SUPREME COURT OF QUEENSLAND

CITATION:	*Williams as liquidator of C & D Global Protection Pty Ltd (in liquidation) v CD Protective Services Pty Ltd & Ors (No 3)* [2010] QSC 224
PARTIES:	**WILLIAMS, Julie as liquidator of C & D GLOBAL PROTECTION PTY LTD (IN LIQUIDATION)** (plaintiff) **v** **CD PROTECTIVE SERVICES PTY LTD** ANC 125 210 068 (first defendant) **WHELAN, Craig Robert** (second defendant) **HELFERT, Joseph Aaron** (second defendant)
FILE NO/S:	SC No 8075 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2010
JUDGE:	Margaret Wilson J
ORDER:	**Leave is granted to the plaintiff nunc pro tunc to file a further amended claim in the proceeding.** **Leave is granted to the plaintiff to file a second further amended statement of claim in the proceeding.** **There be no order as to the costs of the plaintiff obtaining leave to file the further amended claim and second further amended statement of claim.** **The defendants' application for a declaration that the resolution to approve the plaintiff's remuneration of 12 October 2009 was invalid or in the alternative, a declaration that the use of a casting vote by the plaintiff to pass such resolution was a breach of her duties as liquidator is dismissed.** **The defendants pay the plaintiff's costs of and incidental to the application for a declaration on the standard basis.** **The defendants' application for an inquiry pursuant to section 536 of the *Corporations Act 2001 (*Cth)**

into the conduct of the liquidator is dismissed.

The defendants pay the plaintiff's costs of and incidental to the application for an inquiry on the standard basis.

CATCHWORDS: CORPORATIONS – WINDING UP – LIQUIDATORS – REMUNERATION – IN VOLUNTARY WINDING UP – where defendants filed an application seeking (inter alia) a declaration that a resolution to approve plaintiff liquidator's remuneration was invalid or in the alternative a declaration that plaintiff's use of a casting vote to pass such resolution was a breach of her duties as liquidator – where defendants further sought an inquiry into the conduct of plaintiff pursuant to s 536 of the *Corporations Act* 2001 (Cth) – where application for inquiry not pursued – whether Court should make declaration that the resolution to approve plaintiff's remuneration invalid – whether Court should make declaration that plaintiff's use of a casting vote to pass resolution was a breach of duties – whether costs of application not pursued should be granted, and if so on what basis

Corporations Act 2001 (Cth), s 473, s 536
Corporations Regulations 2001 (Cth), reg 5.6.17(1)(a), reg 5.6.21(4), reg 5.6.33

Krejic as liquidator of Eaton Electrical Services Pty Ltd (2006) 58 ACSR 403, not followed

COUNSEL: C A Johnstone for the plaintiff.
D C Rangiah SC for the defendants.

SOLICITORS: Minter Ellison for the plaintiff.
Piper Alderman for the defendants.

HER HONOUR: On 8 December 2009, the defendants filed an application seeking (inter alia) a declaration that the resolution to approve the plaintiff's remuneration of 12 October 2009 was invalid or in the alternative a declaration that the plaintiff's use of a casting vote to pass such resolution was a breach of her duties as liquidator. Further they sought an inquiry into the conduct of the plaintiff liquidator pursuant to section 536 of the Corporations Act 2001

These two applications were listed before me today. The application for an inquiry was not pursued. There was an argument about the costs of that application, to which I will turn in due course.

By section 473 of the Corporations Act, a liquidator is entitled to receive such remuneration as is determined by resolution of the creditors, or if no such resolution is passed, by the Court. See section 473(3)(b).

By notice given on 24 September 2009, the plaintiff liquidator convened a meeting of creditors to be held on 12 October 2009. With the notice of meeting she enclosed an explanatory note, a proxy form and a proof of debt form.

In the explanatory material she recounted that a motion to approve the liquidator's further remuneration had been put to the annual general meeting and lapsed. She said that a further meeting was being convened to consider the

liquidator's remuneration in an endeavour to avoid the costs of an application to the Court. She said there would be two motions before the meeting, one with respect to fees to date and the other with respect to future fees. The resolutions to be considered were set out as follows:

"1. that fees incurred to date of $38,554.64 inclusive of GST be approved and paid at the liquidator's discretion; and
2. that a future fee approval of $40,000 capped inclusive of GST for the balance of the liquidation and is paid at the liquidator's discretion [sic]."

