Federal Court of Australia

Bolwell (Liquidator), in the matter of Mandalay Road Holdings Pty Ltd (in liq) v Goldsmith-Medd (Trustee) [2022] FCA 1300

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| File number(s): |  |
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| Judgment of: | **O'SULLIVAN J** |
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| Date of judgment: | 2 November 2022 |
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| Catchwords: | **CORPORATIONS LAW –** trusts & trustees – practice and procedure – interlocutory application by the Liquidator of a company and Receiver of a trust of which the Company was trustee seeking directions pursuant to s 90-15 of the *Insolvency Practice Schedule (Corporations)* as contained in Schedule 2 of the *Corporations Act 2001* (Cth) – whether the Trust was validly constituted – where the Company was named in the Trust Deed as trustee but not incorporated at the time the Trust Deed was executed – whether the sole director of the Company once incorporated became the trustee of the Trust upon execution of the Trust Deed – whether upon its subsequent incorporation the Company became the trustee of the Trust – whether the Company ratified the pre-incorporation actions of the person who became its sole director upon incorporation – whether the Company acted solely in its capacity as trustee of the Trust – whether the Company property was, prior to its sale by the Receiver of the Trust, properly characterised as property held by the Company in its capacity as trustee of the Trust – whether the realisation and distribution of the proceeds of the sale of the property are each governed by Parts 5.4B and 5.6 of the *Corporations Act 2001* (Cth) – where the plaintiffs are entitled to the directions sought. |
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| Legislation: | *Corporations Act* *2001* (Cth), Schedule 2, *Insolvency Practice Schedule* (*Corporations*), s 90-15, 90-20 & Parts 5.4B and 5.6  |
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| Cases cited: | *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; (2019) 268 CLR 524*Jones v Matrix Partners Pty Ltd; Re-Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40; (2018) 260 FCR 310*Korda v Australian Executor Trustees (SA) Ltd* [2015] HCA 6; (2015) 255 CLR 62*Legal Services Board v Gillespie-Jones* [2013] HCA 35; (2013) 249 CLR 493*Raftland Pty Ltd (as trustee of the Raftland Trust) v Commissioner of Taxation* [2006] FCA 109; (2006) 227 ALR 598*Re LEWIS (as liquidators of CONCRETE SUPPLY PTY LTD (in liq) (ACN 007 848 580)* (2020) 145 ACSR 459*Re McGowan & Valentini Trusts* [2021] VSC 154  |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 32 |
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| Date of hearing: | 11 October 2022  |
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| Counsel for the Plaintiffs: | Ms C Conway |
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| Solicitor for the Plaintiffs: | Mills Oakley |
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| Counsel for the Defendants: | Ms S Goldsmith-Medd in person |

ORDERS

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|  | QUD 276 of 2020 |
| IN THE MATTER OF MANDALAY ROAD HOLDINGS PTY LTD (IN LIQUIDATION) |
| BETWEEN: | CRAIG IVOR BOLWELL (AS LIQUIDATOR OF MANDALAY ROAD HOLDINGS PTY LTD (IN LIQUIDATION) (ACN 162 240 093)First PlaintiffMANDALAY ROAD HOLDINGS PTY LTD (IN LIQUIDATION) (ACN 162 240 093)Second PlaintiffCRAIG IVOR BOLWELL IN HIS CAPACITY AS RECEIVER AND MANAGER OF THE ASSETS OF THE MANDALAY ROAD TRUSTThird Plaintiff |
| AND: | SUZANNA IRIS GOLDSMITH-MEDD (IN HER CAPACITY AS TRUSTEE FOR THE MANDALAY ROAD TRUST)First DefendantSUZANNA IRIS GOLDSMITH-MEDDSecond Defendant |

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| order made by: | O'SULLIVAN J |
| DATE OF ORDER: | 2 November 2022 |

The Court directs that:

1. Pursuant to s 90-15 of the *Insolvency Practice Schedule (Corporations)* (as contained in Schedule 2 to the *Corporations Act 2001* (Cth) (**Act**), the first plaintiff and the third plaintiff would be justified and otherwise acting reasonably in proceeding on the basis that:
	1. The Mandalay Road Trust (**Trust**) was validly constituted under a deed dated 4 January 2013 (**Trust Deed**), notwithstanding that Stephen John Barber (**Mr Barber**) purported to execute the Trust Deed on the second plaintiff’s behalf even though the second plaintiff, Mandalay Road Holdings Pty Ltd (**Company**), was not incorporated until 5 February 2013;
	2. Mr Barber became the trustee of the Trust upon execution of the Trust Deed on 4 January 2013;
	3. Upon its incorporation on 5 February 2013, the Company became the trustee of the Trust with Mr Barber as its sole director;
	4. By its actions after incorporation, the Company ratified Mr Barber’s pre-incorporation actions;
	5. The Company acted solely in its capacity as trustee of the Trust, and not in its own right or any other capacity;
	6. 111 Lone Hand Road, Eumundi, in the State of Queensland (more particularly described as Lot 5 on Survey Plan 167227, Title Reference 50500922 (**Property**)) was, prior to its sale, properly characterised as property held by the Company as trustee of the Trust; and
	7. The possession, realisation and any distribution of the proceeds derived from the sale of the Property is governed by Parts 5.4B and 5.6 of the Act.
2. The plaintiffs’ costs of the interlocutory process filed 15 September 2022 be their costs in the winding up of the Company.

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

REASONS FOR JUDGMENT

O’SULLIVAN J:

# OVERVIEW

1. The first plaintiff, Craig Ivor Bolwell (**Mr Bolwell**), was appointed liquidator of the second plaintiff, Mandalay Road Holdings Pty Ltd (**Company**), on 30 June 2020.
2. On 15 June 2021, Reeves J appointed Mr Bolwell as Receiver of the assets of the Mandalay Road Trust (**Trust**).
3. The Trust was established by a Deed of Settlement dated 4 January 2013 with the Company named as trustee. That day, Stephen John Barber (**Mr Barber**) executed the Deed of Settlement on behalf of the Company and is named in the execution clause as a director of the Company. The Deed of Settlement was executed by Angelis Jason Karageorgiou as Settlor. Mr Barber is also named as Appointor of the Trust: affidavit of Craig Ivor Bolwell sworn and filed on 28 August 2020 (**first Bolwell affidavit**).
4. On 18 January 2013, the Company as trustee for the Trust entered into a contract for the purchase of the property at 111 Lone Hand Road, Eumundi, Queensland (**Property**). An historical title search for the Property reveals the transfer of the Property to the Company as trustee as being lodged on 8 March 2013: first Bolwell affidavit, annexure CIB-8.
5. In fact, the Company was not incorporated until 5 February 2013 at which time Mr Barber was appointed sole director and secretary of the Company. Mr Barber was also the sole shareholder of the Company although he was not the beneficial owner of the shares.
6. On or about 6 November 2018, Mr Barber, in his capacity as Appointor of the Trust, appointed the second defendant (**Ms Goldsmith-Medd**) as trustee of the Trust in place of the Company. The same day, the Company executed a transfer of the Property from itself to Ms Goldsmith-Medd in her capacity as trustee of the Trust.
7. On 21 March 2022, Downes J ordered that as Receiver of the Trust, Mr Bolwell recover possession of the Property and Ms Goldsmith-Medd in her personal capacity deliver vacant possession of the Property by 15 April 2022.
8. The Property was sold under the instruction of Mr Bolwell as Receiver of the Trust at auction on 23 July 2022 for $3,210,000. After paying various expenses relating to the sale and insurance of the Property, the balance of the remaining funds have been held by the Receiver pending taxation advice.
9. In the circumstances, Mr Bolwell as Liquidator of the Company and Receiver of the Trust, seek directions pursuant to s 90-15 of the *Insolvency Practice Schedule* (*Corporations*) (**IPSC**) (contained in Schedule 2 to the *Corporations Act* *2001* (Cth) (**Act**)) that as Liquidator and Receiver, he would be justified and otherwise acting reasonably in proceeding on the basis that the Trust was validly constituted; that the Company’s director, Mr Barber, became the trustee of the Trust upon execution of the Trust Deed; that the Company became the trustee of the Trust upon its incorporation; that the Property was, prior to its sale by the Receiver, characterised as Property held by the Company as trustee of the Trust; and that the possession, realisation and any distribution of the proceeds of sale of the Property are each governed by Parts 5.4B and 5.6 of the Act.
10. The issues in this matter are:
	1. Was the Trust validly constituted?
	2. Did Mr Barber became the trustee of the Trust upon execution of the Trust Deed and did the Company become the trustee of the Trust upon its incorporation?
	3. Was the Property held by the Company in its capacity as trustee of the Trust?
	4. Should the Court give directions to the Liquidator and Receiver pursuant to s 90-15 of the IPSC? and
	5. Is the realisation and any distribution of the proceeds of sale of the Property governed by Parts 5.4B and 5.6 of the Act.
11. For the reasons which follow, the answers to each of these issues is yes.

