

FEDERAL COURT OF AUSTRALIA

Ample Source International Limited v Bonython Metals Group Pty Limited (in liquidation), in the matter of Bonython Metals Group Pty Limited (in liquidation) (No 10) [2019] FCA 533

File number: NSD 1784 of 2010

Judge: **GLEESON J**

Date of judgment: 18 March 2019

Date of publication of reasons: 17 April 2019

Catchwords: **BANKRUPTCY AND INSOLVENCY** – where liquidator seeks order to pay distributions into Court pursuant to r 18.03(1)(b) of the *Federal Court Rules 2011* – whether there are competing claims concerning distributions per r 18.01(b)(ii) of the Rules – where liquidator claims no interest in property – interpleader relief granted by way of payment of distributions into Court

Legislation: *Corporations Act 2001* (Cth) ss 485, 488, Sch 2 cl 60-10(1)(c), 60-10(3)(a)
Federal Court (Corporations) Rules 2000 r 7.10
Federal Court Rules 2011 rr 18.01, 18.03(1), 18.05

Cases cited: *Guerinoni v Dennis Castino trading as Castino & Co Chartered Accountants* [2008] NSWSC 175
New Guinea Line Pty Ltd v Board of Trustees of Papua New Guinea National Museum & Art Gallery [2006] FCA 171

Date of hearing: 18 March 2019

Registry: New South Wales

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Category: Catchwords

Number of paragraphs: 28

Counsel for the Plaintiff:	Dr C Mantziaris
Solicitor for the Plaintiff:	HWL Ebsworth
Counsel for the Second Defendant/First Respondent:	The Second Defendant/First Respondent appeared in person
Counsel for the Second Respondent:	The Second Defendant/First Respondent represented the Second Respondent
Counsel for the Third and Fourth Respondents:	Mr C McMeniman
Solicitor for the Third Respondent:	Sarajinsky & Co
Solicitor for the Fourth Respondents:	Duffy Law Group

ORDERS

NSD 1784 of 2010

IN THE MATTER OF BONYTHON METALS GROUP PTY LIMITED (ACN 141 257 294) (IN LIQUIDATION)

BETWEEN: **AMPLE SOURCE INTERNATIONAL LIMITED (BVICN 1575638)**
Plaintiff

AND: **BONYTHON METALS GROUP PTY LIMITED (ACN 141 257 294) (IN LIQUIDATION)**
First Defendant

JOHN HILLAM
Second Defendant

CFM MEDIA HOLDINGS PTY LIMITED (ACN 143 465 909)
(and others named in the Schedule)
Third Defendant

AND BETWEEN: **MICHAEL ANDREW OWEN AS LIQUIDATOR OF BONYTHON METALS GROUP PTY LIMITED (ACN 141 257 294) (IN LIQUIDATION)**
Applicant

AND **JOHN HILLAM**
First Respondent

SARABOL TEERANUKUL
Second Respondent

BRIAN RAYMENT (and others named in the Schedule)
Third Respondent

JUDGE: **GLEESON J**

DATE OF ORDER: **18 MARCH 2019**

THE COURT ORDERS THAT:

1. Pursuant to clauses 60-10(1)(c) and 60-10(3)(a) of Schedule 2 of the *Corporations Act 2001* (Cth) (“Act”), the liquidator’s remuneration and costs be approved, in the amount verified and identified as “Z” in Table 2C in the affidavit of Michael Andrew Owen affirmed on 15 March 2019.

2. Subject to orders 3 to 5 and pursuant to the special leave granted under s 488(2) of the Act on 7 March 2019, and in exercise of the powers conferred by s 485(2) and s 488(1) of the Act and r 7.10 of the *Federal Court (Corporations) Rules 2000*, the liquidator distribute the surplus assets of the first defendant to the first defendant's contributories in accordance with annexure A to these orders.
3. The distribution under order 2 not occur until the liquidator has issued to the plaintiff 10 shares in the first defendant, as identified in paragraphs [115] and [116] of David John Leigh's affidavit sworn on 19 July 2017, so that the share register of the first defendant comprises 95,010 fully paid shares.
4. Upon the undertaking given to the Court by the third and fourth respondents through their counsel to commence proceedings within 28 days of the date of payment into Court, pursuant to rule 18.03(1)(b) of the *Federal Court Rules 2011*, the liquidator pay into Court the distribution that would otherwise be paid to the first and second respondents under order 2.
5. The liquidator make the distributions to the fifth, seventh and eighth respondents identified in annexure A to these orders in the form of a distribution pursuant to s 488(2) of the Act.
6. Pursuant to s 480(d) of the Act and r 7.5 of the *Federal Court Rules 2011*, upon the execution by the liquidator of orders 2 to 5, the liquidator be released from his office and the Australian Securities and Investment Commission deregister the first defendant.

