



## Transcript of Proceedings

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[2003] QSC 170

SUPREME COURT

CIVIL JURISDICTION

MULLINS J

No 3330 of 2003

IN THE MATTER OF STRATA BUILDERS  
PTY LTD (ACN 071 491 800)  
(UNDER EXTERNAL ADMINISTRATION)

PERMANENT TRUSTEE AUSTRALIA LIMITED                      Applicant  
(ACN 008 412 913)

and

STRATA BUILDERS PTY LTD    Respondent  
(ACN 071 491 800)  
(UNDER EXTERNAL ADMINISTRATION)

BRISBANE

..DATE 03/06/2003

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.

HER HONOUR: This is an application that the respondent be wound up in insolvency. The application was filed on 11 April 2003 and relied on a statutory demand dated 24 December 2002 that was sent to the respondent by registered post on that date. The respondent did not seek to set aside the demand.

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The applicant concedes that the demand overstated the amount owed. The demand was for the sum of \$162,478.47 when the applicant now states that the amount owed by the respondent to the applicant was \$136,578.55 as at 24 December 2002. The respondent is presumed to be insolvent as it failed to comply with the statutory demand which was not set aside.

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The hearing of the application was adjourned on 16 May 2003 until today, 3 June 2003. At 4. p.m. at 2 June 2003 Mr M A Fitzgerald the sole director of the respondent appointed Mr R E Murphy as the voluntary administrator of the respondent. The respondent and Mr Fitzgerald therefore seek an adjournment of the winding-up application to allow the administration to proceed or, alternatively, to allow further material to be placed before the Court by the administrator so that the Court can determine whether it is in the best interests of the creditors for the company to continue under administration rather than be wound up.

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The adjournment is opposed by the applicant and the supporting creditors Messrs Raj Khatri and Michael Peldan who are the trustees and liquidators of the run-out mortgage business previously operated by Lex Nominees Pty Ltd and P A Triscott (to which I shall refer collectively as "Triscotts").

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The respondent's business has been that of purchasing and developing land. There were five loans made by Triscotts to the respondent with a personal guarantee being given by Mr Fitzgerald in respect of each loan. Messrs Khatri and Peldan have been realising the securities that remained to be sold at the time of their appointment. According to the affidavit of Mr Peldan filed on 30 May 2003, about \$677,000 is owed by the respondent in principal and about \$726,000 in interest in respect of these loans.

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It appears that the respondent also borrowed from the applicant and was a guarantor in respect of other loans made by the applicant to related entities. As at 10 April 2003 the amount claimed to be owing to the applicant by the respondent was \$137,398.87.

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Mr Fitzgerald disputes the level of indebtedness claimed by each of the applicant and Messrs Khatri and Peldan against the respondent. The waters appear to have been muddied by the applicant's solicitors giving a notice of completion of sale under section 85 of the Property Law Act 1974 as mortgagee exercising power of sale in respect of the property described as Lot 397 on RP120494 in the County of Stanley Parish of

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Redlands for \$800,000 when the sale price appears to have been \$167,500.

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Mr Fitzgerald has deposed to being prepared to fund the administrator to investigate the sales of properties by the applicant and Messrs Khatri and Peldan as he believes that they were either not for value or were sufficient to extinguish the debts on the properties and should have returned a surplus.

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If either mortgagee has sold a property in an undervalue, the right to pursue a claim for damages in respect of the sale at an undervalue is an asset of the respondent which any liquidator of the respondent would have to consider pursuing. The creditors of the respondent identified in the material are the applicant, Triscotts, a second mortgagee Law Partners and Mr Fitzgerald.

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The test which should be applied in determining whether or not the application should be adjourned is that provided for in section 440A subsection 2 of the Corporations Act 2001. The Court must be satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up.

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The administrator, having been appointed only yesterday, has not been in a position even to commence to undertake the inquiries which Mr Fitzgerald has indicated that he is prepared to fund an administrator to undertake.

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The respondent, therefore, is not in a position to satisfy the onus that would need to be discharged under section 440A subsection 2 to enable the administration to take its course. The question that is really raised by this application is whether there should be a short adjournment to allow further material to be placed before the Court so that the question which must be answered to justify a lengthier adjournment under section 440A subsection 2 can, in fact, be considered appropriately.

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This is not the sort of case where the administration is sought to be pursued because if the administration is allowed to run its course there can be shown to be a good case that there will be a greater or more accelerated return for the creditors than from a winding-up.

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What I am really being asked to determine is whether the administrator should be allowed to make the inquiries in respect of possible sales at an undervalue which Mr Fitzgerald wishes the administrator to pursue or whether, if there is any basis to Mr Fitzgerald's belief about sales at an undervalue, the liquidator should undertake those inquiries.

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All parties referred me to the decision of the Court of Appeal in *Creevey v. Deputy Commissioner of Taxation* (1996) 19 ACSR 456 in which his Honour, Mr Justice McPherson, stated at 457:

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"In order to satisfy the Court of the matter referred to in section 440A(2) of the Corporations Law, one would expect that there would have to be some persuasive evidence to enable it to be seen that there were assets which, if realised under one form of administration rather than the other, would produce a larger dividend or at least an accelerated dividend for the creditors."

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The purpose for which the adjournment is sought to allow inquiries to be made could not result in any larger dividend to the creditors than if the same inquiries were pursued by the liquidator. There is no reason to believe on the material that has been placed before me that if there is any substance to Mr Fitzgerald's concerns about sales at an undervalue that the liquidator appointed by the Court would not pursue those relevant inquiries and any possible causes of action.

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I am therefore not persuaded that it is an appropriate case to adjourn the winding-up application, even for a relatively short period. I am therefore proposing to order that the company be wound up.

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HER HONOUR: I make an order in terms of the amended draft initialled by me and placed with the file.

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