to s 51(2) of the *Federal Court of Australia Act 1976* (Cth), the court declares that the proceeding is not invalid by reason of the unauthorised joinder of the claims against the defendants into a single proceeding.
2. Pursuant to r 1.34 of the *Federal Court Rules 2011* (Cth), the court dispenses with the requirement for compliance with r 9.02(b) in relation to the commencement of the proceeding on 26 April 2019.
3. Paragraph 1 of the orders of 28 August 2019 and paragraph 1 of the orders of 11 September 2019 are vacated.
4. Costs reserved.

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

REASONS FOR JUDGMENT

JACKSON J:

1. These reasons follow on from *Dudley (Liquidator) v RHG Construction Fitout and Maintenance Pty Ltd* [2019] FCA 1355. In the previous reasons I found that the plaintiff liquidators of Precision Catering & Equipment Pty Ltd (in liq) had commenced this proceeding in a way that was not authorised by the *Federal Court Rules 2011* (Cth). That was because they had joined multiple defendants to the proceeding in circumstances where, contrary to r 9.02, not all rights to relief claimed in the proceeding arise out of the same transaction or event or series of transactions or events. I also held, however, that this was an irregularity which was capable of being cured on application by the plaintiffs. In the result, I granted an application by the fourth defendant and the sixth defendant that they cease to be parties to the proceeding, but suspended the operation of that order to give the plaintiffs the ability to apply to cure the irregularity.
2. The plaintiffs made that application on 10 September 2019. They seek a declaration that the proceedings are not invalid by reason of the unauthorised joinder of the defendants, and dispensation from the relevant requirement of r 9.02 *nunc pro tunc*. They also seek vacation of the order that the two defendants cease to be parties to the proceeding.
3. I made directions further suspending the operation of that last order until after the present application is determined. Directions were also made requiring any defendant who opposed the plaintiff's application to notify the court by 1 October 2019. No defendant has done so.
4. The background to the present application, and many of the applicable principles, are set out in detail in the previous reasons. For present purposes the following points are relevant:
5. This is what is sometimes called a 'mothership proceeding', being a number of unfair preference claims in respect of the same insolvent company that have been commenced against multiple defendants in relation to separate payments made by the company to each defendant. There is a line of authority supporting that way of constituting the proceeding, which comes with significant procedural advantages. There will be issues of law and fact common to the claims against each of the defendants. They will potentially include the issue of when the company became insolvent, which may give rise to a substantial dispute of fact and law.
6. The way the proceeding was commenced here was an irregularity. It does not mean that the proceeding as against any defendant is a nullity or somehow void.
7. Section 51(2) of the *Federal Court of Australia Act 1976* (Cth) authorises the court to cure an irregularity or defect in the way the proceeding has been commenced. It is not necessary for a step to be null and void for a declaration under the subsection to be made and to have utility.
8. Generally, the court should not be seen to implicitly condone a failure to comply with its rules, especially where the non-complying party has made no attempt to cure or otherwise regularise the position. But if a party applies for explicit approval of non-compliance, the court has flexible powers to provide that approval, and may do so in appropriate cases. Apart from s 51(2), r 1.34 of the *Federal Court Rules* gives the court power to dispense with requirements of the rules.
9. It was open to the liquidators here to contend that r 9.02 did authorise commencement of a mothership proceeding, even though that contention turned out to be wrong.
10. In other cases, liquidators who have commenced mothership proceedings have applied promptly for orders validating the steps they have taken, and those orders are often made.
11. The liquidators commenced this proceeding (in an irregular way) within the time limited under s 588FF(3)(a)(i) of the *Corporations Act 2001* (Cth), but that time expired a few days afterwards. If the fourth defendant and sixth defendant cease to be parties to the proceeding then any new proceedings against them will be time barred. The potential for irreversible prejudice to unsecured creditors of the company if that happens is a factor strongly in favour of both regularising the way the proceeding has been constituted, and vacating the orders made on 28 August 2019.
12. Nevertheless, the liquidators should explain why they commenced the proceeding so close to the expiry of the limitation period, why it was not practicable to apply for leave ex parte before joining multiple unrelated defendants, and why they did not seek an order extending the time for commencing the proceeding.

