SUPREME COURT OF QUEENSLAND

CITATION:	*Golden Star Resources Limited & Anor v Keryn Beatrice Rosel* [2010] QSC 28
PARTIES:	**GOLDEN STAR RESOURCES LIMITED** Applicant/Plaintiff **GOLDEN STAR (BOGOSO/PRESTEA) LIMITED (FORMERLY KNOWN AS BOGOSO GOLD LIMITED)** Applicant/Second Plaintiff **v** **KERYN BEATRICE ROSEL** Respondent/Defendant
FILE NO/S:	BS 8032 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application on the papers without oral hearing
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	1 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	15 January 2010
JUDGE:	White J
ORDER:	**1. John Richard Park and David John Winterbottom, joint and several receivers (the Receivers) appointed by order of the court on 25 February 2009 (the Order) are allowed remuneration** **(a) in the sum of $199,663.52 made up as follows:** **(i) the amount of $77,943.69 (including GST) in respect of remuneration for work previously carried out; and** **(ii) the amount of $121,719.83 (including GST) in respect of their costs and expenses.** **(b) up to a maximum of $2,420 (including GST) in respect of remuneration for work to be carried out in concluding the receivership.**

2. The Receivers be relieved of the obligation to submit accounts.

3. Upon distribution of all proceeds of sale of the Queensland Property and the New South Wales Property (as defined in the Order) (together, "Properties") in accordance with paragraph 10(d) of the Order, the Receivers be discharged from their appointment to those Properties; and

4. The Receivers maintain all documents held by them in relation to their appointment as Receivers to the Properties for a period of seven years from the date of their discharge as Receivers, following which period they be at liberty to dispose of all documents held by them in relation to the receivership.

CATCHWORDS: Receivers – Remuneration – Principles guiding remuneration.

Corporations Act 2001, s 420

Uniform Civil Procedure Rules, r 269, r 269(2), r 270, Ch 13 Pt 6,

Ide v Ide [2004] NSWSC 751

Mohamed v Hurstville Tower Medical Clinic Pty Ltd (In Liquidation) [2006] NSWSC 4

Re Queensland Forrests Limited (In Liquidation) [1966] Qd R 180

Re Solfire Pty Ltd (In Liquidation) (No. 2) [1999] 2 Qd R 182

COUNSEL:

SOLICITORS: Blake Dawson for the applicants

[1] On 25 February 2009 the applicants (the Receivers) were appointed as joint and several receivers to certain real property situated in Queensland and New South Wales of which the defendant was the registered proprietor. It is unnecessary to say anything further about the circumstances which caused that order to be made except that they arose out of the fraudulent conduct and breaches of fiduciary duty owed by the defendant to her employer and its parent company in her capacity as accountant/bookkeeper in its enterprise in West Africa.

[2] Part of the plaintiffs' monies directed to the defendant's bank account in Western Australia were traceable into the properties in Queensland and New South Wales. On 25 February 2009 the court declared that the defendant held those properties on trust in favour of the plaintiffs subject to the interest of the Westpac Banking Corporation as registered mortgagee. The court ordered that the defendant:

- Pay to the plaintiffs the sum of $1,041,440 plus interest of $260,537.30 to the date of judgment being a total of $1,302,477.30.

- Pay to the second plaintiff the sum of $491,670 plus interest of $109,987.62 to the date of judgment being a total of $601,657.62.

- The plaintiffs were entitled to trace the sum of $98,146.49 into the Queensland property.

- The plaintiffs were entitled to trace a sum of $944,435.17 into the New South Wales property.[1]

[3] By para 10 of that Order the Receivers were:

(a) directed to sell the Qld Property and the NSW Property at public auction;

(b) authorised to engage qualified real estate agents to advertise the Qld Property and the NSW Property for sale and to conduct the auction;

(c) be at liberty to sell the Qld Property and NSW Property by private treaty prior to the auction;

(d) directed to pay the proceeds of the sale of the Qld Property and the NSW Property as follows:

(i) first, to Westpac, to discharge the Qld mortgage and the NSW mortgage;

(ii) second, to meet the costs of and incidental to the sales;

(iii) third, to meet the receivers' costs of receivership;

(iv) fourth, to the plaintiffs in discharge of their interest in the Qld Property and the NSW Property pursuant to these orders;

(v) fifth, the balance (if any) be held by the receivers subject to an accounting of any other money owing from the defendant to the plaintiffs;

(vi) sixth, the balance of any monies remaining after payment of any monies owing to the plaintiffs to be paid by the receivers to the defendant.

