[2018] QCA 235

COURT OF APPEAL

HOLMES CJ
MORRISON JA
PHILIPPIDES JA

Appeal No 4418 of 2018
DC No 17 of 2017

ANTHONY JOHN CREENAUNE	**Appellant**
v	
WORKCOVER QUEENSLAND	**First Respondent**
MARITIMO OFFSHORE PTY LTD **ACN 070 000 798**	**Second Respondent**
ANDREW CUMMINS & BRIAN SILVA	**Third Respondent**

BRISBANE

TUESDAY, 25 SEPTEMBER 2018

JUDGMENT

HOLMES CJ: The appellant appeals a decision of a District Court judge refusing to grant him default judgment in his action for personal injuries. The basis which his Honour identified for the refusal was that the applicant had failed to obtain the consent of the then administrators of the second respondent before commencing or continuing the proceedings. The appeal turns on whether the administrators' consent to service of the claim and statement of claim on them by post amounted to consent to the appellant's beginning or proceeding with the proceeding against the second respondent while it was in administration, for the purposes of s 440D(1)(a) of the *Corporations Act* 2001.

Section 440D(1) provides:

> "(1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:
>
> (a) with the administrator's written consent, or
>
> (b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes."

The appellant was injured on 4 June 2015, when he fell from a work platform at premises controlled by the second respondent. The second respondent was later placed under external administration on 11 October 2016, although the administration ended on 30 April 2018. On 23rd June 2017, the applicant filed a claim and statement of claim in the District Court. The Chief Executive Officer of the second respondent advised that he would accept service and purported to have the authority of the administrators to do so. However, lawyers for the company in administration advised that the administrators had not given their consent to the appellant's proceeding, with the consequence that the proceedings could not be prosecuted until s 440D(1) was complied with. That led to a letter from the appellant's solicitors to the administrators, advising them in these terms:

> "Unfortunately, section 440D(1)(a) of the Corporations Act 2001, the Act, requires your approval in writing to accept service."

That was incorrect. That is not what s 440D(1)(a) requires.

With that letter, the appellant's solicitors provided the administrators with an authority to accept service. Ultimately, it was returned signed and dated by one of the administrators. The consent, headed Authority to Accept Service, reads, with names omitted:

> "We, [the administrators], hereby consent to [the plaintiff's solicitors] serving the claim and statement of claim in Beenleigh District Court matter 17 of 17 directly upon us by express post."

The claim and statement of claim were then sent to the administrators. That was followed by further correspondence from the appellant's solicitors, culminating in a letter to the administrators, advising that if a notice of intention to defend and defence were not filed, an application for default judgment would be brought. The solicitors for the second respondent

responded by advising that proceedings could not be commenced or proceeded with against it, except with the administrators' written consent or the leave of the Court, and if the application for a default judgment were brought and granted, they would seek to have it set aside.

The appellant, notwithstanding, filed a request for default judgment under r 284 of the *Uniform Civil Procedure Rules*, which was then referred, pursuant to r 982, to a judge of the District Court. The learned primary judge, having considered authority as to the purpose and application of s 440D, reached the conclusion that the words of the provision should be read literally. Consent to receive service was not, his Honour said, the same as consent to a proceeding being commenced or proceeded with. He refused the request for default judgment.

The appellant contends that that reflects error on the primary judge's part. His argument is that acceptance of service amounts to permitting commencement of the proceedings. The reasoning is that consent to continuing proceedings carries the necessary implication of consent to commencing them. Reference is made to obiter dicta of Justice Peter Lyons in *Artahs Pty Ltd v Gall Standfield & Smith (A Firm)* [2013] 2 Qd R 202 at [48], where his Honour expressed the view that filing and serving of a reply would constitute a step in a proceeding.

It can be noted here that the consent in question is not concerned at all with filing and refers simply to service. There may be an argument as to whether service can be said to amount to a step in proceedings in the sense that it must be questionable whether proceedings irregularly commenced can be advanced. It is unnecessary to resolve that issue. However, even if one were to characterise the administrators' consent to acceptance of service in a particular form on themselves as a step, that would amount to agreement to one step in the proceedings, not to continuation of the proceedings, much less to commencement of them against the company.

The implication for which the appellant argues, that this consent amounts to a consent to the proceedings being continued and hence to being commenced, is not rationally available from the limited form of agreement to be seen in the authority to accept service. It is not necessary

to resolve the question of whether an administrator can give consent nunc pro tunc to commencement of proceedings in the way in which a Court can. The primary judge's reasoning in this case was correct. I would dismiss the appeal with costs.

MORRISON JA: I agree.

PHILIPPIDES JA: I also agree.

HOLMES CJ: The orders then are that the appeal is dismissed with costs.