

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

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No. 6947 of 2009

IN THE MATTER of an application by the Legal Services Board for the appointment of a receiver for the law practice of David Forster, an Australian legal practitioner trading under the name Hollows Lawyers, pursuant to s 5.5.1 of the *Legal Profession Act 2004*

B E T W E E N

LEGAL SERVICES BOARD (ABN 825 189 45610)

Plaintiff

v

DAVID FORSTER

Defendant

<u>JUDGE:</u>	EMERTON J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	28 April 2011
<u>DATE OF RULING:</u>	7 June 2011
<u>CASE MAY BE CITED AS:</u>	Legal Services Board v Forster

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	No appearance	
For the Defendant	Mr J. Bleechmore	Pinto Law
For the Receivers	Mr P. Corbett	Hall & Wilcox
For Mrs Forster	Mr P. Nugent	Charles Fice

HER HONOUR:

- 1 On 12 April 2010, following an investigation by the Law Institute of Victoria and an application made by the plaintiff, the Legal Services Board, pursuant to s 5.2.2(2)(c) of the *Legal Profession Act 2004* (the 'Act'), the Court appointed receivers to the law practice of David Forster, which traded under the name 'Hollows Lawyers'. The principal task of the receivers was to examine Melbourne Voyager files held by the law practice to ensure that all irregularities in relation to trust money, trust property or the affairs of the practice had been fully identified and rectified and, in particular, that all trust deficiencies had been properly restored. The receivers subsequently moved to wind up the law practice.
- 2 The receivers have now filed two summonses seeking orders that Mr Forster, his wife Mrs Maire Philomenia Forster and Mr John Lombardo, who is a chartered accountant engaged by Mr and Mrs Forster to prepare their tax returns over a number of years, be directed to produce for inspection specified documents and information relating to the legal practice pursuant to s 5.5.9 of the Act and that those persons also be directed to appear and produce documents in an examination by the Court pursuant to s 5.5.10 of the Act.
- 3 The schedule of documents in respect of each of the two summonses is in identical form. In substance, the receivers seek production of the following:
 - (a) Mr and Mrs Forster's tax returns for the 2007, 2008, 2009 and 2010 years.
 - (b) Annual returns, audited financial accounts and statements and records of payments, benefits paid to or at the direction of Mr Forster and records of all contributions made by or on behalf of Mr Forster in respect of any superannuation fund of which Mr Forster is a member or has made contributions for 2007, 2008, 2009 and 2010, and the same in respect of any superannuation fund of which Mrs Forster is a member or has made contributions.
 - (c) Profit and loss accounts, balance sheets, management accounts and tax returns in respect of any trust of which Mr or Mrs Forster is a fixed or discretionary beneficiary or trustee for the years 2007, 2008, 2009 and 2010.

- (d) All documents which record any shares or share portfolio owned by Mr or Mrs Forster or in respect of which Mr or Mrs Forster has a beneficial interest (whether vested or contingent).
- (e) Bank statements for the joint bank account and cheque account referred to in the affidavit of Mr Forster sworn 11 February 2011 for the period from May 2010 to date.
- (f) Bank statements for the period May 2010 to date for accounts in respect of which Mr Forster or Mrs Forster is or was named as an account holder or in respect of which either of them has or had a beneficial interest (whether vested or contingent).
- (g) All documents which record any property owned by Mr or Mrs Forster or in respect of which Mr or Mrs Forster has a beneficial interest (whether vested or contingent).

4 Section 5.5.9 of the Act provides that a receiver for a law practice may require specified persons, including a person who is an associate or former associate of the law practice and a person who has or has had control of documents relating to the affairs of the practice, to give the receiver access to documents relating to the affairs of the practice that the receiver reasonably requires.

5 Section 5.5.10 of the Act provides that on an application by a receiver for a law practice, this Court may make an order directing that an associate or former associate of the practice or any other person appear before the Court for examination on oath or affirmation in relation to the regulated property of the practice.

6 Mr Forster, Mrs Forster and Mr Lombardo submit that they are not required to produce the documents in question, because the documents do not relate to the affairs of the law practice. They also submit that they are not amenable to examination by the Court, as the receivers do not seek to examine them "in relation to the regulated property" of the law practice. In the alternative, they say that the applications are premature and/or oppressive.

7 As a preliminary matter, it will be observed that s 5.5.9 does not require an order of the Court. The receiver may simply require the production of the relevant

documents from the relevant persons. So far as I am aware, the receivers have not made a request to Mr and Mrs Forster or to Mr Lombardo to produce the documents that they say they need. In fact, the documents in question were the subject of a notice to produce filed and served on Mr Forster by the plaintiff, the Legal Services Board, in response to an application by Mr Forster to vary a freezing order. Mr Forster withdrew his application to vary the freezing order on the basis that the Legal Services Board would not require him to comply with the notice to produce. The notice to produce has not been pursued by the Board.

