Federal Court of Australia

LFI Ventures Pty Ltd v Carter, in the matter of Australian Vocational Learning Institute Pty Ltd (in liq) [2021] FCA 1555

|  |  |  |
| --- | --- | --- |
| File number(s): | NSD 687 of 2021 | |
|  |  | |
| Judgment of: | **GOODMAN J** | |
|  |  | |
| Date of judgment: | 14 December 2021 | |
|  |  | |
| Catchwords: | **PRACTICE AND PROCEDURE** – application for leave to amend Originating Process – where application made before Points of Defence filed – where no prejudice to the defendants | |
|  |  | |
| Legislation: | *Corporations Act 2001* (Cth) Sch 2 s 90-15  *Federal Court of Australia Act 1976* (Cth) ss 22, 37M  *Federal Court Rules 2011* (Cth) rr 1.32-1.35, 8.21  *Higher Education Support Act 2003* (Cth) Sch 1A  *National Vocational Education and Training Regulator Act 2011* (Cth) | |
|  |  | |
| Cases cited: | *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175  *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1138; (2016) 109 ACSR 191  *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* [2010] FCAFC 101;(2010) 187 FCR 261  *McGraw-Hill Financial, Inc v Clurname Pty Ltd* [2017] FCAFC 211; (2017) 123 ACSR 467  *Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm)* [2016] FCAFC 2; (2016) 332 ALR 199 | |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 55 | |
|  |  | |
| Date of hearing: | 18 November 2021 | |
|  |  | |
| Counsel for the Plaintiffs: | Mr J Hynes | |
|  |  | |
| Solicitor for the Plaintiffs: | William James | |
|  |  | |
| Counsel for the First and Second Defendants: | Mr S B Whitten | |
|  |  | |
| Solicitor for the First and Second Defendants: | WGC Lawyers | |
|  |  | |
| Counsel for the Third Defendant: | Ms T L Wong SC with Mr J K S Entwisle | |
|  |  | |
| Solicitor for the Third Defendant: | Clayton Utz | |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 687 of 2021 |
| IN THE MATTER OF AUSTRALIAN VOCATIONAL LEARNING INSTITUTE PTY LTD (IN LIQUIDATION) ACN 097 453 828 | | |
| BETWEEN: | LFI VENTURES PTY LTD ACN 131 581 612  First Plaintiff  PAUL ANDREW LANGE  Second Plaintiff | |
| AND: | MOIRA KATHLEEN CARTER  First Defendant  AUSTRALIAN VOCATIONAL LEARNING INSTITUTE PTY LTD (IN LIQUIDATION) ACN 097 453 828  Second Defendant  COMMONWEALTH OF AUSTRALIA BY AND THROUGH THE DEPARTMENT OF EDUCATION, SKILLS AND EMPLOYMENT  Third Defendant | |

|  |  |
| --- | --- |
| order made by: | GOODMAN J |
| DATE OF ORDER: | 14 December 2021 |

THE COURT ORDERS THAT:

1. The plaintiffs have leave to file, within 7 days of the date of these Orders, an Amended Originating Process in the form of the proposed Amended Originating Process attached to their Interlocutory Process dated 29 September 2021.
2. The defendants pay the plaintiffs’ costs of the Interlocutory Process dated 29 September 2021.

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

REASONS FOR JUDGMENT

GOODMAN J:

# introduction

1. By Interlocutory Process dated 29 September 2021 and filed on 1 October 2021, the plaintiffs seek leave to amend their Originating Process filed on 14 July 2021.
2. The respondents oppose only the inclusion of a paragraph numbered 3A. By that paragraph, the plaintiffs seek relief in the form of an order under s 90-15 of the *Insolvency Practice Schedule (Corporations)* (**IPS**) in Schedule 2 of the *Corporations Act 2001* (Cth) (**Act**) for the removal of the first defendant (**Liquidator**) as the liquidator of the second defendant (**Company**).
3. For the reasons set out below, the leave sought is granted.

