FEDERAL COURT OF AUSTRALIA

Bester, in the matter of Mirror Trading (Pty) Ltd (in liquidation) [2024] FCA 305

|  |  |
| --- | --- |
| File number(s): | VID 1084 of 2023 |
|  |  |
| Judgment of: | **MCEVOY J** |
|  |  |
| Date of judgment: | 27 March 2024 |
|  |  |
| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – application for “shelf order” pursuant to s 588FF(3)(b) of the *Corporations Act 2001* (Cth) in the context of a Ponzi-type scheme – company placed into liquidation by High Court of South Africa – application granted – extension of suppression order pursuant to ss 37AE, 37AF, 37AG, 37AH of the *Federal Court of Australia Act 1976* (Cth). |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth) ss 588FF(3), 588FE  *Federal Court of Australia Act 1976* (Cth) ss 37AE, 37AF, 37AG, 37AH |
|  |  |
| Cases cited: | *ASIC v Karl Suleman Enterprizes Pty Ltd (in liq)* [2004] NSWSC 1244; (2005) 52 ACSR 103  *Bester v Mirror Trading International (Pty) Ltd (in liq)* [2023] FCA 1194  *Blakeley v Ausmart Services Pty Ltd (in liq), in the matter of Ausmart Services Pty Ltd (in liq)* [2021] FCA 1470  *BP Australia Ltd v Brown* [2003] NSWCA 216; (2003) 58 NSWLR 322  *Brown v DML Resources Pty Ltd (No 5) (in liq)* [2001] NSWSC 973; (2001) 166 FLR 1  *Caron v Jahani (No 2)* [2020] NSWCA 117;(2020) 102 NSWLR 537  *Clout v Andi-Co Australia Pty Ltd* (2013) 96 ACSR 512; [2013] QSC 278  *Donnellon Childcare Holdings Pty Ltd (in liq) v Donnellon* [2020] FCA 1003  *Fletcher and Others (As Liquidators of Octaviar Ltd and Octaviar Administration Pty Ltd) v Anderson and Others* [2014] NSWCA 450; (2014) 103 ACSR 236  *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2015] HCA 10; (2015) 254 CLR 489  *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2014] NSWCA 148; (2014) 87 NSWLR 728  *Franklyn Scholar (Australia) Pty Ltd* [2020] NSWSC 1902  *Gordon v Tolcher* [2006] HCA 62; (2006) 231 CLR 334  *Grant Samuel Corporate Finance Pty Ltd v Fletcher* [2015] HCA 8; (2015) 254 CLR 477  *Green v Chiswell Furniture Pty Ltd (in liq)* [1999] NSWSC 608  *Horne v Retirement Guide Management Pty Ltd* [2017] VSCA 47; (2017) 54 VR 325  *Re Cohalan & Mitchell Roofing (in liq)* [2020] VSC 222  *Re Dudley (as liquidator of Freshwater Bay Investments Pty Ltd (in liq) (ACN 105 274 226))* [2021] FCA 608; (2021) 152 ACSR 532  *Re Half Price Enterprises Pty Ltd* [2021] FCA 805  *Re McGrath* [2004] NSWSC 165; (2004) 48 ACSR 723  *Walker v CBA Corporate Services (NSW) Pty Ltd* [2012] FCA 328; (2012) 88 ACSR 153  *Wallman (as liquidator of Graffiti Holdings Pty Ltd (in liq)) v Milestone Enterprises Pty Ltd* [2006] WASC 260; (2006) 205 FLR 68 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Victoria |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 32 |
|  |  |
| Date of hearing: | 26 March 2024 |
|  |  |
| Counsel for the Plaintiffs: | Mark McKillop |
|  |  |
| Solicitor for the Plaintiffs: | Hicks Oakley Chessell Williams |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | VID 1084 of 2023 |
| IN THE MATTER OF MIRROR TRADING INTERNATIONAL (PTY) LTD (IN LIQUIDATION) | | |
| BETWEEN: | HERMAN BESTER N.O.  First Plaintiff  ADRIAAN WILLEM VAN ROOYEN N.O.  Second Plaintiff  CHRISTOPHER JAMES ROOS N.O. (and others named in the Schedule)  Third Plaintiff | |
| AND: | MIRROR TRADING INTERNATIONAL (PTY) LTD (IN LIQUIDATION)  Defendant | |

|  |  |
| --- | --- |
| order made by: | MCEVOY J |
| DATE OF ORDER: | 26 March 2024 |

THE COURT ORDERS THAT:

1. Pursuant to s 588FF(3)(b) of the ***Corporations Act*** *2001* (Cth), the time for the plaintiffs to make any application or applications for orders under s 588FF of the Corporations Act against any party is extended for a period of 12 months from 26 March 2024.

