FEDERAL COURT OF AUSTRALIA

Erskine, in the matter of North Shore Property Developments Pty Ltd (in liq) [2019] FCA 476

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| File number: | NSD 411 of 2019 |
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| Judge: | **FARRELL J** |
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| Date of judgment: | 5 April 2019 |
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| Date of publication of reasons | 9 April 2019 |
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| Catchwords: | **CORPORATIONS –** application by liquidatorfor approval to enter deeds for indemnity and funding on behalf of the Company under s 477(2B) of the *Corporations Act 2001* (Cth) **–** where one deed requires retrospective approval **–** whether entering into the deeds is in the best interests of creditors **–** *Robinson, re Reed Constructions Australia Pty Ltd (in liq)* [2017] FCA 594 considered **–** application granted |
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| Legislation: | *Corporations Act 2001* (Cth) ss 436B, 477, 564, 588FF  *Federal Court of Australia Act 1976* (Cth) s 37AF |
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| Cases cited: | *Erskine v 72-74 Gordon Crescent Lane Cove Pty Ltd, in the matter of North Shore Property Developments Pty Ltd (in liq)* [2018] FCA 1094  *Robinson, re Reed Constructions Australia Pty Ltd (in liq)* [2017] FCA 594 |
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| Date of hearing: | 5 April 2019 |
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| Registry: | New South Wales |
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| Division: | General 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: | 21 |
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| Counsel for the Plaintiff: | Mr Adam Bell SC |
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| Solicitor for the Plaintiff: | Norton Rose Fulbright Australia |

ORDERS

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|  | | NSD 411 of 2019 |
| IN THE MATTER OF NORTH SHORE PROPERTY DEVELOPMENTS PTY LTD (IN LIQUIDATION) | | |
|  | ROBYN-LEE ERSKINE AS LIQUIDATOR OF NORTH SHORE PROPERTY DEVELOPMENTS PTY LTD ACN 141 597 622 (IN LIQUIDATION)  Plaintiff | |

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| JUDGE: | FARRELL J |
| DATE OF ORDER: | 5 April 2019 |

THE COURT ORDERS THAT:

1. Pursuant to s 37AF(1) of the *Federal Court of Australia Act 1976* (Cth) and on the ground that the order is necessary to prevent prejudice to the proper administration of justice, the confidential affidavit of Robyn-Lee Erskine sworn 15 March 2019 together with confidential annexures A and B are to be marked “confidential” on the electronic Court file and are not to be published or accessed, except pursuant to an order of the Court, until such time as any litigation (including any appeal) arising out of the winding up and affairs of North Shore Property Developments Pty Ltd ACN 141 597 622 (in liquidation) (“North Shore Property Developments”) is concluded.
2. Pursuant to s 477(2B) of the *Corporations Act 2001* (Cth) (“Act”):
   1. approval be granted *nunc pro tunc* for the plaintiff (in her capacity as liquidator of North Shore Property Developments) to enter into and cause North Shore Property Developments to enter into the Deed of Indemnity dated 7 December 2017 that is confidential annexure A to the confidential affidavit of the plaintiff sworn 15 March 2019 (“Historical Indemnity Deed”), and
   2. approval be granted for the plaintiff (in her capacity as liquidator of North Shore Property Developments) to enter into and cause North Shore Property Developments to enter into the Funding Deed that is confidential annexure B to the confidential affidavit of the plaintiff sworn 15 March 2019.
3. Pursuant to s 1322(4) of the Act, order that the Historical Indemnity Deed is not invalid by reason of it being entered into on 7 December 2017 without the Court’s approval and extending for a period of more than three (3) months.
4. The costs of the application be costs and expenses in the winding up of North Shore Property Developments.

