

When a director may commence and carry on Supreme Court proceedings on behalf of the company - Rule 7.1 of the Uniform Civil Procedure Rules 2005 (NSW)

22 March 2016

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Introduction

1. Under r 7.1(2)(a) and (3) of the *Uniform Civil Procedure Rules 2005* (NSW) (“UCPR”), a company may commence and carry on proceedings in the Supreme Court of New South Wales by a solicitor, or by a director of the company if that director of the company is also a plaintiff in the Supreme Court proceedings.
2. Two recent decisions of the New South Wales Court of Appeal, dealing with separate proceedings between the same parties, have read these provisions as permitting a company to commence and carry on Supreme Court proceedings by a director only if:
 - the company and the director in question are both plaintiffs in the proceedings; and
 - the director is a proper plaintiff in the proceedings i.e. the director has a cause of action which can be pursued in the same proceedings.
3. This reading of the provisions, taken by two differently constituted Courts of Appeal, is consistent with the reading taken of the provisions by earlier authorities.
4. This paper considers the relevant provisions of the UCPR and the two Court of Appeal decisions.

Relevant provisions

5. Rule 7.1(1) of the UCPR provides that a natural person may commence and carry on proceedings in any court either by a solicitor or in person. Rule 7.1 then goes on to relevantly provide:

“(2) A company within the meaning of the Corporations Act 2001 of the Commonwealth:

(a) may commence and carry on proceedings in any court by a solicitor or by a director of the company, and

...

(3) In the case of proceedings in the Supreme Court, subrule (2)(a) authorises a company to commence proceedings by a director only if the director is also a plaintiff in the proceedings.”

6. Rule 7.2(1) of the UCPR requires a person who commences or carries on proceedings in the Supreme Court or District Court as a director of a company within the meaning of the *Corporations Act* to file an affidavit as to his or her authority to act in that capacity, together with a copy of the instrument evidencing that authority. Rule 7.2(2) sets out certain statements which must be contained in the affidavit made by a director of a company including a statement that the director has been authorised by resolution of the directors to commence and carry on the proceedings.

Tanamerah Estates – application to set aside a creditor’s statutory demand

Background matters

7. In the first decision published, *Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd*,¹ the respondent (“**Tibra**”) had served a creditor’s statutory demand on the applicant company (“**Company**”) under s 459E of the *Corporations Act 2001* (Cth) and the Company had brought proceedings in the Supreme Court of New South Wales to set the demand aside pursuant to ss 459H and 459J of the *Corporations Act*.
8. The proceedings to set aside the demand were commenced by a director of the Company, a Mr Tydeman (“**Director**”), who was duly authorised by a resolution of the Company’s directors to do so. However, the Director was not separately a plaintiff in the proceedings pursuing a cause of action that he had and the Company had at no time retained a solicitor to commence and carry on the proceedings.
9. Tibra filed a motion in which it sought a declaration that the Company was not entitled to commence and carry on the proceedings because it had not complied with r 7.1 of the UCPR and orders that the proceedings be stayed for a period following which, if the rule was not complied with, the proceedings be dismissed.
10. The motion was heard by Black J who raised the possibility of the Company making an application under s 14 of the *Civil Procedure Act 2005* (NSW) (“**CPA**”) to dispense with the requirements of r 7.1 of the UCPR. However, the Director made it clear that the Company did not wish to invoke the operation of that section.² In essence, the Director’s claim was that the Company was entitled to appear by him as its director as of right.
11. After reviewing the authorities, Black J:
 - ordered that the proceedings be stayed to a specified date and time to enable the Company to obtain legal representation and for a legal representative to enter an appearance on its behalf; and
 - relisted the matter on that date to determine whether, if no legal representation had been obtained by that time, the proceedings should be dismissed.

¹ [2016] NSWCA 23.

² In his judgment, Black J indicated that even had such an application been made, there may have been real difficulties for the application.

12. On the relisted date, the Director indicated that the Company did not propose to retain a solicitor. No application was made under s 14 of the CPA to dispense with the requirements of r 7.1. Nor was any evidence led or submissions made to explain why the Company was not or could not be represented by a solicitor. The Director however, submitted that the Court should not dismiss the proceedings because this would deprive the Company of an opportunity for a hearing of its application on the merits and would expose it to the making of a winding-up order.
13. Black J rejected this submission on the basis that the Company would only be deprived of a hearing if it chose not to comply with the UCPR. His Honour directed the Company to file a notice of appearance by a legally qualified representative by 4pm on that day, noting that if the direction was not complied with, he would make an order in chambers dismissing the proceedings with costs.
14. No such notice of appearance was filed and Black J subsequently ordered that the proceedings be dismissed with costs.

