[2006] QSC 368

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ROBIN A/J

No BS 5969 of 2005

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION	Applicant
and	
MOUNT WARREN PARK (NOMINEES) PTY LTD (ACN 102 398 818)	First Respondent
and	
CARRARA NOMINEES (QLD) PTY LTD (ACN 103 217 241)	Second Respondent
and	
HILLCREST NOMINEES (QLD) PTY LTD (ACN 103 217 214)	Third Respondent
and	
MORAYFIELD (The Avenues) PTY LTD (ACN 100 748 794)	Fourth Respondent

and

PARTNERING DYNAMICS PTY LTD (ACN 068 541 346)	Fifth Respondent

and

LIFECARE SERVICES AUSTRALIA PTY LTD (ACN 102 326 081)	Sixth Respondent

and

QUALITY CARE MANAGEMENT PTY LTD (ACN 088 962 707)	Seventh Respondent

and

ROBERT THOMAS ADCOCK	Eighth Respondent

and

COLIN GRAHAM FRANCIS	Ninth Respondent

and

DAVID JOSEPH STOYAKOVICH	Tenth Respondent

and

BRIAN JAMES MAHER	Eleventh Respondent

and

MARIE THERESE MAHER	Twelfth Respondent

and

PAUL JAMES RODDA	Thirteenth Respondent

BRISBANE

..DATE 08/11/2006

ORDER
CATCHWORDS: Winding up of unregistered managed investment scheme ordered by court - operator of scheme nominated to effect the winding up - operator's application for extension of time allowed by order to complete winding up and repay scheme investors opposed by ASIC and one investor - limited evidence available attributed delay in finalising construction and sale of 50 townhouses to changing stances taken by the local government.

HIS HONOUR: I find this a difficult matter. It arises from the frustration of expectations that seem to have been held all round when orders were made, effectively by consent, by White J on 21 October last year. Her Honour published reasons on the 9th of November which can be found reported at 56 ACSR43 and at [2005] QSC326. Reference to those reasons confirms that today's application concerns only one of four unregistered managed investment schemes. It appears to have been the most advanced.

The reasons were reportable on the basis of her Honour's permitting the first to fourth respondents in the overall proceeding to be appointed to wind up each of the schemes, notwithstanding that they had been the operators of them as unregistered managed investment schemes. There were considerations not only of efficiency but also of those respondents having new directors appointed and the like which persuaded her Honour to avail herself of the possibility which the legislation held out of making the unusual orders in the special circumstances.

In respect of the scheme presently relevant, completion of the winding up and, within a very short time, payment in full of the investors was contemplated. In respect of that scheme it was seen as feasible within 12 months, in respect of two of the schemes within 18 months and in respect of the fourth, within 24 months. I have not dared to enquire what had been the fate of the three schemes not presently relevant. Reading between the lines, ASIC, which had been the applicant, was not necessarily pleased with the outcome but acquiesced in

arrangements which the investors gave fully informed consent to.

An independent solicitor had been provided free of cost to them to advise them independently. Only one of them appears today, Mr Goss, representing himself and his wife as trustees of a superannuation scheme.

...

It is, from some points of view, surprising to hear from Mr Goss that the investors, of whom there were apparently about 11 in the Morayfield scheme, were kept in ignorance of the identities of the others, precluding their having any ability to make common cause. There is on the court file, open to public inspection, an affidavit of the solicitor I mentioned, Mr Rosengren, which lists the investors and in court today Mr Goss has had the opportunity to look at that - so he is no longer in ignorance.

What has gone wrong in relation to the Morayfield scheme is delay the blame for which is attributed to the local government in a short affidavit of Mr Stoyakovich, the 10th respondent. He says without elaboration or provision of supporting documents that in March this year, after what seems a lengthy delay from the time of her Honour's order, the local government indicated that no approval of reconfiguration from it was required, only to change its mind a few months later.

