SUPREME COURT OF QUEENSLAND

CITATION:	*Shannon & Ors v Simmons* [2020] QSC 115
PARTIES:	**GLENN MICHAEL SHANNON, RICHARD ALBARRAN and BLAIR ALEXANDER PLEASH in their capacity as liquidators of W2R PTY LTD (IN LIQUIDATION) ACN 126 948 945** (first plaintiffs) **W2R PTY LTD (IN LIQUIDATION) ACN 126 948 945** (second plaintiff) **v** **COREY SIMMONS** (defendant)
FILE NO:	12912/19
DIVISION:	Trial
PROCEEDING:	Application on the papers without oral hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers. Further submissions filed 15 April 2020.
JUDGE:	Flanagan J
ORDER:	**Order as per draft, initialled by me and placed with the papers, with a correction to paragraph 1(c) to reflect interest payable to the date of judgment.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – DEFAULT JUDGMENT – JUDGMENT IN DEFAULT OF APPEARANCE – whether an application under r 288(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) is required to be served on a respondent CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – OFFICERS OF INSOLVENT CORPORATIONS – DUTY TO PREVENT INSOLVENT TRADING – CONSEQUENCES OF BREACH – COMPENSATION AND REPARATION ORDERS – whether the applicants established an entitlement to compensation for loss resulting from insolvent trading

Uniform Civil Procedure Rules 1999 (Qld) r 282
Corporations Act 2001 (Cth) s 588G, s 588M

COUNSEL: S T Lane for the plaintiffs

SOLICITORS: Mills Oakley Lawyers for the plaintiffs

[1] The first applicants are the liquidators of the second applicant, W2R Pty Ltd (W2R). The respondent, Corey Simmons, was at all material times and remains the sole director of W2R.

[2] The applicants apply pursuant to r 288 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR), for the following relief:

(a) a declaration that the respondent failed to prevent debts in the sum of $7,107,109.49 being incurred by W2R in contravention of s 588G(2) of the *Corporations Act* 2001 (Cth);

(b) the respondent pay the applicants the amount of $7,107,109.49 in accordance with s 588M of the *Corporations Act;*

(c) the respondent pay to the applicants interest on the said sum pursuant to s 58 of the *Civil Proceedings Act* 2011 (Qld); and

(d) costs of and incidental to the proceedings on the standard basis.

[3] The applicants request that the application be heard on the papers pursuant to r 489 of the UCPR. The application has the following notation: "This application is not intended to be served on anyone". The matter came before me in the applications list on 14 April 2020. The Court invited further submissions from the applicants as to whether an application to the court for a judgment pursuant to r 288(2) of the UCPR was required to be served. Further submissions addressing this issue were received on 15 April 2020.

[4] For the reasons which follow, I am of the view that:

(a) an application under r 288(2) is not required to be served on a respondent;

(b) the application may appropriately be dealt with on the papers; and

(c) the judgment sought by the applicants should be granted.

(a) There is no requirement for service of an application under r 288(2) of the UCPR

[5] Rule 288 falls within Division 2, Part 1, Chapter 9 of the UCPR. Chapter 9 deals with ending proceedings early and Division 2, Part 1 is concerned with judgment by default for proceedings started by claim. Rule 288 provides:

"**Judgment by default – other claims**

> (1) This rule applies if a defendant is in default and the plaintiff is not entitled to apply for judgment under rule 283, 284, 285 or 286.
>
> (2) The plaintiff may apply to the court for a judgment.
>
> (3) On the application, the court may give the judgment it considers is justified on the pleadings even if the judgment was not claimed."

[6] In the present case, as the applicants seek declaratory relief, they are not entitled to apply for judgment under rr 283, 284, 285 or 286. These rules are differently worded to r 288. Rules 283, 284, 285 and 286 do not refer to applying to the court for a judgment, rather the procedure is the filing of a request for judgment. In such circumstances if an applicant files a request for judgment, the court (as constituted by a Registrar) may give judgment.[1] Rule 288(2) expressly contemplates the making of an application to the court for judgment as opposed to filing a request for a judgment from a Registrar.

