FEDERAL COURT OF AUSTRALIA

Bryant, in the matter of Gunns Limited (in liq) (receivers and managers appointed) v Badenoch Integrated Logging Pty Ltd (No 2) [2020] FCA 1081

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| File number: |  |
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| Judge: | **DAVIES J** |
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| Date of judgment: | 30 July 2020 |
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| Catchwords: | **COSTS** – application for indemnity costs – where Calderbank offer made and notice of offer to compromise under r 25.01(1) of the *Federal Court Rules 2011* (Cth) (**Rules**) later issued – whether defendant unreasonably rejected Calderbank offer – indemnity costs awarded only from notice of offer to compromise in accordance with r 25.14(3) of the Rules |
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| Legislation: | *Corporations Act 2001* (Cth) s 588FA(3)  *Federal Court Rules 2011* (Cth) Pt 25, rr 25.01(1), 25.14(3) |
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| Cases cited: | *Anchorage Capital Partners Pty Limited v ACPA Pty Ltd (No 2)* [2018] FCAFC 112  *Bryant (Liquidator) v LV Dohnt & Co Pty Ltd,**in the Matter of Gunns Limited (In Liq) (Receivers and Managers Appointed)* [2018] FCA 238  *Bryant, in the matter of Gunns Limited (in liq) (receivers and managers appointed) v Badenoch Integrated Logging Pty Ltd* [2020] FCA 713  *Ford Motor Company of Australia Ltd v Lo Presti* [2009] WASCA 115; 41 WAR 1  *Timberworld Ltd v Levin* [2015] 3 NZLR 365 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 1 July 2020 |
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| Registry: | South Australia |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 5 |
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| Counsel for the Plaintiffs: | Mr J Evans QC with Mr B Gibson |
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| Solicitor for the Plaintiffs: | Johnson Winter & Slattery |
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| Counsel for the Defendant: | Mr M G R Gronow QC with Ms R G Morison |
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| Solicitor for the Defendant: | Scanlan Carroll Pty Ltd |

ORDERS

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|  | | SAD 341 of 2015 |
| IN THE MATTER OF GUNNS LIMITED (IN LIQUIDATION) (RECEIVERS & MANAGERS APPOINTED) (ACN 009 478 148) | | |
| BETWEEN: | DANIEL MATHEW BRYANT, IAN MENZIES CARSON AND CRAIG DAVID CROSBIE (IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF GUNNS LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) (ACN 009 478 148))  Plaintiffs | |
| AND: | BADENOCH INTEGRATED LOGGING PTY LTD (ACN 097 956 995)  Defendant | |

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| JUDGE: | DAVIES J |
| DATE OF ORDER: | 30 July 2020 |

THE COURT ORDERS THAT:

1. It is declared that the payments made by Gunns Limited (In Liquidation) (Receivers and Managers Appointed) (ACN 009 478 148) (**Gunns Limited**) to the Defendant on the dates and in the amounts set out below were unfair preferences within the meaning of s 588FA of the *Corporations Act 2001* (Cth) (**the Act**), insolvent transactions within the meaning of s 588FC of the Act, and voidable transactions within the meaning of s 588FE of the Act:

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| **No:** | **Date** | **Amount** |
| 1 | 30 March 2012 | $410,000.00 |
| 2 | 16 April 2012 | $410,956.07 |
| **Total** | | $820,956.07 |

1. It is declared that the following payments made by Gunns Limited to the Defendant and the invoices issued by the Defendant to Gunns Limited between 30 April 2012 and 30 June 2012 are a single transaction which was an unfair preference within the meaning of s 588FA of the Act in the sum of fifty-one thousand, two hundred and forty-two dollars and twenty-nine cents ($51,242.29), an insolvent transaction within the meaning of s 588FC of the Act, and a voidable transaction within the meaning of s 588FE of the Act:

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| **No:** | **Date** | **Amount** |
| 3 | 2 May 2012 | $660,347.78 |
| 4 | 8 June 2012 | $678,929.63 |

1. It is declared that the payments made by Gunns to the Defendant on the dates and in the amounts set out below were unfair preferences within the meaning of s 588FA of the Act, insolvent transactions within the meaning of s 588FC of the Act, and voidable transactions within the meaning of s 588FE of the Act:

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| **No:** | **Date** | **Amount** |
| 5 | 8 August 2012 | $300,000.00 |
| 6 | 17 August 2012 | $150,000.00 |
| 7 | 27 August 2012 | $150,000.00 |
| 8 | 3 September 2012 | $150,633.68 |
| 9 | 10 September 2012 | $150,000.00 |
| 10 | 17 September 2012 | $150,000.00 |
| 11 | 24 September 2012 | $150,000.00 |
| **Total** | | $1,200,633.68 |

