Summary of Judgment

***In the Matter of Kornucopia Pty Ltd (No 4)* [2020] VSC 7**

24 January 2020

On 24 January 2020, the Hon. Justice Sifris made orders winding up three companies, Kornucopia Pty Ltd (**Kornucopia**), Efektiv Pty Ltd (**Efektiv**) and Avant-Garde Ventures Pty Ltd (**AGV**) (collectively, the **Companies**) in insolvency, pursuant to s 459A of the *Corporations Act 2001* (Cth). The trial was heard in December 2019.

Kornucopia

Kornucopia is the tenant of an apartment in Docklands, Victoria owned by Jeffrey Chen (**Chen**). The Companies appear to be in the business of leasing apartments in the Southbank or Docklands areas from landlords, like Chen, and then subletting or licensing those apartments to others. Many landlords, including Chen, have not been paid and have commenced proceedings against the Companies in the Victorian Civil and Administrative Tribunal (**VCAT**). Chen failed to obtain possession of the property and rental arrears at VCAT on technical grounds, and subsequently commenced a winding up application against Kornucopia in this Court.

Kornucopia submitted that the winding up application ought to be dismissed as an abuse of the Court's processes. Specifically, Kornucopia said it had been denied the right of a tenant to quiet enjoyment of a leased premises, because of allegedly abusive conduct of the owners corporation of the building. Further, Chen was said to be liable for damages to Kornucopia for not having 'reined in' the conduct of the owners corporation, which would offset any debt it owed to Chen. Kornucopia submitted the Court has a discretion to stay or dismiss a winding up proceeding as an abuse of process where there is a bona fide dispute on a substantial ground as to the company's liability to the creditor.

Justice Sifris rejected this. First, the principle Kornucopia relied upon had no application in the case of an insolvent company. Kornucopia was presumed to be insolvent because it had not complied with a statutory demand and had not presented any evidence in support of its apparent solvency. Secondly, even if the ground could be raised at law, it 'failed on multiple levels and was fundamentally misconceived'. Kornucopia provided an 'estimate' of its loss in the amount of $100,000, but did not explain how that amount had been calculated or what it represented. His Honour said "it was an unsubstantiated figure with absolutely no basis, plucked out of thin air by Kornucopia".

Kornucopia raised several other grounds to support its argument to dismiss the winding up application. Each was rejected as "frivolous, vexatious and entirely without merit".

Efektiv and AGV

Madgwicks Lawyers (**Madgwicks**) are a firm of solicitors which acted for Efektiv and AGV until April 2019. They contend that invoices they issued to Efektiv and AGV, pertaining to services rendered, have also not been paid. Efektiv and AGV argued that Madgwicks' winding up applications with respect to those companies should be dismissed, because Madgwicks had not provided costs disclosure to them prior to their entry into a retainer agreement. This, it was argued would result in the relevant costs agreements being void.

Justice Sifris rejected this. First, Efektiv and AGV required leave of the Court to raise this ground. His Honour did not grant them leave. Secondly, he found that each of the tax invoices, costs agreements and disclosure statements were sent by email by Madgwicks, and received by Shivesh Kuksal (**Kuksal**), the controller of the corporate group. His Honour found that Kuksal had given false evidence during the trial and that his denial of any documents having been received was to be rejected. His Honour said that "he was a most untruthful witness and I will not accept any of his evidence unless it is supported by other cogent documentary evidence".

Each of the Companies did not adduce sufficient evidence of solvency, and accordingly, a winding up order would be made with respect to each company.

The Conduct of the Trial

Justice Sifris included a detailed chronology of the December 2019 trial in his Judgment. That was because prior to, and over the course of the trial, the Companies frequently asserted that they had not been afforded procedural fairness and that Justice Sifris ought to have recused himself from hearing the trial, for he exhibited a reasonable apprehension of bias that would be observed by a member of the public. Those submissions were each rejected.

His Honour considered that "the conduct of the Companies in this litigation has been appalling", and extended to giving false evidence, the making of threats, ambush tactics, unsubstantiated allegations of dishonesty, and various other improper tactical manoeuvres in the conduct of the litigation. His Honour said:

> …the Court must actively hold parties to account for undesirable practices in civil litigation. That is especially so in circumstances of continued and prolonged delinquency with the Court's orders and directions, or where untruths, baseless assertions and strategic conduct is employed by a party to achieve a favourable outcome.

His Honour referred the Companies' in-house solicitor to the Legal Services Commissioner and its controller to the Office of Public Prosecutions.
