FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation) [2019] FCA 1601

|  |  |
| --- | --- |
| File number: | ACD 41 of 2018 |
|  |  |
| Judge: | **KATZMANN J** |
|  |  |
| Date of judgment: | 26 September 2019 |
|  |  |
| Catchwords: | **CORPORATIONS** — application for leave to proceed against company in liquidation under s 500(2) of the *Corporations Act 2001* (Cth) in proceedings for remedies under the *Fair Work Act 2009* (Cth) for pecuniary and other forms of relief, including pecuniary penalties, arising out of alleged contraventions of Fair Work Act — where deed of company administration pleaded as a bar to some of the claims — where claim against the company has a solid foundation and gives rise to a serious question to be tried — where claim has to be proved against the company before claims of accessorial liability can be made out against the other respondents — public interest considerations — where no opposition from liquidators or company’s other major creditor |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth), ss 9, 444A(4), 444D(1), 444E(3), 491(1), 494, 500(2), 553B, 556(1)  *Fair Work Act 2009* (Cth), ss 61(1), 361, 682 |
|  |  |
| Cases cited: | *ACN 093 117 232 Pty Ltd (in liq) v Intelara Engineering Consultants Pty Ltd (in liq)* [2019] FCA 1489  *Atkins Freight Services Pty Ltd v Fair Work Ombudsman* [2017] FCA 1134  *Australian Competition and Consumer Commission v Artorios Ink Co Pty Ltd* [2013] FCA 753  *Australian Competition and Consumer Commission v Birubi Art Pt Ltd (No 2)* [2018] FCA 1785  *Australian Competition and Consumer Commission v Link Solutions Pty Ltd* [2008] FCA 1790  *Australian Competition and Consumer Commission v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* [2016] FCA 1246  *Bartolome Durado & Delo Be Isugan v Foot & Thai Massage Pty Ltd* [2018] FWC 4711  *BE Australia WD Pty Ltd (subject to a Deed of Company Arrangement) v Sutton* (2011) 82 NSWLR 336  *Kowalski v Trustee, Mitsubishi Motors Australia Limited Staff Superannuation Pty Ltd* [2003] FCAFC 18  *Lehman Brothers Holdings Inc. v City of Swan* (2010) 240 CLR 509  *Melhelm Pty Ltd, in the matter of Boka Beverages Pty Ltd (in liquidation) v Boka Beverages Pty Ltd (in liquidation)* [2019] FCA 1184  *Metropolitan Health Service Board v Australian Nursing Federation* (2000) 99 FCR 95  *Rushleigh Services Pty Ltd v Forge Group Ltd (In Liq) (Receivers and Managers Appointed); In the Matter of Forge Group Ltd (In Liq) (Receivers and Managers Appointed)* [2016] FCA 1471  *Tomlinson v Ramsey Food Processing Pty Limited* (2015)256 CLR 507  *Vagrand Pty Ltd (In liq) v Fielding* (1993) 41 FCR 550 |
|  |  |
| Date of hearing: | 24 September 2019 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | Fair Work Division |
|  |  |
| National Practice Area: | Employment & Industrial Relations |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 48 |
|  |  |
| Counsel for the Applicant: | Mr M Seck with Ms B Byrnes |
|  |  |
| Solicitor for the Applicant: | Office of the Fair Work Ombudsman |
|  |  |
| Counsel for the Respondents: | The respondents did not appear |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | ACD 41 of 2018 |
|  | | |
| BETWEEN: | FAIR WORK OMBUDSMAN  Applicant | |
| AND: | FOOT & THAI MASSAGE PTY LTD (ACN 147 134 272) (IN LIQUIDATION)  First Respondent  COLIN KENNETH ELVIN  Second Respondent  JUN MILLARD PUERTO  Third Respondent | |

|  |  |
| --- | --- |
| JUDGE: | KATZMANN J |
| DATE OF ORDER: | 26 September 2019 |

THE COURT ORDERS THAT:

1. The name of the first respondent be amended to read “Foot & Thai Massage Pty Ltd (ACN 147 134 272) (in liquidation)”.
2. Pursuant to s 500(2) of the *Corporations Act 2001* (Cth), the applicant have leave to proceed against the first respondent.

