IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

No. 2025/267011
(proceeding below 2024/220393)

IN THE MATTER OF BALAMARA RESOURCES LTD (IN LIQUIDATION)

Ample Skill Ltd & Ors
Applicants

Geoffrey Reidy, Andrew Barnden and Paula Smith in their capacities as joint and several liquidators of Balamara Resources Ltd (In Liquidation)
Respondents

Respondents' Summary of Argument Opposing Leave

A. Introduction and Respondents' Position on Leave

1. Leave should not be granted to the Applicants to appeal the decision of Black J of 13 June 2025 in *In the matter of Balamara Resources Ltd (In Liquidation)* [2025] NSWSC 618 (**J**). The Court should decide whether to grant leave prior to and separately from any hearing of the appeal. The Respondents do not oppose the question of leave being determined in the absence of the public and without the attendance of any person. If the Court is minded to grant leave to appeal, leave should not be granted to permit the Applicants to file the draft notice of appeal (**NoA**) in its current form for the reasons set out at Part B below.

2. On 9 December 2024 the Applicants directed the Respondents (the **Liquidators** of Balamara Resources Ltd (In Liquidation) (**Company**)) to convene a meeting of creditors of the Company (**Direction**). The Liquidators declined to do so, having formed the opinion, in good faith, that the request was unreasonable, pursuant to s 75-15(2) *Insolvency Practice Schedule (Corporations) 2016* (Cth) (**IPS**) and r 75-250 *Insolvency Practice Rules (Corporations) 2016* (Cth) (**IPR**). The Liquidators sought orders pursuant to s 90-15 IPS that their decision was justified. The Applicants sought orders pursuant to s 90-15 IPS that the Liquidators be directed to convene a meeting. By consent, the hearing below was conducted on the basis that his Honour was asked to consider the competing applications on the basis of circumstances as they existed as at the date of the Direction, that is, in December 2024, rather than the date of the hearing.[1] By reason of that agreed approach, the question of correctness or otherwise of the trial judge's decision is entirely academic and will not have any effect on the ongoing conduct of the winding up.

3. Leave is required because the decision at first instance was interlocutory, being a decision pursuant to s 90-15 IPS in the context of an ongoing liquidation and where no rights were finally determined: see for example *Michael Wilson & Partners Ltd v Porter* [2022] FCA 336 per Stewart J at [27], citing *Georges v Seaborn International Pty Ltd (Trustee)* [2012] FCA 294 at [27] per Murphy J. The Applicants appear to accept that leave is required (at [33] of the Applicants' Summary of Argument (**AS**), White Book p 15.)

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[1] Transcript Day 2 T15-25, White Book p 1077; J [2], White Book p 20; orders made by consent on 13 May 2025

4. Leave is opposed in circumstances where:

   4.1. The value of the matter in issue does not exceed the statutory threshold of $100,000 prescribed by s 101(2)(r) *Supreme Court Act 1970* (NSW);

   4.2. There is no substantial injustice to the Applicants occasioned by the orders below, noting the Applicants are not (and have not been, including during the hearing below) precluded, by either the Liquidators' initial refusal or the judgment of Black J, from issuing a new request for the convening of a meeting at any stage of the ongoing liquidation, which request will fall to be considered by the Liquidators in light of the circumstances as exist now in the liquidation, rather than by reference to circumstances as existed almost nine months ago. The judgment gives rise to no issue estoppel or res judicata which would prevent that step being taken;

   4.3. Whilst the AS states that the appeal raises an important point of public policy, namely the interpretation of r 75-250 IPR:

      4.3.1. In truth (and substance), the appeal is one from findings of fact, as demonstrated by the draft grounds of appeal[2];

      4.3.2. Relatedly, any consideration of the application of r 75-250 IPR would necessarily be confined to a consideration of the particular factual circumstances in the winding up as they existed in December 2024 and would thus not be of any public utility;

      4.3.3. Insofar as a question may be raised about the imposition of an additional requirement of reasonableness in respect of r 75-250 IPR, the argument is misconceived and does not actually give rise to a serious proposition requiring appellate judicial attention. This is developed in Part C below. The mere absence of appellate authority on the construction of a legislative provision does not trigger a need for such authority, particularly when the judgment complained of is well-reasoned, is not manifestly wrong, and is not inconsistent with a plain reading of the statute or the two earlier cases that considered the statute[3], in significantly lesser detail in both cases and in the context of a request for quasi-judicial advice *before* any steps were taken to engage the statute in one case; and

      4.3.4. The orders were made pursuant to s 90-15 IPS, being a discretionary provision in respect of which a *House v R* error must be demonstrated, and which is not apparent from the AS.

