FEDERAL COURT OF AUSTRALIA

Dudley (Liquidator) v RHG Construction Fitout & Maintenance Pty Ltd [2019] FCA 1355

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| File number: |  |
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| Judge: | **JACKSON J** |
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| Date of judgment: | 28 August 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** - application by defendants to cease being party to proceedings under r 9.08 *Federal Court Rules 2011* (Cth) - 'mothership' unfair preference proceedings against multiple unrelated defendants - relief claimed does not arise out of same transaction or event or series of transactions or events under r 9.02(b) - irregularity in proceedings may be cured by s 51 *Federal Court of Australia Act* 1976 (Cth) - application successful in part |
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| Legislation: | *Corporations Act 2001* (Cth) ss 588FA, 588FC, 588FE, 588FF, 588M*Federal Court of Australia Act 1976* (Cth) ss 37M, 51*Federal Court (Corporations) Rules 2000* (Cth) rr 1.3, 2.2*Federal Court Rules 2011* (Cth) rr 1.34, 9.02, 9.05, 9.07, 9.08 |
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| Cases cited: | *Australian Consumer and Competition Commission v Launceston Superstore Pty Ltd* [2013] FCA 297*Bendir v Anson* [1936] 3 All ER 326*Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32; (2006) 225 CLR 364*Bishop v Bridgelands Securities* (1990) 25 FCR 311*Cerche v Commissioner of Taxation* [2001] FCA 1146; (2001) 48 ATR 17*Crayford Freight Services Ltd v Coral Seatel Navigation Company* (1998) 82 FCR 328*Dean-Willcocks v Air Transit International Pty Ltd* (2002) 55 NSWLR 64*Dickinson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500*Emanuele v Australian Securities Commission* (1997) 188 CLR 114*Fernance v Nominal Defendant* (1989) 17 NSWLR 710*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125*Johnston v Vintage Developments Pty Limited* [2006] FCAFC 171*Lois Nominees Pty Ltd v Hill* [2011] WASC 53*Lord v Agreserves Australia Ltd* [2006] FCA 598*Martin Bruce Jones as Liquidator of Forge Group Ltd (Receivers and Managers Appointed) (In Liquidation) v Sun Engineering (Qld) Pty Ltd* [2017] WASC 195*Payne v Young* (1980) 145 CLR 609*Qantas Airways Ltd v AF Little Pty Ltd* [1981] 2 NSWLR 34*Re Bias Boating Pty Ltd* [2017] NSWSC 1524*Smurthwaite v Hannay* [1894] AC 494*Vintage Developments Pty Limited v GHD Pty Limited* [2006] FCA 531 |
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| Date of hearing: | 16 August 2019 |
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| Registry: |  |
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| Solicitor for the Sixth Defendant: | Results Legal |

ORDERS

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|  | WAD 238 of 2019 |
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| BETWEEN: | GREGORY BRUCE DUDLEY & NEIL RAYMOND CRIBB AS JOINT AND SEVERAL LIQUIDATORS OF PRECISION CATERING & EQUIPMENT PTY LTD (IN LIQ) (ACN 126 255 936)Plaintiff |
| AND: | RHG CONSTRUCTION FITOUT & MAINTENANCE PTY LTD FORMERLY KNOWN AS RHG CONTRACTORS PTY LTD (ACN 159 703 349)First DefendantMTS ELECTRICAL CONTRACTING PTY LTD (ACN 136 656 829)Second DefendantWESCO ELECTRICS (1966) PTY LTD (ACN 008 700 025) (and others named in the Schedule)Third Defendant |

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| JUDGE: | JACKSON J |
| DATE OF ORDER: | 28 AUGUST 2019 |

THE COURT ORDERS THAT:

1. Pursuant to r 9.08 of the *Federal Court Rules 2011* (Cth), the fourth defendant and the sixth defendant will each cease to be a party to these proceedings.
2. The operation of paragraph 1 of these orders is suspended so that it does not take effect until 4.00 pm (WST) on 27 September 2019.
3. There is liberty to apply in relation to paragraphs 1 and 2 of these orders.
4. The matter is listed for mention at 9.45 am on 11 September 2019.
5. Costs reserved.

