

SUPREME COURT OF QUEENSLAND

CITATION: *Jawhite Pty Ltd & Anor v Trabme Pty Ltd & Ors* [2019] QCA 119

PARTIES: **JAWHITE PTY LTD**
ACN 106 661 287
(first appellant)
TRENT ANDREW RYAN
(second appellant)
v
TRABME PTY LTD
ACN 154 609 159
(first respondent)
BOEDRY PTY LTD
ACN 154 609 882
(second respondent)
VESTWELL PTY LTD
ACN 106 478 808
(third respondent)
ADAM BOLAND
(fourth respondent)
MARK WILLIAM EDWARDS
(fifth respondent)

FILE NO/S: Appeal No 9896 of 2018
SC No 2310 of 2014

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane – [2018] QSC 174 (Boddice J)

DELIVERED ON: 14 June 2019

DELIVERED AT: Brisbane

HEARING DATE: 26 November 2018

JUDGES: Sofronoff P and Morrison and McMurdo JJA

ORDERS: **1. Orders 1, 2, 3, 4 and 7 of the order made on 4 September 2018 are set aside.**

2. The second appellant pay to the second respondent \$33,224.74, with interest under s 58 of the *Civil Proceedings Act* 2011 (Qld), in the sum of \$11,437.61.

3. The appellants pay 60 per cent of the respondents' costs of the trial in BS2310/14 to be assessed on the standard basis.

4. David Michael Stimpson and Anne Meagher be

released and discharged from their appointment as receivers and managers of the first respondent, the second respondent, and the assets and undertakings of the Boedry Unit Trust (the Receivers).

5. Pursuant to r 270(1) of the *Uniform Civil Procedure Rules 1999* (Qld), the Court dispenses with the requirement for the Receivers to submit any further accounts.
6. Pursuant to s 532(2) of the *Corporations Act 2001* (Cth), the first and second respondents be wound up and the Liquidators be appointed joint and several liquidators of the first and second respondents.
7. Pursuant to s 461(1)(k) of the *Corporations Act 2001* (Cth), the first and second respondents be wound up and the Liquidators be appointed joint and several liquidators of the first and second respondents.
8. Pursuant to s 472(6) of the *Corporations Act 2001* (Cth), the Court declares that anything that is required or authorised to be done by the Liquidators can be done by either of them.
9. Subject to order 10 below, the Liquidators –
 - (a) are appointed receivers and managers of the Boedry Unit Trust (the Trust);
 - (b) be appointed with the powers provided by s 420 of the *Corporations Act 2001* (Cth) as if the reference therein to “the corporation” were to the Trust together with the powers that a liquidator has in respect of property of a company (in its role as legal owner and trustee) pursuant to s 477(2) of the *Corporations Act 2001* (Cth);
 - (c) are directed to sell the assets of the Trust and distribute such asset remaining, after payment of any indemnity to the second respondent in its capacity as trustee of the Trust and after payment of the past and future remuneration and expenses of the Liquidators in their capacities as liquidators of the first and second respondents or in their capacity as receivers of the Trust, to the first appellant and third respondent according to their unitholding;
 - (d) in their capacity as receivers and managers are to be remunerated from the assets of the Trust at the same rates and in the same manner as they are remunerated as liquidators as a consequence of order 7 above.

10. Nothing in any of the orders above prejudices the rights of Westpac Banking Corporation pursuant to any securities held by it over the first respondent, the second respondent and the Trust, including (without limitation), the rights of Westpac Banking Corporation to appoint receivers and managers to the first respondent, the second respondent and/or the Trust, pursuant to its securities, without further order from the Court.

11. The respondents pay the appellants' costs of the appeal.

12. The respondents are granted an indemnity certificate under s 15(1) of the *Appeal Costs Fund Act 1973 (Qld)*.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where the appeal was allowed and the Court proposed orders in its reasons for judgment – where the Court did not make final orders because it was thought possible that circumstances existed that might have required orders in particular terms – where the parties were invited to agree upon appropriate orders consistent with those foreshadowed by the Court – where the parties did not agree upon the appropriate orders – whether the appeal should be reopened for submissions as to the appropriate final orders – whether the Court should make final orders in the appeal

COUNSEL: P Tucker, with N Shaw, for the appellants
A Myers (*sol*) for the first and second respondents
A Boland (*director*) for the third respondent and appeared on his own behalf
The fifth respondent appeared on his own behalf