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

REASONS FOR JUDGMENT

FARRELL J:

# Introduction

1. By an application filed on 19 March 2019, the liquidator of North Shore Property Developments Pty Ltd (in liq) (**Company**), Robyn-Lee Erskine, applied for approval under s 477(2B) of the *Corporations Act 2001* (Cth) to enter into two agreements on behalf of the Company:
2. A Confidential Deed of Indemnity dated 7 December 2017 (**Historical Indemnity Deed**) for which approval was sought *nunc pro tunc*; and
3. A proposed Confidential Funding Deed (**Funding Deed**),

together the “**Deeds**”. In each case the funder is named as being the Commissioner or Deputy Commissioner of Taxation.

1. Ms Erskine also sought confidentiality orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) in relation to the Deeds and an affidavit sworn by Ms Erskine on 15 March 2019.
2. These are the reasons for making those orders.

# Principles applicable to the application

1. The principles under which an application of this kind, which include an application for approval *nunc pro tunc*, are determined are conveniently set out in the judgment of Gleeson J in *Robinson, re Reed Constructions Australia Pty Ltd (in liq)* [2017] FCA 594 at [31]-[41]:

***Section 477(2B)***

31 Section 477(2)(m) of the Corporations Act provides for a liquidator’s general power to “do all such other things as are necessary for winding up the affairs of the company and distributing its property”. That power is qualified in relation to the entry into agreements in the circumstances in s 477(2B).

32 Section 477(2B) of the Act provides:

Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company’s behalf (for example, but without limitation, a lease or a an agreement under which a security interest arises or is created) if:

(a) without limiting paragraph (b), the term of the agreement may end; or

(b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;

more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged , within those 3 months.

33 In *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2011] FCAFC 89; (2011) 85 ACSR 38 (“*Fortress*”) at [40], the Full Court observed that, in considering whether to give approval under s 477(2B), the Court must consider the purposes for which the powers of a liquidator exist. Those purposes include the recovery of funds for the benefit of creditors: *McGrath and Another (in their capacity as liquidators of HIH Insurance Limited and Others)* [2010] NSWSC 404; (2010) 266 ALR 642 at [13]; *Pascoe; re Brentwood Village Ltd (in liq)* [2014] FCA 1295, [44].

34 The standard imposed under s 477(2B) concerns an assessment by the Court that entry into the agreement is a proper exercise of power and not ill-advised or improper on the part of the liquidator, rather than involving the exercise of commercial judgment: *Re Gerard Cassegrain & Co Pty Ltd (in liq)* [2013] NSWSC 257 (“*Cassegrain*”) at [11] per Black J citing *Re McGrath (in their capacity as liquidators of HIH Insurance Ltd)* [2010] NSWSC 404; (2010) 266 ALR 642.

35 In *Pascoe; re Matrix Group Ltd (in liq)* [2011] FCA 1117 (“*Pascoe*”) at [7], Jacobson J cited with approval the following statement by Austin J of the relevant test in *Leigh; Re AP and PJ King Pty Ltd (in liq)* [2006] NSWSC 315 at [23]:

Although the court has the statutory task [under s 477(2B)] of giving “approval” to a liquidator’s agreement that may end more than three months after it is entered into, the case law shows that the court undertakes something less than a complete “merits review”. As Giles J said in *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83 at 85-6:

... the court is necessarily confined in attempting to second guess the liquidator in the exercise of his powers, and generally will not interfere unless there can be seen to be some lack of good faith, some error of law or principle, or real and substantial grounds for doubting the prudence of the liquidator’s conduct.

36 The Court’s task is to satisfy itself, having regard to the liquidator’s commercial judgment, that there is no error of law, grounds for suspecting bad faith or any other good reason to intervene: *Corporate Affairs Commission v ASC Timber Pty Ltd* (1998) 29 ACSR 109 at 118; *Stewart, re Newtronics Pty Ltd* [2007] FCA 1375.

