Re BRASHS PTY LTD - (1994) 15 ACSR 477

SUPREME COURT OF VICTORIA
Hayne J

8 November, 1 December 1994
-- Melbourne

Deed of arrangement -- Deed of company arrangement -- Dispensation to include in name -- (NSL) Corporations Law ss 447A, 450E.

On 2 May 1994 administrators were appointed to Brash Pty Ltd and other related companies. On 30 June 1994 creditors of each of the related companies resolved that each company should execute a deed of company arrangement and on 5 July 1994 deeds of company arrangement were executed on behalf of the companies. Under the deed four funds were established to pay various classes of creditors. The participating creditors were to be paid by instalments ending in July 1995 which was to be the effective end of the deed. Apart from these payments there was the possibility of further receipts from actions taken against persons allegedly in breach of their duty to the companies. A further term of the deed was that the administrators were to seek orders from the court under s 447A of the Corporations Law that the company was no longer required to have the words ``subject to a deed of companies arrangement'' after its name on every public document and eligible negotiable of the company.

The administrators duly sought orders from the court in the terms of the deed and argued that it was necessary for the continuation of the company as its suppliers were creating difficulties as a result of the inclusion of that phrase after the company name. The Australian Securities Commission (ASC) appeared to oppose the application and argued that the only kind of orders which might be made under s 447A were ones which filled in what would otherwise be a gap in the legislative scheme or added to the provisions of the part. In the alternative, the ASC argued that the court should not exercise its discretion to grant the orders sought because the primary purpose of s 450E was to ensure that those who now dealt with the company which was under a deed of company arrangement were put on notice of the consequence of that fact and in particular of the possibility that under Pt 5.3A an order may be made terminating the deed.

Held, dismissing the application:

(i) To say that the purpose of s 447A is to provide only for cases in which the legislature is not intending by other provisions of the part to lay down a rule of mandatory and universal application leads to circularity of reasoning as it is not possible to say that the other sections in the part have such application without having first made the a priori assumption that s 447A has nothing to say in such cases.

(ii) Section 447A enables the court to dispense with the requirement under s 450E for a company to have the phrase after its name.

Cawthorn v Keira Constructions Pty Ltd (1994) 13 ACSR 337, applied

(iii) The court's discretion to grant the order under s 447A should not be exercised since the application is premature in the sense that it is too early to say that the circumstances existing after the last instalment payment will be such as to warrant the making of an order dispensing with the application of s 450E from that time.

Application

This was an application to the Supreme Court of Victoria for a declaration under the terms of a deed of company arrangement. The facts

appear sufficiently from the judgment of the court.

R A Finkelstein QC and *M D Wyles* instructed by *Arnold Bloch Leibler* for D J Beatty.

M Sloss instructed by *Arthur Robinson & Hedderwicks* for Brashs Pty Ltd.

D H Denton for the Australian Securities Commission.

Hayne J.

On 2 May 1994, David John Beatty and Michael James Humphris were appointed as administrators of Brash Holdings Ltd, Brashs Pty Ltd, Electronic Imports Pty Ltd, Hi-Fi Nominees Pty Ltd and Allans Publishing Pty Ltd, a group of companies which it is convenient to refer to as the ``Brashs Group''. At that time the Brashs Group operated in what is referred to in the material as the ``in home entertainment market'' selling video and audio systems, recorded music and music products. It carried on business under the names of ``Brashs'', ``Allans'', ``Palings'', ``Douglas Hi-Fi'' and ``Caldwells''. The business had grown from the business established as long ago as 1862 by Marcus Brasch to sell pianos and reed organs.

On 11 May 1994 the administrators advertised for expressions of interest in the assets and business of the Brashs Group. On 2 June 1994 Hotel Properties Ltd and Reef Holdings Pty Ltd offered to acquire the Brashs Group on terms that $40m would be invested in Brashs Pty Ltd by equity or subordinated loan, that there would be a large percentage of debts owed by Brash Holdings creditors which would be forgiven and that the transactions would be completed by 1 July 1994. On 30 June 1994 creditors of each of the companies resolved that each company should execute a deed of company arrangement.

