FEDERAL COURT OF AUSTRALIA

CBA Corporate Services (NSW) Pty Ltd, in the matter of ZYX Learning Centres Ltd (receivers and managers appointed) (in liq) v Walker [2013] FCA 243

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| Citation: | CBA Corporate Services (NSW) Pty Ltd, in the matter of ZYX Learning Centres Ltd (receivers and managers appointed) (in liq) v Walker [2013] FCA 243 |
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| Parties: | **CBA CORPORATE SERVICES (NSW) PTY LTD (ABN 25 072 765 434), COMMONWEALTH BANK OF AUSTRALIA LTD (ANC 123 123 124), WESTPAC BANKING CORPORATION (ABN 33 007 457 141), AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ABN 11 005 357 522), NATIONAL AUSTRALIA BANK LTD (ABN 12 004 044 937), BANK OF AMERICA N.A (ABN 51 064 874 531), CITIBANK N.A (ABN 34 072 814 058) and MIZUHO CORPORATE BANK LTD (ABN 83 099 031 106) v PETER WALKER AND GREGORY MOLONEY (IN THEIR CAPACITY AS LIQUIDATORS OF ZYX LEARNING CENTRES) LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) (ACN 079 736 664) AND THE COMPANIES LISTED IN SCHEDULE 1 TO THE APPLICATION FILED 21 FEBRUARY 2013** |
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| File number: |  |
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| Judge: |  |
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| Date of judgment: | 15 March 2013 |
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| Legislation: | *Corporations Act 2001* (Cth), s 477*Federal Court (Corporations) Rules 2000*, r 2.13(1)(a)*Federal Court of Australia Act 1976* (Cth), Part IVA*Federal Court Rules 2011* (Cth), r 39.05  |
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| Cases cited: | *ABC Learning Centres Limited, in the matter of ABC Learning Centres Limited, application by Walker (No. 12)* [2012] FCA 1141*Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160  |
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| Date of hearing: | 14 March 2013 |
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| Place: |  |
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| Division: |  |
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| Category: | No catchwords |
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| Number of paragraphs: | 27 |
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| Counsel for the Applicants: | Mr AW Street SC with Mr DG Healey |
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| Solicitor for the Applicants: | Henry Davis York |
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| Counsel for the Respondent: | Mr IM Jackman SC with Ms JK Taylor |
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| Solicitor for the Respondent: | Addisons |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1846 of 2008 |

in the matter of OF ZYX LEARNING CENTRES LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)

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| BETWEEN: | CBA CORPORATE SERVICES (NSW) PTY LTD (ABN 25 072 765 434)First ApplicantCOMMONWEALTH BANK OF AUSTRALIA LTD (ANC 123 123 124)Second ApplicantWESTPAC BANKING CORPORATION (ABN 33 007 457 141)Third ApplicantAUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ABN 11 005 357 522)Fourth ApplicantNATIONAL AUSTRALIA BANK LTD (ABN 12 004 044 937)Fifth ApplicantBANK OF AMERICA N.A (ABN 51 064 874 531)Sixth ApplicantCITIBANK N.A (ABN 34 072 814 058)Seventh ApplicantMIZUHO CORPORATE BANK LTD (ABN 83 099 031 106)Eighth Applicant |
| AND: | PETER WALKER AND GREGORY MOLONEY (IN THEIR CAPACITY AS LIQUIDATORS OF ZYX LEARNING CENTRES) LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) (ACN 079 736 664) AND THE COMPANIES LISTED IN SCHEDULE 1 TO THE APPLICATION FILED 21 FEBRUARY 2013Respondents |

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| JUDGE: | JACOBSON J |
| DATE OF ORDER: | 15 MARCH 2013 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The application filed on 21 February 2013 be dismissed.
2. The applicants pay the respondents’ costs of the application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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in the matter of OF ZYX LEARNING CENTRES LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)

