



## Précis Paper

### The Need for Corporations to Appear by a Solicitor in Superior Courts

I particularly like this discussion. It is important and there are surprises for even experienced litigators. It's worth watching, or if you wish, listening to – or both.

#### Discussion Includes

- What restrictions are there on the right of a corporation to commence or carry on proceedings?
- What principles apply to motions to re-open decided proceedings?
- What is the slip rule?

## Précis Paper

### The Need for Corporations to Appear by a Solicitor in Superior Courts

1. In this edition of BenchTV, Michael Klooster (Barrister) and Ian Benson (Solicitor) discuss *Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd* [2016] NSWCA 42 (Gleeson JA, Simpson JA, Emmett AJA). Mr Klooster acted for the successful respondent in this case, Tibra Capital Pty Ltd.

#### Background

2. The case arose from a dispute between Tibra Capital Pty Ltd ("Tibra") and a shareholder of that company, Tanemerah Estates Pty Ltd ("Tanemerah"). Tibra acquired Tanemerah's shares in the company using a valuation method Tanemerah opposed. In 2012 Tanemerah instituted proceedings against Tibra in the Supreme Court of NSW. Over the next years Tanemerah brought three further proceedings in the Supreme Court and four in the Court of Appeal against Tibra. In each proceeding Tanemerah failed to have legal representation, and this emerged as the defining issue of this suite of litigation. The issue of the correct share valuation remains unresolved.
3. In response to the initial action instituted by Tanemerah in the Supreme Court, Tibra filed a notice of motion in which it raised the issue of the absence of a solicitor representing Tanemerah. Justice Hallen found that without a solicitor or other authorised person appearing for the company Tanemerah had no standing and made an order staying the proceedings until Tanemerah obtained a solicitor. (*Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd* [2013] NSWSC 36 (6 February 2013)). The initial proceedings remained stayed.
4. Tanemerah unsuccessfully appealed to the Court of Appeal in regard to the finding of lack of standing (See *Tanamerah Estates Pty Ltd as the trustee for Alexander Superannuation Fund v Tibra Capital Pty Ltd* [2013] NSWCA 266 (19 August 2013) Basten AJ, Sackville AJA). The Court of Appeal confirmed Justice Hallen's findings in regard to lack of standing.
5. In 2015 on the basis of the two assessed costs orders made against Tanemerah (by Hallen J and then the Court of Appeal), Tibra issued and acted on a statutory demand. In 2015 Tanemerah instituted proceeding seeking to set aside the statutory demand (See: Division 3 of Part 5.4 *Corporations Act 2001* (Cth)). Tibra responding, again raised the issue of Tanemerah's standing to bring this action. Justice Black found for Tibra as Tanemerah failed to engage a solicitor within the time set. The application to set-aside was dismissed. (See: *Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd* [2015] NSWSC 1519 (12 October 2015) & *Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd* [2015] NSWSC 1708 (16 November 2015)).

6. The case in discussion between Mr Klooster and Mr Benson basically concerned Tanemerah's application for leave to appeal to the Court of Appeal in relation to the dismissal of Tanemerah's application to set aside the statutory demand.

#### Representation of a Company in the Supreme Court

7. Different requirements for the representation of a company apply in different jurisdictions. In the Supreme Court, the *Uniform Civil Procedure Rules 2005* ("UCPR") rules 7.1(2) and (3), require a company to commence, and carry on, proceedings by a solicitor, or by a director of the company, but only if the director is also a plaintiff to the proceedings.
8. The UCPR contains further administrative requirements to be met by a director appearing without a solicitor, including requiring an affidavit that demonstrates that the director is authorised to appear on behalf of the company (UCPR 7.2).
9. Extracts from the UCPR are set out below:

##### **RULE 7.1:**

##### ***By whom proceedings may be commenced and carried on***

...

- (1) *A natural person may commence and carry on proceedings in any court, either by a solicitor acting on his or her behalf or in person.*

...

- (2) *A company within the meaning of the Corporations Act 2001 of the Commonwealth:*
  - (a) *may commence and carry on proceedings in any court by a solicitor or by a director of the company, and*
  - (b) *may commence and, unless the court orders otherwise, carry on proceedings in the Local Court by a duly authorised officer or employee of the company.*
- (3) *In the case of proceedings in the Supreme Court, subrule (2) (a) authorises a company to commence proceedings by a director only if the director is also a plaintiff in the proceedings....*

##### **RULE 7.2:**

##### ***Affidavit as to authority to commence and carry on proceedings in Supreme Court or District Court***

...

