

SUPREME COURT OF QUEENSLAND

File No S2863 of 2002

BETWEEN:

ASIC

Applicant

AND:

RAJNOCH

Respondent

MOYNIHAN J – REASONS FOR JUDGMENT

CITATION: *ASIC v Rajnoch* [2003] QSC 046

PARTIES: **Australian Securities & Investments Commission**
(Applicant)

v

Jana Rajnoch
(Second Respondent)

FILE NO/S: SC 2863 of 2002

DIVISION: Trial Division

PROCEEDING: Interlocutory Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 13 March 2003

DELIVERED AT: Brisbane

HEARING DATE: 5th September 2002

JUDGE: Moynihan J

ORDER: **Supports the application to make an order pursuant to s 1323 of the *Corporations Act 2001*. The respondent is restrained until trial or further order from dealing with any or all of her assets or money.**

CATCHWORDS: CORPORATIONS LAW - Where application made under s 1323 of the *Corporations Act 2001* (Cth) – Where protection of assets for aggrieved persons is necessary – Where

application upheld

Corporations Act 2001 (Cth)

ASIC v Adler (2000) 19 ACL 1221

ASIC v Bourke [2000] NSW 694

COUNSEL: Mr D.G. Clothier for the Applicant
 Mr P.P. McQuade for the Second Respondent

SOLICITORS: Australian Securities and Investments Commission for the Applicants
 Sykes, Pearson and Miller for the Second Respondent

- [1] The Australian Securities & Investments Commission (ASIC) applies for “mareva orders” against the second respondent Jana Rajnoch (Rajnoch). The application is brought in proceedings commenced by originating application in which ASIC seeks wide-ranging relief against eight respondents, including Rajnoch.
- [2] The relief sought includes declarations of contraventions of ss 180, 181 and 182 of the *Corporations Act 2001*. ASIC also seeks pecuniary penalty and compensation orders against Rajnoch, termination of a deed of company arrangement and that specified corporate respondents be wound up.
- [3] The orders are sought pursuant to s 1323 of the *Corporations Act*. The provisions of sub s 1(a) and (c) being satisfied it is for the Court to consider whether it is necessary or desirable to make orders pursuant to sub s 1(d) to (h).
- [4] That jurisdiction may be exercised when the Court considers it necessary or desirable to make such orders for the purpose of protecting the interest of a person to whom Rajnoch may be or become liable to pay money in respect of a debt or by way of damages or compensation.
- [5] An order under s323 (1) may prohibit conduct absolutely or subject to condition (sub 2) and may be an order pending the termination of the application (sub 3). It is relevant to note ASIC is not required to give an undertaking as to damages as a condition of making an interim order (sub s. 4).
- [6] Considerations relevant to the exercise of the discretion given by s 1323 are canvassed by Santow J in *ASIC v Adler* (2000) 19 ACL 1221 at 1223 and following. The discretion is wide. Its exercise in circumstances such as here necessarily involves the balancing of competing public and private interests. Any order should be no more intrusive than is necessary in the circumstance, in this context considerations as to the balance of convenience arise.

- [7] Satisfying the provisions of s 1323(1)(a)(b) or (c) suffice to enliven the jurisdiction to make an order even absent a *prima facie* case. Nevertheless as Santow J points out at 1223 of Adler (supra) at least a reasonably persuasive case and evidence of dissipation of assets are powerful considerations if the discretion is to be exercised to grant an order under the section.
- [8] The overriding consideration is however not the character of the alleged wrong doing by a defendant but an “overriding concern to protect assets for the benefit of those entitled to them”; *ASIC v Bourke* [2000] NSW 694.
- [9] Finally, as Santow J pointed out in *Adler* it is unwise to attempt to delineate in advance the future exercise of the discretion “beyond emphasising that the court, in giving a reasonable margin of appreciation to ASIC in its public interest role, does not abrogate its responsibility to make sure that the orders it makes operate in a matter (*sic*) that is proportionate and not more intrusive than is necessary in the circumstances”.
- [10] The transactions in issue here are complex, this is reflected in the volume and intricacy of the material relied on in the application. The following summary is neither comprehensive nor exhaustive. A more expansive version of the issues is to be found in the pleadings filed by direction in the originating application. The allegations in the statement of claim are supported by various reports and affidavits and the respondent has filed material. The respondent relies on affidavit material. There has been no oral evidence or cross examination.
- [11] The facts relied on by ASIC and the inferences to be drawn from them are controversial in many respects and controverted in others. It is neither possible nor appropriate to resolve those issues of this application.
- [12] The first respondent, Jamie Neville McIntyre (McIntyre) and Rajnoch are husband and wife. ASIC’s investigations centre on the affairs of a group of companies effectively controlled by McIntyre at least until they were placed into provisional liquidation. The group is conveniently referred to as the McIntyre Group. The corporate respondents to the originating application are members of the Group.
- [13] The core business of the McIntyre Group appears to be the conduct of “wealth creation” seminars under the name 21st Century Academy. People pay for seminars and associated services conducted or provided. The fees were collected by or paid to Jaymac Communications Aust No. 2 Pty Ltd (the seventh respondent - Jaymac) a member of the Group. Latterly investment funds were also solicited from participants in the activities conducted by the Group in circumstances to be mentioned later.
- [14] The material shows that McIntyre has consistently and somewhat floridly promoted himself as a self made millionaire no doubt to engage the interest and involvement of persons prepared to pay for seminars and associated services and to invest money in enterprises endorsed by him or others associated with him.

