Federal Court of Australia

Hutton, in the matter of Big Village Australia Pty Ltd (Administrators Appointed) [2023] FCA 48

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| File number: | VID 50 of 2023 |
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| Judgment of: | **ANDERSON J** |
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| Date of judgment: | 2 February 2023 |
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| Catchwords: | **CORPORATIONS** – urgent application – originating process seeking an order pursuant to s 447A of the *Corporations Act 2001* (Cth) (**Act**) that Part 5.3A is to apply to the second plaintiff as though the appointment of the first plaintiffs as voluntary administrators on 26 January 2023 was valid – where evidence suggests the second plaintiff is likely insolvent – where contrary to s 201A(1) of the Act, the Company’s sole director did not ordinarily reside in Australia at the time Company resolutions appointing the administrators were passed – where the Company’s sole director purported to resign as a director shortly before Company resolutions were passed – where the application is granted |
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| Legislation: | *Corporations Act 2001* (Cth) |
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| Cases cited: | *Australian Memory Pty Ltd v Brien* (2000) 200 CLR 270  *Billingsley v Napoli*, *in the matter of Biometric Identity Systems Pty Ltd* *(Administrators Appointed)* [2019] FCA 1640; 139 ACSR 213  *Dolores Correa and The Spanish Club Limited (subject to Deed of Company Arrangement) v Whittingham (No 3)* [2012] NSWSC 526  *Re Condor Blanco Mines Ltd* [2016] NSWSC 1196  *Re Continental Pacific Ltd* [2002] NSWSC 789  *Re Creative Memories Australia Pty Ltd (Administrators Appointed)* [2013] NSWSC 652  *Re Darin (As Administrators of Palamedia Ltd)* [2010] NSWSC 451; *Re Ethan Minerals Ltd (Administrators Appointed)* [2011] NSWSC 899  *Re DH International Pty Ltd (Administrators Appointed)* [2013] NSWSC 1120; 95 ACSR 578  *Re Foodora Australia Pty Ltd (Administrators Appointed)* [2018] NSWSC 1426  *Re Gulf Energy Ltd* [2019] NSWSC 1637  *Re HPI Australia Pty Ltd* [2008] NSWSC 1106  *Re Jack James as Administrator of ZYL Ltd* [2015] WASC 57  *Re Maria’s Farm Veggies Pty Ltd (Administrators Appointed)* [2016] NSWSC 1899  *Re Milgerd Nominees Pty Ltd (Administrators Appointed)* [2019] NSWSC 311  *Re Pasdonnay Pty Ltd* (2005) 53 ACSR 717  *Smolarek v McMaster* [2006] WASCA 216 |
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| Division: | General Division |
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| Registry: | Victoria |
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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: | 48 |
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| Date of hearing: | 2 February 2023 |
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| Counsel for the Plaintiffs: | Mr C E A Hibbard |
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| Solicitors for the Plaintiffs: | Gilbert + Tobin |
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ORDERS

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|  | | VID 50 of 2023 |
| IN THE MATTER OF BIG VILLAGE AUSTRALIA PTY LTD ACN 126 100 276 (ADMINISTRATORS APPOINTED) | | |
|  | MATTHEW RUSSELL HUTTON AND ROBERT BRUCE SMITH IN THEIR CAPACITY AS JOINT AND SEVERAL ADMINISTRATORS OF BIG VILLAGE AUSTRALIA PTY LTD (ACN 126 100 276) (ADMINISTRATORS APPOINTED)  First Plaintiff  BIG VILLAGE AUSTRALIA PTY LTD ACN 126 100 276 (ADMINISTRATORS APPOINTED)  Second Plaintiff | |
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| order made by: | ANDERSON J |
| DATE OF ORDER: | 2 February 2023 |

THE COURT ORDERS THAT:

1. Pursuant to section 447A(1) of the *Corporations Act 2001* (Cth), Part 5.3A of the Act is to operate in relation to the second plaintiff as though the first plaintiffs were validly appointed as joint and several administrators of the second plaintiff on 26 January 2023.
2. The plaintiffs’ costs of and incidental to this application be costs in the administration of the second plaintiff.
3. There is liberty to apply.

