FEDERAL COURT OF AUSTRALIA

Elkerton, in the matter of South Head & District Synagogue (Sydney) (In Liq) [2017] FCA 1206

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| File number: | NSD 1708 of 2017 |
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| Judge: | **FARRELL J** |
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| Date of judgment: | 9 October 2017 |
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| Catchwords: | **CORPORATIONS** – winding up – application by liquidators under s 477(2B) of the *Corporations Act 2001* (Cth) for approval of litigation funding agreement with creditors |
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| Legislation: | *Corporations Act 2001* (Cth) ss 436A, 439C, 477(2B); 482; Pt 5.3A |
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| Cases cited: | *Crosbie, in the matter of Hastie Group Limited (in liq)* [2016] FCA 1289  *Hughes, in the matter of Sales Express Pty Ltd (In Liq)* [2016] FCA 423  *In the matter of City Pacific Limited* [2017] NSWSC 784  *In the matter of 7 Steel Distribution Pty Limited (in liquidation) (receivers and managers appointed)* [2013] NSWSC 669; 13 ACLC 13-021  *In the matter of South Head & District Synagogue (Sydney) (Administrators appointed)* [2017] NSWSC 823 |
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| Date of hearing: | 28 September 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 24 |
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| Counsel for the Plaintiff: | Mr S Balafoutis and Ms C Hamilton-Jewell |
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| Solicitor for the Plaintiff: | Henry William Lawyers |

ORDERS

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|  | | NSD 1708 of 2017 |
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| IN THE MATTER OF SOUTH HEAD & DISTRICT SYNAGOGUE (SYDNEY) (IN LIQUIDATION) | | |
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|  | ANTHONY WAYNE ELKERTON AND RONALD JOHN DEAN-WILLCOCKS IN THEIR CAPACITY AS LIQUIDATORS OF SOUTH HEAD & DISTRICT SYNAGOGUE (SYDNEY) (IN LIQUIDATION)  Plaintiff | |

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| JUDGE: | Farrell J |
| DATE OF ORDER: | 28 September 2017 |

THE COURT ORDERS THAT:

1. Pursuant tos 477(2B) of the *Corporations Act 2001* (Cth), the Court approves Anthony Wayne Elkerton and Ronald John Dean-Willcocks in their capacity as liquidators of South Head & District Synagogue (Sydney) (in liquidation) (“Liquidators” and “Company” respectively) entering into the following agreements on behalf of the Company:
   1. an agreement which is in, or substantially to the effect of, the funding agreement set out at pages 76 to 92(vi) in Exhibit AWE 1 to the affidavit of Anthony Wayne Elkerton sworn on 28 September 2017 and filed in these proceedings;
   2. an agreement retaining Henry William Lawyers to act and continue acting as the legal representatives for the Company which is in, or substantially to the effect of, the document set out at pages 99 to 103 in Exhibit AWE 1; and
   3. an agreement for the exclusive use of chattels which is in, or substantially to the effect of, the document set out at pages 104 to 114 in Exhibit AWE 1.
2. The Liquidators’ costs and expenses of this application be costs and expenses in the liquidation of the Company.

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

REASONS FOR JUDGMENT

FARRELL J:

1. On 28 September 2017, Messrs Anthony Wayne Elkerton and Ronald John Dean-Willcocks as liquidators of South Head & District Synagogue (Sydney) (**Company**) filed an ex parte application for the Court’s approval to enter into three agreements on behalf of the Company pursuant to s 477(2B) of the *Corporations Act 2001* (Cth). Factual matters set out below are derived from an affidavit sworn by Mr Elkerton on 28 September 2017 and exhibit AWE-1.
2. These are reasons for orders made following a hearing in the afternoon of that day.

