Federal Court of Australia

Barry, in the matter of an application by Barry [2024] FCA 13

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| File number: |  |
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| Judgment of: | **SHARIFF J** |
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| Date of judgment: | 11 January 2024 |
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| Date of publication of reasons: | 6 February 2024 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** **–** application for leave to manage a corporation where otherwise disqualified – application for declaration that acts done in managing corporation are not invalid – application to extend the time after which the super fund would otherwise cease to be a self-managed superannuation fund |
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| Legislation: | *Corporations Act 2001* (Cth) ss 206A(1), 206B(3), 206G, 1322(4)(a)  *Superannuation Industry (Supervision) Act 1993* (Cth) ss 17A(4)(b), 120(1)(b), 126J(1), 126K, 312 |
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| Cases cited: | *Austpac Resources N.L., in the matter of Austpac Resources N.L.* [2023] FCA 108  *ICandy Interactive Limited, Re ICandy Interactive Limited* [2018] FCA 533  *In the matter of Pacific Springs Proprietary Limited* [2020] NSWSC 1240  *Macalister, in the matter of an application by Macalister* [2021] FCA 1455  *Re Golden Rim Resources Limited* [2019] FCA 1206 |
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| 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: | 23 |
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| Date of hearing: | 11 January 2024 |
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| Solicitor for the Plaintiffs: | Ms Fiona Reynolds of Turks Legal |
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| Solicitor for the Interested Party (Commissioner of Taxation): | Mr Victor Tse of ATO Litigation and Legal Services |

ORDERS

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|  | | QUD 8 of 2024 |
| IN THE MATTER OF AN APPLICATION BY BOUBACAR SIDY BARRY (A BANKRUPT) AND ANGELA MAREE HOLMES-BARRY (A BANKRUPT) | | |
|  | BOUBACAR SIDY BARRY | |
|  | First Plaintiff | |
|  | ANGELA MAREE HOLMES-BARRY | |
|  | Second Plaintiff | |

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| order made by: | SHARIFF J |
| DATE OF ORDER: | 11 January 2024 |

THE COURT ORDERS THAT:

1. Pursuant to s 206G(1) of the Corporations Act 2001 (Cth), and subject to the conditions in paragraph 2 of these orders, Boubacar Sidy Barry and Angela Maree Holmes-Barry have leave to manage to manage the following corporations:
   1. Boubacar and Angela Pty Ltd ACN 169 022 468; and
   2. Barry And Holmes-Barry Family Pty Ltd ACN 166 169 240.
2. Leave is granted pursuant to order 1 for the limited purpose of giving effect to the sale of the property at 411/430 Marine Parade, Biggera Waters, QLD, 4216 (title reference 411/SP211887) and to wind up the Barry And Holmes-Barry Family Superannuation Fund and any other steps incidental and ancillary to those steps.
3. Pursuant to s 126J(1)(b) of the Superannuation Industry (Supervision) Act 1993 (Cth), each of the Plaintiffs are not a disqualified person in relation to the companies referred to in order 1(a) and 1(b) for the same purposes as those specified in Order 2.
4. Pursuant to s 1322(4)(a) of the Corporations Act 2001 (Cth), it is declared that any act, matter or thing purporting to have been done by Boubacar Sidy Barry and Angela Maree Holmes-Barry in their capacity as company officers of Boubacar And Angela Pty Ltd and Barry and Holmes-Barry Family Pty Ltd under the Corporations Act 2001 (Cth) since 17 May 2023 is not invalid by reason of any contravention of a provision of that Act or a provision of the constitution of either company.
5. Pursuant to s 1322(4)(c) of the Corporations Act 2001 (Cth), Boubacar Sidy Barry and Angela Maree Holmes-Barry are relieved from any civil liability arising out of any contravention of a provision of the Corporations Act 2001 (Cth) or a provision of the constitutions of Boubacar And Angela Pty Ltd and Barry and Holmes-Barry Family Pty Ltd arising from any act, matter or thing purporting to have been done by either of them in their capacity as company officers of those companies since 17 May 2023.
6. Pursuant to s 312(5)(a) of the Superannuation Industry (Supervision) Act 1993 (Cth), any act, matter or thing purporting to have been done by Boubacar Sidy Barry and Angela Maree Holmes-Barry in their capacity as company officers of Barry And Holmes-Barry Family Pty Ltd as trustee for the Barry And Holmes-Barry Family Superannuation Fund under the Superannuation Industry (Supervision) Act 1993 (Cth) in relation to the Barry And Holmes-Barry Family Superannuation Fund since 17 May 2023 up to the date of making of these orders is not invalid because of any contravention of a provision of the Superannuation Industry (Supervision) Act 1993 (Cth) or the governing rules of the Barry And Holmes-Barry Family Superannuation Fund.
7. Pursuant to s 312(5)(b) of the Superannuation Industry (Supervision) Act 1993 (Cth), Boubacar Sidy Barry and Angela Maree Holmes-Barry are relieved from any civil liability in respect of any contravention of the Superannuation Industry (Supervision) Act 1993 (Cth) or the governing rules of the Barry And Holmes-Barry Family Superannuation Fund arising from any act, matter or thing purporting to have been done by either of them in their capacity as company officers of Barry And Holmes-Barry Family Pty Ltd since 17 May 2023 up to the date of making of these orders.
8. Pursuant to s 312(5)(c) of the Superannuation Industry (Supervision) Act 1993 (Cth), the time limit within which the Barry And Holmes-Barry Family Superannuation Fund would otherwise cease to be a self-managed superannuation fund under s 17A(4)(b) of the Superannuation Industry (Supervision) Act 1993 (Cth) is extended to 31 October 2024.

