Federal Court of Australia

Karellas Investments Pty Ltd v FW Projects Pty Limited (in liq) [2021] FCA 870

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| File number(s): |  |
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| Judgment of: | **CHEESEMAN J** |
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| Date of judgment: | 29 July 2021 |
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| Catchwords: | **CORPORATIONS –** *Insolvency -**Orders in relation to external administration –* the plaintiff creditor seeks the appointment of a special purpose liquidator to conduct investigations into the examinable affairs of the defendant company – applicant / interested person seeks to be joined to the proceedings as a defendant under r 2.13(3) of the *Federal Court (Corporations) Rules 2000* (Cth) – Alternatively, applicant / interested person seeks leave to be heard in the proceedings under r 2.13(1) of the Corporations Rules – whether leave ought to be granted – whether the joinder of the applicant / interested person is “necessary” – relationship between the power to join a party to a proceedings under r 2.13(3) and the power available to the Court under r 9.05 of the *Federal Court Rules 2011* (Cth) – Held: successful in part – application for leave to be joined refused – interested person granted leave to be heard – reserve costs, leave to cross-examine and other procedural matters to the docket judge |
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| Legislation: | *Federal Court Act 1976* (Cth), ss 4, 37M, 37N*Federal Court Rules 2011* (Cth), rr 1.32, 1.33, 9.05, Sch 1*Federal Court (Corporations) Rules 2000* (Cth), rr 1.3, 2.13  |
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| Cases cited: | *Australia and New Zealand Banking Group Ltd v Carpenter* (unreported, NSWCA, 20 May 2005)*Carpenter v Pioneer Park Pty Ltd* [2004] NSWSC 973; (2004) 186 FLR 104*Deputy Commissioner of Taxation, in the matter of Italian Prestige Jewellery Pty Limited (in liq) ACN 116 031 022 v Italian Prestige Jewellery Pty Limited* [2018] FCA 983; (2018) 129 ACSR 115*ECAP Finance Pty Ltd v Ottoway Engineering Pty Ltd* [2017] FCA 237*Freehills, in the matter of New Tel Limited (in liq) ACN 009 068 955* [2008] FCA 762*Grant v BHP Coal Pty Ltd* [2015] FCA 329*Kadam v MiiResorts Group 1 Pty Ltd* [2016] FCA 1205*Onefone Australia Pty Ltd v One.Tel Limited*; *Weston v Publishing and Broadcasting Limited* [2007] NSWSC 1320*Re FW Projects Pty Limited (in liq)* [2019] NSWSC 892 *Sensis Pty Ltd v Bivami Pty Ltd* [2012] FCA 1365*Shakespeares Pie Co Australia Pty Ltd v Multipye Pty Ltd* [2005] NSWSC 1338 |
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| Division | General |
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| Registry | New South Wales |
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| National Practice Area | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Number of paragraphs: | 51 |
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| Date of hearing: | 19 July 2021 |
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| Counsel for the Applicant / Interested Person: | Mr A Shearer |
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| Solicitor for the Applicant / Interested Person:  | Dentons |
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| Counsel for the Plaintiff:  | Mr A J McInerney SC with Ms A L Reid (written submissions only)  |
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| Solicitor for the Plaintiff:  | BAL Lawyers |
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| Counsel for the Defendant:  | Mr E Young with Ms F McNeil |
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| Solicitor for the Defendant:  | Nelson McKinnon Lawyers |

ORDERS

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|  | NSD 328 of 2021 |
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| BETWEEN: | KARELLAS INVESTMENTS PTY LTD ACN 008 547 911Plaintiff |
| AND: | FW PROJECTS PTY LIMITED (IN LIQUIDATION) ACN 160 553 515Defendant |
|  | MANASSEN HOLDINGS PTY LIMITED ACN 003 456 004 Interested Person |

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| order made by: | CHEESEMAN J |
| DATE OF ORDER: | 29 July 2021 |

THE COURT ORDERS THAT:

1. Manassen Holdings Pty Ltd is granted leave to be heard pursuant to Rule 2.13(1) of the *Federal Court (****Corporations****)* ***Rules*** *2000* (Cth) at the hearing of the plaintiff’s application filed on 19 April 2021.
2. Costs of the Interlocutory Application be costs in the cause.

