AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v. LANEPOINT ENTERPRISES PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (P43/2010)

Court appealed from: Full Court of the Federal Court of Australia [2010] FCAFC 49

Date of judgment: 24 May 2010

Date special leave granted: 21 October 2010

The respondent ("Lanepoint") is a company within the Westpoint Group of companies and its property development activities were financed by loans secured by floating charges from Suncorp Metway Limited ("Suncorp") and from Westpoint Management Pty Ltd ("Westpoint Management"). Westpoint Management was a company within the Westpoint Group and made the loan to Lanepoint in its capacity as the responsible entity of the managed investment scheme which raised funds from the public to invest in Lanepoint's project to purchase and redevelop into residential strata units the Regency Motel site in Rivervale, Western Australia. Shortly before January 2006, Westpoint Group's accounts showed Lanepoint's debt to Westpoint Management as $6,607,978. In January 2006 two transactions were recorded in Lanepoint's books by Westpoint Group's financial controller which had the effect of reducing that debt to $2,266,557. Lanepoint defaulted on both the Suncorp and the Westpoint Management loans and in March 2006 both Suncorp and Westpoint Management appointed receivers and managers under their respective floating charges (Westpoint Management was by then in provisional liquidation).

On 2 June 2006 the appellant commenced an application for the winding up in insolvency of Lanepoint, pursuant to s 459P of the *Corporations Act* 2001 (Cth) ("Act"). Lanepoint contended that it was solvent and that the amount owed to Westpoint Management was only $2,266,557. It was agreed before Gilmour J that Lanepoint had assets of $5,729,837. Tax liabilities and other inter-group loans amounted to approximately $1.6 million, although Lanepoint contested these sums. The hearing was conducted over several days and Lanepoint called several witnesses including Westpoint Group's financial controller. Gilmour J ordered that Lanepoint be wound up, concluding that the two transactions were improper transactions designed to conceal the true position, that Lanepoint had failed to rebut the statutory presumption of insolvency arising under s 459C(2)(c) of the Act, and rejecting Lanepoint's argument that the winding up application should be dismissed or stayed on the basis that there was a substantial dispute as to the extent of indebtedness to Westpoint Management.

The Full Court of the Federal Court of Australia by majority allowed Lanepoint's appeal (North and Siopis JJ; Buchanan J dissenting). In a joint judgment the majority held that in the light of the dispute about the Westpoint Management loan, the trial judge's discretion to stay or dismiss the winding up application miscarried. The majority held that in general a company should not be wound up on a disputed debt and that the trial judge had erred in proceeding to determine that disputed debt in winding up proceedings from which the putative creditor and other key parties and evidence were absent. Buchanan J would have dismissed the appeal, agreeing with the trial judge that the January 2006 transactions had concealed the true position about the debt. Buchanan J held

that the trial judge was entitled to reject Lanepoint's case and having done so there was no barrier to proceeding to act on the presumption that Lanepoint was insolvent and had not demonstrated the contrary.

The grounds of appeal include:

- Whether, and if so in what circumstances, the assertion by a company presumed to be insolvent under s 459C(2) of the *Corporations Act* (Cth) that it disputes a debt ought result in the dismissal or stay of an application that the company be wound up in insolvency.