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legal update

RECEIVER'S SALE OF ASSETS WITHOUT ADVERTISING OR AUCTION

When is it appropriate?

The recent decision of Black J in *In the matter of Australasian Barrister Chambers Pty Limited (in liquidation)* [2017] NSWSC 597 confirms that advertising and sale of an asset at or after auction is not necessary as a matter of course in a receivership.

The decision shows that a receiver can sell an asset off-market with minimal risk that the sale will be injunctioned, if:

- the receiver properly instructs a valuer
- the valuation is cogent and comprehensive, and
- the sale price exceeds the valuation.

FACTS OF THE CASE

A Custodian Appointment Deed dated 2008 between Australasian Barrister Chambers Pty Limited (in liquidation) (ABCPL) and ABCD Corporation Pty Ltd as trustee for a super fund (ABCD) provided that ABCPL would act as custodian to acquire assets as legal owner on behalf of ABCD (an arrangement which allowed ABCPL to give a mortgage over the property and for ABCD to comply with the *Superannuation Industry (Supervision) Act 1993* (Cth)).

After the date of the Custodian Appointment Deed, ABCPL purchased and became the registered proprietor of a strata property consisting of three lots.

It was a term of the Custodian Appointment Deed that ABCPL was a bare trustee, and a further term that it was entitled to be indemnified from the assets of the super fund in respect of liabilities which it incurred as custodian (i.e. bare trustee).

In November 2015, ABCPL transferred title to the property to ABCD without consideration after ABCPL received service of an Originating Process for its winding up. The plaintiff in that Originating Process was the owners corporation, seeking to recover strata levies from ABCPL.

On 8 December 2015, Mr Sampson was appointed as liquidator of ABCPL.

On 25 October 2016, on Mr Sampson's application, Brereton J ordered that Mr Sampson be appointed as court-appointed receiver of the property and was authorised to sell it to enforce ABCPL's right of indemnity out of super fund assets (i.e. the property) arising out of ABCPL's liability for unpaid strata levies.

The orders empowered the receiver to sell the property by public auction or private treaty as he saw fit. The receivership was stayed for six weeks on the basis of undertakings to the Court from Mr Derek Minus, a person associated with both companies, to permit time for an application to be made to terminate the winding up of ABCPL under s 482 of the *Corporations Act 2001* (Cth).

During the operation of the stay, the receiver and Mr Minus discussed the likely costs of a receiver's sale of the property compared with payment of liquidation expenses, remuneration and creditors' claims through a termination of the winding up of ABCPL. Ultimately Mr Minus did not pay or apply under s 482.

On 6 December 2016, Brereton J dismissed Mr Minus' application to extend the stay of the receivership, and early on 7 December 2016 the receiver took possession of the property.

On 4 January 2017, the receiver's agent instructed a valuer in relation to the property. On 6 January 2017, the receiver obtained a comprehensive valuation of the property based on comparable sales and capitalisation of net rental income. The valuation stated:

We are of the opinion the open market value of the freehold interest in [the property] as at 6 January 2017 and subject to vacant possession, good and marketable title free from encumbrances; and the comments, terms and conditions contained within this report, is in the sum of \$550,000 FIVE HUNDRED AND FIFTY THOUSAND DOLLARS) Excl GST.

On 16 January 2017, the owner of a neighbouring property who had no knowledge of the valuation made an offer to purchase the property from the receiver for \$618,000.

Between 17 and 24 January 2017, the receiver's solicitors prepared a contract for sale of the property and by letter dated 24 January 2017 written on legal advice, Mr Sampson informed Mr Minus that he had obtained an offer for \$618,000, that the offer exceeded the valuation of the property and that he intended to accept the offer. A consideration in accepting the offer was the potential for the receiver to avoid costs and delays in advertising and auctioning the property at an estimated additional cost of \$22,000 plus GST.

On 24 January 2017, Mr Minus submitted a written offer to the receiver to purchase the property in the name of APLUS Pty Ltd as trustee for the APLUS Family Trust (A Plus) for \$650,000.

On 25 January 2017, on legal advice the receiver wrote to Mr Minus requesting evidence of A Plus's financial capacity to pay a deposit and complete a purchase of the property and requested nomination of guarantors of its obligations under a contract. Mr Minus did not supply the requested evidence and information.

On 25 January 2017, the receiver again wrote to Mr Minus, informing him that in the absence of the requested evidence and information, he would exchange contracts with the neighbouring owner for \$618,000.

On 27 January 2017, the receiver exchanged contracts with the neighbouring owner for \$618,000.

By letter dated 2 February 2017, the receiver informed Mr Minus of the exchange of contracts. Delay in the completion of the contracts followed when Mr Minus lodged caveats on title (which the receiver later lapsed) and failed to deliver the certificates of title (until compelled to do so by mandatory injunction which the receiver obtained).

