FEDERAL COURT OF AUSTRALIA

Owen, as liquidator of Cockatoo Crane Trucks Pty Ltd (in liq) v Hazlewood [2018] FCA 2123

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| File number: |  |
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| Judge: | **REEVES J** |
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| Date of judgment: | 13 December 2018 |
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| Catchwords: | **CORPORATIONS** – application for an extension of time for the respondents to file a notice of cross-claim – whether there was an “acceptable explanation” for the delay in filing – whether there was any prejudice to the respondent – whether the application had merit – where leave was granted |
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| Legislation: | *Federal Court Rules 2011* (Cth) rr 15.04, 15.05 |
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| Cases cited: | *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 |
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| Date of hearing: | 13 December 2018 |
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| Registry: | Queensland |
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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: | 8 |
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| **Interlocutory Application** |  |
| Counsel for the Applicants: | The Applicants did not appear |
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| Counsel for the Respondent/Proposed Cross-Claimant: | Mr PG Jeffery |
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| Solicitor for the Respondent/Proposed Cross-Claimant: | JHK Legal |

ORDERS

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|  | | QUD 291 of 2018 |
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| BETWEEN: | MICHAEL ANDREW OWEN AS LIQUIDATOR OF COCKATOO CRANE TRUCKS PTY LTD (IN LIQUIDATION)  First Applicant  COCKATOO CRANE TRUCKS PTY LTD (IN LIQUIDATION) (ACN 144 617 961)  Second Applicant | |
| AND: | STEVEN HAZLEWOOD  Respondent | |

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| JUDGE: | REEVES J |
| DATE OF ORDER: | 13 DECEMBER 2018 |

THE COURT ORDERS THAT:

1. Pursuant to r 15.05 of the *Federal Court Rules 2011* (Cth), the time fixed by r 15.04 for the respondent to file a notice of cross-claim be extended to 29 October 2018.

2. The costs of and incidental to the respondent’s interlocutory application filed 24 October 2018 are reserved.

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

REASONS FOR JUDGMENT

(Corrected from transcript)

REEVES J:

1 This is an application under r 15.05 of the *Federal Court Rules 2011* (Cth) to extend the time under r 15.04 in which to bring a cross-claim in this proceeding. The time fixed by r 15.04 is the date of filing of the respondent’s defence in the proceeding. That was 26 July 2018.

2 An application under r 15.05 must be accompanied by an affidavit stating briefly, but specifically, “the nature of the cross-claim and its relationship to the subject matter of the proceeding” and “why the notice of cross-claim was not filed in accordance with [r] 15.04”.

3 Such an affidavit was filed with this application on 24 October 2018. Mr Hazlewood, the respondent in this proceeding, is the deponent to that affidavit. It was served, together with this application, on 29 October 2018. The extension of time sought is therefore approximately three months.

4 The principles relevant to the exercise of the Court’s discretion on an application of this kind were expressed by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 348–349. In summary, they are:

(a) the Court should have regard to whether the applicant has shown an “acceptable explanation” for the delay in filing the process;

(b) any prejudice to the respondent, including any prejudice in defending the principal proceeding occasioned by the delay in filing the process; and

(c) the merits of the application – that is, in this instance, the merits of the cross-claim.

5 As to (a) above, Mr Hazlewood’s affidavit deposes to the following:

(a) at the time that the cross-claim was to be filed, his solicitors were, on his instructions, undertaking investigations, including obtaining documents from the proposed cross-respondent, to ensure that he had a sufficient evidentiary basis to make a cross-claim against it;

(b) attempts were made to settle the cross-claim without recourse to litigation in September 2018, but those attempts, ultimately, failed on or about 19 September 2018;

(c) he required some time thereafter to obtain sufficient funds to be placed in his solicitor’s trust account to cover the legal costs of this application; and

(d) there was a further short delay connected with the settling and filing of this application and its supporting material.

6 As to [4(b)] above, the first applicant did not appear at the hearing of this application. Notwithstanding that non-appearance, he has lawyers acting for him on the record. From that fact and the absence of any material alleging that the first applicant will suffer any prejudice if this extension of time is ordered, I infer that there is none.

7 As to [4(c)] above, Mr Jeffery, for the respondent, summarised the circumstances in which the cross-claim arose, as follows. The principal proceeding in this matter relates to two directors’ loans recorded in the books of account of the company of which the first applicant is the liquidator. The first applicant has sought to collect those loans from Mr Hazlewood, as the former director of the company. Ms Lahey, the proposed cross-respondent, was the principal of Roz Lahey Accounting Pty Ltd (ACN 112 623 873), which firm served as the company’s accountant. Ms Lahey allegedly recorded the directors’ loans in the company’s books of account in error. Mr Hazlewood claims to have met with Ms Lahey in or about early May 2016 and, at that meeting, she admitted in the presence of a witness that she had made that error.

8 Without expressing any views as to whether these claims will ultimately be accepted at the trial, I am satisfied that they demonstrate that the cross-claim has sufficient merits to justify the exercise of my discretion to allow the extension of time. For these reasons, I order that:

1. Pursuant to r 15.05 of the *Federal Court Rules 2011* (Cth), the time fixed by r 15.04 for the respondent to file a notice of cross-claim be extended to 29 October 2018.

2. The costs of and incidental to the respondent’s interlocutory application filed 24 October 2014 are reserved.

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| I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves. |

Associate:

Dated: 19 December 2018