37 In *Fortress*, at [24], the Full Court endorsed the following comprehensive list of factors (identified by Austin J in *Leigh re AP& PJ King Pty Ltd (in liq)* [2006] NSWSC 315 at [25] and *Re ACN 076 673 875 Ltd (rec’r & mgr apptd) (in liq)* [2002] NSWSC 578; (2002) 42 ACSR 296 at [17]-[34]) relevant to the Court’s assessment of a proposed litigation funding agreement:

(1) the prospects of success of the proposed litigation;

(2) the interests of creditors other than the proposed defendant;

(3) possible oppression;

(4) the nature and complexity of the cause of action;

(5) the extent to which the liquidator has canvassed other funding options;

(6) the level of the funder’s premium;

(7) consultations with creditors; and

(8) the risks involved in the claim.

38 Generally, creditors are the best judge of their commercial interests, and the approval of creditors is an important discretionary factor in favour of the approval of the funding agreement: cf. *Buiscex Ltd v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357 at 362.

39 In *Emu Brewery Developments Pty Ltd; re Emu Brewery Developments Pty Ltd* [2009] FCA 1212, Gilmour J made an order approving a compromise of a claim that had been approved by creditors pursuant to s 477(2A). In that case, the deed giving effect to the compromise contained a condition precedent requiring the Court to make a direction that the liquidators were justified in entering into the deed. Similarly, in *One.Tel Network Holdings* [2001] NSWSC 1065; (2001) 40 ACSR 83, at [23], Austin J noted that his Honour had approved the liquidators’ entry into an agreement pursuant to s 477(2B) where that approval was a condition of the agreement and where another condition was the approval of the committee of inspection.

***Section 1322(4)***

40 By s 1322(4)(d), subject to the terms of that provision, the Court may, relevantly, make an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act.

41 A liquidator should seek the Court’s approval before entering into a long term agreement. However, the Court may give retrospective approval to an agreement under s 477(2B) in appropriate circumstances: *Hamilton, re ACN 101 634 146 Pty Ltd (in liq)* [2014] FCA 687; *Stewart, re Newtronics Pty Ltd* [2007] FCA 1375 at [25]; *Re HIH Insurance Group Ltd* [2001] NSWSC 308; (2001) 19 ACLC 1102; *Empire (Aust) Nominees Pty Ltd v Vince* [2000] VSC 324; (2000) 35 ACSR 167.

# Background

1. Ms Erskine explains the background to her application as follows. The Company was incorporated on 29 March 2010. At all times, its sole director, secretary and shareholder was John Haddad. Its business was property development. From the limited books and records in her possession, Ms Erskine understands that the Company’s major enterprise was the development of a multi storey apartment complex containing over 50 apartments and car parking spaces in Lane Cove, New South Wales (**Development**). It was completed in late 2013. Ms Erskine understands that John Haddad’s brother, Eddy Haddad, was the project and construction manager of the Development.
2. On 24 December 2014, the Company’s accountants, **Banq** **Accountants**, applied to this Court to wind up the Company on the grounds of insolvency. On 11 February 2015, orders were made that the Company be wound up and that Murray Godfrey and David Iannuzzi of Veritas Advisory be appointed as joint and several liquidators of the Company. Mr Godfrey died on 10 June 2015, leaving Mr Iannuzzi as sole liquidator.
3. On 30 November 2016, a meeting of the creditors of the Company was held at which Mr Iannuzzi and Steven Naidenov of Veritas Advisory were appointed joint and several administrators of the Company pursuant to s 436B of the *Corporations Act*. On 10 January 2017, the administration of the Company ceased and it was returned to liquidation.
4. On 25 August 2017, the Commissioner of Taxation filed an application in this Court (NSD1510/2017) (**CoT Proceeding**) seeking orders that Mr Iannuzzi cease to be the liquidator of the Company and that Ms Erskine be appointed. Other orders sought in relation included that an inquiry be conducted into the external administration by Mr Iannuzzi, that he pay compensation, that he be removed from the register of liquidators, and a banning order. Mr Iannuzzi informed the Court that he proposed to resign as liquidator of the Company without admission and he did so. Ms Erskine was appointed as liquidator of the Company to fill the vacancy created by Mr Iannuzzi’s resignation on 14 September 2017.
5. Mr Iannuzzi informed Ms Erskine upon her appointment that there were no assets in the liquidation. Mr Iannuzzi’s enquiries indicated that the potential unsecured creditors are as follows:

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| **Priority Creditor** | **RATA** | **Advised** | **Claimed** |
| Banq Accountants | $7,308.10 | $7,308.10 | $0 |
| **Unsecured Creditor** | **RATA** | **Advised** | **Claimed** |
| Amanda Jane Pearson | $0 | $44,716 | $0 |
| Australian Taxation Office | $5,824,812.60 | $3,514,752.65 | $7,471,856.65 |
| Banq Accountants | $400,000 | $400,000 | $337,341.30 |
| Centerium Wholesalers Pty Ltd | $0 | $0 | $144,000 |
| Charlie Hanna (Plumb Group) | $0 | $1 | $1 |
| Energy Australia | $0 | $0 | $0 |
| Haddad, Eddy | $1,000,000 | $0 | $0 |
| Haddad, John | $0 | $1 | $1 |
| Sydney Tools | $0 | $66,000 | $66,000 |
| The Owners Corporation SP | $0 | $2,008,073 | $8,073 |
| **Contingent Creditor** | **RATA** | **Advised** | **Claimed** |
| The Owners Corporation SP | $0 | $0 | $2,000,000 |

1. On 3 October 2017, Mr Iannuzzi provided some of the books and records of the Company to Ms Erskine. On 17 October 2017, he lodged a Presentation of Accounts and Statement with the Australian Securities & Investments Commission indicating that the total balance of money held by the Company was nil and that he did not expect any dividend to be paid to any class of creditor. On 17 October 2017, Ms Erskine wrote an initial information letter to creditors advising of her preliminary view that there were a number of matters requiring further investigation but that the liquidation was without funds. The letter advised that any creditor who was interested in providing indemnity funding should contact her office. The only creditor to respond was the Commissioner of Taxation.
2. Ms Erskine notes that the Australian Taxation Office’s claim of $7,471,856.65 makes it the largest creditor, being approximately 75% of the total value of unsecured claims. The Haddad brothers are related parties. Charlie Hanna provided plumbing services and he is the husband of Patricia Hanna, who acquired a unit in the Development and it might be claimed that that transfer had been at an undervalue.
3. The CoT Proceeding has not yet been determined. One of the issues raised in the CoT Proceedings was the Commissioner of Taxation’s concern that four apartments and car spaces within the Development may have been sold to a company controlled by Eddy Haddad at an undervalue and that Mr Iannuzzi had not properly investigated that matter. There were other allegations made in those proceedings concerning some other units that may have been sold at an undervalue. Ms Erskine says that her limited investigations have identified other transactions which require further investigation.
4. Ms Erskine’s appointment as liquidator of the Company occurred approximately two years and nine months after the relation-back day, being 24 December 2014. Unless the time for bringing proceedings in relation to potentially voidable transactions was extended, claims could not be brought after 24 December 2017. It is in that context that Ms Erskine entered into the Historical Indemnity Deed, the purpose of which was to enable Ms Erskine to undertake the tasks of preparing and making an application to the Court for an extension of time under s 588FF(3)(b) of the *Corporations Act*.
5. Ms Erskine says that at the time the Historical Indemnity Deed was entered into, the parties did not contemplate that it would extend beyond three months given that, in the ordinary course, an application for an extension of time can be made and determined on a summary basis. However, while the application for an extension of time was filed on 12 December 2017 on an *ex parte* basis, as events transpired the matter was not heard until April 2018 and judgment was delivered on 25 July 2018. Defendants to the application were 72-74 Gordon Crescent Lane Cove Pty Ltd, a company controlled by Eddy Haddad, Eddy Haddad, GFP Holdings (Aust) Pty Ltd, Banq Accountants and Patricia Hanna.
6. The extension was granted, but not in respect of certain transactions purportedly settled by a Deed of Release and Settlement entered into by Mr Iannuzzi on behalf of the Company with Eddy Haddad and his company: see *Erskine v 72-74 Gordon Crescent Lane Cove Pty Ltd, in the matter of North Shore Property Developments Pty Ltd (in liq)* [2018] FCA 1094. On 17 August 2018, Ms Erskine filed an appeal from that decision which was heard on 1 March 2019 and that decision is reserved. Ms Erskine says that she only became aware of the Deed of Release and Settlement in an affidavit filed by Eddy Haddad on 7 February 2018; a copy of the Deed of Release and Settlement was not included in the papers provided to her by Mr Iannuzzi.