Court of Appeal

15. In the meantime, the Company filed a summons seeking leave to appeal to the Court of Appeal. The application for leave to appeal was heard by McColl and Meagher JJA who delivered a joint judgment.
16. The proceedings for leave were also not commenced by a solicitor but the Court of Appeal granted the Director leave to appear on behalf of the Company for the purpose only of making the application.
17. The arguments made on behalf of the Company relied on the definitions of “person under legal incapacity”, “plaintiff” and “tutor” appearing in s 3(1) of the CPA. The arguments were as follows:
 - A company answered the description of a “person under legal incapacity” as defined in s 3(1) of the CPA and when a person was granted the right to act in legal proceedings on behalf of such a person, the first person, in exercising that right to so act, was a “tutor” as defined in s 3(1) because he or she was “appointed to represent the person (whether by the court or otherwise) in accordance with the uniform rules”. Someone appointed as a “tutor” did not need to have a personal claim in order to exercise that right of representation and if a person answering the description of a “tutor” commenced proceedings on behalf of the “person under legal incapacity”, then the first person was a “plaintiff” as defined in s 3(1) of the CPA, because he or she was a “person by whom proceedings are commenced”.
 - Rule 7.2(2) of the UCPR proceeded on the basis that a company could authorise a director to “commence” legal proceedings on its behalf and the requirement in r 7.1(3) that the director also be a “plaintiff” was satisfied if the

proceedings were commenced by that director in accordance with r 7.1(2)(a), because, in so doing, that director answered the description of “a person by whom proceedings are commenced” within the definition of “plaintiff” in s 3(1) of the CPA.³

18. It also seems that the Company placed reliance on a statement made by Handley AJA in *May v Christodoulou*.⁴
19. The arguments advanced on behalf of the Company were very similar to arguments which had been made on behalf of the Company to the Court of Appeal in 2013 in other proceedings between the Company and Tibra. The Court of Appeal (Basten JA with whom Sackville AJA agreed) had rejected the arguments.⁵
20. The Court of Appeal on this occasion also rejected the arguments, saying that they were misconceived and had no realistic prospects of success.⁶ The Court of Appeal’s reasons were as follows:
 - The Company did not answer the description of a “person under legal incapacity” as defined in s 3(1) of the CPA because, as Basten JA had said in 2013, that expression was concerned with individuals and not artificial entities and, if that was not so, the consequence would be that every company would be required to sue through a “tutor” in all cases. Furthermore, by reason of r 7.14 of the UCPR, the consequence would also be that, unless the Court ordered otherwise, the tutor would have to commence and carry on the proceedings by a solicitor.⁷
 - The Director was authorised to pursue the proceedings in his capacity as director and as the Company’s agent, and not as a “tutor”. Under r 7.16 of the UCPR, a “tutor” was not permitted to commence or carry on proceedings unless there were filed the tutor’s consent to act as such and a certificate from the tutor’s solicitor in the proceedings to the effect that the tutor did not have any interests in the proceedings adverse to the interests of the person under legal incapacity. These requirements existed because, as had been observed by Basten JA in 2013, a “tutor” did not pursue any personal interest or cause of action in the proceedings. For that reason, a tutor could not be a “plaintiff” for the purposes of r 7.1(3).⁸
21. The Court of Appeal then concluded that the correct view was that:

³ Above, n 1, at [15]-[16].

⁴ [2011] NSWCA 75; (2011) 80 NSWLR 462 at [8].

⁵ The other proceedings are the subject of the second recent Court of Appeal decision and are discussed below. It seems that the debts in the creditor’s statutory demand may have related to costs assessments made in the earlier proceedings.

⁶ Above, n 1, at [17] and [21].

⁷ Above, n 1, at [18].

⁸ Above, n 1, at [19].

“[rule] 7.1(3) requires the director ‘plaintiff’ to have a cause of action which may properly be pursued in the same proceedings. This construction accords with the ordinary meaning of the language. It has been adopted in the first instance decisions cited by Basten JA ...; and is not contradicted by what Handley AJA said in May v Christodoulou ...”⁹

22. After also rejecting other arguments made by the Company which suggested that the judge may have erred in dismissing its application, the Court of Appeal concluded that the Company’s proposed appeal did not have any arguable prospects of success and dismissed the summons seeking leave to appeal with costs.

