FEDERAL COURT OF AUSTRALIA

Kadam v MiiResorts Group 1 Pty Ltd [2016] FCA 1205

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| File number: |  |
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| Judge: | **EDELMAN J** |
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| Date of judgment: | 10 October 2016 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application by non-party to be joined as an applicant – application opposed by existing applicants – scope of r 9.05 of *Federal Court Rules* *2011* (Cth) – scope of general power in r 1.32 – discretionary considerations |
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| Legislation: | *Federal Court Rules 2011* (Cth) rr 1.31, 1.32, 1.33, 9.05, 9.05(a), 9.05(b)(i), 9.05(b)(ii), 9.05(b)(iii), 9.12, 9.12(3)*Federal Court Rules* 1979 (Cth) Or 6 r 8*Federal Court of Australia Act 1976* (Cth) s 37M*Securities and Exchange Board of India Act 1992*  |
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| Cases cited: | *Commerzbank Aktiengesellschaft v Morgan* [2004] EWHC 2771 (Ch)*Dauguet v Centrelink* [2015] FCA 395*Grant v BHP Coal Pty Ltd* [2015] FCA 329*McAlister v State of New South Wales* [2014] FCA 702; (2014) 223 FCR 1*News Ltd v Australian Rugby Football League Ltd* [1996] FCA 870; (1996) 64 FCR 410*Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52*Sensis Pty Ltd v Bivami Pty Ltd* [2012] FCA 1365*State of Victoria v Sutton* [1998] HCA 56; (1998) 195 CLR 291 |
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| Date of hearing: | 10 October 2016 |
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| Registry: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 32 |
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| Solicitor for the Applicants: | Shine Lawyers |
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| Counsel for the Prospective Fourth Applicant/Intervener: | M Hodge |
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| Counsel for the First Respondent: | D Savage QC and M Hickey |
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| Solicitor for the First Respondent: | Tucker & Cowen Solicitors |
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| Solicitor for the Second Respondent: | S Tolhurst of HWL Esbworth Lawyers |
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| Solicitor for Third Respondent: | The Third Respondent did not appear |

ORDERS

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|  | QUD 528 of 2016 |
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| BETWEEN: | SUNANDA BALKRISHNA KADAMFirst ApplicantVISHAL DILIP MHETRESecond ApplicantABASAHEB RUPNAR (and another named in the Schedule)Third Applicant |
| AND: | MIIRESORTS GROUP 1 PTY LTD ACN 140 177 395First RespondentPEARLS INFRASTRUCTURE PROJECTS LIMITED (INDIA)Second RespondentPACL LIMITED (INDIA)Third Respondent |

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| JUDGE: | EDELMAN J |
| DATE OF ORDER: | 10 OCTOBER 2016 |

THE COURT ORDERS THAT:

1. The application by the Securities and Exchange Board of India (SEBI) to be joined as a party be dismissed.
2. The cost of the application in order 1 above, as between the SEBI and the applicants, be reserved.
3. There be no order as to costs of the application in order 1 above in relation to the respondents.
4. The SEBI have leave to intervene in the proceedings.

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

REASONS FOR JUDGMENT

EDELMAN J:

