Federal Court of Australia

Markey (Liquidator), in the matter of Bestjet Travel Pty Ltd (in liq) v Bestjet Travel Pty Ltd (in liq) [2020] FCA 1881

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| File number: |  |
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| Judgment of: | **REEVES J** |
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| Date of judgment: | 23 July 2020 |
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| Date of publication of reasons: | 24 December 2020 |
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| Catchwords: | **CORPORATIONS –** application for the appointment of a special purpose liquidator under s 90-10 of the *Insolvency Practice Schedule* (Schedule 2 to the *Corporations Act 2001* (Cth)) – where the plaintiffs are the liquidators of two related companies – where one company lodged a proof of debt in the other giving rise to a conflict of interest and duty – whether the special purpose is substantial and serious – whether that purpose has been sufficiently defined – application granted |
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| Legislation: | *Corporations Act 2001* (Cth)  *Insolvency Practice Schedule* (Schedule 2 to the *Corporations Act 2001* (Cth)) |
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| Cases cited: | *Deputy Commissioner of Taxation, in the matter of Italian Prestige Jewellery Pty Ltd (In Liq) ACN 116 031 022 v Italian Prestige Jewellery Pty Limited* (2018) 129 ACSR 115; [2018] FCA 983  *GDK Projects Pty Ltd, Re Umberto Pty Ltd (in liq) v Umberto Pty Ltd (in liq)* [2018] FCA 541  *Handberg, in the matter of Greight Pty Ltd (in liq)* (2006) 56 ACSR 334; [2006] FCA 17  *In the matter of Aus Streaming (In Liq)* [2020] VSC 313  *McGrath & Anor re HIH Insurance Ltd & Ors* [2006] NSWSC 385  *Melhelm Pty Ltd, in the matter of Boka Beverages Pty Ltd (in liq) v Boka Beverages Pty Ltd (in liq)* (2019) 138 ACSR 95; [2019] FCA 1184  *Tanning Research Laboratories Inc v O’Brien* (1990) 169 CLR 332  *Warner (liquidator), in the matter of Sakr Bros Pty Ltd (in liq)* [2019] FCA 547  *Williams & Kersten Pty Ltd v Walton Construction (Qld) Pty Ltd (in liq), in the matter of Walton Construction (Qld) Pty Ltd (in liq)* [2019] FCA 1201 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 32 |
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| Date of hearing: | 23 July 2020 |
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| Solicitor for the Plaintiff: | Mr P Betros of HopgoodGanim |

ORDERS

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|  | | QUD 170 of 2020 |
| IN THE MATTER OF BESTJET TRAVEL PTY LTD (IN LIQUIDATION) ACN 155 965 601 & WYNYARD TRAVEL PTY LIMITED (IN LIQUIDATION) ACN 107 305 224 | | |
| BETWEEN: | NIGEL ROBERT MARKEY AND BRADLEY VINCENT HELLEN IN THEIR CAPACITY AS JOINT AND SEVERAL LIQUIDATORS OF BESTJET TRAVEL PTY LTD (IN LIQUIDATION) ACN 155 965 601 & WYNYARD TRAVEL PTY LIMITED (IN LIQUIDATION) ACN 107 305 224  Plaintiff | |
| AND: | BESTJET TRAVEL PTY LTD (IN LIQUIDATION) ACN 155 965 601  First Defendant  WYNYARD TRAVEL PTY LIMITED (IN LIQUIDATION) ACN 107 305 224  Second Defendant | |

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| order made by: | REEVES J |
| DATE OF ORDER: | 23 July 2020 |

THE COURT ORDERS THAT:

**Appointment of Special Purpose Liquidator**

1. Pursuant to s 90-15(1) of the *Insolvency Practice Schedule* (**IPS**), David Lewis Clout be appointed as the additional joint and several liquidator (**Special Purpose Liquidator**) of the first defendant, Bestjet Travel Pty Ltd (in liquidation) ACN 155 965 601 (Bestjet), for the purpose of exercising the following powers and performing the following functions and duties:

(a) adjudicating on any proof of debt which has been, or may be, submitted by the second defendant, Wynyard Travel Pty Ltd (in liquidation) ACN 107 305 224 (Wynyard) in the winding up of Bestjet (**Wynyard Proof of Debt**), in accordance with Part 5.6 of the *Corporations Regulations 2001* (Cth) (**Regulations**);

(b) performing all of the functions and exercising all of the powers which are necessary for the purpose of that adjudication, including:

* + 1. exercising any powers and complying with any obligations conferred on liquidators by rr 5.6.52 to 5.6.57 of the Regulations in relation to the Wynyard Proof of Debt;
    2. conducting investigations into any of the matters which are necessary to adjudicate on the Wynyard Proof of Debt, including, if thought appropriate:
       1. inspecting the books and records of Bestjet;
       2. conducting examinations pursuant to ss 596A and 596B of the *Corporations Act 2001* (Cth) (**Act**) and obtaining orders for production pursuant to s 579(9) of the Act; and
       3. requiring statements to be provided pursuant to s 475(2) of the Act;

(c) exercising any powers and complying with any obligations conferred on liquidators by ss 477 and 506(1)(b) of the Act in relation to the adjudication of the Wynyard Proof of Debt, including the power to seek relief under ss 588FF and 1317K of the Act, except for the powers contained in ss 477(1)(a) and (2)(c), (ca), (f), (g) and (m) of the Act; and

(d) conducting any negotiations and defending any proceedings which arise in connection with the outcome of that adjudication, including as a result of the Wynyard Proof of Debt being accepted or rejected.

(**Adjudication Functions**)

1. Pursuant to s 90-15 of the IPS, the plaintiffs (in their capacity as primary liquidators of Bestjet):

(a) must refrain from exercising any of the Adjudication Functions specified in Order 1 above, except with the prior written consent of the Special Purpose Liquidator or by leave of this Court; and

(b) must use their reasonable endeavours to assist the Special Purpose Liquidator to exercise the Adjudication Functions, including by providing any documents or information previously prepared or obtained by them in investigating or pursuing any claim in relation to any of the matters.

1. Pursuant to s 90-15 of the IPS, the Special Purpose Liquidator:

(a) shall, in accordance with the requirements of the Act, report to creditors of Bestjet, and any liquidators of Bestjet then in office, on the terms of the Special Purpose Liquidator’s appointment and, subsequently, once every 6 months during the course of the Special Purpose Liquidator’s appointment; and

(b) must refrain from exercising any powers or performing any functions which are not Adjudication Functions specified in Order 1 above, except with the prior written consent of the plaintiffs or by leave of this Court; and

(c) must use his reasonable endeavours to assist the plaintiffs to exercise their powers and functions as the primary liquidators of Bestjet.

1. The plaintiffs and the Special Purpose Liquidator each have leave to apply in this proceeding with three days’ notice, including for the purposes of extending or restricting the scope of their functions pursuant to s 472(6) of the Act.

**Remuneration of the Special Purpose Liquidator**

1. Pursuant to s 60-10(2) of the IPS, the remuneration of the Special Purpose Liquidator be approved in the Schedule of Hourly Rates attached to the Form 8 Consent of the Special Purpose Liquidator filed on 3 June 2020.

**Costs**

1. The plaintiffs’ costs of this application are to be costs shared equally in the liquidations of Bestjet and Wynyard.

**Notice to Creditors and Leave to Apply**

1. The plaintiffs provide a copy of these Orders as soon as practicable to:

(a) all known creditors of Bestjet and Wynyard by sending it to their last known postal or email addresses; and

(b) the Australian Securities and Investments Commission (**ASIC**).

1. The ASIC, and any creditor of Bestjet or Wynyard who may wish to be heard in relation to the matters which are the subject of these Orders, have leave to apply in this proceeding with three days’ notice.

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

REASONS FOR JUDGMENT

REEVES J:

1. Mr Nigel Markey and Mr Bradley Hellen, the plaintiffs in this proceeding, are the joint and several liquidators of two related companies: Bestjet Travel Pty Ltd and Wynyard Travel Pty Limited, the two defendants.
2. Arising from their investigations of the affairs of the two defendant companies, the Liquidators formed the view that Bestjet is liable to Wynyard in the amount of $8,389,957.59 for, among other things, breach of contract. Accordingly, they caused Wynyard to lodge a proof of debt for that amount in the winding up of Bestjet (the Wynyard Proof of Debt). That occurred on 30 April 2020.
3. This situation presented an obvious conflict of interest, or more precisely duty, for the Liquidators in their roles as liquidators of both companies. It was in an attempt to resolve that conflict that they brought this proceeding.
4. It may not be surprising to find that similar situations have come before the courts on many occasions in the past. The resulting authorities have identified the following three options for dealing with it:
5. firstly, by an order for the appointment of a special purpose liquidator to determine the particular issue which has created the conflict of interest and only that issue (see, for example, the cases cited at [19] below);
6. secondly, by a direction to the conflicted liquidator that he or she would be justified in performing an act which would otherwise involve a conflict, for example, by admitting or rejecting the contentious proof of debt (see, for example, *Warner (liquidator), in the matter of Sakr Bros Pty Ltd (in liq)* [2019] FCA 547 (*Sakr*) at [21]); and
7. thirdly, by an order removing the conflicted liquidator from one or more of the companies and appointing a new liquidator in his or her place (see, for example, *Handberg, in the matter of Greight Pty Ltd (in liq)* (2006) 56 ACSR 334; [2006] FCA 17).
8. In this application, the Liquidators urged the adoption of the first option. Specifically, they proposed that Mr David Clout, an experienced Chartered Accountant and registered liquidator, be appointed as the special purpose liquidator of Bestjet for the specific and limited purpose of determining whether the Wynyard Proof of Debt should be admitted. They also applied for an order fixing Mr Clout’s remuneration and that the costs be shared equally between the two liquidations.
9. Because of the need to resolve this issue promptly, I made orders on 23 July 2020 along the lines of those sought by the Liquidators and indicated that I would publish my reasons in due course. The following are my reasons.

# FACTUAL BACKGROUND

1. Prior to the Liquidators’ appointment, Bestjet and Wynyard were companies within a group of related entities which owned and operated a substantial travel agency business with headquarters in Brisbane. There were two distinct components to that business: an online component and a store front component. Bestjet operated the online component through the website “bestjet.com” whereby customers would purchase, primarily, airline tickets. At the time of the Liquidators’ appointment, online sales were in the order of $70 million per month. The storefront component consisted of a traditional “bricks and mortar” retail outlet in Sydney. That store was operated by Wynyard and specialised in the sale of corporate travel products on a comparatively small scale.
2. Both Bestjet and Wynyard are members of the International Air Transport Association (IATA), an international trade association which allows retail travel agents to purchase wholesale airline tickets from its member air carriers.
3. During two periods between 1 July 2017 and 23 December 2018, Wynyard purchased airline tickets from IATA which were then supplied to Bestjet. Those tickets did not relate to Wynyard’s customers and were solely for the benefit of Bestjet’s customers who had ordered the tickets online through Bestjet. Bestjet and Wynyard adopted a practice whereby Bestjet would reimburse the costs of the tickets purchased in this manner and pay a handling fee to Wynyard.
4. From a review of the relevant books and records of Bestjet and Wynyard, the Liquidators have ascertained the following:
5. Bestjet did in fact reimburse Wynyard for the tickets purchased on Bestjet’s behalf up to 2 December 2018;
6. Of the $10,746,626.41 incurred by Wynyard in purchasing tickets on behalf of Bestjet between 3 December 2018 and 23 December 2018, Bestjet paid only $4,000,000 for those tickets; and
7. Bestjet did not pay Wynyard the abovementioned handling fee (see at [9]) for any of these transactions.
8. Consequently, the Liquidators formed the view that Bestjet is liable to Wynyard in the amount of $8,389,957.59 and caused Wynyard to lodge the Wynyard Proof of Debt.

# THE RELEVANT STATUTORY PROVISIONS AND PRINCIPLES

1. The Liquidators sought orders under ss 90-15 and 60-10 of the *Insolvency Practice Schedule* (Schedule 2 to the *Corporations Act 2001* (Cth)) (the IPS) appointing Mr Clout as a special purpose liquidator and approving his remuneration.
2. Section 90-15 of the IPS confers power on the Court to “make such orders as it thinks fit in relation to the external administration of a company”. It relevantly provides:

*Court may make orders*

(1) The Court may make such orders as it thinks fit in relation to the external administration of a company.

*Orders on own initiative or on application*

(2) The Court may exercise the power under subsection (1):

(a) on its own initiative, during proceedings before the Court; or

(b) on application under section 90-20.

*Examples of orders that may be made*

(3) Without limiting subsection (1), those orders may include any one or more of the following:

(a) an order determining any question arising in the external administration of the company;

(b) an order that a person cease to be the external administrator of the company;

(c) an order that another registered liquidator be appointed as the external administrator of the company;

(d) an order in relation to the costs of an action (including court action) taken by the external administrator of the company or another person in relation to the external administration of the company;

(e) an order in relation to any loss that the company has sustained because of a breach of duty by the external administrator;

(f) an order in relation to remuneration, including an order requiring a person to repay to a company, or the creditors of a company, remuneration paid to the person as external administrator of the company.