Tanamerah Estates – share valuation dispute

Background matters

23. The reasons for judgment in the second decision, *Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd*,¹⁰ were published two weeks after the first Court of Appeal decision was published.¹¹
24. These proceedings had been commenced by the Company against Tibra in 2012 and involved a dispute concerning the valuation of shares which Tibra had bought back from the Company under a shareholder’s agreement made between the Company and Tibra.
25. The proceedings had been commenced through the agency of the Director who relied on a resolution of the Company’s directors authorising him to do all things necessary on behalf of the Company to enforce its rights against Tibra. However, the Director was not named as a plaintiff in the statement of claim.
26. Tibra raised the question of whether the Company was entitled to commence proceedings without a solicitor and, subsequently, an amended statement of claim was filed in which the Director was named as the second plaintiff.
27. Tibra then filed a notice of motion seeking an order that the Director be removed as a party to the proceedings and, in the alternative, that the proceedings be dismissed generally. The Company and the Director filed a notice of motion in which various forms of relief were sought, including an order that if the Director was removed as a party to the proceedings, then a dispensing order under s 14 of the CPA should be made to permit the Company to commence and carry on the proceedings through the Director as its duly authorised agent.
28. Both motions were heard by Hallen J who noted that the Director had:

⁹ Above, n 1, at [20].

¹⁰ [2016] NSWCA 42.

¹¹ The hearing, however, took place before the hearing in the application to set aside the creditor’s statutory demand.

- indicated that he did not “trust solicitors ...in this particular matter”;
- admitted that he did not have any individual cause of action available to him against Tibra; and
- accepted that he was not what was called a ‘proper plaintiff’ in the proceedings.

29. After reviewing the authorities, Hallen J ordered that the Director be removed as a party in the proceedings and that the Company and the Director’s notice of motion be dismissed. His Honour also ordered that, unless by a specified date a notice of legal practitioner acting was filed and served by a solicitor retained by the Company, the proceedings be stayed. No such notice of appearance was filed so the proceedings were stayed.

30. After pursuing alternative means in the Court to try to have the orders set aside, the Company and the Director filed a summons seeking leave to appeal to the Court of Appeal. It was in these circumstances then that, in 2013, Basten JA and Sackville AJA came to deal with the question of the Company’s entitlement to commence and carry on the proceedings by the Director. Basten JA (with whom Sackville AJA agreed) dismissed the application for leave to appeal.¹³

31. The effect then was that the proceedings remained stayed.

Re-opening application in the Court of Appeal

32. In mid-2015, the Company and the Director filed a notice of motion in the Court of Appeal which, in substance, sought a re-opening of the application for leave to appeal. By a further notice of motion, the Company and the Director sought declarations as to the construction which they wished to have placed on rr 7.1 and 7.2 of the UCPR.

33. The members of the Court of Appeal which heard the motions were Gleeson JA, Simpson JA and Emmett AJA. The Court granted leave to the Company to appear by the Director on the hearing of the motions.

34. Gleeson JA (with whom Simpson JA agreed) made the following points:

- It should be accepted that the primary power and authorisation in the rules as to the commencement and carrying on of litigation by companies is found in r 7.1 of the UCPR.
- Rule 7.1 distinguishes between proceedings commenced in the Local Court, the District Court and the Supreme Court.
- In Local Court proceedings, a company need not appear by way of a solicitor but may appear either by a director or (unless the Court orders otherwise) by a duly authorised officer or employee of the company. In District Court proceedings, a company may appear by a director.

¹³ [2013] NSWCA 266.

- In Supreme Court proceedings, the right of a company to appear by a director is qualified by the requirement in r 7.1(3) that the director is also a plaintiff in the proceedings. Rule 7.2 imposes an additional obligation in the case of proceedings in the Supreme Court or the District Court by requiring a director to file an affidavit of the director's authority in circumstances where a director is permitted to act pursuant to r 7.1.¹⁴

35. Gleeson JA then observed as follows

"20 In JSBG Developments Pty Ltd v Kozlowski [2009] NSWSC 1128; 75 NSWLR 745 at [18], Barrett J (as his Honour then was) held that only a director who is in his or her own right a plaintiff is eligible under r 7.1(2)(a), and that the combined effect of UCPR r 7.1(2)(a) and (3) was that if the company and the director of the company are both plaintiffs, the company may commence and carry on the proceedings by that director. Otherwise, the company may only commence or carry on the proceedings in the Supreme Court by a solicitor.