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

REASONS FOR JUDGMENT

ANDERSON J:

# introduction

1. On 2 February 2023, I made the orders sought by the first plaintiffs (**Administrators**). These are my reasons for doing so. I acknowledge the substantial assistance I have received from the Administrators’ written submissions dated 1 February 2023.
2. The Administrators are administrators of the second plaintiff (**Company**). They apply for an order under s 447A of the *Corporations Act 2001* (Cth) (**Act**) that Part 5.3A of the Act operate in relation to the Company as though the Administrators were validly appointed as joint and several administrators of the Company on 26 January 2023.
3. In the alternative, they seek orders either confirming the validity of their appointment under s 447C of the Act, or confirming that their appointment and actions taken since their appointment have not been invalid under s 1322 of the Act.
4. The Administrators make the application to dispel any uncertainty about whether they were validly appointed. The application is prompted by two issues. Both relate to the circumstances of the Company’s sole director, Ms Dana Edwards Kracht, when she passed resolutions appointing the Administrators as voluntary administrators of the Company (**Resolutions**):
5. The first issue is that, contrary to s 201A(1) of the Act, Ms Kracht did not ordinarily reside in Australia at the time the Resolutions were passed. There remains a “real question” whether a breach of s 201A of the Act will invalidate the appointment of a voluntary administrator: *Re Milgerd Nominees Pty Ltd (Administrators Appointed)* [2019] NSWSC 311 at [14] (Black J) (***Re******Milgerd***).
6. The second issue is that Ms Kracht had purported to resign as director shortly before the Resolutions were passed. While cl 11.5(c) of the Company’s constitution provides that such a resignation would leave the office of director vacant, it appears that s 203AB of the Act prevents that resignation from taking effect. Ms Kracht proceeded on the assumption that s 203AB applied to her circumstances, and made the Resolutions despite her purported resignation. The application of s 203AB has not been substantively considered by any Court.
7. In order to provide certainty and to facilitate the proper operation of Part 5.3A of the Act, the Administrators seek the orders stated in the originating process. They rely on affidavits sworn by Ms Kracht, the Company’s sole director (**Kracht Affidavit**), and Mr Hutton, one of the Administrators (**Hutton Affidavit**).
8. The application is urgent because the Administrators wish to remove any doubts about the validity of their appointment as soon as possible, and prior to the conclusion of an “expression of interest” campaign for the sale or recapitalisation of the Company’s business. The Administrators consider that seeking a sale or recapitalisation of the business via that campaign is the only viable alternative to liquidation, and conducting it is imperative having regard to the objects of Part 5.3A of the Act. Expressions of interest are due by Friday, 3 February 2023.

# background

1. The background of the operations of the Company is set out in the Hutton Affidavit.
2. In brief, the Company is part of an international group of companies, described in the Hutton Affidavit as the “BV Group”. The Company principally operates three largely independent consulting services business units, which concern market research, “digital transformation consulting services” and advertising, respectively. The second business group is responsible for the Company’s “flagship” contract with the Commonwealth Government to develop Australia’s first national exclusion register for problem gamblers.
3. The Company has approximately 175 staff, the bulk of whom (123) are casual employees who work in interviewing and call centre support roles.
4. In 2022, the Company was reliant on funding from related parties within the BV Group in order to remain solvent. Since that time, the BV Group has experienced a number of “challenges” that mean it can no longer provide financial or strategic support to the Company. Between 31 October and 23 December 2022, all of the Company’s directors aside from Ms Kracht resigned.
5. On 11 January 2023, Ms Kracht sought to resign as director by sending a letter to the Company’s registered office.
6. Ms Kracht later satisfied herself that her resignation was ineffective given the operation of s 203AB of the Act. She subsequently formed the view that the Company was insolvent or likely to become insolvent, after reviewing the Company’s cash flow forecast and considering the financial issues facing the Company.
7. In that context, on 25 January 2023 (New York time), Ms Kracht caused the Resolutions to be passed in her capacity as sole director of the Company. The Resolutions provided, from (b) to (f):

The sole director resolved that:

(b) in the opinion of the sole director, the Company is insolvent, or likely to become insolvent at some future time.

(c) administrators should be appointed to the Company under section 436A of the Act.

(d) Matthew Hutton and Robert Smith be appointed as joint and several administrators of the Company.

(e) the Company execute, in accordance with the Act, the Instrument of Appointment of Administrators; and

(f) all necessary actions, including the lodgement of an ASIC Form 505 be taken to reflect the appointment of administrators.

1. On the same day, Ms Kracht signed the Instrument of Appointment of Administrators.
2. After their appointment, the Administrators formed the view that there may be some doubt about the validity of their appointment in light of Ms Kracht being a resident of New York and her purported resignation.

