schemes was not just a matter of the liquidators' commercial judgment. It had to be based on established principles of law and equity. Judd J also held that the allocation in the sales contract was "compromised" and not an arm's length allocation, and there was a real and substantial ground for doubting the liquidators' prudence in advancing their preferred allocation. Judd J preferred the allocation proposed by an independent value in which no value was allocated to certain schemes.

In *Huntingdale Village Pty Ltd (Recs and Mgrs Apptd) ATF Huntingdale Village Unit Trust v Perpetual Nominees Ltd (No 2)* [2014] WASC 217; BC201405199, Le Miere J granted security for costs under s 1335(1) CA to receivers defending an application for inquiry under s 423 CA in relation to allegations of excessive charging by the receivers. Those allegations were made by the Westpoint companies that were in receivership. The threshold for the enlivening of the Court's discretion under s 1335(1) CA was met because there was a reason to believe the companies, if unsuccessful in their s 423 application, would not be able to pay the receivers' costs. His Honour followed two of Siopis J's holdings in *Oswal v Carson* [2012] FCA 341; BC201201834: first, that while s 423 had a public interest element, unsuccessful parties should still be required to pay costs; and secondly, the companies' s 423 application was not merely defensive.

Article

[353] "NSW Court of Criminal Appeal increases sentence for breaches of s 184(2) and s 1308 of Corporations Act 2001: Director of Public Prosecutions (Cth) v Bryan Raymond Northcote [2014] NSWCCA 26; BC201401556"

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[1] Introduction

In a recent decision, the NSW Court of Criminal Appeal (NSWCCA) upheld an appeal against the leniency of a sentence issued by the NSW District Court (NSWDC) to the former managing director of collapsed Compass Hotel Group for serious and deliberate breaches of sections 184(2) and 1308(2) of the Corporations Act 2001 (Cth). The former managing director had been convicted of dishonestly withholding information from the board of Compass and using his position to gain a financial advantage through arranging for a company he controlled to receive $1.566 million in commission payments pursuant to a "conjunction agreement" with a hotel broker -- under which the company would receive 50 per cent of all sales commissions paid by Compass and vendors to the hotel broker for hotels purchased by Compass. In upholding the Crown's appeal, the NSWCCA held that the sentencing judge had erred in failing to take account of material considerations, and by taking into account irrelevant considerations. Emphasising the importance of general deterrence, the NSWCCA quashed the original sentence of two years to be served by way of an Intensive Correction Order in the community, and re-sentenced the former managing director to a term of full-time imprisonment.

[2.1] Formation of NovaPrime and Compass Hotel Group

Mr Bryan Raymond Northcote, born in 1962, had for several years worked in the hospitality consulting business.[1] He was the director and together with his former wife, the ultimate owner of a company called Yardhouse Australia and New Zealand Pty Ltd (YANZ), trading as NovaPrime.[2] In November 2006 NovaPrime entered into a "conjunction agreement" with a West Australian hotel broker, Burgess Rawson (WA) Pty Ltd, under which Burgess Rawson would equally divide with NovaPrime any sales commission it received for any successful hotel sale where the purchaser was introduced by NovaPrime.[3] Mr Northcote believed a successful business venture involving the acquisition of several hotels in the Perth area could be undertaken, and by around May 2007 Burgess Rawson had identified approximately 16 hotels as possible purchases, and commenced negotiations for their acquisition.[4] To raise the capital to purchase the targeted hotels, Compass Hotel Group Ltd (Compass) was incorporated in October 2007 with Mr Northcote as chief executive officer and managing director. In November 2007 Compass undertook an initial public offer (IPO), which

raised $123 million.[5] Compass became part of the broadly described Compass Hotel Group, which consisted of it and Compass Hotel Group Trust (the Trust). Wholly owned subsidiaries of Compass were used as vehicles to purchase each of the businesses associated with the target hotels in Western Australia, and the Trust was used to purchase the freehold of the land associated with those hotels.[6]

By 16 November 2007, and prior to the IPO, Compass negotiated to purchase 12 hotels and a market attached to one of the hotels. Prices had been agreed and the sales commissions had been negotiated between Mr Northcote on behalf of Compass, Burgess Rawson and the respective vendors.[7] Between November 2007 and January 2008, Mr Northcote as managing director and chief executive officer of Compass, had signed or authorised a number of documents to effect the purchase of the 13 businesses and associated freehold properties in Western Australia, with the settlements for these purchases being completed between January and April 2008.[8] In January 2008, Burgess Rawson sent invoices totalling $3,271,248 to Compass and to the hotel vendors in respect of the commissions payable for the purchase of the relevant hotels and businesses. Pursuant to the conjunction agreement, NovaPrime was to receive half of this sum (being $1,635,624) and, between February and April 2008, received five payments from Burgess Rawson totalling $1,566,730. Thereafter, Mr Northcote arranged for the transfer of $1,091,984.19 from NovaPrime to bank accounts of other companies he owned.[9]