21 This reading of the rules has been followed and applied at first instance in Connectland Pty Ltd v Porthaven Pty Ltd [2011] NSWSC 616 (White J); DB Mahaffy & Associates Pty Ltd v Mahaffy [2011] NSWSC 673 (White J) and In the Matter of DB Mahaffy & Associates Pty Limited [2012] NSWSC 776 (Brereton J).

22 Hallen J accepted and applied this reading of the rules, and this Court (Basten JA and Sackville AJA) affirmed his Honour's approach when refusing leave to appeal. The applicants seek to re-agitate, among other things, this reading of r 7.1."¹⁵

36. Gleeson JA noted that a main complaint of the Company and the Director was that the Court had failed to properly apply the definitions of "person under legal incapacity", "tutor" and "plaintiff" in relation to rr 7.1 and 7.2 of the UCPR and that the essential arguments relating to this complaint were as follows:

- that the Director was a "plaintiff" for the purposes of r 7.1(3) when the proceedings were commenced because he signed the statement of claim on behalf of the Company as its duly authorised representative;
- that the Director was a tutor for the Company because a company was only a "sheet of paper" and hence a person under a "legal incapacity"; and
- that in dismissing the application for leave to appeal, Basten JA and Sackville AJA had disregarded a relevant Court of Appeal authority in *May v Christodoulou*.¹⁶

¹⁴ Above, n 10, at [18]-[19].

¹⁵ Above, n 10, at [20]-[22].

¹⁶ Above, n 10, at [29]; [32].

37. As can be seen, the arguments were very similar to those advanced in the proceedings to set aside the creditor's statutory demand. Like McColl and Meagher JJA, Gleeson JA rejected the arguments and did so for similar reasons:

- When a company commences proceedings, the "plaintiff" is the company itself, not the person who happens to sign the statement of claim on its behalf, whether that person is a solicitor instructed by the company or an eligible director of the company. This follows from an ordinary reading of the expression "plaintiff" as defined in s 3(1) of the CPA. The term "plaintiff" relevantly means "the person by whom proceedings are commenced". Under s 21 of the *Interpretation Act 1987* (NSW), the word "person" when used in any Act or instrument includes a corporation.
- The notion that a company as a juristic entity is a "person under legal incapacity" because a company itself is inanimate is misconceived for the reasons given by Basten JA in the Court of Appeal in 2013. The definition of the phrase "person under legal incapacity" in s 3(1) of the CPA is concerned with individuals rather than juristic persons. The suggestion that a company was under a "legal incapacity" and therefore a company would be forced to sue through a "tutor" in all cases was properly rejected by the Court of Appeal in 2013.
- The reliance on the passage by Handley AJA in *May v Christodoulou* was misplaced.¹⁷

38. Gleeson JA also rejected various other complaints made by the Company and the Director.

39. Emmett AJA, who delivered separate reasons for judgment, said that the bases upon which the Director contended that the Company was entitled to appear by him, without a solicitor, were "completely without substance or merit."¹⁸ His Honour further said as follows:

*"First, he suggested that any company, because it can only act through its directors, is a person under a legal incapacity and, in some way, [the Director], as an authorised agent of [the Company], was its tutor. Alternatively, he suggested that, because he signed the statement of claim as an agent on behalf of [the Company], he was in effect the plaintiff, whether or not he was named as second plaintiff. Both contentions are completely without merit and show a complete misconception and misapprehension of the notions involved."*¹⁹

¹⁷ Above, n 10, at [33]-[40].

¹⁸ Above, n 10, at [67].

¹⁹ Above, n 10, at [67].

40. His Honour observed that the Director had accepted that no relief was claimed by him in the amended statement of claim, that he did not have any individual cause of action available to him against Tibra and that he was not what might be called “a proper plaintiff” in the proceedings. In these circumstances, his Honour said, there could be no possible complaint about the order made for the Director’s removal as a party to the proceedings. Once he was removed as a party, namely, as the second plaintiff in the proceedings, then r 7.1(3) was no longer satisfied.¹⁹

41. The Court of Appeal, accordingly, dismissed the motions with costs.

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22 March 2016

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¹⁹ Above, n 10, at [68]-[69].