Federal Court of Australia

Arnautovic v Qaqour [2022] FCA 726

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judgment of: | **YATES J** |
|  |  |
| Date of judgment: | 17 June 2022 |
|  |  |
| Catchwords: | **CORPORATIONS** – application by provisional liquidator of company pursuant to s 486Aof the *Corporations Act 2001* (Cth) |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth) ss 181(1), 182(1), 486(1), 486A(1), 486A(1)(c), 486A(1)(d), 486A(2), 486A(2)(b)– (d), 486A(2A) |
|  |  |
| Cases cited: | *Scottish Pacific Business Finance Pty Ltd v Qaqour, in the matter of Penny World Pty Ltd (receivers and managers appointed)* [2022] FCA 725 |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Sub-area: |  |
|  |  |
| Number of paragraphs: | 24 |
|  |  |
| Date of hearing: | 17 June 2022 |
|  |  |
| Counsel for the Plaintiff: | Mr A Cheshire |
|  |  |
| Solicitor for the Plaintiff: | Mills Oakley |
|  |  |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 459 of 2022 |
|  | | |
| BETWEEN: | SULE ARNAUTOVIC, THE PROVISIONAL LIDQUIDATOR OF PENNY WORLD PTY LTD (RECEIVERS AND MANAGERS APPOINTED)  Plaintiff | |
| AND: | SHADI QAQOUR  Defendant | |

|  |  |
| --- | --- |
| order made by: | YATES J |
| DATE OF ORDER: | 17 JUNE 2022 |

THE COURT ORDERS THAT:

1. The Plaintiff have leave to file in Court the Originating Process.
2. Pursuant to s 486A(1)(c) of the *Corporations Act 2001* (Cth), the Defendant surrender his passport to the District Registrar of the New South Wales District Registry by 11:00 am on 20 June 2022.
3. Pursuant to s 486A(1)(d) of the *Corporations Act 2001* (Cth), up until 11:59 pm on 24 June 2022, the Defendant be prohibited from leaving New South Wales without the prior consent of the Court.
4. Liberty to apply be granted on 24 hours’ notice or such shorter period as the Court may permit.
5. Service of the Originating Process and these orders be effected on the Defendant by:
   1. sending a copy to Nicola Craven of Cockburn & Co Lawyers by email to [REDACTED];
   2. sending a copy by email to [REDACTED];
   3. sending the following text message to the mobile number [REDACTED] stating “Orders have been made against you by the Federal Court of Australia and have been sent by email to [REDACTED]. Please contact [REDACTED] of Mills Oakley on [REDACTED]”.

by 7.00 pm on 17 June 2022.

1. The proceedings stand over before the Commercial and Corporations Duty Judge for New South Wales at 2.15 pm on 24 June 2022.
2. These orders be entered forthwith.

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

REASONS FOR JUDGMENT

YATES J:

1. On 17 June 2022, on the application of the plaintiff, who is the provisional liquidator of Penny World Pty Ltd (receivers and managers appointed) (the **company**), I made orders pursuant to s 486A(1) of the *Corporations Act 2001* (Cth) (the **Corporations Act**) against the defendant, Shadi Qaqour. The defendant is the sole director, secretary, and shareholder of the company.
2. The evidence in support of the application was as follows:
   1. Exhibit A – Affidavit of Justin Nicholas Doczy made 14 June 2022;
   2. Exhibit B – Affidavit of Grahame Ward made 14 June 2022;
   3. Exhibit C – Affidavit of Grahame Ward made 17 June 2022;
   4. Exhibit D – Affidavit of Nicholas Anthony James Dale made 17 June 2022;
   5. Exhibit E – Exhibit GXW-1 to the Affidavit of Grahame Ward made 14 June 2022;
   6. Exhibit F – Exhibit JND-1 to the Affidavit of Justin Nicholas Doczy made 14 June 2022.
3. These affidavits had been filed and read, and the exhibits tendered, in proceeding NSD 444 of 2022.
4. Sections 486A(1)(c) and (d) of the Corporations Act provide:

(1) The Court may make one or more of the following:

(a) …

(b) …

(c) an order requiring an officer or employee of a company, or a related entity of a company that is a natural person, to surrender to the Court his or her passport and any other specified documents;

(d) an order prohibiting an officer or employee of a company, or a related entity of a company that is a natural person, from leaving this jurisdiction, or Australia, without the Court's consent.

