Federal Court of Australia

Gothard (Liquidator), in the matter of Halifax Investment Services Pty Ltd (in liquidation) v Loo [2024] FCA 323

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| File number: | NSD 2191 of 2018 |
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| Judgment of: | **MARKOVIC J** |
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| Date of judgment: | 29 February 2024 |
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| Date of publication of reasons: | 4 April 2024 |
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| Catchwords: | **INSOLVENCY** – application by liquidators for directions and judicial advice – application for approval of entry into a deed of settlement in recovery proceedings – where directions and advice sought are given – application for approval pursuant to s 477(2A) and s 477(2B) of the *Corporations Act 2001* (Cth) – where approvals sought are given – where liquidators are justified in causing the company to resolve the recovery proceedings |
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| Legislation: | *Australian Consumer Law*, being Sch 2 to the *Competition and Consumer Act 2010* (Cth) s 236  *Corporations Act 2001* (Cth) s 477  *Federal Court of Australia Act 1976 (Cth)* s 37AF, 37AG  *Insolvency Practice Schedule (Corporations)*, being Sch 2 to the *Corporations Act 2001* (Cth) s 90-15  *Trustee Act 1925* (NSW) s 63 |
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| Cases cited: | *Elderslie Finance Corp Ltd v Newpage Pty Ltd (No 6)* (2007) 160 FCR 423  *In the matter of A.C.N 004 410 833 Limited (formerly Arrium Limited) (In Liquidation)* [2021] NSWSC 799  *In the matter of One.Tel Limited* (2014) 99 ACSR 247; [2014] NSWSC 457  *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66  *Re* *HIH**Insurance Ltd* [2004] NSWSC 5  *Thorn (liquidator), in the matter of South Townsville Developments Pty Ltd (in liq)* [2022] FCA 143 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Number of paragraphs: | 28 |
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| Date of hearing: | 29 February 2024 |
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| Counsel for the Plaintiffs: | Ms E Holmes and Mr B Hancock |
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| Solicitor for the Plaintiffs: | K&L Gates |

ORDERS

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|  | | NSD 2191 of 2018 |
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| BETWEEN: | PETER JAMES GOTHARD & PHILIP ALEXANDER QUINLAN IN THEIR CAPACITY AS JOINT & SEVERAL LIQUIDATORS OF HALIFAX INVESTMENT SERVICES PTY LTD (IN LIQUIDATION) ACN 096 980 522 (and another named in the schedule)  First Plaintiffs | |
| AND: | CHOO BOON LOO (and others named in the schedule)  First Defendant | |

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| order made by: | MARKOVIC J |
| DATE OF ORDER: | 29 FEBRUARY 2024 |

THE COURT ORDERS THAT:

1. Until midday on 5 March 2024, pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and on the ground that it is necessary to prevent prejudice to the proper administration of justice for the purposes of s 37AG(1)(a) of the FCA Act, the following material is not to be disclosed or made available for inspection by any person other than to the docket judge, a member of the docket judge's staff, any officer of the Court authorised by the docket judge, the plaintiffs, their staff and their legal representatives:
   1. the unredacted copy of the affidavit of Philip Alexander Quinlan sworn on 30 January 2024 (**Quinlan Affidavit**);
   2. Confidential Exhibit PAQ-9 to the Quinlan Affidavit;
   3. the unredacted copy of any written submissions provided by the plaintiffs in support of this interlocutory process; and
   4. the transcript of the hearing of this interlocutory process.
2. The requirement for service of the interlocutory process dated 1 February 2022, the Quinlan Affidavit and the exhibits to the Quinlan Affidavit on the defendants be dispensed with.
3. Pursuant to s 90-15 of the *Insolvency Practice Schedule (Corporations)* (**IPS**) (being Schedule 2 to the *Corporations Act 2001* (Cth)), Peter James Gothard and Philip Alexander Quinlan (**Liquidators**) as joint and several liquidators of Halifax Investment Services Pty Ltd (In Liquidation) ACN 096 980 522 (**Halifax AU**), are justified in causing Halifax AU to settle the proceedings in accordance with the terms of the deed of settlement dated 22 December 2023 (**Deed of Settlement**).
4. Pursuant to s 63 of the ***Trustee Act*** *1925* (NSW), Halifax AU in its capacity as trustee of the client moneys is justified in settling the proceedings in accordance with the terms of the Deed of Settlement.
5. Pursuant to s 90-15 of the IPS and/or s 63 of the Trustee Act, any funds recovered pursuant to the Deed of Settlement form part of the same commingled pool of funds of Halifax AU and Halifax NZ.
6. Pursuant to s 477(2A) of the Corporations Act, the Liquidators have approval to compromise debts owing to Halifax AU, the terms of which are set out in the Deed of Settlement appearing at pages 29 to 57 of Confidential Exhibit PAQ-9 to the Quinlan Affidavit, to the extent that approval may be required.
7. Pursuant to s 477(2B) of the Corporations Act the plaintiffs be granted approval to enter into the Deed of Settlement.
8. The plaintiffs’ costs of and incidental to this application be costs and expenses in the liquidation of the third plaintiff and be paid out of the funds and accounts listed in Order 1 of the Orders made by Gleeson J on 2 July 2020.

