

Re GLOBAL SDR TECHNOLOGIES PTY LTD (provisional liquidator appointed); PATTISON v MAY

SUPREME COURT OF VICTORIA — COMMERCIAL AND EQUITY DIVISION

WHELAN J

31 October 2005 — Melbourne

[2005] VSC 454

Corporations — Liquidators — Whether conditions should be imposed upon warrant — Contrasting practices of the Federal Court of Australia and the Supreme Court of New South Wales — Warrant granted pursuant to Corporations Act 2001 (Cth), s 530C.

The plaintiff, acting in his capacity as liquidator, sought a warrant under s 530C of the Corporations Act 2001 (Cth) to search for and seize company property from the defendants, who were formerly directors of the company in liquidation. The relevant property was software and related hardware. The company had, prior to it being placed in liquidation, acquired all of the intellectual property in the software. The liquidator had arranged a possible sale of the software.

Held, granting the warrant sought by the liquidator:

(i) An application for a warrant under s 530C of the Corporations Act is a last resort only to be made after all other reasonable steps have been taken: at [2].

(ii) Despite numerous requests, summonses, and court orders to deliver up the relevant property to the liquidator or to the court, the relevant property remained in the control of the defendants and there were grounds for serious concern that the defendants may wish to prevent the sale of that property and to inhibit and delay the liquidator in the performance of his duties: at [10], [11], [13].

(iii) The warrant was granted without conditions in circumstances where a letter prepared by the liquidator's solicitor which advised the defendants of their ability to apply urgently if they should wish to do so was to be given or delivered to the defendants when the warrant was executed. The liquidator was required to return to the court, as soon as practicable, to set out the circumstances of the execution of the warrant and seek directions as to the disposition of any property seized. It was indicated that if a police officer was not present when the warrant was executed it would be advisable for the liquidator to have in attendance an independent solicitor having no association with any of the relevant parties: at [14], [15].

(iv) Obiter: although there is a difference in practice between the Federal Court and the Supreme Court of New South Wales concerning the imposition of conditions on warrants neither approach should be invariably followed and in the present circumstances the practice of the Federal Court of Australia was appropriate: at [14].

Application

This was an ex parte application made by the liquidator of Global SDR Technologies Pty Ltd (in liquidation). The application was for a warrant to search for and seize the company's property under s 530C of the Corporations Act 2001 (Cth).

C Charles, solicitor, instructed by *Charles Fice Solicitors* for the applicant.

[1] **Whelan J.** This is an application made ex parte under s 530C of the Corporations Act 2001 (Cth) by Global SDR Technologies Pty Ltd's (Global SDR) liquidator, Mr Paul Pattison. He seeks a warrant to search for and seize all property and books of Global SDR in the possession or control of the respondents, Mr Roger May and Mr Jason May.

[2] Such applications are a last resort to be made only after all other reasonable steps have been taken.¹

[3] Global SDR is a company which is a member of a group of entities formerly controlled by, or associated with, Mr Roger May and Mr Jason May. Mr Roger May and Mr Jason May are now each bankrupt. They were formerly directors of Global SDR.

[4] Mr Pattison was appointed provisional liquidator of Global SDR by Mandie J on 14 October 2004 on an application made by the Australian Securities and Investments Commission (ASIC). Mr Pattison was appointed liquidator on 7 June 2005.

[5] The material relied upon in support of the application is an affidavit of Mr Pattison sworn on 28 October 2005 and an affidavit of Mr Simon Peter Cleary also sworn on 28 October 2005. It seems from his affidavit that Mr Cleary is, or was, a close associate of Mr Roger May and Mr Jason May in relation to the development of the software which is in issue in this application.

[6] On that material I am satisfied that Mr Jason May and Mr Roger May have concealed or removed company property, being SpectruCell software and related hardware.