1. Pursuant to s 588FF of the Act, the Defendant pay to the Plaintiff the sum of two million, seventy-two thousand, eight hundred and thirty-two dollars and four cents ($2,072,832.04) representing the total of the amounts of the unfair preferences referred to in Orders 1 to 3 above.
2. Pursuant to s 51A(1)(a) of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**), the Defendant pay the Plaintiffs pre-judgment interest on the amount payable pursuant to Order 4 above, in the amount of five hundred and five thousand, eight hundred and forty-eight dollars and twenty-one cents ($505,848.21), calculated as follows:
   1. pursuant to paragraph 3.1 of the Plaintiffs’ Amended Originating Process, pre‑judgment interest of $314,062.90 on the sum of $1,200,633.68 in respect of the transactions referred to in order 3 above (being transactions which occurred between 3 July 2012 and 25 September 2012) calculated from 1 September 2015 until 27 May 2020 on the following basis:
      1. $23,881.10 for the period between 1 September 2015 and 31 December 2015, calculated at a rate of 6.00% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT;
      2. $35,822.19 for the period between 1 January 2016 and 30 June 2016, calculated at a rate of 6.00% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT;
      3. $34,706.84 for the period between 1 July 2016 and 31 December 2016, calculated at a rate of 5.75% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT;
      4. $66,034.85 for the period between 1 January 2017 and 31 December 2017, calculated at a rate of 5.50% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT;
      5. $66,034.85 for the period between 1 January 2018 and 31 December 2018, calculated at a rate of 5.50% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT;
      6. $32,746.05 for the period between 1 January 2019 and 30 June 2019, calculated at a rate of 5.50% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT;
      7. $31,775.67 for the period between 1 July 2019 and 31 December 2019, calculated at a rate of 5.25% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT; and
      8. $23,061.35 for the period between 1 January 2020 and 27 May 2020, calculated at a rate of 4.75% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT.
   2. pursuant to paragraph 3.2 of the Plaintiffs’ Amended Originating Process, pre‑judgment interest of $191,785.31 on the sum of $872,198.36 in respect of the transactions referred to in in orders 1 and 2 above (being transactions which occurred between 30 March 2012 and 2 July 2012 calculated from 12 May 2016 (being the date of the Plaintiffs’ Amended Originating Process) until 27 May 2020 on the following basis:
      1. $7,006.18 for the period between 12 May 2016 and 30 June 2016, calculated at a rate of 6.00% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT; and
      2. $25,212.73 for the period between 1 July 2016 and 31 December 2016, calculated at a rate of 5.75% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT;
      3. $47,970.91 for the period between 1 January 2017 and 31 December 2017, calculated at a rate of 5.50% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT;
      4. $47,970.91 for the period between 1 January 2018 and 31 December 2018, calculated at a rate of 5.50% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT;
      5. $23,788.31 for the period between 1 January 2019 and 30 June 2019, calculated at a rate of 5.50% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT;
      6. $23,083.39 for the period between 1 July 2019 and 31 December 2019, calculated at a rate of 5.25% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT; and
      7. $16,752.88 for the period between 1 January 2020 and 27 May 2020, calculated at a rate of 4.75% per annum pursuant to paragraph 2 of Federal Court Practice Note GPN-INT.
3. Pursuant to s 52 of the Federal Court Act, the Defendant pay the Plaintiffs post‑judgment interest on the amount payable pursuant to Order 4 above, calculated at a rate of 6.75% per annum pursuant to paragraph 3.2 of Federal Court Practice Note GPN‑INT from 27 May 2020 and continuing to accrue at that rate until the date of the Defendant’s payment of the amount payable pursuant to Order 4 above.
4. Pursuant to r 40.02 of the Federal Court Rules 2011 (Cth), the Plaintiffs are entitled to their costs of, and incidental to, this proceeding on:
   1. a party and party basis up to and including 11.00am on 18 February 2019; and
   2. an indemnity basis after 11.00am on 18 February 2019.
5. Within 14 days of the date of this order, the parties are to confer with a view to agreeing the amount of costs payable by the Defendant pursuant to Order 7 above.
6. In the absence of agreement in respect of the costs payable by the Defendant pursuant to Order 8 above, the Plaintiffs have liberty to apply to a Registrar of this Court for the taxation of their costs.