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

REASONS FOR JUDGMENT

MARKOVIC J:

1. On 29 February 2024, on the application of Peter Gothard and Philip Alexander Quinlan in their capacity as joint and several liquidators of Halifax Investment Services Pty Ltd (in liquidation) and Halifax Investments Services Pty Limited (in liquidation) (**Halifax AU**), the plaintiffs in this proceeding, I made orders, among others, pursuant to: s 90-15 of the *Insolvency Practice Schedule (Corporations*) (**IPS**) being Schedule 2 to the ***Corporations Act*** *2001* (Cth) and s 63 of the ***Trustee Act*** *1925* (NSW) that Messrs Gothard and Quinlan (together, **Liquidators**), on the one hand, and Halifax AU, on the other, are justified in settling proceeding NSD 711 of 2022 commenced in this Court by the Liquidators and Halifax AU (**Recovery Proceeding**); and s 477(2A) and s 477(2B) of the Corporations Act in relation to the entry into a deed of settlement with the respondents to the Recovery Proceeding (**Settlement Deed**).
2. These are my reasons for making those orders.

# Background

1. On 25 August 2022 the Court made orders that the Liquidators would be justified in bringing and prosecuting a proceeding against the former auditors and lawyers of Halifax AU, and orders concerning the entry into a litigation funding agreement to enable that to occur: see *Kelly (Liquidator), in the matter of Halifax Investment Services Pty Ltd (in liquidation) v Loo (No 2)*[2022] FCA 1078.
2. Consequently, on 4 September 2022 the Liquidators caused Halifax AU to commence the Recovery Proceeding.
3. On 30 August 2023 the parties to the Recovery Proceeding attended a mediation. The Recovery Proceeding did not settle at the mediation. However, following further negotiations, on 22 December 2023 the parties entered into the Settlement Deed to resolve that proceeding. It is in relation to the settlement that is the subject of the Settlement Deed that the Liquidators and Halifax AU by interlocutory application filed on 2 February 2024 sought the orders which were made on 29 February 2024.
4. In support of their interlocutory application the Liquidators and Halifax AU relied on an affidavit sworn by Mr Quinlan on 30 January 2024, a substantial part of which is the subject of an order made pursuant to s 37AF and s 37AG of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**). There were two exhibits to Mr Quinlan’s affidavit, one of which, Confidential Exhibit **PAQ-9**, is also subject to an order pursuant to s 37AF and s 37AG of the FCA Act. PAQ-9 includes, among other things, a copy of the Settlement Deed and advice from counsel in relation to the Recovery Proceeding.
5. In his affidavit Mr Quinlan addressed the terms of, and expressed his views in relation to, the Settlement Deed and the effect of the settlement of the Recovery Proceeding on the ongoing administration of Halifax AU. I do not propose to set out Mr Quinlan’s evidence in any detail given the orders that were made on the application of the plaintiffs, and supported by two of the defendants to the Recovery Proceeding, pursuant to s 37AF and s 37AG of the FCA Act.