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

REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from the transcript)

SHARIFF J:

# introduction

1. The plaintiffs are undischarged bankrupts. They have been undischarged bankrupts since in or about May 2023. At or about that time, Ms Anne Meagher and Mr Adam Peter Kersey of SV Partners (Brisbane) were appointed as the trustees of their respective bankrupt estates.
2. As a result of the plaintiffs being undischarged bankrupts, they are disqualified from managing corporations and from acting as responsible officers of the trustee of a superannuation entity pursuant to s 206B(3) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and s 120(1)(b) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**). The plaintiffs would commit an offence if they continued to so act: see s 206A(1) of the Corporations Act and s 126K of the SIS Act.
3. The plaintiffs applied to this Court seeking orders granting them leave to manage two corporations for particular purposes connected with a self-managed superannuation fund and certain other ancillary orders. The proceedings came before me on an urgent basis as the vacation duty judge in New South Wales and Queensland.
4. I was satisfied that I should make the orders sought by the plaintiffs and made those orders on 11 January 2024. I gave *ex tempore* reasons for making those orders. These are my reasons (as revised from the transcript).

# BACKGROUND

1. The plaintiffs were directors of the following two entities:
2. Barry and Holmes-Barry Family Pty Ltd (**First Trustee**) which is the trustee of the plaintiffs’ self-managed superannuation fund known as the ‘The Barry and Holmes-Barry Family Superannuation Fund’ (**Super Fund**); and
3. Boubacar and Angela Pty Ltd (**Second Trustee**) which is the trustee of the Boubacar and Angela Bare Trust (**Bare Trust**).
4. The plaintiffs are each members of the Super Fund and are the only such members.
5. The Bare Trust was established for the purpose of the Second Trustee acquiring assets (including real property) for its beneficiary, being the First Trustee as trustee of the Super Fund.
6. The Second Trustee acquired, and is the registered owner of, a residential investment unit located at Marine Parade, Biggera Waters in the State of Queensland (Lot 411 on Strata Plan 211887) (**Property**).
7. Following their bankruptcy, the plaintiffs ceased to be directors of the First Trustee and the Second Trustee.
8. The plaintiffs received advice from external advisors, including an accountant and a lawyer, that they should roll over the benefits held in the Super Fund into an industry superannuation fund. In order to act on this advice, the plaintiffs took steps to sell the Property during the latter part of 2023.
9. On 28 October 2023, a contract for the sale of the Property was exchanged and became unconditional on or about 13 November 2023. The settlement of the sale of the Property was due to occur by 27 November 2023, but due to circumstances that have come to pass the settlement has not yet taken place. With the consent of those acting on behalf of the purchaser of the Property, the settlement date has been extended to 29 January 2024.
10. Until approximately November 2023, the plaintiffs laboured under the misapprehension that they had the capacity to take steps to sell the Property and to enter into transactions for its sale. This was unsound given that by reason of their bankruptcy and their cessation as directors of the First and Second Trustee they were both disqualified from managing those two corporations and from acting as responsible officers of a superannuation entity.
11. The plaintiffs applied to this Court by way of an Originating Application filed on 9 January 2024 seeking, amongst other things, orders granting them leave to manage the First Trustee and the Second Trustee for the purposes of giving effect to the sale of the Property and also to give effect to their present intention to wind up the Super Fund. These orders are sought pursuant to s 206G of the Corporations Act and s 126J(1) of the SIS Act. These provisions empower the Court to make an order granting a person who is otherwise disqualified from managing a corporation leave to do so if certain conditions are met, and where the exercise of the Court’s discretion favours the granting of such orders.
12. The plaintiffs also seek other orders ancillary to the primary relief, being, first, a declaration under s 1322(4)(a) of the Corporations Act and s 312(5)(a) of the SIS Act to the effect that any act, matter or thing that they have done or purported to do in their capacity as officers of the First Trustee and the Second Trustee since they became undischarged bankrupts is not invalid. They also seek orders pursuant to s 312(5)(c) of the SIS Act that the time after which the Super Fund would otherwise cease to be a self-managed superannuation fund under s 17A(4)(b) of the SIS Act be extended, which arises by reason of, in effect, a period of inactivity of that fund.
13. The plaintiffs’ application came before me on 9 January 2024 as the vacation duty judge, and I was informed of the need for urgency in making orders, given the impending settlement date for the Property scheduled to occur on 29 January 2024. I granted orders for short service at that time, requiring the relevant Originating Application and evidence filed up to that time to be served on the Australian Securities and Investments Commission (**ASIC**), the trustees in bankruptcy (**SV Partners**), and the Commissioner of Taxation. I listed the matter for hearing on 11 January 2024 and directed the plaintiffs to file some short written submissions in support of the orders they sought. These orders were complied with, and the matter came before me for hearing on 11 January. At that time, a representative for the Commissioner of Taxation appeared and indicated that the Commissioner of Taxation’s position was that he did not oppose the orders being sought, subject to some refinement to those orders with which the plaintiffs agreed.
14. ASIC had been given the opportunity to be heard and indicated that it did not oppose the orders sought by the plaintiffs. SV Partners had also been given notice of the orders sought by the plaintiffs and did not oppose them.

