FEDERAL COURT OF AUSTRALIA

Wilson v Manna Hill Mining Company Pty Ltd [2004] FCA 1663

PRACTICE AND PROCEDURE – Interveners – leave to intervene – nature of jurisdiction to allow intervention – where intervener opposed being joined at outset of matter – where issues arising at trial had been determined and orders entered – whether issues sought to be agitated by intervener should have been dealt with at trial – whether intervener seeking to assist resolution of issues already before the Court or raise new issues.

Corporations Act 2001 (Cth)

Federal Court Rules, O 6 r 17

Wilson v Manna Hill Mining Company Pty Ltd [2004] FCA 912 related
Deputy Commissioner of Taxation v Portinex Pty Ltd (2000) 34 ACSR 422 cited
United States Tobacco Company v Minister for Consumer Affairs (1988) 20 FCR 520 cited
Corporate Affairs Commission v Bradley [1974] 1 NSWLR 391 cited
Hocking v The Southern Greyhound Racing Club Inc (1993) 61 SASR 213 cited
Ku-ring-gai Municipal Council v Attorney-General (NSW) (1954) 55 SR (NSW) 65 cited
Levy v State of Victoria (1997) 189 CLR 579 cited
Australian Competition and Consumer Commission v Boral Ltd [2004] FCA 1072 cited
Earl Cowley v Countess Cowley [1901] AC 450 cited
National Australia Bank Ltd v Hokit Pty Ltd (1996) 39 NSWLR 377 cited
Harvey v Phillips (1956) 95 CLR 235 cited
Zollo v Maron (Unreported, Supreme Court of South Australia, 30 September 1994, Prior J) cited
Craven-Ellis v Canons Ltd [1936] 2 KB 403 cited
Blackwood Foodland Pty Ltd v Milne and The Superintendent of Licensed Premises [1971] SASR 403 cited
Bropho v Tickner (1993) 40 FCR 165 cited
Kabushiki Kaisha Sony Computer Entertainment v Stevens (2001) 116 FCR 490 cited
Day v Day [1957] P 202 cited
Sutherland v Take Seven Group Pty Ltd (1998) 29 ACSR 201 cited
Kazar v Duus (1998) 29 ACSR 321 cited
O'Keefe Nominees Pty Ltd v B.P. Australia Ltd; Trade Practices Commission (Intervener) (1995) 128 ALR 718 cited

WAYNE STEPHEN WILSON & ANOR v MANNA HILL MINING COMPANY PTY LTD & ORS

SAD 3004 of 2003

LANDER J
ADELAIDE
20 DECEMBER 2004

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY **SAD 3004 OF 2003**

BETWEEN: **WAYNE STEPHEN WILSON**
FIRST APPLICANT

GAYLE LAWTON
SECOND APPLICANT

AND: **MANNA HILL MINING COMPANY PTY LTD**
(ACN 075 590 644)
FIRST RESPONDENT

DAVID GERALD MOORE
SECOND RESPONDENT

GRAHAM DESMOND HAGGER
THIRD RESPONDENT

EAST ADELAIDE COMPANY PTY LTD (ACN 010 070 612)
FOURTH RESPONDENT

DENE ROBERT SPRATT
FIFTH RESPONDENT

STEPHEN JOHN EWEN
SIXTH RESPONDENT

HODGEMORE PTY LTD (ACN 092 397 629)
SEVENTH RESPONDENT

MANNA HILL GOLD PTY LTD (ACN 106 678 540)
EIGHTH RESPONDENT

JUDGE: **LANDER J**

DATE OF ORDER: **20 DECEMBER 2004**

WHERE MADE: **ADELAIDE**

THE COURT ORDERS THAT:

1. Leave to intervene is refused.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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EIGHTH RESPONDENT

JUDGE: **LANDER J**

DATE: **20 DECEMBER 2004**

PLACE: **ADELAIDE**

REASONS FOR JUDGMENT

1 On 17 August 2004, a notice of motion was filed in this Court in these proceedings by John Ronald Hart and Martin David Lewis (the Administrators) who claim to have been appointed

Administrators of the first respondent. The notice of motion has been brought as an adjunct to the principal proceedings. It is not a fresh application.

2 The notice of motion sought the following orders:

> *'1. ... an order that the Administrators be given leave to intervene pursuant to Order 6 Rule 17 of the Federal Court Rules.*
> *2. ... a declaration that on 11 February 2004 the Administrators were appointed of the First Respondent and remained Administrators until the order of Lander J made on 16 July 2004.*
> *3. ... an order that the remuneration of the Administrators as Administrators of the First Respondent pursuant to Part 5.3A of the Corporations Act ("the Act") be fixed by the Court and paid by the First Respondent pursuant to section 449E(1)(b) of the Act or alternatively section 447A of the Act.'*

3 I say that the applicants claim to be the Administrators because on 16 July 2004, after the hearing of the principal proceedings, I made, inter alia, the following declaration:

> *'10. That the purported appointments of Mr John Ronald Hart and Mr Martin David Lewis as Voluntary Administrators of the Company were void and of no effect.'*

4 I shall, however, refer to Mr Hart and Mr Lewis as the Administrators.

5 It is unnecessary to refer in detail to the other findings and orders I made in the principal proceedings. However, the following history is relevant to the motion.

