Federal Court of Australia

Knight, in the matter of GMG Victoria Holdings Pty Ltd (In Liq) [2021] FCA 86

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| File number(s): |  |
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| Judgment of: | **GREENWOOD J** |
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| Date of judgment: | 10 February 2021 |
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| Catchwords: | **CORPORATIONS** – consideration of an application for directions by the liquidators of GMG Victoria Holdings Pty Ltd (In Liq) in relation to the acceptance of proofs of debt in the winding up of the company |
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| Legislation: | *Corporations Act 2001* (Cth), s 600K  *Insolvency Practice Schedule (Corporations)*, Schedule 2 to the Act, clause 90‑15(1), 90‑20(1)(d)  *Federal Court (Corporations) Rules 2000* (Cth), rule 2.8 |
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| Cases cited: | *Re Ansett Australia Ltd (No 3)* (2002) 115 FCR 409  *In the matter of Go Energy Group Ltd* [2019] NSWSC 558 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Number of paragraphs: | 31 |
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| Date of hearing: | 10 February 2021 |
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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 |

ORDERS

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|  | | QUD 336 of 2020 |
| IN THE MATTER OF GMG VICTORIA HOLDINSG PTY LTD (IN LIQUIDATION) | | |
|  | TRACY LEE KNIGHT AND DAMIEN LEE HOU LAU IN THEIR CAPACITY AS LIQUIDATORS OF GMG VICTORIA HOLDINSG PTY LTD (IN LIQUIDATION) ACN 610 761 129  First Plaintiff  GMG VICTORIA HOLDINSG PTY LTD (IN LIQUIDATION) ACN 610 761 129  Second Plaintiff | |

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| order made by: | GREENWOOD J |
| DATE OF ORDER: | 10 FEBRUARY 2021 |

THE COURT ORDERS THAT:

1. Pursuant to clause 90‑15 of Schedule 2 (*Insolvency Practice Schedule (Corporations)*)to the *Corporations Act 2001* (Cth), Tracy Lee Knight and Damien Lee Hou Lau, in their capacity as liquidators of GMG Victoria Holdings Pty Ltd (In Liquidation) (the “Company”), are justified in admitting the following proofs of debt in the administration of the liquidation of the Company:
   1. the proof of debt submitted by Galea Marble & Granite Industries Pty Ltd (in Liquidation) ACN 001 762 143 dated 8 July 2020 in the amount of $1,634,496.50;
   2. the proof of debt submitted by GMG Stone Pty Ltd (in Liquidation) ACN 117 657 020 dated 8 July 2020 in the amount of $946,943.88;
   3. the proof of debt submitted by GMG Wholesale Pty Ltd (In Liquidation) ACN 117 638 507 dated 8 July 2020 in the amount of $154,824.03; and
   4. the proof of debt submitted by GMG Toowoomba Pty Ltd (In Liquidation) ACN 117 638 776 dated 8 July 2020 in the amount of $9,200.00.
2. The costs of and incidental to the application be costs in the liquidation of the Company.

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

REASONS FOR JUDGMENT

GREENWOOD J:

