

SUPREME COURT OF QUEENSLAND

CITATION: *Re Reef Cove Resort Limited* [2009] QSC 378

PARTIES: **HOLDING REDLICH LAWYERS** ABN 15 364 527 724
(applicant)
v
REEF COVE RESORT LIMITED ACN 098 880 329
(respondent)

FILE NO/S: BS 5969 of 2009

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 24 November 2009

DELIVERED AT: Brisbane

HEARING DATE: 11 November 2009

JUDGE: White J

ORDER: **1. Reef Cove Resort Limited ACN 098 880 329 be wound up by this Court under the provisions of the *Corporations Act 2001* (Cth).**
2. Jonathan McLeod be appointed as liquidator to conduct the winding up.
3. The costs of the applicant of and incidental to this application (including issuing and serving the Creditor's Demand for Payment of Debt) be costs in the winding up.

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – OTHER CASES – where the applicant applied to wind up the respondent company on the ground of insolvency – where the respondent is a foreign company registered under Part 5B.2 Division 2 of the *Corporations Act 2001* (Cth) – where the respondent purported to appoint administrators and purported to execute a Deed of Company Arrangement – whether the respondent is a company to which the provisions of the *Corporations Act* relating to external administration apply – whether the respondent ought to be wound up

Corporations Act 2001 (Cth), s 9, s9(a), s 17(2), s 117(1), s 118, s 119, s 119A, s 436A, s 583, s 601CE(j)

Peninsular Group Ltd v Kintsu Co Ltd (1998) 44 NSWLR 534, applied

COUNSEL: G D Beacham for the applicant
No appearance for the respondent

SOLICITORS: Holding Redlich Lawyers for the applicant
No appearance for the respondent

- [1] The applicant, Holding Redlich Lawyers, applied to wind up the respondent company, Reef Cove Resort Limited (“Reef”), by application dated 4 June 2009 on the ground of insolvency pursuant to s 583 of the *Corporations Act 2001* (Cth) (“the *Corporations Act*”).
- [2] On 11 November 2009 I made an order winding up Reef and Jonathan McLeod was appointed the liquidator to conduct the winding up, with reasons to be provided subsequently. Those reasons I now provide.
- [3] The foundation for the application to wind up Reef is a creditor’s demand dated 8 April 2009 for \$207,858.61 for the provision of legal services which remained unpaid to the date of the winding up.
- [4] Reef is a foreign company pursuant to Part 5.7 of the *Corporations Act*, registered in New Zealand.¹ It is registered in Australia under Part 5B.2 Division 2 of the *Corporations Act*, and has been allocated ARBN 098 880 329.²
- [5] Reef did not appear on the hearing of the application although it was served and has appeared after that service on two previous occasions when the application to wind up was adjourned by consent. Correspondence exhibited to the several affidavits demonstrates that Reef was well aware of this application.
- [6] Reef purported to appoint Messrs Andrew Wily and David Hurst as joint administrators on the resolution of its sole director on 30 June 2009 pursuant to s 436A of the *Corporations Act*. On 18 August 2009 Reef purported to execute a Deed of Company Arrangement under the *Corporations Act*.
- [7] In correspondence, Reef maintained that the administrators had been validly appointed pursuant to the *Corporations Act*, a position resisted by Holding Redlich which asserts that Reef is not a company to which the provisions of the *Corporations Act* relating to external administration apply.

The status of Reef

- [8] The primary issue for decision is whether Reef is a Part 5.7 body. By s 9 of the *Corporations Act*, “company”:

“... means a company registered under this Act and:

- (a) in Chapter 2K (other than sections 273A to 273E), includes a registrable body that is registered under Division 1 or 2 of Part 5B.2 of this Act; and
- (b) in sections 273A to 273E, includes a registered body that carries on business outside its place of origin; and

¹ *Corporations Act 2001* (Cth), s 9(a): “foreign company”.

² *Corporations Act 2001* (Cth), s 601CE(j).

- (c) in Parts 5.7B and 5.8 (except sections 595 and 596), includes a Part 5.7 body; and
- (d) in Part 5B.1, includes an unincorporated registrable body.”

It is the expression “registered under this Act” which must be considered. Chapter 2A of the *Corporations Act* concerns registering a company. Section 12 describes what types of companies may be registered under the *Corporations Act*. They are:

- proprietary companies limited by shares or unlimited with share capital; and
 - public companies limited by shares, limited by guarantee, unlimited with share capital, or no liability companies.
- [9] Part 2A.2 describes how a company is registered. Section 117(1) provides that to register a company a person must lodge an application with the Australian Securities and Investments Commission (“ASIC”). Section 117(2) sets out what the application must include. The balance of the subsections in s 117 deal with other machinery requirements for registration. By s 118, if an application is lodged under s 117, ASIC may give the company an ACN number and register the company and issue a company certificate stating, *inter alia*, that the company is registered as a company under the *Corporations Act* and naming the State or Territory within Australia in which the company is taken to be registered.

[10] By s 119 *Corporations Act*:

“A company comes into existence as a body corporate at the beginning of the day on which it is registered ... [and] remains in existence until it is deregistered.”³

Section 119A provides that a company is incorporated “in this jurisdiction”. This is because the States referred powers to the Commonwealth to enact corporations legislation as a federal law of national application while retaining certain State (or Territory) incidents such as stamp duty.⁴ Each company is taken to be registered in a particular State or Territory. In *Peninsular Group Ltd v Kintsu Co Ltd*,⁵ Sheppard AJA, with whom Meagher and Sheller JJA agreed, concluded that “company” as defined in s 9 of the *Corporations Law*⁶ is not a company which is a “foreign company”. Such a “company” must be wound up pursuant to s 583 as a Part 5.7 body.

