Federal Court of Australia

Fletcher v Brown (No 3) [2021] FCA 803

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| File number: | WAD 59 of 2021 | |
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| Judgment of: | **JACKSON J** | |
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| Date of judgment: | 14 July 2021 | |
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| Catchwords: | **PRACTICE AND PROCEDURE** - application for orders permitting receivers to recover costs and expenses from assets of respondents - value of assets identified and recovered negligible - requirement to file and pass accounts dispensed with - limited leave granted to proceed against company in liquidation - formal noting of assertion of equitable lien over future property refused - receivers to be included in circulars issued to creditors of respondents - receivers granted liberty to apply - proceeding stayed until further order | |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 58, 60  *Competition and Consumer Act 2010* (Cth) Schedule 2 (*Australian Consumer Law*)  *Corporations Act 2001* (Cth) s 471B  *Federal Court of Australia Act 1976* (Cth) s 23 | |
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| Cases cited: | *Hutchins, in the matter of Ardenberg Pty Ltd (in liq) (Administrators Appointed) (No 3)* [2021] FCA 519  *Ide v Ide* [2004] NSWSC 751; (2004) 50 ACSR 324  *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 | |
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| Division: |  | |
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| Registry: |  | |
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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: | 38 |
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| Date of hearing: | 14 July 2021 | |
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| Counsel for the Applicants: | Mr JW Daly | |
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| Solicitor for the Applicants: | Mills Oakley Lawyers | |
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| Counsel for the First Respondent: | Mr LCA Palmos | |
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| Solicitor for the First Respondent: | Palmos Legal | |
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| Counsel for the Second Respondent: | Mr JG Abberton | |
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| Solicitor for the Second Respondent: | Lavan | |
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| Counsel for The West Australian Newspapers Ltd, Channel 7 Pty Ltd and Mr Neale Prior: | Mr T McCarthy | |
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| Solicitor for The West Australian Newspapers Ltd, Channel 7 Pty Ltd and Mr Neale Prior: | Steedman Stagg Lawyers | |
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| Counsel for the Trustee in Bankruptcy: | Mr M Maskell | |
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| Solicitor for the Trustee in Bankruptcy: | Thynne + Macartney | |
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| Counsel for Ms Nirupa Manoharan: | Mr M Holler | |

ORDERS

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|  | | WAD 59 of 2021 |
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| BETWEEN: | ADAM FLETCHER  First Applicant  STUART CAMPBELL  Second Applicant  JAYSEN TAYLOR (and others named in the Schedule)  Third Applicant | |
| AND: | CHRISTOPHER MICHAEL BROWN  First Respondent  CMB INVESTMENTS 1993 PTY LTD (ACN 618 397 925)  Second Respondent | |

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| order made by: | JACKSON J |
| DATE OF ORDER: | 14 JULY 2021 |

THE COURT ORDERS THAT:

1. For the purposes of today's hearing, and pursuant to s 47B of the *Federal Court of Australia Act 1976* (Cth), counsel for the Trustee in Bankruptcy of the first respondent is permitted to deliver oral submissions by way of video link.
2. Unless the court otherwise orders, and apart from the court's transcript provider, no person, including the parties and members of the public, who is observing the hearing of the proceeding by accessing any audio or video link, including by link to the platform Microsoft Teams, may make any audio or video recording or photography of the hearing or any part of it.
3. Nothing in the preceding paragraph prevents any person, based on what he or she has seen or heard during the hearing:
   1. making his or her own notes of the proceeding; or
   2. publishing a fair report of the proceeding.
4. The name and identifying details of the individual who filed a confidential affidavit in this proceeding on 9 June 2021 will be redacted from any version of the affidavit of Adam Fletcher filed 16 March 2021 that is released to any member of the public.
5. Pursuant to s 37AG(1)(c) of the *Federal Court of Australia Act 1976* (Cth), on the ground that it is necessary to protect the safety of a person, until further order, and with liberty to apply, Tony McCarthy and Neale Prior must not communicate to any other person, by publication or otherwise, the name of the individual referred to in the preceding paragraph insofar as it was disclosed to them by the court, or the fact that that individual is named in Mr Fletcher's affidavit.
6. Any application by a party in relation to any alleged breach of the suppression orders made on 24 June 2021 must be made within 7 days of the date of this order.
7. The Receivers have leave pursuant to s 471B of the *Corporations Act 2001* (Cth) to proceed with these proceedings against the second respondent for the purposes of seeking the order sought at paragraph 4 of the applicants and Receivers' revised minute of proposed orders lodged for filing on 13 July 2021.
8. The requirement in r 14.25 of the *Federal Court Rules 2011* (Cth) for the Receivers to file accounts is dispensed with, as well as the need to pass accounts.
9. Pursuant to paragraphs 5 and 6 of the orders made on 25 March 2021, the monetary assets of the first respondent realised by the Receivers in these proceedings as identified in Annexure A, in the amount of $5,433.44, may be applied by them to satisfy part payment of their costs and expenses incurred as receivers and managers of the property of the first respondent.
10. The Trustee in Bankruptcy must promptly provide to the Receivers copies of any circulars or other communications issued by the Trustee to the general body of the first respondent's creditors.
11. The Liquidators of the second respondent must promptly provide to the Receivers copies of any circulars or other communications issued by the Liquidators to the general body of the second respondent's creditors.
12. Pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth), the proceeding is stayed until further order.
13. The applicants must pay the second respondent's costs of and incidental to today's hearing.
14. The Receivers have leave to file a written outline of submissions as to costs, of no more than 1 page in length (excluding the header), by 21 July 2021.
15. The Trustee and the second respondent may file any submissions in response, of no more than 1 page in length (excluding the header), by 28 July 2021.
16. The parties, the Receivers, the Trustee in Bankruptcy and the Liquidators have liberty to apply on three days' written notice.

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

Annexure A

TABLE OF THE ASSETS OF THE FIRST RESPONDENT'S ESTATE HELD BY THE RECEIVERS

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| **Asset** | **Amount ($)** |
| Bank of Queensland Limited | 3.00 |
| 86 400 Bank | 1,950.41 |
| Net proceeds from horse racing prize money | 3,480.03 |
| **Total** | **5,433.44** |

REASONS FOR JUDGMENT

(edited from the transcript)

JACKSON J:

## Background

1. This is a proceeding in which the applicants have claimed declarations that the first respondent, Mr Brown, is indebted to them in a total sum of $126,019,336.30. They also claim compensation under the *Australian Consumer Law* (according to the originating process, as applied by Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) for alleged misleading or deceptive conduct.
2. The applicants initially sought freezing orders ex parte, which were made on 18 March 2021. The second respondent, CMB Investments 1993 Pty Ltd, was included as a party because there was a suggestion in the evidence that it may have received property from Mr Brown.
3. On 25 March 2021, by consent, the court made orders appointing Matthew Woods and Hayden White of KPMG (**Receivers**) as receivers and managers of the property of both respondents. The court formally noted in the orders that Mr Brown had acknowledged his indebtedness to the applicants in the total amount referred to above. The orders included directions as to the Receivers' entitlement to recovery of their reasonable costs and expenses from receivership property.
4. On 10 May 2021 a sequestration order was made against the estate of Mr Brown in a separate proceeding, and he became a bankrupt. John Shanahan was appointed as his trustee in bankruptcy (**Trustee**). Since then, Mr Shanahan has participated in this proceeding as an interested party.
5. The Receivers provided their final report in relation to the receivership property on 15 June 2021 and, pursuant to the orders of the court, the receivership ended on 16 June 2021 (for convenience I will continue to refer to them as the Receivers).
6. The court ordered the winding up of CMB Investments on 30 June 2021 in another separate proceeding, and appointed Richard Tucker and John Bumbak of KordaMentha as liquidators.

