

37A/07; [2007] VSC 291

SUPREME COURT OF VICTORIA

BELLA FRESH PTY LTD (In Liq) v PETRAC and ANOR

Robson J

14 August 2007

CORPORATIONS – COMPANY IN LIQUIDATION – MONEY SEIZED FROM CORPORATION BY POLICE OFFICER – TWO CLAIMANTS TO MONEY – APPLICATION MADE BY OFFICER TO MAGISTRATES' COURT TO DETERMINE TO WHOM MONEY SHOULD BE DELIVERED – FINDING BY MAGISTRATE THAT COMPANY WAS REQUIRED TO OBTAIN LEAVE BEFORE MAKING CLAIM – WHETHER MAGISTRATE IN ERROR: CORPORATIONS ACT 2001 (CTH), S471B; POLICE REGULATION ACT 1958, S125.

Where a police officer seized an amount of money from the premises of a company in liquidation, and applied under s125 of the *Police Regulation Act 1958* ('Act') to the Magistrates' Court for an order as to which of two claimants the money should be delivered, the magistrate was in error in finding that the company was not entitled to act as a claimant to be delivered the money under s125 of the Act without the leave of the Court under s471B of the *Corporations Act 2001* (Cth).

ROBSON J:

The Supreme Court Application

1. I have before me an application begun by way of Originating Motion by Bella Fresh Pty Ltd (in liquidation) (ACN 085 740 101) ("Bella Fresh") naming Tony Petrac ("Mr Petrac") as the first defendant and the Magistrates' Court of Victoria as the second defendant, wherein the plaintiff seeks an order from this Court to, in effect, quash the decision of her Honour Magistrate Popovic made on 14 May 2007 to adjourn an application that had been made to her by a member of the police force, Officer Matthew R. Pascoe ("Officer Pascoe").

Officer Pascoe's Application

2. Officer Pascoe had made the application on 1 March 2007 to the Magistrates' Court under s125 of the *Police Regulation Act 1958*. Section 125 provides:

"When any member of the police force has taken possession of any goods other than goods seized under a warrant to seize property issued under section 73 of the *Magistrates' Court Act 1989* and it is doubtful whether any person claiming such goods or which of any two or more persons so claiming is entitled to the possession thereof of the Magistrates' Court, upon the application of such member and in the presence of all the parties claiming such goods or in the absence of any such parties who having had reasonable notice of the hearing of such application do not appear, may hear receive and examine evidence touching the matter of such application and may order to whom such goods shall be delivered by such member, and such goods shall be delivered accordingly; and if after the making of such order any action is commenced against such member for the recovery of such goods or the value thereof, such order and the delivery of the goods in pursuance thereof may be given and shall be received in evidence in bar of such action, but such order or delivery shall not affect the rights or liabilities of the persons claiming such goods or to whom the same have been delivered as aforesaid."

3. In substance, Officer Pascoe had in his possession \$25,000, which I have been informed had been seized at the premises of the plaintiff, Bella Fresh. I have been informed, and accept, that Officer Pascoe had formed the view that he was no longer entitled to retain possession of the \$25,000 in bank notes.

4. As indicated by s125 above, that section provides a mechanism whereby a member of the police force who has taken possession of goods can return them to claimants or a claimant and be protected from further action in having taken the goods and, as indicated by the wording of the section, provides a mechanism whereby, if there is more than one claimant, the Court can order which claimant the goods should be delivered to.

5. As indicated by s125, however, the Magistrate's order, or delivery of the goods following

the order, "Shall not affect the rights or liabilities of the persons claiming such goods or to whom the same had been delivered as aforesaid."

6. As matters eventuated, there were two claimants to the moneys, Bella Fresh and Mr Tony Petrac. I have been informed of some of the details lying behind the basis for the claims. I do not think it is necessary for me to go into the basis of their claims.

7. Officer Pascoe's application came on for hearing on 14 May 2007 before her Honour Magistrate Popovic. At the hearing, Mr Jonathan Evans of counsel appeared for Bella Fresh, as he does again today and Mr Andrew S. Dickenson of counsel appeared for Mr Petrac, as he does again today.

Section 471B of the *Corporations Act*

8. Apparently prior to the hearing, Mr Dickenson, or his solicitors, had given notice to Bella Fresh that Mr Petrac intended to argue that under s471B of the *Corporations Act* 2001 (Cth) ("Corporations Act") Bella Fresh required leave to claim in the proceedings under s125 that the disputed property should be delivered by Officer Pascoe to it.

9. Section 471B of the *Corporations Act* provides as follows:

"While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:

(a) a proceeding in a Court against the company or in relation to property of the company; or

(b) enforcement process in relation to such property;

except with the leave of the Court and in accordance with such terms (if any) as the Court imposes".

