

## Supreme Court New South Wales

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Case Title: In the matter of Mothercare Australia Limited  
(administrators appointed)

Medium Neutral Citation: [2013] NSWSC 263

Hearing Date(s): 5 February 2013

Decision Date: 05 February 2013

Jurisdiction: Equity Division - Corporations List

Before: Black J

Decision: Extension of period to provide notices to lessors granted. Orders made for provision of notice of meeting of creditors by communications in specified forms.

Catchwords: CORPORATIONS - Company under administration - Application for extension of statutory period in which to provide notices to lessors under s 443B(3) Corporations Act 2001 (Cth) - Whether prejudice to lessors - Whether prejudice to companies ability to achieve a sale of their business as ongoing concern CORPORATIONS - Meetings - Creditors' meetings - Company under administration - Manner of giving notice of meeting - Whether cost of mailing notices is significant burden

Legislation Cited: Corporations Act 2001 (Cth) ss 439A, 443B(2)(a), 443B(3), 443B(8), 447, 447A, 447A(1), 447A(4), 600G

Cases Cited: - ABC Learning Centres (admins apptd) (recs and mgrs apptd) v Honey [2010] FCA 353  
- Carson, Re Hastie Group Ltd (No 2) [2012] FCA 717  
- Re Ansett Australia Ltd v Mentha [2002] FCA 2; (2002) 115 FCR 395; (2002) 40 ACSR 419  
- Re Carson (as administrators of Hastie Group Ltd (admin apptd)) [2012] FCA 626

- Re Silvia (as administrators of FEA Plantations Ltd (admins apptd)) [2010] FCA 468  
- Silvia v FEA Carbon Pty Ltd (ACN 009 505 195) (admins apptd) (recs and mgrs apptd) [2010] FCA 515; (2010) 185 FCR 301

Category: Interlocutory applications

Parties: Antony Resnick and Brian Raymond Silvia in their capacity as administrators of Mothercare Australia Limited (administrators appointed), Baby on a Budget Pty Limited (administrators appointed), Skansen KCG Pty Limited (administrators appointed) and Skansen Pty Limited (administrators appointed) and others named in Schedule A (Plaintiffs)

Representation

- Counsel: Counsel:  
M. Painter/D. Dinnen (Plaintiffs)

- Solicitors: Solicitors:  
Macpherson & Kelley (Plaintiffs)

File Number(s): 2013/35832

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## JUDGMENT - EX TEMPORE

1 Messrs Resnick and Silvia in their capacity as administrators of Mothercare Australia Limited (administrators appointed) ("Mothercare") and several associated entities ("Administrators") seek, broadly, an extension of the statutory period in which to provide notices to lessors under section 443B(3) of the *Corporations Act 2001* (Cth) and leave to provide notices under section 439A of the *Corporations Act* by email, where they have email addresses for creditors of Mothercare, and otherwise by publication on websites and by newspaper. This judgment needs to be delivered in circumstances of some urgency and in doing so I have drawn on the helpful submissions of Ms Painter and Ms Dinnen who appear for the Plaintiffs.

- 2 The first issue which arises is the application for an extension of time in order to give any notice to lessors under s 443B(3) of the *Corporations Act*. That section broadly deals with the circumstances in which an administrator becomes subject to personal liability for rental or other amounts payable by a company under a lease. In broad terms, the section provides that the administrator is liable for rent payable by a company under administration for the period which begins more than five days after the administration begins, but may avoid that liability by giving notice that specifies the property and states that the company does not propose to exercise its rights in relation to the property. That section will operate in a relatively straightforward manner in circumstances that, for example, a company occupies a single or a small number of properties, and assumes that the administrator will be in a position, by the exercise of appropriate diligence, to form a view as to whether the company should continue to occupy the premises and whether or not to assume personal liability in respect of the premises within that period.
- 3 However, a situation may arise where there are obstacles to the administrator forming that view within that period. Such a situation was considered in *Silvia v Fea Carbon Pty Ltd (ACN 009 505 195) (admins apptd) (recs and mgrs apptd)* [2010] FCA 515; (2010) 185 FCR 301, where Finkelstein J noted the policy behind the section and that the section was intended to allow the administrator the opportunity to avoid personal liability for rental payable by giving notice within the five day period, but also recognised the possibility that that period may be too short in a particular case. His Honour noted that the Court can either excuse such liability under s 443B(8) of the *Corporations Act* or extend the time for investigation under s 447A of the *Corporations Act*.
- 4 The Administrators here seek orders under s 443B(8) of the *Corporations Act* or alternatively under s 447A which, in effect, extend the time for the giving of notice of an intention not to exercise rights in respect of the relevant properties to 5 March 2013, a month from today. A number of