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

REASONS FOR JUDGMENT

## Introduction

1. Foot & Thai Massage Pty Ltd (**FTM**) is the owner and operator of a therapeutic massage shop trading as “foot&thai” in Belconnen, ACT. From 1 November 2010 to 11 April 2016, its sole director was Colin Kenneth Elvin. Jun Millard Puerto is alleged to have been an employee of FTM, who was responsible for supervising other FTM employees.
2. On 22 June 2018 the Fair Work Ombudsman instituted proceedings against FTM, Mr Elvin and Mr Puerto. The Ombudsman alleges that FTM contravened the *Fair Work Act 2009* (Cth) (**FW Act**) in several respects over a period of approximately three and a half years, from 22 June 2012 until 11 February 2016. The alleged conduct in question includes:

* multiple breaches of award entitlements contrary to s 45 of the FW Act, involving failing to pay minimum wages, public holiday rates, and overtime rates;
* failing to pay annual leave entitlements on termination of employment in contravention of s 90(2) of the FW Act;
* requiring employees to repay to FTM $800 per fortnight in cash out of their wages in contravention of s 325 of the FW Act;
* requiring employees to work unreasonable hours in excess of 38 hours a week in contravention of ss 44(1) and 62(1) of the FW Act;
* failing to make and keep records as required by the *Fair Work Regulations* *2009* (Cth) (**Regulations**) in contravention of s 535(1) of the FW Act;
* failing to ensure that records that were kept were not false or misleading and using false or misleading records contrary to reg 3.44 of the Regulations;
* threatening employees that they would be repatriated to the Philippines and in some cases that their families would be killed if they disclosed their working conditions to the Department of Home Affairs or anyone outside the workplace, thereby taking adverse action against them to prevent them from exercising a workplace right to make a complaint in relation to their employment in contravention of ss 340(1) and 343(1) of the FW Act, which prohibits, amongst other things, threats to take action against a person with intent to coerce the person not to exercise a workplace right;
* discriminating against employees because of their race, national extraction or social origin in contravention of s 351 of the FW Act by reason of all the above as well as by restricting their freedom of movement; and
* failing to provide employees with pay slips on a regular basis in contravention of s 536(2) of the FW Act or to include in payslips the information prescribed by the Regulations in contravention of s 536(2) of the FW Act.

1. The case relates to seven employees or, more correctly, former employees, each of whom was employed by FTM as a massage therapist.
2. Mr Elvin and Mr Puerto are said to be knowingly concerned in the contraventions.
3. The Ombudsman seeks various forms of relief, including declarations, orders for compensation and the publication of certain information, and civil penalties.
4. On 13 August 2019, well after the matter had been listed for hearing and the Ombudsman had filed her evidence on liability, FTM appointed an external administrator and resolved to wind up the company.
5. Section 500(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**) relevantly provides that, after the passing of a resolution for voluntary winding up, no action or other civil proceeding against a company is to be proceeded except by leave of the Court and on such terms as the Court imposes.
6. On 4 September 2019 the Ombudsman filed an interlocutory **application** seeking leave to proceed against FTM. The application was supported by five affidavits, the most substantial of which was affirmed by Sharissa Thirukumar on 9 September 2019, a lawyer in the Ombudsman’s office. Each of the affidavits was read but none of the deponents was required for cross-examination.
7. Indeed, the application was not opposed. The liquidators were notified of the application the day it was filed and indicated that they neither consented to nor opposed any orders the Court might make. On 12 September 2019 Mr Elvin advised that he neither consented to nor opposed the application. Mr Puerto remained silent. None of the respondents appeared at the hearing.
8. For the reasons that follow, leave should be granted.

