FEDERAL COURT OF AUSTRALIA

McCann, in the matter of Walton Construction Pty Ltd (In Liquidation) v Walton [2020] FCA 223

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| File number(s): | QUD 573 of 2019 |
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| Judge(s): | **GREENWOOD J** |
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| Date of judgment: | 19 February 2020 |
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| Catchwords: | **CORPORATIONS** – consideration of an application by the liquidators of a company to be released from an implied undertaking not to use documents obtained in one proceeding (the “initial proceeding”) in relation to issues to be heard and determined in other proceedings overlapping as to factual questions with the initial proceeding |
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| Legislation: | *Corporations Act 2001* (Cth), ss 180, 181, 182, 1317H |
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| Date of hearing: | 19 February 2020 |
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| Date of last submissions: | 19 February 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 55 |
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| Counsel for the Plaintiffs: | Mr J A Hughes |
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| Solicitor for the Plaintiffs: | Colin Biggers & Paisley Pty Ltd |
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| Counsel for the First Defendant: | The first defendant appeared in person |

ORDERS

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|  | | QUD 573 of 2019 |
| IN THE MATTER OF WALTON CONSTRUCTION PTY LTD (IN LIQUIDATION) ACN 060 900 218 AND WALTON CONSTRUCTION (QLD) PTY LTD (IN LIQUIDATION) ACN 100 833 225 | | |
| BETWEEN: | MICHAEL GERARD MCCANN, ANDREW STEWART REED HEWITT AND GRAHAM ROBERT KILLER IN THEIR CAPACITY AS JOINT AND SEVERAL LIQUIDATORS OF WALTON CONSTRUCTION PTY LTD (IN LIQUIDATION) ACN 060 900 218 AND WALTON CONSTRUCTION (QLD) PTY LTD (IN LIQUIDATION) ACN 100 833 225 (and others named in the Schedule)  First Plaintiff | |
| AND: | CRAIG WALTON (and others named in the Schedule)  First Defendant | |

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| JUDGE: | GREENWOOD J |
| DATE OF ORDER: | 19 FEBRUARY 2020 |

THE COURT ORDERS THAT:

## Use of document from QUD 674 of 2016

1. The plaintiffs be released from the implied undertaking to the extent necessary to permit the plaintiffs to use in the present proceedings the following affidavit filed and read in the proceeding QUD 674 of 2016:
   1. The affidavit of Patrick Joseph McCurry of 8 May 2018 (including the exhibits PJM‑2, PJM‑4, PJM‑6, PJM‑7, PJM‑8, PJM‑9, PJM‑10, PJM‑11, PJM‑12, PJM‑13, PJM‑14, PJM‑15, PJM‑16, PJM‑17, PJM‑18, PJM‑21, PJM‑23, PJM‑24, PJM‑25, PJM‑27).
2. A copy of this order be placed on the Court file in respect of the proceedings mentioned in the preceding order.

## Timetabling orders

1. Orders 5 to 12 of the orders made on 18 December 2019 be varied as set out in Orders 4 to 10 below.
2. The interlocutory hearing date on 23 March 2020 be vacated.
3. The third defendant file and serve his defence by 21 February 2020.
4. The plaintiffs file and serve their reply to the third defendant’s defence by 6 March 2020.
5. The plaintiffs file and serve any affidavit evidence by 3 April 2020.
6. Any application for discovery by a defendant be filed by 10 April 2020 and heard at 9.30am on the date to be nominated by the Registry.
7. The defendants file and serve any affidavit evidence by 1 May 2020.
8. The matter be listed for a further case management hearing at 9.30am on a date convenient to the Court not before 6 May 2020.
9. Liberty to apply.
10. Costs reserved.