factors relevant to making such an order were identified in *Silvia v Fea Carbon*, including that there may be a large amount of paperwork to review; factual uncertainty in relation to the leases; or the administrators' inability to form a view within the five business days allowed by the section as to whether it was necessary or desirable to exercise rights over the relevant property for the purpose of maximising the chances that some or all of the members of the companies can continue in existence or maximising the return to creditors.

- 5 In this case, Mr Resnick's affidavit draws attention to matters, which in my view, squarely raise these difficulties. The business of Mothercare and its associated entities operates from 47 leased retail stores; the Administrators have to date obtained copies of 38 leases and met a lessor of 16 stores; the Administrators need to obtain copies of the remaining leases; and the Administrators need to assess the commercial implications of continuing or not continuing in occupation of the premises. That decision has two particular implications which mean that it is critical to the result of the administration. First, Mr Resnick's affidavit draws attention to the fact that one of the Mothercare companies has the benefit of a Development Agreement with a franchisor in the United Kingdom, which is in evidence. While there is a risk that that agreement is presently terminable by reason of the fact that the company has been placed in administration, that risk would increase if the company were to close two or more outlets, giving rise to a potential further event of termination of the Development Agreement. Second, the closure of any significant number of outlets would plainly have an impact upon the companies' attractiveness to a potential purchaser and the Administrators must be therefore balance, on the one hand, the risk to the ongoing business of closure of outlets against, on the other hand, the risk to themselves personally of continuing to operate those outlets for any extended period.
- 6 I am conscious that, as was recognised in *Silvia v Fea Carbon* above, an extension of the period to give such notice may involve prejudice for the

lessors who lose the advantage of a claim against the administrator personally during that extended period. However, in the present case, I am satisfied that, in a practical sense, the time permitted has not been sufficient to allow the Administrators to address these issues and, if an extension of time were not granted, the Administrators may be forced to an early closure of premises which may prejudice the ability of the companies to achieve a sale of their business as an ongoing concern or further risk their rights under the Development Agreement. In these circumstances, I am satisfied that orders should be made in substantially the form sought by the administrators in respect of the notice to be given to lessors of the premises. The Court has ample power to make such orders under section 447A of the *Corporations Act* and, in these circumstances, I do not consider that it is necessary to rely on section 443B(8) of the *Corporations Act*.

- 7 A second issue arose in the application concerning the publication to creditors of notices and documents required, in particular, in respect of the second meeting of creditors under section 439A of the *Corporations Act*. The applicant draws attention to the fact that certain forms of electronic service of notices are already contemplated by s 600G of the *Corporations Act*. However, a particular issue arises because creditors of the applicants include a class of persons who are members of a loyalty club who hold a Mothercard, who are identified but very numerous, numbering potentially 200,000 persons, as well as persons who hold gift certificates or who have paid for unspecified goods some of whom may be unidentifiable. Mr Resnick's evidence is that the costs of mailing a notice and report to each of those creditors falling within the class of those who hold Mothercards, those who hold gift certificates or those who hold unspecified goods would be in the order of \$500,000, on the basis that the mailing costs would be \$2 per creditor and the number of creditors may be in the order of 250,000 persons. It is plain that that cost would impose a significant burden and necessarily reduce the funds available to creditors on the outcome of the administration.

