

FEDERAL COURT OF AUSTRALIA

Woolworths Limited v GetUp Limited [2012] FCA 726

Citation: Woolworths Limited v GetUp Limited [2012] FCA 726

Parties: **WOOLWORTHS LIMITED (ACN 000 014 675) v
GETUP LIMITED (ACN 114 027 986)**

File number(s): NSD 941 of 2012

Judge: **YATES J**

Date of judgment: 6 July 2012

Catchwords: **CORPORATIONS** – application under s 1322 of the *Corporations Act 2001* (Cth) for an extension of time for the calling and holding of an extraordinary general meeting and the issuing of a members’ statement – whether no substantial injustice is likely to be caused to any person by the making of the order

Legislation: *Corporations Act 2001* (Cth) ss 249D, 249P, 1322

Cases cited: *National Roads and Motorists’ Association Ltd v Parkin* (2004) 49 ACSR 386
National Roads and Motorists’ Association Ltd v Parkin (No 2) (2004) 49 ACSR 501
National Roads and Motorists’ Association Ltd v Snodgrass (2002) 42 ACSR 371
NRMA Insurance Group Ltd v Spragg (2001) 38 ACSR 174

Date of hearing: 6 July 2012

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 29

Counsel for the Plaintiff: Mr J Lockhart SC

Solicitor for the Plaintiff: Allens

Counsel for the Defendant: Mr GK Rich

Solicitor for the Defendant: Marque Lawyers

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 941 of 2012

**BETWEEN: WOOLWORTHS LIMITED (ACN 000 014 675)
Plaintiff**

**AND: GETUP LIMITED (ACN 114 027 986)
Defendant**

JUDGE: YATES J

DATE OF ORDER: 6 JULY 2012

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. Pursuant to s 1322(4)(d) of the *Corporations Act 2001* (Cth) (the Corporations Act) the time fixed by s 249D(5) for calling the meeting (Meeting) requested in the document which is Annexure PJH-1 to the affidavit of Peter John Horton (Notice) be extended up until and including 31 October 2012.
2. Pursuant to s 1322(4)(d) of the Corporations Act the time fixed by s 249D(5) for holding the Meeting be extended up until and including 30 November 2012.
3. Pursuant to s 1322(4)(d) of the Corporations Act the time fixed for issuing a members' statement under s 249P(6) be extended up until and including 31 October 2012.
4. Until further order, the contact addresses listed in the 3rd and 5th columns of the table at Annexure PJH-1 to the affidavit of Peter John Horton be kept confidential and access to those documents be restricted to the parties, their solicitors and counsel.

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

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
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NSD 941 of 2012

**BETWEEN: WOOLWORTHS LIMITED (ACN 000 014 675)
Plaintiff**

**AND: GETUP LIMITED (ACN 114 027 986)
Defendant**

JUDGE: YATES J

DATE: 6 JULY 2012

PLACE: SYDNEY

**REASONS FOR JUDGMENT
(REVISED FROM TRANSCRIPT)**

1 The plaintiff seeks orders pursuant to s 1322(4)(d) of the *Corporations Act 2001* (Cth) (the Act) extending the time fixed under the Act for calling and holding an extraordinary general meeting and for issuing a members' statement. It wishes to extend the relevant times to coincide with the times for calling and holding its scheduled annual general meeting for 2012.

Background

2 The directors of a company must call and arrange to hold a general meeting on the request of members with at least 5% of the votes that may be cast at the general meeting, or at least 100 members who are entitled to vote at the general meeting: s 249D(1). The directors must call the meeting within 21 days after the request is given to the company. The meeting is to be held no later than two months after the request is given to the company: s 249D(5). The members making the request may also request the company to give to all its members a statement provided by them about a resolution that is proposed to be moved at the general meeting, or any other matter that may properly be considered at the meeting: s 249P(1). The company must distribute to all its members a copy of the statement at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of the general meeting: s 249P(6).

3 On about 25 June 2012 the plaintiff received a letter enclosing notices signed by 210
current members containing a request to the directors to call a general meeting and a request
to issue a members' statement. One of those members was GetUp Limited (GetUp).

4 GetUp has been joined as a defendant to the proceeding pursuant to r 2.13(3) of the
Federal Court (Corporations) Rules 2000 and, pursuant to r 2.13(5), has been appointed the
representative of each of the members who requested the extraordinary general meeting of
the plaintiff pursuant to s 249D and who requested the issue of a members' statement
pursuant to s 249P of the Act. It opposes the extensions of time that have been sought.

5 The purpose of the requested general meeting is to consider and, if thought fit, pass a
special resolution to alter the plaintiff's constitution by inserting a new clause which will
effect a change to the plaintiff's objects and purposes. In substance, the proposed change is
that, with effect from 1 January 2016, the ownership or operation by the plaintiff of electronic
gaming machines having certain characteristics, or the derivation by it of any income,
revenue or benefit from electronic gaming machines having those characteristics, will be
excluded from its objects and purposes.

