FEDERAL COURT OF AUSTRALIA

Yeo v Alpha Racking Pty Ltd, in the matter of Alpha Racking Pty Ltd [2019] FCA 1338

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| File number: |  |
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| Judge: | **O'BRYAN J** |
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| Date of judgment: | 5 September 2019 |
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| Date of publication of reasons: | 10 September 2019 |
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| Catchwords: | **CORPORATIONS** – application for appointment of first and second plaintiffs as provisional liquidators of the defendant pending hearing of an application to wind up the defendant on the just and equitable ground in section 651(1)(k) of the *Corporations Act 2001* (Cth) – where evidence establishes strong prima facie case of “phoenixing” activity |
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| Legislation: | *Corporations Act* 2001(Cth), ss 472(2), 651(1)(k) |
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| Cases cited: | *Deputy Commissioner of Taxation v A & S Services Australia Pty Ltd* [2017] FCA 437 |
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| Date of hearing: | 5 September 2019 |
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| Registry: |  |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Counsel for the Plaintiffs: | Mr C Moller |
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| Solicitor for the Plaintiffs: | Frenkel Partners |
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| Solicitor for the Defendant: | Mr D Anderson of ERA Legal |

ORDERS

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|  | | VID 960 of 2019 |
| IN THE MATTER OF ALPHA RACKING PTY LTD (ACN 115 229 288) | | |
| BETWEEN: | ANDREW REGINALD YEO AND GESS MICHAEL RAMBALDI AS LIQUIDATORS OF ALPHA STORAGE & EQUIPMENT PTY LTD (IN LIQUIDATION) (ACN 163 410 802)  First and Second Plaintiffs  ALPHA STORAGE & EQUIPMENT PTY LTD (IN LIQUDIATION) (ACN 163 410 802)  Third Plaintiff | |
| AND: | ALPHA RACKING PTY LTD (ACN 115 229 288)  Defendant | |

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| JUDGE: | O'BRYAN J |
| DATE OF ORDER: | 5 september 2019 |

THE COURT ORDERS THAT:

1. The time for service of the plaintiffs’ originating process is abridged and the application be returnable at 2.15pm on 5 September 2019.
2. Until further order, Andrew Reginald Yeo and Giuseppe Michele Rambaldi (also known as Gess Michael Rambaldi) are appointed jointly and severally as the provisional liquidators of the defendant.
3. The provisional liquidators have control over the whole of the property of the defendant.
4. The provisional liquidators shall have the power to exercise all or any of the following powers:
   1. to take possession of, collect and protect any property of the defendant;
   2. to carry on the business of the defendant;
   3. to exercise so far as may be lawful and necessary all or any of the functions and powers which may be performed and exercised by a liquidator of the defendant under paragraph 477(1)(d), subsection 477(2) (except paragraph 477(2)(m)) and subsection 477(3) of the *Corporations Act* 2001 (Cth), if the defendant was being wound up in insolvency or by the Court.
5. The provisional liquidators shall, by 12pm on 18 September 2019, provide the Court with a report as to the provisional liquidation of the defendant, including:
   1. the identification of the assets (including any business) and liabilities of the defendant;
   2. the ownership of property used or occupied by, or in the possession of, the defendant;
   3. an opinion as to whether the defendant has proper financial records;
   4. an opinion as to the solvency of the defendant;
   5. the identification of any further information necessary to enable the financial position of the defendant to be assessed;
   6. any recommendations as to further steps necessary to complete the investigation into the affairs of the defendant;
   7. any suspected contravention of the *Corporations Act* 2001 (Cth) by the defendant or any of its directors or officers; and
   8. any other matter which the provisional liquidators consider material to their functions.
6. The proceeding is adjourned to 19 September 2019.
7. Costs are reserved.
8. Liberty to apply is reserved.

**THE COURT NOTES THAT:**

The plaintiffs undertake to submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order.

