SUPREME COURT OF QUEENSLAND

CITATION:	*Re: Aprais P/L (in liquidation)* [2003] QSC 329
PARTIES:	**IN THE MATTER OF APRAIS PTY LTD (IN LIQUIDATION)** ACN 063 207 581 **MARIA CARMELA TWIN** (Applicant) **v** **DEPUTY COMMISSIONER OF TAXATION** (Respondent)
FILE NO/S:	SC No 1501 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	23 July 2003
JUDGE:	Holmes J
ORDER:	**It is declared that:** **1. the resolution of shareholders of Aprais Pty Ltd of 8 March 2002 for a voluntary winding up of that company is not invalid by reason of any contravention of the Corporations Act;** **2. the resolution of the meeting of creditors of Aprais Pty Ltd of 8 March 2002 for a voluntary winding up of that company is not invalid by reason of any contravention of the Corporations Act;** 3. **the winding up of Aprais Pty Ltd commenced on 8 March 2002**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP VOLUNTARILY – RESOLUTIONS – where applicant was a director of the company – where extraordinary general meeting called for purpose of passing a resolution to wind up company – where subsequent meeting of creditors accepted the resolution of the extraordinary general meeting – where respondent commenced proceedings against the applicant to recover unremitted holdings on the basis that the winding up had not occurred – whether applicant had standing to bring application – whether company was effectively wound up – when company was effectively wound up *Corporations Act* 2001 (Cth), s 1322 (4) *Allatech Pty Ltd v Construction Management Group Pty Ltd*

& Anor (2002) 41 ACSR 587, considered
Batoka Pty Ltd v Jackson (1998) 30 ACSR 67, considered
Re Duomatic Ltd [1969] 2 Ch 365, applied
Papaioannoy & Anor v Greek Orthodox Community of Melbourne & Anor (1978) 3 ACLR 801, distinguished
Ryan v South Sydney Junior Rugby League Club (1974) 3 ACLR 486, distinguished

COUNSEL: P W Hackett for the applicant
C D Coulsen for the respondent

SOLICITORS: Baker Johnson for the applicant
Australian Tax Office Legal Practice for the respondent

The application

[1] The applicant, Maria Carmela Twin, seeks declarations that resolutions for the voluntary winding up of Aprais Pty Ltd, said to have been passed on 8 March 2002, firstly by an extraordinary general meeting of the company and secondly by a meeting of creditors, are not invalid by reasons of contraventions of the *Corporations Act*, and a further declaration that the winding up of the company commenced on that date. The significance of the winding up date is that the applicant had on 24 February 2002 received a director's penalty notice in respect of unremitted withholdings, and was liable for the amount involved unless a winding-up of the company had commenced within 14 days. The respondent opposes the making of the declarations sought on the grounds that the applicant has no standing to bring the application, that the resolutions for the winding up of the company passed at the meetings on 8 March were irregular, and that any order with the effect of validating the resolutions would cause the respondent substantial injustice.

The background to the meetings

[2] The material filed on the applicant's behalf includes three affidavits sworn by her. In the first, she explains that Aprais Pty Ltd was incorporated on 20 June 1994 and that between 19 June 2001 and 7 February 2002 she was a director. After the latter date, her husband Roger was the sole director of the company. As at February 2002 each of them owned one of the two ordinary shares in the company. On 24 February 2002 Mrs Twin received a director's penalty notice dated 19 February 2002, pursuant to s222 AOE of the *Income Tax Assessment Act* 1936, from the Australian Taxation Office. The respondent alleged that Aprais Pty Ltd had failed to remit withholdings for some six months, rendering its directors liable to pay a penalty equal to the unpaid amount.

[3] Section 222 AOE of the *Income Tax Assessment Act* requires the Commissioner to give notice that a liability exists but will be remitted if within 14 days it is discharged or the subject of an agreement, or the company is under administration or being wound up. Relevantly for present purposes, s 513B of the *Corporations Act*, deems the company's winding up to have commenced on the day it resolves by special resolution that it be wound up.

The meetings and the resolutions passed

[4] Mrs Twin brought the notice to the attention of her husband, Roger Twin. According to his affidavit, on 27 February 2002, as the sole director of Aprais Pty

Ltd, he held a meeting of directors to resolve to call an extraordinary meeting of members to wind the company up and appoint a Mr McDonald as liquidator. Annexed to Mr Twin's affidavit are minutes of the meeting resolving that the extraordinary meeting be convened,

> "and held as soon as practicable, being 21 days from notice being given of the meeting or less should members consent to short notice."

