



Transcript of Proceedings

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Date: 6 April, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MUIR J

No 9055 of 2003

AUSTRALIAN SECURITIES AND INVESTMENTS Applicant
COMMISSION

and

MARCEL IVAN SHEARS First Respondent

and

OZESHOP.COM.AU PTY LTD Second Respondent
(ACN 090 600 650)

BRISBANE

..DATE 25/03/2004

JUDGMENT

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HIS HONOUR: In this application the applicant seeks an order that the second respondent, Ozeshop.com.au Pty Ltd be wound up pursuant to sections 459A or 461(1)(k) of the Corporations Act 2001, and an order that the first respondent, Mr Shears, be disqualified from managing a corporation pursuant to section 206E of the Corporations Act 2001 for a period of ten years.

Mr Shears in 1999 or thereabouts conceived the notion of setting up a boat-building business whereby materials would be purchased in the United States and shipped to Australia for the manufacture here of boats for sale in the United States. He set up a company, Cabriolet Royale LLC, in Delaware for that purpose, it being his understanding that customers in the United States would feel more comfortable dealing with a United States corporation. There were other reasons for this as well, including the fact that the materials for use in the business were largely to be sourced in the United States.

He had concerns, however, about the level of litigiousness in that jurisdiction, and in order to protect the assets of the prospective business he resolved, probably in consultation with his accountant Mr Gillard, that two companies be formed here; one to manufacture the boats, and the other to hold the assets relating to the boat-building enterprise. The lastmentioned company is the second respondent, Ozeshop. The other company is Cabriolet Royale Pty Ltd. Mr Shears was the sole director and shareholder of each of the three companies.

The funding for the acquisition of the plant and equipment for use in the boat-building business came from LLC, as did the moneys for the acquisition of materials for use in the construction of the boats. In some cases such materials were acquired directly by LLC in the United States and shipped to Cabriolet Royale. There were separate proceedings decided by me today in which LLC sought a declaration that property in the partially-completed boats and one fully-completed boat, as well as in the plant and equipment, was vested in it. It failed in that application.

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At the time Mr Shears procured his appointment as director of each of the Australian companies, he was prohibited from managing a corporation for a period of five years from 22 October 1999. Clearly, he was in breach of that prohibition, and the contrary is not contested by Mr Hackett who appears for him. The prohibitions resulted from convictions on 22 October 1999 for (a) failure to deliver up to the liquidator of Cornerstone Group Australia Pty Ltd all books in his possession belonging to the company contrary to section 590(1)(b)(ii) of the Corporations law; and (b) failure to comply with the requirement made under section 33 of the ASIC Law without reasonable excuse to provide all books relating to the affairs of Cornerstone Group Australia Pty Ltd in his possession, contrary to section 63(1) of the ASIC Law.

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I observed in the course of my reasons in the other matter I mentioned earlier (BS622 of 2004) that "Mr Shears appeared to have only a vague understanding of the corporate structure

which his accountants had set up for him, and of the transactions effected within that structure. It may be doubted also that he has much of an understanding of the nature of corporations as separate legal entities". I then went on to discuss some related matters and further observed, "It is unlikely, though, that he (Mr Shears) gave the matter much thought, as he probably considered that the inter-company financial arrangements were best left to the accountants."

Cabriolet Royale was the subject of legal action by an American resident, and judgment was obtained against it. Mr Shears then decided that it should cease trading, and that the manufacturing business should be taken over by Ozeshop. Cabriolet Royale was left to be wound up.

It may have been intended by Mr Shears that all local creditors of Cabriolet Royale were to be paid out, but that did not occur. What did occur is that on Mr Shear's instructions, employees of the new business continued to use the name Cabriolet Royale when dealing with other trade entities, and orders were placed in the name Cabriolet Royale. The fact of Cabriolet Royale's winding up was concealed by Mr Shears from suppliers.

