[2007] QSC 070

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MUIR J

No S1881 of 2007

IN THE MATTER OF PROPERTY DEVELOPERS FUND LIMITED (ADMINISTRATORS APPOINTED) (ACN 109 263 354)

WILLIAM JAMES HARRIS AND JOHN PATRICK CRONIN IN THEIR CAPACITY AS THE JOINT AND SEVERAL ADMINISTRATORS OF PROPERTY DEVELOPERS FUND LIMITED (ADMINISTRATORS APPOINTED) (ACN 109 263 354) Applicants

BRISBANE

..DATE 13/03/2007

JUDGMENT

HIS HONOUR: Because of the limited time available, these reasons will be necessarily short. This is an application by administrators for directions. The facts are admirably set out in an outline of submission by the applicant's counsel, Mr McKenna SC, and Mr Hay, and in a joint opinion by them which is in evidence. I adopt the facts there stated and do not propose to repeat them to any great extent.

The applicants also seek an order that the period specified by section 439(A5) of the Corporations Act 2001 for the convening of a meeting of creditors of the subject company be extended and a further direction pursuant to section 447A(1). The orders sought are justified by the matters set out in paragraphs 32 and 33 of the outline of submissions. It is of relevance also that the orders sought are not opposed by the committee of creditors.

I now turn to the other matters for determination. The company's financial circumstances relevantly are that:

(a) The general creditors will be paid in full regardless of the form of the administration;

(b) There will be a shortfall in return on capital to investors; and

(c) The company is effectively unable to further conduct its business.

If the only creditors of the company are its general body of creditors, there is little point in continuing the administration. That makes it important to establish whether the company's preference shareholders are creditors in the winding up. The term "contingent creditor" was defined by Pennyquick in Re William Procley Limited (1962) 2 All ER 111 in these terms:

> "The expression 'contingent creditor' is not defined in the Companies Act 1948 but must, I think, denote a person towards whom, under an existing obligation, the company may or will become subject to a personal liability on the happening of some future events or at some future date."

Palmer's Company Precedents 17th edition, page 41 states:

> "A contingent creditor is a person who has a claim which may ripen into a debt or contingency."

I refer also in this regard to ex parte Ruffle in re Dummelow, (1873) 8 APP 997 per Mellish LJ at 1001. The articles provide for a cumulative preference dividend for the subject preference shares. That expression or combination of words has historically meant a dividend payable out of the profits generally in priority to the subordinate class or classes of shares so that if the profits of one year are not sufficient to pay the dividend for that year, the deficiency accumulates as against subsequent profits that has to be paid before any

dividend can be paid on the subordinate class or classes, see Palmer's Company Precedents, Volume I, 7th Edition, page 775.

The wording of the articles conforms with that description. As is pointed out in the joint opinion under the Corporations Law and the company's constitution, prior to winding up, dividends were only payable out of profits. Moreover, entitlement to dividends arose only upon declaration of a dividend by directors.

I understand that at no time were there profits from which dividends could have been declared.

Is that correct; Mr McKenna?

MR MCKENNA: That's my understanding of the position, your Honour.

HIS HONOUR: Thank you. It is difficult then in these circumstances to categorise the preference shareholders as creditors contingent or otherwise at the point of winding up. Upon winding up, resort must be had once again to the constitution to determine the rights of the preference shareholders. Consistently with the nature of a cumulative preference share generally at law the right on winding up as appears from clause 24.8.13:

> "Is the right in priority to any payment to the holders of any other class of shares to the residual surplus

> capital of the company up to the amount paid on the issue of the shares and all dividends in arrears but shall not participate in any further or any distribution of profits or assets of the company."

The right, it will be seen, is to payment out of "residual surplus capital". That is a defined term which does not suggest the shareholders have a right other than the conventional one to share in capital after the general body of creditors have been paid out. The better view is that such entitlements and an entitlement to redemption do not give rise to a debtor/creditor relationship.

I agree with the views expressed in the joint opinion in that regard. Having regard to the views thus expressed, it is appropriate in my view to make the orders and directions in the draft document provided to me. The applicants are seeking directions with a view to the company being wound up as promptly and efficiently as possible. In that regard, they are co-operating with the Australian Securities and Investment Commission.

The direction provides for the giving of a notice to creditors and shareholders with a view to acquainting them fully with the applicants' proposals so that such persons can make their views known and take such action as they may be advised.

I order in terms of the draft initialled by me.

MR MCKENNA: Thank you, your Honour.

HIS HONOUR: Is there anything arising out of that, Mr McKenna?

MR MCKENNA: Your Honour, I wonder whether it's prudent in the advice to mention that these are the nature of directions to us and not intended to be binding on anyone who hasn't been heard before your Honour.

HIS HONOUR: Yes. Yes, it - it undoubtedly would be and the - let me see the - well they're substantially in accordance with - would accommodate that.

MR MCKENNA: Yes, thank you.
