FEDERAL COURT OF AUSTRALIA

In the matter of KASH Aboriginal Corporation ICN 108 (Administrators Appointed) No 2 [2012] FCA 789

|  |  |
| --- | --- |
| Citation: | In the matter of KASH Aboriginal Corporation ICN 108 (Administrators Appointed) No 2 [2012] FCA 789 |
|  |  |
| Parties: | **IN THE MATTER OF JOANNE EMILY DUNN AND GINETTE DAWN MULLER IN THEIR CAPACITY AS JOINT AND SEVERAL VOLUNTARY ADMINISTRATORS OF KASH ABORIGINAL CORPORATION ICN 108 (ADMINISTRATORS APPOINTED) and KASH ABORIGINAL CORPORATION ICN 108 (ADMINISTRATORS APPOINTED)** |
|  |  |
| File number: |  |
|  |  |
| Judge: |  |
|  |  |
| Date of judgment: | 27 July 2012 |
|  |  |
| Catchwords: | **CORPORATIONS** – Aboriginal Corporation – administrators seeking directions in respect of proposed loan and mortgage with associated entity – whether administrators personally liable for monies borrowed – potential liability of administrators in respect of workplace health and safety issues – proposal to borrow funds from related entity  |
|  |  |
| Legislation: | *Aboriginal Councils and Associations Act 1976* (Cth)*Corporations (Aboriginal and Torres Strait Islander) Act 200*6 (Cth) Div 521, ss 521.1, 521.2*Corporations Act 2001* (Cth) Pt 5.3A, ss 435A, 439A, 443A, 443D, 447A, 447D*Work Health and Safety Act 2011* (Qld) |
|  |  |
| Cases cited: | *In the Matter of KASH Aboriginal Corporation ICN 108 (Administrators Appointed)* [2012] FCA 571 cited*Re Ansett Australia Ltd* (2001) 115 FCR 376 cited*Re Carter; SFM Australasia Pty Ltd (Administrators Appointed)* [2009] FCA 360 cited*Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83 cited  |
|  |  |
| Date of hearing: | 27 July 2012 |
|  |  |
| Place: |  |
|  |  |
| Division: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 21 |
|  |  |
| Solicitor for the First and Second Applicants: | Mr W Jiear of Hynes Lawyers |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 256 of 2012 |

IN THE MATTER OF KASH ABORIGINAL CORPORATION ICN 108

|  |  |
| --- | --- |
| BETWEEN: | IN THE MATTER OF JOANNE EMILY DUNN AND GINETTE DAWN MULLER IN THEIR CAPACITY AS JOINT AND SEVERAL VOLUNTARY ADMINISTRATORS OF KASH ABORIGINAL CORPORATION ICN 108 (ADMINISTRATORS APPOINTED)First ApplicantKASH ABORIGINAL CORPORATION ICN 108 (ADMINISTRATORS APPOINTED)Second Applicant |

