ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

BELMONT SPORTSMANS CLUB CO-OPERATIVE LIMITED & ORS [2018] NSWSC 2

Supreme Court of New South Wales, Black J, 2 January 2018

Court has no power to appoint administrator to registered club where appointees not approved by liquor and gaming authority.

Key words: Co-operative, Supreme Court of New South Wales, Registered Club, insolvency, voluntary administration

1. The Belmont Sportsmans Club Co-operative Limited (the Club) is currently in financial difficulties. Despite its name, it is not a company, but rather a co-operative registered under the Co-operatives National Law (CNL), as applied by the Co-operatives (Adoption of National Law) Act 2012 (NSW). The CNL provides that certain provisions of the *Corporations Act 2001* (Cth) apply to co-operatives. These provisions include Pt 5.3A which deals with voluntary administration of insolvent companies.

2. The Club is also a registered club, to which section 41 of the *Registered Clubs Act 1976* (NSW) applies. Section 41 provides that a person is not "capable of" being appointed to act in the capacity of the administrator of a registered club that is a co-operative registered under the Co-operatives National Law, or of acting in any such capacity, unless the person has been appointed to act in that capacity by the Supreme Court, or approved to act in that capacity by the Independent Liquor and Gaming Authority (the Authority).

3. The application in this case arose because there could be no appointment of the two prospective administrators without the approval of the Authority, which was not due to meet until 19 January 2018. On this point, the court said, obiter, but testily (at [3]):

> I should pause to note that it would be a most unfortunate state of affairs if a statute provides that a person is not capable of being appointed to act in the capacity of a voluntary administrator, in circumstances that a registered club is in a position of insolvency or likely insolvency, without the approval to act in that capacity by the Authority, but the Authority will not promptly take steps to determine whether to grant such approval. It is to be hoped that the Authority's position is not, in fact, that which was communicated to the Court in this application.

4. As at 1 January 2018, the Club had several outstanding and urgent debts, including to the Australian Taxation Office and the Office of State Revenue. On this basis, the court was satisfied that the directors could properly form an opinion that the Club was insolvent, or was likely to become insolvent, at some future time, for the purposes of section 436A of the Corporations Act, as applied by the National Co-operatives Law, so as to appoint voluntary administrators to the Club.

5. Unfortunately, the effect of section 41 of the Registered Clubs Act was of invalidating the appointment of a voluntary administrator appointed under Pt 5.3A, which would otherwise have been validly made under the *Corporations Act* (as applied to the Club by the National Co-operatives Law), if the relevant appointment had not been approved by the Authority prior to the time at which it was made. Moreover, in *Correa v Whittingham* [2013] NSWCA 263, the Court of Appeal had held that such an appointment could not be validated under section 447A of the *Corporations Act* or otherwise.

6. Administrators were purportedly appointed to the Club on 21 December 2017 in a carefully worded resolution of the directors. However, since the Authority does not meet until 19 January, directors were concerned that, there being no valid appointment despite their best efforts, debts were continuing to be incurred in the interim. But did the court have jurisdiction to intervene to give the relief sought by the directors against trading whilst insolvent? The court held that there was no such jurisdiction (at [10]):

> The difficulty with that view is, it seems to me, that ss 436A–436C of the Corporations Act (as applied to the Club by the National Co-operatives Law) indicate the circumstances in which a voluntary administrator may be appointed. The first, specified in s 436A, is that a company may by writing appoint the administrator if the directors have passed the relevant resolution. That section does not, in terms, confer a statutory function on the Court in respect of such an appointment. Section 436B…permits a liquidator to appoint an administrator, but there only where a meeting of a company's creditors has approved the appointment, or the appointment is made with the leave of the Court. It seems to me that section does not assist [the Club] because the relevant appointment is still there made by the liquidator, albeit that the creditors' resolution or the Court's leave is required to do so. A secured creditor may also appoint an administrator under s 436C of the Corporations Act. Unlike provisions that deal with the appointment of receivers or provisional liquidators, there is no express power for a court to make an appointment of a voluntary administrator.

7. Moreover, the court held that section 41 of the *Registered Clubs Act* did not confer any further 'freestanding power' on the court to make such an appointment (at [11]). All references in section 41 were to appointments made under other legislation (at [13]):

> Neither Pt 5.3A of the Corporations Act nor s 41 of the Registered Clubs Act contemplate the third, intermediate, position for which [the Club] contended, by which a voluntary administrator could both be appointed by the Club for the purposes of s 436A of the Corporations Act and be appointed by the Court under s 41 of the Registered Clubs Act, because appointment by the Club and appointment by the Court are true alternatives.

8. The court concluded, somewhat reprovingly, (at [14]):

> It is obviously undesirable that s 41 of the *Registered Clubs Act* have the result that directors of registered clubs that face financial difficulties cannot take responsible steps which would be available to directors of companies to address those difficulties. That difficulty could generally be avoided by the Authority reaching prompt decisions whether to approve such appointments where they are genuinely urgent, as will often be the case. That difficulty could be avoided in this case if, on review of this judgment, the Authority will act more promptly in determining whether to approve the persons proposed for appointment as voluntary administrators than it has to date indicated to the Plaintiffs. If that is not the case, then it is open to the Club's directors, although it is plainly not the most desirable of outcomes, to seek to have receivers appointed by the Court under the Supreme Court Act pending a later approval by the Authority of the persons proposed for appointment as voluntary administrators...I would require little persuasion to appoint receivers in the relevant circumstances. The Court also has power to appoint a provisional liquidator, if a winding up application were brought, but I recognise that the Club's directors are seeking to avoid that result.

9. Since the court did not have jurisdiction to approve the appointment of administrators, the case was stood over to a later date.

IMPLICATIONS

This case makes a strong case for either legislative amendment or new procedures in such a situation by the regulator.

VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC//2018/2.html

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