SUPREME COURT OF QUEENSLAND

CITATION:	*Capital Globe Investments Pty Ltd ACN 111 631 559 v Parker Investments Australia Pty Ltd ACN 089 580 450* [2011] QSC 31
PARTIES:	**CAPITAL GLOBE INVESTMENTS PTY LTD ACN 111 631 559** (Applicant) **V** **PARKER INVESTMENTS AUSTRALIA PTY LTD ACN 089 580 450** (Respondent)
FILE NO/S:	S990/10
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	11 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 February 2011
JUDGE:	Applegarth J
ORDER:	**1. Declare that the applicant's director has standing to continue the application.** **2. The applicant to submit draft orders that include terms as to indemnities and security for costs in respect of the prosecution of the application.**
CATCHWORDS:	CORPORATIONS – MANAGEMENT AND ADMINISTRATION – AUTHORITY, RIGHTS AND POWERS OF OFFICERS OF CORPORATION – POWERS – OF DIRECTORS – applicant company developed real estate – company applied to set aside statutory demand – receivers and managers subsequently appointed in respect of certain mortgaged property of the company – receivers proposed neither to continue nor defend the proceedings in relation to the statutory demand – sole director of the company sought to continue the application to set aside the statutory demand – receivers did not object to director so doing – whether director has residual power to continue the proceedings on behalf of the company – whether director

requires leave under s 237 *Corporations Act* 2001 (Cth)

CORPORATIONS – RECEIVERS, CONTROLLERS AND MANAGERS – POWERS – WITH RESPECT TO LEGAL PROCEEDINGS – whether appointment of receivers over certain property of a company affects the residual power of sole director to continue proceedings on behalf of the company

LEGISLATION: *Corporations Act* 2001 (Cth) s 237, s 459C

CASES: *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd* (2006) 60 ACSR 217; [2006] FCA 1163 followed

Deangrove Pty Ltd (Receivers and Managers Appointed) v Commonwealth Bank of Australia (2001) 108 FCR 77; [2001] FCA 173 followed

Ernst and Young (Reg) v Tynski Pty Ltd (2003) 47 ACSR 433; [2003] FCAFC 233 cited

Re Geneva Finance Ltd ; Quigley v Cook (1992) 7 WAR 496 cited

Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd [1969] 2 NSWR 782 cited

Perovich v Australian Securities and Investments Commission (2005) 56 ACSR 303; [2005] QCA 456 cited

COUNSEL: D Kelly SC and E Morzone for the applicant

D Tucker (Solicitor) for the respondent

SOLICITORS: Emanate Legal for the applicant

Tucker & Cowen for the respondent

[1] I am required to decide two preliminary issues. The first is whether the appointment of receivers to certain property of the applicant has affected the residual power of the applicant's sole director to continue an application to set aside the respondent's statutory demand. If I conclude that no such residual power exists, then the director, Mr Lee, applies for leave pursuant to s 237 of the *Corporations Act* 2001 (Cth) ("the *Act*") to continue the proceedings on behalf of the applicant. This gives rise to the second issue of whether or not leave should be granted.

[2] The applicant is the registered owner and developer of land in Cairns, principally the North Point residential subdivision and proposed town centre at Smithfield. The respondent asserts, and the applicant disputes, that the applicant entered into three agreements dated 2 December 2008, each styled a Portfolio Management and Advisory Agreement. On 10 December 2010 the respondent served a statutory demand upon the applicant for amounts that were alleged to be repayable pursuant to these agreements. On 23 December 2010 the applicant filed an application to set aside the statutory demand.

[3] The applicant submits that there is a genuine dispute as to the existence of the debts that are the subject of the demand because:

1. it was not a party to the alleged agreements which were entered into by its former director, Mr Haque, who had no authority to enter into them on behalf of the applicant;
2. the agreements are void since they are uncertain in their terms; and
3. the respondent did not perform the agreements so as to entitle it to claim in debt. In particular, the applicant did not receive any of the monies transferred by the respondent.

[4] On 31 January 2011, the National Australia Bank appointed receivers and managers over certain mortgaged property owned by the applicant. The receivers were not appointed in respect of certain "Excluded Property" as defined in the Deed of Appointment. On 8 February 2011, the receivers advised that they did not propose to continue or defend any proceedings in relation to the statutory demand served by the respondent. The solicitors for the respondent raised the issue of Mr Lee's standing to continue the application to set aside the statutory demand. Mr Lee contended that the appointment of receivers did not affect his residual power as the applicant's sole director to continue the application in the applicant's name. However, he indicated that if that issue was determined against him, he would apply for leave pursuant to s 237 of the *Act*. An application for the grant of leave to continue the proceedings was filed on 21 February 2011. On 24 February 2011, the receivers indicated that they did not propose to assume conduct of the company's application to set aside the statutory demand, and did not object to the relief sought in Mr Lee's application filed on 21 February 2011.

Is leave required to continue with the application?