The Principal Proceedings

6 The applicants in the principal proceedings sought various orders and declaratory relief directed to resolutions purportedly passed by directors of the first respondent, Manna Hill Mining Company Pty Ltd (the Company). The impugned resolutions affected share allocations, diluted the Company's assets and also changed the persons in whom effective control of the Company was vested, either as directors or otherwise.

7 The applicants claimed to be directors of the Company who had been unlawfully dismissed. Their case was that they remained directors of the Company throughout the relevant period, and that the failure of the respondents to notify them of meetings rendered those meetings invalid.

8 They also claimed that other persons had been invalidly appointed as directors of the Company and, as a result, resolutions subsequently allocating shares and implementing other business dealings were void and of no effect.

9 One such resolution claimed to be void and of no effect, was a resolution purportedly passed by directors of the Company on 11 February 2004 at 4:11pm, appointing Mr Hart and Mr Lewis as Administrators.

10 At that time, Messrs Moore, Spratt, and Ewen, all of whom were respondents in the principal proceedings, claimed to be the directors of the Company.

11 The minutes of a meeting of directors of the Company held at 4:11pm on 11 February 2004 record:

> *'Present:* *David Moore*
> *Dene Spratt (by telephone)*
> *Mr Terry Frangakis*
> *By invitation*
> *Chair:* *David Moore took the chair for this meeting*
>
> *APPOINTMENT OF ADMINISTRATORS*
>
> *IT WAS RESOLVED that, in the opinion of the Directors, the Company is insolvent or is likely to become insolvent at some future time.*
> *IT WAS FURTHER RESOLVED that Administrators be appointed to the Company pursuant to Section 436A of the Corporations Act.*
> *IT WAS FURTHER RESOLVED that the attached document titled "Instrument of Appointment of Administrators" be executed.*
>
> *CLOSURE*
>
> *There being no further business, the meeting was declared closed.*
>
> *Witnessed seal placed by Mr Moore.*
> *4:53 Terry Frangakis (signed) 11/2/04*
>
> *(signed David Moore) 4.40pm*
> *DIRECTOR(S)*
>
> *Witnessed and present when Mr Moore spoke to Mr Spratt & heard following as correct.*
> *(signed T Frangakis)*
> *11/2/04*
>
> *CHAIRMAN*
> *DIRECTOR 11/2/2004*
> *NOTE: Mr D Spratt advised the Chairman that he had talked to Mr Trevor Ainsbury (as re: the Coy & various matters. He also voted for Administrator*

> *subject to advice. Mr Moore as Chairman cast his vote on the resolution to place the Coy in administration.*
>
> *Mr Moore advised Mr Spratt that given all the issues this was was [sic] the best thing to do in the best interests of the company.'*

12 The Company seal was affixed and the minutes, for no apparent reason, were attested to by Mr Frangakis as being correct. It is unclear why Mr Frangakis was present at the meeting, let alone why he signed the minutes: he was not a director, officer or employee of the Company.

13 In the principal proceedings I found that Mr Spratt and Mr Ewen had not been validly appointed as directors. I also found that the applicants had been and were directors of the Company, and their absence from the meeting and the failure of the respondents to provide them with notice of the meeting, invalidated the resolution.

14 The meeting was invalidly convened and lacked a quorum. It was therefore invalid and any resolution passed, void and of no effect. For those reasons, I made the declaration referred to in par [3].

The Appointment of the Administrators

15 Two factual arguments were put by the applicants on the hearing of this motion in opposition to the application by the Administrators for leave to intervene.

16 First, the Administrators had notice immediately after their appointment that the validity of the resolution appointing them as administrators was challenged.

17 Secondly, and in any event, the Administrators ought not to have acted upon the resolution purportedly appointing them as administrators because the minute which was provided to the Administrators disclosed matters which should have put them on notice of the need to inquire into the regularity or validity of the resolution.

18 The Administrators were approached by Mr Moore, a director of the Company, on 11 February 2004.

19 At 4:11pm that day, the directors of the Company purportedly passed the resolution set out above and attached the company seal to an Instrument of Appointment of Administrators.

20 A Consent of Administrators to Act was provided the same day, and accepted by Mr Moore at 6:15pm.

Notice of the relief claimed

21 One of the Administrators, Mr Hart, subsequently caused an ASIC search to be conducted in respect of the Company. ASIC's records showed that the directors of the Company were Messrs Moore, Spratt and Ewen.

22 On 12 February 2004, Mr Hart received a facsimile from Iles Selley, solicitors for the applicants annexing various interlocutory orders made by Selway J on 6 and 10 February 2004 which relevantly provided:

> *'1. The second, fifth and sixth respondents, whether by themselves or their servants or agents be restrained by way of interim injunction until 5pm on the 17th day of February 2004 from:*
> *1.1. issuing, allotting, transferring, charging, altering or in any way dealing with shares in or the share capital of the first respondent;*
> *1.2. selling, transferring, charging, or in any way dealing with the assets of the first respondent other than by way of discharging trade debts reasonably and properly incurred by the first respondent in the ordinary course of business;*
> *1.3. appointing or effecting any changes in the office-holders or shareholders of the first respondent.*
> *...'*

23 Mr Iles (the applicants' solicitor) telephoned Mr Hart's office on 12 February 2004. Mr Iles says in his affidavit of 22 November 2004 that he advised Mr Hart's office of the nature of the dispute in the principal proceedings. He told an officer in the employ of Mr Hart that, in Mr Iles' clients' view, Mr Hart should not accept any appointment as Administrator of the Company.