8 The Courts have, over time, become increasingly willing to modify the manner in which notices may be given in respect of companies in administration to address issues of costs and practicality, and have been increasingly willing to contemplate electronic means providing such notices, no doubt as such means are more widely accepted in the wider community. In the early decision of *Re Ansett Australia Ltd v Mentha* [2002] FCA 2; (2002) 115 FCR 395; (2002) 40 ACSR 419, Goldberg J was not prepared to grant orders which would have entirely dispensed with personal communication with creditors, by providing only for publication on a website. However, there are several subsequent decisions in which orders have been made, both in respect of the first and second meeting of creditors, permitting notice to be given by electronic means to those for whom email addresses are available and otherwise by notice on the administrators' website and by newspaper advertisement: for example, *ABC Learning Centres Ltd (admins apptd) (recs and mgrs apptd)* [2010] FCA 353; *Re Silvia (as administrators of FEA Plantations Ltd (admins apptd))* [2010] FCA 468; *Re Carson (as administrators of Hastie Group Ltd (admin apptd))* [2012] FCA 626 and *Carson Re Hastie Group Ltd (No 2)* [2012] FCA 717.

9 In the present case, the Administrators have noted that it is likely to be possible to provide notice by email to creditors drawing attention to publication of the reports on the relevant website, and to combine such notice with notices on both the Administrators' and the companies' website and with newspaper advertisements. I consider that to be an appropriate course given the number of creditors involved in the class to which I have referred; the fact that their claims are likely to be relatively small, in circumstances that the balance sheet reflects an amount of \$440,000 attributable to such claims, and not all of those claims would be redeemed in the ordinary course; and the significant costs involved in giving notice to that class of creditors. In my view, consistent with the approach adopted in *Re Silvia (as administrators of FEA Plantations Ltd (admins apptd))*, this

course recognises on the one hand the need to take appropriate steps to give notice to creditors but, on the other hand, the need to avoid costs of compliance that would otherwise operate to the detriment of the creditors generally.

10 Accordingly, I make the following orders:

1. An order, pursuant to section 447 of the *Corporations Act 2001* (Cth) ("Act") that Part 5.3A of the Act is to operate in relation to Mothercare Australia Limited (administrator appointed) (ACN 060 199 082) ("Mothercare"), Baby On a Budget Pty Limited (administrator appointed) (ACN 075 655 515) ("Baby"), Skansen KCG Pty Limited (Administrator Appointed) (ACN 134 497 420) ("KCG") and Skansen Pty Limited (administrator appointed) (ACN 128 276 175 ("Skansen") as if, in relation to each of these companies section 443B(2)(a) of the Act provided "that begins after 5 March 2013".

2. An order, in accordance with section 447A of the Act, that Part 5.3A of the Act is to operate in relation to Mothercare, Baby, KCG and Skansen as if, in relation to each of these companies, the words "within five business days after the beginning of the administration" in section 443B(3) of the Act read "by 5 March 2013".

3. An order, in accordance with section 447A(1) of the Act, permitting notice of the meeting of creditors to be convened pursuant to section 439A of the Act ("the notice") and the documents required to be sent to creditors pursuant to section 439A(4) of the Act ("the report") to be given to all creditors of the company by:

(a) sending the notice and an internet link to the report to the persons electronic address of each creditor of the company, identified in schedule B, who has requested that the administrators communicate with her, him or it by electronic means.

(b) giving notice electronically by email containing a link to the report, where the email address of the creditor is contained on electronic records relating to the Mothercard;

(c) publishing the notice and the report on the administrator's website and on Mothercare's website; and

(d) causing a notice to be published in a national newspaper at least five business days before the second meeting of creditors providing:

(i) notice of the date, time and location of the meeting of creditors;

(ii) notice that the report is available on the administrators' website; and

(iii) details of a telephone hot line number by which any creditor may contact the administrators to request a paper or electronic copy of the report.

4. Pursuant to section 447A(1) of the Act, subject to further order, all future notices, reports and communications that the administrators must or may give or send to creditors may be given and/or sent in accordance with the procedure described in paragraph 3 above (which need not include the information specified in paragraph 3(c)(i)-(iii))

5. An order that the costs of these proceedings are costs and expenses of the administration of the second, third, fourth and fifth plaintiffs.

6. These orders be entered forthwith.

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