

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 9) [2019] FCA 287

File number: NSD 1784 of 2010

Judge: **GLEESON J**

Date of judgment: 7 March 2019

Catchwords: **BANKRUPTCY AND INSOLVENCY** – application for judicial advice as to conduct of liquidation – where liquidator seeks order pursuant to s 488(2) *Corporations Act 2001* (Cth) to distribute surplus – whether to grant special leave – leave granted

Legislation: *Corporations Act 2001* (Cth) s 488(2)
Federal Court (Corporations) Rules 2000 (Cth) r 7.9
Corporations Regulations 2001 (Cth) reg 5.6.77

Cases cited: *Cherry v Boulton* [1839] Eng R 1099; (1839) 41 ER 171
In the matter of Hawden Property Group Pty Ltd (in liq) [2018] NSWSC 481; (2018) 125 ACSR 355
In the matter of Klaus Maertin Pty Ltd (in liq); Maertin v Klaus Maertin Pty Ltd [2009] NSWSC 618; (2009) 232 FLR 239

Date of hearing: 1 February 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: 21

Counsel for the Applicant: Dr C Mantziaris

Solicitor for the Applicant: HWL Ebsworth

Counsel for the First

Respondent/Second Defendant: The Second Defendant/First Respondent appeared in person

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: **7 MARCH 2019**

THE COURT ORDERS THAT:

1. Pursuant to reg 5.6.71(1) of the *Corporations Regulations 2001*, the requirement that this order annex a schedule in accordance with Form 551 be dispensed with.

2. Pursuant to s 488(2) of the *Corporations Act 2001* (Cth), the liquidator be granted special leave to distribute the surplus assets of the first defendant to the contributories of the first defendant in accordance with annexure “A” to these orders.

THE COURT NOTES THAT:

3. The amounts identified as “Z” in annexure “A” to these orders is to be calculated in accordance with the affidavit of Michael Andrew Owen affirmed 12 February 2019.

ANNEXURE "A"

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 + \$6,753.96) <i>minus</i> (\$67,539.63 + \$6,753.96 + Z)] <i>minus</i> (\$85,659.07 + 15,000.00/2)
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 + \$6,753.96) <i>minus</i> (\$67,539.63 + \$6,753.96 + Z)] <i>minus</i> (\$85,659.06 + \$15,000.00/2)
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 + \$6,753.96) <i>minus</i> (\$67,539.63 + \$6,753.96 + Z)]
Red Gold 283 Rokeby Road Subiaco WA 6008	3.2207%	Nil	3.2207% x [(\$843,866.00 + \$171,318.13 + \$15,000.00 + \$6,753.96) <i>minus</i> (\$67,539.63 + \$6,753.96 + Z)]
Giralia 300 Murray Street Perth WA 6000	3.0944%	Nil	3.0944% x [(\$843,866.00 + \$171,318.13 + \$15,000.00 + \$6,753.96) <i>minus</i> (\$67,539.63 + \$6,753.96 + Z)]
TOTAL	100%	\$186,318.13	(\$843,866.00 + \$171,318.13 + \$15,000.00 + \$6,753.96) <i>minus</i> (\$67,539.63 + \$6,753.96 + Z)

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

REASONS FOR JUDGMENT

GLEESON J:

1 In *Ample Source International Limited v Bonython Metals Group Pty Limited (in liquidation)*,
in the matter of *Bonython Metals Group Pty Limited (in liquidation) (No 8)* [2018] FCA 1614
("Ample Source (No 8)"), I made directions addressing:

- (1) the liquidator's obligation to reimburse a litigation funder (Pure Metals Pty Ltd); and
- (2) the application of the rule in *Cherry v Boulton* [1839] Eng R 1099; (1839) 41 ER 171
in relation to amounts owed to the liquidation fund by two of the contributories of the
company, Mr Hillam (the second defendant) and Ms Teeranukul (the fourth defendant).

2 The liquidator has determined that there is a surplus available for distribution.

3 The liquidator now seeks an order pursuant to s 488(2) of the *Corporations Act 2001* (Cth)
("Act") granting him leave to distribute the surplus in the manner set out in table 3A of the
liquidator's affidavit affirmed on 12 February 2019. The order is sought with a view to the
liquidator making final calculations for the distribution of the surplus to be approved by the
Court at a final hearing. In table 3A, "G" signifies an amount of GST referred to in para 12 of
the affidavit and calculated as \$6,753.96, and "Z" signifies the sum of estimated future fees to
finalise the liquidation from 1 December 2018 and estimated disbursements, taking account of
GST payments and GST credits.

4 The table has been revised to reflect the orders made on 1 February 2019, that:

- (1) The liquidator's costs in the lump sum of \$15,000.00 be deducted from any proposed
distribution to the first respondent and second respondent.
- (2) Pursuant to s 473(3)(b)(ii), s 473(10) of the Act and s 1581(1) of Part 10.25 of the
transitional provisions of the Act, the liquidators' remuneration and costs up to
30 November 2018 are determined in the amount of \$67,539.63 (excluding GST).

5 By s 488(2), a liquidator may distribute a surplus only with the Court's special leave.

6 The liquidator proposes to return to Court to obtain an order for his final release under s 480(d)
of the Act and for approval of the final instalment of his remuneration and, upon obtaining
those orders, to make the final distribution.