[7] As the material presently stands, it appears that Global SDR acquired that property from a related company, Advanced Communications Technologies (Aust) Pty Ltd (ACTA), pursuant to a deed of 13 August 2003. Under this deed, Global SDR acquired all of the intellectual property associated with SpectruCell and defined "Related Assets", which included hardware resources used to form the core physical implementation of the SpectruCell system.²

[8] Any subsisting claim ACTA itself may have had to the software or associated hardware has been resolved by an agreement between Mr Pattison and ACTA's receivers and managers, which was most recently embodied in a letter dated 27 October 2005.³

[9] Documents, computers and software concerning SpectruCell were stored at premises controlled by the Mays in Lorimer St, Docklands at the time of Mr Pattison's appointment as provisional liquidator.⁴

[10] Despite numerous requests,⁵ summonses⁶ and court orders,⁷ according to the affidavit of Mr Cleary, which I accept for the purposes of this application, property requested and/or ordered to be handed to Mr Pattison or to the court still remains under the control of Mr Jason May and Mr Roger May.⁸

1. See *Cvitanovic v Kenna & Brown Pty Ltd* (1995) 18 ACSR 387 (*Cvitanovic*).

2. See Ex PAP-5; affidavit of Mr Paul Pattison, para 12; Ex PAP-8 — Sch C to the RATA completed by the Mays; and Ex PAP-8A — a balance sheet produced by Mr Jason May.

3. Exhibit PAP-20.

4. See affidavit of Mr Paul Pattison, para 14.

5. See affidavit of Mr Paul Pattison, para 19, and affidavit of Mr Simon Peter Cleary, para 24.

6. See affidavit of Mr Paul Pattison, para 20.

7. See affidavit of Mr Paul Pattison, paras 22 and 23.

8. See affidavit of Mr Simon Peter Cleary, paras 17–27, and in particular paras 25 and 26.

[11] Mr Pattison, in cooperation with the receivers and managers of ACTA, has arranged a possible sale of the SpectruCell system. On the material as it presently stands, there are grounds for serious concern that Mr Roger May and Mr Jason May may wish to prevent the sale by withholding company property.⁹

[12] It further appears to me that there are grounds for serious concern that the Mays may exploit any opportunity given to them for explanation or preparation in order to inhibit and delay the liquidator in the performance of his duties. They have previously given inconsistent accounts of ownership of the relevant property, as a consequence of which there has been uncertainty and confusion which has impeded realisation of the property and enhanced their capacity to maintain control of the property. In this respect, I refer in particular to the account given by Mandie J of the submissions made to him on the application for the appointment of a provisional liquidator, as set out in his reasons of 18 October 2004,¹⁰ the account given of the examination of the Mays before Master Kings,¹¹ and Mr Roger May's email of 18 October 2005.¹²

[13] Mr Charles, the solicitor for the applicant, told me that the liquidator is concerned that if the Mays were advised of this application or given forewarning of the execution of the warrant, they may hide or even destroy the property. On the material I have seen, it seems to me that there are grounds for this concern.

[14] I have considered the difference in practice between the Federal Court¹³ and the Supreme Court of New South Wales¹⁴ concerning the imposition of conditions on warrants. It does not seem to me that either approach should be invariably followed. In the particular circumstances here it seems to me that the Federal Court approach is the appropriate one. The liquidator's solicitor has indicated that a letter will be given to the Mays, or delivered to the Mays, as soon as the warrant is executed, and a copy of the letter has been handed to me, which I have initialled and placed on the court file.

[15] Further, I have indicated that if a police officer is not present when the warrant is executed, it would be advisable for the liquidator to have in attendance an independent solicitor having no association with any of the relevant parties. The liquidator should return to the court setting out the circumstances of execution of the warrant, and seeking directions as to the disposition of any property seized as soon as is practicable. The Mays will be advised by the letter to which I have been referred of their ability to apply urgently, should they wish to do so.

Orders

Orders accordingly.

9. See affidavit of Mr Simon Peter Cleary, paras 25–7, and particularly the last sentence of para 27.

10. Exhibit PAP-4.

11. Affidavit of Mr Paul Pattison, para 15, and Ex PAP-9.

12. Exhibit PAP-19.

13. See *Australian Securities Commission v Samson* (1997) 24 ACSR 555; *Re Whitmore Holdings Ltd (in liq)* [2004] FCA 806.

14. See *Cvitanovic; House of Diamonds (NSW) Pty Ltd (in liq) v Lemery Pty Ltd* [2002] NSWSC 868.

[Editorial note: this case was previously published as (2005) 224 ALR 464. It has been re-published due to an administrative error.]

ADRIAN HONNERY
SOLICITOR