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[2] White Book Tab 4 p 53

[3] *In the matter of FW Projects Pty Limited (in liquidation)* [2019] NSWSC 892 per Black J, and *AXF Group Pty Ltd (in liq) v AXF Holdings Pty Ltd* [2020] VSC 375 per Almond J

5. In light of the above the application for leave should be determined first and, if the Court so elects, determined on the papers. That avoids the costs that would otherwise be incurred in preparing for a substantive appeal which, whilst an appeal from a two day trial and regarding matters of construction, would still require significant time and expenditure.

6. Further, if the question of leave were deferred to the hearing of the substantive appeal, the Liquidators' attention would necessarily be diverted from the ongoing conduct of the liquidation, which includes significant and complex overseas litigation.[4] Whilst a costs order against the Applicants would militate against the unnecessary costs incurred by the Liquidators if leave were refused, there is no remedy for the time incurred by the Liquidators and their representatives on an unsuccessful leave application and appeal as opposed to the progress of the liquidation.

B. Grounds of Appeal

7. Of the 20 grounds of appeal in the NoA:

   7.1. Two grounds are not available, namely:

      7.1.1. Ground One, as the Applicants did not oppose the granting of leave to adduce further evidence despite being expressly given the opportunity to do so: T61:42-62:15 (White Book 1072-1073); and

      7.1.2. Ground Four, because the proposition in (a) asks for a finding not contended for at first instance and the proposition in (b) is not established on the evidence, with the attempt to pursue such line of questioning in cross-examination having been abandoned;[5]

   7.2. 16 grounds relate to findings of fact or discretion open to the trial judge on the evidence, which findings are not manifestly wrong in the *House v R* sense, would not necessarily be disturbed even if the "reasonableness" requirement in r 75-250 IPR advocated for by the Applicants was made out, and which otherwise raise no issue of public importance; and

   7.3. Ground 6 seeks a finding that the words "good faith" in r 75-250 IPR require that the liquidator's opinion be reasonable, or alternatively that it not be an opinion that no reasonable person in the liquidator's position could hold. Ground 5 relates to the same argument. It is only this part of the NoA that could possibly be capable of interpretation as a ground of public importance. However, for the reasons set out below, that supposition does not withstand cursory scrutiny.

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[4] See for instance Affidavit of Andrew James Barnden 20 December 2024 at [11]-[16], White Book Tab 12 p 108-109

[5] See Transcript Day 2 T15:7-16:31 (White Book Tab 18 p 1090-1091) for cross-examination on this topic

8. In light of the above, leave should not be granted or, if it is granted, should not be granted to permit the filing of the NoA in its present form.

C. Applicants' identified issues and summary of argument

9. The Respondents disagree that the issues identified at AS [7] properly arise or would lead to any alteration in the outcome of the hearing below. Further, as set out below, the Applicants' summary of argument in Part D of AS belies the accuracy of the Issues as described at AS [7]. The Respondents' response below proceeds both on the articulation of the issues at AS [7] as well as the true arguments revealed in AS Part D.

C1. Issue 1: The "wrong" question

10. The Liquidators correctly directed their attention to whether or not the direction to convene a meeting to consider a resolution for the Liquidators' removal and replacement was unreasonable. The trial judge was correct (at J [32]) to reject the submission that the question of reasonableness or otherwise of a request to convene a meeting can be divorced from consideration by the liquidator of the purpose sought to be achieved by the proposed meeting and the effect of that outcome if it was achieved.

11. Importantly, the Applicants accepted in the hearing below that the purpose of the proposed meeting was a relevant consideration when ascertaining whether a direction under s 75-15 IPS is unreasonable.[6] Having made that concession, it is not now open to the Applicants to suggest that the only stage at which the Liquidators ought to have considered the propriety of creditors seeking to effect their removal was after the requested meeting had been held (AS [19]), or to complain that the primary judge similarly had regard to the stated purpose of the meeting as expressly contained in the Direction which the Liquidators were to consider (AS [8(a)]).