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

REASONS FOR JUDGMENT

O’BRYAN J:

## Introduction

1. On 2 August 2019, the first and second plaintiffs, Andrew Reginald Yeo and Giuseppe Michael Rambaldi (**liquidators**), were appointed as liquidators of the third plaintiff, Alpha Storage & Equipment Pty Ltd (ACN 163 410 802) (**Alpha Storage**), by an order made by this Court.
2. On 20 August 2019, the liquidators applied *ex parte* under s 530C of the *Corporations Act* 2001 (Cth) (**Act**) for warrants authorising them to search for and seize the books and property of Alpha Storage. Warrants were necessary because the company’s directors had not provided its books and property to the liquidators and, based on their investigations and documents obtained from other sources, the liquidators believed that the business of Alpha Storage was being wrongfully transferred to the defendant, Alpha Racking Pty Ltd (**Alpha Racking**), a practice commonly referred to as “phoenixing”. Justice Beach issued those warrants on 22 August 2019.
3. On 4 September 2019, the liquidators and Alpha Storage commenced this proceeding by originating process seeking to wind up Alpha Racking on the “just and equitable” ground in s 651(1)(k) of the Act. They also sought, by way of urgent interim relief, to have themselves appointed as its provisional liquidators.
4. The application for the appointment of provisional liquidators to Alpha Storage was supported by affidavits made by one the liquidators, Andrew Yeo, and two of his staff, Marcus Rodaughan and Innis Cull. The evidence adduced shows the likelihood of serious misconduct and potentially fraud in the conduct of Alpha Racking’s affairs as discussed below. The plaintiffs submitted that the appointment of provisional liquidators to Alpha Racking was warranted because first, it is likely that the controllers had engaged in serious misconduct; second, there can be no confidence in the proper conduct and management of Alpha Racking’s affairs; and third, there is a real risk to the public interest.
5. I heard the interlocutory application urgently at 2.15pm on 5 September 2019. At the hearing, Alpha Racking was represented by a solicitor, Mr Anderson. Mr Anderson informed the Court that he had only been instructed that morning and had had only a brief opportunity to take instructions. Mr Anderson said that he had instructions to offer an undertaking on behalf of Alpha Racking and its director, Paul Athanasiadis, as to the conduct of the affairs of Alpha Racking pending the determination of the winding up application. I gave the parties an opportunity to discuss whether any such undertaking would be acceptable to the plaintiffs, but the discussions did not result in agreement. Given the evidence adduced at the hearing, I formed the view that an undertaking given by Alpha Racking and its director Mr Athanasiadis would not address the serious concerns about the conduct of the affairs of Alpha Racking.
6. Given the limited opportunity that Mr Anderson had had to consider the evidence that had been filed, I heard the interlocutory application as if it had been made *ex parte*. On the basis of the evidence that was filed, I made orders for the appointment of the liquidators as provisional liquidators of Alpha Racking with the power to conduct the business of Alpha Racking, an obligation to report to the Court by 18 September 2019 with a further hearing to be held on 19 September 2019 and reserving to Alpha Storage general liberty to apply to have the appointment set aside. These are my reasons for making those orders.

