Federal Court of Australia

Connelly, in the matter of TSK QLD Pty Ltd (in liq) v Torquejobs Pty Ltd [2022] FCA 823

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| File number(s): | QUD 126 of 2022 |
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| Judgment of: | **DOWNES J** |
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| Date of judgment: | 7 July 2022 |
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| Date of publication of reasons: | 15 July 2022 |
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| Catchwords: | **COSTS** – application by liquidators of company for costs of application for warrant pursuant to s 530C *Corporations Act 2001* (Cth) which resulted in consent order – prior to filing application, liquidators served notices under s 530B *Corporations Act 2001* (Cth) and proposed regime to enable claims for privacy and legal professional privilege to be determined – books were being held by new company which had acquired business of company in liquidation and was employing its former director and chief financial officer – new company did not agree to the regime proposed by liquidators – liquidator deposed to concerns about documents being concealed, destroyed or removed – liquidators had proper basis to seek the issue of the warrant in the circumstances – costs awarded in favour of liquidators  |
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| Legislation: | *Corporations Act* *2001* (Cth) ss 286, 436A, 530B, 530C |
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| Cases cited: | *Re Carrello (as the liquidator of Drilling Australia Proprietary Limited) (in liquidation)* (2019) 139 ACSR 187; [2019] FCA 1563 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Number of paragraphs: | 50 |
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| Date of hearing: | 7 July 2022  |
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| Counsel for the Applicant: | Mr P O’Brien |
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| Solicitor for the Applicant: | McInnes Wilson Lawyers |
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| Counsel for the Respondents: | Mr B Kidston |
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| Solicitor for the Respondents: | Enyo Lawyers |

ORDERS

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|  | QUD 126 of 2022 |
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| BETWEEN: | ANTHONY NORMAN CONNELLY AND WILLIAM JAMES HARRIS IN THEIR CAPACITY AS LIQUIDATORS OF TSK QLD PTY LTD (IN LIQUIDATION) ACN 605 921 506 Applicants |
| AND: | TORQUEJOBS PTY LTDFirst RespondentNERYDA JANSE VAN RENSBURG AS TRUSTEE FOR THE JANSE VAN RENSBURG FAMILY TRUST TRADING AS "QUALITY IT"Second Respondent |

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| order made by: | DOWNES J |
| DATE OF ORDER: | 7 JULY 2022 |

THE COURT ORDERS THAT:

1. The first and second respondents pay the applicants’ costs of and incidental to the originating application filed 14 April 2022.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

DOWNES J:

