[2002] QSC 262

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No S6636 of 2002
No S6638 of 2002
No S6639 of 2002
No S6640 of 2002

DEPUTY COMMISSIONER OF TAXATION Applicant

and

TREVOR JOHN SCHMIERER First Respondent

and

PETRUS MERMANUS ALFONSIUS WILLEMSE Second Respondent

and

MARIA FRANCESCA CLARK Third Respondent

And

JOANNES CORNELIUS PETRUS WILLEMSE Fourth Respondent

BRISBANE

..DATE 26/07/2002

JUDGMENT

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HIS HONOUR: I have before me four applications in relation to each of four companies which are under administration. The four companies are related companies and in each of them the same administrator has been appointed. He was, of course, appointed by the directors of the companies who are the same persons. The application in each case is for an order that a proposed resolution of creditors be taken to have been passed at a meeting on 17 July and for consequential orders.

Of the four companies one is in a different position from the other three. The one is the subject of proceedings number 6636 of 2002. Its difference in position arises from the fact that at least from the applicant's point of view it is the company which is the profit-making company, the other three being loss-making companies. I should interpolate that when I say "companies" I really refer to the trusts of which the companies are the trustees. I shall however continue to use the word "company" and I trust everyone will know what I mean.

The case comes on in the applications Court because it is of some urgency, there being continuing cost incurred, and time in relation to the convening of the second meeting is running. The resolution in question was passed at the first meeting of the company. In the case of the one company, that is, Queensland Mushrooms Pty Ltd, the resolution was not passed. It was not passed by either a majority by number or a majority by value.

In the case of the other three companies the resolution was passed by a majority by value, a substantial majority because the Commissioner of Taxation's debt far exceeded any combined remaining debts, but was not passed by a majority by number. What made the difference in relation to the first company as against the other three is that in relation to the first company the chairman allowed a proxy for the other three companies to vote.

The claim was made that each of the other three companies was a creditor of Queensland Mushrooms in very large amounts and those amounts, as it turned out, were, when added to the other creditors, just sufficient to carry the vote. For the other three companies the chairman used his casting vote to resolve the deadlock, he says in order to ensure that the same administrator was appointed to all four. Consistently with this, his counsel conceded today, had the result been in favour of the resolution in the case of the first company he would have voted in favour of the same resolution in relation to the others.

However, he has indicated that had Queensland Mushrooms been deadlocked then he would have cast his casting vote against the resolution. What makes all of this interesting is the fact that the resolution was a resolution to remove him as an administrator. That is a resolution which it is open to the creditors to pass at a first meeting pursuant to section 436E of the Corporations Act.

The application today has been approached by some of the parties as though it were an application for the removal of an administrator. While that may be the practical effect if the application were to be successful, it does not seem to me that the power conferred by section 600A of the Corporations Act, under which the application today is made, is exactly the same as that which falls to be exercised in the case of an application to remove an administrator.

Section 600A submission (1) has three elements. It is common ground between the parties that the first two elements are satisfied. What is in dispute is paragraph (c) of the subsection. That paragraph provides that subsection (2) of the section applies in one of two cases where the failure to pass the resolution, one, is contrary to the interests of the creditors as a whole or, two, has caused prejudice in a way which is set out in some detail in the subparagraph.

The first of those options directs attention to what is in the interests of the creditors as a whole. In the present case it is not at all easy to identify just what that interest is. Obviously, one of the factors which is in the interests of creditors as a whole is to maximise the amount of money available for distribution to the creditors.

That factor in the present case seems to weigh against making any change. There has been substantial cost incurred and it is inevitable that some portion of it will be wasted if there

has to be a new administrator. Precisely how much will be wasted is not in evidence.

From the material that's before me it would seem to me that a good deal of what has been done will not have been wasted and would be able to be taken up by a new administrator.

There is an another financial aspect which is more particular to those who are the directors of the companies and who have appeared before me today.

That is that they put forward a proposal for a deed of arrangement and have spent a considerable amount of time and money in discussing that with the present administrator.

