27/81

SUPREME COURT OF VICTORIA

SOLTRA PTY LTD v GRANT & ORS

McGarvie J

9 June 1980 — (1980) 5 ACLR 10

STATUTORY INTERPRETATION – COMPANY LAW – RECEIVERS AND MANAGERS APPOINTED – SUCH RECEIVERS AND MANAGERS CONNECTED WITH ANOTHER COMPANY – WHETHER CONFLICT OF INTEREST: *COMPANIES ACT* 1961, S187.

Receivers and managers were not within the meaning of s187(1)(c) of the *Companies Act* 1961 officers of the connected company and accordingly they were validly appointed.

McGARVIE J: There are six applications before me in two related proceedings. The applications were all heard together. As the outcome of each application depends primarily on the determination of a question of construction, I will deal with that question before turning to the separate applications.

On 18th March 1976, the company, Soltra Pty Ltd ("Soltra"), gave a debenture over its assets to the Australia and New Zealand Banking Group Limited ("ANZ") to secure repayment of moneys lent. Soltra defaulted and under the debenture, ANZ on 20th March 1978, appointed Messrs Grant and Nicholl as receivers and managers of the property of Soltra. The question of construction arises because Messrs Grant and Nicholl have since 1st July 1979, been partners in a firm of chartered accountants now known as "Deloitte Haskins & Sells". They were originally members of a firm known as "Dulhunty, Grant & Co." By two agreements, one made on 1st July 1978, and one made in February 1980, the partners of Dulhunty, Grant Co joined or merged with the partners of Yarwood Vane & Co to form a new partnership. The result is that the former partners of Dulhunty, Grant Co and of Yarwood Vane & Co have since 1st July 1979, all been partners together in the partnership first called Yarwood Vane & Co and now called Deloitte Haskins & Sells.

As at 1st July 1978, the Victorian division of the firm Yarwood Vane Co was the appointed statutory auditor of a company Building Societies Resources Ltd ("BSR"). That company is relevant to these applications because it has at all material times been the mortgagee of five properties owned by Soltra at Brunswick which Soltra mortgaged to it. The mortgage continues in existence and Soltra continues to pay the interest due under it.

It is conceded for the purpose of these applications only, that Messrs Grant and Nicholl have since 1st July 1979, been auditors of BSR. It is argued on behalf of Soltra that because

Messrs Grant and Nicholl were auditors of a corporation which is a mortgagee of the property of Soltra, they were disqualified by s187 of the Act from being appointed receivers and managers and the purported appointment of them was a nullity. Section 187 is in these terms:

> "(1) The following shall not be qualified to be appointed and shall not act as receiver of the property of a company:-
> (a) a corporation;
> (b) an undischarged bankrupt;
> (c) a mortgagee of any property of the company an auditor of the company or an officer of the company or of any corporation which is a mortgagee of the property of the company;
> (d) any person who is not a registered liquidator.
> (2) Nothing in paragraph (a) or (d) of sub-section (1) of this section shall apply to any corporation authorised by any Act to act as receiver of the property of a company.
> (3) Nothing in this section shall disqualify a person from acting as receiver of the property of a company if acting under an appointment made before the commencement of this Act."

It is Mr Liddell's submission that Messrs Grant and Nicholl were disqualified under that Section because they were auditors of BSR and also because they were officers of BSR. Mr Forsyth, whose argument was adopted by Dr Sundberg, submits that they are not officers of BSR and that the section applies only to auditors of Soltra, not to auditors of BSR.

As my first task is to consider the proper construction of s187(1)(c), I will set out that paragraph, sub-divided and arranged (where necessary with repetition of phrases) so as to give effect to the alternative constructions which are advanced before me. Mr Liddell submits that it would be read so as to disqualify:

1. A mortgagee of any property—
(A) of the company,
(B) or of any corporation which is a mortgagee of the property of the company,

2. an auditor—
(A) of the company,
(B) or of any corporation which is a mortgagee of the property of the company,

3. or an officer—
(A) of the company,
(B) or of any corporation which is a mortgagee of the property of the company.

Mr Forsyth submits that the paragraph should he read so as to disqualify:

1. A mortgagee of any property of the company,

2. an auditor of the company,

3. or an officer—
(A) of the company,
(B) or of any corporation which is a mortgagee of the property of the company.