24 Mr Iles also said that he considered the appointment of the Administrators to be in breach of Selway J's orders.

25 Mr Iles also advised Mr Hart's office that, contrary to the minute of 11 February 2004, the Company was solvent. It had the financial backing of the applicant Mr Wilson who was in a position to ensure the Company paid all its debts.

26 Mr Hart was also contacted directly by the applicants' junior counsel, who also told Mr Hart that he should not accept an appointment as Administrator.

27 On 13 February 2004, the Administrators' solicitors received a facsimile from Iles Selley in the following terms:

> *'We reiterate that our clients, two of the directors of Manna Hill Mining Company Pty Ltd, dispute the validity of your clients' appointment as administrators of the above company. In our view, their appointment is invalid. In our view, the "appointment" proceeded on the basis of a "resolution" of an invalidly constituted meeting of the "directors" of the company and in clear breach of the orders made by Justice Selway in the Federal Court on 6 February 2004.*
>
> *The persons who proceeded to pass the "purported" resolution of 11 February 2004 were attempting to do two things – prevent the litigation before Justice Lander on 17 February 2004 proceeding and, secondly, seeking to put beyond the reach of our clients' [sic], Manna Hill Mining Company Pty Ltd and the Court the last remaining assets of that company (assuming that earlier resolutions of January 2004 for the transfer of the company's Mining Leases were effective (which we dispute)).*
>
> *Manna Hill Mining Company Pty Ltd is not insolvent.*
>
> *Our clients, in particular, our client Mr Wayne Wilson, stands ready to support this company in respect of all lawful and legitimate debts. Our client (and the Wilson Family Trust of which he is Trustee) is the principal creditor of this Company. His ongoing support in relation to the affairs of this company has been maintained for some time.*
>
> *The suggestion in your letter of 13 February 2004 that this company is insolvent stands in stark contrast to the information contained in the administrators' circular to creditors wherein they indicated that it was "business as usual" and that the affairs of the company remained to be investigated.*
>
> *Your clients' decision to press on in this administration in the light of the fact that they know their actions to be facilitative of a breach of the Federal Court's orders of 6 February 2004 is surprising to say the least.*
>
> *As we have said before, our clients will hold your clients fully and personally accountable for any loss or damage which they suffer as a consequence of your clients' decision to proceed in relation to what is clearly an invalid appointment.*
>
> *We will apply to Justice Lander on 17 February 2004 for orders seeking, inter alia, the termination of the administration.*

We will oppose any claim by your clients for remuneration out of the assets of the company.

We will seek costs.

...'

28 Mr Iles said that the purpose of this letter was to place the Administrators on notice that the applicants would oppose any attempt by the Administrators to recover their costs of the administration and to indicate that they intended to hold the Administrators fully accountable for any loss or damage sustained by the Company as a result of the Administrators accepting the appointment.

29 The letter reiterated that the Company was not insolvent and that the Adminstrators' acceptance of the appointment was in breach of the orders of Selway J.

30 Importantly, the letter also served to put the Administrators on notice of the relief the applicants would claim in the principal proceedings.

31 The applicants argued that there could be no doubt that after receipt of that letter the Administrators had notice that the applicants would apply for a declaration that the resolution appointing the Administrators was invalid.

32 The Administrators argued that the only relief they were aware would be sought was an order terminating the administration under s 447A of the *Corporations Act 2001* (Cth) (the Act). They argued that it followed that they were justified in accepting and acting upon the appointment because there was no challenge to the validity of the appointment. That contention is unsustainable on any reading of Mrs Iles' letter of 13 February 2004.

33 For reasons which follow, in my opinion the Administrators had notice that the validity of the resolution appointing them as Administrators was challenged and therefore they should have brought action for a determination of the regularity of their appointment.

34 Mr Hart deposed, in his affidavit of 16 August 2004 in support of the notice of motion, that as at 11 February 2004, he and Mr Lewis considered themselves to be the Administrators of the Company. They took control of the Company's business, property and affairs in accordance with s 437A of the Act.

35 Mr Hart said further:

> *'15. Our understanding of the applicants' position was that they accepted that myself and Lewis had been appointed as administrators of Manna Hill albeit by an invalid resolution and sought an order that because the directors who passed a resolution were either not properly appointed or were only some of the directors of Manna Hill that the resolution should be declared void and of no effect and that the Court should declare that the administration by myself and Lewis be at an end at a date and in a manner to be determined by the Court pursuant to the provision of section 447A of the Act.'*

36 The Administrators therefore, he said, began discharging their duties under the Act.

37 Assuming that was the understanding of the Administrators, they must have known, at the very least, that the applicants, if successful in the principal proceedings, would oppose any order that the Company pay the Administrators' costs of the administration.

38 The Administrators convened the first meeting of creditors on 18 February 2004. No committee of creditors was appointed at that meeting and Mr Hart and Mr Lewis remained 'the Administrators'.