## Whether the trust was validly constituted

1. The Trust, if validly constituted, is an express trust. The requirements for the creation of an express trust are: certainty of intention, certainty of subject matter, and certainty of object: *Korda v Australian Executor Trustees (SA) Ltd* [2015] HCA 6; (2015) 255 CLR 62, [7] (French CJ); *Re McGowan & Valentini Trusts* [2021] VSC 154 [19] (Macaulay J).
2. A consideration of the Trust Deed reveals clearly an intention to create the Trust, certainty of subject matter which is the trust property constituted by the Trust Fund, and certainty of object which are the named beneficiaries and the classes of beneficiaries identified in the schedule to the Trust Deed: *Legal Services Board v Gillespie-Jones* [2013] HCA 35; (2013) 249 CLR 493 [116] (Bell, Gageler and Keane JJ); affidavit of Craig Ivor Bolwell sworn and filed 15 September 2022 (**second Bolwell affidavit**), annexure CIB-46 pp 30-43.
3. The only issue is the trustee.
4. Equity will not allow trust to fail for want of a trustee: *Raftland Pty Ltd (as trustee of the Raftland Trust) v Commissioner of Taxation* [2006] FCA 109; (2006) 227 ALR 598 at [66] (Kiefel J as her Honour then was); *Re McGowan* at [37].
5. The Trust Deed provides for the removal and replacement of the trustee in cl 20 such that the Settlor contemplated clearly the possibility of different or additional trustees. On that basis, I infer the Settlor did not intend for the trust to fail because the named trustee was not able to take the role, or in this case, because it did not then exist.
6. A question arises as to whether Mr Barber was aware the Company did not exist or if he was aware, whether as sole director, he intended for the Company to ratify his pre-incorporation actions upon incorporation. Mr Barber is now deceased, however there are a number of matters which indicate clearly that the Company ratified Mr Barber’s pre-incorporation actions after incorporation and assumed the role of trustee of the Trust. Those factors are:
	1. The Company is named as purchaser in its capacity as trustee for the Trust in the contract for the purchase of the Property apparently executed by Mr Barber on 18 January 2013: second Bolwell affidavit [22], annexure CIB-46 pp 44-45;
	2. The Company settled on the Property and was named on the title as registered proprietor as trustee. The transfer documents include the Trust Deed: second Bolwell affidavit [24(b)], [28] annexure CIB-46 pp 53,-68;
	3. The investigations carried out by or on behalf of Mr Bolwell and the Report on Company Affairs and Property completed by Mr Barber reveal that the Company operated exclusively in its capacity as trustee of the Trust and never traded or carried on any business whether in its own right or as trustee of the Trust: first Bolwell affidavit [5]-[7], [10], annexure CIB-5 pp 65-71; second Bolwell affidavit [34], annexure CIB-46 pp 107-114;
	4. As trustee, the Company entered into two Chattel Mortgage Agreements with BMW Australia Finance: second Bolwell affidavit [30], [31] annexure CIB-46 pp 72-101; and
	5. On or about 6 November 2018, the Company was replaced by Goldsmith-Medd as trustee: first Bolwell affidavit [12], annexure CIB-9.
7. Under those circumstances by executing the Trust Deed as director of the then non-existent Company and executing the contract for the purchase of the Property in the Company’s name as trustee for the Trust, Mr Barber was trustee of the Trust personally. Upon the Company’s incorporation on 5 February 2013, by its actions it ratified Mr Barber’s pre-incorporation actions and assumed the role of trustee.
8. Accordingly, I find the Trust was validly constituted on 4 January 2013.

## Whether Mr Barber became the trustee of the Trust upon execution of the Trust Deed

1. It is for the reasons I have set out above that I consider Mr Barber became the trustee of the Trust upon execution of the Trust Deed and maintained that position until such time as the Company was incorporated at which time the Company became trustee of the Trust.

## Whether the Property was held by the Company in its capacity as trustee of the Trust

1. It follows from my findings above that the Property was held by the Company in its capacity as trustee of the Trust.

##  Whether the Court should give directions to the Liquidator and Receiver pursuant to s 90-15 of the IPSC.

1. Section 90-15 provides, in part:

*Court may make orders*

(1) The Court may make such orders as it thinks fit in relation to the external administration of a company.

*Orders on own initiative or on application*

(2) The Court may exercise the power under subsection (1):

(a) on its own initiative, during proceedings before the Court; or

(b) on application under section 90‑20.

