FEDERAL COURT OF AUSTRALIA

Currie, in the matter of The Country Wellness Group [2018] FCA 1455

File number(s):	QUD 617 of 2018
Judge(s):	**DERRINGTON J**
Date of judgment:	4 September 2018
Catchwords:	**CORPORATIONS** – insolvency – directions to administrators as to reasonableness of proposed conduct – extension of time for compliance with requirements of s 443B – whether appropriate to limit liability of administrators in relation to proposed conduct – entitlement of affected parties to seek variation of orders
Legislation:	*Corporations Act 2001* (Cth)
Cases cited:	*Maronis Holdings v Nippon Credit Australia* (2001) 38 ACSR 404 *Re Ansett Australia Ltd (No 3)* (2002) 115 FCR 409 *Re Mentha* (2010) 82 ACSR 142 *Re Unlocked Ltd (Administrators Appointed)* [2018] VSC 345
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Category:	Catchwords
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Counsel for the Plaintiffs:	Mr D Chesterman
Solicitor for the Plaintiffs:	Bennett & Philp

ORDERS

QUD 617 of 2018

IN THE MATTER OF THE COUNTRY WELLNESS GROUP

IAN ALEXANDER CURRIE
First Plaintiff

STEFAN DOPKING
Second Plaintiff

JUDGE: **DERRINGTON J**

DATE OF ORDER: **4 SEPTEMBER 2018**

THE COURT DIRECTS THAT:

1. Subject to Orders 2 and 3 the Plaintiffs are justified and acting properly and reasonably in extending loans from Palmerston 2, Rosanna, Wynnum and Hibiscus to other companies within the Country Wellness Group, for the purpose of funding their operations until and including 25 September 2018 (Intercompany Loans).

2. In respect of any Intercompany Loans to be paid from Hibiscus or Rosanna no such loan is to be paid without the written approval of the Commonwealth Bank.

3. In respect of any Intercompany Loans to be paid from Wynnum no such loan is to be paid without the written approval of the Westpac Bank.

THE COURT ORDERS THAT:

4. Pursuant to s 447A of the *Corporations Act* 2001 (Cth) (the Act), Pt 5.3A of the Act is to operate as if s 443A(1) of the Act provides that, if the property of any company in the Country Wellness Group that receives an intercompany loan is insufficient to satisfy the debts and liabilities incurred by the Plaintiffs under the intercompany loan for which the right of indemnity exists under s 443D of the Act, the Plaintiffs will not be personally liable to repay such debts and liabilities to the extent of that insufficiency.

5. Pursuant to s 447A of the Act, Pt 5.3A of the Act is to operate in relation to each of the said companies in the Country Wellness Group (except for Zuccoli and Cumberland) as if:

(a) the administrators' liability under s 443B(2)(a) in relation to each of the said companies begins at 4pm on 25 September 2018; and

(b) s 443B(3) of the Act provided in relation to each of the said companies "by 4pm on 25 September 2018, the administrators may give to the owner or lessor a notice that specifies the property and states that the company does not propose to exercise rights in relation to the property".

6. The affidavit of Ian Alexander Currie sworn 3 September 2018 and the Affidavit of Stefan Dopking sworn 4 September be marked 'confidential and not be opened without an order of a judge'.

7. The Plaintiffs are to:

(a) advise creditors at the first creditors' meeting of the Country Wellness Group of this application and the orders made; and

(b) make available to those creditors copies of the originating application and the orders made.

8. Any person who is affected, or claims to be affected, by these orders may apply to the Court, on 2 days written notice, for the variation of the orders.

9. The costs of this application be the costs in the administration of each Company within the Country Wellness Group jointly and severally but can be paid by Palmerston 2 as an Intercompany Loan.

10. The matter is listed for further hearing on 25 September 2018, at 9.30am.

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

REASONS FOR JUDGMENT

DERRINGTON J:

1 The application before the Court today is brought by two well-known and respected insolvency practitioners, Mr Stefan Dopking and Mr Ian Currie, who are the administrators of a number of companies which operated as a corporate group. For convenience the companies will be referred to as "The CW Group".