## Background

1. The Company is a public company limited by guarantee; it was registered on 24 December 1954. Its constitution provides that its object is to establish and conduct a synagogue practising and observing Orthodox Judaism. Its members are the congregation who worship at the synagogue erected on land owned by the Company in Old South Head Road, Dover Heights in Sydney (**Property**). It has approximately 961 fee paying members.
2. The Company’s board of directors appointed Messrs Elkerton and Dean-Willcocks as voluntary **administrators** on 26 April 2017 pursuant to s 436A of the *Corporations Act*. On 21 July 2017, the Company’s creditors resolved that the Company be wound up pursuant to s 439Cof the *Corporations Act* and Messrs Elkerton and Dean-Willcocks were appointed as **liquidators**.
3. Consistent with the Company’s purposes, any surplus on a winding up (after payment of all creditors) is not payable to the Company’s members. Any surplus is to be “given or transferred” to another institution having objects similar to those of the Company.
4. The Property is the Company’s major asset. According to a valuation dated 2 May 2017, the Property is valued at approximately $7 million. As at 21 July 2017, its creditors were:
5. YJAB No 1 Pty Ltd, K 9 Hora Pty Ltd and Poppet Holdings Pty Ltd who were jointly owed $1.5 million, secured by a first registered mortgage over the Property (the **Secured Creditors**). The Secured Creditors are companies associated with members of the congregation. They advanced the money to the Company to enable it to repay Westpac Banking Corporation, which had been a secured creditor by way of first registered mortgage over the Property (**Mortgage**);
6. Employee creditors whose claims totalled $45,823.23;
7. Unsecured creditors whose claims totalled $128,781.19; and
8. The Chief Rabbi of the synagogue as at date the administrators were appointed, Rabbi Milecki. The entitlements of Rabbi Milecki will depend upon the outcome of an appeal from a judgment of Brereton J published on 22 June 2017: see *In the matter of South Head & District Synagogue (Sydney) (Administrators appointed)* [2017] NSWSC 823 (**Brereton Judgment**).
9. Rabbi Milecki commenced his services with the synagogue on 15 January 1985. The terms of engagement of Rabbi Milecki are set out in a document entitled “Contractual Terms of Engagement between Rabbi Benzion Milecki and the South Head & District Synagogue” dated 29 May 1999 as subsequently amended.
10. The costs associated with employment of Rabbi Milecki were $373,711 in the calendar year ending December 2016 and $379,317 for the calendar year ending December 2017. On 27 April 2017, the administrators formed the view that the Company had insufficient funds to employ Rabbi Milecki. They purported to terminate his employment primarily on the grounds of redundancy. This decision was challenged by Rabbi Milecki who argued that his employment could not be terminated unless a properly constituted Jewish court (“Din Torah”) had first determined that the Company was entitled to terminate the contract in accordance with Orthodox Jewish law (“Halacha”).
11. The liquidators filed an originating process in the New South Wales Supreme Court seeking a declaration that Rabbi Milecki’s employment had been validly terminated. Rabbi Milecki filed a cross summons seeking a declaration that the purported termination was of no effect and an injunction restraining the administrators from giving effect to the purported termination. On 22 June 2017, the Brereton Judgment was delivered. His Honour accepted Rabbi Milecki’s argument and:
12. Found that Rabbi Milecki’s contract includes life tenure (“Hazakah”) by implication if not by incorporation and voluntary administration under Pt 5.3A of the *Corporations Act* has no special significance for the Company’s contractual obligations so that it was not entitled to terminate the Rabbi’s employment for redundancy or otherwise;
13. Noted that if the Company went into liquidation, Rabbi Milecki would have a provable claim for unpaid arrears, as well as a claim for damages for wrongful dismissal arising upon the appointment of a liquidator, in which, prima facie, his damages would be the present value of his future contractual entitlements for his life expectancy, reduced by provision for his duty to mitigate by seeking an alternative post;
14. Declared void the purported termination because no properly constituted Din Torah had determined in accordance with Halacha that the termination was justified on a ground recognised in Halacha; and
15. Restrained the administrators from giving effect to their decision unless and until a properly constituted Din Torah so found.
16. Once the liquidators were appointed as such, the employment of all of the Company’s employees (including Rabbi Milecki) was terminated. As Rabbi Milecki is about 62 years old, is difficult to estimate his likely total claim. Assuming a life expectancy of about 20 years, the liquidators calculate that his total claim could be well in excess of $5 million if his contract is subject to Halacha. They say that it is possible that his claim may be so large that there would be no return the unsecured creditors. If an appeal from the Brereton Judgment were to be successful, Rabbi Milecki’s entitlement might be as little as $20,000 if the contract is subject only to laws usually applicable in New South Wales.
17. The liquidators wish to appeal the Brereton Judgment and gave notice to that effect on 5 July 2017. The Secured Creditors have advised Mr Elkerton that, subject to the outcome of the appeal, it is their intention to make sufficient funds available to the liquidators so that all unsecured creditors (including Rabbi Milecki) can be paid their entitlements, all of the liquidators’ costs and expenses be paid, and thereafter to apply to the Court to have the winding up of the Company terminated pursuant to s 482(1) of the *Corporations Act*. Whether that intention is realised depends, in part, upon the total amount owing to Rabbi Milecki. As Mr Elkerton understands it, the Secured Creditors’ rationale is that they wish the synagogue to continue as a place of Orthodox Jewish worship with a congregation rather than it being sold by the liquidator. The Property will be sold if the winding up is not terminated. The Secured Creditors wish the liquidators to appeal the Brereton Judgment so that the basis for the determination of Rabbi Milecki’s entitlements for wrongful dismissal is clear.
18. The Secured Creditors have entered into a funding agreement with the liquidators subject to the Court approving the liquidators’ entry into it under s 477(2B).
19. The liquidators proposed to enter into a retainer agreement with Henry William Lawyers for the conduct of the appeal.
20. The Secured Creditors have entered into possession of the Property pursuant to the mortgage and they have granted to **Kehillat Kadima** Ltd the right to use the Property to conduct services. The liquidators seek approval to enter into an exclusive licensing agreement with KehillatKadima relating to use of chattels the Company owns which are located in the synagogue, including religious items. Under this agreement, Kehillat Kadima would be obliged to secure the chattels and insure them; the agreement will terminate when the Property is sold.
21. As the directions hearing relating to the appeal will occur in late November 2017, it might properly be expected that the appeal will not be heard until 2018. In those circumstances it is likely that each of the proposed agreements will extend for a period greater than three months. The requirement for liquidators to secure the Court’s approval to enter into the agreements is engaged under s 477(2B) of the *Corporations Act*.