By oversight, a schedule containing details of the remuneration sought to be approved was not enclosed with the notice of meeting. However, it was tabled at the meeting.

The meeting took place in the liquidator's office. She chaired it pursuant to regulation 5.6.17(1)(a). No creditor was personally present. A poll was taken. The liquidator exercised special proxies by which she was directed to vote in favour of the resolutions by two creditors together representing 99.99 per cent of the value of debts owed to all the creditors voting - ATO $1,449,673.13, Oh My Pty Ltd $15,492.49, making a total $1,465,168.62.

Mr Evans, the solicitor for the three defendants in this proceeding, exercised proxies from five creditors together representing the remaining 0.01 per cent of the value of debts owed to all creditors voting - second defendant $500, third defendant $500, LE Hawkins & Associates $11,200, LE Hawkins $2,000, Wilsons Accountants $3,000, making a total of $17,200.

Thus, there was a majority in value in favour of the resolutions but a majority in number against them.

Regulation 5.6.21 of the Corporations Regulations applies to a poll taken at a meeting of creditors. A resolution will be carried if a majority in number and a majority in value of creditors voting vote in favour of it. It will not be carried if a majority in number and a majority in value of creditors voting vote against it.

Applying those rules in the circumstances of the present case, there was a stalemate. However, the liquidator as chairman of the meeting had a casting vote pursuant to regulation 5.6.21(4). By paragraph (a) of (4), if she exercised a casting vote in favour of the resolution, it would be carried.

The liquidator exercised her casting vote in favour of each resolution, stating that she was doing so "as the dollar value is far greater for the resolution than against and as there would be substantial costs in applying to Court..." She declared the motions carried.

The defendants contend that her use of her casting vote to secure the passage of the resolutions approving her own remuneration was in breach of her fiduciary duty.

A liquidator is clearly a fiduciary bound to avoid a situation of conflict of duty and interest.

In Krejic as liquidator of Eaton Electrical Services Pty Ltd (2006) 58 ACSR 403, the applicant was the administrator and subsequently liquidator of the company. At a meeting of creditors chaired by him, it was resolved that the company be wound up.

Two further resolutions were proposed, one for his remuneration as administrator and the other for his remuneration as liquidator. A poll was taken. Eight creditors representing approximately 58 per cent in value of the creditors voting were in favour of the resolutions and 12 creditors representing approximately 42 per cent in value of the creditors voting were against it.

Barrett J. considered "fundamental equitable principles" needed to be taken into account. He said, "[8].....In the first place, it is necessary to refer to the unwritten rule that a chairman exercising the casting vote given by regulation 5.6.21(4) must act 'honestly and in accordance with what he believed to be the best interests of those affected by the vote: Kirwan v. Cresvale Far East Limited (in liq) (2002) 44 ACSR 21 at 101 per Young CJ in Eq. And as was recognised in the same case (see particularly the judgment of Giles JA at 67-72) it would be improper for an administrator to use the casting vote to keep himself in office regardless of other circumstances bearing upon the relevant decision-making. (See also Young v. Sherman (2001) 166 FLR 96 at 116-7 per Austin J, that principle not being challenged upon the subsequent

appeal: Young v. Sherman (2002) 170 FLR 86.)"

His Honour said later in the judgment "[13] In the present case, the availability of the casting vote to the plaintiff caused three courses to become open to him. He might exercise the vote in favour of the remuneration resolution; exercise the vote against the remunerative resolution; or not exercise the vote at all. Had he chosen the second or third course, the resolution would not have been passed. In that event, the fixing of the plaintiff's remuneration as administrator would have become a matter for decision by the Court upon application made by the plaintiff as administrator: s 449E(1)(b). Either such course would have enabled the plaintiff to observe and give effect to the fundamental requirement that he avoid a situation in which his duty to serve the interests he was bound to serve (that is, the interests of the company as an embodiment of the interests of its creditors) conflicted with his personal interest in having his remuneration fixed so that he might then receive and enjoy it."

In that case, the applicant chose the first option, and Barrett J. found that in doing so he breached his fiduciary duty, despite the fact that he did not in any sense act dishonestly. But by the time that matter came to Court, the creditors no longer opposed the remuneration sought, and so the Court fixed it in the relevant amounts.