## Orders sought

1. The applicants and Receivers now seek orders concerning the Receivers' entitlement to recover their reasonable costs and expenses from any assets of the respondents. The orders sought arise out of the following problem which the Receivers perceive. The assets of the respondents which they have identified and recovered to date are extremely modest; compared to the acknowledged indebtedness to the applicants, they are negligible. But it is at least theoretically possible that in the course of the bankruptcy or liquidation, the Trustee or liquidators, respectively, may identify and realise further assets. The Receivers wish to assert, if appropriate, an interest in any assets so identified and recovered or an interest in the proceeds of realising those further assets. The Receivers may claim an equitable lien under the principle enunciated by Dixon J in *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 at 174 in respect of their costs (i.e., remuneration) and expenses.
2. The Receivers therefore now seek a number of orders which, broadly speaking, would be to the following effect.
3. First, they ask the court to formally note in the orders that they have asserted equitable liens with respect to their costs and expenses over the modest amount of money which the Receivers have realised and brought in, over any proceeds arising out of the ownership of certain racehorses in which Mr Brown appears to have an interest, and over any future property that may be realised.
4. Second, the Receivers seek orders permitting them to apply the modest amount of money that they have realised to their costs and expenses without the need to file and pass accounts.
5. Third, the Receivers seek orders requiring that they be given at least 21 days' notice of any proposed distribution of any future property or proceeds either of Mr Brown or CMB Investments, and the amount or origin of the future proceeds or property.
6. Fourth,the Receivers seek orders permitting them, if they receive such notice, to have liberty to apply to the court to enforce any asserted equitable lien against that property on the giving of 48 hours' written notice.
7. Fifth, the Receivers also seek an order pursuant to s 60 of the *Bankruptcy Act 1966* (Cth), or the implied jurisdiction of the court, that the proceedings be otherwise stayed until delivery of the final report by the Trustee or otherwise until further order.
8. Finally, the applicants and the Receivers seek leave under s 471B of the *Corporations Act 2001* (Cth), to the extent necessary, to proceed against CMB Investments for the purposes of seeking these orders.

## Applying funds currently held

1. Only one aspect of those orders sought is uncontroversial. It is the Receivers' application for permission to apply the modest amount of proceeds they have realised to date, namely $5,433.44, to their costs and expenses. One of the Receivers, Mr Woods, has sworn an affidavit dated 29 June 2021 which establishes that the Receivers are entitled to costs and expenses in an amount which, on any view, far exceeds that sum.
2. It would be a waste of further costs to require the Receivers to file and pass accounts in order to apply that amount of money to their costs and expenses. It is appropriate to dispense with that requirement and to authorise payment out of the modest sum that has been realised, without requiring accounts to be filed or passed: *Ide v Ide* [2004] NSWSC 751; (2004) 50 ACSR 324 at [24]‑[26]; *Hutchins, in the matter of Ardenberg Pty Ltd (in liq) (Administrators Appointed) (No 3)* [2021] FCA 519 at [9].
3. The balance of the orders sought by the applicants and Receivers are in controversy.

## Leave to proceed

1. CMB Investments appeared by a solicitor on instructions from the liquidators. The interest of CMB Investments in the matters in issue was largely confined to the question of whether the applicants and Receivers should be granted leave to proceed against CMB Investments under s 471B of the *Corporations Act*.
2. CMB Investments submitted that leave was unnecessary, but, in any event, should not be granted. The Receivers made submissions which did not positively assert or establish that leave was required, but which said, in effect, that if it was required, it should be granted, given what was submitted to be the limited impingement on any property of CMB Investments which would follow from the orders proposed.
3. There is a prima facie case that leave to proceed is required under s 471B, which provides:

**Stay of proceedings and suspension of enforcement process**

While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:

(a) a proceeding in a court against the company or in relation to property of the company; or

(b) enforcement process in relation to such property;

except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

1. The necessity for leave, in my view, emerges out of the order sought by the Receivers that they be given at least 21 days' notice of any proposed distribution of future proceeds of either the first or second respondents. While the proposed order does not clearly state who the subject of the order is, the company, CMB Investments, is a party to the proceeding and the liquidators are not, and neither the applicants nor the Receivers sought to join the liquidators. Insofar as the order touches upon CMB Investments (as distinct from Mr Brown's personal bankruptcy), it can only be directed against the company. On the face of things, then, it falls within the ordinary meaning of the phrase 'proceed with … a proceeding in a court against the company'.
2. It is not necessary to go into further detail to resolve the argument about leave because, for reasons which will emerge later, CMB Investments, on instructions provided by the liquidators, has accepted a practical resolution of the Receivers' concern about notice of any distribution of property. In those circumstances, I consider it appropriate to grant leave for the limited purpose of the Receivers seeking the order at paragraph 4 of their minute.

