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CLUB APPOINTS RECEIVER TO ITSELF – DIRECTOR MISBEHAVIOUR?

The recent decision in the New South Wales Supreme Court: In the matter of Coogee Sports Club Ltd [2016] NSWSC 817 (17 June 2016) reflects a pragmatic decision in unusual circumstances.

Coogee Sports Club Ltd ("the Club") is a club registered under the Registered Clubs Act 1976 (NSW). In these circumstances the Club applied to the NSW Supreme Court for the appointment of a Receiver to itself.

The Club has 5 Directors, one of whom was Mr McCurry. Mr McCurry was also Treasurer of the Club until removed by the other Directors on 12 May 2016.

The Court noted [para 5]:-

> *"A schism has evidently developed between Mr McCurry, on the one hand, and the other four directors on the other. The background to that difficulty is outlined in an affidavit sworn in these proceedings by the current chief executive officer and secretary of the Club, Mr David Yole. It is unnecessary that I set out those details in these reasons."*

Accordingly, little of the background between the Directors and their relationship is known other than to conclude that it was unproductive given 4 Directors turned to the Supreme Court for the appointment of a Receiver to the Club.

Interestingly, on or about 19 April 2016, the Club received a notice dated 1 April 2016 from 2 club members purporting to requisition a general meeting of the Club within 21 days to remove those 4 other Directors. The Club received advice that the requisition was invalid as it did not comply with the Corporations Act nor the Club's Constitution.

On 12 May 2016, the Board resolved by majority to remove Mr McCurry as Treasurer and to revoke his authority as a signatory to the Club's bank account. Nevertheless Mr McCurry remained a Director of the Club. Pursuant to the Corporations Act the power to remove a Director(s) rests in the members in general meeting.

On 13 May 2016 the Club's Chief Executive Officer ("CEO") advised the Club's bankers the Commonwealth Bank of Australia ("CBA") that Mr McCurry was no longer the Club's Treasurer nor a signatory to the account.

The Club's CEO had sworn in his affidavit that he had been advised by the CBA that the Club's accounts "had been frozen due to Mr McCurry". This expression is not further explained in the judgement.

The Club's Solicitors advised the CBA that Mr McCurry was not authorised to make any representations on behalf of the Club affecting its banking arrangements. Nevertheless the bank advised that "the bank will not be lifting the freeze on the Club's accounts until all Directors have signed off to the CBA's satisfaction, that the dispute has been resolved." Again there is no explanation as to what the purported "dispute" involved.

On or about 26 May 2016 there was another attempt by some members to convene a meeting of members for 19 June 2016. The Court noted [para 13]:-

> *"According to that notice, the matter on the agenda is the removal of all of the directors of the Club other than Mr McCurry. The notice does not propose that anyone be appointed in lieu of the four directors proposed to be removed. The result would be that the Club would not have the number of directors required by its constitution"*

On 7 June 2016 a Board Meeting of the Club was convened of which Mr McCurry was given notice but did not attend. The remaining Directors resolved that, "in the opinion of the directors [the Club] is insolvent, or is likely to become insolvent, at some future time", and, "subject to the approval of the Independent Liquor and Gaming Authority Mr Gregory J Parker, Registered Liquidator, to be appointed as Administrator of the Club." [para14].

For reasons not explained the Authority was unable to consider the matter until 29 June 2016.

However, the Club's financial position was dire. The Club had access to approximately $20,000 held in an account at the bank of Sydney. It had a term deposit at CBA of approximately $345,000 and a business transaction account with a credit of $23,000. However, the amounts at the CBA were not accessible due to the circumstances of the purported "dispute". On the other hand, there were approximately $73,000 of immediate payments required to creditors, one of which was the electricity supplier that was threatening to disconnect power to the Club.

Because of the delay and the now dire circumstances of the Club, a further Board meeting was held on 15 June 2016 of which Mr McCurry was given notice but did not attend. On that occasion the Board resolved that it apply to the Supreme Court to seek the appointment of a Receiver.

The Court further observed [para 21]:-

> *"Usually, the Court will not appoint a receiver on the ex parte application of the company concerned except in the case of an emergency, in extraordinary circumstances, or where satisfied that the creditors, "or at least a very substantial body of them" support the application"*

The Court went on [para 22]:-

> *"However, I am satisfied that this is an extraordinary case and that the Club is facing an emergency. It cannot pay its creditors. The electricity supply is under threat to the Club, amongst other potential problems. There is a prospect that its members may pass a resolution resulting in the Club only having one director and thus being unable to function.*
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> *There is no evidence before me that the Club's creditors consent to the appointment of the receiver. However, one of the objects of the proposed appointment is that the receiver open a bank account in his name and call on the CBA to transfer the funds it is holding on the Club's behalf to him so that he can cause creditors to be paid. It is safe, therefore, for me to assume that those creditors would consent to the appointment because it would result in their payment."*

Interestingly, the Club had no secured creditors. The Court also felt that the Receivers appointment would be only short term until the Authority considered the Clubs position on 29 June 2016.

Accordingly, the Court ordered that the Receiver be appointed.

Observations

Whilst this appears a relatively straightforward case there are many potential issues that may complicate the matter. In our view, the Court made a pragmatic decision in the best interests of the Club and its members as a whole. However, we make the following observations:-

1. If members seek to requisition a meeting of the members of a body corporate they must ensure they comply with the Corporations Act and the body's constitution.

2. The form of the proposed resolutions for a requisitioning of a meeting and the matters to be considered need to be carefully drawn.

3. Query whether Mr McCurry was acting in the best interests of the Club and its members as a whole.

4. Query whether the other Directors considered calling a general meeting or organising members to requisition a meeting of members seeking the removal of Mr McCurry and appointing a substitute.

5. All Directors should be aware of the solvency of their Club at all times in order to avoid exposure to personal liability.

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