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

REASONS FOR JUDGMENT

CHEESEMAN J:

# OVERVIEW

## The Corporations List

1. By originating process, the plaintiff, Karellas Investments Pty Ltd, an unsecured creditor,applies for the appointment of a special purpose liquidator (**SPL**) to the defendant, FW Projects Pty Ltd (in liquidation), (the **Company**). The proceedings were listed for hearing before me in the Corporations List with a listing estimate of 2 hours.
2. I required the Company’s liquidators to give notice of the application to the Company’s creditors. That resulted in the present interlocutory application being brought by **Manassen** Holdings Pty Limited, a substantial creditor. Manassen applies to be joined as a party to the proceedings, or alternatively, be given leave to be heard under Rule 2.13 of the *Federal Court (****Corporations****)* ***Rules*** *2000* (Cth).
3. After hearing argument, I was satisfied that Manassen should be granted leave to participate in the proceedings, but reserved judgment in order to consider the form that Manassen’s participation should take.
4. In the interim, and to keep the proceedings progressing, I made orders timetabling the preparation of the matter for hearing with a view to the matter being referred by the Registry for hearing before a docket judge at an appropriate time, the listing estimate having been updated to two days.
5. In the result, I am not satisfied that Manassen should be joined as a party under r 2.13(3) but should be given leave to be heard under r 2.13(1) of the Corporations Rules. These are my reasons for reaching that conclusion.

# BACKGROUND

1. Manassen is a major creditor and the sole secured creditor of the Company. Manassen’s application is borne of a desire to oppose the appointment of a SPL in circumstances where the Company consents to the appointment. The originating process, in particular the proposed SPL’s scope of work, demonstrates that the proposed work is directed to investigating finance agreements between Manassen and the Company (the **Manassen Security Agreements**) and will likely entail examinations of persons associated with Manassen. Manassen’s application is made in the context of, and following, a dispute in relation to the liquidators’ appointment and the appointment of a SPL in proceedings in the **Supreme Court** of New South Wales: ***Re FW Projects*** *Pty Limited (in liq)* [2019] NSWSC 892 (Black J).
2. Manassen maintains that the appropriate order to be made is that it be joined as a defendant under r 2.13(3) of the Corporations Rules, accepting all of the burdens and obligations, as well as the rights and privileges, of a party to the proceedings. Obtaining leave to be heard on the SPL application as a non-party pursuant to r 2.13(1) of the Corporations Rules is Manassen’s fallback position.
3. The plaintiff lodged short written submissions on the interlocutory application. The plaintiff neither consented nor opposed the application insofar as the relief was directed to leave to be heard. The plaintiff did, however, oppose Manassen being joined as a defendant, contending that there was no proper basis for Manassen to be joined to the proceedings. The plaintiff submitted that Manassen’s joinder was not necessary for the proper determination of the issues arising in respect of the appointment of a SPL and that the application does not call for final determination of a right or interest of Manassen. The plaintiff’s submissions did not refer to authority, the Corporations Rules or the *Federal Court* ***Rules*** *2011* (Cth).
4. The Company appeared at the hearing. The Company neither consented nor opposed the interlocutory application and made no substantive submissions.