[7] It may be thought that an application to the court for judgment under r 288(2) constitutes "an application in a proceeding". Rule 31(5) would ordinarily require service of such an application on a respondent at least two business days before the day set for hearing. Rule 288(2), however, needs to be construed in the context of Division 2, Part 1, Chapter 9. When so construed it is, in my view, readily apparent that an application under r 288(2) does not need to be served.

[8] The starting point is r 281(1) which provides:

> "This division applies if a defendant in a proceeding started by claim has not filed a notice of intention to defend and the time allowed under rule 137 to file the notice has ended."

[9] Division 2 applies to the present proceeding because it was started by claim filed 20 November 2019. The claim was accompanied by a statement of claim filed on the same date. Further, the time for the filing of a notice of intention to defend has ended. Rule 137(1) provides that in a proceeding started by a claim, a notice of intention to defend must be filed within 28 days after the day the claim is served. As at the date the application was filed on 27 March 2020, the respondent had failed to file a notice of intention to defend.

[10] The only express reference to service requirements under Division 2, Part 1, Chapter 9 is r 282 which provides:

> "A plaintiff must prove service of a claim on a defendant in default before judgment may be given under this division against the defendant."

[11] Here there is evidence that one of the liquidators who knew the respondent personally served him with the claim and statement of claim on 20 November 2019.[2] Personal service of the claim is required by the UCPR. Rule 105(1) requires that a person serving an originating process must serve it personally on the person

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1 *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) rr 283(3), 284(3), 285(3) and 286(3).

2 Court Document 6, affidavit of Glenn Michael Shannon filed 27 March 2020, paras 14 and 15.

intended to be served. A claim is an originating process.[3] Rule 17, which falls within Part 2 of Chapter 2 of the UCPR, deals with requirements concerning originating processes. Rule 17(1) requires a plaintiff to provide certain details on the originating process, including telephone and fax numbers and an email address of the plaintiff if acting for themselves, or similar details for a solicitor appointed to act for the plaintiff. Rule 17(1) also requires the provision of an address for service. The claim in the present case contained all the relevant details required by r 17(1).

[12] A claim must also include a statement about filing a notice of intention to defend. Rule 23 provides:

> "The plaintiff must ensure a claim has a statement on it telling the defendant—
>
> (a) the relevant time limited for filing a notice of intention to defend; and
>
> (b) that if the defendant does not file a notice of intention to defend within the time, a default judgment may be obtained against the defendant without further notice."

[13] The claim in the present case contained the statement required by r 23. The respondent, however, having not filed a notice of intention to defend, has not provided the details nor an address for service as required by r 17, which applies in relation to a notice of intention to defend as if the notice were a claim and the defendant were a plaintiff.[4]

[14] The requirement for personal service of a claim is to be contrasted with the service of an application under r 31, which does not require personal service to be effected on a respondent. Rule 112 deals with how ordinary service is effected. As correctly identified by the applicants, as there is no notice of intention to defend filed, there is in fact no address, fax number or email address for service as would ordinarily be the case after a defendant had entered an appearance by filing a notice of intention to defend. Consequently, as a matter of practicality, personal service would need to be effected on the respondent in circumstances where an application under r 288(2) does not constitute an originating process.[5]

[15] As I have already observed, the only explicit requirement for service for an applicant seeking judgment by default under Division 2, Part 1, Chapter 9 is proof of service of the claim. The notice on such a claim as required by r 23 expressly informs a defendant that a default judgment may be obtained without further notice. In addition, as no notice of intention to defend has been filed, an applicant for default judgment is not in a position to effect ordinary service and the UCPR does not expressly or by necessary implication require personal service of an application under r 288(2).

(b) The application may be dealt with on the papers

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3 UCPR r 8(2).
4 UCPR r 140(1).
5 Plaintiffs' Supplementary Outline of Submissions, para 9(a).

[16] The court may refuse to deal with an application without an oral hearing if it considers it inappropriate to do so.[6] The applicants seek not only discretionary declaratory relief, but also judgment for a considerable amount of money in excess of $7 million. When it is considered, however, that what is being sought is judgment in default of pleadings, it is, in my view, not inappropriate to deal with the application on the papers.

