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DING DONG THE SUMMONS IS DEAD

15 September 2017

This week's TGIF considers the effect of material non-disclosures and breach of parliamentary privilege on the setting aside of examination summonses issued under ss 596B and 597 of the *Corporations Act 2001* (Cth).

WHAT HAPPENED?

On 7 September 2017, the Federal Court of Australia handed down the latest decision in a series of Court actions related to the liquidation of the Bell Group Ltd (**BGL**).

The decision concerned applications to set aside examination summons and summonses for production of documents under ss 596B and 597 of the *Corporations Act 2001* (Cth) (the ***Corporations Act)*** issued on the application of Garry Trevor as liquidator of Bell Group NV (in liq) against the State Solicitor for Western Australia, a member of the State Solicitor's Office, and a partner and a manager of KordaMentha. The summons related to the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (**The Bell Act**). (The Bell Act was held to be invalid by the High Court on the basis that is was inconsistent with the Commonwealth's taxation legislation).

Jagot J held that the case for the summonses to be set aside was 'overwhelming'. These findings were primarily based on Mr Trevor's material non-disclosure of particular information to the Registrar in making the ex parte application for the issue of the summons and on the basis of Parliamentary privilege.

In short, the summonses in relation to the KordaMentha applicants were set aside on the basis that, as strangers to BGNV, Jagot J could not see how they would be able to give information about examinable affairs of BGNV.

In relation to the non-KordaMentha applicants, Jagot J identified multiple basis upon which the summonses should be set aside.

The Court noted that given the ex parte nature of the application for an examination summons under the *Corporations Act,* there exists a heightened obligation of full and frank disclosure on the applicant to disclose anything that may affect the decision to summon a person for examination.

The Court commented that not all non-disclosures lead to the result that a summons is set aside, but in this case the failure to disclose the overlap between the summons and an existing proceedings was significant.

Parliamentary Privilege

The Court observed that a large part of the affidavit in support of the application for the issue of the summons sought to call into question the motives and intentions of the parliament which enacted the Bell Act, and sought to impugn the truth of statements of the Legislation Committee. As such, those paragraphs 'infringe Parliamentary privilege or depend for their relevance upon such infringement'.

Any attempt to rely on the truth of or otherwise impugn statements in or to Parliament to found a cause of action infringes Parliamentary privilege. Also, the privilege extends to the evidence given by persons to a Parliamentary committee.

While it was not the primary reason for the summons being set aside, the Court held that 'the improper placing before the Registrar of material subject to Parliamentary privilege and associated failure to disclose the existence and consequences of that privilege are separate and sufficient reasons to set aside all of the summonses'.

Improper Purpose

Given the findings above, Jagot J made no decision as to whether the summons were for an improper purpose.

CORRS COMMENT

The case is a warning to applicants for leave to issue examination summons (or any applications on an ex parte basis) that they need to make full and frank disclosure to the Court. Any material non-disclosure may be fatal to the enforceability of the summons. In the context of examination summons, related litigation should be carefully considered and disclosed.

This case is also a reminder to those who practice primarily in commercial law of the application of Parliamentary privilege and the seriousness of breaching the privilege should you attempt to rely on protected material in court proceedings.

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