Federal Court of Australia

 Huber V CellOS Software Ltd (in liq) [2022] FCA 744

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| File number(s): | VID 338 of 2020 |
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| Judgment of: | **MCELWAINE J** |
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| Date of judgment: | 29 June 2022 |
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| Catchwords: |  **PRACTICE AND PROCEDURE –** application for extension of time and for leave to appeal from a decision of the Federal Court pursuant to r 36.05 of the *Federal Court Rules 2011* (Cth) – where respondent company is in liquidation – where proceeding stayed under s 500(2) of the *Corporations Act 2001* (Cth) – where no application for leave to proceed pursuant to s 500(2) has been made**CORPORATIONS –** whether an appeal is an “other civil proceeding” within the meaning of s 500(2) of the *Corporations Act 2001* (Cth) |
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| Legislation: | *Corporations Act 2001* (Cth)ss 439C(c), 440D, 500(2)*Federal Court of Australia Act 1976* (Cth)s 24*Federal Court (Corporations) Rules 2000* (Cth) rr 2.2, 2.4*Federal Court Rules 2011* (Cth) rr 36.03, 36.05 |
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| Cases cited: | *Australian Securities Commission v Marlborough Gold Mines Limited* (1993) 177 CLR 485; [1993] HCA 15*Barnes v Addy* (1874) 9 LR Ch App 244*BPM Pty Ltd v HPM Pty Ltd* (1996) 131 FLR 339*Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 7)* (2020) 144 ACSR 621; [2020] FCA 572*Caruso v Built IT Pty Ltd (No 2)* (2019) 134 SASR 280; [2019] SASC 125*CellOS Software Ltd v Huber and Others* (2018) 132 ACSR 468; [2018] FCA 2069*CellOS Software Ltd v Huber and Others (No 2)* (2020) 144 ACSR 267; [2020] FCA 505*Cummings v Claremont Petroleum NL* (1996) 185 CLR 124 at 130*Huang v Hua Cheng International Group Pty Ltd* [2019] NSWCA 155*Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141*Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2007] NSWCA 338*King v Yurisich* (2006) 59 ACSR 598*MG Corrosion Consultants Pty Ltd v Gilmour* [2012] 202 FCR 354; [2012] FCA 383*Re Gordon Grant and Grant Pty Ltd* [1983] 2 Qd R 314*Skinner v Jeogla Pty Ltd* (2001) 37 ACSR 106; [2001] NSWCA 15*Zervas v Burkitt* [2019] NSWCA 112 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 20 |
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| Date of last submission/s: | Applicant: 30 May 2022Respondent: 13 May 2022 |
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| Date of hearing: | Determined on the papers |
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| Solicitor for the Applicant: | The Applicant was self-represented |
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| Solicitor for the Respondent: | Mills Oakley |

ORDERS

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|  | VID 338 of 2020 |
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| BETWEEN: | JASON JOSEPH EMMANUEL HUBERApplicant |
| AND: | CELLOS SOFTWARE LTD (IN LIQUIDATION)Respondent |

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| order made by: | MCELWAINE J |
| DATE OF ORDER: | 29 June 2022 |

THE COURT ORDERS THAT:

1. The separate question, the subject of the order made on 13 April 2022, namely whether the Applicant may proceed with his application for leave to appeal filed 25 May 2020

be answered: no, in the absence of a grant of leave to proceed pursuant to s 500(2) of the *Corporations Act 2001*

1. Within 7 days the parties are to file short submissions, limited to two pages as to any consequential orders, including costs.
2. Any necessary further orders be determined on the papers, unless the Court otherwise orders.