THE COURT NOTES:

7. Annexure B to these orders, being the table of Minimum Distributions to Contributories based on (i) order 2 made by the Court on 7 March 2019 and (ii) the 'Z' figure identified in order 1 made on 18 March 2019.

ANNEXURE “A”

Table of Minimum Distributions to Contributories

Contributory	Amount of distribution
John Hillam	At least \$190,681.68
Sarabol Teeranukul	At least \$190,681.68
Ample Source International	At least \$221,838.68
Giralia Resources	At least \$26,077.75
Red Gold	At least \$27,142.13
Total Distribution	At least \$656,421.92

ANNEXURE “B”

Name and Address	% Shares	Contribution owed to fund	Revised Distribution Amount
Mr Hillam Level 1, 122 Pitt Street, Sydney NSW 2000	33.6807%	\$85,659.07 + \$15,000.00/2 = \$93,159.07	33.6807% x [(\$843,866.00 + \$171,318.13 + \$15,000.00 + G + \$119,904.44) <i>minus</i> (\$85,659.07 + 15,000.00/2) = \$190,681.68
Ms Teeranukul Level 1, 122 Pitt Street, Sydney NSW 2000	33.6807%	\$85,659.06 + 15,000.00/2 = \$93,159.06	33.6807% x [(\$843,866.00 + \$171,318.13 + \$15,000.00 + G + \$119,904.44)] <i>minus</i> (\$85,659.07 + 15,000.00/2) = \$190,681.68
Ample Source International Limited BVICN 1575638 Level 11, 66 Eagle Street Brisbane QLD, 4000	26.3235%	Nil	26.3235% x [(\$843,866.00 + \$171,318.13 + \$15,000.00 + G) <i>minus</i> (\$67,539.63 + \$6,753.96 + G + \$119,904.44)] = \$221,838.68
Red Gold 283 Rokeby Road Subiaco WA 6008	3.2207%	Nil	3.2207% x [(\$843,866.00 + \$171,318.13 + \$15,000.00 + G) <i>minus</i> (\$67,539.63 + \$6,753.96 + G + \$119,904.44)] = \$27,142.13
Giralia 300 Murray Street Perth WA 6000	3.0944%	Nil	3.0944% x [(\$843,866.00 + \$171,318.13 + \$15,000.00 + G) <i>minus</i> (\$67,539.63 + G + \$119,904.44)] = \$26,077.75
TOTAL MINIMUM AMOUNT TO BE DISTRIBUTED			<u>\$656,421.92</u>

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

REASONS FOR JUDGMENT

GLEESON J:

1 On 18 March 2019, I made various unopposed orders that were designed to permit the completion of the liquidation of Bonython Metals Group Pty Ltd (“company”), its de-registration, and the finalisation of this proceeding. Those orders were:

- (1) an order approving the liquidator’s remuneration and costs;
- (2) orders for the distribution of the surplus assets of the company to its contributories; and
- (3) an order that, upon the execution of the orders made, the liquidator be released from his office and the Australian Securities and Investment Commission deregister the company.

2 Over the opposition of the first respondent (“Mr Hillam”), who also purported to represent the second respondent (“Ms Teeranukul”), I also made an order that the liquidator pay into Court the distribution that would otherwise be paid to Mr Hillam and Ms Teeranukul (“Hillam and Teeranukul distributions”) pursuant to r 18.03(1)(b) of the *Federal Court Rules 2011*.

3 The liquidator sought to pay the Hillam and Teeranukul distributions into Court on the basis that:

- (1) he is liable to pay those amounts to Mr Hillam and Ms Teeranukul upon the making of the final order pursuant to s 488(2) of the *Corporations Act 2001* (Cth); and
- (2) if payment is not made into Court, he expected to be sued in the Court for those amounts by Mr Hillam and Ms Teeranukul and by the third respondent (“Mr Rayment QC”) and the fourth respondent (“Mr Gollan”).