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

EX TEMPORE REASONS FOR JUDGMENT

GREENWOOD J:

1. This is an application made by Michael McCann, Andrew Hewitt and Graham Killer in their capacity as joint and several liquidators of Walton Construction Pty Ltd (in liquidation) and Walton Construction (Qld) Pty Ltd (“Walton Construction”).
2. In the application, those applicants seek an order that they be released from an implied undertaking to the extent necessary to permit the plaintiffs to use, in the present proceeding, the following affidavit read in another proceeding and described as QUD 674/2016. The document is an affidavit of Patrick Joseph McCurry sworn 8 May 2018 and filed on 9 May 2018 and, in particular, the documents which the applicants seek to use and have access to are the exhibits to that affidavit which bear the numbers 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 23, 24, 25 and 27.
3. The proceeding in which the applicants would wish to have access to documents and rely upon them is a proceeding which bears the number QUD 573/2019, and in that proceeding the applicants seek relief against Mr Walton, as first defendant, ACN 152 646 323 Pty Ltd, formerly known as Mawson Restructures and Workouts Pty Ltd (“MRW”), and three individuals, Mr Patrick McCurry, Mr Phillip Spry and Mr Julian Kirzner.
4. In that application, the relief that is sought in a declaration that Mr Walton has breached his duties under ss 180, 181 and 182 of the *Corporations Act 2001* (Cth) (the “Act”). A declaration is also sought that the second, third, fourth and fifth defendants were involved in the contraventions of ss 180, 181 and 182 by Mr Walton within the meaning of the terms of s 79 of the Act.
5. An order is sought under s 1317H of the Act that the first, second, third, fourth and fifth defendants pay compensation to the plaintiffs to the value of payments described as the “MRW Payment”, the “Peloton Payment” and the “Lewton Payment” together with interest from the date of such payments.
6. Those claims thus involve claims of breaches of the well‑understood duties of directors arising under the Act which, in many respects, crystallise the obligations owed at common law and in equity. It is important to say just a few things about the nature of the claims made in this proceeding in which the applicants would wish to use the documents. It is not necessary to describe these matters in great detail. The material facts relied upon to support the claim for relief, as I just identified, are set out in a statement of claim filed in the proceeding on 17 September 2019. I will just mention briefly some things. Central to the proceeding is the history of the financial arrangements between the two Walton entities and its banker, the National Australia Bank (“NAB”), which led to a relationship developing between the Walton Construction entities and MRW. I will simply use these acronyms, derived from the statement of claim and supporting affidavit material, to avoid reciting the full titles of the entities.
7. At para 22 of the statement of claim, it is said that on or about 5 April 2013, Walton Construction and MRW entered into an agreement pursuant to which MRW agreed to provide business, restructuring and workout advice to Walton Construction, the Walton Group, and Mr Walton in return for fees. Details of those arrangements are then pleaded.
8. At para 35, it is said that on or about 18 September 2013, Walton Construction, WCQ and an entity described as QHT entered into an agreement called the Deed of Assignment whereby WCQ assigned to QHT absolutely, all of its right, title and interest in a debt due by Walton Construction to WCQ of $18.876 million for a consideration of $30,000.
9. Paragraphs 36, 37 and 38 set out the elements of a facility agreement. Paragraph 39 pleads that on 19 September 2013, MRW demanded payment of a “Success Fee” and, subsequent to that demand, Walton Construction paid the sum of $1.173 million to MRW, called the “MRW Payment”, by way of electronic funds transfer.
10. At para 40, it is said that the sum of $1.173 million was paid to MRW pursuant to “Success Event 4” referred to in a document or arrangement called the “MRW Third Agreement”.
11. At para 42, it is said that on or about 20 September 2013, Walton Construction and Lewton entered into an Asset Sale Agreement described as the “Lewton ASA” whereby Walton Construction agreed to sell its assets to Lewton.
12. At para 45, it is said that on or about 30 September 2013, WCQ and Peloton entered into an “Asset Sale Agreement” whereby WCQ agreed to sell to Peloton certain assets of WCQ, including the benefit of certain construction contracts entered into by WCQ.