The approval has been forthcoming but the Council has not sealed the relevant plan, apparently awaiting payment of headworks charges and the like. As I understand it, the sealing of the plan is thought to be only days away. The Morayfield scheme involves construction of 50 houses or townhouses and construction of them is complete. They represent the balance of a larger development of 104 houses in total.

Seeking to be heard on the present application. which is one by the fourth respondent for more time than the year her Honour's order allowed, is Bloomer Constructions (Queensland) Pty Ltd represented by Mr Ferrett. I take it the company was involved in construction work. Mr Ferrett informed the Court of an application which his client has against the fourth respondent returnable on the 17th of November 2006 seeking a declaration that under its contractual arrangements it is entitled to have a mortgage in registrable form made available to it securing indebtedness to it. Specific performance of the fourth respondent's obligation is sought.

Mr Ferrett was concerned that if the Court granted relief sought by the applicant/fourth respondent here that might in some way be taken as requiring the sale of property over which his client hopes to establish a right to a registered mortgage. Bloomer Constructions is not a party to this proceeding and would not be bound by any order made.

It seems to me, further, all that is sought by the fourth respondent is additional time for the completion of tasks set

by the Court's existing order. There is no change in the nature of them. If complications in the carrying out of those tasks, in particular in passing legal title to purchasers, arise because of dealings that have occurred with third parties such as Bloomer Constructions, it seems to me that has to be seen by the fourth respondent as one of the risks of the enterprise it has engaged in.

Her Honour signed separate orders in respect of the four schemes and that of present concern is relevantly as follows (it is at page 60 of the ACSR report):

> 2. The Fourth Respondent wind-up the Morayfield scheme by completing the Morayfield project and the winding up of the Morayfield scheme shall be deemed to be completed when each investor in the Morayfield scheme is paid a sum comprising:
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> (a) the principal sum contributed by each investor to the scheme; and
>
> (b) interest on the principal calculated at the rate of 10% per annum on the principal sum from the date of the contribution of the said sum by the investor until 30 June 2005; and
>
> (c) any stamp duty paid by the investor on account of stamp duty on the Deed of Extinguishment and Transfers signed by the investor (other than duty that has already been refunded to the investor).
>
> For the avoidance of doubt, if the winding up is not completed within 12 months of the date of this order, the Fourth Respondent shall forthwith sell the land and improvements thereon then comprising the Morayfield project and distribute the proceeds in accordance with paragraph 5(e).

Paragraph 2 can be better understood by reference to paragraph 5 which identifies the steps which the fourth respondent "shall undertake" in completing the Morayfield project. Those included construction of the 50 residences, marketing of them,

and execution and completion of contracts of sale followed by distribution of proceeds in the way indicated in paragraph 5, which accorded recognition to the claims of any registered mortgagee and then to the claims of the investors.

It is convenient to interpolate here that the investors who, or most of whom, had previously agreed to a scheme of arrangement, accepted new rights, as set out in paragraph 2 of the order.

It is a matter of some interest that what her Honour ordered should happen in default of completion within 12 months of winding up of the scheme appears to be very much what was to happen in the winding up. The main difference might be that a sale in bulk of houses not already separately disposed of would be required.

Mr Adcock gave brief oral evidence which indicated, unsurprisingly, that enquiries made to date indicate that any investor purchasing on that basis would expect a 20 per cent discount against the $10 million or so which he expected would become available if there were separate sales. He indicated that one at least of the potential bulk purchases was disposed to insist on the termination of existing separate contracts. Most of the houses have been sold, but because of delay and invocation of "sunset clauses" some of those purchases have been lost.

Mr Goss complains of a lack of information - or lack of reliable information in relation to the progress of sales, which is surprising and ought not to have happened, assuming paragraph 6 of her Honour's order (calling for monthly reporting) had been complied with. He appears to be getting conflicting information from sources contacted by him including the local government and a real estate agent supposedly engaged in effecting sales.