## Affidavits in support of the application

1. The liquidators have filed two affidavits in support of their application. One of the liquidators, Mr Dudley, summarises the investigations he and his colleagues conducted which resulted in this proceeding. The liquidators were appointed on 2 May 2016. There were 121 creditors and 69 of those were identified as having received potentially voidable payments during the relation back period. The present solicitors for the liquidators in the proceeding were engaged in February 2018 to help to recover unfair preference claims. A total of 44 demands were issued, and of those, 24 claims have since been settled.
2. Mr Dudley says that a number of the defendants are potentially linked through their work on the Roy Hill iron ore project so that, as well as the issue of insolvency, other common issues of fact may emerge too.
3. Mr Dudley also deposes to his belief, based on his experience as an insolvency practitioner, that if the proceedings against the defendants are separated out, it may make some of the claims commercially unviable. He confirms the obvious prejudice to unsecured creditors which will result if the fourth defendant and sixth defendant cease to be parties, so that the claims against them become time barred.
4. The other affidavit is affirmed by Benjamin Morton, who is a director of Mendelawitz Morton, the incorporated legal practice representing the liquidators in this proceeding. Mr Morton confirms the engagement of his firm in February 2018 to help with the recovery of approximately 67 unfair preference claims, the issue of demands between that time and May 2018, and subsequent active engagement with the potential defendants to seek to resolve the claims. That process continued up until approximately 24 April 2019. It included the sending of letters to 30 creditors in compliance with the liquidators' obligations to take genuine steps to resolve the disputes. The letters enclosed draft application papers which indicated that the potential defendant was going to be joined to one proceeding together with 29 other defendants. No defendant objected to that approach before the proceeding commenced.
5. The proceeding ended up being issued against 17 defendants. Mendelawitz Morton was engaged in resolving claims against other creditors, up to a time within days of commencing the proceeding. That included settling six claims in the week leading up to filing. Each settlement required amendment of the draft papers. Those papers were voluminous - two affidavits of Mr Dudley sworn on the day of lodgement of the papers with the court totalled over 1,600 pages.
6. Mr Morton's evidence is that he held a considered view, in light of various matters that he lists, that it was reasonably open to believe that the rules of court did authorise the commencement of the proceeding by a single originating process against multiple defendants. However his affidavit annexes correspondence from two different solicitors, one acting for the second and sixth defendants, and another writing on behalf of the fourth defendant, sent after the proceeding was commenced, disputing the liquidators' position and pointing out why it was wrong. The response on behalf of the liquidators was a confident assertion of the correctness of their position.