[2.2] Mr Northcote's failure to disclose his interest in NovaPrime, and its receipt of half of the sales commissions

In the period between the incorporation of Compass in October 2007 and NovaPrime's receipt of the final payment of its share of the commissions from Burgess Rawson in April 2008, there were numerous occasions when Mr Northcote, as managing director of Compass, failed to disclose to the board and/or the shareholders of Compass his interest in NovaPrime, and that NovaPrime would be receiving half of the commissions arising from the purchase of the West Australian hotels by Compass under the conjunction agreement.[10] These included:

- Mr Northcote was a member of Compass's Due Diligence Committee formed for its IPO, which met on ten occasions during September and November 2007 -- but did not disclose his interest in NovaPrime nor the existence of the conjunction agreement between NovaPrime and Burgess Rawson as to share sales commissions, despite each meeting of this committee having an agenda item requiring the declaration of conflicts of interest by attendees;[11]
- During the formation of Compass, Mr Northcote recommended Burgess Rawson as the appropriate agent to facilitate the purchase of hotels by Compass in Western Australia -- but did not disclose to Compass and its board his interest in NovaPrime or that it would receive half of the commissions under the conjunction agreement;[12]
- When Compass's prospectus was issued for its IPO, Mr Northcote and the other directors signed a "Management Sign Off Certificate" declaring they were not aware of any material omissions from the prospectus -- yet Mr Northcote failed to declare his interest in NovaPrime;[13] and
- During the ten meetings of Compass's board of directors, and two meetings of its Audit and Risk Management Committee between December 2007 and August 2008, the Chair asked all directors to declare any conflicts of interest -- however Mr Northcote did not declare his interest in NovaPrime nor the receipt of payments from Burgess Rawson.[14]

[2.3] Lodgement of false or misleading documents with ASIC

On 2 January 2008, documents including a "Resignation of Director" and "Circular Resolution of the Board of Directors" were lodged with ASIC which recorded Mr Northcote's resignation as a director of NovaPrime on 1 October 2007. Whilst these documents purported to have been signed by Mr Northcote on 1 October 2007, they were later found to have been back-dated to enable Mr Northcote to falsely assert that there was no conflict of interest between his respective positions with Compass and NovaPrime.[15]

As a result of his own investigations in June 2009, the Chairman of Compass became aware of Mr Northcote's interests in NovaPrime and the payments it had received pursuant to the conjunction agreement with Burgess Rawson. Mr Northcote was stood down from his duties and directorship of Compass on 16 July 2009.[16] Compass subsequently went into receivership in March 2011.[17]

Following an ASIC investigation, on 11 December 2012 Mr Northcote pleaded guilty in the NSW Local Court to three charges of breaching the Corporations Act 2001 (Cth), and was committed for sentencing by the NSW District Court.[18] Mr Northcote's signing and lodging of the two documents falsely recording his resignation as director of NovaPrime with ASIC on 2 January 2008 formed the basis of two charges under 1308(2) of the Corporations Act, and his failure to declare his interest in NovaPrime, and NovaPrime's receipt of half of the sales commissions from Burgess Rawson formed the basis of the charge under s 184(2) of the Corporations Act.[19]

[3] Original sentence of Mr Northcote

In sentencing Mr Northcote to two years' imprisonment to be served by way of an Intensive Correction Order (ICO) involving a minimum of 32 hours' community service work per month, Jeffreys DCJ took account of Mr Northcote's early guilty plea, his expression of contrition for his conduct, the unlikelihood of him committing further offences and his good prospects of rehabilitation.[20] Additionally, after noting that NovaPrime received $1.566 million through Mr Northcote's dishonest conduct, from which Mr Northcote received around $1.1 million,[21] his Honour considered the facts surrounding the charging of commission by Burgess Rawson as hotel broker. He noted that the commission of 2 per cent for each hotel sale was the normal market rate either paid by the vendor hotels or included in the purchase price if paid by Compass. He also noted that on occasions when Compass was paying the commissions, the rate of 2 per cent was negotiated down to 1 per cent, and then noted:

> "It seems that Burgess Rawson would have been, in my view, entitled to commission in relation to the purchase of those various hotels. *In the materials before me, it is difficult to establish what, if any, actual detriment was caused to Compass Hotel Group, and that is a matter that I take into account* ... It seems clear in my view, and the Crown accepted, that a broker such as Burgess Rawson would have needed to be employed at some stage, and if the vendors of the particular hotels had not agreed for the broker to charge them commission, then somebody would have had to pay the commission. The commission is not an inflated commission, it was a market commission. That, in my view, is an important consideration in this matter"[22] . [Emphasis added]

[4.1] NSWCCA consideration of Crown's appeal

The Commonwealth Director of Public Prosecutions (CDPP) appealed Mr Northcote's sentence in the NSWCCA on the basis of errors by the sentencing judge, and secondly on the grounds of manifest inadequacy.[23] For the reasons outlined below Garling J, with whom Hoeben CJ at CL and Hulme AJ agreed, upheld the CDPP's appeal.