13. At para 53, it is said that following a meeting with NAB on or about 2 October 2013, Mr Spry emailed NRF and Deloitte to advise them of payments to be made totalling $465,000 to various creditors, including the sum of $275,000 to Lewton as per the Lewton ASA.
14. At para 54, it is said that on 3 October 2013, the day on or before Walton Construction was placed into administration, NAB transferred the sum of $274,618 from Walton Construction to Lewton constituting the Lewton Payment.
15. At para 55, it is said that the Lewton Payment by NAB from Walton Construction to Lewton, on or about 3 October 2013, was authorised by Mr Walton.
16. At para 56 it is said that on 3 October 2013, Mr Spry emailed NAB providing, amongst other things, instructions to NAB to transfer $1.3 million from WCQ’s bank account to Peloton’s bank account, and then details are given of that transaction.
17. Then, at para 62, it is said that on 3 October 2013, before WCQ was placed into voluntary administration, Mr Walton authorised and directed NAB to transfer $1.3 million from the account held by WCQ with NAB to Peloton in satisfaction of the amount payable under the Peloton ASA.
18. At para 63, it is said that in accordance with Mr Walton's direction, NAB effected as a real‑time gross settlement, the transfer of $1.3 million from WCQ to Peloton on 3 October 2013, which is described as the Peloton Payment.
19. At para 68, it is said that, in the premises of the facts referred to in the statement of claim and with particular focus on the paragraphs I have mentioned, Mr Walton acted in breach of the duties he owed by authorising NAB to make the MRW Payment and then facts are asserted which go to the objective degree of care and diligence required of a director having regard to s 180 of the Act.
20. At para 70, it is said that, in the premises of the facts pleaded, Mr Walton acted in breach of the duties pleaded by authorising NAB to make particular payments. Other breaches are pleaded as reflected in paras 71 and 74 of the statement of claim.
21. Thereafter at paras 75, 76, 77 and 78, breaches of duty are pleaded against MRW, Mr McCurry, Mr Spry and Mr Kirzner resulting in, ultimately, the claim for relief as reflected in the originating application.
22. So these matters represent the scope of the claims which are agitated in this proceeding QUD 573/2019.
23. The interlocutory application by which the applicants seek access to the range of exhibits to Mr McCurry's affidavit is supported by two affidavits. One affidavit is by Courtney Jane MacDade sworn 14 September 2020, and in that affidavit Ms MacDade exhibits (“CGM17”) a range of documents which are the documents the applicants would wish to have access to in the proceeding. Of course, they are exhibited to Ms MacDade's affidavit simply for the purpose of enabling this application to be heard and considered and determined.
24. The application is also supported by an affidavit of Mr Scott Hedge sworn 17 February 2020, and in that affidavit Mr Hedge seeks to depose to descriptive matters which seek to establish the commonality of issues in this proceeding and in the other proceeding which is QUD 674/2016. That is a proceeding against QHT and others in which relief is sought to set aside particular transactions.
25. It is now necessary to turn to an aspect of Ms MacDade's exhibited documents which provide some content to the documents which are now sought to be used in the QUD 573/2019 proceeding and in respect of which Mr McCurry has no objection to the applicants being released from their undertaking. Nevertheless, it seems to me important, having regard to Mr Walton's position as an unrepresented party, to identify the topics with which these documents are concerned.
26. So the first of them is an exhibit which I will just call, in these reasons, documents 2, 3 and so on, rather than the full exhibit description. Document 2 is concerned with online published details of successful structures and turnaround examples with which Mr McCurry has been involved in relation to the provision of restructuring advice and related matters.
27. Document 4 is a copy of a spreadsheet entitled “Security Tracker”, being one of Walton Construction’s business records, which sets out a summary of the bank guarantees, security bonds and cash retentions issued in respect of Walton Construction projects as at April 2013. Those matters are relevant to the nature of the financial facilities and their terms and conditions and the role of those documents.
28. Document 6 is a true copy of the Walton Construction “Advisory Board Pack” dated 30 April 2013, and that pack shows a number of things relating to current and non‑current liabilities, trade debtors and such matters.
29. Document 7 is a true copy of Mawson's initial presentation to the Walton entities called “Walton Construction Group – Assessment and Recommendations to the Stated Concerns” dated April 2013.
