

SUPREME COURT OF QUEENSLAND

CITATION: *Re: Ascot Community Sports Club Incorporated (in liquidation)* [2014] QSC 258

PARTIES: **HOMMA PTY LTD (ACN 151 242 330)**
(applicant)
v
ASCOT COMMUNITY SPORTS CLUB INCORPORATED (IN LIQUIDATION)
(first respondent)
and
TERRY JOHN ROSE AND ANNE MEAGHER AS JOINT AND SEVERAL LIQUIDATORS OF ASCOT COMMUNITY SPORTS CLUB INCORPORATED (IN LIQUIDATION)
(second respondents)

FILE NO/S: BS 4535/2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 21 October 2014

DELIVERED AT: Brisbane

HEARING DATE: 28 July 2014

JUDGE: Alan Wilson J

ORDERS:

- 1. Terry John Rose and Anne Meagher be removed as liquidators of Ascot Community Sports Club Incorporated (in liquidation);**
- 2. Blair Pleash be appointed as liquidator;**
- 3. The applicant's application filed 10 June 2014 be dismissed.**

CATCHWORDS: CORPORATIONS – WINDING UP – LIQUIDATORS – REMOVAL – IN VOLUNTARY WINDING UP – where the first respondent was voluntarily wound up, and the second respondents were appointed as liquidators – where the applicant, which claims to be a creditor, applied for their removal as liquidators and for their replacement – where after that application was brought another creditor challenged the creditor status of the applicant – where the applicant seeks to review the adjudication of its proof of debt by the present liquidators if the court finds that it does not have standing to

bring the application for the removal of the second respondents as liquidators of the first respondent – whether the applicant has standing to bring the application for the liquidators’ removal, and, if so, whether the second respondents should be removed as liquidators and replaced by different liquidators

Associations Incorporation Act 1981 (Qld), s 91
Corporations Act 2001 (Cth), s 503, s 533, Pt 5.5, Pt 5.6
Corporations Regulations 2001 (Cth), reg 5.6.54(1)(b)(ii)

Re Allebart Pty Ltd (in liq) [1971] 1 NSWLR 24, cited
City & Suburban Pty Ltd v Smith (1998) 28 ACSR 328, cited
Re GK Pty Ltd (in liq); Ex parte Deputy Commissioner of Taxation (1983) 7 ACLR 633, cited
Haulotte Australia Pty Ltd v All Area Rentals Pty Ltd (2012) 90 ACSR 177, cited

COUNSEL: C D Coulsen, of Counsel, for the applicant
S Martin, Solicitor, for the first and second respondents
J D Andrews, Solicitor, for Nottingham Properties Pty Ltd

SOLICITORS: Hallett Legal for the applicant
JHK Legal for the first and second respondents
Lynch Andrews for Nottingham Properties Pty Ltd

- [1] The Ascot Community Sports Club Inc (which had previously been known, for many years, as the Hendra Nundah Bowls Club) was voluntarily wound up in August 2013, and Mr Rose and Ms Meagher were appointed as liquidators. Homma Pty Ltd, which claims to be a creditor, applied on 14 May 2014 for an order for their removal, and replacement by different liquidators.
- [2] After that application was brought another creditor, Nottingham Properties Pty Ltd, challenged Homma’s claims to be a lawful creditor and, at the hearing of this matter, Homma also sought to review the adjudication of its proof of debt by the present liquidators.

Homma’s standing to bring this application

- [3] Homma alleges that, pursuant to an agreement with the Club, it provided management services in the period June-December 2011 but that on 12 December 2011 the Club unlawfully terminated that agreement and Homma suffered losses. Homma made a written demand upon the Club for \$47,428.98. The demand was not met.
- [4] Then, in March 2012, Homma commenced proceedings in the District Court claiming damages for breach of contract, comprised of various sums for moneys it claimed to have spent under the agreement on capital improvements and chattels; for the return of its property and money which had been, it alleged, unlawfully retained by the Club; and, for loss of profits in the sum of \$740,318. The Club filed a defence and counterclaim in April 2012, and Homma filed a reply in answer in June of that year.

