

SUPREME COURT OF QUEENSLAND

CITATION: *Maclag (No 11) Pty Ltd as Trustee for the Burns Family Trust and Anor v Chantay Too Pty Ltd as Trustee for the Chantay Trust* [2013] QSC 200

PARTIES: **MACLAG (NO 11) PTY LTD ACN 010 611 631 AS TRUSTEE FOR THE BURNS FAMILY TRUST**
(first plaintiff)
LARRY MARK LAZARIDES
(second plaintiff/applicant)
CHANTAY TOO PTY LTD ACN 099 086 521 AS TRUSTEE FOR THE CHANTAY TRUST
(defendant)

FILE NO/S: BS 9219 of 2008

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 7 August 2013

DELIVERED AT: Brisbane

HEARING DATE: 1 August 2013

JUDGE: Martin J

ORDER: **Application dismissed.**

CATCHWORDS: CORPORATIONS – RECEIVERS, CONTROLLERS AND MANAGERS – REMUNERATION AND EXPENSES – where orders made establishing a regime by which the receivers’ costs and expenses were to be invoiced, paid and assessed – where the second plaintiff made an accusation that receivers had failed to pay a distribution on time – where the second plaintiff now seeks a declaration that no moneys expended by the receivers with respect to his assertion can be paid out of partners’ funds – where no decision has been made by the receivers to pay any amount of that nature – whether the orders sought by the second plaintiff are warranted

COUNSEL: No appearance for the first plaintiff
Litigant in person for the second plaintiff
No appearance for the defendant
E Goodwin for the receivers and managers

SOLICITORS: Hickey Lawyers for the receivers and managers

- [1] On 13 August 2010, P D McMurdo J ordered that the Mermaid Retail Partnership be wound up and that Jason Bettles and Ivor Worrell be appointed to the partnership, without security, to conduct the winding up with powers equivalent to those prescribed by s 420 of the *Corporations Act 2001*.¹
- [2] The course of the winding up has not, in the three years since then, been without disruption.
- [3] On 27 April 2011, Dalton J made an order establishing a regime by which the receivers' costs and expenses were to be invoiced, paid and assessed. In particular, it set out the steps which are to be taken if there was an objection by any of the former partners to those costs and expenses. So far as it is relevant the order provided:
- “3. Subject to orders 4 and 5, for the period from 13 August 2010 until further or other order, the Receivers are to be allowed to pay from the funds held in trust on behalf of the Mermaid Retail Partnership any costs and expenses reasonably and properly incurred by them in the performance of their duties as Receivers ("disbursements").
 4. The Receivers shall for the period January to April 2011, within 5 business days after the end of April and then monthly thereafter, provide each of the parties to the action ("parties") with accounts under UCPR 270, including an itemised invoice showing details of the work performed and the professional time spent by the Receivers and their staff accompanied by a statement of expenses incurred and funds held.
 5. Subject to order 6, any partner may on giving reasonable notice to the Receivers, either personally or by an agent, inspect and make copies of the documents and things on which the accounts are based.
 6. The Receivers shall be under no obligation to disclose to the parties any privileged or confidential documents.
 7. If none of the parties provide a written objection to the Receivers as to the accounts within 21 days of the date of the invoice, the amount of the invoice will be deemed to be approved, and may be paid out from the funds held in trust on behalf of the Mermaid Retail Partnership.
 8. If a written objection is received from one or more of the parties:
 - a. the amount of any invoice for which there is no objection will be deemed to be approved, and may be paid out from the funds held in trust on behalf of the Mermaid Retail Partnership; and
 - b. in respect of the balance, the Receivers and the parties may make application to the Court pursuant to Rule 269 and/or 270 of the UCPR for approval of the invoice.

¹ [2010] QSC 299

9. The Receivers' and the parties' costs of and incidental to this application be paid out of the assets of the Mermaid Retail Partnership on the indemnity basis.”
- [4] The second plaintiff (Mr Lazarides) applies for the following orders:
- “1. Any fees, costs, expenses and outlays including premiums, excesses and any other costs or charges relating to the Receivers professional indemnity insurance or any consideration thereof by the Receivers, their advisers and consultants (including their legal advisers) in correspondence or otherwise are not an expense of the receivership and shall not be paid from Partners' funds.
 2. The Receivers shall within seven (7) days provide the Plaintiffs and the Defendant with relevant sufficient particulars including the amounts of the Receivers fees, outlays and expenses for the period 1 April 2013 to and including 29 July 2013.
 3. The Receivers fees and costs of and incidental to this Application shall not be an expense of the receivership.
 4. The Receivers shall pay the Plaintiffs and Defendants costs of and incidental to this Application on the indemnity basis.”

The receivership

- [5] In May 2011 the receivers sold the real property of the partnership and, after payment to the secured creditor was made, residual funds of some \$4,000,000 remained and an interim distribution took place. Since that time there have been a number of disputes between the partners and a series of allegations have been made by Mr Lazarides against the receivers. Orders were made in November 2012 and July 2013 with respect to some of those matters.
- [6] At the end of July 2013 the receivers retained approximately \$382,000 which, subject to the finalisation of the receivership and the payment of fees and expenses, will be distributed.

This application

- [7] In September 2012, Mr Lazarides accused the receivers of failing to pay the distribution on time.
- [8] In October 2012, the receivers notified their professional indemnity insurer of this assertion. Mr Bettles was told by the insurer that any settlement that might be reached in relation to the allegation of delay would need to be approved by the insurer.
- [9] Following the reporting of the allegation to their professional indemnity insurer, the receivers became engaged in correspondence with Mr Lazarides, among others, over the delay issue. So far as the correspondence related to the allegation of delay, the receivers referred the correspondence to their lawyers.

- [10] Nothing that the receivers have done, so far as the allegation of delay is concerned, is out of the ordinary.
- [11] So far, the receivers have not sought to recover any expenses relating to any legal costs incurred by them with respect to their professional indemnity policy. They have specifically informed Mr Lazarides in earlier correspondence that they will not be seeking to recover any costs for their own time in dealing with their insurer.

Is the application premature?

- [12] The order sought by Mr Lazarides relates to matters which are clearly encompassed by the regime established under the order of Dalton J. If the receivers seek to recover by way of an expense any legal fees incurred by them with respect to the claim of delay, then that will need to be properly detailed in the invoice or invoices required to be rendered under order 4 of the order of Dalton J. Mr Lazarides would then be able to provide a written objection, if he wished, within 21 days of the date of the invoice and an application could then be made to the Court for approval.
- [13] I was told by Mr Goodwin that the amount involved, should an amount be claimed, would be no more than \$2,000.
- [14] The order sought by Mr Lazarides is, effectively, a declaration that no moneys expended with respect to his assertion that the receivers had failed to comply with their duties and the issue of professional indemnity which arises from that can be paid from the partners' funds.
- [15] That is not warranted for at least three reasons:
- (a) There has as yet been no decision by the receivers to pay any amount of that nature,
 - (b) Any such claim for reimbursement would need to be assessed in the light of all the circumstances to determine whether it was reasonably and properly incurred, and, most importantly,
 - (c) There is a regime in place which is designed to determine this very issue.
- [16] Each of those reasons demonstrates that the application is premature. It is also inconsistent with the orders of Dalton J. No reason has been advanced for the bringing of this application outside the processes set up by that order.
- [17] The other substantive order sought by Mr Lazarides is also covered by the order of Dalton J and is similarly premature and unwarranted.
- [18] The application is dismissed.