

# Update

Insolvency

September 2010

## Shareholder granted retrospective leave to bring a derivative action on behalf of a company in liquidation

In *HFGC Nominees (No 2) Pty Ltd v Hancock as Liquidator of 246 Arabella Investments Pty Ltd (in Liquidation)* [2010] FCA 1005 it was decided that the Court had the power to grant a shareholder retrospective leave to appeal a ruling by the Commissioner of Taxation.

### Background

246 Arabella Investments Pty Ltd (in liq) (“the Taxpayer”) was the lessor of premises at 513-515 South Dowling Street, Surry Hills in Sydney. Between 1993 and 2003 the tenants of the premises operated a business known as “Design Establishment”. During those years the Taxpayer claimed \$5,983,653 worth of deductions for interest payments said to have been paid under a commercial loan agreement.

Following a tax audit, the Commissioner of Taxation (“the Commissioner”) disallowed the interest expenses as a deduction and imposed penalties and interest. The total assessed by the Commissioner was \$10,395,717.34. The Commissioner also dismissed an objection to the assessment lodged by the Taxpayer.

The Taxpayer was then placed into liquidation. The Liquidator saw little merit in appealing the ruling, and declined to pursue an appeal against the decision in the Administrative Appeals Tribunal (“the AAT”) pursuant Division 4 of Part IVC of the *Taxation Administration Act 1953* (Cth).

The second plaintiff, Mr Higgins, was a shareholder of the Taxpayer and held his shares on trust for two family trusts of which the first plaintiff, HFGC Nominees (No 2) Pty Ltd (“HFGC”), was the trustee. The two family trusts were also the subject of two book debts which were the only two major assets of the Taxpayer.

In short, if it were not for its tax debt, the Taxpayer would be solvent, and therefore little likelihood that the debts owed by the two family trusts would have been called upon by the Taxpayer.

Mr Higgins commenced a review application in the AAT entitled *Christopher Higgins on behalf of 246 Arabella Investments Pty Ltd (in liquidation) v Commissioner of Taxation* (6058 of 2009). At the time of commencing the application, Mr Higgins indicated to the AAT that he would seek orders from the Court to clarify his entitlement to bring that application.

There was no dispute that the Court had the power to permit Mr Higgins as a contributory to pursue the appeal before the AAT in the name of the Taxpayer. The question which arose was whether an order may be made which retrospectively authorised Mr Higgins’ earlier commencement of the application in the AAT

### The relevant law

The relevant legislation is s 511 of the *Corporations Act 2001* (Cth) which provides:

- “1. The liquidator, or a contributory or creditor, may apply to the Court:
  - b. to determine any question arising in the winding up of a company; or

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*c. to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court.*

...

- 2. The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks fit."*

### The decision of Justice Perram

In granting Mr Higgins retrospective leave, His Honour found that:

- the power granted under s 511 was intended ensure that the powers formerly possessed by Chancery in the case of companies being wound-up by the Court extended to windings-up which are not court superintended;
- the Federal Court's inherent power under section 23 of the *Federal Court of Australia Act 1976* (Cth) can be exercised *nunc pro tunc* (i.e. that it can make orders which apply retrospectively); and
- there is nothing in the wording of s 511 which limits the power of the Court to make orders which apply retrospectively.

### Implications

This decision may be used to support an application that the Court retrospectively authorise actions taken by a contributory on behalf of a company in liquidation.

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