8 The receivers submit that the documents in question are documents “relating to the affairs of the law practice” and that, in seeking to examine Mr and Mrs Forster about their financial affairs, the examination would be “in relation to” the regulated property of the law practice. They submit that they do not at present have sufficient information about the financial affairs of Mr and Mrs Forster to determine whether there is merit in pursuing recovery action against them or whether it is in the interest of the legal practice and the former clients of the practice to persist in inquiries as to the potential for recovery from Mr Forster, as principal of the law practice.

9 The solicitor for the receivers, Mr Myles Brown, has sworn an affidavit in support of the applications for the production of documents and for examination.¹ Mr Brown refers to findings in reports provided to the receiver by Deloitte following analysis of the law practice’s accounts in the matter of Ramsay and in relation to the value of client trust accounts for the Melbourne Voyager files. He refers to some evidence already given by Mr Forster concerning the management of his affairs by Mrs Forster and to searches he has made concerning real property in which Mr Forster may have an interest. He also refers to the fact that Mr Forster was served with the notice to produce by the Legal Services Board, and that Mr Forster did not comply with that notice. Mr Brown concludes:

I am informed by Mr Noel Batrouney, one of the receivers, and verily believe that in his opinion an examination of Mr Forster, Mrs Forster

¹ Filed 1 April 2011.

and the former accountant of the legal practice Mr Lombardo would assist in ascertaining if any necessary or other proceedings should be pursued to recover fees that may have been overcharged by the legal practice or recovered pursuant to voidable costs agreements. To date, the receivers have been unable to determine what assets Mr and Mrs Forster have against which recovery steps could be pursued (apart from the funds subject of the freezing order made 21 May 2010, the property identified in paragraph 6 above and fees payable to the legal practice).

- 10 To the same effect, Mr Corbett, counsel for the receivers, informed the Court that one of the matters of concern to the receivers was whether it was in the public interest to continue with the receivership and what the likely returns were for members of the public, should the receivership continue. One of the factors which would influence the continuation of the receivership, and what steps should be taken in pursuit of the 'road map' for the further investigation of the Melbourne Voyager files, is whether at the end of the day assets are available to be recovered under the powers that are vested in the receivers under the Act.
- 11 The receivers have focussed on "fee agreement issues" in their supporting material. In their report of 4 February 2011, the receivers stated that it was necessary to conduct an examination of Mr and Mrs Forster to determine whether Mr Forster held sufficient assets to warrant any recovery action due to "fee agreement issues". In this context, the receivers stated that after the examination of Mr and Mrs Forster, they proposed to bring an application to determine the validity of Hollows' costs agreement with a particular client, an avenue that had been recommended by senior counsel. In fact, that issue has been brought before the Court on the third summons and is currently a matter for determination by the Court.
- 12 In their written submissions, the receivers describe the purpose for seeking access to financial information from Mr and Mrs Forster in broader terms. They submit that the financial information is relevant to the further conduct of the receivership, in particular as to:
- (a) whether recovery action should be pursued against Mr and Mrs Forster in relation to trust account discrepancies;

- (b) whether steps should be taken to have fees rendered by Mr Forster to Voyager clients taxed and assessed to determine whether they are reasonable and proportionate;
- (c) whether action should be taken to pursue Mr and Mrs Forster for breach of trust and/or knowing participation in the breach of trust or knowing receipt of trust property; and
- (d) whether the receivers should report to the Court that the receivership should now end.

13 In other words, the receivers say that they require the Forsters' financial information to assist in the pursuit of their statutory and court appointed functions. In this context, the receivers compare the examination power in the Act to the powers under the *Corporations Act 2001* (Cth) to conduct examinations for purposes which will benefit the company, its creditors, its members and the public generally² and to enable a liquidator to gather information which will assist in winding up the company.³ The receivers refer in particular to *Re Southland Coal Pty Ltd (recs and mgrs apptd) (in liq)*⁴ in which Austin J considered an application by a receiver for an examination and orders for production under ss 596B and 596C of the *Corporations Act* and in which his Honour held that the receiver's purpose in seeking to obtain documents and conduct an examination of the purpose of deciding whether to institute proceedings was a proper purpose.

14 Insofar as the production of documents or the examination is said to be required to enable the question of the law practice's costs agreements to be pursued by the receivers, Mr Forster, Mrs Forster and Mr Lombardo submit that the receivers have no power to embark on such an inquiry. They submit that the role of a receiver is to be the receiver of the "regulated property" of the practice and to wind up and terminate the affairs of the practice. "Regulated property" means trust money or trust property, and income derived from the use of trust money or trust property together with any documents or records pertaining thereto. It follows, so it is

² *Re Newtell Limited (in liq)* [2005] FCAFC 114, [119].

³ *Lombard Nash International Pty Ltd v Berentsen* (1990) 3 ACSR 343.