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

REASONS FOR JUDGMENT

JACKSON J:

1. The plaintiffs are the liquidators of Precision Catering & Equipment Pty Ltd (in liq). They have commenced these proceedings against 17 corporate defendants seeking repayment of what are alleged to be unfair preferences paid at a time when the company was insolvent.
2. The proceedings were commenced by way of a single originating process under r 2.2 of the *Federal Court (Corporations) Rules 2000* (Cth). The claims have been resolved in relation to four of the defendants, but they remain on foot against 13 parties. They are proceedings of the kind that is sometimes called a 'mother proceeding' (*Dean-Willcocks v Air Transit International Pty Ltd* [2002] NSWSC 525; (2002) 55 NSWLR 64 at [14]; *Martin Bruce Jones as Liquidator of Forge Group Ltd (Receivers and Managers Appointed) (In Liquidation) v Sun Engineering (Qld) Pty Ltd* [2017] WASC 195 at [62]) or a 'mothership proceeding' (*Re Bias Boating Pty Ltd* [2017] NSWSC 1524 at [18]). That is, they are unfair preference claims in respect of the same insolvent company (or group of companies) that have been commenced against multiple defendants in relation to separate payments made by the company to each defendant.
3. The claims are at an early procedural stage. The originating process was supported by an affidavit that the first‑named plaintiff, Mr Dudley swore. The court ordered the plaintiffs to file a statement of claim, and on 3 July 2019 they did so. No defences have yet been filed.
4. These reasons concern an application brought by each of the fourth defendant, Tasman Power WA Pty Ltd, and the sixth defendant, GCO Electrical Pty Ltd (together, the **applicants**), seeking orders under r 9.08 of the *Federal Court Rules 2011* (Cth) that they be removed as parties to the proceedings. The liquidators oppose the applications. This raises issues of how and to what extent the rules of this court accommodate mothership proceedings.
5. The outcome of the applications will not just have procedural implications. It is common ground that the winding up of Precision Catering commenced on 2 May 2016, and that this was the relation‑back day for the purposes of the *Corporations Act 2001* (Cth). As a result, the three year limitation period under s 588FF(3)(a)(i) of that Act started on that day. The liquidators lodged the originating process on 26 April 2019, nearly three years after 2 May 2016. If the claims were to be commenced now, they would be out of time. The applicants say that if they are removed as parties, any order joining them to the proceedings would have effect no earlier than the time of the order. The result would be that the liquidators would be out of time for their claims against the applicants.

## The rules of court

1. It was common ground that the *Federal Court (Corporations) Rules* do not deal specifically with the issues that arise on the applications, but that, by reason of r 1.3(2) of those rules, the *Federal Court Rules 2011* apply.
2. The rules that are relevant are as follows

**9.02 Joinder of parties - general**

An application may be made by 2 or more persons, or against 2 or more persons, if:

(a) a separate proceeding could be made by or against each person in which the same question of law or fact might arise for decision; and

(b) all rights to relief claimed in the proceeding (whether joint, several or alternative) arise out of the same transaction or event or series of transactions or events.

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**9.05 Joinder of parties by Court order**

(1) A party may apply to the Court for an order that a person be joined as a party to the proceeding if the person:

(a) ought to have been joined as a party to the proceeding; or

(b) is a person:

(i) whose cooperation might be required to enforce a judgment; or

(ii) whose joinder is necessary to ensure that each issue in dispute in the proceeding is able to be heard and finally determined; or

(iii) who should be joined as a party in order to enable determination of a related dispute and, as a result, avoid multiplicity of proceedings.

(2) A person must not be added as an applicant without the person’s consent.

(3) If a person is joined as a party under this rule, the start date of the proceeding for the person is the date on which the order is made.

(4) An application under subrule (1) need not be served on any person who was not served with a copy of the originating application.

Note: The Court may make an order for any of the following:

(a) service of the order and any other document in the proceeding;

(b) amendment of a document in the proceeding;

(c) the filing of a notice of address for service by a party.

…

**9.07 Errors in joinder of parties**

A proceeding will not be defeated only because:

(a) a party has been improperly or unnecessarily joined as a party; or

(b) a person who should have been joined as a proper or necessary party has not been joined.

**9.08 Removal of parties by Court order**

A party may apply to the Court for an order that a party that has been improperly or unnecessarily joined as a party, or has ceased to be a proper or necessary party, cease to be a party.

Note: The Court may make an order for the future conduct of the proceeding.

