SKB:CAT REVISED (28/05/18)

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

GLEESON AJ

TUESDAY 22 MAY 2018

2018/00115384 - JIE PAN v DIVERSIPAK PTY LIMITED

JUDGMENT re orders for appointment of a provisional liquidator

HIS HONOUR: I give the following brief reasons why I am satisfied that an order should be made for the appointment of a provisional liquidator to the first defendant, Diversipak Pty Limited (Diversipak). By originating process filed 12 April 2018, the plaintiffs Ms Jie Pan and Mr Feng Shi sought a variety of relief in relation to Diversipak, and three other defendants, Zlaace Pty Limited (Zlaace), Mr Jie Min Chen and Ms Laysieng Chen.

Ms Pan, owns 35 percent of the shares in Diversipak. Zlaace owns 65 percent of the shares in Diversipak. Mr Shi, is a director of Diversipak. The other directors of Diversipak are the third and fourth defendants, Mr Chen and Ms Chen, who are also the shareholders in Zlaace.

The relief sought by the plaintiffs pursuant to the amended originating process filed 20 April 2018 includes an order pursuant to ss 233(1)(a) or 461(1)(k) of the Corporations Act 2001(Cth) that Diversipak be wound up. An order is also sought pursuant to s 472 of the Corporations Act that a liquidator be appointed to Diversipak. That relief was sought in circumstances where disputes had arisen between the directors and shareholders concerning dealings with company property by Mr Chen and Ms Chen, and Ms Chen had given notice of an extraordinary general meeting of directors to consider a resolution to remove Mr Shi as a director of Diversipak.

By amended interlocutory application filed 20 April 2018, the plaintiffs sought interlocutory relief restraining the defendants from engaging in certain conduct and, in the alternative, that a liquidator be appointed provisionally to Diversipak.

On 20 April 2018, upon the usual undertaking as to damages given by the plaintiffs by their counsel, the Court made orders by consent regulating certain conduct in relation to the affairs of Diversipak. Those orders were continued on 1 May 2018.

Before the Court yesterday, the plaintiffs moved on their application for the appointment of a provisional liquidator to Diversipak. That application was opposed by the defendants who appeared by counsel. The application occupied a large amount of yesterday's hearing and was stood over to today, part-heard, at 2pm. Shortly prior to the resumption of the hearing, counsel for the plaintiffs sent a communication to my associate indicating that the defendants had withdrawn their opposition to the appointment of a provisional liquidator. The sole remaining issues were indicated to be the identity of the provisional liquidator and appropriate costs orders. I will address those matters shortly.

Before doing so, it is appropriate that I record that notwithstanding that the defendants have now indicated their consent to the appointment of a provisional liquidator, I am satisfied that on the material to which I have been taken during the course of the hearing, that it is appropriate for a provisional liquidator to be appointed. The relevant principles are sufficiently summarised by Goldberg J in Re Property Corporate Services Pty Ltd; National Investment

Institute Pty Ltd (ACN 098 189 863) (in liq); Property Corporate Services Pty Ltd (ACN 098 898 572) (2004) [48] ACSR 508 at [4]-[5]. Among other things, I am satisfied that the appointment of the provisional liquidator is necessary to preserve the assets of the company and to preserve the status quo in relation to the company's affairs. I am also satisfied that it appears on the material presented on the application that a winding-up order is likely to be made in due course.

It is unnecessary to refer to the evidence adduced on the present application other than to observe that according to a balance sheet of Diversipak as at 22 May 2018, the company has negative net assets of a little over $261,000 (Ex P11).

Turning to the question of who should be appointed provisional liquidator, the plaintiff proposes that Mr Maxwell William Prentice should be appointed; he has signed a consent to act as liquidator, dated 16 April 2018. That consent is in the usual form. Mr Prentice states that he is not aware of any conflict of interest or duty that would make it improper for him to act as provisional liquidator of the company. Mr Prentice further states that he is not aware of any relevant relationship mentioned in s 60(2) of the Corporations Act which otherwise might be a relevant consideration as to the appropriateness of appointing Mr Prentice.