1. Section 600K of the *Corporations Act 2001* (Cth) (the “Act”) and clause 90‑15(1) of the *Insolvency Practice Schedule (Corporations)* which is Schedule 2 to the Act, confer power on the Court to make such orders as it thinks fit in relation to the external administration of a company including an order “determining any question arising in the external administration of the company”.
2. Clause 90‑20(1)(d) confers standing on the liquidators of such a company to apply for an order under clause 90‑15(1).
3. These proceedings are concerned with such an application by the liquidators, Tracy Lee Knight and Damien Lee Hou Lau, of GMG Victoria Holdings Pty Ltd (“in liq”) (the “Company”).
4. The application arises in the following circumstances.
5. The liquidators were appointed as liquidators of the Company on 4 March 2019. They were also appointed on 21 March 2019 as liquidators of four companies related to the Company: Galea Marble & Granite Industries Pty Ltd (in liq) (“GMGI”); GMG Stone Pty Ltd (in liq) (“GMGS”); GMG Toowoomba Pty Ltd (in liq) (“GMGT”); and GMG Wholesale Pty Ltd (in liq) (“GMGW”) (the “related entities”).
6. Since their appointment as liquidators of the Company and the related entities, the liquidators have conducted investigations into the Company’s affairs. The evidence of Tracy Knight is that those investigations have resulted in significant recoveries for the Company’s creditors. The liquidators have obtained the books and records relating to the Company and the related entities including the Company’s servers, MYOB accounting software operated by the Company and related entities, bank statements and the known bank accounts for each entity.
7. The investigations by the liquidators have identified that each related entity has a claim in the liquidation of the Company concerning the repayment of loans made by the related entities to the Company (the “inter‑company loans”). The quantum of each claim is: GMGI, $1,634,496.50; GMGS, $946,943.88; GMGT, $9,200.00; and GMGW, $154,824.03.
8. In their capacity as liquidators of each related entity, the liquidators have prepared and lodged proofs of debt in respect of each related entity’s claim in the liquidation of the Company. The immediate difficulty is that the liquidators who are called upon to determine whether each proof of debt so lodged ought to be accepted in the winding up of the Company as a proper proof of debt are the individuals (liquidators) who prepared and lodged each proof of debt of each related entity. Thus, the liquidators find themselves in a position of conflict of interest and duty for that reason and also because they have a financial interest in the outcome of the adjudication of whether each proof of debt is to be accepted. That arises because they have a claim for unpaid remuneration and disbursements in the liquidation of the four related entities.
9. The affidavit of Tracy Knight demonstrates that the liquidators, to date, have declared and paid dividends to priority creditors (employees) of the Company, GMGI and GMGS. The liquidators estimate that if the proofs of debt lodged on behalf of the related entities are admitted in the winding up of the company, and taking into account the unpaid current and anticipated remuneration and disbursements of the liquidators, the following returns are likely to arise.
10. *First*, there will be a return to the Company’s ordinary unsecured creditors ranging between 4.93 and 7.14 cents in the dollar.
11. *Second*, there will be a further return to priority creditors of GMGI ranging between 78.71 and 100 cents in the dollar.
12. *Third*, there will be a return to ordinary unsecured creditors of GMGS ranging between 12.05 and 15.07 cents in the dollar.
13. *Fourth*, there will not be sufficient funds in the liquidation of GMGT to meet the estimated remuneration and disbursements of the liquidators.
14. *Fifth*, there will not be sufficient funds in the liquidation of GMGW to meet the estimated remuneration and disbursements of the liquidators.
15. In assessing each related entities’ claim concerning the inter‑company loans, the liquidators have undertaken the process and have reasoned as disclosed in Annexure A to each proof of debt and as further described in Tracy Knight’s affidavit of 29 October 2020. In essence, the liquidators have relied on the MYOB accounting records and bank statements relating to the Company and each related entity so as to verify each claim. However, the liquidators have also identified transactions within the MYOB records, described as “non‑cash” transactions characterised as “journal adjustments” for the period prior to 1 July 2017, prepared and entered into the MYOB records by external accountants. As to those journal adjustments, the liquidators have accepted each adjustment as accurate, on its face, in the absence of any evidence to the contrary.
16. Because the liquidators find themselves in a conflict of interest for the reasons already mentioned, the liquidators have obtained an expert report from Mr Derrick Vickers of PwC. Mr Vickers is an experienced registered liquidator. It is not necessary to set out the scope of his experience. I accept that Mr Vickers is a highly experienced registered liquidator. The expert report prepared by Mr Vickers attaches the four proofs of debt together with the underlying documents which Mr Vickers has reviewed in support of the claims the subject of each proof of debt. Mr Vickers was engaged by the liquidators to review the proofs of debt and take the following steps.
17. *First*, to assess and take any and all steps necessary to determine whether the Company ought to admit the proofs of debt or reject them in the liquidation of the Company.
18. *Second*, to prepare an expert report addressing the question of whether the inter‑company debts are true and proper debts properly admissible in the liquidation of the Company.
19. I have considered the report of Mr Vickers. It is clear that Mr Vickers has addressed the correct legal principles applicable to the assessment of a proof of debt. In each detailed review of each claim by each related entity, the information relied upon and the assumptions made by Mr Vickers in forming his opinion are set out. As to the assumptions relied upon by Mr Vickers, he summarises them in this way:

* the inter‑company loan accounts independently verified in 2017 were accurate. I note that there was no other reasonable alternative available other than to proceed on the recorded balances as at that date, as there is no alternative source of relevant information.
* I have not had access to any person who formerly worked for or with the [Company and related entities] to query any of the financials. Comments with respect to conversations with management are references to comments made to the Liquidators (and/or their staff) by management and provided to me in the Annexures to the [proofs of debt]. In this regard I have assumed that the summary of discussions held with management have been accurately reflected in the material provided to me.