39 On 20 February 2004, the applicants applied for an extension of time within which the Administrators had to convene the second meeting of creditors for 60 days. The period was again extended on 24 March 2004 and 19 May 2004.

40 During this period, the Administrators carried out their normal functions in pursuance of the statutory objectives of an administration. Mr Hart says that as a consequence:

> *'24. Myself [sic] and Lewis, as administrators of Manna Hill, have incurred fees and expenses in carrying out our duties as administrators and seek a declaration that we are entitled to reimbursement:*
>
> *24.1 pursuant to section 449E(1)(b) of the Act on the basis that the administration commenced on 11 February 2004 and continued until the order of the Learned Trial Judge on 16 July 2004, or alternatively*
>
> *24.2 pursuant to the line of authority discussed by Young J in Sutherland v Take Seven (1998) 29 ACSR 201 at 204.15, or alternatively*
>
> *24.3 on the basis referred to by Merkel J in Kazar v Duus (1998) 29 ACSR 321 at 342.40.'*

41 It may not have been unreasonable for Mr Hart to have assumed from the terms of the facsimile of 13 February 2004 that the applicants were only seeking an order that the administration be terminated. Mr Iles, in that facsimile, said that the applicants would '… apply to Justice Lander on 17 February 2004 for orders seeking, inter alia, the *termination* of the administration' (emphasis added).

42 The Administrators might have construed that statement as evincing an intention on Mr Wilson and Ms Lawton's part to seek an order under s 447A that the administration be terminated because the Company was solvent. An order of that nature might not have deprived the appointment of validity *ab initio*.

43 However, the letter also made it clear that the applicants considered the resolution appointing the Administrators to be invalid. I repeat what Mr Iles wrote in the first paragraph of his letter:

> *'We reiterate that our clients, two of the directors of Manna Hill Mining Company Pty Ltd, dispute the validity of your clients' appointment as administrators of the above company. In our view, their appointment is invalid. In our view, the "appointment" proceeded on the basis of a "resolution" of an invalidly constituted meeting of the "directors" of the company and in clear breach of the orders made by Justice Selway in the Federal Court on 6 February 2004.'*

44 In those circumstances, the better inference is that the Administrators had notice that relief was sought in terms of the declaration eventually made.

45 I find that from 13 February 2004 the Administrators had been put on notice that the applicants:

(1) disputed that the Company was insolvent;

(2) asserted that the meeting at which the resolution appointing the Administrators was invalidly convened;

(3) asserted that the resolution appointing the Administrators was invalid;

(4) asserted that the resolution had been passed for collateral purposes;

(5) asserted that the resolution was in contravention of orders made by Selway J; and

(6) would oppose any claim for remuneration by the Administrators.

46 In any event, the Adminstrators certainly became aware of that fact on 17 February 2004 in circumstances discussed below.

Ex facie validity of the appointing resolution

47 The applicants' second ground of opposition was that the Administrators were wrong to assume they had been validly appointed, irrespective of whether they had been given notice that the resolution was impugned.

48 The applicants argued that the Administrators had a duty to inquire into the validity of the resolution, particularly in light of what the applicants said were anomalies on the face of the minute.

49 Mr Hart said that he was obliged under s 129 of the Act to assume that the directors had been validly appointed and it therefore followed that the resolution appointing the Administrators was valid.

50 He said that in considering his appointment he had relied on the ASIC register which, when searched, revealed that there were three directors of the Company: Messrs Moore, Spratt and Ewen.

51 Mr Moore was present on 11 February 2004 and it is recorded he assumed the role of Chairman. It is recorded that Mr Frangakis was present by invitation. He was not a director. His presence is unexplained. Mr Spratt is noted on the minute as being present by telephone.

52 There is, however, no mention of Mr Ewen being present, nor is their anything which indicates why he was absent.

53 The minute also suggests that Mr Spratt wished to take further advice before giving his formal assent to the resolution. It is recorded that Mr Moore also purported to exercise his casting vote as Chairman. Why he did so is unclear. Clearly, no casting vote was necessary if Mr Spratt had consented to the resolution. No casting vote was necessary even if Mr Spratt had not consented to the resolution.

54 The minute does not record Mr Spratt's assent to the resolution. In any event, Mr Moore was not entitled to exercise his casting vote except in accordance with the Company's constitution. The Administrators did not, apparently, have access to the Company's constitution.

55 The applicants argued that the minute was such that the Administrators were not entitled to rely on the resolution as being prima facie regularly made.

56 They say that the discrepancies on the face of the minute should have prompted the Administrators to bring an application to this Court for a determination as to the validity of their appointment: s 447C. Section 447C provides:

> *'**447C(1)** If there is doubt, on a specific ground, about whether a purported appointment of a person as administrator of a company, or of a deed of company arrangement, is valid, the person, the company or any of the company's creditors may apply to the Court for an order under subsection (2).*
>
> ***447C(2)** On an application, the Court may make an order declaring whether or not the purported appointment was valid on the ground specified in the application or on some other ground.'*

57 The applicants argued that the failure of the Administrators to seek an early determination under that section is a reason for refusing this application for leave to intervene.

