SUPREME COURT OF QUEENSLAND

CITATION:	*Affleck v Australian Securities and Investments Commission* [2015] QSC 236
PARTIES:	**MARK AFFLECK** (applicant) **v** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (respondent)
FILE NO:	Supreme Court No 4393 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	21 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	26 June 2015
JUDGE:	Boddice J
ORDER:	**The applicant be granted leave to manage a corporation, Hurford Wholesale Pty Ltd (ACN 009 657 845), pursuant to s 206G *Corporations Act* 2001 (Cth), as and from 27 September 2015, on the condition he not be appointed a Director of the corporation except with the further leave of the Court.**
CATCHWORDS:	CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – DISQUALIFICATION FROM MANAGEMENT OF CORPORATION – LEAVE TO MANAGE OR ACT AS DIRECTOR – where the applicant was the general manager and director of a company – where the applicant pleaded guilty to six counts of forgery and one count of contravention of regulations relating to official marks – where the applicant was sentenced to concurrent terms of imprisonment and was released forthwith upon entering into a recognisance to be of good behaviour for 12 months – where the applicant was automatically disqualified from managing corporations for a period of five years – where the applicant continued working as an employee of the company under a new business structure and management – where the applicant applies, pursuant to s 206G of the *Corporations Act* 2001 (Cth), to be involved in the company's day-to-day general management – where the applicant has the support of the new

directors and management – whether the applicant ought to be granted leave to manage the company

Corporations Act 2001 (Cth), s 206G

Adams v Australian Securities and Investments Commission (2003) 46 ACSR 68; [2003] FCA 557, applied
Australian Securities and Investments Commission v Healey (No 2) (2011) 196 FCR 430; [2011] FCA 1003, cited
Australian Securities and Investments Commission v Vizard (2005) 145 FCR 57; [2005] FCA 1037, cited
Duffy; Re Westgate Ports Pty Ltd (2010) 79 ACSR 267; [2010] FCA 608, cited
Re Colin Gregory Ryan [2014] QSC 18, cited
Re Gay (2014) 99 ACSR 199; [2014] TASSC 22, considered
Re Magna Alloys & Research Pty Ltd (1975) 1 ACLR 203, cited
Re Zim Metal Products Pty Ltd (1977) 2 ACLR 553, cited

COUNSEL:	A J MacSporran QC for the applicant No appearance for the respondent
SOLICITORS:	Ashworth Lawyers for the applicant No appearance for the respondent

[1] By originating application, filed 5 May 2015, Mark Affleck sought orders granting him leave to manage a corporation, Hurford Wholesale Pty Ltd (ACN 009 657 845) ("Hurford"), pursuant to s 206G of the *Corporations Act* 2001 (Cth). At issue is whether the applicant has established that there ought to be an exception in this case to the general policy of the legislature, as enunciated in that section.

Background

[2] The applicant was born on 26 January 1971 in New Zealand. He has been employed in the timber industry for most of his working life. He came to Australia in 2004. Between 14 July 2009 and 3 October 2014 the applicant was a director of a corporation specialising in the export of timber products, Moxon and Company Pty Ltd,.

[3] Prior to being appointed a director, the applicant had held senior management positions within Moxon and Company Pty Ltd. He had first been employed as a sales representative. He held that position between 2004 and 2006. In 2006, he was appointed its National Sales Representative. The applicant was promoted to the position of General Manager in 2008. He was appointed a Director the following year.

[4] On 26 September 2014, the applicant pleaded guilty to six counts of forgery, contrary to ss 11.2(1) and 144.1(5) of the *Criminal Code* 1995 (Cth), and one contravention of regulations relating to official marks, contrary to s 14(1) of the *Export Control Act* 1982 (Cth). The offences related to the use of a false Australian Quarantine Inspection Service ("AQIS") stamp on export certificates so as to imply the export of timber overseas had complied with the relevant requirements.