On 4 and 5 July 1994 three other agreements were made:

- /bb a purchase agreement (to which there was annexed a loan agreement) and under which the investors bought 76,767 $2 shares in the capital of Brashs Pty Ltd;
- /bb a loan agreement under which the investors were required to pay Brashs not less than $40m by way of subordinated loan and
- /bb a subordination deed.

On 5 July 1994 deeds of company arrangement were executed on behalf of Brashs Pty Ltd, Electronic Imports, Hi-Fi Nominees and Allans and on 21 July 1994 a deed of company arrangement was executed on behalf of Brash Holdings.

Pursuant to the deeds of company arrangement Brash Holdings, Electronic Imports, Hi-Fi Nominees and Allans transferred to Brashs Pty Ltd, for no consideration, all their property and liabilities (with certain specified exceptions the detail of which I need not notice).

Under the Brashs' deed of company arrangement four funds, described in an affidavit filed on behalf of the administrators as ``notional funds'' have been established to pay various classes of creditors. In that affidavit, Humphris describes the funds in the following terms:

> (a) The Fixed Fund out of which Priority Creditors being retention of title creditors, Lending Syndicate Members and any claims by Terminated Employees are to be paid.
>
> *15 ACSR 477 at 479*
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> (b) The Distribution Fund from which claims of participating creditors are to be paid.
> (c) The Provision Fund which is the amount of $9.2m being provision for the re-structure in the balance sheet and out of which ongoing fees are to be paid.
> (d) The Contingency Fund which will be made up from any moneys recovered from successful prosecution of ``the Proceedings'' described in clause 12 of the Brashs' deed of company arrangement and which will then be available for distribution to participating creditors.

Clause 11 of the deed regulates the distribution of the ``Fixed Fund'' to priority creditors and the ``Distribution Fund'' to participating creditors. The fixed fund is an amount of money that is to be determined by the application of a formula set out in the deed. The distribution fund is defined as ``the Fixed Fund less Priority Creditor Amounts'' and thus is the amount remaining in the fixed fund after payment of priority creditors in full.

In general the scheme is to provide for an immediate payment of 20% of 38% of each participating creditor's claim and then further instalments will be paid from the distribution fund on the first business day of each of the 6 calendar months commencing February 1995 and ending July 1995, with the intention being that participating creditors (who are in effect all the unsecured creditors) will share the distribution fund rateably according to their claims.

By the deed, each deed creditor (which is defined as any person having a claim against Brashs which is a debt or claim the circumstances giving rise to which occurred on or before 2 May 1994) agreed to assign all its claim balance to another company in the Brashs Group called Geoffrey Button Sales Pty Ltd (GBS) and, subject to

certain specified provisions of the deed, each deed creditor released each Brashs company from their respective claim balances. One of the provisions to which that release was subject is a provision (cl 20.10) that the assignment to GBS and the release of the Brashs companies ``are not effective in law or in equity if Brashs Pty Ltd is wound up" on or before the date on which the deed comes to an end. That termination of the deed can occur by order of the court, by resolution of the deed creditors or by the administrators giving notice to all deed creditors that Brashs has paid all of the deed creditors' entitlements.

By cl 12.1 of the deed Brashs assigned to the administrators (who are referred to in the deed as ``the Deed Administrator") ``all of the right title and interest of whatsoever nature of Brashs Pty Ltd in and to any choses in action or any causes of action arising directly or indirectly from any and all of" four classes of transaction or proceeding (called in the deed ``the Proceedings"). Those causes of action include causes of action for any breach of fiduciary or other duties by any director of Brashs prior to the date of the deed of company arrangement and any breach of fiduciary or other duty owed by any auditor, tax adviser or solicitor of Brashs and which was a breach that occurred before that date. Clause 12.1 of the deed also provided that the administrators were to hold those rights in the proceedings ``on trust for the benefit of the participating creditors". Clause 12.2 of the deed provided that Brashs should hold all of its rights title and interest in the proceedings on trust for the administrators who would hold them on trust for the participating creditors. In addition, subject to a condition precedent to which it will be necessary to return, Brashs

irrevocably appointed the administrators its attorney to exercise or refrain from exercising in the administrators' absolute discretion any and all of Brashs' right or powers in relation to or in connection with its right title and interest in the proceedings.