The defendants have submitted that Mr Graeme Beattie should be appointed provisional liquidator and have tendered a consent signed by Mr Beattie dated 17 May 2018. Mr Beattie states that he is not aware of any conflict of interest or duty that would make it improper for him to act as

liquidator and/or provisional liquidator for the company. He acknowledged that he was referred to the fourth defendant by Mr Ern Phang of Phang Legal on 17 May 2018 and stated that he had never had any prior communication with Ms Cheng prior to that date. He also stated that he was not aware of any relevant relationship mentioned in s 60(2) of the Corporations Act.

Both of the persons whom the parties respectively propose be appointed as provisional liquidator have included in their signed consent a statement of the hourly rates currently charged for work done as a liquidator and/or provisional liquidator by those persons, their partners and employees.

Counsel for the defendants did not suggest that Mr Prentice was not an appropriate person to be appointed provisional liquidator, but simply indicated a preference for the appointment of Mr Beattie. He referred to the location of Mr Beattie's office at Parramatta as being closer to the business premises of Diversipak.

Counsel for the plaintiffs emphasised that there was the possibility of some costs savings if Mr Prentice was appointed, given the rates charged by Mr Prentice and his firm are slightly less than the rates charged by Mr Beattie, and Mr Prentice's firm includes a greater graduation of staff at slightly lesser rates than that of Mr Beattie's firm such that the work could be done by the more appropriate levels of staff assisting Mr Prentice at a lesser hourly rate.

Counsel for the plaintiffs also emphasised that the consent of Mr Prentice had been served in mid-April this year and no prior objection had been raised to Mr Prentice being a suitable appointment.

Plainly, in making an appointment the court seeks to avoid persons who

have an association with the applicant: *Re Nida Pty Ltd* (1993) 10 ACSR 195 at 197. The court is concerned to ensure that someone who is independent and unobjectionable to the applicant or the company is appointed: *Brian Cassidy Electrical Industries Pty Ltd (in prov liq) v Attalex Pty Ltd* [1984] 3 NSWLR 52 at 67-68. Given that there is no suggestion that Mr Prentice is not a suitable appointee, there is no reason why the court should not treat the nomination of Mr Prentice as an appropriate person to be appointed.

With respect to the question of costs the defendants say that costs of the application should be reserved or alternatively should be costs in the cause. The plaintiffs say that the second, third and fourth defendants should pay the plaintiffs' costs of their application for the appointment of a provisional liquidator, as agreed or assessed.

Section 98 of the *Civil Procedure Act 2005* (NSW) provides that, subject to any rules of the court or other legislation, costs are at the discretion of the court and the court has full power to determine by whom, to whom and to what extent costs are paid. Part 42 of Uniform Civil Procedure Rules 2005 (NSW) relates to costs and r 42.1 provides, in effect, that costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs. Here the event is the result of the outcome of the interlocutory application on which the plaintiffs have succeeded in obtaining the appointment of a provisional liquidator to Diversipak.

Generally where litigation has been resolved without a hearing on the merits and the only issue remaining is that of costs the principles stated by McHugh J in *Re The Minister for Immigration and Ethnic Affairs of the*

Commonwealth of Australia; Ex parte Lai Qin (1997) 186 CLR 622 (*Lai Quin*) at 624-625 are invoked. However, as has been pointed out, it is important to remember the context in which McHugh J made those observations. *Lai Qin* involved proceedings in the original jurisdiction of the High Court to review of a decision of the Refugee Review Tribunal confirming the Minister's decision to deny the applicant a protection visa. The Minister later exercised his discretion in favour of the applicant and granted her a protection visa. That rendered the proceedings in the High Court redundant. McHugh J observed that the Minister granted the visa because of the changed circumstances of the applicant since her arrival in Australia: her marriage to an Australian citizen; and that she had given birth to a child. Since the Minister had been considering the applicant's case for only a few days prior to the proceedings being commenced in the High Court, there was nothing unreasonable with the Minister's failure to inform her, prior to the institution of proceedings, that a decision in her favour might be made. Accordingly, McHugh J declined to make an order for costs in favour of the applicant.