- (1) *A person who commences or carries on proceedings in the Supreme Court or District Court:*

- (a) *as the director of a company within the meaning of the Corporations Act 2001 of the Commonwealth, or*
- (b) *as the authorised officer of a corporation (other than a company within the meaning of the Corporations Act 2001 of the Commonwealth),*  
*must file with the originating process, notice of appearance or defence, as the case may be, an affidavit as to his or her authority to act in that capacity, together with a copy of the instrument evidencing that authority.*
- (2) *The affidavit made by the director of a company within the meaning of the Corporations Act 2001 of the Commonwealth must contain:*
  - (a) *a statement to the effect that:*
    - (i) *the director is a director of the company, and*
    - (ii) *the director has been authorised by a resolution of the directors duly passed at a meeting of directors held on a specified date (which must not be earlier than 21 days before the date of the affidavit) to commence and carry on the proceedings, as the case requires, and*
    - (iii) *the authority has not been revoked, and*
    - (iv) *the director is aware that he or she may be liable to pay some or all of the costs of the proceedings, or*
  - a statement to the effect that:*

#### Who Brought the Proceedings in the Current Case?

10. The 2012 proceedings were initiated with only Tanamerah as the plaintiff. In response to Tidra's notice of motion in regard to lack of standing, Mr Tydeman who was a director of Tanemerah, joined as plaintiff. It was accepted that Mr Tydeman had filed an affidavit as to his authority to act in that capacity with the relevant matters stated in UCPR rule 7.2(2) (See *Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd* [2013] NSWSC 36 (6 February 2013) para [84]. However, Mr Tydeman acknowledged that he claimed no relief against Tibra in the amended Statement of Claim, and that he did not have any individual cause of action available to him against Tibra or "a joint personal entitlement" to the relief sought by Tanamerah. Justice Hallen stated "[Mr Tydeman] accepts that he is not what is called a "proper Plaintiff" in the proceedings, but submits that he does not have to be in order to commence, or carry on, the proceedings on behalf of Tanamerah." (para [23]).
11. Justice Hallen found that it was insufficient for a director to merely join as a plaintiff, and that a cause of action was required as well. His Honour considered the purposes of UCPR rules 7.1 and 7.2 and stated: "It seems to me to be implicit that the director must be a plaintiff in his, or her, own right, and not merely one who is named as a plaintiff because he, or she, has been authorised to commence or carry on proceedings on behalf of the company. As a

plaintiff in his, or her, own right, the director is not likely to be removed as a party, or have his, or her, proceedings summarily dismissed." (para [107]).

12. During the suite of litigation that followed in the Supreme Court, Mr Tydeman continued to maintain his claim that even without a cause of action he was entitled to remain a plaintiff in the proceedings.

#### Case Authority that Director Must have a Cause of Action to be a Plaintiff

13. Amongst case authority for the proposition that a director seeking to represent a corporation in proceedings in the Supreme Court must have a cause of action is *D B Mahaffy & Associates Pty Ltd v Mahaffy* [2011] NSWSC 673 , and also *JSBG Developments Pty Ltd v Kozlowski* [2009] NSWSC 1128.

14. In the latter case Justice Barrett stated:

*...[T]he right or ability of a company within the meaning of the Corporations Act to commence proceedings "by a director" is, in this court, qualified and constrained by rule 7.1(3). That rule makes eligible, for the purposes of rule 7.1(2)(a) only a director who is, in his or her own right, a plaintiff in the proceedings. The combined effect of rules 7.1(2)(a) and 7.3 is that, if the company and a director of the company are both plaintiffs, the company may commence and carry on the proceedings by that director. Otherwise, the company may not commence or carry on the proceedings by a director* (para [18]).

#### Discretion to Dispense with Requirements of the Rules

15. Mr Tydeman never raised an issue of lack of funding as a bar to Tanamerah being represented by a solicitor. Mr Tydeman chose not to appoint a solicitor for Tanamerah. He informed Justice Hallen that he did not trust solicitors (paras [6]-[7]). If inadequate funding had been an issue, Mr Klooster is of the view that it may have been open to the Court to consider exercising discretion under s.14 of the *Civil Procedure Act 2005* (NSW) to dispense with requirements of the rule in regard to representation by a solicitor.
16. Justice Hallen decided not to dispense with the rules. He referred to *Damjanovic v Maley* [2002] NSWCA 230;(2002) 55 NSWLR 149 which set out a number of themes that run through "cases which are relevant to the exercise of the discretion to grant or refuse leave to an unqualified person to appear on behalf of an unrepresented litigant" [para 6g]. These include the complexity of the case, genuine difficulties the unrepresented party may face, the unavailability of disciplinary measures and a duty to the court by lay advocates, protection of the client and the opponent, lay advocates in inferior courts and tribunals, and the interests of justice (paras [72]-[86]).

