

SUPREME COURT OF QUEENSLAND

[2002] QSC 145
Application No S639 of 1995

IN THE MATTER of *The Corporations
Law*

-and-

IN THE MATTER of GLOBAL
FINANCE PTY LTD (ACN 010 664 972)

File No 11469 of 2001

BETWEEN:

**GLOBAL FINANCE PTY LTD (in liquidation)
(ACN 010 664 972)**

First Plaintiff

AND:

ROBERT ERIC DI MOIA

Second Plaintiff

AND:

PAUL DESMOND SWEENEY

First Defendant

AND:

HALL CHADWICK (a firm)

Second Defendant

MOYNIHAN J – REASONS FOR JUDGMENT

DELIVERED ON: 28 May 2002

HEARING DATE/S: 11 February 2002

ORDER:

1. The application for reinstatement of the registration of Global Finance is dismissed;
2. Paragraphs 1, 2, 3 and 4 of the claim for relief by the second plaintiff are struck out;
3. Paragraphs 5, 6, 8, 9, 14, 22, 26 and 27 of the statement of claim should be struck out.

CATCHWORDS: CORPORATIONS LAW – s601AH CORPORATIONS ACT 2001
– where applicant seeks reinstatement of the registration of Global

Finance Pty Ltd – whether applicant is a person aggrieved by the company’s deregistration – whether Court is satisfied it is just for the company to be reregistered – where plaintiff was a director and shareholder in the company – where plaintiff also claims to be a creditor.

CORPORATIONS LAW – where first and second defendant seek to have current statement of claim, or at least part of it, struck out – where plaintiff claims damages for negligence – where plaintiff claims unspecified damages for breach of fiduciary duty – where plaintiff claims exemplary damages together with interest and costs – whether pleadings in statement of claim are adequate – whether statement of claim or parts of it should be struck out.

Corporations Law 2001, ss 601 AH, 459C(2), 474, 477, s501, 536(1)(2)(3), 1321, 321

Uniform Civil Procedure Rules ss 150(1)(a)-(f); 150(1)(j) & (2); 157(c); 158(2)

Polsed v Devenish (1903) 2 Ch 625

Brown v Cowen (1912) 31 NZLR 1219

Austin Securities Ltd v Northgate and English Stores Ltd (1969) 1 WLR 539

Re Waldcourt Investment Co Pty Ltd (1986) 11 ACLR 7

Re Day & Dent Constructions Pty Ltd (1984) 9 ACLR 319

Timberland (1979) 4 ACCR 259

COUNSEL: Mr A Vasta, with Mr D Eliades for the applicant
Mr J.B. Sweeney for the respondent

SOLICITORS: Whitehead Payne Lawyers for the applicant
Jones King for the respondents

- [2] The applicant (“Di Moia”) applies for the reinstatement of the registration of Global Finance Pty Ltd (“Global”) with the view to its being a plaintiff in action 11469/01 (“the action”) he commenced against Paul Desmond Sweeney (“Sweeney”) and the firm Hall Chadwick (“Hall Chadwick”).