The CDPP submitted that Jeffreys DCJ had erred in failing to properly take account of material considerations -- including the amount of advantage Mr Northcote personally obtained, the deliberate and premeditated nature and duration of his offending, and the number of occasions upon which Mr Northcote failed to disclose NovaPrime's arrangement with Burgess Rawson as his duties to Compass required him to do.[24] In accepting this submission, Garling J held that Jeffreys DCJ ought to have, but did not, assess Mr Northcote's conduct to be at the higher end of the objective criminality of offending.[25] He viewed as correct the CDPP's submissions to Jeffreys DCJ that Mr Northcote's conduct:

> "... involved the deliberate, premeditated and systematic abuse by [Mr Northcote] of his position. He repeatedly failed to declare his interests in NovaPrime on occasions when he had a positive duty to do so. [Mr Northcote] took active steps to conceal his dishonesty by arranging for false documents to be lodged with ASIC. As a result of his dishonesty, [Mr Northcote] improperly obtained a benefit to himself and companies controlled by him in excess of $1.5 million. This was a gross breach of trust of not only the Board of Compass Hotel Group, but its shareholders and all those with whom he had dealings with respect to the purchase of the relevant properties".[26]

Garling J also accepted the CDPP's submission that Jeffreys DCJ had taken into account irrelevant factors in determining the appropriate sentence for Mr Northcote -- including the absence of any detriment to Compass through Mr Northcote's conduct, and the entitlement of Burgess Rawson to charge a market rate commission in any event.[27] His Honour distinguished Mr Northcote's conduct from the earlier NSWCCA case of *Kwok v R*[28] -- in which the appellant director had obtained an advantage for companies with which he was associated, but did not inappropriately gain money for himself nor cause detriment to his company. He commented that:

> " ... had Compass known of the advantage which had been obtained by Mr Northcote, it would have been able to consider whether it called upon him to give an account of his profit, that is, $1.56 million to the company of which he was a director, namely Compass. It was denied the opportunity so to do. As well ... Mr Northcote obtained a significant personal advantage".[29]

Garling J therefore concluded that Jeffreys DCJ had erred in considering the absence of any monetary detriment to Compass as a result of Mr Northcote's conduct when determining his sentence.[30] His Honour also determined that Jeffreys DCJ's conclusion that Burgess Rawson would have been entitled to charge a commission at market rate in any event to be another irrelevant factor in determining Mr Northcote's sentence. Rather, he considered the relevant factor for consideration to have been Mr Northcote's dishonest concealment of the share of commission payments pursuant to the conjunction agreement.[31]

Garling J also upheld the CDPP's second argument that Mr Northcote's total effective sentence imposed of two years to be served by ICO was manifestly inadequate because it did not reflect the seriousness of the offence, the extent to which Mr Northcote personally benefited from his offending, the need for general deterrence and the need to impose a sentence which both punished Mr Northcote and denounced his criminal conduct.[32]

[4.2] Re-sentencing

Having concluded Mr Northcote's original sentence to be "offensive to the administration of justice", and "mercifully lenient",[33] and characterising Mr Northcote's offending to be "at the higher end of the range" of breaching s 184(2) of the Corporations Act,[34] Garling J determined that re-sentencing was warranted. His Honour acknowledged Mr Northcote's undertaking of community service in a charity store on one

day per week since his conviction, his compliance with the conditions of his ICO, and the financial dependence of his former wife on his income in providing for their 14 year old son.[35] Notwithstanding these considerations, his Honour considered that nothing less than a term of full-time imprisonment served in custody would appropriately reflect the nature and circumstances of Mr Northcote's offending. Accordingly, His Honour quashed Mr Northcote's original sentence and re-sentenced him to a term of imprisonment of three years and six months, to be released on 26 September 2015 upon a recognisance that he be of good behaviour during the balance of the term of that sentence.[36]

In welcoming this decision, ASIC Commissioner John Price warned that "... directors who step over the line by abusing their position for their own dishonest purposes need to know that they are risking jail time for their actions".[37] The NSWCCA's decision highlights the importance of general deterrence for white collar crime offences, and also provides useful guidance on the factors which are, and are not, likely to be relevant considerations when considering the appropriate sentence to be imposed for breaches of s 184(2) of the Corporations Act.