In the course of its trading compulsory superannuation in respect of its employees was either not paid or left substantially unpaid. This was despite Mr Shears having been advised of the default. A similar problem occurred in

relation to compulsory WorkCover insurance. There is also
evidence that Mr Shears failed to keep adequate records in
respect of both Australian companies pursuant to section 286
of the Corporations Act, and to provide books and records of
Cabriolet Royale to the liquidator, in contravention of
sections 530A(1) and 483(1). There is evidence also of
failure to deliver books and records of Ozeshop to the
receivers.

Ms Hoch, who appears for the applicant on the hearing of these
applications, now seeks Mr Shears' disqualification for a
period of five years. Mr Hackett does not oppose that period.
In my view it is appropriate. In reaching that conclusion I
take into account the argument put forward to the effect that
Ozeshop was set up as a "phoenix" operation. I am not
satisfied that this is a correct description of what happened.
Mr Shears and his accountant transferred much of the assets of
the business of Cabriolet Royale to Ozeshop before any
financial difficulties of Cabriolet were in prospect. No
doubt when Cabriolet ran into difficulties as a result of the
action in the United States, a quick transition was resolved
upon. It may well be the case that there were irregularities
in the way in which that was effected, but the overall
position, it seems to me, was nowhere near as reprehensible as
the applicant initially thought.

Accordingly, I order that Marcel Ivan Shears be disqualified
from managing a corporation pursuant to section 206E of the
Corporations Act 2001 for a period of five years from today's

date, and that he pay the applicant's costs of and incidental to that application, including reserved costs, to be assessed on the standard basis.

It is appropriate to make the winding-up orders sought. The evidence discloses insolvency on the part of Ozeshop. Furthermore, if the winding up does not occur, it is effectively only Mr Shears who is capable of and will conduct the management of the company. He is not in a position to do that. There is also a public interest in protecting the creditors of the company.

...

HIS HONOUR: Whilst that is being looked at, is it going to be possible to separate out the costs of the winding-up application as opposed to the costs of the disqualification?

...

HIS HONOUR: It isn't possible, then, to make an order that Mr Shears pay the costs of in effect the order for his disqualification, but not of the winding up, so it would have to be done differently. I will vacate that order as to costs.

MS HOCH: That's correct, your Honour, and the material really does go to both issues.

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MS HOCH: If it would assist your Honour, I could have an order done. I didn't come prepared with one.

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HIS HONOUR: That would be useful. I shouldn't formally pronounce it, in any event, until tomorrow, because it has been advertised for tomorrow.

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MS HOCH: That's correct, your Honour.

HIS HONOUR: And I gather there is unlikely to be any appearance by anybody, but nevertheless regrettably it will be necessary, I think, to come back and make a formal order tomorrow. So if you could produce a draft I would be grateful.

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The order for costs will be that the first respondent, Marcel Ivan Shears, pay one half of the applicant's costs of and incidental to the proceedings, to be assessed on the standard basis. The other costs can be met out of what will be the applicant's costs out of the winding up, or in the winding up, however it is appropriate to express that.

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It seems to me for reasons advanced by Mr Hackett in the course of his submissions, that it would be inappropriate for Mr Shears to be ordered to pay all of these costs, having regard to his conduct once the matter was raised, and also having regard to the fact that there do appear to be some assets of substance which are available to meet a costs order. There is the further consideration that those assets have been

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provided directly or indirectly by Mr Shears in the first place. So on reflection it is more appropriate that the order be that he pay one-third of the costs, and that should be reflected in the draft order.

MS HOCH: Yes, your Honour. Your Honour, when the matter was before you in January, the costs of that hearing were reserved. I would seek an order that the costs include any reserved costs.

HIS HONOUR: That was a one-day hearing, was it?

MS HOCH: It was a directions hearing.

HIS HONOUR: A directions hearing? I won't order that Mr Shears' one-third include reserved costs, but any reserved costs, of course, of the applicant will be its costs in the winding up.

MS HOCH: Thank you, your Honour.

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