## The assertion of equitable liens

1. The Trustee had broader bases for opposition to the orders sought. The Receivers submitted that it was necessary to provide a procedural 'framework' for any application they may make in the future asserting an equitable lien over such property as may be realised by either the Trustee or the liquidators at a future time. Save in relation to some modest winnings apparently won by one of the racehorses, there is no basis for the Receivers to make an application at present asserting an equitable lien over any property. That is for the simple and obvious reason that there is no property which appears to be in existence, or to be available, over which that interest can be asserted. The question of whether there is a sufficient causal connection between the efforts of the Receivers and any future recoveries of property to justify an equitable lien, or any other order requiring payment of their costs and expenses out of that property, is not a matter which can be determined on a hypothesis made in a vacuum.
2. The practical concern expressed by the Receivers in light of this was that the Trustee or the liquidators, if they did realise such property, might seek to apply it either in payment of their own costs and expenses, or by way of a dividend to creditors, without acknowledging the claim to the lien or giving the Receivers a proper opportunity to assert it.
3. The Trustee opposed the orders sought on various bases. The Trustee submitted that the proceedings should not 'hang around' for the likely three years or longer for which the bankruptcy may run. The Trustee submitted that the Receivers should file any application asserting an equitable lien now. He submitted that he could not make decisions to pursue recovery action if potential claims to liens existed. For example, if a claim for a lien was asserted and found to be valid, it might be in the interests of the bankrupt estate to disclaim the property instead of taking steps to recover it. The Trustee submitted that if questions like that were to persist, it would be an unacceptable impediment to his administration of the bankrupt estate in the discharge of his duties.
4. The Trustee also characterised the orders sought by the Receivers as 'holding orders'. It was submitted that if the orders noted asserted claims to an equitable lien, that could lead third parties who may be in possession of assets of the bankrupt estate to refuse to provide those assets to the Trustee because of doubts over whether the Trustee is entitled to them or the Receivers are.
5. Nevertheless, counsel for the Trustee acknowledged that if assets were recovered and the Receivers asserted a claim to them, including possibly by way of an equitable lien, the Trustee would deal with that claim in the ordinary course in accordance with his duties under the *Bankruptcy Act*, including s 58(5) which provides that nothing in s 58, concerning the vesting of property in the Trustee, affects the right of a secured creditor to realise or otherwise deal with his or her security.
6. Counsel for the Trustee also addressed the Receivers' concern that the Trustee may distribute assets realised in the bankruptcy, or take them for himself in payment of his own costs and expenses, without giving the Receivers an opportunity to assert the lien. After exchanges between bar table and bench, both the Trustee, and CMB Investments on instructions provided by its liquidators, indicated that they would have no objection to orders requiring the Trustee and the company respectively to include the Receivers in circulars to creditors which are sent out in the usual way (in the end, counsel for CMB Investments confirmed that the instructions of the liquidators indicated that it would be more convenient if the liquidators were made subject to the order rather than the company).
7. It appears to me to be likely that notification of that kind will permit the Receivers to learn, promptly and ahead of time, of the realisation of any assets, and of any proposal to disburse those assets. Counsel for the Receivers indicated, after taking instructions, that their clients remained concerned that, although they might be included in such circulars, there would be no certainty about whether and to what extent property recovered would be notified to them, and whether any proposals to pay money out would be notified ahead of time. However, the Receivers did not develop that submission in any detail or point to any specific reason why a direction of the kind proposed would not be sufficient.

