Federal Court of Australia

Davaria Pty Limited v 7-Eleven Stores Pty Ltd (No 14) [2023] FCA 449

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| File number(s): | VID 180 of 2018VID 182 of 2018 |
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| Judgment of: | **O’CALLAGHAN J** |
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| Date of judgment: | 9 May 2023 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – reports of referees appointed pursuant to s 54A of the *Federal Court of Australia Act 1976* (Cth) adopted in whole  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 54A*Federal Court Rules 2011* (Cth) r 28.67 |
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| Cases cited: | *Chocolate Factory Apartments Pty Ltd v Westpoint Finance Pty Ltd* [2005] NSWSC 784 *Gulf Conveyor Systems Pty Ltd v Gulf Integrated Systems Solutions Pty Ltd* [2020] FCA 1245*Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NWLR 549 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Number of paragraphs: | 14 |
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| Date of hearing: | Determined on the papers  |
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| Counsel for the Applicants: | Mr D Pritchard SC with Mr P Tucker, Mr NYH Li and Mr A Rizk |
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| Solicitor for the Applicants: | Levitt Robinson Solicitors |
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| Counsel for Galactic Seven Eleven Litigation Holdings LLC: | Mr SG Finch SC with Mr DTW Wong |
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| Solicitor for Galactic Seven Eleven Litigation Holdings LLC: | Madison Marcus |
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| Contradictor: | Mr JA Redwood SC with Mr RK Jameson |
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| Costs referee: | Ms EM Harris |
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| Counsel for the Administrator: | Mr D Pritchard SC |
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| Solicitor for the Administrator: | Levitt Robinson Solicitors |
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ORDERS

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|  | VID 180 of 2018 |
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| BETWEEN: | DAVARIA PTY LIMITED (ACN 165 206 404)First ApplicantKAIZENWORLD PTY LTD (ACN 163 833 565)Second Applicant |
| AND: | 7-ELEVEN INC (A TEXAS CORPORATION)Second RespondentGALACTIC SEVEN ELEVEN LITIGATION HOLDINGS LLCThird Respondent |
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|  | VID 182 of 2018 |
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| AND BETWEEN: | PARESHKUMAR DAVARIAFirst ApplicantKHUSHBU DAVARIASecond ApplicantJATINDER PAL SINGH (and another named in the Schedule)Third Applicant  |
| AND: | GALACTIC SEVEN ELEVEN LITIGATION HOLDINGS LLCSecond Respondent  |

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| order made by: | O’CALLAGHAN J |
| DATE OF ORDER: | 9 May 2023 |

**THE COURT NOTES THAT:**

1. Pursuant to section 33ZB of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**), the persons affected and bound by these orders are:
	1. the Applicants;
	2. any group member in the proceeding that has not opted out of the proceeding (**Group Members**);
	3. Stewart Alan Levitt trading as **Levitt Robinson** (solicitors for the Applicants);
	4. **Galactic** Seven Eleven Litigation Holdings LLC (the litigation funder);
	5. **7-Eleven** Stores Pty Ltd (ACN 005 299 427, the First Respondent); and
	6. the Administrator (Steven Nicols of Nicols + Brien).
2. In these orders:
	1. **Administrator** means Steven Nicols of the accounting firm Nicols & Brien, appointed as the Administrator of the Settlement Scheme pursuant to the First Settlement Orders.
	2. **Approval Application** means the Interlocutory Application dated 12 August 2021 and amended on 17 December 2021 to approve the settlement of these proceedings.
	3. **Settlement Scheme** has the meaning given to it by Order 3 of the orders made on 31 March 2022 (**First Settlement Orders**).
	4. **Settlement Sum** has the meaning given to it by the First Settlement Orders.

**THE COURT ORDERS THAT:**

**Approval of Referee reports**

1. Pursuant to s 54A of the FCA Act, the following reports be adopted:
	1. the report dated 3 April 2023 prepared by Judicial Registrar Edwards;
	2. the report dated 24 April 2023 exhibited to the Affidavit of Elizabeth Mary Harris filed 24 April 2023; and
	3. the report dated 26 April 2023 exhibited to the Affidavit of Elizabeth Mary Harris filed 26 April 2023.