Clause 12.5 provided that:

> Within 47 days of the Commencement Date, the Deed Administrator will make application to the court:
>
> 12.5.1 For an order or direction that the provisions of clause 12.1 effectively vests in the Deed Administrator as trustee for the participating creditors all of the right title and interest of Brashs Pty Ltd in any or all of the proceedings; and
>
> 12.5.2 pursuant to s 447A(1) of the Law or otherwise seeking an order that after the Distribution Period each Brashs company is no longer required to have the words ``subject to deed of company arrangement" set out after its name on every public document and eligible negotiable of Brashs Pty Ltd as required by s 450E(2) of the Law.

Clause 12.7 provided that it was a condition precedent to those provisions of the deed whereby the administrators were appointed attorney to exercise Brashs' rights in relation to the proceedings that ``a court orders or directs that the assignment referred to in clause 12.1 is not effective to vest in the Deed Administrator as trustee for Participating Creditors all of the right title and interest of Brashs Pty Ltd in all of the Proceedings".

An application has been made by the administrators for a declaration that the provisions of cl 12.1 effectively vests in the deed administrator as trustee for the participating creditors all of Brashs' right title and interests in the proceedings. That application came on for hearing before me but now stands adjourned.

The administrators have also applied for an order under s 447A of the Corporations Law that s 450E(2) is ``not to operate in respect of [the companies of the Brashs Group) when the Distribution Period (as defined in each company deed of company arrangement) has ended". It is that application which now falls for determination.

Section 447A provides that:

> (1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.
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> (2) For example, if the court is satisfied that the administration of a company should end:
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> (a) because the company is solvent; or
> (b) because provisions of this Part are being abused; or
> (c) for some other reason;
>
> the Court may order under subsection (1) that the administration is to end.
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> (3) An order may be made subject to conditions.
>
> (4) An order may be made on the application of:
>
> (a) the company; or
> (b) a creditor of the company; or
> (c) in the case of a company under administration -- the administrator of the company; or
> (d) in the case of a company that has executed a deed of company arrangement -- the deed's administrator; or

(e) the Commission; or
(f) any other interested person.

15 ACSR 477 at 481

The administrators contend that s 447A permits the making of an order dispensing the members of the Brashs Group from compliance with s 450E(2). That latter section provides that:

> (2) Until a deed of company arrangement terminates, the company must set out, in every public document, and in every eligible negotiable instrument, of the company, after the company's name where it first appears, the expression ``(subject to deed of company arrangement)".

Counsel appeared on behalf of the Australian Securities Commission (the ASC or the Commission). The Commission did not seek to intervene in the proceeding but I thought it appropriate in all the circumstances to permit it to make such submissions as it saw fit. The Commission contended that there was no power granted by s 447A to make the order sought and that if, contrary to that submission, I were of the view that there is power to make such an order, nevertheless in the exercise of my discretion I should refuse to do so.

It is convenient to deal first with the ambit of s 447A.

As the Full Court said in *Brash Holdings Ltd (admr apptd) v Katile Pty Ltd* (1994) 13 ACSR 504 at 507-8:

> It seems clear enough that s 447A(1) is intended to empower the court to make orders which alter what would otherwise be the operation of the part in relation to a particular company.

I consider that so much follows from the fact that the section speaks of a court making an order about how the part ``*is to*" operate in relation to a company rather than referring to the making of an order about how the part *does* operate. Although it is clear from the reasons for decision in *Katile* that the court reserved any general question about the scope of the section for future consideration, I consider that the court did hold that the section does empower the court to make orders altering what otherwise would be the operation of Pt 5.3A of the Law. Even if that is not so, and the matter is to be treated as free from authority which binds me, I am clearly of the view that the section does have the operation that has been identified. Apart from the words used in s 447A(1), which are words I consider compel the conclusion that I have mentioned, there are several other matters which point to the same conclusion.

