

## COURT SUPERVISION OF LIQUIDATORS, ADMINISTRATORS & RECEIVERS & THE APPLICATION OF THE RULE IN *EX PARTE JAMES; RE CONDON*.

1. The immediate prompt for choosing this topic was recent involvement in *Presbyterian Church (NSW) v Scots Church Development Ltd* [2007] NSWSC 676, where Young CJ in Eq, applied *Ex parte James; re Condon*<sup>1</sup>, to order that the liquidator of a mezzanine finance company was required discharge a registered mortgage over the Scots Church in circumstances where there was no other legal entitlement to that result short of redeeming the mortgage. In so doing, his honour has effectively confirmed a previously unknown further exception to indefeasibility of title to Real Property Act land.
2. His honour the Chief Judge in Equity took the view that the *Ex parte James* exception to Torrens Title indefeasibility came under the same exception as personal equities.
3. No doubt that is the closest analogy. However, it is clear that the operation of the rule in *Ex parte James* goes beyond any remedies hitherto recognised as giving rise to personal equities. The most useful summation of the rule and its historical operation is to be found in the judgment of Campbell J in *Hypac Electronics v Mead* [2003] NSWSC 934 at [118] ff; 179 FLR 295 at 326 et seq. The authorities reviewed there demonstrate that the operation of the rule is a matter of ethics rather than law, and that the Courts impose higher standards of probity and honesty than is required by the ordinary operation of the law of the land. It is a matter of requiring conduct that is “honourable” as well as honest.
4. The approach of Young CJ in Eq was to list 7 factors as relevant to the exercise of his discretion. The most important test, he said, was to ask what a person on the Bondi Bus would say if asked whether the plaintiff should be given relief. Moreover, in his Honour’s

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<sup>1</sup> (1874) LR 9 Ch App 609.

view, the position of the general creditors of the insolvent company is not taken into account in the exercise of the discretion: “The concern is solely whether it is clearly unfair for the company to retain the enrichment at the plaintiff’s expense”.

5. In effect, this is an area where what might in some circles be characterised as “palm tree justice” is the recognised norm.
6. The scope for the operation of the rule is considerable. Obviously it applies in the Bankruptcy setting and in insolvent liquidations. The rule applies to liquidators appointed out of court because of the extent of the courts’ powers of supervision over their conduct. Relevant provisions in this regard include Corporations Act s477(6), the current equivalent of the provision mentioned by Gummow J in *Hartogen Energy Limited v Australian Gas Light Co* (1992) 36 FCR 557; 109 ALR 177; 8 ACSR 277 and Young J in *Star v Silver (No1)* (1994) 12 ACLC 600, as the means by which *Ex parte James* now operates. Other relevant provisions mentioned by Campbell J in *Hypac* are as follows:

”[185] In addition to the extensive powers of the liquidator, in [section 477](#), all being subject to the control of the Court, under [section 477\(6\)](#), the provisions of the [Corporations Act 2001](#) which govern winding up by the Court contain many provisions which confer discretions on the Court which will have a significant effect on the assets which are divisible in a liquidation, and the creditors amongst whom the assets are divisible. [Section 466\(2\)](#) and (4) confers on the Court a power to order that the costs involved in obtaining the winding up order not be paid out of the assets of the company. [Section 468\(1\)](#) and (3) confers on the Court a power to decide that a disposition of property of the company after the commencement of the winding up is valid. [Section 471B](#) enables the Court to grant leave, on such terms as it thinks fit, for litigation to be brought against the company. The Court controls the remuneration of the liquidator, under [section 473](#). [Section 477\(2B\)](#) enables the Court to approve a liquidator entering an agreement which might take more than three months to perform: *Re G A Listing & Maintenance Pty Ltd* (1994) 15 ACSR 308.

[186] Under [section 479\(3\)](#) the Court can give directions to a liquidator concerning any particular matter arising in the winding up. Under [section 480](#), the Court can release a liquidator even if not all of the property of the company has been realised, if realisation would

needlessly protract the winding up. The Court has power, under [section 482](#), to stay or terminate the winding up. [Section 484](#) enables the Court to appoint a special manager, with such powers as the Court thinks fit – a power which if exercised can affect the costs of the liquidation significantly. [Section 485](#) enables the Court to ignore claims by creditors who have not proved their debts or claims by a date which the Court fixes. [Section 562A](#) gives the Court discretionary power to decide how proceeds of reinsurance contracts should be applied, when an insurer is in liquidation. [Section 564](#) enables the Court to give preferential treatment, in distribution of assets, to creditors who have provided certain kinds of financial support to the liquidator. Under [section 568-568F](#) the Court has significant discretionary powers concerning whether or not disclaimer of onerous property is permitted, and if so on what terms. Further, [section 1318](#) and [1322\(4\)\(c\)](#) have the effect that the Court can relieve a liquidator from a liability which he would otherwise have for not performing his duties correctly.”