LEGAL FRAMEWORK

- 7 In *In the matter of Hawden Property Group Pty Ltd (in liq)* [2018] NSWSC 481; (2018) 125 ACSR 355 at [56]-[57], Gleeson JA stated:

[56] While the power to distribute the surplus in a winding up has been delegated to the liquidator (by a combination of *Corporations Act*, ss 485(2) and 488(1)(c)), Corporations Rules, r 7.10 provides that such a delegation under Pt 5.4B of the *Corporations Act* is subject to the *Corporations Act*, the Corporations Regulations, these Rules, and any order of the Court. Relevantly, s 488(2) means that the liquidator nonetheless requires the Court's "special leave" to distribute a surplus: *In the Matter of Trussted Frames and Trusses Pty Ltd* [2012] NSWSC 787 at [2]-[3] (Brereton J).

[57] The phrase "special leave" only requires that an application be made to the Court, rather than the matter being dealt with as part of some other administrative process: *Maertin v Klaus Maertin Pty Ltd (in liq)* (2009) 232 FLR 239; [2009] NSWSC 618 at [40]-[41] (Austin J) citing *Re DS Millard & Son Pty Ltd* (1997) 24 ACSR 71 (Young J); *Re RH Trevan* at [6]. The purpose of the provision is to ensure that there is, in reality, a surplus, in that creditors' claims have been recognised and met in full, and that the correct relativities among the contributories have been observed: *CGU Workers Compensation (NSW) Ltd v Ascom Service Automation (Australia) Pty Ltd* [2005] NSWSC 747 at [4] (Barrett J).

- 8 In *In the matter of Klaus Maertin Pty Ltd (in liq); Maertin v Klaus Maertin Pty Ltd* [2009] NSWSC 618; (2009) 232 FLR 239, Austin J declined to grant special leave in general terms, authorising the liquidator to make a final distribution to the contributories of the amounts calculated for that purpose, without having to return to the Court for special leave when the calculations have been made. However, at [64], his Honour was prepared to assume that the Court had jurisdiction to make such an order in an appropriate case.

- 9 The liquidator submitted that this is an appropriate case for the following reasons:

- (1) The liquidator proposes that an interim order be made under s 488(2).
- (2) The distribution formula is identified. The calculations have been made and are before the Court for a second time. Future liabilities of the liquidation fund in the form of fees and disbursements have been estimated. All transactions in the nature of offsets have been addressed.
- (3) Judicial directions on the proposed payment mechanism, based on the assumption of similar though not identical future liability estimates, have been received.
- (4) Curial supervision of the liquidation will continue until the application for final remuneration and discharge. The Court will be asked to make a final order under s 488(2) at that time.

10 Rule 7.9 of the *Federal Court (Corporations) Rules 2000* (Cth) and reg 5.6.71 of the
Corporations Regulations 2001 (Cth) concern the distribution of a surplus with the special
leave of the Court. Having regard to the information contained in the proposed annexure to the
orders, I will dispense with the requirement of reg 5.6.71(1) that the order annex a schedule in
accordance with Form 551.

11 The liquidator proposes to send to each of the contributories a notice in accordance with
Form 552, in compliance with reg 5.6.71(2), immediately prior to or after the final hearing.

CONSIDERATION

12 The liquidator has identified five contributories, as set out in *Ample Source (No 8)* at [16] and
following.

13 On the basis of Mr Owen's affidavit evidence, I am satisfied that the proposed distribution
reflects the directions that are the subject of *Ample Source (No 8)*.

14 As noted in *Ample Source (No 8)* at [17], Mr Vereker holds 5,000 unpaid shares. The liquidator
proposed to make the distribution on the basis of the 95,010 fully paid shares held by the five
contributories.

15 Mr Hillam contended that he and Ms Teeranukul should receive the unpaid shares allocated to
Mr Vereker on the basis that the shareholders agreement dated 20 April 2010 provided for
those shares to "revert" back to him and Ms Teeranukul. When asked, Mr Hillam did not
identify any provision in the shareholders agreement to that effect. In the absence of evidence
that Mr Hillam and Ms Teeranukul have an entitlement to Mr Vereker's 5,000 unpaid shares,
I am not satisfied that they should receive those shares.

16 Accordingly, I am satisfied that the liquidator's proposal to make the distribution on the basis
of the 95,010 fully paid shares held by the five contributories is appropriate.

17 Mr Hillam also criticised the liquidator's calculation in the following respects:

- (1) the inclusion of interest in relation to a costs order made in February 2015 in an amount
of \$90,000 included as part of the sum owed by Mr Hillam to the company in
liquidation; and
- (2) the calculation is based on a netting off of a proof of debt from Wentworth Metals
Group Pty Ltd ("Wentworth"), the fifth defendant, against amounts owed by

Wentworth as at 11 March 2015. Mr Hillam contended that Wentworth was entitled to interest on the amount in the proof of debt until the date of distribution.

18 As to (1), the inclusion of interest is supported by my finding, in *Ample Source (No 8)* at [65], of an agreement made on 27 March 2015 that the total amount to be paid in respect of two February 2015 costs orders was \$90,000 plus interest.

19 As to (2), Mr Hillam did not explain why it was not appropriate for the liquidator to net off the debts on 11 March 2015. Nor did he seek to demonstrate that any party was adversely affected by the netting off as at 11 March 2015 rather than at the date of distribution. On the basis of my findings in *Ample Source (No 8)* at [74], interest was accruing on the amount owed by Wentworth to the company in liquidation.

20 For these reasons, I am satisfied that the liquidator's calculation is not defective in either of the respects identified by Mr Hillam.

CONCLUSION

21 On the basis of the liquidator's evidence, I am satisfied that he should be granted leave to distribute the surplus in the manner set out in table 3A of the liquidator's affidavit affirmed on 12 February 2019.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson.

Associate:



Dated: 7 March 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)