4 Mr Rayment QC and Mr Gollan were represented by counsel at the hearing on 18 March 2019 and supported the liquidator’s application.

5 The following are my reasons for making the order pursuant to r 18.03(1)(b).

BACKGROUND FACTS

6 The amount of the Hillam and Teeranukul distributions is \$381,363.36. Mr Rayment QC claims that Mr Hillam and Ms Teeranukul owe him an amount for unpaid legal fees that exceeds the total of the Hillam and Teeranukul distributions.

- 7 Mr Gollan claims to be owed an amount of at least \$145,000, also for unpaid legal fees.
- 8 In each case, the unpaid legal fees are for services provided between about March 2012 and 1 May 2012 including appearing in an appeal heard by a Full Court of the Federal Court on 30 April and 1 May 2012: *Hillam v Ample Source International Limited (No 2)* [2012] FCAFC 73; (2012) 202 FCR 336.
- 9 Mr Rayment QC and Mr Gollan claim to hold security interests by way of fixed and floating charges over the shares held by Mr Hillam and Ms Teeranukul in the company. Each of them relies upon a document entitled “Deed of Acknowledgement and Fixed and Floating Charge Document” dated 28 April 2012. In each document, Mr Hillam and Ms Teeranukul are identified as the “chargor”. Mr Rayment QC and Mr Gollan each seek to claim an amount from the Hillam and Teeranukul distributions *pari passu* with the other.
- 10 The liquidator drew attention to the following features of the charge documents, which are in relevantly identical terms:
- (a) The parties to the charge documents are identified.
 - (b) The charge documents recite that the chargor is indebted to the chargee “in respect to Counsel Fees” due to the chargee “both current and future”.
 - (c) “Secured property” means, relevantly, “the rights to any dividends declared whether by income or corpus paid or unpaid on shares held by the Chargor in Bonython Metals Group Pty Ltd”.
 - (d) The definition of “secured money” includes all moneys which the chargor is liable to pay on any account for counsel fees including amounts of fees as at the date of the deed and estimated future fees.
 - (e) Clause 5.1 requires the chargor to pay the secured money to the chargee in tranches by 30 June 2012.
 - (f) Clause 9 sets out events of default, including the failure to pay an amount payable under the document when due.
 - (g) Clause 10 sets out terms for crystallisation of the charge into a fixed charge.
 - (h) Clause 11 sets out powers on default.

11 Mr Rayment QC made a written demand on Mr Hillam and Ms Teeranukul dated 2 November 2012 to remedy their default under the charge. In a letter to the liquidators, also dated 2 November 2012, Mr Rayment QC's solicitor:

- (a) noted that the charge document under which Mr Rayment QC is "chargee" is registered in the Personal Property Securities Register;
- (b) stated that the amount then due and payable by Mr Hillam and Ms Teeranukul was \$408,696.31; and
- (c) stated: "Could you please acknowledge receipt of this letter and further acknowledge the interest of our client as Chargee on which basis he will take priority over any payments otherwise available to be furnished to John Hillam and Sarabol Teeranukul".

12 By email dated 5 November 2014, Mr Gollan wrote to solicitors apparently then acting for the liquidator, stating that he did not "wish to be heard on any question other than distribution. That is, I adopt the same position I understand Mr Rayment QC to have". Mr Gollan then stated:

My security is in identical terms to Mr Rayment QC and is for \$145,000.00 plus interest. If you require I can send you an up to date account and a copy of the security.

13 By letter dated 20 March 2015, Mr Gollan's solicitor wrote to the same solicitor, enclosing a copy of the registered charge and "noting our client is seeking payment of \$145,000 plus interest under the Charge".

14 In an affidavit sworn on 11 March 2019, Mr Rayment QC stated his desire:

... to enforce the charge so as to claim those monies *pari passu* with Mr Gollan, who also has a charge in similar terms. If the order sought by the liquidator for the payment into Court of the monies due to Messrs Hillam and Teeranukul is made, I propose to apply to the Court for payment out of monies due to me under the charge.