## Background facts

1. FTM was registered on 1 November 2010. Mr Elvin was its only director as well as its secretary and sole shareholder. It was placed in voluntary administration on 15 December 2015. On 11 April 2016 FTM entered into a deed of company arrangement (**DOCA**). The same day Viet Ngo was appointed as sole director, secretary and shareholder of FTM, replacing Mr Elvin in those positions. The DOCA was terminated on 17 October 2017 and at that point FTM ceased to be under external administration.
2. On 15 October 2018, Mills Oakley, who formerly represented FTM in this proceeding, referred the company to Jirsch Sutherland, a firm of insolvency practitioners. On 13 August 2019 a resolution was passed to wind up the company under s 491(1) of the Corporations Act and Trent Andrew Devine and Andrew John Spring of Jirsch Sutherland were appointed liquidators. A week later, a Form 205 was lodged with ASIC notifying it of the resolution. Evidently, no declaration of solvency was made in accordance with s 494 of the Corporations Act which means that the winding up was a “creditors’ voluntary winding up”, having regard to the definition of that term and of the term “members’ voluntary winding up” in s 9 of the Corporations Act. That much is confirmed by the terms of the Form 205.
3. On 23 August 2019, Jirsch Sutherland lodged with ASIC the information about the company’s affairs sent to creditors (Form 5604). Three categories of creditors were identified in that form:
4. secured creditors, most of whom are customers who hold current vouchers to the FTM shop, but include employee entitlements with liabilities amounting to $83,458.15;
5. unsecured creditors whose liabilities amount to $444,495.83, 92%, of which is a liability owing to the Australian Taxation Office (**ATO)**; and
6. contingent liabilities amounting to $668,352.58, which is the sum the Ombudsman is seeking in compensation with respect to the alleged underpayments to employees in the present proceeding.

## The relevant principles

1. Subsection 500(2) of the Corporations Act does not mandate any particular considerations. The discretion to grant leave is at large. Nevertheless, the authorities have laid down a number of principles which guide the exercise of the discretion. Black J recently summarised the position taken in the authorities in *In the matter of DSHE Holdings Limited (recs and mgrs apptd) (in liq)* [2018] NSWSC 82at [18]:

[T]he purpose of this section is to prevent a company’s assets being dissipated by unnecessary litigation, and an applicant for leave will be required to show why it should not be left to prove its debt in the winding up: *Re Gordon Grant & Grant Pty Ltd* [1983] 2 Qd R 314; (1983) 7 ACLR 669; (1983) 1 ACLC 742; *HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (in liq) (No 1)* [2016] FCA 442 at [18]. The claimant must establish that the claim has a solid foundation and gives rise to a serious question to be tried; factors relevant to the exercise of the court’s discretion may include the degree of complexity of legal and factual issues and the prospect that a proof of debt will be rejected; and the power to grant leave is discretionary and other factors may be relevant to its exercise…

See also: *Rushleigh Services Pty Ltd v Forge Group Ltd (In Liq) (Receivers and Managers Appointed); In the Matter of Forge Group Ltd (In Liq) (Receivers and Managers Appointed)* [2016] FCA 1471 (Foster J) at [15].

1. Where leave is sought by a regulator, however, additional considerations arise, such as general deterrence and other public policy considerations: *Australian Competition and Consumer Commission v* ***Artorios******Ink*** *Co Pty Ltd* [2013] FCA 753 (Mortimer J) at [10]–[11]. The Ombudsman has important statutory responsibilities which include enforcing the FW Act through proceedings of this kind: FW Act, s 682. Orders that can be made in such a proceeding include the imposition of civil penalties, the principal purpose of which is deterrence, both specific and general.

