FEDERAL COURT OF AUSTRALIA

Krejci, in the matter of Union Standard International Group Pty Ltd (Administrators Appointed) (No 2) [2020] FCA 1111

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| File number: |  |
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| Judge: | **STEWART J** |
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| Date of judgment: | 30 July 2020 |
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| Date of publication of reasons: | 4 August 2020 |
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| Catchwords: | **CORPORATIONS** – application by administrators for directions under s 90-15 of Sch 2 to the *Corporations Act 2001* (Cth), the *Insolvency Practice Schedule* – whether unquantified risks too great – director’s obligations to furnish information to administrators – whether director should be ordered to furnish information**PRACTICE AND PROCEDURE** – whether leave should be granted to serve on a person in a foreign country pursuant to s 10.42 of the *Federal Court Rules 2011* (Cth) – whether to order substituted service pursuant to r 10.24  |
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| Legislation: | *Corporations Act 2001* (Cth) ss 9, 438B; Sch 2, *Insolvency Practice Schedule (Corporations)* ss 90-15, 90-20*Federal Court Rules 2011* (Cth) rr 10.24, 10.42, 10.43  |
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| Cases cited: | *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; 93 ALJR 807*In the matter of RCR Tomlinson Ltd (administrators appointed)* [2018] NSWSC 1859*Kelly, in the matter of Halifax Investment Services Pty Ltd (in liquidation) (No 8)* [2020] FCA 533; 144 ACSR 292*Kelly (liquidator), in the matter of Australian Institute of Professional Education Pty Limited (in liq)* [2018] FCA 780*Krejci, in the matter of Union Standard International Group Pty Ltd (Administrators Appointed)* (No 1) [2020] FCA 1110*Re Ansett Australia Ltd (No 3)* [2002] FCA 90; 115 FCR 409*Re ONE.TEL LTD and Others* [2014] NSWSC 457; 99 ACSR 247*Reidy, in the matter of eChoice Limited (Administrators Appointed)* [2017] FCA 1582  |
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| Date of hearing: | 30 July 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 48 |
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| Counsel for the Plaintiff: | R Scruby SC with C Ernst |
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| Solicitor for the Plaintiff: | Colin Biggers & Paisley |

ORDERS

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|  | NSD 754 of 2020 |
| IN THE MATTER OF UNION STANDARD INTERNATIONAL GROUP PTY LTD |
|  | PETER PAUL KREJCI AND ANDREW JOHN CUMMINS AS VOLUNTARY ADMINISTRATORS OF UNION STANDARD INTERNATIONAL GROUP PTY LTD ACN 117 658 349Plaintiff |

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| JUDGE: | STEWART J |
| DATE OF ORDER: | 30 JULY 2020 |

THE COURT ORDERS THAT:

1. Mr Soe Hein Minn be joined as Respondent to the Interlocutory Process dated 30 July 2020.
2. By no later than 2.00pm on 31 July 2020 the Respondent is to provide (or to cause any entities controlled by him to provide) to the First Applicant such passwords, digital keys or other information as would provide immediate ‘administrator access’ to the First Applicant to the:

(a) Metaquotes MT4 and MT5 trading platforms (**Platforms**); and

(b) Servers on which the Platforms are hosted (**Servers**).

1. That until 2.00pm on 31 July 2020 the Respondent be restrained by himself, his servants or agents or by any entity controlled by him, from using ‘administrator access’ to the Platforms and/or Servers to change or delete or otherwise alter any of the records, information or data of the Second Applicant.
2. In the event that the Respondent wishes to oppose or vacate these orders 2 and/or 3, he notify the Associate to Stewart J on Associate.StewartJ@fedcourt.gov.au and the Applicants by 1.00pm on 31 July 2020 and he appear in person or by Counsel at the hearing referred to in order 6 below.
3. Service of the Interlocutory Process, these orders, and the affidavits of Mr Krejci of 27 July 2020 and 30 July 2020 be effected by sending them by email by no later than 1 hour after entry of these orders to:

(a) siyu.zhang@juriscorlegal.com.au;

(b) yu.chen@juriscorlegal.com.au; and

(c) soe@usgfx.com.