15 Mr Gollan swore an affidavit on 13 March 2019 which contained a statement to similar effect.

LEGAL FRAMEWORK

16 Rule 18.03(1)(b) of the Rules provides:

- (1) A stakeholder may, in an application for relief by way of interpleader, apply for:
 - ...
 - (b) an order that the stakeholder pay or transfer part or all of the property

in dispute into Court ...

17 The meaning of “stakeholder” is explained by r 18.01 which provides, relevantly:

A person (the stakeholder) may apply to the Court for relief by way of interpleader if:

- (a) the stakeholder is liable for a debt or personal property in the stakeholder's possession (the property in dispute); and
- (b) the stakeholder:
 - ...
 - (ii) has received competing claims about the property in dispute; or
 - (iii) expects to be sued in the Court for the property in dispute by 2 or more persons making adverse claims.

Note: Interpleader is a special procedure available to a person who is faced with 2 or more claims about the same debt or personal property. The procedure enables the competing claimants to litigate their difference while the stakeholder abides by the result.

18 In *New Guinea Line Pty Ltd v Board of Trustees of Papua New Guinea National Museum & Art Gallery* [2006] FCA 171, Allsop J (as his Honour then was) considered O 44 r 2 of the former *Federal Court Rules 1979* (Cth), which provided for the grant of relief by way of interpleader where, relevantly, a person was “sued, or [expected] to be sued, in the Court, for or in respect of the debt or property by two or more persons making adverse claims to the debt or property”. At [36], his Honour stated:

In my opinion it is clear ... that those appearing to act on behalf of the State have relinquished no claim on the containers, and that the applicants would reasonably apprehend having to fight claims in the Federal Court within the interpleader proceeding. It goes without saying that if that proceeding were to cease, the applicants would reasonably apprehend having to answer proceedings (quite possibly in the Federal Court) seeking injunctions against the delivery of the property, or alternatively, answer a suit for conversion of property. In my opinion O 44 r 2 requires the expectation of a suit that could be brought in the Federal Court. It does not require an expectation that the suit will be brought specifically in the Federal Court and not in some other court of competent jurisdiction.

19 In *Guerinoni v Dennis Castino trading as Castino & Co Chartered Accountants* [2008] NSWSC 175 at [15], Barrett J said, in relation to an analogous interpleader procedure:

References to “claimed” must, I think, be understood as references to something that goes beyond bald assertion and shows, even in the absence of evidence, a cogent or arguable basis for the existence of a legal claim.

OTHER RELEVANT FACTS

20 The liquidator noted that he has complied with r 18.02 of the Rules by filing the further amended interlocutory process dated 31 January 2019, which has been served on each of the affected parties.

21 Further, the liquidator submitted that he claims no interest in the property in dispute, and has not colluded with any claimant so that the Court was not required to dismiss the application pursuant to r 18.05. The liquidator seeks to finalise the liquidation in the interests of all contributories, the interests of creditors having been satisfied. If he were to pay Mr Hillam and Ms Teeranukul directly under the s 488(2) order, the liquidator would enter into a dispute in which he and the other contributories of the company have no interest, and the liquidation would be prolonged.

22 The liquidator acknowledged that there is no requirement that the expected suit be brought in the Federal Court. However, the liquidator contended that the evidence supports a finding that he expects to be sued in this proceeding in the event that the Hillam and Teeranukul distributions are not paid into Court.

OPPOSITION TO PAYMENT INTO COURT

23 Mr Hillam opposed the grant of interpleader relief, relying on affidavits affirmed by him on 5 March 2019, 14 March 2019 and 18 March 2019. Mr Hillam raised the following matters:

- (1) He and Ms Teeranukul dispute the validity of the charge documents on several bases, including complex factual matters concerning the circumstances in which the documents were executed.
- (2) Neither counsel gave any fee disclosure to Mr Hillam or Ms Teeranukul.
- (3) Mr Rayment QC's fee disclosure letter does not comply with statutory requirements under the *Legal Profession Act 2004* (NSW), with the result that he may not maintain proceeding for recovery of relevant legal fees until the costs have been assessed.
- (4) Neither Mr Rayment QC nor Mr Gollan have taken any action to enforce their claims against him and Ms Teeranukul. Neither of them have taken any steps to have their unpaid legal fees assessed by a costs assessor and they are out of time to do so. If they had attempted to enforce the charges earlier, Mr Hillam and Ms Teeranukul would have brought forward evidence as to why the charges are invalid.