1. The grounds on which such orders can be made are specified in s 486A(2):

(2) The Court may only make an order under subsection (1) if:

(a) the company is being wound up in insolvency or by the Court, or an application has been made for the company to be so wound up; and

(b) the Court is satisfied that there is at least a prima facie case that the officer, employee or related entity is or will become liable:

(i) to pay money to the company, whether in respect of a debt, by way of damages or compensation or otherwise; or

(ii) to account for property of the company; and

(c) the Court is also satisfied that there is substantial evidence that the officer, employee or related entity:

(i) has concealed or removed money or other property, has tried to do so, or intends to do so; or

(ii) has tried to leave this jurisdiction or Australia, or intends to do so;

in order to avoid that liability or its consequences; and

(d) the Court thinks it necessary or desirable to make the order in order to protect the company's rights against the officer, employee or related entity.

1. An order under s 486(1) can only be made on the application of a liquidator or provisional liquidator of the company, or the Australian Securities and Investments Commission: s 486A(2A). That requirement was plainly satisfied in the present case.
2. The background to the application is discussed in *Scottish Pacific Business Finance Pty Ltd v Qaqour, in the matter of Penny World Pty Ltd (receivers and managers appointed)* [2022] FCA 725 (***Scottish Pacific v Qaqour***), which should be read with these reasons.
3. The evidence before the Court was that the company, under the control of the defendant, had been used as the vehicle for what appeared to be fraudulent conduct involving the obtaining of large sums of money from Scottish Pacific Business Finance Pty Ltd (**ScotPac**) under a debtor finance facility into which the company had entered. The evidence was that the company had obtained these sums from ScotPac in reliance on invoices that now appear to have been fabricated by the company. The evidence showed that ScotPac paid these funds into the company’s bank account with the Commonwealth Bank of Australia (**CBA**). The defendant is the sole signatory on that account. Amounts in round figures, corresponding to the deposited amounts, were, in most cases, almost immediately withdrawn and transferred to an account maintained by Wizly Pty Ltd (**Wizly**) with the CBA. The defendant is sole director, secretary, and shareholder of Wizly. The company’s bank account with the CBA has a nil balance. It is not known whether, and if so what, funds sourced from the advances made by ScotPac, remain in Wizly’s account. The company is presently indebted to ScotPac for $3,120,489.85.
4. As explained in *Scottish Pacific v Qaqour*, a perusal of the company’s bank statements for its CBA account showed that withdrawals from the account appear to be related to personal expenditure (apparently, the defendant’s personal expenditure), including overseas travel. In this latter regard, the bank statements show what is obviously the purchase of an airline ticket with Emirates, international ATM withdrawal fees, international transaction fees, in-flight service fees, hotel accommodation in Jordan, and expenditure in Dubai, to name just a few entries.
5. The evidence indicated that the defendant was not only using the money advanced to the company by ScotPac as his own money, but that these funds had provided him with the facility and means to travel overseas.
6. The plaintiff was appointed as provisional liquidator of the company in NSD 444 of 2022, earlier on 17 June 2022. ScotPac had previously appointed receivers and managers to the company (the **receivers**).
7. On 16 June 2022, the defendant’s former wife, Nisrin Jebril, sent an email to the receivers. Ms Jebril sent the email in response to information sought by the receivers. The email stated that Ms Jebril and the defendant were divorced in 2016. It seems, however, that they remain in contact with each other and that Ms Jebril knows the defendant’s whereabouts and movements. In the email, Ms Jebril provided a current address for the defendant.   
   However, she added:

He is still in Australia, but he plans to move abroad soon because of this case. He owns bank accounts in Hong Kong under Yeild Rich Tech. And another account in Jordan, probably under his name.

1. Ms Jebril’s reference to “this case” is to proceeding NSD 444 of 2022, which has been commenced by ScotPac against the defendant and the company, amongst others. A number of orders have been made in that proceeding, including freezing orders.
2. On the afternoon of 9 June 2022, ScotPac received a telephone call from Myrna Alphonse. Ms Alphonse is associated with a business called PAA Holdings. PAA Holdings is one of the company’s supposed debtors. PAA Holdings had received a payment notice from ScotPac on the basis of what seems to have been one of the apparently fabricated invoices provided by the company.
3. ScotPac’s General Manager for NSW/ACT spoke with Ms Alphonse on 10 June 2022. Ms Alphonse knows Ms Jebril and the defendant. In the course of the conversation, Ms Alphonse said:

I can’t believe that Shadi has done this to me. Don’t be surprised if he’s overseas when you try to find him.

