

FEDERAL COURT OF AUSTRALIA

Simpson v Taylors Business Pty Ltd [2025] FCA 835

File number(s): VID 891 of 2023

Judgment of: **BENNETT J**

Date of judgment: 21 July 2025

Date of publication of reasons: 23 July 2025

Catchwords: **PRACTICE AND PROCEDURE** – application by director to represent a company where director is not a lawyer – whether to exercise Court’s discretion to waive compliance with r 4.01(2) of the *Federal Court Rules 2011* (Cth) – application dismissed

Legislation: *Federal Court of Australia Act of 1976* (Cth)
Federal Court Rules 2011 (Cth)

Cases cited: *AA Shi Pty Ltd v Avbar Pty Ltd (No 4)* [2010] FCA 878
Benjamin Hornigold Ltd v John Bridgeman Ltd (No 2) [2024] FCA 1041
Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175
Julie Anne Barrow Charitable Trust v Brisconnections Management Co Ltd [2009] FCA 412
Molnar Engineering Pty Ltd v Burns [1984] 3 FCR 68
Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 12) [2012] FCA 289
Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd (1986) 8 NSWLR 104
Southcorp Brands Pty Ltd v Australia Rush Rich Winery Pty Ltd [2019] FCA 720; 369 ALR 299
Super Choice Now Pty Ltd (ACN 122 134 703) v BrisConnections Management Co Ltd (ACN 128 614 291) [2009] FCA 1026
Termi-Mesh Australia Pty Ltd v Josu Manufacturing Pty Ltd [1999] FCA 1241

Division: General Division

Registry: Victoria

National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
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Date of last submission/s:	23 June 2025
Date of hearing:	21 July 2025
Counsel for the Applicant:	M Guo with P Kelly
Solicitor for the Applicant:	Consumer Action Law Centre
Counsel for the Respondent:	The Respondent was not represented.

ORDERS

VID 891 of 2023

BETWEEN: **LISA GAY SIMPSON**
 Applicant
AND: **TAYLORS BUSINESS PTY LTD ACN 107 445 723**
 Respondent

ORDER MADE BY: **BENNETT J**
DATE OF ORDER: **21 JULY 2025**

THE COURT ORDERS THAT:

1. Mr Grainger’s application for leave to represent the Respondent is refused.
2. The Court directs that the following documents filed by the Respondent on 16 July 2025 be removed from the file:
 - (a) Defence;
 - (b) Outline of submissions; and
 - (c) Affidavit of Graeme John Grainger affirmed on 16 July 2025.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from transcript)

BENNETT J:

- 1 I have before me an application of Mr Grainger, the sole director and shareholder of the Respondent, Taylors Business Pty Ltd (**Taylors**), to represent that company both in the applications he seeks to advance today, and in defending the applications that the Applicant has brought today, and in the proceedings more broadly, including by the filing of documents.
- 2 Proceedings were issued against Taylors on 25 October 2023. The proceedings concern allegations that Taylors engaged in unconscionable conduct and unlicensed lending, by its operation of a pawnbroking business.
- 3 Currently, the sole director of Taylors is Mr Graeme Grainger. Mr Grainger became the director of Taylors following the disqualification of the earlier director, Mr Noel Borruso. Taylors carries on the business of pawnbroking. It was the practise of the business to take possession of certain goods at the time funds are advanced. The nature of the relationship created by the contracts is at the core of the contest in the matter. The Applicant asserts a credit contract was created, and the possession of the goods was the bailment to secure the loan created by the credit contract.
- 4 The Respondent filed its defence on 28 March 2024. By that defence, the Respondent said, among other things, that no credit contract was created by the pawnbroking agreement. It argued in part, the pawnbroking contract was effective to pass title to the goods after a default of payment, but not at the time the goods were obtained. The borrower is said to have had an entitlement, but not an obligation, to redeem the goods if they chose. Issues around whether or not this conduct required a licence, whether the Respondent company was relevantly licensed, and whether the conduct was otherwise unconscionable, is the subject of the proceeding.
- 5 By orders made by O’Callaghan J on 23 August 2024, certain separate questions were set out. They deal more clearly and comprehensively with the subject matter of the proceedings than I have summarised above. In December 2024, an application was made for a freezing order. Justice Neskovic granted an interim freezing order. The matter was then allocated to my docket, and it returned on 20 January 2025 before me. At the return of the freezing order, I

gave Mr Grainger limited leave to represent the Respondent, to enable him to respond to issues concerning the freezing order. He did so, and made submissions as to why the freezing order should not be made, or should not be made in the terms sought. I nonetheless granted the extended order for the reasons that I gave at the time.