6. The Interlocutory Process is otherwise adjourned to 2.00pm 31 July 2020 to be heard remotely on a link to be furnished to the parties on request to the Associate to Stewart J at the email address referred to in order 4.

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

REASONS FOR JUDGMENT

STEWART J:

## Introduction

1. On 30 July 2020, I made orders in this matter. These are my reasons for those orders.
2. Some background to the voluntary administration of Union Standard International Group Pty Ltd (the **company**) is set out in my reasons of 28 July 2020 in *Krejci, in the matter of Union Standard International Group Pty Ltd (Administrators Appointed) (No 1)* [2020] FCA 1110. These reasons assume familiarity with those reasons and adopt the same abbreviations used in those reasons.
3. On 30 July 2020, the administrators applied for a direction under s 90-15(1) of the Insolvency Practice Schedule, being Sch 2 to the *Corporations* ***Act*** *2001* (Cth) as follows:

1. An order that the Administrators would be justified in:

(a) directing Beeks Financial Cloud to physically turn off the servers licenced to the Company and/or to collect the physical hard-drive of the servers licenced to the Company from the location of each server;

(b) directing Metaquotes to take the MT4 and MT5 platforms software licenced to the Company offline; and

(c) directing Gold-I to suspend the bridge services in respect of all of the Company’s servers.

2. An order that the Administrators’ costs of this application be costs in the administration of the Company.

3. An order that the Court’s orders be entered forthwith.

4. Such further or other orders or directions as the Court considers appropriate.

1. The application was brought on as a matter of considerable urgency on the basis of the administrators’ concern that unless urgent action was taken company data would be erased or falsified and/or clients’ accounts would be transferred to other platforms. If that occurred, the voluntary administrators would be unable to obtain an accurate understanding of the true financial position of the company, including its creditors and debtors.
2. The urgent action that was proposed by the administrators was to in effect shutdown the servers and trading platforms used by the company. The administrators recognised that those servers and platforms are also used by other entities. Shutting them down could expose the company to liability to those entities. It could also expose the company to liability to its clients. The administrators were therefore concerned that they might be criticised for taking those steps and as a result they sought the protection that would be afforded by a direction under s 90-15(1).

## Principles governing exercise of s 90-15 power

1. In short written submissions, senior and junior counsel for the administrators conveniently set out the principles governing the court’s power to make directions under s 90-15. The following summary draws heavily on those submissions.
2. A court is empowered by s 90-15(1) of the Insolvency Practice Schedule to “make such orders as it thinks fit in relation to the external administration of a company”. The power conferred by s 90-15(1) is “very broad”: *Kelly (in the matter of Halifax Investment Services Pty Ltd (in liquidation) (No 8)* [2020] FCA 533; 144 ACSR 292 at [51] (Gleeson J). It includes a power to make orders determining any question arising in the external administration of a company: s 90-15(3)(a). An administrator of a company may apply for such an order: s 90-20(1)(d), read with s 9 of the Act (paragraph (d) of the definition of “officer”).
3. The court’s power under s 90-15(1) includes a power to give directions about a matter arising in connection with the performance or exercise of an administrator’s functions or powers: ***Reidy****, in the matter of eChoice Ltd (Administrators Appointed)* [2017] FCA 1582 at [26]-[27] (Yates J). In this respect, s 90-15(1) confers a power to give directions that was previously conferred by ss 447D(1) and 479(3) of the Act concerning administrators and liquidators, respectively: see *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; 93 ALJR 807 at [166] (Gordon J); *Reidy* at [27] (Yates J); and *Kelly (liquidator), in the matter of Australian Institute of Professional Education Pty Ltd (in liq)* [2018] FCA 780 at [30] (Gleeson J). The principles governing directions to administrators and those governing directions to liquidators are relevantly analogous: *Re* ***Ansett*** *Australia Ltd (No 3)* [2002] FCA 90; 115 FCR 409 at [43] (Goldberg J).
4. The function of a judicial direction of this kind is not to determine rights and liabilities arising out of a particular transaction, but to confer a level of protection on the administrator. An administrator who acts in accordance with a judicial direction, having made full and fair disclosure to the court of the material facts, has “protection against claims that they have acted unreasonably or inappropriately or in breach of their duty in making the decision or undertaking the conduct” proposed: *Ansett* at [44].
5. A court may give a direction on an issue of “substance or procedure” or “of power, propriety or reasonableness”: *Ansett* at [65]. Although a court will not give a direction on a decision that is purely commercial, a direction may be provided where there is a “particular legal issue raised for consideration or attack on the propriety or reasonableness of the decision in respect of which the directions are sought”: *Ansett* at [65]. As Black J observed in *In the matter of RCR Tomlinson Ltd (administrators appointed)* [2018] NSWSC 1859, a decision may have a “commercial character” but nonetheless be amenable to judicial direction. His Honour said (at [14]) of the application before him (which sought a direction as to whether a company should borrow loan funds):

