[2002] QSC 085

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Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BYRNE J

No 1534 of 2002

GREGORY WINFIELD HALL &
RICHARD ANTHONY BARBER — Applicants

and

INTERCHASE CORPORATION LIMITED
(In Liquidation) (ACN 010 663 993) — Respondent

and

PERMANENT NOMINEES (AUST)
LIMITED — Second Respondents

BRISBANE

..DATE 18/03/2002

..JUDGMENT

18032002 jmc&mja (Byrne J)

HIS HONOUR: This is an application pursuant to section 564 of the Corporations Act seeking orders for the distribution of property with a view to giving creditors who have funded the costs of litigation an advantage over others in consideration of the risk assumed by them. The application also seeks directions pursuant to section 479(3) of the Act. But it is not necessary to say more with respect to that topic, other than that that aspect of the application is uncontroversial.

Interchase Corporation Limited was wound up in October 1992. Its principal asset was a shopping centre in central Brisbane. The shopping centre was sold at a price substantially less than the price paid to acquire the premises about four years earlier. That price was established having regard to the average of valuations by two valuers.

It appeared to the liquidators that both valuers may have over-valued the centre, thereby causing Interchase to pay too high a price. The liquidators eventually instituted proceedings against the valuers for damages.

The bulk of the net funds received from the sale of the Myer Centre were distributed to creditors. This resulted in the payment of secured and unsecured creditors. A class of "creditors" remained unpaid: the holders of unsecured convertible notes which had been issued when Interchase was floated on the Stock Exchange in 1997. The notes had become

repayable in December 1992. Such funds as the liquidators had retained were in part applied towards the costs of instituting and prosecuting proceedings against the valuers. Eventually, additional funding was required in view of the complexity of the litigation and the nature and extent of the defences mounted.

In January 1999 the liquidators applied to GIO, which then conducted a business of funding litigation by liquidators. The liquidators also wrote to the trustee for the noteholders and nine of the larger noteholders inviting them to a meeting in Sydney on 29th January 2000. The letter advised that the purpose of the meeting was to provide an oral brief to those who attended on the current status of the matter and the tactics to be adopted for the mediation.

At that stage, as the letter suggests, mediation was in prospect. The letter explained that the idea of providing the information orally was to avoid confidential information falling into the hands of the valuers. The liquidators were anxious to avoid information so sensitive finding its way in written form to the valuers or their insurers.

The meeting was attended by Mr Barber, one of the liquidators, a representative of the trustee for noteholders, Mr Hall, and three individual noteholders, Mr Grey and Mr Brown, and Dr Ross. At the meeting, Dr Ross presented the apologies of Mr Blann, who controls a substantial noteholder, Maboli Pty Ltd. Maboli holds 4

million of the 53.4 million convertible notes: approximately 7.5 per cent of the notes.

Mr Blann knew that the meeting was to take place. He chose not to attend. His priorities lay elsewhere.

The meeting was addressed by Mr Barber, who spoke to a briefing note prepared with the assistance of lawyers. The attending noteholders and the trustees' representative were informed of the main issues in the litigation, that the assets of the valuers appeared to be restricted to the proceeds of their insurance policies, and that the insurers had declined indemnity; that Interchase had sought to join the insurers as parties to the proceedings, unsuccessfully; that negotiations had been conducted with one of the valuers regarding a settlement in which there might be consent to a judgment on terms, but that no compromise had yet been concluded; that the liquidators did not have sufficient funds to prosecute the case to trial and through any subsequent appeals; that an application had been made to GIO for funding, but that the application had not yet been approved and would not be approved prior to the mediation; that GIO would require, as a condition of advancing the funds needed to prosecute the litigation, a premium of 30 per cent of the net proceeds of the action; that noteholders may wish to consider funding the litigation; and that if they were prepared to do so, that, in itself, would advance the prospects of success on the mediation.

Additionally, there was discussion concerning section 564 of the Corporations Law. Those present were informed that if noteholders were prepared to fund the litigation, a number of steps would need to be taken. These included the sending by noteholders to the liquidators of a "letter of intent" which, although not binding, might be shown at the mediation to suggest that the liquidators might well acquire the means to prosecute the litigation to trial. There was also discussion of the terms upon which noteholders might be invited to participate.

On or about 1st February 1999 Mr Blann attempted to contact Dr Ross to discover what had happened at the meeting. Dr Ross, annoyed that Mr Blann had failed to attend it, conveyed through his wife that he would not speak to him. But Mr Barber did speak to Mr Blann on 1st February 1999.

At this time, Mr Barber did not have commitments from substantial or other noteholders to fund the litigation. He was anxious to secure Mr Blann's financial support as the controller of a large noteholder with a considerable amount of money at stake.