1. TSK QLD Pty Ltd (in liquidation) (**the Company**) was registered on 19 May 2015 and had at that time, as one of its directors, Mr Ciano St John Lopez. The Company held the business name “Torquejobs” from 6 February 2020 until 10 July 2021. Mr Savvas Papadopoulos was appointed director and secretary of the Company on 15 January 2016 and was the sole director of the Company on and from 8 November 2016.
2. Leopho Pty Ltd (**Leopho**) is now the sole shareholder of the Company. Mr Papadopoulos is the sole director, secretary and shareholder of Leopho.
3. On 19 March 2021, a company called ACN 648 846 520 Pty Ltd was incorporated and on 12 June 2021, that company changed its name to Torquejobs Pty Ltd (**Torquejobs**). The sole director and secretary of Torquejobs, which is the first respondent, is Mr Lopez. The sole shareholder of Torquejobs is Green Candle Pty Ltd (**Green Candle**) and Mr Lopez is the sole director, secretary and sole shareholder of Green Candle.
4. The Company formerly operated a business providing recruitment and labour hire services to customers in the mining, resources, energy, engineering, construction, manufacturing and logistics industries. It traded as both “Torquejobs” and “Torque Recruitment Group”. The Company’s revenue was approximately $34 million in the 2018 financial year, $90 million in the 2019 financial year and $82 million in the 2020 financial year. In 2021, the Company employed or contracted in the order of 500 staff and operated from leased premises located at Brisbane Airport, Kewdale in Western Australia and Melbourne in Victoria.
5. On or about 24 October 2021, the Company sold its business to Torquejobs, that is, the first respondent, pursuant to a business sale agreement executed on or about 1 June 2021. Mr Papadopoulos is now working for Torquejobs.
6. The sale agreement provided, amongst other things, that the purchase price was calculated pursuant to a formula which included taking into account 20% of the receivables value as at the date of purchase. The Company’s books and records were sold as part of that business sale transaction in October 2021 and the Company did not retain a copy of those books and records.
7. On 14 January 2022, Mr Papadopoulos resolved that Gavin Morton of Morton & Lee Insolvency be appointed as a voluntary administrator of the Company pursuant to section 436A of the *Corporations Act* *2001* (Cth) (**the Act**).
8. Mr Morton reported in his report to creditors that he sought to obtain the books and records of the Company from Mr Papadopoulos, Viden Group and the Company’s former chief financial officer, Mr Duncan Bremner. He reported that responses to his requests were not timely which hampered his ability to conduct his investigations and, in his opinion, the Company had not complied with its obligations to keep books and records under section 286 of the Act.
9. At the resumed second meeting on 21 March 2022, the creditors of the Company resolved to wind up the Company and appointed Mr Anthony Connelly and Mr William Harris as the joint and several liquidators of the Company.
10. From the records available to the liquidators, the liquidators have not identified any amount that has been paid by Torquejobs to the Company as the purchase price for the Company’s business under the terms of the sale agreement.
11. Based on the information available to the liquidators, the liquidators’ investigations indicate that, amongst other things:
12. while the Company had unpaid taxation and other statutory liabilities exceeding $19 million and negative net assets exceeding $13 million, it had sold all of its business assets and, in particular, more than $11 million of receivables assets. It did so for a price which involved discounting the receivables assets by 80% on the basis of the purported uncollectability of those receivables and describing nominal or nil values to the Company’s other assets, which values were substantially lower than the values recorded in the Company’s balance sheet;
13. the purchaser under the transaction was an entity controlled by a former joint venture partner of the Company.
14. On 30 March 2022, Mr Connelly sent a notice by email to Mr Lopez at Torquejobs care of MinterEllison on the Gold Coast seeking various documents and asking certain questions in relation to the acquisition by that company of the business of the Company. In addition, a notice was served pursuant to section 530B of the Act requiring delivery of books of the Company to the liquidators.
15. Pausing there, subsection 530B(1) of the Act provides that:

(1) A person is not entitled, as against the liquidator of a company:

(a) to retain possession of books of the company; or

(b) to claim or enforce a lien on such books;

but such a lien is not otherwise prejudiced.

1. Subsection 530B(3) of the Act provides that:

A person must not engage in conduct that results in the hindering or obstruction of a liquidator of a company in obtaining possession of books of the company.

1. Subsection 530B(4) of the Act enables a liquidator of a company to give to a person a written notice requiring the person to deliver to the liquidator, as specified in the notice, books so specified that are in the person's possession.
2. Subsection 530B(5) of the Act requires that:

A notice under subsection (4) must specify a period of at least 3 days as the period within which the notice must be complied with.

1. Subsection 530B(6) of the Act imposes an obligation on the person who receives such a notice to comply with it.
2. MinterEllison responded to the notice on 4 April 2022 by providing a copy of the books and records which that firm had in its possession or under its control falling within the categories set out in the notice and stating that:

We have forwarded on the correspondence you addressed to Torquejobs dated 30 March 2022. We do not have instructions to respond on behalf of Torquejobs Pty Ltd to this letter.

1. A further section 530B notice was issued to Torquejobs on 5 April 2022; that notice was sent directly to Mr Bremner, the former chief financial officer of the Company, who is now employed by the first respondent. In that request, there was reference to the electronic records that were being sought and, in particular, the notice stated that Mr Connelly understood that some or all of the Company’s electronic records are now held by or are accessible by Torquejobs’ IT service provider, Quality IT. Mr Connelly stated in the notice that he required that the electronic records, in particular, be made available to him urgently. He proposed that Torquejobs comply with its obligation to produce the Company’s books held by Quality IT by permitting his staff to attend at Quality IT’s premises and take an image of the relevant servers or data. He requested confirmation that Torquejobs was agreeable to this approach.
2. On the second page of that notice, Mr Connelly set out under the heading “Privilege and Confidentiality” a proposed regime dealing with any concerns, in effect, that the first respondent could have about handing over the records that were sought under that notice. In particular, the notice stated:

To the extent that Torquejobs intends to press a claim for legal professional privilege (or some other claim to withhold possession) over particular electronic records held by Torquejobs or its IT service provider, please let me know immediately.

