

# SUPREME COURT OF QUEENSLAND

CITATION: *Furniss v Blue Sky Alternative Investments Limited (No 3)*  
[2021] QSC 230

PARTIES: **DAVID FURNISS**  
(applicant)  
v  
**BLUE SKY ALTERNATIVE INVESTMENTS LIMITED**  
**(SUBJECT TO A DEED OF COMPANY**  
**ARRANGEMENT) (RECEIVERS AND MANAGERS**  
**APPOINTED)**  
ACN 136 866 236  
(respondent)

FILE NO/S: BS No 10824 of 2020

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 9 September 2021

DELIVERED AT: Rockhampton

HEARING DATE: 3 September 2021

JUDGE: Crow J

ORDER: **1. Application dismissed.**

CATCHWORDS: CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS’ REMEDIES AND INTERNAL DISPUTES – OTHER ACTIONS OR REMEDIES – TO ENFORCE PERSONAL RIGHTS OF MEMBER – where the respondent company has gone into liquidation - where on 12 May 2021 the applicant was granted inspection of classes of documents under s 247A of the *Corporations Act* 2001 (Cth) – where 62 documents were partially redacted by the respondent on the basis of privilege – where, upon further inquiry by the applicant, 26 of the 62 redacted documents were disclosed to the applicant – where the applicant seeks an order requiring the respondent to file an affidavit to assist in determining whether the remaining documents subject to a claim of privilege are valid claims – where the privilege may related to persons or entities which are not a party to the current proceeding – whether such a course is required under the previous order of 12 May 2021

*Corporations Act* 2001 (Cth), s 247A

*Areva NC (Australia) Pty Ltd v Summit Resources (Australia)*

*Pty Ltd (No 2)* [2008] WASC 10, cited  
*Furniss v Blue Sky Alternative Investments Ltd* [2021] QSC  
 46, cited  
*Re Claremont Petroleum LN (No 2)* [1990] 2 Qd R 310,  
 applied  
*Re Tolco Pty Ltd* [2016] NSWSC 1069, cited  
*Smartec Capital Pty Ltd v Centro Properties Ltd & Anor*  
 (2011) 83 ACSR 461; [2011] NSWSC 495, cited

COUNSEL: D Bampton for the applicant  
 A Crowe QC for the respondent

SOLICITORS: Piper Alderman for the applicant  
 Gilbert + Tobin for the respondent

- [1] On 12 May 2021 orders were made pursuant to s 247A(1) of the *Corporations Act* 2001 (Cth) (“*Corporations Act*”) authorising the applicant to inspect and make copies of seven categories of documents, being books of the respondent company. Due to the complex nature of the inspection process, the inspection was ordered to be undertaken in tranches in May and June 2021 and because of the numerous potential documents, the orders in respect of each category of documents required the respondent to identify “responsive documents and redact any responsive documents for privilege”.
- [2] On 20 May 2019, Blue Sky Alternative Investments Ltd (“Blue Sky”) was placed into administration with Mr Hellen and Mr Markey of Pilot Partners being appointed as administrators. Also, on 20 May 2019, Mr Korda and Mr Villani of Korda Mentha was appointed as a receiver and manager of Blue Sky on behalf of a substantial secured creditor.<sup>1</sup>
- [3] On 11 July 2019, Blue Sky entered into administration under a deed of company arrangement. The previously appointed administrators, Mr Hellen and Mr Markey, were appointed as the administrators under a deed of company arrangement. On 31 May 2021, Blue Sky entered into liquidation with Mr Hellen and Mr Markey being appointed as liquidators.<sup>2</sup>
- [4] The respondent’s solicitors receive their instructions from Korda Mentha, the current receiver and manager of Blue Sky. In respect of Blue Sky, the restructuring of Blue Sky Group is said to be largely complete. It is no longer trading, all its employees have had their employment terminated, all former subsidiaries have either been restructured or wound down. The inspection process has been undertaken whilst the affairs of Blue Sky have been wound up. In compliance with the orders, the receiver’s staff have reviewed over 7,500 documents and identified many documents which properly fall within the scope of the inspection order and some which may not. The documents which the receiver’s staff were unable to determine as being disclosable were sent for review by the respondent’s solicitors.
- [5] 313 documents were identified as responsive to the seven categories set out in the orders and in 62 of those documents, partial redactions were made to preserve the privilege. The redactions were made not only to preserve the respondent’s privilege

<sup>1</sup> Affidavit of Colleen Anne Platford filed 3 September 2021, paragraph 5.

<sup>2</sup> Affidavit of Colleen Anne Platford filed 3 September 2021, paragraph 5.

but also preserve the privilege of the former directors of Blue Sky and its auditor, Ernst+Young. The 62 documents which were partially redacted were contained within 4,000 pages of material which were individually reviewed by the respondent's solicitors.