12. Further, the Liquidators did consider matters that related to the unreasonableness of the Direction. Amongst other things, the Liquidators considered that the Direction appeared to be an attempt to bypass the orders made by Black J as to the Liquidators' appointment (paragraph 31 of the Liquidators' solicitors' **Letter** dated 17 December 2024[7], expanded upon in Andrew Barnden's affidavit dated 27 May 2025 (**Barnden 3**) at [10]-[12][8] and the Liquidators' **Record**[9]), that there would be an increase in costs of the liquidation, and also delays in the Company's prosecution of its claims against the Republic of Poland (paragraph 32 of the Letter, Barnden 3 [25]-[27], Record).[10] The fact that some of those reasons may have related both to the convening of the meeting as well as the possible outcome of it is irrelevant.

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[6] Transcript Day 1, T30:44-48, White Book p 1041, T46:36, White Book p 1057, Day 2, 29:23-42, 31:15-17

[7] The Letter is at AB-11 to the affidavit of Andrew James Barnden dated 26 February 2025 (**Barnden 2**); the relevant paragraph is at White Book Tab 13 p 368

[8] White Book Tab 16 p 999

[9] Annexure C to Barnden 3, White Book Tab 16 p 1010

[10] White Book pp 368 (Letter), 1003 (Barnden 3), 1011 (Record)

13. The Applicants' arguments in AS [16] are flawed for two reasons.

14. *Firstly* – and putting to one side the complaint about the grant of leave which, as set out at [7.1.1] above, is not available to the Applicants on appeal, no opposition to that leave having been indicated in the hearing below – AS [16] proceeds on a post ipso-facto basis, contrary to the parties' agreement that the hearing should proceed on the basis of facts and matters at the time of the Direction, without reference to events that subsequently occurred. Whatever actions were taken, or not taken, by the Liquidators after the Direction (and the Letter) are not available for consideration on appeal.

15. *Secondly*, the Applicants mischaracterise the "good faith" requirement in r 75-250 IPR, implicitly suggesting that because, the Applicants assert, there is no case law to support the proposition that a liquidator should minimise work where a removal attempt has been foreshadowed, the Liquidators' formation of that genuinely held belief was impermissibly flawed. The Applicants' argument is contrary to the findings in two cases upon which they rely, namely ***Re Pacific Biotechnologies*** *Ltd; Pacreef Investments Pty Ltd v Gladman (As administrator of Pacific Biotechnologies Ltd) & Pacific Biotechnologies Ltd (admins apptd)* [2020] VSC 636, in which the Court held that the administrator was acting in good faith in forming an opinion that material was the subject of legal professional privilege, without the Court having itself to determine if such privilege did in fact exist[11], and ***Watson & Co*** *Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd* [2022] FCA 1273, where the Court was satisfied[12] that the administrators had formed an opinion, acting in good faith, that disclosure of insurance policies would found an action by the insurers for breach of confidence or risk avoidance of the policies, without the Court considering the merits or likelihood of either occurring.

16. In any event, there is nothing in AS [16] which relates to the "issue" of whether the Liquidators asked themselves the wrong question. It is rather a complaint about the evidence adduced by the Applicants at first instance, coloured by hindsight observations beyond the scope of what was argued before the trial judge.

17. *Thirdly*, and despite substantial cross-examination regarding Mr Barnden's reasoning process, it was never put to Mr Barnden that he had asked himself the "wrong question" (as characterised by the Applicants at AS[7(a)]). Indeed, questions in cross-examination were expressly premised on the basis of Mr Barnden's reasons for finding that the Direction was unreasonable.[13] The trial judge rejected the Applicants' attack on Mr Barnden's credibility, accepted his evidence and made appropriate findings accordingly.[14]

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[11] At [33] and [45] per Robson J
[12] At [39] per Thawley J
[13] See for example Transcript Day 2 T7:1-8, T8:24-25, T8:51-9:1, White Book Tab 18 pp 1082-1084
[14] See for example J[43], White Book Tab 3 p 43

18. Finally, and in circumstances where the matters relied upon by the Liquidators in coming to the view that the Direction was unreasonable are matters affecting both the convening of the meeting and its possible outcome, even if the Liquidators did ask themselves the wrong question, which is denied, and in light of his Honour's findings including at J [16], [18], [26], [32], [50-[68], and [78]-[79], the outcome would be no different.

19. As exposed above, Issue 1 is not in fact an issue at all and, even if it were, it is not an issue that would disturb the orders made by the trial judge.

