

SUPREME COURT OF QUEENSLAND

CITATION: *Re Bidjara Aboriginal Housing & Land Company Limited (Receivers and Managers Appointed)* [2007] QSC 345

PARTIES: **IN THE MATTER OF Bidjara Aboriginal Housing & Land Company Limited (Receivers and Managers Appointed) (ACN 010 017 955)**
Ross Andrew Duus and Garry John Hamilton as Receivers and Managers of Bidjara Aboriginal Housing & Land Company Limited
Applicant
and
Bidjara Aboriginal Housing & Land Company Limited
Respondent

FILE NO/S: BS5434 of 2007

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 21 November 2007

DELIVERED AT: Brisbane

HEARING DATE: Written submissions

JUDGE: White J

ORDER: **The respondents, Floyd Robinson, Robert Mailman and Raymond Fraser, pay the costs of the Commonwealth occasioned by their opposition to the Commonwealth's application to be substituted for the receivers and managers in the winding up application**

CATCHWORDS: PROCEDURE - COSTS - DEPARTING FROM THE GENERAL RULE - where the respondents opposed the applicant's application to be substituted as applying creditor in a winding up proceeding - where the respondents held themselves out as being directors of the company - where the company was found to have no financial members - where the respondents were not directors of the company - whether the respondents have standing - where the respondents are liable for costs personally incurred by opposing the substitution application

Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (Cth)

Corporations Act 2001 (Cth), s 237, s 465B

COUNSEL: Ms S Anderson for the Commonwealth of Australia
 Mr NP Hiscox for Floyd Robinson, Robert Mailman and
 Raymond Fraser

SOLICITORS: Australian Government Solicitor for the Commonwealth
 Fraser Power for the respondents

- [1] On 5 November 2007 the Commonwealth of Australia sought to be substituted as applying creditor in the application to wind up the Bidjara Aboriginal Housing and Land Company Limited (“the company”) brought by the receivers and managers of the company pursuant to s 465B of the *Corporations Act 2001*. The receivers and managers supported the application. The Commonwealth had succeeded to the assets of the Aboriginal and Torres Strait Islander Commission (“ATSIC”) and became responsible for its liabilities pursuant to the provisions of the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth). ATSIC had advanced loans to the company.
- [2] The company, purportedly by its directors, sought to oppose the application for substitution. A preliminary point about the standing of those individuals who characterised themselves as directors of the company was raised. In their opposition they sought to establish that the company was not insolvent and that neither the receivers and managers nor the Commonwealth was entitled to bring an application to wind up the company.
- [3] I was not satisfied that Floyd Gabriel Robinson, Ernest Robert Mailman or Raymond Floyd Fraser, who described themselves as directors, were currently directors of the company. This was because there was no evidence that there were any financial members from whom any directors of the company could be appointed.
- [4] The Commonwealth sought an order that those men be made personally liable for the costs incurred by the Commonwealth in meeting their resistance to the substitution application. Directions were made about the exchange and filing of submissions in respect of that application for costs. That has now occurred including the filing of affidavits from each of the respondents to the costs application as well as an affidavit from Mr Gregory Phillott who prepared an audit report about the company dated 27 October 2007 and an advice from Mr Martin Daubney SC (as his Honour then was) dated 29 November 2005.
- [5] When the question of standing was raised by Ms Anderson for the Commonwealth at the outset of the application on 5 November 2007, Mr Stephens, who announced his appearance for the company instructed by Mr Fraser Power, said that he was “caught by surprise” by the standing point. The issue of the valid appointment of any director of the company had been raised by Mr Ross Duus, one of the receivers and managers appointed to the company by ATSIC, as long ago as 2003. In her affidavit sworn on 22 July 2007 but not filed until 5 November 2007, Ms Darlene Robinson deposed
- “When Mr Duus raised this allegation that there were no financial members of Bidjara Housing, I took legal advice from Mr Frank Jongkind some time after 2003. I believe he caused a general

meeting of the company to elect directors and to ratify the past conduct of the Directors. I believe the members paid their fees. Mr Jongkind would have the minutes.”

- [6] Ms Robinson deposed to being the chairperson of the company and authorised to swear her affidavit on behalf of the company. Whilst that may have been the case, in an informal sense, when she swore her affidavit, it was not the case when the affidavit was filed by leave on 5 November 2007. In any event, no evidence of the kind referred to in paragraph 24 of her affidavit was forthcoming.
- [7] After the lunch adjournment on 5 November 2007 Mr Stephens sought and was given leave to read and file an affidavit of Mr Fraser Power. Mr Power exhibited a letter dated 1 November 2007 from Mr Floyd Robinson who wrote that he “was recently appointed by the directors to be the Chairperson of the company” who engaged Mr Power “to take whatever action is necessary to defend the proposed winding up of the company”. Mr Power also exhibited a resolution “of the directors” of the company dated 25 October 2007. The resolution is described as “Resolution of Directors” and is set out in full

“Current directors of the company

Ernest Robert Mailman, Keelan Marie Mailman, Raymond Floyd Fraser, Floyd Gabriel Robinson, Harold John Lake.