- [6] In respect of the partial redaction of 62 of the documents, after the applicant, questioning the basis for the redactions, the respondent further considered its position and un-redacted 26 documents. An example of this is contained upon page 208 and 209 of Exhibit LML-2, the confidential exhibits to Mr Lamont's affidavit.<sup>3</sup> The applicant seizes upon the 26 demonstrable "errors" as a means of testing the validity of the remaining 36 documents and proposes orders to enable a review of the remaining documents so as to determine any claims to privilege.
- [7] Mr Crowe QC, for the respondent, accepts that errors were made in respect of a wrongful claim of privilege as demonstrated Mr Lamont's affidavit.<sup>4</sup> Mr Crowe QC submits that the respondent, acting through its solicitors as officers of the court, has diligently undertaken a proper process to ensure that the order is complied with by ensuring that the staff of the receivers identified all documents which were potentially relevant, obtaining the assistances of its solicitor to make available for inspection those documents which were ordered to be available for inspection and claiming privilege where appropriate.
- [8] Mr Crowe QC further submits that where the claim for privilege was shown not to be correct, the solicitors for the respondent have reconsidered their position and made fair concessions in respect of the 26 documents which were then un-redacted. Accordingly, the respondent has met its obligations under the order made 12 May 2021.
- [9] Mr Crowe QC on behalf of the respondent submits that the only appropriate further order that ought to be made is an order that "the court notes the applicant reserves his right to challenge any privilege claims made by the respondent in any subsequent proceedings brought by the applicant."
- [10] The applicant applies under paragraph 9 of the order made 12 May 2021 for further orders and directions in relation to the information conduct of the inspection authorised by the orders.
- [11] The applicant applies for orders which seek to determine that the remaining claims of privilege are valid by utilising a procedure similar to that set out in Chapter 7 of the *Uniform Civil Procedure Rules 1999 (Qld)* ("UCPR"), that is, service of a document identifying the premise upon which a claim of privilege is made, describing the document, setting out the basis for the claim of privilege and requiring an affidavit in support of the claim for privilege. The applicant then proposes that submissions by both parties to be made upon the disposition of the application (r 213), before a determination of privilege claim with the application judge inspecting the document for the purpose of deciding the objection (r 223(5)).
- [12] The applicant emphasises that they do not seek the discovery of privileged documents, but rather a judicial determination as to whether the remaining claims

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<sup>3</sup> Exhibit LML-2 to the affidavit of Lachlan McAlister Lamont filed 3 September 2021.

<sup>4</sup> Exhibit LML-2 to the affidavit of Lachlan McAlister Lamont filed 3 September 2021, page 208-209.

for privilege are validly made and that such a course is appropriate in order to enable the order of 12 May 2021 to be properly enforced.

[13] On behalf of the respondents, Mr Crowe QC resists the making of such orders in that such orders would go beyond the ambit of orders that ought to be made under s 247A and that such orders would adversely affect the rights of unrepresented third parties, namely the former directors of Blue Sky, and Ernst+Young.

[14] In *Re Claremont Petroleum LN (No 2)* [1990] 2 Qd R 310 at 314 McPherson J said

“In reaching conclusions on these matters I have acted on the principle that s. 265B is intended to enable a member of a company to inspect its books in order to obtain information about matters that, as member or shareholder in the company, he ought to be informed of by the company. The procedure under s. 265B is not intended as a form of or substitute for inspection of documents after discovery on affidavit or answers to interrogatories in pending litigation. I therefore consider that in many circumstances a shareholder ought not to be assisted by an order under s. 265B to examine decisions of directors, or the reports or records leading to those decisions; but I think that in a case like this he is entitled by inspection of books to find out what the results of those decision are; that is to say, whether the company has entered into agreements, and with whom, disposing of corporate assets of value, and for what consideration, and what has happened to those assets or the consideration given in return for them. ...”

[15] In *Re Tolco Pty Ltd* [2016] NSWSC 1069,<sup>5</sup> Brereton J with reference to the judgment of McPherson J in *Claremont* said:

“[26] However, the form of orders sought by TFGS savours of imposing on Tolco an obligation in the nature of discovery. The function of an order under s 247A is to authorise a shareholder to inspect a company’s books — not to require a company to undertake an exercise of discovery. Authority to inspect books of a company does not involve imposing on the company an obligation to examine its own books to form a judgment whether particular documents do or do not relate to a particular issue or subject matter. Orders under s 247A should be framed so as to identify particular books or classes of books (such as minutes, cash books, wages books, correspondence registers, cheque books, or MYOB records), for defined periods where appropriate, rather than issues or topics to which documents may relate — since the latter impermissibly requires the company to undertake an exercise in the nature of discovery. Only paragraph (m) of the orders sought does this, and the documents referred to in it have already been provided.”

(Citations omitted.)

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<sup>5</sup> At [26].