6 The statement which the requesting members seek to have issued propounds an
ethical case and a business case for the resolution they propose. It is not necessary for me to
expand upon the contents of the statement other than to note, as the proposed resolution itself
makes clear, that the change sought to be made to the plaintiff's constitution is one intended
to change the way in which the plaintiff owns, operates and obtains income, revenue or other
benefits from certain electronic gaming machines from 1 January 2016.

7 The statement makes clear that there will be ample time between the passing of the
resolution and 1 January 2016 for the plaintiff to bring about the necessary changes to update
the gaming machine software in the machines it owns or operates.

The reason for the extensions of time

8 The plaintiff seeks an extension of the relevant time periods under the Act because
there will be substantial costs involved in calling and holding the general meeting separately
from and before its annual general meeting, which is scheduled to be held on
22 November 2012. It is the plaintiff's intention to send notices on or before

31 October 2012 in respect of the convening of the annual general meeting. There is evidence before me of the costs that will be incurred by the plaintiff if the requested meeting is called and held independently of the calling and holding of the annual general meeting. The plaintiff currently has over 302,000 members who receive documents from the plaintiff in hard copy form. The approximate cost to the plaintiff of calling and holding the requested meeting independently of its scheduled annual general meeting will be approximately \$550,000. The evidence before me indicates that this is a conservative estimate. Most of that cost can be avoided if the requested meeting is called at the same time as the annual general meeting and held on the same day.

9 If this is not done, then the unchallenged evidence before me is that, apart from incurring the anticipated costs of approximately \$550,000, the plaintiff will be put to additional expense and inconvenience. At a minimum, separately calling and holding an extraordinary general meeting on a day other than the day of the scheduled annual general meeting would require:

- (a) some or, most likely, all of the 12 directors to attend the separate meeting. The directors of the plaintiff are resident in, variously, the United Kingdom, the United States of America, New Zealand, Sydney and Melbourne. The plaintiff would need to pay for flights and accommodation in respect of each director who attends the separate meeting;
- (b) the plaintiff's accountants, solicitors and various key management personnel to attend;
- (c) additional time spent by key management personnel and other employees of the plaintiff liaising with institutional and retail investors of the plaintiff regarding the meeting;
- (d) the attendance of approximately 30 to 40 staff to assist with the general running of the meeting;
- (e) attendance by the plaintiff's media team;
- (f) the arranging of a media conference following the meeting; and
- (g) attendance by both the plaintiff's internal security staff and external security contractors.

10 Once again, the costs and inconvenience associated with these matters can be avoided
if the requested meeting is called at the same time as the annual general meeting, and if both
meetings are held on the same day.

11 The evidence before me shows that the plaintiff has sought to obtain the consent of
the requesting members to having the proposed resolution considered at the scheduled annual
general meeting itself, with a view to avoiding what the plaintiff sees to be a costly
duplication of effort and a diversion of its resources. Its efforts, in that regard, have been to
no avail. As a result, it has formed the view that it has become necessary for it to commence
this proceeding.

12 I should note that under the time limits imposed by the Act it would be necessary for
the plaintiff to call the requested meeting on or before 16 July 2012, and to hold that meeting
by no later than about 25 August 2012. If the requested meeting were to be held on the same
day as the scheduled annual general meeting, a delay of approximately three months would
be involved.

The opposition to the extensions of time

13 GetUp opposes the extensions of time that have been sought for the following
reasons.

14 First, it submits that s 249D requires that a separate meeting be held so that the
additional costs referred to by the plaintiff will be incurred in any event. GetUp points to the
language of ss 249D(1) and 249D(5), which makes clear that the meeting to be called is the
meeting that has been requested, not some other meeting.

15 Secondly, it submits that every general meeting of the plaintiff, and of every other
large public company, that is requested under s 249D will cost a significant amount of
money. It says that it is not suggested that the request made by the defendant and those
whom it represents has unusual features which makes it more expensive to comply with than
any other s 249D request. It submits that if the normal cost to the plaintiff of holding a
general meeting were a sufficient basis to grant the relief it now seeks, then the rights
conferred by s 249D on all its members, and of all other large public company shareholders,
would, in practice, be nugatory. In short, it submits that cost alone cannot be a sufficient base

from which to move the Court under s 1322(4)(d) to extend the time for calling and holding a meeting as required by s 249D.

16 Thirdly, it submits that the plaintiff earned a net profit after tax of \$2.125 billion for the 2011 financial year and paid a dividend of 122 cents per share, with total shares on issue of over 1.2 billion. It submits that, in this context, a cost of approximately \$550,000 to call and hold the requested meeting is less significant than it might otherwise appear.

17 Fourthly, it submits that the Court should not accord any weight to the plaintiff's submissions directed to the cost and inconvenience to its senior executives and employees being diverted from the plaintiff's business by the need to participate in calling and holding the requested meeting. It submits that complying with requests lawfully made under ss 249D and 249P of the Act is not a diversion. It submits that every request made under these provisions will require the time and attention of management and others associated with the company. It submits that the circumstances relied upon by the plaintiff are in no way unusual so as to justify a departure from the statutory timeframes. It submits that, for these reasons, the plaintiff has not made out a case for any extension of the time limits prescribed in ss 249D and 249P of the Act.