- [3] Di Moia also seeks the appointment of Graham Lindsay Starkey as liquidator of Global for the purpose of his pursuing Global's action and orders regularising its commencement while Global was deregistered.
- [4] Sweeney and Hall Chadwick opposed the reinstatement and consequential orders. They also seek to have the current statement of claim in the action, or at least portions of it, struck out. The considerations arising on the striking out application and the application for reinstatement are, to a degree interrelated. Their application for security for costs was adjourned pending the outcome of the applications I have referred to.
- [5] It is convenient to note that the action is founded on De Moia's complaints about Sweeney's conduct as the liquidator of Global and Hall Chadwick vicariously liability for any wrongs he committed.
- [6] An application for the reinstatement of a company gives rise to two issues. First, whether the applicant is a person aggrieved by the company's deregistration and secondly that the Court is satisfied that it is just for the company to be reregistered; s 601 AH of the *Corporations Act* 2001.
- [7] Di Moia was a director and shareholder of Global and claims to be a creditor. It was further also submitted in support of the reinstatement application that if Global's registration is not reinstated it will lose any right to complain about the manner in which the winding up was effected. That said Di Moia has made his personal claim without asserting a need for reinstatement. The submissions in support of the reinstatement application acknowledged that the substance of Global's claim was "something that may be commenced by a personal litigant without the leave of the court".
- [8] So far as Global's losing the right to complain about the manner in which the winding up was effected is concerned it is unclear whether that relates to the making of the winding up order, the conduct of the liquidation or both.
- [9] The winding up order was made on 29 September 1995. It was founded on Global's failure to comply with a statutory demand relying on a default judgment obtained in the Magistrates Court. The failure to comply with the statutory demand gave rise to the presumption of insolvency provided for by the *Corporations Law* s 495C(2).
- [10] It is alleged that on the day of, but prior to the winding up order, the petitioning creditor's solicitor rejected the tender of a bank cheque for the amount of the debt but not including costs. Global, it is further alleged showed a "nett assets position of approximately \$1,403,200.00" at the date of the winding up.
- [11] It is not evident that the rejection of the cheque was wrongful; assuming that it was no basis is pleaded for Sweeney's liability consequent on the rejection. Apart from the nett assets position being asserted the issue of whether Global was able to pay its debts as and when they fell due or other issues bearing on solvency are not addressed.

It is thus far from obvious that Global's reinstatement is required so a claim about the circumstances of the making of the winding up order can be pursued.

- [12] Di Moia has, again without asserting a need for reinstatement, sued Sweeney and Hall Chadwick for wrongful rejection of a proof of debt. There is authority that a creditor may do so; *Polsed v Devenish* (1903) 2 Ch 625; *Brown v Cowen* (1912) 31 NZLR 1219; *Austin Securities Ltd v Northgate and English Stores Ltd* (1969) 1 WLR 539.
- [13] Di Moia claims \$477,000.00 damages for Sweeney having wrongfully rejected his claim as an unsecured creditor. The statement of claim does plead a basis for the debt or for the rejection being wrongful. It is not evident that the rejection was wrongful.
- [14] In February 1996 Di Moia lodged a proof of debt for a total of \$467,000.00. In March 1996 he lodged a fresh proof of debt in an amount of \$261,842.00. Some of the salient features of the correspondence are that on 3 December 1996 Sweeney wrote to Di Moia's solicitors noting that the proof of debt of 15 March 1996 superseded the earlier proof. That does not appear to have been challenged. The letter raised issues in respect of which Sweeney sought records and supporting documentation. These were not provided so on 23 December 1999 Sweeney rejected the proof for reasons set out in the notice of rejection. Di Moia did not appeal against the rejection or seek an extension of time in which to do so.
- [15] So far as his position as a shareholder is concerned Di Moia again has sued without asserting the need for Global to be a party. A shareholder in Di Moia's position will not ordinarily be aggrieved by the deregistration of an insolvent company because his shares have no value at the time of deregistration. As I have said Global's failure to comply with the statutory notice founded its deemed insolvency and the issue otherwise is not adequately addressed.
- [16] A shareholder in Di Moia's position has to establish a basis for the liquidator being ordered to make good the companies loss because of the liquidator's wrongful act or omission. This involves establishing the shares are worth less as a consequence of the liquidators wrongful act or omission taking into account whether the loss would have occurred in any event; *Re Waldcourt Investment Co Pty Ltd* (1986) 11 ACLR 7; *Re Day & Dent Constructions Pty Ltd* (1984) 9 ACLR 319; *Re: Timberland* (1979) 4 ACCR 259. These considerations led to the case pleaded in the statement of claim.
- [17] In the statement of claim Global claims:
1. \$1,555,300 damages for negligence.
- Di Moia claims:
1. \$1555,300.00 under either ss 536 or 321 of the *Corporations Law*;
 2. Payment of \$470,000 under ss 536 or 321.
- [18] Each plaintiff also claims unspecified damages for breach of fiduciary duty and as exemplary damages together with interest and costs.
- [19] The statement of claim in para 12 pleads breach of Sweeney's duty pursuant to s 474 of the *Corporations Law* to collect the company's assets and in the exercise of his power under s 477 to preserve them and s 477(2)(c). There is a plea of a failure to discharge the company's liabilities and distribute its property to members pursuant to s 501. There are pleas of a fiduciary duty owed to the company, its

creditors and contributories together with the duty to act reasonably in the exercise of powers and the discharge of duties.

