



Supreme Court New South Wales

Medium Neutral Citation:	In the matter of Bankstown City Radio Co-Operative Limited (in liquidation) [2016] NSWSC 1884
Hearing dates:	28 November 2016 (written submissions 2 December 2016)
Decision date:	21 December 2016
Jurisdiction:	Equity - Corporations List
Before:	Black J
Decision:	The Court grants leave to James Alexander Shaw to distribute the surplus in respect of the liquidation of Bankstown City Radio Co-operative Limited to Bankstown Auburn Community Radio Incorporated. The Court orders that the Plaintiff's costs of this application be paid out of the assets of Bankstown City Radio Co-operative Limited.
Catchwords:	CORPORATIONS — Winding up — Winding up of co-operative under Co-operatives National Law (NSW) – where plaintiff sought special leave to distribute surplus in the liquidation of the co-operative to another entity – whether special leave ought to be granted.
Legislation Cited:	<ul style="list-style-type: none">- Associations Incorporation Act 2009 (NSW), s 65- Co-operatives (Adoption of National Law) Act 2012 (NSW), Sch 1, cl 2, 4- Co-operatives Act 1992 (NSW), ss 5, 109A, 328, Pt 12- Co-operatives National Law (NSW), s 24, 56, 64, 65, 442, 443, 444, 448, 455, 472, Sch 1, cl 1, 3- Co-operatives National Regulations (NSW), Sch 7, r 70- Corporations (Ancillary Provisions) Act 2001 (NSW), Pt 3- Corporations Act 2001 (Cth), ss 488, 490, Pt 5.4B- Income Tax Assessment Act 1936 (Cth), s 23
Cases Cited:	<ul style="list-style-type: none">- CGU Workers Compensation (NSW) Ltd v Ascom Service Automation (Australia) Pty Ltd [2005] NSWSC 747- Re D S Millard & Son Pty Ltd (1997) 24 ACSR 71- Re HIH Services Pty Ltd (in liq) [2012] NSWSC 1188
Category:	Principal judgment
Parties:	James Alexander Shaw in his capacity as Liquidator of Bankstown City Radio Co-Operative Limited (Applicant)

Bankstown/Auburn Community Radio Inc (amicus curiae)

Representation: Counsel:
B Douglas-Baker (Applicant)
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Solicitors:
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File Number(s): 2016/311029

JUDGMENT

1 By Originating Process filed on 18 October 2016, the Plaintiff, Bankstown City Radio Co-Operative Ltd (“Co-operative”) seeks special leave under s 488(2) of the *Corporations Act 2001* (Cth) and s 448 of the *Co-operatives National Law* (NSW) (“National Law”) to distribute the surplus in the liquidation of the Co-operative to Bankstown-Auburn Community Radio Incorporated (“BACR”). That application is supported by an affidavit of its liquidator, Mr Shaw, dated 17 October 2016 and of its solicitor, Ms McGill, dated 22 November 2016. This apparently straightforward application requires review of a complex statutory structure. I have been provided with helpful written submissions of Mr Douglas-Baker who appears for the Co-operative in this application, and I have drawn heavily on those submissions in what appears below.

Winding up of the Co-operative

2 By way of background, the Co-operative was registered under the *Co-operatives Act 1992* (NSW) (“1992 Act”) as a non-trading co-operative with share capital. The 1992 Act was then repealed by the *Co-operatives (Adoption of National Law) Act 2012* (NSW) (“*Adoption of National Law Act*”) on 3 March 2014 and the National Law then commenced. From that date, the Co-operative was taken to be registered as a non-distributing co-operative under the National Law, by cll 2, 4(1) and 4(3) of Schedule 1 to the *Adoption of National Law Act*, and the National Law applied to the Co-operative.