# Background

1. The background facts are not in dispute.
2. From about March 2013 until 2 December 2016, the Company carried on a business of providing vocational training courses. In the course of that business, the Company received payments from the third defendant (**Department**).
3. The first plaintiff (**LFIV**) is the sole shareholder of the Company. The second plaintiff (**Mr Lange**) is the sole director of both LFIV and the Company.
4. On 2 December 2016, LFIV resolved to wind up the Company and to appoint Mr Justin Cadman as its liquidator.
5. On 19 June 2018, the Liquidator replaced Mr Cadman as liquidator of the Company.
6. On 6 June 2019, the Department lodged a proof of debt in the sum of $28,985,159 (**Proof of Debt**) and on 10 June 2019 the Liquidator admitted the Proof of Debt in full.
7. On 20 September 2019 and 21 May 2020, the Court made orders pursuant to s 477(2B) of the Act approving the entry by the Company and the Liquidator into a funding agreement with the Department.
8. On 1 June 2020, the Liquidator commenced the proceeding numbered NSD 613/2020 in this Court against various persons including Mr Lange and LFIV.
9. On 14 July 2021, LFIV filed the Originating Process in the present proceeding. By that Originating Process, LFIV sought a declaration that the Liquidator had wrongly admitted the Department as a creditor in the winding up of the Company and orders under s 90-15 (1) of the IPS directing the Liquidator to: (1) revoke her decision to admit the Proof of Debt; and (2) reject the Proof of Debt.
10. On 26 August 2021, the Court conducted the initial case management hearing in this proceeding. The orders made on that day included orders for the joinder of Mr Lange as a plaintiff and for the filing of Points of Claim by 1 September 2021 and Points of Defence by 6 October 2021.
11. On 2 September 2021, the solicitors for the plaintiffs wrote to the solicitors for the defendants, providing the Points of Claim, together with a proposed Amended Originating Process. Shortly afterwards, the Points of Claim were filed with the Court.
12. The Points of Claim addressed two broad topics.
13. The first is the basis for the orders sought in the Originating Process for: (1) the revocation of the Liquidator’s decision to admit the Proof of Debt; and (2) the rejection of the Proof of Debt (**Proof of Debt Claim**). The salient allegations in the Proof of Debt Claim are that:
14. the Company was an “NVR registered training organisation” within the meaning of the *National Vocational Education and Training Regulator Act 2011* (Cth) and was approved as a “VET provider” within the meaning of Schedule 1A to the *Higher Education Support Act 2003* (Cth);
15. pursuant to those Acts, the Company became entitled to certain payments from the Department;
16. in the 2015 calendar year:
    1. the Company became entitled to payments from the Department in the order of $74.5 million;
    2. the Department paid the Company an amount in the order of $44.5 million, with the result that the Department owes the Company an amount in the order of $30 million; and
17. thus, the Department was not a creditor of the Company and the Proof of Debt was wrongly admitted by the Liquidator.
18. The second topic addressed in the Points of Claim is the basis for the orders sought in the proposed paragraph 3A for the removal of the Liquidator (**Removal Claim**). Paragraph 3A is in the following form:

Further, an order under one or both of section 90-15(1) and 90-15(3) (b) of the IPS that:

* 1. the First Defendant cease being liquidator of the Second Defendant; and
  2. another registered liquidator be appointed as liquidator of the Second Defendant in place of the First Defendant.