|  |  |
| --- | --- |
| JUDGE: | COLLIER J |
| DATE OF ORDER: | 27 JULY 2012 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. Pursuant to s 521.1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (“CATSI Act”) and s 447A and s 447D of the *Corporations Act 2001* (Cth) (“Corporations Act”), a declaration is made that Pt 5.3A of the Corporations Act and s 447D in particular as applied by s 521.2 of the CATSI Act operate to enable the Court to direct that the First Applicant Administrators may properly and justifiably cause the second applicant to enter into the loan and mortgage documents in a form with no substantial differences to those at exhibit GDM-13 to the affidavit of Ginette Dawn Muller sworn 26 July 2012 and filed herein.
2. The First Applicant Administrators may properly and justifiably cause the Second Applicant to:
3. enter into the loan and mortgage documents which are exhibit GDM-13 to the affidavit of Ginette Dawn Muller sworn 26 July 2012; and
4. register the said mortgage.
5. Pursuant to s 521.2 of the CATSI Act and s 447A(1) of the Corporations Act, the operation of Pt 5.3A of the Corporations Act and s 443A in particular as applied by s 521.2 of the CATSI Act is modified and has the effect in relation to the First Applicant Administrators that they are not liable for the borrowings identified in the loan and mortgage documents which are exhibit GDM-13 to the affidavit of Ginette Dawn Muller sworn 26 July 2012.
6. Liberty to apply is granted to the Registrar of Aboriginal and Torres Strait Islander Corporations, any creditor of the Second Applicant, and any other person who can demonstrate sufficient interest to make such application as he, she or it may be advised, to vary or discharge these orders upon three (3) business days’ written notice being given to the Applicants and/or the Applicants’ solicitors on the record and to the Court.
7. The first Applicant cause notice of these Orders, within two business days after the making of these Orders:
	1. to be sent to the Registrar of Aboriginal and Torres Strait Islander Corporations;
	2. to be sent to the Department of Health and Ageing;
	3. to be sent by email to all creditors of the Second Applicant who have provided the First Applicant with an email address; and
	4. to be given to all other creditors of the Second Applicant who have provided the First Applicant with a mailing address, by mail.
8. These orders be entered forthwith.
9. The costs and expenses of this application in respect of the Applicants are costs and expenses of the Administration of the Second Applicant.

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

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
|  |  |

IN THE MATTER OF KASH ABORIGINAL CORPORATION ICN 108

|  |  |
| --- | --- |
| BETWEEN: | IN THE MATTER OF JOANNE EMILY DUNN AND GINETTE DAWN MULLER IN THEIR CAPACITY AS JOINT AND SEVERAL VOLUNTARY ADMINISTRATORS OF KASH ABORIGINAL CORPORATION ICN 108 (ADMINISTRATORS APPOINTED)First ApplicantKASH ABORIGINAL CORPORATION ICN 108 (ADMINISTRATORS APPOINTED)Second Applicant |

|  |  |
| --- | --- |
| : |  |
| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

1. This is an interlocutory application made pursuant to s 447A and s 447D of the *Corporations Act 2001* (Cth) (“Corporations Act”) and s 521.1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 200*6 (Cth) (“CATSI Act”). On the face of the interlocutory application the orders sought by the applicants are summarised as:
2. directions under s 447A and s 447D of the Corporations Act as to whether or not the Administrators are authorised to enter into loan and mortgage documents with an associated entity, KMQ Insolvency Pty Ltd, to fund the expenses of the First Applicant; and
3. an order under s 447A and s 443A of the Corporations Act that the Administrators are not personally liable for the monies so borrowed or any interest or charges thereon.
4. Specifically, the applicants claim:

1. Pursuant to section 521.1 CATSI Act and sections 447A and 447D Corporations Act, a declaration that Part 5.3A of the Act and section 447D in particular as applied by section 521.2 CATSI Act operate to enable the Court to direct that the First Applicant Administrators may properly and justifiably cause the second applicant to enter into the Loan and Mortgage documents which are exhibited to the affidavit of Ginette Dawn Muller sworn and filed herein

2. A direction that the First Applicant Administrators may properly and justifiably cause the Second Applicant to:-

(a) enter into the Loan and Mortgage documents which are exhibit GDM-13 to the affidavit of Ginette Dawn Muller sworn 26 July 2012 and filed herein; and

(b) register the said Mortgage.

3. An order that pursuant to section 521.2 of CATSI Act and section 447A(1) of the Act , that the operation of Part 5.3A of the Act and section 443A in particular as applied by section 521.2 of CATSI Act is modified and to have effect in relation to the First Applicant Administrators that they are not liable for the borrowings identified in the Loan and Mortgage documents which are exhibited as exhibit GDM-13 to the affidavit of Ginette Dawn Muller sworn and filed herein;

4. Liberty to apply is granted to the Registrar of Aboriginal and Torres Strait Islander Corporations and any person including any creditor who can demonstrate sufficient interest to make such application as he, she or it may be advised, to vary or discharge these orders upon three (3) business days’ written notice being given to the Applicants and/or the Applicants’ solicitors on the record and to the Court.