## Relevant law

1. Section 477(2B) of the *Corporations Act* provides as follows (as written):

(2B) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company’s behalf (for example, but without limitation, a lease or a an agreement under which a security interest arises or is created) if:

(a) without limiting paragraph (b), the term of the agreement may end; or

(b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;

more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.

1. It is conventional for applications of this kind to be brought ex parte: see *Crosbie, in the matter of Hastie Group Limited (in liq)* [2016] FCA 1289 per Moshinsky J at [2].
2. As observed by Edelman J in *Hughes, in the matter of Sales Express Pty Ltd (In Liq)* [2016] FCA 423, the approach to be taken by the Court in applications for approval under s 477(2B) is well settled. His Honour went on to summarise those principles at [20] as follows:

The principles, based on the authorities cited at the conclusion of this paragraph, concerning the grant or refusal of approval by the Court can be summarised as follows:

(1) the role of the Court is to grant or refuse approval. It is not to develop an alternative proposal;

(2) the notion of necessity in the power of the liquidator to do “things as are necessary” has a broad meaning and empowers a liquidator to do anything expedient in relation to the beneficial completion of the winding-up of the affairs of the corporation and the distribution of its assets;

(3) however, notwithstanding this breadth, the Court must be satisfied that there is a good and solid reason for concluding that the processes of winding up and distribution would be enhanced by the funding agreement, compared with the ordinary deployment of surplus funds. The enhancement must be demonstrated by some informed and independent assessment of the separate and selfish interests of the funding company;

(4) although the Court must be satisfied that it is appropriate for the exercise of power under s 477(2B), the Court will not generally review a liquidator’s commercial judgment or second guess its decision;

(5) circumstances in which the Court will scrutinise a liquidator’s decision closely include where there appears to be a lack of good faith, an error of law or principle, or a real or substantial ground for doubting the prudence of the liquidator’s conduct;

(6) the Court will rarely approve an agreement which has important terms that are unclear;

(7) in considering whether the Court’s power under s 477(2B) should be exercised, any relevant matter can be considered. Matters that are commonly relevant include:

(a) the manner in which the funding or indemnity will be provided under the agreement;

(b) the extent to which the liquidator has considered other funding options;

(c) the interests of creditors other than the proposed or potential respondents and the extent to which the liquidator has consulted them;

(d) the liquidator’s prospects of success in the litigation although this factor will rarely be able to be assessed at anything other than a high level of abstraction;

(e) possible oppression in bringing the proceedings;

(f) the nature and complexity of the cause of action;

(g) the risks involved in the claim (including the amount of costs likely to be incurred in the proposed litigation, the extent to which the funder is to contribute to those costs, and the extent to which the funder is to contribute to the costs of the defendant in the event that the action is not successful, or towards any order for security for costs);

(h) any particular premium or benefit which is promised in consideration of the provision of the funding or indemnity including whether that benefit is proportionate to the risk undertaken by the funder;

(i) whether the liquidator is subject to any control over the conduct of the litigation, other than the usual obligation to keep the funder fully informed of all matters relating to the action; and

(j) whether the agreement provides for a clear mechanism for resolving any dispute between the funder and the liquidator about the compromise of the litigation which is funded,

see *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2015] NSWCA 85; (2015) 295 FLR 13; *Sheahan, In the matter of BCI Finances Pty Ltd (in liq)* [2015] FCA 121; *Re McGrath (in their capacity as liquidators of HIH Insurance Ltd)* [2010] NSWSC 404; (2010) 266 ALR 642; *Re Ascot Vale Self-Storage Centre Pty Ltd (in liquidation)* [2014] VSC 75; *Re ACN 076 673 875 Ltd* [2002] NSWSC 578.