- [5] After the Club went into voluntary liquidation Homma lodged a proof of debt in respect of these claims but it was rejected by the liquidators on 27 March 2014. The Notice of Rejection relied upon the fact that the proceedings in the District Court remained unadjudicated and, accordingly, the liquidators ‘... *do not believe it appropriate to admit your claim at this time*’. The Notice went on to inform Homma that if it was dissatisfied with that determination, it could appeal within 14 days. On the same date the liquidators sent a letter to Homma advising that it held no objection to Homma seeking leave to proceed with its District Court action, notwithstanding the liquidation.
- [6] Less than a week later, however, the liquidators wrote to Homma on 2 April 2014, saying:
- ‘We acknowledge that you may have a contingent claim against the club, however the quantum of that claim is still to be determined and agreed upon. As such, we are prepared to admit you for a claim against the club at this point in time for \$1.00’.* (emphasis added)
- [7] The Club was, at the time of its voluntary winding up, an incorporated association under the *Associations Incorporation Act 1981* (Qld). Under s 91 of that Act, the process of voluntary winding up is to be conducted with reference to the *Corporations Act 2001* (Cth) and in particular, Parts 5.5 and 5.6 of that Act. In Part 5.6, s 553 declares that the debts or claims which are provable in a winding up will include claims which are present or future, certain or contingent, ascertained, or sounding only in damages.
- [8] Homma’s claims as outlined in its District Court proceedings may be categorised as in some respects certain and, in others, contingent and/or sounding only in damages. Regardless, the present liquidators’ letter of 2 April 2014 cannot be construed other than as an acceptance of Homma’s proof of debt, at least to the extent of \$1.00.
- [9] The solicitors for the present liquidators, and for Nottingham, had pointed out in submissions that in light of the liquidator’s initial rejection on 27 March 2014, Homma should have appealed that decision under reg 5.6.54(1)(b)(ii) of the *Corporations Regulations 2001* (Cth); and, sensibly, should also have applied for leave to continue with the District Court action. Homma has done neither but the liquidators’ acceptance of its proof, albeit only for one dollar, obviates the need for it to do more – at least, for the purposes of establishing standing to bring this application – because a creditor has standing.¹
- [10] At the hearing Homma accepted that, if it was found to have standing to apply for removal of the present liquidators, its application for review of the rejection of its proof of debt was superfluous. It is not, in any event, appropriate that the Court should otherwise attempt to adjudicate, now, on the present liquidator’s initial rejection of Homma’s claim; to do so carries the risk of admitting, in full or part, a claim which the present liquidators – for apparently legitimate reasons – rejected.

¹ *Re GK Pty Ltd (in liq); Ex parte Deputy Commissioner of Taxation* (1983) 7 ACLR 633.