## The basis of the application

1. While each of the applicants filed separate sets of written submissions, the thrust of their respective applications was the same. They contend that the joinder of multiple defendants in the present proceedings was not permitted by r 9.02, because all rights to relief claimed in the proceeding do not arise out of the same transaction or event or series of transactions or events. They say that this means that the claims against them should not be permitted to proceed, and the court should give effect to that by making orders under r 9.08 that each of them cease to be a party. They point out that the liquidators have not applied for any order under r 9.05 that they (the applicants) be joined as parties, and say that even if such an order were to be made, it could not take effect from a time before the expiry of the limitation period.
2. The applicants relied on affidavits sworn by their respective officers. The contents of the affidavits were not contentious. They established that each applicant was party to its own arrangement or agreement with Precision Catering, whereby each separately provided goods or rendered services to Precision Catering before the commencement of the winding up of the company, giving rise to separate indebtedness and separate payments to each defendant. There was no evidence before me of any overlap or commonality between transactions involving either applicant, and transactions involving any other defendant. Each applicant rendered invoices and collected on those invoices without the involvement of any other defendant.
3. There are two other matters which confine the issues because they were common ground or at least not seriously in dispute.
4. First, even though no defences have been filed, all parties proceeded on the assumption that whether and when Precision Catering became insolvent would be in issue and that this (at least) means that the same question of law or fact might arise for decision. As a result, the requirements of r 9.02(a) were satisfied.
5. Second, neither applicant relied on any factors of inconvenience, cost or injustice arising from the fact that the proceedings include a large number of unrelated defendants. Tasman Power accepted that there is a line of authority supporting the use of a 'mother proceeding' for large scale and complex recoupment of preferences: see *Sun Engineering* at [63] and the cases cited there. Counsel for GCO Electrical similarly accepted that it is a well‑recognised policy of the courts to join multiple defendants to a 'mother proceeding', in the right circumstances. The applicants did not dispute that there are procedural advantages in constituting proceedings that way. Their complaint is that the liquidators here have not commenced the proceedings in accordance with the rules of court.