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

REASONS FOR JUDGMENT

**MCELWAINE J:**

1. On 20 December 2018, Beach J published extensive liability reasons in proceeding VID 951/2015, commenced by CellOS Software Ltd (CellOS) against multiple respondents, including the present applicant, Mr Huber: *CellOS Software Ltd v Huber and Others* (2018) 132 ACSR 468; [2018] FCA 2069 (**liability judgment**). In very short compass his Honour found that Mr Huber, whilst acting as the CEO and as a director of CellOS, breached various statutory and fiduciary duties owed to it in relation to various dealings in its shares. Additionally, his Honour also found that various offshore corporations controlled by Mr Huber were involved in those contraventions within the meaning of the second limb of *Barnes v Addy* (1874) 9 LR Ch App 244. The proceeding against certain respondents: Mrs Constance Peck, Mr Alan Peck and Mr Melvin Tan was dismissed. His Honour adjourned for further hearing the consequential question of what relief should be awarded to CellOS.
2. The hearing of the proceeding resumed in October 2019 and on 17 April 2020, his Honour published further reasons for the making of various orders, including that Mr Huber and his related corporations must account to CellOS in the amount of $42 million: *CellOS Software Ltd v Huber and Others (No 2)* (2020) 144 ACSR 267; [2020] FCA 505 (**relief judgment**).
3. Initially, Mr Huber and the fifteenth respondent, Blue Delorite Pty Ltd, were legally represented at the trial that resulted in the liability judgment. That representation ceased partway through the hearing and Mr Huber appeared for himself and for the fifteenth respondent. None of the other respondent corporations associated with Mr Huber appeared upon the trial.
4. On 25 May 2020, Mr Huber, as the only named applicant, filed an application for an extension of time, an affidavit in support and a proposed notice of appeal from the “whole of the judgment of the Federal Court against the appellant given on 20 December 2018 and 17 April 2020” pursuant to rule 36.05 of the *Federal Court Rules 2011* (Cth)(***Federal Court Rules***). It is convenient that I refer to this as the **extension application**.
5. It is common ground that CellOS was placed into administration on 10 January 2022, and following the second meeting of creditors, was voluntarily wound up pursuant to s 439C(c) of the *Corporations Act 2001* (***Corporations Act***) on 19 April 2022.
6. Mr Huber does not accept that the extension application is now the subject of the stay that is provided for at section 500(2) of the *Corporations Act* which relevantly provides:

**Execution and civil proceedings**

…

(2) After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

1. In somewhat prolix affidavits and supporting submissions, Mr Huber has set out in considerable detail the reasons why he did not file a notice of appeal from the final orders made by Beach J on 17 April 2020 as required by rule 36.03 of the *Federal Court Rules*. Mr Huber has not made an application for leave to proceed pursuant to s 500(2) of the *Corporations Act*.
2. On 13 April 2022, I made orders by consent for determination as a preliminary issue, the separate question of whether Mr Huber may proceed with the extension application absent a grant of leave and that it be determined on the papers following receipt of written submissions. I have now received those submissions from Mr Huber and from the legal practitioners for CellOS. For the following reasons, I have decided that it is not open to Mr Huber to continue with the extension application unless he first obtains leave pursuant to s 500(2) of the *Corporations Act*.
3. Some understanding of the proceeding is necessary in order to explain why that is so and why Mr Huber’s arguments, to the effect that the extension application is not a fresh proceeding and is not therefore subject to the statutory stay, are incorrect..
4. In an admirably clear summary of the principal issues in the complex litigation that was before his Honour, Beach J set out the following in his liability judgment at [1] – [15]:

The applicant, CellOS Software Limited (CellOS), an Australian unlisted public company, is a software development company in the field of data analytics. CellOS has brought these proceedings against numerous respondents. Primarily it has brought these proceedings against its former chief executive officer and director, Mr Jason Huber, the first respondent. Mr Huber was CEO of CellOS from 19 December 2005 to 3 September 2015. He was a director from 19 December 2005 to 12 May 2010 and from 1 March 2012 to 3 September 2015.

CellOS alleges that Mr Huber carried out a scheme against it, and in carrying out this scheme breached various statutory and fiduciary duties owed to CellOS, particularly under ss 181, 182 and 183 of the *Corporations Act 2001* (Cth). Broadly, CellOS alleges that the scheme carried out by Mr Huber consisted of the following steps.

At all relevant times CellOS was not generating sufficient revenue and was reliant upon new equity capital or debt funding to continue its operations and its business of software development. Mr Huber was personally responsible for securing this funding.

From late 2012, Mr Huber instructed a corporate secretarial services provider to establish a web of offshore companies registered in Belize, Panama, Anguilla, British Virgin Islands and Samoa, which Mr Huber was to control, and which were designed to disguise Mr Huber’s involvement in his planned scheme and in those vehicles. Mr Huber established a web of offshore companies to hold his CellOS shares (Huber controlled entities) with the corporate secretarial assistance of Mr Chua Min Wee and his company Grandeza Corporate Services Pte Ltd (Grandeza), a Singaporean company, and Mr Harveen Singh Narulla. The Huber controlled entities disguised Mr Huber’s involvement in what later occurred.