**Contradictor’s costs**

1. Pursuant to section 33V and 33ZF of the FCA Act, the Contradictor’s costs in relation to this proceeding and proceeding VID182/2018 be approved in the amount of $294,030 ($247,280.00 incurred by Mr Redwood, $46,750.00 incurred by Mr Jameson).
2. Pursuant to section 33V and 33ZF of the FCA Act, the Contradictor’s costs and disbursements for the conduct of this proceeding and proceeding VID182/2018 in the amount of $294,030 paid by Galactic as costs of the proceedings, be paid to Galactic, or to its nominated bank account, by the Administrator out of the Settlement Sum.

**Applicants’ costs and disbursements of the Approval proceedings**

1. Pursuant to section 33V and 33ZF of the FCA Act, the Applicants’ legal costs and disbursements for the conduct of the Approval Application in this proceeding and proceeding VID182/2018 be approved in the amount of $2,248,194.10 (excluding the Contradictor’s costs).
2. Pursuant to section 33V and 33ZF of the FCA Act, the Applicants’ legal costs and disbursements for the conduct of the Approval Application in this proceeding and proceeding VID182/2018 in the amount of $1,244,206.12 paid by Galactic, be paid to Galactic, or to its nominated bank account, by the Administrator out of the Settlement Sum.
3. Pursuant to section 33V and 33ZF of the FCA Act, the Applicants’ legal costs and disbursements for the conduct of the Approval Application in this proceeding and proceeding VID182/2018 that are unpaid in the amount of $959,036.48, be paid to Levitt Robinson, or to its nominated bank account, by the Administrator out of the Settlement Sum.
4. Pursuant to section 33V and 33ZF of the FCA Act, the amount of $36,707 be paid to the Costs Referee, or to her nominated bank account, by the Administrator out of the Settlement Sum for the costs of her Report dated 26 April 2023.

**Administration costs and disbursements of the Administration of the Settlement Scheme**

1. Pursuant to section 33V and 33ZF of the FCA Act, the Administration costs and disbursements for the conduct of the administration of the Settlement Scheme be approved in the amount of $1,908,837.95.
2. Pursuant to section 33V and 33ZF of the FCA Act, the amount of $9,086 be paid to the Costs Referee, or to her nominated bank account, by the Administrator out of the Settlement Sum for the costs of her Report dated 26 April 2023.
3. Liberty to apply.

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

REASONS FOR JUDGMENT

O’CALLAGHAN J:

1. On 8 March 2023, pursuant to s 54A of the *Federal Court of Australia Act 1976* (Cth), I made the following relevant orders in proceeding VID180/2018 (as amended by an order dated 27 March 2023):

11. … the Referee is further directed to inquire into and report in writing on the questions set out below, and on any further questions that may later be ordered:

a. Are the legal costs and disbursements charged or sought to be charged by the solicitors for the Applicants in relation to the approval of the Settlement from and including 4 August 2021 (including the costs and disbursements incurred in relation to the CFO Application) reasonable ([**Approval or**] **Applicants’ Costs**)?

b. Are the costs sought by the Administrator, including the costs of any legal work to be undertaken by Levitt Robinson, in relation to the administration of the Settlement reasonable (**Administration Costs**)?

c. If not, by what amount should those costs be disallowed?

…

18. As to the Contradictor’s costs:

a. A Registrar of the Court be appointed pursuant to s 54A of the *Federal Court of Australia Act 1976* (Cth) to inquire and report in accordance with the *Federal Court Rules 2011* (Cth) on the reasonableness of the Contradictor’s costs and disbursements charged or sought to be charged from 15 September 2021 to 13 May 2022 (the **referral**) [(**Contradictor’s Costs**)].