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| BETWEEN: | CBA CORPORATE SERVICES (NSW) PTY LTD (ABN 25 072 765 434)First ApplicantCOMMONWEALTH BANK OF AUSTRALIA LTD (ANC 123 123 124)Second ApplicantWESTPAC BANKING CORPORATION (ABN 33 007 457 141)Third ApplicantAUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ABN 11 005 357 522)Fourth ApplicantNATIONAL AUSTRALIA BANK LTD (ABN 12 004 044 937)Fifth ApplicantBANK OF AMERICA N.A (ABN 51 064 874 531)Sixth ApplicantCITIBANK N.A (ABN 34 072 814 058)Seventh ApplicantMIZUHO CORPORATE BANK LTD (ABN 83 099 031 106)Eighth Applicant |
| AND: | PETER WALKER AND GREGORY MOLONEY (IN THEIR CAPACITY AS LIQUIDATORS OF ZYX LEARNING CENTRES) LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) (ACN 079 736 664) AND THE COMPANIES LISTED IN SCHEDULE 1 TO THE APPLICATION FILED 21 FEBRUARY 2013Respondents |

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| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

On 17 August 2012, Emmett J made orders granting approval to the liquidators of a group of companies previously known as the ABC Learning Group to enter into a funding agreement with IMF (Australia) Limited in relation to proceedings against a syndicate of banks seeking to set aside certain securities granted by the companies to the banks: see *ABC Learning Centres Limited, in the matter of ABC Learning Centres Limited, application by Walker (No. 12)* [2012] FCA 1141.

His Honour observed at [16] and [18] that in the proposed proceedings against the banks, the liquidators would seek recovery of approximately $244 million and that unless the liquidators are successful in the proceedings, it is unlikely that there will be any return to unsecured creditors.

Subsequently, on 24 October 2012, the liquidators and the relevant companies in the ABC Learning Group commenced proceedings against the banks seeking to set aside certain floating charges and claiming various restitutionary remedies. I will call those proceedings the “charge proceedings”.

On 21 February 2013, the syndicate of banks who are the respondents in the charge proceedings filed an interlocutory process seeking an order under r 39.05(c) of the *Federal Court Rules 2011* (Cth) that the orders and directions made by Emmett J on 17 August 2012 be set aside by reason of what is said to be failure to disclose a material fact to the Court.

The fact which the banks claim to be material is that, in addition to IMF funding the charge proceedings, IMF had agreed to fund, or was actually funding, representative proceedings brought by shareholders against the ABC Learning Group. Those proceedings are matter number NSD 1776 of 2010 entitled JC International Investments Pty Ltd v ZYX Learning Centres Limited (Receivers and Managers Appointed) (in Liquidation).

The claim is a representative action under Part IVA of the *Federal Court of Australia Act 1976* (Cth). It is a claim for damages alleged to have been suffered by shareholders by reason of the misleading and deceptive conduct of the companies by failing to disclose material information relating to the financial position of the companies. It is similar in nature to the claim considered by the High Court in *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160.

Mr AW Street SC who appears for the banks contends that the fact that IMF was funding the class action and was proposing to fund the charge proceedings placed the liquidators and IMF in an invidious position of conflict. The conflict is said to arise from the fact that in the charge proceedings, the liquidators are carrying out their duty to get in assets of the companies, whereas in the class action, the companies are the defendant in a proceeding which, if successful, will reduce the dividend that would be available to the existing pool of creditors who are not funded by IMF. This is because it would add, as claimants against the fund available to unsecured creditors, the shareholders who stand to benefit from the class action which is (or may be) funded by IMF.

Whilst there was some debate about this issue, the thrust of Mr Street’s submissions dealt with the question of materiality. There was no debate about the well established proposition that the liquidators owed a heavy duty to disclose to the Court all facts that were material to the application for approval of the funding.

The issue of materiality was put by Mr Street on two separate bases. The first was that, by reason of funding arrangements in relation to the class action, IMF stands to obtain a further benefit if that action is determined favourably to the shareholders at a future point of time.

This was said to be material because it went to the issue of the reasonableness of the fee payable to IMF as a proportion of the proceeds of recovery in the charge proceedings. The issue of the reasonableness of the fee payable to IMF was referred to by Emmett J at [14] and [15] of his judgment.

The second basis was that IMF and the shareholders who may stand to benefit from the class action will obtain what is said to be a significant forensic advantage by reason of access to documents obtained in the charge proceeding. Mr Street submits that this will put IMF and the shareholders in the unique position of knowing exactly what the liquidator thinks about a central issue in both sets of proceedings, namely, the solvency of the companies in the ABC Learning Group.

The only other issue which arises in the present application is the issue of standing but ultimately Mr Jackman SC, who appears for the liquidators, did not oppose the application on that ground. I am satisfied that the banks have standing as creditors pursuant to s 477(6) of the *Corporations Act 2001* (Cth) and rule r 2.13(1)(a) of the *Federal Court (Corporations) Rules* 2000 (Cth).

