Federal Court of Australia

Commonwealth of Australia v Castel Electronics Pty Ltd, in the matter of Castel Electronics Pty Ltd [2022] FCA 432

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| File number: | NSD 251 of 2022 |
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| Judgment of: | **LEE J** |
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| Date of judgment: | 13 April 2022 |
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| Date of publication of reasons: | 22 April 2022 |
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| Catchwords: | **CORPORATIONS** – application for order that Australian Securities and Investments Commission deregister company two years after scheduled deregistration date – s 509(2) of the *Corporations Act 2001* (Cth) that ASIC deregister the company – whether to exercise discretion to make order – considerations relevant to the exercise of discretion – application allowed |
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| Legislation: | *Corporations Act 2001* (Cth) ss 433, 509, 560*Personal Property Securities Act 2009* (Cth) s 340 |
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| Cases cited: | *Programmed Maintenance Services Ltd v Ranelagh House Pty Ltd (in liq)* [2008] FCA 1974*Re ACN 002 408 040 (in liq)* [2013] NSWSC 470; (2012) 94 ACSR 485*Re Rosaub Pty Ltd* [2005] NSWSC 689; (2005) 192 FLR 395 |
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| Division: | General Division |
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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: | 12 |
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| Date of hearing: | 13 April 2022  |
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| Counsel for the Plaintiff: | Mr J Hynes |
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| Solicitor for the Plaintiff: | King & Wood Mallesons |
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| Counsel for the Defendants: | The First and Second Defendant did not appear |

ORDERS

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|  | NSD 251 of 2022 |
| IN THE MATTER OF CASTEL ELECTRONICS PTY LTD (ACN 074 561 087) |
| BETWEEN: | COMMONWEALTH OF AUSTRALIA AS REPRESENTED BY THE ATTORNEY-GENERAL'S DEPARTMENT (ABN 92 661 124 436)Plaintiff |
| AND: | CASTEL ELECTRONICS PTY LTD (ACN 074 561 087)First DefendantAUSTRALIAN SECURITIES AND INVESTMENTS COMMISSIONSecond Defendant |

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| order made by: | LEE J |
| DATE OF ORDER: | 13 APRIL 2022 |

THE COURT ORDERS THAT:

1. Pursuant to s 509(2) of the *Corporations Act 2001* (Cth), the second defendant, the Australian Securities and Investments Commission, deregister the first defendant, Castel Electronics Pty Ltd (ACN 074 561 087), on 21 April 2024.

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

REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from the transcript)

LEE J:

1. Before the Court is an application for an order pursuant to s 509(2) of the *Corporations Act 2001* (Cth) (**Corporations** **Act**), that the deregistration of Castel Electronics Pty Ltd (**Castel**) be deferred until 21 April 2024, being a date two years after the scheduled deregistration of Castel.
2. The background to the application can be shortly stated. In January 2018, receivers were appointed to Castel and, approximately six months later, a liquidator was appointed. In September 2018, the Commonwealth, through the Attorney-General’s Department (**Department**), made advances totalling approximately $630,000 to former employees of Castel under what is described as the “Fair Entitlements Guarantee scheme” (**FEG Advance**). It is said that, by virtue of s 560 of the Corporations Act, the Commonwealth became a subrogated priority creditor of Castel and, in September 2018, it lodged a proof of debt in respect of the funds advanced. The Commonwealth has received no distribution in the external administration.
3. The Commonwealth has now considered the returns lodged via the receivers in the external administration. The returns record receipts of approximately $1.75 million in respect of “legal recoveries”, approximately $1.252 million in payments to Castel’s secured creditor, and approximately $450,000 on account of the receivers’ remuneration, expenses and legal fees.
4. On 23 December 2021 and 24 January 2022, the Commonwealth sent correspondence to the receivers identifying concerns in relation to the payments made to the secured creditor and also the receivers’ fees.
5. In particular, it was identified that the receivers’ recoveries were likely proceeds of a circulating asset, as defined in s 340 of the *Personal Property Securities Act 2009* (Cth), such that, by virtue of the operation of s 433 of the Corporations Act, the FEG Advance should have been satisfied ahead of any debt owing to the secured creditor. The Commonwealth has not received what it considers to be a satisfactory response in relation to these matters. Indeed, the evidence does not disclose whether the Commonwealth has received any reasoned or substantive response.
6. In January 2022, the liquidator lodged an end of administration return in respect of the company’s liquidation and advised the Department that the winding up of the company had been finalised. The liquidator also advised that necessary forms had been lodged with ASIC for deregistration. It was subsequently confirmed that this was scheduled to occur, as noted above, on 21 April 2022. In the event that the Commonwealth does not secure an order, the position of ASIC is that the registration will take place on the scheduled deregistration date provided for by the statutory scheme.
7. I am informed by counsel that the Commonwealth has determined to commence proceedings against the receivers for breach of s 433 of the Corporations Act in relation to the treatment of the company’s assets. The evidence before the Court reveals concerns that the continued existence of Castel will be necessary to allow the company (as well as the receivers) to be included as defendants in the proposed proceedings, and the company’s continued existence may be necessary to allow an orderly disbursement of funds realised from any proceedings ultimately brought. Additionally, references were made to the concern that the deregistration may lead to an earlier than otherwise destruction of books, records, and working papers that may be relevant to both the external administration and the issues in the proposed proceedings.
8. The principles upon which the discretion in s 509(2) of the Corporations Act is founded are well established and do not require any further elaboration.
9. There can be no doubt in the present circumstances the Commonwealth is plainly an “interested party” for the purposes of s 509(2) of the Corporations Act. Accordingly, it is a person who is at risk of its claim being defeated if the company is deregistered. In these circumstances, it is difficult to understand why it would not be an appropriate exercise of the Court’s discretion to grant the relief sought. It seems to me that the only issue that arises is whether the proposed two-year deferral is not excessive in the circumstances, given there is clearly a public interest in the company being deregistered, if appropriate, as soon as practicable, subject to ensuring that there is no prejudice occasioned by the deregistration.
10. In *Re Rosaub Pty Ltd* [2005] NSWSC 689; (2005) 192 FLR 395 (at 398 [15]), Barrett J observed that some unspecified date (such as when any proceedings commenced by the Commonwealth were completed) is not a specified date and noted that where the court makes an order displacing the three-month period under s 509(5) of the Corporations Act (as it then was), the court must ensure that its order “leaves no doubt on the question what ASIC is to do, in a timing sense, by way of deregistration”: see also *Programmed Maintenance Services Ltd v Ranelagh House Pty Ltd (in liq)* [2008] FCA 1974 and *Re ACN 002 408 040 Pty Ltd (in liq)* [2013] NSWSC 470; (2012) 94 ACSR 485 (at 488 [8] per Black J).
11. The further issue is that if an order is to take place on a fixed date, such a date should allow sufficient time for the Commonwealth to pursue its claims against the company. The date of two years proposed by the Commonwealth seems appropriate, recognising that the Court’s power under s 509(2) of the Corporations Act cannot be subsequently exercised after the expiration of the deregistration period of three months.
12. In all the circumstances, I am persuaded it is appropriate that the orders sought by the Commonwealth ought to be made.

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| I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee. |

Associate:

Dated: 22 April 2022