FEDERAL COURT OF AUSTRALIA

Williams & Kersten Pty Ltd v Walton Construction (Qld) Pty Ltd (in liq), in the matter of Walton Construction (Qld) Pty Ltd (in liq)
[2019] FCA 1201

|  |  |
| --- | --- |
| File number: | QUD 390 of 2019 |
|  |  |
| Judge: | **REEVES J** |
|  |  |
| Date of judgment: | 2 August 2019 |
|  |  |
| Catchwords: | **CORPORATIONS** – application for the appointment of a special purpose liquidator – where the plaintiffs seek the appointment of a special purpose liquidator for the purpose of investigating and commencing proceedings related to the recovery of damages or compensation – where the liquidators neither consent to, nor oppose, the application –whether there was a reasonable basis for the plaintiffs’ belief that the identified matters required further investigation – application allowed  |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth)  |
|  |  |
| Cases cited: | *GDK Projects Pty Ltd, in the matter of Umberto Pty Ltd (in liq) v Umberto Pty Ltd (in liq)* [2018] FCA 541*In re Universal Distributing Company Limited (in liquidation)* (1933) 48 CLR 171*In the matter of* *ACN 152 546 453 Pty Ltd (formerly Hemisphere Technologies Pty Ltd) (in liq)* [2018] NSWSC 1002*McCann, in the matter of Walton Construction (Qld) Pty Ltd (In Liq) v QHT Investments Pty Ltd* [2018] FCA 1986*Stewart v Atco Controls Pty Ltd (In liq)* (2014) 252 CLR 307; [2014] HCA 15  |
|  |  |
| Date of hearing: | 23 July 2019 |
|  |  |
| Registry: | Queensland |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 30 |
|  |  |
| Counsel for the Plaintiffs: | Mr S Monks |
|  |  |
| Solicitor for the Plaintiffs: | Bounty Law |
|  |  |
| Counsel for the Defendants: | Mr G Handran |
|  |  |
| Solicitor for the Defendants: | Colin Biggers & Paisley |

ORDERS

|  |  |
| --- | --- |
|  | QUD 390 of 2019 |
| IN THE MATTER OF WALTON CONSTRUCTION (QLD) PTY LTD (IN LIQUIDATION) ACN: 100 833 225 |
| BETWEEN: | WILLIAMS & KERSTEN PTY LTD ACN 141 894 724First PlaintiffPAGE STEEL FABRICATIONS PTY LTD ACN 006 636 004Second Plaintiff |
| AND: | WALTON CONSTRUCTION (QLD) PTY LTD (IN LIQUIDATION) ACN 100 833 225First DefendantWALTON CONSTRUCTION PTY LTD (IN LIQUIDATION) ACN 060 900 218Second DefendantMICHAEL GERARD MCCANN, GRAHAM ROBERT KILLER AND ANDREW STEWART REED HEWITT (IN THEIR CAPACITY AS THE LIQUIDATORS OF THE FIRST AND SECOND DEFENDANTS)Third Defendant |

|  |  |
| --- | --- |
| JUDGE: | REEVES J |
| DATE OF ORDER: | 2 AUGUST 2019 |

THE COURT ORDERS THAT:

1. The parties are to consult, prepare and submit a draft set of orders to reflect these reasons.

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

REASONS FOR JUDGMENT

REEVES J:

# INTRODUCTION

1. Two creditors, one of Walton Construction (Qld) Pty Ltd (in liquidation) and the other of Walton Construction Pty Ltd (in liquidation) (**the** **Walton companies**), have applied for the appointment of a Special Purpose Liquidator (**SPL**) under Division 90, s 90-15 of the Insolvency Practice Schedule (Corporations) (**the Schedule**), which is Schedule 2 to the *Corporations Act 2001* (Cth) (**the Act**).
2. The plaintiffs require that order because they wish to have the SPL investigate bringing, and if appropriate bring, proceedings to recover damages or compensation from Mr Walton, a director of each of the Walton companies, for his alleged involvement in two schemes in breach of his duties as a director, and from the National Australia Bank Limited (**the NAB**) for its alleged involvement in the same schemes.

