

SUPREME COURT OF QUEENSLAND

CITATION: *Australian Securities and Investments Commission v Sheers and Howes* [2003] QSC 270

PARTIES: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**
(Applicant)
v
RICHARD THOMAS SHEERS
(First Respondent)
and
GARY RAYMOND HOWES
(Second Respondent)

FILE NO: S5793 of 2003

DIVISION: Trial Division

DELIVERED ON: 29 August 2003

DELIVERED AT: Brisbane

HEARING DATE: 25 August 2003

JUDGE: Dutney J

DECLARATIONS:

1. This declaration is made by the Supreme Court of Queensland;
2. The provisions of s180(1), s181(1), and s182(2) of the *Corporations Act* 2001 (Cth) have been contravened;
3. The person who contravened the provisions was GARY RAYMOND HOWES;
4. The conduct constituting the contravention is the conduct set out in paragraphs [9] to [14] of these reasons;
5. The corporation to which the contraventions relate is Gold Ribbon (Accountants) Pty Ltd (ACN 081 156 078).

ORDERS:

1. GARY RAYMOND HOWES be disqualified from managing a corporation for a period of five (5) years.

CATCHWORDS: CORPORATIONS LAW – CONTRAVENTIONS - DIRECTORS – where lack of good faith demonstrated in exercising directors’ powers – where improper use of position

Corporations Act 2001 (Cth), s180(1), s181(1), s182(2) and s260C

Australian Securities Commission v Donovan (1998) 28 ACSR 583, followed

COUNSEL: Ms CJ Conway for the Applicant
Mr Sheers self represented for the First Respondent
No appearance by the Second Respondent

SOLICITORS: Australian Securities and Investments Commission for the Applicant
Mr Sheers self-represented for the First Respondent
No appearance by the Second Respondent

- [1] The Australian Securities and Investments Commission (“ASIC”) seeks an order banning the second respondent from acting as a company director for a period of five years. The application seeks similar relief against the first respondent but that application has been adjourned to enable the first respondent to file material in response to the application.
- [2] The second respondent did not appear when the application was first before the court on 14th August 2003. He did not appear before me on 25th August 2003. I am satisfied that he was served with the applicant’s material and given notice of both dates. The applicant wishes to proceed against him notwithstanding his non appearance.
- [3] Despite there being no opposition to the ASIC application for the reason I have just outlined and having regard to the consequences of the application for the second respondent I consider it necessary to look carefully at the application and give reasons for my decision.
- [4] Gold Ribbon (Accountants) Pty Ltd (“GRA”) was incorporated in Queensland on 24th December 1997 and operated as a lender providing finance to

accounting practices under the name “Gold Ribbon Accountants Funding Programme”.

- [5] On 20th August 1998 Colonial State Bank provided a bill facility to GRA with a limit of Twenty-Five Million Dollars (\$25,000,000). The funding was subject to conditions including a condition that the amount outstanding be insured by a policy issued by HIH Casual and General Insurance Ltd (“HIH”). The funding was available to on-lend to accountants in accordance with specified terms. By clause 19.1(g) of the facility agreement the facility became repayable upon HIH stopping or suspending payment to creditors generally or entering into an arrangement, assignment or composition with creditors.
- [6] The facility made available to GRA was called up when HIH underwent its well recorded failure. GRA was unable to repay the amount drawn on the facility in part at least because of the nature of the loans made and GRA went into liquidation.
- [7] The second respondent (“Mr Howes”) had been a director of GRA since its incorporation.
- [8] An investigation was conducted into the affairs of GRA. This investigation revealed a number of irregularities. It is not necessary to consider all the irregularities alleged. I consider the matters set out below are sufficient in themselves to justify the relief sought against Mr Howes.
- [9] In the case of Mr Howes the investigation disclosed a number of transactions involving a Mr Moss. Mr Moss was an accountant practising as a sole practitioner from his home. He was approached by Mr Howes to invest start-up capital in a number of ventures. Mr Howes advised him that the capital could be obtained from GRA. Two of the companies involved were Cable Drum Pty Ltd and Innovation Design Pty Ltd. In return for providing start-up capital Mr Moss received shares in each company. Mr Howes also took a

shareholding through a family trust the trustee of which was a company owned by Mr Moss.