## Facts disclosed by the evidence

1. Alpha Storage operated a business of providing commercial warehouse and storage solutions in the form of steel shelving systems imported from overseas. It operated from premises located in Dandenong South in Victoria and Brisbane in Queensland.
2. An ASIC search for Alpha Storage dated 19 August 2019 shows that:
   1. The company was incorporated on 22 April 2013.
   2. Paul Athanasiadis has been a director of the company since its incorporation.
   3. George McMillan was a director of Alpha Storage for two brief periods: 13 to 20 May 2019 and 4 to 8 July 2019.
   4. On 15 May 2019, the registered office was changed to the offices of Abbott Adams & Associates Pty Ltd (**Abbott Adams & Associates**) at Unit 6, 33 Crombie Avenue, Bundall, Queensland.
3. On 2 August 2019, Alpha Storage was wound up on the application of the Commissioner of Taxation, to whom it owes some $1.06 million.
4. On the next business day, 5 August 2019, staff from the liquidators’ office attended the Dandenong South premises to secure its books, records and assets and meet its director and management. The liquidators met with Mr Athanasiadis, Vince Camera, the business manager of Alpha Storage and a man named Troy Kantzidis. Part way through the meeting, Mr McMillan attended by telephone. The liquidators were given the following information at the meeting:
   1. Mr Kantzidis said that Mr Athanasiadis was not Alpha Storage’s director but that Mr McMillan, who “handles the company’s accounts”, was its director. Mr Kantzidis attempted to phone Mr McMillan to have him participate in the meeting but was initially unsuccessful.
   2. Mr Athanasiadis said that he had first encountered Mr McMillan when he (Mr McMillan) had offered some “loan services”. In about February 2019, shortly after the ATO served a statutory demand on Alpha Storage, Mr Athanasiadis engaged Mr McMillan to act as an advisor to Alpha Storage. He also stated that: Alpha Storage leased the Dandenong South and Brisbane premises and another company, Alpha Racking (the defendant in this proceeding), had taken over consignment of all the stock of the Brisbane premises as well as the two forklifts on site; and the two employees based at the Brisbane premises had been transferred to Alpha Racking.
   3. Mr Kantzidis said that Alpha Storage’s books and records were not at the Dandenong South premises but were stored with Mr McMillan on the Gold Coast, from where Mr McMillan also ran its payroll.
   4. Mr McMillan then joined the meeting by telephone. He said that he (and not Mr Athanasiadis) was the director of Alpha Storage and that the ASIC records were erroneous. He stated that an error had been made by the lodging agent, Ezy Debt Recovery Pty Ltd. Mr McMillan stated that the books and records were not at the Dandenong South premises but were kept with him on the Gold Coast and he was in the process of preparing them to provide to the liquidators. Asked whether the company was trading, Mr McMillan referred to a joint venture agreement between it and Alpha Racking and explained that, due to the liquidation, Alpha Racking was to take over the trading activity. He said he would provide a copy of the joint venture agreement to the liquidators. Mr McMillan requested that the liquidators wait for him to complete a report on company activities and properties before making any decisions about trading the business. As to the joint venture, Mr McMillan said that Alpha Racking was the trading entity and holds all the assets of the joint venture and that Alpha Storage was merely a “labour hire” company, providing labour services to Alpha Racking.
5. On 9 August 2019, Kevin Hutchinson, as director of an entity with the name “Ezydebt Solutions”, sent the liquidators an ASIC Form 492 “Request for Correction” which stated that Mr Athanasiadis had resigned as a director of Alpha Storage on 8 July 2019. The letter stated that Ezydebt had made a mistake in an earlier form notifying Mr McMillan’s resignation rather than the resignation of Mr Athanasiadis.
6. The evidence discloses the following facts concerning Mr McMillan, Abbott Adams & Associates and the Ezy Debt entities.
   1. ASIC searches show that, between 30 September 2018 and 25 February 2019, Mr McMillan was a director of the accounting firm Abbott Adams & Associates. Abbott Adams & Associates was incorporated on 4 August 2016 and changed its registered office to Unit 6, 33 Crombie Avenue, Bundall, Queensland on 29 October 2018.
   2. ASIC searches show that Abbott Adams & Associates holds all of the shares in a company called Ezy Debt Recovery Pty Ltd which has its registered office at Unit 1, 33 Crombie Avenue, Bundall, Queensland (the same building as Abbot Adams & Associates) and that Mr McMillan has been a director since 10 January 2019.
   3. ASIC searches also show that Abbott Adams & Associates holds all of the shares in another company called Ezy Debt Solutions (Aust) Pty Ltd, which also has its registered office at Unit 1, 33 Crombie Avenue, Bundall, Queensland. Mr McMillan ceased to be a director of that company on 29 October 2018 and was replaced by Mr Hutchinson.
   4. During the winding up proceeding commenced by the Commissioner of Taxation against Alpha Storage, Mr McMillan swore two affidavits. In the first affidavit sworn 15 May 2019, Mr McMillan described himself as a director of Alpha Storage. In the second affidavit sworn 27 July 2019, Mr McMillan described himself as the manager of Alpha Storage. In the latter affidavit, Mr McMillan stated, amongst other things, that:

…on or about 25th Day June 2019 Alpha Racking & Equipment Pty Ltd appointed Abbott Adams & Associates an Accounting firm specialising in forensic accounting. The accountants have over 50 years' experience as tax agents and 30 years in pre-insolvency.

Abbott Adams & Associates' initial assessment of the financials had found that many data entries do not reflect accurately the bank statement position nor does the financials record accurately the Joint Venture arrangements or the contract labour costs provided by the related entity.

Since the appointing of Abbott Adams & Associates, the business has cancelled the Joint Venture agreement with Alpha Racking Pty Ltd, this was done to allow Alpha Racking & Equipment to assess its stand-alone financial position.

The above passage appears to refer erroneously to Alpha Storage & Equipment Pty Ltd as “Alpha Racking & Equipment Pty Ltd”.