C2. Issue 2: The "balancing exercise"

20. Issue 2 asks the Court to prescribe a regime for what is inherently a subjective exercise that is always and unavoidably context-dependent. That is both antithetical to the scope and intent of r 75-250 IPR and the insolvency regime more generally and inutile in this appeal, which is limited to considering a narrow time period now since long past.

21. Yet whilst the issue is described in broad terms, the nub of the Applicants' complaint is much more confined, namely that there was no evidence that the Liquidators had identified or weighed the benefit of giving creditors the opportunity to decide whether or not to replace the Liquidators (AS [23]). Such benefit, the Applicants say, was "*plain for the Liquidators to see and it was their job to look for [it] and weigh [it]*" (AS [23]).[15]

22. However:

    22.1. As the primary judge noted on more than occasion, including during the hearing[16] and in the judgment[17], there was no evidentiary basis for identifying a benefit of the meeting beyond it being what the Applicants wanted;

    22.2. It was never put to Mr Barnden (being the only Liquidator who gave evidence) that he had not identified or considered any such benefit. The Applicants submitted in the hearing below that the benefit was "informed by the statutory structure"[18] and there was no suggestion that the Liquidators were unaware of their statutory obligations or did not have regard to legislative provisions. In fact, in cross-examination Mr Barnden affirmed his knowledge of the so-called benefit, namely creditors' right to remove a liquidator;[19] and

    22.3. The weighing of any benefit in allowing creditors the opportunity to consider replacing the Liquidators must be informed by matters that were expressly considered by the Liquidators, including the possible attempt by individuals the subject of adverse findings to

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[15] The quote in AS [23] refers to benefits plural, though the only benefit identified is that described above.
[16] Transcript Day 2 Tab 18 T30:1-49
[17] J [18], [75], White Book Tab 3 pp 25, 45
[18] Transcript Day 2 T30:20-29, White Book Tab 18 p 1105
[19] Transcript Day 2 T5:36-6:7, White Book Tab 18 p 1080

misuse such powers,[20] the lack of complaint about the Liquidators' conduct and absence of ascertainable reason for facilitating the opportunity to consider replacement liquidators at the particular junction of the liquidation,[21] and the fact that creditors and shareholders as a whole had not requested such an opportunity.[22] Those considerations reveal an implicit, albeit not express, consideration and weighing of the single benefit identified by the Applicants.

23. In light of the above, the narrow complaint which the Applicants would make in this appeal under Issue 2 is not one which withstands examination.

24. Insofar as Issue 2 otherwise invites a wide-ranging consideration of how a liquidator should fulfil his or her obligation to form an opinion, acting in good faith, that is not something which arises on the facts of this case and, as set out above, would seriously undermine the broad discretion given to external administrators to conduct administrations as they see fit, absent substantial grounds for doubting the prudence of the administrator's conduct.[23] It would also have the effect of limiting the existing statutory wording in r 75-250 IPR by imposing restrictions that are not found in the legislation.

C3. *Issue 3: Good Faith*

25. The Applicants seek to supplant the requirement in r 75-250 IPR of a liquidator forming an opinion acting in good faith with the formation of a "reasonable opinion". This is apparent from AS [29] (*"good faith ought require that the liquidator's opinion be reasonable"*), AS [30] (*"Good faith requires that the opinion be reasonable"*) and AS [32] (*"...the primary judge ought to have found that the Liquidators' subjective opinion (if formed at all) was not reasonable"*). There is neither any power nor basis for the Applicants or this Court to replace the statutory language imposed by parliament with alternative language preferred by the Applicants in this case. Accordingly, Issue 3 cannot succeed.

26. Even if the Applicants' position is the lesser version articulated in AS [7(c)], namely that there must be a "reasonable basis" for the opinion formed by the liquidator in good faith (as opposed to there being a "reasonable opinion"), the argument is futile for the reasons set out below.

27. Implicit in "good faith" is the state of mind of the decision-maker, as the trial judge noted at J [36], citing *Spalla v St George Motor Finance Ltd (No 7)* [2006] FCA 1177 at [168]. It may be accepted that if a liquidator did not identify any matters for consideration or expose any part of his or her reasoning process then an opinion may appear capricious or arbitrary: in that case it

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[20] Barnden 3 [16], White Book Tab 16 p 1001
[21] Barnden 3 [32], White Book Tab 16 p 1004
[22] Barnden 3 [33], White Book Tab 16 p 1004
[23] See for example *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83 at 85-6 per Giles J; *Re Jay-O-Bees Pty Ltd (in liq); Rosseau Pty Ltd (in liq) v Jay-O-Bees Pty Ltd (in liq)* (2004) 50 ACSR 565; [2004] NSWSC 818 per Campbell J at [46], [48]

could not be said to be an opinion formed by the liquidator acting in good faith. There is nothing which the imposition of the words "reasonable basis" would add to that scenario.

