

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 2) [2020] FCA 284

File number: WAD 215 of 2019

Judge: **JACKSON J**

Date of judgment: 6 March 2020

Catchwords: **CORPORATIONS** - application for leave to proceed against a company in voluntary liquidation under s 500(2) of the *Corporations Act 2001* (Cth) - regulator wishing to proceed for public purposes - leave granted

Legislation: *Australian Consumer Law* ss 21, 24, 239
Competition and Consumer Act 2010 (Cth) Schedule 2
Corporations Act 2001 (Cth) s 500

Cases cited: *Australian Competition and Consumer Commission v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* [2016] FCA 1246; (2016) 116 ACSR 353
Australian Competition and Consumer Commission v Smart Corporation Pty Ltd [2019] FCA 1603
Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd [2011] NSWSC 1305; (2011) 285 ALR 207
Phoenix Institute of Australia Pty Ltd v Australian Competition and Consumer Commission [2017] FCAFC 155
Rushleigh Services Pty Ltd v Forge Group Ltd (In Liq) (Receivers and Managers Appointed); In the Matter of Forge Group Ltd (In Liq) (Receivers and Managers Appointed) [2016] FCA 1471

Date of hearing: 6 March 2020

Registry: Western Australia

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Category:	Catchwords
Number of paragraphs:	19
Counsel for the Applicant:	Ms JA Thornton
Solicitor for the Applicant:	Norton Rose Fulbright
Counsel for the Respondents:	The respondents did not appear

ORDERS

WAD 215 of 2019

BETWEEN: **AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**
Applicant

AND: **SMART CORPORATION PTY LTD (ACN 134 192 297)**
First Respondent

VITALI ROESCH
Second Respondent

MARYNA KOSUKHINA
Third Respondent

JUDGE: **JACKSON J**

DATE OF ORDER: **6 MARCH 2020**

THE COURT ORDERS THAT:

1. Leave is granted to the applicant to continue the proceedings against the first respondent, pursuant to section 500(2) of the *Corporations Act 2001* (Cth).
2. The applicant must not enforce any monetary relief granted against the first respondent in these proceedings without the prior leave of the Court.

Evidence

3. The applicant must file and serve any affidavit evidence or any additional material on which it intends to rely as to liability and relief by 15 April 2020.
4. The respondents must file and serve any affidavit evidence or any additional material on which they intend to rely as to liability and relief by 13 May 2020.
5. The applicant must file and serve any affidavit evidence or any additional material on which it intends to rely in reply as to liability and relief by 27 May 2020.

Trial

6. The proceeding be listed for a hearing, on an estimate of two days, on dates to be fixed not earlier than 1 June 2020.

Objections to evidence

7. No later than four weeks prior to the date of the commencement of trial, any party who intends to object to the admissibility of any evidence in any affidavit must notify the party who served the affidavit of the grounds upon which the objection is made. Within two days of the receipt of the notice of objection, the party on which the notice is served must inform the other party whether any of the objections are conceded.
8. Save with the leave of the Court, no party may object to any evidence in an affidavit filed and served in accordance with the orders of this Court, other than on the grounds set out in a notice of objection filed and served in accordance with these orders.

Tender bundle

9. No later than three weeks prior to the date of the commencement of trial, each party must, by notice in writing to each other party, specify the documents they intend to tender at the trial, and if inspection has not been directed, where the documents may be inspected. Only those documents which will be tendered at trial should be included within the bundle, and a party including a document within the bundle should be able to justify to the Court the purpose for which the document is to be tendered upon request.
10. Each document proposed by a party for inclusion within the trial bundle shall, in the absence of specific objection by another party, be taken to be:
 - (a) authentic;
 - (b) prepared by its apparent author; and
 - (c) in the case of a communication, sent by the person appearing to have sent it, and received by the persons appearing to have received it on or about the date which it bears.
11. No later than two weeks prior to the date of the commencement of trial, each party must advise each other party in writing which of the specified documents may be tendered by consent, and whether the authenticity of any of the remaining documents (specify which) is disputed and give reasons in writing as to why consent to tender the remaining documents is withheld.
12. Two weeks prior to the date of the commencement of trial, the parties must provide the Court with an agreed index for the trial bundle.

13. One week prior to the date of the commencement of trial, the applicant must file three copies of the indexed trial bundle.

Outline of submissions

14. The parties must confer and endeavour to agree a statement of the issues in dispute, expressed as questions to be determined by the Court and, if agreed, file the statement at least four weeks prior to the date of commencement of trial.
15. Three weeks prior to the date of the commencement of trial, the applicant must file and serve written submissions.
16. Two weeks prior to the date of the commencement of trial, the respondents must file and serve written submissions, if any.
17. Two weeks prior to the date of the commencement of trial, the parties must each file and serve a list of authorities, if any.
18. One week prior to the date of the commencement of trial, the applicant must file and serve any reply submissions.