From at least late 2012, Mr Huber procured through these Huber controlled entities at least 47,872,063 CellOS shares from early investors in CellOS, without disclosing his involvement to the vendors or to CellOS; it is said that these transactions were entered into without CellOS’ knowledge. It is known that Huber controlled entities purchased 19,059,834 shares (out of 47,872,063 shares transferred from private investors) for AU$4,848,094. The price for the remainder is not known.

From at least late 2012, Mr Huber sought out potential investors for CellOS, ostensibly to raise funds for CellOS’ ongoing operations. But instead of CellOS issuing shares directly to new investors, Mr Huber procured investors to purchase shares from Huber controlled entities at prices between US$2 and US$10. Between late 2012 and mid-2015, the Huber controlled entities sold 51,945,132 shares in CellOS to 355 private investors. It is known that Huber controlled entities sold 22,832,921 shares out of 51,945,132 shares transferred to private investors for AU$50,353,076. The price for the remainder is not known.

Mr Huber directly or indirectly lent part of the proceeds from these share sales back to CellOS in order to fund its operations.

In or around May 2013, Mr Huber arranged for CellOS to enter into a loan agreement with one of his offshore companies, LGA Energy Investments Ltd based in Belize (LGA) to loan CellOS up to SG$25 million (LGA loan) without disclosing his interest in LGA or the LGA loan to either CellOS’ board or its shareholders, on terms that the loan could be converted to shares at SG$1.80. Mr Huber wearing his CellOS hat would call for loans from LGA and then convert those loans to shares. At the time, CellOS was able to issue new shares at US$5 per share and CellOS shares were on the secondary market at up to US$5 per share.

LGA is not a party to the proceedings. The LGA loan operated such that:

(a) The loan operated retrospectively to cover money advanced since 1 March 2012, that is, over a year earlier and included advances by third parties nominated by LGA;

(b) LGA or third parties would loan money to CellOS; and

(c) LGA had an option to convert the loan amount into CellOS shares at the price of SG$1.80 per share, which was favourable to Mr Huber and LGA but disadvantageous to CellOS and the other shareholders.

The effect of the LGA loan allowed:

(a) Mr Huber to immediately benefit from the funds he had been lending CellOS since March 2012 by converting them into new CellOS shares at the favourable strike price of SG$1.80 per share; and

(b) Mr Huber to, first, prospectively sell CellOS shares held by the Huber controlled entities, second, then lend the funds to CellOS under the LGA loan and, third, obtain more shares at SG$1.80 per share by exercising the conversion option.

Significant proceeds from the sale of shares by the Huber controlled entities were paid to CellOS and attributed to the LGA loan. In all, Mr Huber procured payments into CellOS of SG$29,143,387.90 and AU$1,228,786.85, which were attributed to the LGA loan, and through LGA converted those loan funds into 17,477,204 shares in CellOS at SG$1.80 per share.

Mr Huber directed LGA to transfer 16,815,157 of those shares to Huber controlled entities for no consideration and then procured the on-sale of 4,265,157 of those shares, of which 2 million were sold at US$2 per share, 399,000 at US$10 per share, and the remainder at unknown prices.

As I say, between 28 June 2013 and 27 March 2014, LGA came to hold almost 17 million CellOS shares by way of its conversion option under the LGA loan. In May 2014, LGA transferred these shares to seven of the Huber controlled entities.

On 1 July 2014 Mr Huber arranged for CellOS to enter into another loan arrangement with another associated company, Pized Management Ltd (Pized) (Pized loan). Pized is the fourteenth respondent. The Pized loan was similar to the LGA loan, and Mr Huber again failed to disclose his interest. Significant proceeds from the sale of shares by the Huber controlled entities were advanced to CellOS and attributed to the Pized loan. When Mr Huber was removed from his position in September 2015, amounts under the Pized loan in the order of SG$2.5 million and US$8.3 million had not been converted and still remain a liability owing to Pized on CellOS’ books.

CellOS alleges that Mr Huber’s scheme, which it characterises as fraudulent, generated significant profits for him.