2. Liberty to apply is reserved to any person affected by a proceeding under s 588FF of the Corporations Act commenced under paragraph 1 to vary or discharge that order.

3. Pursuant to ss 37AE, 37AF, 37AG and 37AH of the *Federal Court of Australia Act 1976* (Cth), paragraphs 14, 15, 16, 16(a)-16(c) (inclusive), 17, 18 and 19, including all annexures referred to therein of the affidavit of Chavonnes Badenhorst St Claire Cooper N.O. sworn 15 December 2023, be suppressed until 26 March 2025

4. The plaintiffs’ costs of this application, including reserved costs, be costs in the winding up of the defendant.

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

REASONS FOR JUDGMENT

MCEVOY J:

1 By way of originating process dated 19 December 2023, the plaintiffs, being the eight appointed liquidators of the defendant, Mirror Trading International (Pty) Ltd (in liquidation) (**MTI**), seek a “shelf order” pursuant to s 588FF(3) of the ***Corporations Act*** *2001* (Cth). That is to say, they seek an order extending the time for them to make any application for orders about voidable transactions pursuant to s 588FE of the Corporations Act.

2 MTI is a South African company which was placed in provisional liquidation by an order of the High Court of South Africa (Western Cape Division, Cape Town) (the **South African court**) on 28 December 2020 and placed under final liquidation by order made on 30 June 2021.

3 On 6 October 2023 the liquidation was recognised in Australia as a foreign main proceeding pursuant to the *Cross-Border Insolvency Act 2008* (Cth): see *Bester v Mirror Trading International (Pty) Ltd (in liq)* [2023] FCA 1194 (Button J).

4 The background facts to the liquidation are set out in more detail in the two supporting affidavits of Chavonnes Badenhorst St Claire Cooper N.O. sworn 15 December 2023 (filed 19 December 2023) and 30 January 2024 (filed 31 January 2024).

5 For the reasons that follow there will be orders in the terms sought by the plaintiffs.

# RELEVANT BACKGROUND

6 A judgment of the South African court dated 26 April 2023 sets out the background to the operations of MTI more fully, as well as that court’s conclusions that (inter alia), MTI operated an illegal Ponzi-type scheme whereby members of the public invested in a bitcoin venture promising high returns. The bitcoin was to be managed with an AI trading bot on the “Trade 300” platform, but that platform did not exist. No pooled investment existed either, with returns to early investors funded by later investment monies.

7 The plaintiffs submit that in a Ponzi scheme, any investor who receives a return from the scheme is liable to disgorge it. The reason is said to be that the return is the result of their being an early investor, not because any underlying gain on their investment exists as a legal basis for the payment. It is said that in the academic literature analysing Ponzi scheme recoveries, such investors are known as “winners”, as they receive a return from the scheme. Part of the object of a liquidator in administering an insolvent Ponzi scheme is to identify winners and assess whether it is possible to make a recovery from them so that their returns can be redistributed across all investors. As to the issues which may arise in these situations, see generally *Caron v Jahani (No 2)* (2020) 102 NSWLR 537 (Bathurst CJ, Bell P and Macfarlan JA).

8 The plaintiffs have apparently identified over 300,000 investors across 234 countries, including 866 Australian participantsin the scheme, who have received a return of bitcoin from MTI (the **Australian recipients**). The Australian recipients are said to be the “winners” of the scheme in this country and are potential defendants to future claims that MTI may bring because of the shelf order.

# SHELF ORDERS: THE STATUTORY REGIME AND RELEVANT PRINCIPLES

9 Section 588FF(3)(a) of the Corporations Act provides that an application by a liquidator seeking relief in respect of voidable transactions under Division 2 of Part 5.7B may be commenced only during the period beginning on the relation-back day and ending three years after the relation-back day, or 12 months after the appointment of a liquidator, whichever is later.