[5] The respondent's contention that Mr Lee was required to file an application for leave pursuant to s 237 of the *Act* is founded on the proposition that, upon the appointment of receivers and managers to the applicant, its directors ceased to have the managerial power to instruct solicitors to continue the application against the respondent. Mr Lee does not concede that leave is required. He submits that the appointment of receivers has not affected his residual power to continue the application. He relies upon the general principle that the appointment of receivers does not entirely displace the powers and authorities of the directors.[1] In *Deangrove Pty Ltd (Receivers and Managers Appointed) v Commonwealth Bank of Australia*, Sackville J reviewed authorities which were found clearly to 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.[2] Sackville J found it unnecessary to consider in what other circumstances, if any, the directors were entitled to commence and maintain proceedings in the name of the company. McPherson JA in *Perovich v Australian Securities and Investments Commission* agreed with what Sackville J had said in *Deangrove* in relation to the authorities.[3] The proposition stated by Sackville J related to a claim against the debenture holder.

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1 *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* [1969] 2 NSWR 782 at 790.
2 (2001) 108 FCR 77 at 84-88; [2001] FCA 173 at [29] to [43].
3 (2005) 56 ACSR 303 at 307; [2005] QCA 456 at [12].

McPherson JA was concerned with a proceeding to wind up a company, and reference to the debentures indicated that the power to take proceedings in the company's name did not reside in the directors. There was no evidence that the applicants were authorised by the lender or by the receiver to oppose the winding up order.

[6] The applicant in this proceeding acknowledges that McPherson JA simply approved the statement of Sackville J in *Deangrove* in relation to a claim against the debenture holder, and did not address the issue that arises here where the directors retain control over property excluded from the receivership. Counsel for the applicant also note that McPherson JA did not have occasion to address other authorities upon which the applicant relies. These authorities include *Re Geneva Finance Ltd; Quigley v Cook*, in which Owen J stated that:

> "The task is to look at the effect which the exercise of the power will have on the receiver's functions rather than to concentrate on the identification and delineation of the residual duties reposed in the directors….
>
> It is a question of fact to be decided in each case whether the purported exercise of power by the directors is detrimental to the functions of the receiver. If it is, the directors must defer to the receiver. If it is not, it does not offend the principle which *Newhart*, supra, enunciates."[4]

[7] This statement has been followed in later cases and was quoted with approval by Sackville J in *Deangrove*. These and other cases relating to the residual capacity of a director to represent a company in receivership were considered by French J (as the Chief Justice then was) in *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd*.[5] After reviewing relevant authorities, including *Re Geneva Finance*, French J stated that the practical concern must be "whether the exercise by a director of any power in the name of the company would interfere with the legitimate exercise by the receivers of their powers."[6] His Honour quoted what Owen J had said in *Re Geneva Finance*:

> "The real question is whether the directors, wishing to exercise a power which they would otherwise have, can do so without prejudicing the legitimate interests of the receiver and the secured creditor in the realisation of the assets."[7]

In that case, French J was concerned with the standing of a director to oppose winding up applications. The director was found to be at liberty, without the leave of the Court, to defend the winding up application in the name of each of the companies, subject to restrictions in relation to access to the assets of the companies. Justice French found that there was no need for an application for leave under s 237 of the *Act*.

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4 (1992) 7 WAR 496 at 510-11. His Honour is referring to *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814.

5 (2006) 60 ACSR 217; [2006] FCA 1163.

6 Ibid. at 221, [21].

7 *Re Geneva Finance Ltd; Quigley v Cook* (1992) 7 WAR 496 at 511.

[8] I respectfully follow the approach adopted by French J of inquiring whether the exercise of the residual power of the director to continue the proceedings in the name of the company would interfere with the legitimate exercise by the receivers of their powers or prejudice the legitimate interests of the receiver and the secured creditor in respect of the assets that are the subject of the charge. The receivers do not suggest that this is the case. However, the receivers' lack of objection to the relief sought in Mr Lee's application is seemingly premised on the offer made by Mr Lee to indemnify the company and the receivers against any adverse costs consequences. In his affidavit Mr Lee indicated that he would be prepared to agree to orders that he:

1. personally finance the continued pursuit of the proceedings;
2. not seek indemnity from the applicant in respect of their financing the proceedings, unless successful; and
3. take personal responsibility for any costs order that may be made by the Court against the applicant.

[9] His offer to be personally responsible for any costs order that may be made is appropriate.[8] It is also appropriate to require Mr Lee to provide security in respect of any costs order made against the company arising from the continued prosecution of the application. The provision of security has been addressed between the parties since the hearing of the application.[9] I will hear the parties as to the form of order which should be made. The parties agreed to terms as to a condition for any leave being granted to Mr Lee pursuant to s 237 of the *Act*. For the reasons that I have given, I do not consider that it is necessary for leave to be granted pursuant to s 237. However, a similar form of security should be provided in respect of costs which may be ordered in the respondent's favour upon the discontinuance, resolution or determination of the application.

