

FEDERAL COURT OF AUSTRALIA

Frisken, in the matter of Avant Garde Investments Pty Ltd v Cheema [2020]

FCA 98

File number: NSD 1820 of 2019

Judge: **JAGOT J**

Date of judgment: 4 February 2020

Catchwords: **CORPORATIONS:** appointment of liquidator liquidator must be and appear to be impartial liquidator retained same solicitor as receiver before retaining independent solicitor and convened a meeting of secured creditors only no reasonable apprehension of lack of impartiality on behalf of liquidator proposed by receiver

Legislation: *Corporations Act 2001* (Cth) ss 459A, 588J

Cases cited: *Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd* [2014] FCAFC 85; (2014) 223 FCR 204 (2014) 223 FCR 204
Deputy Commissioner of Taxation, in the matter of WD Hall Pty Ltd v WD Hall Pty Ltd [2017] FCA 767
Re Chevron Furnishers Pty Ltd (in liq) (No 2) [1995] 1 Qd R 125

Date of hearing: 4 February 2020

Registry: New South Wales

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Category: Catchwords

Number of paragraphs: 25

Counsel for the Plaintiff: Mr EA Walker

Solicitor for the Plaintiff: Fortis Law Group

Counsel for the First
Defendant:

Mr DA Hughes

Solicitor for the First
Defendant:

Norton Rose Fulbright Australia

Counsel for the Second
Defendant:

The Second Defendant did not appear

Table of Corrections

18 February 2020

In the Appearances on the cover page Solicitor for the Plaintiff has been amended from Minter Ellison to Fortis Law Group.

ORDERS

NSD 1820 of 2019

IN THE MATTER OF AVANT GARDE INVESTMENTS PTY LTD (RECEIVER APPOINTED) ACN 630 136 015

BETWEEN: **DANIEL JOHN FRISKEN AS RECEIVER OF AVANT GARDE INVESTMENTS PTY LTD (RECEIVER APPOINTED) ACN 630 136 015 AS TRUSTEE FOR THE AVANT GARDE INVESTMENTS TRUST ABN 30 169 380 124**
Plaintiff

AND: **SIKANDER FAROOQ CHEEMA**
First Defendant

AVANT GARDE INVESTMENTS PTY LTD (RECEIVER APPOINTED) ACN 630 136 015 AS TRUSTEE FOR THE AVANT GARDE INVESTMENTS TRUST ABN 30 169 380 124
Second Defendant

JUDGE: **JAGOT J**

DATE OF ORDER: **4 FEBRUARY 2020**

THE COURT ORDERS THAT:

1. Pursuant to s 459A of the *Corporations Act 2001* (Cth), the second defendant be wound up in insolvency.
2. Mr Shumit Banerjee is appointed liquidator of the second defendant.
3. The first defendant pay the plaintiff's costs of the hearing on 4 February 2020 as agreed or taxed.

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

REASONS FOR JUDGMENT

JAGOT J:

1 This is an application for an order pursuant to s 459A of the *Corporations Act 2001* (Cth) (the **Corporations Act**) that the company Avant Garde Investments Pty Ltd (the **company**) be wound up in insolvency and for the appointment of a liquidator.

2 There is no dispute between the parties that the company is insolvent. There is evidence before me that the receiver (who is the plaintiff) has conducted investigations which have resulted in the view that the company is “clearly insolvent”. This is in circumstances where the company has defaulted on loans made to it by its creditors totalling approximately \$25 million. The receiver has identified that creditors are owed approximately \$12 to 15 million. The receiver has also identified that the company has only limited assets. All of these matters led the receiver to the view that the company is “clearly insolvent”.

3 A provisional liquidator that I appointed on 20 November 2019 has also carried out investigations and reached a preliminary view that the company is insolvent.

4 The director of the company has also expressed the view in evidence that the company is insolvent.

5 In these circumstances, I am satisfied that the company is insolvent and an order should be made winding up the company in insolvency.

6 The real issue in dispute between the plaintiff and the director of the company is the identity of the liquidator who should be appointed. The plaintiff seeks that Shumit Banerjee, the provisional liquidator, be appointed as the liquidator of the company. Mr Banerjee has provided an affidavit in which he expresses the view that he considers it is in the best interests of the company that he be appointed liquidator to take control of the company and to further investigate its financial affairs to ascertain, amongst other things, whether or not improper transactions have been made including voidable transactions.