When McHugh J said that in an appropriate case the court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed, he had in mind a case where the party seeking costs in effect has succeeded in obtaining the relief sought in the proceedings. As McHugh J said at p 624 the context of his remarks were the principles which:

> … govern an application for costs when a party elects not to pursue an action because he or she has achieved the relief sought in the

action either by settlement or by extra-curial means.

McHugh J further observed in *Lai Qin* at p 625:

> If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings.

Reference should be made to one further authority. In *ONE.TEL v Deputy Commissioner of Taxation* [2000] FCA 270; (2000) 101 FCR 548, Burchett J expressed the view (at 553 [6]):

> … it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement so removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the Court's discretion otherwise than by an award of costs to the successful party. It is the latter type of case which more often creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs. …

This statement was cited with approval by the Full Court of the Federal Court in *Chapman v Luminis Pty Ltd* [2003] FCAFC 162 at [7].

In the present case counsel for the plaintiffs submits that the defendants acted unreasonably in resisting the appointment of a provisional liquidator. Counsel emphasised that the plaintiffs have succeeded in obtaining the relief sought in the amended interlocutory application in circumstances where after opposing the relief sought for some time, the defendants effectively surrendered.

It is not necessary to refer to the evidence adduced in support of the plaintiffs' application. I am satisfied that this is a case in which the defendants acted unreasonably in resisting the appointment of a provisional liquidator.

Up until shortly prior to the resumption of the hearing today the evidence adduced by the plaintiffs demonstrated that since about April this year Diversipak has been unable to obtain supply of the product which it requires for on sale to its customers from its main supplier in China in circumstances where Diversipak has refused to pay its main supplier for past orders which had been received, and on the evidence no complaint had been made by those in control of Diversipak as to the quality of the goods provided. Indeed, there is evidence that goods provided by the supplier from China had not only been received by Diversipak but on a number of occasions had been sold to customers and payment had been received by Diversipak from its customers in Australia. Attempts by the third and fourth defendants to obtain an alternative supplier of product from China have been, at least on the evidence, unsuccessful. The dire financial circumstances of Diversipak are shown in the balance sheet

dated 22 May 2018 referred to above (Ex P11).

There were a number of other unsatisfactory aspects of the way in which the defendants approached the application for the appointment of a provisional liquidator, including the defendants' failure to face up to the accounting anomalies in the shareholders' loan account in respect of the third and fourth defendants.

Counsel for the defendants acknowledged during argument yesterday that there were matters calling for explanation, but was not in a position to provide any cogent explanation for what seem to be serious anomalies in the company's accounting records, including entries made in the accounting records reflecting credit entries in favour of the third and fourth defendants' loan account with Diversipak (including recent changes to the amount of such credit entries) in circumstances where, on the material, there was no corresponding cash receipt by the company's bank account reflecting those credit entries. These, amongst other things, are matters which will be appropriate for a provisional liquidator to examine in due course.

In the circumstances, I am persuaded that the appropriate order as to costs is that the second, third and fourth defendants pay the plaintiffs' costs of their application for the appointment of a provisional liquidator, as agreed or assessed.

Insofar as the plaintiffs sought a further order that the first defendant not pay any of the costs incurred by the defendants' legal representatives relating to the opposition to the application for the appointment of a provisional liquidator, I am not satisfied that it is appropriate to make such an order. The

position in relation to the first defendant is the subject of consent orders made by the parties on 20 April 2018. No circumstances have been shown as to why the court should revisit those orders.

Accordingly, the Court makes the following orders:

1. Order pursuant to s 472(2) of the *Corporations Act 2001* (Cth) that Maxwell William Prentice of BPS Recovery, level 18, 201 Kent Street, Sydney, NSW 2000 be appointed as provisional liquidator of Diversipak Pty Ltd, ACN 122 831 707;

2. That the second, third and fourth defendants pay the plaintiffs' costs of their application for the appointment of a provisional liquidator, as agreed or assessed;

3. Direct that the Provisional liquidator provide a written report to the Court concerning the results of his investigation of the affairs of Diversipak Pty Ltd and his opinion as to the solvency of that company by 15 June 2018, such report to be lodged with my Associate and served on the parties;

4. Stand over the amended originating process to 18 June 2018 before the Corporations List judge at 10am;

5. That these orders be entered forthwith.

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