10. Prior to the hearing on 14 May 2007, points of claim had been filed on behalf of Bella Fresh. The points of claim conclude by saying that the \$25,000 subject to the proceeding is the property of Bella Fresh, which would obviously found the basis for the Magistrate ordering that the money be handed to Bella Fresh. As mentioned above, the section does provide, however, that the Magistrate's order does not affect the rights or liabilities of the persons claiming such goods.

11. I should not be taken as making any findings about the effect of those words or whether the proceeding would give rise to any estoppel between Bella Fresh and Mr Petrac. I say nothing about that one way or the other as that is not a matter that is the subject of this hearing.

The Magistrate's Findings

12. The Magistrate heard argument on 14 May 2007 whether or not Bella Fresh was required to obtain leave under s471B. At page 7 of the transcript (see page EB14 of Exhibit TMR1 of the affidavit of Trevor Michael Rosenthal sworn 29 June 2007) the learned Magistrate said, "I don't accept the argument of Mr Evans that these proceedings establish whether or not the money in dispute was the property of the company Bella Fresh." She may have been right in that observation, but, as I have indicated above, it is not necessary for me to decide that issue. She went on to say, however, in substance, that Bella Fresh was obliged to obtain leave of the Court under s471B of the *Corporations Act* to raise a claim to have the moneys delivered to it under s125 of the *Police Regulation Act* 1958. I find the learned Magistrate fell into error in so finding.

13. First of all, in my view, and I so find, Bella Fresh had not begun or proceeded with a proceeding in a Court in relation to property of Bella Fresh within the meaning of s471B. In my view, and I so find, the proceeding was begun and proceeded with by Officer Pascoe. Section 471B was not activated. The purpose of the proceeding was as I have discussed above, to protect Officer Pascoe.

14. Secondly, the clear intent of s471B is to regulate proceedings against the company and its property that is in liquidation, and it is not intending to impede in any way the action of the liquidator in getting any assets of the company. The *Corporations Act* makes it clear it is the primary duty of the liquidator is to get the property of the company in.

15. For those two reasons I find that the learned Magistrate fell into error.

Jurisdiction

16. The matter has been brought before me under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005. I will not set out all the requirements of that rule as, in my view, they have been substantially complied with, save I should make reference to sub-rule (5) of Rule 56.01, which provides:

"The Court shall not grant any relief or remedy in the nature of *certiorari* unless—

(a) a copy of the warrant, order, conviction, inquisition or record in respect of which the relief is sought, verified by affidavit, is produced; or

(b) if a copy is not produced, the non-production is accounted for to the satisfaction of the Court."

17. The transcript of the hearing on 14 May 2007 has been produced to me. On page 11 of that transcript (page EB18 of Exhibit TMR1), the Magistrate indicates it is appropriate to grant an adjournment and I infer such an order was made. She did, however, also on that page at line 9, reserve the question of costs. I have been told from the bar table that, in fact, a quantum sum was agreed, which was \$2,081 and, in fact, that was the subject of a written order. The written order was not produced to me in Court, but an earlier version of it was produced, which is as follows: "Adjourned to a date to be fixed to Mildura Magistrates' Court. Bella Fresh Pty Ltd in liquidation (other party) ordered to pay costs in the amount of \$2,081." Later, the order was amended to add, "to Tony Petrac." The order goes on to say, "Stay to 28 May 2007" and the document tendered to me is headed, "Certified extract". I am satisfied that sub-rule (5) is, in those circumstances, complied with in respect to the order as to costs and that I have jurisdiction in relation to this matter.

Orders

18. Mr Dickenson for Mr Petrac accepts that the Magistrate was in error in finding that Bella Fresh was not entitled to act as a claimant to be delivered the moneys under s125 without the leave of the Court under s471B. In those circumstances, and for the reasons given above, the Magistrate should have proceeded to hear Officer Pascoe's application; she should not have adjourned the application and she should not have made an order for costs against Bella Fresh.

19. I therefore order under Order 56 that an order in the nature of *certiorari* quashing the order of the Magistrates' Court of Victoria made on 14 May 2007 to adjourn the application of Officer Pascoe be made and the order that Bella Fresh pay Mr Petrac's costs of \$2,081 be quashed. I further order that the first defendant, Tony Petrac, pay the plaintiff's costs of this application including this day and including any reserved costs.

20. I wish to add, not as part of the order, but as part of my judgment, that I would expect that the Magistrate would resume the hearing of Officer Pascoe's application and make the orders that he seeks without either Bella Fresh or Mr Petrac seeking leave under s471B of the *Corporations Act*.

21. Finally, Mr Dickenson, on behalf of Mr Petrac, has made an application for an indemnity certificate in respect to costs in relation to this matter under s4 of the *Appeals Costs Act* 1998. I grant such certificate. My reasons for doing so are apparent from the errors I identified in the learned Magistrate's decision made on 14 May 2007.

APPEARANCES: For the plaintiff Bella Fresh: Mr J Evans, counsel. Rosendorff Lawyers, solicitors. For the first-named defendant Petrac: Mr Andrew S Dickenson, counsel. Martin Irwin & Richards, solicitors.