FEDERAL COURT OF AUSTRALIA

Theobald, in the matter of Bowesco Pty Ltd (in liq) [2018] FCA 1725

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| File number(s): | NSD 1887 of 2018 |
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| Judge(s): | **FARRELL J** |
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| Date of judgment: | 24 October 2018 |
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| Catchwords: | **CORPORATIONS** – application to fill vacancies in the office of liquidator or deed administrator of nine companies pursuant to s 473A and s 90-15(3)(c) of Sch 2 of the *Corporations Act 2001* (Cth) – liquidators resigned to pursue other opportunities after two accounting firms merged – proposed replacement liquidators and deed administrators are from the merged firm – application granted |
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| Legislation: | *Corporations Act 2001* (Cth) Sch 2 s 90-1, ss 473, 473A |
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| Cases cited: | *Condon v Watson* (2009) 174 FCR 314; [2009] FCA 11  *Re Free* [2010] NSWSC 1079  *Re Kukulovski, Arnautovic & Crisp* [2015] NSWSC 2040  *Re McGrath* [2005] NSWSC 506  *Re Porter and Mansfield* [2012] NSWSC 220  *Wily v Wily* [2003] NSWSC 1260 |
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| Date of hearing: | 24 October 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 7 |
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| Counsel for the Plaintiffs: | Ms T Fishburn |
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| Solicitor for the Plaintiffs: | Assured Legal Solutions |

ORDERS

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| IN THE MATTER OF BOWESCO PTY LTD (IN LIQ) AND OTHER COMPANIES | | |
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|  | | NSD 1887 of 2018 |
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| BETWEEN: | SIMON GUY THEOBALD  First Plaintiff  MARK JULIAN ROBINSON  Second Plaintiff  MELISSA JANET MARY HUMANN (and others named in the Schedule)  Third Plaintiff | |

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| JUDGE: | FARRELL J |
| DATE OF ORDER: | 24 October 2018 |

THE COURT ORDERS THAT:

1. Dispense with the requirement to serve the originating process filed on 9 October 2018 and supporting affidavits on the creditors of the companies referred to in schedule 1, schedule 2 and schedule 3 of the originating process, or on the creditors of Reed Constructions Australia Pty Limited (in Liq) (ACN 003 340 878) (Reed) or on the creditors of Momentum Mortgages Limited (in Liq) ACN 103 596 210 (Momentum).
2. The Plaintiffs procure that a copy of these orders is published in the ‘Insolvency Cases’ section of the PricewaterhouseCoopers Australia website by 5:00pm on Friday, 26 October 2018

**Schedule 1 Companies:**

**Vacancy in office of Simon Theobald as court appointed liquidator**

1. The vacancy in the office of liquidator of the companies referred to in schedule 1 below caused by the resignation of the first plaintiff from that office, be filled by the third plaintiff and the fourth plaintiff.
2. An order that the creditors of the companies set out in schedule 1 have leave to apply by Friday, 21 December 2018.
3. An order that the third plaintiff and fourth plaintiff notify the creditors of the companies set out in schedule 1 of the making of these orders by Friday, 2 November 2018.

**Schedule 2 Companies:**

**Vacancy in office of Mark Robinson as court appointed liquidator**

1. The vacancy in the office of liquidator of the companies referred to in schedule 2 below caused by the resignation of the second plaintiff from that office, be filled by the fifth and sixth plaintiffs.
2. An order that the creditors of the companies set out in schedule 2 have leave to apply by Friday, 21 December 2018.
3. An order that the fifth and sixth plaintiffs notify the creditors of the companies set out in schedule 2 of the making of these orders by Friday 2 November 2018.

**Schedule 3 Companies:**

**Vacancy in office of Mark Robinson as deed administrator**

1. The vacancy in the office of deed administrator of the deed of company arrangement in respect of the companies referred to in schedule 3 below caused by the resignation of the second plaintiff from that office, be filled by the fifth and sixth plaintiffs.
2. An order that the creditors of the companies set out in schedule 3 have leave to apply by Friday, 21 December 2018.
3. An order that the fifth and sixth plaintiffs notify the creditors of the companies set out in schedule 3 of the making of these orders by Friday, 2 November 2018.

**Reed Constructions Australia Pty Limited:**

**Vacancy in office of Mark Robinson as court appointed liquidator**

1. The vacancy in the office of liquidator of Reed caused by the resignation of the second plaintiff from that office, be filled by the seventh plaintiff and the eighth plaintiff.
2. An order that the creditors of Reed have leave to apply by Friday, 21 December 2018.
3. An order that the seventh and eighth plaintiff notify the creditors of Reed of the making of these orders by Friday, 2 November 2018.

**Momentum Mortgages Limited:**

**Vacancy in Office of Mark Robinson as Court Appointed Liquidator**

1. The vacancy in the office of liquidator of Momentum caused by the resignation of the second plaintiff from that office, be filled by the ninth plaintiff.
2. The creditors of Momentum have leave to apply by Friday, 21 December 2018.
3. An order that the ninth plaintiff notify the creditors of Momentum of the making of these orders by Friday, 2 November 2018.