On the words of the paragraph, the construction advanced by Mr Forsyth appears to be the natural meaning while the construction advanced by Mr Liddell involves a substantial degree of contortion of the natural flow of meaning. In my opinion the presence of the words "the company" where they first twice appear in the paragraph, tells strongly in favour of the construction advanced by Mr Forsyth. If those words were deleted, I think that the argument advanced by Mr Liddell as to the construction of the paragraph would carry a great deal of weight.

The natural meaning of the paragraph may be discarded if the context or other provisions of the Act indicate that another meaning is intended. It was not contended that in this respect the meaning of the paragraph is controlled by context or other provisions. It is submitted that the history of the legislation and considerations of likely legislative policy give support to the construction put forward on behalf of Soltra.

Mr Liddell relied on s306 of the *Companies Act* 1938, from which s187 of the present Act may be regarded as having evolved. Sub-section (2)(a) of s306 provided that a mortgagee of any property of a company or a director manager or secretary of any such company or of any company which was a mortgagee of the property of the first company, was not qualified to be appointed receiver or manager of the property of the first company. That section does not appear to assist the argument of Soltra. Except that it applied only to specified officers, it imposed on officers of the company and on mortgagees or the officers of corporate mortgagees of property of the company, similar disqualifications to those which would be imposed on those persons by each of the alternative constructions of s187(1)(c) advanced before me. The section of the Act of 1938 did not disqualify auditors. In any event, the proper approach to the construction of an Act is to resort to its history only for assistance in resolving an uncertainty of meaning which appears upon a natural reading of a provision. It is not permissible to resort to earlier provisions "for the purpose, first of introducing uncertainty into plain words, and then of resolving the difficulty thus illegitimately created". *The King v Metal Trades Employers Association; ex parte Amalgamated Engineering Union Australian Section* [1951] HCA 3; (1951) 82 CLR 208 at 263; [1951] ALR 93

per Kitto J. I do not consider that any uncertainty of meaning appears from a natural reading of paragraph (c).

Mr Liddell put it that there were good policy reasons for the legislature to intend that a mortgagee of any property of, or an auditor of, any corporation which is a mortgagee of the property of the company should be disqualified from being appointed receiver of the company. He put it that the policy considerations were similar to those applying in the case of an officer of such a corporation. Paragraph (c) of s187(1) does disclose a policy of disqualifying certain categories of persons from being receivers, who would or may have a conflict of interest if they were receivers. There are various degrees of conflict of interest. Parliament had to decide what relationships with the company had such a degree of conflict of interest inherent in them, that they should produce a legal disqualification. It is not obvious that Parliament would have intended to provide the wide area of disqualification which would result from the construction advanced by Mr Liddell rather than the narrower area; which would follow from the construction advanced by Mr Forsyth. It would not be unlikely that Parliament could form an intention to disqualify a mortgagee of the company's property and an officer of a corporate mortgagee of the company's property while not disqualifying the auditor of a corporate mortgagee of the company's property. Parliament could well have intended to differentiate between the degrees of conflict of interest inherent in the position of officers of a corporate mortgagee and that of an auditor of a corporate mortgagee. Whatever else may be meant by the words "auditor" and "officer" in the paragraph, the word "officer" includes any director, secretary or employee of the corporate mortgagee (s5(1)), the persons who would usually direct, control and carry out its activities and affairs. Accordingly, I hold that Messrs Grant and Nicholl were not disqualified from appointment because they were auditors of BSR unless the fact that they were auditors meant that they were officers of BSR within the meaning of s187.

Mr Forsyth submitted that s187 provides its own dictionary and by using the expression "an auditor of the company" as well as the expression "an officer of the company", shows that the former expression is not included in the latter. If it were, he contended, the words "an auditor of the company" would be nothing but surplusage. Mr Liddell submitted that while the auditor appointed by the company in accordance with the obligations imposed by the *Companies Act* is an officer of the company, another auditor, such as an internal auditor employed by the company or an auditor engaged by the company for a particular audit (for example, the audit of the assets of another company being taken over by the first company), would not be an officer, but, would be covered by paragraph (c) because he was an auditor. Compare *In re Western Counties Steam Bakeries and Milling Company* (1897) 1 Ch 617.