## Were the proceedings commenced in accordance with r 9.02?

1. There does not appear to be any authority in this court since the introduction of the *Federal Court Rules 2011* that establishes whether a single set of proceedings making unfair preference claims against unrelated defendants is authorised by the rules of court. The parties have referred me to cases decided under similar, but not identical, rules.
2. The key question in the construction and application of r 9.02 is whether all rights to relief claimed in these proceedings 'arise out of the same transaction or event or series of transactions or events'. In *Payne v Young* (1980) 145 CLR 609 a majority of the High Court held that a rule authorising joinder in one proceeding where 'a right to relief in respect of, or arising out of, the same transaction or series of transactions is alleged to exist in more than one person' did not authorise multiple plaintiffs to commence proceedings (against multiple defendants) in the same action. The common thread in the claims was that all the plaintiffs claimed that they had paid a certain statutory fee to the defendants (various local and state authorities) when the regulations levying the fee were invalid. The majority held that the rule did not authorise the plaintiffs to join their claims together because each fee had been paid by a particular plaintiff to a particular defendant. There was no common participation in the services performed or in the fees levied and paid. It could not therefore be said that the relief claimed was in respect of or arose out of 'the same transaction or series of transactions'.
3. In *Dean-Willcocks*, Austin J applied *Payne v Young* in the context of 'mother proceedings' for recovery of unfair preferences. The rule his Honour was considering was relevantly the same as the High Court rule to which I have referred. At [23]‑[27] his Honour rejected the liquidator's submission that the claims arose out of the same series of transactions, being either the payments to the various defendants, which were said to be part of a series, or the transactions that led to the company becoming insolvent. As far as the allegedly preferential payments were concerned, the fact that they were linked by the liquidator's allegation that they were unfair preferences was not enough to place them in the same series of transactions. As far as the transactions leading up to insolvency were concerned, the claims did not arise out of them; rather, they arose out of the allegedly preferential payments.
4. Subject to one possible qualification, these authorities compel the conclusion that r 9.02 of the *Federal Court Rules* did not authorise the liquidators to commence mothership proceedings such as the present case, without leave. As a decision of a superior court on comparable rules, and in the context of the same unfair preference provisions of the *Corporations Act*, to ensure a nationally consistent approach I should follow *Dean-Willcocks* unless I consider that it is plainly wrong. With respect, I do not. In any event other courts have followed that approach: see e.g. *Sun Engineering* at [59] (Martin J).
5. The possible qualification is that the introduction of the current *Federal Court Rules* in 2011 resulted in a difference between the wording of r 9.02 and the wording of the comparable rules, such as the rule that was the subject of *Dean-Willcocks*. The difference is that r 9.02 refers to 'the same transaction *or event* or series of transactions *or events*'(emphasis added). The reference to an 'event' or 'events' is new. The liquidators here contend that their rights to relief arise primarily out of the event of the winding up of the company, which is a necessary prerequisite for their claim against each of the defendants.
6. It is arguable that r 9.02 can be applied in that way. Taking the key phrase according to its ordinary meaning, it can be said that the claimed rights to relief all arise out of the same event. The rights to relief are the rights to invoke the power of the court to direct the defendants to pay money to Precision Catering under s 588FF(1)(a) of the *Corporations Act*. The right to apply for such orders is a right of the liquidators: s 588FF(1). The order may be made when the court is satisfied that a transaction is voidable under s 588FE: s 588FF(1). Section 588FE only operates if the company is being wound up: s 588FE(1).
7. So the rights to relief claimed here all depend for their existence on an event, namely the winding up. In that sense, the rights all arise out of the winding up. As counsel for the liquidators submitted, if a payment is made that discharges a debt to a creditor of a company at the time when the company is insolvent, it only gives rise to a vulnerability that, if the company is wound up at some future point in time, a liquidator may apply for an order for repayment. That is the combined effect of s 588FA(1) (describing unfair preferences) and s 588FC (describing insolvent transactions), together with s 588FE(1), 588FE(2) and s 588FF(1).