Also annexed are: a notice of the same date of the extraordinary general meeting to be held on 8 March 2002 at 12:30pm, for the purpose of considering a resolution to wind the company up and to appoint Mr McDonald as liquidator; and a consent to short notice, signed by Mr Twin, which is said to be an agreement by the majority of the members of Aprais Pty Ltd entitled to vote at an extraordinary general meeting that the "resolutions here underset" may be proposed and passed as special resolutions at a meeting to be held on 8 March 2002 (although no resolutions are in fact set out in the body of the consent to short notice).

[5] Those documents were, Mr Twin says, shown to Mrs Twin on that date. Each of the documents refers to a meeting to be held at the offices of Queensland Administration Services (a commercial agent whose services Mr Twin had engaged) at Nerang; but, in fact, Mr Twin decided instead to hold the shareholders' meeting at his home. He did so at 12:15 on 8 March and signed the minutes, which record him as present, but not the applicant. Resolutions that the company be wound up and Mr McDonald be appointed liquidator were carried. Mr Twin asked the applicant to send the minutes by facsimile to Mr Hawney of Queensland Administration Services. She confirms in her affidavit that she was shown the minutes and duly faxed them.

[6] In her affidavit sworn 18 February 2003 the applicant says:

> "I did not attend the shareholders' meeting on 8 March 2002 as I did not know that it was necessary for me to do so. However, Aprais was insolvent and I wanted the company wound-up within that 14 day period so that I would not be personally liable and I was totally in agreement with the short notice being given and the holding of the shareholders' meeting and the resolution to wind the company up."

Later in the same affidavit she says,

> "I was the only other shareholder of Aprais who did not attend the meeting of shareholders on 8 March 2002, although I had notice of it and desired the company to be wound-up."

She goes on to say she was in complete agreement with the resolutions passed, and, as far is she is able, ratifies them.

[7] In a later affidavit sworn on 19 May 2003 Mrs Twin deposes in the following terms:

> "On 08th March 2002 I met with my husband Roger Twin and agreed to the terms of the Minutes of Extraordinary General Meeting of the 08th March 2002 at 12.15pm situate [sic] at 66 Rivertree Avenue, Helensvale.

> The Minutes which reflect that I was not present at the time of the Meeting are incorrect.
>
> I did not appreciate and/or realise the error prior to the returning of the Minutes by facsimile to Mr Will Hawney."

[8] What seems to emerge, more clearly from the earlier affidavit than the later, is that although Mrs Twin was physically present on the premises where the meeting was held, and was made aware of, and agreed with, its results immediately after, she did not participate in it.

[9] According to Mr Twin's affidavit, after the shareholders meeting was held and the minutes faxed, he attended by telephone a meeting of the creditors of Aprais at the office of Queensland Administration Services. Mr Hawney, who held proxies on behalf of three creditors, attended the meeting, as did representatives of two other creditors. The minutes of the shareholders meeting were tabled. The creditors represented at the meeting resolved to wind the company up and appoint Mr McDonald as liquidator.

[10] After the meeting was held, officers of the respondent complained that they had received notice of the meeting only through a facsimile of very poor quality, apparently showing the meeting time as 2:45. The respondent had wished to attend at the meeting in order to seek the appointment of a different liquidator. There was also a concern that the notice of meeting of creditors was not advertised in locally distributed papers, and there was some doubt also as to whether it had been advertised, as claimed, in the Sydney Morning Herald. As a result of these concerns, Mr McDonald agreed to resign as liquidator, and another meeting of creditors was called for 25 March 2002. This meeting was advertised in the Courier Mail.

[11] Six creditors were represented at the 25 March meeting, including the respondent. The minutes record that the minutes of an extraordinary general meeting held that morning were tabled and that

> "A Motion was moved that the Special Resolution passed by the company at an Extraordinary General Meeting held this day, be accepted by the meeting without amendment."

The minutes are of course quite misleading; there had been no further meeting of shareholders. They seem to have been contrived to suggest that matters were proceeding in an orthodox way. Mr Hawney also moved that the company be wound up, with new liquidators proposed by representatives of the respondent. That motion was passed unanimously. He says that he moved it because of the concerns raised by the respondent as to the adequacy of the advertising and the time shown in the original creditors' meeting notice.