[5] On 3 October 2014, the applicant was sentenced to concurrent terms of 12 months imprisonment in respect of the forgery charges and six months imprisonment in respect of the contravention of regulation offence. The sentencing Judge further ordered that the applicant be released forthwith upon entering into a recognisance in the amount of $1,000 to be of good behaviour for a period of 12 months. The applicant was also ordered to pay a fine of $6,000 for each forgery charge, a total of $36,000. As a consequence of the sentence, the applicant was automatically disqualified from managing corporations for a period of five years.

[6] The main director and shareholder of Moxon and Company Pty Ltd, Tony Moxon, also pleaded guilty to counts of forgery and a contravention of the regulations. In his case, he had pleaded guilty to 29 counts of forgery and one count of possession of a false stamp in respect of a period covering almost three years. Another shareholder and director, Andrew Wilson, also pleaded guilty to forgery and other offences.

[7] All of the offences arose out of a dishonest system which had been used for some time at Moxon and Company Pty Ltd. That system employed the use of a false AQIS stamp to phytosanitary certificates in respect of the shipments of timber for export to overseas countries. Those certificates falsely implied the relevant shipments had been inspected by AQIS officers, and passed as complying with the importing country's requirements.

[8] The false certification scheme had been developed by Moxon who was the Chief Executive Officer of Moxon and Company Pty Ltd. Whilst there was evidence there had been a routine practice of forging certificates even before his superintendence of the company, the prosecution alleged that Moxon instructed employees to arrange for the manufacture of a replica stamp which was then used for most of the offences. Wilson pleaded guilty on the basis he had encouraged the shipping clerk to commit the offence

of forgery in respect of six shipments. Wilson had a 35.25% shareholding in Moxon and Company Pty Ltd.

[9] The applicant did not have any equity in Moxon and Company Pty Ltd. His liability arose in respect of the same six shipments as Wilson. Those shipments involved a total of about 65 tonnes of timber, with an invoice price of just under AUD$170,000. The prosecution was not in a position to allege positively the timber had not been treated in accordance with the certificate. The gravamen of the allegation was that the shipments occurred outside the purview of AQIS, the body charged with ensuring compliance with the relevant importing obligations. The applicant's pleas of guilty were on the basis he became aware of what was occurring and facilitated its continuation.

The application

[10] After being convicted of the offences, Moxon and Wilson sold their shares in Moxon and Company Pty Ltd. The timber business previously operated by Moxon and Company Pty Ltd was eventually sold to Hurford. That entity continued to operate the timber business but with a new business structure and new management. The current General Manager of Hurford is Jacob Eldridge and its Chief Executive Officer is Bob Engwirda. The applicant remained working for Hurford in its sales section.

[11] The applicant's employment with Hurford requires him to sell products at prices determined by senior management. He works in a team with six external sales representatives. His experience in sales means he advises the team with product information and answers day-to-day questions from customers and external sales representatives. The disqualification consequent upon his conviction means he cannot, however, do anything in relation to management of the timber business.

[12] The applicant contends the disqualification renders it difficult for him to fully undertake his duties of employment. Hurford would like the applicant to be involved in the day-to-day general management and operation of its business. If leave was granted, those duties would include budgeting, pricing, negotiations and advice in respect of potential new markets. However, any final decisions in relation to budgets, financials and market

segments would still require approval from the Chief Executive Officer. The applicant would also be answerable to the Chief Executive Officer and the Directors of Hurford.

[13] The applicant has the support of the Chief Executive Officer, the Chief Financial Officer, the General Manager and the Board of Directors of Hurford in making the application. They confirm that should the application be successful the applicant's work would be overseen by the Chief Executive Officer, the Chief Financial Officer, the Board of Directors and external auditors. The benefit for Hurford is that the applicant would be able to fully apply his knowledge and skills for the benefit of its business.

[14] The application was served on the Australian Securities and Investment Commission. It advised it would not oppose the application, and did not wish to be heard in relation to it.