6 The manner of Mr Grainger’s conduct at that time raised questions over the financial propriety underpinning the operations and, importantly – Mr Grainger’s ability to understand them. He explained that certain funds were removed from the Respondent, to be paid to the former owner of the company, who had entered into an agreement with Taylors which required the payment of the funds. The agreement that was said to ground that obligation was ultimately produced, and its terms appeared to operate quite differently from the way in which Mr Grainger had explained it.

7 It follows that the basis upon which substantial funds had been paid out of the company remained opaque. Recently, leave was granted to amend the statement of claim and application. Those changes arose following a change in circumstances by the warehouse at which the pawn goods were stored, on premises previously leased by Taylors. I was informed, by affidavit filed in relation to the amendment application, that the goods were removed and placed in a shipping container. By that affidavit dated 20 May 2025, the Applicant’s solicitor deposed to security concerns regarding the storage of the goods in the shipping container.

8 The amended originating application sought a declaration that the persons entitled to possession of the pawned goods are the Applicant and the group members. It is in relation to the confined question of a declaration in relation to that question, that the current application for judgment in default is focused.

9 There are some background procedural matters that are relevant to set out.

10 Taylors had solicitors engaged –but they ceased acting on about 6 November 2024. There was an interim injunction concerning dealing with the goods, made by McElwaine J on or around 9 November 2023, to preserve assets that it took as security. Order 2 on that day made clear that order 1 did not prevent the Respondent from returning the pawned goods to the group members or the Applicant, at the Respondent’s expense, without requiring the payment of any charges under the pawn contracts.

- 11 On 8 February 2024, there was an application for default judgment, because Taylors had not filed a defence. The Court subsequently made orders to extend the time to file a defence in default of which judgment could be entered.
- 12 In compliance with that order, a defence was filed on 28 March 2024, and a reply was filed on 11 April 2024. There was then an order on 23 August 2024, that there be a series of separate questions tried. There were various other procedural orders for the balance of 2024.
- 13 In November 2024, the Respondent's solicitors gave notice that they had ceased to act. As I have noted above, there was a freezing order granted in December of 2024, to preserve some assets of the company, in circumstances where Neskovcin J was satisfied there was a real danger that a judgment in this proceeding may be wholly or partially unsatisfied, due to the risk of dissipation or destruction or removal of assets.
- 14 No solicitors have subsequently been appointed. Ample time has been provided for solicitors to be obtained since Taylors filed a notice of termination of its lawyer's retainer on 6 November 2024.
- 15 In the further hearing of 27 February 2025, further financial anomalies became apparent, following Mr Grainger's cross-examination, that cross-examination taking place with the benefit of pro bono counsel. That cross-examination revealed Mr Grainger's affidavits had been materially inadequate, and he was unable to explain basic matters of financial propriety around the operation of Taylors.
- 16 On 13 February 2025, the Applicant was substituted for the previous Applicant. In the material before the court at that time, it became clear the owner of the warehouse that held the goods the subject of the impugned contracts had re-entered to take possession. At the time it did so, the goods were subject to an injunction to prevent dealing with them.
- 17 A hearing of the separate questions then took place before me on 15 April 2025. No representative of Taylors appeared, or sought leave to appear, in relation to those separate questions. Judgment is reserved in relation to those separate questions.
- 18 It appears uncontroversial that the Applicant did not remove the goods the subject of the contracts at the time the warehouse reverted to the possession of the landlord.
- 19 As I have observed above, the Applicant obtained leave to amend their claim, based on the developments set out in the affidavit 20 May 2025 that I have summarised. That leave was

granted on 23 May 2025. The Applicant, in that amendment, raised a claim that the Respondent had abandoned the goods at a time that the warehouse owner re-entered to take possession.

20 I made an order providing a time by which a defence could be filed. The Respondent sought, without instructing solicitors, additional time to file a defence. Additional time was granted by orders made on 3 June 2025. No defence was filed by the extended date of 20 June 2025. On 23 June 2025, the Applicant applied for partial default judgment in respect of the application for the abandonment of the goods only.

21 A date for the hearing of the default judgment was set, and it was set including by reference to the availability of Mr Grainger.

22 On 16 July 2025, a document purporting to be a defence was filed by Mr Grainger, as was an affidavit and a document entitled “submissions”, apparently on behalf of the Respondent. None of these documents were filed by lawyers. Mr Grainger appears today by reference to those documents, and seeks to represent the company himself. The Applicant seeks orders that these documents be removed from the Court’s file.

23 This matter has been on foot for a substantial period of time. I have clearly in mind, the overarching purposes set out in 37M and 37N of the *Federal Court of Australia Act of 1976* (Cth) (the **Act**), and the interest the community has in the fair and efficient conduct of these proceedings.