7. Ms Erskine notes that:
8. The Historical Indemnity Deed contemplates that it would have a duration of three months, although the parties might agree to extend it. That is what occurred in the circumstances outlined above. Clause 5.1 of the proposed Funding Deed is relevant in this regard. If approved, it would have the effect of extending the Historical Indemnity Deed. Ms Erskine therefore sought the Court’s approval to the extended duration of the Historical Indemnity Deed *nunc pro tunc*.
9. While the Company is a party to the Historical indemnity Deed, it bears no obligations under it other than the obligation to maintain confidentiality and the Company itself receives nothing under it, other than the potential to benefit ultimately from an order under s 588FF were such a claim able to be made. The Commissioner of Taxation has no right of recovery under the deed although the deed is silent as to whether the Commissioner might seek recovery of expenses under s 564 of the *Corporations Act*.
10. The funding provided by the Commissioner of Taxation under the Historical Funding Deed did not extend to making an application for approval of the deed and the estate was without funds. In circumstances where, if the application to extend time under s 588FF was successful, the Court would be approached to seek approval to a further funding arrangement, it was considered that the costs and use of Court time would be better served in making a single application.
11. Unlike the Historical Indemnity Deed, cl 11 of the proposed Funding Deed does provide a mechanism whereby, if property is recovered into the estate, the liquidator is required to “repay” to the Deputy Commissioner of Taxation the indemnity expenses paid by the Deputy Commissioner from the funds which the liquidator herself is entitled to claim as a priority payment in the winding up. The Deputy Commissioner expressly reserves the right to make an application under s 564 of the *Corporations Act*.
12. Ms Erskine has deposed that she believes that it is in the best interests of creditors to enter into the proposed Funding Deed because:
13. Without funding, there will be no recovery at all for any creditors;
14. No other creditor has indicated any interest in funding the liquidator to make enquiries and potentially get funds into the estate;
15. The Australian Taxation Office is by far the largest creditor accounting for approximately 75% of the proofs;
16. The proposed Funding Deed does not provide for any uplift/premium or success fee which, on the basis of Ms Erskine’s experience, commercial funders would seek;
17. The proposed Funding Deed provides for indemnification in respect of adverse costs orders. This ensures that there is little or no financial risk for creditors of the Company in entering into the Funding Deed; and
18. On Ms Erskine’s limited investigations undertaken to date, there are transactions and matters of concern that warrant further investigation and that may, subject to those further investigations, necessitate claims to be made with a view to obtaining recoveries for the creditors.
19. While it would be possible, in theory, to approach the creditors for approval for entry into the Deeds, Ms Erskine notes that the body of creditors includes the related parties who were the subject of potential investigations. They are accordingly unlikely to fund those investigations nor approve entry into the Deeds.
20. Ms Erskine sent a letter to creditors on 29 March 2019 informing them of the application. As at the morning of 5 April 2019, no responses to that letter were received by Ms Erskine. Furthermore, no creditor advised of its intention to attend at the hearing on 5 April 2019 and no creditor appeared to oppose the application for approval of the Deeds.

# Conclusion

1. Having regard to the principles and the background set out above, the Court observed no issue of principle or law which would suggest that Ms Erskine’s commercial judgment did not justify the orders being made. The Court was also satisfied that it was in the interests of the administration of justice that the confidentiality orders sought be made.

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| I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell. |

Associate:

Dated: 9 April 2019