5. The first Applicant cause notice of these Orders, within two business days after the making of these Orders:-

(a) To be sent to the Registrar of Aboriginal and Torres Strait Islander Corporations;

(b) To be sent to the Department of Health and Ageing;

(c) To be sent by email to all creditors of the Second Applicant who have provided the First Applicant with an email address; and

(d) To all other creditors of the Second Applicant who have provided the First Applicant with a mailing address, by mail.

6. These orders be entered forthwith.

7. The costs and expenses of this application in respect of the Applicants are costs and expenses of the Administration of the Second Applicant.

## Background

1. The Second Applicant (“KASH”) was incorporated pursuant to the *Aboriginal Councils and Associations Act 1976* (Cth) on 7 May 1981. The objectives of KASH, as set out in the Rule Book, include assistance of indigenous or other persons in recovery and rehabilitation from alcoholism and drug addiction; operating a centre in Mt Isa for the treatment of indigenous or other persons suffering from or recovering from alcoholism or drug addiction; education; and provision of support for the families of indigenous or other persons recovering from alcoholism or drug addiction.
2. On 5 May 2012 Ms Joanne Dunn and Ms Ginette Muller (“the First Applicant Administrators”) were appointed joint and several voluntary administrators of KASH by way of resolution of the directors of KASH in accordance with Div 521 of the CATSI Act and Pt 5.3A of the Corporations Act. Both Ms Dunn and Ms Muller are partners of KordaMentha.
3. By Originating Process filed 28 May 2012 the applicants made an application pursuant to s 439A of the Corporations Act whereby they sought, *inter alia*, an extension of the period during which the First Applicant Administrators were required to convene a meeting of the creditors of the Second Applicant pursuant to s 439A. On 29 May 2012 Greenwood J made orders in those terms pursuant to s 439A of the Corporations Act and s 521.2 of the CATSI Act: *In the Matter of KASH Aboriginal Corporation ICN 108 (Administrators Appointed)* [2012] FCA 571.

## The current application

1. There is no contradictor to the application currently before the Court. The solicitor for the applicants, Mr Jiear, deposes in his affidavit sworn 26 July 2012 that on 25 July 2012 his firm sent correspondence to the Office of the Registrar of Indigenous Corporations (“ORIC”) and the Commonwealth Department of Health and Aging (“DOHA”) providing them with a copy of the application the First Applicant Administrators intended to file and inviting them to respond with any issues. In his affidavit filed in Court this morning, Mr Jiear deposes that no response has yet been received from DOHA, but that ORIC has responded stating that it had not had sufficient time to form a view in relation to the application (but that it noted the liberty to apply provision in the draft orders).
2. The reason for the application before me is apparent from the affidavits of Mr Christopher Baskerville and Ms Ginette Muller, both sworn 26 July 2012. In summary:
* On 15 June 2012 the First Applicant Administrators commissioned the preparation of a Work Place Health and Safety Report (“WHS Report”) by Risk Strategies Pty Ltd (“Risk Strategies”) on the premises of the Second Applicant in Mt Isa. Those premises are currently leased by the Salvation Army which is providing services previously provided by the Second Applicant. It appears that a WHS Review site inspection was conducted by Risk Strategies on 25 June 2012.
* The WHS Report identified, as high risk, health issues which could arise in respect of the sewerage treatment system on the premises. In particular, the WHS Report recommended that there be undertaken further investigations into the status of effluent disposal (soaking trench), and, should the soaking trench have failed, the probability of exposure to semi-treated waste products and associated health risks to persons on site.
* Evidence before the Court is that, as anticipated by the WHS Report, the soaking trench has failed, and the sewerage treatment system at the KASH premises in Mt Isa requires repair.
* The facilities provided at the KASH premises in support of indigenous and other persons in respect of alcohol and drug addiction support are the only facilities of this nature for a substantial distance in north-western Queensland. The applicants contend that there is a public benefit in ensuring that the facilities be maintained to provide services to the indigenous community of Mt Isa and surrounding areas.
* The First Applicant Administrators have sought quotes for the repair of the sewerage treatment system. Mr Baskerville deposes that the costs of rectification of the sewerage treatment system are likely to be between $150,000 and $200,000.
* DOHA has informed the First Applicant Administrators that it is not in a financial position to provide the level of funding required to repair the sewerage treatment system at the KASH premises.
* The Second Applicant does not have sufficient resources available to fund the rectification works required.
* The First Applicant Administrators are concerned that, if the repairs are not undertaken, the Second Applicant will not have the capacity to maintain the premises, the premises would be unsafe and incapable of being leased to the Salvation Army, and the community operations and programs offered at the KASH premises would cease.
* In order for the repair work to be conducted in respect of the sewerage treatment system, the First Applicant Administrators require third party funding.
* In light of the financial position of the Second Applicant and its status in administration, the First Applicant Administrators submit that the Second Applicant is not in a position to borrow funds on the open market. KMQ Insolvency Pty Ltd, the entity from whom the First Applicant Administrators propose to borrow money to repair the sewerage treatment system and provide a mortgage, is the operating entity of KordaMentha in Queensland. KMQ Insolvency Pty Ltd is prepared to provide adequate finance to permit repairs to be conducted in return for a first ranking mortgage over the land of the Second Applicant.

