[2005] QSC 146

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Transcript of Proceedings

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Date: 24 May, 2005

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MOYNIHAN J

No BS 3794 of 2005

LEONARD WILLIAM NEILSEN	Applicant
and	
BROTHERS NEILSEN PTY LIMITED (ACN 010 391 401)	First Respondent
and	
PAUL GREGORY NEILSEN	Second Respondent
and	
RICHARD ANSTEY	Third Respondent
and	
PETER BLIZZARD	Fourth Respondent
and	
KIM JOHN LOMAS	Fifth Respondent
and	

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RODERICK JAMES NEILSEN Sixth Respondent

and

KAREN LORRAINE NEILSEN Seventh Respondent

BRISBANE

..DATE 12/05/2005

JUDGMENT

HIS HONOUR: These proceedings were commenced by an originating application for an interlocutory injunction to restrain the respondents from convening a meeting of the first respondent. The purpose of the meeting was to remove the applicant as director of the first respondent. The meeting is to be held later this afternoon.

The company was formed in 1982 to take over a family partnership of which the applicant had been a member. The applicant is a minority shareholder. The other shareholders in the company are family members and a long-serving employee. The applicant is now a non-executive director and is one of five directors of the company.

The material shows that the applicant, not without reason, has had concerns about the financial position of the company and aspects of its operation. These are conveniently summarised in the outline. The ultimate justification for those concerns, and whether they are presently justifiably held, is a matter for determination at a later stage.

It is clear, however, that the applicant has lost the confidence of the respondent shareholders and directors and they have lost theirs in him. I note, too, lest I forget it, at this stage, that the applicant has declined to execute a director's guarantee of a lease, as a consequence of which the lease of trading premises used by the company has not yet been executed.

There are some curious features of the originating application. It is said to be brought in reliance on section 233 of the Companies Act. The only substantive relief it seeks is the interlocutory injunction in the terms that I mentioned earlier. It is clear, to use neutral language, that the applicant is contemplating an oppression action. If he successfully pursues that course the probable outcomes would be a compulsory purchase order or a winding up of the company. But, as I say, the application seeks no relief beyond the interlocutory injunction.

In those circumstances it is difficult to see what the interlocutory injunction supports. This is, for example, not a case where the applicant would be deprived of the benefits of a successful application for final relief, should he make one and be successful. Nor is it a case where his removal as a director would have the consequence that something which could not otherwise be done could be done.

There is no basis for suggesting that the meeting is convened other than in accordance with the company's constitution. The notice of meeting appears to have been given in a timely way and to contain the necessary information. There is no contractual constraint on the proposed course, for example by way of a shareholders' agreement. The condition of a security over the company's assets in respect of the consent of the security holder to the proposed course, on the material before me, will be forthcoming.

Put shortly, the meeting is apparently lawfully convened, may lawfully consider the resolution and pass it, subject to the considerations to which it is now necessary to turn.

It is not oppressive, without more, for members of the company to exercise their rights under the Companies Act and the constitution, to proceed with the meeting, deal with the resolution and pass it.

This is particularly so when, as I say in this case, there is no claim for substantive relief to which the interlocutory application might be said to relate.

In those circumstances, the Court is, generally speaking, reluctant to intervene. This is manifest by, for example, the decision of Young J in Alibrandi v Jefa Australia Pty Ltd [2004] NSWSC 1065. His Honour said that it was a very rare situation where Courts would restrain the holding of a meeting.

If the meeting was invalid, or the persons participating had some unconscionable purpose, then in due course, that could be undone if the resolution is passed. The concern was reiterated in Uniting Church of Australia Property Trust (NSW) v Macquarie Radio Network Pty Ltd (1997) ACSR 721 where it was said that the Court would intervene only in the most extraordinary situations and would never assume in respect of the outcome of the meeting. That view was reinforced by the

decision of Hopkins Professional Services Pty Ltd v Foyster Holdings Pty Ltd [2001] NSWSC 915.

It is not readily apparent in this case, even if the application was brought in support of a claim for substantive relief that there is a prima facie case. It is true that the cases conveniently reviewed in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 take as the starting point of a view that a decision apparently open and proper on its face may be, for want of a better word, tainted, by an improper purpose, but that has not yet occurred in this case.

It is convenient to mention the applicant's submissions referred to GFS Management Services Pty Ltd v Ground Foundation Supports Pty Ltd [2001] WASC 143. In that case the oppressive act, for want of a better word, was the dismissal of a managing director without giving him notice of the proposed course, or the opportunity of dealing with the allegations which were made against him so as to found the dismissal. But that is not this case.

In this case, there has been correspondence, notably a letter of the 8th of April 2005, expressing the view that the attempt to remove the applicant as director was a direct retaliation to his insistence on prudent Corporate practice, was an abuse of power under the Act, for an ulterior purpose, the ulterior purpose apparently being that his removal was "unnecessary", whatever that means, was not in the interests of the members as a whole, and discriminatory against him as a member.

There is little factual basis for these assertions. I have already mentioned the ulterior purpose issue. Whether it is in the interests of the members as a whole might be best determined once the members have exercised their power. It is not clear how it is discriminatory against the applicant as a member in any way justifying the intervention of the Court at this stage. Whether it is a matter of retaliation is something which would need to be founded on facts, at least giving rise to that consideration.

Another complaint is the attempts to buy the applicant's shareholding at figures below the director's valuation was the "motive" behind the conduct. That may or may not be the case, but the evidence here does little to advance it. There is no suggestion, for example, that something was concealed, or something was falsely put. The applicant was in a position to simply decline to accept the offer.

It is also submitted that removal as a director would restrict the flow of information to the applicant in the ordinary course, so it will, but that is the inevitable consequence of a properly exercised power in any event.

So in my view, the applicant has failed to make out the necessary prima facie case. Had he done so, there is, in any event, a serious issue as to whether the balance of convenience in the circumstances justifies the interference at this stage with the shareholders' exercise of their powers.

The basis for that concern is, in my view, reinforced by the considerations of this being nothing more than an interlocutory application, not in support of any form of application for a grant of final relief.

As a discretionary consideration, that issue standing alone supports the conclusion that the relief should not be granted.

In the circumstances, therefore, it is in my opinion the position that there is no basis for granting the relief which is sought.

...

HIS HONOUR: I dismiss the application. I order that the applicant pay the respondents' costs to be assessed on a standard basis. In other words, I am not satisfied that the requirements founding an indemnity costs order are satisfied, although the respondents successfully resisted the application on the bases which were mentioned in the reasons.
