

# SUPREME COURT OF QUEENSLAND

CITATION: *Shepard v HP Industrial Pty Ltd* [2018] QSC 10

PARTIES: **ADAM SHEPARD (IN HIS CAPACITY AS LIQUIDATOR OF HP INDUSTRIAL PTY LTD ACN 117 409 300 (IN LIQUIDATION))**  
(applicant)  
**v**  
**HP INDUSTRIAL PTY LTD ACN 117 409 300 (IN LIQUIDATION)**  
(respondent)

FILE NO: BS 10240 of 2016

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 31 January 2018

DELIVERED AT: Brisbane

HEARING DATE: 1 September 2017

JUDGE: Douglas J

ORDER: **1. An extension of time of six months be granted for the applicant to bring proceedings pursuant to s 588FF(1) of the Act.**

**2. Further submissions about the form of the order and costs shall be heard**

CATCHWORDS: CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – EFFECT OF WINDING UP ON OTHER TRANSACTIONS – PREFERENCES AND VOIDABLE TRANSACTIONS – GENERALLY – where delay in identifying voidable transactions – where extension of time sought to bring applications under s 588FF(1) – where extension of time unlikely to cause prejudice  
*Corporations Act* 2001 (Cth), ss 588FF(1), 588FF(3)  
*BP Australia Ltd v Brown* (2003) 58 NSWLR 322; [2003] NSWCA 216, cited  
*Clout v Andi-Co Australia Pty Ltd* (2013) 96 ACSR 512; [2013] QSC 278, cited  
*Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489; [2015] HCA 10, cited

*Francis v Bratovich* [2008] WASC 242, distinguished  
*Green v Chiswell Furniture Pty Ltd* [1999] NSWSC 608, cited  
*Taylor v Woden Constructions Pty Ltd* [1998] FCA 1228, followed  
*Williams v KIM Management Pty Ltd* [2013] 1 Qd R 387; [2012]  
 QSC 143, cited

COUNSEL: Mr P Somers for the applicant  
 Ms K E Downes QC with Ms S Forder for Mr Roberts, Mr Barrett  
 and Mr McCart in their capacity as directors of the respondent

SOLICITORS: Bennet & Philp for the applicant  
 Holding Redlich for Mr Roberts, Mr Barrett and Mr McCart in their  
 capacity as directors of the respondent

### **Background**

- [1] This is an application pursuant to s 588FF(3)(b) of the *Corporations Act* 2001 (Cth) to extend the time in which the applicant may commence proceedings pursuant to s 588FF(1) of the Act for orders about potential voidable transactions relating to the company respondent now in liquidation. What he seeks is commonly referred to as a “shelf order”.<sup>1</sup> A shelf order is used to extend the time in which an application may be brought to make orders under the section if a court is satisfied that a company has entered into a transaction that is voidable. The shelf order permits an extension of time pursuant to s 588FF(3)(b). Such an order is sought here because the applicant is not presently in a position to identify all potential transactions and parties pursuant to such an application.
- [2] The company was voluntarily wound up by a resolution passed on 3 September 2014. Different liquidators were appointed initially who were removed on 6 October 2016 with the applicant being appointed in their place. He has met with difficulties because the company was part of a larger group of companies, some of which have also been wound up where the liquidator has only been able to obtain some documents in respect of the group and three only in respect of the respondent. Those three consisted of a creditor list of 30 June 2013 and two sets of management accounts of 30 June 2013 and 28 February 2014. The management accounts consisted only of profit and loss statements and a balance sheet. The applicant came to learn that a large number of documents concerning the group of companies, 1,296 cartons of records, were destroyed on 27 July 2015.
- [3] That has made his task obviously more difficult. He is also presently without funds to pursue his inquiries but is finalising negotiations for a funding arrangement with the Department of Employment and from two creditors of the company, a Mr and Mrs Tagget. As soon as funding becomes available the applicant intends to apply for orders for public examinations.

### **Discussion**

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<sup>1</sup> See *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489; [2015] HCA 10.