- [10] Mr Howes also took an interest in another company for which Mr Moss was to provide start-up finance, No Lift Products (Aust) Pty Ltd. Mr Moss also received an interest in this company as reward for providing the capital. Mr Howes further requested Mr Moss to provide start-up finance to a company being set up by a friend of Mr Howes' on the basis that Mr Moss would receive free flights. That company was Tasmanian Airline Company IADA Pty Ltd. This company was proposing to establish an air transport business.
- [11] Mr Howes initially told Mr Moss he would need to borrow \$650,000 for the purposes of the investments. The borrowings would be secured against Mr Moss' receivables from his accounting practice. This covered the amounts to be invested and \$50,000 for Mr Moss' expenses. Mr Moss told Mr Howes that he didn't have any debtors to which Mr Howes responded "That's okay, I'll help you". By working backwards from the point that there needed to be \$900,000 in debtors to support a \$650,000 loan Mr Howes then created a fictitious debtors list for Mr Moss. Mr Moss had never had debtors even approaching the figure of \$900,000 at any point in his entire accounting career.
- [12] Mr Moss transposed Mr Howes' fictitious debtors list onto a loan application form. At the time the receivables for his practice were of the order of \$2,000. The loan application was completed on 11th October 1999. The loans provided by GRA were in form a factoring of the receivables of the accountancy practice to which the money was paid. Unless the loan was supported by an appropriate quantum of receivables in excess of the amount to be advanced the loan could not have been made.
- [13] Mr Moss was led to believe by Mr Howes that the loan would be approved by himself and the first respondent. Mr Moss was concerned as to his liability to GRA and received a cross guarantee from Mr Howes and the first respondent to protect him against personal liability to GRA.

[14] Money was received and disbursed. Further capital was required and in April 2000 a second application for funding was made again based on a false debtors list compiled by Mr Howes. This loan was for \$85,000. For a few months after the funds borrowed from GRA had been fully expended without any financial return from the start up companies Mr Howes was paying the interest on the loans himself. Since the loans were unsupported by receivables they were in breach of the agreements between GRA, Colonial and HIH and in fact unsecured. The HIH insurance would not extend to loans given in contravention of the conditions on which they were authorised by HIH.

[15] The conduct of Mr Howes to which I have referred and to which he makes no challenge or response plainly establishes a failure to exercise the degree of care and diligence a reasonable person in his position in a company in the position of GRA at the relevant time would exercise. Further, it demonstrates in my view an absence of good faith in the exercise of his powers as a director or officer of GRA and the use of that position for an improper purpose. I am also satisfied that it demonstrates an improper use of his position to gain a personal advantage in the form of an interest in the start up companies.

[16] In all the circumstances I declare as follows:

- (a) This declaration is made by the Supreme Court of Queensland;
- (b) The provisions of s180(1), s181(1), and s182(2) of the *Corporations Act* 2001 (Cth) have been contravened;
- (c) The person who contravened the provisions was GARY RAYMOND HOWES;
- (d) The conduct constituting the contravention is the conduct set out in paragraphs [9] to [14] of these reasons;

- (e) The corporation to which the contraventions relate is Gold Ribbon (Accountants) Pty Ltd (ACN 081 156 078).

[17] No pecuniary penalty is sought against Mr Howes by the applicant but it does seek an order pursuant to s206C of the *Corporations Act 2001* (Cth) disqualifying Mr Howes from managing a corporation for a period of five years. The conduct of Mr Howes set out above does in my view justify such a penalty. I consider the conduct to be fraudulent with consequences not only for GRA but also for Colonial State Bank (now part of the Commonwealth Bank). The advancing of money in the manner and amounts described above was plainly in my view a contributing factor to the ultimate failure of GRA.

[18] In determining the length of any ban I should take into account Mr Howes present activities, likelihood of re-offending, contrition and any benefit received by him.¹ Having chosen not to appear and contest the allegations or proffer any explanation or justification for his conduct I must assume that Mr Howes accepts what is factually alleged against him, is not at all contrite and is thus a real risk of re-offending. In those circumstances it seems to me that the period of disqualification sought by the applicant is appropriate.

[19] I further order that GARY RAYMOND HOWES be disqualified from managing a corporation for a period of five (5) years.

¹ See *Australian Securities Commission v Donovan* (1998) 28 ACSR 583.