



Transcript of Proceedings

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Date: 10 June, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No S8673 of 2003

PETER CHARLES PATTY and GEORGE PATTY Applicants

and

JOHN PAUL PATTY, PETER PAUL PATTY, First Respondents
VICTOR PAUL PATTY and JOHN CHARLES
PATTY

and

PATTY PROPERTIES PTY LTD Second Respondent
ACN 010 680 798

BRISBANE

..DATE 04/06/2004

JUDGMENT

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HER HONOUR: This proceeding commenced on 1 October 2003 when the applicants who are two of the six directors of Patty Properties Pty Ltd (Patty) filed an application seeking leave pursuant to section 237 of the Corporations Act 2001 (the Act) to bring proceedings under sections 234 and 247A of the Act in the name of Patty against Pacifique Corporation Pty Ltd (Pacifique).

The shareholders of Pacifique are Patty as to 50 per cent and Mr Peter Dawson (Dawson) as to the other 50 per cent. V P Patty (V Patty) and Dawson are the directors of Pacifique. V Patty is also a director of Patty. The first respondents in this proceeding are the four directors of Patty, other than the applicants. Patty was named as the second respondent.

When the application came on for hearing on 21 October 2003, directions were given by the Court for the conduct of the application. Dawson and V Patty sought an extended timetable for the filing of affidavits. They offered to the Court an undertaking not to take steps to wind up Pacifique or to sell, encumber or otherwise deal with its assets, other than in the ordinary course of business, until a period of 30 days expired from the determination of the applicants' application for leave pursuant to section 237 of the Act.

Upon that undertaking being given to the Court, the directions allowing for the extended timetable were made. When the application came on for hearing again on 12 January 2004, leave was granted to the applicants to bring proceedings in

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the name of Patty for relief under section 247A of the Act
against Pacifique. That order for leave was not opposed. On
that day, the application for leave to bring proceedings under
section 234 of the Act was adjourned and has not been pursued.
The undertaking of Dawson and V Patty remained in place. The
application pursuant to section 247A of the Act was filed.
That proceeding is S286 of 2004, but that application has not
been pursued. A number of documents sought by the applicants
have been made available by Pacifique to the applicants.

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It is now common ground that it is appropriate for Pacifique
to be wound up by way of a members' voluntary winding up.
Each of Dawson and V Patty have filed applications seeking a
discharge of their undertaking given on 21 October 2003 to the
extent necessary to permit them to declare and pay a dividend
of the retained profits of Pacifique to its members and to
vote in favour of a resolution of the members of Pacifique
that it be wound up.

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These applications are opposed by the applicants, unless the
order is made conditional on a number of matters including
that Dawson's share of the declared dividends from the profits
of Pacifique be held pending the outcome of the report of an
independent investigation into Pacifique's dealings. Dawson
opposes the imposition of any such restraint on his dealing
with any dividend to which he may be entitled to be paid from
Pacifique.

The principal business of Pacifique has been to participate for over 10 years in a joint venture with another company to carry out a large residential property development at Albany Creek. The property development has been completed and all the lots have been sold. There are no current plans for any further business to be undertaken by Pacifique. There is no issue about the solvency of Pacifique.

The applicants brought proceeding S8673 of 2003 on the basis of concerns which they held about a large number of loan transactions entered into by Pacifique with related entities of Dawson and V Patty. The applicants were not able to obtain the support of their fellow directors of Patty for the purpose of pursuing their concerns.

The undertaking of Dawson and V Patty was only ever given in connection with the application by the applicants for leave to bring proceedings in the name of Patty under sections 234 and 247A of the Act. As the leave has been granted in respect of bringing the application under section 247A, the only relief outstanding under the application is the leave to bring the oppression proceedings. Because events have transpired which have made all the relevant parties agreeable to the proposal that Pacifique be wound up in a members' voluntary winding up, it is no longer necessary for the applicants to seek leave to bring oppression proceedings in which a winding up order was a likely result.

Although the current state of this proceeding is not strictly such as to bring about the expiry of the undertaking of Dawson and V Patty having regard to the terms of that undertaking, in substance, the current state of this proceeding does not warrant the continuation of the undertaking.