# Judicial directions and/or advice

1. The Liquidators sought a direction that they would be justified in causing Halifax AU to settle the Recovery Proceeding in accordance with the terms of the Settlement Deed and Halifax AU sought judicial advice to the same effect.
2. The Liquidators sought their direction under s 90-15 of the IPS which relevantly provides that “[t]he Court may make such orders as it thinks fit in relation to the external administration of a company” while Halifax AU sought an order under s 63(1) of the Trustee Act which provides that “[a] trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property”.
3. In *In the matter of* *One.Tel Limited* (2014) 99 ACSR 247; [2014] NSWSC 457 at [32] Brereton J recognised that the Court’s power to give advice to a trustee is analogous to its power to give directions to a liquidator.
4. In *In the matter of A.C.N 004 410 833 Limited (formerly* ***Arrium*** *Limited) (In Liquidation)* [2021] NSWSC 799 at [14] Black J observed that the Court may give directions in relation to settlement of litigation where: there is an element of potential controversy in respect of the compromise; a settlement has a substantial element of compromise about it; or it involves not only the exercise of a commercial judgment by the liquidator but also the exercise of a legal judgment as to the assessment of the merits of the settlement against the prospects of success in the proceeding.
5. Insofar as s 63 of the Trustee Act is concerned, in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [58] the High Court (Gummow ACJ, Kirby, Hayne and Heydon JJ) observed that the only jurisdictional bar to the Court giving advice or directions to a trustee is that the question is one “respecting the management or administration of the trust property”. Whether a trustee should settle a proceeding to bring in funds that form part of the trust estate is such a question: see *Cowan v Lai* [2014] NSWSC 1143 at [18] (Darke J).
6. Having regard to the criteria set out in *Arrium* at [14] (see [11] above) I was satisfied that it was appropriate for the Court to give a direction as sought by the Liquidators under s 90-15 of the IPS:
7. as Mr Quinlan explained, the settlement reached by the parties to the Recovery Proceeding involves a compromise on the part of Halifax AU, the plaintiff to that proceeding;
8. in determining whether the settlement was appropriate the Liquidators had regard to legal advice provided to them and the amount likely to be recovered if Halifax AU succeeded at trial. The assessment of the merits of the settlement has an element of legal as well as commercial judgment to it; and
9. given the number of creditors, the complexity of the Recovery Proceeding and the nature of the settlement there was the risk of some controversy in relation to entry into the Settlement Deed.
10. In relation to the advice sought under s 63(1) of the Trustee Act it was clear that the question of whether the Liquidators would be justified in settling the Recovery Proceeding on the terms proposed in the Settlement Deed was a question in relation to the management or administration of trust property.
11. Based on the evidence before me I was satisfied that the Liquidators would be justified in resolving the Recovery Proceeding on the terms set out in the Settlement Deed. It was apparent that the compromise reached in relation to the Recovery Proceeding would avoid the uncertainty and risk associated with continuing that litigation. In particular, the Liquidators weighed the prospect of, among other things, continuing with the Recovery Proceeding and perhaps achieving a better outcome following judgment against the likely costs of doing so. The Liquidators gave detailed evidence in relation to their analysis of the legal issues, the likely recovery, and the costs, both legal and of the administration, of continuing with the Recovery Proceeding. Given its confidential nature I do not propose to set out that evidence.
12. However, having regard to it and the thorough analysis undertaken by the Liquidators I was satisfied that the direction under s 90-15 of the IPS and the advice under s 63(1) of the Trustee Act should be given in the terms sought.

# Section 477 of the Corporations Act

1. The Liquidators sought orders under both s 477(2A) and s 477(2B) of the Corporations Act in relation to their entry into the Settlement Deed. Those sections are in the following terms:

(2A) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not compromise a debt to the company if the amount claimed by the company is more than:

(a) if an amount greater than $20,000 is prescribed—the prescribed amount; or

(b) otherwise—$20,000.

(2B) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company’s behalf (for example, but without limitation, a lease or an agreement under which a security interest arises or is created) if:

(a) without limiting paragraph (b), the term of the agreement may end; or

(b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;

more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.

