SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 6347 of 2002

IN THE MATTER OF RED WAGYU AUSTRALIA PTY LTD

RED WAGYU AUSTRALIA PTY LTD ACN 078 006 854 — Applicant

BRISBANE

..DATE 22/07/2002

ORDER

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HIS HONOUR: This is an unusual ex parte application. The applicant is a company, Red Wagyu Australia Pty Ltd. It seeks the appointment of receivers and managers to the whole of its property. It does so because an employee of the company is feared to have placed some of the company's property beyond its reach and has demonstrated an unwillingness to respond to the directions of the board of the company.

The extent of this is such that the directors are unable to ascertain all of the company's obligations or I am told even its state of solvency. It is argued that with the appointment of receivers and managers the authority of the Court will be available to ensure that the employee in question responds to questions regarding the company's property.

It seems to me that that is an appropriate occasion for the exercise of the Court's power under the Supreme Court Act 1995 to appoint receivers and managers. The case is, of course, unusual because usually if a company appoints or if a receiver or manager is appointed to a company it produces adverse consequences in terms of the company's position under security documents. However, in this case, the company has informed me that it wishes to proceed regardless of that possibility. The company carries on an unusual business which has involved it in acquiring a substantial number of cattle and having possession of further cattle to which it does not have title by reason of agreements with investors in a scheme operated by the company. It is unnecessary to set out the detail of the

arrangements in which the company is participating; it is sufficient to say that prima facie the company is entitled to possession of the cattle. That is the property which is of primary concern to it.

One matter has arisen, however, in the course of an examination of the order which is to be made. The company seeks to have Ian Richard Hall and Peter James Hedge appointed as the receivers and managers without security.

The power to make an appointment is contained in section 246 of the Supreme Court Act 1995. Rule 268 of the Uniform Civil Procedure Rules provides unless the Court otherwise orders the appointment of a receiver by the Court does not start until the receiver files security acceptable to the Court for the performance of the receiver's duties. In terms that rule does not permit a dispensation from the requirement to provide security. It merely permits a variation of the timing of the starting of the order.

The requirement for receivers to give security is a requirement of long standing. (I am referring here, of course, to receivers appointed under the Supreme Court Act, not under the Corporations Law. Rule 268 does not apply in the latter case - see rule 266.) The power conferred by the Supreme Court Act is to make the appointment either unconditionally or upon such terms and conditions as the Court shall think just. I am prepared for present purposes to assume that this is sufficient to enable the appointment to be

made without security.

The only material relied upon to support the order sought is the fact that the two gentlemen proposed as receivers are official liquidators appointed under the Corporations Act.

The question, therefore, is whether that fact by itself is sufficient evidence to warrant departure from the long-standing requirement for receivers to give security.

On behalf of the applicant Ms Muir has argued that it is. She submits that a person who is an official liquidator is of necessity a registered liquidator under the Corporations Act and therefore is a person who has given security pursuant to section 1284 of that Act.

She further submits that it is the practice of the Court not to require an official liquidator who is appointed in this way to give security.

The only authority cited in support of the latter submission is the decision of the Court of Appeal Division of the Supreme Court of New South Wales in McIntyre v. Perkes (1987) 15 NSWLR 417.

In that case both Mr Justice Samuels with whom Mr Justice Mahoney agreed and Mr Justice Rogers referred to the matter. The former said that in the Equity Division of that Court security was not normally required of a class A liquidator.

Mr Justice Rogers said that the proposed receiver was a liquidator on the A list and that it would be inappropriate to require him to provide security. I am not aware of the current practice in the Supreme Court of New South Wales.

The rules of that Court as they stood in 1988 and quite possibly as they still stand are substantially different from the statutory provisions applicable in this Court. The consequences of a person at that time being on the A list in New South Wales have not been spelled out. No authority suggesting that this Court has the same practice has been cited. It is certainly not a practice which I have ever applied and nor is it one which I have seen evidence of being of such a general application that my colleagues regularly apply it. That is to say I have no reason to think that my colleagues generally are prepared to appoint a person as a receiver without security under the statutory provisions to which I have referred merely on the basis that the person is an official liquidator under the Corporations Act. I am not persuaded of the existence of a practice in the terms for which the applicant contends.

