

# SUPREME COURT OF QUEENSLAND

CITATION: *McCann (as liq of Events R Us P/L) v Commissioner of Taxation & anor* [2006] QSC 374

PARTIES: **MICHAEL GERARD McCANN AS LIQUIDATOR OF EVENTS R US PTY LTD (IN LIQUIDATION) ACN 059 919 489**  
(applicant/respondent)  
v  
**THE COMMISSIONER OF TAXATION**  
(first respondent/applicant)  
**GREGORY JOHN DUNK**  
(second respondent – not a party to the proceeding)

FILE NO: SC No 8100 of 2006

DIVISION: Civil

PROCEEDING: Civil application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 30 November 2006

DELIVERED AT: Brisbane

HEARING DATE: 30 November 2006

JUDGE: Fryberg J

ORDER: **1. Gregory John Dunk be added as a respondent to the proceeding.**

**2. Pursuant to s 588FGA(4) of the *Corporations Act 2001 (Cth)* the first respondent, Gregory John Dunk, pay to the respondent/applicant, the Commissioner of Taxation, the sum of \$10,506.80 (inclusive of \$1,179.80 interest as awarded to the applicant against the respondent applicant).**

**3. No order as to costs.**

CATCHWORDS: Procedure – Supreme Court Procedure – Queensland – Procedure under rules of court – Parties – Third parties and similar proceedings – Corporations – Winding up – Order sought against person not party to proceedings – Requirement of joinder of that person as party to proceedings

*Corporations Act 2001 (Cth) s 588FGA*

*Hall & anor (as liq of Reynolds Wines Ltd) v Commissioner of Taxation and ors* [2004] NSWSC 985 applied

COUNSEL: A C Pensen (solicitor – Australian Taxation Office Legal Services Branch) for the applicant 1  
K M Williams (solicitor – Mullins Lawyers) for the respondent

SOLICITORS: Australian Taxation Office Legal Services Branch for the applicant  
Mullins Lawyers for the respondent 10

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SUPREME COURT OF QUEENSLAND

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CIVIL JURISDICTION

[2006] QSC 374

FRYBERG J

No BS8100 of 2006

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IN THE MATTER OF MICHAEL  
GERARD McCANN AS LIQUIDATOR OF  
EVENTS R US PTY LTD (IN LIQUIDATION)  
ACN OR ARBN 059 919 489

MICHAEL GERARD McCANN AS LIQUIDATOR  
OF EVENTS R US PTY LTD  
(IN LIQUIDATION)

Applicant

and

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COMMISSIONER OF TAXATION

Respondent/Applicant

and

GREGORY JOHN DUNK

First Respondent

BRISBANE

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..DATE 30/11/2006

ORDER

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HIS HONOUR: This is an application originally by the liquidator of Event R Us Pty Ltd against the Commissioner of Taxation. The originating application sought recovery of money paid to the Commissioner by the company as a preference. The Commissioner concedes that the payment was, in the circumstances, a preference and that he is obliged to repay the money to the liquidator with interest.

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Consequently, a consent order to that effect has today been made on the originating application. That order requires the Commissioner to pay the liquidator \$20,000, the amount of the preference, plus \$2,529.86 for interest calculated pursuant to section 47 of Supreme Court Act 1995 plus \$1,531.40 for costs.

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Before today the Commissioner served on Gregory John Dunk, a director of the company, an interlocutory application in the principal proceedings by which he sought an order pursuant to section 588FGA(4) of the Corporations Act that Mr Dunk pay him \$9,327 plus any costs and interest awarded to the liquidator against the Commissioner in the proceedings and also the Commissioner's costs.

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That application was served on Mr Dunk and he was informed that the Commissioner intended to consent to the liquidator's claim. All of the material in the liquidator's claim was also served upon him. On the hearing of the matter today he has not appeared. The Commissioner now seeks the order, foreshadowed in the interlocutory application.

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It is, I think, clear that the section referred to permits an order to be made in the principal proceedings against a director. I agree with the decision of Barrett J that the claim against the director is an interlocutory proceeding and should be pursued by interlocutory application (see Condon -v- Commissioner of Taxation [2004] NSWSC 481 and Hall -v- Commissioner of Taxation [2004] NSWSC 985).

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A question which has arisen, however, is whether the director should be a party to the proceedings in order to enable the order to be made. There can, I think, be no doubt that the Corporations Act confers the power to make an order against the director in the proceedings. As some of the decisions in relation to costs against non-parties have demonstrated, it is not essential that a person against whom an order for the payment of money is to be paid be a party to proceedings.

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However, it is, in my view, desirable that whenever the Court makes an order against a person of that nature, the person, if possible, be made a party so that the provisions of the rules which are designed to operate primarily in relation to parties may have their ordinary effect. If the person is not made a party the result is often inelegant or to adapt the words of Barrett J, procedurally incongruent.

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In Hall -v- The Commissioner of Taxation Barrett J said at para [15]:

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"If an order in favour of B and against C is to be made 'in' proceedings in which an order has been made in favour of A and against B, it must, I think, follow that

all of A, B and C are intended to be parties to those proceedings. It cannot be contemplated that an order will be made against C without C's having become a party to the proceedings 'in' which the order is to be made. There is, thus, in my view, an implicit statutory direction that directors against whom the Commissioner proceeds under section 588FGA(4) be accepted as being parties to the proceedings brought by the liquidator against the Commissioner. The provision of the Supreme Court (Corporations) Rules that makes an interlocutory process the appropriate vehicle for pursuit of the Commissioner's claim against directors introduces an element of procedural incongruity but that must not stand in the way of full recognition and effectuation of the statutory intention to which I have referred."

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It seems to me that as a matter of generality, directors in this position should ordinarily formally be joined as defendants or respondents, as the term is in Queensland, in order to promote the applicability of all of the Uniform Civil Procedure Rules. Provision is made for an officer of a corporation to be added as a respondent to a proceeding by rule 2.13(3) of the Corporations Proceedings Rules. Despite the submission made on behalf of the Commissioner that the step is unnecessary, I should formally order that Mr Dunk be added pursuant to that rule.

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The elements of the claim against Mr Dunk are clearly made out in the affidavit material placed before me. The order against the Commissioner, having already been made, I am satisfied that I should make the order described in section 588FGA(4) of the Act.

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The amount claimed by the Commissioner is in fact less than the total amount of the loss and damage which he has suffered. I have not been given an explanation of why the whole of the amount has not been claimed, but I see no reason why the

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Commissioner should not elect, in his own wisdom, to claim  
less than his full entitlement. The amount which the  
Commissioner claims is \$10,506.80, inclusive of \$1,179.80 of  
interest. He seeks no amount for costs and no order as to  
costs. I have been provided with a draft to that effect. I  
have amended the draft to include the new paragraph 1 as  
follows: Gregory John Dunk be added as a respondent to this  
proceeding.

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I have renumbered the existing paragraphs 1 and 2 as  
paragraphs 2 and 3. With those amendments, there will be an  
order in accordance with the draft, initialled by me and  
placed with the papers.

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