

SUPREME COURT OF QUEENSLAND

[2004] QSC 166

CIVIL JURISDICTION

MULLINS J

No BS4020 of 2004

DEPUTY COMMISSIONER OF TAXATION

Applicant

and

ACN 101 070 035 PTY LTD

Respondent

BRISBANE

..DATE 01/06/2004

JUDGMENT

**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 by the applicant, the Deputy Commissioner of Taxation, for an order, that the resolution carried at the meeting of creditors of the respondent on 17 February 2004, that the respondent execute a deed of company arrangement (the deed), be set aside, pursuant to section 600A of the *Corporations Act 2001* (the Act) or, alternatively, that the deed be declared void pursuant to sections 445D or 445G or 447A of the Act. The applicant also seeks an order that the respondent be wound up pursuant to section 447A of the Act.

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At the outset of the hearing on 27 May 2004, Mr Hodge of counsel, on behalf of the respondent, objected to specified parts of the supporting affidavit of Ms L J Hughes, filed on 6 May 2004.

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Each of those objections was validly made. The first two were made on the basis that the identified parts of the affidavit were supposition and the remainder on the ground of irrelevance. I have therefore struck out the third sentence of para 9, para 10, the balance of the first sentence of para 12 from the words, "on the basis", sub paras (c), (c) and (d) of para 12 and Exhibits J to M.

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The struck out parts of para 9 and para 10 of the affidavit could be and were relied on by Mr Byrne of counsel on behalf of the applicant, as submissions, rather than evidence.

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The respondent, which was incorporated on 24 June 2002, was  
formerly known as Rawbelle Creek Pty Ltd. It operated as a  
service company to the legal practice of Broadbent Radich  
Sampson at Bundall in Queensland. Its sole director and  
shareholder is solicitor, Mr Nicholas Radich. On 14 November  
2003, the applicant issued a director's penalty notice (DPN)  
pursuant to section 222AOE of the Income Tax Assessment Act  
1936 to Mr Radich, in respect of unpaid amounts totalling  
\$22,484, withheld by the respondent and for which the  
respondent was liable to pay the applicant for the period  
between 1 July 2002 and 31 March 2003. On the same day the  
applicant sent to the respondent a creditor's statutory demand  
for payment of debt in respect of the amount of \$34,035.55.

On 20 November 2003, the respondent changed its name from  
Rawbelle Creek Pty Ltd, to its present name, which merely  
recites its ACN.

By letter dated 24 November 2003, the respondent advised the  
applicant that it had been placed in voluntary administration  
and referred to the consequences of that of precluding  
liability of Mr Radich under the DPN and preventing the  
applicant from proceeding to wind up the respondent.

The appointment of the administrator, Mr Trevor Angus of  
Darwin, to the respondent took effect on 26 November 2003.  
The administrator sent a circular to the creditors, dated 15  
December 2003, which included a report and gave notice of a  
meeting of creditors, to be held on 22 December 2003.

The report advised that the respondent had ceased trading and had accumulated a deficiency of some \$170,000 and the deficiency had been funded by loans from Mr Radich and his family, amounting to some \$137,000 and the debt due to the applicant of \$34,000. The report noted that the administrator understood there were no assets owned by the respondent and that no financial statements had been prepared by the respondent.

The report noted that Mr Radich had advised the administrator that, as to the level of indebtedness, the fiscal year 2002-2003 and the year to date, had been the worst period in a decade, in terms of practice income, Mr Radich had suffered ill health caused by stress and he was proposing to cease legal practice, except for some limited consultancy from 31 December 2003.

The report advised that the following proposal would be submitted for consideration of the creditors:

"That the company execute a deed to the effect that upon the director, Nicholas Radich, by himself or a third party, paying the administrator \$5,000, to be applied to all debt owed to the Australian Taxation Office, by the company as at the date of the administrator being appointed and on payment being made that the administration shall end".

The administrator expressed the opinion that he did not believe that it would be in the interest of creditors for the respondent to execute the proposed deed and that it would be in the interest of creditors for the company to be wound up.

The administrator's reasons were that the company was insolvent, there was no ongoing business in the company, liquidation provides an opportunity for the liquidator to further investigate the affairs of the company and to pursue any amounts that might be recoverable in the nature of unfair insolvent or non commercial transactions or claims in the nature of insolvent trading or a debt due to the company and the proposal for a deed of company arrangement provided only \$5,000 for unsecured creditors.