- [15] As I have said McIntyre and Rajnoch are married. The evidence finds a conclusion that she has been closely involved with McIntyre in the activities of the McIntyre Group. I note that whether that involvement was such as to justify certain substantial payments made to her is controversial without it detracting from that conclusion.
- [16] It is true that there may be little or no direct evidence of Rajnoch's involvement in certain aspects of conduct attributed to McIntyre which form part of the basis for ASIC's claim to relief against her or of this application. This submission was made on her behalf in respect of what appears to have been an attempt by McIntyre to impose, as a condition of repayment to investors from funds that he was raising, a term that investors not co-operate with ASIC.
- [17] On the other hand there is evidence of a personal and business relationship between McIntyre and Rajnoch capable of sustaining inferences that she was at least compliant, or a participant in various activities the subject of ASIC's investigations.
- [18] That said, it must be acknowledged that this is a general conclusion. It is not possible in these proceedings to reach a concluded view as to the nature and extent of Rajnoch's involvement in any unlawful activities with particularity or precision. Those are matters which must await a fuller hearing.
- [19] I am however satisfied that there is a strong basis for inferring Rajnoch has, in close association with her husband, had substantial involvement in the activities of the McIntyre Group. To the extent to which conduct founding the relief sought in the originating application is made out it is probable she would be found to be implicated in some at least of the activities.
- [20] ASIC's case is that its investigation into the affairs of the McIntyre Group reveals a number of matters of concern. What follows is a summary of the more salient aspects of some of them. I should say that it is not a matter of considering each example or transaction in isolation. The weight of material in support of ASIC's case is greater in some than in others. Rajnoch advances explanations in respect of some matters of varying weight. Some issues cannot be resolved here. In the end the decisive consideration is the combined effect of the material as a whole.
- [21] The core business of the McIntyre Group has been transferred twice, apparently when financial difficulties have arisen in respect of the "holding" company. There appears to have been no obvious reason or consideration for the transfer. In this context I have already mentioned Jaymac, one of the respondents to the originating application as the recipient of money paid for 21st Century Academy seminars and services.
- [22] Shortly prior to its voluntary administration Jaymac's substantial debts were written off for no apparent reason. It had a considerable cash flow from payments for the provision of seminars and associated services. It was placed under a deed of

company arrangement until a motion seconded by Rajnoch placed the company back into McIntyre's hands.