Mr Adcock gave evidence of his opinion that the Morayfield scheme is solvent. There were two reasons for his going into the witness box. One was a concern which I developed that if further time were allowed to the fourth respondent that might result in the scheme being bled by fees of various kinds being earned as time went by at the cost of investors. Her Honour's order in terms recognised an entitlement of the sixth respondent (of which Mr Adcock is a director) to management fees. The other matter of early concern concerned Mr Adcock's very general reference in his affidavit to having advised investors of this application by sending them copies of it and of the tenth respondent's supporting affidavit.

That action of his was doubtless prompted by the reaction of ASIC to the service of the same material on it on the 23rd of October this year. That reaction was to emphasise the primacy ASIC placed on informed consent of the investors (who face court endorsed delay in getting any funds back) to what was being proposed. Ms Luchich for ASIC indicates a continuing lack of satisfaction in this regard. I think that, read with

Mr Stoyakovich's affidavit, the application could be understood by any of the investors as seeking an extension from the 21st October, 2006 to the 30th of March, 2007 of the period of the winding up, carrying with it an equivalent delay in their being paid.

Ms Luchich suggested that the investors should once again be accorded the advantage of independent legal advice which they needn't pay for. Mr Goss excepted, none of them appeared when the case was called on outside Court before lunch. It is patent that their interests are very much affected by this application, although the extent of that is difficult to gauge.

It could be that if the most advantageous way of disposing of the houses from the point of view of the investors is by separate sales that is what would happen. It seems to me that there might be consequences if what could be demonstrated to be a disadvantageous bulk sale were engaged in. There is nothing before the Court enabling it to make any commercial judgment today.

What underlies the application which was filed on the 23rd of October 2005, and therefore perhaps a couple of days late, is concern that the fourth respondent may be in contempt of Court in not complying with clause 2 in a timely way in the sense that the deadline was not met. From that point of view the application (which may be seen as coming under r668 of the UCPR) is entirely proper.

There is a paucity of information bearing on the nature and causes of delay, so the Court is in no position to assign blame in any quarter. I understood Mr Goss to favour refusal of the present application as a way of forcing the issue and obliging the fourth respondent to "forthwith sell the land and improvements" and then distribute the proceeds in accordance with paragraph 5.

Mr Ferrett's approach was to suggest that more might be granted than sought by Mr Lynch (who appeared for the applicant) in the form of a stay of the order so that nothing would happen, at least in advance of 17th of November.

What I propose to do is accept the reality of the situation, and treat it as one in which the fourth respondent has not been shown by evidence before the Court to be blameworthy. I do propose to amend the order as sought, but by allowing the minimum time proposed by Mr Stoyakovich as sufficient, rather than the more indulgent one he suggested to be on the "safe side".

Mr Adcock indicated that the sixth respondent does not expect to make any more fees, its services having been quantified at about half a million dollars, of which $100,000 is apparently outstanding. I propose to deal with the concern which I have that, in the circumstances, the respondents ought not be allowed to profit from delay, by including a provision precluding payments to them unless those are permitted in advance by the Court, or by ASIC.

The Court may be easier to persuade, as, curiously, Ms Luchich was opposed to my proposal to keep ASIC better informed by its being admitted to the group of those entitled to monthly reports over and above the quarterly reports which it gets under her Honour's order. ASIC is concerned not to be put in the situation of having to supervise arrangements which it had no part in designing.

I also propose to add liberty to apply to the order of her Honour, the purpose of that being to allow investors who have not been heard to apply to have the order changed. The same might apply to Mr Goss, if he is able to demonstrate that the information which he has been given is misleading, for incompleteness or any other reason.

I shall order that the order of the 21st of October 2006 in relation to the fourth respondent be amended:

> (1) By deleting "within 12 months of the date of this order", and inserting "by 28 February 2007" in paragraph 2.
>
> (2) By adding at the end:
>
> "(17) No payments shall be made to any respondent after the 7th of November 2006 without the prior approval of ASIC or of the Court."
>
> "(18) Liberty to apply to any party and to any investor in the Morayfield scheme."

I further order that a copy of this order be supplied by the

Applicant forthwith to each of the said investors.

...

I will order that ASIC's costs be paid by the applicant.
