

SUPREME COURT OF QUEENSLAND

CITATION: *Sherred & Anor v McDonald & Anor* [2004] QSC 332

PARTIES: **FRANK RAYMOND SHERRED**
(applicant)
v
TOTAL BUILDING GROUP PTY LTD
(ACN 089 156 927)
(second applicant)
**GEOFFREY McDONALD AND RICHARD
ALBARRAN**
(first respondent)
ARTHUR DAVID DEWIS
(second respondent)
CASTLE DEVELOPMENT GROUP PTY LTD
(ACN 100 697 729)
(third respondent)

FILE NO/S: BS6855/04

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 23 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 24 August 2004

JUDGE: Moynihan J

ORDER: **1. The appointment of the administrator is invalid.**

CATCHWORDS: CORPORATIONS – VOLUNTARY ADMINISTRATION –
ADMINISTRATOR – APPOINTMENT – the applicants seek
a declaration that the appointment of the Administrators is
void ab initio

Corporations Act 2001
Sutherland v Take Seven Group Pty Ltd [1998] NSW SC 538

COUNSEL: Mr S J Keim for the applicants
Mr C D Coulsen for the second respondent

SOLICITORS: Campbell Standish partners for the applicants
Mr J H Crowther (Crowther Solicitors) for the first
respondent
Baker Johnson Lawyers for the second respondent

- [1] On 24 August I ordered that the third respondent (the company) be wound up pursuant to the provisions of the *Corporations Act 2001* (Commonwealth). Morgan Gerard Lane and Rajondia Khatrie were appointed liquidators to conduct the winding up and it was declared that anything a liquidator was authorised under the *Corporations Act 2001* (Commonwealth) (the *Act*) to do could be done by one or both liquidators.
- [2] I reserved my decision in respect of the applicant's (Sherred's) application for declaration that the first respondent's (McDonald and Albarrin – "the administrators") appointment as administrators for the company was invalid and that the administration had come to an end. It was noted that the outcome of that application might bear on the administrators.
- [3] I gave the second respondent (Dewis) leave to file originating and interlocutory applications for the appointment of provisional liquidators and for the winding up of the company on the just and equitable ground.
- [4] On 24 August, I reserved costs since the matter was dealt with as a matter of urgency I gave counsel for Dewis leave to make further written submissions. This has been done; further written submissions have been lodged and the administrators have sought to file an affidavit.
- [5] Those submissions seek a curative or remedial order pursuant to ss 447A and 1322 in the event Dewis appoint and acts as a director were involved.
- [6] The administrators seek to recover their costs and outlays in the event their appointment was invalid relying on *Sutherland v Take Seven Group Pty Ltd* [1998] NSW SC 538.
- [7] The company was incorporated to act as trustee for a unit trust for the purpose of a town house development at Strathpine. The development was not completed but the land was sold for \$2,360,060.
- [8] The shareholders in the company were a company controlled by Sherred and a company controlled by Dewis and each of them became a director of the company.
- [9] It seems that there was no agreement as to the contributions of the relevant party or the division of any profits from the enterprise although it was apparently contemplated that Dewis, through his company, was to supply planning and development expertise to obtain development approvals which was done.
- [10] There is an outstanding dispute about the entitlement of Dewis' company to fees in relation to the development and relations generally between Sherred and Dewis have broken down leading to the events to which I am about to refer.

- [11] Sherred and Dewis were appointed as directors of the company. The former resigned on or about 6 September 2003 and the latter on or about 4 December of that year. This brought about a deadlock.
- [12] Round about 4 December 2003 Allan Grahame Baker was appointed sole director of the company in circumstances which are not all together clear and it may be, although it's not particularly relevant for present considerations, that the company by its actions ratified that appointment.
- [13] Baker was aware of the dispute between Dewis and Sherred at the time of his appointment and deposes that he had conversations with each of them in June 2004.
- [14] Baker was unable to resolve the deadlock and purported to resign as a director and to appoint Sherred and Dewis directors on about 10 June 2004.
- [15] It seems they only agreed to this but it was never confirmed by the company.
- [16] Sherred alleges that Dewis, without his knowledge or authority, purported to act as sole director and appointed the administrators on 30 June 2004 purportedly under s 436A of the *Act*. When he became of this on 1 July 2004 Sherred instructed his solicitors to advise the administrators that their appointment was not lawful and they seem to have done so by, at the latest, 7 July 2004. The administrators nevertheless apparently continued to act in that capacity.
- [17] There is little or no occasion to doubt that the company was insolvent at the time of the appointment of the administrators.
- [18] The creditors have been largely paid out. The outstanding amounts are for fees claimed by the company controlled by Dewis (\$253,000) and an as yet unquantified GST or tax liabilities arising from the sale of the land which is \$280,400. The company's only asset is an amount of \$430,000 which leaves a deficiency of \$115,400.
- [19] Section 436A requires the resolution of the board of a company for the appointment of an administrator.
- [20] Article 21.1 (exhibited to Dewis' affidavit) provides that:-
"The directors shall have power at any time to appoint another person as director either to fill a casual vacancy or as an addition to the board."
- [21] Clause 21.2 provides:
"That the company by ordinary resolution may remove any director and by ordinary resolution appoint another director in such persons stead."
- [22] Section 201(H) of the *Act* provides that the directors of a company may appoint a person as a director and that the company must confirm the appointment by a resolution within two months after the appointment having been made.

- [23] Section 201(M) provides that an act done by a director is effective even if the appointment is invalid because of non-compliance with the company's constitution or any provision of the *Act*.
- [24] As appears to be accepted by the supplementary submissions on behalf of Dewis the purported appointment of Baker and his purported appointment of Sherred and Dewis did not comply with cl 21 of the company's constitution. There has been no ratification of any appointment of directors in compliance with s 201H of the *Act*. Moreover, Dewis had no power as sole director to bind the company.
- [25] It follows that Dewis' purported appointment of the administrators was invalid and I so declare.
- [26] I am not prepared to deal with any application by Dewis for curative or remedial order on the material before me. As things stand Dewis needs to explain and justify his role in the receiver's appointment to have the benefit of such an order.
- [27] I am also not prepared to deal with any application by the administrators in respect of their costs and outlays at this stage. It should be done on the basis of a proper exchange of sworn material.
- [28] As far as costs are concerned I will hear submissions.