Federal Court of Australia

Georges (Liquidator), in the Matter of SIRA Pty Ltd (In Liquidation) [2022] FCA 768

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| File number(s): | VID 197 of 2022 |
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| Judgment of: | **MCEVOY J** |
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| Date of judgment: | 1 July 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – service of a document outside the jurisdiction – where the plaintiffs seek leave to serve an order on a company in Singapore pursuant to r 10.44 of the *Federal Court Rules 2001* (Cth) – where the order requires a foreign company through its company secretary to attend for examination and produce documents – where the requirements of r 10.43(3) of the *Federal Court Rules 2001* (Cth) are met – consideration of the *Rules of Court 2021* (Singapore) – where the principle of international judicial comity should not preclude the grant of leave – leave granted |
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| Legislation: | *Corporations Act 2001* (Cth) ss 596A, 596B, 597(9)  *Federal Court Rules 2011* (Cth) rr 10.33, 10.44  *Rules of Court 2021* (Singapore)O 64, r 3  Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters done at the Hague on 15 November 1965 |
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| Cases cited: | *Arhill Pty Ltd and Others v General Terminal Company Pty Ltd* (1990) 23 NSWLR 545  *Ceramic Fuel Cells Ltd (in Liq) v McGraw-Hill Financial Inc* (2016) 112 ACSR 102; [2016] FCA 401  *Clifton (Liquidator), in the matter of Solar Shop Australia Pty Ltd (in Liq)* [2014] FCA 891  *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; [1997] HCA 33  *Devine (Liquidator), Re Lempriere Grain Pty Ltd (In Liquidation)* [2020] FCA 420  *Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd* [2000] SGCA 24  *Gao v Zhu* [2002] VSC 64  *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch 482  *Stemcor (A/sia) Pty Ltd v Oceanwave Line SA* [2004] FCA 391  *Titan Enterprises (Qld) Pty Ltd v Cross* [2016] FCA 890  *Waller v Freehills* (2009) 177 FCR 507; [2009] FCAFC 89 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Number of paragraphs: | 17 |
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| Date of hearing: | 1 July 2022 |
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| Solicitor for the Plaintiffs: | Mr Kyrou of Piper Alderman |

ORDERS

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|  | | VID 197 of 2022 |
| IN THE MATTER OF SIRA PTY LTD (IN LIQUIDATION) (ACN 163 988 690) | | |
| BETWEEN: | GEORGE GEORGES AND JOHN ROSS LINDHOLM IN THEIR CAPACITY AS JOINT AND SEVERAL LIQUIDATORS OF SIRA PTY LTD (IN LIQUIDATION) (ACN 163 988 690)  Plaintiffs | |

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| order made by: | MCEVOY J |
| DATE OF ORDER: | 1 JULY 2022 |

THE COURT ORDERS THAT:

1. Pursuant to rule 10.44 of the *Federal Court Rules 2011*(Cth), leave is granted to the plaintiffs to serve the orders made on 30 May 2022 in this proceeding on Nutrition Science Design Pte Ltd (UEN 201703213M), a company registered in Singapore, in accordance with the laws of Singapore.

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

REASONS FOR JUDGMENT

EX TEMPORE

MCEVOY J:

1. On 30 May 2022 the plaintiffs, who are the liquidators of SIRA Pty Ltd (In Liquidation) (“SIRA”) obtained orders under ss 596A, 596B and 597(9) of the *Corporations Act 2001* (Cth) (“the Act”) for the issuing of summonses for examination against certain individuals and corporations. The orders, amongst other things, require that the plaintiffs serve on each examinee a sealed copy of the orders together with the relevant summons requiring attendance for examination about the examinable affairs of SIRA and other associated entities. The summonses also require the individuals and entities to produce documents in their possession, custody or control in relation to SIRA and other associated entities.
2. For present purposes it is unnecessary to descend into the circumstances of the liquidation of SIRA, and the nature of the enquiries being made by the liquidators. These matters are, however, the subject of detailed evidence in the affidavit of one of the liquidators, Mr John Lindholm, sworn 13 April 2022 in support of the application for orders under ss 596A, 596B and 597(9) of the Act.
3. One of the companies the subject of the orders of 30 May 2022, Nutrition Science Design Pte Ltd (“NSD”), is a Singaporean entity. The plaintiffs now seek leave pursuant to r 10.44 of the *Federal Court Rules 2011* (“the Rules”) to serve the orders made on 30 May 2022 on NSD in Singapore, in accordance with the laws of Singapore. The plaintiffs rely on the affidavit of Ms Joanne Hardwick sworn 3 May 2022 (“the Hardwick affidavit”), and written submissions filed 30 June 2022 with accompanying documents.
4. Division 10.4 of the Rules governs service outside Australia. Rule 10.44 addresses service of documents other than an originating application filed in or issued by the Court on a person in a foreign country, relevantly by grant of leave: r 10.44(1). Pursuant to r 10.44(2), an application under subrule (1) must be accompanied by an affidavit that includes the information mentioned in r 10.43(3)(a) to (c).
5. Rule 10.43 is concerned with service of originating process on a person in a foreign country by grant of leave: r 10.43(2). Pursuant to r 10.43(3)(a) to (c), an application under subrule (2) must be accompanied by an affidavit stating the name of the foreign country where the person is, or is likely to be, the proposed method of service, and that the proposed method of service is permitted by a relevantly applicable convention, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters done at the Hague on 15 November 1965 (“the Hague Convention”), or the law of the foreign country.
6. The Hardwick affidavit deposes that:
7. the foreign country where NSD is to be served is the Republic of Singapore;
8. the proposed method of service on NSD is by private agent; and
9. the proposed method of service is permitted by the laws of Singapore.
10. Ms Hardwick deposes also that Singapore is not a contracting party to the Hague Convention, and that Singapore permits service of a foreign process by means of a private agent pursuant to O 64, r 3 and O 7 of the *Rules of Court 2021* (Singapore) (“the Singapore Rules”).
11. I am satisfied that the Hardwick affidavit includes the information mentioned in r 10.43(3)(a) to (c), and that the law of Singapore does permit service of a foreign process by means of a private agent, Singapore not being a party to the Hague Convention. I note, in this respect, *Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd* [2000] SGCA 24 at [15], [31], [35]. The matters necessary for the grant of leave pursuant to r 10.44 are established.
12. It should be observed, however, that there has traditionally been some reluctance to grant leave to issue or serve a subpoena or like process in another country on the basis that an order requiring a foreign national to do something in Australia on pain of punishment, in proceedings to which that foreign national has not submitted, is an infringement of the sovereignty of that other country which should not readily be allowed: *Ceramic Fuel Cells Ltd (in Liq) v McGraw-Hill Financial Inc* (2016) 112 ACSR 102 (Wigney J); *Titan Enterprises (Qld) Pty Ltd v Cross* [2016] FCA 890 (Edelman J); *Clifton (Liquidator), in the matter of Solar Shop Australia Pty Ltd (in Liq)* [2014] FCA 891 (White J) (“*Clifton*”); *Stemcor (A/sia) Pty Ltd v Oceanwave Line SA* [2004] FCA 391 (Allsop J); *Gao v Zhu* [2002] VSC 64 (Habersberger J); *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch 482 (Hoffmann J); *Arhill Pty Ltd and Others v General Terminal Company Pty Ltd* (1990) 23 NSWLR 545 (Rogers CJ Comm D).
13. As White J observed in *Clifton* at [10], these cases reflect the application of the principle of international comity pursuant to which courts exercise caution about asserting judicial power beyond the territorial limits of their own jurisdiction in a way which interferes with the sovereignty of another State. See also the explanation of international comity in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 396 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
14. However paying due regard to the importance of international judicial comity, I do not consider that this principle should preclude the grant of leave in the present case.
15. Although (in contradistinction to the position in *Clifton*) the present application is not for leave to serve the relevant orders in accordance with the Hague Convention because Singapore is not a party to that Convention, it is clear that the Singapore Rules contemplate and regulate the service in Singapore of any process required in connection with civil proceedings pending before a foreign court. Order 64, r 3 of the Singapore Rules is in the following terms:

(1) Subject to Rule 4, this Rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country where Rule 2 does not apply or is not invoked.

(2) Service of any such process within Singapore may be effected by a method of service authorised by these Rules for the service of analogous process issued by the Court.

(3) This Rule applies even though the foreign process is expressed to be or includes a command of the foreign sovereign.

1. Significantly, O 64, r.3(3) of the Singapore Rules specifically contemplates the possibility that the foreign process may be expressed to be or may include a command of a foreign sovereign.
2. Further, it is clear that ss 596A and 596B of the Act operate extraterritorially and also apply to persons whether or not they are Australian residents or citizens: *Waller v Freehills* (2009) 177 FCR 507 at [53]-[54], [58] (Finn, Dowsett and Siopis JJ) (“*Waller*”); *Devine (Liquidator), Re Lempriere Grain Pty Ltd (In Liquidation)* [2020] FCA 420 at [18] (Gleeson J). As the Full Court observed in *Waller*:

[58] …it is apparent that Parliament intended that the court is to have the power and jurisdiction to summons those persons falling within the ambit of those two provisions to attend the court and be examined in relation to the “examinable affairs” of a company in liquidation, whether or not they are resident in Australia, and whether or not they are citizens of Australia.

1. Noting the wide range of persons who may be the subject of an order under s 596B of the Act, the Full Court in *Waller* accepted that an order for examination made pursuant to s 596B has a greater risk of adversely affecting international comity on the basis of the absence of a sufficient connection with Australia. As to this risk the Court observed:

[61] …However, it appears this risk is recognised and accommodated within the section, by giving the court a discretion as to whether to issue the examination summons. Thus, it appears that the legislative scheme seeks to meet in some respect international law concerns regarding comity by vesting in the court discretion as to whether to issue a summons for the examination of a nonresident in the first place, as opposed to giving the court a power to determine whether such summons once issued, should be served.

1. On the subject of the possible intrusion upon the sovereignty of a foreign state arising from the service of an examination summons and the criminal consequences of non-compliance with the summons, the Full Court in *Waller* was prepared to infer that the Parliament would have appreciated that the exercise by the Court of the jurisdiction to summons foreigners or non residents to appear before it pursuant to ss 596A and 596B of the Act would necessarily involve an invasion of the sovereignty of the state in which the foreigner or non resident is resident. Their Honours observed:

[96] …It is further to be inferred that Parliament has decided that any international opprobrium attached to the passing of extraterritorial legislation is justified in the public interest for the protection of the interests of Australian creditors and contributories. Accordingly, the fact that the issue of an examination summons would involve an invasion of sovereignty per se carried little weight as a discretionary consideration in determining whether leave should be granted to serve the summons in a foreign country…

1. The Full Court’s careful consideration of the issue of international comity in the context of an examination summons in *Waller* provides a further basis for the conclusion that this principle should not preclude the grant of leave in the present case. Accordingly, I grant the leave sought by the applicants, and will make orders in the terms proposed.

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| I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McEvoy. |

Associate:

Dated: 1 July 2022