- [23] This outcome involved the voting of proxies by the administrator of Jaymore despite his acknowledgement that the books and records of Jaymac was substantially incomplete and without the administrator fully investigating the transfer of the business, the writing off of debts whether it had made a profit or, Rajnoch's role or other pertinent matters. The deed of arrangement has now been terminated by order of this Court.
- [24] Jaymac apparently has no assets other than a property mortgage to secure a loan of \$70,000 to acquire investment property. Shortly before it went into voluntary liquidation its business was somehow acquired by another member of the McIntyre Group, the third respondent, conveniently referred to as Visual Changes. There was apparently no consideration. There is evidence that McIntyre has subsequently represented that Jaymac continues to be connected with the 21st Century Academy.
- [25] After Visual Changes took over the business of 21st Century Academy from Jaymac following its voluntary administration it is alleged to have been involved in two apparently illegal investment schemes which have led to losses by investors. These involved soliciting funds when Visual Changes appeared to be in a difficult financial position.
- [26] The first scheme involved soliciting loans from graduates of 21st Century Academy to be invested in blue chip shares and share options founding a 30% return. It appears that some \$290,000 was raised in this way. ASIC alleges that this raising constituted misleading and deceptive conduct in dealing with securities contrary to s 995 of the *Corporations Act* and s 52 of the *Trade Practices Act*.
- [27] Only \$180,000 was deposited to a bank account in the name of Visual Changes and this has been dispersed in various ways including \$110,000 to Cashflow Creation the fourth respondent and another member of the McIntyre Group.
- [28] There is no satisfactory explanation advanced for this conduct, McIntyre's position apparently being that the loans having been obtained Visual Changes was entitled to use them as it pleased.
- [29] The second scheme involved Visual Changes soliciting graduates of 21st Century Academy to buy shares without a prospectus for the apparent purpose of paying overdue creditors. Other schemes have been proposed by McIntyre but not put into effect for example one involving a lesser than 30% return to raise funds to pay creditors comparable to the first scheme referred to.
- [30] A total of \$1,214,146.00 has been identified as transferred to Rajnoch's account or expended or applied on her behalf by members of the McIntyre Group. There is a basis for concluding that other such monies have found their way to her. I note that Rajnoch owns six properties in which she has a net equity of \$1,369,140.

- [31] It is sufficient to say that ASIC's case with respect to those payments, the challenges to it notwithstanding, gives cause for concern that those payments are not justified.
- [32] I mentioned that Cashflow Creation received funds from Visual Changes. Some of those funds were apparently used to deal in securities. The company also entered into a lease at premises at Noosaville from which the operations of the McIntyre Group were conducted. The lease was for five years with a monthly rent of \$5,940 only one rent payment was ever made and the landlord took repossession of the premises. A statutory demand for a payment of \$40,000 by the landlord has not been satisfied or set aside.
- [33] There seems to have been no tenancy agreement and Cashflow Creation had no apparent capacity to meet its obligations. It seems it was originally agreed that Rajnoch guarantee the lease but McIntyre intervened to remove this connection. After the default he informed the landlord that the company had been placed into voluntary administration and entered into a deed of arrangements with his creditors, he should have known this was false.
- [34] It is contended by ASIC that the transactions involved endeavours by McIntyre to isolate the leaseholder from his trading operations with Cash Flow Creation entering into obligations it had no capacity to meet.
- [35] ASIC alleges that Rajnoch is in breach of the terms of an existing restraining order which allowed Rajnoch to deal with her assets for limited purposes subject to a notification to ASIC. In essence it is alleged that Rajnoch approached her bank to put in place arrangements to allow her to draw down an additional amount to repay investors but did not notify ASIC that she proposed to do so. ASIC found out about the proposal by other means but, as I understand it before money was drawn down. From one view this may be a technical departure. On the other hand given the wide ranging concerns founded by the material it is not an irrelevant consideration.
- [36] As I said at the outset that I have not canvassed the evidence exhaustively in these reasons. On my view of the evidence there is at least a reasonably persuasive case that Rajnoch may become liable to pay money to "aggrieved persons" by way of damages or compensation for unlawful activities. It is obviously in the interests of McIntyre and Rajnoch that funds under their control are not available to meet any such claim.
- [37] It is true that there is no direct evidence of disposition of assets by Rajnoch. There is however evidence that McIntyre in particular has little compunction in manipulating his affairs, or the affairs of entities he controls in his own interest and contrary to the interests of others to whom those entities are or may become liable. The material as it presently stands offers little by way of explanation or justification to diminish those concerns.

- [38] As I have said it is also true that there is less direct evidence of Rajnoch's involvement in these activities than there is in the case of McIntyre. The evidence is in my view sufficient for present purposes to found connection between her involvement and the activities founding the claim for relief in the originating application.
- [39] In the light of the considerations I have canvassed in my view the overriding concern to protect assets for the benefit of aggrieved person founds the making of an order pursuant to s 1323 of the *Corporations Act*. I will hear submission as to the terms of the order and as to costs.