SUPREME COURT OF QUEENSLAND

CITATION:	*Etridge & Ors v Mt Nathan Land Owners P/L & Anor* [2002] QSC 339
PARTIES:	**VANESSA SUSAN ETRIDGE, JOHN CARBAETTA, RAYMOND JOHN LANE AND MARIE THERESE LANE** (applicants) **v** **MT NATHAN LAND OWNERS PTY LTD ("ADMINISTRATOR APPOINTED")** (first respondent) **ROBERT E MURPHY (ADMINISTRATOR)** (second respondent)
FILE NO:	8278 of 2002
DIVISION:	Trial Division
DELIVERED ON:	16 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2002
JUDGE:	Mackenzie J
ORDER:	**1. I order that the second respondent be removed as liquidator of the first respondent.** **2. I order that, in his stead, Peter Ivan Felix Geroff be appointed liquidator.** **3. If submissions are not made to the contrary within 7 days or such further time as may be allowed, I order that the second respondent pay the applicants' costs of and incidental to the application to be assessed, which the second respondent may recover as costs in the liquidation of the first respondent.**
CATCHWORDS:	CORPORATIONS – VOLUNTARY ADMINISTRATION – ADMINISTRATOR – APPOINTMENT – WINDING UP – LIQUIDATORS – RESIGNATION OR REMOVAL – application that the second respondent be removed as the liquidator of the first respondent – whether the first respondent was or was likely to become insolvent – where the second respondent appointed as voluntary administrator of the first respondent – where first respondent subsequently wound up – where second respondent appointed as liquidator of the first respondent – where court has power to remove a liquidator "on shown cause"

Corporations Act 2001 (Cth), s 533(1)(a) , s 533(1)(b)
Corporations Law 1989 (Cth), s 436E, s 438B, s 439A

Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd - as trustee for the Albans Unit Trust (1994) 14 ACSR 230, considered
Cadwallader v Bajco Pty Ltd (2001) 189 ALR 370, applied
Re Biposi Pty Ltd; Condon v Rodgers (1995) 17 ASCR 730, considered
Re Club Superstores Australia Pty Ltd (in liq) (1993) 10 ACSR 730, considered
Tracker Software International Inc v Smith (1997) 24 ACSR 644, considered
Re Ross Wood & Sons Pty Ltd (in liq); Wood & Anor v Targett (1997) 23 ACSR 291, considered

COUNSEL: R R Lindwall for the applicants
D R Murphy for the first and second respondents

SOLICITORS: Blake Dawson Waldron for the applicants
Deacons for the first and second respondents

[1] **MACKENZIE J:** This is an application that the second respondent be removed as liquidator of the first respondent and that Peter Ivan Felix Geroff be appointed liquidator. Despite the voluminous material the essential facts may be stated briefly. The second respondent was appointed voluntary administrator of the first respondent on 13 October 1999. Shortly prior to his appointment the directors of the company had resolved that in their opinion the company was insolvent or likely to become insolvent at some future time. On the face of it there was therefore a proper basis for appointment of an administrator.

[2] However, Mrs Etridge, through her husband, raised at an early stage the question whether the company was insolvent or likely to become insolvent on the basis that the directors had acted upon a wrong construction of documents by which the scheme underlying the company was implemented. The allegation essentially was that accounts upon which the directors had relied treated people who had transferred land to the company under the scheme in return for shares as creditors in the accounts.

[3] The accountants who prepared those accounts subsequently advised Mr Etridge that the accounts had not been audited by them. They had been employed to construct financial accounts and taxation records in reliance on instructions from the directors and company books provided to them. If Mr Etridge's information was correct the accounts prepared by them would need to be amended. They also prepared amended accounts which showed that, on the assumption that the view expressed by Mr Etridge was correct, the company was not insolvent, nor likely to become insolvent at some future time.

[4] Without going into the details of the correspondence it was also alleged by Mr Etridge that a $50,000 payment to Mr and Mrs Goodier, who had had a dispute with the company over certain problems that had arisen, had been resolved by a deed of

compromise without proper authority. It was further alleged that placing the company into voluntary administration was a device to avoid shareholders inquiring into the conduct of the directors in doing so.