17. Mr Klooster in discussing Justice Hallen's consideration of these issues noted that the situation could vary according to the jurisdiction. For example, in the Local Court, unrepresented litigants are more common and under the UCPR a company can appear in a Local Court without a solicitor (Refer to UCPR r.7.1).
18. Justice Hallen noted the proceedings were in a superior court rather than an inferior court. He considered that the Tanamerah claims involved significant complexity and numerous causes of action. He was also concerned that Mr Tydeman would probably be involved in the case as a material witness. If leave was granted, a material witness without legal training or qualification would be running a case involving a convoluted and complex fact and law scenario. In light of these considerations and because Mr Tydeman had not claimed Tanamerah to be in the position that it could not afford a solicitor, Justice Hallen declined to exercise his discretion to dispense with the rules. Rather, his Honour stayed the proceedings on terms.

#### Implications in Actions to Set Aside a Statutory Demand

19. This current case and other Supreme Court cases (including *Mahaffy & Associates Pty Ltd v Mahaffy*, and *JSBG Developments Pty Ltd v Kozlowski* above) demonstrate the importance of being represented by a solicitor in proceedings by a corporation to set aside a statutory demand (s.459G of the *Corporations Act*). This is because the cause of action lies with the company rather than anyone else, including a director.

#### Mr Tydeman Removed as Plaintiff and Costs

20. In regard to the 2012 proceedings brought by Tanamerah, Justice Hallen removed Mr Tydeman as plaintiff and stayed the proceedings until Tanamerah was represented by a solicitor. Mr Tydeman then filed a notice of motion seeking to set aside Justice Hallen's orders. The application was heard by the Chief Judge in Equity, Justice Bergin as Duty Judge. Her Honour remitted the matter back to Justice Hallen in regard to costs only as the parties had not been heard on that issue. Otherwise, Mr Tydeman was unsuccessful before her Honour.
21. Mr Tydeman was also unsuccessful in his arguments as to costs before Justice Hallen. Justice Hallen made a cost order against Tanamerah and Mr Tydeman personally. At this time in the proceedings Mr Tydeman was a party having joined himself. However, Justice Hallen noted that even if Mr Tydeman was not a proper party there was scope to award costs against a director (refer to UCPR r.7.2). When Mr Tydeman was removed from the proceedings his Honour stated that he saw no reasons why the costs order previously made

against Mr Tydeman personally should not be made payable forthwith, and that was the order that was made.

22. Mr Tydeman also sought to re-open matters previously raised before Justice Hallen but Justice Hallen declined to change his orders noting the issues had been properly considered. (*Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd (No 2)* [2013] NSWSC 616)

#### Principles that Apply in Considering a Re-opening

23. There are two rules that apply in considering re-opening a matter. These are UCPR rules 36.15 and 36.16. Mr Tydeman sought to rely on r.36.15. This states that a judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith.
24. The authority that sets out the principles behind re-opening is the High Court decision *Autodesk Inc v Dyason [No2] 1993 HCA 6; 176 CLR 300*. In that case Justice Mason indicated in that case that the power to re-open needs to be exercised with great caution and will only happen in exceptional circumstances. There needs to be a finality to litigation as it expensive and time-consuming. The power to re-open is enlivened where the court "apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to re-argue their cases" [para 4].
25. It is another principle in regard to re-opening that appellate rights or judicial review rights should first be exercised before an application to re-open is considered. Mr Klooster commented in his discussion of the case, that to be successful in a reopening application it needs to be demonstrated that all other options to re-opening have been attempted.
26. Mr Klooster also commented that self-represented litigants can be inclined to seek to open their case again and again. In the Tanamerah situation, many of the arguments heard in the Court of Appeal had been heard previously by Justices Hallen, Black and Chief Judge Bergin, and previously in the Court of Appeal.
27. Mr Klooster commented that if he was advising a client in regard to whether to apply to re-open a matter, he would want to know the complete circumstances of the first instance decision that was to be re-opened. He would also want to find out about appeal or judicial review rights available but not yet exercised. He would need to be persuaded that there was a new ground of fact or law that had not been considered at first instance, or that there had

been a significant change in circumstances that had not been considered at first instance. But he would also warn the client that the application would be fraught with danger and not an easy application to make.

#### What Did the Court of Appeal Decide in Regard to Tanamerah?

28. The Court of Appeal refused to grant leave to appeal to Tanamerah primarily because it was not satisfied that Tanamerah had an arguable case. Despite the rules being clear, Tanamerah had not complied with the procedural rules and had not demonstrated a misapprehension of the law or rules.
29. An unusual argument raised by Mr Tydeman was that Tanamerah was a person under legal capacity and therefore he was entitled to be its legal tutor. This argument was dismissed by the Supreme Court and the Court of Appeal. Among the many reasons for dismissing this argument (including that the tutor would be an interested party) it was noted that companies appeared routinely in the Corporations list without need of a tutor.