- [20] Paragraph 26 of the statement of claim pleads that as a consequence of Sweeney's breaches pleaded and particularised in paras 22 and 23 the plaintiffs have suffered loss and damage.
- [21] Paragraph 22 is a plea that the conduct pleaded and particularised in paras 13 and 15 was a breach by the first defendant of the duties and obligations particularised in para 12 and incorporates particulars. Paragraph 23 is the plea that the first defendant wrongly rejected the second plaintiff's claim as an unsecured creditor.
- [22] The pleaders relevance on ss 501, 536 and 1321 appears to be misconceived. Section 501 applies in the case of a voluntary winding up. Section 536(1)(2)(3) relevantly provides:

“(1) Where: (a) it appears to the Court or to ASIC that a liquidator has not faithfully performed or is not faithfully performing his or her duties or has not observed or is not observing:

- (i) a requirement of the Court; or
- (ii) a requirement of [this Act](#), of the regulations or of the rules; or

(b) a complaint is made to the Court or to ASIC by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties; the Court or ASIC, as the case may be, may inquire into the matter and, where the Court or ASIC so inquires, the Court may take such action as it thinks fit.

- (2) ASIC may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss that the estate of the company has sustained thereby and may make such other order or orders as it thinks fit. (3) The Court may at any time require a liquidator to answer any inquiry in relation to the winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation to be made of the books of the liquidator”.

The section does not provide a basis for the claim of common law damages pleaded here.

- [23] Section 1321 provides that a person aggrieved by any act, omission or decision of a liquidator may appeal to the Court in respect of the act, omission or decision. It is a procedural mechanism providing a basis for an enquiry not a foundation for a jurisdiction to make an award of damages such as is claimed here.
- [24] The statement of claim, in paras 26 and 27, purports to plead a claim of damages for negligence and breach of duty. The pleading does not differentiate between damages for negligence, damages or compensation for breach of fiduciary duty, or

damages for breach of statutory duty all of which the statement of claim purports to raise if not plead.

- [25] As a further example of the deficiencies of the pleading the same \$1,555,300 is claimed under ss 536 and 321 of the *Corporations Law*.
- [26] The combined effect of *Uniform Civil Procedure Rules* 150(1)(a)(f) and 157(c) requires the pleading of a claim of fiduciary duty be precise and explicit. That has not occurred.
- [27] There is no plea of specific facts found in the breach of fiduciary duty claim and no separate claim of equitable damages or compensation for a breach of fiduciary duty and there is no attempt at quantification of the claim under this head.
- [28] UCPR 158(2) provides that when exemplary damages are contained the pleading must contain particulars of all matters relied on in support of that claim. The statement of claim provides no basis for identifying particulars relied on as supporting the claim for exemplary damages.
- [29] Put shortly the statement of claim subsequent to para 12 is essentially a pleading about a breach of the common law duty of care alleged in para 12(f).
- [30] I turn to para 22 of the statement of claim. This paragraph and the particulars it contains is the major exposition of the plaintiff's complaints about Sweeney's conduct of the liquidation. It alleges that by the conduct pleaded in paras 13 and 15 of the statement of claim Sweeney was in breach of the duties and obligations pleaded and particularised in para 12 and failed to conduct an orderly realisation of the company's assets.
- [31] Paragraph 13 relates to what the statement of claim calls the 'Jarrett contracts'. These are contracts that the liquidator entered into for the sale of a number of units, which were a principle asset of Global. The contracts and their outcome is a major source of Di Moia's complaints. Paragraph 15 is an allegation to the extent that Sweeney obtained the approval of the Court to proceed with the Jarrett sale, something he could only do by leave of the Court on misleading and inaccurate materials.
- [32] I turn to para 22 in the context of this framework. Paragraph 22(a) is a plea that Sweeney entered into the Jarrett contract. The pleading is however silent as to any basis for his doing so being of itself a breach of any or all of the multiplicity of duties alleged to have been breached.
- [33] Paragraphs 22(b)(i) and (j) assert failure to make reasonable enquiry or take reasonable steps or to properly consult but do not provide any particulars of what ought to have been done or as to the consequences of its having been done.
- [34] Paragraph 22(q) alleges Sweeney failed to consider "the strong probability that Jarrett's financial position would cause him to default". It does not identify the basis on which Sweeney ought to have concluded that there was a strong probability of default or assuming that he was, provides no basis for the assertion that Sweeney failed to consider it. Similarly para 22(f) provides no particulars of when and by what means Sweeney; acting in the proper discharge of his functions as a liquidator,