58 In *Deputy Commissioner of Taxation v Portinex Pty Ltd* (2000) 34 ACSR 422 at 423 Austin J identified the duty of an administrator to promptly inquire into the validity of his or her appointment after receiving notification of the appointment:

> *'A voluntary administrator has a duty of care which has been recognised in the cases. In my opinion, the discharge of that duty of care requires the voluntary administrator to satisfy himself or herself, immediately after appointment, that the resolution of the directors under s 436A authorising the appointment appears on the face of the minute which records it to be a valid resolution (or if there is not yet any minute of the resolution, that the facts and circumstances appear on their face to amount to a valid resolution). Additionally, the administrator should satisfy himself that the instrument of appointment, extended pursuant to the resolution of the board, appears on its face to be valid.'*

59 There can be no doubt, in my opinion, that an administrator should satisfy himself or herself that he or she has been regularly appointed. An administrator, who becomes the agent of the company, has very wide powers. An administrator has the control of and may carry on the

company's business, property and affairs. He or she can terminate or dispose of that business and dispose of any of the property: s 437A. The administrator may perform any function and exercise any power that the company or its officers could have performed if the company were not under administration: s 437A(1)(d).

60 An administrator's appointment suspends the powers of the company's officers: s 437C. An administrator can remove a director from office or appoint a person as a director: s 442A.

61 Clearly, the company's officers, its members and its creditors can expect that an administrator would satisfy himself or herself of the regularity of the appointment before entering into the administration.

62 That does not mean that an administrator must undertake a comprehensive analysis of the historical records of the company. Austin J said further in *Deputy Commissioner of Taxation v Portinex Pty Ltd* at 423:

> *'It cannot be correct that the administrator has a duty, upon appointment, to trawl back through the records of the company to ensure that there is no defect prior to the resolution of appointment, if the resolution appears ex facie to be valid.'*

63 However, where the minute containing the appointing resolution, the appointing resolution or the circumstances surrounding the passing of the resolution or any other circumstances particular to the company involved contain some feature which ought to put an administrator on notice, the duty to inquire will oblige the administrator to carry out whatever reasonable enquiries are necessary to satisfy the administrator that the appointment has been validly and regularly made. What is reasonable will depend upon the facts and circumstances of each individual case.

64 In my opinion the applicants' submission that the minute disclosed matters which should have alerted the Administrators to the possibility of invalidity should be upheld. Apparently, the Administrators only inquiry was to search ASIC's files to determine who had been recorded as directors. No inquiry was made as to whether the meeting at which the resolution was passed was validly convened; who was present at the directors meeting; in particular whether Mr Spratt was present; whether Mr Ewen had been advised of the meeting; why Mr Frangakis was present; who had voted for the resolution; and why the Chair had exercised a casting vote. All of these matters were relevant to the Administrators satisfying themselves

about the validity of the resolution. All of those inquiries could have been made by contacting the three directors.

65 The applicants have established that the Administrators failed to take reasonable steps to satisfy themselves, immediately after their appointment, that the meeting at which the resolution was passed was validly convened or that the resolution purportedly appointing them as Administrators was valid.

66 The applicants have also established that, at least by 13 February 2004, the Administrators were on notice that the applicants asserted, at least, that the meeting was invalidly convened and that the resolution was invalid. They were also on notice of the applicants' other complaints.

67 The Administrators could have, but did not, apply to the Court seeking a declaration whether or not the purported appointment was valid.

68 If the Administrators' application requires the exercise of a discretion those three matters must weigh against a favourable exercise.

69 There are further matters which would suggest that the application should be dismissed.

Application to join the Administrators

70 The principal proceedings were called on for hearing on 17 February 2004 when the applicants obtained leave to amend the relief sought in their application in the following terms:

> *'7P. A declaration that the resolution purportedly passed at a meeting of directors of Manna Hill Mining Company Pty Ltd on 11 February 2004 to appoint Mr John Ronald Hart and Mr Martin David Lewis as administrators of Manna Hill Mining Company is void and of no effect.*
>
> *7Q. An order pursuant to s 447 of the Corporations Act 2001 (Cth) that the administration of the first respondent is to end.'*

71 The Administrators' counsel was present when leave was sought and obtained.

72 At the same hearing the applicants applied to join the Administrators in the principal proceedings as the ninth and tenth respondents, and to have the administration stayed pending the outcome of the trial of the principal proceedings.

73 The applicants submitted that it would be appropriate for the Administrators to be joined because, in the event their case succeeded, it was likely that the resolution appointing the Administrators would be held to be void.

74 The application was opposed by the Administrators' counsel, Mr Wilkinson, who argued the Administrators should not be joined because they could not make any worthwhile contribution to the resolution of the issues before the Court and they would, in any event, abide the orders of the Court. Mr Wilkinson said:

> *'We oppose that, your Honour. We say it's not appropriate to join us as a party. There's nothing in order 6 that would enable it to do it, and certainly not in these proceedings. The two administrators are of course officers of the court by reason of having to be liquidators, and they would obviously – whatever orders were made in relation to the company, would carry that out. There is just no point in joining them as parties.'*

75 At that hearing, counsel for the Administrators acknowledged that the validity of their appointment was an issue and that the Administrators could seek a declaration as to the validity of their appointment under s 447C of the Act.