The background to this application

[12] In April 2002, the respondent commenced proceedings against the applicant to recover an amount of $45,290, representing unremitted withholdings, alleging that the requisite winding up of the company had not occurred, and in February 2003 sought summary judgment on its claim. That application was, it seems, adjourned to permit the present application to be brought.

The applicant's standing

[13] Section 1322 (4) of the *Corporations Act* permits the court "on application by any interested person" to make orders of the kind sought here, that is to say,

> "an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act…"

Mr Coulsen, for the respondent, argued that the applicant was not an interested person for the purposes of the section: she sought the declarations so as to advantage herself in the application for summary judgment made by the respondent, rather than to protect any rights held by her as a director or shareholder in the company.

[14] "Interested person" is not defined in the *Corporations Act*. Mr Coulsen was unable to point to any authority on the meaning of the expression as it appears in s 1322(4). He suggested that it should be construed as limited to persons with the sorts of rights discussed in *Papaioannoy & Anor v Greek Orthodox Community of Melbourne & Anor*[1] and *Ryan v South Sydney Junior Rugby League Club*[2] ; that is, as referring to company members whose individual rights were at risk of infringement. But those cases concerned contractual rights conferred by the articles of association of the companies in question, rather than any statutorily conferred entitlement to proceed, and I do not think that they assist in construing s 1322.

[15] In *Allatech Pty Ltd v Construction Management Group Pty Ltd & Anor*[3] Austin J considered the width of the expression "other interested person" in s 445D (2) of the *Corporations* Act, which permits application for an order terminating a deed of company arrangement. His conclusion was that the term was sufficiently wide to embrace an applicant whose "material legal rights or pecuniary or other economic interests…are or may be substantially affected by the matter in issue".[4] There was perhaps a stronger basis for the conclusion in that case, because of the contrast between 445D(2)(c), which contained the expression, and other provisions conferring standing in the same subsection and elsewhere in the same part of the Act, which specified creditors and the company itself as eligible applicants.

[16] But the powers conferred by s 1322(4) are extremely broad, and the section has a remedial purpose, so as to make it probable that the legislature intended the relief provided by it to be available to a wide class of applicants. As Austin J did in *Allatech*, I conclude that a real financial interest in the result suffices to confer standing as an "interested person"; although, plainly enough, the nature and extent of that interest may be a significant determinant of other issues relevant to whether an order should be made. In the present case, whether the applicant is entitled to the remitting of the s 222AOE penalty is directly dependent on whether the resolutions of the meetings of members and creditors are invalidated by contraventions of the Act. I consider that she is an interested person within the meaning of s 1322(4).

Irregularities

---

[1] (1978) 3 ACLR 801.
[2] (1974) 3 ACLR 486.
[3] (2002) 41 ACSR 587.
[4] (2002) 41 ACSR 587 at 592.

[17] Mr Coulsen pointed to a number of irregularities which, he said, rendered invalid the resolutions passed both at the extraordinary general meeting and at the meeting of creditors. The consequence, on Mr Coulsen's argument, was that the winding up did not start on 8 March and the applicant had not complied with s 222AOE of the *Income Tax Assessment Act* so as to be entitled to a remitting of her liability.

[18] In relation to the company meeting, Mr Coulsen said firstly, there was no evidence of consent by the applicant to short notice of the extraordinary meeting, and that short notice could not be ratified subsequent to the winding up of the company. Secondly, the extraordinary general meeting was not held at the address nominated in the notice. Thirdly, there was no evidence that the requisite number of members voted at the extraordinary general meeting (indeed Mrs Twin's affidavit suggested she did not attend the meeting).

The Notice for the Extraordinary General Meeting

[19] Section 249H (1) of the *Corporations Act* requires 21 days notice for a meeting of the company's members, but s 249H (2) permits shorter notice if members with at least 95% of the votes which may be cast at the meeting agree beforehand. Mr Coulsen argued that this required agreement to the giving of shorter notice, not merely before the meeting was held, but before the notice itself was given. The positioning of the adverb "beforehand" certainly makes the provision ambiguous, but I doubt that the correct construction is as Mr Coulsen contends.

[20] Authority on the point is short. In *Batoka Pty Ltd v Jackson*[5], Hansen J concluded that a consent to short notice given on the morning of, but prior to the commencement of, the meeting of shareholders in question satisfied the requirement of s 249H(2)(b).[6] He noted, however, that counsel had not submitted to the contrary.