10 The general limitation in s 588FF(3)(a) of the Corporations Act is afforded some flexibility by s 588FF(3)(b), which provides that the court may order that any proceedings can be commenced within such longer period as the court orders. In the present case, the relation-back day is 23 December 2020. This application was filed on 19 December 2023 and is accordingly (just) within three years of the relation-back day and the time limit.

11 Applications for extensions of time cannot be filed outside the time limit. The power of the court to extend the time within which a liquidator could bring proceedings challenging voidable transactions under s 588FF(3) of the Corporations Act may only be made within the period set out in s 588FF(3)(a). Section 588FF(3) of the Corporations Act is not to be characterised merely as a procedural stipulation as to time: *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 254 CLR 477 at 485 [17] and 486-487 [22] – [23] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ); citing *Gordon v Tolcher* (2006) 231 CLR 334 at 347 [37] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

12 Extensions of time can be granted in respect of an identified recovery. However, a liquidator may not be in a position to identify all possible defendants or relevant transactions at the time of making an application under s 588FF(3)(b) of the Corporations Act. This has led to applications for orders in general or blanket terms, which are known as “shelf orders”.

13 The term is said to have originated in *Brown v DML Resources Pty Ltd (No 5) (in liq)* (2001) 166 FLR 1 at 8 [31] (Austin J); which was itself cited in ***Fortress Credit*** *Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 495 [1] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); see also *Blakeley v Ausmart Services Pty Ltd (in liq), in the matter of Ausmart Services Pty Ltd (in liq)* [2021] FCA 1470 at [39] (O’Callaghan J). As the High Court held in*Fortress Credit* at 506 [27], the power under s 588FF(3)(b) of the Corporations Act to extend the time within which a company’s liquidators may apply for orders in relation to voidable transactions entered into by a company extends to transactions that cannot be identified at the time of the order.

14 The principles governing the exercise of discretion in an application for an extension generally were summarised by Sifris J in *Re Cohalan & Mitchell Roofing (in liq)* [2020] VSC 222 at [30]–[33]. The factors to be considered were said by his Honour to be as follows:

(a) the adequacy of the liquidator's explanation for the delay in commencing proceedings;

(b) a preliminary view of the merits of the proposed proceedings; and

(c) a balancing of the case for granting the extension against any actual prejudice to the respondents that is likely to arise from granting the extension.

15 It is submitted that these factors flow from a more general obligation of the court to consider what is fair and just in all the circumstances, as to which see ***BP Australia*** *Ltd v Brown* (2003) 58 NSWLR 322 at 357-358 [187] (Spigelman CJ, with Mason P and Handley JA agreeing).

16 The plaintiffs submit that relevant principles distilled from other cases in the application of these factors to the present case include:

(a) the absence of funding to conduct examinations into voidable transactions is at least one factor to be taken into account in considering the explanation for delay in commencing proceedings: *Clout v Andi-Co Australia Pty Ltd* (2013) 96 ACSR 512 at 521 [62] (Mullins J);

(b) a liquidator's hesitancy to act in circumstances where he or she is without funds may be a relevant factor in considering any explanation for the delay in proceeding: *Donnellon Childcare Holdings Pty Ltd (in liq) v Donnellon* [2020] FCA 1003 at [31] (Reeves J); *Re Half Price Enterprises Pty Ltd* [2021] FCA 805 at [21] (Markovic J);

(c) where the liquidator’s purpose in seeking the extension of time is simply to be put into a position where they can properly decide whether to bring proceedings, a preliminary inquiry into the merits of any consequent proceedings may not always be necessary. There is a risk that in some cases, requiring a preliminary inquiry into the merits may impose an unnecessary burden on both the liquidator and the court, especially in a case where the circumstances appear to give rise to complex or disputed questions of fact and law and the evidence before the court is manifestly incomplete: *Green v Chiswell Furniture Pty Ltd (in liq)* [1999] NSWSC 608 at [15]-[16] (Austin J); see also *Walker v CBA Corporate Services (NSW) Pty Ltd* (2012) 88 ACSR 153 at 161-162 [43]-[44] (Nicholas J);

(d) prejudice caused by an extension may be actual prejudice the subject of evidence, or there may be what is termed “presumptive prejudice”. Presumptive prejudice is recognition that facts which were once known may now be forgotten, or their significance may not now be appreciated. The possibility of presumptive prejudice diminishes where related party transactions are involved, as there may be a confluence of knowledge about the transactions; and

(e) a shelf order may not be made for a lengthy period simply because it is convenient for the plaintiffs to defer commencing prospective proceedings while they seek to determine whether it would be commercial to do so: *Franklyn Scholar (Australia) Pty Ltd* [2020] NSWSC 1902 at [15] (where Black J nonetheless granted a short extension of three months: see at [18]).