## Introduction

1. This is an application by a non-party, the **Securities and Exchange Board of India (SEBI)** to be joined as the fourth applicant in this proceeding.
2. The proceeding is a closed class representative proceeding. The current applicants make numerous allegations, but the heart of their case is based upon allegations of a Ponzi scheme in India which masqueraded as a collective investment scheme, constituted as a trust, for development of land. More than $9 billion is said to have been invested by 58.5 million people on trust. The applicants are members of the management committee of a Community Action Group in India which, senior counsel for the applicants said, represents approximately 46,000 investors. The applicants, in their current pleading, make numerous different allegations against numerous respondents. Some involve claims which are based upon allegations of knowing receipt of property transferred in breach of trust. Part of their case involves the allegation that funds from the alleged Ponzi scheme were traceably used in the purchase of properties by the first respondent, MiiResorts Group 1 Pty Ltd ACN 140 177 395 (**MiiResorts**), and the second respondent, Pearls Infrastructure Projects Limited (India) (**PIPL**). The property acquired by the first respondent was the Sheraton Mirage on the Gold Coast, for $62.5 million with an additional $20 million spent in renovations. The applicants’ claims include that the respondents hold those properties on trust for the investors.
3. SEBI’s application to be joined as an applicant to this proceeding is said to be on the basis of its statutory duties and duties arising under orders of the Supreme Court of India to bring in the assets of the trust constituted by the collective investment scheme, liquidate them and return the proceeds to the 58.5 million investors. MiiResorts and PIPL did not oppose the orders sought. They pragmatically, and economically, consented to SEBI’s proposed orders. But the applicants opposed the joinder. The applicants initially submitted that there is no power to join SEBI. They also submitted that the Court should decline to exercise discretion to join SEBI. They asserted that SEBI had no standing to seek relief.
4. Although this Court has power to join SEBI to the proceeding as a party, in the circumstances involving dispute between the applicants and SEBI, it is not appropriate to exercise discretion to do so. Instead, SEBI should be given the power to intervene in this proceeding, with the broadest role as intervener. If SEBI seeks independent relief then it should commence a separate action, potentially with the existing applicants and some of the respondents. Directions will be made to ensure that any new action be commenced promptly because it is likely that it would be consolidated with this proceeding or at least jointly case managed.

## The position of SEBI

1. Counsel for SEBI submitted that SEBI’s interest in the litigation is as follows.
2. SEBI is the Indian regulator with the statutory responsibilities for protecting the interests of investors in “collective investment schemes”. SEBI determined that the business operated by the third respondent PACL Limited (India) (**PACL**) was a “collective investment scheme”. The Securities Appeal Tribunal dismissed an appeal against that determination. An appeal has been filed with the Supreme Court of India against that finding.
3. The Supreme Court of India ordered SEBI to constitute a committee to dispose of the properties of PACL in Australia or overseas. In effect, SEBI submits that it has been tasked by the Supreme Court of India with bringing in the assets of the trust constituted by the collective investment scheme, liquidating them and returning the proceeds to the investors.
4. SEBI’s proposed statement of claim was annexed to affidavit evidence in support of its application. Its proposed case is reasonably simple. It alleges that the money received by PACL in India from investors was held on trust; that part of the money can be traced into the Sheraton Mirage (owned by MiiResorts) and the two properties that PIPL purchased; that the money was received by MiiResorts and PIPL with knowledge of the fact that it was trust money in the hands of PACL; and that the properties purchased with that money by MiiResorts and PIPL, and the balance of the trust money, are held on trust by MiiResorts and PIPL or alternatively MiiResorts and PIPL must make restitution.

## The applicants’ opposition to this application

1. This application was opposed only by the applicants. In some respects their opposition, and the force of it, is surprising. Counsel for SEBI submitted that SEBI’s involvement was needed to complement the applicants’ case. He submitted that there may be an issue for the existing applicants concerning the extent to which they can trace any funds into the properties since the applicants represent only 46,000 of the 58.5 million investors with PACL. There may also be issues, under Indian law if not Australian law, concerning the extent to which any recovery by the applicants would be held on trust for a much larger group (up to 58.5 million people) if there is a basis for *pari passu* distribution (see *Commerzbank Aktiengesellschaft v Morgan* [2004] EWHC 2771 (Ch) [48] (Lawrence Collins J)). It is possible that that issue may need to be determined even if only to determine the extent of any losses suffered by the 46,000 individuals represented by the applicants. Nevertheless, rather than embrace the broader representative power asserted by SEBI, the applicants attack it. Although SEBI’s submission appears to be that it is in a position, arising from Indian statute and ruling of the Supreme Court of India, akin to that of a trust protector, the applicants submit that SEBI has no standing to seek the relief sought in its proposed statement of claim.
2. It is neither necessary nor appropriate to attempt to deal with these submissions concerning standing other than to observe that there is a real dispute about this issue between the applicants and SEBI. As senior counsel for the applicants observed, some of the questions of standing involve matters of foreign law, including the construction of the Indian *Securities and Exchange Board of India Act 1992*,which cannot be resolved without expert evidence.
3. The applicants initially opposed the joinder of SEBI as a party on two bases. First, the applicants said that there is no power to join SEBI. Senior counsel for the applicants abandoned this submission in oral argument. For the reasons below, she was correct to do so. Secondly, the applicants say that the Court should decline to exercise any discretion to join SEBI.