2 There are numerous companies in the CW Group to which the administrators have been simultaneously appointed. The evidence before the Court reveals that the financial arrangements between those entities is complex but, most importantly, a number of the more profitable companies have previously entered into loan agreements with the less profitable companies. In other words, some companies in the CW Group have been for some time financially supporting the less profitable ones.

3 The administrators were appointed only recently; being on 27 August 2018. Necessarily, given the large number of companies to which they have been appointed and the complexity of the inter-company arrangements, they have encountered substantial difficulty in accurately identifying all of the relevant financial dealings at this stage.

4 They have approached the Court today for a number of orders. The first is that they are justified and acting properly and reasonably in extending loans made from certain companies within the CW Group to other companies within the group for the purposes of funding the operation of the borrowing companies during the administration period. The second order sought is one which limits any personal liability of the administrators arising from the continuation of the inter-company loans. The limitation sought is that the administrators only be liable to the extent to which the borrowing entities have assets with which to repay the indebtedness.

5 Further orders are sought for the extension of time under s 443B(2) and (3) of the *Corporations Act 2001* (Cth) (the Act) in relation to the liability of the administrators for rent and other liabilities which would ordinarily accrue five business days after the administration began. No doubt such an order has been prompted by the enormity of the task given to the administrators as a result of their appointments to the multiple companies.

Appropriateness of extending inter-company loans

6 The first order is sought pursuant to s 447D of the Act, which permits an administrator to apply for directions about any matter arising in connection with the performance or exercise of any of their functions and powers. The jurisprudence around that section is well-known, and is set out in the careful submissions of Mr Chesterman who appeared for the liquidators. The leading authority remains that of *Re Ansett Australia Ltd (No 3)* (2002) 115 FCR 409, and there is no need to repeat the principles set out there, save only to mention that it is accepted that the orders by the Court pursuant to s 447D may sometimes have limited effect.

7 In this matter there are a number of circumstances confronting the administrators which justify the making of an order that they are acting reasonably and properly in extending loans from one company of the group to another. I shall only identify a few of the more salient ones referred to in the administrators' written submissions.

8 First, it is very significant that the corporate group has historically operated in the manner in which the administrators seek to continue. There has been a well-established practice within the CW Group of the profitable businesses providing financial support to the newer and less profitable ones. In that way, what the administrators seek is consistent with the group's ordinary financial operations.

9 Secondly, the extent of the lending is for limited purposes, being not extraordinary expenses, but rather the essential and ordinary recurring business expenses such as employees' wages and the purchase of goods sold in the businesses. Loans of that nature are appropriate for the purposes of allowing those newer, struggling businesses to continue operating pending their sale or refinancing.

10 Thirdly, the orders sought are for a very limited duration being until 25 September 2018. Orders to this effect will allow the group to continue trade whilst the administrators expeditiously seek to negotiate for the sale of the group or the various entities in it as going concerns, or possibly to re-finance all of them, but they are not for a duration which will accommodate dilatoriness.

11 Fourthly, as Mr Chesterman has accurately pointed out in his submissions, any perceived potential losses arising from the unprofitable businesses in the short term would be a very small proportion of the group's overall indebtedness. In other words, the extent to

which creditors might be prejudiced will be relatively insignificant in the scheme of any liquidation were that to occur.

12 Fifthly, the opinion of Mr Currie, who is well known to the Courts and well-respected is not unimportant. He has identified in his sworn affidavit what he perceives to be the import of the orders which he seeks in relation to his intention to continue the trading operations of the entire group. Mr Currie's commercial opinions as to the value which is likely to be obtained by allowing the companies to continue ought to be accepted. Indeed, as he points out, it would appear that if the financial arrangements which historically have been in place are continued, there is a possibility that the lending companies will, in fact, be better off than they would be were the loans to terminate at this point in time. That is a significant factor.