SOLICITORS: McMahan Clarke for the appellants
Results Legal for the first and second respondents
A Boland (*director*) for the third respondent and appeared on his own behalf
The fifth respondent appeared on his own behalf

[1] **THE COURT:** This appeal was heard on 28 November 2018. On 1 February 2019 the Court delivered its reasons. The Court decided that the appeal should be allowed and that substantive orders made by the trial judge should be set aside. The Court proposed that the first and second respondents, Boedry and Trabme, should be wound up and that receivers be appointed to the unit trust of which Trabme was trustee. The Court also proposed that the order made by the trial judge that required Vestwell Pty Ltd to pay to Boedry the sum of \$33,224.74 by a certain date be set aside and replaced by an order that still required the payment of that sum but without any requirement that the sum be paid by any date. As to the costs of the trial, the Court proposed that the appellants should pay 60 per cent of the respondents' costs. The Court proposed that the respondents should pay the

appellants' costs of the appeal but that the respondents be indemnified for their costs by a certificate under the *Appeal Costs Fund Act 1973* (Qld).

- [2] The Court did not make final orders because it was thought possible that circumstances existed that might have required orders in particular terms. When the Court's reasons for judgment were published the parties were invited to agree upon appropriate orders consistently with the Court's intimations. That has not happened. Instead, the respondents sent submissions contending for entirely different orders from those that the Court had foreshadowed. The appellants have furnished a draft set of order consistent with the Court's reasons.
- [3] The respondents have submitted that, in several respects, the orders proposed by the Court are inappropriate.
- [4] The form of orders was a matter that was the subject of detailed submissions at the end of the appeal. Indeed, the respondents sought, and were granted, an overnight adjournment to consider their position. There is no basis upon which the appeal should now be reopened for further substantive argument, whether by written submissions or orally.
- [5] The orders of the Court are:
1. Orders 1, 2, 3, 4 and 7 of the order made on 4 September 2018 are set aside.
 2. The second appellant pay to the second respondent \$33,224.74, with interest under s 58 of the *Civil Proceedings Act 2011* (Qld), in the sum of \$11,437.61.
 3. The appellants pay 60 per cent of the respondents' costs of the trial in BS2310/14 to be assessed on the standard basis.
 4. David Michael Stimpson and Anne Meagher be released and discharged from their appointment as receivers and managers of the first respondent, the second respondent, and the assets and undertakings of the Boedry Unit Trust (the Receivers).
 5. Pursuant to r 270(1) of the *Uniform Civil Procedure Rules 1999* (Qld), the Court dispenses with the requirement for the Receivers to submit any further accounts.
 6. Pursuant to s 532(2) of the *Corporations Act 2001* (Cth), David Michael Stimpson and Ann Meagher (the Liquidators) be granted leave to consent to be appointed as, and to act as, liquidators of the first and second respondents.
 7. Pursuant to s 461(1)(k) of the *Corporations Act 2001* (Cth), the first and second respondents be wound up and the Liquidators be appointed joint and several liquidators of the first and second respondents.
 8. Pursuant to s 472(6) of the *Corporations Act 2001* (Cth), the Court declares that anything that is required or authorised to be done by the Liquidators can be done by either of them.
 9. Subject to order 10 below, the Liquidators –
 - (a) are appointed receivers and managers of the Boedry Unit Trust (the Trust);

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 - (c) are directed to sell the assets of the Trust and distribute such asset remaining, after payment of any indemnity to the second respondent in its capacity as trustee of the Trust and after payment of the past and future remuneration and expenses of the Liquidators in their capacities as liquidators of the first and second respondents or in their capacity as receivers of the Trust, to the first appellant and third respondent according to their unitholding;
 - (d) in their capacity as receivers and managers are to be remunerated from the assets of the Trust at the same rates and in the same manner as they are remunerated as liquidators as a consequence of order 7 above.
10. Nothing in any of the orders above prejudices the rights of Westpac Banking Corporation pursuant to any securities held by it over the first respondent, the second respondent and the Trust, including (without limitation), the rights of Westpac Banking Corporation to appoint receivers and managers to the first respondent, the second respondent and/or the Trust, pursuant to its securities, without further order from the Court.
 11. The respondents pay the appellants’ costs of the appeal.
 12. The respondents are granted an indemnity certificate under s 15(1) of the *Appeal Costs Fund Act 1973 (Qld)*.