24 Rule 4.01(2) of the *Federal Court Rules 2011* (Cth) (the **Rules**) provides that “[a] corporation must not proceed in the Court other than by a lawyer”.

25 There is currently no grant of leave in place, and it is clear that leave is required to file documents (see *Benjamin Hornigold Ltd v John Bridgeman Ltd (No 2)* [2024] FCA 1041 at [12] (Needham J)).

26 In seeking leave today, Mr Grainger sought to advance three applications.

(1) First, to file what he has called the “second defence”. He acknowledges that this document was filed in breach of the time for filing imposed by this Court’s orders, and he has no explanation as to why that is so. He seeks to rely upon *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 (**Aon**) in support of his application, but I do not understand the basis upon which *Aon* can be said to be relevant.

- (2) Secondly, he says he cannot afford legal fees, and seeks a referral for pro bono legal assistance. That is a submission based, at least in part, upon his misapprehension of the freezing orders in place, which provide a carve out for the payment of reasonable legal fees. It is evident from Mr Grainger’s submission that he has taken no real reasonable steps to inform himself about the content of those orders, or to attempt to access funds which could have assisted him to advance more cogent submissions.
- (3) Thirdly, he also said that the company has no funds and no ability to obtain funds. He referred, somewhat cryptically, to past compliance with Court orders, despite simultaneously acknowledging past defaults.

ANALYSIS

27 In light of the matters raised, it is relevant to again note the prohibition of r 4.01(2) of the Rules is cast in mandatory terms, stating (emphasis added) “[a] corporation *must not* proceed in the Court other than by a lawyer”.

28 Of course, r 1.34 of the Rules permits me to dispense with the obligation imposed by r 4.01(2). That is a discretion to be exercised judicially. It is necessary for me to identify a sufficient reason to permit the company to proceed without a lawyer. A number of factors have been recognised as relevant, particularly the comments of Gordon J in *Julie Anne Barrow Charitable Trust v Brisconnections Management Co Ltd* [2009] FCA 412 at [12] that (citations omitted):

What constitutes “sufficient reason” will, of course, vary from case to case. It may include such factors as actual financial incapacity, the financial difficulties created by diversion to paying legal expenses of funds which might be necessary to meet wider commitments of a company, the class of company involved, the nature of its undertaking, its financial structure, its ability to retain and pay its staff, the identity of its shareholders and the spread of the shareholding and the fact that a company is the alter ego of a single person who has advantageous educational and technical qualifications

29 Without limiting relevant facts, the other cases have identified additional factors, which often include:

- (1) The class of company involved, the nature of its undertakings, its financial structure, its ability to retain and pay staff and, no doubt, other factors which might be identified as relevant (*Molnar Engineering Pty Ltd v Burns* [1984] 3 FCR 68 (*Molnar Engineering*) at 74 (Smithers J)).
- (2) Whether the company is the applicant or respondent, or as sometimes is put, whether the company is the aggressor in litigation. In this respect it has been noted that where

a company is not before the court voluntarily, it is fundamental to the system of justice in operation in Australia that courts be accessible. However, it has also been regarded as appropriate to take into account the fact that when a trader decides to take on a corporate form, it takes the benefit which that form provides as to its mercantile endeavours. I was referred to by counsel for the Applicant, and I accept, the comments of Flick J in *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 12)* [2012] FCA 289 (***Pharm-a-Care***) at [13], citing the analysis in *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 8 NSWLR 104 at 105-6 (Kirby P) and 110 (Samuels JA). It is also relevant to refer to *Pharm-a-Care* at [17], citing *Termi-Mesh Australia Pty Ltd v Josu Manufacturing Pty Ltd* [1999] FCA 1241 at [14], where French J observed:

There is no doubt that those who choose to carry on their business through corporate structures enjoy advantages that those carrying on business on their own account do not enjoy. They also acquire disabilities and obligations. One of the disabilities is that which is imposed by the Rules of Court under consideration in this case.

I adopt those comments.

- (3) Whether the individual is capable of conducting the proceeding on behalf of the company (*AA Shi Pty Ltd v Avbar Pty Ltd (No 4)* [2010] FCA 878 at [18] (Collier J)).
- (4) The financial capacity of the company, and of those standing behind it.
- (5) The complexities of the case. For example, if the proceeding involves difficult questions of law, leave may less readily be granted.
- (6) A further factor is whether the overarching purpose prescribed by s 37M of the Act would be promoted by the grant of leave. I refer in particular to the comments of Beach J in *Southcorp Brands Pty Ltd v Australia Rush Rich Winery Pty Ltd* [2019] FCA 720; 369 ALR 299 at [82(g)]-[82(h)]:

the manner in which the case has progressed to date and the manner in which it may progress without the company having legal representation; and

whether the proposed representative is also a witness and, if so, whether they will properly be able to conduct the case of the company whilst also being a witness.