General

19. The parties have liberty to apply on two days' notice.
20. Costs be in the cause.

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

REASONS FOR JUDGMENT

(edited from the transcript)

JACKSON J:

- 1 This is an application for leave to proceed against the first respondent in these proceedings. The applicant, the Australian Competition and Consumer Commission (ACCC), seeks the leave pursuant to s 500(2) of the *Corporations Act 2001* (Cth). The application is necessary because on 23 December 2019 the first respondent, Smart Corporation Pty Ltd, went into a creditors' voluntary liquidation, so s 500(2) provides that no action or other civil proceeding is to be proceeded with against the company except by leave of the court and subject to such terms as the court imposes. The ACCC also seeks directions programming the matter to trial.
- 2 There has been no appearance on behalf of the respondents today. The third respondent is a director of Smart Corporation, and the second respondent was an employee of the company. The ACCC accepts that the second and third respondents have an interest in the order sought for leave to proceed against Smart Corporation. However, the former solicitors for all three of the respondents are now off the record and they advised the solicitors for the ACCC on 13 January 2020 by email that they are not acting for the liquidator of Smart Corporation and nor are they seeking instructions to do so. They also said that the other two defendants are overseas looking for work 'but that we are in contact with them'.
- 3 The application first came on for hearing on 19 February 2020, at which time it was adjourned to today's hearing in order to give the ACCC an opportunity to give notice of the application to the second and third respondents (although, according to their former solicitors' email, a copy of the application and supporting affidavit, submissions and lists of authorities had already been given to them).
- 4 On 19 February 2020, pursuant to a direction made by the court, the respondents' former solicitors provided email addresses for the second and third respondents to the court and to the ACCC's solicitors. The application and supporting documents were emailed to the second and third respondents at those addresses on 20 February 2020, along with the orders made on 19 February 2020, which set the adjourned hearing date for today. Automatic notifications generated by the email server confirm receipt of those emails. In addition to that, on 27 February 2020 the application papers were sent by express registered post to the last known

address for the second and third respondents shown on the former solicitors' notice of ceasing to act. There is also evidence that a process server has delivered copies of the application papers to that address. In the circumstances, I am satisfied that adequate notice of the application has been given to the second and third respondents and it is appropriate to proceed in their absence.

5 In relation to the first respondent, Smart Corporation, the liquidator of the company has indicated in correspondence to the solicitors for the ACCC that his position is that he does not consent to the application for leave to proceed against the company, but he does not hold 'any specific objections' either. The liquidator also indicated in other correspondence that as at 17 February 2020 he was unfunded in the liquidation and will not be likely to be in a position to participate in the proceedings until further notice. The liquidator has also indicated that, after some concerns about the programming orders initially proposed by the ACCC led to revisions to those orders, he is satisfied with the orders programming the matter to trial.

6 I described the issues in these proceedings in broad terms in *Australian Competition and Consumer Commission v Smart Corporation Pty Ltd* [2019] FCA 1603. The ACCC's claim can be classed under three heads. The first is that the ACCC alleges that Smart Corporation engaged in misleading or deceptive conduct in relation to certain representations made to its customers or prospective customers. The second is that the ACCC claims that standard form contracts between Smart Corporation and its customers contain terms that are unfair contract terms within the meaning of s 24 of the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010* (Cth)) (ACL). The third head is that the ACCC alleges that Smart Corporation engaged in conduct that was unconscionable, in contravention of s 21 of the ACL. The relief that the ACCC seeks includes: declarations that Smart Corporation contravened the ACL and that the standard form contracts between Smart Corporation and its customers contain unfair terms; injunctions restraining the respondents from making further misleading representations and enforcing or entering into further contracts containing unfair terms; pecuniary penalties for breaches of the ACL; and other non-punitive orders, including an order that the respondents pay non-party consumer redress pursuant to s 239 of the ACL.

7 The basis of the application for leave to proceed is set out in an affidavit of Brenda Banister-Jones filed on behalf of the ACCC on 13 February 2020. Ms Banister-Jones is the Director, Western Australia and South Australia enforcement for the ACCC. Her affidavit

indicates that the ACCC intends to continue the proceedings for the purposes of: protecting and promoting the interests of Australian consumers generally; promoting the deterrence of conduct which contravenes the *Competition and Consumer Act*; protecting and promoting the interests of particular consumers who may have been affected by conduct that may have contravened the Act; and addressing particular conduct that may have contravened the Act. It may readily be accepted that the ACCC's objectives in pursuing the litigation include objectives of that kind, consistent with its functions as the principal regulator under the Act.