- ought to have discovered that Jarrett was not likely to be in a position to meet his obligation.
- [35] Paragraphs 22(c) and (s) allege failure to obtain further adequate collateral security but there are no allegations of what further collateral security would have been available or what steps ought to have been taken to obtain it but were not.
- [36] Paragraphs 22(d) and (h) allege failure to realise or take into account certain considerations but provide no basis for the assertion that the liquidator did not take them into account or how failing to do so was a breach of the duties pleaded.
- [37] So far as para 22(e) is concerned, the defendants are entitled to know when, by what means and in what terms the liquidator knew the stated preference of the major creditors identified in the paragraph.
- [38] Paragraph 22(g) alleges Sweeney's failure to use his best endeavours to obtain the best price for the property there referred in terms of particulars that he accepted a reduced price, that the contract terms were uncommercial etc. It does not, for example, identify what it is alleged that Sweeney ought to have done and what the consequences of his doing it would have been.
- [39] Paragraph 22(j) is defective in that it is an assertion without any factual basis that Sweeney failed "to properly consult" creditors. The issue of the outcome of proper consolidation is not addressed.
- [40] Paragraphs 22(k) and (l) are effectively allegations of fraudulent conduct and the pleading should comply with UCPR 150(1)(j) and (2).
- [41] Paragraph 22(m) alleges "failure to properly evaluate the Colliers Jardine valuation as against the implications of the terms of the Jarrett contracts". The subparagraph is essentially meaningless and embarrassing.
- [42] Paragraphs 22(r) and (v) are deficient in failing to identify the facts relied on for asserting the implication that the units should have been sold by private treaty or public auction, in failing to specify the reasonable steps to properly advertise and market which ought to have been taken but which were not and the consequences of proper steps having been taken.
- [43] Paragraph 22(r) is embarrassing in that it fails to identify the obligation alleged to have been breached, provide any basis for the assertion of failure to take the matter specified into account or any factual basis for the particulars constituting a breach of an identified duty.
- [44] As I have already mentioned the plea of damages in paras 26 and 27 make no attempt to differentiate the loss suffered by Di Moia as a creditor, as a shareholder or by the company and is deficient in pleading facts establishing a causal link to the allegations of breach of identified duties and the alleged loss. There is no attempt to plead that the course that ought to have been taken by the liquidator during the winding up would have lead to a better outcome.
- [45] In my view it follows for the reasons canvassed that:

1. It has not been established that Di Moia is ‘aggrieved’ in terms of s 601 AH of the *Corporations Act* by Global’s deregistration;
2. It has not been established it is ‘just’ in terms of s 601 AH that it be re-registered for the purpose of its pursuing the action as a plaintiff;
3. The claims for breach of fiduciary duty, exemplary damages and for payment in reliance ss 536 and 1321 of the *Corporations Law* should be struck out;
4. Paragraphs 5, 6, 8, 9, 14, 22, 26 and 27 at least of the statement of claim should be struck out.

[46] I therefore order:

1. The application for reinstatement of the registration of Global Finance is dismissed;
2. Paragraphs 1, 2, 3 and 4 of the claim for relief by the second plaintiff are struck out;
3. Paragraphs 5, 6, 8, 9, 14, 22, 26 and 27 of the statement of claim should be struck out.

I will take submissions as to any further orders, the terms of the delivery of any amended statement of claim and as to costs.