[21] The explanatory memorandum for the *Company Law Review Bill* 1997, which became the *Company Law Review Act* 1998 (which by schedule inserted s 249H into the *Corporations Law*, as it was then) contains the following:

> "10.27 For general meetings other than AGMs, members holding at least 95% of the votes will be able to agree to shorter notice (Bill s 249H**(**2)(b)). The requirement for short notice to be agreed to by a majority of the members will be repealed, to provide greater flexibility for those members holding the vast majority of votes (current s 247(3)(b)). As at present, an AGM will only be able to be held on shorter notice if all the members entitled to vote agree (Bill s 249H**(**2)(a)). Members will be able to consent to short notice immediately before a meeting commences."

The last sentence reinforces the view that it is merely before the meeting that there must be agreement, not before the giving of notice. On the whole I think it unlikely that the legislature intended to make it necessary that agreement to shorter notice be achieved before the giving of that notice; it is a cumbersome way of going about things when the provision seems to have been introduced with flexibility in mind.

[22] But there remains some doubt in this case whether consent to short notice was given prior to the meeting. Only Mr Twin signed the consent to short notice, on 27

---

[5] (1998) 30 ACSR 67.
[6] (1998) 30 ACSR 67 at 76.

February 2002. The notice was shown to the applicant. In one of her affidavits she said she consented to short notice "in or about [sic] 8 March 2002" before sending the documents to Mr Hawney. She says also that she consented to the notice being sent, which rather suggests she had not consented in advance of the meeting.

[23] In addition Mr Coulsen makes the point about the meeting not being held at the address nominated in the notice. However, it seems to me that both the deficiencies identified as to notice in the circumstances of this case are relatively trivial. Mrs Twin was well aware when the meeting was to be held, where, and for what purpose and took no issue as to timing or location. To the contrary, she supports its holding and outcome.

Whether there was an effective vote

[24] More significant is the point that the applicant did not participate in the meeting, although she agreed with its outcome. So far as that is concerned, however, it is to be noted that, although the formalities were not observed, there was mutual assent to the resolution. It is a proper case for the application of the *Duomatic* principle[7]:

> "[W]here it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

Mr and Mrs Twin were the only shareholders and agreed to the course of action. I conclude, therefore, that notwithstanding any contraventions of the *Corporations Act* as to the time or place of the meeting, the resolution and meeting are properly declared not invalid, subject to any question of substantial injustice.

The creditors' meeting

[25] As to the creditors' meeting, Mr Coulsen argued that s 497(2) was contravened in a number of respects. The creditors did not have at least 7 days notice by post, as required by s497(2)(a), because the notice to creditors was enclosed under a covering letter dated 1 March 2002 and sent by facsimile, while the meeting was to be held on 8 March, which did not amount to seven days notice. He argued that s 497(1), in its requirement that the creditors' meeting be held on, or on the day following, the day of the company meeting, contemplated that the 21 days notice of the meeting required under s 249H(1) would result in a creditors' meeting also held on at least 21 days notice. Since s 497 did not contemplate short notice being given to creditors, the consequence would be that a general meeting to vote on a winding up could not be held on abbreviated notice.

[26] In addition, Mr Coulsen pointed out, a copy of the notice and accompanying documents was not lodged with ASIC within the required time under s 497(2)(c). The advertising requirement in s 497(2) (d), of publication in a daily newspaper circulating in the state in which the company carried on business, was not met; and a copy of the notice of the meeting and accompanying documents was not lodged, as required by s497(2)(c), with the Australian Securities and Investment Commission (ASIC) at least 7 days before the meeting date.

---

[7] *Re Duomatic Ltd* [1969] 2 Ch 365 at 373.

[27] Mr Hackett, for the applicant, contended that whether the creditors' resolution to wind up was passed on 8 March or 25 March, the effect was the same: the winding up by virtue of s 513B, dated back to the company's resolution on 8 March. To that Mr Coulsen responded that the creditors' meeting of 25 March 2002 could not substitute for the irregularly held meeting of 8 March, because it was not a meeting convened for the day of, or the day following, the day of the meeting at which the resolution for voluntary winding up was to be proposed, as required by s 497(1); and in any event it resulted in the nomination of a different liquidator. The deeming effect of Section 513B as to the commencement of winding up applied only where there was a resolution of the company to wind up followed by a valid resolution of the meeting of creditors at the time stipulated by s 497 (1).