1. The notice then proposed a regime as follows:

In that event, with a view to effecting the immediate preservation of TSK’s books and records and subsequent resolution of Torquejobs’ claims, I am prepared to agree to the following regime:

a. By 4:00pm on 8 April 2022, Torquejobs will cooperate to permit my staff to image all of the data files which contain or are likely to contain electronic records of TSK, and deliver the imaged data to the custody of an independent firm of solicitors nominated by me;

b. By 4:00pm on 15 April 2022:

(i) Torquejobs will identify in writing what, if any, documents are the subject of a claim for privilege (or any other claim which may affect my entitlement to possession of the data) and sufficient particulars of the basis of any such claim to allow me to understand the nature of the document and basis of the claim; and

(ii) Any data which is not the subject of such a claim will be released to me;

c. By 4:00pm on 22 April 2022, I will provide a response to the claims made;

d. By 4:00pm on 29 April 2022, Torquejobs must apply to the Court for orders restraining release of documents the subject of unresolved claims, failing which the balance of the data will be released to me.

1. As can be seen, the regime proposed, in effect, that an independent firm of solicitors nominated by Mr Connelly would receive the imaged data and then a process would be engaged in for the purposes of deciding if and to what extent the liquidators could obtain that data.
2. On 7 April 2022, solicitors acting for the first respondent, Torquejobs, wrote to Mr Connelly raising issues including the scope of what may or may not be books and records of the Company, legal professional privilege and, potentially, privacy issues. The letter stated that the proposal to deal with legal professional privilege was inequitable as it placed all the burden on Torquejobs and was rejected. No alternative process was proposed.
3. A request was made in that letter for an explanation as to why there was any urgency and, otherwise, it was proposed that books and records of the Company which could be identified as belonging to the Company be provided, and to the extent that documents sought are not books and records of the Company, they would not be provided. The letter also proposed that there would be consideration and the withholding of all remaining documents and a particularisation in the usual fashion of any claim for privilege. The letter stated that Torquejobs would endeavour to provide books and records that day and the balance on Tuesday, 12 April 2022.
4. In a response of the same day, that is, 7 April 2022, the solicitors for the liquidators articulated why there was urgency in obtaining the records, and that explanation spans nearly two pages of that letter. The letter raised concerns about difficulties by the administrator and then the liquidators in obtaining records which the liquidators considered were critical to the affairs of the Company, and it also raised concerns about the transfer of Company records to Torquejobs and the circumstances of the sale of the business of the Company to Torquejobs. The letter stated:

Having regard to the time which has now elapsed since the former voluntary administrators’ initial request for the Company’s books and records, the continuing difficulty experienced by our clients in obtaining those records and that the books are apparently held by Torque without oversight from our clients to ensure their integrity is maintained, our clients consider that steps to secure the records are required to be undertaken urgently.

1. The letter continued:

Torquejobs’ concerns about legal professional privilege, privacy and limiting the data collection to records of the company could be adequately dealt with by the regime proposed in our client’s correspondence [which is a reference to the letter of notice of 5 April 2022].

1. The letter from the liquidators’ solicitors stated that that regime provided for an image of the data to be taken and then placed in the custody of an independent firm of solicitors while Torquejobs’ concerns were resolved. The letter then stated:

It is unclear what aspect of that regime your client considers to be inequitable, and what “drastic effects” will be occasioned by Torquejobs if it permits [the liquidators] to make a copy of various electronic data under its control and then participate in an orderly process to determine any claims of Torquejobs about the release of that data to [the liquidators].

1. The letter stated that:

Any claims for privilege or the like can be assessed and resolved after a copy of the Company’s records has been secured.

1. The letter concluded, seeking that, by no later than 8 April 2022, the liquidators’ staff be permitted to attend and take an image of the relevant servers or data on the basis set out in the liquidators’ letter to Torquejobs of 5 April 2022. The letter stated that if that timeframe was not met, then there will be an application to the Court for the issue of a warrant under section 530C of the Act without further notice and costs will be sought on that application if it was necessary.
2. Section 530C of the Act relevantly provides that:

**530C Warrant to search for, and seize, company’s property or books**

(1) The Court may issue a warrant under subsection (2) if:

(a) a company is being wound up or a provisional liquidator of a company is acting; and

(b) on application by the liquidator or provisional liquidator, as the case may be, or by ASIC, the Court is satisfied that a person:

(i) has concealed or removed property of the company with the result that the taking of the property into the custody or control of the liquidator or provisional liquidator will be prevented or delayed; or

(ii) has concealed, destroyed or removed books of the company or is about to do so.