They are concerned that that would be wasted if there were a replacement made. In a sense that may bear upon the interest of creditors as a whole but only if it were shown that the proposal is one which would be beneficial to creditors as a whole. It has not been suggested that the evidence today goes that far. Indeed, I do not understand the proposal to be sufficiently far advanced for that submission to be viable.

One other matter which affects the interests of creditors as a whole is that there be an appearance of - that there be no appearance of bias on behalf of the administrator. Administrators are, of course, almost always senior accountants. It is a matter for some regret that some members of that profession in recent times have conducted

administrations in such a way that those affected have been left with strong feelings of bias and these cases come before the Courts from time to time.

That is not an influencing fact today. But what is important today is that on each side there is an apprehension that the person proposed by the other to act as an administrator has an appearance of bias. I suspect that each side would like to say "is actually biased" but has refrained from doing so because the evidence is not strong enough and they know perfectly well that if they did I would refer the case to trial and there would be no decision today.

The appearance of bias if it is to be given any weight in regard to the interest of creditors must be an appearance which is based in reason. On behalf of the applicant, Mr Gotterson QC, has referred to a number of matters which he submits give rise to such an appearance.

One is that the figures relating to the voting in the Queensland Mushrooms meeting show that the three debts for the related companies not only made a crucial difference, they made a massive difference. They were proofs of debt signed by the chairman himself so that it could hardly have been thought that he would have done other than to have accepted the proofs and they were proofs which were accepted in circumstances where there was an inter company relationship and grounds for doubting their validity.

That is compounded in Mr Gotterson's submission that the fact the initial report to creditors when circulated prior to the meeting (and it must be remembered that this was a report only a day or two before the meeting) made no mention of these debts.

The sequence of events seems to have been that Mr Schmierer was appointed to Queensland Mushrooms. He made his investigations. He sent out his report. No doubt, he continued with his investigations. On the morning of the meeting he was informed by an officer of the Commissioner that there would be a motion at the meeting that afternoon to remove him from office pursuant to section 436E (4A) and that even then he did not say anything to the Commissioner's representative about these new debts.

I think there is considerable force in that submission. One would have expected that having regard to the debts as contained in the report, it would appear obvious that the resolution would be carried.

At some time, and it does not appear when, Mr Schmierer submitted the proofs of debt to himself on behalf of the other three companies and they were enough to bring about the loss of the resolution.

It is said against that argument that no objection was taken to the proofs of debt at the time they were allowed by the chairman of the meeting. That is true but it must be

remembered that this happened in the course of the meeting without any warning to the Commissioner's representatives and in circumstances which can fairly be described as an ambush.

The Commissioner's representative further says that there is an appearance of bias because an investigation of the position between the companies shows a substantial unexplained discrepancy in the intercompany accounts. That is something that it is submitted Mr Schmierer should have been aware of. It is something which casts doubt upon the validity of these debts. The argument for the first respondent in relation to that is that with the benefit of hindsight there may be something in this but that was not something which in the conduct of the meeting was something of which he was aware or something which he could take into account.

That raises the question whether when I am here exercising power under section 600A I should regard the position of those who conducted the vote on the resolution from the point of view of how things then seemed to them or whether I should approach the matter as a complete merits review assessing what is in the interests of the creditors as a whole not in the light of what was then known but in the light of what is now known. For the directors, Mr Cowen submitted unequivocally that I should not carry this out as a merits review but rather should take into account matters as they appeared at the time. I understood Mr Logan's submission on behalf of Mr Schmierer to be to like effect, though perhaps not quite so strongly put.

In my judgment section 600A requires me to make an assessment of the interests of the creditors on the basis of the evidence which is now before me. If that produces a result that is different from what occurred at the meeting by reason of the availability now of different evidence then so be it. I do not think I should approach the question raised by the section as though it was one of a judicial review.

I think that my approach ought to be that of a complete review on the merits. That it seems to me is in accordance with some of the decisions to which I have been referred, for example Crestvale Far East Limited in liquidation v. Crestvale Securities Limited (2001) 37 Australian Companies and Securities Reports 394.

Adopting that approach it seems to me that the allowance of the debts in full was, with the benefit of what is now known, a very dubious matter indeed. Indeed I would go further and say that to my mind the nature of the inter-company debts was such that to allow anything for them would require a reasonably thorough investigation. Mr Schmierer says that he allowed them only because, and I infer to the extent, of the existence of actual cash flows between the companies.

