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Case Alert

Shaping the future of insurance law

NSW Supreme Court refuses leave to sue court-appointed liquidators

***Aardwolf Industries LLC v Riad Tayeh* [2020] NSWSC 299**

17 April 2020

AT A GLANCE

- Wotton + Kearney acted for the liquidators of Herdgraph Pty Limited and Aardwolf Pty Ltd in response to an application for leave to commence proceedings against them for alleged negligence and misleading or deceptive conduct.
- The NSW Supreme Court found that the plaintiffs' proposed causes of action lacked sufficient merit to warrant a grant of leave. It also found that a number of discretionary factors weighed against leave being granted. Accordingly, it dismissed the leave application and the proceedings with costs.
- This decision provides guidance on proceedings against court-appointed liquidators and the ability of liquidators to resist leave being granted. For insurers, it also highlights the value of taking a strong position on the leave application.

CASE OVERVIEW

Facts

The proceedings concerned the liquidators' execution of a Trademark Deed of Assignment between Herdgraph Pty Limited and Aardwolf Pty Ltd (Aardwolf), as assignor, and Nhon Noa Nguyen, as assignee. Under the terms of the Trademark Deed, Herdgraph and Aardwolf assigned certain trademark rights to Nguyen for $5,000.

The plaintiffs, Aardwolf Industries LLC and Aardwolf Australia Pty, alleged that Herdgraph and Aardwolf did not own the trademark rights at the time of their entry, by the liquidators, into the Trademark Deed. They claimed Herdgraph and Aardwolf had abandoned the trademark rights in about May 2007 and that Aardwolf Industries became the owner shortly afterwards.

They also claimed that, on 29 March 2011, Aardwolf Industries had assigned the trademark rights to Aardwolf Australia for use in Australia.

The plaintiffs alleged that the liquidators' execution of the Trademark Deed was negligent by virtue of their failure to take reasonable steps to determine the ownership of the trademark rights. The plaintiffs also alleged that the liquidators engaged in misleading or deceptive conduct.

The Trademark Deed was said to have caused disputes between the plaintiffs and Nguyen in Australia, the United States and Canada regarding the ownership of the trademark rights. The damages sought were significant, comprising of the legal costs incurred in those disputes and the loss of sales.

The issue

Leave of the court is required to sue a court-appointed liquidator.[1] To obtain such leave, a prospective plaintiff is required to satisfy the court that the proposed claim has "sufficient merit", based on the prospects of success, circumstances and timing.[2]

The plaintiffs filed an application seeking leave to commence proceedings against the liquidators in the NSW Supreme Court (Leave Application). The liquidators resisted the Leave Application, submitting that:

- the claim in negligence did not have "sufficient merit", as the plaintiffs were not vulnerable to the liquidators in the relevant sense, as they had remedies available to them under section 1321 of the *Corporations Act 2001* (Cth), and
- the misleading or deceptive conduct claim did not have "sufficient merit", as the liquidators were not acting in "trade or commerce" within the meaning of section 18 of the Australian Consumer Law.

Regarding circumstances and timing, the liquidators argued that the plaintiffs were on notice of the Trademark Deed sometime between 30 January 2014 and 27 May 2015, before the finalisation of the liquidation in October 2015, but made no complaint to the liquidators until at least September 2016 and did not approach the court for relief until July 2019.

The decision

On 26 March 2020, Justice Rees delivered judgment dismissing the Leave Application and the proceedings and ordering that the plaintiffs pay the liquidators costs of the Leave Application and the proceedings.[3]

Regarding the proposed cause of action in negligence, Justice Rees found:

> *"… I do not consider that there is any real prospect that the plaintiffs will establish the posited duty as they lacked the vulnerability which they contend formed the basis of that duty. Aardwolf Industries and Aardwolf Australia were able to protect themselves from the consequences of any want of due care by the liquidators…"*[4]

Regarding the proposed cause of action for misleading or deceptive conduct, Justice Rees first made the following finding about whether the liquidators were acting "in trade or commerce":

> *"The liquidators' actions seem to me to fall classically within a court-appointed liquidator's function of identifying assets of the company and realising those assets as best can be done in the circumstances so that a distribution can be made to creditors or contributories…There is nothing apparent from the evidence that would indicate that the liquidators' conduct was anything other than performing their statutory powers under Part 5.3A. I consider that the prospects of establishing that the representations in the deed were made 'in trade or commerce' are poor."*[5]

Her Honour then expressed "serious doubts" about the plaintiffs' ability to establish the requisite reliance on the alleged misleading or deceptive conduct and found that the plaintiffs' "proposed claim for misleading and deceptive conduct lacks sufficient merit to warrant a grant of leave".

Beyond the inherent flaws in the plaintiffs' proposed causes of action, Justice Rees identified other factors that weighed against a grant of leave:

- The liquidators were presented with significant difficulties by reason of the failure of the directors of those companies – who are also the directors of the plaintiffs – to comply with their statutory obligations to cooperate, hand over the books and records and promptly submit a Report as to Affairs.
- When the directors eventually provided information, it was less than fulsome.
- By March 2014, a plaintiff director was aware of the Trademark Deed but did not take his complaints up with the liquidators at the time.

Considering those factors and the merits of the proposed causes of action, Justice Rees concluded:

> *"…I am not prepared to allow a court-appointed liquidator to be subject to such an action in respect of matters which happened so long ago and in respect of which the plaintiffs have not agitated their complaints in a timely manner. Having apparently failed to cooperate with the liquidators at the time, I consider it is necessary to protect the integrity of the winding up process by refusing leave to permit Mr Corbett Snr and Mark Corbett through their corporate vehicles – the plaintiffs – to now sue the liquidators for how they did their job in the absence of such cooperation…"*[6]

[1] *Eighty Second Agenda Pty Ltd v Handberg* [2014] VSC 665; *Armitage v Gainborough Properties Pty Ltd* [2011] VSC 419; *Re Siromath Pty Ltd (No 1)* (1991) 9 ACLC 1580.
[2] *Mamone v Pantzer* (2001) 36 ACSR 743 (*Mamone*).
[3] *Aardwolf Industries LLC v Riad Tayeh* [2020] NSWSC 299 (Judgment).
[4] Judgment, at [104].
[5] Judgment, at [121].
[6] Judgment, at [131].

IMPLICATIONS FOR INSURERS

While courts are generally hesitant to prohibit parties from having their day in court, this decision shows that court-appointed liquidators will be protected against proceedings, brought many years after those decisions are made, on the basis of weak causes of action. This decision will provide comfort for a profession that often has to make decisions in difficult circumstances with a paucity of information.

The matter also highlights the value of a prospective liquidator-defendant identifying significant deficiencies in a proposed cause of action against it, as well as any other discretionary factors weighing against a grant of leave, particularly delay. Taking a strong position on the leave application can assist insureds and their insurers to avoid potentially significant legal costs and damages.

Need to know more?

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