3 Section 442 of the National Law provides that a co-operative may be wound up on a certificate from the Registrar, if the necessary grounds for taking the action exist under s 455 of the National Law, which include that a co-operative has suspended business for more than 6 months. Under s 444 of the National Law, a winding up on the certificate of the Registrar, is a voluntary winding up for the purposes of the *Corporations Act*, although s 490 of the *Corporations Act* does not apply. On 22 April 2015, the Registrar issued a certificate under ss 443(1) and 455(2)(b) of the National Law (Shaw 17.10.16, Ex A1, 68) certifying that the Co-operative has suspended business for a period of more than 6 months and appointing Mr Shaw as liquidator of the Co-Operative under s 443 of the National Law.

As Mr Douglas-Baker points out, s 472(1) of the National Law in turn provides that the winding up of a participating co-operative is declared to be an applied Corporations legislation matter for the purposes of Part 3 of the *Corporations (Ancillary Provisions) Act 2001* (NSW) of this jurisdiction in relation to Part 5.4B of the Corporations Act, which contains s 488(2) of the *Corporations Act*. That section provides that special leave of the Court is required in order that a liquidator may distribute a surplus.

Distribution of surplus property of the Co-operative on a winding up

5 Section 448 of the National Law relevantly provides that:

“(1) On a winding up of a non-distributing co-operative, the surplus property of the co-operative must be distributed as required by the rules of the co-operative.

(2) The rules of a non-distributing co-operative must make provision for the way in which the surplus property of the co-operative is to be distributed in a winding up.

(3) In this section:

surplus property means property of the co-operative remaining after satisfaction of the debts and liabilities of the co-operative and the costs, charges and expenses of the winding up.”

6 As Mr Douglas-Baker points out, the Co-operative does not have its own rules which make provision for the distribution of the surplus property of the Co-operative; however, rule 73 of the Co-op Rules of the Co-operative (Co-op Rules) provides that:

“The winding up of the Co-operative shall be in accordance with Part 12 of the Act.”

That rule refers to Part 12 of the 1992 Act and s 328 of the 1992 Act, contained in that Part, provides, in similar form to s 448 of the National Law, that:

“(1) On a winding up of a non-trading co-operative, the surplus property of the co-operative must be distributed as required by the rules of the co-operative.

(2) The rules of such a co-operative must make provision for the way in which the surplus property of the co-operative is to be distributed in a winding up.

(3) In this section:

surplus property means that property of the co-operative that remains after satisfaction of the debts and liabilities of the co-operative and the costs, charges and expenses of the winding up.”

7 Mr Douglas-Baker also points out that s 109A of the 1992 Act provides that:

(1) The Registrar may by notice published in the Government Gazette approve model rules for co-operatives or for any class of co-operatives and alter or repeal the model rules from time to time.

(2) The model rules may make provision for anything for which the rules of a co-operative may make provision.

(3) If the model rules provide for a matter and the rules of a co-operative of the class to which the model rules apply do not provide for that matter, the provision of the model rules relating to that matter is deemed to be included in the rules of the co-operative.”

As Mr Douglas-Baker also points out, s 109A(3) of the 1992 Act has effect that the Model Rules under the 1992 Act apply to the Co-operative, where its rules do not provide for the distribution of surplus property in a winding up.

8 Rule 27 of the Model Rules approved 29 June 2006 (Old Model Rules) in turn provided that:

- a) The winding of the co-operative shall be in accordance with Part 12 of the Act.
- b) If on the winding up or dissolution of the co-operative there remains after the satisfaction of all its debts and liabilities any property, this shall not be paid or distributed amongst the members of the co-operative but shall be given or transferred to an organisation:
 - (i) which has objects similar to those of the co-operative;
 - (ii) whose constitution prohibits the distribution of its property among its members;
 - (iii) which has been chosen by the members of the co-operative at or before the time of dissolution or in default thereof, as directed by such Court as may have or acquire jurisdiction in the matter; and
 - (iv) which satisfies the relevant sub-section of section 23 of the Income Tax Assessment Act. ...
- e) In subparagraph (b), the expression “institution” includes an institution or institutions.