Subsection (2) gives examples of the kinds of order that may be made under s 447A. Accepting that such legislative examples are not taken to be exhaustive and, if inconsistent with the substantive provision, are to give way to that provision (s 109L), the examples given in s 447A(2) of circumstances in which the court may order that an administration should end are examples of cases in which the court would make an order altering what otherwise would be the operation of the part.

It was said on behalf of the ASC that the only kind of order that might be made under s 447A was one which filled in what otherwise would be a gap in the legislative scheme or added to the provisions of the part. I accept that there may be cases in which orders might be made under s 447A that could properly be described as orders to fill gaps in the part ``by the exercise by the court of wide powers to make such orders as it thinks appropriate about how the part is to operate in relation to a particular company": (*Katile*, supra at 507). However, I do not take what the Full Court said in *Katile* as some indication that the jurisdiction conferred by s 447A is to be confined to

15 ACSR 477 at 482

cases in which it could be said that there is a gap in the legislation and I do not consider that the section itself so provides.

The distinction between cases in which there is a ``gap" in the legislation and cases in which there is not, is a distinction far easier to state than to apply. Thus it is clear that the part provides for some circumstances in which an administration may be brought to an end but those provisions do not include any provision cast in the general terms in which the examples given in s 447A(2) are cast. Is it then to be said that there is a ``gap" in the legislation in a case where the circumstances are such as to lead the court to conclude that the ``provisions of [Part 5.3A] are being abused"? Is it to be said that there is a ``gap" in the legislation in cases in which the court for reasons other than those specified in s 447A(2) consider that having regard to the general purposes of the part and the law as a whole it is desirable that a particular administration should end?

In the present case the Commission sought to draw a contrast between filling in gaps in the legislation and making an order permitting a company to depart from what otherwise is a mandatory requirement in Pt 5.3A. In my view that distinction is not soundly based. Either it is illusory or it leads to circularity of reasoning. To continue with the particular examples given in s 447A(2), if the circumstances which are given as examples of

cases in which an order might be made for termination of an administration are to be treated as a gap in the legislation, it cannot be because the legislation does not make provision for termination of administrations. It could be described as a ``gap'' only because the particular circumstances of termination are not elsewhere specified in the legislation and thus that the ``gap'' exists in that part of Pt 5.3A which excludes s 447A from consideration. Section 450E is cast in mandatory terms. It was said on behalf of the ASC that there is no ``gap'' in the legislation in respect of that or other similar provisions because by using the mandatory expressions found in the sections, the legislature intends to create a universal rule from which there can be no departure. But if that is so, similar reasoning would lead to the conclusion that the specified events on which administration may be brought to an end by order of the court are also intended by the legislature to be an exhaustive statement of those matters. Yet it is clear that s 447A is intended to serve a purpose. To say that that purpose is to provide only for cases in which the legislature is not intending by other provisions of the part to lay down a rule of universal and mandatory application leads to circularity of reasoning. It is not possible to conclude whether the legislature intends that some provision in Pt 5.3A is to have mandatory and universal application without first construing the part as a whole, including s 447A. Thus just as I do not consider that it is legitimate to conclude from the presence in the law of provisions that specify circumstances in which administrations may be brought to an end prematurely, that s 447A(1) is not intended to permit the making of orders of termination in circumstances other than those identified in the particular sections, so too in the case of s 450E I do not consider that it is possible to conclude that that section is intended to have universal and mandatory application without having first made the a priori assumption that s 447A has nothing to say in such cases. In my view the language used in s 447A makes plain that such an assumption is not warranted.

15 ACSR 477 at 483

The conclusion which I consider follows from the language of the provision is also reinforced by consideration of the fact that s 447D of the Law permits an administrator to seek directions ``about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers'' and thus enables an administrator to obtain advice about how the Law, as it stands unaffected by any order under s 447A, affects the conduct of the administrator and the performance of his duties.