# BACKGROUND

1. An important matter of context for the present application is the existence of prior proceedings in the Supreme Court involving the Company, its liquidators, Manassen and others.
2. An application to remove the incumbent liquidators and appoint a new liquidator, or to appoint a SPL, was brought by other unsecured creditors of the Company, Hindmarsh Construction Australia Pty Ltd and Bellerive Homes Pty Ltd, in the Supreme Court (**NSWSC Proceedings**). The proposed matters to be investigated by a SPL included investigating the Manassen Security Agreements and dealings between Manassen and the Company.
3. Manassen was a party to the NSWSC Proceedings, as one of three defendants. The Company and its liquidators were the other two defendants. The plaintiff in the present proceedings was not a party to the NSWSC Proceedings. Manassen has the same legal representation in the present proceedings as it had in the NSWSC Proceedings. There is some commonality in the legal representation of the plaintiff in the NSWSC Proceedings and the plaintiff in the present proceedings. While the plaintiff in the present proceedings was not a party to the NSWSC Proceedings, it did have a solicitor present in court during the trial and offered funding for the appointment of an alternate liquidator which was sought to be appointed in those proceedings: *Re FW Projects* at [162], [164].
4. The plaintiffs in the NSWSC Proceedings relied on amended points of claim which identified some 25 separate grounds for removal of the liquidators or appointment of a SPL. Each of the grounds was identified as an aspect of a wider allegation of breach of duty for want of independence: *Re FW Projects* at [98]. The plaintiffs abandoned their application for a SPL shortly before the hearing: *Re FW Projects* at [2]. No explanation was given in relation to the abandonment of the SPL application: *Re FW Projects* at [169]. The liquidators had indicated that they did not oppose the appointment of a SPL to investigate and bring any challenge to the Manassen Security Agreements provided the Company was protected against adverse financial consequences and it was funded by the plaintiffs: *Re FW Projects* at [24] and [110]. After the application for a SPL was abandoned, the liquidators indicated that they would not oppose leave being granted to the plaintiffs in the NSWSC Proceedings to pursue a derivative action in respect of claims concerning the Manassen Security Agreements and associated matters: *Re FW Projects* at [145].
5. Following a three day hearing and extensive post hearing written closing submissions, the application as pressed was dismissed. In dismissing the application, Black J made the following observations about the conduct of the proceedings at [3] - [5]:

[3] ... This hearing did not determine questions of final relief as to those matters.

[4] Both the Plaintiffs and Manassen made submissions as to transactions between the Company and Manassen, beyond what was necessary to establish a serious question to be tried; or determine whether interlocutory relief … should be granted; or the Liquidators should be removed. I am conscious that this application is limited in its scope; that there are very likely to be further disputes between the parties, including a hearing as to the claims for final relief noted above; and it is appropriate that I do not determine any more than is necessary to determine whether interlocutory relief should be granted or refused … and whether the Liquidators should be removed and new liquidators appointed.

[5] The Plaintiffs relied on voluminous closing submissions, of some 332 paragraphs over 92 pages… on which [Counsel for the Plaintiffs] relied to the exclusion of oral closing submissions, where the hearing was subject to time constraints. Those submissions overlapped with, but substantially expanded, submissions previously made by the Plaintiffs. While I have had regard to those submissions in their entirety, I have not referred to or determined many matters raised in them in this judgment, where those matters need not be determined in order to determine this application and are properly deferred for determination at a final hearing. This application is not properly treated as a trial run of a future trial.

1. Black J further observed that the plaintiffs in the NSWSC Proceedings had been prepared to incur significant costs in seeking interlocutory relief in respect of certain proceeds of sale in circumstances where the net realisations from those proceeds were likely to be relatively modest, and quite possibly less than the parties’ collective costs of the application in the Supreme Court: *Re* *FW Projects* at [168].
2. It is apparent from the materials filed to date in the present proceedings, including the affidavit of Mr McIntosh, which was read in support of the interlocutory application, that materials in evidence in the NSWSC Proceedings will be relied on in the substantive application in the present proceedings for the appointment of a SPL and that many of the issues ventilated in the Supreme Court will be revisited in the present proceedings. It is in this context that Manassen seeks to demonstrate that it should be joined as a party to the present proceedings.

# RULES

## Corporations Rules

1. Manassen brings its application under r 2.13 of the Corporations Rules which provides:

**2.13 Leave to creditor, contributory or officer to be heard**

 (1) The Court may grant leave to any person who is, or who claims to be:

(a) a creditor, contributory or officer of a corporation; or

(b) an officer of a creditor, or contributory, of a corporation; or

(c) any other interested person;

to be heard in a proceeding without becoming a party to the proceeding.

(2) If the Court considers that the attendance of a person to whom leave has been granted under sub rule (1) has resulted in additional costs for any party, or the corporation, which should be borne by the person to whom leave was granted, the Court may:

(a) direct that the person pay the costs; and

(b) order that the person not be heard further in the proceeding until the costs are paid or secured to the Court’s satisfaction.

(3) The Court may order that a person who is, or who claims to be, a creditor, contributory or officer of a corporation be added as a defendant to the proceeding.

(4) The Court may grant leave to a person under sub rule (1), or order that a person be added as a defendant to a proceeding under sub rule (3):

(a) on application by the person or a party to the proceeding; or

(b) on the Court’s own initiative.