# Validity of Administrators’ appointment

## Issue 1: Compliance with s 201A(1) of the Act

1. Section 201A(1) of the Act provides: “A proprietary company must have at least one director. That director must ordinarily reside in Australia.”
2. At the time of passing the Resolutions (and all other relevant times), Ms Kracht did not ordinarily reside in Australia.
3. Courts have been hesitant to express a concluded view on whether a breach of s 201A of the Act renders the appointment of a voluntary administrator ineffective. The better view appears to be that the fact a company has breached s 201A(1) does not affect the ability of the company to function (subject to the provisions of its constitution), and therefore does not affect its ability to appoint an administrator under s 436A of the Act.
4. In *Re Creative Memories Australia Pty Ltd (Administrators Appointed)* [2013] NSWSC 652, a resolution appointing voluntary administrators was passed by two directors, neither of whom resided ordinarily in Australia at the time of the resolution. Hammerschlag J said at [7]: “I am far from convinced that the resolution is ineffective or invalid but if it is, this is clearly a case where any doubt should promptly be dispelled by the making of an order pursuant to s 447A(1) of the Act”.
5. In *Re DH International Pty Ltd (Administrators Appointed)* [2013] NSWSC 1120; 95 ACSR 578, the sole director of the company was a resident of Illinois. Brereton J found at [8] that: “The consequences of a proprietary company not having at least one resident Australian director are less than clear. It may be that the company technically breaches the Act, but it is a breach for which no penalty is proscribed.” In those circumstances, his Honour concluded at [14] that a breach of s 201A(1):

… may well mean that the company is in contravention of the Act, in respect of the requirement imposed by s 201A(1), but it does not mean that a person who is previously a director somehow automatically vacates that office, or ceases to hold office, upon ceasing to ordinarily reside in Australia.

1. His Honour made an order under s 447C(2) of the Act that the appointment of administrators was not invalid “by reason of there being only one director of the company in office and/or by reason that that director was not ordinarily resident in Australia”: *Re DH International Pty Ltd (Administrators Appointed)* [2013] NSWSC 1120; 95 ACSR 578 at [22] (Brereton J).
2. In *Re Milgerd*, Black J noted at [14] that “there is a real question as to whether a contravention of [s 201A] would in fact invalidate the relevant appointment, and the better view may well be that it would not”. His Honour nonetheless went on to make an order under s 1322(4) (which his Honour noted could also have been made under s 447A). His Honour observed “that order may ultimately not be necessary, so far as any contravention of s 201A of the Act is unlikely to invalidate the appointments, but it is desirable so far as it will provide certainty as to the position”: *Re Milgerd* at [15] and [16] (Black J).
3. Similar conclusions were reached about the effect of s 201A in *Re Continental Pacific Ltd* [2002] NSWSC 789 at [9]-[10] and *Re Condor Blanco Mines Ltd* [2016] NSWSC 1196 at [95]-[96], [102].
4. Nonetheless, in *Re Jack James as Administrator of ZYL Ltd* [2015] WASC 57, Master Sanderson of the Western Australian Supreme Court suggested that a resolution passed in circumstances that breach s 201A(2) (the subsection of s 201A governing public companies) may not be valid.
5. In those circumstances, and given the interlocutory character of the authorities, there remains a risk of the validity of the Administrators’ appointment being challenged due to an apparent breach of s 201A.

## Issue 2: Effect of sole director’s purported resignation

1. Section 203AB(1) provides:

The resignation of a director of a company does not take effect if, at the end of the day that the resignation is to take effect, the company does not have at least one director.

1. Section 203AB was introduced to the Act on 18 February 2020 and does not appear to have been the subject of judicial consideration. However, its terms are clear. It prevents a resignation taking effect if that resignation would leave the company without a director. In the present case, it operated to prevent Ms Kracht’s resignation taking effect on 13 January 2023. That meant that, notwithstanding cl 11.5(c) of the Company’s constitution, which provides that “the office of a Director becomes vacant if the Director … resigns as Director by giving written notice of resignation to the Company …”, she remained the director at the time she passed the Resolutions. Ms Kracht relied on the assumption that the legislation had that effect at the time she passed the Resolutions.
2. The Administrators submit that the position in relation to Ms Kracht’s resignation is relatively free from doubt. However, given the lack of judicial consideration of the issue, the Administrators consider it prudent that this matter be brought to the Court’s attention in the context of this application. It is a matter that further supports the making of an order under s 447A in order to dispel any lingering uncertainty that may affect the validity of the Administrators’ appointment.