17 The plaintiffs submit that further principles governing the making of a shelf order, as opposed to an order extending time to bring a specific claim against an identified defendant, include:

(a) in *Fortress Credit* at [23]–[27] the High Court accepted that shelf orders can be made in appropriate circumstances, resolving a previous controversy in the authorities regarding whether such orders were open;

(b) a general or blanket extension may be apposite in a large and complex liquidation where potential defendants are unidentified: *Re McGrath* (2004) 48 ACSR 723 at 732 [17] (Barrett J);

(c) a shelf order may be justified to enable a liquidator to complete investigations, and identify potentially voidable transactions and defendants: ***Horne*** *v Retirement Guide Management Pty Ltd*  (2017) 54 VR 325 at 341- 342 [55] (Warren CJ, Tate and Beach JJA); and

(d) a liquidator must prove that he or she has not been sitting idle in a liquidation to obtain such an order: *ASIC v Karl* ***Suleman*** *Enterprizes Pty Ltd (in liq)* (2005) 52 ACSR 103 at 133 [22]-[23] (Barrett J).

18 The plaintiffs further submit that the principles relating to giving notice to potential targets of proceedings to be brought after the shelf order is made include:

(a) a failure to provide the required notice is not fatal to an extension order and whether an extension order will be made is the subject of the court's discretion: *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2014) 87 NSWLR 728 at 746-747 [106] (Bathurst CJ).

(b) where an order is made without notice, failure to provide notice may render the extension liable to be set aside on application by an affected person: *Fletcher and Others (As Liquidators of* ***Octaviar*** *Ltd and Octaviar Administration Pty Ltd) v Anderson and Others* (2014) 103 ACSR 236 at 237 [5]-[8] (Beazley P);

(c) if the extension order sought is drafted in such a way that the right of any affected person to object or take issue with it at a later date is preserved, the court will be more inclined not to set aside the extension order for want of notice: *Re* ***Dudley*** *(as liquidator of Freshwater Bay Investments Pty Ltd (in liq) (ACN 105 274 226))* (2021) 152 ACSR 532 at 538 [25] (McKerracher J); citing ***Wallman*** *(as liquidator of Graffiti Holdings Pty Ltd (in liq)) v Milestone Enterprises Pty Ltd* (2006) 205 FLR 68 at 69 [4] (Master Newnes).

(d) a failure to provide notice to affected persons may be addressed by way of case management, rather than refusing the application. For example, the court may require a specific putative defendant to be notified before the matter proceeds: *BP Australia* at 348 [136]; see also *Dudley* at 538 [25], citing *Wallman* at 69 [4].

(e) as a matter of procedural fairness, the common law requires that if a particular creditor is targeted as a likely defendant in voidable preference proceedings, that creditor must be given notice of the application for extension of time, and may need to be joined as a party to the application for extension of time, especially if it responds to a notice by objecting to the proposed order on substantive grounds: *BP Australia* at 351-352 [154] (referring to the first instance decision of Austin J), *Suleman* at 105 [7], *Horne* at 350-351 [97]; and

(f) if there is no targeted creditor and the application for extension is made to permit the liquidator to conduct investigations necessary to identify and explore potentially preferential transactions generally, the court may grant the extension of time in general terms without specifying any particular transactions or defendants, and in that event it will not be necessary at any stage to join any particular creditor as the defendant to the application for extension: *BP Australia* at 351-352 [154] (referring to the decision of Austin J at first instance); see also *Octaviar* at 248 [64] (Barrett JA).

# CONSIDERATION

## Service on putative defendants

19 The plaintiffs submit that they have not been able to determine whether they have a claim on the merits against any of the Australian recipients. This is because all that is presently known is that the Australian recipients have received bitcoin. The individual circumstances of the relevant acquisitions, whether the relevant parties can be located and served, and the prospects of any recovery, have not been established.

