

# SUPREME COURT OF QUEENSLAND

CITATION: *Birbilis Bros Pty Ltd v Bunnings Group Ltd (No 2)* [2023] QSC 257

PARTIES: **BIRBILIS BROS PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT)**  
ACN 115 942 311  
(plaintiff)  
v  
**BUNNINGS GROUP LTD**  
ABN 26 008 672 179  
(defendant)

FILE NO/S: BS No 7403 of 2021

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 15 November 2023

DELIVERED AT: Brisbane

HEARING DATE: Application on the papers. Application filed 4 May 2023; Plaintiff's submissions filed 15 June 2023.

JUDGE: Kelly J

ORDER: **The plaintiff is granted leave *nunc pro tunc* to proceed with the proceeding.**

CATCHWORDS: CORPORATIONS – VOLUNTARY ADMINISTRATION – PROTECTION OF COMPANY PROPERTY FROM PERSONS BOUND BY DEED OF COMPANY ARRANGEMENT – where the plaintiff is in voluntary administration and bound by a deed of company arrangement – where s 444E(3)(a) of the *Corporations Act 2001* (Cth) prevents a person bound by deed from proceeding with a proceeding in relation to any of the company's property without leave of the court – where the causes of action alleged in the proceeding are *choses in action* and, hence, property of the plaintiff – where the plaintiff has applied for leave *nunc pro tunc* to continue with the proceeding – where the application is not opposed – whether the plaintiff should be granted leave *nunc pro tunc* to proceed with the proceeding  
*Corporations Act 2001* (Cth), s 444E(3)(a), s 444E(3)(c)  
*Adelaide Brighton Cement Ltd v Concrete Supply Pty Ltd* (2018) 124 ASCR 389, cited

*Hastie Group Ltd (In Liq) v Multiplex Constructions Pty Ltd (Formerly Brookfield Multiplex Constructions Pty Ltd) (No 2)* (2021) 155 ACSR 217; [2021] FCA 1344, cited  
*Re QMT Constructions Pty Ltd* [2000] 1 Qd R 284; [1999] QSC 2, cited

COUNSEL: A Messina, with S Keizer, for the plaintiff

SOLICITORS: McLachlan Thorpe Partners for the plaintiff  
 King & Wood Mallesons for the defendant

### **An application for leave to proceed**

- [1] The plaintiff has applied pursuant to s 444E(3)(c) of the *Corporations Act 2001* (Cth) (“the Act”) for leave *nunc pro tunc* to continue with the proceeding. The application is not opposed.
- [2] The proceeding commenced on 29 June 2021. On 14 October 2022, the plaintiff entered voluntary administration. On 6 February 2023, a deed of company arrangement (“the Deed”) was entered. The pleadings have been amended several times, particulars have been sought and provided, some disclosure has occurred together with other interlocutory steps, including court ordered mediation and an application for security for costs. The trial has been listed and vacated on three occasions. The proceeding is now on the Commercial List.

### **The power to grant leave**

- [3] Section 444E(3)(a) of the Act applies to “a person bound by the [D]eed”. Such a person cannot proceed with a proceeding in relation to any of the company’s property without the leave of the court, which may be granted *nunc pro tunc*.<sup>1</sup>
- [4] It is accepted that the plaintiff is bound by the Deed and that the causes of action alleged in the proceeding are *choses in action* and, hence, property of the plaintiff.
- [5] The power to grant leave is discretionary. The only limitations on the discretion are to be derived from the context, scope and purpose of Pt 5.3A of the Act. The factors relevant to the exercise of discretion may include:<sup>2</sup>
- (a) the amount and seriousness of the claim;
  - (b) whether there is a serious question to be tried in the sense of the Court being “affirmatively satisfied that the claim has a solid foundation and gives rise to a serious dispute”;
  - (c) the stage of the proceeding;
  - (d) whether the plaintiff would suffer disadvantage were leave to be refused;

<sup>1</sup> *Adelaide Brighton Cement Ltd v Concrete Supply Pty Ltd* (2018) 124 ASCR 389, [19]; *Re QMT Constructions Pty Ltd* [2000] 1 Qd R 284.

<sup>2</sup> *Hastie Group Ltd (in liq) & Ors v Multiplex Constructions Pty Ltd (formerly Brookfield Multiplex Constructions Pty Ltd) & Ors (No 2)* (2021) 155 ACSR 217, 220 [7]–[11].

- (e) whether, a grant of leave would unreasonably distract the deed administrator from performance of statutory duties or oblige the administrator unnecessarily to incur substantial legal costs.

### **An appropriate case for the grant of leave**

- [6] The claims made in the proceeding are for substantial amounts and advance recognisable causes of action. There is a serious question to be tried. At the heart of the proceeding is an executed document said to constitute a binding written supply agreement. The defendant contends that there is no binding agreement. The authority of employees of the defendant is in contest. For the purpose of identifying a serious question to be tried, the existence of the executed document and the contest about authority provide the requisite level of satisfaction that the claim has a solid foundation and gives rise to a serious dispute.
- [7] It is apparent that the administrator does not oppose, and the Deed countenances the conduct of, the proceeding. The following matters are worthy of note:
- (a) The object of the Deed is expressed as being to achieve a better return for creditors other than on a winding up.
  - (b) At the time of the Deed, the administrator was aware of the proceeding.
  - (c) The administrator opined that the Deed was in the interests of creditors.<sup>3</sup>
  - (d) As at 14 October 2022, the plaintiff's estimated assets were about \$100,000 and its estimated liabilities were \$2,953,782.
  - (e) Of those liabilities, priority unsecured creditors, the employees, were owed \$103,517, secured creditors were owed \$1,837,500 and unsecured creditors were owed \$1,012,765.
  - (f) On 7 December 2022, in his report for the second meeting of creditors, the administrator stated:
 

“The success of [the proceeding] is expected to result in sufficient funds for payment of up to 100 cents in the dollar to priority creditors.”
  - (g) The Deed relevantly provides as follows:
    - (i) any damages award from the proceeding is to be paid into the Deed Fund controlled by the administrator; and
    - (ii) the Deed Fund is to be used to pay admitted employee priority claims and then unsecured creditors on a *pari passu* basis;
    - (iii) Mr Birbilis is appointed as the plaintiff's attorney for the purpose of conducting the proceeding and to deal with any litigation funder.
- [8] Litigation funding has been obtained by a litigation funding agreement entered on or about the date of the Deed.

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<sup>3</sup> Affidavit of Tarrek Naji filed 4 May 2023 [41(b)].

- [9] The proceeding is relatively well advanced. Substantial costs have been incurred.<sup>4</sup>
- [10] In this case, the impact on the administrator is not a significant consideration because Mr Birbilis is running the proceeding as attorney and the administrator is indemnified by the plaintiff.
- [11] In all of the circumstances I am satisfied that this is an appropriate case for the grant of leave.

**Order**

1. The plaintiff is granted leave *nunc pro tunc* to proceed with the proceeding.

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<sup>4</sup> Ibid [58].