[28] I do not think that there is to be read into s 497(1) any requirement that the creditors' meeting be held on 21 days notice. To the contrary, the language of the sub-section is clearly designed to preserve flexibility by aligning the creditors' meeting to the general meeting whenever it may be held, rather than setting any fixed time period beyond the requirement in the next sub-section of 7 days notice. That notice did, in my view, require seven days clear, because the time should have been reckoned exclusive of the day on which notice was given[8]; however, in this case short notice by a day was entirely without consequence. But it is indubitably the case that the company failed to give the respondent that seven days notice by post, instead sending notice by facsimile, with the direct result that, although the meeting date was known to the respondent, the meeting time was not clear. The failure to advertise locally, there being no suggestion that the company carries on business anywhere other than in the Brisbane area, contravened s 497 (2), as did the failure to lodge documents with ASIC within the required time, but neither seems to have been of any significance in this case.

Whether these matters were of a procedural nature

[29] Sub-section 1322(6)(a) prohibits the making of an order under s 1322(4) unless the court is satisfied in one of three specified respects, including that the relevant acts, matters, things and proceedings were of a procedural nature. Mr Coulsen conceded, properly, in my view, that the matters identified here met that description. They were all, I consider, irregularities in respect of which a declaration under s 1322(4) would be appropriate, subject to the question of whether the further requirement, contained in s 1322(6)(c), "that no substantial injustice has been caused or is likely to be caused to any person", has been met.

Substantial injustice

[30] The real issue then is whether it can be said that substantial injustice has been caused or is likely to be caused to the respondent by the identified contraventions, or the orders sought in relation to them. The injustice Mr Coulsen identifies is the loss to the respondent of his ability to recover the unremitted tax from the applicant.

[31] It is true in the larger sense that if the resolutions of 8 March are declared not invalid, notwithstanding the contraventions of the various sections, the result must be that the winding up commenced on that date and the respondent will not be

---

[8] s 36 *Acts Interpretation Act* 1901 (Cth)

entitled to recover from the applicant in respect of any liability for unremitted tax. But the issue in terms of s 1332(6)(c) is, in my view, a narrower one, concerned with the actual effect of the irregularities and any order with the effect of validating them[9]. Had the respondent received notice in the correct form and attended the meeting of 8 March, there is every reason to believe his representative would have voted for the winding up, but for a different liquidator. That was the position the respondent's officers took when they were advised that they had missed the meeting, and it was the position they ultimately took when there was a further meeting on 25 March. The respondent's interest was in the appointment of a different liquidator, and if there was injustice to it in the effective denial of the opportunity to seek one at the 8 March meeting, that was cured by the later meeting. I conclude that the net result would have been the same had proper notice been given to his office so that his representatives attended the meeting of 8 March.

[32] There is the question of whether other creditors might, had proper notice and advertisement taken place, have wished to vote at the meeting; but the company has now been in the hands of the liquidator for over 18 months and no other creditors have been identified.

[33] In essence, formal requirements were not met by the applicant and her husband as shareholders and directors of the company, possibly because they were not well advised. But for those irregularities, the applicant was entitled to the shelter of s 222AOE, and the respondent would have no argument to the contrary. The necessary nexus between the irregularities and the loss of the ability to recover from the applicant does not exist, because the former did not affect the winding up of the company, which produces the latter. Thus I am satisfied that no substantial injustice within the meaning of s 1332(6)(c) has been or is likely to be caused to any person. Accordingly I think it appropriate to make the declarations sought.

[34] I declare that:-

4. the resolution of shareholders of Aprais Pty Ltd of 8 March 2002 for a voluntary winding up of that company is not invalid by reason of any contravention of the Corporations Act;

5. the resolution of the meeting of creditors of Aprais Pty Ltd of 8 March 2002 for a voluntary winding up of that company is not invalid by reason of any contravention of the Corporations Act;

6. the winding up of Aprais Pty Ltd commenced on 8 March 2002.

[35] I will hear the parties as to costs.

---

[9] *Re Broadway Motors Holdings Pty Ltd (in liq)* (1986) 6 NSWLR 45 at 58; *Re Pembury* [1993] 1 Qd R 125 at 127; *Poliwka v Heven Holdings Pty Ltd* (1992) 7 ACSR 85 at 97-98; *Mamouney v Soliman* (1992) 9 ACSR 63 at 71; *Sutherland (as liq of Sydney Appliances Pty Ltd (in liq)) v Robert Bosch (Aust) Pty Ltd and ors* (2000) 33 ACSR 680 at 690.