1. Amongst other things, s 90-20 provides that an officer of the company is a person who may apply for an order under s 90-15. In *Re LEWIS (as liquidators of CONCRETE SUPPLY PTY LTD (in liq) (ACN 007 848 580)* (2020) 145 ACSR 459 at [31] White J summarised the principles applying to the power of the Court to give directions under s 90-15. Those principles include:

(a) the power to give directions is intended to facilitate the performance of the liquidator’s functions and should be interpreted widely to give effect to that intention: *Re Octaviar Administration Pty Ltd (in liq)* [2017] NSWSC 1556 (*Re Octaviar*) at [9];

(b) the power is available to give a liquidator advice as to the proper course of action to be taken in the liquidation: *Re Bell* at [47]; *Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994 at [7];

(c) the Court may give directions that provide guidance on matters of law and the reasonableness of a contemplated exercise of discretion but will usually not do so when the subject of the directions sought relates to the making and implementation of a business or commercial decision and when there is no particular legal issue raised and no attack on the proprietary or reasonableness of the decision: *Re MF Global* at [7];

(d) …

(e) the effect of a direction is to sanction a course of conduct on the part of the liquidators so that, providing full disclosure has been made to the Court, the liquidator may adopt the course free from the risk of personal liability for breach of duty: *Re Bell* at [47]; *Re One.Tel* at [32]; and

(f) the directions do not bind third parties, and do not determine substantive matters in dispute between the liquidator and third parties: *Re Bell* at [47].

1. In this application, in his capacity both as Liquidator and Receiver of the assets of the Trust, Mr Bolwell seeks directions so that accurate tax calculations can be made prior to both the distribution of the proceeds of the sale of the Property to creditors and payment of remuneration.
2. The directions sought pursuant to s 90-15 are that the Liquidator and Receiver would be justified and otherwise acting reasonably in proceeding on the basis that:
	1. The Trust was validly constituted under a deed dated 4 January 2013 notwithstanding that the Company was not incorporated until 5 February 2013;
	2. Stephen John Barber became the trustee of the Trust upon execution of the Trust Deed;
	3. Upon its incorporation on 5 February 2013, the Company became the trustee of the Trust;
	4. The Company acted solely on its capacity as trustee of the Trust, and not in its own right or any other capacity; and
	5. The Property was, prior to its sale, properly characterised as property held by the Company in its capacity as trustee of the Trust.
3. There is one further direction I would add, which that by its actions after incorporation, the Company ratified Mr Barber’s pre-incorporation actions. For the reasons I have set out above, I am satisfied as to each of the directions sought and there will be directions accordingly.

## Is the realisation and distribution of the proceeds of sale of the Property each governed by parts 5.4B and 5.6 of the Act

1. It is well-settled that the realisation and distribution of the proceeds of sale of the Property in the circumstances of this matter are each governed by Parts 5.4B and 5.6 of the Act.
2. In *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; (2019) 268 CLR 524 at [95]-[96] (Bell, Gageler and Nettle JJ) the High Court said that the liquidator of a company assumes control of the company’s assets subject to equities and as such must deal with assets held by the company as trustee in accordance with the terms of the trust. However, the company’s right of indemnity arising out of properly incurred trust obligations gives rise to a beneficial interest in the trust assets such that the trust assets are property of the company available for the payment of creditors and that “… there is no reason why the statutory order of priorities should not be followed in the distribution of the proceeds of the trustee’s right of indemnity amongst trust creditors ...”.
3. The High Court continued by referring to the observations of Allsop CJ in *Jones v Matrix Partners Pty Ltd; Re-Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40; (2018) 260 FCR 310, 338-339 [108] where when referring to s 556(1)(e), (f), (g) and (h) (which is within Part 5.6 of the Act), his Honour said, “Where the Corporation has only ever acted as a trustee of one trust and that has been the totality of its affairs, there is no reason either in principle or by reference to context or text why the words of the statute setting the order of priority should not be followed.”
4. Finally, Ms Goldsmith-Medd both in her capacity as trustee for the Trust and personally, filed two sets of written submissions dated 12 April 2021 and 10 October 2022, both of which were read on this application. Ms Goldsmith-Medd did not object in those written materials to the directions sought by the first and third plaintiffs.
5. Ms Goldsmith-Medd was present at the argument but did not wish to say anything further. Neither of Ms Goldsmith-Medd’s written submissions advanced the matter further.

## Conclusion

1. I am satisfied that the plaintiffs are entitled to the directions they seek and there will be orders accordingly.

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

Associate:

Dated: 2 November 2022