SUPREME COURT OF QUEENSLAND

CITATION:	*Perovich & Anor v ASIC* [2005] QCA 456
PARTIES:	**SILVANA PEROVICH AND RICHARD WILLIAM SPENCER** (applicants) **v** **AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION** (applicant/respondent)
FILE NO/S:	Appeal No 10268 of 2005 SC No 4544 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	8 December 2005
JUDGE:	McPherson JA
ORDER:	**Application dismissed with costs**
CATCHWORDS:	CORPORATIONS – OFFICIAL MANAGEMENT – WINDING UP – CONDUCT AND INCIDENTS OF LIQUIDATION – PROCEEDINGS BY OR AGAINST COMPANY – STAY OF PROCEEDINGS – whether a single order can wind up two companies – where application for leave to appeal not yet granted – whether an order staying the winding up can be made CORPORATIONS – OFFICIAL MANAGEMENT – WINDING UP – CONDUCT AND INCIDENTS OF LIQUIDATION – PROCEEDINGS BY OR AGAINST COMPANY – LEAVE TO PROCEED – whether the applicants have authority to set the company in motion to appeal against the winding up order – whether the applicants had a right to appear or be heard on behalf of the companies *Corporations Act* 2001 (Cth), s 459C, s 459P(3), s 471A *Uniform Civil Procedure Rules* 1999 (Qld), r 761, Sch 1A - r 2.13 *Bell v Bay-Jespersen* [2004] 2 Qd R 235, applied *Brolrik Pty Ltd v Sambah Holdings Pty Ltd* (2001) 40 ACSR

361, applied
Deangrove Pty Ltd v Commonwealth Bank of Australia (2001) 108 FCR 77, considered
Emanuele v Australian Securities Commission (1997) 188 CLR 114, cited
R v Diamond Fuel Co (1879) 13 Ch D 400, distinguished
Re Shields Marine Association (1867) 16 WR 69; 17 LT 308, considered
Re Shields Marine Insurance Association, Lee & Moor's Case (1868) LR 5 Eq 368, considered
R v Warbler Pty Ltd (1982) 6 ACLR 526, distinguished
Rock Bottom Fashion Market Pty Ltd v HR & CE Griffiths Pty Ltd [2000] 2 Qd R 573, cited
Stone v Copperform Pty Ltd [2002] 1 Qd R 106, applied

COUNSEL: The applicant, Ms Perovich, appeared for the applicants
G M Egan, with N H Ferrett, for the respondent

SOLICITORS: The applicant, Ms Perovich, appeared for the applicants
Australian Securities and Investment Commission for the respondent

[1] **McPHERSON JA:** This is an application by Silvana Perovich and Richard William Spencer for leave to appeal against an order winding up in insolvency two companies, Neolido Pty Limited and Neolido Holdings Pty Limited. The application is for: (1) leave to appeal against that order; and (2) under Rule 761(2) of the Uniform Civil Procedure Rules an order staying that order pending the hearing of the appeal. The order for winding up was made by Fryberg J on 25 November 2005 on the application of Australian Securities and Investments Commission ("ASIC"). It is common ground that the order was made on that date, but I was not provided with a copy of it until after the hearing of this application began. Until then, I was left to see through a glass darkly.

[2] On examining the order, I find that it purports to be a single order for the winding up of two companies and the appointment of Mr Richards as liquidator. In *Re Shields Marine Association* (1867) 16 WR 69; 17 LT 308, Lord Romilly MR said that such an order was "quite irregular" (17 LT 308), and that two separate orders must be made; but that an order might afterwards be obtained directing the adoption under each of the new orders of the proceedings under the old order. This was, in due course, presumably done because there is a reference in the Law Reports to the effect that another order was later obtained: *Re Shields Marine Insurance Association, Lee & Moor's Case* (1868) LR 5 Eq 368, 369. The *Corporations Act 2001* confirms rather than alters that requirement except in the limited respect that two or more companies may be wound up in insolvency on one application "if they are joint debtors". There is nothing here to show that this is so in the case of these two companies. They are not sought to be wound up as debtors, joint or otherwise, of ASIC.

[3] One can see the good sense of Lord Romilly's requirement. In addition to other possible problems, it might, for example, be difficult on appeal to set aside the order for winding up of one of the companies without discharging the other as well. But, as it stands now, the order of 25 November 2005 is an order of a superior court of

record and as such it would not in modern times be regarded as vitiated by the irregularity, at least in the absence of an appeal on that ground, of which there has so far been none. See *Cameron v Cole* (1944) 68 CLR 571, 585, 590, 598, 607. ASIC may need hereafter to apply for the order for winding up of the two companies and the appointment of the liquidator to be embodied in separate orders to that effect; but there is no question of treating the order made here as in any sense a nullity.