1. The salient allegations in the Points of Claim in support of the Removal Claim are:
2. the Liquidator owes duties under the Act and at general law to exercise her powers and discharge her duties with requisite care and diligence; to act in good faith in the best interests of the Company and for a proper purpose; and to not improperly use her position to gain an advantage for herself or someone else or cause detriment to the Company;
3. the Liquidator breached those duties in:
   1. failing, neglecting or refusing to recover an amount due and owing to the Company by the Department (being an amount in the order of $30 million);
   2. failing to properly or adequately consider, assess and rule on the Proof of Debt and instead improperly admitting the Proof of Debt;
   3. failing, neglecting or refusing to properly communicate with Mr Lange concerning the Company otherwise than via a conversation initiated by Mr Lange when the Liquidator was initially appointed and a public examination of Mr Lange;
   4. seeking and obtaining Court approval for entry into a funding agreement with the Department on the erroneous premise that the Department was a creditor of the Company, a matter which should have been known to the Liquidator had she conducted herself to the required standard;
   5. incurring remuneration and expenses in the winding up of the Company which were not required and by which the Liquidator has gained an unwarranted advantage and benefit in circumstances where the winding up of the Company should have proceeded as a solvent winding up;
4. for the above reasons, the Liquidator has conducted herself in a manner which would cause a fair-minded lay observer to reasonably apprehend that she has not brought, or may not continue to bring, an impartial mind to the conduct of the liquidation of the Company, including that:
   1. the interests of the Department have been preferred by the Liquidator to the interests of other creditors, members and contributories of the Company (including LFIV and Mr Lange); and
   2. the liquidator has received substantial remuneration which she would not otherwise have received if the Proof Debt had not been admitted and the winding up of the Company had proceeded as a solvent winding up.
5. On 3 September 2021, the solicitors for the plaintiffs wrote to the solicitors for the defendants, seeking the consent of their clients to the plaintiff having leave to file the proposed Amended Originating Process.
6. By 16 September 2021, the solicitors for each of the defendants had notified the solicitors for the plaintiffs that their clients would not consent to the plaintiffs having such leave.
7. On 1 October 2021, as noted above, the plaintiffs filed their Interlocutory Process seeking leave to file the proposed Amended Originating Process.
8. No Points of Defence have been filed.

# Legal framework

1. Rule 8.21 of the *Federal Court Rules 2011* (Cth) provides in so far as is presently relevant:

**8.21 Amendment generally**

             (1)  An applicant may apply to the Court for leave to amend an originating application for any reason, including:

                    …

(b)  to avoid the multiplicity of proceedings; or

       …

(g) to add or substitute a new claim for relief, or a new foundation in law for a claim for relief, that arises:

      (i)  out of the same facts or substantially the same facts as those already pleaded to support an existing claim for relief by the applicant

…

1. Rule 8.21 enables an applicant to seek leave to amend an originating application *“for any reason, including”* those in subrules 8.21(1) (a) to (g). Those subrules do not provide a code, but are examples of amendments that may be the subject of application: *McGraw-Hill Financial, Inc v Clurname Pty Ltd* [2017] FCAFC 211; (2017) 123 ACSR 467 (***McGraw-Hill Financial***) at [23]. The breadth of the power of the Court to grant leave is seen also in rr 1.32-1.35: *McGraw-Hill Financial* at [24], which rules include a power to make any order the Court considers appropriate in the interests of justice.
2. The Court’s discretion to allow an amendment, although broad, is to be exercised in a manner which best promotes the overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible: s 37M (1) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**); *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* [2010] FCAFC 101;(2010) 187 FCR 261 (***Cement Australia***) at [43]; *Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm)* [2016] FCAFC 2; (2016) 332 ALR 199 (***Tamaya Resources***) at [122]-[124].
3. The exercise of the discretion is informed by the principles enunciated by the High Court of Australia in *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 (***Aon***): *Tamaya Resources* at [125].
4. The weight to be given to the considerations identified in *Aon*, individually and in combination, and the outcome of the balancing process, may vary depending on the facts in the individual case: *Cement Australia* at [51].

