

GORDON v TOLCHER IN HIS CAPACITY AS LIQUIDATOR OF SENAFIELD PTY LTD (IN LIQUIDATION) AND ANOR (S62/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 3 May 2005

Grant of special leave: 14 February 2006

On 5 June 2000 Raymond George Tolcher ("the liquidator") was appointed liquidator of Senafield Pty Limited ("Senafield"). Charles Stuart Gordon, the appellant, was the father of Hugh Charles Gordon who was the sole director and shareholder of Senafield.

On 2 May 2003 the liquidator and Senafield (the respondents) filed a statement of liquidated claim in the District Court ("the action") against the appellant in which they sought various declarations and orders including an order that pursuant to s 588FF(1) of the *Corporations Act* 2001 (Cth) the appellant pay to the respondents the sum of \$522,504.07.

The statement of liquidated claim was not served on the appellant. On 1 December 2003, pursuant to Part 18 rule 9 of the *District Court Rules* 1973 ("the Rules"), the action was taken to be dismissed. On 19 January 2004 the respondents filed a notice of motion in the District Court in which, inter alia, they claimed pursuant to Part 3 rule 2(2) of the Rules an extension of time. The practical effect of any such extension, if granted, was that the dismissal of the action would be rescinded.

His Honour Judge Armitage heard the notice of motion on 13 May 2004. At the conclusion of argument, his Honour delivered an ex tempore judgment whereby he ordered that the notice of motion be dismissed and that the respondents pay the appellant's costs of the motion. The respondents sought leave to appeal.

The Court of Appeal granted leave to appeal and allowed the appeal. The orders which the Court of Appeal made included the following:

"4. Pursuant to Part 3 Rule 2(2) of the [Rules], order that the time specified in Part 18 Rule 9 be extended to nunc pro tunc up to and including a date being sixty days after the date of these orders."

The effect of the orders was that notwithstanding that the proceedings had been finally disposed of some 18 months earlier, the period of time specified in Part 18 Rule 9 was enlarged to 2 July 2005.

Section 78B notices have been served and the Attorney General for Victoria and the Attorney General of the Commonwealth are intervening.

The ground of appeal is:

- The Court of Appeal erred in failing to hold that provisions of State legislation expressly authorising extension of time within which an action may be maintained, notwithstanding dismissal of proceedings, in this case Part 3 rule 2 of the Rules were not inconsistent with the requirements of Section 588FF(3) of the *Corporations Act* and accordingly were rendered inapplicable by reason of s 79 of the *Judiciary Act*.