I should mention also that there was reference to regulation 5.6.33 as it then stood. It was to the effect that

subject to certain exceptions, a person must not, as a proxy, vote in favour of any resolution which would directly or indirectly place him in a position to receive any remuneration out of assets of the company except as a creditor rateably with the other creditors.

In that case, recognising there was no corresponding written rule in relation to a casting vote given by regulation 5.6.21(4), the applicant inferred that no similar constraint applied. While agreeing that the applicant was correct insofar as the written law was concerned, Barrett J went on to deal with the matter as a breach of fiduciary obligation.

Regulation 5.6.33 has since been amended. It now regulates voting by general proxy. In doing so it preserves the efficacy of a creditor's instruction to a special proxy holder and the authority of the special proxy holder to vote in accordance with the creditor's wishes. But it still does not deal with the exercise of a casting vote.

In my view, all the relevant circumstances of a case must be considered in determining whether a fiduciary has acted in the breach of his duty to those whose interest he is bound to serve.

If Barrett J meant there can never be circumstances in which a liquidator may exercise his casting vote in favour of his own remuneration, I respectfully disagree.

In this case, the liquidator was obliged to serve the interests of the company as an embodiment of the interests of its creditors, to use Barrett J's description. Here, 99.9 per cent in value of the creditors voting were in favour of the resolution. An application to the Court would have involved expenditure of money which might otherwise be available to creditors. A schedule containing details of the remuneration had already been tabled at the meeting. These were all circumstances properly bearing upon the liquidator's decision how to exercise the casting vote. I am not persuaded that she preferred her personal interests to those of the company.

Accordingly, I dismiss the application for a declaration. The costs of that application should follow the event. That is, the defendants should pay the plaintiff's costs on the standard basis.

There is then the question of the costs of the application for an inquiry into the liquidator's conduct, an application which was not pursued. The liquidator sought costs on the indemnity basis. The defendants submitted that if they were unsuccessful in their argument about breach of fiduciary duty, there should be an order for costs against them only on the standard basis.

Of course, costs on the indemnity basis are very much an exception rather than a rule of practice, and it is really necessary to show that the application was baseless or that there was some other misconduct on the part of the applicant warranting indemnity costs.

Senior counsel for the defendants submitted that it had not been unreasonable for his clients to seek an inquiry because arguably there had been a breach of fiduciary duty, because the liquidator had sworn an inaccurate affidavit, and for a number of other reasons which can be categorised as more general complaints.

I have already found against the applicant/defendants in relation to the fiduciary duty argument, but the mere fact that I found against them is not sufficient to warrant indemnity costs. The point was an arguable one.

As to the inaccurate affidavit, on 6 October 2009 the liquidator swore that the Commonwealth of Australia through its agency the Australian Taxation Office "[had] agreed to provide an indemnity in respect of my costs of the proceeding including any adverse costs order which may be made against me." In fact, the ATO had agreed to provide a capped indemnity for the costs of running a liquidation and a capped indemnity against any adverse costs order.

The affidavit was inaccurate. In argument today it was not submitted that it contained a deliberate falsehood. It would be a very serious matter to allege that a liquidator, who is an officer of the Court, swore an affidavit which contained a deliberate falsehood. What was alleged here, at least by the time the matter came before the Court, was something less than that.

Another matter canvassed was the defendants' assertion that the liquidator did not explain her failure to enclose details of the remuneration sought with the notice of meeting until very recently. However, that is not so, because an explanation was given in a letter of 23 October 2009.

The defendants pointed to the IPA Code of Practice for Insolvency Practitioners, which at all material times provided that a practitioner must not use a casting vote in relation to any resolution determining or fixing his remuneration. But, of course, such a code of practice is not legally binding and non-compliance with this particular provision of it would not in itself, in my view, be a sufficient basis for an inquiry into a liquidator's conduct.

All of these matters need to be considered not only individually but in terms of the overall picture that they paint. It seems to me unlikely that the application for an inquiry would have succeeded, but I am not satisfied that the prospects were so bleak that the application ought never to have been brought.

In the circumstances I refuse indemnity costs but order the applicant/defendants to pay the respondent/plaintiff liquidator's costs of and incidental to the application for an inquiry on the standard basis.

...

HER HONOUR: There will be no order as to the costs of the plaintiff's obtaining leave nunc pro tunc to file a further amended claim and leave to file a second further amended Statement of Claim.