The Court has been prepared to give directions of this kind, where the decision is a complex one, and where it has to be made, as here, under circumstances of time pressure, in respect of a very large corporate group, and by balancing different interests. The Court’s preparedness to grant such a direction in those circumstances reflects the intrinsic unfairness of leaving a voluntary administrator to be at risk of liability, in respect of a complex decision of that kind, where any decision that is made, including making no decision, will have inevitable risks for some or all of the affected constituencies.

1. Because the effect of a direction under s 90-15 is to exonerate the liquidator or administrator if full disclosure is made, it will usually necessitate consideration by the court of the liquidator’s or administrator’s reasons and decision making process: see *Re ONE.TEL Ltd* [2014] NSWSC 457; 99 ACSR 247 at [36] per Brereton J (referring to former s 511 of the Act).

## The administrators’ need for “administrator access”

1. All of the information regarding the company’s trading history and clients is held on four servers. The servers are located in London, New York, Tokyo and Cyprus and are all managed by a company registered in the United Kingdom, **Beeks** Financial Cloud Ltd. The servers are managed under a Master Services Agreement between the company and Beeks dated 2 February 2017.
2. The company and its clients trade on software platforms operated or hosted on the servers. They are referred to as the MT4 and MT5 platforms. The company uses the trading platforms under software license agreements with MetaQuotes Software Corporation which is registered in the Bahamas although it is said to be operating out of Cyprus.
3. In order to undertake their responsibilities and obligations as administrators, the administrators require complete access to the servers and platforms in order to ascertain the company’s present and historical financial position. Such complete access is referred to as “administrator access”. The person who has “administrator access” is able to see all the trading information on the relevant platforms and all of the data on the servers. That access also enables alteration of the data.
4. The evidence shows that USG Holdings and/or Mr Soe, its controller, has “administrator access” to the servers and the platforms.
5. USG Holdings and Mr Soe are represented by solicitors in Sydney, Juris Cor Legal. The solicitor there who appears to be responsible for the matter on behalf of USG Holdings and Mr Soe is Ms Siyu Zhang.
6. There has been extensive correspondence between solicitors acting for the administrators and Ms Zhang at Juris Cor Legal. The administrators have sought “administrator access”, but that has been refused. All they have been granted is limited “manager access” to one platform and some servers. “Manager access” in substance allows sight of what the person with “administrator access” has allowed. The evidence indicates that such “manager access” that has been granted by USG Holdings and/or Mr Soe is restricted in such a way that much of the company information is not able to be seen.
7. The administrators have also been unable to obtain “administrator access” through the third-party providers of the servers and the platforms. The administrators believe that they have exhausted all avenues to obtain that access. Accordingly, they wish to issue directions to those third-party providers to shut down the servers and the platforms.
8. If complied with, the directions would effectively shut down all trading on the MT4 and MT5 platforms. An IT expert engaged by the administrators has advised that closing down the servers and the platforms is the only practical means by which to secure control over the company’s records.
9. The administrators’ concern is that if the situation remains unchanged, the administrators will be prevented from gaining access to the company’s records, and/or that such records as they are able to access may be incomplete or falsified. That would prevent them obtaining an accurate understanding of the company’s financial position, including as to its debtors and creditors.
10. The administrators are also concerned that if the present position remains unchanged, there is a substantial risk that USG Holdings, or another person not acting with the authority of the administrators, will erase or alter the company’s records or transfer clients’ trading accounts onto other platforms.