8 The principles applicable to applications for leave to proceed in circumstances like the present circumstances are well established. Foster J summarised them in *Rushleigh Services Pty Ltd v Forge Group Ltd (In Liq) (Receivers and Managers Appointed); In the Matter of Forge Group Ltd (In Liq) (Receivers and Managers Appointed)* [2016] FCA 1471 at [15] as including the following:

- (1) the decision concerning leave to proceed involves the exercise of a judicial discretion;
- (2) if it were not for the restriction on proceeding which is found in s 500 and its analogues elsewhere in the *Corporations Act*, a corporation in liquidation would be subjected to a multiplicity of actions which would be both expensive and time consuming, as well as in some cases completely unnecessary;
- (3) generally speaking, a claimant should proceed by way of lodgement of a proof of debt, unless the claimant can demonstrate there is good reason why a departure from that procedure is justified in the case of the particular claim in dispute; and
- (4) circumstances which in the past have been said to justify giving leave to proceed include factors such as the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved, and the stage to which proceedings have progressed.

9 In *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 1305; (2011) 285 ALR 207, Hammerschlag J held at [40]:

Every application must be considered on its own circumstances. There are infinite possible scenarios. There may be a flurry or a dearth of meritorious applications. Those circumstances need have no particular quality of rarity.

It has therefore been said that the question cannot be approached as a 'shopping list' of factors: *Australian Competition and Consumer Commission v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* [2016] FCA 1246; (2016) 116 ACSR 353 at [86].

10 However, one factor which is commonly important in circumstances where regulators are seeking leave to pursue proceedings is the public interest. In *Phoenix Institute of Australia Pty Ltd v Australian Competition and Consumer Commission* [2017] FCAFC 155 at [15], Perram, Yates and Wigney JJ quoted with apparent approval from an observation of the primary judge in that matter ([2016] FCA 1246; (2016) 116 ACSR 353 at [89]) that:

In the exercise of the discretion to grant leave, plainly the public interest in enforcing contraventions of the ACL is a relevant consideration and the weight to be afforded to it will turn upon a consideration of all the circumstances of the particular case.

11 There are a number of factors which are relevant to the exercise of the discretion in the present case. The first is whether or not there is a serious question to be tried against the first respondent. I am satisfied that there is such a serious question to be tried. The concise statement articulates a coherent claim, which I have already described in broad terms. If the facts alleged in it are proved, then there would be at least a serious question as to whether to grant the relief sought.

12 In relation to what I described as the first broad head of claim, namely, misleading conduct, there is an allegation that a representation has been made in relation to characteristics of insurance said to have attached to the vehicles that Smart Corporation rented to customers. There is also then filed a collection of documents which comprise standard form contracts said to have been used by Smart Corporation in its business of renting vehicles to customers. Those contracts contain provisions which, it is reasonably open to be argued, falsify the representation concerning the characteristics of the insurance to which I have already referred. It is also open to argue that those terms are unfair contract terms within the meaning of s 24 of the ACL, which if established would make good the ACCC's second head of claim.

13 There are also in evidence examples of emails sent by officers of Smart Corporation to customers concerning claims that the customers have breached the terms of the rental or otherwise misused the vehicles rented, which contain strong language. It is reasonably open to be argued that this, in conjunction with other conduct such as refusal to return the customers' security bond, is capable of being characterised as unconscionable conduct, the ACCC's third head of claim. I am therefore satisfied that on the face of the materials before me the claim against the first respondent raises serious questions to be tried.

14 The second factor relevant to the exercise of the discretion in this case is that much of the relief sought by the ACCC is not capable of being claimed by way of proof of debt procedure. That is apparent on the face of the description of the relief that I have already given.

15 The third relevant factor, which is of considerable importance in this case, is the public interest in enforcing breaches of the *Competition and Consumer Act*, including the ACL, to which I have already referred. As I have noted, the ACCC wishes to pursue the proceedings against the first respondent in order to further that public interest.

16 Given that there is a serious question to be tried, I accept that it would be in the public interest for the ACCC to pursue the proceedings, regardless of whether the final result is, as the ACCC seeks, remedial orders against Smart Corporation. At the very least, finalising the proceedings to trial will help to clarify the rights and obligations of Smart Corporation and, potentially, customers, and that is an outcome which would be in the public interest. I therefore place considerable weight on that factor in relation to the exercise of the discretion.

17 The fourth important factor in the present circumstances is that it does not appear that there will be any prejudice to the creditors of Smart Corporation if the claim is permitted to proceed against it. As I have noted, the liquidators do not oppose leave being granted, and it appears they have no intention, at least at present, to incur any expense in the defence of the proceedings. The ACCC has indicated that it would be prepared to submit to a condition attached to any grant of leave to continue the proceedings that it not enforce any monetary relief against Smart Corporation without further leave of the court. I am satisfied that a condition of that sort would be appropriate in the present case.

18 Having regard to all of these factors, it is appropriate to exercise the discretion afforded by s 500(2) of the *Corporations Act* in favour of granting leave. There will therefore be an order in terms sought by the ACCC in that regard, although there will be appended to that an order that the ACCC must not without the prior leave of the court enforce any monetary relief granted against Smart Corporation in these proceedings.

19 It is also appropriate that the directions sought by the ACCC programming the matter to trial are made.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jackson.

Associate:

Dated: 10 March 2020