

SUPREME COURT OF QUEENSLAND

CITATION: *Geoff Sharpe Pty Limited v M&E Fitzgerald Holdings Pty Ltd and Ors (No. 2)* [2010] QSC 231

PARTIES: **GEOFF SHARPE PTY LIMITED**
ACN 000 757 602
(plaintiff)
v
M & E FITZGERALD HOLDINGS PTY LTD
ACN 056 249 060
(first defendant)
and
FITZGERALD, Elizabeth Anne and FITZGERALD, Michael William
(second defendants)
and
M & E FITZGERALD HOLDINGS PTY LTD
ACN 056 249 060 as trustee of the Fitzgerald Family Trust
(third defendants)

FILE NO/S: SC No 6419 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 15 and 16 June 2010

DELIVERED AT: Brisbane

HEARING DATE: 16 June 2010

JUDGE: Margaret Wilson J

ORDER: **That the plaintiff have leave to proceed against the first defendant pursuant to s 440D of the Corporations Act 2001 (Cth).**

CATCHWORDS: CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – PROCEEDINGS BY OR AGAINST THE COMPANY – LEAVE TO PROCEED – WHEN LEAVE GRANTED – where plaintiff as lender and first defendant and another as borrowers and second defendants and another as guarantors entered into a loan agreement – where plaintiff as mortgagee and first defendant as mortgagor also entered into a mortgage debenture to secure obligations owed to plaintiff by several entities including first and third defendants – where first defendant is

M & E Fitzgerald Holdings Pty Ltd and third defendant is M & E Fitzgerald Holdings Pty Ltd as trustee for the Fitzgerald family trust – where second defendants, Mr and Mrs Fitzgerald, are directors of M & E Fitzgerald Holdings Pty Ltd – where plaintiff seeks declarations that by virtue of the mortgage debenture it is entitled to mortgages to secure repayment of approximately \$3.9 million – where first defendant was placed in voluntary administration – where administrator given notice of the trial but elected not to defend the proceeding – whether plaintiff should be given leave to proceed against the company pursuant to s 440D of the *Corporations Act 2001* (Cth)

Corporations Act 2001 (Cth), s 9(e), s 435A, s 437A, s 437B, s 437C, s 440B, s 440D, s 440F, s 440G, s 441A, s 441B

BBC Hardware Limited v GT Homes Pty Ltd [1997] 2 Qd R 123, cited

Danny Morris v The Ship “Kiama” [1998] FCA 256, considered

COUNSEL: N J Thompson for the plaintiff.
T N Dobinson (sol) for the first defendant.
E A Fitzgerald (not a lawyer) for the second defendants.

SOLICITORS: Lehns Lawyers for the plaintiff.
Preston Law for the first defendant.

HER HONOUR: On or about the 6th of February 2006 the plaintiff, as lender, and Pub Group Pty Ltd and the first defendant as borrower and the second defendants and another as guarantors entered into a loan agreement.

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Also on or about the 6th of February 2006 the plaintiff, as mortgagee, and the first defendant, as mortgagor, entered into a mortgage debenture to secure obligations owed to the plaintiff by several entities including the first and third defendants.

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The first defendant is M & E Fitzgerald Holdings Pty Ltd and the third defendant is M & E Fitzgerald Holdings Pty Ltd as trustee for the Fitzgerald family trust.

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The second defendants, Mr and Mrs Fitzgerald, are directors of M and E Fitzgerald Holdings Pty Ltd. The plaintiff seeks declarations that by virtue of the mortgage debenture it is entitled to mortgages to secure repayment of approximately \$3.9 million.

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As against the first defendant the plaintiff alleges in paragraph 8 of the Statement of Claim that the first defendant was the registered owner of the following piece of land: lot 111 on SP 100727 in the County of Ward Parish of Gilston. That has been admitted in paragraph 5.1 of the defence.

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As against the third defendant the plaintiff alleges that the third defendant was the registered owner of the following

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parcel of land: lot 76 on BRP 106137 in the County of Stanley, Parish of South Brisbane contained in title reference 50194031. In paragraph 5.2 of the defence the defendants have denied that at all material times the third defendant was the registered owner of that piece of land and have said they believe the same to be untrue on the grounds that it is contrary to fact.

Counsel for the plaintiff submitted that there is an inadequate explanation for the denial and hence a deemed admission that the third defendant was the registered owner of that parcel of land. During the course of submissions I made it plain that I did not accept it was a deemed admission. In my view, it was an adequate explanation for the denial to assert that it was contrary to fact. In other words, in my view there is a live issue on the pleadings as to whether the third defendant was the registered owner of that parcel of land in the County of Stanley, Parish of South Brisbane.

As against the second defendants, the plaintiff seeks to recover approximately \$3.9 million pursuant to the guarantee. This case is on the Commercial List. It was listed for trial for four days commencing yesterday.

On 19 May 2010 Westpac appointed a receiver to the company pursuant to a fixed and floating charge.

Last Friday, 11 June 2010, at 4.36 p.m. the directors of the company resolved to place it in voluntary administration and a

voluntary administrator was appointed. Upon his appointment he assumed control of the affairs of the company and the powers of all other officers were suspended (See sections 437A, 437B and 437C of the Corporations Act).

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At the commencement of the trial yesterday, a solicitor, Mr Dobinson, appeared by telephone on behalf of the administrator. A letter from the solicitors for the administrator was admitted into evidence as Exhibit 2. The administrator had had no opportunity to investigate the books and records of the company although he had "had the opportunity of taking advices" from the directors of the company and Pub Group Pty Ltd, a company to which he was also appointed voluntary administrator.