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[1] Paragraph 10 Order White J, 25 February 2009.

The Receivers otherwise had the powers set out in s 420 of the *Corporations Act* 2001 to the extent that they were not inconsistent with the above orders.

[4] On 3 June 2009 that Order was amended in a minor way in para 10(d)(iii) to include the words "including the receiver's remuneration" at the end of that sub-paragraph. That Order also entitled the Receivers to receive any rental income in relation to the Queensland property and for the costs of the proceedings fixed in the sum of $146,208.61, the question of the costs of the application having been held over from the February hearing.

[5] The Receivers have now applied pursuant to r 269 of the *Uniform Civil Procedure Rules*(*UCPR*) to be remunerated for their work in and about the receivership together with the costs of and incidental to the sales of the properties and this application. They seek the amount of $199,663.52 including GST and an amount to a maximum of $2,420 (including GST) for remuneration for work to conclude the receivership in the future.

[6] The Receivers seek a dispensation from submitting accounts pursuant to r 270 of the *UCPR* and that upon discharge as receivers, they maintain all documents held by them in relation to their appointment as receivers to the property for seven years after which they be at liberty to dispose of all such documents.

[7] The Receivers propose that this application be heard on the papers without an oral hearing pursuant to Ch 13 Pt 6 of the *UCPR*.[2]

[8] The solicitor having the day to day care of this matter for the plaintiffs exchanged emails with the defendant in which the defendant requested that all documents be sent to her via email.[3] The defendant was served with this application by sending an electronic copy of the documents to her at her email address and by pre-paid post to her mother's Queensland address. No communication has been received by the plaintiffs' solicitors in response to this application.

[9] The New South Wales and Queensland properties have been sold. Settlement on the New South Wales property occurred on 29 June 2009. The mortgage was discharge contemporaneously with settlement. The mortgage on the Queensland property was also discharged out of the proceeds of sale of the New South Wales property. Settlement on the Queensland property occurred on 16 October 2009. The transfer of both properties has been registered. Accordingly, the primary purpose for which the Receivers were appointed, namely, to sell the properties has been achieved and the Receivers now need only pay the balance of the proceeds in accordance with the provisions of para 10 of the order made 25 February 2009.

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2 The solicitors propose this course after discussion with my associate since I had heard the principal application in February 2009 and the application to amend that order in June 2009 and was aware that the defendant, who resided outside Australia, had been properly served with the originating application in accordance with the law of the United Arab Emirates where she then resided, was in email communication with the plaintiffs' solicitors and would be unlikely to appear or challenge any application for receivers' remuneration. The material was filed on 24 December and allocated a hearing date of 15 January 2010 by the Registry.

3 The defendant wrote that she had ceased to reside in Dubai and offered no other address; if documents were required to be posted she asked that they be sent to her mother's address in Queensland.

[10] Mr David John Winterbottom, who with Mr John Richard Park was appointed a joint receiver, has sworn an affidavit on behalf of himself and Mr Park concerning the work undertaken by them in the receivership. He deposes that the principal areas of work were establishing the status of the properties, whether they were tenanted and, if so, on what basis, and implementing advice relating to the options available for obtaining vacant possession. The properties then had to be prepared and marked for sale. The New South Wales property was occupied by the defendant's daughter on an informal basis, that is, it was not subject to any tenancy agreement. The Queensland property was occupied by the defendant's brother and his family pursuant to a lease due to terminate in November 2010 at a below market rental.

[11] Mr Winterbottom supervised the work of staff in KordaMentha's Sydney office and Mr Park supervised the work of staff in its Brisbane office. Exhibited to Mr Winterbottom's affidavit are summaries of the work undertaken in respect of the Queensland property by Mr Park in the Brisbane office and the summary of tasks undertaken by Mr Winterbottom and the staff in the Sydney office. These tasks involved undertaking insurance over the property, dealing with local real estate agents, the local council and the Office of State Revenue, reviewing marketing proposals, liaising with the registered mortgagee relating to the funding of the marketing and other matters associated with the sale of the properties. Of some concern were issues relating to the long term tenant at under market rental which limited the property's saleability and involved considerable negotiation with the tenant after the receipt of legal advice. Similar issues arose with respect to the New South Wales property. There the tenant was not the subject of any tenancy agreement.