# Consideration

1. Leave to amend should be granted for the following reasons.
2. *First*, the delay was relatively short.
3. The point in time from which delay is measured is no earlier than the date of commencement of the proceeding: see *Tamaya Resources* at [136]. As noted above, the Originating Process was filed on 14 July 2021 and the application to amend the Originating Process was foreshadowed on 3 September 2021 and filed on 1 October 2021. Thus, the application to amend has been brought at an early stage of the proceeding and prior to the defendants filing their Points of Defence.
4. The Company and the Liquidator submitted that in assessing the delay, regard should be had to the period commencing in October 2016 (when, it is submitted, the plaintiffs became aware of the Department’s claim that it was owed an amount in the order of $30 million by the Company) because the plaintiffs could have sought the removal of Mr Cadman for failing to “pursue the Department” but took no steps to do so.
5. Whilst, as the Full Court explained in *Tamaya Resources* at [135]-[136], it is permissible to have regard to events prior to the commencement of a proceeding in considering the question of delay (being the delay commencing from the start of the proceeding to the making of the amendment application), I do not accept the submission made. The Removal Claim concerns the present Liquidator and her conduct, including her admission of the Proof of Debt. Any failure by the plaintiffs to pursue Mr Cadman is of little, if any, moment.
6. *Secondly*, the absence of prejudice.
7. Importantly, none of the defendants contend that they would be prejudiced by the delay in including the relief concerning the Removal Claim as part of the Originating Process. In any event, it is difficult to discern any substantial prejudice given the early stage of the proceeding.
8. *Thirdly*, the explanation for the delay is adequate in the circumstances.
9. The strength of the explanation required to explain the delay in bringing an amendment application depends on the particular case and affidavit evidence is not always required: *Tamaya Resources* at [154]. In the present case, the plaintiffs’ solicitor has deposed that the need to amend became apparent during the preparation of the Points of Claim. This explanation is far from detailed, however it falls to be considered in the present case in the context of a short delay in respect of which no defendant is prejudiced.
10. The relatively brief period of the delay and the absence of any apparent resulting prejudice to the defendants are factors which tend strongly toward an exercise of the discretion in favour of allowing the amendment. In this context, a less than detailed explanation for the delay is of less weight than it might be in a case in which there had been an extensive delay or the delay had caused prejudice to any of the defendants.
11. *Fourthly*, none of the other factors discussed in *Aon* tend against a favourable exercise of the discretion.
12. As the amendment application has been made at an early stage of the proceeding, a number of the other factors discussed in *Aon* are of little moment in the exercise of the discretion. For example: the parties’ choices to date in the proceeding and the consequences of those choices; the detriment to other litigants in the Court; and question of costs associated with the amendment, are factors which may carry significant weight where the amendment is sought when the proceeding is well underway, but that is not this case. None of the defendants submitted that any of these factors were significant to the present application.
13. *Fifthly*, allowing the amendment will likely avoid a further proceeding.
14. If leave to amend were not to be given, then the likely result would be a separate proceeding in which the Removal Claim would be pursued. Such a result is one to be avoided if possible, as is clear from s 22 of the FCA Act and r 8.21(1) (b).
15. *Sixthly*, there may be some overlap between the factual substrata of the two Claims. The Proof of Debt Claim will have, at its core, a calculation of the balance owing as between the Company and the Department. The Removal Claim will likely also include consideration of that calculation and the related question as to whether the Liquidator undertook such a calculation and if so the method of such calculation and the appropriateness of such method. If the Claims were to be tried in a separate proceeding, then a different conclusion as to the balance owing as between the Company and the Department might be reached in each proceeding. There may be other areas of overlap which become apparent upon the close of pleadings or from the evidence once filed. In circumstances where the Court is not in a position to conclude definitively that there will be no overlap, it is more efficient for both Claims to be kept together in the one proceeding.
16. The question of factual overlap also arises for consideration in the application of r 8.21(1) (g), and in particular whether the new claim for relief arises out of the same facts or substantially the same facts as those already pleaded to support an existing claim for relief by the plaintiffs. I accept that the new claim for relief in paragraph 3A does not arise from the *same facts* as those pleaded in support of the existing claim. Whether that new claim for relief can be said to arise from *substantially the same facts* involves a question of degree: *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1138; (2016) 109 ACSR 191 at [10].
17. However, it is not necessary to resolve this question because even if the new claim for relief were not to arise from substantially the same facts, this would not be a factor of significance in the exercise of the discretion. It is not a necessary condition for a grant of leave to amend that r 8.21(1) (g) be satisfied. As noted above, subrules 8.21(1) (a) to (g) do not provide a code and the Court’s discretion is broad. The short delay, the absence of prejudice to the defendants, the desirability of avoiding a further proceeding and the possibility of overlapping factual substrata discussed above significantly outweigh any non-satisfaction of r 8.21(1) (g).
