

SUPREME COURT OF QUEENSLAND

CITATION: *Re Dalewon P/L (in liq)* [2009] QSC 370

PARTIES: **BRISCONNECTIONS MANAGEMENT COMPANY LIMITED (ACN 128 614 291) as responsible entity for BRISCONNECTIONS HOLDING TRUST (ARSN 131 125 025) and BRISCONNECTIONS INVESTMENT TRUST (ARSN 131 124 813)**
(applicant)

v

DALEWON PTY LTD (ACN 069 181 755) (IN LIQ)
(respondent)

LINDA SAUNDERS and TREVOR PAGANONI
(cross applicants)

FILE NO/S: BS 7295 of 2009

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 November 2009

DELIVERED AT: Brisbane

HEARING DATE: 13 November 2009

JUDGE: McMurdo J

ORDER: **Upon Linda Saunders and Trevor Paganoni undertaking that they will not deal with any assets of Dalewon Pty Ltd (in liq) (“the company”) held in its own right until the hearing and determination of the cross-application, it is ordered that Linda Saunders and Trevor Paganoni provide to the liquidators by 4.00 pm 25 November 2009:**

- 1. all of the books and records of the company; and**
- 2. a report as to the affairs of the company as required by s 475 of the *Corporations Act 2001* (Cth).**

CATCHWORDS: EQUITY – GENERAL PRINCIPLES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – MISCELLANEOUS OTHER POWERS, DUTIES AND LIABILITIES – where the company had been replaced as trustee of a trust – where the company was wound up – where counsel for the officers of the company undertook not to deal with any assets held by the company in its own right –

whether the officers should be ordered to deliver up to the liquidators books, records, money and property of the company

CORPORATIONS – WINDING UP – LIQUIDATORS – STATEMENTS OF COMPANY’S AFFAIRS – where the officers had provided a report purporting to be a list of assets and liabilities – whether the officers should provide a report including all assets and all liabilities whether incurred as trustee or otherwise

Corporations Act 2001 (Cth), s 475

Re Indopal Pty Ltd (1987) 12 ACLR 54, applied

Southern Wine Corp (in liq) v Frankland River Olive Co Ltd (2005) 31 WAR 162, cited

COUNSEL: G Handran for the applicant
C D Coulsen for the respondent
M Steele for the cross applicants

SOLICITORS: Results Legal for the applicant
McInnes Wilson for the respondent
Brightline Lawyers as town agents for Foster Nicholson for the cross applicants

- [1] Dalewon Pty Ltd (“the company”) was wound up by an order of this court on 29 July 2009. This is an application by the liquidators, Mr Greig and Mr Hughes, for orders against Ms Saunders and Mr Paganoni, respectively the company’s director and secretary. I shall refer to them as the respondents.
- [2] The liquidators seek orders for the delivery up of the books and records of the company and of any of its money and property which is in the hands of the respondents. They seek an order for the provision of a report as to affairs as required by s 475 of the *Corporations Act 2001 (Cth)*. And they seek an interlocutory injunction restraining the respondents from dealing with any property of the company.
- [3] The company was a trustee of two trusts: the Topmoor Investing Trust and the Topmoor Superannuation Trust. It was apparently in the latter capacity that it subscribed for partly paid units in the BrisConnections project. Upon a call being made by BrisConnections, the company defaulted. BrisConnections served a statutory demand which was not satisfied or set aside and the company was wound up. By then however, the respondents claim that the company had been replaced as the trustee of the Superannuation Trust (on 22 June 2009) and as trustee of the Investing Trust (on 1 July 2009).
- [4] On 13 August 2009 the respondents provided a document purporting to be a report as to affairs. But it related only to the affairs of the company as trustee of the Superannuation Trust. On 12 November 2009, the respondents, through their solicitors, provided what purported to be another report as to affairs. It was the previous report to which was attached what was said to be “the details relating to the Topmoor Investing Trust assets”. The covering letter advised that this had been

done “to set out assets of both trusts” but that the respondents did not concede that the assets of the Investing Trust were “assets of Dalewon available to Dalewon in its winding up”. It appears that the respondents have taken the view that the liability to BrisConnections was that of the Superannuation Trust, as in some way distinct from the liability of the company, so that the company has no such liability now that it is no longer a trustee of that trust and the liquidators are not entitled to the company’s property.