76 Quite clearly, the Administrators had notice that the applicants disputed their appointment. They were put on notice by the applicants that any application by the Administrators for remuneration for costs incurred in carrying out the administration would be opposed. They nonetheless maintained their submission that they ought not be joined, and that an order staying the administration should not be made.

77 Given the Administrators' objections, no order was made joining them in the proceedings.

The Result in the Principal Proceedings

78 On 14 July 2004, I published my reasons for decision in the principal proceedings and directed the applicants to bring in short minutes of order to reflect those reasons.

79 The matter was adjourned to 16 July 2004 for this purpose.

80 The Administrators were represented on that occasion and requested that the applicants' solicitors provide them with the draft short minutes of orders which the applicants intended to seek.

81 Mr Agresta, one of the applicants' solicitors deposed, in an affidavit sworn 23 November 2004, that on 15 July 2004 he sent to the solicitors for the Administrators draft minutes of orders. The orders sought included the following:

> *'9 That the resolutions purporting to place the Company in Voluntary Administration on 11 February 2004 were void and of no effect.*
>
> *10 That the purported appointments of Mr John Ronald Hart and Mr Martin David Lewis as Voluntary Administrators of the Company were void and of no effect.'*

82 On 16 July 2004 when the matter was again called on, the Administrators were represented by counsel who sought leave to appear to address the issue now before me. I allowed the Administrators to appear but indicated that any application the Administrators had for remuneration would need to be determined at a later stage, given that they were not parties and had opposed the joinder application.

83 I subsequently made an order in the terms set out in par [3] above.

84 The orders were settled and sealed that day and, for the purposes of O 36 of the Federal Court Rules, were finally entered.

85 The orders, subject to costs orders subsequently made by me on 30 July 2004, finally determined the issues between the parties to the principal proceedings.

86 It is in those circumstances that the Administrators now seek leave to intervene.

Leave to Intervene

87 Intervention must be distinguished from granting a party leave to act as amicus curiae. This Court may hear an amicus curiae if the Court considers it to be in the interests of justice: *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520. It is for the Court to determine whether it will be assisted by a friend of the Court. No one has the right to insist upon appearing as amicus curiae: *Corporate Affairs Commission v Bradley*

[1974] 1 NSWLR 392 at 399. An amicus curiae does not become a party to the proceedings. The role of an amicus curiae is restricted to addressing the Court on an issue upon which the Court will be assisted. It is doubtful that an amicus curiae could tender evidence, call witnesses, or cross-examine witnesses: *Blackwood Foodland Pty Ltd v Milne and The Superintendent of Licensed Premises* [1971] SASR 403 at 411; *Bropho v Tickner* (1993) 40 FCR 165 at 172-173; *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2001) 116 FCR 490. In *Corporation Affairs Commission v Bradley*, Hutley JA said at 398-399:

> *'An amicus curiae has been permitted to argue a case:* Morelle Ltd. v. Wakeling *[1955] 2 Q.B. 379. The Attorney-General appeared as amicus curiae to argue among other things that a previous decision of the court had been given per incuriam. This is a case where the Crown sought to be made a party, which application was refused. There is no definition in this case of the role of an amicus curiae, but Jowitt's* Dictionary of English Law *at p. 114 defines amicus curiae as follows: "A friend of the Court, that is to say a person, whether a member of the Bar not engaged in the case or any other bystander, who calls the attention of the Court to some decision, whether reported or unreported, or some point of law which would appear to have been overlooked". A similar definition appears in Black's* Law Dictionary, *4th ed., an American publication, and a detailed statement of the position of an amicus curiae is set out in the judgment of the appellate court of Indiana in* Re Perry *(1925) 148 N.E. Rep. 163, at p. 165 where the court said: "Courts undoubtedly have the right to allow an attorney, or other person, to appear as a friend of the court in a case, to act as an adviser of the court, and to make suggestions as to matters appearing upon the record, or in matters of practice. An amicus curiae has no rights in the matter. He can file no pleadings or motions of any kind. He can reserve no exception to any ruling of the court, and of course cannot prosecute an appeal. It has been held in this state that an amicus curiae may, on leave, file briefs, argue the case, and introduce evidence." The last sentence is not consistent with the law of this State, and there is no provision for an amicus curiae making any contribution to the record.'*

88 An amicus curiae is not entitled to an order for costs: *Blackwood Foodland Pty Ltd v Milne and The Superintendent of Licensed Premises* at 411.

89 Because an amicus curiae is not a party, an amicus curiae cannot appeal.

90 In *Day v Day* [1957] P 202 at 212, Willmer J observed that the Queen's Proctor had no right of appeal because the Queen's Proctor was not a party to the proceedings. Of course, the Queen's Proctor under the then *Matrimonial Causes Act 1950* had a statutory function.

91 In *Corporate Affairs Commission v Bradley*, Hutley JA contrasted the position of an intervener at 396:

> *' A person accepted as an intervener becomes a party to the proceedings with all the privileges of a party. Thus he can appeal, tender evidence and participate fully in all aspects of the argument. His position is quite different from that of an amicus curiae. Interveners have been allowed to appeal. Thus the Attorney-General of the Commonwealth appealed to the Privy Council in* Attorney-General of the Commonwealth of Australia v. The Queen *(the Boilermakers' case), though he was only an intervener in* R. v Kirby; Ex parte Boilermakers' Society of Australia *in the High Court. See also* Attorney-General for Ontario v. Winner.' (Footnotes omitted.)