In my opinion, the matters on which Mr Street relies were not material and the liquidators were not guilty of material non-disclosure in the application made to Emmett J. There are a number of reasons for this.

Central to the application made to Emmett J, and to his Honour’s reasons, is the proposition that it is unlikely that the assets of the ABC Learning Group of companies will realise sufficient funds for any creditors other than the banks. Even then, there will be a shortfall for the banks who will prove for the balance as unsecured creditors. His Honour dealt with this at [18] of his reasons and said in that paragraph

Only if the Liquidators are successful in any proposed proceeding would there be any return available to the unsecured creditors. The Liquidators therefore consider that is in the best interests of the ABC Group of Companies and its creditors that the proposed funding agreement and legal costs agreement be entered into, and that the Liquidators perform their obligations under those agreements.

Thus, it seems to me that the question of materiality has to be considered in light of the central issue determined by his Honour, namely, his acceptance of the liquidators’ opinion that it was in the best interests of unsecured creditors to enter into the funding agreement. Without it, there was no real possibility of any dividend in the liquidation.

It follows, in my view, that what is material to the question of the fee payable to IMF if the charge proceedings are successful, is the fee that may be payable in relation to the charge proceedings.

His Honour considered the matters going to the reasonableness of the fee at [14] and [15] and it is clear enough from what his Honour said that the question of the reasonableness of the fee and all matters pertaining to the fee payable in the charge proceedings were put to his Honour.

The question of whether IMF may earn another fee from the shareholder proceedings is not something which might reasonably have affected the question which Emmett J had to decide. Moreover, the possibility of IMF earning a fee from such a proceeding is highly contingent.

It is true that the shareholder action is on foot but I have evidence before me on information and belief that IMF does not propose to fund the proceedings even though leave to proceed has been granted. IMF apparently intends to assist its clients who comprise some of the ABC shareholders to press their proofs of debt but this will only be done if funds become available from the charge proceedings.

The question of materiality in relation to access to documents and information obtained in the charge proceedings must also be considered in light of the proposition that any claim by or on behalf of unsecured creditors will await the result of the charge proceedings.

Once the charge proceedings are determined, the liquidators will be released from the implied undertaking as to the use of documents obtained under compulsory process in those proceedings. His Honour made reference to the undertaking in [13] and the question of access to documents was plainly enough brought to the Court’s attention in the course of that application.

The contractual position between the liquidators, the ABC Learning Group of companies and IMF is addressed in clause 13 of the Litigation Funding Agreement. It is evident from [13] of Emmett Js reasons that he was taken to the relevant clause of the agreement. The implied undertaking is spelled out and expanded in clause 13.4 and 13.5. Emmett J had regard to this in his judgment.

The question of the forensic advantage suggested by Mr Street does not seem to me to arise because the attitude of the liquidators to the solvency issue will become irrelevant once the outcome of the charge proceedings is known. The proceedings will either culminate in a judgment or they will not. If for any reason the case does not proceed or is compromised favourably to the companies, any possible question of the liquidators’ position can be addressed by way of application to the Court.

Mr Street submitted that the matters which I have addressed today were not referred to in the evidence filed by the liquidators. He submits that I have no explanation before me for why the liquidators did not consider it material to disclose the existence of the class action or the possibility of IMF earning a fee from recoveries by a proof of debt procedure, in the application that was made to Emmett J. The effect of Mr Street’s submission is that what is being done in the present application is to look at the matter with the benefit of hindsight and, in particular, that these matters should at least have been addressed in the evidence filed on behalf of the liquidators in the present application.

The short answer to this submission seems to me to be that, as I have said, I do not consider it to have been material to the application before Emmett J to address the matters on which Mr Street now relies. The effect of what I have said above is that the application made by the banks must be dismissed.

Nevertheless, in doing so, I should not be thought in any way to depart from the principle that practitioners owe a duty of full disclosure in making an application of the type made to his Honour. What is or is not material in any application is a question of judgment in each case. Of course, the Court should not be burdened with irrelevant detail but it is always better to err on the side of caution particularly where, as in the present case, a litigation funder may possibly wear more than one hat.

Accordingly, for the reasons I have set out above, the order I will make is that the application be dismissed.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jacobson. |

Associate:

Dated: 15 March 2013