# appropriate relief

## Section 477A

1. I am of the opinion that the preferable approach to dispel any doubt about the validity of the Administrators’appointment is for the Court to make an order under s 447A of the Act.
2. Section 447A confers wide powers on the Court to modify how Part 5.3A applies to a particular company: *Australian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at [17] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ). The overriding requirement is that the order “be designed to achieve the objective of Part 5.3A [and] have a nexus with how Part 5.3A is to operate in relation to the particular company”: *Re Foodora Australia Pty Ltd (Administrators Appointed)* [2018] NSWSC 1426 at [7] (Black J).
3. In a case such as the present one, the Court need not make any finding about the actual validity of the appointment of the Administrators before making an order under s 447A. Even if there is a question about the validity of the Administrators’ appointment, there is no doubt they have standing to seek orders under s 447A(4) as interested persons: *Re Pasdonnay Pty Ltd* (2005) 53 ACSR 717 at [17] (Gyles J).
4. Section 447A has often been invoked to dispel uncertainty about the validity of the appointment of administrators. By way of example (and in addition to the cases set out above), orders have been made under s 447A to the effect of those sought in this application where public companies have not had the requisite three directors required by s 201A: *Re Foodora Australia Pty Ltd (Administrators Appointed)* [2018] NSWSC 1426 at [7] (Black J); *Re Darin (As Administrators of Palamedia Ltd)* [2010] NSWSC 451; *Re Ethan Minerals Ltd (Administrators Appointed)* [2011] NSWSC 899.
5. Factors considered by the Courts in granting an order under s 447A typically relate to situations where major steps in an administration and a subsequent deed of company arrangement have taken place and a challenge to validity only comes much later: see the non-exhaustive summary in *Billingsley v Napoli*, *in the matter of Biometric Identity Systems Pty Ltd* *(Administrators Appointed)* [2019] FCA 1640; 139 ACSR 213 at [25] (Farrell J). In the particular circumstances of this case, it is nonetheless relevant to consider:
6. the likely insolvency of the Company;
7. the inquiries the Administrators took to confirm the validity of their appointments;
8. the potential disruption that may be caused by a future challenge to the validity of the Administrators’ appointment;
9. the conduct of the directors prior to the appointment;
10. any work the Administrators have carried out on the assumption their appointments are valid;
11. whether substantial injustice would be afforded to any party by the making of the orders; and
12. whether making the order is otherwise consistent with the objectives of Part 5.3A.
13. I will now deal with each of these factors below, in turn.

### Likely insolvency:

1. Mr Hutton has deposed that, on the basis of the Company’s books and records he has reviewed in the limited time since his appointment, the Company was likely to have been insolvent immediately prior to the Administrators’ appointment. The basis for his opinion is set out in paragraphs 17 to 26 of his affidavit, and includes:

*Cashflow analysis*

1. the Company’s short term cash flow forecast dated 13 January 2023, prepared by its management, projected the Company would not have sufficient cash to meet its debts as and when they fell due across the period to 24 March 2023;
2. the Company’s management personnel have indicated that further costs to the Company’s business, of about $100,000 were inadvertently excluded from the short term cash flow;
3. the Company was reliant in calendar year 2022 on financial support from related parties. It appears based on the Administrators’ enquiries with the BV Group’s global board and CEO that that support will no longer be forthcoming;
4. Mr Hutton’s conclusion, based on his review of documents and his experience, is that it is unlikely the Company would have been able to raise funds from outside the BV Group within the time required to stave off insolvency; and

*Balance sheet analysis*

1. the largest asset on the Company’s balance sheet is an intercompany loan totalling $16,289,369. It appears recovery of that loan is impossible in the short to medium term, and will depend entirely on broader challenges facing the BV Group. If that loan is not recoverable, the Company’s balance sheet will have a net deficiency of $712,117.

### Administrators’ inquiries

1. After their appointment, the Administrators took immediate action to confirm the validity of their appointment, including by commencing this proceeding.

### Potential disruption

1. While a future challenge to the administrators’ appointment may appear unlikely, it is apparent that any challenge to their role is likely to cause significant disruption to any successful sale or recapitalisation of the Company’s business.

### Prior conduct of director

1. There is no suggestion of bad faith or improper behaviour in the process that led to the appointment of the Administrators. Rather, all the evidence suggests that it was a bona fide exercise of power by Ms Kracht, by then the sole director of the Company, in circumstances where the Company was in imminent financial distress and all other directors had resigned.