1. Mr Huber initially attempted to file a notice of appeal from the various findings as set out in the liability judgment on 4 February 2019. He encountered difficulty in that the liability judgment did not result in the making of orders that could be the subject of an appeal pursuant to s 24 of the *Federal Court of Australia Act 1976* (the **FCA**). When appealable orders were made pursuant to the relief judgment, Mr Huber encountered further difficulty in relation to the payment of the required filing fees and the time-limit for the filing of an appeal as of right expired. In the events as they did occur, the extension application was filed 10 days outside of the time-limit for the filing of a notice of appeal.
2. First, Mr Huber submits that the respondent “is seeking a stay pursuant to section 500(2) of the *Corporations Act*” which with respect reflects a misunderstanding on his part. Where section 500(2) applies, it operates to deny rights that otherwise exist to commence or continue a civil proceeding. There is no step that is required to be taken by CellOS to effect the stay.
3. Second, Mr Huber submits that the extension application is not a “fresh proceeding” but is to be understood as a continuation of the primary proceeding and is not therefore subject to the statutory stay. There is no merit in that submission. An appeal is a creature of statute. Appellate jurisdiction is conferred by s 24 of the *FCA*, relevantly in this case, from all judgments of the Court constituted by a single judge exercising the original jurisdiction of the Court. Once a notice of appeal has been regularly filed, the appellate jurisdiction is engaged. That jurisdiction is separate and distinct from the original jurisdiction that was exercised by Beach J. Self-evidently, an appeal is not a continuation of the exercise of the original jurisdiction.
4. Third, what is meant by the words “other civil proceeding” in s 500(2) of the *Corporations Act* does not provide a statutory definition of proceeding. Barker J in *MG Corrosion Consultants Pty Ltd v Gilmour* [2012] 202 FCR 354; [2012] FCA 383 (***M G Corrosion***) was concerned with the status of an interlocutory application for freezing orders where, after the decision was reserved, the defendant corporation was placed into administration, which then raised the operative effect of section 440D of the *Corporations Act*. His Honour reasoned as follows at [6]:

The term “proceeding” does not appear to be defined relevantly in the *Corporations Act* but it is defined in s 4 of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) to mean “a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connexion with, a proceeding, and also includes an appeal”. In my view, in the present circumstances, the FCA Act definition of “proceeding” should be adopted for the purposes of the *Corporations Act*, not on the basis that the FCA Act definition applies as a matter of incorporation, but rather on the basis that the broad definition given in the FCA Act accords with the ordinary meaning of the word and there is nothing in the context of the *Corporations Act* to suggest it has a different or narrower meaning of the word for the purposes of s 440D.

1. McKerracher J in *Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 7)* (2020) 144 ACSR 621; [2020] FCA 572 at [22] referenced with approval the decision of Barker J in *M G Corrosion*, adding “there is nothing in the context of the [*Corporations Act*] to suggest that the broad and ordinary meaning given in the FCA should not apply for the purposes of s 440D”.
2. There are textual differences in the wording of s 440D in that it provides that “a proceeding in a court against the company… cannot be begun or proceeded with…” which is less comprehensive than the phrase ‘action or other civil proceeding” in s 500(2). Ultimately, I need not decide whether in some circumstances s 500(2) operates more broadly, as the narrow question in this case is whether an appeal, and relatedly an application to leave to commence an appeal out of time, is a civil proceeding within the meaning of s 500(2). The authorities that have considered this question are not uniform. The issue has variously been described as “vexed”: *King v Yurisich* (2006) 59 ACSR 598; [2006] FCA 1369; at [6], Weinberg J and “unclear”: *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2007] NSWCA 338 at [20], Giles JA. The difficulty arises from reconciling whether a defensive proceeding is properly to be understood as subject to the stay (*Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141; *BPM Pty Ltd v HPM Pty Ltd* (1996) 131 FLR 339) where the purpose of the stay is to limit the wasting of the company’s assets and to free the liquidator from the distraction of litigation by substituting a statutory procedure for the lodgement and assessment of claims: *Re Gordon Grant and Grant Pty Ltd* [1983] 2 Qd R 314 at 316 – 317, McPherson J. A defendant who suffers a judgment in favour of a company in liquidation is a debtor, not a creditor entitled to participate in a dividend. Or as put by Professor Keay as editor of McPherson & Keay, *The Law of Company Liquidation* (5th ed, Sweet and Maxwell, 2021) at [7-073]: “The connotation is that it would be unfair to require the defendant to obtain leave when it was the company that initiated the proceedings. The appeal is merely part of the defendant’s attempt at providing a defence, believing that the decision at first instance was wrong.”
3. A civil proceeding, in its ordinary meaning, includes an appeal: *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124 at 130, Brennan CJ, Gaudron and McHugh JJ. Despite the reservations expressed by the Court of Appeal in *Skinner v Jeogla Pty Ltd* (2001) 37 ACSR 106; [2001] NSWCA 15, Spigelman CJ, Powell JA and Ipp AJA, there is now a long and consistent line of authority in NSW to the effect that an appeal by an unsuccessful defendant from a judgment in favour of a company in liquidation is subject to the statutory stay. Gleeson JA usefully summarised the course of authority in *Zervas v Burkitt* [2019] NSWCA 112 at [11]- [14] as follows:

There are authorities that a “defensive proceeding” is not subject to the requirement of leave under s 471B or s 500(2) of the *Corporations Act*: *BPM Pty Ltd v HPM Pty Ltd* (1996) 14 ACLC 857, Anderson J citing the reasoning of Lord Davey in *Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141 (*Humber*). *BPM Pty Ltd v HPM Pty Ltd* involved a “defensive procedural measure”, relevantly, an application for security for costs by a respondent to an appeal.

Whether the reference in *Humber* to a “defensive proceeding” encompasses prosecuting an appeal was doubted, but not finally determined in *Skinner v Jeogla Pty Ltd* [2001] NSWCA 15; (2001) 37 ACSR 106 at [20] (Spigelman CJ) and [59] (Ipp AJA).

In *Distinctive FX 9 Pty Limited v Statewide Developments Pty Limited* [2012] NSWCA 393 at [13], Beazley JA (as her Honour then was) reviewed the authorities and concluded:

Notwithstanding the uncertainty expressed in these authorities, I am of the opinion that when regard is had to the *Civil Procedure Act* and the UCPR, the bringing of an appeal (or, I should add, a summons for leave to appeal) is the commencement of a proceeding for which leave is required pursuant to s 471B.

That approach has been followed in this Court thereafter: *Cassegrain v Gerard Cassegrain & Co Pty Ltd (in liq)* [2012] NSWCA 435 at [31]; *Chief Commissioner of State Revenue v CCM Holdings Trust Pty Ltd* [2014] NSWCA 42 at [3]; *Naaman v Sleiman* [2015] NSWCA 259 at [82]; *Commissioner of Taxation of the Commonwealth of Australia v 4 Doonan Street Collinsville Pty Ltd (in liq)* [2016] NSWCA 69 at [31]. Mr Zervas and Dr Burkitt both accept that they need leave and it is appropriate to proceed upon that basis. There is no need to consider whether and the extent to which the requirement for leave might not apply, such as to “defensive proceedings”.

1. The authorities were also comprehensively considered by Parker J in *Caruso v Built IT Pty Ltd (No 2)* (2019) 134 SASR 280; [2019] SASC 125, who concluded at [54] that he would apply the analysis of Beazley JA in *Distinctive FX9*, particularly because her Honour’s reasoning was referred to with approval, albeit *obiter*, in *DSG Holdings Australia Pty Ltd v Helenic Pty Ltd* (2014) 307 ALR 143; [2014] NSWCA 96 at [54], Leeming JA, with whom Meagher JA and Bergin CJ in Eq agreed. Finally, in *Huang v Hua Cheng International Group Pty Ltd* [2019] NSWCA 155 at [21], Basten JA, in delivering the judgment of the Court, stated that “the language is sufficiently similar to conclude that the same operation should be given to s 500(2)”.
2. I propose to follow and apply these authorities: *Australian Securities Commission v Marlborough Gold Mines Limited* (1993) 177 CLR 485; [1993] HCA 15. The result is that absent a grant of leave, Mr Huber may not proceed with the extension application.
3. In his written submissions, Mr Huber addresses in considerable detail the principles applicable to a grant of leave pursuant to s 500(2). Mr Huber has not made an application for a grant of leave supported by an affidavit as required by rules 2.2 and 2.4 of the *Federal Court (Corporations) Rules 2000* (Cth). If an application of that type is made, the respondent will be entitled to be heard and to test any factual material that Mr Huber relies upon. Thus, I do not consider any of the discretionary submissions of Mr Huber which proceed on the assumption that there is before the Court an application for leave to proceed.

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| I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McElwaine. |

Associate:

Dated: 29 June 2022