20 The plaintiffs submit and I accept that that there is thus no natural justice requirement for them to serve any putative defendant since none has been identified, and further investigation is required to determine if there is any such defendant subject to a claim with merit: applying *BP Australia* at 351-352 [154] and *Octaviar* at 248 [64] (Barrett JA).

## Relevant discretionary factors

21 As will be apparent, the plaintiffs seek the shelf order for the following reasons:

(a) investigations to date have not been able to determine whether there are voidable transactions that are of merit to pursue in respect of the Australian recipients;

(b) the potential claims involve recovery from “winners” which, in view of the scheme, are potentially voidable, and accordingly have potential merit;

(c) further investigation is required to identify the location, means and circumstances of the Australian recipients of the transfers, among other things; and

(d) it is not possible to evaluate prejudice to potential defendants other than presumptive prejudice since the merits of specific claims have not been established.

22 The plaintiffs submit that the following matters demonstrate that the reasons for the delay in pursuing these investigations have been properly explained:

(a) they were appointed provisionally and the making of final orders for their appointment was delayed by some seven months;

(b) the sheer scale of the scheme, with more than 300,000 investors across 234 countries, has made the investigation of the scheme complex and time consuming;

(c) the initial investigations culminated in the declaration of the scheme as an illegal Ponzi scheme;

(d) they have received many claims (some 8,509 to date) across many countries, requiring considerable time to investigate;

(e) they have determined to pursue recoveries in 86 jurisdictions, of which Australia is but one;

(f) they have had to pursue or defend a range of other litigation, including recognition claims;

(g) recognition in Australia for the liquidation did not take place until 6 October 2023, following recognition proceedings in four other places, and this application has been made as soon as practicable after Australian recognition.

23 The plaintiffs submit and I accept that a shelf order is justified having regard to these matters.

24 The plaintiffs assert that further justification for the order is that:

(a) the liquidation of MTI is large and complex;

(b) the complexity is heightened by the transnational nature of the scheme and the wide dispersal of its victims;

(c) since the scheme pursued by MTI is a fraud against its victims, the public interest is served by extending time to allow the careful and deliberative investigation of the potential claims; and

(d) as it is likely that future claims brought during the extension period would be against “winners”, rather than creditors or other commercial arm’s length parties, considerations of prejudice in the nature of delay are accordingly not as important as they might be in the case of shelf orders that preserve voidable transactions in other circumstances.

25 I accept that these matters provide a further basis for the making of the shelf order.

26 The plaintiffs note that in the circumstances no potential defendant has been served or given notice of this application. The form of order the plaintiffs propose allows for any future defendant to seek to vary or discharge the shelf order sought, and I accept that this is appropriate.

## Conclusion

27 The plaintiffs have established the grounds for a favourable exercise of the discretion given to the court in s 588FF(3)(b) of the Corporations Act and the orders they have sought should be made.

# EXTENSION OF SUPPRESSION ORDER

28 On 2 February 2024, Anderson J made a suppression order in this proceeding having regard to the contents of the affidavits filed on 19 December 2023 and 31 January 2024.

29 That order suppressed parts of the 19 December 2023 affidavit until the determination of this proceeding pursuant to ss 37AE, 37AF, 37AG, 37AH of the *Federal Court of Australia Act 1976* (Cth) (the **Act**).

30 The plaintiffs seek to have the suppression orders extended for 12 months so that it continues for the duration of the shelf order.

31 I am satisfied having regard to the affidavits filed on 19 December 2023 and 31 January 2024 that the grounds in s 37AG of the Act have been established for the purposes of making a suppression or non-publication order pursuant to s 37AF of the Act.

32 Accordingly, there will also be an order that paragraphs 14, 15, 16, 16(a)-16(c) (inclusive), 17, 18 and 19, including all annexures referred to therein of the affidavit filed on 19 December 2023 be suppressed until 25 March 2025.

|  |
| --- |
| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McEvoy. |

Associate:

Dated: 27 March 2024

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  |  |
| Plaintiffs |  |
| Fourth Plaintiff: | JACOLIEN FRIEDA BARNARD N.O. |
| Fifth Plaintiff: | DEIDRE BASSON N.O. |
| Sixth Plaintiff: | CHAVONNES BADENHORST ST CLAIRE COOPER N.O. |
| Seventh Plaintiff: | DANIEL SANDILE NDLOVU N.O. |
| Eighth Plaintiff: | KEVIN TITUS N.O. |