13 Sixthly, the orders sought by the administrators advance the intent and object of Part 5.3A of the Act in that they promote the probability of a better outcome than could be achieved from an immediate liquidation, and/or that a larger return will be made available to the creditors. It should also be accepted, as was submitted by administrators, that it is not necessarily an improper activity for one company in a corporate group to support another: see Bryson J in *Maronis Holdings Ltd v Nippon Credit Australia Pty Ltd* (2001) 38 ACSR 404 at [190] to [191]. Based on the opinion of Mr Currie, there is likely to be an overall benefit to all the companies in the group and, generally, to all the creditors by the making of the orders sought.

14 Mr Chesterman also submitted that the proposal has a commercial reasonableness and propriety to it, and in that respect he identifies the difficulties experienced by the administrators to date in relation to the financial affairs of the group. That includes some concerns about the reliability of the books and records and the lack of co-operation received from directors and key staff which have prevented the administrators from fully understanding the financial position of the group. In those circumstances, the appropriateness of effectively maintaining the *status quo* of the operation of the companies until at least a better view of their financial position becomes clear is manifest.

15 For those reasons it can be accepted that the administrators are justified and are acting properly and reasonably in extending the loans from the identified companies until and including 25 September 2018.

16 Mr Chesterman has very properly directed the Court's attention to the interests of secured creditors and the orders proposed by him on behalf of the administrators include orders which protect their interests by requiring the seeking of their approval in respect of the proposed conduct where relevant.

Relief from personal liability

17 The second and ancillary orders sought by the administrators are for them to be relieved of personal liability for the inter-company debts which might arise as a consequence of the extensions of the loans. Specifically, the relief sought is that the liability for those debts be limited to the extent the borrowing entities have assets available to satisfy those debts. Such an order is appropriate in the circumstances of this case. In this respect, reference should be made to the observations of Gilmour J in *Re Mentha* (2010) 82 ACSR 142 where his Honour identified the principles relevant to the application of orders of this nature. At [30] his Honour said:

> The principles governing the granting of an application for orders under s 447A to vary the liability of administrators under s 443A can be summarised as follows:
>
> (a) the proposed arrangements are in the interests of the company's creditors and consistent with the objectives of Part 5.3A of the *Corporations Act*: *Re Great Southern* at [13].
>
> (b) typically the arrangements proposed are to enable the company's business to continue to trade for the benefit of the company's creditors: *Re Malanos* at [9] and *Re View* at [17].
>
> (c) the creditors of the company are not prejudiced or disadvantaged by the types of orders sought and stand to benefit from the administrators entering into the arrangement: *Re View* at [18], and also *Re Application of Fincorp Group Holdings Pty Ltd* [2007] NSWSC 628 at [17].
>
> (d) notice has been given to those who may be affected by the order: Re Great Southern at [12].

18 For the reasons set out above in relation to the reasonableness of the extension of the loans, it is apparent that the criteria identified by Gilmore J are satisfied save for the last. In that latter respect, all the creditors, being parties who might be affected by the making of the orders in this case have not yet been served. That is understandable in the circumstances of the complexity of the administration and urgency of the application. Nevertheless, the administrators have sought to ameliorate any difficulties by undertaking to serve all interested parties forthwith upon the making of the proposed orders, and identifying to those parties their entitlement to approach the Court for any variation of the orders they might seek.

Similar orders were made in *Re Unlocked Ltd (Administrators Appointed)* [2018] VSC 345, by Sloss J in an application which was similar to the one now before the Court.

19 Here the limitation on the liability of the administrators is appropriate given that it is most likely the lending entities will not be worse off by the continuation of the loans for a short period of time or, if they are, it will be in a relatively small amount. Counterbalancing that, is the significant possibility of an improvement in the overall financial position of the entire CW Group.