There is a dispute between Mr Barber and Mr Blann concerning the contents of this conversation. Especially as the surrounding circumstances disclose an anxiety on the part of Mr Barber to secure Mr Blann's financial commitment, that the conversation occurred the next working day after the

meeting on the 29th, and that records demonstrate that the conversation (contrary to Mr Blann's recollection) lasted for 17 and a half minutes, I am persuaded that Mr Barber's recollection of the conversation is correct.

When Mr Barber spoke to Mr Blann, he did so by reference to the briefing note used at the meeting on the 29th. The need for further funding was explained in much the same way as it had been at the meeting.

Subsequently, Mr Barber forwarded to Mr Blann a draft letter for Mr Blann to execute, indicating a willingness to fund. This was soon sent to the liquidators, no doubt so that they would be armed with it at the mediation. The letter advised that it was Maboli's present intention, as a substantial creditor, "to share in the funding of yourselves in the prosecution of the above matter in the Supreme Court through to judgment".

The mediation commenced on 3rd February 1999. It failed. About a week later, there was a further conversation between Mr Barber and Mr Blann. Its details are not material.

By 17th March 1999, agreement had been reached between ACN, a valuer, and Interchase. ACN would agree to compromise the proceedings upon terms which exposed ACN ultimately to a liability of as much as $20 million, depending upon the ultimate assessment of damages.

This development removed from the litigation one of the two valuers against which the proceedings had until then been maintained. But it did not result in the payment, or promise of payment, of any particular sum of money; and, more importantly, it did not involve any commitment on the part of ACN's insurers. It, therefore, had some potential to shorten the trial and to reduce the trouble and expense of the litigation; but it did not expose any prospect of a substantial increase in the ultimate return. So much would depend upon recovery against the insurers.

A telephone call occurred on 18th March 1999 between Mr Barber and Mr Blann. Again, the contents are controversial. Mr Barber's recollection is that he told Mr Blann of the settlement with ACN; that liability under the ACN insurance policy was the subject of a continuing denial; that though judgment had been entered, it did not give Interchase any money; but that the settlement did make the case simpler and more streamlined for the reason that only one defendant remained, Hillier Parker.

Mr Blann denies that such information was given to him on this occasion or at all before he discovered the compromise after reading a report in the Australian Financial Review of the judgment delivered by Justice White on 23rd June 2000 in relation to the costs of the trial.

Subsequently, Maboli's solicitors pursued over more than a year a request to be provided with information concerning

that compromise. The assertion so frequently made in Maboli's solicitors' letters to the solicitors for the liquidators was that Mr Blann had not previously known of the compromise with ACN. In view of evidence of Mr Barber, by affidavit and orally that the conversation of 18th March occurred, it might have been expected that his solicitors would have responded to Maboli's solicitors asserting that the fact of the ACN compromise was communicated by Mr Barber to Mr Blann on 18th March 1999. The absence of such an assertion, when an opportunity to make it was presented on so many occasions over more than a year, has given me cause to reflect upon where the probabilities lie in connection with Mr Barber's claimed recollection of the material events of 18th March 1999.

Another factor must necessarily be weighed in the balance in deciding where the truth probably lies.

Mr Barber accepts that he did not in a subsequent telephone conversation with Mr Blann shortly after Mr Blann became aware of the Financial Review report and in which Mr Blann asserted the non-disclosure respond by asserting that, indeed, the disclosure of the ACN compromise had been made on 18th March the previous year. Mr Barber says he saw no point in making such an assertion in the circumstances.

But there are reasons for supposing that Mr Barber's account is probably true.

The conversation is said to have occurred the day after the judgment was entered against ACN under the terms of the compromise. At this time, Mr Barber remained anxious to secure the financial support which Maboli was capable of providing to prosecute the litigation.

The material before me does not disclose any reason for Mr Barber to have spoken to Mr Blann on the day after the ACN judgment was entered other than to tell Mr Blann of the compromise so as to offer an additional incentive to Maboli to fund the prosecution by Interchase of its claims against Hillier Parker.

It is also, I think, correct, as Mr Sofronoff QC submitted, that Mr Barber had no reason to withhold the information concerning the compromise; indeed, since it made the prosecution of the litigation easier, Mr Barber had good cause to discuss it with Mr Blann who was by no means committed to supporting the litigation financially.

Having had the advantage of seeing Mr Blann testify, I can understand why Mr Barber, as in effect he said, thought there was little point in arguing the toss with Mr Blann when he claimed ignorance of the ACN compromise.

In summary, I prefer the evidence of Mr Barber to that of Mr Blann on this issue and am satisfied that it is more

probable than not that Mr Barber's recall of the conversation of 18th March 1999 is, in substance, correct.