#### Opportunity to Appoint a Solicitor

30. Mr Klooster pointed out that the consequences of Tanamerah and Mr Tydeman's litigation were largely of their own making. In regard to the proceedings to set aside the statutory demand, Justice Black had granted Mr Tydeman a period of 6 weeks to appoint a solicitor. He was warned that if he did not do so it was possible that the proceedings would be dismissed. Mr Tydeman did not appoint a solicitor in this period or in the shorter extended period then allowed by Justice Black. The proceedings were dismissed. This was significant as there is not another opportunity to set aside a statutory demand once an application is dismissed.
31. These circumstances were also relevant when Tanamerah applied to the Court of Appeal. Mr Tydeman had been granted a reasonable opportunity to appoint a solicitor. Given his refusal to appoint one it was very difficult to demonstrate that Tanamerah had been an injustice or that the rules had disadvantaged it.

#### The Slip Rule

32. UCPR rule 36.17 states that "if there is a clerical mistake, or an error arising from an accidental slip or omission, in a judgment or order, or in a certificate, the court, on the application of any party or of its own motion, may, at any time, correct the mistake or error". In one of his arguments, Mr Tydeman had been of the view that a correction by the Court



under the Slip had tainted the whole decision. However, the purpose of the rule was explained to him and also that the Court could on its own motion correct an error.

#### What Happened to the Statutory Demand?

33. Mr Klooster commented that the statutory demand had remained on foot and there were currently winding-up proceedings by his client, Tibra, against Tanamerah. In these proceedings Tanamerah had legal representation. However, as they are current proceedings Mr Klooster does not discuss the situation further.
34. Mr Kloostler also observed that Mr Tydeman had applied for leave to the High Court following the Court of Appeal decision, and that as this was also current he was not able to discuss it further.

#### Can the 2012 Proceedings be Re-instated?

35. Mr Kloostler noted that as the 2012 proceedings continued to be stayed pending the appointment of a solicitor, it remains open to Tanamerah to appoint a solicitor and continue the original proceedings.
36. Mr Kloostler also noted that there had been significant damages sought by Tanamerah that it could chose to pursue.

## **BIOGRAPHY**

### Micheal Klooster

Barrister, 8 Garfield Barwick Chambers, Sydney

Michael Klooster was admitted as a solicitor in 2005. He gained experience in various and diverse areas of the law but developed a particular focus in commercial litigation. In 2007, he also completed a Masters of Environmental Law at the University of Sydney. He was admitted to the NSW Bar in 2010 and has a general commercial practice. Michael plays the bassoon and piano and enjoys surfing, soccer, tennis, sailing and trivia.

### Ian Benson

Solicitor, AR Conolly & Company Lawyers, Sydney

Ian Benson is Special Counsel at AR Conolly and Company

## **BIBLIOGRAPHY**

### Focus Case

*Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd* [2016] NSWCA 42

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/composite/benchmark\\_17-03-2016\\_insurance\\_banking\\_construction\\_government.pdf](https://benchmarkinc.com.au/benchmark/composite/benchmark_17-03-2016_insurance_banking_construction_government.pdf)

### Judgment Link

<https://www.caselaw.nsw.gov.au/decision/56e5e247e4b0e71e17f50224>

### Cases

[\*Damjanovic v Maley\*](#) [2002] NSWCA 230; (2002) 55 NSWLR 149

[\*D B Mahaffy & Associates Pty Ltd v Mahaffy\*](#) [2011] NSWSC 673

[\*Autodesk Inc v Dyason \[No2\]\*](#) 1993 HCA 6; 176 CLR 300

[\*Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd\*](#) [2013] NSWSC 36

[\*Tanamerah Estates Pty Ltd as the trustee for Alexander Superannuation Fund v Tibra Capital Pty Ltd\*](#) [2013] NSWCA 266

[\*Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd \(No 2\)\*](#) [2013] NSWSC 616

[\*Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd\*](#) [2015] NSWSC 1519

[\*Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd\*](#) [2015] NSWSC 1708

[\*JSBG Developments Pty Ltd v Kozłowski\*](#) [2009] NSWSC 1128

### Legislation

[\*Uniform Civil Procedure Rules 2005\*](#) ("UCPR") rr 7.1, 7.2, 36.15, 36.16

[\*Corporations Act \(Cth\) 2001\*](#) Division 3 of Part 5.4 (s. 459G)

[\*Civil Procedure Act \(NSW\) 2005\*](#), s.14