Consideration

18 The power reposed in the Court by s 1322(4)(d) is a wide one, conditioned in the present case only by the requirement that no substantial injustice is likely to be caused to any person. Section 1322(4) provides:

Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

...

- (d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;

and may make such consequential or ancillary orders as the Court thinks fit.

19 Section 1322(6) provides:

The Court must not make an order under this section unless it is satisfied:

...

- (c) in every case—that no substantial injustice has been or is likely to be caused to any person.

20 In *NRMA Insurance Group Ltd v Spragg* (2001) 38 ACSR 174, Santow J at [27] said that:

... the cases have determined that “injustice” within s 1322(6)(c) requires “the Court to consider real, and not merely insubstantial or theoretical prejudice” (*Elderslie Finance Corp Ltd v ASC* (1993) 11 ACSR 157; 11 ACLC 787 at 790) and that a degree of prejudice to a person or persons may be outweighed by the “overwhelming weight of justice”: *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477; (1976) 2 ACLR 135 at 150. Moreover, as I said in *Super John Pty Ltd v Futuris Rural Pty Ltd* (1999) 32 ACSR 398 at 402 [14]:

... detriment per se is not the same as substantial injustice; that must depend on whether the remedial order in giving rise to that detriment is unjust in the sense of causing such prejudice overall as to be unfair or inequitable, taking into account the interests of all of those directly affected by such dispensation.

21 In *National Roads and Motorists’ Association Ltd v Parkin (No 2)* (2004) 49 ACSR 501, Campbell J at [34] said:

... When there is no evidence of any particular consequence flowing to anyone from that failure of the resolution to be determined, I do not accept that the mere fact of delay amounts to substantial injustice.

22 In the present case GetUp properly concedes that no specific prejudice will be caused to it, or those whom it represents, if the requested meeting is delayed by about three months. I am satisfied that such delay is not likely to result in any substantial injustice being caused to any person.

23 If the extensions of time sought by the plaintiff are granted then the delay in holding the requested meeting will be, in the scheme of things, fairly short, having regard to the object to be achieved by the passing of the proposed resolution. The object of the proposed resolution is to bring about a change with effect from 1 January 2016 in the plaintiff’s operations with respect to electronic gaming machines.

24 The real thrust of GetUp’s submissions is that the plaintiff has failed to establish a case that passes the threshold for exercising the power in s 1322(4)(d). In that connection it relies on the remark by Campbell J in *National Roads and Motorists’ Association Ltd v Parkin* (2004) 49 ACSR 386 at [73] that:

... the first question the court has to ask is what case has been made out for an extension of time under s 1322(4)(d), and it is only in considering possible answers to that question that any further question arises, of whether a particular extension would cause substantial injustice.

25 In short, GetUp submits that the plaintiff has simply failed to make a case for an extension of time, regardless of the lack of substantial injustice should the extensions be granted.

26 I disagree. I am satisfied that the plaintiff has made out a case. Its case does not simply stand on the fact that convening and holding the requested meeting will cost it a substantial amount of money and put it to considerable inconvenience. The additional factor that the plaintiff brings to the table is that it can substantially avoid this cost and inconvenience by calling and holding a meeting within timeframes that are different to those provided by the Act but which, if implemented, would be sufficiently proximate to those timeframes so as to work no prejudice, let alone cause substantial injustice, to any person. In my view, that outcome is plainly relevant to whether the Court's power under s 1322(4)(d) is enlivened. I am satisfied that the Court's power has been enlivened in the present case.

27 I should deal with one further matter. GetUp advanced a submission that the holding of the requested meeting on the same day as the annual general meeting may result in some distraction from the intended task of the requested meeting, having regard to the considerable matters to be considered at the annual general meeting. This submission was based on some observations by Windeyer J in *National Roads and Motorists' Association Ltd v Snodgrass* (2002) 42 ACSR 371 at [15]. However, his Honour's remarks in that regard can be seen to be confined to the particular facts of the case before him. There is no material before me which would lead me to conclude that the business of the requested meeting cannot be attended to properly and with due consideration by those members who might choose to participate in it, if held on the same day as the annual general meeting.

28 Finally, the relief originally sought by the plaintiff included an order that the proposed resolution be put to members at the annual general meeting itself instead of at a separate general meeting. I record that the plaintiff no longer seeks that relief in this application.

Disposition

29 In all the circumstances, I propose to grant the orders sought in paragraphs 1, 2 and 3 of the originating process that was filed on 3 July 2012. The parties have also requested that an interlocutory confidentiality order be made in relation to the addresses given in evidence of the requesting members. I am satisfied that such an order is appropriate.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Yates.

Associate:

Dated: 6 July 2012