FEDERAL COURT OF AUSTRALIA

Kite v Mooney, in the matter of Mooney’s Contractors Pty Ltd (in liq)
[2016] FCA 886

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| File number: |  |
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| Judge: | **YATES J** |
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| Date of judgment: | 29 July 2016 |
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| Catchwords: | **CORPORATIONS** – external administration – winding up – where the company in liquidation is a bare trustee – where there is uncertainty as to liquidators’ power to dispose of trust property – appointment of liquidators as receivers and managers of the trust property  |
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| Legislation: | *Corporations Act 2001* (Cth) s 477  |
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| Cases cited: | *Bastion v Gideon Investment Pty Ltd (in liq)* (2000) 35 ACSR 466; [2000] NSWSC 939*Hundy (Liquidator); In the Matter of Enviro Friendly Products Pty Ltd (In Liq)* [2013] FCA 852*QBE Insurance (Australia) Limited v WA Metal Recycling Pty Ltd, in the matter of WA Metal Recycling Pty Ltd (in Liq)* [2016] FCA 238*Re South West Kitchens (WA) Pty Ltd* (2014) 224 FCR 408; [2014] FCA 670 *Re Stansfield DIY Wealth Pty Limited (in liq)* (2014) 291 FLR 17; [2014] NSWSC 1484*SMP Consolidated Pty Limited (in liquidation) v Posmot Pty Limited* [2014] FCA 1382 |
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| Date of hearing: | 29 July 2016 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 11 |
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| Counsel for the Plaintiffs: | Mr C Wood with Ms T Phan |
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| Solicitor for the Plaintiffs: | McCabes Lawyers |

ORDERS

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|  | NSD 1228 of 2016 |
| IN THE MATTER OF MOONEY’S CONTRACTORS PTY LTD (IN LIQUIDATION) ACN 144 726 296 |
| BETWEEN: | ROBERT KITE AND MARK HUTCHINS IN THEIR CAPACITY AS LIQUIDATORS OF MOONEY’S CONTRACTORS PTY LTD (IN LIQUIDATION) ACN 144 726 296First Plaintiff MOONEY’S CONTRACTORS PTY LTD (IN LIQUIDATION) ACN 144 726 296Second Plaintiff  |
| AND: | LANCE MOONEYFirst Defendant SHELLY MOONEYSecond Defendant  |

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| JUDGE: | YATES J |
| DATE OF ORDER: | 29 JULY 2016 |

THE COURT ORDERS THAT:

1. The originating application filed on 28 July 2016 be treated as an originating process, with the parties named as applicants treated as plaintiffs, and the parties named as respondents treated as defendants.
2. Leave be granted to the plaintiffs to move on the application for interlocutory relief instanter.
3. The need for service in respect of the application for interlocutory relief be dispensed with.
4. To the extent necessary, leave be granted to the first-named plaintiffs to begin and continue this proceeding in relation to property of Mooney’s Contractors Pty Ltd
(in liquidation) (**the company**).
5. Pursuant to s 57 of the *Federal Court of Australia Act 1976* (Cth), the first-named plaintiffs be appointed as joint and several receivers and managers without security over the property, assets and undertaking (**the assets**) of the Mooney Family Trust (**the MF Trust**) constituted by the Trust Deed referred to in paragraph 5 of the affidavit of Robert Kite, affirmed 27 July 2016 and filed in this proceeding, with the powers provided by s 420 of the *Corporations Act 2001* (Cth) (other than in s 420(2)(s), (t), (u) and (w)) as if the reference therein to “the corporation” were to the MF Trust.
6. The first-named plaintiffs not distribute the assets of the MF Trust to the beneficiaries thereof without further direction of the Court.
7. The costs, expenses and remuneration incurred by the first-named plaintiffs in acting as receivers and managers of the MF Trust, including the costs of this application, be paid from the assets of the MF Trust and, if they be insufficient, from the assets of the company.
8. The claims for relief referred to in paragraphs 6 and 7 of the originating process be treated as claims for final relief.
9. The proceeding be stood over for directions before the Commercial and Corporations Duty Judge at 9.30 am on 24 August 2016
10. The parties and any person with a sufficient interest under the MF Trust be granted liberty to apply on 24 hours’ notice.