11. In the above regard, investigations by the administrators indicate that during the course of the administration USG Holdings has been purporting to transfer client accounts to a new operation in Vanuatu, which appears to have been established shortly before the company entered into voluntary administration.
12. Further, accumulated profits are reported to have decreased by nearly $58 million since 1 July 2020 and by about $6.8 million since 17 July 2020, when the administrators stopped all trades. The administrators have been unable to ascertain whether these decreases are due solely to trading by clients. Their staff have been informed by the Australian directors of the company that these decreases are too great to be explained simply by trading.
13. At the first meeting of creditors, the administrators were informed by some attendees that Mr Soe had sent circulars to some clients inviting them to transfer their accounts to a Vanuatu entity. Also, an unauthorised attempt was made on 21 July 2020 by someone as yet unidentified to direct the Commonwealth Bank of Australia to make payments out of bank accounts which hold client trust funds.
14. Also, by email on 26 July 2020, someone from an email address of USG Holdings gave instructions to Beeks. The instructions included that Beeks should not accept any instructions other than from certain identified email addresses, all of which appear to be email addresses of USG Holdings. The email however purported to be from the company. The email thus implicitly acknowledges that the relevant contractual relationship is between Beeks and the company, not USG Holdings.
15. On 28 July 2020, Beeks advised the administrators that Beeks itself had been prevented from accessing the data concerning the company on its own servers.
16. Juris Cor Legal advised that their clients, USG Holdings and Mr Soe, are not prepared to provide “administrator access” to the administrators because, they say, the relevant platforms are shared by companies within the group with the result that “administrator access” would allow access to information of clients who hold accounts with related companies in other jurisdictions and to close off those accounts. They say that in order to preserve confidentiality of clients’ information and to protect the interests of clients and related companies, it is prudent to confer only “manager access” on the administrators.
17. However, in view of the relevant agreements with the service providers being with the company, it would appear that USG Holdings or Mr Soe could only have obtained “administrator access” through Mr Soe being a director of the company. The administrators say that they are not aware of any other head license arrangements for either the servers or the MT4 and MT5 platforms.
18. Also, the question of which clients are clients of the company and which are clients of “the group”, or other companies in the group, is one that the administrators need to consider.
19. The administrators acknowledge that the course proposed by them, to close down the servers and the platforms, is not without risk. Those risks include the following.
20. First, there is potentially legal exposure arising from the interruption to trading on the MT4 and MT5 platforms. So long as the platforms are not operative, clients, and any entities using the company’s software license, will be prevented from trading.
21. Second, there are clients of the company who have existing open positions which they wish to close out. If the proposed directions are complied with, they will be unable to do so on the platforms for so long as the platforms are offline. Because of the uncertainty arising from the quality of information available to the administrators, it is not clear how many clients might be affected. The administrators’ position in relation to these contracts in an earlier application to the Court for directions was stated to be that the clients had been notified that they have until 7 August 2020 to close out their positions. Closing down the servers and platforms now would potentially prejudice clients who are acting on that information.
22. Third, there is a possibility that if the servers are turned off, data will inadvertently be lost.
23. Fourth, there is the possibility that the company will be pursued for breach of sublicensing agreements between the company and certain entities.
24. Given the grave consequences of remaining unable to access the company’s records, the administrators consider the course proposed by them to be justified, notwithstanding the above risks.