Applicable principles

[15] Section 206G provides a wide discretion to the Court in the granting of leave. Whilst the application must be decided having regard to all relevant factors, on its own facts, there are a number of well established principles. Those principles recognise that the policy behind the disqualification of a person convicted of certain offences from acting as a director or taking part in the management of a company is not punitive, although it has a punitive aspect.[1] It is designed to protect the public, and to prevent a corporate structure from being used to the financial detriment of an investors, shareholders, creditors and persons dealing with the company.[2]

[16] The relevant principles were helpfully summarised by Lindgren J in *Adams v Australian Securities and Investments Commission*:[3]

> "1. The applicant bears the onus of establishing that the court should make an exception to the legislative policy underlying the prohibition.
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> 2. That legislative policy is one of protecting the public, not one of punishing the offender.
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> 3. Another objective is to deter others from engaging in conduct of the particular kind in question.

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1 *Australian Securities and Investments Commission v Healey (No 2)* (2011) 196 FCR 430 at [109]; *Re Colin Gregory Ryan* [2014] QSC 18 at [19].
2 *Re Magna Alloys & Research Pty Ltd* (1975) 1 ACLR 203 at 205.
3 (2003) 46 ACSR 68 at [8]; see also *Duffy; Re Westgate Ports Pty Ltd* (2010) 79 ACSR 267 at [19].

> 4. A further objective is the more general one of deterring others from abusing the corporate structure to the disadvantage of investors, shareholders and others dealing with a company.
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> 5. The prohibition itself contemplates that there will be hardship to the offender. Therefore hardship to the offender alone is not a persuasive ground for the granting of leave.
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> 6. The court in exercising its discretion will have regard to the nature of the offence of which the applicant has been convicted, the nature of his involvement, and the general character of the applicant, including his conduct in the intervening period since he was removed from the board and from management. Where, as here, the applicant seeks leave to become a director and to take part in the management of particular companies the court will consider the structure of those companies, the nature of their businesses and the interests of their shareholders, creditors and employees. One matter to be considered will be the assessment of any risks to those persons or to the public which may appear to be involved in the applicant's assuming positions on the board or in management." (Citations omitted)

[17] In enunciating those principles, Lindgren J stressed they did not represent an exhaustive statement of the relevant matters to be taken into account in the exercise of the discretion.

Discussion

[18] The applicant is 44 years of age. Most of his adult life has been spent in employment in the timber industry in New Zealand, and later in Australia. He has significant skills in respect of the sale of timber products, including in the export market. He is currently employed in the sales field in a corporation specialising in timber products. His disqualification does not prevent him from undertaking his duties of employment. It does prevent him from utilising all of his skills to the advantage of his employer's business. I accept the disqualification restricts Hurford from fully utilizing the applicant's considerable skills to the detriment of the proper management of its business.

[19] Until these offences, the applicant had an unblemished record and was a person of good general character. That is not an uncommon feature in "white collar crime".[4] However, there is no suggestion, since being placed on the recognisance as a consequence of his convictions, that the applicant has engaged in any conduct in breach of it, or has engaged

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[4] *Australian Securities and Investments Commission v Vizard* (2005) 145 FCR 57 at [36]-[37].

in behaviour in the course of his employment which breached his obligations to his employer or in relation to any statutory requirements for the sale of timber products.

[20] That said, the applicant's disqualification arises out of his conviction for offences of dishonesty in relation to the certification of timber products for export overseas. That dishonesty seriously undermined the integrity of the certification process, so important for the export industry. The applicant, by his pleas of guilty, acknowledged he was a knowing participant in the dishonest arrangement. Although there was no suggestion he was the architect of the arrangement or that he facilitated and perpetuated its continuation for personal gain, he encouraged an employee of the company on six occasions over an eight month period to use the false certification stamp as part of his duties of employment.

[21] Whilst the applicant's offending conduct was far less serious than that of Moxon, the applicant was a senior manager within the company. He had extensive experience within the timber industry, and would have been aware of the significance of compliance with the certification process. He had an obligation to take action to prevent the offending conduct. His failure to do so constituted a serious departure from his obligations. Those failures placed the financial future of the company in jeopardy. It also placed the export of timber generally at risk due to doubts it raised as to the reliability of the certification system. The offending is properly to be described as serious.

