



Transcript of Proceedings

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Date: 19 May, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

No 2863 of 2002

IN THE MATTER OF:

VISUAL CHANGES PTY LTD
(ACN 084 792 585)
TRADING AS 21ST CENTURY ACADEMY

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Applicant

and

JAMIE NEVILLE McINTYRE First Respondent

and

JANA ROJNOLK Second Respondent

and

VISUAL CHANGES PTY LTD
ACN 084 792 585 Third Respondent

and

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08042003 T2/JJD24 M/T 1/2003 (McMurdo J)

CASHFLOW CREATION PTY LTD
ACN 085 344 065

Fourth Respondent

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and

JNMAC PTY LTD
ACN 096 389 623

Fifth Respondent

and

JNMAC2 PTY LTD
ACN 096 580 326

Sixth Respondent

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and

JAYMAC COMMUNICATIONS AUST NO 2 PTY LTD
ACN 076 467 966 (IN LIQUIDATION)

Seventh Respondent

and

RICHARD ANDREW GAGIE

Eighth Respondent

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BRISBANE

..DATE 08/04/2003

JUDGMENT

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HIS HONOUR: In these proceedings, I have before me four applications for winding up of the companies which are respectively the third to sixth respondents.

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In each case the application is made upon the ground of alleged insolvency and in each, there is an issue of fact, as to whether that ground is established.

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In the hearing conducted yesterday, I ultimately permitted the director of those companies, Mr J N McIntyre, who is the first respondent in the proceedings, to make submissions going to whether each of those companies ought to be ordered to be wound up.

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He had filed two affidavits on the 13th of March, one of which exhibited a very substantial written submission and in that and his other affidavit, there was extensive evidence, much of it in the form of assertion or argument, but none of it the subject of objection, going to issues which at least in some senses, are relevant to the present applications. I have had regard to that material, including his written submission annexed to one of those affidavits, as well as his oral submissions, made in opposition to these applications in yesterday's hearing.

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The evidence as to the alleged insolvency, relied upon by the applicant in the case of each company, is in the form of affidavits sworn by Mr B V Hellen, who since May of last year, has been the provisional liquidator of each of the companies,

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having been appointed in March last year as receiver and manager of each of them.

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He is also the liquidator of the seventh respondent, whose affairs are of some relevance in assessing the solvency or otherwise of at least some of the presently relevant companies.

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To the extent that any of these companies has accounting records, he has had the benefit of access to them and he also speaks from a position of having been effectively in charge of the companies for the past year.

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That to my mind gives his evidence particular weight in the contest that exists in some respects between his evidence and that of Mr McIntyre in relation to the issue of insolvency.

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The third respondent, which I shall call Visual Changes, is a company which has a group of creditors who were investors in a particular scheme in which this company was involved. That group of investors, it appears from Mr McIntyre's material, was owed or is owed, something slightly in excess of \$40,000 and Mr McIntyre says that their claims can very nearly be met by what he asserts is about \$38,000 in the hands of the provisional liquidator, which he says ought to be applied to meet them.

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He then says that in the event that that \$38,000 was so used, the attitude of Mr McIntyre's wife, who is on his own evidence

a very substantial creditor of this company in the sum of about \$130,000, might be, to put it broadly, more favourable to the third respondent, that is to say, she might be inclined to look to recover any loss from having been a creditor of that company by other means, including it is asserted, by seeking compensation from the present applicant.

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However, he puts the matter no higher than saying that in that event, she would be "prepared to consider leaving her claim of \$130,000 and fund the repaying of the remaining \$2,294", that latter sum being what he asserts is the difference between the funds held by the provisional liquidator and the amounts owing to these investors. That hardly provides any reasonable assurance that she will not seek to recover any of her debt and it is clear that if she did seek to do so, there would be no funds available from the assets of Visual Changes, assuming that the so-called frozen funds of \$38,000 were applied to pay the external investors.

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There is also, in relation to this company, another alleged debt of approximately \$100,000 said to be owing to Mr McIntyre himself and there is no satisfactory explanation for why that debt was once claimed by Mr McIntyre, but would not now be able to be claimed by him against the company.

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Mr McIntyre swears that most of the investors whose claims total that sum slightly in excess of \$40,000, oppose the winding up of Visual Changes, although only some of those

opponents have gone into print, at least in what I have seen,
to demonstrate their opposition.

It is relevant that I consider their opposition to the
application to wind up Visual Changes, but their views do not
determine the matter. Having regard to the evidence of
Mr McIntyre and his submissions, nevertheless there is no good
reason shown to reject the evidence of Mr Hellen that Visual
Changes is insolvent.

I now turn to the fourth respondent, which I shall call Cash
Flow Creation. According to Mr Hellen, the administration
holds funds of but \$3.97 and it has substantial creditors.
One of those, he says, is a company called Gibson Road
Proprietary Limited, which has been a landlord of premises
leased to Cash Flow Creation.