## Another remedy

1. I am satisfied that the administrators require “administrator access” to the relevant servers and platforms in order to fulfil their obligations and responsibilities as administrators. I am also satisfied that the requisite usernames, passwords or other digital or electronic keys that give “administrator access” to the servers and platforms is “information about the company’s business, property, affairs [or] financial circumstances” within the meaning of s 438B(3)(b) of the Act. As a director of the company, Mr Soe is obliged to give that information to the administrators. As indicated, he has refused to do so despite several requests.
2. I also accept that there is considerable urgency attached to the administrators getting “administrator access”. Prima facie, at least, there is reason to suspect that clients of the company are being unlawfully migrated off the platforms and the financial position of the company is being eroded. Whether or not these things are actually taking place is unknown and is not ascertainable without “administrator access”.
3. Although the outcome of the direction that the administrators intend giving is uncertain, it has a prospect of being successful and there is little else that the administrators can do. They have therefore made out a good case in support of these actions.
4. However, in the debit column of the ledger is the risks that are attendant on the administrators’ directions to the service providers being followed. Those are documented above. I am concerned that those risks are not adequately assessed, as to the likelihood, or quantified, as to their impact on potentially innocent third parties and the liabilities of the company. That is no criticism of the administrators. They have done the best that they can with limited information.
5. Because of that concern, and because of the availability of another remedy which carries with it far less risk although of uncertain efficacy, I was not satisfied that the directions that the administrators sought should be given, at least not at this stage. I raised my concern, and the other possible remedy, with counsel for the administrators.
6. The other remedy is to order Mr Soe to provide the requisite “administrator access”. I have already explained why in my view he is obliged to do so. Insofar as his explanation, through Juris Cor Legal, is concerned, on the information before me I do not accept that the fact that “administrator access” may give access to third parties’ information is sufficient reason to withhold such access. As things stand, Mr Soe, either directly or through USG Holdings, has unfettered access to company information. To the extent that he is entitled to that access as a director of the company, the administrators are equally entitled to it and he is obliged to furnish it up to the administrators. Also, it is the company that is entitled, in its relationship with the service providers, to have the “administrator access”. It is not apparent on what basis Mr Soe and/or USG Holdings has any entitlement to such access.
7. On that basis, the administrators sought an order against Mr Soe compelling him to furnish “administrator access” to the servers and platforms to them.
8. Two principal issues arose in that regard. The first is that Mr Soe is in a foreign country. The second is that he had not been given notice of the proposed order against him.
9. I was satisfied that the circumstances were properly made out for the exercise of so-called “long arm jurisdiction” under r 10.42 of the *Federal Court Rules 2011* (Cth) (**FCR**). In that regard, the Court clearly has jurisdiction as a matter arising under a law of the Commonwealth. The administrators relied on item 14 of r 10.42 which provides that an originating application may be served on a person in a foreign country in a proceeding that consists of, or includes: “Proceeding in relation to the construction, effect or enforcement of an Act, regulations or any other instrument having, or purporting to have, effect under an Act.” The proceeding for the order against Mr Soe is a proceeding to enforce s 438B(3) of the Act.
10. I was therefore satisfied that item 14 applies. Item 24(c) would also apply, i.e. “Proceeding affecting the person to be served in relation to … the person’s conduct as a member or officer of … a corporation [incorporated, or carrying on business, in Australia] … .”
11. Further, in view of the difficulties that would obviously be attendant on serving Mr Soe personally in Myanmar in circumstances of considerable urgency, and the fact that he is represented in this jurisdiction in relation to the very matters that are the subject of the proceeding, I was satisfied that an order for substituted service under r 10.24 of the FCR was justified. The order provided for service by email on Mr Soe at his known personal email address as well as by email to Ms Zhang at the email address used by her in corresponding on behalf of Mr Soe.
12. On the question of notice to Mr Soe, the orders sought by the administrators whilst ordering Mr Soe to furnish the requisite “administrator access” before a particular time also provided for Mr Soe to give notice at an earlier time that he intended opposing the orders. In the event of him doing that, he could then appear in person or by counsel at the relisting of the matter at the later time when the order would be reconsidered in view of it having been made in his absence in the first instance.
13. I appreciated that such an order is unusual, but in the circumstances I was satisfied that it adequately provided Mr Soe with the opportunity to appear and oppose the order whilst at the same time allowing the order to in effect become final in the event that he elected not to appear and oppose it.

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| I certify that the preceding forty-eight (48) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stewart. |

Associate:

Dated: 4 August 2020