- [5] As is submitted for the liquidators, the correct position is that the company is liable for any debt incurred albeit as a trustee. It was and is entitled to be indemnified from the assets of the relevant trust and that right is secured by an equitable lien extending to all assets of that trust, save those which are specifically excluded by the trust instrument. And that right of indemnity is not lost by the retirement or removal of the trustee.¹
- [6] However, if the assets are no longer held by the company, the respondents should not be ordered to deliver them up. To the extent that they would have some control over them, it would be in their capacity as officers of the new trustee. That is not to deny them recourse to those assets which the liquidators would seek in order to enforce the company’s right of indemnity. Rather it goes to the question of what order, if any, should now be made for the delivery up of assets.
- [7] The company incurred its debt to BrisConnections as trustee of the Superannuation Trust. However, it had also incurred substantial liabilities as trustee of the Investment Trust, at least according to what was provided on 12 November. In the same way it is entitled to an indemnity against the assets of that trust for those liabilities.
- [8] I go then to the first application, which is for the provision of the books and records of the company. The respondents say that they have provided them already. On 12 November, Mr Paganoni sent to the liquidators’ solicitors documents in relation to the Superannuation Trust. They appear to have sent no books or records relating to the Investment Trust. There is no sworn evidence to the effect that there were no books and records of the company other than those which were sent last week. The company has been replaced as trustee of each of these trusts yet the respondents have been able to provide some books and records for the Superannuation Trust but have provided nothing for the other trust. It appears that this is in consequence of the misconception that the affairs of the other trust are irrelevant to the company’s winding up. In the circumstances there will be an order for the provision of the books and records of the company by 4.00 pm on 25 November 2009.
- [9] The next application is for the delivery up of all money and property of the company which is in the hands of the respondents. The respondents say that the company had no business of its own but only as a trustee. It has passed the trust assets to the respective new trustees. Its only assets are its rights of indemnity. Accordingly, it is said that there is nothing which can be “delivered up” to the liquidators.
- [10] The liquidators’ response is to say that there are certain assets which are still held in the name of the company. There is real property in Victoria of which the company remains the registered owner. However, that is sufficiently protected by a caveat

¹ *Southern Wine Corp (in liq) v Frankland River Olive Co Ltd* (2005) 31 WAR 162.

lodged by the liquidators. It is said that there are shares held by the company. In an affidavit sworn on 30 October 2009, Mr Hughes refers to those shares and says that he has taken steps to freeze access to them. Further, on 5 November 2009 the respondents undertook to the court that they will not deal with any of the assets of the company until the hearing and determination of the cross-application which they have filed to terminate the winding up. Counsel appearing for the respondents has confirmed that to avoid doubt, that undertaking will be extended to any assets held by the company in its own right.

[11] In these circumstances I am not persuaded to make the order for the delivery up of property which is sought. If that order were made there would likely to be a controversy as to whether certain property is “held” by the respondents, given that they would appear to control each of the new trustees. The provision of all books and records of the company, in whatever capacity, will enable the liquidators to more specifically identify the assets to be protected. In the meantime, the liquidators have the protection of the undertakings given on 5 November.

[12] The respondents are yet to provide a proper report as to affairs. The report must identify and value trust assets and trust liabilities, because as McLelland J held in *Re Indopal Pty Ltd*,² such assets and liabilities

“are very much part of the ‘affairs’ of an insolvent company trustee, whether or not the company has ceased to hold the office of trustee under the terms of the trust.”

The report must set out the particulars of the assets and liabilities at the relevant date, which in this case is 29 July 2009. Assuming that the company was no longer a trustee of either trust by then, the further question is whether it still held trust assets. Obviously it did to some extent: for example, the real property to which I have referred. And it would have to identify all of its liabilities, whether incurred as a trustee or otherwise. Further, its assets would include its rights of indemnification.

[13] Thus far no such report has been provided. What was provided on 12 November is not sufficient. It was not verified by the respondents. Instead there was a schedule purporting to be a list of assets and liabilities of the Investment Trust which was simply annexed to an earlier document verified in August. It will be ordered that the respondents provide to the liquidators a report as to the affairs of the company as required by s 475 of the *Corporations Act 2001 (Cth)* by 4.00 pm on 25 November 2009.

[14] The liquidators seek orders restraining the respondents from dealing with any property, assets or undertakings of the company. But the liquidators have the undertakings given on 5 November, with the benefit of the further undertaking in relation to the assets (if any) of the company in its own capacity. Accordingly, a requirement for an interlocutory injunction at present is not demonstrated.

[15] The application by the liquidators filed on 30 October also seeks final relief, for which there will have to be a hearing and directions to that end. The liquidators have sought their costs of the application the subject of this judgment. I will hear the parties as to those costs having regard to these reasons.

² (1987) 12 ACLR 54 at 58.