9 Mr Douglas-Baker also points out that cl 15 of the Co-operatives (New South Wales) Regulation 2014 sets out the savings and transitional provisions for rules of a co-operative, and provides that:

- (1) Subject to subclause (2), a co-operative may continue to operate under the rules (**old rules**) applying to the co-operative that were in force immediately before the commencement of the Act.
- (2) While a co-operative is operating under old rules:
 - (a) if there is any inconsistency between a provision of the old rules and a provision of the Act, the Law, CNR or this Regulation – the provision of the Act, the Law, CNR or this Regulation prevails, and
 - (b) if there is any reference in the old rules to a requirement contained in the *Co-operatives Act 1992* or the *Co-operatives Regulation 2005* – that reference is to be read as a reference to the equivalent requirement contained in the Act, the Law, CNR or this Regulation, and
 - (c) if there is any reference in the old rules to:
 - (i) the co-operative being a trading co-operative – that reference is to be read as a reference to the co-operative being a distributing co-operative, and
 - (ii) the co-operative being a non-trading co-operative – that reference is to be read as a reference to the co-operative being a non-distributing co-operative.

The reference to “CNL” in this section is to the National Law and the reference to “CNR” is to the Co-operatives National Regulations (NSW).

10 Mr Douglas-Baker in turn refers to s 56 of the National Law which requires that the rules of a co-operative state or provide for the matters included in Schedule 1 to the National Law; cl 1(x) of Schedule 1 to the National Law which requires that the rules of a co-operative set out or make provision for how the co-operative may be wound up; cl 3 of Schedule 1 to the National Law which requires the rules of a non-distributing co-operative to provide for the manner of distribution of surplus property at winding up; s 24(3) of the National Law which provides that the Registrar may approve the relevant provisions of the model rules as rules of the co-operative; ss 64 and 65 of the National Law which respectively provide that the Co-operatives National Regulations (NSW) may prescribe model rules and that the rules of a co-operative may adopt by reference

all or any of the provisions of the model rules; Sch 7 to the Co-operatives National Regulations (NSW) which sets out the model rules; and rule 70 of the Model Rules which, omitting notes to the rule, relevantly provides that:

“(1) The winding up of the co-operative must be in accordance with Part 4.5 of the Law.

(2) If, on the winding up or dissolution, there remains after the satisfaction of all its debts and liabilities any property, this must not be paid to or distributed among the members of the co-operative but must be given or transferred to (insert name of entity to receive surplus).

(3) If the entity specified in subrule (2) does not exist at the time of the winding up or dissolution of the co-operative, any surplus property after the satisfaction of all its debts and liabilities must be given or transferred to an institution or institutions:

(a) with objects similar to those of the co-operative; and

(b) whose constitution prohibits the distribution of its property among its members; and

(c) chosen by the members of the co-operative at or before the dissolution or, in default, by the a [sic] judge of the court with jurisdiction in the matter.”

- 11 Mr Douglas-Baker in turn points out that the New Model Rules prevail to the extent there exists any inconsistency as between the Old Model Rules and the New Model Rules and, in the absence of any inconsistency, the Co-operative may continue to operate under the Old Model Rules. Mr Douglas-Baker also points out that the only inconsistency as between rule 27 of the Old Model Rules and rule 70 of the New Model Rules is the reference in rule 27(b)(iv) of the Old Model Rules to the requirement that the organisation to which a surplus is to be transferred “satisfies the relevant sub-section of section 23 of the Income Tax Assessment Act”, and that that section was in any event repealed on 14 September 2006, so that there is no operative inconsistency as between rule 27 of the Old Model Rules and rule 70 of the New Model Rules. Mr Douglas-Baker submits, and I accept that, it follows from this extraordinarily complex route that rule 27 of the Old Model Rules applies to the distribution of the surplus property of the Co-operative.