1. The liquidators point out that in *In the matter of City Pacific Limited* [2017] NSWSC 784 at [12]-[13], Brereton J referred to a similar list of considerations and noted that, while it is true that those considerations can be identified from the authorities, they are more relevant where a direction is sought that the liquidator would be justified in entering into such an agreement. That is because those considerations are relevant to an evaluation of propriety of the liquidator’s judgement and whether the liquidator should receive the protection that flows from a direction under s 479 of the *Corporations Act*. I accept that, in considering an application under s 477(2B), an important question is whether any prolongation of the liquidation which might be occasioned by the agreement for which approval is sought is warranted by the offsetting benefits that might flow from it.

## Consideration

1. The liquidators have not made an application for directions under s 479 of the *Corporations Act*. It is for the liquidators to exercise their own commercial judgement as to whether the further conduct of an appeal of the Brereton Judgment is a course which they should take in all of the circumstances. Despite the substantial equity in the Property, the liquidators do not have sufficient available funds to prosecute an appeal.
2. The following considerations favour making an order under s 477(2B):
3. Although the liquidators have not sought to negotiate funding from any other source, they have formed the view that it is unlikely that they would be able to secure funding on better terms. That view is not obviously wrong. No premium will be payable to the Secured Creditors if the appeal is successful. Interest will be payable on amounts advanced in accordance with the terms of the loan agreement pursuant to which the Secured Creditors previously advanced funds, that is, a rate of 4% (with a default rate of 6%). All amounts advanced under the funding agreement will be secured by the Mortgage.
4. The Secured Creditors have agreed to advance $110,000 (excluding GST) for legal costs and the liquidators’ costs of prosecuting the appeal and this application. This amount reflects the estimated legal costs and liquidators’ costs to be incurred in running the appeal and this application. The Secured Creditors will also fund the amount of $296,919 for the administrators’ and liquidators’ remuneration and expenses incurred to the date of the funding agreement but not yet paid.
5. The Secured Creditors agree to indemnify the administrators in relation to the adverse costs orders obtained by Rabbi Milecki in the proceedings before Brereton J.
6. The Secured Creditors are not required to provide funding if an extension of time to file the appeal is not granted. The appeal was filed six days late, due to a miscalculation of the period in which to file the appeal by the solicitors to the liquidators. The liquidators are confident that that extension will be granted given the relatively short delay, however, if the funding agreement is not approved, they will be exposed to an adverse costs order if they do not secure funding to pursue the appeal. The appeal will likely to be heard within one day. The appeal is unlikely to unduly prolong the liquidation.
7. The litigation has some prospects of success, given the unusual nature of the contract. If the appeal is successful, Rabbi Milecki’s claims are likely to be reduced substantially, perhaps to an amount of approximately $20,000. In those circumstances, other unsecured creditors may be paid their full entitlement and it is possible that the congregation may be in a position to secure the Company’s release from winding up, which would be for the benefit of the synagogue’s congregation and therefore in pursuit of its object.
8. The funding agreement requires the liquidators to consult with the Secured Creditors at their request but contains no other provision allowing the Secured Creditors control over the litigation.
9. There is no reason to think that the liquidator’s judgement is infected by a lack of good faith or that there is a real or substantial ground for doubting the prudence of the liquidator’s conduct in seeking to enter into the funding agreement.
10. The liquidators are satisfied that the provisions of the retainer agreement are appropriate and that the rates set out in it are within the range of typical fees charged for similar matters. The retainer agreement relates directly to the appeal and there is no reason to think that the entry into the retainer agreement is not a proper exercise of the liquidators’ powers: see *In the matter of 7 Steel Distribution Pty Limited (in liquidation) (receivers and managers appointed)* [2013] NSWSC 669; 13 ACLC 13-021 at [25].
11. Similarly, the exclusive licence agreement serves to protect the chattels the subject of them, including by insurance, and the agreement terminates when the Property is sold, if not before. The Company suffers no detriment from entering into this agreement and it will not prolong the liquidation.

## Conclusion

1. Orders should be made under s 477(2B) of the *Corporations Act* authorising the liquidators to enter into the funding agreement, the retainer agreement and the exclusive license agreement on the terms they propose. It is appropriate that the liquidators’ costs and expenses of the application be costs in the winding up.

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| I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell. |

Associate:

Dated: 9 October 2017