(5) The Court may:

(a) appoint a creditor or contributory to represent all or any class of the creditors or contributories on any question, or in relation to any proceeding, before the Court, at the expense of the corporation; and

(b) remove any person so appointed.

1. An application to be heard under r 2.13(1) or added as a defendant under r 2.13(3) may be brought by a person who is the subject of the order (that is, a non-party), a party or on the Court’s own initiative: Corporations Rules, r 2.13(4). Apart from the requirement as to the status of the person the subject of the order (for example, as an officer, creditor or contributory) r 2.13 does not stipulate the criteria to be applied in exercising the discretion to make the relevant order under sub rules (1) or (3). It is therefore necessary to consider r 1.3(2) of the Corporations Rules which is directed to the interaction of the Corporations Rules and the Rules.
2. Rule 1.3(2) of the Corporations Rules relevantly provides:

**1.3 Application of these Rules and other rules of the Court**

(1) Unless the Court otherwise orders:

(a) these Rules apply to a proceeding in the Court under the Corporations Act, or the ASIC Act, that is commenced on or after the commencement of these Rules;

…

(2) The other rules of the Court apply, to the extent that they are relevant and not inconsistent with these Rules:

(a) to a proceeding in the Court under the Corporations Act, or the ASIC Act, that is commenced on or after the commencement of these Rules; …

## Federal Court Rules

1. In considering the application of the Rules in this matter the starting point is to have regard to the general powers of the Court. Rule 1.32 of the Rules provides:

The Court may make any order that the Court considers appropriate in the interests of justice.

1. Rule 1.33 of the Rules provides:

The Court may make an order subject to any conditions the Court considers appropriate.

1. The specific power to join parties by court order is in Rule 9.05(1) of the Rules which relevantly provides:

**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.

1. The right to make an application under r 9.05 of the Rules is reserved to a party: *Grant v BHP Coal Pty Ltd* [2015] FCA 329 at [10] (Collier J) citing *McAlister v New South Wales* [2014] FCA 702; (2014) 223 FCR 1 at [14] (Edmonds J); c.f. *Sensis Pty Ltd v Bivami Pty Ltd* [2012] FCA 1365 (Griffiths J). However, the issue of whether r 9.05 extends to an application by a non-party does not appear to have been raised in circumstances where the joinder was neither consented to nor opposed. Party is defined as a party to a proceeding: Rules, r 1.51 and Sch 1. Proceeding means “a proceeding in a court whether between parties or not, and includes an incidental proceeding in the course of, or in connexion with, a proceeding, and also includes an appeal”: *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), s 4.
2. On a literal reading of r 9.05 the applicant for an order under r 9.05(1) must be a party to the proceeding to which it is sought to join the person who is the subject of the application. The rule provides a means by which a party can apply to join a non-party as a party to a proceeding.
3. The predecessor rule, O6 r8 of the *Federal Court Rules 1979* (Cth) used the word “person” instead of “party” in the opening phrase which made it clear a non-party could apply to be joined under the predecessor rule.

# CONSIDERATION

## Joinder as a defendant

### Power to join non-party

1. Manassen submits that the power in r 2.13 of the Corporations Rules is an independent power which is expressed in general unconstrained and unqualified terms in the particular context of Corporations Act proceedings. As such rule 2.13(3) of the Corporations Rules should not be in effect read down by reference to the qualifications contained in r 9.05 of the Rules, which applies more generally.
2. Manassen’s submissions did not refer to r 1.3(2) of the Corporations Rules. The Corporations Rules are silent as to the criteria to which regard is to be had upon a joinder application under r 2.13(3). In conformity with r 1.3(2) “other rules of the court” are to be applied “to the extent that they are relevant and not inconsistent with” the Corporations Rules.
3. Rule 9.05 confers a discretion on the Court on the application of a party to make an order joining a person as a party provided that the criteria set out in r 9.05(1)(a) or (b) are met. The criteria in r 9.05(1)(a) and (b) are, to borrow the language of r 1.3(2) of the Corporations Rules, relevant to and not inconsistent with the exercise of the joinder power in r 2.13(3) of the Corporations Rules.
4. The criteria specified in r 9.05(1)(b)(i) to (iii) of the Rules are broadly in accordance with the general law principles in relation to the proper constitution of proceedings. The criteria in r 9.05(1)(b)(i) to (iii) are not by their nature bespoke to joinder applications brought by a party to the relevant proceedings. The criteria are also of relevance to a joinder application initiated by a non-party.
5. In ***ECAP Finance*** *Pty Ltd v Ottoway Engineering Pty Ltd* [2017] FCA 237, Charlesworth J, in an appeal from a decision of Besanko J, noted that:

[28] Besanko J proceeded on the basis that the application for joinder was to be decided in the exercise of the Court’s general power to make any order that the Court considers appropriate in the interest of justice: r 1.32 of the *Federal Court Rules 2011* (Cth) (Rules). He stated that the principles applicable on an application by a non-party to be joined as a party to a proceeding are the same as those applicable on a joinder application made by a party to the proceeding under r 9.05. That is consistent with earlier authority of this Court: *McAlister v New South Wales* (2014) 223 FCR 1 at [23] (Edmonds J); *Kadam v MiiResorts Group 1 Pty Ltd* [2016] FCA 1205 at [13]–[19] (Edelman J). Rule 9.05 relevantly provides for the joinder of a person “whose joinder is necessary to ensure that each issue in dispute in the proceedings is able to be heard and finally determined”.

See also *Deputy of Taxation v ASIC* [2013] FCA 623; (2013) 304 ALR 319 at 324 [30] (Kenny J).

1. In a joinder application initiated by a non-party relying on the Court’s general power under r 1.32 of the Rules to make any order that the Court considers appropriate in the interests of justice, the same constraints and conditions as are required by r 9.05 have been treated as generally applicable: *Kadam v MiiResorts Group 1 Pty Ltd* [2016] FCA 1205 at [13] - [19] (Edelman J).
2. In my view, a similar approach should be adopted with respect to a joinder application by a non-party under r 2.13(3) of the Corporations Rules, having regard to r 1.3(2) of the Corporations Rules.
3. A similar approach has been taken in the context of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) and the *Supreme Court (Corporations) Rules 1999* (NSW): *Shakespeares Pie Co Australia Pty Ltd v Multipye Pty Ltd* [2005] NSWSC 1338 at [22] - [23] (Barrett J); ***Roach*** *v Winnote Pty Ltd* [2006] NSWSC 231; (2006) 227 ALR 758 at 761 [13] (Barrett J); *Access Services Group Pty Ltd v Mcloughlin* [2006] NSWSC 532; (2006) 201 FLR 16 at 22 – 23 [26] - [29] (Barrett J). I note that at a textual level the analogy between the federal and state position is imperfect because although the federal and state corporations rules are relevantly in identical terms, the joinder rules in the respective rules of court are not: Rules, r 9.05; UCPR, rr 6.24(1), 6.26 and 6.27. The underlying principle in relation to the proper composition of proceedings is however common.