1. An ASIC search for Alpha Racking dated 2 September 2019 shows that:
   1. The company was incorporated on 11 July 2005.
   2. Paul Athanasiadis has been a director of the company since its incorporation.
   3. The registered office was changed to the offices of Ezy Debt Recovery Pty Ltd (although given as Unit 6, 33 Crombie Avenue, Bundall Queensland) on 13 August 2019 and then to the offices of Abbott Adams & Associates at the same address on 22 August 2019.
2. On 5 August 2019, the liquidators sent letters (by both email and registered mail) to Messrs Athanasiadis and McMillan. The letters made formal requests that they:
   1. provide a report on company activities and property, as required by s 475 of the Act, within 10 business days (that is, by 19 August 2019); and
   2. provide Alpha Storage’s books and records, as required by s 530A of the Act, within five business says (that is, by 12 August 2019).
3. Each letter also included a formal notice under ss 483 and 488 of the Act that Mr Athanasiadis and McMillan provide the Company’s books and property to the liquidators.
4. On 9 August 2019, Abbott Adams & Associates emailed the liquidators attaching a document purporting to be the joint venture agreement between Alpha Storage and Alpha Racking. The purported agreement provides that its execution date is 1 July 2017 and that the joint venture commenced on that date. The purported agreement also provides that Alpha Storage would grant a charge in favour of Alpha Racking and provides for an assignment of the lease of the Dandenong South premises to Alpha Racking. The document provided to the liquidators contains a “deed of consent to assignment” purportedly dated 1 August 2019 (the day before Alpha Storage was placed into liquidation) and that purports to have been signed on behalf of Alpha Storage and Alpha Racking but is not signed by the landlord of the Dandenong South premises. The documents and information obtained by the liquidators, referred to below, establish a strong prima facie case that the purported joint venture agreement is a false document the purpose of which is to falsify the trading activity of Alpha Storage.
5. On 13 August 2019, Mr Yeo spoke to Sharron Kyroussis, a partner at Alpha Storage’s former accountants, BDO Melbourne. Ms Kyroussis told Mr Yeo that:
   1. she was in the process of putting together Alpha Storage’s books and records for his staff to collect;
   2. in her and her firm’s experience with Alpha Storage, there had been no mention of a joint venture arrangement; and
   3. she understood that Alpha Storage had traded in its own right.
6. Subsequently, BDO Melbourne delivered documents in their possession to the liquidators. These included financial documents for the 2018 financial year (that have been extracted from a MYOB file provided by BDO Melbourne) and financial accounts and income tax statements for Alpha Storage for the 2014, 2015, 2016 and 2017 financial years. Those documents show that Alpha Storage had conducted a substantial business in its own right. There is no suggestion of a joint venture arrangement in those documents.
7. The documents provided by BDO Melbourne included an email dated 17 June 2019 that BDO Melbourne had received from Mr Athanasiadis advising that he had appointed Abbott Adams & Associates as Alpha Storage’s new accountants and tax advisors.
8. On 19 August 2019,Abbott Adams & Associates wrote to Pitcher Partners advising that they were reviewing Alpha Storage’s accounts but were having difficulty in reading “special purpose software” and they were “trying to undertake a manual rebuildof accounts”. They sought an extension to Friday 30 August 2019 to finalise the paperwork.
9. The only documents that have been provided to the liquidators by Messrs Athanasiadis and McMillan following the initial meeting and formal request for information were the purported joint venture agreement and the ASIC Form 492 “Request for Correction” concerning Mr Athanasiadis’ purported resignation as a director of Alpha Storage.
10. Despite the lack of cooperation from Messrs Athanasiadis and McMillan, the liquidators have undertaken investigations and obtained documents from other sources. In particular, they have:
    1. obtained from Alpha Storage’s former accountants, BDO Melbourne, its financial statements and taxation documents (referred to above);
    2. obtained from the managing agents for the Dandenong South and Brisbane premises copies of the lease documents; and
    3. been informed by the managing agents for the Dandenong South premises that the managing agents were unaware of any joint venture involving Alpha Storage and that, in the week ending 9 August 2019, Mr Camera had sought an assignment of the lease for those premises.
11. On 20 August 2019, the liquidators applied to this Court for the issue of warrants to search for and seize books and property of Alpha Storage. Justice Beach ordered that the warrants be issued for the search of the Dandenong South and Brisbane premises of Alpha Storage and the Gold Coast premises of Abbott Adam & Associates. The warrants were executed on 27 August 2019 simultaneously at the Dandenong South, Brisbane and Gold Coast premises. Due to the volume of documents of Alpha Storage found at the Dandenong South premises, the execution of the warrant there had to be continued on 28 August 2019.
12. During the execution of the warrants, the liquidators obtained documents relevant to the business, including the following:
    1. from the Gold Coast premises of Abbott Adam & Associates:
       1. a document listing quotations that Alpha Storage had given to customers for the supply of products showing that, between 1 February 2019 and 14 May 2019, Alpha Storage provided quotes totalling $8.6 million to customers;
       2. a document listing customer orders for the supply of products by Alpha Storage showing that, between 13 March 2019 and 14 May 2019, customers placed orders worth $1.7 million with Alpha Storage and it collected deposits totalling $612,322.64 in respect of those orders;
       3. sales invoices for the period between October 2018 and June 2019, all in Alpha Storage's name;
       4. purchase orders and supplier invoices for the period between June 2018 and April 2019, all addressed to Alpha Storage; and
       5. a listing of “debtor aged balances” as at 28 August 2019 for “Alpha Storage and Equipment”;
    2. from the Dandenong South premises, documents titled “Letter of Continuity of Employment”, all dated 5 August 2019 (three days after the liquidators’ appointment), purporting to offer staff of Alpha Storage employment with Alpha Racking on an “ongoing” basis.
13. The liquidators also seized documents showing that, following their appointment, efforts were made to transfer not just Alpha Storage’s employees but also its property, including its business, extant orders placed by customers and its receivables, away from it. Those actions included the following:
    1. On 2 August 2019, the day that liquidators were appointed to Alpha Storage, Wendy Irvine, the CFO of Alpha storage, emailed Mr McMillan, asking whether certain supply agreements could be transferred from Alpha Storage to GESS Pty Ltd, a company associated with Vince Camera (Alpha Storage’s business manager), apparently in repayment or satisfaction of a loan from Mr Camera’s company. The email was copied to Alpha Storage's head of operations, Troy Kant, and to Mr Athanasiadis.
    2. On 3 August 2019 (a Saturday), Ms Irvine sent an email at 12.53pm to Alpha Storage’s accounting staff, senior management, director (Mr Athanasiadis) and warehouse manager, giving instructions about changes to its internal bookkeeping processes. Under the changes, sales were no longer to be recorded in Alpha Storage’s “GCORP” stock management system but were to be entered instead on a “QuickBooks” system used by Alpha Racking. At 1.09pm, she sent a further email, giving instructions that:

Open sales orders in Gcorp are to be transferred to Quickbooks for the sales order balance back date no earlier than 15 June 2019. All transactions are to be dated prior to 31 July 2019

…

NO FURTHER ORDERS ARE TO BE PLACED IN THE NAME OF ASE.

I infer that “ASE” is a reference to Alpha Storage.

* 1. At 6.16pm on 3 August 2019, Ms Irvine sent a further email to all staff of Alpha Storage setting out instructions for changing their email signatures to show Alpha Racking’s name instead of Alpha Storage’s name.
  2. On 7 August 2019, Mr Camera sent an email (apparently to all of Alpha Storage’s customers) announcing that “Alpha” had changed its bank account details and providing new bank account details for an account with Alpha Racking.

1. From the computer system at the Gold Coast premises, the liquidators obtained an email dated 24 May 2019 from “KH” in the following terms (errors in original):

This was an initial Text message GM.

…

Hi Kevin.

I call u today both Troy and I want to come to Brisbane end of next week. I am leaving for veitnam Saturday and back late next week.

We need to plan new strategy especially if ADC. Anti dumping. Hit us up for the 110% duty **I think it's best we liquidate and start fresh**

I have 32 containers in china to value of over $1.2 m for orders I can't service. It's fucked me I am going over to veitnam to speed up the new manufacturing plant with the potential investor . If the investor doesn't put in his funds then **I have down size and restructure**

(emphasis added)

1. I infer that the email was sent by Kevin Hutchinson to George McMillan and records a text message received from either Mr Athanasiadis or another manager at Alpha Storage. The email appears to record an intention to liquidate Alpha Storage and “start fresh”.
2. From the computer system at the Gold Coast premises, the liquidators also obtained emails by which Abbott Adams & Associates provided Mr McMillan with Alpha Storage’s general ledger accounts (which Ms Irvine had sent to them). The liquidators also obtained copies of the accounts with handwritten amendments, which Mr Yeo believes were made for the purpose of recreating the accounts so as to provide false evidence of the purported joint venture arrangement. That belief is supported by inconsistent versions of the accounts of Alpha Racking that the liquidators have received. A copy of Alpha Racking’s accounts for the financial year ended 30 June 2017, prepared by BDO Melbourne and signed by Mr Athanasiadis as director on 13 November 2018, records income of only $43,995, derived from “ATO interest”. The BDO Melbourne accounts strongly suggest that Alpha Racking was not carrying on a trading business. Those accounts can be contrasted with accounts for the year ending 30 June 2017 purportedly prepared by Abbott Adam & Associates and provided to the liquidator by Abbott Adam & Associates on 8 August 2019 which record rental income of $15,000 and “J.V. Income” of $215,207. The latter accounts also record a range of trading expenses which are not recorded in the BDO Melbourne accounts.
3. From the computer system at the Gold Coast premises, the liquidators also obtained emails between Mr McMillan (the email address being gm@ezydebtsolutions.com.au) and staff of Alpha Storage relating to its liquidation. These emails included the following:
   1. At 11.55am on 2 August 2019 (the day the winding up application was heard), Mr McMillan sent an email to Mr Athanasiadis and Ms Irvine (amongst others) in which he reported that he had “*instructed the solicitor attending court today to consent to the company being liquidated so that the liquidator has to contact us*”*.* His email appears to give instructions about novating Alpha Storage’s leases, backdating those novations, ensuring that any work in progress was in a new entity’s name and emptying the bank accounts of Alpha Storage:

Now we need to make sure the lease on the premises is transferred to the trading trust as soon as possible.

Then any lease in the name of the old company be novated immediately. Make sure there is no money in the bank account of the old company as that will be taken by the liquidator as he is by law required to close the account.

Any W.I.P. in place I understand is in the name of the trust please confirm

…

What needs to happen now is that you confirm how much can be forwarded to us today so I can arrange to be in Melbourne to get documents signed Tuesday at the latest so we can show the novation and assignments have been in place for some time

* 1. At 12.30pm on 2 August 2019, Ms Irvine replied with a series of questions (shown in plain text below), to which Mr McMillan replied at 12.48pm (shown in underlined text below). The emails appear to show a plan to alter the leasing arrangements for Alpha Storage’s premises, transferring its phone numbers and email accounts, novating certain supply agreements and back dating the novation, backing up the company’s MYOB accounts onto an external drive and letting the MYOB system otherwise fail:

1. Richardson French (premises) will lock the gate if we proceed today, this has been made clear to us, they will require 14 days to arrange rental agreements with Landlord. Keep in mind your registered office is here so the landlord at this time will not be informed as the liquidator must first attend registered office. Either ask can you sub-lease now or can they start on the new rental agreement now.

Also forgot to mention move the phone numbers and emails to the trading trust now

2. The novated agreements for the Gess/ Rentals can that be done today and back dated. I have our inhouse solicitor working on everything already so we can arrive and put a copy back in the system

3. MYOB and server. – Do I back up all copies of MYOB on external drive and the MYOB drive fail and be beyond repair? Yes exactly as we discussed at last meeting

4. The server - other information how do you want this handled. It belongs to Alpha Racking not storage, as we discussed the stock even belongs to third party

5. Will send 8 its the best I can do. Please confirm that is happening now so I can make arrangements at this end for things to happen

## Relevant Legal Principles

1. Section 461(1)(k) of the Act provides that the Court may order the winding up of a company if the Court is of the opinion that it is just and equitable to do so.
2. Under s 462(2)(b), a winding up order can be sought by (amongst others) a creditor (including a contingent or prospective creditor) of the company. Section 462(4) requires that, where the applicant is a contingent or prospective creditor, the Court must not hear the application unless and until:
   1. such security for costs has been given as the Court thinks reasonable; and
   2. a prima facie case for winding up the company has been established to the Court's satisfaction.
3. Under s 472(2), the Court can appoint a liquidator to a corporation provisionally any time after the filing of the winding up application and before the making of the winding up order.
4. The applicable principles governing the appointment of a provisional liquidator were recently discussed by Davies J in *Deputy Commissioner of Taxation v A & S Services Australia Pty Ltd* [2017] FCA 437 in a similar context of suspected “phoenixing” activities (at [4]-[5]) which I gratefully adopt:

4 The principles for the appointment of a provisional liquidator are well established and were recently summarised by this Court in *Australian Securities and Investments Commission v Uglii Corporation Ltd* [2016] FCA 1099; (2016) 116 ACSR 389 at [72] as follows:

The Court’s power is wide and the Court may appoint a provisional liquidator on any ground but as the appointment of a provisional liquidator is a drastic intrusion into the affairs of the company, a provisional liquidator will generally not be appointed unless the Court is satisfied that there is a reasonable prospect that a winding up order will be made on the application to wind up and some good reason is shown for placing the affairs of the company under the external control of a provisional liquidator prior to the hearing of the winding up application, such as public interest considerations, to preserve the status quo, or to protect the company’s assets or affairs: *Australian Securities and Investments Commission v Solomon* (1996) 19 ACSR 73, 80 (per Tamberlin J) (**Solomon**); *Australian Securities and Investments Commission v Weerappah (No 2)* [2009] FCA 249 at [8]–[9]; *Australian Securities and Investments Commission v Tax Returns Australia Dot Com Pty Ltd* [2010] FCA 715 at [73]–[77]. Public interest considerations may include, for example, the need for an independent examination of the state of accounts of the corporation by someone other than the directors, or where the affairs of the company have been carried on without due regard to legal requirements so as to leave the Court with no confidence that the company’s affairs are being properly conducted with due regard for the interests of shareholders: *Solomon* at 80.

Thus, whilst the power to appoint a provisional liquidator is not circumscribed, and there is a wide discretion, an applicant for the appointment of a provisional liquidator generally needs to satisfy the Court that there is a reasonable prospect, or it is reasonably likely, that a winding up order will be made on the application (see also *Allstate Explorations NL v Batepro Australia Pty Ltd* [2004] NSWSC 261 (**Allstate Explorations**) at [27]) and the applicant can point to some good reason for intervention prior to the final hearing and show that the appointment is needed in the public interest, or to preserve the status quo in relation to the affairs of the company, or to protect the company’s assets (*Allstate Explorations* at [30]). On an *ex parte* application, there should be cogent evidence that the delay involved in effecting service, or at least in giving notice of the application, or the very fact of notice itself is likely to be such as to defeat the purpose of appointing a provisional liquidator: *South Downs Packers Pty Ltd v Beaver* [1984] 2 Qd R 559; (1984) 8 ACLR 990 at 994 (McPherson J). In *Carr v Darren Berry International Marine Pty Ltd (No 1)* [2013] FCA 1150, Perram J ordered the appointment of provisional liquidators on an ex parte basis. His Honour considered that the potentially fraudulent nature of what was taking place combined with the inherent mobility of the company’s property made it impracticable for the application to be heard on notice in the ordinary way.

5 The principles for winding up a company on the just and equitable ground under s 461(1)(k) of the Act are also well established. These principles were helpfully summarised by Gordon J in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* [2013] FCA 234; (2013) 93 ACSR 189. At [20]–[24], her Honour stated:

It has long been established that a company may be wound up where there is “a justifiable lack of confidence in the conduct and management of the company’s affairs” and thus a risk to the public interest that warrants protection: *Loch v John Blackwood Ltd* [1924] AC 783 at 788. In *Australian Securities and Investments Commission v ABC Fund Managers* (2001) 39 ACSR 443 ; [2001] VSC 383 at [119] (ABC Fund Managers), Warren J (as her Honour then was) set out three “general fundamental principles”:

[119] First, there needs to be a lack of confidence in the conduct and management of the affairs of the company … Second, in these types of circumstances it needs to be demonstrated that there is a risk to the public interest that warrants protection. Third, there is a reluctance on the part of the courts to wind up a solvent company. [Citation omitted.]

In relation to the first, a lack of confidence may arise where, “after examining the entire conduct of the affairs of the company” the Court cannot have confidence in “the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company”: *Galanopoulos v Moustafa* [2010] VSC 380 at [32]; see also *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 532–3; 133 ALR 1 at 61–2; 18 ACSR 459 at 518–9 (**AS Nominees**); *ABC Fund Managers* at [117]–[118]; *Australian Securities and Investments Commission v International Unity Insurance Pty Ltd* (2004) 22 ACLC 1416; [2004] FCA 1059 at [135]–[139] (**International Unity Insurance**).

There is thus a significant overlap between the matters relevant to the just and equitable ground and the matters which weigh in favour of the exercise of the Court’s discretion to appoint a provisional liquidator. For example, matters which indicate “the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company” might also demonstrate that “the company’s affairs have been conducted in a manner without regard to legal requirements or accepted principles of corporate management”.

In relation to the second, a risk to the public interest may take several forms. For example, a winding up order may be necessary to ensure investor protection or where a company has not carried on its business candidly and in a straightforward manner with the public: *International Unity Insurance* at [138]; see also *Australian Securities and Investments Commission v Finchley Central Funds Management Ltd* [2009] FCA 1110 at [3]. Alternatively, it might be justified in order to prevent and condemn repeated breaches of the law: *Kingsley Brown Properties* at [96]; see also *AS Nominees* at FCR 527; ALR 56–7; ACSR 513–4; *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* (2001) 36 ACSR 778; [2001] WASC 27 at [75]–[77]. Again, there is an overlap between matters which would pose a risk to the public interest for the purpose of s 461(1)(k) and which are relevant to the appointment of a provisional liquidator.