[11] Part 5.7 of the *Corporations Act* concerns winding up bodies other than companies. Section 582 provides, relevantly:

“(1) This part has effect in addition to, and not in derogation of, sections 601CC and 601CL⁷ and any provisions contained in this Act or any other law with respect to the winding up of bodies, and the liquidator or Court may exercise any powers or do any act in the case of Part 5.7 bodies that

³ *Corporations Act* 2001 (Cth), Chapter 5A.

⁴ Explanatory Memorandum for the *Corporations Bill* 2001 (Cth).
⁵ (1998) 44 NSWLR 534.

⁶ In all material respects the same as the *Corporations Act* 2001(Cth).

⁷ Cessation of business.

might be exercised or done by him, her or it in the winding up of companies. ...”

[12] A “Part 5.7 body”, means, relevantly:

- “(a) a registrable body that is a registrable Australian body and:
 - (i) is registered under Division 1 of Part 5B.2; or
 - (ii) is not registered under that Division but carries on business in this jurisdiction and outside its place of origin; or
- (b) a registrable body that is a foreign company; and
 - (i) is registered under Division 2 of Part 5B.2; or
 - (ii) is not registered under that Division but carries on business in Australia ...”⁸

A “body” means:

“... a body corporate or an unincorporated body and includes, for example, a society or association.”⁹

A “body corporate”:

- “(a) includes a body corporate that is being wound up or has been dissolved; and
- (b) in this Chapter (except section 66A) and section 206E includes an unincorporated registrable body.”¹⁰

It is clear that Reef is a Part 5.7 body.

Winding up a Part 5.7 body

[13] Section 583 sets out the circumstance in which a Part 5.7 body may be wound up. Relevantly, it provides:

“Subject to this Part, a Part 5.7 body may be wound up under this Chapter and this Chapter applies accordingly to a Part 5.7 body with such adaptations as are necessary, including the following adaptations:

- (a) the principal place of business of a Part 5.7 body in this jurisdiction is taken, for all the purposes of the winding up, to be the registered office of the Part 5.7 body;
- ...
- (c) the circumstances in which a Part 5.7 body may be wound up are as follows:
 - (i) if the Part 5.7 body is unable to pay its debts ...

⁸ *Corporations Act 2001 (Cth)*, s 9.

⁹ *Corporations Act 2001 (Cth)*, s 9.

¹⁰ *Corporations Act 2001 (Cth)*, s 9.

- (d) if the Part 5.7 body is a registrable Australian body – the winding up must deal only with the affairs of the body outside its place of origin.”

[14] Section 585 sets out the circumstances in which a Part 5.7 body will be taken unable to pay its debts.¹¹

- “(a) a creditor ... to whom the Part 5.7 body is indebted in a sum exceeding the statutory minimum then due has served on the Part 5.7 body, by leaving at its principal place of business in this jurisdiction ... a demand, signed by or on behalf of the creditor, requiring the body to pay the sum so due and the body has, for 3 weeks after the service of the demand, failed to pay the sum or to secure or compound for it to the satisfaction of the creditor; ...”

The demand for the payment of the amount for legal services owed to Holding Redlich was served on Reef by delivering the demand to Reef’s registered office on 15 April 2009. As deposed to at the hearing on 11 November 2009, Reef has failed to pay the sum due within the time allowed.

[15] The winding up application was filed on 4 June 2009 and served on Reef together with the supporting affidavit and a copy of the Form 519 (which has been lodged); notice of the winding up application has been published; and Mr McLeod has filed his consent to act as liquidator and that consent has been served on Reef.

Ought the winding up order be made?

[16] The material reveals that Messrs Wily and Hurst assert their appointment as administrators under 436A of the *Corporations Act*. They do not purport to be appointed under New Zealand law and, in any event, New Zealand searches reveal that Reef is not under external administration. The court has had the assistance of expert evidence about New Zealand law from Mr Tobias Braun, a New Zealand practitioner with corporate insolvency experience in that country.

[17] Only a “company” can have an administrator appointed to it under the *Corporations Act* and Reef is not a “company” in that sense as discussed above. Thus the purported appointment of Messrs Wily and Hirst is of no effect. The provisions of Chapter 5 which apply to a Part 5.7 body are those which relate to the winding up of such bodies and not to their external administration.

The effect of the Deed

[18] Since there has been no valid appointment of an administrator to Reef the proposed Deed is of no effect. It is, therefore, unnecessary to elaborate further on the benefit or otherwise to the creditors as a whole of a proposal that is seeking to refinance a debt in the vicinity of \$45,000,000 when the land registered to Reef in Queensland is estimated to be worth no more than \$3,000,000.

[19] There are no discretionary factors which operated against making the order.

Orders

[20] The following orders were made on 11 November 2009:

¹¹ The provisions of Part 5.4 relating to winding up in insolvency do not apply to a Part 5.7 body: *Peninsular Group Ltd v Kintsu Co Ltd* (1998) 44 NSWLR 534 at 537.

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