[4] The first issue before me then is whether an order staying the winding up can and should now be made. The power of the Court of Appeal to stay a decision under appeal is conferred by Rule 761(2) of the Uniform Civil Procedure Rules, and is exercisable by a single judge of appeal. But it relates to a stay of enforcement only of a decision "subject to an appeal". In *Stone v Copperform Pty Ltd* [2002] 1 Qd R 106, I held that the Court or a judge of appeal had no power under Rule 761(2) to order the stay of enforcement of a decision that was not subject to an appeal, but was subject only to an application for leave to appeal which had not yet been granted. The decision was later, although in a slightly different context, approved and applied in *Bell v Bay-Jespersen* [2004] 2 Qd R 235, by which I am bound. It follows that the applicants here are unable to bring themselves within Rule 761(2).

[5] Conceding this to be so, Ms Perovich, who appeared at the hearing before me on behalf of both applicants, said that she would confine her application to applying for leave to appeal; and, if successful, would then apply for a stay after filing a notice of appeal to bring the matter within Rule 761(2). As to this, I will only add in passing that I have been favoured by ASIC with authorities including the very learned judgment of former Master Lee QC, in *Re Warbler Pty Ltd* (1982) 6 ACLR 526, concerning the requirements to be satisfied before a stay of winding up will be granted. But the Master was there concerned with a stay of proceedings in a winding under s 243 of the then *Companies Act 1961*. Such a stay is in the nature of a permanent stay amounting in substance to a complete termination of the winding up. The stay under Rule 761(2) is quite different. What is envisaged by that rule is a stay designed to prevail only during the pendency of an appeal and until its determination. It is not a stay of the kind that the Master in *Re Warbler* was addressing.

[6] With these matters out of the way, I turn to the application for leave to appeal. The history briefly is this. The companies carried on the business of land development in Queensland. The originating application to wind them up in insolvency was filed by ASIC on 6 June 2005. ASIC did not at first apply for or obtain an order of Court giving it leave so to apply as required by s 459P(2) of the *Corporations Act 2001*. Section 459P(3) provides that the Court may give leave if satisfied that there is a prima facie case that the company is insolvent, "but not otherwise". Relying on the decision of the High Court in *Emanuele v Australian Securities Commission* (1997) 188 CLR 114, ASIC sought an order granting such leave *nunc pro tunc* (now for then). This application was made to Fryberg J and came before him at the hearing on 23 November 2005 of the originating application for winding up. It became the fourth of the orders made by his Honour on 25 November 2005. It is not specifically or separately the subject of an appeal by Ms Perovich and Mr Spencer; but no doubt it will be if they are granted leave to appeal in this application.

[7] In order to make such an order giving ASIC leave to apply for the winding up in insolvency of the two companies, it was necessary for Fryberg J to be satisfied that there was a prima facie case of their insolvency. What, perhaps among other things, ASIC relied on to satisfy this requirement was the appointment of receivers and managers to those two companies on 8 June 2005 by the Commonwealth Bank of Australia acting under registered charges or debentures granting floating charges that were put before Fryberg J. Section 459C(2)(c) provides that the Court must presume that the company is insolvent if, during or after 3 months ending on the day when the application was made, a receiver or a receiver and manager of property of the company was appointed under a power contained in an instrument relating to a floating charge on such property. It may be doubted if the appointment on 8 June 2005 of the receiver in this case was made "during … the 3 months ending on the day when the application was made", which was 6 June; but it was certainly made "after" the 3 months ending on that date. His Honour was therefore required by s 459C(2)(c) to treat the companies as insolvent. He did so, and ordered them to be wound up.

[8] We come now to, or closer to, the crux of the matter on this application. Section 471A of the *Corporations Act* provides:

> "(1) While a company is being wound up in insolvency … a person cannot perform or exercise … a function or power as an officer of the company."

By force of s 471A, subsection (1) does not apply to the extent that the performance or exercise of a power is "… (d) with the approval of the Court." No approval of the Court has been obtained by the applicants to their acting as directors for the purpose of putting the companies in motion to appeal against the winding up order. Formerly, there was authority in *Re Diamond Fuel Co* (1879) 13 Ch D 400 that the directors of a company in winding up retained a residual power to institute an appeal against a winding up order. Whatever comfort that proposition might have provided has, however, been lost with the enactment of s 471A. In *Brolrik Pty Ltd v Sambah Holdings Pty Ltd* (2001) 40 ACSR 361, Barrett J in the Supreme Court of New South Wales held that that implied power was eliminated by the enactment of s 471A, which displaced the rule or presumption recognised in *Re Diamond Fuel Co* (1879) 13 Ch D 400. I would have had no hesitation in following the decision of Barrett J even if it had not been founded on the decision of the Queensland Court of Appeal in *Rock Bottom Fashion Market Pty Ltd v HR & CE Griffiths Pty Ltd* [2000] 2 Qd R 573, which is binding on me. The applicants here therefore have no authority to set the company in motion to appeal against the winding up order made on 25 November 2005.