(2) The warrant may authorise a specified person, with such help as is reasonably necessary:

(a) to search for and seize property or books of the company in the possession of the person referred to in subsection (1); and

(b) to deliver, as specified in the warrant, property or books seized under it.

1. In this case, as the books of the Company had been removed and were now being held by the purchaser under the sale transaction, it is apparent that the requirements of section 530C of the Act were satisfied.
2. The timeframe referred to in the letter from the liquidators’ solicitors was not met.
3. Instead, on 8 April 2022, another letter was written by Torquejobs’ solicitors complaining, amongst other things, about the section 530B notice being incompetent because it expressed a requirement for delivery of the books in less than three days and stating that Torquejobs was compiling all the books and records as quickly as it could. The letter repeated that the books and records of Torquejobs were not the books and records of the Company and that it will not be handing those books and records over, given that they contain legally privileged material and documents which are not documents of the Company. The letter stated that the documents would be preserved for any pending litigation or to be argued about at a later date.
4. Further correspondence was exchanged culminating in the delivery by Torquejobs of seven archived boxes of documents and a laptop on 13 April 2022. Also on 13 April 2022, Torquejobs’ solicitors wrote and stated that:

[Torquejobs] instructs that it expects further material will be delivered next week, as archived records are being recalled from storage.

We are considering your client’s entitlements to Office 356 [sic] and expect to revert next week.

1. By letter dated 14 April 2022, the liquidators’ solicitors refer to the delivery of one archive box and the laptop on 13 April from Taylor David Lawyers, and explained why the documents which had been supplied, both by Torquejobs and through Taylor David Lawyers, were grossly inadequate. The letter stated that, in particular, Torquejobs had failed to provide access to any of the Company’s email records or any of the electronic files on the “Windows Server 2003 Active Directory with Distributed File Share”. The letter stated that:

The sale of the Company’s business to Torquejobs settled on 24 October 2021. All electronic documents and emails acquired by your clients from the Company in that sale, which are dated or were created on or before 24 October 2021, are plainly books of the Company. Any legal professional privilege claim over those documents is in the hands of the Company (and therefore our clients).

1. An offer was made that the liquidators’ staff isolate an image of Office 365 email records by date range, that is, to copy only the emails created on and prior to 24 October 2021 without disruption to Torquejobs’ business. The letter stated that:

[The liquidators] remain available to attend your clients’ premises to do so, and to image the Server and place it in the custody of a third party whilst any concerns about privilege or ownership of particular files is resolved.

1. On that date, an application for a warrant under section 530C was filed by the liquidators, accompanied by an affidavit of Mr Connelly. In that affidavit, Mr Connelly referred to the sale transaction to Torquejobs and another transaction. He deposed that:

From my review of the material delivered to date, [that is, up until 14 April 2022] I consider that [the liquidators] have not been provided with:

(a) the complete financial records of the Company, and in particular its balance sheets and profit & loss statements;

(b) any email records of the Company;

(c) any other Office 365 data in respect of the Company which may exist; and

(d) any electronic files contained in the Company’s “Windows Server 2003 Directory with Distributed File Share”.

1. Mr Connelly deposed, and he was not challenged on this opinion, that he considered that:

[T]hese books and records are critical to the affairs of the Company and to the conduct of the winding up.

1. Mr Connelly also deposed that:

Based on my investigations, the books of the Company have already been removed and are in the possession of Torquejobs and its IT service provider, Quality IT. Torquejobs is willing to provide direct access to its records to Mr Papadopoulos but not to [Mr Connelly].