The difficulty facing this argument is that s166 requires the appointment of an "auditor or auditors of the company" and s187(1)(c) also refers to "an auditor of the company". I consider that s187(1)(c) is referring to an auditor appointed by the company as required by s166 and not to an internal auditor or an auditor engaged for casual audit work. In the context of this Act it is unlikely that the words "an auditor of the company" would have been used if the word "auditor" was designed to refer only to an employee auditor or a casual auditor, neither of whom would in ordinary speech be called an auditor of the company. It would be inconsistent with the view I have formed of the general construction of paragraph (c), to regard the words "an auditor of the company" as used in order to make it clear that auditors are officers within the meaning of the paragraph. On the general construction which I regard as the correct one, the disqualification of officers extends more widely than the disqualification of auditors. This is because, on my construction of the paragraph, the disqualification of officers extends to an officer of a corporate mortgagee of the company while the disqualification of auditors does not extend to an auditor of a corporate mortgagee of the company. Counsel referred to other sections in the Act which may have thrown light on whether the word ''officer" is used in paragraph (c) as including an auditor. I was referred to the definition of "officer" in s5(1) and to ss165, 166, 166B, 168, 306 and 365. My attention was drawn to provisions prescribing the duties of auditors under the Act. I think that an examination of the Act shows no more than that the word "officer" according to the context or applicable definition may or may not in a particular section include the auditor of a company. I was also referred to *In re London and General Bank* (1895) 2 Ch 166; *In re Kingston Cotton Mills* (1896) 1 Ch 6; *R v Shacter* (1960) 2 QB 252; *Re Stewden Nominees No. 4 Pty Ltd* (1975) 1 ACLR 185; *Re Photo Holdings Pty Ltd; ex parte Ramsay and Warhurst* (1976) 2 ACLR 117 and dictionary definitions of the word "officer".

I consider that, whatever might be the meaning of the word "officer" if used in a section of this Act where there is no context or definition to indicate its meaning, in the context of s187(1)(c) it does not include an auditor of the company appointed as required by s166. I conclude that Messrs Grant and Nicholl were not within the meaning of s187(1)(c) officers of BSR. The result is that Messrs Grant and Nicholl were validly appointed and have validly acted as receivers and managers of Soltra.

I turn now to the separate applications before me. Four of them cover much the same ground. The parties have asked that I decide the question of construction and apply that decision to all applications if I consider that to be appropriate. The first application which I will consider is a summons dated 21st May 1980, issued by Messrs Grant and Nicholl against Soltra. They seek declarations that their appointment as receivers and managers is valid and that their acts since appointment are not invalid under s187(1) of the Act. Alternatively they seek an order that notwithstanding invalidity of their appointment and acts since appointment, the appointment and those acts be validated under s366 of the Act.

It follows from what I have decided that I will make the declarations sought. As the applications before me bear characteristics of applications whose litigious life is yet only in its infancy, I will also state my opinion upon the applications under s366.

Since the appointment of Messrs Grant and Nicholl as receivers and managers there has been friction and dispute between them and the governing director of Soltra. Messrs Grant and Nicholl, on 23rd January 1980, sold the plant, equipment and stock of Soltra to Everco Industries Pty Ltd. A contract of sale dated 28th February 1980, was submitted for the first agreement of sale. On 13th March 1980, Soltra issued a writ against Messrs Grant and Nicholl and ANZ alleging that the purported appointment of Grant and Nicholl as receivers and managers was a nullity and that they had not been entitled to act as receivers and managers, and claiming declarations, injunctions and damages.

Mr Forsyth submitted that if the appointment or acts of his clients were invalid, he was entitled under subsections (1) and (2) of s366 to the order sought. His argument relied on s363(3). He referred me to *Omega Estates v Ganke* (1964) 80 WN (NSW) 1218 at 1224-5; [1963] NSWR 1416 and submitted that I had power to make the order claimed in the summons. In my opinion I do have power to make that order in this case.