## Consideration

1. In my view, the competing concerns that I have outlined are to be resolved in the following way.
2. *First*, I do not consider that there is any utility in the court noting the assertion of a claim by the Receivers to present or future property, and I consider that to do so would be undesirable. Insofar as property is already in the hands of the Receivers, there is no need for that to be noted, because it is, as I have indicated, uncontroversial that they may apply that modest sum of money to their costs and expenses. To the extent that there is property which has been identified and does exist, but is not in the hands of the Receivers - for example, the winnings of the previously mentioned racehorse - it is open to the Receivers now to assert that lien if they wish, and for any issues arising from that to be resolved in the ordinary course. To the extent that their wish to assert a lien relates to future property, that is, at this stage, entirely hypothetical. I accept, as the Trustee submitted, that a formal notation by the court could be confusing to third parties, even if what is in truth noted is only the assertion of a claim. I say that without accepting, as the Trustee also submitted, that this confusion was an objective the Receivers sought to achieve.
3. *Second*, there has been no final judgment in this proceeding so it remains on foot. Despite Mr Brown's acknowledgment of indebtedness, the monetary claims made by the applicants have not been finally determined by binding judgment. Nevertheless, the proceedings will obviously be inutile while the respective insolvency administrations are on foot. Without precluding any application for leave to proceed under s 58(3) of the *Bankruptcy Act* or s 471B of the *Corporations Act*, this proceeding is no longer a convenient forum for the applicants to recover the sums which they seek in their originating process. I therefore consider it appropriate to make the status of the proceeding clear by ordering, pursuant to the court's general power under s 23 of the *Federal Court of Australia Act 1976* (Cth), which encompasses its implied power to control its own proceedings, a stay of the proceeding until further order, subject to the other orders which I will be making.
4. *Third*, self-evidently there is no point in forcing the Receivers to make any application now asserting an interest in property which does not exist. But they were Receivers appointed in this proceeding, for the purpose of the proceeding, pursuant to orders of the court, and the court has made orders providing for the payment of their costs and expenses and the realisation of assets for that purpose and other purposes. So on the face of things, if after future developments the Receivers see a need to assert a claim to any particular asset, it would be appropriate for them to assert that claim in the context of this proceeding.
5. *Fourth*, there is no need to make any provision for any procedural framework for any such asserted claim, beyond a simple provision for liberty to apply. If the Receivers wish to make an application asserting, for example, an equitable lien over any particular asset of one of the respondents, and if the Receivers determine that they will need to also seek leave under s 58(3) of the *Bankruptcy Act* or s 471B of the *Corporations Act*, they can seek that leave at the same time.
6. *Fifth*, as already indicated I consider that the concern of the Receivers, that they receive adequate advance notice of any potential disbursement of assets which have been identified and realised by the Trustee or the liquidators, is likely to be adequately met by an order requiring, in effect, the Receivers to be included in any circular to the general body of creditors. To the extent that, as matters emerge, that proves not to address the Receivers' concern adequately, the Receivers will have the general liberty to apply. I note that the Trustee's counsel indicated that it may be open to the Receivers to sit on the committee of creditors in the bankruptcy. If that transpires, it will provide the Receivers with further comfort.
7. *Sixth*, as I have indicated, I consider it is appropriate to give leave under s 471B of the *Corporations Act* to the extent necessary for the order requiring the Receivers to be included in any circularisation to the general body of creditors to be made, on the basis that this will be an attenuated version of the orders about notification sought in the Receivers' minute.

## Conclusion

1. In my view, resolving the issues in the manner I have outlined above will strike a suitable balance between the interests of the Receivers, the Trustee and CMB Investments. I have referred to the Trustee's submission that it will be unsatisfactory in his administration of the bankrupt estate for this proceeding to 'hang around', and that it may impede his decisions to pursue or realise assets. However, it seems to me that, in the end, that is simply a function of the common circumstance that the Trustee may wish to realise a particular asset while being aware that there is another party who may assert a claim to that asset, perhaps by way of a security interest. The *Bankruptcy Act* makes provision for situations of that kind.

## Costs

1. I will order that the applicants pay CMB Investments' costs of the hearing on the basis that they were seeking an indulgence to permit them to proceed against the company and it was necessary for the liquidators to instruct a practitioner to appear to assist the court in that regard. As to whether the Receivers should also be jointly liable for those costs, or liable for the costs of the Trustee, it is appropriate after hearing oral submissions to permit the Receivers to file a very short submission raising any authorities pertaining to their arguably distinct position as officers appointed by the court, rather than adversarial parties. Directions facilitating that will be made.

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| I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson. |

Associate:

Dated: 19 July 2021

SCHEDULE OF PARTIES

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| Applicants |  |
| Fourth Applicant: | 365 PLANT HIRE PTY LTD (ACN 621 477 978) |
| Fifth Applicant: | JAYTONA PTY LTD (ACN 137 723 418) |
| Sixth Applicant: | NAMEO PTY LTD (ACN 155 839 197) |