On 23 March 2017, ABCD sought leave to apply for an injunction against the receiver restraining him from completing the contract and that the receiver also:

... be restrained from entering into any further contracts for sale without having first engaged in a thorough marketing campaign followed by public auction with respect to the property, pending further order.

Mr Minus and his companies contended in Court that the market price for the property could only be obtained through a marketing campaign and public auction. If ABCD obtained the injunctions sought they would have prevented the receiver from completing an above market sale for the property obtained without the expense and delay associated with advertising and auction.

LEAVE TO BRING PROCEEDINGS

The first issue for Black J to decide was whether to grant ABCD leave to bring proceedings against a court appointed receiver who was carrying out his powers as delegated by the court, as such leave is required: *Ames v Trustees of the Birkenhead Docks [1855] EngR 373; 52 ER 630; (1855) 20 Beav 332 at 353.*

In *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* 5th edition, the learned authors observe at [29-120] that:

Any interference with a receiver appointed by the court in the conduct of the receivership, and any interference with the possession of that receiver, is a contempt of court, unless the leave of the court is first obtained.

Black J considered the evidence before him and determined that 'leave should be granted to ABCD to bring the application, since it is desirable that there be a merits determination of the complaints raised by Mr Minus, at least on an interlocutory basis'.

DID THE RECEIVER BREACH s 420A OF THE CORPORATIONS ACT?

ABCD argued that the receiver had breached s 420A and the sale should be restrained because the process occurred during the Christmas break, the receiver did not follow the valuer's recommendation to auction the property, the property was not advertised for sale and the property was sold to a neighbouring owner without negotiations taking place.

The receiver denied any breach of s 420A and argued that the sale was above market and achieved economies through the avoidance of advertising and selling costs.

Section 420A of the Corporations Act provides that:

In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:

- (a) if, when it is sold, it has a market value – not less than that market value; or*
- (b) otherwise – the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.*

(2) Nothing in subsection (1) limits the generality of anything in section 180, 181, 182, 183 or 184.

Black J held that the property had a readily identifiable market value by virtue of the fact that there is demand for

Sydney commercial property and a value could be ascribed to the property. His Honour observed s 420A(1)(a) applies where a property has a 'definite' or 'determinable' market value, which is ascertainable by reference to events in a market: *Skinner v Jeogla Pty Ltd* [2001] NSWCA 15; [2001] 37 ACSR 106 at [40]; *GE Capital Australia v Davis ...* at [116].

His Honour held that s 420A(1)(a) applies to the exclusion of s 420A(1)(b). The latter sub-section only operates if the former does not apply.

The Court accepted the receiver's argument that a receiver does not owe a duty under s 420A to obtain the 'best price' for an asset. Rather, the duty is to obtain the market price of property that has a definite or determinable market value.

Black J held that 'the legislature has not imposed a duty on a receiver to obtain the "best price" that might conceivably be obtained on the sale of a property, where a receiver also owes duties to act in the interests of creditors, which would often not be served by delaying the sale of a property in the hope that a better price could be achieved.'

His Honour went on to observe that s 420A requires a controller to take reasonable care to sell property for not less than market value, if it has a market value when it is sold. If a receiver obtains a reliable valuation of property, and then obtains an offer for it prior to commencing marketing which is above the valuation, it is difficult to see why reasonable care to sell the property for not less than market value requires anything more than acceptance of the offer.

Section 420A of the Corporations Act does not impose an obligation to obtain the maximum possible sale price for a property with a definite or determinable value, but only to take reasonable steps to sell the property for not less than its market value. The Court held that the receiver clearly obtained market value when he accepted the offer to purchase the property at a price above the written valuation he had obtained. ABCD and an associated entity failed to injunct the sale and it was completed.

KEY TAKEAWAY POINTS

The case centred on the receiver's duty to obtain market value and how a receiver discharges that duty. It is permissible for a receiver to sell an asset without advertising or auction, provided they obtain a reliable valuation and the sale price exceeds it.

However, based on a South Australian Full Court decision, Black J found (for interlocutory purposes) that an off-market sale might be capable of constituting a breach

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of s 420A, although here the receiver was not liable, at least at the interlocutory stage, because ABCD could not establish that any loss flowed when the sale price exceeded the valuation and the valuation appeared to be convincing.

Practitioners should bear in mind that the decision to sell an asset without marketing or auction ought to depend on:

- the circumstances of the receivership (or other administration)
- the nature and value of the asset
- the appointee's powers to sell by private treaty or otherwise
- whether a saving of time and cost can be achieved, and
- the practitioner's appetite for risk.

Accordingly, if:

- the asset has a market value which can be easily determined
- the practitioner has obtained a suitable valuation addressed to them, and
- the practitioner obtains an offer above valuation
- then the risk to the appointee from an off-market sale is reduced.

The principles emerging from this important judgment will apply by analogy in both personal and corporate insolvency administrations of various types. ▲