[16] In *Smartec Capital Pty Ltd v Centro Properties Ltd & Anor* (2011) 83 ACSR 461, Barret J said:<sup>6</sup>

“[67] The learned author then lists instances in which the court has refused applications, indicating the following as not “proper” purposes:

1. To ascertain the value of the equity of redemption in respect of a mortgage issued over the member’s share by investigating the exercise of rights between mortgagor and mortgagee (*United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 404, [24]–[26], [10]).
2. To outflank a claim for client legal privilege made (or anticipated) over the company’s books (*Czerwinski v Syrena Royal Pty Ltd (No 1)* (2001) 34 ACSR 245; [2000] VSC 125; *Keenfern Pty Ltd v Thorlock International Ltd* (2002) 20 ACLC 1322 at [6]; [2002] WASC 142) or to serve as a substitute for discovery (*Rowland v Meudon* [2008] NSWSC 381 ; (2008) 220 FLR 362 at [38]; [2008] NSWSC 381 ; 66 ACSR 83; *Re Claremont Petroleum NL (No 2)* [1990] 2 Qd R 310 at 314; *Czerwinski v Syrena Royal Pty Ltd [No1]* (2001) 34 ACSR 245; [2000] VSC 125).
3. To obtain confidential information for a competitor to the company (*Knightswood Nominees Pty Ltd v Sherwin Pastoral Co Ltd* (1989) 15 ACLR 151 ; 7 ACLC 536).
4. To improve the chances of a take-over bid (*Garina Pty Ltd v Action Holdings Ltd* (1989) 7 ACLC 962).
5. To ascertain whether the corporation is solvent (a finding which should be attended by some doubt if it is intended to state a general principle) (*Keenfern Pty Ltd v Thorlock International Ltd* (2002) 20 ACLC 1322 at [9]; (2002) WASC 142).”

[17] As a matter of principle, it ought to be accepted the s 247A authorisation to inspect the books of a company ought not to be in the form of a substitute inspection of documents pending litigation, however, as McPherson J emphasised in *Claremont Petroleum* the proper order depends upon the circumstances of the case.

[18] In *Re Claremont Petroleum*,<sup>7</sup> AGL as a substantial shareholder in Claremont Petroleum LN, in good faith and for the proper purpose of ascertaining the true financial position of Claremont Petroleum NL was authorised to inspect four categories of documents relating to transactions between Claremont Petroleum and companies in the Independent Resources Limited Group, Zuri Invest and Rothwell Ltd.

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<sup>6</sup> At [67].

<sup>7</sup> *Re Claremont Petroleum NL (No 2)* [1990] 2 Qd R 310.

- [19] In order to meet the proper purpose of ascertaining the true financial position of Claremont Petroleum NL, it was reasonable that documents concerning transactions in value in excess of \$10 million in respect of those entities occurring in six months in 1988 were made available to AGL.
- [20] The circumstances of the applicant are quite different to that of AGL. The applicant is a small shareholder who is seeking access to Blue Sky's documents for the proper purpose being "the investigation of potential representative claim or class action for his losses sustained as a shareholder of Blue Sky".<sup>8</sup>
- [21] As may be seen from Exhibit CAP-6,<sup>9</sup> a public announcement by the solicitors for the applicant shows that the applicant "has now finalised a cause of action and is consulting on how best to particularise the claims..." such that the "class action against Blue Sky will be filed in the Victorian Supreme Court or Federal Court".
- [22] Statements made via the applicant's solicitor on behalf of the applicant have not been disavowed and may be accepted. As the proper purpose for the authority to investigate the company's books was to investigate the potential of a representative claim or a class claim has been fulfilled then it is inappropriate to make a further order in respect of the inspection of company documents.
- [23] Paragraphs 3, 4 and 5 of the orders of 12 May 2021 acknowledge that the respondent was entitled to redact "any responsive documents or privilege" thus protecting the respondent and third parties' positions in respect to privilege. In respect of the basis of the claim for the privilege, Exhibit CAP-3<sup>10</sup> shows that as far as possible, without compromising the rights of third parties, details have been provided as the basis of the privilege claim with respect to each partially redacted document.
- [24] There is manifest difficulty and unfairness as Mr Crowe QC points out in a court making a decision upon privilege without reference to the rights of the former directors of Blue Sky and Ernst+Young, when those parties which may be adversely affected by such a determination. The respondent submitted that it was not the respondent's submission that there could not be a determination in respect of a question of privilege in applications such as the present, in a general sense,<sup>11</sup> but rather that it was inappropriate to do so in the present case because the purpose of the s 247A of the *Corporations Act* order had in fact been met and such a procedure would adversely affect the rights of third parties. I accept those submissions. The question of privilege ought to, in my view, be the subject of determination in substantive litigation where all parties are represented and may be heard.
- [25] I consider that the appropriate method is that proposed by the respondent, that is, to note that the applicant reserves his right to challenge any privilege claims made by the respondent in any subsequent proceedings brought by the applicant, otherwise the application is dismissed.

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<sup>8</sup> See *Furniss v Blue Sky Alternative Investments Ltd* [2021] QSC 46 at [66].

<sup>9</sup> Affidavit of Colleen Anne Platford filed 3 September 2021.

<sup>10</sup> Affidavit of Colleen Anne Platford filed 3 September 2021.

<sup>11</sup> *Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2)* [2008] WASC 10.