[2002] QSC 229

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No S439 of 2002

IN THE MATTER OF BOYNE TANNUM COUNTRY CLUB ACN 010 116 239

ALBERT HENRY DUNSTAN and OTHERS — Applicants

and

BOYNE TANNUM COUNTRY CLUB LIMITED ACN 010 116 239 — Respondent

BRISBANE

..DATE 23/05/2002

ORDER

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act* 1999, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application by the provisional liquidators of Boyne Tannum Country Club Limited for orders:

(1) That the directors of the company be permitted to call an extraordinary general meeting of the company's members; and 10

(2) That subject to the company's members resolving in favour of a certain proposal, to execute on behalf of the company certain documents.

20

The application is brought under section 471A(2) of the Corporations Act. Section 471A(2) provides that while a provisional liquidator of a company is acting, a person cannot perform or exercise and must not purport to perform or exercise a function or power as an officer of the company. It 30 therefore disables the directors from doing that which, apart from the appointment, they would ordinarily be able to do.

The things that it is wished that the directors should do in this case are: calling a general meeting to discuss a 40 restructure of the company, a proposal which will involve a new memorandum and articles of association of the company, and subject to that, entering into certain commercial arrangements involving leases and management agreements and deeds.

50

I am assured that all of the things which it is proposed that the directors should do are things which would be within their powers were it not for the appointment of the provisional liquidators.

60

Section 471A(2)(a) provides that subsection 2 does not apply to the extent that the performance or exercise or purported performance or exercise is, so far as relevant, either with the provisional liquidator's written approval or with the approval of the Court. It is this last alternative which is the ground for the present application.

The first question which, it seems to me, arises on the application, which I should add is brought ex parte by the provisional liquidators, is whether it is necessary for any application to be made to the Court. The section envisages that the provisional liquidators may give approval just as much as the Court may do.

I was informed from the Bar table that the reason the provisional liquidators have not given written approval themselves is that they are doubtful that the things which it is proposed the directors should do are things that they themselves could do.

It does not seem to me that that is, in the circumstances of this case, a material consideration. What matters is whether the provisional liquidators have the power to give such an approval. The order appointing them provides that their powers include exercising, as far as may be lawful and necessary, all or any of the functions and powers which may be performed and exercised by a provisional liquidator under the Corporations Act.

Giving an approval is such a power. I am prepared to infer, from the fact of this application, that the liquidators think that an approval is necessary. It is also, I am told from the Bar table, the fact that the steps which it is proposed that the directors should take are steps which are in the interests of the company, its creditors and its shareholders.

In other words, there is no doubt about the propriety of what it is proposed that the directors should do. I can understand that if provisional liquidators were in doubt about whether it would be proper for the directors to take the steps which are proposed, they might feel that it was desirable for the question of whether the directors should be given approval to take those steps to be referred to the Court.

However, in a case where there is absolutely no doubt as to the propriety of what is proposed for the directors to do, I cannot understand why the liquidators should hesitate to exercise their powers. It does not seem to me that the mere fact, if it be the fact, that the liquidators could not themselves do these things is of any consequence.

Indeed, if the liquidators were able to do these things themselves, one would ask why is it necessary to authorise the directors to do them; why not simply do them themselves? That question seems to me to be irrelevant in the present circumstances.

The liquidators have power to give a written approval. No doubt is cast upon the propriety of what the directors are about to do consequent upon the approval. I cannot see why there is any need for an application to the Court. Liquidators should be astute to ensure that costs are minimised. Court proceedings are expensive, and where they can be avoided, they should be avoided.

In the circumstances, it seems to me that the proper course is to dismiss the application on the basis that it is unnecessary. The order of the Court is application dismissed.