SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No 7272 of 2008

BRETT SOUTHERN	Applicant
and	
SOUTHERN BN PTY LTD (ACN 119 803 422)	Applicant
and	
HOTEL PROPERTIES LTD	Applicant
and	
HEARTWOOD ARCHITECTURAL TIMBER & JOINERY PTY LTD (ACN 125 503 504)	Respondent
and	
BCA CODE CONSULTANTS PTY LTD (ACN 072 884 845)	Respondent
and	
DUNCAN SCOTT MAIR	Respondent

BRISBANE

..DATE 28/11/2008

ORDER

HER HONOUR: On 24 November 2008 administrators were appointed to the company Southern BN Pty Ltd. They were appointed under section 436C of The Corporations Act which provides:

"Chargee may appoint administrator.
(1) A person who is entitled to enforce a charge on the whole, or substantially the whole, of a company's property may by writing appoint an administrator of the company if the charge has become, and is still, enforceable."

Subsection (2) is not relevant for present purposes.

The application before me is pursuant to section 447A, for an order terminating the administration. 447A(2) provides, as an example of the orders which the Court may make about an administration, that the Court may order the administration should end: "(a) because the company is solvent; or (b) because provisions of this Part are being abused; or (c) for some other reason." If any of those is established, the Court then has a discretion whether to order that the administration end.

The matter has been brought before the Court as a matter of urgency. It first came on late on Wednesday. It came on again yesterday, Thursday, late, and it has been before the Court this afternoon for the last hour and a half approximately.

The company concerned conducts a joinery business on the Sunshine Coast. On 3 June 2008 the company entered into an agreement to purchase that business from Heartwood Architectural Timber & Joinery Pty Ltd, which is one of the respondents to this application. The consideration for the sale was the transfer of two units in Auckland from Hotel Properties Pty Ltd, a company which the applicant and those behind it are associated, to BCA Code Consultants Pty Ltd, a company with which Heartwood Architectural Timber & Joinery Pty Ltd and Mr Mair are associated. The business contract was subject to and conditional upon a contract for the sale and purchase of the two units in Auckland being entered into within seven days from the execution of the business contract and the land contract settling contemporaneously with the settlement of the business contract. Matters proceeded, and settlement of each contract took place on 24 June 2008.

It seems that shortly thereafter Mr Brett Southern, who was a shareholder of Southern BN Pty Ltd and a director of Hotel Properties Pty Ltd, asserted that there had been various misrepresentations on the part of the vendor company, which had induced the purchase. On 30 July 2008 the company Southern BN Pty Ltd obtained ex parte an interim freezing order preventing dealing in the New Zealand units. That freezing order was back before the Court on a number of occasions. Ultimately, it was discharged by Applegarth J on 7 November 2008. One of the reasons for the discharge was that the company, Southern BN Pty Ltd, had not provided a bond in the sum of $150,000 as required by the order. There was also

a question of three undertakings normally given in order to obtain such a freezing order having been deleted by the company.

Despite there having been directions given by the Court for the filing and serving of a statement of claim in that proceeding and for the further conduct of the proceeding, nothing was done by the company to progress the proceeding. It is true that a draft statement of claim has been exhibited to one of the affidavits presently before me, but that has never been filed.

The application which is before me has, as I have said, been brought as a matter of urgency. It is simply not possible for me to form a concluded view as to the solvency or insolvency of the company in the circumstances. Of course, it is for the applicant to persuade me that the administration should be brought to an end, and there are really two grounds that the applicant relies on: one, as I understand it, that this is not a clear case of insolvency and, in that regard, it is said that the company has recently turned the corner in terms of its business; that no one has sworn that it is insolvent; there is no objective evidence of insolvency; and that Mr Southern has sworn that it is solvent. The other ground relied on is that the appointment of the administrators was an abuse of the provisions of the relevant part of The Corporations Act. I shall deal first with the second point.

The argument seems to be that the effect of the appointment of the administrators is to stymie the litigation brought by the company against those from whom the business was acquired. It is clear that under the Corporations Act, section 440D, the proceeding is not automatically stayed. That provision relates only to proceedings against the company. It does not relate to proceedings brought by the company. It is a matter for the administrators whether they continue with the litigation.

Perhaps of even greater import in the present case is the history of the litigation to date, which I have briefly outlined. I am not persuaded on the material presently before me that the upshot of the appointment of the administrators is that that litigation has been stymied. It seems to me that the litigation was not being pursued as required by directions of the Court or otherwise with any diligence or promptitude before the appointment of the administrators. It seems, further, that at least one of the reasons for that was the financial position of the company. It could not come up with the bond required to maintain the freezing order.

That leads me to the question of the company's financial status. The administrators have done their best to provide a balance sheet as at 27 November 2008, as well as a profit and loss statement from July to November 2008. The balance sheet shows negative total cash on hand of in excess of $19,000. In arriving at that sum they have taken account of the positive balance in the bank account which, on their figures, was

approximately $45,500. (I note that a bank statement has been put before me showing it yesterday at $48,800 approximately: there is little difference). But there are other accounts in which there are negative balances and, as I say, the net cash on hand is a negative figure. There are trade debtors shown of in excess of $200,000. As for current liabilities, there are trade creditors shown of approximately $93,500. Even disregarding certain customer deposits, the current liabilities are approximately $144,000.

There is some evidence from Mr and Mrs Southern suggesting that the financial position of the company is not as serious as I have just described. As I have said, I cannot form a final view on the question of insolvency, but I certainly am not confident that the company is solvent.

This is a company which has ten employees. It has some work in progress. The administrators have drawn $25,000 against the funds in the bank to meet immediate expenses, including wages. Their attitude is that they are not prepared to give an assurance that the company will continue trading beyond the end of this week, i.e., beyond this afternoon. As I understand it, there are two reasons for that, principally: one is that the moratorium on the payment of rent is for only seven days from the appointment of the administrators; and, the other, that they are exposing themselves to personal liability if they continue to trade. It is a matter for them what decision they ultimately reach with respect to continued trading.

Counsel for the company submitted that if the administration is not brought to an end, real insolvency and winding-up are almost inevitable. As the solicitor for the administrators pointed out, as a matter of law that is certainly not the case. There are various courses which might be taken under section 439C of the Act at the conclusion of the second meeting of creditors: the creditors may resolve that the company executed deed of company arrangement, or that the administration end, or that the company be wound up.

In all of the circumstances, having been asked to determine this matter urgently, I am not satisfied on the material before me or the submissions put before me that this is a case where the administration should end. The application is dismissed.

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HER HONOUR: Both Mr Jiear, on behalf of the administrators, and Mr Mylne on behalf of the other respondents, have sought costs against the applicants of and incidental to the application, including costs that I reserved over the last couple of days; they have both sought those costs on the indemnity basis.

There will be an order that the applicants pay the respondents' costs of and incidental to the application, including reserved costs.

As to the basis upon which those costs are to be assessed, indemnity costs are of course exceptional. The most common circumstances in which they are ordered are where there has been some misconduct in the conduct of a litigation and circumstances where the proceeding was always bound to fail and that was patently obvious. While I am conscious of the position of creditors, I am not satisfied that this is a case warranting indemnity costs. Accordingly, I order that the costs be assessed on the standard basis.

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HER HONOUR: The respondent administrators' costs on the standard basis will be fixed in the sum of $10,000.

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