[12] A requisition was raised by the Department of Lands in New South Wales pursuant to which the Receivers were required to make an application to register the order of 25 February 2009 with the Supreme Court of New South Wales in order to achieve registration of the transfer of the New South Wales property to the purchasers.

[13] According to Mr Winterbottom, the KordaMentha policy and practice on an administration require each level of staff to enter on a computer the time spent performing work on the administration; the classification of the work; and a brief description of the work undertaken so that accurate computerised records are maintained in respect of any appointment.

[14] The KordaMentha standard rates effective from 1 July 2008 for each level of staff member in Brisbane and Sydney have been exhibited to Mr Winterbottom's affidavit and similarly from 1 July 2009. The KordaMentha (Qld) Standard Rates describe the method of calculation. They are subject to review and adjustment on 1 July each year to reflect changes in the cost base of the firm and changes in market conditions and rates for comparable insolvency firm. The firm states that subject to market conditions it is expected that the rates will be adjusted upward and on 1 July each year

> "to reflect the change in the cost of living index for Brisbane as determined by reference to a broad based cost of living index. The increase will note be less than the increase in the Brisbane Consumer Price Index and not greater than the annual increase in the latest

> available published Mercer Human Resource Consulting Cost of Living Survey Index (or equivalent index)."[4]

The approach to the hourly rates of the New South Wales office is not provided in the material but the rate per hour of comparable staff members is very similar to the Queensland office.

[15] The details of each item of work are exhibited to Mr Winterbottom's affidavit constituting some 30 or so closely typed pages. Mr Winterbottom has deposed that from his review of the files and his supervision of the employees and from the information provided to him by Mr Park in relation to his supervision of employees, the persons listed in the schedules did the work described and the schedules accurately record the work completed. Mr Winterbottom has also exhibited schedules summarising the receipts and payments made by the Receivers in relation to the properties in Queensland and New South Wales. In Mr Winterbottom's opinion those amounts are fair and reasonable.

[16] Mr Winterbottom also refers to the legal service provided by the plaintiffs' solicitors to the Receivers after the order was made on 25 February 2009. The solicitors have rendered accounts totalling $65,533.18 including disbursements and GST which are yet to be paid by the Receivers and in Mr Winterbottom's opinion those accounts for work and advice are fair and reasonable. He identified modest out of pocket expenses.

[17] Mr Winterbottom has exhibited to his affidavit certain provisions from the Insolvency Practitioners' Association Code.

The appropriate approach to a receiver's remuneration

[18] Rule 269 of the *UCPR* provides that a receiver is permitted the remuneration allowed by the court. Rule 269(2) provides that the court may order that a receiver be remunerated under a scale the court specifies in the order. A scale of rates had been set by the Insolvency Practitioners' Association of Australia to which courts regularly had resort but that practice was discontinued about a decade ago and there is no longer any scale of costs recommended by that body. It does offer principles and guidance in relation to claims for and payment of remuneration of insolvency practitioners from whose ranks court appointed receivers are customarily drawn, in the form of a Code of Professional Practice For Insolvency Practitioners. The First Remuneration Principle as set out in that Code provides:

> "A Practitioner is entitled to claim remuneration and disbursements, in respect of necessary work, properly performed in an administration."

The touchstone is that the work for which remuneration is claimed must be both necessary and properly performed. The Code provides that "necessary" entails work done that was:

> "… • connected with the administration; and

[4] Exhibit DJW-4 exhibited to the affidavit of David John Winterbottom filed 24 December 2009 at pp 11 and 13.

- done in furtherance of the exercise of the powers and performance of the duties of a Practitioner as required by insolvency law and practice."

[19] The Second Remuneration Principle concerns "meaningful disclosure":

> "A claim by a Practitioner for remuneration must provide sufficient, meaningful, open and clear disclosure to the approving body so as to allow that body to make an informed decision."

[20] As mentioned above, the Receivers in their respective offices engaged a system of recording the work done and by which staff member and the time that it took. Those descriptions are comprehensive and easily understood. The basis for charging is, as is recognised in the Code, on a time basis.