1. A company is taken to be under “external administration” if a liquidator has been appointed to it (s 5-15(c)). Under s 9 of the *Corporations Act 2001* (Cth), an “officer of the company” includes a liquidator. The Liquidators therefore had standing to apply under s 90-20(1)(d) of the IPS.
2. The breadth of the power in s 90-15 and some of its constraints were explained by Farrell J in *GDK Projects Pty Ltd, Re Umberto Pty Ltd (in liq) v Umberto Pty Ltd (in liq)* [2018] FCA 541 (*GDK*) as follows (at [33]):

Despite the breadth of the power conferred by s 90-15(1), it is difficult to envisage circumstances where the power would be exercised if the Court could not be satisfied that it would be just and unless the applicant had demonstrated sufficient utility to the external administration.

1. Special purpose liquidators are most commonly appointed where a liquidator is prevented from undertaking investigations due to an actual, or perceived, conflict and where it is useful and just that certain matters be investigated by a different liquidator (see *In the matter of Aus Streaming (In Liq)* [2020] VSC 313 at [44]). This application falls into the former category.
2. As liquidators of both companies, the Liquidators would be required to submit the Wynyard Proof of Debt and adjudicate on its merits and priority in determining whether it ought to be admitted. In adjudicating on a proof of debt, liquidators act in a quasi-judicial capacity according to standards no less than that of a court (see *Tanning Research Laboratories Inc v O’Brien* (1990) 169 CLR 332 at 338-339 per Brennan and Dawson JJ). Adjudicating the Wynyard Proof of Debt would therefore be inconsistent with the Liquidators’ obligations to act in that capacity, as well as their fiduciary duties to each defendant company.
3. The three options available to the Court to resolve that conflict are summarised at [4] above.
4. The first option is for the Court to appoint a special purpose liquidator for the sole purpose of determining the issue which has given rise to the conflict. In doing so, the Court ought to have regard to the utility of that course. Where the appointment is sought by a creditor for the purpose of pursuing a claim that the existing liquidator is unwilling to pursue, the courts have identified several factors to be considered. While this proceeding has not been brought by a creditor, I consider the factors identified provide useful guidance in this instance. Those factors are:
5. whether the plaintiff has identified with specificity the “special purpose” for which the appointment is sought;
6. whether the appointment of a special purpose liquidator would ensure that “confidence in the integrity, objectivity and impartiality of the administration is maintained”;
7. whether the special purpose is “substantial and serious”; and
8. the public interest.

See variously *Melhelm Pty Ltd, in the matter of Boka Beverages Pty Ltd (in liq) v Boka Beverages Pty Ltd (in liq)* (2019) 138 ACSR 95; [2019] FCA 1184 at [58]; *Deputy Commissioner of Taxation, in the matter of Italian Prestige Jewellery Pty Ltd (In Liq) ACN 116 031 022 v Italian Prestige Jewellery Pty Limited* (2018) 129 ACSR 115; [2018] FCA 983 (*Italian Prestige*) at [39]; *Williams & Kersten Pty Ltd v Walton Construction (Qld) Pty Ltd (in liq), in the matter of Walton Construction (Qld) Pty Ltd (in liq)* [2019] FCA 1201 at [22] and [27]; and *GDK*.

1. The second option requires the Court to make a declaration that it is proper for the liquidator to determine the issue notwithstanding any conflict. In *Sakr*, Griffiths J made orders declaring the existing liquidator would be acting properly in admitting a contentious proof of debt, observing (at [19]):

I accept the plaintiff’s submission that the relief he seeks does not concern a merely business or commercial decision, and it is plainly to the advantage to the liquidation of Sakr Family. There is no suggestion in the material available to Mr Warner that the Sakr Family Debt is anything other than a legitimate transaction nor has any creditor of Sakr Family objected to the proposed orders. The Court is satisfied that the appointment of a special purpose liquidator would generate an unwarranted additional burden on creditors. For this reason, the Court accepts the plaintiff’s submission that that alternative option of appointing a special purpose liquidator is not to be preferred.