## Section 477(2A)

1. Halifax AU’s claims in the Recovery Proceeding were for breach of contract, negligence and misleading or deceptive conduct and the making of false or misleading representations under the relevant sections of the *Australian Consumer Law* being Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**).
2. Claims for breach of contract and negligence are not debts for the purposes of s 477(2A) as they are not claims for payment of a liquidated amount but are claims for damages: see *Daniel Ivan Cvitanovic in his capacity as liquidator of Master Education Services Pty Ltd (in liquidation)* [2012] NSWSC 205 at [5]. However, the approach of dismissing an application for approval under s 477(2A) because the claim in question is not a debt in the strict sense should only be adopted in the clearest of cases because s 477(2A) goes to the existence of a liquidator’s power: see *Re* ***HIH*** *Insurance Ltd* [2004] NSWSC 5 at [12].
3. The question of whether a claim for compensation under s 236 of the ACL is a debt for the purpose of s 477(2A) is an open one. The Liquidators were not able to identify any authority that had considered that question but noted that other statutory claims, such as claims for unfair preferences, have been held not to be debts. In ***Elderslie*** *Finance Corporation Ltd v Newpage Pty Ltd (No 6)* (2007) 160 FCR 423 at [24] and [26], in considering whether a claim made by a liquidator under s 588FF of the Corporations Act was a debt for the purposes of s 477(2A) of the Corporations Act, Lindgren J observed:

24 The meaning of the word “debt” can be affected by its context. There is a line of authority to the effect that the expression “a debt to the company” in s 477(2A) bears its familiar meaning of a sum of money that is either immediately payable, or that, by reason of an existing obligation, will become payable in the future (*debitum in praesenti, solvendum in futuro*): *Luxtrend* [1997] 2 Qd R 86; *Re Tietyens Investments Pty Ltd (in liq) (recs and mgrs apptd)* (1999) 31 ACSR 1 at [92]–[94] (*Tietyens*); and see Austin RP and Ramsay IM, *Ford’s Principles of Corporations Law* (13th ed, LexisNexis Butterworths, 2007) at [28-260] p 1412. Accordingly, claims by liquidators to recover amounts paid away by the company under voidable transactions have been held to lie outside the predecessor provision of s 477(2A), namely, s 477(2A) of the *Corporations Law*: *Luxtrend* [1997] 2 Qd R 86; *Nambucca Investments Pty Ltd v Snoco Ltd* [1999] NSWSC 211 at [2]. In *Tietyens* 31 ACSR 1 a claim of equitable damages based on accessorial liability for breaches of trust, the primary cause of action being a claim based on *Barnes v Addy* (1874) 9 Ch App 244, was similarly held not to be a claim of a debt to the company.

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26 In *HIH* [2004] NSWSC 5 at [12] and *QBE Workers Compensation (NSW) Ltd v GJ Formwork Pty Ltd* (2006) 56 ACSR 687 at [4]-[5] (*QBE*), Barrett J said that where there is room for argument about whether a claim is one of a debt to the company, the court should err on the side of treating the claim as a debt rather than decline to grant approval under s 477(2A). His Honour pointed out that the opening words of s 477(1) have the effect of making the power to compromise contained in para (d) of that subsection subject to subss (2A) and (2B). It follows that if it transpired that a claim was, indeed, one of “a debt to the company” within subs (2A), a compromise of it without approval of the Court, of the committee of inspection or of a resolution of the creditors, would lie outside the power of the liquidator.

1. At [27] of *Elderslie* Lindgren J expressed agreement with the approach suggested in *HIH* and added that in his Honour’s view s 477(2A) of the Corporations Act applies where the claimed debt to the company of more than $20,000 is one of several claims that are all the subject of a single comprehensive compromise. His Honour further observed that a judge is rightly reluctant to “turn away, on the lack of jurisdiction, a liquidator who comes to the court seeking approval under s 477(2A), if there is a possibility that in consequence the proposed compromise will be entered into in contravention of the prohibition contained in that subsection”. His Honour also observed that it is in the interest of creditors for a liquidator to compromise a claim early and without the costly factual and legal investigation that resolution of the debt/non‑debt question may demand.
2. At [34] of *Elderslie* Lindgren J noted that in a doubtful case the Court can grant approval under s 477(2A) of the Corporations Act to the extent that approval may be required. It was appropriate to take that approach in this case given the uncertainty that surrounds the question of whether a claim for damages under s 236 of the ACL is a debt for the purposes of s 477(2A) and for the reasons set out at [15] above.

## Section 477(2B)

1. The Liquidators also sought an order under s 477(2B) of the Corporations Act for approval to enter into the Settlement Deed. Approval was necessary because the term of the Settlement Deed will end, and obligations of the parties to the agreement may be performed, more than three months after it is entered into.
2. The principles applicable to consideration of approval under s 477(2B) of the Corporations Act are settled. They were conveniently summarised by Stewart J in *Thorn (liquidator), in the matter of South Townsville Developments Pty Ltd (in liq)* [2022] FCA 143 at [21]-[23]:

21 The relevant principles were summarised by Gordon J in *Stewart,* *in the matter of* ***Newtronics*** *Pty Ltd* [2007] FCA 1375 at [26]. That summary has been approved and adopted in many subsequent decisions. The relevant principles include the following:

(1) The court does not simply “rubber stamp” whatever is put forward by a liquidator.

