

# SUPREME COURT OF QUEENSLAND

CITATION: *Re Stanley William Gordon Moore*  
*ex parte Devanjul Pty Ltd (ACN 1176440087)* [2012] QSC  
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PARTIES: STANLEY WILLIAM GORDON MOORE  
Applicant  
**And**  
DEVANJUL PTY LTD  
(ACN 1176440087)  
Respondent

FILE NO/S: 5 of 2012

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING  
COURT: Supreme Court Bundaberg

DELIVERED ON: 7 September 2012

DELIVERED AT: Supreme Court Rockhampton

HEARING DATE: 27 August 2012

JUDGE: McMeekin J

ORDER: The application is dismissed.

CATCHWORDS: CORPORATIONS LAW – where application to reinstate the  
registration of a company pursuant to s601AH *Corporations*  
*Act* – whether the applicant is a person aggrieved by the  
deregistration – whether it is just that the company’s  
registration be reinstated  
*Hardoon v Belilios* [1901] AC 118  
*Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360  
*Re Brockweir Pty Ltd* [2012] VSC 225  
*Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439  
*Corporations Act* 2001 ss 109X, 201B, 601AH  
*Trust Act* 1973 s 72

SOLICITORS: Carswell & Co Solicitors for the applicant  
V & D Berthelsen in person

- [1] **McMeekin J:** The applicant applies to reinstate the registration of Devanjul Pty Ltd (“Devanjul”) pursuant to s 601AH(2) of the *Corporations Act 2001*.
- [2] Section 601AH(2) provides:

**“Re-instatement by court**

The Court may make an order that ASIC reinstate the registration of a company if:

- (a) an application for reinstatement is made to the Court by:
- (i) a person aggrieved by the deregistration; ... and
- (b) the Court is satisfied that it is just that the company’s registration be reinstated.”
- [3] ASIC have been advised of the application, have communicated their requirements to the applicant and do not oppose the reinstatement.

**Service of the Former Directors**

- [4] The application first came on before me when sitting in Bundaberg on 17 August 2012. I adjourned the application to 27 August 2012. I was concerned that the applicant was not in a position to prove that all former directors of Devanjul had been served with the application and supporting affidavits. Two of the three former directors appeared on 17 August 2012. I was informed by Ms Berthelsen, one of the directors, that the former director who did not appear, David Edgar Wilson, was ill.
- [5] At the adjourned hearing the applicant relied upon the affidavits of Peter Francis Ponti and John Leslie Hyland to show that service on David Edgar Wilson had been effected. Mr Ponti deposed to having caused a letter to be forwarded to Mr David Edgar Wilson enclosing a copy of the subject application and supporting affidavit of Mr Moore on 13 August 2012. Mr Ponti does not depose to the address to which he forwarded the letter nor does he depose as to any fact which would enable a decision to be made as to whether Mr Wilson might receive a letter forwarded to that address. The copy of the letter attached to his affidavit refers to an address at 36 Kepnock Road, Bundaberg 4670. Presumably the letter was sent to that address.
- [6] My Hyland is the bailiff of the court at Bundaberg. He first received instructions to effect service on Mr Wilson on 17 July 2012. His affidavit shows that he has attempted service at the 36 Kepnock Road address on some 18 occasions without success. On one occasion he met an unnamed male who was also looking for Mr Wilson, the male being, according to his account to the Bailiff, a tenant of a property owned by Mr Wilson. The male indicated that he too had been calling at the address “early and late but with no luck”.
- [7] The applicant contended that there had been effective service on Mr Wilson relying on s 109X(2) of the *Corporations Act*. That subsection provides that “for the purposes of any law, a document may be served on a director ... by leaving it at, or posting it to, the alternative address notified to ASIC...” under various subsections of the Act. As best I can see from the material I have no evidence that the 36 Kepnock Road address is “the alternative address notified to ASIC”.
- [8] While it seems to me advisable that the former directors of Devanjul be alerted to the fact that there was an application to reinstate the registration of the company (with the consequence that the directors will come under continued obligations imposed on

every registered company of filing reports as to its status and the like) there is no requirement in s 601AH that the directors be served.

- [9] In the circumstances while formal service on Mr Wilson was not established it is very likely that he has received notice of the application. The affidavit of Mr Hyland indicates that Ms Berthelsen had spoken to Mr Wilson on the 16<sup>th</sup> August 2012, on the night before the first return date of the application. It would be surprising if the matters that were before the court which concerned both of them were not discussed. Whatever be the case I propose to deal with the application rather than delay it further.