### Administrators’ work since appointment

1. The Administrators have been aware since their appointment that a question may arise about validity. They have urgently sought comfort from the Court in that context. Nonetheless, given the time-sensitive requirements of the administration, it has not been realistic for them to wait for that confirmation before performing significant work in the conduct of the administration, which has included commencing a campaign for the sale or recapitalisation of the business. In those circumstances, the Administrators submit that their actions are reasonable in the circumstances of this case and ought not prevent an order under s 447A being made.

### Substantial injustice

1. The Administrators are not aware of any prejudice or substantial injustice that may be suffered by any other party as a result of the Court making the orders sought in this application. Ms Kracht, the sole director of the Company, is aware of and supports this application. Creditors of the Company have been informed of the substance of the application and a copy of the documents filed in this proceeding have been made available to them. At the time of Mr Hutton swearing his affidavit, no person has objected to the application.

### Operation of Part 5.3A

1. Otherwise, the Court may be satisfied that the actions taken by the Administrators are consistent with the objects of Part 5.3A of the Act as set out in s 435A.
2. As Mr Hutton deposes in his affidavit, the best prospect of the Company’s business continuing to operate, or of the benefit to creditors being maximised, relies on the expression of interest campaign commenced by the Administrators, which is due to close by 3 February 2023. That task is inherently time-sensitive.

## Section 447C

1. Section 447C confers power on the Court to declare the appointment of an administrator valid. Orders made under s 447C require the Court to be satisfied that there is doubt about the validity of a purported appointment of a person as administrator. Orders are declaratory rather than curative – they rely “on a finding that there is nothing that needs to be cured”: *Re HPI Australia Pty Ltd* [2008] NSWSC 1106 at [8] (Barrett J). The Western Australian Court of Appeal has pointed to that as the key point of distinction between s 447A and 447C: *Smolarek v McMaster* [2006] WASCA 216 at [25] (Buss JA).
2. To make an order under s 447C, the Court must make factual findings about the appointment. In cases of urgency, it has been held that making an order under s 447A is a preferable and more expedient course: *Re Maria’s Farm Veggies Pty Ltd (Administrators Appointed)* [2016] NSWSC 1899 at [16] (Black J); *Billingsley v Napoli, in the matter of Biometric Identity Systems Pty Ltd (Administrators Appointed)* [2019] FCA 1640; 139 ACSR 213 at [23]-[24] (Farrell J). The Administrators have accordingly sought orders under s 447A, but submit that the evidence before the Court forms a sufficient basis for the Court to conclude that the Resolutions were validly made, and to make an order under s 447C.

## Section 1322

1. Section 1322 of the Act also confers power on the Court to declare the Administrators’ appointment valid. Section 1322(4) allows the Court to correct irregularities in the exercise of any power conferred by the Act. Relief is only available if one of the three requirements in s 1322(6)(a) is satisfied and it is also established that no substantial injustice has been or is likely to be caused to any person. That is, in addition to satisfying the Court that no substantial injustice arises, the applicant must show that:
2. the relevant act is “essentially of a procedural nature”;
3. the persons concerned acted honestly; or
4. it is just and equitable for the order to be made.
5. It has been held the considerations in relation to validating the appointment of an administrator under s 1322(4) are similar to those under s 447A, and that the appointment of an administrator is a “procedural step” for the purpose of s 1322(6): *Re Milgerd* at [15] (Black J); *Re HPI Australia Pty Ltd* [2008] NSWSC 1106 at [29] (Barrett J); *Dolores Correa and The Spanish Club Limited (subject to Deed of Company Arrangement) v Whittingham (No 3)* [2012] NSWSC 526 at [96] (Black J); *Re Gulf Energy Ltd* [2019] NSWSC 1637 at [19] (Ward CJ in Eq).
6. It appears from the authorities that s 1322 may be a preferable power under which to make orders where there is some question about the ability of the Court to exercise the power in s 447A (for example, where the relevant company is in liquidation by the time the order is made, which occurred in *Re Milgerd* and *Re Continental Pacific Ltd* [2002] NSWSC 789). There is no such issue in this case. Accordingly, while the Administrators submit that the analysis in relation to s 447A may equally support the making of an order under s 1322(4) of the Act, an order under s 447A is the preferable course. I agree.

# disposition

1. I am satisfied that the Court should grant the orders sought by the plaintiffs, including an order that the plaintiffs’ costs be costs in the administration of the Company: *Re Milgerd* at [21] (Black J), *Re Creative Memories Australia Pty Ltd (Administrators Appointed)* [2013] NSWSC 652 at [14] (Hammerschlag J); *Re Gulf Energy Ltd* [2019] NSWSC 1637 at [28] (Ward CJ in Eq).

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

Associate:

Dated: 2 February 2023