

Supreme Court
New South Wales

Case Name: Owners Strata Plan 95562 v City Wide Maintenance and Construction Pty Ltd

Medium Neutral Citation: [2022] NSWSC 1509

Hearing Date(s): 2 November 2022

Date of Orders: 2 November 2022

Decision Date: 2 November 2022

Jurisdiction: Equity - Technology and Construction List

Before: Ball J

Decision: (1) Orders in terms of paragraphs 2 and 3 of the plaintiff's notice of motion filed in court on 2 November 2022 as follows:

(a) The plaintiff is granted leave pursuant to s 500(2) of the Corporations Act 2001 (Cth) to continue these proceedings against the defendant.

(b) Costs of the motion be costs in the cause.

(2) Further order that it is a condition of the order referred to in paragraph 1(a) that the plaintiff not seek to enforce any judgment it obtains in these proceedings without the leave of the Court.

Catchwords: CORPORATIONS — Voluntary winding up — Practice and procedure — Leave to continue proceedings in circumstances where final hearing is one week away

Legislation Cited: Corporations Act 2001 (Cth)
Home Building Act 1989 (NSW)

Cases Cited: Quintano v B W Rose Pty Ltd [2008] NSWSC 720

Category: Procedural rulings

Parties: Owners Strata Plan 95562 (Plaintiff)
City Wide Maintenance and Construction Pty Ltd
(Defendant)

Representation: Counsel:
M Newton (Plaintiff)

Solicitors:
Aronstan Law (Plaintiff)

File Number(s): 2020/246280

Publication Restriction: Nil

EX TEMPORE JUDGMENT

- 1 By notice of motion filed in court today, the plaintiff seeks leave pursuant to s 500(2) of the *Corporations Act 2001* (Cth) to continue these proceedings against the defendant. The proceedings relate to a residential building contract made between the plaintiff and the defendant in relation to renovations to a dwelling of the plaintiff in Dover Heights. In the proceedings the plaintiff claims for damages against the defendant for breaches of the statutory warranties under the *Home Building Act 1989* (NSW). It is apparent both from the Technology and Construction List Statement and the evidence that has been filed in the proceedings that there are substantial disputes between the parties concerning the existence of various defects in relation to the building work.
- 2 The proceedings are due to commence on Monday, 7 November 2022. It appears from the material before the Court that the defendant was placed into external administration on 31 October 2022 as a consequence of a creditors' voluntary winding up. The liquidator was informed of today's application. There has been no appearance by the liquidator. However, in correspondence to the plaintiff's solicitor, the liquidator has indicated that he neither consents nor opposes this application.
- 3 The principles relating to whether leave should be granted under s 500(2) are well established. They were summarised by Austin J in *Quintano v B W Rose Pty Ltd* [2008] NSWSC 720 at [14] in the following terms:

Where an applicant for leave has a provable claim, the applicant must persuade the Court that there is some good reason on the balance of convenience why the claim should be pursued by court action to judgment rather than by lodging a proof of debt with the liquidator. The Court considers whether the claimant has a case involving a real dispute which is not futile and involves serious questions, whether the action will impede orderly winding up, and whether it will cause prejudice to other creditors. (citation omitted)

- 4 Applying those principles, I am satisfied that it is appropriate to grant leave in the present case. I say that for a number of reasons. First, it is apparent from what I have already said that the case is well advanced. It is listed for hearing next week. All the evidence in the case has been prepared. Consequently, if the liquidator wishes to contest the proceedings, the company will not be put to very substantial expense.
- 5 Second, it is apparent that there is a substantial dispute concerning at least quantification of the amounts claimed by the plaintiff. There is a real risk that if leave to proceed is not granted and the plaintiff is left to lodge a proof of debt, that that proof of debt will be rejected at least in part and it will be necessary for the Court to resolve the plaintiff's claim in any event. In circumstances where the case is ready for hearing, it would be undesirable to bring about a position where the proceedings are stayed but the Court is required to determine the same issues on a challenge to the rejection of the plaintiff's proof of debt.
- 6 Third, although there is no evidence before me on this point, it may be inferred that the defendant has obtained insurance in accordance with Pt 6 of the *Home Building Act*. The plaintiff is a beneficiary of that insurance. The existence of the insurance and the fact that the plaintiff may be entitled to make a claim in relation to it is a strong discretionary reason for granting leave.
- 7 In the normal course of events it would be appropriate as a condition of the grant of leave to impose a condition that the plaintiff not enforce any judgment it obtains without further leave of the Court. Mr Newton, who appeared for the plaintiff, properly conceded that there was no reason in this case why that condition should not be imposed.
- 8 Accordingly, the orders of the Court are:
 - (1) Orders in terms of paragraphs 2 and 3 of the plaintiff's notice of motion filed in court on 2 November 2022 as follows:

- (a) The plaintiff is granted leave pursuant to s 500(2) of the *Corporations Act 2001* (Cth) to continue these proceedings against the defendant.
 - (b) Costs of the motion be costs in the cause.
- (2) Further order that it is a condition of the order referred to in paragraph 1(a) that the plaintiff not seek to enforce any judgment it obtains in these proceedings without the leave of the Court.