[17] The task of the court pursuant to r 288(3) is quite limited. This sub-rule provides:

> "On the application, the court may give the judgment it considers is justified on the pleadings even if the judgment was not claimed."

[18] As observed by Fryberg J in *Crane Distribution Ltd v Brown*[7] sub-rule (3) directs attention to the "only pleading in the matter, the statement of claim".

[19] His Honour continued:[8]

> "… an affidavit in support of an application is not a pleading within the meaning of the *Uniform Civil Procedure Rules.* The rule does not empower the court to give judgment in accordance with the evidence. That is the purpose of the summary judgment rules. Rule 288 requires judgment on the pleadings. Indeed I question whether it is appropriate in an application under that rule to file affidavits which address anything other than service of the claim, whether the defendant is in default and any other procedural matter relevant to the applicability of the rule." (footnotes omitted)

[20] In *GMW Group Pty Ltd (Receivers and Managers Appointed) (in liquidation) & Ors v Michael Saadie in his own right and trading as GMW1 & Ors*[9] McMurdo J (as his Honour then was) identified that in cases within Division 2, Part 1, Chapter 9 of the UCPR, "the basis for a judgment is the admission of the plaintiff's case which is implied from the defendant's default in pleading to it". The Court's limited task, therefore, is to consider the material facts pleaded in the statement of claim, which are deemed to have been admitted in default of pleading, and determine whether on those admitted material facts to give the judgment the Court considers is justified.

(c) Section 588G of the *Corporations Act*

[21] Section 588G(1) and (2) provides:

> "(1) This section applies if
>
> (a) a person is the director of a company at the time when the company incurs a debt; and
>
> (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and

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6 UCPR r 489(2)(a).
7 [2011] QSC 90 at [4].
8 *Crane Distribution Ltd v Brown* [2011] QSC 90 at [11].
9 [2012] QSC 140 at [25].

(c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and

(d) that time is at or after the commencement of this Act.

…

(2) By failing to prevent the company from incurring the debt, the person contravenes this section if:

(a) the person is aware at that time that there are such grounds for so suspecting; or

(b) a reasonable person in a like position in a company in the company's circumstances would be so aware."

[22] Section 588M deals with recovery of compensation for loss resulting from insolvent trading:

"(1) This section applies where:

(a) a person (in this section called the director) has contravened subsection 588G(2) or (3) in relation to the incurring of a debt by a company; and

(b) the person (in this section called the creditor) to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency; and

(c) the debt was wholly or partly unsecured when the loss or damage was suffered; and

(d) the company is being wound up;

whether or not:

(e) the director has been convicted of an offence in relation to the contravention; or

(f) a civil penalty order has been made against the director in relation to the contravention.

…

(2) The company's liquidator may recover from the director, as a debt due to the company, an amount equal to the amount of the loss or damage."

[23] As correctly submitted by the applicants, in order to establish an entitlement to the relief sought, the statement of claim must plead the following:

(a) that the respondent was a director of W2R when it incurred the relevant debts;

(b) that W2R was insolvent at the time it incurred the relevant debts;

(c) that at the time the relevant debts were incurred, there were reasonable grounds for suspecting that W2R was insolvent; and

(d) that the respondent failed, in breach of s 588G(2), to prevent W2R from incurring the relevant debts, in circumstances where the respondent was aware that W2R was insolvent or that there were grounds for so suspecting.[10]

[24] The material facts pleaded in the statement of claim satisfy each of these four requirements, entitling the applicants to the relief sought. The debts of W2R for which the respondent is sought to be made liable are debts that were incurred between 1 December 2018 and 18 June 2019. Paragraph 3 of the statement of claim pleads that the respondent was the sole director of W2R from 7 February 2011 and remained the sole director through to at least the date of the filing of the statement of claim, 20 November 2019. Paragraph 12 expressly pleads that the respondent was a director of W2R when it incurred the debts between 1 December 2018 and 18 June 2019.