[22] Hurford operates a timber business. Its directors are independent of the applicant, and would have ultimate supervision of him should leave be granted in accordance with the application. The applicant would be responsible to the Chief Executive Officer and the Chief Financial Officer, each of whom are independent of the applicant. There is no suggestion they have conflicting obligations which would prevent them from diligently supervising the applicant in the management of Hurford's day-to-day activities.

[23] Offences of corporate dishonesty, which are serious and place in jeopardy the legitimacy of the certification of timber products for export, call for sentences which have both a general and a personal deterrent effect. The resultant automatic disqualification from management of corporations as a consequence of that conviction is part of that general and personal deterrent effect.

[24] There is a risk that the granting of leave, whilst the respondent is still subject to the recognisance ordered as part of the sentence imposed for his offending behaviour, would undermine that general and personal deterrent effect. The grant of leave would also undermine confidence in the Court's upholding of corporate standards. The upholding of corporate standards is a relevant consideration. In *Re Zim Metal Products Pty Ltd*[5] McInerney J observed:

> "The policy of the legislation is that, prima facie, the persons convicted, the applicants, should be excluded from being directors. The possible harm which might occur to the company and to the applicants if they are excluded from management is, in my view, much more real than any harm that may flow if they are not allowed to become directors. There is something to be said, I think, for the view that public morality is better vindicated if the applicants continue to be excluded from being directors. Creditors and persons dealing with the company who now know or may hereafter come to know of the convictions of the applicants, may take the view that the court views the convictions as matter of no concern, if the court allows an applicant to be reinstated as director in a case where, in my view, there is no real need for that appointment."

[25] The applicant has been disqualified since 3 October 2014. That is a period of 10 months. His recognisance was for a period of 12 months. The fact the application is made whilst the applicant is still subject to the recognisance does not prevent the granting of leave. Section 206G does not provide any limitation on the granting of leave by time. The exercise of a discretion does not depend on whether a lengthy period has been served of the automatic period for disqualification. The exercise of the discretion depends on the facts of each case.[6] Here, there is less than two months remaining on the recognisance. Assuming the applicant satisfactorily discharges the requirements of that recognisance he will not be subject to further orders, other than the disqualification, after 3 October 2015.

[26] In *Re Gay*,[7] an application for leave, made only approximately eight months after the period of automatic disqualification had commenced, was granted. However, the circumstances in *Re Gay* were significantly different. First, Mr Gay, who pleaded guilty to one count of insider trading, was not sentenced to a period of imprisonment or released on a recognisance. Second, the Court expressly recognised that whilst Mr Gay's offence

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5 (1977) 2 ACLR 553 at 558.
6 *Re Gay* (2014) 99 ACSR 199 at [45].
7 (2014) 99 ACSR 199.

was serious it did not involve dishonest or deliberate conduct.[8] That is a significant distinguishing feature in relation to the applicant's offending which did involve dishonesty.

[27] Having considered all of the relevant circumstances, I am satisfied that upon the applicant successfully discharging the terms of his recognisance, the applicant should be granted leave to manage Hurford. That corporation is owned by persons other than the applicant, is subject to an independent Board of Directors, and has senior management who would have ultimate supervision of the applicant's activities. Those safeguards would ensure the applicant's management of that corporation posed no risk to the public or the interests of the corporation shareholders, creditors or other employees.

[28] Whilst it is appropriate that leave be granted to the applicant to manage Hurford, I am satisfied the protective, deterrent and punitive objects intended by the legislature in providing for automatic disqualification require the imposition of a condition that leave to manage that corporation not include the appointment of the applicant as a Director of Hurford without the further leave of the Court.

Orders

[29] I order:

1. The applicant be granted leave to manage a corporation, Hurford Wholesale Pty Ltd (ACN 009 657 845), pursuant to s 206G *Corporations Act* 2001 (Cth), as and from 27 September 2015, on the condition he not be appointed a Director of the corporation except with the further leave of the Court.

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8 *Re Gay* (2014) 99 ACSR 199 at [48].