92 Intervention by a non-party was not known in the common law or in equity. It was permitted in ecclesiastical law and by statute in matrimonial law. Intervention was permitted in the Probate and Admiralty jurisdictions: *Corporate Affairs Commission v Bradley* at 397. In general, the jurisdiction to allow non-parties to intervene has been limited.

93 A party may have a statutory right to intervene. Section 78A of the *Judiciary Act 1903* (Cth) gives the Attorneys-General of the Commonwealth and the States the right to intervene in any court in any proceedings 'that relate to a matter arising under the Constitution or involving its interpretation'.

94 In *Levy v State of Victoria* (1997) 189 CLR 579 at 601, Brennan CJ discussed the provenance of the jurisdiction to grant leave to parties apart from the Attorneys-General to intervene in the High Court in constitutional matters:

> *'None of the constitutional or statutory provisions which confers jurisdiction on this Court contains an express grant of jurisdiction to allow non-party intervention save s 78A of the Judiciary Act 1903 (Cth). If there be jurisdiction apart from s 78A to allow non-party intervention, it must be an incident of the jurisdiction to hear and determine the matters prescribed by the several constitutional and statutory provisions which confer this Court's jurisdiction. It is of the nature of that jurisdiction that it should be exercised in accordance with the rules of natural justice. Accordingly, its exercise should not affect the legal interests of persons who have not had an opportunity to be heard. Therefore, a non-party whose interests would be affected directly by a decision in the proceeding – that is, one who would be bound by the decision albeit not a party – must be entitled to intervene to protect the interest liable to be affected. This, indeed, is the explanation of many of the cases in which intervention has been allowed in probate and admiralty cases and in other cases where an intervener and a party are privies in estate or interest.'*

95 As the Chief Justice went on to explain, the possibility of some indirect effect on some legal right flowing from an order of the Court would not necessarily entitle a non-party to intervene: *Australian Competition and Consumer Commission v Boral Ltd* [2004] FCA 1072 at [11]. The jurisdiction of that Court to allow intervention is expressed more narrowly. Brennan CJ continued at 603:

> *'Nevertheless, an indirect affection of legal interests enlivens no absolute right to intervene. The assumption is that the Court will determine the law correctly, so that the indirect affection of an applicant's legal interest is simply the inevitable consequence of the exercise by this Court of its jurisdiction as the final Court in the Australian hierarchy. On that assumption, no undue prejudice is suffered by a person whose interests will be affected by the decision.'*

96 Where a person having the necessary legal interest to apply for leave to intervene can show that the parties to the particular proceeding in the High Court may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene.

97 Brennan CJ was only concerned with the High Court's power to permit a non-party to intervene in constitutional matters. Nothing he said can, in my opinion, support the proposition that this Court, or any other Court below the High Court, has some inherent jurisdiction to permit non-parties to intervene.

98 Intervention by the State Attorney-Generals developed with regard to the reserved powers doctrine and notions of legislative trespass by the Commonwealth into State matters: *Corporate Affairs Commission v Bradley* at 399-400.

99 There are other statutes which provide a right to a party to intervene (e.g. s 12 *Administrative Decisions (Judicial Review) Act 1977* (Cth)) but they need not be further addressed.

100 The applicants applied to join the Administrators pursuant to O 6 r 8. They sought to make the Administrators parties to ensure that all matters in dispute were determined. That application was successfully resisted by the Administrators. Order 6 rule 8 is not a rule relating to intervention but joinder in the circumstances contemplated in the rule: *O'Keefe Nominees Pty Ltd v B.P. Australia Ltd; Trade Practices Commission (Intervener)* (1995) 128 ALR 718 at 722 (Spender J). That rule has no application after the principal proceedings

have been determined. If there is jurisdiction to make the order sought it must be in some other rule.

101 The Federal Court of Australia has no inherent power to allow an intervener to become a party: *Corporation Affairs Commission v Bradley* at 398.

102 The Federal Court's jurisdiction to allow intervention derives from O 6 r 17 of the Federal Court Rules, which provides:

> ***'Interveners***
>
> ***17*** *(1) The Court, at any stage of a proceeding, may give leave to a person (the* ***intervener****) to intervene in the proceeding, on the terms and conditions, and with the rights, privileges and liabilities (including liabilities for costs), determined by the Court.*
>
> *(2) In deciding whether to give leave, the Court must have regard to:*
>
> *(a) whether the intervener's contribution will be useful and different from the contribution of the parties to the proceeding; and*
>
> *(b) whether the intervention might unreasonably interfere with the ability of the parties to conduct the proceeding as they wish; and*
>
> *(c) any other matter that the Court considers relevant.'*
>
> *'(3) The role of the intervener is solely to assist the Court in its task of resolving the issues raised by the parties.'*

103 In *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377 at 381, Mahoney P identified four salient considerations when considering an application for leave to intervene.