1. The third option is for the Court to replace the conflicted liquidator with another liquidator who would not be subject to the same conflict. However, this option is not without difficulties. In *McGrath & Anor re HIH Insurance Ltd & Ors* [2006] NSWSC 385, Barrett J decided it would be impractical and cost-ineffective to remove the existing liquidators in those circumstances. Relevantly, his Honour observed (at [11]):

… One possibility, of course, is that the existing liquidators, upon encountering such a situation of conflict, should vacate the field. But that would be highly counterproductive in a case such as the present where application and experience over a period of more than five years has put the existing liquidators in a position of special knowledge that it would be very expensive indeed to replicate in the mind of some new liquidator, assuming that replication were possible at all. The much preferable course is that there be an additional liquidator who can take charge of and administer the separate aspect of the winding up giving rise to the conflict difficulty.

# CONTENTIONS

1. The Liquidators contended that option (a) was appropriate in the circumstances as they had a conflict of interest with respect to a relatively confined aspect of the Bestjet winding up which required that the Wynyard Proof of Debt be assessed separately and independently. Referring to the factors identified at [19] above, they also contended that the appointment of a special purpose liquidator was appropriate in the circumstances because:
2. his role in the Bestjet winding up had been clearly and precisely defined;
3. his appointment would ensure confidence in the integrity, objectivity and impartiality of the Bestjet winding up;
4. the Wynyard Proof of Debt, and the conflict it gave rise to, are substantial and serious; and
5. the public interest justified the appointment as the Bestjet winding up is “a high profile winding up involving the loss of significant sums of money by ordinary members of the public”.
6. The Liquidators argued that option (a) was favourable to option (b) because, although they are aware of transactions indicating Bestjet is indebted to Wynyard, the books and records of the companies do not clearly disclose that debt. Further, the circumstances in which those transactions were made are unclear and may give rise to future proceedings. As well, the creditors of each company had not consented to the Liquidators adjudicating the Wynyard Proof of Debt and the Liquidators had not engaged an independent expert to advise on how the debt ought to be adjudicated. In this respect, the Liquidators contended that engaging such an expert may have resulted in them being required to seek orders for the appointment of a special purpose liquidator in any event.
7. Finally, the Liquidators contended that option (c) would be “highly counterproductive” as they had acted continuously in each winding up thus giving them special knowledge, the replication of which would require significant expense.

# CONSIDERATION

1. I accept that Mr Clout’s experience and qualifications make him a suitable person to be appointed as the special purpose liquidator in the circumstances outlined above. He has been a Chartered Accountant since 1980 and a registered liquidator since 1982. During that time he has acted in all facets of corporate insolvency across a range of industries. He has no prior dealings with either company and he was not aware of any reason that would result in a conflict of duty or interest arising if he were appointed.
2. Unlike cases such *Sakr*, where the available evidence clearly indicated that the relevant debt was payable, in this matter further investigations into the terms of any agreement between Wynyard and Bestjet are necessary to determine the validity and quantum of the Wynyard Proof of Debt. In the circumstances of this matter, I therefore consider it would be inappropriate for the Liquidators to adjudicate those matters. I also consider that to replace the Liquidators in either administration would cause significant additional costs for the winding up process that should be avoided.
3. I therefore accept the Liquidators’ contentions that the appointment of a special purpose liquidator is the most appropriate option in the circumstances. I am satisfied that the scope of work to be undertaken by the special purpose liquidator has been sufficiently defined and that this course of action would maintain the integrity of both administrations. I therefore consider that Mr Clout ought to be appointed.
4. Section 60-10(2) of the IPS provides:

A determination, specifying remuneration that an external administrator of a company in a members’ voluntary winding up is entitled to receive for necessary work properly performed by the external administrator in relation to the external administration, may be made:

(a) by resolution of the company at a general meeting; or

(b) if a determination is not made under paragraph (a)––by the Court.

Note: For determinations made by the Court, see also section 60-12 (matters to which the Court must have regard).

1. This provision also applies to the appointment of a special purpose liquidator (see *Italian Prestige* at [55]-[56]).
2. Having regard to Mr Clout’s experience and qualifications detailed above (see at [25]), that his proposed hourly rates are his firm’s usual rates and that those rates are commensurate with similar accounting firms operating in the market, I accept that Mr Clout’s fees are fair and reasonable. I therefore consider his hourly rates should be approved.
3. Finally, I accept that granting the relief sought is equally beneficial to both Bestjet and Wynyard and that it is therefore appropriate for both companies to share the costs of this application.
4. For these reasons, I made the orders sought by the Liquidators.

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

Associate:

Dated: 24 December 2020