8. Two further points lend support to the liquidators' submission. The first is that rules as to joinder of parties are remedial and should be construed beneficially or liberally: *Lois Nominees Pty Ltd v Hill* [2011] WASC 53 at [33] (Beech J). The historical problems which rules such as these were introduced to solve are described in *Qantas Airways Ltd v AF Little Pty Ltd* [1981] 2 NSWLR 34 at 45‑46. The court should be slow to place limits on the ordinary meaning of the words which are not expressly required.
9. The second point is that it is well recognised that the test posited by the words 'arising out of' is a wide one. Although it involves some causal or consequential relationship, it does not require the direct or proximate relationship which would be imported by a phrase such as 'caused by': see e.g. *Dickinson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500 at 505. While most of the authorities on the phrase are in the context of insurance law, they reflect the ordinary meaning of the phrase 'arising out of' and can be applied in the present context, especially if the rules are to be read beneficially.
10. Nevertheless, I have come to the view that the liquidators' submission should not be accepted. It is inconsistent with Austin J's reasoning in *Dean-Willcocks* at [25]‑[26] as to why multiple preference claims cannot be said to arise out of the series of transactions leading up to the company's insolvency. If the preference claims do not arise out of those transactions, but instead arise out of the allegedly preferential payments themselves, then it seems, equally, that they do not arise out of the winding up of the company which was the result of that insolvency.
11. More fundamentally, in my view the approach evinced in *Dean-Willcocks* and other cases is consistent with the text of r 9.02, even taking into account the added reference to an event or events. It would not be correct to fasten on the use of the singular term 'event' and say that the requirement in r 9.02(b) is satisfied as long as the claims have a single event in common, even a crucially important event. The text must be read as a composite phrase: 'the same transaction or event or series of transactions or events'. The claims here arise not out of a single event, but out of a series of transactions or events. Whether or not the series for each applicant includes the transactions resulting in insolvency, and the winding up, it must also include the separate payments which are said to have been unfair preferences. Once that is appreciated, it cannot be said that each series of transactions or events for each defendant is the same as the others. The intent behind r 9.02 remains, as for the comparable rules of court, that there must be a substantial degree of commonality between different claims before the rules will authorise joinder of those claims without leave. The cases on mothership unfair preference claims indicate that the transactions or events that result in the winding up of the company, by themselves, do not provide a sufficient degree of commonality. The same must go for the winding up itself.
12. Consistently with that, the authorities concerning the joinder rules in relation to 'transactions' give that term a wide meaning, and sometimes treat it as synonymous with 'events': see e.g. *Dean-Willcocks* at [24], [26] and, in a different context, *Bendir v Anson* [1936] 3 All ER 326 at 330 (Lord Wright MR). I do not think that the added reference to events in r 9.02 effects a change significant enough to support the liquidators' arguments in this regard.
13. Counsel for Tasman Power illustrated the problems that might arise if the liquidators' construction of r 9.02 was adopted. It would then be possible to join, in one proceeding, an unfair preference claim against a former creditor of the company and an insolvent trading claim against a director under s 588M of the *Corporations Act*. Even if the debts leading to the insolvent trading claim had nothing to do with the creditor being pursued for unfair preferences, the two proceedings could be joined together because the time of insolvency would be a common issue, and both claims could be said to arise out of the winding up. In my view that would be outside the intent evinced in r 9.02, and it confirms that the winding up is, by itself, insufficient to establish the level of commonality required to bring multiple claims within r 9.02(b).
14. I therefore find that r 9.02 did not authorise the liquidators to commence a single set of proceedings in this court against multiple defendants where the allegedly preferential payments, and the agreements or arrangements with the company under which they were made, were unique to each separate defendant.