## Power to join a non-party to a proceeding

1. SEBI’s application to be joined relies upon r 9.05 and r 1.32 of the *Federal Court Rules 2011* (Cth). Rule 9.05 provides:

(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.

1. Rule 9.05 does not contain a power for a non-party to apply to be joined as a party. It permits only a party to apply for joinder of a non-party. In *Sensis Pty Ltd v Bivami Pty Ltd* [2012] FCA 1365, Griffiths J allowed a non-party to be joined as a respondent under r 9.05. The application for joinder was not opposed and no issue was raised about the scope of r 9.05. In contrast, in *McAlister v State of New South Wales* [2014] FCA 702; (2014) 223 FCR 1, 5, Edmonds J said that he was not sufficiently persuaded that r 9.05 gave him the power to “on the application of a person who is not a party to extant proceedings, to join that person as a party”. The approach of Edmonds J was followed by Mortimer J in *Dauguet v Centrelink* [2015] FCA 395 [111]. It was also cited with apparent approval by Collier J in *Grant v BHP Coal Pty Ltd* [2015] FCA 329 [10].
2. The wording of r 9.05 is curious because it appears to be confined to applications by a party for the addition of a non-party as a party. Although the heading is concerned with “Joinder of parties by court order” and not “Joinder of proposed parties as Court order”, the opening reference to “A party may apply” does not easily encompass a “proposed party” because the same sentence also uses “party” in a reference to being joined as a “party”.
3. Therefore the literal terms of r 9.05 appear to restrict the power previously contained in Order 6 rule 8 of the *Federal Court Rules* 1979 (Cth) which empowered the Court to order that a person be added as a party without limiting the persons entitled to make such an application. The power was expressed in terms which included the expression, with a long history deriving from English Rules of Court permitting joinder of “a person whose joinder as a party is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined and adjudicated upon”. That long standing discretionary power of the Court to join other persons as parties, was necessary to ensure procedural fairness: *State of Victoria v Sutton* [1998] HCA 56; (1998) 195 CLR 291, 316-317 [76]-[78] (McHugh J); *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52, 55-56 (Lord Diplock). In the former case, McHugh J quoted from *Penang Mining* observing that:

[O]ne of the principal objects of the rule is to enable the Court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given the opportunity to be heard.