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At the meeting of creditors held on 22 December 2003, Mr Atkinson attended as proxy for the applicant and the administrator held the proxies of three related creditors of the respondent, namely Mr Radich, Mrs Radich and Galastream Pty Ltd.

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Mr Radich was the sole director of Galastream Pty Ltd; Mrs Radich was noted as a secured creditor of the respondent, as Mrs Radich held a registered charge over the respondent.

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At this meeting, the administrator advised that he had been unable to inspect the respondent's records and unsuccessful in his attempts to contact the respondent's accountant. The meeting was adjourned to 27 January 2004.

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Because the administrator still had received almost no records and was unable to provide any further information about the respondent's history and circumstances, the meeting was adjourned again until 17 February 2004.

At the meeting on 17 February 2004, the administrator advised that the three related creditors, from whom he had previously held proxies, had withdrawn the proxies and had appointed Mr G Farrer as proxy.

Mr Farrer was present at this meeting, as well as Mr Atkinson, on behalf of the applicant. The administrator reported that he had received a facsimile from Mr Radich on 13 February 2004, enclosing what appeared to be an extract of the respondent's receipts and payments and on 16 February, he had received in the mail, cash receipt books for the period 9 January 2002, to 4 August 2003 and bank deposit books for 12 December 2001 to 26 November 2003, but no bank statements or cheque books or other supporting documentation had been received.

The deposits included amounts apparently received from the three related creditors, which on a quick review by the administrator, added to a figure near the total they collectively had claimed to be owed, of about \$137,000. The net debts could not be confirmed because no record of payments by the respondent was available.

I will add an observation, that the starting dates for each of the cash receipts and bank deposits pre-date the incorporation of the respondent.

At this meeting, Mr Farrer representing two creditors, moved and seconded the motion that the proposed deed as circulated to creditors, be approved. The motion was carried as Mr Farrer for three creditors voted in favour and Mr Atkinson voted against.

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The deed was executed on 9 March 2004. The applicant undertook further investigations before filing this originating application on 6 May 2004.

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The deed recites that apart from the four creditors represented at the creditor's meeting on 17 February 2004, Mr Radich has assured the administrator that the respondent has no outstanding debts, other than the debts owed to those four creditors.

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There is no provision in the deed for the payment of the administrator's fees and expenses. That leads to the inference that the respondent or Mr Radich has otherwise made arrangements for the payment of the administrator's fees and expenses.

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Section 600A(2) of the Act empowers the Court to make certain orders when the outcome of voting at a creditor's meeting is determined by related creditors, when the conditions in each of paragraphs (a), (b) and (c) of section 600A(1) are fulfilled.

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There is no dispute on this application that paragraphs (a) and (b) are applicable. The question which is raised is whether paragraph (c) applies. There are alternative requirements in paragraph (c).

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Paragraph (c)(i) has no application, as it is not possible for the applicant to show that the passing of the resolution was contrary to the interests of the creditors as a whole, on the state of the evidence, which shows that three out of four creditors supported the resolution.

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The applicant, therefore, must show that paragraph (c)(ii) is applicable, which requires the applicant to show that the passing of the proposed resolution prejudiced or was reasonably likely to prejudice, the interests of the creditors who voted against the proposed resolution, to an extent that was on unreasonable, having regard to the matters that are specified in paragraphs (A), (B) and C. These matters are:

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(A) the benefits resulting to the related creditor, or to some or all of the related creditors, from the resolution or from the failure to pass the proposed resolution as the case may be; and

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(B) the nature of the relationship between the related creditor and the company or body, or of the respective relationships between the related creditors and the company or body; and

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(C) any other relevant matter.

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The respondent relied on the test formulated by Fitzgerald JA, in *Khoury v Zambena Pty Ltd* [1999] NSWCA 402, at para 60, that what must be considered under section 600A(1)(c)(ii) is whether the creditors who voted against the resolution, would have been better off if it had not been passed before considering the matters set out in sub paragraphs (A), (B) and (C), to determine whether the extent of the prejudice is unreasonable.

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That was not the approach by the other members of the Court in the same case. Davies AJA, at paras 108 to 112, with whom Beazley JA, agreed on this aspect, considered whether the relevant deed prejudiced the interests of the creditors who voted against the resolution, to an extent that was unreasonable, having regard to the matters to be taken into account for the purpose of section 600A(1)(c)(ii).