- [4] The question for me is whether it is fair and just in all the circumstances to make the order.<sup>2</sup> Finn J, in particular, in *Taylor v Woden Constructions Pty Ltd* said that it was ordinarily appropriate to consider the merits of the application proposed to be made. His Honour went on to say, however, that a merits inquiry, even of a preliminary character, may not always be necessary. His Honour said:<sup>3</sup>

“Where the liquidator is not in the position to consider the merits but has proper grounds for inquiring into the matter because of suspicion it invites (or that is cast on it) or of the explanation it requires, then provided he can satisfactorily explain his delay in inquiring sufficiently into the matter, he should not be closed out from an extension because he is unable to say he has a meritorious claim. In some instances, as here, it will be sufficient if he can say ‘I do not know if I do but there is reason to inquire’.”

- [5] The liquidator, having come late to the role, is not aware whether the former liquidators have undertaken any action in respect of possible voidable transactions nor whether they have undertaken any real investigation into what are described as “related party” and “associated party loans” set out in the documents he has obtained. Those documents identify total liabilities of \$3,804,201 in respect of shareholder loans and related entity loans. He wishes to investigate through public examinations the circumstances in which those loans came into existence. He explains his delay because of his lack of funding and of documents concerning the company’s affairs but has had negotiations for funding on foot which he hope would soon be resolved.
- [6] He points out that the delay is through no fault of his. He also points to the possibility that the former directors of the company may hold some relevant documents given that they appeared before ASIC to respond to notices to demonstrate issued under s 206F of the Act where ASIC was concerned whether there had been poor financial control and record keeping of the company. The speculative submission was made that the directors may have avoided an ASIC ban by producing adequate records to it.
- [7] The main form of prejudice advanced on behalf of the former directors is that they are concerned that they will not be able to recall much about the operations of the company if they are the subject of a public examination. That is not a very persuasive submission in the circumstances. As was submitted by Mr Somers for the applicant, if they truly have no recollection they may give that evidence in the course of any examination. He also pointed out that, as late as March 2017, the directors of the company offered to assist the applicant but have now withdrawn that proposed assistance.

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<sup>2</sup> *BP Australia Ltd v Brown* (2003) 58 NSWLR 322; [2003] NSWCA 216; *Green v Chiswell Furniture Pty Ltd* [1999] NSWSC 608, applied in *Clout v Andi-Co Australia Pty Ltd* (2013) 96 ACSR 512 at 518 [43]; [2013] QSC 278 at [43] and *Taylor v Woden Constructions Pty Ltd* [1998] FCA 1228 at 6; see also *Fortress Credit (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 505-506 [24]–[26]; [2015] HCA 10 [24]–[26].

<sup>3</sup> *Taylor v Woden Constructions Pty Ltd* [1998] FCA 1228 at 6.

- [8] Ms Downes QC for the respondents argued that other possible respondents had not been served but, if any order I make affects them they have a right to apply to set the order aside.<sup>4</sup> Ms Downes also relied on the decision in *Francis v Bratovich*.<sup>5</sup> There the Court concluded that there had been a failure to explain the relevant delay in the liquidator having litigation funding approved. That delay was much more significant than the current one. Nor had that liquidator made inquiries about the transfer of certain properties said to be of interest.
- [9] In this case, Ms Downes characterised the applicant's conduct as involving merely the reading of a few lever arch volumes of records and discussing funding on no more than three occasions during a period extending over nearly a year. I infer, however, that there has been delay in obtaining a proposal from the Department of Employment which seems to be one of the main likely sources of funding and am satisfied that the delay has been adequately explained. The circumstance that the directors were previously, and quite recently, willing to provide assistance also persuades me that they are unlikely to suffer any prejudice from the delay in the application being brought.

### **Conclusion**

- [10] In the circumstances, it seems to me that the extension of time sought should be granted. It is only for six months in circumstances where the applicant has adequately explained his delay in not being in a position to commence proceedings in the time allowed under s 588FF(3)(a). I also agree that, given the lack of information presently available, there is no need for the Court to consider fully the merits of any proceedings that may be brought. Nor is there any significant actual prejudice shown as a result of the grant of the extension.

### **Order**

- [11] Accordingly, I shall grant an extension of time for six months for the applicant to bring proceedings pursuant to s 588FF(1) of the Act. I shall hear further submissions about the form of the order and costs.

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<sup>4</sup> See *Williams v KIM Management Pty Ltd* [2013] 1 Qd R 387, 390 at 393 [8] and [22]; [2012] QSC 143 at [8] and [22].

<sup>5</sup> [2008] WASC 242.