7 The director seeks the appointment of different liquidators, primarily on the basis that conduct of Mr Banerjee subsequent to his appointment as provisional liquidator is such that a reasonable person might have a reasonable apprehension that Mr Banerjee, if appointed as the liquidator, might not be impartial. In this regard, the director relies on the decision in *Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions*

Pty Ltd [2014] FCAFC 85; (2014) 223 FCR 204 at [58] (citing *Re Chevron Furnishers Pty Ltd (in liq) (No 2)* [1995] 1 Qd R 125 at 130) to the effect that a liquidator must have no prior or other involvement with either the company in liquidation, its directors and major shareholders, or one of its creditors so that the liquidator may fairly and impartially carry out the duties of a liquidator to act in the best interests of the general body of creditors.

8 The director relies on the following conduct of Mr Banerjee as provisional liquidator to support the position that Mr Banerjee should not be appointed as the liquidator of the company:

- (1) after his appointment as provisional liquidator Mr Banerjee retained and was represented by the same solicitors as the solicitors for the plaintiff in circumstances where on 20 November 2019 I refused the plaintiff's application for the plaintiff to be appointed as the provisional liquidator of the company;
- (2) on 23 January 2020, the lawyers for the plaintiff filed an affidavit by Mr Banerjee, which was prepared by the lawyers for the plaintiff and was also said to be filed on behalf of the plaintiff; and
- (3) on 21 November 2019, Mr Banerjee convened a meeting confined to the secured creditors of the company to seek funding for his investigations into the affairs of the company.

9 The real question in this case is whether, by his conduct after his appointment as a provisional liquidator on 20 November 2019, Mr Banerjee has done anything such as might give rise to a reasonable apprehension on the part of a creditor that Mr Banerjee might be impeded or inhibited in acting impartially if appointed as a liquidator of the company. I say this because it could not be suggested that there was any reasonable apprehension of partiality on the part of Mr Banerjee at the time of his appointment. Further, all other things being equal, in a contest between a liquidator being proposed by the director of the company and a liquidator being proposed by the plaintiff, in the circumstances of the present case (to which I shall make further reference), I would weigh in favour of the appointment of the liquidator sought by the plaintiff.

10 In this regard I refer to the decision of Derrington J in *Deputy Commissioner of Taxation, in the matter of WD Hall Pty Ltd v WD Hall Pty Ltd* [2017] FCA 767 (**WD Hall**) at [5] to the following effect:

The Commissioner relied upon certain "guiding principles" in relation to the appointment of liquidators as were set out by Barrett J in *Workers Compensation Nominal Insurer v Denny Earthmoving & Bulk Haulage Pty Ltd* [2008] NSWSC 1167

at [10], [11] and [12]:

10 Three guiding principles come into play here. First, liquidators must be independent and have the appearance of independence so that the Court must judge, in the words of Santow J in *Advance Housing Pty Ltd v Newcastle Classic Development Pty Ltd* (1994) 14 ACSR 230:

"... whether there would be a reasonable apprehension by any creditor of lack of impartiality on the liquidator's part in the circumstances, by reason of prior association with the Company or those associated with it, including creditors or indeed any other circumstances".

11 Second, there is the matter referred to by Hodgson J in *Unifor Office Systems Australia Pty Ltd v Brewer Partnership Pty Ltd* [1999] NSWSC 137:

"This Court, in winding up proceedings, has acted on a general principle that liquidators should not be chosen by the directors or other principals of the Company. It is considered to be in the interests of creditors that someone entirely independent undertake that role. ..."

12 Third, there is the obvious point that, all other things being equal, the court will select an option that is likely to involve less cost.

11 Having regard to the principles expressed in [5] of *WD Hall*, first and as I have said, there can be no doubt that at the time of his appointment as provisional liquidator Mr Banerjee was in fact independent and had the appearance of independence from all creditors.

12 Secondly, the liquidator should not be chosen by the directors or other principals of the company because of the inevitable perception of bias to which such an appointment might give rise. In this regard, while the plaintiff has been appointed as the receiver for some time, this is not comparable to the position of the director of the company whose conduct is the subject of proposed investigation.

13 Thirdly, Mr Banerjee has already conducted relatively substantial investigations into the company for the purpose of determining whether there are voidable transactions including in favour of secured creditors. As noted, he has convened a meeting of the company's secured creditors and has obtained funding for investigations to be undertaken. He has communicated with banks for the provision of information. He has conducted preliminary investigations into the company's affairs. He has now instructed independent lawyers to act on his behalf in respect of the funding arrangements as well as to conduct public examinations should he be appointed liquidator of the company.

14 Fourthly, the fees that would apply if Mr Banerjee was appointed as the liquidator are slightly less than the fees that would apply if the director's proposed liquidators were appointed.