Further support for the conclusion that I have identified is to be found in the judgment of Young J in *Cawthorn v Keira Constructions Pty Ltd* (1994) 13 ACSR 337. There his Honour held that what was said in the Harmer Report, the explanatory note to the Bill which introduced Pt 5.3A, and the minister's second reading speech reinforced the construction that he placed on the section namely:

> That the court is to have plenary powers to do whatever it thinks is just in all the circumstances, but the court is to bear in mind when exercising those powers the rights of the various groups of people that are affected by voluntary administration, and that there is a very great public interest in not permitting such voluntary administrations to go on for a very long period of time. (13 ACSR at 341)

Cawthorn's case concerned an application to extend the time fixed under s 439B(2) of the Law, a time fixed in apparently inflexible and mandatory terms. Notwithstanding that s 439B(2) provided that a meeting``*cannot* be adjourned'' to a day more than 60 days after the first day on which the meeting was held, Young J held that s 447A empowered the court to make an order extending the time by which the meeting might be concluded. That conclusion is clearly inconsistent with any limitation on the operation of s 447A to cases in which there is a ``gap'' in the legislation.

The need for uniformity of judicial decision in matters arising under the Corporations Law is self evident. In *ASC v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 ; 112 ALR 627 ; 10 ACSR 230 the High Court referred to the importance of uniformity of decision in the interpretation of uniform national legislation such as the Corporations Law. Although the court was there speaking particularly of the decisions of intermediate appellate courts, I consider that the point is one of general application and that I should be very slow indeed to depart from the decision of a single judge in relation to the Corporations Law unless, as the High Court said in *Marlborough Gold Mines* ``convinced that that interpretation is plainly wrong''. (177 CLR at 492)

Accordingly, I consider that s 447A permits the making of an order dispensing a company from compliance with s 450E.

It was submitted that such an order should be made in the present matter because once distributions have been made from the distribution fund during the 6 months commencing February 1995 and ending July 1995, creditors will have received (putting the matter perhaps too generally and loosely) all that they were promised and, apart from the possibility of some further receipt as a result of action being brought by the administrators in their own name or in the name of the company against persons alleged to have been in breach of some duty to the company, the deed would have come to an effective end. The administrators would not then have, and

indeed do not now have, any effective participation in the management of the company. If the administrators bring actions of the kind contemplated

15 ACSR 477 at 484

by cl 12, it may be a very long time before those actions are concluded. The deed cannot come to a formal end until those actions are concluded and thus the deed will have, so it is said, theoretical but not practical operation for what may prove to be a very long time.

The secretary of Brashs swore that:

> Since the company became subject to a deed of company arrangement, it has experienced ongoing difficulties with many of its suppliers who, apart from being concerned about the likely shortfall in payment of their debts as at 2 May 1994, are either unaware or wary of the precise meaning and consequences for them (in terms of receiving payment for supply of goods ordered by [Brashs] post 5 July 1994) of [Brashs] continuing under a deed of company arrangement.

It is said that the staff of Brashs have experienced difficulty in persuading some suppliers to provide goods on credit and that it has been experiencing delays in supply and in some cases refusal to supply by suppliers who are wary of trading with a company that is operating under a deed of company arrangement. It seems that the senior management of Brashs have to visit suppliers to convince them of the desirability of continuing to trade with the company. The secretary of the company went on to swear:

> [Brashs] is concerned that the goodwill of the business will continue to be eroded while there is a public perception that [Brashs] continues under a deed of company arrangement. That perception will continue at least for so long as [Brashs] is required to comply with s 450E of the Corporations Law to put the words ``subject to deed of company arrangement'' after its name in every public document and in every eligible negotiable instrument.