# CONSIDERATION

1. I was assisted in the determination of the matter by the written submissions filed by Ms Reynolds, the solicitor for the plaintiffs who appeared at the hearing before me. I made the orders that were sought by the plaintiffs for substantially the reasons that are set out in those submissions.
2. Without being exhaustive, s 206G of the Corporations Act empowers the Court to give leave for persons who are disqualified from managing corporations to be able to do so subject to any conditions the Court might impose. The conditions necessary for the exercise of that power and the factors that are relevant to the exercise of the discretion to exercise that power have been set out in various authorities of this court: see *Macalister, in the matter of an application by Macalister* [2021] FCA 1455 (***Macalister***) at [14] to [21]. Similar principles apply to s 126J(1) of the SIS Act: see *Macalister* at [14] to [21].
3. I was satisfied that the conditions necessary for the exercise of the power had been satisfied for the purpose of both provisions being, namely, that at least 21 days’ notice of the orders sought had been provided to, respectively, ASIC and the Commissioner of Taxation. Such notice was also provided to the trustees in bankruptcy, SV Partners. These conditions having been met, I was satisfied that it was an appropriate exercise of my discretion to grant the orders sought by the plaintiffs for the following reasons.
4. I was satisfied that the plaintiffs’ intentions in taking the course that they have taken and propose to take is *bona fide* and not intended to defeat creditors. Granting leave to the plaintiffs to manage the affairs of the First Trustee and the Second Trustee for the purpose of giving effect to the sale of the Property and to take steps to wind up the Super Fund, would not be contrary to the public interest or give rise to any risk of a potential for any contraventions of the Corporations Act or the SIS Act. I was satisfied that there would be no risk to third parties including former and current creditors by taking this course.
5. I was also satisfied that declarations under s 1322(4)(a) of the Corporations Act and s 312 of the SIS Act should be made to the effect sought in the Originating Application. I was satisfied that the plaintiffs either unwittingly or labouring under misapprehension of the legal position took steps to sell the Property, but did not take such steps dishonestly. As neither of them were directors of the First and Second Trustee at the time the steps were taken and a contract for sale of land was entered, I was satisfied that a question as to the invalidity of their actions or a question as to whether they contravened their relevant obligations under the Corporations Act and the SIS Act arose, and that such matters extended beyond mere procedural irregularities. I had regard to the authorities that are relevant to the exercise of this power and the factors that bear upon the exercise of discretion in making orders under s 1322(4)(a) of the Corporations Act and s 312 of the SIS Act: see *In the matter of Pacific Springs Proprietary Limited* [2020] NSWSC 1240; *Re Golden Rim Resources Limited* [2019] FCA 1206 at [28], *ICandy Interactive Limited, Re ICandy Interactive Limited* [2018] FCA 533 at [43]-[44] and [54]-[57], and *Austpac Resources N.L., in the matter of Austpac Resources N.L.* [2023] FCA 108. I was satisfied that it would be just and equitable to grant the orders that were sought.
6. I was also satisfied that pursuant to s 312(5)(c) of the SIS Act, an order should be made extending the period for doing any act, matter or thing in relation to the superannuation entity being the Super Fund. The period of inactivity of that fund was explicable on the material before me and I was satisfied that the plaintiffs had endeavoured to act honestly in the maintenance of that self-managed fund. I ordered that the time be extended until 31 October 2024 to enable the plaintiffs to settle on the sale of the Property, to roll over their member benefits into a nominated industry superannuation fund and, otherwise, to lodge all necessary documents to comply with financial reporting requirements and to bring the fund to an end.
7. No question of costs arose and I made no order as to costs.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Shariff. |

Associate:

Dated: 6 February 2024