7. The concept of *Ex parte James* has been attributed to Chancery’s long history of carrying out administrative functions, in particular its “*parens patriae*” jurisdiction, and in the administration of estates generally. An analogy has also been made to the court’s expectation that the Crown must be a model litigant. Presumably the expectation is that those subject to court supervision will be required to adhere to at least such a standard.
8. What the *Ex parte James* cases show is that the scope for complaining about unfair treatment at the hand of a liquidator is considerable, and the courts are not restricted in granting appropriate remedies merely because the plaintiff has failed to prove a cause of action against either the company in liquidation or the liquidator.

#### **Administrators under Ch 5 Pt 5.3A.**

9. There is no reason to suppose that an Administrator appointed under ss 436A – 436C could not be made the subject of a claim based on *Ex parte James*. It might be relatively rare that such a claim would arise, because of the limited functions of the administrator and the limited time such administrations are meant to last. However Part 5.3A also covers the operation of Deeds of Company Arrangement, and there may well be occasions when the *Ex parte James* rule might be relevant to the operation of the deed of company arrangement.

10. The court's powers with respect to administrators and administrations generally are collected in Division 12 of Part 5.3A (ss 447A-447F). The "plenary" nature of the court's power in s.447A, enables relief to be fashioned if appropriate in the particular circumstances even if that requires some exception or modification to the applicable statutory provisions. The Court is also given a range of relevant powers with respect to the operation of Deeds of Company Arrangement in Division 11. The sort of discretionary considerations likely to arise on applications made under these provisions may well be informed by the cases addressing the scope and operation of the rule in *Ex parte James*.

### Receivers.

11. The position of Receivers is not so obvious. Court appointed receivers are obviously subject to Court supervision and would in general appear to qualify for application of the *Ex parte James* standards, but nobody seems to have put forward an argument to that effect yet. It may be that the strictly ethical approach does not apply because the function of a court appointed receiver is normally to preserve property which is in dispute, for the benefit of the person or persons ultimately adjudged entitled. This functional distinction does not appear to be all that far removed from the functions of a liquidator. It may be that the relevant difference is historical rather than logical, in that courts assumed greater administrative functions in liquidations. However, that may not be the last word on the subject. It may be that the right case has not come up where the argument would have legs.
12. As to Receivers appointed out of Court it seems clear that the rule does not apply to interfere with the secured creditor being entitled to the benefit of its security. However it should be noted that in the case of receivers appointed over corporate property, Courts are given a significant number of statutory functions under Ch 5 Pt 5.2 of the Corporations Act, including
- declaration whether acting validly (s 418A)
  - relief from liability (s 419(3) & 419A)

- authority to sell property the subject of prior charge (s 420B)
- approval to carry on business during winding up (s 420C)
- supervise inspection of controller's records (s 421(2))
- directions to lodge reports (s 422(3))
- power to inquire as to faithful performance of functions and make remedial orders (s423)
- give directions to controllers in relation to any matter arising or in connection (s 424)
- fix remuneration (s 425)
- enforce duty to make returns (s 434)
- remove controller for misconduct (s 434A) or who is redundant (s 434B)

13. In addition, s 1321 (which also gives a general right of appeal from decisions of liquidators and Administrators,) allows any person aggrieved by a decision of a receiver or receiver and manager to appeal from that decision to the Court. Such an appeal is a hearing de novo: *Tanning Research Laboratories v O'Brien* (1990) 169 CLR 332 at 340-1. The appeal is not confined to considering the correctness of the grounds relied on by the controller: *Murray v Donnelly* (2001) 34 ASCR 630; [2000] NSWSC 634 at [3]. There would appear to be plenty of scope to complain of unfair treatment in decisions made by Receivers under the section, although it appears to have been little used for that purpose.

14. Certainly, so far as the Court exercises its power to give directions and require receivers to faithfully perform their functions there would appear to be some scope for the Court to apply some of the high-minded ideals developed in the *Ex parte James* context. In general it is to be expected that Courts will require appropriate standards of fairness to be observed by receivers on appeals under s 1321. However contests about whether assets held by receivers should be handed back or compensated for have traditionally been dealt with as property law questions, usually as to priorities in this context, and there is no reason to suppose that approach will change where it has traditionally applied.

Dated 26 July 2007

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