…

1. On the same day, I made cognate orders in proceeding VID182/2018.
2. On 3 April 2023, Judicial Registrar Edwards provided a report on the Contradictor’s Costs to the court. The learned Registrar considered that the Contradictor’s costs and disbursements charged or sought to be charged in the sum of $294,030 (including GST) were reasonable.
3. On 24 April 2023, Ms Elizabeth Harris provided a report on Approval Costs to the court. In circumstances where the report is adopted and orders are made on the papers, Ms Harris considered the reasonable Approval Costs to be $2,248,194.10.
4. On 26 April 2023, Ms Harris provided a report on Administration Costs to the court. Ms Harris considered the reasonable Administration Costs to be $1,908,837.95.
5. I then directed my Associate to send each report to the parties, as envisaged by the Note to r 28.67 of the *Federal Court Rules 2011* (Cth).
6. On 9 May 2023, the parties sent an agreed email to my Chambers inviting me by consent to adopt the reports and otherwise to make consequential orders consistently with a proposed minute of order that accompanied the email.
7. I now give brief reasons for making those orders.
8. The power to appoint a referee and deal with a referee report is conferred by s 54A of the Federal Court Act:

**54A Referral of questions to a referee**

(1) Subject to the Rules of Court, the Court may by order refer:

(a) a proceeding in the Court; or

(b) one or more questions arising in a proceeding in the Court;

to a referee for inquiry and report in accordance with the Rules of Court.

(2) A referral under subsection (1) may be made at any stage of a proceeding.

(3) If a report of a referee under subsection (1) is provided to the Court, the Court may deal with the report as it thinks fit, including by doing the following:

(a) adopting the report in whole or in part;

(b) varying the report;

(c) rejecting the report;

(d) making such orders as the Court thinks fit in respect of any proceeding or question referred to the referee.

1. Rule 28.67(1) of the Federal Court Rules provides:

**28.67 Proceeding on report**

(1) After a report has been given to the Court, a party may, on application, ask the Court to do any of the following:

(a) adopt, vary or reject the report, in the whole or in part;

(b) require an explanation by way of a further report by the referee;

(c) remit on any ground, for further consideration by the referee, the whole or any part of the matter that was referred to the referee for inquiry and report;

(d) decide any matter on the evidence taken before the referee, with or without additional evidence;

(e) give judgment or make an order in relation to the proceeding or question.

1. The principles relevant to the court’s discretion in an application under r 28.67 of the Federal Court Rules are well-established. An authoritative summary of those principles was set out by Katzmann J in *Gulf Conveyor Systems Pty Ltd v Gulf Integrated Systems Solutions Pty Ltd* [2020] FCA 1245 at [13]-[21]. Relevantly for present purposes, it suffices to say that an application to adopt a referee’s report is not an appeal. The Court does not conduct a hearing de novo or a rehearing. Further, the discretion to adopt, vary or reject a referee’s report is to be exercised in a manner consistent with the context and purpose of the relevant rules. The purpose of the rules is to provide, where the interests of justice so require, “a form of partial resolution of disputes alternative to orthodox litigation, and it would frustrate that purpose to allow the reference to be treated as some kind of warm-up for the real contest”. See *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NWLR 549 at 563 (Gleeson CJ). On the other hand, “if the referee’s report reveals some error of principle, absence or excessive jurisdiction, patent misapprehension of the evidence or perversity or manifest unreasonableness in fact finding, that would ordinarily be a reason for rejection”. See *Chocolate Factory Apartments Pty Ltd v Westpoint Finance Pty Ltd* [2005] NSWSC 784 at [7] (McDougall J).
2. I have considered, and will adopt, each of the referee’s reports. Each of them, if I may say so with respect, is well-reasoned and well-structured, and correctly applies the relevant principles.
3. I have marked the reports as exhibits, as follows:
	1. the report dated 3 April 2023 prepared by Judicial Registrar Edwards: Exhibit X;
	2. the report dated 24 April 2023 exhibited to the Affidavit of Elizabeth Mary Harris filed 24 April 2023: Exhibit Y; and
	3. the report dated 26 April 2023 exhibited to the Affidavit of Elizabeth Mary Harris filed 26 April 2023: Exhibit Z.
4. I will accordingly make the orders sought.

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| I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Callaghan. |

Associate:

Dated: 9 May 2023

SCHEDULE OF PARTIES

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|  | VID 182 of 2018 |
| Applicants |  |
| Fourth Applicant:  | SUMAN MEET KAUR |