



Transcript of Proceedings

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State Reporting Bureau
Date: 14 October, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No 6733 of 2003

BRADLEY VINCENT HELLEN

Applicant

and

CAPRICORNIA HOMES PTY LTD ACN 055 351
141 IN LIQUIDATION AND YUNA EAST PTY
LTD ACN 052 287 313 (IN LIQUIDATION)

Respondent

BRISBANE

..DATE 06/10/2003

JUDGMENT

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HIS HONOUR: This is an application - or rather there are two applications, as I shall explain - under s.564 of the Corporations Act 2001.

By an application filed on 28 July 2003, Mr Bradley Hellen, the liquidator of Capricornia Homes Pty Ltd and Yuna East Pty Ltd who had been appointed by order of White J on 22 August 2000, an order was sought that \$20,000 paid by Lesley May Schinkel and Michael John Schinkel to Mr Hellen "for settlement monies" be paid out of the net value of the property of "the company" in priority to other creditors of "the company" to Michael Osbourne. That application came before me on 11 August 2003, and, after I had pointed out an obstacle to its succeeding, namely that Mr Osbourne was not, it appeared, a creditor of either company, the application was adjourned to 22 August 2003, when, on Mr Hellen's behalf, leave was sought and obtained to file a further application, this one naming a company called Guanaba Nominees Pty Ltd and not Mr Osbourne as the beneficiary of the order sought. The second application was otherwise in the same terms as the earlier one.

The power provided for in s.564 is to make orders in favour of certain creditors.

The obstacle to the success of the earlier application was that the evidence did not show that Mr Osbourne was a creditor of either company, although, according to an affidavit sworn on 11 August 2003 by Ms Anne Gubbins, an employee of the firm

of solicitors acting for Mr Hellen, Mr Osbourne had "incurred
\$6,612.00 in liquidator's fees pursuant to the Funding
Agreement" and furthermore the firm had "recorded
approximately \$11,980.00 in professional fees and
disbursements", giving "an approximate total of \$18,592.00
incurred to date by Mr Osbourne in funding this litigation".
The funding agreement referred to was one dated 2 June 2002,
entered into between Mr Hellen, the companies in liquidation,
Mr Osbourne and Guanaba Nominees Pty Ltd. The litigation
referred to was a proceeding begun on 29 November 2001 in this
Court by Mr Hellen against Mr and Mrs Schinkel, who were
former directors of the companies in liquidation. The claim
was to \$92,205.23 and was settled on 23 May 2003 with their
agreement to pay Mr Hellen \$20,000. Ms Gubbins continued in
paragraph 3 of the affidavit: "Whilst the Funding Agreement
was entered into by both Mr Osbourne and his company Guanaba
Nominees Pty Ltd, Mr Osbourne has chosen to pay the
liquidation costs personally."

In a further affidavit sworn on 11 August 2003, Ms Gubbins
referred to the affidavit I have mentioned and said that she
had "incorrectly deposed that payment of the liquidator's fees
and the fees of [her employers] had been paid by Mr Osbourne".
No explanation was given as to how that mistake had been made,
but Ms Gubbins continued that it was "in fact the case" that
all moneys received to 11 August 2003 in payment of the
liquidator's and her employers' fees "have been paid from
Guanaba Nominees Pty Ltd". Attached to her later affidavit
were copies of trust matter ledger reports showing that from

22 August 2000 all receipts had been from Guanaba Nominees Pty Ltd. The liquidator's accounts and the solicitors' fees have been paid from the trust account, Ms Gubbins swore.

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In a notice to creditors dated 26 September 2001, Mr Hellen had asserted that Mr Osbourne and Guanaba Nominees Pty Ltd were creditors of both companies in liquidation. A copy of that notice was attached to an affidavit sworn by Mr Hellen and filed on 28 July 2003.

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In yet another affidavit sworn by Ms Gubbins, this one on 21 August 2003, for which Mr Hellen sought and obtained leave to file and read on 22 August 2003, Ms Gubbins said that Guanaba Nominees had incurred approximately \$11,980 "up to 11 August 2003 in fees from [her employers] in pursuing the litigation" and that deposits received from Guanaba Nominees Pty Ltd in respect of the litigation into her employers' trust account had been in all \$14,351.83. Ms Gubbins estimated that at most \$5000 would be available for distribution to the companies' creditors after her employers had rendered their final bill.

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According to an affidavit sworn on 18 August 2003 by Mr Hellen, the only debts of the companies are, in the case of Capricornia Pty Ltd, \$72,357.50 (WorkCover \$2357.50 and Guanaba Nominees Pty Ltd \$70,000), and, in the case of Yuna East Pty Ltd, \$15,184.87 (Telstra \$184.87 and Guanaba Nominees Pty Ltd, \$15,000). Accordingly if the estimated \$5000 were distributed pro rata to the creditors, WorkCover would receive

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\$134.65, and Telstra, \$10.56, since the companies have no other assets.

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After the hearing of 11 August, the creditors were notified that an order in favour of Guanaba Nominees Pty Ltd would be sought on 22 August and none appeared to resist the order.

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Bearing in mind the sums involved, the history of the litigation, and the apparent indifference of the other creditors to the litigation and the application, I shall make the order sought in favour of Guanaba Nominees Pty Ltd and dismiss the application filed on 28 July 2003.

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I shall invite further submissions on the form of the order to be made in favour of Guanaba Nominees Pty Ltd and on costs.

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HIS HONOUR: The application filed on 28 July 2003 is dismissed.

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On the application filed by leave on 22 August 2003, I order that the \$20,000 paid by Lesley May Schinkel and Michael John Schinkel to the applicant be paid out of the net value of the property of the respondents to Guanaba Nominees Pty Ltd in priority to the claims of other creditors of the respondents.

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I order that the costs of this application, limited to the costs incurred on 22 August 2003, be costs in the winding-up.

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