[25] As to the second requirement, namely that W2R was insolvent, s 95A(1) of the *Corporations Act* states that a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable. Section 95A(2) provides that a person who is not solvent is insolvent. Paragraph 6 of the statement of claim pleads that from at least 1 December 2018 until 18 June 2019, W2R was insolvent (within the meaning of s 95A of the *Corporations Act*) in that it was unable to pay its debts as and when they fell due during that period. Paragraph 7 pleads the reasons that W2R was insolvent during the relevant period. Ten specific reasons are identified and include the fact that W2R recorded net continuing losses from at least August 2018; its working capital was insufficient to meet all of its current liabilities from at least December 2018; it had outstanding Commonwealth and State taxes due and payable; the Commissioner of Taxation had issued a statutory garnishee notice on the company's ANZ bank account for unpaid taxation liabilities; and the company had entered into special instalment arrangements with some creditors, including the Commissioner of Taxation, which it did not comply with. Paragraph 12(b) expressly pleads that at the time W2R incurred the relevant debts, it was insolvent.

[26] As to the third requirement that there were reasonable grounds for suspecting that W2R was insolvent, the material facts pleaded in paragraphs 6 to 12(c) of the statement of claim establish a sufficient basis for there being reasonable grounds for suspecting that W2R was insolvent. As the sole director, the respondent was in a position to know or ought to have known the facts pleaded in paragraphs 6 and 7 of the statement of claim.

[27] As to the fourth requirement, paragraph 13 of the statement of claim pleads that in breach of s 588G of the *Corporations Act,* the respondent failed to prevent W2R from incurring each of the relevant debts when it was insolvent. The debts incurred by W2R for the period 1 December 2018 to 18 June 2019 are pleaded in paragraphs 8 to 10 of the statement of claim. The relevant debts consist of $198,490.04 described as "Tax Debts" which remain unpaid to the Commonwealth of Australia and payable to the Commissioner of Taxation. A further amount of $107,518.13 described in the pleading as "Priority Creditor Debts" are debts incurred to priority creditors that fell due and payable and which remain unpaid. The third category of debts is "Trade Creditor Debts" in the amount of $6,801,101.32. Paragraph 10 of

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10 Plaintiffs' Outline of Submissions, para 14.

the statement of claim provides particulars of the trade creditor's name, the amounts of the debt due and owing by W2R and the dates during which the said debts were incurred. Paragraph 11 pleads that all of the Tax Debts, Priority Creditor Debts and the Trade Creditor Debts incurred by W2R were wholly unsecured.

[28] Paragraph 14 of the statement of claim pleads that as at the date of filing the claim, there are not sufficient funds available in the liquidation of W2R to be able to pay any dividend to the unsecured creditors. In the result, the unsecured creditors of W2R have suffered loss and damage in the sum of $7,107,109.49. This amount was demanded by the first applicants from the respondent by letter dated 10 October 2019. No part of this amount has been paid by the respondent.

[29] Based on the deemed admissions of the material facts pleaded in the statement of claim, I am satisfied that the respondent has failed to prevent the relevant debts being incurred by W2R in contravention of s 588G(2) of the *Corporations Act* in the sum of $7,107,109.49. It is appropriate to make a declaration in those terms, together with an order pursuant to s 588M that the respondent pay the applicants the amount of the loss by way of compensation in the sum of $7,107,109.49.

[30] The applicants seek interest on that amount pursuant to s 58 of the *Civil Proceedings Act* 2011 (Qld). The applicants have calculated the amount of interest pursuant to Practice Direction No 7 of 2013 to the date of the filing of the application, which is 27 March 2020. Paragraph 19 of the statement of claim seeks interest from 24 September 2019 (being the date of the winding up of W2R when the cause of action arose) until the date of judgment, at the rate of four per cent above the Reserve Bank of Australia cash rate. I have calculated interest to the date of judgment on this basis.

Disposition

[31] There will be order as per draft, initialled by me and placed with the papers, with a correction to paragraph 1(c) to reflect interest payable to the date of judgment.