Federal Court of Australia

Algeri, in the matter of Royal Express Pty Ltd [2022] FCA 1169

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| File number: |  |
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| Judgment of: | **MCEVOY J** |
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| Date of judgment: | 30 September 2022 |
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| Catchwords: | **CORPORATIONS** – application for issue of arrest warrant – failure to comply with summons to attend to be examined about the examinable affairs of a company in liquidation – whether to make orders for issue of arrest warrant  |
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| Legislation: | *Corporations Act 2001* (Cth) s 596A, 597(6), 597(6A)*Federal Court (Corporations) Rules 2000* (Cth) r 11.10*Federal Court Rules 2011* (Cth) r 41.06  |
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| Cases cited: | *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225; [1993] FCA 801*Hughes, in the matter of Firepower Operations Pty Ltd (in liquidation)* (No 3) (2010) 183 FCR 150; [2010] FCA 141 *Pascoe, in the matter of GMP Electrical and Technical Services Limited (in liq)* [2010] FCA 999  |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 12 |
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| Date of hearing: | 30 September 2022  |
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| Place: | Melbourne |
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| Counsel for the Applicants:  | Mr Rosewarne with Ms Anderson |
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| Solicitor for the Applicants: | Allens |

ORDERS

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|  | VID 626 of 2021 |
| IN THE MATTER OF IN THE MATTER OF ROYAL EXPRESS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) |
| BETWEEN: | SALVATORE ALGERI AND TIMOTHY BRYCE NORMAN AS RECEIVERS AND MANAGERS OF ROYAL EXPRESS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 159 689 139Plaintiff |
| IN THE INTERLOCUTORY APPLICATION:  |
|  | SALVATORE ALGERI AND TIMOTHY BRYCE NORMAN AS RECEIVERS AND MANAGERS OF ROYAL EXPRESS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 159 689 139Applicant  |

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| order made by: | MCEVOY J |
| DATE OF ORDER: | 30 September 2022 |

THE COURT ORDERS THAT:

1. Pursuant to r 11.10 of the *Federal Court (Corporations) Rules 2000* (Cth), a warrant be issued and addressed to the Sheriff to arrest Mr Di Huang and to bring that person before the Court to be examined under section 596A of the *Corporations Act 2001* (Cth) on oath or affirmation about the examinable affairs of Royal Express Pty Ltd (Receivers and Managers Appointed) (In Liquidation) (ACN 159 689 139), detaining such person in custody in the meantime.
2. Notice of the issue of the warrant referred to in paragraph 1 be communicated by the applicants to the Commissioner of the Australian Federal Police for the purpose of the warrant's enforcement.
3. The applicants are to serve a copy of this order on Mr Huang by emailing it to hdhuang123@gmail.com by no later than **4:00pm on 5 October 2022**.
4. The examination of Mr Huang be adjourned to a date to be fixed.
5. Mr Huang is to pay:
	1. the wasted costs of the applicants in respect of his failure to appear at his examination in this Court on 25 July 2022; and
	2. the costs of the applicants in respect of the interlocutory application dated 29 July 2022.
6. Mr Huang pay the costs of the applicants referred to in paragraph 5 above on an indemnity basis, such that Mr Huang is to pay the applicants' costs save to the extent they were unreasonably incurred.
7. The costs referred to in paragraph 5 are to be paid forthwith.

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

REASONS FOR JUDGMENT

MCEVOY J:

1. This is an application pursuant to r 11.10(2) of the *Federal Court (Corporations) Rules 2000* (the **Rules**). The applicants are Salvatore Algeri and Timothy Norman, the appointed receivers and managers of Royal Express Pty Limited (in liquidation).
2. By interlocutory application dated 29 July 2022, the applicants seek an order for the issue of a warrant for the arrest of Mr Di Huang for his failure to comply with an order under s 596A of the *Corporations Act 2001* (Cth) (**Act**) in that Mr Huang failed to attend for examination as required by that order and the summons for examination that was served on him. The applicants also seek their wasted costs in respect of Mr Huang’s failure to attend for examination, and the costs of the interlocutory application.
3. Section 597(6) of the Act relevantly provides that a person who is summoned under s 596A of the Act to attend before the Court must not intentionally or recklessly fail to attend as required by the summons or fail to attend from day to day until the conclusion of the examination. Section 597(6A) provides that s 597(6) does not apply to the extent that the person has a reasonable excuse.
4. The application for the issue of the warrants is supported by an affidavit affirmed by Mr Matthew Whittle, the solicitor for the applicants on 29 July 2022, and written submissions dated 26 September 2022.
5. It would appear from Mr Whittle’s affidavit that the background to the applicants’ attempts to ensure that Mr Huang attend for examination is as follows:
6. a summons for examination was served on Mr Huang on 9 December 2021;
7. on 2 March 2022, Mr Huang was informed that his examination would take place in person at the Owen Dixon Law Courts Building in Melbourne on 18, 19 and possibly 20 May 2022;
8. despite various communications passing between the applicants’ solicitors (Allens) and Mr Huang’s solicitors (Macpherson Kelley) between 2 March 2022 and late April 2022, Allens were not informed until 27 April 2022 that Mr Huang was allegedly in Shanghai, in lockdown, and unable to attend his examination in person;
9. no evidence has been filed by Mr Huang to demonstrate that he was in fact in Shanghai, although an affidavit was filed by his solicitor (Ms Catherine Tan of Macpherson Kelley) which stated that she was instructed that he was in China and exhibited a flight itinerary for a one-way flight from Melbourne to Guangzhou on 24 November 2021;
10. no evidence was provided that Mr Huang took that flight or, if he did, that he remained in China;
11. Mr Huang made an interlocutory application on 13 May 2022 seeking to be permitted to attend his examination on 18 to 20 May 2022 by audio video link or alternatively, that he ‘be excused’ from attending his examination on those dates;
12. at the hearing of the interlocutory application on 18 May 2022, a Registrar adjourned Mr Huang’s examination to 25 July 2022, and stated that he expected Mr Huang would use his 'best endeavours to make arrangements to attend' the hearing in person;
13. despite this statement from the Registrar, letters from Allens to Macpherson Kelley dated 27 May 2022 and 3 June 2022 seeking information about Mr Huang’s arrangements to attend his examination went unanswered;
14. on 23 June 2022, Macpherson Kelley responded to a further request for information from Allens made on 21 June 2022 stating that Mr Huang was now in Beijing, asking if the applicants would fund his flight tickets and expenses to return to Melbourne, and stating that Mr Huang intended to seek employment in Melbourne once he returned;
15. Allens responded to this correspondence on 27 June 2022 stating that the applicants were prepared to arrange and pay for Mr Huang’s flights and sought his passport details in order to do so;
16. there followed a series of communications between Allens and Macpherson Kelley relating to Mr Huang’s return to Melbourne, but despite repeated request, Mr Huang’s passport details were never provided to the applicants;
17. on 11 July 2022, the Registrar made orders requiring Mr Huang to provide his passport details to the applicants forthwith and requiring the applicants to arrange at their expense air travel, transfers, and accommodation to facilitate Mr Huang’s appearance in person at his examination;
18. an individual with the screen name “HD (Guest)” attended the 11 July 2022 hearing (which was held on Microsoft Teams);
19. correspondence between Allens and Macpherson Kelley following the hearing on 11 July 2022 and failed to result in Mr Huang’s passport or other details being provided;
20. the proceeding was brought back for mention on 19 July 2022 at which time Mr Huang’s counsel informed the Court that he appeared as a courtesy and without instructions from Mr Huang;
21. the Registrar again made orders requiring the provision of Mr Huang’s passport and other details by 10.00am on 20 July 2022, which orders carried a penal endorsement under r 41.06 of the *Federal Court Rules 2011* (Cth);
22. on 19 July 2022, Ms Carly Donovan of Allens sent an email to Ms Tan of Macpherson Kelley attaching, by way of service, a copy of the orders made on 19 July 2022, and details of return flights from Beijing that had been booked on Mr Huang’s behalf by the applicants; and
23. on 24 July 2022, Ms Tan replied confirming that Ms Donovan's email had been forwarded to Mr Huang and stated that no response had been received from Mr Huang and that Macpherson Kelley had no instructions to appear on Mr Huang’s behalf at his examination on 25 July 2022.
24. On 25 July 2022, Mr Huang failed to appear at his examination personally and there was no appearance made on his behalf.
25. When the present application came before the Court today, 30 September 2022, Mr Huang was called and he did not appear. On 22 August 2022 Mr Huang had been informed by way of email to his solicitors on the record of the hearing date. Subsequent emails were exchanged between the Court and the parties, with Ms Tan being copied in to all emails (as well as Mr Huang directly from 26 September 2022 to the date of the hearing). No responses were received by Ms Tan or Mr Huang to those various email communications. Whilst a notice of ceasing to act was filed by Macpherson Kelley on 9 August 2022 in the principal proceedings, no such notice has been filed in these proceedings.
26. Rule 11.10 of theRules relevantly provides that it applies if a person is summoned or ordered by the Court to attend for examination and, without reasonable cause, the person fails to attend at the time and place appointed or fails to attend from day to day until the conclusion of the examination. Subrule (2) provides that the Court may issue a warrant for the arrest of the person summoned or ordered to attend for examination and may make any other orders that the Court thinks just or necessary.
27. Having regard to the evidence, which I have summarised above, I am satisfied that Mr Huang was aware of the date for examination and failed to attend. In circumstances where Mr Huang has been on notice since at least 2 March 2022 that the examination would be in person, that his original examination dates were adjourned to accommodate his attendance in person, where the applicants agreed and were ordered to pay Mr Huang’s return flights, accommodation and daily costs for attending the examination, where Mr Huang was previously represented by counsel and solicitors and has ceased engaging in the proceedings, it appears that Mr Huang has no reasonable cause for his failure to comply with the orders: see *Pascoe, in the matter of GMP Electrical and Technical Services Limited (in liq)* [2010] FCA 999 at [4] (Stone J).
28. I am satisfied therefore that, pursuant to r 11.10(2) of the Rules, the Court has the power to issue a warrant for the arrest of Mr Huang and that orders should be made to that effect. I will make orders accordingly, including an order that a copy of the orders so made be served on Mr Huang by email.
29. The applicants also invite the Court to make a costs order against Mr Huang. They submit that as Mr Huang’s examination was listed for three full sitting days the applicants expended significant resources in preparation for his examination. It is submitted that the investigations of the applicants and the conduct of the other examinations relating to the examinable affairs of the company have revealed that Mr Huang’s actions and knowledge are central to the examinable affairs of the company. The applicants therefore seek their wasted costs for the preparation of the examination and the costs of the interlocutory application on an indemnity basis to be payable forthwith.
30. In light of the conduct of Mr Huang as summarised above I am satisfied that the requisite special circumstances are present and that Mr Huang should pay the applicant’s costs on an indemnity basis: see *Hughes, in the matter of Firepower Operations Pty Ltd (in liquidation)* (No 3) (2010) 183 FCR 150 at 154, [18]-[24] (Siopis J); *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 at 233 (Sheppard J).

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

Associate:

Dated: 30 September 2022