1. The Explanatory Statement to the *Federal Court Rules* *2011* says that the provisions with respect to joinder of parties were “simplified and modified for consistency with the general provisions of the new Rules”. It is difficult to comprehend that the simplification introduced by r 9.05 was intended to introduce the possibility of injustice to a person whose rights will be affected by a judgment in the proceeding. Indeed, as the Full Court observed in *News Ltd v Australian Rugby Football League Ltd* [1996] FCA 870; (1996) 64 FCR 410, 524, “An order which directly affects a third person’s rights against or liabilities to a party should not be made unless the person is also joined as a party. If made, the order will be set aside”.
2. The simple answer to the curious drafting of r 9.05 may be that it was not contemplated that the rule would cover (i) any application would be made for joinder by a non-party or (ii) an order by the Court in the absence of any application from a party or even a non-party. The source of power for joinder orders in such cases might derive from the power under r 1.32 to “make any order that the Court considers appropriate in the interests of justice”. The Explanatory Statement to the *Federal Court Rules* *2011* says that rr 1.31 and 1.32 “support the overarching purpose of civil practice and procedure set out in section 37M of the *Federal Court of Australia Act 1976* (Cth)”. This includes the *just* resolution of disputes according to law, which encompasses the requirements of procedural fairness embodied in hearing of disputes which directly affect the rights of non-parties.
3. In *McAlister v State of New South Wales*, the application for joinder was brought on the alternative basis of r 1.32. However, it was not necessary to consider r 1.32 in detail on that alternative application because it was not in the interests of justice to allow joinder. The applicants submitted that in *McAlister* Edmonds Jheld that r 1.32 did not apply because “a general power should not be exercised in a way that transcends the threshold requirements placed on the exercise of discretion under the specific power” ([23]). This submission does not take into account the opening words of his Honour’s sentence where his Honour explained that this qualification applied “[i]f there is power under r 9.05 for a non-party to be joined as a party on its own application”. In other words, the point being made was only that if r 9.05 *did* provide power for a non-party application then the qualifications to r 9.05 could not be evaded by reliance upon a general power.
4. There were no detailed submissions made on this application about the contours of r 1.32 as a source of power in the two circumstances not contemplated in r 9.05, namely joinder by the Court or on the application of a non-party. In this case, SEBI assumed, and I accept, that any application of r 1.32 should generally be subject to the same constraints and conditions required by r 9.05. In particular SEBI accepted that it must satisfy either of rr 9.05(b)(ii) or 9.05(b)(iii). No reliance was placed upon rr 9.05(a) or 9.05(b)(i).

## Whether discretion should be exercised to join SEBI as a party

1. SEBI submitted that it ought to be joined because its case is intimately and inextricably linked with at least part of the case brought by the existing applicants. SEBI says that its case will not expand the scope of the dispute between the existing applicants and the existing respondents and that it will rely upon the same evidence. It submitted that there is a strong likelihood that joinder would be necessary to avoid a multiplicity of proceedings that would otherwise occur (r 9.05(1)(b)(iii)).
2. On the other hand, the applicants submit that the joinder of SEBI as an applicant will raise a number of difficulties. Some of those difficulties are not insurmountable. For instance, the concern of the applicants that they, through their chosen solicitors, should have total control over the conduct of their case can probably be accommodated by different pleadings. I do not accept the submission of the applicants that the proposed pleading by SEBI, which appears to be simpler, clearer, and more concise, is likely to cause unnecessary complication and confusion. Although I do not rule out the possibility of complication and complexity, those consequences do not currently appear to be likely.
3. Other difficulties, however, are less easily resolved.
4. One difficulty arises from the proposed common originating application. If SEBI did not file its own originating application, which it does not currently propose to do, then it is unclear how any dispute would be resolved concerning amendments to the originating application (which amendments are proposed by the applicants). There may also be questions about the interaction between joinder of SEBI as an applicant with a separate statement of claim and the inability for an additional applicant to “opt in” to a closed class representative proceeding: *Multiplex Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200; (2007) 164 FCR 275, 280 [17] (Lindgren J) 295 [142] (Jacobson J, French J agreeing).
5. A second difficulty arises as a result of apparent disputes between the applicants and SEBI. Some of those disputes may be more apparent than real. For instance, SEBI apprehended that there is a dispute concerning whether money paid by the 58.5 million investors was held on trust by PACL. Yet, as senior counsel for the applicants accepted, the applicants’ case depends in part upon allegations that PACL held the money on a “trust for a purpose” (that expression apparently being used in a loose sense to describe an express trust rather than an invalid non-charitable purpose trust). Indeed, the applicants’ own pleading alleges that PACL held the money on constructive trust.
6. Other aspects of the dispute between the applicants and SEBI may be more substantial. For instance, as I have explained there appears to be a real dispute concerning the standing of SEBI to prosecute any action. There also may be dispute about the facts necessary for the applicants to succeed. The applicants allege that SEBI’s case is “vastly more complicated than the applicants’ case” due to the alleged need for SEBI to prove that there were 58.5 million investors in PACL who invested over $9 billion. The applicants alleged that it is necessary for SEBI to collate and provide the details of those investors to this Court, and to explain how SEBI would distribute to each of those 58.5 million investors their $2.36 share. It is not clear why these issues must necessarily arise as a consequence of SEBI’s proposed pleading. The orders that SEBI seeks for a declaration of trust may not require the Court to record the names of 58.5 million beneficiaries, still less to make orders for the distribution of those proceeds. More fundamentally, it may be that such issues could still arise as part of the consideration of the applicants’ case. But in circumstances in which no defence has even yet been filed it is too early to assess these matters.
7. In its reply submissions, SEBI submitted that some or all of these difficulties might be overcome by joining it as a respondent and then permitting it to bring a cross-claim. I do not consider this formal change a basis for a different exercise of discretion. Even if SEBI were joined as a respondent, it would, in effect, be an applicant in dispute with the other applicants. The designation of SEBI as respondent would be merely a formal matter which would not affect the underlying dispute between the applicants and SEBI who both seek to prosecute claims against some or all of the respondents.
8. It may be that all of the alleged difficulties raised by the applicants do not materialise. If so, then if SEBI is given power to intervene it may later become in the interests of justice for it to be joined as a party. But, given the substantial differences that currently appear to exist between SEBI and the applicants, the proper course would be for SEBI to bring separate proceedings if it is unable to protect its position through intervention. I accept that there are obstacles to a fresh proceeding being brought by SEBI, which might then be consolidated with the existing proceeding. One obstacle might be that a very narrow claim might not be within Federal jurisdiction. This would lead to the undesirable consequence of very similar proceedings being prosecuted between similar parties in separate courts. But, as counsel for SEBI accepted, this consequence might be avoidable depending on the way that the claim is pleaded. There may also be a potential delay by a separate proceeding being filed by SEBI but that delay can be minimised by case management directions which I will make today as well as joint management of any concurrent proceeding.

