

Supreme Court
New South Wales

Case Name: Chen v Liu (No 2)

Medium Neutral Citation: [2015] NSWSC 479

Hearing Date(s): 23 April 2015

Date of Orders: 23 April 2015

Decision Date: 23 April 2015

Jurisdiction: Equity Division

Before: McDougall J

Decision: See at [18]

Catchwords: CORPORATIONS – associations – control of incorporated association – where control previously disputed but now determined at special general meeting ordered by the Court – whether appropriate to make orders noting outcome of meeting

CORPORATIONS – associations – where plaintiff now seeks to recoup legal expenses from funds of the association – whether appropriate for an incorporated body to expend funds on determining who controls it – effect of costs agreement entered into between plaintiff’s lawyer and association – result that plaintiffs breached their fiduciary obligations in causing association to enter into costs agreement – further result that upholding the agreement would involve plaintiff’s solicitor as an accessory to that breach of fiduciary obligation

Cases Cited: Carr v Resource Equities Ltd [2010] NSWCA 286

Category: Consequential orders (other than Costs)

Parties: Australia Fuzhou Community Alliance Incorporated

(Fourth Defendant)

Representation:

Counsel:

R Doughty (Solicitor for the Plaintiffs)

S A Lees (First, Second and Third Defendants)

Solicitors:

Ralph Doughty (Plaintiffs)

Machiao Lawyers (First, Second and Third Defendants)

File Number(s):

2014/263622

JUDGMENT

- 1 The dispute between the plaintiffs and the first three defendants related to the control of the fourth defendant, an incorporated association.
- 2 On 9 March 2015, the parties agreed on a way of resolving their disputes. In substance, that resolution involved confirming the position of various defendants as office-bearers of the association on condition that the affairs of the association be conducted in accordance with a prescribed form of constitution, and that a special general meeting (as it was called) of the association be held to determine who should control it. The parties agreed who were the members of the association who would be entitled to vote at that meeting.
- 3 To facilitate the implementation of the agreed scheme, the parties agreed that an independent and mutually respected person, the Honourable Ernest Wong MLC, should chair a sub-committee which in effect would supervise the general meeting and the elections. The Court is grateful indeed to Mr Wong for his assistance, on a voluntary basis, in resolving this dispute.
- 4 In the course of the hearing it appeared that a substantial sum of money, from the funds of the association, had been paid to the plaintiffs' lawyers on account of legal costs. I expressed the tentative view that, since the association had no interest in who controlled it, that might not be an appropriate use of its funds. I said, further, that to the extent that the payment had been directed by the plaintiffs, their action in doing so might represent a breach of fiduciary duty owed to the association.

- 5 The plaintiffs' lawyer, Mr Doughty, relies on a costs agreement made between him and the association. It is obvious that it was the plaintiffs who caused the association to make that agreement.
- 6 In the course of dealing with the matter on 9 May 2015, I directed that the balance of the money that had been paid by the association to Mr Doughty, for the purpose just noted, be paid into Court.
- 7 The matter comes back today so that orders can be made to finalise the dispute. The first order that the first to third defendants seek is that the Court note the outcome of the general meeting. Since it is clear that the outcome that they ask the Court to note is in fact what happened, there can be no problem with that.
- 8 I should add that the first three defendants have effectively been confirmed as the office holders of the association by the general meeting that has been held.
- 9 The second order sought asked the Court to note the appointment of the second defendant as public officer of the association. That was opposed. I see no reason why the Court's imprimatur is necessary.
- 10 The third order sought was that the funds of the association that were paid into Court should be paid out to the association. Mr Doughty opposed that order. He submitted that the money in question was paid for the purposes of the costs agreement to which I have referred. He has summarised the terms of that costs agreement in a document that I shall mark for identification A and keep with the file.
- 11 It is in my view clear that it must be a misapplication of the association's funds, to utilise them for payment of the plaintiffs' fees. It is trite law that an incorporated body has no interest in who controls it: *Carr v Resource Equities Ltd* [2010] NSWCA 286 at [58] per Spigelman CJ. It must follow from that trite observation that an application of the incorporated body's funds, in the interest of one rather than the other of the rival factions, cannot be appropriate.
- 12 To the extent that Mr Doughty relied on a costs agreement that the plaintiffs caused the association to make, it is equally plain, following on from what I

have just said, that the plaintiffs, in causing the association to act in that way, breached their fiduciary obligations to the association.

- 13 One would expect that any lawyer, even one only moderately conversant with the law of fiduciary obligations, would have been aware of that.
- 14 In those circumstances, to permit the funds of the association to be applied for payment of the plaintiffs' costs, whether or not pursuant to a costs agreement that the plaintiffs caused the association to make, would involve Mr Doughty as an accessory to a breach of fiduciary obligation. The Court cannot countenance one of its officers acting in that way.
- 15 In my view, it is appropriate that the funds of the association, paid into Court, be paid back to it. If Mr Doughty wishes to assert the validity of his costs agreement, and his entitlement to be paid costs by the association, he may do so separately. As I see the facts at present, this Court should not lend its aid to that process, particularly where the association, under its new management, opposes that.
- 16 The fourth order sought was that the plaintiffs add the first, second and third defendants as authorised signatories on the association's bank account, and remove themselves as authorised signatories. Mr Doughty opposed that order, apparently on the basis that it should not be made until the entitlement to the funds paid into Court had been determined. I do not think that this was appropriate in any event, but it is now a moot point because I have determined that question of entitlement.
- 17 The fifth order sought was that the first and second plaintiffs deliver up to the first, second or third defendants all documents in their possession that belonged to the association. That was not opposed. It is clearly an order that it is appropriate to make.
- 18 Deleting the second of the orders set out in the draft order, and renumbering what follows, I make the following orders:
 - (1) I note that at a general meeting of the fourth defendant, the Australia Fuzhou Community Alliance Incorporated ('the Association'), ordered by the Court and held on 11 April 2015, the following people were elected:
 - (a) Yugan Chen as President of the Association;

- (b) Yan Liu as Vice-President of the Association;
 - (c) Haliu Meng as Secretary of the Association;
 - (d) Xiu Zhi Wang as Treasurer of the Association; and
 - (e) Erwin Hai Lin, Ling Li, and Guanyu Xu as committee members of the Association.
- (2) I order that the funds of the fourth defendant which were paid into Court shall be paid to the fourth defendant.
- (3) I order that the first and second plaintiff must, within 14 days of the date of this order, sign any documents necessary to remove themselves, and add the first, second and third defendants, as authorised signatories of the fourth defendant's bank account.
- (4) I order that the first and second plaintiffs must, within 14 days of the date of this order, deliver to the first, second or third defendants, all documents or records in their possession that belong to the fourth defendant.
- 19 I will amend what I have just said by noting that Mr Doughty has said, and of course I accept, that the money in question (of the association) was not paid to him. Nonetheless, it is clear that it was paid, or has been retained, by the plaintiffs I assume, for the purpose of paying his costs. Regardless, it does not matter because it is simply not appropriate to apply the association's funds for payment of costs incurred by the plaintiffs in asserting their entitlement to control the association.