28. This begs the question – how does the added requirement of a "reasonable basis" (which, like good faith, must be context and fact-dependent) change the task which is before the Court in determining if a liquidator has complied with the requirements of r 75-250 IPR, or alter the obligations of a liquidator in coming to his or her opinion? Is a "reasonable basis" to be tested by some objective standard? If so, how is that standard identified? Once identified (and presuming it is correctly identified by the liquidator at the relevant time), what if it is a standard about which the liquidator has some doubts or disputes? The liquidator cannot be said to have been acting in good faith to form an opinion which is premised upon a basis with which he disagrees (or does not know). Accordingly, a risk arises that the liquidator will either form an opinion in good faith, but not on an objectively reasonable basis, or bow to the objective reasonable basis but not form the opinion in good faith. Such a tension is avoided under the current iteration of r 75-250 IPR.

29. If the answer is instead "what is a reasonable basis will depend on the circumstances", and noting that the Courts have disavowed[24] any requirement to determine the existence of the underlying matters on which the good faith opinion is formed, how is that test any different to considering whether the liquidator formed the requisite state of mind in good faith after identifying and analysing those identified factors?

30. Framed the above way, the Applicants' lesser putative argument of an additional requirement (as opposed to a replacement of the statutory language) does no more than insert into the express text of the legislation an additional subjective requirement which adds nothing to the test at best and risks internal incompatibility at worst.

31. The Applicants complain (at AS [30]) that the primary judge was wrong at J [42] to find that the standard for a liquidator faced with a direction to call a meeting is a lower standard than what is required under ss 236 and 237 of the *Corporations Act 2001* (Cth) for derivative leave. That argument ignores two of the three reasons given in J [42] as to why the Applicants' proposed "reasonable basis" requirement should be rejected, namely that such an imposition is not part of the ordinary meaning of the term "good faith", including by reference to case law, and that if the intent of the IPR had been for the Court to assess whether the liquidator had a reasonable basis for his or her opinion, the text of the IPR could have so provided. No complaint can be made against either finding. Further, neither of the derivative leave cases relied upon by the

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[24] *Re Pacific Biotechnologies* at [33], [45]; considered with apparent approval in *Watson Co* at [26]-[27]

Applicants at first instance[25] contain any requirement for good faith to have a "reasonable basis".

32. There was no error by the primary judge in the understanding of the statutory requirements of r 75-250 IPR. There was no error by the primary judge in the application of those requirements or in the outcome of the hearing below.

D. Further matters

33. The Applicants should pay the costs of any refused leave application and unsuccessful appeal.

34. The Liquidators' list of authorities and legislation is annexed.

8 August 2025

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[25] *Swansson v Pratt Properties Pty Ltd* (2002) 42 ACSR 313; [2002] NSWSC 583 and *Gillespie v Gillespie* (2025) 172 ACSR 183; [2025] NSWCA 24

Legislation and Authorities

Legislation

1. s 101(2)(r) *Supreme Court Act 1970* (NSW)
2. s 75-15(2) *Insolvency Practice Schedule (Corporations) 2016* (Cth) (**IPS**)
3. s 90-15 IPS
4. r 75-250 *Insolvency Practice Rules (Corporations) 2016* (Cth)

Cases

5. *Michael Wilson & Partners Ltd v Porter* [2022] FCA 336 per Stewart J at [27]
6. *Re Jay-O-Bees Pty Ltd (in liq); Rosseau Pty Ltd (in liq) v Jay-O-Bees Pty Ltd (in liq)* (2004) 50 ACSR 565; [2004] NSWSC 818 per Campbell J at [46], [48]
7. *Re Pacific Biotechnologies Ltd; Pacreef Investments Pty Ltd v Gladman (As administrator of Pacific Biotechnologies Ltd) & Pacific Biotechnologies Ltd (admins apptd)* [2020] VSC 636
8. *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83 at 85-6 per Giles J
9. *Spalla v St George Motor Finance Ltd (No 7)* [2006] FCA 1177 at [168]
10. *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd* [2022] FCA 1273