Removal and replacement of liquidators

- [11] The present liquidators neither oppose, nor consent to, Homma's application for their removal. The evidence shows that there is very little in the way of funds available to them, and that has limited their ability to effectively proceed towards finalisation of the liquidation. That is not a criticism: as will be seen, they have identified significant matters which should be investigated in the winding up. If they are removed they seek, only, an order that their costs to date be paid.
- [12] The significant matters they have identified as warranting further investigation are, in particular, Homma's claim for over \$800,000, the subject of a District Court action; and, secondly, transactions which occurred before the liquidators were appointed. In June 2013 the Club entered into a contract with Nottingham to sell its real property at Hendra for \$800,000 – a significant undervalue, it is alleged. According to the liquidators' report to creditors of 6 February 2014, they also had concerns about the allegedly uncommercial sale of the Club's gaming machines and licence authorities, and certain payments which may have been unlawfully preferential.
- [13] As their report shows, there are insufficient funds to pursue investigations into those matters or, if shown by those investigations to be warranted, to bring any recovery proceedings.
- [14] Mr Roberts is the sole director of Homma and is prepared to fund liquidators who could, then, undertake investigations into those transactions but proposes, for that purpose, the removal of the present liquidators and their replacement with Mr Stefan Dopking and Ms Joanne Emily Dunn. Precisely why he prefers them over the current liquidators is not disclosed.
- [15] At the hearing, however, Nottingham alleged that because of a perceived conflict of interest between Mr Roberts and the proposed new liquidators, they should not be appointed or substituted for Mr Rose and Ms Meagher. Nottingham pointed to meetings and conversations between Mr Roberts and the proposed new liquidators from which, it was argued, I should draw an inference that they would not have the appropriate degree of independence.
- [16] Before that question is addressed, it is necessary to consider whether the present liquidators should be removed. The court has a wide discretion to do so under s 503 of the *Corporations Act*. The discretion has been expressed in terms of a question: whether removal can be seen to be for the better conduct of the liquidation, or to the general advantage of those interested in the assets of the company. The cases also show that it is not necessary for an applicant to establish anything adverse or detrimental to the current liquidators – e.g., a lack of personal fitness, impropriety or some breach of duty.²
- [17] Homma, and Mr Roberts, make no criticism of Mr Rose and Ms Meagher. Nottingham expresses suspicion about Mr Robert's motives and points to evidence

² *City & Suburban Pty Ltd v Smith* (1998) 28 ACSR 328, at 336; and *Haulotte Australia Pty Ltd v All Area Rentals Pty Ltd (in liq)* (2012) 90 ACSR 177, at 185.

suggesting what it says is an actual, perceived or potential conflict of interest between Mr Roberts, and the proposed new liquidators he has personally selected.

- [18] I was not taken to any authority for the proposition that a creditor claiming in a winding up in which there are insufficient funds to permit the liquidators to pursue actions they think are necessary *must*, if inclined to advance funds for those purposes, continue to fund the liquidators previously appointed and cannot, as it were, pick and choose; but it is settled that liquidators must be, and be seen to be, independent.³
- [19] Evidence of a fairly close involvement between Mr Roberts and the proposed new liquidators does give rise, at least, to a perception of a possible lack of impartiality. The evidence shows more than one meeting between Mr Roberts and persons associated with FTI Consulting, the company with which Mr Dopking and Ms Dunn are associated. There is also correspondence including, in particular, a letter of 24 April 2014 from Mr Rose and Ms Meagher to a person associated with FTI, Mr Bender, from which it might be inferred that an agreement has been reached between the present and the proposed liquidators for, in effect, a transfer of the office. While Nottingham may not, itself, be entirely impartial, the concerns it raises have some obvious substance in light of what seem to have been close dealings between Mr Roberts and the new liquidators' firm, and them personally.
- [20] The appointment of a person apparently unconnected with the Club, the parties, or any of those dealings is, in those circumstances, attractive. Apparently anticipating that view Homma proposed, during the hearing, the appointment of quite a different liquidator – Mr Blair Pleash, of Hall Chadwick. Nothing in the material suggests any earlier involvement on Mr Pleash's part, or contact between him, and any of the actual or potential creditors, which might cast any pall over the question of his independence. His appointment would, it appears, appropriately allay the concerns raised by Nottingham.

Orders

- [21] It will be ordered that:
1. Terry John Rose and Anne Meagher be removed as liquidators of Ascot Community Sports Club Incorporated (in liquidation);
 2. Blair Pleash be appointed as liquidator;
 3. the applicant's application filed 10 June 2014 be dismissed.
- [22] The present (now former) liquidators also seek some orders by way of protection in respect of a sum of about \$70,000 expended, I understand, by them in the course of their work in the liquidation. I will hear further submissions about that and, also, about costs in the matter.

³ *Re Allebart Pty Ltd (in liq)* [1971] 1 NSWLR 24 at 30, per Street J; and, see Andrew Keay, *McPherson's Law of Company Liquidation* (3rd ed, 2001, Sweet & Maxwell) at 209.