Designation of BACR to receive distribution of the surplus property

- 12 Mr Douglas-Baker points out that rule 27 of the Old Model Rules provides for the surplus of the Co-operative to be distributed to an entity with similar objects to the Co-operative; with a constitution that prohibits the distribution of its property among its members; and which has been chosen by the members of the Co-operative at or before its dissolution or in default thereof, as directed by the Court. The Co-operative, by its liquidator, proposes such a distribution to BACR.
- 13 The first requirement of rule 27 of the Old Model Rules is that the surplus of the Co-operative be distributed to an entity with similar objects to the Co-operative. Mr Douglas-Baker submits, and I accept, that the objects of the Co-operative as set out in its constitution (Ex A1, 2–63) and the objects of BACR as set out in its constitution (Ex

A1, 296–328) are similar, being the advancement of community interests and media activities in the Bankstown and Auburn area, and the function of audio production and transmission facilities for use by the community.

- 14 The second requirement of rule 27 of the Old Model Rules is that the constitution of the relevant organisation prohibits the distribution of its property among its members. Mr Douglas-Baker fairly recognises that BACR's constitution does not expressly prohibit the distribution of its property among its members, but rule 13 of BACR's constitution provides for the distribution of any surplus funds to "another community broadcasting organisation" in the event of a winding up of BACR. It seems to me that that provision impliedly prohibits a distribution of property to members by requiring a distribution of a surplus in a different manner. I am reinforced in that view by the fact that, as Mr Douglas-Baker also points out, BACR, as an incorporated association, is subject to the *Associations Incorporation Act 2009 (NSW)* ("AI Act"), and s 65(3) of the AI Act prohibits the distribution of any surplus property of BACR to its members. I am satisfied that these matters are sufficient, in substance, to comply with the requirements of rule 27 of the Old Model Rules.
- 15 The third requirement of Rule 27 of the Old Model Rules is that the surplus be distributed to an organisation chosen by the members of the Co-operative at or before its dissolution or, if that did not occur, as directed by the Court. The Co-operative's constitution does not identify any recipient of its property on its dissolution, and the Co-operative had not otherwise chosen a recipient of its surplus property on dissolution (Shaw 17.10.16 [30]–[32]). I am satisfied that the Court has jurisdiction under s 5 of the 1992 Act to decide to what entity the surplus is to be distributed and I accept the liquidator's assessment (Shaw 17.10.16 [35]) that BACR is an appropriate entity to receive distribution of the surplus.

Orders under s 488 of the *Corporations Act*

- 16 It is necessary, finally, to address the requirements of s 488 of the *Corporations Act*, as applicable to the Co-operative in the manner noted above. Section 488 of the *Corporations Act* provides, relevantly, in s 488(2), that a liquidator may distribute a surplus only with the Court's special leave. That provision is intended to ensure that there is in reality a surplus, in that creditors' claims have been recognised and met in full, and also to ensure that the correct relativities among contributories have been observed: *CGU Workers Compensation (NSW) Ltd v Ascom Service Automation (Australia) Pty Ltd* [2005] NSWSC 747 at [4]. The phrase "special leave" requires that a special application be made to the Court, as has occurred in this case: *Re D S Millard & Son Pty Ltd* (1997) 24 ACSR 71 at 72; *Re HIH Services Pty Ltd (in liq)* [2012] NSWSC 1188 at [10].
- 17 Mr Shaw's evidence is that the Co-operative has surplus property to the value of approximately \$1,074,795 (Shaw 17.10.16 [21]). I am satisfied, having regard to Mr Shaw's affidavit, that appropriate inquiries have been made to determine and identify

the creditors of the Co-operative and that their claims have been met, and in those circumstances I am also satisfied that the amount now available is properly treated as a surplus available for distribution.

Orders

18 Accordingly, I make the following orders in the form sought by the liquidator:

1 Pursuant to s 488(2) of the *Corporations Act* 2001 (Cth), s 448 of the *Co-operatives National Law* (NSW) and rule 27 of the Model Rules for Non-trading Co-operatives with Share Capital approved under the *Co-operatives Act* 1992 (NSW), James Alexander Shaw be granted leave to distribute the surplus in respect of the liquidation of Bankstown City Radio Co-operative Limited (ACN 069 222 457) to Bankstown Auburn Community Radio Incorporated (INC9888499).

2 The Plaintiff's costs of this application be paid out of the assets of Bankstown City Radio Co-operative Limited (ACN 069 222 457).

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Decision last updated: 23 December 2016