[5] Following the holding of the necessary meetings of creditors it was resolved that the company execute a deed of company arrangement. It was provided that if the conditions of the deed were not satisfied within 3 months after the date of sale of the last remaining real property belonging to the company that the company be wound up. The second respondent became liquidator of the company by operation of the deed on 13 September 2002.

[6] The second respondent deposes that prior to his appointment he had received a phone call from the then solicitors for the company in which he was told amongst other things that there was a dispute in relation to the company's compromise of the claim by one of the participants in the underlying scheme, there were internal board problems, that Suncorp Metway was a secured creditor to the extent of about $580,000 and that the directors were considering voluntary administration. After a further meeting he gave his consent to act as administrator and was appointed the next day. He commenced his investigation into the company's affairs. At the first creditors' meeting on 20 October 1999 pursuant to s 436E of the Corporations Law 1989 it was resolved that he be confirmed as administrator of the company. By the time of the second creditors' meeting, pursuant to s 439A, on 9 November 1999 and subsequently adjourned to 30 November 1999 he had formed the opinion that the company was insolvent or was likely to become insolvent and that it was in the best interests of creditors to execute the deed.

[7] The reasons for his recommendations, according to his affidavit, were that the Report As to Affairs pursuant to s 438B of the *Corporations Law* included as a liability of the company the sale price of the land to the company by the shareholders and stated that there was an excess of estimated liabilities over estimated realizable value of assets of almost $1.7m. He also relied on the financial records prepared by the accountants which included as a liability of the company the sale price of the land to the company. He was not aware of any dispute by anyone connected with the applicants concerning this prior to his appointment.

[8] The second respondent also deposes that regardless of the issue of whether the shareholders were creditors of the company, at the date of his appointment it had a liability of $508,000 under a fixed and floating charge over the company's assets in favour of Suncorp Metway, almost $17,000 in unpaid land tax, $200,000 owing to a director and his wife under an unsecured loan made by them to the company, another $56,000 owing to them and other small debts of about $14,000. He was of the opinion that the company was not able to repay those debts at that date. However, it is of some concern that it is not apparent that all of these debts, and particularly the large debts, were then due and owing, apart from payments required to be made periodically.

[9] Upon the second respondent's appointment as voluntary administrator Suncorp Metway exercised its rights under its security and appointed receivers and managers. It may well have been that at that point the company became insolvent but that could not be related back to the date of formation of the necessary opinion to found the appointment of a voluntary administrator. After refinancing was completed in January 2000 the receivership ceased and the second respondent

proceeded to administer the company's affairs under the deed of arrangement. Sale of the land proceeded and settlement of the last lot occurred on 13 June 2002. All that remains in the liquidation is to adjudicate on proofs of debt, to resolve a dispute with the Gold Coast City Council concerning infrastructure arrangements between the council and the company and to distribute the remaining funds.

[10] The second respondent also deposes that he had pursued alternative finance to discharge the debt to Suncorp Metway and to implement a marketing strategy likely to achieve sale prices at higher than valuation in the interest of obtaining a better result for the creditors. He also was aware that the company had experienced management difficulties for some time prior to his appointment. In particular, a dispute had arisen about 12 months previously between the directors and some shareholders over their decision, based on legal advice, to compromise the Goodier dispute. He was aware that the shareholders had refused to ratify the deed of compromise and had threatened legal action. He believed that neither the members nor the directors of the company were capable of resolving those conflicts and improving the management. He believed that if control were handed back to the directors they would not have been able to agree on the implementation of the preferred marketing strategy.

[11] The complaints upon which the applicants originally invited the second respondent to stand aside and allow an independent liquidator to be appointed were the following:

1. At no material time was the company insolvent. The directors would have been aware of that at the time they passed the resolution to appoint the second respondent as voluntary administrator.
2 The second respondent would also have been aware shortly after his appointment that the company was not insolvent.
3. He had specifically been informed that there should not have been shareholder loans as the shareholders agreement provided for equity not loans.
4. He had been appointed on an improper premise namely to forestall proceedings some of the shareholders had threatened against the directors, of which he knew.
5. Some of the shareholders had complaints against him, the directors and others such as the solicitors who advised him and the directors.
6. Throughout the administration he had manifested a lack of understanding of his duties and powers. This was demonstrated by his lack of understanding of the company's financial position, the content of his reports to "creditors" and in more recent times, his attitude to requests for access to and copies of documents which the applicants wished to access.