1. With reference to the requirements of s 486A(2)(b) of the Corporations Act, the plaintiff submitted that there was at least a prima facie case that the defendant is or will become liable to pay money to the company or to account for property of the company. The plaintiff submitted that there was a prima facie breach by the defendant of his fiduciary and statutory duties including, in particular, the duty under s 181(1) of the Corporations Act that the defendant exercise his powers and discharge his duties in good faith in the best interests of the company and for a proper purpose, and his duty under s 182(1) not to improperly use his position to gain an advantage for himself or someone else, or cause detriment to the corporation. The plaintiff submitted that: it was not in the company’s best interests that the defendant caused the company to procure money from ScotPac by fraud leaving it with a large debt which, it seems, it has no means to repay; and it was not in the company’s best interests that the defendant apparently obtained and used that money for his own purposes.
2. With reference to the requirements of s 486A(2)(c), the plaintiff submitted that the Court could be satisfied that there was substantial evidence that the defendant had concealed or removed money (or intends to do so) in order to avoid his liability to pay money to the company or to account for property of the company. The plaintiff relied on the movement of funds from the company’s CBA bank account by the defendant, the timing of those movements relative to the deposits by ScotPac, and the fact that the defendant treated and used those funds as his own funds. This evidence showed the movement of funds away from the company, and an apparent attempt by the defendant to conceal them by placing them into the hands of another entity, Wizly, which the defendant also controls.
3. The plaintiff submitted that the Court could also be satisfied that there was substantial evidence that the defendant intends to leave Australia in order to avoid his liability or its consequences. In this connection, the plaintiff relied on the information provided by Ms Jebril, supported by Ms Alphonse’s comments, as well as the fact that the bank statements for the company’s CBA account showed that the defendant had recently been in Jordan and Dubai. The plaintiff submitted that this indicated that the defendant could leave, and had recently left, Australia with ease in the recent past. The plaintiff also relied on the fact that when, in proceeding NSD 444 of 2022, the defendant was asked by ScotPac to undertake not to leave Australia (as the cost for extending the time for him to make and serve an affidavit concerning the transfer of certain funds from the company’s CBA account), he declined to give such an undertaking, without giving any reasons.
4. With reference to the requirement of s 486A(2)(d), the plaintiff submitted that the Court could be satisfied that the orders sought under s 486A(1)(c) and (d) were necessary or desirable to protect the company’s rights against the defendant.
5. Based on the evidence that was before me, and the submissions that were made, I was satisfied that the plaintiff had established the requirements of s 486A(2).
6. First, I was satisfied that there was a strongly arguable case, on the available evidence, that the defendant is, or will become, liable to pay money to the company or to account for property of the company—namely, the funds originally advanced by ScotPac and held by the company in its own right, which the defendant then took from it by transferring that money to Wizly’s CBA account.
7. Secondly, I was satisfied that there was substantial evidence that, by taking the funds from the company, and depositing them into Wizly’s account, the defendant was removing money of the company and treating it as his own. The defendant was then seeking to conceal the money in an attempt to avoid the consequences of his liability to account to the company for that money. In this regard, s 486A(2) treats a company’s money as part of its property.
8. Thirdly, I was satisfied that the cumulative effect of the facts and matters summarised in [18] above were sufficient to amount to substantial evidence that the defendant intends to leave Australia in order to avoid his potential liability to the company, or at least the consequences of that liability. However, if, contrary to my view, the cumulative effect of those facts and matters is not sufficient to constitute “substantial evidence” for the purposes of s 486A(2)(c), my satisfaction as to the matters referred to in the preceding paragraph was enough to meet the requirements of s 486A(2)(c).
9. Fourthly, I was persuaded that the orders were necessary or desirable to protect the company’s rights against the defendant. I was satisfied that the evidence disclosed, at the very least, a real risk that the defendant might remove himself to avoid the consequences of his conduct.   
   As the application was made in the absence of the defendant, I considered it appropriate that, in the first instance, the orders should be made for a limited period—namely, until 11.59 pm on 24 June 2022, with liberty being granted to the defendant to apply on short notice. The initial period of the order coincides with the effective period of other interlocutory orders I have made in proceeding NSD 444 of 2022.

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

Associate:

Dated: 23 June 2022