Mr McIntyre swears that the debt to that company is disputed,
for reasons that are not at all clear to me. He asserts that
the lease is what he describes as an "invalid" lease.

Accepting for the moment that there is a genuine dispute as to
that debt, Mr Hellen's most recent affidavit reveals other
creditors of the company, including persons called Bednall and
the seventh respondent.

Mr McIntyre's material does not, in my view, meet the evidence
of the existence of those other creditors. I am satisfied

upon Mr Hellen's evidence, that Cash Flow Creation is insolvent.

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The fifth respondent is a company which, according to Mr Hellen's affidavit of 19 December 2002, showed or had no assets or liabilities, according to a report as to its affairs, which Mr McIntyre had submitted.

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However, Mr Hellen swears that the company had been involved in numerous financial transactions, although in the absence of proper records, as at December 2002, he was unable to state any more than that he believed that it was more likely than not, that the company was insolvent.

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In his most recent affidavit sworn last month he reveals a transaction of \$110,000 paid to a bank account in the name of this company and his investigations show substantial intercompany transactions between this company and amongst others the seventh respondent which as I have said are not the subject of any due recording and in particular recording in any ledger or loan accounts.

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What appears from his evidence is that the assertion by Mr McIntyre that the company has no assets or liabilities should be rejected. A company which has had an involvement in substantial transactions at least in one case in excess of \$100,000 is unlikely to have no assets or liabilities. In addition Mr Hellen has incurred professional fees and disbursements through acting as receiver manager and

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provisional liquidator and although they are yet to be approved by the Court they seem to me to be contingent liabilities of the company which must be brought into account in the present context.

In the circumstances I consider that I should accept Mr Hellen's opinion that the fifth respondent is insolvent.

The sixth respondent was also the subject of a report as to affairs which disclosed no assets or liabilities. However Mr McIntyre had lodged with the then administrator of the seventh respondent of which Mr Hellen is now the liquidator a claim for an amount of \$149,000 said to be owed to this company, that is owed to the sixth respondent. Mr Hellen says that this claim is unfounded.

In his December affidavit Mr Hellen was unable to determine whether the sixth respondent was solvent. But in his March affidavit he refers to some other matters being this company's guarantees of payments due to the deed fund for the seventh respondent. And Mr Hellen's professional fees and disbursements for acting for this company as receiver and manager and provisional liquidator are also contingent debts owing by it.

In the circumstances I accept Mr Hellen's evidence that more likely than not the sixth respondent is insolvent and I so find.

Having then found that each of the subject companies is insolvent, there is then a necessity to consider matters relevant to the exercise of the Court's discretion as to whether in each case the company ought to be ordered to be wound up.

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Most of the evidence relied upon by Mr McIntyre in this hearing consisted of matters going to whether orders made by Mr Justice Ambrose in March last year for the appointment of receivers and managers to amongst others these four companies were made as a consequence of what Mr McIntyre alleges were misrepresentations as to the facts.

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Ultimately Mr McIntyre's evidence and submissions went as far as saying that the applicant has misconducted itself in these proceedings such that the present applications should be regarded as an abuse of process. In effect he asserts that they have been brought for some improper purpose or purposes. One of those purposes he asserts is to avoid what he says would otherwise be the responsibility of the applicant to meet Mr Hellen's fees.

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I am not in a position to assess the precise merit or demerit of the detailed criticisms made of the evidence put before Mr Justice Ambrose. However it must be noted that Mr McIntyre's interests have been represented at least by solicitors on the occasion of several hearings involving the broader proceedings, that is those numbered S2863 of 2002, and it was

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only in the past few weeks that Mr McIntyre ceased to be
legally represented in these proceedings.

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There was no appeal from the order of Mr Justice Ambrose nor
was there any appeal from the orders of Justice Fryberg which
appointed provisional liquidators to these companies in May
2002. Nor has any application been made to strike out these
proceedings or any part of them as having been an abuse of
process. To my mind that very substantially detracts from any
weight that might be given to the very serious allegations
that are made by Mr McIntyre.

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The present question is whether there is a demonstrated case
of these applications for winding up having been brought for
an improper purpose. I am a very long way indeed from being
satisfied that there is any case made out by Mr McIntyre to
that effect.

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The companies are in each case insolvent and the applicant is
entitled to rely upon the advice of Mr Hellen, an independent
officer of the Court as to their insolvency.

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At one stage Mr McIntyre's submissions gave the impression of
also impugning the conduct of Mr Hellen. I do not see
anything in the evidence which would at all support such an
allegation. And nor do I see anything which would suggest
that Mr Hellen is not a person who is an appropriate appointee
as liquidator of each of the companies.

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In all the circumstances then I shall order that each of the
third, fourth, fifth and sixth respondents be wound up.

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HIS HONOUR: I have added to Mr Conrick's draft an order
number 4 in these terms: The first respondent shall pay to Mr
Bradley Hellen his costs of appearing at this hearing on 7 and
8 April 2003.

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