## Consideration

1. I accept that the affidavits provide a satisfactory explanation for why the proceeding was commenced in the way it was, so close to the expiry of the time bar in s 588FF(3)(a)(i) of the *Corporations Act*. There is, as I have said, no issue that there were good reasons for joining all the defendants into a mothership proceeding. No doubt the process of engaging with such a large number of potential defendants, and negotiating and resolving claims while preparing the voluminous papers, was an involved and time consuming one. Also, the fact that it appears that some claims were settled within a week before commencing the proceeding suggests that it was reasonable for the liquidators to wait until the expiry of the limitation period was imminent before commencing the proceeding. I infer that it would not have been practicable to seek leave before the commencement of the proceeding to join all the claims together, or to seek an extension of the time limit under s 588FF(3)(a)(i).
2. The explanation for the decision not to seek leave promptly after commencement is less satisfactory. As I observed in my previous reasons, the correctness of the liquidators' view of r 9.02 was hardly assured, and it would have been prudent and preferable for the liquidators to make an application to regularise the position, even if that application was put in the alternative to their primary position that regularisation was not required. That is especially so after solicitors acting for certain defendants raised the point in the correspondence annexed to Mr Morton's affidavit. The confidence displayed in the responses given on behalf of the liquidators was, as it turned out, unjustified. Mr Morton's evidence now does not indicate that he took that position with any conviction. There is force in submissions made on behalf of the fourth and sixth defendants at the hearing of their applications that it should not be for their clients to force the liquidators to take action, where the liquidators are the ones who have not complied with the Rules.
3. Nevertheless, there is nothing to suggest that the plaintiffs and their solicitors held their view about the application of the Rules in anything other than good faith. Their failure to make the appropriate application promptly does weigh against the exercise of the relevant discretions in their favour, but not strongly.
4. As foreshadowed in the previous reasons, the prejudice to unsecured creditors of Precision Catering if certain defendants cease to be parties to the proceeding is a much more substantial factor, and it weighs in favour of exercising the discretions in favour of the liquidators here. The object of the court is not to punish parties for mistakes made in the conduct of their case, but to correct errors with the result that a decision can be made on the real matters in controversy: *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322 at [20]. Even less is it the object of the court to punish third parties for the mistakes of those who represent their interests.
5. In my view, it is appropriate to resolve any doubt about the regularity of the way in which this proceeding has been commenced by declaring under s 51(2) of the *Federal Court Act* that this proceeding is not invalid by reason of the unauthorised joinder of the claims against the defendants into a single proceeding.
6. As for dispensing with the requirement in r 9.02 that all rights to relief claimed in the proceeding arise out of the same transaction or event or series of transactions or events, r 1.34 gives a very wide discretion to waive compliance, and the court ought to do what justice appears to require: *Dowling v Fairfax Media Publications Pty Ltd (No 2)* [2010] FCAFC 28 at [61]. In the particular circumstances of this case as outlined in the previous reasons and in these reasons, it is appropriate to dispense with the requirement here. Rule 1.34 expressly authorises the court to do so after the occasion for compliance arose. For the avoidance of doubt about any step taken in the proceeding so far, I will dispense with the requirement of r 9.02(b) in relation to the commencement of the proceeding, that is, the filing of the originating process on 26 April 2019.
7. In view of the orders I propose to make, I do not see any utility in another declaration the liquidators sought: that all the present defendants are joined as defendants in the proceeding and that such joinder takes effect from the date of filing of the originating process. Such an order seems to me to be inconsistent with r 9.05(3), which provides that when a person is joined as a party under r 9.05, the start date of the proceeding for the person is the date on which the order is made. I have made it clear that all the defendants and the claims against them here were joined in the proceeding from the beginning, albeit in an irregular way. I will not make the second declaration sought.
8. It follows from the other orders I will make, and from the potential prejudice to the unsecured creditors if the fourth and sixth defendants cease to be parties to the proceeding, that it is just to vacate the orders made on 28 August 2019, which would otherwise have that effect.
9. I will hear the parties as to the costs of this application and the reserved costs of the fourth and sixth defendants' applications to cease to be parties to the proceeding.

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| I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jackson. |

Associate:

Dated: 18 October 2019

SCHEDULE OF PARTIES

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| Defendants |  |
| Fourth Defendant: | TASMAN POWER WA PTY LTD (ACN 125 419 570) |
| Fifth Defendant: | TOPWRIGHT GLOBAL ENTERPRISES PTY LTD (ACN 159 400 754) |
| Sixth Defendant: | GCO ELECTRICAL PTY LTD (ACN 123 571 059) |
| Seventh Defendant: | S & K ELECTRICAL CONTRACTING PTY LTD (ACN 104 590 972) |
| Eighth Defendant: | METAL MANUFACTURERS LIMITED (ACN 003 762 641) |
| Ninth Defendant: | HIGH ENERGY SERVICE PTY LTD (ACN 125 857 525) |
| Tenth Defendant: | N D Y MANAGEMENT PTY LTD (ACN 003 234 571) T/AS NORMAN DISNEY & YOUNG |
| Fifteenth Defendant: | ALLPOINT NOMINEES PTY LTD (ACN 083 731 257) T/AS K‑TRANS WA |
| Sixteenth Defendant: | HOLM LTD (ACN 009 322 856) AS TRUSTEE FOR THE JEVTIC FAMILY TRUST T/AS COCKBURN TRANSPORT |
| Seventeenth Defendant: | DE NADA ENGINEERING SURVEYS PTY LTD (ACN 123 232 575) |