## Reasons why leave should be granted

### The claims have a solid foundation giving rise to a serious question to be tried

1. The Ombudsman’s action is far from frivolous. The underlying claims undoubtedly have a solid foundation and the substantive application raises a serious question to be tried.
2. In *Vagrand Pty Ltd (In liq) v Fielding* (1993) 41 FCR 550 at 556 the Full Court made it clear that it was unnecessary for an applicant to establish a prima facie case, and that the test of whether the claim has a solid foundation and gives rise to a serious question to be tried is akin to the “serious question to be tried” test used to determine whether an interlocutory injunction should be granted.
3. The foundation for the claim is set out in the Ombudsman’s pleading. The action results from an investigation by the Ombudsman’s office. The allegations in the pleading are supported by a statement of agreed facts signed by the former lawyer for FTM, certain other admissions made in FTM’s Further Amended Defence, and a number of affidavits, including affidavits from former employees of FTM who were the alleged victims of FTM’s conduct. The Ombudsman has also filed submissions on liability, which indicate that there is a serious question to be tried.
4. The underpayments claim is supported by admissions made by FTM in its defence. While FTM does not admit the Ombudsman’s allegation that the Health Professionals and Support Services Award 2010 covered and applied to FTM with respect to the employment of the relevant employees, it does not deny it. Nor does it suggest that another award was applicable. Moreover, annexed to the affidavits of the employees are copies of their contracts which include the following statement:

If applicable, this letter should be read in conjunction with the Health Professionals and Support Services Award 2010.

1. Insofar as the general protections claims are concerned, the Ombudsman has the benefit of the statutory presumption that the adverse action was taken for the reasons she alleged: FW Act, s 361.
2. In its defence FTM pleaded that it could not be found to be “subject to any order for underpayment”, since it was a party to the DOCA, which extinguished any claims or debts of the former employees who were also party to the DOCA, including any claims or debts for wages.
3. Contrary to FTM’s pleading, the employees were not “party” to the DOCA. Nevertheless, a deed of company arrangement binds all creditors of the company, so far as it concerns claims arising on or before the day on or before which claims must have arisen if they are to be admissible under the deed — at the latest, the day the administration began: Corporations Act, ss 444A(4), 444D(1). In other words, the DOCA binds all those persons who were creditors of FTM on 15 December 2015. It is common ground that the employees who were allegedly underpaid were covered by the DOCA and received monies in accordance with its terms.
4. But the Ombudsman does not accept that the DOCA operates as a bar to her action either in respect of the alleged underpayments or at all. The Ombudsman’s contention is that the DOCA only operates to prevent the creditors of FTM from bringing legal proceedings against FTM but does not extinguish its underlying liability. She contends that the DOCA does not bind her.
5. There is much to be said in favour of the Ombudsman’s contention.
6. Section 444D(1) of the Corporations Act provides that “[a] deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed”. In ***Melhelm*** *Pty Ltd, in the matter of Boka Beverages Pty Ltd (in liquidation) v Boka Beverages Pty Ltd (in liquidation)* [2019] FCA 1184at [46] Gleeson J observed that:

By s 5-5, “creditor”, when used in relation to a company under external administration, means a creditor of the company. The core meaning of “creditor” is a person to whom a debt is owing: *BE Australia WD Pty Ltd (subject to a Deed of Company Arrangement) v Sutton* [2011] NSWCA 414; (2011) 82 NSWLR 336 (*BE Australia*) at [133]. In its widest sense, the word “creditor” includes all persons having any pecuniary claims against the company: *Re Midland Coal, Coke & Iron Company* [1895] 1 Ch 267 at 277 and see s 553 of the Act. A person has a claim within the meaning of s 553 if they have a basis, founded on an existing legal right, for asserting a right to participate in the division of the assets of the company: *BE Australia* at [107].