It has been said that leave should be granted where, having regard to the necessary or reasonable commitments of the company, the appropriation of funds to engage legal practitioners would create financial difficulties with which the company could not, or should

not, be required to cope. In this connection, the ability of the company to retain and pay its staff may be relevant (*Molnar Engineering* at 74).

30 I have considered each of these factors, as well as the circumstance of the pleaded case and the defence as presently articulated, with particular regard to the procedural history that I have set out above. In my view, it is not appropriate to grant leave for the company to proceed without a lawyer, principally for the following reasons.

- (1) I accept that the company is the Respondent and, therefore, is not the moving party of the litigation. I accept that this is a matter which has been accepted, in some instances, to make it more appropriate to permit a non-lawyer to represent the company. I have taken that into account, and proceed on that more beneficial basis identified in *Super Choice Now Pty Ltd (ACN 122 134 703) v BrisConnections Management Co Ltd (ACN 128 614 291)* [2009] FCA 1026 at [19] (Goldberg J). However, in doing so, I note that Taylors has repeatedly failed to comply with orders of this Court, and has failed, in earlier hearings, to give assurances as to the security of the property proffered by individuals. It was in those circumstances necessary for the Applicant to obtain an injunction in this Court, because such assurances were not forthcoming. There has been a lack of clarity about the security of the goods, which shifts, somewhat, the Respondent's position as being somebody who has been brought into proceedings otherwise against their will. In short, I consider that to some extent it was necessary for these proceedings to be issued, to vindicate or protect the rights of the Applicants, or potential rights of the Applicants, in relation to the goods the subject of the interim injunction.
- (2) It is also relevant that the information concerning the financial irregularities of the company is long-standing and concerning. If impecuniosity is claimed as a reason a corporation seeks leave to carry on other than by a solicitor, such impecuniosity must be demonstrated. Mr Grainger says that the Respondent has few assets, and the freezing order has prevented him from accessing a lawyer. The freezing order permitted the use of funds for legal fees. Mr Grainger said, in submissions today, he had not understood that, but was unable to explain why that was so in face of the clear terms of the order – which he says that he has read. He claimed to not understand how he could have brought about access to the limited funds the company has. But it was clear, in the course of the exchange, that he has taken no steps to inform himself about those matters, and seeks to cast the burden of compliance upon others.

- (3) Further, the financial irregularities themselves that I have referred to in the course of the freezing order applications remain a matter of concern, albeit not directly relevant to this application. Mr Borruso was a bankrupt who was prohibited from being involved in the affairs of Respondent. And there have been large transfers of money out of the company, to related parties, and without any explanation or apparent understanding. This matter is not directly relevant to the application before me. However, I see it as relevant to Mr Grainger's ability to carry on the proceedings, both as a matter of his technical understanding and as a matter of his ability to separate himself from the events the subject of the proceedings.
- (4) The fact there is a single director of the company is a factor, but not a significant one. Mr Grainger is a relatively recent director.
- (5) It is an important factor to determine whether Mr Grainger is capable of representing the company, and doing so with appropriate professionalism. There are three observations I would make in that respect.
- (a) Mr Grainger does not demonstrate any real understanding of the court process. He has not provided any reason for his failure to comply with the orders of this Court. It appears his interest in the matter has languished and then revived over time, with no explanation being provided as to why that is so.
 - (b) The evidence before the Court, while not up to date, is that there are no current employees. And Mr Grainger's assertion from the bar table is that the company is not operating.
 - (c) Mr Grainger has not previously been of assistance to the Court. And he has already been a witness to the proceeding, and he could be again. He has not, generally, demonstrated the candour and assistance this Court is entitled to look for in a person seeking to act in a matter before it.
- (6) The various defaults of the Respondent in the orders leading up to hearing today are also relevant. Mr Grainger has not taken steps to participate, for some time, in the proceeding, has been in breach of several orders, but has nonetheless asserted that I should exercise my discretion to allow him to now participate, after the lengthy delays, prevarication and failure to inform the Applicant of his intended applications today.

31 I do not consider that Mr Grainger having leave to conduct the proceeding is appropriate or consistent with the overarching purposes in ss 37M and 37N of the Act. Accordingly, I do not

consider it appropriate to grant leave to permit the company to proceed other than by a lawyer. For the same reason, I will reject the filing of the documents, purportedly by the Respondent, dated 16 July 2025. I will make consequential orders.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bennett.



Associate:

Dated: 23 July 2025