[12] These matters were all set out in a letter to the second respondent and the comment was made that a liquidator would have all the usual duties and powers to investigate the position of the company including any potential claims it may have. Those would include not only claims against its directors but against the second respondent and perhaps the solicitors who advised the directors and him. In the circumstances it would be inappropriate for him to become liquidator and that therefore he should stand aside and allow an independent liquidator to be appointed. That letter was written about 10 days before he became liquidator by operation of the deed of arrangement.

[13] A matter of concern is that the same kinds of complaints that are made at this point have been made for the past 3 years. Nothing was done during that period to bring matters to a head.

[14] Section 438A of the *Corporations Law* required an administrator as soon as practicable after administration of the company begins to investigate the company's business, property, affairs and financial circumstances and form an opinion about each of the following matters:

(i) whether it would be in the interests of the company's creditors for the company to execute a deed of company arrangement;
(ii) whether it would be in the creditors interests for the administration to end;
(iii) whether it would be in the creditors interests for the company to be wound up.

[15] If an issue is raised whether the company is insolvent or likely to become insolvent at some future time it would seem to be a relevant factor to investigate and take into account whether the company was in fact insolvent or likely to become so at a future time in forming the opinion about the matters an administrator is required to address (*Cadwallader v Bajco Pty Ltd* (2001) 189 ALR 370).

[16] Equally if an interested person wished to challenge any aspects of the administrator's conduct of the matter it would not be unreasonable to expect it to be done by promptly instituting appropriate proceedings. This was not done in the present case. The argument was allowed to fester away for years. The longer the administration went, the more likely the court would be disinclined to remove an administrator because the administration was well advanced and removal would be disruptive or expensive (*cf Re Biposi Pty Ltd; Condon v Rodgers* (1995) 17 ASCR 730; *Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd - as trustee for the Albans Unit Trust* (1994) 14 ACSR 230; *Re Ross Wood & Sons Pty Ltd (in liq)*; *Wood & Anor v Targett* (1997) 23 ACSR 291).

[17] However, the affairs of the company have moved on to another phase, liquidation. In the course of winding up the company a liquidator has a duty to report on a variety of matters referred to in s 533(1)(a) and (b) of the *Corporations Act* 2001. The term "officer" is widely defined in s 9 and includes an administrator. Where the activities of directors have been questioned in certain respects and the administrator's approach to that issue has been challenged and there is, further, an allegation that the administrator did not adequately address the issue of solvency of the company in the process of forming one of the opinions required to be addressed under s 438A of the *Corporations Law* (then the applicable legislation), it is in my opinion undesirable that the administrator continue as liquidator.

[18] In saying that, I am plainly not in a position to express an opinion whether the matters raised will eventually be made out. But the possibility that one or more of them might be cannot be dismissed as fanciful. The power of the court to remove a liquidator is couched in terms of the court being empowered to do so "on cause shown". Although proven misconduct would be to trigger the power, it is not necessary to prove misconduct before it may be exercised. The paramount principle in a case like the present, in my view, is that even if it proves that the liquidator has acted with perfect probity in his role as administrator, the appearance that there may be a possibility of conflict of interest is real and may lead to a genuinely held apprehension that, as liquidator, he may be impeded from making the necessary

investigations with the required degree of impartiality (*cf Advance Housing (supra); Re Club Superstores Australia Pty Ltd (in liq)* (1993) 10 ACSR 730; *Tracker Software International Inc v Smith* (1997) 24 ACSR 644). In those circumstances, he ought not remain as liquidator.

[19] The parties are at liberty to make submissions as to costs, in writing, within 7 days of delivery of the judgment or such further time as may be allowed. I am prepared to consider those submissions on the papers unless any of the parties wish to have a further oral hearing. If submissions are not made to the contrary within the time allowed, the order is that the second respondent pay the applicants' costs of and incidental to the application to be assessed, but recover those costs as costs in the liquidation of the first respondent

[20] The orders are the following:

1. I order that the second respondent be removed as liquidator.
2. I order that, in his stead, Peter Ivan Felix Geroff be appointed liquidator.

3. If submissions are not made to the contrary within 7 days or such further time as may be allowed, I order that the second respondent pay the applicants' costs of and incidental to the application to be assessed, which the second respondent may recover as costs in the liquidation of the first respondent.