Mr Forsyth submitted that I should make an order validating what had occurred to the time of the order. He emphasised that when they were appointed, Messrs Grant and Nicholl had no connection with BSR or its auditors; that Grant and Nicholl had embarked on their duties and had done a lot of work before they became auditors of BSR; that the partner in Yarwood Vane & Co and now is Deloitte Haskins & Sells, who has at all material time been responsible for the auditing of BSR, is Mr Cochrane; and that the evidence shows that if sold, the land of Soltra, mortgaged to BSR would realize substantially more than the amount for which it is mortgaged. He submitted that the possibility of conflict of interest or disadvantage to the company, or creditors other than ANZ, was virtually non-existent and no disadvantage had been shown to have occurred. He stressed. that his clients had acted in good faith and that great commercial difficulty would follow if the sale of the plant, equipment and stock to Everco Industries Pty Ltd had to go off.

In my view, if it was desired by Soltra to raise any of the matters which Mr Liddell has submitted require investigation, it was open to Soltra to have done that in the application by summons in which the receivers and managers seek an order of validation under s366. There was no material placed before me on behalf of Soltra indicating any facts which would tend to show that it was inappropriate to make the order sought by the receivers and managers. Accordingly I regard the proceeding in which the validation order has been sought as an appropriate proceeding in which to consider the question arising under s366.

In my opinion there is substance in the submission made by Mr Hayes in the reply for the receivers and managers, where he stressed that there is no evidence to indicate any misconduct by Messrs Grant and Nicholl. He argued that the real question to be considered is whether they had done their work properly, and there is nothing to indicate that they had not. In those circumstances, he submitted, the making of the order would decide only whether the work done

by the persons presently appointed as receivers and managers is to be utilized or is to be re-done by other receivers and managers.

In the light of the competing constructions of s187(1)(c) advanced in these proceedings, even if the construction advanced by Soltra were the correct one, it is unlikely that Messrs Grant and Nicholl did any acts which they knew they had no authority to do. There is nothing in the material to indicate that they doubted their entitlement to do what they did. I think the question for me is whether Messrs Grant and Nicholl are to be relieved from their having inadvertently acted without authority, if, contrary to my view, they did act without authority. On considering the rival submissions and the material before me relevant to this application, it is my opinion that if, contrary to my decision, the appointment and later acts of Messrs Grant and Nicholl were invalid, the appropriate exercise of discretion would be to make under s366(3) of the Act the order sought in the summons.

In the action which was mentioned above, the defendant ANZ on 23rd April 1980 issued a summons claiming under Order 114(A), an order that it be at liberty to enter judgment against the plaintiff with costs. The defendants Grant and Nicholl issued a similar summons on 28th April 1980. As the action of the plaintiff depends entirely on the question of construction which I have decided adversely to the plaintiff, I am satisfied that all defendants have a good defence on the merits and that I should order that judgment be entered for the defendants against the plaintiff.

In the action, the plaintiff Soltra in paragraph 7 of its statement of claim, alleges that in consequence of facts earlier set out in the statement of claim the appointment of Messrs Grant and Nicholl as receivers and managers was null and void. The defence of Grant and Nicholl denies the allegations in that paragraph. The defence of ANZ in effect raises the point of law that if the allegations in the statement of claim were established, the appointment of the receivers and managers would still not be void.

The statement of claim pleads the plaintiff's cause of action in wider terms than the evidence before me would establish. It is alleged that at all material times Messrs Grant and Nicholl were auditors of BSR, while the evidence before me indicates that they became auditors of BSR some time after they were appointed receivers and managers of Soltra. For that reason the point of law raised is as to the validity of their appointment.

The plaintiff issued a summons dated 4th June 1980, against the defendants. The claim in the summons which is relied on by Soltra before me, is that the points of law raised by the relevant paragraphs of each of the defences be set down for hearing and disposed of before trial. That application is made under Order 25 Rule 2, I am asked to set down the points for hearing and disposal and forthwith to dispose of them. In my opinion, in the light of my decisions on the other applications, this is an appropriate case in which to take that course.

I will in my order set down the points of law and dispose of them in accordance with my opinion on the construction of the section. As the decisions on the points of law dispose of the whole action I will under Order 25 Rule 3 order that judgment be entered in the action for all defendants against the plaintiff. The result is that in the action the defendants are entitled to judgment under both Order 14(A) Rule 1 and Order 25 Rule 30. I will order that Soltra pay the taxed costs including reserved costs of Messrs Grant and Nicholl and ANZ of all applications to which they are respectively parties and of the action.