# THE CONTEXT

1. Their primary target, to use an expression adopted in submissions, is the latter. In *McCann, in the matter of Walton Construction (Qld) Pty Ltd (In Liq) v QHT Investments Pty Ltd* [2018] FCA 1986 (***Walton***), Derrington J described how the schemes mentioned above were devised and implemented between April and October 2013, shortly before the Walton companies were placed in liquidation (see *Walton* at [53]–[55] and [73]–[95]).
2. In brief summary, the first scheme involved replacing a number of bank guarantees issued by the NAB to the principals of various construction projects in which the Walton companies were engaged, with surety bonds issued by a company called Assetinsure Pty Ltd. The total sum of those replaced guarantees was estimated in submissions to be at least $5 to $7 million.
3. The second scheme involved a restructuring under which various assets, including an $18.8 million debt owed by one of the Walton companies (Walton Construction Pty Ltd) to the other (Walton Construction (Qld) Pty Ltd), were transferred from the Walton companies to corporate entities connected with a firm of restructuring advisers known as the Mawson Group (**Mawson**).
4. As unsecured creditors of the Walton companies, the plaintiffs claimed that the schemes had a serious impact on them. Specifically, they claimed that they “diverted funds away to the NAB (which as at April 2013 was not fully secured) that might otherwise have been used to pay other unsecured creditors”. They claimed this kept the Walton companies operating while they were insolvent and “new unsecured debts were incurred that would otherwise not have been, and which were unlikely to ever be paid because of the funds that were being diverted away to the NAB”.
5. In *Walton*, Derrington J found that the Walton companies were insolvent from at least the end of April 2013 (see *Walton* at [10], [65], [96] and [98]–[100]). His Honour also made findings concerning the purpose of the schemes and he came to a number of conclusions in relation thereto, exemplified by the following (at [129]):

… the strategies engaged in by Mawson from April through to September 2013, including the entry into of the asset sale agreements, were pursued to extricate the NAB from the Mawson Group and, thereby, relieving Mr Walton and his associated companies from liability under any guarantees securing the NAB debt. This was clearly the primary objective of Mawson’s strategy and the restructuring was part of that. There is nothing in any of the documents which suggests that Mr Walton or Mawson had any consideration to the interests of Walton Qld or Walton Construction or their unsecured creditors, in particular.

1. The Walton companies resolved to appoint administrators in October 2013. At the second meeting of creditors in November 2013, it was resolved that the companies be wound up. The administrators were appointed as liquidators. They were subsequently replaced by the current liquidators (the Liquidators).
2. A director of each of the plaintiffs is a member of the Committee of Inspection of one of the Walton companies.

# THE ORDERS SOUGHT

1. The special purpose for which the SPL is sought to be appointed was outlined in the amended originating application in the following terms:

1. Pursuant to section 90-15 of Division 90 of Schedule 2 of the *Corporations Act*, an order that Michael Caspaney (**special purpose liquidator**) be appointed as additional liquidator to the first and second [defendants] (**the Companies**) for the purpose of:

(a) conducting investigations into any of the matters set out in the **Schedule** to these orders, including by:

(i) inspecting the books and records of the Companies, excluding any files and working papers of the third [defendants];

(ii) conducting (further) public examinations pursuant to sections 596A or 596B of the *Corporations Act* or obtaining orders for production pursuant to section 597(9) of the *Corporations Act* or under the relevant provisions of either the *Federal Court Rules 2011* or the *Uniform Civil Procedure Rules 1999* (Qld); and

(iii) requiring statements to be provided pursuant to section 475(2) of the *Corporations Act*;

(b) commencing and pursuing any claim, including commencing any legal proceedings, that may be available to the Companies or the special purpose liquidators in relation to any of the matters set out in the Schedule, including considering and obtaining legal advice in respect of pursuing any such claim;

(c) taking any steps in relation to any matters set out in the Schedule, including by commencing legal proceedings, to preserve or to protect the assets of the Companies, or assets to which the Companies or the special purpose liquidators claim to be entitled, whether or not in the possession of the Companies; and

(d) exercising any powers conferred on the liquidator of the Companies by sections 477 and 506(1)(b) of the *Corporations Act*, including the power to seek relief under section 1317H of the *Corporations Act*, in relation to any matters set out in the Schedule, except for the powers contained in section 477(l)(a) of the *Corporations Act*.

1. The following matters were set out in the Schedule referred to in this order:

I. Whether, in relation to the Companies’ engagement of, dealings with, or following the instructions, advice, recommendations or proposals of Mawson Restructures and Workouts Pty Ltd and the people and entities related to or connected with that company (collectively, **Mawson**), any of the appointed directors or officers of the Companies breached the statutory or fiduciary duties (or both) that they owed to the Companies.

II. Whether the National Australia Bank Ltd (including its officers, agents or employees) was involved in, or is otherwise liable for (whether as an accessory or otherwise), any breaches of duty that may be found pursuant to paragraph I.