- (5) Mr Rayment QC and Mr Gollan have not established good prospects of success on their respective claims. In particular, they have not rebutted the presumption of undue influence that applies to the charges where Mr Rayment QC and Mr Gollan were acting as lawyers for Mr Hillam and Ms Teeranukul at the time of the execution of the charges and required legal representation for an imminent court hearing.
- (6) The liquidators “are obviously in close contact and cooperation with” Mr Rayment QC and Mr Gollan and their claimed neutrality is “questionable”. The liquidators could have dismissed the claims of Mr Rayment QC and Mr Gollan.
- (7) Mr Hillam and Ms Teeranukul have substantial counter claims against Mr Rayment QC and Mr Gollan in negligence. Further, the fees claimed are excessive. For example, Mr Hillam contends that the Full Court appeal on 30 April 2012 was concluded in one day.
- (8) The liquidator had not demonstrated an expectation of being sued for the purposes of r 18.01(b)(iii).

CONSIDERATION

24 Mr Hillam did not dispute that r 18.03(1)(a) was satisfied because the liquidator was liable to him and Ms Teeranukul for amounts that, together, are the Hillam and Teeranukul distributions.

25 I was satisfied that the liquidator received competing claims about the Hillam and Teeranukul distributions: Mr Hillam claims that the amounts should be paid directly to him and Ms Teeranukul; Mr Rayment QC and Mr Gollan each claim to be entitled to enforce their security interests against the Hillam and Teeranukul distributions.

26 Mr Hillam contends that the charges are invalid and that Mr Rayment QC and Mr Gollan are not entitled to enforce the charges, or to claim the unpaid legal fees. However, in my view, the claims made by Mr Rayment QC and Mr Gollan are sufficiently arguable that they are “claims” within the meaning of r 18.01(b)(ii) and r 18.01(b)(iii) for the following reasons:

- (1) They are based on charge documents that are apparently enforceable.
- (2) It is not obvious that any non-compliance with disclosure rules renders the charge documents unenforceable or otherwise defeats the claims made.
- (3) The claims are apparently genuine, having regard to the evidence that the charge documents have been registered and Mr Rayment QC and Mr Gollan each notified the then liquidators of their respective claims through legal representatives.

(4) On the evidence before me, I did not accept that the claims are defeated by reason of delay on the part of Mr Rayment QC or Mr Gollan.

(5) It is not necessary for the liquidator to demonstrate that Mr Rayment QC and Mr Gollan have good prospects of success in order to satisfy the requirements of r 18.01(b).

27 Where it was plain that the liquidator has received competing claims about the Hillam and Teeranukul distributions, within the meaning of r 18.01(b)(ii), it was unnecessary to decide whether the liquidator's evidence also satisfied r 18.01(b)(iii).

CONCLUSION

28 In my view, this was an obvious case for the grant of interpleader relief by way of an order that the Hillam and Teeranukul distributions be paid into Court, on the basis of the proffered undertaking that Mr Rayment QC and Mr Gollan commence proceedings to vindicate their respective claims of the funds promptly. The parties who claim the moneys that will be paid into court will be able to do so in a new proceeding without the unnecessary prolongation of the liquidation.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson.

Associate:



Dated: 17 April 2019

SCHEDULE OF PARTIES

NSD 1784 of 2010

Defendants

Fourth Defendant: SARABOL TEERANUKUL

Fifth Defendant: WENTWORTH METAL GROUP PTY LIMITED (ACN 139 532 719)

Respondents to the Interlocutory process

Second Respondent: SARABOL TEERANUKUL

Third Respondent: BRIAN RAYMENT

Fourth Respondent: MATTHEW GOLLAN

Fifth Respondent: AMPLE SOURCE INTERNATIONAL LIMITED (BVICN 1575638)

Sixth Respondent: JAMES RICHARD VEREKER

Seventh Respondent: GIRALIA RESOURCES PTY LTD (FORMERLY GIRALIA RESOURCES N.L) (ACN 009 218 204)

Eighth Respondent: RED GOLD AUSTRALIA PTY LTD (ACN 147 204 457)

Ninth Respondent: PURE METALS PTY LTD (ACN 151 066 321)