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It is submitted by the applicants that the various affidavits filed on their behalf raise the possibility that Dawson and V Patty have breached their statutory and fiduciary duties to Pacifique and that the liquidators of Pacifique may seek to pursue Dawson and V Patty for the recovery of funds or damages. These allegations are strenuously denied by Dawson and V Patty.

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It is the existence of these allegations that underlies the applicants' submission that the discharge of the undertaking, at least in the case of Dawson who will be in receipt of a substantial dividend on the winding up of Pacifique, should be conditional on an order which restrains the distribution of the dividend to Dawson, so that those funds are available to meet any recovery action or damages claim brought by the liquidators.

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It is submitted on behalf of Dawson that there is no suggestion that the funds available for distribution by way of dividend are the result of some breach of duty by Dawson or that Dawson has been or will conduct himself so as to render any action taken against him by liquidators of Pacifique as fruitless.

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The condition which the applicants sought was aptly described as being in substance a Mareva order. The seeking of that condition at this stage, and without any attempt being made to show that the conditions for granting a Mareva order exist, is premature.

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I would therefore order that Dawson and V Patty be discharged from their undertaking given on 21 October 2003 to the extent they seek without imposing the condition sought by the applicants.

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When I heard this application on 2 June 2004, I indicated to the parties that as there was agreement that it was appropriate for the shareholders of Pacifique to pursue a members' voluntary winding up, but having regard to the existing animosity, I would be prepared to make the discharge of the undertaking conditional on orders that the parties were able to agree upon that would facilitate what is proposed by way of the members' voluntary winding up of Pacifique.

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I will therefore hear submissions on the form of orders which I should make to reflect these reasons and also on costs.

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On the question of costs, Mr Couper QC, on behalf of the applicants, submits that there should be no order as to costs on the basis that the correspondence between the parties prior the hearing of the application elicited that Dawson and V Patty would not be offering any undertakings to the Court in substitution of the undertaking they were seeking to have

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discharged. Mr Couper points to what happened during the hearing on 2 June 2004 when Mr O'Shea SC, on behalf of Dawson, indicated that there would be no difficulty with some limited undertakings being given by Dawson and the same position was adopted by V Patty.

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The application that was due to be heard on 2 June 2004 involved a great many more issues than those that were subsequently pressed. Apart from the question of the terms on which Dawson and V Patty should be discharged from their undertaking given on 21 October 2003, there was an issue about whether or not there should be an independent investigation ordered pursuant to section 241 of the Act and whether cost orders should be made in favour of the applicants in respect of both proceedings 8673 of 2003 and 286 of 2004. Those latter matters were not pursued, ultimately, on the hearing of the application.

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The letter from Dawson's solicitors on 14 May 2004 indicated that Dawson did not see it necessary to offer any replacement undertakings should the Court be minded to discharge the undertaking he had already given, but did not close off the possibility that undertakings would be offered if the Court felt it appropriate to request a substituted undertaking from him.

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The substance of what was argued on 2 June 2004 was the Mareva type order that the applicants sought be placed as a condition on the discharge of Dawson and V Patty's undertaking. I

reviewed the correspondence that Mr Couper draws to my
attention for the purpose of the costs argument in connection
with preparing my reasons for judgment. I remain of the same
view that I expressed provisionally at the outset of the costs
argument, that the applicants should pay the costs of Dawson
and V Patty of their respective applications to obtain the
discharge of their undertaking.

I have made the undertaking offered now by V Patty and Dawson
Exhibit 9. I have amended the draft order that has been
produced to include this costs order as paragraph 2: the
applicants, Peter Charles Patty and George Patty, pay the
costs of Peter William Dawson of the application filed on 2
April 2004 to be assessed, and the costs of Victor Paul Patty
of the application filed on 18 May 2004 to be assessed.

I therefore make an order in terms of the amended draft
initialled by me and placed with the file.

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HER HONOUR: In relation to matter 286 of 2004, as it was in
the list for hearing on 2 June 2004 and parties announced
their appearances, I should formally record that I make no
orders in relation to that application other than to adjourn
the application to a date to be fixed.