[10] In summary, I conclude that the appointment of receivers in respect of certain of the property of the applicant has not deprived Mr Lee of the residual power to continue the prosecution of the application to set aside the statutory demand. He is at liberty, without the leave of the Court, to continue that application in the name of the applicant, subject to his personally financing the continuation of the proceeding and the provision of security for costs in the agreed sum of $55,000.00 upon terms to be reflected in an order to be submitted by the applicant.

The application for leave

[11] My conclusion makes it unnecessary to address the application for leave. Had I reached the conclusion that it was necessary for Mr Lee to apply for leave then I would have granted leave subject to the agreed condition in relation to the terms of appropriate indemnities and security for costs, as agreed between the parties. I will address in a summary fashion my reasons for concluding that this was an appropriate case for leave.

[12] The receivers indicated that they would not be continuing the proceeding. Mr Lee appears to be acting in good faith. For the purpose of the application for leave, the respondent was content for the Court to assume that there was a genuine dispute. Mr Lee could not be said to be not acting in good faith in disputing what he believes is not a debt owed by the company. The applicant has advanced substantial

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8 *Ernst and Young (Reg) v Tynski Pty Ltd* (2003) 47 ACSR 433; [2003] FCAFC 233.

9 See the letter from Emanate Legal dated 3 March 2001, which I have made Exhibit 1.

arguments as to why the debt is not owed. Mr Lee has given some evidence in relation to the solvency of the company, although valid criticisms were made of the lack of detail concerning the extent of the company's indebtedness.

[13] In circumstances in which there is a presumed genuine dispute about the company's alleged indebtedness to the respondent, I was satisfied that it was in the best interests of the company that Mr Lee be granted leave, if required. The granting of leave did not jeopardise the assets of the company, providing Mr Lee offered a satisfactory indemnity as to costs. If the alleged debt was successfully disputed, then there was a potential benefit to the company's unsecured creditors and to its shareholders.

[14] The fact that the appointment of a receiver raises an alternative ground to presume that the company is insolvent[10] does not, in my view, provide a sufficient reason to deprive the company of the opportunity to set aside the statutory demand. If the company is not insolvent, and if there is a genuine dispute that permits the statutory demand to be set aside, then that demand should be set aside, leaving the company to respond, if so advised, to any application to wind it up based upon presumed insolvency under s 459C(2)(c).

[15] Mr Lee did not apply for leave to bring proceedings. The application is for leave to continue them.[11] In any event, the application for leave raises substantial issues to be determined upon the hearing of the application to set aside the statutory demand.

[16] Whilst Mr Lee did not give the receivers and managers the required 14 days notice of his application, they were put on notice and did not object to his application. The rebuttable presumption in s 237(3) of the *Act* does not arise because this is not a case in which the company had decided not to bring the application. The company did decide to bring the application. In any event, I consider that Mr Lee has established that it is in the best interests of the company that the application continue, subject to conditions concerning indemnity and security for costs.

[17] There would have been no advantage in refusing to grant leave to continue the existing application, leaving Mr Lee to oppose a winding up application that relied on the statutory demand. If the statutory demand is liable to be set aside then the application should continue. The company, its shareholders and its unsecured creditors should not be prejudiced by an application to wind up the company based upon the presumed insolvency that may arise if the statutory demand is not set aside.

[18] In summary, had I concluded that Mr Lee required leave to continue the application then I would have granted leave.

Conclusion

[19] I conclude that the appointment of receivers has not deprived Mr Lee of the residual right to continue with the application in the circumstances. Subject to conditions of the kind offered by him which serve to indemnify the company in respect of costs, and subject to the provision of security in respect of legal costs, Mr Lee is at liberty, without the leave of the Court, to continue the application to set aside the statutory

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10 *Corporations Act* 2001 (Cth) s 459C(2)(c).

11 Cf. s 237(2)(d) of the *Corporations Act* 2001 (Cth).

demand. The receivers do not oppose such a course. Mr Lee's exercise of the residual power to continue the application does not interfere with the legitimate exercise by the receivers of their powers in respect of the property over which they have been appointed or prejudice the legitimate interests of the receivers and the secured creditor in the realisation of assets.

[20] Contrary to the respondent's submissions, Mr Lee did not need to seek leave pursuant to s 237 of the *Act*. Had he required leave, I would have granted it, on terms.

[21] I conclude that Mr Lee has standing to continue the application in the name of the applicant, subject to terms. I direct the applicant to bring in draft orders. I will hear the parties as to costs. However, the applicant has succeeded on the preliminary issue of standing. Mr Lee would have succeeded in obtaining leave, if required. The details of the security offered by him and the amount of that security were only addressed after the hearing. It would have been better had these matters been addressed earlier. However, Mr Lee agreed to appropriate terms in paragraph 26 of his affidavit. Having succeeded on the preliminary issue of standing, and having offered personally to finance the continued pursuit of the application and take personal responsibility for any costs order that may be made against the applicant, the appropriate costs order would seem to be that the respondent pay the applicant's costs of and incidental to the application filed 21 February 2011 and the hearing before me on 24 February 2011.