> *'Whether leave to intervene should be granted must be decided having regard to all the circumstances of the instant case. However, ordinarily four matters at least require consideration: whether the intervention is apt to assist the Court in deciding the instant case; whether it is in the parties' interest to allow the intervention; whether the intervention will occupy time unnecessarily; and whether it will add inappropriately to the costs of the proceeding.'*

104 However, that statement must be read having regard to the specific matters which must be addressed by the Court when considering an application to intervene under O 6 r 17. Order 6 rule 17 requires the Court to have regard to the matters in O 6 r 17(2) in the context of the purpose for which intervention is allowed (O 6 r 17(3)). If those criteria are made out then the Court can, in the exercise of its discretion, give leave to a party to intervene subject to whatever terms are appropriate.

105 Order 6 rule 17(1) points up the differences between an amicus curiae and an intervener. An intervener is permitted to intervene 'on the terms and conditions, and with the rights, privileges and liabilities (including liability for costs) determined by the Court': O 6 r 17(1).

106 There are two reasons why the Administrators should not be joined as interveners under O 6 r 17. First, they seek to agitate issues of their own against one party. They do not seek to assist the Court in resolving the issues between the parties. Secondly, the principal proceedings have been completed.

107 The Court is required to consider each of the matters in O 6 r 17(2) before deciding whether to give leave to a party to intervene but, in doing so, must have regard to the intervener's role: O 6 r 17(3). Order 6 rule 17(3) limits the intervener's role solely to one of assisting the Court in its task of resolving the issues raised by the parties. The issues must be issues between the parties apart from the intervener.

108 In *Hocking v The Southern Greyhound Racing Club Inc* (1993) 61 SASR 213 at 216, King CJ observed that:

> *'Neither the general concept of intervention as understood in the jurisdictions in which it exists, nor the words of the section "right to intervene and be heard in", provide support for the argument that the [intervener] may raise issues not raised between the original parties…'*

109 The Administrators seek the determination of issues that were not raised by the parties and were not issues between the parties. The issues sought to be agitated by the Administrators should have been dealt with at the trial of the principal proceedings.

110 The Administrators are not seeking to intervene in these proceedings for the purpose of assisting the Court in its task of resolving the issues raised by the parties.

111 The issues arising in the principal proceedings have been finally determined and final orders entered. The orders have been sealed. All issues between the parties have been determined. The intervener could not assist the Court to resolve issues already resolved.

112 The criteria in O 6 r 17(1) must be understood in the light of the limited role that O 6 r 17(3) permits of an intervener. Where the dispute between the parties has been resolved by

judgment no intervention could be permitted. The issues between the parties have already been determined.

113 For those reasons, it is not strictly necessary to consider the criteria in O 6 r 17(2). However, if an examination of those issues were carried out it would support the conclusion that O 6 r 17 has no application in this case. This is especially so when regard is had to O 6 r 17(2)(b) because the action is at an end.

114 In effect, the Administrators now seek to agitate issues which could have been agitated in the principal proceedings if the Administrators had consented to be joined; in separate proceedings under s 447C of the Act; or could still be agitated in separate proceedings by an action against the Company for the Administrators' costs.

115 The Administrators claim that they are entitled to their remuneration on any one of three bases. First, because the declaration I made does not make the resolution void *ab initio*. It was said a curative order might be made. Secondly, because a person appointed as an officer of a company, such as an administrator, may recover reasonable remuneration for work done of incontrovertible value to the company: *Craven-Ellis v Canons Ltd* [1936] 2 KB 403; *Sutherland v Take Seven Group Pty Ltd* (1998) 29 ACSR 201 at 204. Thirdly, on a quantum meruit: *Kazar v Duus* (1998) 29 ACSR 321 at 342.

116 The first basis suggests that I have power to make orders not sought by the parties after final orders have been made.

117 If I were to consider the second and third bases for remuneration as a quantum meruit claim or as a claim for 'reasonable remuneration for work done of incontrovertible benefit to the Company' following the approach in *Craven-Ellis v Canons Ltd*, the Administrators would have to put on evidence of costs and benefits and the parties to the principal proceedings would need to be given time to respond. However, as Mr Wilkinson acknowledged, there is no evidence before the Court as to the quantum of costs incurred by the Administrators to date or the benefits of the Administrators services to the Company.

118 If I am wrong about my conclusions that the Administrators cannot bring themselves within O 6 r 17(1) and I should exercise my discretion under that rule, because of the factual findings made, I would exercise my discretion adversely to the Administrators.

119 Having regard to the provisions in O 6 r 17 the Administrators' application must be refused.

120 That is not to say that the Administrators are not entitled to their costs. In my opinion, however, this is not the appropriate proceeding for the motion to be heard.

121 Leave to intervene is refused.

I certify that the preceding one hundred and twenty-one (121) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lander.

Associate:

Dated: 20 December 2004

Counsel for the Applicants and First Respondent:	M Abbott QC with D Agresta
Solicitor for the Applicants and First Respondent:	Iles Selley
Counsel for the Second to Eighth Respondents:	No appearance
Counsel for the Administrators:	J Wilkinson
Solicitor for the Administrators:	Cowell Clarke
Date of Hearing:	25 November 2004
Date of Judgment:	20 December 2004