30. Document 8 is described in this way: “During May 2013, Mawson made a further presentation and proposal to NAB to seek the bank's support to allow a ‘going concern’ sale process whilst also pursuing an orderly wind‑down process in relation to the bank guarantee facility”. The affidavit says that as set out in the presentation, as at May 2013, the NAB bank guarantee facility balance was approximately $12 million and the term deposits were a certain amount. Document 8 is a true copy of the presentation prepared by Mawson to NAB in May 2013 about that matter.
31. Document 9 is a project plan called the “Walton's Project Plan”, and it was prepared by Mawson in May 2013. It has relevance to the proposal for the going concern sale of the whole or part of the Walton Construction business.
32. Document 10 is a document which relates to discussions which might have led to a joint venture with an entity called Bouyges and Walton Construction, and it consists of working diagrams and schematic plans of the potential structure.
33. Document 11 is concerned with presentations made to an entity called Kane Constructions.
34. Document 12 is a letter from Mawson to NAB dated 6 June 2013.
35. Document 13 is an update to NAB prepared by Mawson. It is a report dated 24 July 2013 which explains progress on the sale of the WCQ business.
36. Document 14 is a true copy of the balance sheet of the Peloton entity as at 3 October 2013 with relevant extracts attached to it.
37. Document 15 is concerned with discussions with Mr Frank Pellicano and his lawyer Mr Peter Cariei. In his affidavit, Mr McCurry says that he recalls that documents relating to a proposed transaction involving a $2 million capital injection by Pellicano into the WCQ business had been agreed. Mr McCurry recalls that the documents that give effect to this transaction had been drafted and were substantially agreed, and they are the subject of emails (and there are four of those emails in August and September 2013) which constitute document 15.
38. At about this time, Mawson also continued to inform NAB of the sale and restructuring efforts. Updates prepared by Mawson to NAB dated 4 September 2013 and 23 September 2013 are document 16. A further memorandum of 22 August 2013 is document 17.
39. Document 18 is concerned with events which occurred in September 2013 when Mawson also sought NAB’s consent to the assignment and novation of various accounts that were to be transferred to new entities as part of a restructure arrangement. NAB apparently scrutinised the transactions with the assistance of Deloitte and Norton Rose Lawyers, and document 18 is a true copy of a letter from Mawson to NAB dated 18 September 2013.
40. The affidavit then goes on to talk about an Asset Sale Agreement called the WCQ asset sale agreement and refers to aspects of the content of that document which then leads into document 21. Following the entry into the WCQ Asset Sale Agreement, Mawson continued to negotiate re‑capitalisation transactions, and document 21 is concerned with an email chain about that matter.
41. Document 22 is a copy of the WC Asset Sale agreement and document 23 is a copy of the Loan Facility and Deed of Variation.
42. Document 24 consists of true copies of the administrators’ s 439A reports to creditors in respect of Walton Construction, dated 29 October 2013 and Walton Construction Qld dated 30 October 2013. The entities were placed into voluntary administration on 3 October 2013.
43. Document 25 is described as true copies of correspondence which consists of five exchanges in the form of emails and letters.
44. Document 27 is a true copy of an email from Mr Spry to Mr Franklin dated 8 October 2013.
45. These are the documents which are the subject of the present application.
46. Having looked at that affidavit and those matters in some detail, I am satisfied that there is a very significant overlap and inter‑relationship between the material facts and circumstances which are sought to be agitated and will ultimately be the subject of an exercise of judicial power in QUD 573/2019 and the matrix of fact which is the subject of the earlier QUD 674/2016 proceeding.
47. Plainly enough, the applicants are under an undertaking not to use documents produced in the course of proceeding QUD 674/2016 for any purpose other than the forensic analysis of the facts and issues in that proceeding and, ultimately, the prosecution of the proceedings. It is important to appreciate that the documents which were produced by Mr McCurry in the affidavit in that earlier proceeding were not produced under any coercive powers. They were filed as a result of compliance with Directions Orders. Nevertheless, the Court is now asked to, in effect, release the applicants from the undertaking which governs the production of those documents, or at least their use of them as so produced, and in order to do that it is necessary for the applicants to demonstrate that there are “special circumstances” which would warrant the exercise of a discretion in their favour.