1. The Ombudsman submitted that she was not a creditor of the company at the relevant day or at all. Moreover, she argued that she does not bring this action on behalf of the employees referred to in the DOCA. Rather, she acts pursuant to a statutory power to commence a proceeding to enforce the FW Act and an award made under that Act. Orders for the payment of compensation are not made in satisfaction of a claim made on behalf of employees but pursuant to the power of the Court to make such orders and that power only arises when the Court finds that the employees were not paid their entitlements. These submissions are supported by high authority: ***Tomlinson*** *v Ramsey Food Processing Pty Limited* (2015)256 CLR 507 at [44] (French CJ, Bell, Gageler and Keane JJ). See also: ***Atkins Freight Services*** *Pty Ltd v Fair Work Ombudsman* [2017] FCA 1134 (White J) at [32].
2. It will be recalled that the Ombudsman did not institute the proceeding until after the administration had been terminated. In ***BE Australia*** *WD Pty Ltd (subject to a Deed of Company Arrangement) v Sutton* (2011) 82 NSWLR 336, to which Gleeson J referred in *Melhelm* in the passage cited above, Campbell JA (with whom McColl and Young JJA agreed at [1] and [216] respectively) pointed out at [133] that a contingent creditor is not a creditor:

The core meaning of “*creditor*” is a person to whom a debt is owing. That can be confirmed by recourse to dictionaries. It has a subsidiary and specialised meaning in relation to accounting, concerning the type of entries that are made on the credit side of an account. A contingent creditor is not a creditor in either of these senses of the term. Rather, such a person is someone who might, in some circumstances, become a creditor. It would not be appropriate accounting treatment to enter an estimate of the amount for which he or she might become a creditor on the creditor side of a conventional set of accounts. The contingent liabilities of a corporation need to be disclosed in its accounts, if those accounts are to give a true and fair view of the affairs and financial position of the corporation. However, that is done by a note to the accounts, and does not mean that a contingent creditor actually is a “*creditor*” in the ordinary meaning of the word…

1. In any event, the Ombudsman contended no effect would be given to the DOCA because it is well established that employers and employees cannot contract out of minimum award entitlements: see, for example, *Metropolitan Health Service Board v Australian Nursing Federation* (2000) 99 FCR 95 (French J) at [17]–[20], [22]; *Atkins Freight Services* at [49]). While there is an exception in the context of a compromise of bona fide current or contemplated litigation (see *Kowalski v Trustee, Mitsubishi Motors Australia Limited Staff Superannuation Pty Ltd* [2003] FCAFC 18 at [17]–[19]), the exception does not apply here because this proceeding was not commenced until after the DOCA had been terminated and no litigation was previously in contemplation. Moreover, the Ombudsman’s claim with respect to the matters purportedly covered by the DOCA relates to contraventions of the National Employment Standards, which cannot be displaced: FW Act, s 61(1).
2. The Ombudsman also argued that, in any event, there are a number of claims she brings which are not on any view covered by the DOCA. They are:

* the alleged contraventions that occurred after the company was placed in administration but before the commencement date of the DOCA;
* the claims of adverse action under s 340(1) of the FW Act, discrimination under s 351(1) of the FW Act and coercion under s 343(1) of the FW Act;
* the claims against Mr Elvin and Mr Puerto for being knowingly involved in FTM’s contraventions; and
* the non-pecuniary claims.

1. These points are persuasive.
2. In relation to the first point, on the face of the DOCA it only covers claims, causes of action, debts or other liability “which exist as at the appointment date”, which is the date the company went into administration. Consequently, it does not cover any liabilities that arose after that date and some of the Ombudsman’s claims relate to conduct which took place after 15 December 2015 when FTM went into administration.
3. The second point is supported by the judgment of the NSW Court of Appeal in *BE Australia.* At the relevant date FTM had no existing legal obligation either to the Ombudsman or to the relevant employees and there must be such an obligation before a person has a claim that is provable in a winding up: *BE Australia* at [107], [119] (Campbell JA), [223] (Young JA). Moreover, in its defence FTM did not contend that the deed covered anything other than employee underpayments.
4. In a case involving the same DOCA — *Bartolome Durado & Delo Be Isugan v Foot & Thai Massage Pty Ltd* [2018] FWC 4711 — Kovacic DP held that the DOCA did not preclude the bringing of unfair dismissal applications by two employees in circumstances in which the Fair Work Commission had not determined whether the applicants were unfairly dismissed. In those circumstances, he considered that it could not be said that FTM was under an obligation at the time the DOCA was made to pay the applicants a sum of money in respect of the termination of their employment or that the applicants were owed such a sum. In that case Kovacic DP relied on the judgment of the NSW Court of Appeal in *BE Australia*.
5. In *Australian Competition and Consumer Commission v* ***Phoenix*** *Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* [2016] FCA 1246 at [5] Perry J found that the ACCC was a creditor, bound by the terms of a deed of company arrangement and, having regard to the terms of s 444E(3) of the Corporations Act, was unable to proceed against *Phoenix* without the leave of the Court. In that case, as in the present case, “claim” was defined to include a contingent debt and the ACCC was found to be a creditor on the basis that some of the claims for relief were “contingent” claims founded on alleged contraventions of the Australian Consumer Law which occurred before the appointment of the administrators. The relevant claims were described in [62] of her Honour’s reasons:

It will be recalled that paragraphs 9.5 and 9.6 of the prayer for relief respectively seek orders under s 239 of the ACL to annul the Commonwealth’s liability to pay the amount of loans made to students to Phoenix and to require Phoenix to repay to the Commonwealth any amount paid by the Commonwealth to Phoenix in purported discharge of the students’ VET liability, while paragraph 10 seeks declaratory relief to the same effect pursuant to s 21 of the Federal Court Act. Paragraph 15 seeks an injunction pursuant to s 232 of the ACL requiring Phoenix and/or CTI to refund to the Commonwealth the amounts referred to in paragraph 9.6…

1. Her Honour distinguished *BE Australia.* It would not be appropriate at this point in time for me to consider whether or not she was correct to do so. It is sufficient for present purposes to note that the Ombudsman contends that *Phoenix* isdistinguishable and that the point is at least reasonably arguable. I also note that no reference was made in *Phoenix* to the High Court’s judgment in *Tomlinson* and the ACCC apparently did not submit that its role as a regulator put it beyond the reach of the deed.
2. Turning to the third point regarding the claims against Messrs Elvin and Puerto, even if the Ombudsman were a creditor of FTM, the extent to which a deed of company arrangement binds creditors is limited by s 444D(1) of the Corporations Act and the Act does not bind creditors to give up a claim against a person other than the subject company: *Lehman Brothers Holdings Inc. v City of Swan* (2010) 240 CLR 509 at [52]–[53] (French CJ, Gummow, Hayne and Kiefel JJ), [68]–[69] (Heydon J). Furthermore, in its defence FTM did not contend that the DOCA precluded the Ombudsman from bringing these other claims or seeking relief other than an order with respect to the alleged underpayments.
3. As for the fourth point, it does not seem that the DOCA was intended to capture non-pecuniary claims that may be made against FTM or it would preclude anyone from seeking non-pecuniary relief.

### The case raises an issue of general importance

1. A determination on whether the DOCA binds the Ombudsman may have important implications for other claims she may wish to bring in similar circumstances. Indeed, it may have implications for other regulators as well. In their defences, neither Mr Elvin nor Mr Puerto raises the point about the DOCA pleaded against the Ombudsman by FTM.

### Not all the claims for relief are provable in a winding up

1. Claims for civil penalties are not provable in a winding up: Corporations Act, s 553B. Nor are the claims for non-pecuniary relief. The fact that not all the claims for relief are provable in a winding up is a significant factor in favour of the exercise of the discretion to grant leave to proceed: *Australian Competition and Consumer Commission v* ***Birubi*** *Art Pt Ltd (No 2)* [2018] FCA 1785 (Perry J) at [15]; *Australian Competition and Consumer Commission v Link Solutions Pty Ltd* [2008] FCA 1790 (Bennett J) at [11].

### It is in the public interest that leave be granted

1. There is a significant public interest in the Ombudsman continuing with the litigation against all three respondents without further delay. The proceeding raises issues of general public importance. The allegations are serious. They involve systematic exploitation of vulnerable employees. The employees concerned were all foreign workers on temporary visas. The Ombudsman has statutory responsibilities to ensure compliance with, and to enforce, the FW Act. If the claim is made out, the orders the Ombudsman seeks and which are open to the Court to make include orders designed to deter similar behaviour, not only by the respondents but also by others who might be tempted to act in a similar way.