That term was not spelt out in any great detail but I understand it to mean that, in the course of his investigation, he found movements of amounts through the company bank accounts from one company to another, as opposed to mere journal entries in the company books.

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What, in fact, happened is that over a period of about five years the profit making company, Queensland Mushrooms, having made the other three companies beneficiaries of its trust, distributed trust profits to them. That had the effect that they had income to set off against their losses, but on which there was no tax payable. The Queensland Mushrooms company, having distributed its funds, of course, was not liable to tax on those profits either.

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If that was all that might not have aroused the Commissioner's ire, but in fact the recipient companies, in short time, loaned back the money which had been distributed to them to Queensland Mushrooms. The net effect, in other words, was a round robin of financial transactions.

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That, it seems to me, is a matter which called for investigation in some detail, and in more detail than appears to have occurred, before those debts could be allowed. I need not rest my decision, however, on that point. As I say, the matters raised in relation to the discrepancies between the company's books are enough to satisfy me that, on the material presently available, the debts are very doubtful.

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The next matter relied on by the applicant is the conflict which arises by reason of the self interest in the first respondent remaining in office, and yet exercising his powers to bring that about. That point does not impress me very much. The first respondent had, by the time of the meeting, been acting for some time. Money had been expended by him in

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doing his work. If there were nothing substantial put up, there is no reason why he should not have exercised his powers the way he did and, indeed, every reason why he should have done so.

Even looking at the matter now, one is inclined to think that it is a situation where, because his self interest was apparent, it was a matter which ought to give him great cause for thought but, absent the other factors to which I have referred, is not a matter which would, of itself, necessarily lead to a different decision from that which he made.

The debts to which I have referred were not the only ones which have occasioned the applicant concern about the exercise by the first respondent of his decision-making power at the time of the meeting. A company called Mevton Proprietary Limited provided a proof of debt, which was admitted not only in respect of an amount of $402,000 shown in the first respondent's first report, but was admitted for a further $291,000 claimed for interest, only on the morning of the meeting for the first time.

One cannot escape the suspicion that the knowledge that the Commissioner was going to move for the replacement of the first respondent seems to have coincided with the appearance of this extra claim of $291,000 for interest. The material before me does not provide any convincing basis for the allowance of that extra amount.

A third proof of debt which was submitted was on behalf of a company called Contager Proprietary Limited. That proof was unsigned, yet was accepted by the first respondent. It is worthy of note that it appears that Contager is a company operated by the directors of Queensland Mushrooms, or at least by one of them. Its debt was not included in the first report, so it is another late arising debt. There was one other complaint but it does not seem of such great weight.

On behalf of the first respondent, Mr Logan submitted that one should look at the conduct of the meeting to see if one should change the resolution and that I should approach the matter as though I were reviewing the conduct of the administrator. He submitted that I should only grant relief if I was concerned at the way the administrator had conducted the affairs of the company.

In that regard, he pointed to the evidence regarding the way the administrator had conducted the company and, in particular, to the expressed satisfaction of the applicant with the administrator's investigation at least one point. That is, I think, a relevant consideration but it is no more than that. It is not the crucial determinant which Mr Logan seemed to make it in his submissions and I do not think it is a factor which is of anything like the same importance as it would be if there were a motion to remove a liquidator rather than an application under section 600A.

For the directors, Mr Cowen submitted that I should have

regard to the interests of creditors, particularly in terms of cost and time, and based his submissions on the proposition that the evidence did not show that the administrator was wrong. In what I have already said I have expressed my views on that submission.

He rightly made the point that the mere fact that the Commissioner is the biggest creditor, and biggest by a long way, is not enough for the application to succeed. It is, of course, an important factor but I do accept that it is not a determinative one. I accept Mr Cowen's submission in that regard.

His submission, of course, inherently proposed that the interest of creditors included those of companies which were associated companies even if the debts were capable of being set aside as against the Commissioner. I accept that what the Commissioner can have set aside is really irrelevant. What matters is the debt which ought reasonably to have been accepted for the purposes of the resolution.