48. By “special circumstances”, nothing more is meant than there is “good reason” to release the applicants from the undertaking. One of the factors that informs the exercise of a discretion is the commonality of parties, issues and legal representation in both proceedings, and that is precisely the position which prevails here.
49. Also, of course, there is substantial overlap between the matters in the QHT proceeding and in this proceeding, and, in any event, Mr McCurry consents to the proposed orders, as do Mr Spry and Mr Kirzner.
50. Mr Walton is not in a position to express a view about it because he is not sufficiently familiar with the contextual issues which would govern the exercise of a discretion in favour of the applicants, and thus it falls to the Court to determine the matter and, in a sense, do so protecting his interests to the extent that the discretion needs to weigh in the balance of those considerations.
51. It seems to me that the commonality of facts and thus the substantial overlap, together with the matters that I have described drawn from the statement of claim, make it very clear that there is good reason to grant the application and allow the liquidators to be released from the undertaking so that they can have access to and use these documents.
52. The dominant question in these matters is that, in any piece of adversarial litigation, the function of the Court is to administer justice between the parties so that there is a right and proper determination of all factual questions in controversy. All of the other considerations, of course, are relevant, but the dominant consideration is how the interests of justice are best served, and in this particular case with these two proceedings and these overlapping circumstances and the commonality of parties (and the additional circumstance that Mr McCurry, Mr Spry and Mr Kirzner, and the second defendant) do not object to the application and, in fact, support it, weighs in a determinative way in favour of the exercise of the discretion.
53. Of course, it should also be noted that when Mr McCurry swore his affidavit in response to the procedural orders, it was always going to be the position, so far as he was concerned, that that material and his deposed evidence and documents would be used in Court in an open way and there is, therefore, nothing unusual in, or odd about, the fact that Mr McCurry sees no difficulty in consenting to the present orders.
54. For all these reasons, I propose to make orders in accordance with the relief sought in the application. That deals with Orders 1 and 2 sought by the applicants. The remaining part of the application is concerned with timetabling orders for the present proceeding. As to those orders, the proposition is that the orders made by the Court on 18 December 2019 be varied as set out in proposed new orders. The variation is this: the interlocutory hearing date of 23 March 2020 be vacated; the third defendant, Mr McCurry, file and serve his defence by 21 February 2020; the plaintiffs file and serve their reply to the third defendant’s defence by 6 March 2020; the plaintiffs file and serve any affidavit evidence by 3 April 2020; any application for discovery by the defendant be filed by 10 April 2020 (with a hearing suggested for a particular nominated date). The next order is that the defendants file and serve any affidavit evidence by 1 May 2020, and that the matter be listed for a further case management hearing on a date convenient to the Court not before 6 May 2020.
55. All parties other than Mr Walton agree to these timetabling orders. Mr Walton has already indicated that he does not propose to take any steps in relation to the matter and, accordingly, he has no objection to the orders as suggested.

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| I certify that the preceding fifty‑five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood. |

Associate:

Dated: 19 February 2020

SCHEDULE OF PARTIES

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| Plaintiffs |  |
| Second Plaintiff | WALTON CONSTRUCTION PTY LTD (IN LIQUIDATION) ACN 060 900 218 |
| Third Plaintiff | WALTON CONSTRUCTION (QLD) PTY LTD (IN LIQUIDATION) ACN 100 833 225 |
| **Defendants** |  |
| Second Defendant | A.C.N. 152 646 323 PTY LTD (FORMERLY KNOWN AS MAWSON RESTRUCTURES AND WORKOUTS PTY LTD) (IN LIQUIDATION) (ACN 152 646 323) |
| Third Defendant | PATRICK McCURRY |
| Fourth Defendant | PHILIP SPRY |
| Fifth Defendant | JULIAN KIRZNER |