20 That potential for improvement in the overall financial situation, arises because the uninterrupted flow of funds will allow those borrowing entities to continue to trade such that they may be sold as going concerns, rather than be prematurely liquidated. The potential also exists for the borrowing entities to discharge existing indebtedness to the lending entities and, overall, it is likely that the continuance of the extant financial arrangements will give the administrators the best opportunity to realise the best value for the group of companies.

21 The proposed transactions are intended solely for the purposes of benefiting the creditors of the group as a whole, and in the circumstances that is an appropriate reason for limiting the administrators' liabilities.

Extension of time under s 443B(3)

22 The final order which the administrators seek is for extension of the time periods in ss 443B(2) and 443B(3) of the Act. Those sections provide:

> (2) Subject to this section, the administrator is liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period:
>
> (a) that begins more than 5 business days after the administration began; and
>
> (b) throughout which:
>
> (i) the company continues to use or occupy, or to be in possession of, the property; and
>
> (ii) the administration continues.
>
> (3) Within 5 business days after the beginning of the administration, the administrator may give to the owner or lessor a notice that:
>
> (a) specifies the property; and
>
> (b) states that the company does not propose to exercise rights in relation to the property; and

> (c) if the administrator:
>
> (i) knows the location of the property; or
>
> (ii) could, by the exercise of reasonable diligence, know the location of the property;
>
> specifies the location of the property.

23 Section 443B(4) has the effect of relieving the administrators from liability for the period during which a notice is in force:

> (4) Despite subsection (2), the administrator is not liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the company.

24 The purpose of the orders now sought is to afford the administrators additional time in which they might determine whether it is appropriate to allow the corporate entities to continue to incur liabilities pursuant to various real property and chattel leases.

25 As mentioned, the appointment of the administrators was to the large number of companies which constitute the CW Group. The evidence before the Court is that since their appointment the administrators have been working diligently to ascertain and resolve issues concerning the liabilities arising from the numerous real property leases and chattel leases. Those attempts to make appropriate arrangements have encountered some hurdles as a result of delays by real property lessors in providing a response to the administrators' invitations to discuss the matter or by a failure of lessors to commit one way or the other.

26 In relation to the chattel leases, the evidence before the Court shows that it is a complex process to ascertain the identity of all the lessors of all the pieces of equipment leased by the various entities. Nevertheless, it is expected that one major creditor, being Medi Pak, may be the lessor of a significant number of pieces of equipment. Dealings have continued with Medi Pak in relation to the chattel leases, but ultimately nothing yet has been agreed.

27 In the unusual circumstances encountered by the administrators of this group of companies, it is appropriate to make the orders to extend the time for the effective making of an election under s 433B(3) and relieving the administrators of liability under s 433B(2) pending the expiration of that period. This will allow for rational decisions to be made in relation to the various leases.

28 The administrators sought an extension for a period of four weeks. In the circumstances that is, perhaps, too long and instead the period should be extended until 4.00pm on 25 September 2018; being a period of three weeks.

29 It is apparent that this order might have some impact upon the owners of real property or chattels. However the administrators are attempting to cause the businesses to continue as going concerns and in doing so they will necessarily require the consent, to some extent, of those lessors and owners who will generally be in a position to restore their financial position if they have suffered any detriment. They will be in a bargaining position of some strength in relation to amounts which are owing, or will become owing, in relation to the assets which are leased. Vis-a-vis the administrators, they are probably able to look after their own interests at least in the short term. Further the orders as made are expressed in a way which permits the persons who are affected by them to apply to the Court for a variation.

30 The affidavits relied upon by the administrators in this application contain sensitive confidential commercial information. In the context of their attempts to sell the businesses they seek orders that those affidavits be suppressed. It is appropriate such an order be made although that is subject to the right of any party seeking to vary or set aside any of the orders made today, to apply for access to that material. The affidavits ought to be marked on the Court file as being suppressed and an order should be made that they not be accessed by any party save on the order of a judge of this Court.

I certify that the preceding 30 (thirty) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Derrington.

Associate:

Dated: 4 September 2018