15 Accordingly, while the liquidators who the director has proposed be appointed have had no previous contact with the director, the principles referred to in *WD Hall* in all of these circumstances weigh heavily in favour of the appointment of Mr Banerjee as a liquidator. That would be an appropriate appointment having regard, in particular, to the work which Mr Banerjee has already undertaken and the fact that the fees which would be applicable if Mr Banerjee were appointed as liquidator involve lesser hourly rates, albeit not by a substantial amount, than the liquidators proposed by the director.

16 Further, I accept the submissions of the plaintiff that the very fact that the director is seeking appointment of other liquidators itself might be such as to give rise to a perception of a lack of impartiality if the liquidators proposed by the director are in fact appointed. I accept further that this perception, as the plaintiff put it, might be exacerbated by the fact that the director is a defendant to these proceedings in which his conduct as a director of the company is impugned.

17 I also take into account the evidence of Mr Banerjee that he is prepared to continue these proceedings, including the freezing orders presently in place, if appointed. In contrast, I do not have evidence to that effect to give the creditors comfort if the liquidators proposed by the defendant are appointed.

18 Another important factor is that, as the plaintiff has submitted, there is no evidence of concern by any creditor of the company about Mr Banerjee's impartiality. To the contrary, Mr Banerjee's appointment as a liquidator is supported by the plaintiff who is an appointee of five of the company's creditors.

19 In all of these circumstances, I consider that the only issue which arises is whether by his conduct after his appointment as a provisional liquidator a creditor might perceive that Mr Banerjee might not bring an impartial mind to bear on his duties as liquidator, having regard to the fact that there is evidence which suggests that a real issue in the liquidation of this company will be the competing interests of secured and unsecured creditors (a fact which the submissions for the director emphasised). In particular, certain security deeds on which (presumably) the secured creditors rely may be voided and certain payments to secured creditors may be invalidated as preference payments.

20 I have already identified the conduct of Mr Banerjee on which the director relies. Insofar as the meeting of the secured creditors only is concerned, I do not consider that Mr Banerjee

having convened such a meeting for the purpose of obtaining funding is such as to give rise to a reasonable apprehension of a lack of impartiality. It was rational of Mr Banerjee to take the view that funding may be best obtained from the secured creditors. Accordingly, the mere fact that he arranged a meeting of secured creditors to obtain funding in order to undertake investigations which may be inferred to be of benefit to both secured and unsecured creditors, in my view, does not give rise to a reasonable apprehension of a lack of impartiality.

21 I have also considered the fact that Mr Banerjee initially retained the lawyers for the plaintiff to act on his behalf, albeit that Mr Banerjee has now retained independent lawyers to act on his behalf. The director submitted that it is too late for Mr Banerjee to now seek to assume an appearance of independence by retaining independent lawyers as the “well has already been poisoned”. According to the defendant, it is surprising that in circumstances where I did not appoint the plaintiff as the provisional liquidator due to a perceived lack of independence Mr Banerjee in his capacity as the provisional liquidator would choose to be represented by the same lawyers as the plaintiff. Further, it was submitted that this should be weighed against the fact that the liquidators proposed by the director have had no contact with the director and therefore in fact are and would be perceived to be impartial.

22 In my view, the fact that Mr Banerjee retained the same solicitors as the plaintiff to carry out preliminary work on his behalf is not such as to give rise to a reasonable apprehension of a lack of impartiality. Further, the fact that Mr Banerjee initially retained the same lawyers as the plaintiff’s lawyers does not call into question his capacity impartially to adjudicate on the rights of secured and unsecured creditors. In other words, I am not satisfied that the conduct of Mr Banerjee after his appointment has undermined his perceived impartiality.

23 For the reasons given above, the circumstances heavily weigh in favour of the appointment of Mr Banerjee as liquidator given his initial appointment as the provisional liquidator, the work he has carried out in the investigation of the affairs of the company, the lower hourly rates involved, and the fact that Mr Banerjee has indicated that if appointed liquidator he intends to further investigate the financial affairs of the company to ascertain whether or not voidable transactions have been entered into as well as to conduct public examinations.

24 The fact that he has now retained new lawyers to act on his behalf with respect to the funding arrangements as well as to conduct the public examinations if appointed liquidator and the absence of any evidence from any creditor raising any concern as to the perceived impartiality of Mr Banerjee lead me to the view that his appointment as liquidator is appropriate.

25 Accordingly, I propose to order that Shumit Banerjee be appointed as liquidator to the company and that the first defendant pay the plaintiff's costs of the hearing on 4 February 2020 as agreed or taxed.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 10 February 2020