The suggestion that Maboli was unaware of the conclusion of the proceedings against ACN cannot be accepted.

Subsequently the litigation proceeded to a judgment which has yielded a very substantial result after prosecution through a lengthy and difficult trial and on appeal challenging the trial judge's decision. The noteholders who supported the litigation financially stand to benefit very considerably from having done so, but the opportunity to participate in this way was conferred on all the noteholders.

Mr Barber's initial strategy was to attract the interests of major noteholders. On legal advice, eventually he sought the support of all, and on similar terms. The proposal was communicated to all noteholders in mid-April 1999 by a circular which contained optimistic advice concerning the prospects of success, resulting in recovery for the noteholders of a substantial sum.

The circular disclosed that the action had been brought against Hillier Parker "and others" for damages; that advice had been received from solicitors and from senior and junior counsel that the action should be successful, leading to a substantial recovery; that some significant noteholders had already agreed to provide funding and indemnity to a maximum

of $2 million to cover costs of running an action to its conclusion; and that funds were being sought to other noteholders on terms set out clearly and in detail. These included the terms upon which I am now asked to exercise the Court's discretion under s.564 to reward the funding noteholders.

The timeframe within which noteholders were invited to respond was short, but not so as to be unreasonable, having regard to the exigencies of the litigation.

The application has been opposed on a number of grounds. One depends upon a submission that Maboli was unaware of the ACN compromise, that Hillier Parker had made an offer to settle for $2 million, and that the liquidators were confident of success. These assertions are not established.

It was also submitted that some information was communicated to one or more of the significant noteholders, but not to all noteholders. It is quite likely that this is correct. The initial discussions with the significant noteholders were extensive, and information supplied to them at an early stage may not have been fully communicated to all noteholders in the mid-April 1999 circular. But that circular conveyed sufficient information to enable all noteholders to make appropriate decisions in their interests.

It also invited noteholders to make inquiry, in terms which were general. In other words, the liquidators were by the circular offering adequate information to enable a considered decision to be made whether to support the litigation financially, and to the extent to which any noteholders might have thought it desirable to have additional information, they were encouraged to seek it from the liquidators.

Were it not for the financial support of the funding noteholders, the liquidators would have been left with no choice but to accept the $2 million compromise proposal advanced by Hillier Parker. The sum which is actually being obtained through the litigation is many times that. The noteholders who agreed to support elected to do so knowing that the liquidators intended to seek the Court's approval under s.564 in accordance with the detail of the proposal contained in the mid-April circular. More importantly, all noteholders knew that. So each of them was in much the same position to make a determination whether to support the litigation financially, knowing the hoped-for rewards.

By the risks the contributors who funded the litigation assumed, the return to all those noteholders who were unwilling to risk further money has increased tenfold. For example, although Maboli did not fund the litigation, the dividend to it has been increased from $120,000 to $1,400,000, even if this application succeeds.

Yet, Maboli contends, the reward for funding noteholders is too great for the risks assumed by them.

When the determination was made to provide the funding, there was every reason to be confident ultimately about the outcome of the litigation. But as was entirely predictable when the time noteholders decided whether to participate, the litigation proved to be hard fought. The trial lasted for 40 days; and the defence was conducted by two senior and one junior counsel.

The return to funding noteholders will be quite substantial if the proposal is acceded to. When account is taken of interest paid on the funds advanced and the additional, substantial reward involved in the distribution of 30 per cent net proceeds of the litigation to the contributors, the rate of return is about 425 per cent. But this possibility was disclosed by the mid-April circular. Moreover, having regard to the likely complications that may ensue in litigation of this sort, even with the confident prognosis from the lawyers, the funding noteholders were assuming an appreciable risk; and the success of the litigation has reaped for all noteholders in proportion to their debts a huge reward. So it seems to me that the proposal is one that produces a just result.

Having considered these and other factors (without listing them all) which appear to bear upon the discretion (see in particular re Ken Godfrey Pty Ltd in Liquidation 1994

14 ACSR 610, at page 612; and Household Financial Services Pty Ltd v Chase Medical Centre Pty Ltd 1995 18 ACSR 294), I have concluded that the orders sought under s. 564 ought to be made.

I will hear any further submissions the parties may wish to make with respect to the form of the order. Is there anything anyone wishes to say about the terms of the draft?

...

HIS HONOUR: In view of the nature of the contest, and by that I mean the fight over matters of credit, I consider that Maboli ought not to have its costs. Mr Douglas your client's costs will lie where they fall. But I will not make any order that Maboli pay anybody else's.

Having said that, can I leave it to you to agree upon the details of the formal order?

MR SOFRONOFF: Yes, your Honour.