## Intervention under rule 9.12(3)

1. The applicants accept that SEBI should be permitted to participate as an intervener under r 9.12. It is common ground that under r 9.12(3), SEBI’s form of assistance to the Court, and its manner of participation in the proceeding, should include at least:
2. appearing at all hearings;
3. making such written or oral submissions that SEBI wishes to make, in accordance with any directions given to the parties;
4. having access to any discovery that may be made by the parties pursuant to orders of the Court; and
5. being subject to any discovery order that the Court may make against it.
6. I do not consider that it is necessary, as the applicants submit, that the grant of leave to intervene should be made conditional (r 1.33) upon the applicants being granted leave to intervene in any relevant separate proceeding that SEBI institutes or supports. Such separate proceeding might need to join the applicants as parties. Or it might raise issues entirely unconnected with the applicants. Those issues can be determined if, and when, SEBI commences any separate proceeding.

## Conclusion

1. SEBI’s application for joinder must be dismissed. However, SEBI should be given leave to intervene. Whether it should later be joined as an applicant or as a respondent might depend on how the proceeding progresses. It may, however, be most efficient and convenient for SEBI to commence its own proceeding which might be consolidated with the present proceeding.
2. My preliminary view is that the costs of this application should be reserved between SEBI and the applicants to be dealt with in light of later developments in the conduct of this and related proceedings by the applicants and SEBI and that there should be no order as to the costs of this application in relation to the respondents.
3. This is the first interlocutory application in this proceeding. It was able to be heard and decided with only a short hearing. Although numerous other interlocutory applications are foreshadowed, and although the sums of money at stake in this litigation are considerable, it should be borne in mind that the issues do not currently appear to be overly complex. The conduct of the litigation by the solicitors and their cooperation has so far been an encouraging sign that legal costs may not become disproportionate. That approach should continue.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Edelman. |

Associate:

Dated: 10 October 2016

SCHEDULE OF PARTIES

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| Applicants |  |
| Prospective Fourth Applicant / Intervener: | SECURITIES AND EXCHANGE BOARD OF INDIA |