The directors acknowledge that Darlene Roberta Robinson, Betty Wyman, Annette Wyman have been adjudicated bankrupt and therefore are not at the date hereof directors of the company.

Purpose of resolution

The company has been served with an Application to wind up the company which was filed in the Supreme Court of Queensland on 25 June 2007, and which was adjourned in the Supreme Court on 23 July 2007. The Australian Government Solicitor has filed an Application to have the Commonwealth of Australia substituted as the Applicant in lieu of the current administrators of the company, which is to be heard in the Supreme Court on 5 November 2007. The directors of the company wish to defend the application to wind up the company.

Legal Advice

The company sought advice from its lawyer, Fraser Power, that he had been advised by Llewellyn Stephens, barrister, that the company had a reasonable submission to put to the Court to resist the winding up of the company, but could not guarantee the success of defending the Application to wind up the company.

He also advised the directors that there was a possibility that if the Application was not successful the Court could award costs against the directors personally, which then could involve them in bankruptcy proceedings, garnishee of their wages or the taking possession of their assets by a warrant of execution.

Motion 1

'In view of the fact that Darlene Robinson is no longer the Chairperson of the Company the directors appoint Floyd Gabriel Robinson as the Chairperson of the company.'

Resolution

I do ~~not~~/agree to vote in favour of the above resolution.

Motion carried/~~lost~~.

Motion 2

'The directors resolve to instruct their solicitor, Fraser Power, to brief Llewellyn Stephens, and/or Darien Spence and/or Neville Hiscox, barristers, or such other counsel as may be agreed, to prepare appropriate documentation to file in the Supreme Court to resist the Application of the Receivers and Managers and/or the Commonwealth of Australia to wind up the company.'

Resolution

I do ~~not~~/agree to vote in favour of the above resolution.

Motion carried/~~lost~~.

Motion 3

'the directors authorise Floyd Robinson to give instructions to the solicitor/s acting in this matter'

Resolution

I do ~~not~~/agree to vote in favour of the above resolution.

Motion carried/~~lost~~."

- [8] On the third page appears the typed names of each of the directors named as the current directors of the company but only Floyd Gabriel Robinson, Ernest Robert Mailman and Raymond Floyd Fraser and have executed the document.
- [9] Each of Mr Robinson, Mr Mailman and Mr Fraser has sworn an affidavit going to the question of costs which were filed on 9 November 2007. Mr Floyd Robinson deposes that he has been a director since 1994, Mr Mailman that he has been a director for about 15 years and Mr Fraser for 10 years. They each depose
- "2. As a director of Bidjara I was encouraged to defend the application by the Receivers and Managers to wind up the company because of legal advice which Bidjara received from Martin Daubney SC, and from a report received from the company's accountant Greg Phillott.

3. At all times I acted in my capacity as a director of the company and not in a personal capacity. I believed, as a director of the company, and in reliance on the legal and accountancy advice that the company received, and also in the interests of the traditional owners in the Bidjara native title area, that I had a duty to instruct the company's solicitor to defend the action to wind up the company."

- [10] Mr Phillott's report deals with his belief as to the solvency of the company and may have operated upon each of the respondents to induce a belief that the company was and is solvent. Mr Daubney's advice concerned the prospects of the company obtaining an interlocutory injunction to restrain the receivers from selling a rural property owned by the company, the auction of which was imminent. It said nothing about the solvency *per se* of the company but was concerned to explore whether a charge over the assets of the company included the particular property to raise a serious question. He mentioned the need for leave to bring the proceedings pursuant to s 237 of the *Corporations Act* and the high likelihood that a court, if it granted the injunction in addition to the leave, would require the individual directors who sought to proceed on behalf of the company to put up security. As Ms Anderson submitted, the issue of costs was always something which those who were giving instructions to Mr Power from that time would have been aware. Furthermore, the respondents were alert to the issue in their resolution at the end of October to oppose the winding up and substitution applications.
- [11] Neither of those advices addressed the issue of the standing of Messrs Robinson, Mailman and Fraser to describe themselves as directors of the company or, more generally, whether there were any financial members. In the time available for making submissions about costs the respondents have not sought leave to adduce any evidence about their standing which paragraph 24 of Ms Robinson's affidavit inferred had been attended to some years ago.
- [12] With knowledge of the risks of an adverse costs order, the respondents nonetheless proceeded to oppose the substitution. They are, legally, in no better position than any other person who seeks to oppose an application without having a recognised interest in doing so. They are, accordingly, liable for the costs incurred as a consequence of their opposition to the Commonwealth's application. The Commonwealth needed to make the application for substitution. Accordingly, the costs which must be paid should be confined to the extra costs incurred by the Commonwealth in responding to the opposition to the substitution order.