**Schedule 1**

Bowesco Pty Ltd ACN 008 915 357

BRL Building Company Pty Ltd ACN 135 927 383

Richbay Holdings Pty Ltd ACN 065 188 874

Lanepoint Enterprises Pty Ltd ACN 110 693 251

**Schedule 2**

Blaq Investments Pty Ltd ACN 613 219 711

Damil Pty Ltd ACN 001 033 138

Eutopia Port Melbourne Pty Ltd CAN X120 282 831

**Schedule 3**

Mirrus Holdings Pty Ltd ACN 121 920 125

One Station Pier Pty Ltd ACN 168 264 864

**Others**

Reed Constructions Australia Pty Ltd ACN 003 340 878

Momentum Mortgages Limited ACN 103 596 210

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

REASONS FOR JUDGMENT

FARRELL J

1. This is an application made under s 473A of the *Corporations Act 2001* (Cth) and s 90-15(3)(c) of the Insolvency Practice Schedule to that Act by way of an originating process filed on 9 October 2018.
2. On 1 August 2018, the accounting firms PricewaterhouseCoopers (**PWC**) and PPB Advisory merged. The first plaintiff, Mr Theobald, and the second plaintiff, Mr Robinson, were partners in PPB Advisory and are registered liquidators and official liquidators. They have been employees of PWC since the merger and now wish to pursue other opportunities and to resign from their roles as liquidator in the companies identified in the first and second schedules to draft short minutes of order which have been provided by counsel for the plaintiffs. Mr Robinson wishes to resign as deed administrator in relation to the companies identified in the third schedule. Mr Robinson also wishes to resign as liquidator of Reed Constructions Australia Pty Ltd and Momentum Mortgages Ltd. It is proposed that they be replaced by the third to ninth plaintiffs who are partners or employees of PWC and registered and official liquidators in their own right.
3. Two affidavits of Mr Robinson sworn on 25 September 2018 and an affidavit of Mr Theobald sworn on 27 September 2018 were read. The evidence derived from those affidavits is usefully summarised in submissions provided by counsel for the plaintiffs (marked as MFI-1) which is reproduced in annexure A to these reasons. Counsel also tendered a letter dated 15 October 2018 from the Australian Securities & Investments Commission which has been marked as Exhibit 1. The letter indicates that ASIC has received a copy of the originating process and supporting affidavits and considers that these matters are properly left to the determination of the Court and that it does not seek leave to appear at the hearing.
4. Having regard to the principles set out at paragraphs [32]-[35] and [38]-[39] of annexure A, I am satisfied both that the Court has power to make the orders sought and that it is appropriate to make orders appointing the third to ninth plaintiffs as liquidators or deed administrators of the relevant companies.
5. In particular I note that:
6. In *Re Kukulovski, Arnautovic & Crisp* [2015] NSWSC 2040, Black J referred at [3] to the efficiencies in appointing persons from the same firm as replacements for retiring liquidators in minimising the costs of the administration. While Messrs Theobald and Robinson have not been employees of PWC of long duration, I note that some of the replacement liquidators have previously been employed by PPB Advisory and PWC’s systems are now employed in administering those companies which are in liquidation or of which Mr Robinson is a deed administrator. Accordingly, the third to ninth plaintiffs are familiar with PWC’s systems so that it is cost-effective and in the interest of the efficiency of those administrations for the third to the ninth plaintiffs to be appointed.
7. Both of Messrs Theobald and Robinson have given evidence that they have briefed those plaintiffs who it is proposed should be appointed in their place about the things remaining to be done in the relevant liquidations and administrations.
8. The affidavits set out the background of the appointment of Messrs Robinson and Theobald as liquidator or deed administrator. They also set out how the third to ninth plaintiffs have been identified to replace them.
9. The third to ninth plaintiffs have consented in writing to be appointed to those roles and ASIC has been notified of that.
10. The receivers and managers which have been appointed to Bowesco Pty Ltd and Lanepoint Enterprises Pty Ltd have each been given notice of the proposed changes of liquidator and they have no objection.
11. There will be no increase in fees as a result of the replacement and any increase would need the approval of relevant creditors.
12. The plaintiffs do not seek an order as to costs.
13. The plaintiffs have sought an order dispensing with notice of the proceedings being given to creditors prior to the hearing and I am satisfied that I should make the order.
14. The plaintiffs originally proposed to give notice to creditors of the orders within 21 days and that leave should be given to the creditors to approach the Court within 60 days. However, given that the merger has been in effect since 1 August 2018, the plaintiffs should be in a position to identify creditors and how to contact them in a relatively short period and I was not satisfied that the proposed 21 days was appropriate. Further, in my view, in the absence of prior notice of the hearing, a copy of the orders should be available as soon as possible on PWC’s website. The proposed short minutes have been amended accordingly.

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| I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell. |

Associate

Dated: 12 November 2018

SCHEDULE OF PARTIES

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| Plaintiffs |  |
| Fourth Plaintiff: | ROBERT SCOTT DITRICH |
| Fifth Plaintiff: | ANDREW JOHN SCOTT |
| Sixth Plaintiff: | WILLIAM ANTHONY HONNER |
| Seventh Plaintiff: | DANIEL AUSTIN WALLEY |
| Eighth Plaintiff: | CHRISTOPHER CLARKE HILL |
| Ninth Plaintiff: | MICHAEL ANDREW OWEN |

# ANNEXURE A