### The case against the company has to be proved in any event

1. Although the Ombudsman would be free to proceed against the other respondents, in order to obtain relief from them, she first has to prove that FTM contravened the FW Act as alleged. In the circumstances, as the Ombudsman submitted, it would be “incongruous that the principal entity against whom the alleged contraventions are directed, and against whom the relevant prohibitions in the FW Act are intended to operate, should escape liability by reason of voluntary liquidation, while proceedings continue only against [Messrs Elvin and Puerto] by way of their ‘involvement’ in the contraventions…”: cf. *Artorios Ink* (Mortimer J) at [10].

### The proceeding is well advanced

1. The proceeding is at an advanced stage. The Ombudsman has filed all her evidence in chief and the liability hearing is due to start in less than a month.

### There is no opposition to the application from interested parties or third parties

1. FTM’s largest creditor, the ATO, does not oppose the application and, as I have already mentioned, neither do the liquidators.

### Dearth of countervailing considerations

1. A significant portion of the compensation sought by the Ombudsman relates to underpayment of wages and entitlements due to employees under the award, which has priority over the majority of other unsecured creditors in insolvency under s 556(1) of the Corporations Act, including the ATO. I accept the Ombudsman’s submission that, in the absence of opposition from either quarter, and where the case relates to employee entitlements, allowing the claim to proceed without further delay outweighs any detriment that might be occasioned to the other creditors.
2. No evidence was adduced about FTM’s financial circumstances. Ms Thirukumar’s evidence suggests, however, that FTM may not be able to pay the amounts sought by the Ombudsman. She deposed that on 29 August 2019 she was told by Darcy Barlow of Jirsch Sutherland that a valuation of the company’s assets was under way and the liquidators did not know how much it had but Mr Barlow “[did] not think there [was] much money there”. Be that as it may, the fact that a company is in liquidation and may not be able to pay penalties, at least, is irrelevant to the grant of leave: *Birubi* (Perry J) at [14]. Her Honour’s remarks were confined to the payment of penalties but that was a case in which compensation orders were not made or sought: see *Birubi* at [1].

## Conclusion

1. Consequently, not only does the Ombudsman’s claim have a solid foundation and give rise to a serious dispute, the Ombudsman has also established that there is good reason to depart from the course of lodging a proof of debt.
2. The Ombudsman also argued that the circumstances surrounding the voluntary liquidation suggest that Mr Elvin may have had a role in placing the company into liquidation and that the assets of the company were sold to a company owned by Mr Elvin’s partner, Khara Sanchez. Some of the evidence adduced on the application went to this issue. If that were so, the Ombudsman submitted, the liquidators might be able to apply to the Court under s 588FF of the Corporations Act which may result in additional funds being available to meet the claims and/or that there has been a contravention of s 596AB of the Corporations Act, which prohibits a person from entering into an agreement or transaction with the intention of preventing the recovery of employees’ entitlements or significantly reducing the amount that can be recovered. She submitted that conduct of this kind is a powerful factor weighing in favour of the grant of leave: see, for example, *ACN 093 117 232 Pty Ltd (in liq) v Intelara Engineering Consultants Pty Ltd (in liq)* [2019] FCA 1489 (Derrington J). But the Ombudsman only submits that the evidence raises a suspicion of an “uncommercial transaction” (see s 588FB) or an “unreasonable director-related transaction” (see s 588FDA). Having regard to the other considerations, it is unnecessary to deal with the relevant evidence or to decide whether it rises higher than a suspicion.
3. The Ombudsman has made out her case for relief and she should have leave under subs 500(2) of the Corporations Act to continue her proceeding.

|  |
| --- |
| I certify that the preceding forty-eight (48) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann. |

Associate:

Dated: 26 September 2019