1 [2014] NSWCCA 26, [48]-[51].

2 [2014] NSWCCA 26, [8].

3 [2014] NSWCCA 26, [9].

4 [2014] NSWCCA 26, [10].

5 [2014] NSWCCA 26, [11]-[12].

6 [2014] NSWCCA 26, [13].

7 [2014] NSWCCA 26, [14].

8 [2014] NSWCCA 26, [15].

9 [2014] NSWCCA 26, [16]-[19].

10 [2014] NSWCCA 26, [20].

11 [2014] NSWCCA 26, [21].

12 [2014] NSWCCA 26, [22].

13 [2014] NSWCCA 26, [23].

14 [2014] NSWCCA 26, [24]-[25].

15 [2014] NSWCCA 26, [26]-[27].

16 [2014] NSWCCA 26, [29].

17 "Former CEO of collapsed WA hotel chain pleads guilty to ASIC charges" ASIC Media Release 12-312MR, 12 December 2012.

18 [2014] NSWCCA 26, [32]; "Former CEO of collapsed WA hotel chain pleads guilty to ASIC charges" ASIC Media Release 12-312MR, 12 December 2012.

19 [2014] NSWCCA 26, [27]-[28].

20 [2014] NSWCCA 26, [5], [67]-[69].

21 [2014] NSWCCA 26, [59].

22 [2014] NSWCCA 26, [61].

23 [2014] NSWCCA 26, [70].

24 [2014] NSWCCA 26, [72]-[73]; [79].

25 [2014] NSWCCA 26, [80]-[81].

26 [2014] NSWCCA 26, [82].

27 [2014] NSWCCA 26, [85].

28 [2007] NSWCCA 281 (2007) 64 ACSR 307.

29 [2014] NSWCCA 26, [89].

30 [2014] NSWCCA 26, [90].

31 [2014] NSWCCA 26, [91].

32 [2014] NSWCCA 26, [97], [104].

33 [2014] NSWCCA 26, [117].

34 [2014] NSWCCA 26, [120]-[121].

35 [2014] NSWCCA 26, [122]-[125].

36 [2014] NSWCCA 26, [127]-[129].

37 "Hotel entrepreneur jailed after Crown appeal" ASIC Media Release 14-046 MR, 14 March 2014.

Recent Cases

[354] Receivers apply for security for their costs

Ben Langford, Senior Associate, Ashurst

Huntingdale Village Pty Ltd (Recs and Mgrs Apptd) ATF Huntingdale Village Unit Trust v Perpetual Nominees Ltd (No 2) [2014] WASC 217; BC201405199 (2 July 2014, Le Miere J)

[CA ss 423, 424, 434, 1317, 1324]

[ASICA ss 12GD, 12GF]

Court orders security be provided to receivers defending a section 423 inquiry application.

Facts

Receivers of the plaintiff companies applied for security for their costs in a proceeding brought by the plaintiffs for a court inquiry into the receivers' conduct under CA s 423. The plaintiffs were part of the failed Westpoint Group. The plaintiffs' underlying claim was that the receivers had caused them loss, including by charging excessively, which should be investigated. The plaintiffs claimed that it was inappropriate to order security for costs for three broad reasons, being the public policy behind the nature of the proceeding, the receivers' significant delay in prosecuting their action for security and the plaintiffs' claim that the receivers had not faithfully performed their functions. The plaintiffs also raised oppression, that the receivers were indemnified by the secured creditor and that their claim was essentially defensive. The receivers argued that the threshold under s 1335(1) CA, that it appear by credible testimony that there is a reason to believe the corporation will be unable to pay the costs of the successful defendant, as it was clear that the plaintiffs would not be able to meet any adverse costs orders made against them if the receivers were successful. The receivers also argued that, the court's discretion having been enlivened, it was appropriate in the circumstances to order security for costs.

Justice Le Miere accepted that the court's discretion was enlivened because there was reason to believe the plaintiff companies had insufficient funds to pay the receivers' costs if the receivers were successful. His Honour then considered each of the grounds raised by the plaintiffs as being reasons weighing against an order for security for costs against them, although noting that the fact of the plaintiff's insufficient funds is itself a substantial factor in favour of ordering security for costs.

Nature of the proceeding

His Honour referred with approval to the decision of Siopis J in *Oswal v Carson* [2012] FCA 341; BC201201834 in which it was held that although CA s 423 had a public interest element, it did not follow that the unsuccessful party should not be required to pay costs.