⁴ [2006] NSWSC 184, [67]-[68].

submitted, that a receiver appointed pursuant to Chapter 4 of the Act is a receiver of regulated property in the same way that a receiver appointed to a corporation is a receiver of the property of a corporation. In broad terms, as the receiver of the regulated property of the practice tasked with winding up and terminating the affairs of the practice, the receiver can be expected to get in all of the assets of the practice and distribute them to those entitled, after the liabilities of the practice have been satisfied, and to ensure that the regulated property is properly accounted for. This will, incidentally, involve the identification of defalcations, misappropriations or irregularities in the accounting for trust monies, so as to ensure that money that belongs to clients is properly accounted for and recovered where possible. They submit, however, that given specific statutory procedures and processes for dealing with disputes in relation to costs and questions of overcharging, the receiver's powers must be limited in the way described.

15 As I have previously indicated, it is my view that the firm's costs agreements may be relevant to the receivers' inquiries about trust account irregularities, because the law practice purported to make adjustments to client accounts following the identification of the double billing by means of 'writing up' fees that had previously been 'written down' and by issuing new invoices. In this context, I do not accept that the examination power and the power to compel documents to be produced does not extend to enabling the receivers to investigate the way in which clients were charged for professional services and the validity of costs agreements pursuant to which the write ups were made and the new invoices were issued.

16 However, there is a fundamental difficulty with the orders sought in relation to the production of documents and to appear on an examination. It is plain that, although the receiver has identified a number of matters for further investigation concerning the regulated property of the law practice (such as those, for example, that are described in the receivers' report of 3 November 2010), the receivers at this stage only seek information regarding Mr Forster's assets to enable them to determine

whether it is worth pursuing their inquiries as to whether any of the former clients of the law practice are owed monies by it as a result of trust account breaches or irregularities. They want to know how much money is available, should they need to bring recovery actions on behalf of clients and former clients. It is therefore a broad inquiry that they have in mind, and one that they wish to pursue before having formed a view as to whether any recovery actions are likely to be necessary.

17 It appears, therefore, that at this stage there are no particular trust account transactions, or any particular write ups or write offs, about which the receivers wish to examine Mr and Mrs Forster or Mr Lombardo. Rather, they simply seek to establish whether there is any point in continuing with their investigations by ascertaining whether, if continuing irregularities were identified and recovery action was required, assets would be available to be recovered.

18 On this basis, and having regard to the fact that what is sought is a resort to compulsory process that is potentially oppressive to the examinees, I consider any order by the Court to direct Mr or Mrs Forster or Mr Lombardo to appear before the Court for examination to be premature. It is unnecessary at this stage.

19 In my view, the receiver can generally ascertain by other means whether Mr and Mrs Forster are likely to hold assets derived from the regulated property of the law practice which would become available for recovery purposes. The receiver has the records of the law practice. Those records should show what payments have been made to Mr or Mrs Forster and/or to their superannuation funds. Were the receiver to require the provision of information relating to the names of any persons, trusts or other entities to whom or to which the law practice had made payments for or on behalf of Mr or Mrs Forster, that would, in my view, constitute information relating to the affairs of the practice.

20 Insofar as tax returns and records of so-called 'personal' bank accounts, superannuation funds, trust funds, share and property portfolios record transactions

involving the law practice on the one hand and the person or entity on whose behalf the account or fund is held on the other, those records relate to the affairs of the law practice. This will also be the case if they evidence the movement of funds derived from the regulated property of the law practice or identify funds that remain the regulated property of the law practice. The receiver is entitled to require the production of documents that may evidence the whereabouts of moneys derived from the law practice, and, in particular, the regulated property of the law practice.

21 Having said that, the list of records or documents sought by the receiver is extensive, and may require the production of documents or information relating exclusively to matters that have nothing at all to do with the law practice. I note, in particular, the request for documents which record *any* property owned by Mr or Mrs Forster or in respect of which they have a beneficial interest. It may not be possible to establish whether documents or records relate to or contain information relating to the affairs of the law practice without examining the documents and records individually.

22 Given the stage of the receivership and what the receivers have said they are seeking to achieve by the proposed examinations and the production of documents, it seems to me that, in order to ascertain whether or not it is worthwhile undertaking the next stage of the inquiry (which has not yet been specified or identified), it has not yet become necessary for the receiver to engage the compulsory process of examination to inquire into the financial affairs of Mr and Mrs Forster. Given the tenacity with which Mr Forster has fought any attempt to require him to disclose his assets, the receivers might well assume that he has assets that may be available in recovery proceedings.

23 The Court has previously suggested that the receivership should be conducted in 'bite size' pieces. In the light of Mr Forster's attitude to disclosing his financial affairs, the receivership should proceed, at least in the short term, on the basis that some assets are likely to be available for recovery purposes in the event that s 5.5.14 of the Act becomes applicable. If that occurs, and if an examination or the

production of financial documents has not already taken place arising from the receivers' need to inquire into specific transactions, it may then be appropriate to examine Mr or Mrs Forster to ensure that monies would be available if recovery actions were to be commenced.

24 However, the receivers are not at the point where any recovery action is even mooted.

25 The Court will not make an order for examination or give directions to Mr and Mrs Forster or Mr Lombardo to produce documents at this stage.