18. *Seventhly*, I am not satisfied that allowing the amendment so as to include the Removal Claim would likely affect the quick, inexpensive and efficient conduct of the proceeding in such a way that leave should be refused.
19. The defendants submitted that allowing the amendment would likely have several effects, which the Court should strive to avoid.
20. The first is that the amendment would substantially broaden the proceeding. That may be so, but it is not a reason to disallow the amendment. It was open to the plaintiffs to have included the broader allegations from the commencement of the proceeding and as noted above, the defendants have not suggested that the inclusion of those claims now instead of then would prejudice them.
21. The second effect, which was suggested by the Department, concerns procedural issues in hearing the two Claims together. In particular, the Department submitted that:
22. the Proof of Debt Claim will involve a hearing *de novo* as to whether the Proof of Debt disclosed a true liability of the Company enforceable against it and thus whether it should have been admitted;
23. in contrast, the Removal Claim does not focus upon the legal relationship between the Company and the Department but instead focuses primarily upon the propriety of the Liquidator’s conduct since her appointment;
24. trying the Removal Claim together with the Proof of Debt Claim would cause significant procedural difficulties for the parties and the Court because the Court would be required to determine the validity of the Proof of Debt *de novo* whilst receiving evidence and submissions concerning the Liquidator’s conduct and being asked to determine whether or not the Liquidator acted properly in admitting the Proof of Debt; and
25. this would be analogous to a Court hearing a merits review and judicial review of administrative action in the same hearing and evidence that may be admissible on one Claim may not be admissible on the other.
26. Whilst I accept that the legal framework in which each of the Claims is to be determined is different and that there is a possibility that evidence admissible in respect of one Claim would not be admissible in respect of the other (noting that the submissions made did not descend from the general to any particular examples) I am not satisfied that these matters are of such significance as to tend against a grant of leave to amend.
27. It is commonplace for a proceeding to involve more than one claim and for those claims to be different in nature, requiring the application of different legal standards and the consideration of the use which may be made of the evidence adduced. For example, courts are sometimes required to determine in the same proceeding issues which require an objective analysis (such as the construction of a contract) and other issues which require subjective analysis (such as duress, equitable estoppel, undue influence and misrepresentation); and to use particular evidence for the resolution of one issue but not another.
28. *Eighthly*, I do not accept the defendants’ submissions that it would be more efficient to determine only the Proof of Debt Claim in this proceeding. In this regard:
29. the Company and the Liquidator submitted that if the Proof of Debt Claim were to be determined in favour of the plaintiffs, then the Removal Claim would be otiose, particularly as the plaintiffs would then have the voting power required to remove the Liquidator using the process provided for by IPS s 90-35;
30. the Department submitted that if the Proof of Debt Claim were to be determined in favour of the defendants, then the Removal Claim *may* fall away because if there were to be no error in the admission of the Proof of Debt it is difficult to see how the Removal Claim could proceed; and
31. all of the defendants submitted that the Proof of Debt Claim should be heard independently of the Removal Claim, with the Removal Claim to be brought as a separate proceeding once the Proof of Debt Claim had been determined.
32. It cannot be concluded on the materials presently before the Court that the Removal Claim would be rendered otiose by the determination of the Proof of Debt Claim assuming that the latter claim were to be heard first.
33. To the extent that there may be some merit in determining one of the Claims prior to the other, this should be considered within this proceeding rather than by limiting this proceeding to the Proof of Debt Claim and requiring the plaintiffs to commence a separate proceeding in order to pursue the Removal Claim, for the reasons already discussed.
34. *Finally*, I am not persuaded by the remaining submissions of the Company and the Liquidator that leave to amend should be refused. In particular:
35. their submission that the Removal Claim *may* be motivated by a desire to frustrate or delay the prosecution of proceeding NSD 613/2020, which appears to suggest a potential abuse of process by the plaintiffs, was not expanded upon orally and no application was made to cross examine Mr Lange. The evidentiary basis for such a serious conclusion is absent. In these circumstances, the submission cannot be accepted; and
36. their submission that the Removal Claim has slight prospects of success and thus should not be allowed, is not accepted. That submission is pitched at a high level of generality and falls well short of establishing that the Removal Claim is so untenable that it would be futile to allow the proposed amendment to the Originating Process. As part of this, the submission that the Removal Claim requires a pleading that the Liquidator admitted the Proof of Debt with knowledge that the Proof of Debt was inaccurate or with indifference as to its accuracy is not accepted. It may be sufficient to plead, as the plaintiffs have, that the Liquidator failed to give proper or adequate consideration to the Department’s claim.

# Conclusion

1. For the reasons set out above, I will grant leave to the plaintiffs to file their proposed Amended Originating Process. The defendants are to pay the plaintiffs’ costs of the Interlocutory Process.

|  |
| --- |
| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Goodman. |

Associate:

Dated: 14 December 2021