## The consequences of non-compliance with r 9.02

1. It does not follow, however, that the liquidators' act in commencing the proceedings was invalid or ineffective as against any defendant. What the rules require, as a matter of procedure, is that multiple claims only be combined in one proceeding if the necessary preconditions are satisfied. Failing to observe that requirement does not necessarily mean that the step of commencing them in an unauthorised way is a nullity, invalid, or otherwise of no effect.
2. *Johnston v Vintage Developments Pty Limited* [2006] FCAFC 171 concerned an amended originating application and statement of claim which had been filed in existing proceedings, and which named a person as a respondent for the first time. The documents had been filed a few days before the limitation period for the claim against the new respondent expired, and were filed without leave when leave was required. The applicants applied for leave only after filing the documents, and after the expiry of the limitation period. The new respondent resisted his joinder on the basis that the amended application and statement of claim, having been filed without leave, were nullities that were incapable of being saved under s 51 of the *Federal Court of Australia Act 1976* (Cth) (see [10]).
3. Section 51 reads as follows:

**51 Formal defects not to invalidate**

(1) No proceedings in the Court are invalidated by a formal defect or an irregularity, unless the Court is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of the Court.

(2) The Court or a Judge may, on such conditions (if any) as the Court or Judge thinks fit, make an order declaring that the proceeding is not invalid by reason of a defect that it or he or she considers to be formal, or by reason of an irregularity.

1. The Full Court did not accept that the amended application and statement of claim were nullities (see [19]). Their Honours explained (at [16]) that under the rules of court, a proceeding was commenced by filing an application. Filing is an act of the court, in the sense that the applicant lodges the document and the court then accepts it for filing. Since the court had accepted the amended originating application and amended statement of claim for filing, the proceeding against the new respondent had been commenced.
2. In my view the same reasoning applies in this case; r 2.2(1)(a) of the *Federal Court (Corporations) Rules* provides that a person must make an application required or permitted to be made to the court, if the application is not made in a proceeding already commenced, by filing an originating process. That is what occurred here. The registry of the court accepted the originating process for filing before the expiry of the period referred to in s 588FF(3)(a)(i). It follows that proceedings were commenced against all the defendants named in the originating application, including the applicants. But the manner in which they were commenced did not comply with r 9.02 of the *Federal Court Rules*.
3. In *Johnston v Vintage Developments* the court went on to apply observations in *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32; (2006) 225 CLR 364, where at [13] the High Court said:

There is also a very real difficulty in characterising proceedings as 'invalid'. The institution of an action or other proceeding is the exercise by the litigant of the freedom to invoke the jurisdiction of the judicial arm of government to determine a dispute. That step engages the procedural law appurtenant to the Court, which in modern times is found primarily in the Rules.

1. Here, the liquidators have invoked the court's jurisdiction to grant them relief, by filing an originating process under the *Federal Court (Corporations) Rules*. The consequences of any failure to comply with the procedural law appurtenant to that jurisdiction are to be determined principally by reference to those rules and the *Federal Court of Australia Act* and the *Federal Court Rules 2011*.
2. In *Berowra Holdings* the High Court also said (at [14]) that even where a procedural rule is expressed in mandatory form, 'if the party to whom it is addressed chooses to disregard it, the normal outcome is that a choice accrues to the other party either to do nothing or to seek an appropriate order from the court'. That is not, of course, to say that breaching rules of court will be condoned or will have no consequences. The point is just that there is no general principle that failure to comply with a rule when taking a procedural step invalidates the step, or makes it a nullity or otherwise ineffective.
3. In *Johnston v Vintage Developments* (at [25]) the Full Court treated the filing of the amended statement of claim as the joinder of the defendant without leave, and indicated that unless and until the filing of the document was set aside, it had an operative effect, albeit subject to the possibility of disallowance under the rules. It is true that their Honours' views were informed by the rules permitting joinder in the now repealed *Federal Court Rules 1979* (Cth), the wording of which was different to r 9.02, as well as the rules concerning the amendment of pleadings. Nevertheless, they accepted (at [25]) that s 51 of the *Federal Court of Australia Act* supplied a basis to regularise the filing of the amended originating application and amended statement of claim without leave. At [15] they described the section as 'critical'. At [26] they noted that apart from the specific rules about joinder and amendment, the predecessor of r 1.34, empowering the court to dispense with compliance with any of the rules could be used to cure the irregularity. And at [27] their Honours again characterised the failure to obtain prior leave of the court as an irregularity which s 51 contemplated could be cured.
4. Counsel for Tasman Power accepted that the failure to comply with r 9.02 did not render the proceedings a nullity as against his client, but counsel for GCO Electrical was less prepared to concede the point. He referred to *Payne v Young*, in which the High Court ordered that all but one of the plaintiffs, who were not authorised to join in the same proceedings, were to be struck out. However I do not consider that I can draw much from that case in relation to this point. There was no limitation issue in *Payne v Young*. It does not appear that any party resisted the proposition that if the relevant rule did not authorise the joinder, the claims should be struck out. And the facts were very different, because the relevant transactions all involved different plaintiffs and different defendants, with no common issue of fact and only the common legal issue as to the invalidity of the regulations linking the various claims.
5. Counsel for GCO Electrical also referred to *Smurthwaite v Hannay* [1894] AC 494 at 501, where Lord Herschell LC (the other Law Lords agreeing) held that the joinder of multiple plaintiffs to an action, which was 'unwarranted by any enactment or rule' was 'much more than an irregularity'. However I also draw limited assistance from that case. It was decided under a different statutory regime, at a time when the English courts were still working through the implications of the *Judicature Act* reforms: see the history described in *Qantas Airways v AF Little* at 45‑50. Lord Herschell was answering the argument that, due to a particular rule of court, the defendant who had been sued by multiple plaintiffs was out of time to apply to set aside the proceedings, because it had not made the application within a reasonable time. That this was the point being answered also comes out clearly in the speech of Lord Russell of Killowen, where his Lordship said (at 506):