In relation to the third, it has been said that “a stronger case might be required where the company was prosperous, or at least solvent”: *Kingsley Brown Properties* at [96]. Solvency, however, is not a bar to the appointment of a liquidator on the just and equitable ground, particularly where there have been serious and ongoing breaches of the Act: *ABC Fund Managers* at [124]–[130].

As the authorities show, fraud or misconduct are significant factors relevant to the exercise of the Court’s discretion to wind up on the just and equitable ground: *Hipages Group Pty Ltd v Reach Aussie Pty Ltd* [2017] FCA 112 at [47]; *Royal v El Ali (No 2)* [2016] FCA 1156 at [17]; *International Hospitality Concepts Pty Ltd v National Marketing Concepts Inc (No 2)*(1994) 13 ACSR 368.

## Disposition

1. In my view, the evidence summarised above establishes a strong prima facie case that Messrs Athanasiadis and McMillan and other managers have been engaged in a plan or scheme to strip or transfer the business and assets from Alpha Storage and move them to Alpha Racking so as to continue the business of Alpha Storage in Alpha Racking, an activity commonly referred to as “phoenixing”. Further, and relevantly for this application, there is a strong prima facie case that those activities have extended to creating false documents and accounts of Alpha Racking. The “phoenixing” activities have included:
   1. the creation of a false joint venture agreement between the companies;
   2. attempts to have customers pay Alpha Racking – and not Alpha Storage – money they owe to Alpha Storage;
   3. the creation of what appear to be false financial records, including financial statements, for Alpha Racking and Alpha Storage;
   4. the transfer of staff from Alpha Storage to Alpha Racking; and
   5. the setting up of a new financial accounting package for Alpha Racking and the transfer to it of “open” purchase orders that are the property of Alpha Storage.
2. The evidence strongly suggests that the purported joint venture between Alpha Storage and Alpha Racking is a fiction. That evidence includes the following:
   1. First, Alpha Storage has issued invoices to third parties, showing that it was a trading entity and not a “labour hire” firm.
   2. Second, security interests have been registered in the name of Alpha Storage on the Personal Property Securities Register and finance agreements exist between Alpha Storage and various financiers (ANZ Bank, Macquarie Leasing Pty Limited, Toshiba, PCP Finance), again showing that Alpha Storage was conducting a trading business.
   3. Third, a “LinkedIn” page gives a description of the business activities of Alpha Storage and there is no reference to a joint venture.
   4. Fourth, the debt owed to the Commissioner of Taxation includes a significant liability for GST which indicates that Alpha Storage operated a significantly sized business.
   5. Fifth, there is no reference to a joint venture in any of the documents provided to or obtained by the liquidators, including the financial accounts and taxation documents of Alpha Storage.
   6. Sixth, the partner from BDO Melbourne who was responsible for preparing Alpha Storage’s accounts and tax returns confirmed that no mention was ever made of a joint venture arrangement and that Alpha Storage traded in its own right.
   7. Seventh, the documents evidencing the lease for the Dandenong South and Brisbane premises are in the name of Alpha Storage. These documents post-date the purported joint venture agreement. Further, the leasing agent of the Dandenong South premises was unaware of any joint venture.
3. Relevantly to this application, the evidence shows a strong prima facie case that Alpha Racking has knowingly participated in the phoenixing activities as the recipient of the business and assets of Alpha Storage and is complicit in entering into a fictitious joint venture agreement and the creation of false accounts to support the joint venture narrative.
4. The liquidators’ investigations have revealed evidence establishing a strong prima facie case of serious misconduct and potentially fraud in the conduct of Alpha Racking’s affairs. Having regard to the evidence before me, I consider that there can be no confidence in the proper conduct and management of Alpha Racking’s affairs. Further, the conduct of the affairs of both Alpha Storage and Alpha Racking poses a real risk to the public interest, in particular the interests of the creditors of both companies. As the principles have established, these are all bases for winding up companies on the “just and equitable” ground. I am satisfied that there is a reasonable prospect that an order for the winding up of Alpha Racking will be made.
5. In the circumstances, I am satisfied that an appointment of a provisional liquidator of Alpha Racking is needed to preserve the status quo and to investigate the affairs of Alpha Racking.

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| I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Bryan. |

Associate:

Dated: 10 September 2019