III. Whether any of the directors or officers of the Companies breached section 588G of the *Corporations Act*.

1. The other orders sought in the amended originating application were as follows:

2. Pursuant to section 90-15 of Division 90 of Schedule 2 of the *Corporations Act*, an order that the third [defendants] or any liquidator/s of the Companies from time to time (other than the special purpose liquidator) (**the Liquidators**) use their reasonable endeavours to assist the special purpose liquidators to exercise the powers given to them in Order 1 above, including by providing any documents or information previously prepared or obtained by them in investigating or pursuing any claim in relation to any of the matters set out in the Schedule PROVIDED that the special purpose liquidator shall pay any costs incurred or remuneration payable to the Liquidators in respect of the assistance referred to in this order.

3. Pursuant to section 90-15 of Division 90 of Schedule 2 of the *Corporations Act*, an order that the special purpose liquidators shall, in accordance with the requirements of the *Corporations Act*, report to creditors of the Companies and the Liquidators on the terms of their appointment and subsequently once every six months during the course of their appointment.

4. An order that any costs or expenses incurred by, or approved remuneration payable to, the special purpose liquidator:

(a) is not to be paid from any property of the Companies except that which the special purpose liquidator recovers as a consequence of the actions he has been specifically appointed to undertake pursuant to these orders; but

(b) maybe paid from any other funding which the special purpose liquidator may obtain.

5. An order that the costs of the third [defendant] be costs in the liquidation of the Companies.

1. Subject to the following two matters, the Liquidators neither consent to, nor oppose, these orders being made:
2. that the fees and expenses of the SPL cannot be deducted from the property of the company that is available to the unsecured creditors generally; and
3. that the activities of the SPL do not cut across any actions that the Liquidators are currently pursuing, or anticipate pursuing, against Mr Walton or other persons.

# THE RELEVANT LEGISLATIVE PROVISIONS AND PRINCIPLES

1. Section 90-15 of the Schedule confers power on the Court to “make such orders as it thinks fit in relation to the external administration of a company”. It relevantly provides:

*Court may make orders*

(1) The Court may make such orders as it thinks fit in relation to the external administration of a company.

*Orders on own initiative or on application*

(2) The Court may exercise the power under subsection (1):

(a) on its own initiative, during proceedings before the Court; or

(b) on application under section 90‑20.

*Examples of orders that may be made*

(3) Without limiting subsection (1), those orders may include any one or more of the following:

(a) an order determining any question arising in the external administration of the company;

(b) an order that a person cease to be the external administrator of the company;

(c) an order that another registered liquidator be appointed as the external administrator of the company;

(d) an order in relation to the costs of an action (including court action) taken by the external administrator of the company or another person in relation to the external administration of the company;

(e) an order in relation to any loss that the company has sustained because of a breach of duty by the external administrator;

(f) an order in relation to remuneration, including an order requiring a person to repay to a company, or the creditors of a company, remuneration paid to the person as external administrator of the company.

*Matters that may be taken into account*

(4) Without limiting the matters which the Court may take into account when making orders, the Court may take into account:

(a) whether the liquidator has faithfully performed, or is faithfully performing, the liquidator’s duties; and

(b) whether an action or failure to act by the liquidator is in compliance with this Act and the Insolvency Practice Rules; and

(c) whether an action or failure to act by the liquidator is in compliance with an order of the Court; and

(d) whether the company or any other person has suffered, or is likely to suffer, loss or damage because of an action or failure to act by the liquidator; and

(e) the seriousness of the consequences of any action or failure to act by the liquidator, including the effect of that action or failure to act on public confidence in registered liquidators as a group.

1. A company is taken to be under “external administration” if a liquidator has been appointed to it (see s 5-15(c) of the Schedule).
2. This section applies despite the fact that, in the present matter, the external administration of the Walton companies commenced before Schedule 2 to the Act came into force (see ss 600K and 1615 of the Act).
3. The creditors of a company under external administration have the necessary standing to apply for an order under s 90-15 because they fall within the terms of s 90-20(1)(a): “a person with a financial interest in the external administration of the company”. The expression “financial interest” is defined in s 5-30(a)(ii) of the Schedule to include a creditor of the company. Accordingly, as creditors of the Walton companies, the plaintiffs have standing to bring the present application.
4. Pertinent for present purposes, it can be seen that s 90-15(3)(c) above provides, as an example of an order that may be made under s 90-15(1), “an order that another registered liquidator be appointed as the external administrator of the company”.
5. In respect of s 90-15(4)(a) above, no contention has been raised in this application about the Liquidators performance of their duties to date. To the contrary, the plaintiffs made it clear in their submissions that they did not criticise the conduct of the Liquidators, nor did they criticise their decision not to commence a proceeding with respect to the matters described in the schedule to the first proposed order above.
6. As to the relevant principles applicable to the appointment of a SPL, in *In the matter of* *ACN 152 546 453 Pty Ltd (formerly Hemisphere Technologies Pty Ltd) (in liq)* [2018] NSWSC 1002, Gleeson JA observed (at [15] and [19]):