In my judgment, such joinder of plaintiffs is more than an irregularity: it is the constitution of a suit as to parties in a way not authorized by the law and the rules applicable to procedure; and apart altogether from any express power given by the rules, it is fully within the competence of the Court to restrain and to prevent an abuse of its process.

1. Here, there has been no suggestion that the manner in which the liquidators commenced these proceedings was an abuse of process. Nor can there be any suggestion that the court lacks power to prevent the liquidators' claim from proceeding against the applicants if it is appropriate to do so. That power appears in s 51, if 'the Court is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of the Court', and in r 9.08, which permits the removal of the applicants as parties.
2. In any event, in *Johnston v Vintage Developments* at [26] a Full Court of this court held that an irregularity had occurred because no leave had been sought to authorise the joinder of the new defendant. While it is true that their Honours put this in the context of joinder to an existing proceeding, there is no reason to take any different approach to unauthorised joinder of multiple parties to new proceedings. The Full Court went on to hold (at [34]) that '[a]lthough the joinder was irregular, it could not have been a nullity for the reasons given in *Berowra Holdings Pty Ltd v Gordon*'.
3. That is consistent with the approach of an earlier Full Court in *Crayford Freight Services Ltd v Coral Seatel Navigation Company* (1998) 82 FCR 328 at 333‑335, where Burchett, Ryan and Marshall JJ referred to the 'general disfavour towards procedural rigidities' which Kirby J mentioned in *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 147. While that disfavour may not have been general in 1894 when *Smurthwaite* was handed down, it is now.
4. *Emanuele* is also notable because in it, Dawson J (at 125) described a failure by directors of a company to apply, under s 459P(2) of the *Corporations Law*, for leave to seek the winding up of the company, as 'a mere defect or irregularity' in the exercise of the jurisdiction to make a winding up order that had been conferred on the court by a different provisions. In *Crayford* itself, the Full Court held (at 334) that the filing of a cross‑claim without the leave of the court when such leave was required could be remedied under s 51.
5. The applicants here submitted that decisions including *Johnston v Vintage Developments* were distinguishable because they were handed down under different rules of court, which expressly contemplated that joinder at the time of commencement of the proceedings could be authorised by leave. But the reasoning of the Full Court as I have described it is based on principles more fundamental than that.
6. The submission was that the present *Federal Court Rules* are different, because while the court may have power under r 9.05 to order that a person be joined as a party to the proceeding, the rule also provides (in r 9.05(3)) that the start date of the proceeding is the date on which the order granting leave is made. Whether or not an order under r 9.05 can authorise plaintiffs to commence proceedings against multiple unrelated defendants (as to which see *Australian Consumer and Competition Commission v Launceston Superstore Pty Ltd* [2013] FCA 297 at [8]), in view of r 9.05(3) it cannot avail the liquidators here, as the period in s 588FF(3)(a)(i) has expired. But in any event I do not discern in the removal from r 9.02 of any reference to leave, or in the introduction of r 9.05, any intention to remove altogether the power of the court to regularise a joinder of parties or causes of action that has been effected otherwise than in accordance with the rules. The Explanatory Statement released with the new rules in 2011 did not evince any intention to make substantive changes; to the contrary it says (at page 11) that the new Part 9 as to joinder of parties 'simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice'.
7. GCO Electrical referred to the context of the amendments where, in one decision under the previous rules (*Lord v Agreserves Australia Ltd* [2006] FCA 598) the Federal Court had held that leave could be granted *nunc pro tunc* to validate mothership preference proceedings. GCO Electrical submitted that the intention evinced by the 2011 rules was to remove that power. I do not accept that. The amendments were part of a wholesale replacement of the 1979 rules of court, so that they could hardly be said to have been aimed at any mischief as specific as that (if mischief it be). And GCO Electrical did not point to any reason why the rule‑making body (the judges of the court) would wish to remove entirely the court's ability to regularise non‑compliance, if necessary *nunc pro tunc*. Rather, r 9.05(3) is readily explicable by an intention to depart from the principle that if a new respondent is joined to an existing action, for the purposes of limitation of actions the joinder is automatically taken to have effect from the filing of the originating application: cf. *Cerche v Commissioner of Taxation* [2001] FCA 1146; (2001) 48 ATR 17.
8. In any event, the amendments to the rules do not, and cannot, impinge on the effect of s 51 of the *Federal Court of Australia Act*. Rule 9.07 confirms that there was no intention to do so. Nor is there anything to suggest that the discretion in r 1.34 to dispense with compliance with r 9.02(b) is constrained.
9. In my view *Johnston v Vintage Developments* is not relevantly distinguishable. It binds me, and I follow it. So s 51 applies. For reasons I have already given, there are 'proceedings' in this court which have been brought, relevantly, against the applicants. The manner in which those proceedings were commenced, by way of an originating application which also included claims against other defendants, was an irregularity. But the proceedings are validly on foot.
10. Tasman Power submitted that an order under s 51(2) would be unavailable here, because the proceedings are not invalid, and for the same reason such an order would have no utility. Counsel for GCO Electrical made similar submissions. In my view s 51(2) does authorise the court to cure an irregularity or defect. In *Crayford Freight* (at 334‑335) a Full Court accepted as much, and in *Johnston v Vintage Developments* a Full Court proceeded on the basis that it was necessary to find that the non‑compliance was only an irregularity or formal defect in order for it to be remedied.
11. That is, with respect, a sensible reading of the words of s 51(2) according to their ordinary meaning. The court's power to make the declaration depends on it considering that there is a defect considered to be formal or an irregularity. It does not depend on the court finding that there is a nullity. Depending on the circumstances, the utility in making the declaration could be to remove any doubt as to whether the non-compliance resulted in a nullity, or to require the applicant to justify why the declaration should be made, that is, why as a matter of discretion the court should positively indicate that the proceedings may continue despite the defect. It is in that sense that s 51, like its former analogue in s 81 of the *Supreme Court Act 1970* (NSW) 'gave the Court power to overlook or rectify irregularities': *Johnston v Vintage Developments* at [31], referring to *Fernance v Nominal Defendant* (1989) 17 NSWLR 710.
12. Tasman Power's submissions also referred to the first instance decision of *Vintage Developments Pty Limited v GHD Pty Limited* [2006] FCA 531. *Johnston v Vintage Developments* was the decision on appeal from that judgment. In substance the appeal was dismissed. Tasman Power submitted that it is implicit in the first instance decision that, but for a successful application to regularise the joinder, the applicant would not have been permitted to proceed against the new respondent. I doubt that, but in any event the Full Court decision on appeal sets out the principles that are to be applied.
13. The applicants also referred to *Launceston Superstore*, in which Edmonds J ordered the removal of all but one of the respondents which the Australian Consumer and Competition Commission (**ACCC**), without leave, had included in a single proceeding. However the facts there were very different: there was no limitation issue, and there was no issue of law or fact common to the claims against the various defendants. Quite apart from the question of the ACCC's omission to apply for leave in advance, it is clear that his Honour did not consider as a matter of substance that it was appropriate to include all the respondents in the same proceeding: see *Launceston Superstore* at [17]. The same cannot be said here. I accept that *Launceston Superstore* is relevant insofar as it confirms (at [29]) that r 9.07 cannot validate proceedings against a person who has ceased to be a party under r 9.08, but that begs the question of whether an order under r 9.08 should be made.