### **The Former Directors' Views**

- [10] On the hearing of the application I received an application from Ms Berthelsen and heard submissions from her. I also heard briefly from Mr Berthelsen who adopted the submissions of his wife.
- [11] Ms Berthelsen indicated in her affidavit and orally that she had no objection to the reinstatement of the registration of the company. She pointed out that Devanjul had no assets, that the second director (her husband) was an undischarged bankrupt and that the third director (Mr Wilson) had surpassed the age of holding a position as director. As to that last point while s 201B of the *Corporations Act* provides for a minimum age there is no maximum age legislated for directors of a private company.
- [12] In her affidavit Ms Berthelsen contended that there was no “just” reason for the reinstatement of the company stressing its lack of assets.
- [13] I will turn to the merits of the application. There are two conditions that need to be satisfied under s 601AH(2) of the *Corporations Act*. First, the applicant must be a “person aggrieved by the deregistration”. Secondly, it must be just that the company’s registration be reinstated.

### **Aggrieved Person**

- [14] The applicant, in his capacity as trustee of the Moore Investment Trust, is the plaintiff in proceedings in which he seeks compensatory damages of \$176,182 “for breach of lease arising out of the unlawful interference with the Plaintiffs quiet enjoyment of a leasehold estate” and exemplary damages “arising out of the contumelious disregard of the Plaintiff’s rights to quiet (*sic*) enjoyment by the unlawful trespass to the Plaintiff’s estate and possessions”. Further relief is sought against the directors of Devajul personally.
- [15] The claim brought by the plaintiff is, or should be, in its essence, a simple one. He claims that he was the lessee of certain land, that Devanjul was his lessor and that contrary to the terms of the lease the natural persons who are the defendants, acting for and on behalf of Devanjul, entered onto the premises the subject of the lease, removed his personal property and then locked the plaintiff out of the premises. He further alleges that the defendants entered onto the premises and removed or damaged various items of property. These allegations appear in paragraph 11 of the Further Amended Statement of Claim. It is not apparent why these latter actions give the plaintiff a cause of action as there is no pleading that the plaintiff either owned the

property or had the right to immediate possession of the property at the time the various items were removed or damaged. Presumably that is an oversight.

- [16] In summary then the plaintiff's complaint is that persons acting for and on behalf of Devanjul have trespassed onto land to which he was entitled to exclusive possession and converted his goods, again to which he was entitled to immediate possession (assuming that the pleading eventually reflects that fact).
- [17] At the time the action was commenced against Devanjul it was a registered company. It became deregistered on 16 May 2010 without notice to the applicant. At all material times Devanjul was the trustee of the Jadvek Berthelsen Family Trust ("the trust") and was sued in that capacity. That is of significance here.
- [18] The purpose behind the application to reinstate Devanjul is not to get at the assets of the company, it has none, but rather to enable the applicant to execute against the assets of the trust. Section 72 of the *Trust Act 1973* provides: "A trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers." Presumably the applicant's argument is that he can take advantage of s 72 as Devanjul was at all times acting reasonably in the execution of the trust as it acted under the direction of at least Mr and Mrs Berthelsen who were its directors and who were also beneficiaries of the trust. The applicant's contention, no doubt, is that upon a successful conclusion of the proceedings the applicant will become a creditor of the trustee, be entitled to be subrogated to the trustee's right of indemnity and thereby enforce payment of the applicant's claim against the assets of the trust to which the indemnity relates.<sup>1</sup> The fact that the trust assets have been transferred to a different trustee (as the applicant's pleading in the principal proceedings asserts) would not defeat Devanjul's right to indemnity so long as the assets can still be traced in equity: *Octavo Investments Pty Ltd v Knight*.<sup>2</sup>
- [19] I observe in passing that as well as a right of indemnity out of trust assets a trustee also has a right to personal indemnity from a beneficiary in certain circumstances: *Ron Kingham Real Estate Pty Ltd v Edgar*<sup>3</sup>; *Hardoon v Belilios*<sup>4</sup>.
- [20] Thus there is a point to the applicant's wish to have Devanjul reinstated.
- [21] In *Re Brockweir Pty Ltd*<sup>5</sup> Sifris J held, with respect correctly, that in determining whether a person is aggrieved by the deregistration "...it is not necessary to embark upon a detailed and exhaustive analysis of the facts and the law underpinning the claim. The threshold is low. The assessment needs to be dealt with in a summary way. As long as a claim is not plainly hopeless and bound to fail, it should, subject to other relevant matters, proceed."
- [22] In my view that low threshold test is satisfied here.

### Is it Just?

<sup>1</sup> See *Ron Kingham Real Estate Pty Ltd v Edgar* ([1999] 2 Qd R 439 at p443; *Vacuum Oil v Wiltshire Pty Ltd* (1945) 72 CLR 319 at 325.