## Should Manassen be joined?

1. Manassen submitted that as a creditor and an “interested person” it had the requisite status to bring an application under r 2.13(1) and (3) of the Corporations Rules. As a creditor, Manassen is concerned in the efficient administration of the liquidation. Manassen further contends that it has an interest in the proceedings because a key focus of the work to be undertaken by the proposed SPL includes conducting investigations into the Manassen Security Agreements and the public examination of persons including Manassen’s officers and advisers. Manassen submitted that where it is intended for the SPL to investigate aspects of the Manassen Security Arrangements, Manassen has an interest in the proceedings and for that reason ought to be permitted to be heard in opposition to the application. It was asserted that Manassen’s interests are directly affected by the proceedings and the proposed application. Finally, it was submitted that unless Manassen is joined, there would be, in effect a lack of a contradictor, particularly in respect of the issue concerning the relationship between this proceeding and the NSWSC Proceedings and the circumstances relating to Manassen Security Arrangements. In this way, Manassen submitted that notwithstanding that the relief sought is not relief against Manassen, Manassen’s participation in the proceedings in that sense is necessary. Manassen’s submissions did not make reference to r 9.05 of the Rules in this respect.
2. The plaintiff opposed Manassen’s joinder submitting that it is not necessary for the proper determination of the issues arising in respect of the application for the appointment of a SPL.  The plaintiff submitted that the application does not concern any immediate right or interest unique to Manassen that arises for final determination in the present proceedings that might require Manassen’s joinder as a defendant in order for that right to be properly determined. The fact that the proposed scope of work for the SPL includes, amongst other things, the investigation of the circumstances surrounding the Company’s entry into certain financing agreements with third parties including Manassen, does not give rise to an issue which requires Manassen’s joinder for the purposes of these proceedings. No claim for relief is sought in these proceedings in respect of the validity of any of these agreements.
3. In my view, r 9.05 of the Rules is relevant and not inconsistent with r 2.13(3) of the Corporations Rules and for that reason the discretion to join Manassen as a party should be exercised in accordance with the criteria in r 9.05. Accordingly, Manassen’s joinder must be “necessary to ensure that each issue in dispute in the proceeding is able to be heard and finally determined”: Rules, r 9.05(1)(b)(ii). Manassen must show that its rights against, or liabilities to, a party in respect of the subject matter of the proceedings would be directly affected by an order that might be made in the action: *ECAP Finance* at [29] referring to *News Ltd v Australian Rugby Football League Ltd* [1996] FCA 870; (1996) 64 FCR 410 (Full Court) and *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; (2010) 241 CLR 1. It is not sufficient to show that the applicant might be better off financially if the case was decided one way or another.
4. In ***Onefone*** *Australia Pty Ltd v One.Tel Limited*; *Weston v Publishing and Broadcasting Limited* [2007] NSWSC 1320, Barrett J considered an application by prospective defendants for leave to be heard on a special purpose liquidator’s application to vary the function and powers he held and extend the time within which the originating process could be served. In refusing the application, Barrett J observed that:

[21] To the extent that examinations may be undertaken, that will be a product of yet further and separate applications made by the special purpose liquidator in the exercise of the extended powers and in furtherance of the extended functions, assuming the extensions are made. The question whether particular examinations might, for example, entail an abuse of process would logically be addressed if and when those particular examinations were initiated, not when the question before the court was the general question whether the purposes of the appointment will be served by pursuing examinations of a particular kind or on a particular subject.

…

[24] The status or capacity of some of the PBL parties as persons who are (or are associated with) examinees or potential examinees is also insufficient to warrant grant of a right of audience upon the hearing of the application for extension of powers and functions. As I have said, they will have the chance to challenge moves or further moves to examine them in the ordinary course if and when those moves are made in the ordinary course.

[25] In summary, I see no good reason why the PBL parties should be regarded as having such an interest as to make it necessary or desirable that they be heard on the question whether the special purpose liquidator's functions and powers should be extended to allow him to put into motion processes which any other liquidator could put into motion as a matter of course and without assistance from the court.

1. A similar outcome was reached in the context of the prospective defendant in a derivative leave application in ***Carpenter*** *v Pioneer Park Pty Ltd* [2004] NSWSC 973; (2004) 186 FLR 104. In that case, Barrett J noted that (at 109 [16]):

…Part 2F.1A is concerned with the domestic process by which a company makes decisions relevant to initiation and continuation of legal proceedings. The statutory provisions aim to counter the effects of inaction on the part of those who would normally decide such matters internally. In most cases, those persons will be directors whose inaction may be a product of self-interest. Here, the inaction upon which Mr Carpenter seems likely to rely is the inaction of an unfunded liquidator. The provisions do not, in my opinion, have in view the welfare or interests of persons who are, from the company’s perspective, “outsiders”. They enable anyone with a particular form of “insider” status described in s 236(1)(a) to seek the court’s assistance in taking over the role of the normal decision makers in relation to a particular proceeding. The court’s function is essentially a screening function. It must assess against specified criteria the litigation proposal the applicant has in mind for the company. If that proposal is found by the court to meet the criteria, it must grant leave enabling the applicant to pursue it for the company.

1. The basis on which joinder was refused was stated as follows (at 109 [17]):

The intended defendant in the proposed proceeding no doubt has an interest of a general kind in the question whether leave should be granted under Pt 2F.1A. If leave is granted, that person will be sued (or is likely to be sued). If it is not granted, the person will not be sued, at least at the instigation of the person who has failed to obtain leave under Pt 2F.1A. But this cannot, in my view, form a basis for intervention under Pt 8, r 8… The question whether leave should be granted under Pt 2F.1A can be decided perfectly well in the absence of the intended defendant. No legal liability or other legal consequence will accrue to that person by any grant of leave. The presence and involvement of the person when the leave question is argued is in no sense “necessary” to an effectual and complete determination of the matters with which Pt 2F.1A is concerned.