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

REASONS FOR JUDGMENT

DAVIES J:

1. On 27 May 2020, the Court handed down judgment in this proceeding in favour of the plaintiffs: *Bryant, in the matter of Gunns Limited (in liq) (receivers and managers appointed) v Badenoch Integrated Logging Pty Ltd* [2020] FCA 713. The parties have agreed on orders that the defendant (**Badenoch**) pay the plaintiffs the sum of $2,072,832.04. Badenoch also accepts that an order should be made that it pay the plaintiffs’ costs of the proceeding on a party/party basis. However, the plaintiffs seek costs on an indemnity basis after 26 October 2017, or alternatively after 11.00 am on 18 February 2019, which Badenoch disputes. The parties were directed to provide written submissions as to costs, with a decision to be made on the papers.
2. The plaintiffs’ claim for indemnity costs after 26 October 2017 is based on an offer pursuant to which the plaintiffs offered to compromise their claims for the sum of $750,000, inclusive of costs and interest (**the first offer**). It is well established that an unsuccessful party is not liable to pay indemnity costs merely because it received an offer to settle on terms more favourable than it achieved at trial and rejected that offer. However, indemnity costs may properly be awarded where the refusal of the offer was unreasonable when viewed in light of the circumstances existing at the time the offer was rejected. In *Anchorage Capital Partners Pty Limited v ACPA Pty Ltd (No 2)* [2018] FCAFC 112 at [7], the Full Court stated that the circumstances to be taken into account in determining whether the rejection of an offer was unreasonable cannot be stated exhaustively, but may include, for example: the stage of a proceeding which the offer was received; the time allowed to the offeree to consider the offer; the extent of the compromise offered; the offeree’s prospects of success, assessed as at the date of the offer; the clarity with which the terms of the offer were expressed; and whether the offer foreshadowed an application for an indemnity costs order in the event of the offeree rejecting it. The party seeking the award of indemnity costs has the onus to prove that the rejection of a settlement offer was unreasonable in the circumstances of the case: see eg *Ford Motor Company of Australia Ltd v Lo Presti* [2009] WASCA 115; 41 WAR 1 at 9 [21]–[23] per Buss JA (Wheeler JA agreeing).
3. Badenoch accepts that the plaintiffs have obtained judgment in an amount which is significantly more favourable to them than the first offer of $750,000. Badenoch also accepts it was aware of the nature and circumstances of the case against it as at October 2017. It was submitted it was nevertheless not unreasonable for Badenoch to reject the first offer because:
   1. at the time the first offer was made, Badenoch had not been afforded a realistic opportunity to consider the strength or otherwise of the plaintiffs’ position vis‑à‑vis its own position because the preliminary question as to Gunns’ solvency had not been determined. That question was determined in *Bryant (Liquidator) v LV Dohnt & Co Pty Ltd,**in the Matter of Gunns Limited (In Liq) (Receivers and Managers Appointed)* [2018] FCA 238, handed down on 6 March 2018;
   2. the plaintiffs had not yet filed the affidavit of Craig David Crosbie, one of the liquidators of the Gunns Group, which was the only affidavit they ultimately relied on in the proceeding;
   3. the Calderbank letter only gave Badenoch seven days to consider the offer, which was not long enough given the complexity of the proceeding and the issues involved in it;
   4. Badenoch’s defence raised novel questions of law, namely whether the peak indebtedness rule applied on a proper construction of s 588FA(3) of the *Corporations Act 2001* (Cth) (**the Act**), which defence was raised legitimately in the context of the recent (at the time) High Court of New Zealand decision in *Timberworld Ltd v Levin* [2015] 3 NZLR 365. It was argued that Badenoch may have validly reasoned that the benefit of saving costs by acceptance of the offer was disproportionate to the potential benefit to the development of the law in determining the issue of whether the peak indebtedness rule had any application to s 588FA(3) of the Act.
4. I do not think that it was unreasonable for Badenoch to refuse the first offer. Foremost, at the time the offer was received, trial steps had not significantly advanced and, in particular, the plaintiffs had not filed the evidence on which they sought to rely or identified the key documents which they intended to tender at the hearing. Added to this, the defences raised by Badenoch involved substantial factual issues for determination and questions of law on matters where the law was not settled. Although ultimately I found against Badenoch on its defences, it could not be said at the time of the first offer that the defences were not reasonably arguable.
5. The second offer was made by a notice of offer to compromise under r 25.01(1) of the *Federal Court Rules 2011* (Cth) (**Rules**) dated 14 February 2019 (**the second offer**), approximately one month before trial, which commenced on 12 March 2019. By the second offer, the plaintiffs offered to compromise their claims for the sum of $1,140,272.29, inclusive of interests and costs and payable within 28 days of acceptance, comprising the sum of $940,272.29 (said to be the lowest quantum of the plaintiffs’ claim assuming the existence of a running account ($990,272.29), less a commercial discount of $50,000) and costs in the amount of $200,000. By r 25.14(3) of the Rules, if an offer is made by an applicant and not accepted by a respondent and the applicant obtains a judgment that is more favourable than the terms of the offer, there is a presumption that the applicant is entitled to an order that the respondent pay the applicant’s costs on an indemnity basis after 11.00 am on the second business day after the offer was served. Badenoch did not oppose an order that it pay the plaintiffs’ costs of and incidental to the proceeding on an indemnity basis from 11.00 am on 18 February 2019, and as the offer to compromise complies with the requirements of Pt 25 of the Rules, an order will be so made.

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| I certify that the preceding five (5) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies. |

Associate:

Dated: 30 July 2020