Brashs acknowledge that it is appropriate for the company to continue to use that description in its name until the company has made the last of the monthly payments I have mentioned earlier but submit that the companies should then be released from the obligation. As is apparent from what I have said earlier, if the administrators recover anything from the various actions contemplated by cl 12, they will hold that sum on trust for the creditors but it was submitted on behalf of the administrators that ``following payment by Brashs to the administrators of the fixed fund it [Brashs] will be released by the creditors from all claims which they had against it as at 2 May 1994.'' I need not stay to examine whether that submission is well based. For present purposes I am prepared to assume that that is so. However, even making that assumption, I am of the view that no order should now be made dispensing Brashs from compliance with s 450E.

The Commission contended that no such order should be made because the primary purpose of the section was to ensure that those who now deal with a company which is subject to a deed of company arrangement are put on notice of the consequences of that fact and in particular of the possibility that under Pt 5.3A, an order may be made terminating the deed (or the deed may be terminated according to its terms) in either of which events the creditor which extended credit to the company after the commencement of the deed, would be left to its right of proof in a winding up in which all creditors, including those previously affected by the deed would be entitled to prove. (The Commission also contended that no such order should be made because to do so would lead to an unacceptable disconformity between what appears on the public registers maintained by the

15 ACSR 477 at 485

Commission and the way in which the company holds itself out to the world. This point was not given prominence in argument and is one which I do not consider to be of great moment. Much appears on the public registers of the Commission that does not appear as part of the name under which a corporation trades.)

The administrators submitted in answer to the Commission's contentions that the chances of the deed being terminated are now so remote, or, after the making of the last payment due under the deed will be so remote, that I should now order that with effect from the making of that last payment the company should be dispensed from the operation of s 450E.

The argument advanced on behalf of the administrators is one which assumes that the deed will operate according to its terms in the intervening period of 8 months and that there will be no event which will affect the probability of creditors being at risk after July 1995 or at least no event which will affect the likelihood of that occurring in a way that bears significantly upon the exercise of the court's discretion now. I do not accept that that is necessarily so.

Although the deed required this application to be made now, I consider that the application is one which is premature in the sense that it is now too early to say that the circumstances existing in July 1995 will be such as to warrant the making of an order dispensing with the application of s 450E from that time. I am of the view that I should not now proceed on the basis that no unforeseen event will be likely to occur in the next 8 months which could affect the question whether Brashs should be granted the dispensation which it now seeks. First, by

hypothesis I am asked to ignore the possibility of events that now are unforeseen. Second, I consider that there are some events which are likely to occur in the intervening period and which may bear upon the exercise of the relevant discretion. To take but one example, I cannot say that the course adopted by the administrators in connection with the contemplated litigation is irrelevant to the exercise of the discretion whether to make the order sought. Thus, I cannot say that it is irrelevant to the exercise of that discretion to know whether any action will be brought by the administrators, what sum may be sought in that action, how long that action may take, or what attitude the defendants take to it. Nor do I think it a sufficient answer to say now, as the administrators did, that the creditors will be fully satisfied by payment of the 6 monthly instalments contemplated by the deed. The deed will remain in operation until the proceedings are brought to an end and creditors will be entitled to resort to any of the remedies conferred on them by Pt 5.3A or the deed during the currency of the deed.

In essence the argument advanced on behalf of Brashs is that whatever proceedings may be brought, whatever prospects those proceedings may have, and however the administrators conduct them, there is no significant risk of any creditor having resort to the remedies given to creditors under Pt 5.3A once creditors have received the last instalment they have been promised under the deed. That may be so or it may not. In my view it is something that can be judged better at a time closer to the making of that last payment if only because by then the administrators will have had an opportunity to form their views about whether to bring any and if so what action, the company will have traded in the meantime, and its then financial position will be known. Then the discretion to determine whether the

company should continue using the words ``subject to deed of company arrangement'' in every public document and in every eligible negotiable instrument may be exercised in the light of the facts as they are then known.

Being of the opinion that there is power to make the order sought under s 447A but that it is now premature to exercise that discretion, I will hear counsel on whether it is appropriate in the circumstances to adjourn the further hearing of the application to a later date or to dispose of it finally now, leaving it to the parties to make a further application on fresh material if they are so advised.

JUSTIN SMITH

SOLICITOR