<sup>2</sup> (1979) 144 CLR 360 at 371.

<sup>3</sup> [1999] 2 Qd R 439 at 442

<sup>4</sup> [1901] AC 118 at 125

<sup>5</sup> [2012] VSC 225 at [22]

- [23] Whether it is just that the registration be reinstated involves more difficult issues.
- [24] At best for the applicant Devanjul is a trustee with a paid up capital of \$2.00. In the ordinary course there is no benefit in reinstating a \$2.00 company. It is only its entitlement to an indemnity out of trust assets that justifies any proceeding against it. The application presupposes that in order to obtain the necessary findings and orders Devanjul is a necessary party to the proceedings. I have not received any submissions directly on the point but I have difficulty seeing why it would be such a necessary party.
- [25] The discussion by Sifris J in *Re Brockweir Pty Ltd*<sup>6</sup> of the relevant considerations in that case is entirely apposite here:

“If the existence and extent of any indemnity were made part of the proceeding, it would not require the joinder or presence of the Company. As pointed out, it may - or indeed must - involve findings against the Company, but that does not require it to be a party. In the circumstances, part of the claim - and the most relevant from a practical point of view - will involve how and to what extent, any right of indemnity may be used or exploited. This will no doubt be a complicated matter, but it will be so, whether or not the Company is reinstated. If it was reinstated now, the real and practical issue of the availability and extent of the right of indemnity will loom large in any event. There is very little added advantage in reinstating the Company and having it as a party without means, simply for the sake of a judgment. The suggested advantage, namely that a liquidator would have the ability to conduct any relevant public examination and further, that the company would be obliged to make discovery, does not constitute a sufficient reason to reinstate the Company. There are other procedures available.

It is not uncommon for the liability of a party to depend on the liability of another. The liability of the proposed defendants - whatever and whoever that may be - will depend upon the liability of the Company. If the Company is not liable, that will be the end of the matter. If however the Company is liable, the question of indemnity out of the trust assets will follow as part of the proceeding. I see no difficulty with this. The liability of the Company will be the foundation or a trigger for the indemnity. If at some stage and for some reason, the Company needed to be a party, the application can be revisited. However, I see no difficulty in the plaintiffs, if they are successful against the absent Company, from exploiting to the fullest, any right of indemnity - presently an asset held by ASIC - that would give the Company, as an incident of such a right, an equitable proprietary interest in the assets of the trust. This process would be part of the subrogated right held by ASIC. Again, this claim can be made without the need to reinstate the Company (and would need to be made even if the Company was a party) and to this extent, the case is not dissimilar to the Danich case referred to by both parties. Although it is common, and may represent the better view, that in this context, the creditor, the trustee and the beneficiaries should all be parties, the Company is not available to be a party and its right of indemnity is vested in ASIC. Further, it is not apparent that there are any other creditors of the company. In these peculiar circumstances, it is not immediately apparent what advantage flows from any re-registration. Again, should this become necessary, the application can be revisited.”

- [26] As the judgment of Sifris J suggests, in the usual course the right to subrogation should be enforced in proceedings in which the creditor, the trustee and the

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<sup>6</sup> Ibid at [36] and [37] – references omitted

beneficiaries are all parties. That view was expressed in *Jacobs Law of Trusts in Australia*<sup>7</sup> in a passage concerned with the possibility of there being a “plurality of trust creditors”. It is not apparent that that is the case here, that is, that there are other creditors of the company. If that proves to be wrong then the application can be revisited.

- [27] Effectively it seems to me that the applicant’s pleading in the primary proceedings can be amended so as to seek, in the alternative, indemnity out of the trust assets in respect of which Devanjul was the trustee. It would be necessary and appropriate that the beneficiaries of the trust be parties to the action. If necessary an order can be made requiring the present trustee of the Jadvek Berthelsen Family Trust (apparently the son of Ms Berthelsen according to information she provided to the court on 17 August) to disclose the Deed of Trust and hence the identity of the beneficiaries of the trust. Those beneficiaries can then be joined in the proceedings, assuming that they are not already joined.
- [28] Finally I mention, in case it becomes relevant later, that there are no other considerations here which would cause me to be reluctant to revive the defunct company. Here the obligations and liabilities that the applicant seeks to impose on the company were well known to the members and officers of Devanjul at the time that they permitted the company to be deregistered. Whilst there has been some delay in bringing the application I cannot see that any person has been prejudiced thereby.
- [29] I decline to order the reinstatement of the registration of the company simply because I do not see it as necessary.
- [30] The application is dismissed.

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<sup>7</sup> 7<sup>th</sup> edition - editors Heydon JD and Leeming MJ at p575