## Relevant legislation

1. A starting point in considering the interlocutory application before me is s 443A of the Corporations Act, which provides:

**General debts**

(1) The administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for:

(a) services rendered; or

(b) goods bought; or

(c) property hired, leased, used or occupied, including property consisting of goods that is subject to a lease that gives rise to a PPSA security interest in the goods; or

(d) the repayment of money borrowed; or

(e) interest in respect of money borrowed; or

(f) borrowing costs.

(2) Subsection (1) has effect despite any agreement to the contrary, but without prejudice to the administrator's rights against the company or anyone else.

1. Section 443D of the Corporations Act provides administrators with a statutory indemnity out of the property of the company for, *inter alia*, any other debts or liabilities incurred, or damages or losses sustained, in good faith and without negligence, by the administrator in the performance or exercise, or purported performance or exercise, of any of his or her functions or powers as administrator (s 443D(aa)).
2. The legislation pursuant to which the First Applicant Administrators make their current application is s 447A and s 447D of the Corporations Act and s 521.1 of the CATSI Act, which vest the Court with broad discretion to make directions in respect of administrations. In particular:
* Section 447A permits, *inter alia*, an application to be made by an administrator of a company under administration to seek from the Court such order as the Court thinks appropriate about how Pt 5.3A is to operate in relation to a particular company.
* Section 447D permits the administrator of a company under administration to apply to the Court for directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers.
* Section 521.1 CATSI Act specifically applies the Corporations Act administration provisions to Aboriginal and Torres Strait Islander corporations, subject to minor variations which are not relevant for the purposes of this proceeding.

## Consideration

1. The First Applicant Administrators submit unequivocally that they do not seek the approval of the Court in respect of the loan and mortgage facility proposed. They properly draw to my attention observations of Giles J in *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83 at page 85 where his Honour observed that it is generally not appropriate in an application for directions to make the liquidator’s commercial decisions for him or her, and that the liquidator should not seek directions as a kind of insurance that the right commercial decision has been made.
2. Nonetheless, in aid of s 447A the First Applicant Administrators rely on the following comments of Goldberg J in *Re Ansett Australia Ltd* (2001) 115 FCR 376:

[42] The Court does not have express powers to “approve” an agreement entered into or proposed to be entered into by administrators appointed and acting pursuant to Pt 5.3A of the Act, or to direct that the administrators may properly and justifiably enter into an agreement and perform it. For the reasons which I set out in *Re Ansett Australia Limited* (2001) 39 ACSR 355, I am satisfied that s 447A of the Act empowers the Court to make such an order. Although courts will not pronounce upon the commercial prudence of an agreement entered into by administrators, they will act in an appropriate case to protect administrators from claims that they have acted unreasonably in entering into particular agreements.