15 It is well-established that in the case of a voluntary winding-up, the Court has power to appoint an additional or special purpose liquidator on an application by (among others) a creditor: *Lo v Nielsen & Moller (Autoglass) (NSW) Pty Ltd* [2008] NSWSC 407 at [29]-[30] (Barrett J). Prior to [the Schedule], that power arose under s 511 of [the Act] which relevantly provided that, in a voluntary winding-up, the Court may exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court, if satisfied that the exercise of the power would be just and beneficial.

…

19 The power conferred under s 90-15(1) of [the Schedule] is not expressed to be subject to the “just and beneficial” requirement that was contained in s 511 of [the Act]. As I observed in *Re Hawden Property Group Pty Ltd (ACN 003 528 345) (in liq)* [2018] NSWSC 481; (2018) 125 ACSR 355 at [7], the ambit of s 90-15 has not yet been fully considered in the authorities. In *GDK Projects Pty Ltd, in the matter of Umberto Pty Ltd (in liq) v Umberto Pty Ltd (in liq)* [2018] FCA 541, Farrell J expressed the view at [33] that the power conferred under s 90-15(1) is “unconstrained” while adding that “it is difficult to envisage circumstances where the power would be exercised if the Court could not be satisfied that it would be just and unless the applicant had demonstrated sufficient utility to the external administration”.

# THE PLAINTIFFS’ CONTENTIONS

1. The plaintiffs contended that, in the circumstances of this application, the Court does not need to reach a conclusion as to the prospects of success of any prospective litigation and nor does it need to critique or compare the different options advanced by the Liquidators or themselves. Nonetheless, they accepted that they needed to show that there is a reasonable basis for their view that the matters identified in the schedule to the first order warranted investigation and that there is sufficient evidence to support the possibility of an action being brought against Mr Walton and/or the NAB.
2. Adopting the expression used by Farrell J in *GDK Projects Pty Ltd, in the matter of Umberto Pty Ltd (in liq) v Umberto Pty Ltd (in liq)* [2018] FCA 541 (at [20(19)] above), the plaintiffs contended that the appointment of the SPL would be “both just, and of sufficient utility to the external administration” of the Walton companies for some, or all, the following reasons:
3. the matters in issue are “substantial and serious” and the collapse of the Walton companies cost unsecured creditors in excess of $70 million;
4. the NAB has the means to satisfy any judgment that may be entered against it;
5. the appointment of a SPL would enable the unsecured creditors to obtain a “second opinion” about the viability of any proceedings which might be brought against Mr Walton and/or the NAB;
6. that “second opinion” would involve the SPL, his legal advisers and those who would fund the proposed proceeding providing a “different perspective” from that of the Liquidators;
7. the Liquidators were constrained by the funds available to them and the fact that those funds “in effect come out of the pockets of the unsecured creditors”. They were also required to have regard to “the considerable cost of lawyers investigating the claim, and identifying a funder”;
8. public interest factors, particularly insolvent trading by the directors of the Walton companies, were also involved;
9. the general body of unsecured creditors will not be funding the SPL and they will not have to bear the risk of any proceedings brought by the SPL, nor the costs associated therewith;
10. since any proceedings the SPL brings will have to be funded by a litigation funder, there will be little, or no, prospect of any “fruitless proceedings” being brought; and
11. the proposed remit of the SPL will not interfere with, or prejudice, the work of the Liquidators.