[21] The Third Remuneration Principle requires that a practitioner before being entitled to draw remuneration have approval to do so.

[22] Although the receivership was not unduly complex there were a number of issues to which reference has been made which required legal advice and care in proceeding.

[23] For as long as the Insolvency Practitioners Association of Australia published a scale of charges which it compiled and recommended the courts were content to regard charges based on those scales as reasonable.[5] It is now necessary to consider the basis on which the charges are made and if that basis is reasonable. The Receivers have applied the hourly rates which KordaMentha charges its clients. Those rates are set annually and, as the note to the Queensland schedule states, the rates are rationally based and said to be market rates. That approach to charging seems reasonable. It is a transparent process and in the absence of evidence to the contrary or challenge the remuneration sought should be allowed.

Accounts

[24] Rule 270 places the onus upon a receiver to persuade the court that accounts need not be ordered. Young CJ at Common Law when CJ in Equity observed in *Ide v Ide*[6] that there are benefits associated in taking a holistic approach to this question. Here the receivership was straight forward, the defendant has not sought to challenge any basis upon which the Receivers proceeded to discharge their obligations under the order of 25 February 2009 and there is nothing which calls for the cumbersome procedure of an account. His Honour mentioned that the court will usually work off time sheets created in the receiver's office provided that they do significantly more than merely detail the total number of hours spent by the receiver and officers of particular grades on his or her staff.[7] That is what the Receivers have done here.

Conclusion

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5 *Re Queensland Forrests Limited (In Liquidation)* [1966] Qd R 180; *Re Solfire Pty Ltd (In Liquidation) (No. 2)* [1999] 2 Qd R 182.

6 [2004] NSWSC 751; 50 ACSR 324 at [24].

7 At [48].

[25] The propositions of principle assembled and discussed by his Honour in *Ide* were endorsed by Barrett J in *Mohamed v Hurstville Tower Medical Clinic Pty Ltd (In Liquidation)*.[8] His Honour's summary may usefully be set out:

> "1. The court constituted by a judge never considers a review of quantum, but only matters of principle.[9]
>
> 2. A receiver is entitled to have his costs, charges and expenses properly incurred in the discharge of his ordinary duties or in the performance of extraordinary services that have been sanctioned by the court.
>
> 3. The receiver must justify the reasonableness and prudence of the tasks undertaken for which remuneration is sought. The relevant onus is on the receiver.
>
> 4. A receiver's remuneration is not in the same category of [sic] [as] costs. The receiver is making application for a fair recompense for what he or she has actually done.
>
> 5. The court's objective is to award a sum or devise a formula which will reasonably compensate the receiver for the time and trouble expended in the execution of his duties and, to some extent the responsibility he has assumed.
>
> 6. The court will usually work off time sheets created in the receiver's office provided they do significantly more than merely detail the total number of hours spent by the receiver and officers of particular grades on his or her staff.
>
> 7. The court is guided by a professional scale of charges, with emphasis on the broad average or general rate charged by persons of the relevant status and qualifications who carry out relevant work."

[26] I am persuaded that the work done with respect to the receivership for which Mr Park and Mr Winterbottom were appointed was necessary, performed properly and the claim for remuneration is supported by sufficient meaningful, open and clear disclosure at a rate which is fair and reasonable.

[27] There will be some future modest work associated with terminating the receivership, storing and, ultimately destroying the documents. The amount set aside of $2,420 including GST to cover that work is appropriate, fair and reasonable.

[28] The order is:

1. John Richard Park and David John Winterbottom, joint and several receivers (the Receivers) appointed by order of the court on 25 February 2009 (the Order) are allowed remuneration

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8 [2006] NSWSC 4 at [8].

9 This, as his Honour recognised, may be expressing the proposition that the court is not, in effect, a taxing officer, too prescriptively.

(a) in the sum of $199,663.52 made up as follows:
    (i) the amount of $77,943.69 (including GST) in respect of remuneration for work previously carried out; and
    (ii) the amount of $121,719.83 (including GST) in respect of their costs and expenses;
(b) up to a maximum of $2,420 (including GST) in respect of remuneration for work to be carried out in concluding the receivership.

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4. The Receivers maintain all documents held by them in relation to their appointment as Receivers to the Properties for a period of seven years from the date of their discharge as Receivers, following which period they be at liberty to dispose of all documents held by them in relation to the receivership.