The Court of Appeal subsequently refused leave to appeal from this decision: *Australia and New Zealand Banking Group Ltd v Carpenter* (unreported, NSWCA, 20 May 2005).

1. In *Freehills, in the matter of New Tel Limited (in liq) ACN 009 068 955* [2008] FCA 762, during the course of ex parte proceedings concerning the service of an examination notice, the father of the proposed examinee made an application to be heard under r 2.13 of the Corporations Rules and alternatively sought to offer assistance to the Court as *amicus curiae*. McKerracher J declined to grant the applicant leave to be heard as his Honour regarded the proceedings to be properly ex parte and in circumstances where the remedies available to those who sought to be heard and also those available to the examinee were preserved until a later time (at [48]). This approach is consistent with that taken by the Court in *Onefone* and *Carpenter*.
2. I am satisfied that even though Manassen may be a target of the proposed investigation by the SPL and as such clearly has a general interest in the application, it is not a necessary party and should not be joined under r 2.13(3) of the Corporations Rules. The issues relevant to the Court’s consideration of appointing a SPL can readily be decided in the absence of Manassen being joined as a party. If a SPL is appointed, and the SPL exercises powers which directly impact Manassen then its rights are preserved and may be exercised at that later time.
3. I now turn to the separate issue of whether Manassen should nonetheless be granted to leave to be heard as a non-party, and if so, on what conditions.

## Should leave to be heard be granted?

1. Both the liquidator and the plaintiff took a neutral stance on the issue of whether Manassen should be granted leave to be heard, neither consenting nor opposing the application.
2. There is considerable force in Manassen’s submission that in circumstances where the liquidators intend to adopt a neutral stance, it is uniquely placed to provide assistance (by way of evidence and argument) as a contradictor to the application based on the overlap in the subject matter of the present application and the earlier NSWSC Proceedings.
3. As a substantial creditor, Manassen also has a broader interest in the liquidation being completed expeditiously and efficiently. The liquidation has been underway since the appointment of liquidators on or about 18 April 2019. The conduct of the liquidation has already involved substantial litigation in the form of the NSWSC Proceedings which, as noted, were dismissed. An appointment of a SPL is likely to prolong the liquidation.
4. Manassen is well placed to provide assistance on the application in addressing whether there are matters that require investigation by a liquidator with a view to possible recovery for creditors and whether such an appointment would be beneficial to the winding up and the creditors as a whole. These are two of the relevant considerations applicable to appointing a SPL: *Deputy Commissioner of Taxation, in the matter of Italian Prestige Jewellery Pty Limited (in liq) ACN 116 031 022 v Italian Prestige Jewellery Pty Limited* [2018] FCA 983; (2018) 129 ACSR 115 at [34] (Markovic J).
5. For these reasons, I am satisfied that it is appropriate to grant leave to Manassen to be heard on the application.
6. Having regard to Justice Black’s comments in the NSWSC Proceedings, which are extracted at paragraph 14 above, I am concerned to keep the nature of Manassen’s participation under the control of the Court.
7. One of the matters put forward by Manassen during the hearing of the application as to why it should be joined as a party rather than simply being given leave to be heard was that it wishes to be able to compel production of documents using the Court’s coercive processes that are available to parties. Pending allocation to a docket judge, I granted leave to Manassen to apply, through my Associate, for leave in respect of any such applications, which will be determined on the papers.
8. I reserved to the docket judge all issues as to costs, procedure and leave to cross-examine.
9. I raise one final matter for the attention of the parties and Manassen. By the time the present application was heard, the plaintiff had already filed and served written submissions of some 38 pages on the substantive application. That is perhaps regrettable, and with the benefit of hindsight I should have imposed page limits at the outset. In the timetabling orders that I made on 19 July 2021, the defendant and Manassen were given leave to file and serve submissions of similar length, but that should not be taken as an encouragement to do so. The parties must be assiduous to avoid litigating the present application in a way that is disproportionate to what is at stake and is contrary to the overarching purpose of this Court: FCA Act, ss 37M and 37N.

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| I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Cheeseman. |

Associate:

Dated: 29 July 2021