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According to the letter the administrator understands that there are no unsecured assets in the company. It is likely that there will be a deficit of about \$1 million in respect of Westpac's claim as secured creditor. The administrator has no funds to take an active part in the trial.

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Pursuant to section 440D(1) of the Corporations Act - "[Proceedings not to be begun or proceeded with] 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:

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(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."

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The solicitor for the administrator informed the Court that while the administrator did not consent to leave being given pursuant to section 440D, in all the circumstances he was not in a position to oppose an application should one be made. The solicitor for the administrator took no further part in the hearing.

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Mrs Fitzgerald, one of the second defendants, appeared before the Court self-represented. She was given leave to represent her husband, the other second defendant. But, as I explained to the Court this morning, the Fitzgeralds no longer have control of the company and accordingly, she has no right to represent the company in this proceeding. Therefore, I did not hear her in relation to the application for leave to proceed against the company.

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Voluntary administration is dealt with in Chapter 5 Part 5.3A of the Corporations Act. The object of that part of the Act is set out in 435A as follows:

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"The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

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(a) maximises the chances of the company, or as much as possible of its business, continuing in existence or;

(b) if it is not possible for the company or its business to continue in existence - results in a better return for the company's creditors and members than would result from an immediate winding up of the company."

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Within eight days of his appointment the administrator must hold a meeting of creditors to determine whether to appoint a committee of creditors. The administrator must investigate the company's affairs and form an opinion on whether it would be in the interests of its creditors to execute a deed of company arrangement, for the administration to end, or for the company to be wound up. He has 20 business days in which to convene a meeting of creditors to consider the fate of the company. The meeting must be held within five business days on either side of the end of the convening period.

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The administrator must report to the creditors about the company's business, property and financial circumstances and express an opinion on each of the options available for the company's future.

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It is against that background that section 440D provides that leave is necessary to continue this proceeding against the company.

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The rationale for section 440D is explained by Ford's Principles of Corporations Law as two-fold: that no creditor should be free to advance his individual interests against

those of the creditors as a whole; and that the administrator should not be distracted from his statutory duties and obliged unnecessarily to incur legal costs.

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On the cases there is a degree of judicial reluctance to grant leave.

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I have had regard also to section 441B of the Corporations Act which applies, if before the beginning of the administration, a chargee exercised any power in relation to the property of the company for the purpose of enforcing the charge. The section goes on to provide that nothing in sections 437C, 440B, 440F or 440G prevents the chargee from enforcing the charge.

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Having regard to paragraph (e) of the definition of "enforce" in section 9 of the Corporations Act, I am inclined to the view that the commencement of these proceedings was the exercise of a power in relation to the property for the purpose of enforcing the charge.

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Be that as it may, there is still need for leave under section 440D, and in that regard I refer to the decision in *Danny Morris v. The Ship "Kiama"* [1998] FCA 256, a decision of Carr J. His Honour said:

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"In my view section 440D operates in accordance with its terms whether the circumstances of a matter fall within section 441A or section 441B. It is certainly not expressed as being

subject to those sections and nothing in those sections suggest that they somehow override section 440D."

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He went on to find that even if the plaintiffs in that case had brought themselves within section 441A or 441B, they nevertheless had to obtain leave under section 440D.

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So, what are the factors relevant to the grant of leave under 440D? There is no comprehensive statement of them in the Act Or, indeed, in the cases. They include whether there is a substantial dispute, the desirability of not distracting the administrator from his obligations, and also whether the plaintiff claims as a secured or unsecured creditor.

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As I have said, on the view I take of the pleadings there is a dispute about the third defendant's being the registered owner of the parcel of land at South Brisbane.

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The administrator has made his position clear. He does not have funds to take part and, accordingly, is not doing so.

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As to the position of the company, there is not only the very preliminary view of the administrator; there is also evidence from Mr Sharpe, the director of the plaintiff company, in which he deposes on information and belief to the existence of a number of concerning circumstances. The landlord of the premises occupied by the first defendant, Cove Tavern, entered into possession of those premises on 25 March 2010 and there is an application for relief against forfeiture pending in the

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Court. I have already referred to the position with respect to Westpac. There are a number of trade creditors owed amounts including \$40,500, \$38,600, \$26,000, \$14,380, \$15,500 and over \$8,000. He has deposed on information and belief to being informed by an employee of the firm to which the receiver belongs that the company has not filed tax returns for five years and has not completed BAS and superannuation and PAYE obligations since September 2009.

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On this very preliminary material it does seem that the affairs of the company are in disarray and that there is an unlikelihood of it being able to be salvaged.

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In *BBC Hardware Limited v. GT Homes Pty Ltd* [1997] 2 Queensland Reports 123 at 126 to 127 Thomas J acknowledged that different considerations apply according to whether the plaintiff is a secured or an unsecured creditor. He said that in circumstances where the plaintiff is an unsecured creditor in most cases leave would tend to interfere with the orderly disposition and control of unsecured creditors. But, conversely, when the plaintiff is a secured creditor the rights of the plaintiff generally stand outside those to be administered with respect to the unsecured creditors.

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He went on:

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"I do not think that the object of sections 437C to 440D is always to ensure a complete freeze during an administration in order to work out the net position, although that may be a

useful generalisation. However that may be, the orders which
I propose to make will serve to clarify the position in
relation to administration in that the rights of the secured
creditor will be recognised and quantified."

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Weighing up all of these factors, I have come to the
conclusion that there ought to be leave to proceed against the
company pursuant to section 440D.

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