1. The real question before the Court is not whether the Court will “allow” the First Applicant Administrators to enter the loan and mortgage agreement they propose – it is whether the Court will approve the administrators so acting without becoming personally liable for the resultant debt as would normally follow the operation of s 443A of the Corporations Act.
2. In my view it is appropriate to make the orders sought by the applicants. I form this view for the following reasons.
3. First, there does not appear to be any doubt that the proposed expenditure is necessary in order to maintain the operation of the premises which relate to a key function of KASH. To that extent, the proposed arrangements will enable the premises (and the related lease to the Salvation Army) to continue, thus meeting the object of Pt 5.3A of the Corporations Act as described in s 435A of that Act (cf observations of Mansfield J in *Re Carter; SFM Australasia Pty Ltd (Administrators Appointed)* [2009] FCA 360 at [21]).
4. Second, there does not appear to be any doubt that not only does KASH lack the ability to fund the necessary repairs to the sewerage treatment system, but that there is no ready source of funding either from government or on the open market. Accordingly, I accept that funding from KMQ is a reasonable option in the circumstances, including the provision of a mortgage to secure the loan. I take this view particularly in light of the evidence before the Court that:
5. loan funds will be provided by KMQ from its overdraft facility with the Commonwealth Bank;
6. the interest rate proposed by the Loan Agreement mirrors any interest rate payable by KMQ to the Commonwealth Bank; and
7. to that extent, it is clear that neither KMQ nor the First Applicant Administrators are benefitting financially from the loan and associated mortgage over the KASH premises.
8. Third, valuation evidence before the Court annexed to the affidavit of Ms Muller sworn 26 July 2012 indicates that, should the land on which the premises are located (and which is the proposed subject of the mortgage) be sold, it would realise at least $725,000 (on the basis of a forced sale), which would be more than sufficient to discharge any liability pursuant to the loan and mortgage.
9. Fourth, it appears that the loan and mortgage arrangement proposed by the applicants is for repair and maintenance in respect of property of the company under administration, and not for fees or expenses of the First Applicant Administrators.
10. Fifth, there is evidence before the Court that one creditor, DOHA, has been notified of the proposal. There was no appearance in Court today by DOHA. I am concerned that, on the submissions of the applicants, none of the unsecured creditors of KASH have been given notice of this application, and accordingly none have been given notice of their opportunity to oppose this interlocutory application. However I am satisfied that, by the terms of the orders sought, creditors of KASH may apply to vary or discharge these orders should they see fit to make such application. In light of the apparent urgency of the application before me I consider that this entitlement of the creditors provides adequate protection of their interests.
11. Sixth, there is evidence before the Court that one option currently being considered by the First Applicant Administrators is for assets of the Second Applicant to be sold. The First Applicant Administrators submit that, in light of the prospect of sale, they are concerned that they could be potentially liable for any loan entered into in respect of the repairs, and that any practical right to be indemnified from the assets of KASH could be illusory depending on the terms of any sale. In my view, this is a reasonable apprehension, and one against which the First Applicant Administrators are reasonably entitled to protection.
12. Finally, the urgency of the current application is further understandable in light of potential workplace hazards arising at the KASH premises, and the potential liability of the First Applicant Administrators (in their capacity as “persons conducting a business or undertaking”) for the purposes of the *Work Health and Safety Act 2011* (Qld).

|  |
| --- |
| I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associate:

Dated: 27 July 2012