

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ROBIN A/J

No BS5696 of 2004

RAJ KHATRI and IVOR WORRELL

Applicants

and

HEAD START TECHNOLOGIES LIMITED
(ACN 084 379 279)

Respondent

BRISBANE

..DATE 02/11/2006

ORDER

CATCHWORDS: Corporations Act s444D s448C leave granted "nunc pro tunc" for partners of liquidators to be appointed administrators - extension of time allowed for execution of deed of company arrangement on amended application where original application filed within the 21 days allowed sought "further or other order"

HIS HONOUR: The applicants, Messrs Khatri and Worrell, filed an application on the 20th of October 2006 seeking leave nunc pro tunc to be appointed administrators of the company. That leave was required to overcome a disqualification imposed by section 448C of the Corporations Act because the applicants, within paragraph (g), were partners of "an officer of the company" (being, as the section 9 definition makes clear, officers because of their role as liquidators of the company appointed by order of the Senior Deputy Registrar on the 22nd of July 2004). The liquidators are Messrs Griffin and Lane. All four gentlemen are partners in the same firm.

The situation of the company's creditors stood to be improved by the advent of a person or persons willing to contribute funds to permit the adoption of a deed of company arrangement which was anticipated to be and, indeed, proved to be acceptable to the creditors. Presumably in ignorance of the role which section 448C had to play, the liquidators appointed Messrs Khatri and Worrell administrators on the 5th of September this year around about the time of what is called a first meeting of creditors.

The new administrators called the more significant "second meeting of creditors" for 2nd of October 2006 at which the arrangements described above were endorsed. The meeting is now seen to be under a cloud because of the irregularity attending the appointment of those who called it. The filed application sought the leave I have mentioned (not in terms identified as leave "nunc pro tunc"), a declaration that the appointment of administrators was valid, and a declaration

that the resolutions of the creditors meeting of 2nd October 2006 were not invalid, also and importantly "such further or other order" - which is an inelegant way of indicating that other relief might be sought.

An affidavit of Mr Worrell filed with the application sufficiently indicated the parameters of the difficulty which the administrators sought to overcome with the assistance of the Court.

Mr Coulsen representing them today indicates that he realised on the return date of the filed application that further assistance might be required from the Court, in particular by way of an order under section 444D(2)(b) extending the standard 21-day period allowed after the meeting of creditors for execution of the relevant instrument prepared under section 444A.

I am informed that concern was expressed by Mackenzie J on the return date that creditors might not have received sufficient notice of the application. An affidavit of Mr Griffin filed yesterday indicates that some care has been taken to alert the creditors to what is happening in the Court. There has been a more than 90 per cent positive response received-----

That's right, isn't it?

MR COULSEN: Yes. I think it's 91.27 or something, your Honour, and-----

HIS HONOUR: -----and no difficulty raised by any creditor nor has anyone appeared when the matter was called outside Court this morning.

Mr Coulsen obtained leave to read and file an amended application, seeking extension of the period allowed for execution of the deed of company arrangement until the 13th of November 2006.

The late filing of the amended application gives rise to a potential difficulty with the section under 444B(2)(b), which requires that the application for additional time over and above the 21 days allowed after the meeting of creditors must be one "made within those 21 days". The original application was filed within time. The amended application, filed today by leave, comes too late.

In my opinion, in the circumstances, the prayer for "further or other" orders in the original application may be and, in the present circumstances, should be treated as an application for the relief now expressly claimed in the amended application in paragraph 2A, which seeks extension of the period for execution until 13 November 2006.

I may say the only difficulty I felt in the whole scenario relates to the bringing in of administrators who come from the same firm as, but are separate individuals from, the liquidators. In some contexts, there might be grounds for concern that unnecessary costs were being incurred because new

people had to familiarise themselves with matters with which the liquidators were fully cognisant.

1

Mr Coulsen indicates, unsurprisingly, that it is possible for liquidators to become administrators. As he says, there is not likely to be the incurring of much additional cost, given that the administrators will have access to the same computer records and the like, and to assistance of the same personnel in the firm who have been attending to the more mundane parts of the work.

10

20

Reference was made to two decisions which I will note, although I am not in the least surprised by what is said in them, and was not particularly seeking authority for propositions along those lines. The first is *Re Chilia Properties Pty Ltd, (Administrator Appointed)* [1997] 23 ACSR 548 at 550, where Lehane J, by reference to authority under earlier legislation, satisfied himself that leave nunc pro tunc was available for purposes of section 448C.

30

40

In *Dean-Willcocks v. Yeshiva Properties No 1 Pty Ltd, (Provisional Liquidator Appointed)* [2003] 48 ACSR 525 at 528-529 in paragraphs 14 to 15, the acceptability of the appointment of a liquidator or provisional liquidator as administrator in appropriate circumstances was acknowledged. Barrett J was prepared to extend to section 448C the decisions to that effect in the context of section 436B.

50

In the circumstances, I make an order in terms of the
initialled draft.

1

10

20

30

40

50