Other considerations which arise are the potential conflict of interest between the three other companies and Queensland Mushrooms. There is a good deal to be said for the view that that potential conflict regarding the amount of money owing to Queensland Mushrooms would ordinarily suggest the desirability of appointing different persons to administer the one from the three. However, only the applicant has accepted that that is a possibility in the present case. Both the respondents have

adopted the stance that it is in the interests of the creditors as a whole that only one administrator be appointed to all four companies. That is because their businesses are interlocked and there would be considerable difficulty in running them were it otherwise. Without wishing to express too concluded an opinion on this point it seems to me that that is probably correct and that any conflict which does arise eventually will have to be dealt with. It may not arise until after the final meeting of creditors has been held.

There is to my mind a considerable difficulty in identifying the interests of creditors as a whole in a case where the creditors have widely divergent interests. I have referred so far to a number of factors which would bear upon the interests of creditors regardless of whether the particular interests of the creditors were divergent or not. But underlying the conflict before me is I think the fact that the Commissioner has an interest in the companies being wound up and the other creditors an interest in their not being wound up. It is not surprising that the other creditors should feel that the less money available for the Commissioner the more money available for them and more relevantly the fact that if the company is wound up they will likely get very little. If the companies are kept going they may get somewhat more.

In such a situation the interests of the creditors as a whole, at least in respect of those factors, is impossible to identify. There is, however, one interest which I would think all of the creditors would have and that is an interest in the

rules which have been laid down by the legislature being adhered to. In particular the creditors as a whole would, in my view, properly be regarded as being interested in the resolutions put before creditors meetings being dealt with in the way in which they ought to have been dealt with.

The evidence before me on balance satisfies me that more likely than not the decisions which were made in relation to creditors voting at the first meeting were not decisions which in the light of the evidence now available - I emphasise that - were not the correct decisions.

The interests of the creditors as a whole are in having the correct decisions made. Section 600A is designed to bring about the result that would have occurred had the legislation operated in the way in which it ought to have operated. It seems to me that had that occurred the result of the Queensland Mushrooms vote ought to have been a deadlock situation: that is, a majority by value voting one way, a majority by number voting another.

That would not have resolved the matter. That would have left it up to the casting vote of the Chairman. What should now be done about the situation? I have come to the conclusion that on balance it is desirable that Mr Schmierer not continue to act as the administrator.

On the other hand, I am not satisfied that it is desirable that the persons proposed by the Commissioner to be

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substituted should be substituted. My main reason for that is that the Queensland Mushrooms Company is presently the appellant in the Federal Court against the assessment levied by the Commissioner on it.

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The matter is due to come on in September of this year. The persons proposed by the Commissioner to act as administrators have apparently given advice to the Commissioner in relation to tax schemes operated by those behind the Hart Group which has an involvement here.

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I think that the criticisms made by Mr Cowen of their appointment have some validity in the light of the pending appeal. It might be otherwise were the appeal not extant. I would not have thought the mere fact that they had given advice to the Commissioner by itself would be enough to contra-indicate their appointment.

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It is possible to appoint them but appoint someone else to conduct the tax appeal. That, however, has the disadvantage of being more expensive than appointing someone who is not the subject of objection. The other aspect is that while the terms of section 447A are extremely wide, the formulation of an order is not simple particularly when one stops and thinks about the detail which would be required and the practical working of an agent or person operating as the administrator or for the administrator in relation only to the tax appeals. That might be a term which would only be productive of further fights.

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The consequence of all this is that I am prepared to make an order under section 600A which has the effect that so much of the resolution as proposed that the administrator be removed would have been passed but not so much of it as would have appointed the persons now proposed by the Commissioner.

It is late on a Friday evening. Obviously, it is undesirable for me tonight to make a removal order and leave the company without anyone in charge. I therefore propose to defer formal judgment until next Monday by which time I would expect that the parties would have conferred and perhaps reached an agreement on the identity of a person who might be appointed as the replacement administrator.

Such a person would be able to take control of the company and run the tax appeal. As I have said, I accept the respondent's contention that all four companies should be in the hands of the one administrator and therefore that is the consequence which should follow in relation to the other three companies.