1. Mr Vickers also observes that “[f]urthermore, the information provided or sourced has not been audited by me as part of the engagement”.
2. In his report, Mr Vickers says this:

I have taken the steps that would ordinarily be necessary to determine whether the inter‑company loans are true and proper debts and admissible debts, including:

* reviewing each proof of debt;
* considering whether each of the claims was properly admissible under the legal framework for the admission of proofs of debt;
* assessing the evidence supporting the relevant claims, by reference to the balance of any loan at 30 June 2017 and movements of the loan account from the ledger accounts, where available, after that date; and
* reviewing other documentary evidence to support and verify loan movements.

Having completed these steps I have determined that GMGV [the Company] should admit the following claims outlined in the table [immediately set out below].

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1. The report then sets out a detailed summary of the assessment undertaken by Mr Vickers and the methodology he adopted in reaching the conclusion recited above.
2. In the result, Mr Vickers concludes that the proof of debt for each related entity ought to be admitted in the winding up of the Company in the amounts claimed, that is, GMGI at $1,634,496.50; GMGS at $946,943.88; GMGT at $9,200.00; and GMGW at $154,824.03.
3. Accordingly, the liquidators apply for a direction that the proof of debt in respect of each related entity be admitted in the winding up of the Company. In the exercise of the power conferred upon the Court by clause 90‑15(1), it is not the function of the Court to give directions as to the making and implementation of a business or commercial decision falling to be made by the liquidators. Nor is it the role of the Court to substitute its own view about whether a proof of debt ought to be admitted in the liquidation. However, where a particular legal question arises in relation to the propriety or reasonableness of a decision to admit or reject a proof of debt, the Court’s role is properly engaged in deciding the resolution of that question which, in turn, properly leads to the giving of directions in relation to the relevant subject matter. The legal question which engages the Court’s power to make a particular direction may be a legal issue of “substance or procedure [or], it may be an issue of power, propriety or reasonableness, but some issue of this nature is required to be raised”: *Re Ansett Australia Ltd (No 3)* (2002) 115 FCR 409, Goldberg J at [65]. This proposition has been cited many times in subsequent authorities.
4. Plainly enough, a liquidator has a conflict of interest and duty in exercising any power to adjudicate upon and admit a proof of debt in the liquidation of a company which is submitted by another company of which that individual is also the liquidator. Where such a circumstance arises, there is an issue of “propriety or reasonableness” to be determined.
5. In resolving that question, the Court has been assisted by the independent expert report of Mr Vickers. In exercising the power under clause 90‑15, the Court is concerned to determine, *first*, whether, in light of the conflict, and aided by the observations of the expert, the liquidators have engaged with a proper process for determining the basis for the claims the subject of each proof of debt, and, *second*,to examine the reasoning of the liquidators as to that matter. Thus, the Court must have regard to the evidence of the steps taken by the liquidators in preparing each proof of debt, the analysis undertaken by the expert in assessing each proof of debt and the documents underlying that analysis: *In the matter of Go Energy Group Ltd* [2019] NSWSC 558 at [22].
6. I am satisfied that the process deployed by the liquidators aided by the examination by Mr Vickers has been comprehensive. I am also satisfied that the liquidators are justified in admitting each proof of debt in the winding up of the Company.
7. Apart from being satisfied that a legal issue arises in relation to a conflict of duty and interest, that the basis for admitting the proofs of debt has been thoroughly investigated, and that Mr Vickers has independently undertaken a detailed assessment of the proofs of debt and supporting documents, I am also satisfied that there is no evidence to suggest that the liquidators are not faithfully performing their duties. Further, there is nothing in the material before the Court which suggests any failure on the part of the liquidators to comply with the Act or any order of the Court in relation to these matters.
8. In addition, all known creditors of the Company and the related entities have been given notice of the application for directions and the relief sought by the application. No creditor has sought to be heard or raised any objection to the directions sought by the liquidators. A copy of the originating application and supporting affidavits has been served on the Australian Securities and Investments Commission (“ASIC”) in accordance with rule 2.8 of the *Federal Court (Corporations) Rules 2000* (Cth). No correspondence has been received from ASIC by the solicitors for the liquidators.
9. I am satisfied that the application is properly made so as to advance the liquidation of the Company and the administration of the Company’s assets in liquidation. The costs of the application are to be costs in the liquidation of the Company and paid from the assets of the Company.
10. Accordingly, the Court makes the directions sought by the liquidators.

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| I certify that the preceding thirty‑one (31) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Greenwood. |

Associate:

Dated: 10 February 2021