[9] Their application under s 471A(1)(d) for the approval of the Court to their performing or exercising the function of putting the company in motion to appeal against the winding up order must, in my opinion, also fail. I can see no reason why their performance of that function should be approved by the Court in the case of a company or companies which, because of the statutory presumption created by s 459C(2)(c), are insolvent. It can only result in further wastage of costs on the part of the liquidator, with no offsetting advantage to either the companies or their creditors or, for that matter, to the applicants themselves. Insolvent companies ought to be wound up unless they are placed under some form of authorised administration.

[10] The applicants' real complaint is that at the hearing of the winding up application, Fryberg J declined them the right to appear on behalf of the companies. After the application had been filed on 6 June 2005, application was made to Moynihan SPJ pursuant to Rule 2.13 of the Corporations Proceedings Rules of Queensland for an order under that Rule that the applicants as officers of the companies "be heard in a proceeding" subject to those Rules "without becoming a party to the proceeding". At that time, which was before the winding up order was made, the applicants were as directors still officers of the company. On 23 September 2005 his Honour made a directions order for the hearing of the winding up application, which included the following:

> "Silvana Perovich and Richard Spencer as directors of the first and second respondents be granted leave pursuant to Rule 2.13 of the Corporations Rules to be heard in the proceeding in the name of the first and second respondents."

[11] At the hearing of the winding up application on 23 November 2005 before Fryberg J, the applicants asked for an adjournment of the hearing, which, for reasons he gave, his Honour granted only until 25 November. The applicants submitted that the effect of that order of Moynihan SPJ was that they were entitled to oppose the winding up and to do so on behalf and in the name of the companies. Fryberg J did not accept that interpretation of the order, while at the same time making it clear that as individuals they were entitled to be heard and to call evidence at the hearing before his Honour. At one stage the applicants announced that, because of his Honour's ruling, they were withdrawing to seek legal advice. They then left the hearing, although at a later stage Ms Perovich returned and asked for an adjournment of the hearing to enable the companies to obtain legal representation. Referring to the order of Moynihan SPJ, his Honour affirmed that both she and Mr Spencer had leave to be heard and that his Honour recognised their leave in accordance with that order. Ms Perovich responded by saying "No, it is the company. Thank you, your Honour". The applicants took no further part in the hearing, which concluded not long afterwards.

[12] In support of the submission that the applicants as directors retained the power to use the name of the companies in opposing the winding up order, Ms Perovich referred me to *Deangrove Pty Ltd v Commonwealth Bank of Australia* (2001) 108 FCR 77, as demonstrating that directors of a company under receivership retain some of their powers after the receiver's appointment. After considering decisions from various jurisdictions, Sackville J concluded (108 FCR 77, 87)

> "In my view, the authorities clearly support the proposition that, where a company in receivership has a claim against the debenture holder and the receiver declines to pursue the claim, the directors are entitled to initiate and maintain proceedings in the name of the company, provided the directors offer the company a satisfactory indemnity against costs".

I would, with respect, agree with what Sackville J said in that regard. It does not, however, assist the applicants here. His Honour's remarks were directed to the case in which a company in receivership has a claim against the debenture holder or chargee and the receiver declines to pursue that claim. That is not so here. Winding up the company was not directed against the receiver or the Bank which appointed him or her. I have looked at only one of the debentures or charges in this matter; but I have little doubt that they are all alike or similar in form. Clause 25.1 in

enumerating the powers of Lender and Receiver provides in subcl (y) for taking proceedings in the Company's name. It is part of the security given by the company. There is no evidence or reason to suppose that the applicants were authorised by the Bank as lender or by the receiver to oppose the winding up order in the present case.

[13] There is, it may be conceded, a degree of ambiguity about the order made on 23 September 2005. It lies in the expression granting leave to the applicants "to be heard *in the name of the first and second respondents*", which are the two companies. Before Fryberg J and before me, the applicants insisted that they were entitled to be heard and to appear on behalf and in the name of the companies. I do not consider that the order authorised them to do so. Nevertheless, I asked Ms Perovich on several occasions what difference it made to the applicants or the companies if the applicants were heard in person and had the right to tender evidence at the hearing in their own names rather than those of the companies. She failed to specify any respect in which it had or could have made a difference, beyond saying that they or the companies had been denied natural justice. If the applicants themselves were not willing to be heard or to instruct others to be heard at the hearing in opposition to the order that was made, I am unable to see how their or the companies' rights were detrimentally affected by refusing to permit them to be heard in the name of the companies.

[14] For all of these reasons I am not prepared to give the approval of the court to the applicants' exercising the functions of the directors in promoting an appeal to the Court of Appeal in the names of the respondent companies against the order that they be wound up.

[15] The application is dismissed with costs.