(2) The court will not approve an agreement if its terms are unclear.

(3) The role of the court is to grant or deny approval to the liquidator’s proposal. Its role is not to develop some alternative proposal which might seem preferable.

(4) In reviewing the liquidator’s proposal the task of the court is not to reconsider all of the issues weighed by the liquidator in developing the proposal, and substitute its determination in a hearing de novo, but to pay due regard to the liquidator’s commercial judgment and knowledge of all of the circumstances of the liquidation, satisfying itself there is no error of law or grounds for suspecting bad faith or impropriety, and weighing up whether there is any good reason to intervene in terms of the expeditious and beneficial administration of the winding up.

(5) In judging whether or not a liquidator should be given permission to enter into a funding agreement, whether retrospective or not, it is important to ensure, amongst other things, that the entity or person providing the funding is not given a benefit disproportionate to the risk undertaken in light of the funding that is promised or a “grossly excessive profit”.

(6) Generally the court grants approval under s 477(2B) of the Act only where the transaction relates to the proper realisation of the assets of the company or otherwise assists in the winding up of the company.

22 In addition, the court will have regard to the impact that entering into the agreement will have on the duration of the liquidation and whether that impact is, in all the circumstances, reasonable in the interests of the administration: *In the matter of One.Tel Ltd* [2014] NSWSC 457 at [30] per Brereton J.

23 Although s 477(2B) contemplates that approval will be obtained before an agreement is entered into, retroactive approval may be granted in certain circumstances: *Newtronics* at [25]; *Re Ambient Rail Pty Ltd (in liq); Ex parte Tonks* [2019] FCA 1556 at [9] per Yates J.

1. Having regard to those principles I was satisfied that an order should be made granting approval pursuant to s 477(2B) of the Corporations Act for the Liquidators to enter into the Settlement Deed. The evidence before me did not suggest that the liquidation of Halifax AU will be prolonged by entry into the Settlement Deed. Indeed, it is likely to have the opposite effect. Nor will entry into the Settlement Deed add to the cost of the liquidation. In short, based on the evidence, it will have a positive effect on the liquidation and assist in the winding up of Halifax AU.

# Other orders

1. The Liquidators also sought other orders including, as noted above, orders under s 37AF of the FCA Act in relation to parts of Mr Quinlan’s evidence. I was satisfied I should make each of those additional orders.
2. As to the orders made under s 37AF of the FCA Act, the material in question was either subject to legal professional privilege, concerned the Recovery Proceeding such that should that proceeding not conclude it would provide the respondents to the Recovery Proceeding with an unfair forensic advantage if it was disclosed or concerned the terms of the Settlement Deed, which are confidential. In those circumstances, I was satisfied that the orders sought were necessary to prevent prejudice to the proper administration of justice.

# Conclusion

1. For those reasons I made the orders sought by the Liquidators and Halifax AU.

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| I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Markovic. |

Associate:

Dated: 4 April 2024

SCHEDULE OF PARTIES

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|  | NSD 2191 of 2018 |
| Plaintiffs |  |
| Second Plaintiff | HALIFAX INVESTMENT SERVICES PTY LTD (IN LIQUIDATION) |
| Defendants |  |
| Second Defendant: | ELYSIUM BUSINESS SYSTEMS PTY LTD |
| Third Defendant: | JASON PAUL HINGSTON |
| Fourth Defendant: | ATLAS ASSET MANAGEMENT PTY LTD |
| Fifth Defendant: | FIONA MCMULLIN |
| Sixth Defendant: | ANDREW PHILLIP WHITEHEAD AND MARLENE WHITEHEAD IN THEIR CAPACITY AS THE TRUSTEES OF THE BEELINE TRUST |
| Seventh Defendant: | ANDREW PHILLIP WHITEHEAD |
| Eighth Defendant: | JEFFREY JOHN WORBOYS |
| Ninth Defendant: | HONG KONG CAPITAL HOLDINGS PTY LTD |