## Whether the applicants should be removed as parties

1. I now turn to that question. The requirements authorising an order under r 9.08 are satisfied here. In *Launceston Superstore*, Edmonds J ordered the removal of all but one of the respondents to proceedings which the ACCC had commenced against 11 parties. His Honour did not indicate which provision gave him power to do that, but I infer it was r 9.08. The term 'improperly … joined' is wide enough to encompass a situation where the joinder was unauthorised by the rules. In its context, immediately after r 9.07, which provides that the proceeding is not defeated only because a party has been 'improperly … joined', the evident purpose of r 9.08 is to empower the court, in appropriate circumstances, to remove a party even though the proceeding against that party is not defeated only because of the improper joinder.
2. The liquidators referred to authorities on r 9.08 and similar rules where the test for the operation of the rule has been stated in terms of the well‑known standard for summary termination of an action that was laid down in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129. However while it is true that r 9.08 and similar rules are often invoked where it is said that a plaintiff has no arguable case for relief against a defendant who has been joined, there is no reason to suppose that this confines the circumstances in which r 9.08 can be invoked.
3. The applicants accepted, correctly, that the power to make an order under r 9.08 is discretionary. It seems to me that the discretion to remove parties is unconfined but the court should take 'whatever course seems to be most conducive to a just resolution of the disputes between the parties, but having regard to the desirability of limiting, so far as practicable, the costs and delay of the litigation': Wilcox J in *Bishop v Bridgelands Securities* (1990) 25 FCR 311 at 314. That is a case concerning leave to proceed against multiple parties, but it seems to me the same principle applies in the present, converse situation of the removal of parties. It is consistent with the requirement in s 37M(3) of the *Federal Court of Australia Act* that any power conferred by the civil practice or procedure rules be exercised in the way that best promotes the overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.
4. Matters that were advanced in favour of the exercise of the discretion were that it was not reasonably open to the liquidators to contend that the course they took was authorised by the rules, and that the liquidators took no step to regularise the proceedings in the event that they were wrong. It was submitted that permitting the claims to proceed together could be viewed as implicit approval of irregular commencement of such proceedings in this court in future.
5. As is apparent from the reasons above, I consider that it was open to the liquidators to contend that r 9.02 did authorise commencement of the proceedings in the way that they did, even though that contention was wrong. I therefore do not place a great deal of weight on that discretionary consideration.
6. I do accept, however, that the failure of the liquidators to take any step to seek to regularise the course they have taken is a significant factor in favour of the exercise of the power to remove the applicants as parties. Nothing in these reasons should be taken as indicating that the court condones the commencement of proceedings in an irregular manner, or that it will be in the habit of overlooking non-compliance with the rules. For good reason, in other cases liquidators who have commenced mothership proceedings have applied promptly for orders validating the steps they have taken: see *Bias Boating* and *Sun Engineering*.
7. While the liquidators' primary submission, that what they did was authorised by the rules, was arguable, it was hardly certain. It was always open to them to apply, in the alternative to that submission, for orders validating the commencement of the proceedings against multiple defendants. Also, the liquidators have as yet provided no explanation of why they commenced the proceedings so close to the expiry of the limitation period, why it was not practicable to apply for leave ex parte before joining multiple unrelated defendants, and why they did not seek an order extending the time for commencing the proceedings under s 588FF(3)(b) of the *Corporations Act*. If there were no other discretionary factors that were relevant, this would be strongly in favour of ordering that the applicants cease to be parties.
8. Nevertheless, I must be conscious here of the potential for irreversible prejudice if the removal of the applicants from the proceedings forever prevents the liquidators from pursuing the claims against them: see *Johnston v Vintage Developments* at [23]. The liquidators represent the interests of unsecured creditors, who presumably have had no input into the course the liquidators have taken.
9. In my view it would be wrong to visit upon those creditors the potentially drastic consequences of any omissions on the part of the liquidators and those advising them, without giving the liquidators a chance to regularise what they have done. It is appropriate to order the removal of the applicants by reason of the liquidators' failure to comply with r 9.02, but to suspend the operation of that order for 30 days so as to give the liquidators the ability to apply to regularise the position.
10. Whether the liquidators do make an application, and whether they do so under s 51 of the *Federal Court of Australia Act* or another provision, is a matter for them. If they do apply, then at that point I can hear argument on all the relevant discretionary considerations in light of the application that has been made and any evidence that supports it. There will be liberty to apply in relation to the removal order so that it may be vacated if I determine, in light of those considerations, that it is appropriate to do so. At that point the parties may also address me on what orders should be made as to costs.

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| I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jackson. |

Associate:

Dated: 28 August 2019

SCHEDULE OF PARTIES

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| Defendants |  |
| Fourth Defendant: | TASMAN POWER WA PTY LTD (ACN 125 419 570) |
| Fifth Defendant: | TOPWRIGHT GLOBAL ENTERPRISES PTY LTD (ACN 159 400 754) |
| Sixth Defendant: | GCO ELECTRICAL PTY LTD (ACN 123 571 059) |
| Seventh Defendant: | S & K ELECTRICAL CONTRACTING PTY LTD (ACN 104 590 972) |
| Eighth Defendant: | METAL MANUFACTURERS LIMITED (ACN 003 762 641) |
| Ninth Defendant: | HIGH ENERGY SERVICE PTY LTD (ACN 125 857 525) |
| Tenth Defendant: | N D Y MANAGEMENT PTY LTD (ACN 003 234 571) T/AS NORMAN DISNEY & YOUNG |
| Fifteenth Defendant: | ALLPOINT NOMINEES PTY LTD (ACN 083 731 257) T/AS K‑TRANS WA |
| Sixteenth Defendant: | HOLM LTD (ACN 009 322 856) AS TRUSTEE FOR THE JEVTIC FAMILY TRUST T/AS COCKBURN TRANSPORT |
| Seventeenth Defendant: | DE NADA ENGINEERING SURVEYS PTY LTD (ACN 123 232 575) |