In reaching my conclusion I must also have regard to the provision to which Ms Muir referred me - that is, section 1284 of the Corporations Act. That section provides for a person who has been granted registration as a liquidator to lodge and maintain with ASIC security for the due performance of his or her duties as such a liquidator in such form and for such amount as is from time to time determined by ASIC.

Mr Hall and Mr Hedge have not put forward any evidence of compliance with that section but I am prepared to assume that they have complied with it. The security provided pursuant to the section stands only as security for the performance of their duties as liquidators under the Corporations Act. It is not available to act or to stand as security for the performance of their duties as receivers appointed under the Supreme Court Act 1995. However, that does not mean that the section is irrelevant.

In my view, the section is important as pointing up the need perceived by the Commonwealth Parliament for persons who are registered as liquidators to give security. That is a modern legislative expression of a policy which the Courts have enforced for many, many years going back to at least the 19th Century.

The fact that this section is in the legislation, in my view, tends to negate any suggestion that the Courts should assume that just because a person is a qualified accountant and has been registered as a liquidator, there is no need for him to provide security.

It will be seen that the provision for registration of liquidators, section 1282, contains nothing as to the financial viability of the applicant for registration. It requires only that the person have certain specified, mainly academic qualifications, and experience; that ASIC be

satisfied as to the experience of the person in connection with winding up of bodies corporate; and that it be satisfied that the person is capable of performing the duties of a liquidator and he is otherwise a fit and proper person to be registered.

There are other, more limited requirements bearing upon residency outside Australia and so forth, but there is, I think, no need to refer to them. Nothing in that section or in section 1283, which provides for the appointment of official liquidators seems to me to provide any encouragement for the assumption that a person who is an official liquidator may properly be appointed to act as a receiver under the Supreme Court Act 1995 without security.

On the facts of the case the position is even more stark. As I have said, the only evidence is that the proposed receivers are official liquidators. There is no evidence that either of them has a current policy of insurance of sufficient magnitude to support any liability which they may incur, nor any undertaking to maintain any such policy of insurance with a reputable and reliable insurance company. In the light of recent developments in relation to liability insurance that is a factor of some importance.

It is also to be borne in mind that they are appointed personally as receivers and managers and, on the material before me at least, there is no reason to suppose that any partnership of which they may be a member would share any

liability which they might incur.

On the other hand, the applicant's solvency is unknown. Its creditors' interests cannot be overlooked.

The fact that the proposed receivers are experienced accountants may be inferred from section 1282 of the Corporations Act, but it is not a fact which, it seems to me, is sufficient to warrant the assumption that security is not required.

It follows that, in my view, there is no practice of the sort proposed by Ms Muir, and the evidence placed before me does not warrant dispensing with the requirement for the provision of security.

Now I have reviewed the other parts of the order, and subject to one amendment in paragraph 2(a), to which I have earlier referred, I am content to make the order in terms set out. I should record that Ms Muir has informed me of her express instructions to appear on behalf of the two directors of the applicant, Messrs Smart and Stanley, in their personal capacity and of their submission to the order contained in paragraph 3 of the draft.

For those reasons there will be an order in accordance with the draft, initialled by me and placed with the papers. And that, as you will have no doubt deduced, is the one that-----

MS MUIR: Without - that contains without the - "without security".

HIS HONOUR: It does not contain the "without security".

MS MUIR: Yeah, it's - there is no mention of "without security".

HIS HONOUR: Yes, that's right. That is right. And consequently the rule 268 will operate.

MS MUIR: Yeah, that was my understanding, that we didn't specifically say "with security", yes.

HIS HONOUR: Correct. Yes, I think that's right. I think that's right.

MS MUIR: And then my - the receiver has filed with the registry a security that's satisfactory to the-----

HIS HONOUR: I think that's a matter for the registrar.

MS MUIR: Yes, yes.

HIS HONOUR: Yes.

MS MUIR: Thank you, your Honour.

HIS HONOUR: I think that is all that I have to be worried with that now.

MS MUIR: Thank you.

HIS HONOUR: It's - made the order you seek.