# THE LIQUIDATORS’ POSITION

1. Mr McCann, one of the Liquidators, filed an affidavit in response to this application. In that affidavit he described in some detail the steps that the Liquidators have undertaken in the liquidation to date, including conducting public examinations of numerous people associated with the companies and commencing a number of proceedings, including the proceeding which resulted in the judgment in *Walton*. Mr McCann also disclosed that the Liquidators proposed to conduct further public examinations with a view to bringing further claims against various persons for the benefit of the companies’ creditors. They included further proceedings against both Mr Walton and several persons and entities associated with Mawson for breaches of ss 180 to 184 and 79 of the Act.
2. With respect to the possibility of commencing a proceeding against the NAB, Mr McCann said the Liquidators had reviewed all relevant documents available to them, including some provided by the NAB itself, and obtained legal advice in 2016 and 2017 as to whether there existed a “viable claim” against the NAB. He said that he used the expression “viable claim” to refer to “a claim that is in the best interests of credits [sic – creditors] to pursue by regard to its prospect of success, and the potential cost, delay and return to creditors, if funding could be arranged”. With respect to such a proceeding, Mr McCann concluded his affidavit by stating (at [90]):

For the reasons I depose to above:

(a) based on the advice obtained on two separate occasions from different lawyers, the Liquidators do not consider there is a viable claim against NAB and do not intend to commence litigation against NAB; and

(b) the Liquidators do not, in any event, have any funds to commence such proceedings or meet any applications for security for costs that may be brought, nor do they have any intention to seek funding for such proceedings.

# CONSIDERATION

1. For the following reasons, and subject to the observations below about the form of the proposed orders, I consider it is appropriate to appoint a SPL to the Walton companies, limited to the purpose identified in proposed Order 1 above and the schedule thereto.
2. First, I agree with the plaintiffs’ contentions that, in the circumstances of this application, it is not necessary to make a rigorous assessment of the prospects of any proceeding the SPL may bring. Nor is it necessary to consider the Liquidators opinions concerning the alternative courses available, as is commonly required in applications to set aside a deed of company arrangement. For these reasons, in determining this application, I did not consider it necessary to examine the contents of the confidential affidavits filed by both parties.
3. Secondly, however, I also agree with the plaintiffs that it is necessary to consider whether there is a reasonable basis for their belief that the matters identified in the schedule to Order 1 above warrant further investigation and the obtaining of the “second opinion” referred to in their contentions. On that question, having regard to the conclusions reached by Derrington J in *Walton* and for the reasons given by the plaintiffs in their contentions, as outlined at [22] above, particularly those in [22(a)]–[22(d)] and [22(f)], I consider there is such a basis.
4. Thirdly, in reaching this conclusion, I have taken account of the plaintiffs’ intention that the expense of the further investigations to be undertaken by the SPL and the risk of any potential proceedings that may be commenced will be borne by the plaintiffs in conjunction with the SPL and any persons they engage, including any litigation funder. That constraint will be further supported by the need for the SPL to obtain the approval of the Court on the terms of engagement of any litigation funder who may become involved. Finally, the reporting requirements in proposed Order 2 above will provide further protection to the general body of unsecured creditors of the two companies.
5. Fourthly, while I have generally considered all of the matters adverted to earlier in these reasons, in reaching this conclusion, I have also had particular regard to the following:
6. the plaintiffs have levelled no criticism of the conduct of the Liquidators and nor have they criticised their decision not to commence a proceeding of the kind they want the SPL to investigate and consider commencing (see at [19]);
7. while the Liquidators do not, based upon the advice they have obtained, consider there is, what they describe as, a “viable claim”, their decision not to pursue any such claim is partly affected by the lack of funding available to them (see at [24] above); and
8. subject to the observations below, the fees and expenses of the SPL will not be deducted from the property of the company that is available to the unsecured creditors generally (see at [13(a)] above) and the activities of the SPL will not cut across any actions that the Liquidators are currently pursuing or anticipate pursuing (see at [13(b)] above).

# CONCLUSION

1. For these reasons, I will make orders under s 90-15 of the Schedule for the appointment of a SPL to the Walton companies. However, as discussed during the hearing of this application, I consider the form of the plaintiffs’ proposed orders requires some attention. For that reason, the appropriate order, at this stage, is that the parties are to submit a draft set of orders to reflect that discussion and, in particular, to take account of the following:
2. the orders need to address the sentiments expressed by the parties at [13(b)] (the Liquidators) and [22(i)] (the plaintiffs) above;
3. proposed Order 3 (see at [12] above) needs to provide greater detail of the matters upon which the SPL is required to report to the Liquidators and the unsecured creditors; and
4. proposed Order 4 (see at [12] above) needs to make it clear that the SPL may only have resort to any fund that he collects as a consequence of the actions taken by him in respect of the matters described in the schedule to the proposed orders. That is to say, essentially to reflect the principles illuminated by Dixon J in *In re Universal Distributing Company Limited (in liquidation)* (1933) 48 CLR 171 and, more recently, in *Stewart v Atco Controls Pty Ltd (In liq)* (2014) 252 CLR 307; [2014] HCA 15.

|  |
| --- |
| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves. |

Associate:

Dated: 2 August 2019