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

REASONS FOR JUDGMENT

YATES J:

1. The first-named plaintiffs (**the plaintiffs**) are the joint and several liquidators of Mooney’s Contractors Pty Ltd (in liquidation) (**the company**). Their present application is to be appointed as receivers and managers of the property, assets and undertaking of the Mooney Family Trust (**the MF Trust**).
2. The company was registered on 21 June 2010. It was incorporated to be the trustee of the MF Trust, which was created by deed on the same day. The company has never traded in its own right. Its only activity has been to act as trustee and to carry on the business of the
MF Trust in that capacity.
3. On 27 April 2015, the plaintiffs were appointed as the joint and several administrators of the company. The effect of this appointment, so far as the MF Trust was concerned, was that the company was disqualified from holding office as trustee. Notwithstanding this fact, no other trustee was appointed. As a result, the company holds the property, assets and undertaking of the MF Trust as a bare trustee.
4. On 7 June 2015, the company entered into a deed of company arrangement, with the plaintiffs as deed administrators. The company defaulted and the deed was terminated.
On 7 July 2016, the company was placed into liquidation and the plaintiffs were appointed as joint and several liquidators.
5. When acting as administrators, the plaintiffs proceeded on the basis of the principles discussed in *Re South West Kitchens (WA) Pty Ltd* (2014) 224 FCR 408; [2014] FCA 670.
In that case, McKerracher J held that a liquidator’s power of sale under s 477(2) of the *Corporations Act 2001* (Cth) extended to the property of a trust of which the company in liquidation had been trustee but, because of the liquidation, had been disqualified from so acting. After their appointment as liquidators, other authority came to the plaintiffs’ attention which has thrown into doubt the correctness of that position: *Re Stansfield DIY Wealth Pty Limited (in liq)* (2014) 291 FLR 17; [2014] NSWSC 1484 (***Stansfield***). Because of that doubt, the plaintiffs have adopted the course that has been taken in a number of other cases, namely to seek appointment as receivers and managers of the trust property so that, in that capacity, they can exercise powers over the property: see, for example, *Bastion v Gideon Investment Pty Ltd (in liq)* (2000) 35 ACSR 466; [2000] NSWSC 939; *Stansfield*; *Hundy (Liquidator); In the Matter of Enviro Friendly Products Pty Ltd (In Liq)*
[2013] FCA 852; *SMP Consolidated Pty Limited (in liquidation) v Posmot Pty Limited* [2014] FCA 1382; *QBE Insurance (Australia) Limited v WA Metal Recycling Pty Ltd, in the matter of WA Metal Recycling Pty Ltd (in Liq)* [2016] FCA 238.
6. As at 7 July 2016, the company had leased office space and a yard in Mackay, Queensland. These leases have now been disclaimed.
7. The company was also performing work under a contract with Queensland Rail (**the QR Contract**). This is a contract for the provision of labour to undertake tasks as and when specified by Queensland Rail. The only immediately foreseeable expenses under that contract are the expenses associated with paying staff engaged in performing that work. All the staff are casual employees. Since 1 July 2016, the QR Contract has been administered on behalf of the company by another company, called Mooney’s Corp Pty Ltd (**Mooney’s Corp**). This administration has included coordinating the relevant employees, undertaking invoicing and the payroll, and arranging for replacement workers in circumstances of leave or resignation. The plaintiffs are of the view that the QR Contract is profitable, although it will soon come to an end. They are of the view that, without the ongoing assistance of Mooney’s Corp, they would not have the resources or connections to enable the contract to continue to be performed by the company.
8. As at 7 July 2016, the company also held certain items of plant and equipment. The company is not required to use this plant and equipment in the performance of the QR Contract. Some items of plant and equipment are subject to finance agreements. It is the plaintiffs’ intention to disclaim these particular items.
9. An opportunity has arisen to sell some items of plant and equipment (which will not be disclaimed) to Mooney Corp or a nominee. The opportunity is explained in an affidavit of Robert Kite made 27 July 2016. Mr Kite is one of the plaintiffs. The sale price would be at auction value plus an uplift. Until the sale, the plant and equipment would be leased to Mooney’s Corp for a weekly fee. It appears that at least some of this plant and equipment is already in the possession of Mooney’s Corp. The proposal includes taking security in respect of the obligation to pay under the lease arrangement. The security would also cover the value of any plant and equipment in the possession of Mooney’s Corp that is not returned to the plaintiffs in the event that the proposed sale is not completed. Further, under the proposal, Mooney’s Corp would continue to assist the company in performing its obligations under the QR Contract to the extent required.
10. Given the plaintiffs’ concern as to the extent of their powers as liquidators to deal with trust property in the way they consider appropriate, I am persuaded that I should accede to their application to be appointed as receivers and managers of that property, in accordance with the approach that has been taken in other cases.
11. Orders will be made accordingly.

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| I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Yates. |

Associate:

Dated: 4 August 2016