1. Mr Connelly expressed a concern that Mr Papadopoulos or Torquejobs may conceal, destroy or remove books of the Company, and he explains that his concern arises from four matters:
2. the difficulties experienced by the former voluntary administrator and the liquidators in obtaining the books and records of the Company;
3. Torquejobs’ declinature of Mr Connelly’s proposal to immediately preserve the books of the Company in its possession, on the basis of a regime designed not to prejudice any claims for privilege which may exist;
4. the nature of the dealings involving Torquejobs and the Company, relating to the sale of the business, which may give rise to claims against Torquejobs, Mr Papadopoulos and Mr Lopez; and
5. Torquejobs and Mr Papadopoulos’ stated intentions to provide the Company’s books in the possession of Torquejobs in a manner which will permit them to assess and determine which books to deliver up without oversight to ensure all the Company’s books have been delivered.
6. Counsel for the respondents directed me to the decision of Banks-Smith J in *Re Carrello (as the liquidator of Drilling Australia Proprietary Limited) (in liquidation)* (2019) 139 ACSR 187; [2019] FCA 1563. In that decision, her Honour stated that:

Section 530C is ordinarily ‘a remedy of last resort’: see *Cvitanovic v Kenna & Brown Pty Ltd* (1995) 18 ACSR 387.

…

Factors that have been relied upon in deciding that a person has concealed or removed the property of the company include:

(a) refusals to comply with liquidators’ requests to deliver up the books and records of the company: *Vartelas v Kyriakou* [2009] FCA 1489 (*Vartelas* *v Kyriakou*) at [6];

(b) transfer of assets to, and continued use of the assets by, related companies or entities without proper accounting: *Re Crisp (in his* *capacity as liquidator of Buchanan Group Holdings Pty Ltd) v* *Iliopoulos* [2011] FCA 1521 (*Crisp*) at [11] …

1. Having regard to this authority, and to the terms of section 530C, I am satisfied that there was a proper basis, on the facts of this case, for the liquidators to file and bring their application under section 530C. In particular, there are serious concerns raised by the circumstances around the sale of the business to a newly incorporated company which has, as employees, the former chief financial officer and former director of the Company which is now in liquidation, as well as Mr Lopez, who was previously a director of the Company. It is also of serious concern that the liquidators have been unable to identify that any of the purchase price promised under the sale agreement has, in fact, been received by the Company.
2. Once the application for the warrant was filed and served, it was set down for hearing on 22 April 2022.
3. The chronology shows that, on 19 April 2022, that is, three days before the hearing of the application, a draft order was proposed by Torquejobs, which still did not permit or contain a regime containing any supervision over the selection of the documents that would be provided to the liquidators.
4. Ultimately, the parties reached agreement to an order which was made by consent on 22 April 2022 by Greenwood J, pursuant to which an independent person would supervise the selection of the documents and claims for legal professional privilege amongst other things.
5. I am therefore satisfied that it was appropriate to bring the application for the warrant, that it was necessary to do so, and that, had the application not been brought, the agreement as to the regime that was ultimately accepted by the respondents to the application would not have been reached.
6. As to the issue of costs, the respondents submit that the applicants should not have their costs because the originating process was never determined on its merits. However, in the circumstances of this case, the liquidators, in my view, had a strong basis to obtain the warrant and did not bring the application prematurely.
7. It is also submitted by the respondents that the application was premised upon an incorrect understanding that the former voluntary administrator was unable to obtain the Company’s electronic records. However, one aspect of the evidence relied upon by the liquidators is contained in the report to the creditors by the administrator, and so that concern had a proper basis in my view.
8. It is also submitted by the respondents that the liquidators made unreasonable demands for the records in very short periods of time. It is relevant to note that section 530B of the Act requires that the minimum time period that is given for compliance with the notice is at least three days. However, in circumstances where liquidators are appointed, there has been a failure to provide all relevant business records to the previously appointed administrator and there is then a period of two weeks’ delay before filing the application, I am not satisfied the liquidators made unreasonable demands for those records in a very short period of time. I also consider that the liquidators acted reasonably in proposing at a very early stage, that is, on 5 April 2022, a regime whereby concerns raised by Torquejobs about legal professional privilege and privacy and any other basis on which documents should not be produced could be overseen by an independent third party.
9. For all of these reasons, I am satisfied that, had the application under section 530C of the Act proceeded, it is very likely that it would have succeeded, and, as a consequence, I consider that the first and second respondents should pay the applicants’ costs of and incidental to the originating application filed on 14 April 2022.

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| I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Downes. |

Associate:

Dated: 15 July 2022