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Adopting that approach in this matter, the relevant considerations for determining the issue under para (c)(ii) of section 600A(1) are:

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(a) The benefit that results to Mr Radich in the effect of the deed upon payment of \$5,000 to the applicant in releasing the respondent of its entire indebtedness to the applicant for which Mr Radich may otherwise have been able to be made liable under the Income Tax Assessment Act 1936;

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- (b) Mr Radich was not only the sole director and shareholder of the respondent, but a creditor and the sole director of another related creditor, Galastream Pty Ltd and the husband of the only secured creditor; 1
- (c) The appointment of a voluntary administrator based in Darwin, which is remote from Bundall, made it difficult for the administrator to pursue the books and records of the respondent and there was no logical reason why Mr Radich would seek to appoint an administrator in Darwin; 10  
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- (d) There was no disclosure as to how the administrator's fees were to be met; 30
- (e) Despite requests, the administrator had been unable to obtain from the respondent or Mr Radich, sufficient financial records of the respondent, to enable the administrator to be satisfied as to the true financial position of the respondent; 40  
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- (f) The lack of any other creditors, other than the applicant and the related creditors, who claimed to have funded the respondent's deficiency in trading, suggests that serious consideration should be given to the circumstances of the payments made by the respondent, in conducting its business as the service entity of Mr Radich's legal practice, to ascertain whether there were any preferred payments; 50

(g) No view was able to be reached by the administrator on whether Mr Radich was liable for any insolvent trading on the part of the respondent, because of lack of information;

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(h) The passing of the resolution precluded an investigation of the respondent's financial affairs;

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(i) The withdrawal by the related creditors of their proxies from the administrator, when it was apparent that the administrator was not going to vote in favour of the proposal involving payment by Mr Radich or a third party of the sum of \$5,000.

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In these circumstances the deliberate decision of the related creditors to adopt the proposal of the deed, in the absence of the administrator having sufficient information about the respondent to be able to make an informed recommendation about the desirability of the deed, in the light of the benefits obtained by Mr Radich by the entry of the respondent into the deed gives rise to sufficient likelihood of unreasonable prejudice to the applicant by the passing of the resolution for the respondent to enter into the deed to justify making an order setting aside the resolution.

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The applicant urged that an order for winding up of the respondent should follow, relying on the power conferred by section 447A on the Court. The respondent disputed that the

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Court was empowered under section 447A to make a winding up order following an order under section 600A(2)(a).

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It is not necessary to resolve this question because, even if there were power, I am not satisfied that it is appropriate that a winding up order should be made when there are other possible outcomes which could follow consequent upon the setting aside of the resolution.

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I am particularly concerned that winding up would preclude the administrator completing the inquiries about the respondent's affairs that he has properly sought to do before the passing of the resolution and, if that were done, that would enable all creditors to be properly informed about before making any further decision in respect of the respondent.

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As the prejudice to the applicant has partly arisen because of this lack of information available to the administrator there should be another opportunity for Mr Radich to comply fully with the obligations imposed on him under section 438B of the Act and for Mr Radich and the respondent to provide the balance of the books and financial records of the respondent to the administrator.

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The orders which I make are:

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1. The resolution carried at the meeting of creditors of the respondent on 17 February 2004 that the proposed deed of company arrangement whereby Mr Radich or a third party

would provide \$5,000 for the Australian Taxation Office  
in full satisfaction of its debt be set aside;

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2. Liberty to each of the parties and the administrator to  
apply on one day's notice in writing to the others.

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I will hear submissions from the parties on the question of  
costs.

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HER HONOUR: Mr Hodge obtained instructions from Mr Radich as  
to whether or not he would be prepared to personally accept  
responsibility for the costs of the applicant of the  
application. I indicated to Mr Hodge that I thought that that  
was an appropriate order subject, of course, to hearing  
argument on the question.

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As Mr Radich was not present in Court personally today I was  
unable to make such an order unless Mr Radich was prepared to  
accept that order.

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Mr Hodge obtained instructions from Mr Radich that he was  
prepared to pay the applicant's costs on a standard basis.  
That is an appropriate course, in my view, for Mr Radich to  
have taken.

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I therefore make as the third order that Mr Nicholas Radich  
pay the costs of the applicant of the application on a  
standard basis to be assessed.

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