

SUPREME COURT OF QUEENSLAND

CITATION: *Morris v Commissioner of Taxation & Anor* [2007] QSC 353

PARTIES: **PETER JOHN MORRIS as liquidator of CENTRAL FITNESS PTY LTD (in liquidation) ACN 093 660 989**
(Plaintiff)
v
COMMISSIONER OF TAXATION
(Defendant)
DREW ADRIAN KELLAHAN
(Third Party)

FILE NO/S: 354 of 2006

DIVISION: Trial

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court

DELIVERED ON: 7 September 2007

DELIVERED AT: Cairns

HEARING DATE: 3 September 2007

JUDGE: Jones J

ORDER: **1. The defendant pay to the plaintiff the sum of \$50,305.59 for claim together with \$4,353.85 for interest thereon.**
2. The defendant pay to the plaintiff the plaintiff's costs of and incidental to claim to be assessed on the standard basis.
3. The third party pay to the defendant the sum of \$54,659.44.
4. The third party pay to the defendant the defendant's costs of and incidental to this action to be assessed on the standard basis, such costs to include any costs assessed as payable by the defendant to the plaintiff herein.

CATCHWORDS: CORPORATIONS – Winding up – Winding up in insolvency – Insolvent transactions – Effect of winding up on other transactions – Preferences – Effect of avoidance – whether payments of a statutory demand pursuant to s459E of the Corporations Act to the Australian Taxation Office whilst insolvent were unfair preferential payments

COUNSEL: A Philp SC (plaintiff)
M Jonsson (defendant)

SOLICITORS: T McGrath

- [1] The plaintiff is a liquidator of Cairns Fitness Pty Ltd (in liquidation) (hereinafter “the company”). He was so appointed by order of this Court on 25 May 2006. The company was incorporated on 6 July 2000 and carried on the business of fitness centres at Cairns in the State of Queensland.
- [2] The defendant is the delegate of the Commonwealth Government pursuant to the *Taxation and Administration Act 1953* and was responsible for the collection of payments owed to the Commonwealth by the company pursuant to the various taxation laws of the Commonwealth.
- [3] The third party was at all material times a director of the company. When the matter was called on for hearing, the third party, through his solicitor’s agent, consented to judgment being made against him in the event that the defendant was found liable to the plaintiff.
- [4] On about 26 October 2005 the defendant served on the company a Statutory Demand claiming payment in the sum of \$376,260.41 being the arrears for Goods and Services Tax and Pay as You Go Withholding Tax which the company agreed was due and owing by it. Thereafter the company agreed with the defendant to make periodic payments in reduction of its indebtedness.
- [5] Between 2 November 2005 and 11 May 2006 the company made payments to the defendant totalling \$82,800 on the dates and in the amounts set out in Annexure A to the Amended Statement of Claim. Since the filing of the Statement of Claim consent judgment has been entered in respect of certain of those payments totalling \$32,494.41 relating to Goods and Services Tax. These proceedings are concerned with the remaining payments as detailed in the Amended Statement of Claim totalling \$50,305.59.
- [6] By its defence, the defendant has admitted receipt of these payments on the stated dates. The defendant does not raise any direct defence to the claim but rather puts the liquidator to proof of it. In the circumstances and having regard to the admissions made, I am required to be satisfied that-
- (a) Each payment constituted an unfair preference within the meaning of s 588FA of the *Corporations Act 2001*; and
 - (b) At the time of each payment the company was insolvent as defined in s 588FC of the *Corporations Act*.
- [7] The statutory provisions relevantly provide:-
- “**588FA(1)** A transaction is an unfair preference given by a company to a creditor of the company if, and only if:
- (a) The company and the creditor are parties to the transaction (even if someone else is also a party); and
 - (b) The transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;
- Even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

588FC A transaction of a company is an insolvent transaction of the company of, and only if, it is an unfair preference given by the company, or an uncommercial transaction of the company and:

- (a) Any of the following happens at a time when the company is insolvent;
 - (i) The transaction is entered into; or
 - (ii) An act is done, or an omission is made, for the purpose of giving effect to the transaction; or
- (b) The company becomes insolvent because of, or because of matters including:
 - (i) Entering into the transaction; or
 - (ii) A person doing an act, or making an omission, for the purpose of giving effect to the transaction.”

- [8] It is an agreed fact that the relation-back day for the purpose of s 588FE(2) is 2 May 2006 when application was made for the winding up of the company.
- [9] The subject payments were made between 2 November 2005 and 11 May 2006 and thus fall within the relation back period. For the whole of this period I am satisfied that the company was insolvent. The affidavit of Todd William Kelly filed on 7 May 2007 exhibits the Insolvency Report dated 17 January 2007. That report discloses that the company was insolvent as at 30 June 2004; that the company had total creditors in excess of \$1.8 million within excess of \$500,000 in debts due and payable with readily available assets of only \$10,856. At no stage after 30 June 2004 could it be said that the company returned to solvency. Even the level of unpaid taxes due to the defendant rose from \$160,000 in June 2004 to \$440,000 as at the date of winding up. I am therefore satisfied on the balance of probabilities that, at all material times, the company was insolvent.
- [10] The question then is whether each payment constituted an unfair preference. This raises the inquiry of whether the defendant received from the company more than it would receive in respect of the debt if the defendant were to prove for the debt in a winding up. On this issue Mr Kelly materially informs the court that during the relevant period of the payments if the company was wound up either as a going concern or upon a forced sale of assets the unsecured creditors would “receive, at best, no more than a few cents in the dollar, if any return at all”¹. It follows then that I am satisfied that the test enunciated in s 588FC has been satisfied and that accordingly each of the transactions referred to in Annexure A to the Amended Statement of Claim was avoidable and the plaintiff therefore is entitled to have judgment for the payment of the balance on the amount claimed which is yet to be acknowledged by the defendant.

Third party proceedings

- [11] As mentioned in para [3] hereof the third party has agreed to submit to judgment against him in the event that judgment is entered against the defendant in favour of the plaintiff. No further comment is required on this part of the proceeding.

Orders

- [12] I make the following orders –

¹ Ex TWK1 to affidavit of Mr Kelly sworn on 3 May 2007

1. The defendant pay to the plaintiff the sum of \$50,305.59 for claim together with \$4,353.85 for interest thereon.
2. The defendant pay to the plaintiff the plaintiff's costs of and incidental to claim to be assessed on the standard basis.
3. The third party pay to the defendant the sum of \$54,659.44.
4. The third party pay to the defendant the defendant's costs of and incidental to this action to be assessed on the standard basis, such costs to include any costs assessed as payable by the defendant to the plaintiff herein.