PARTIES:	NATIONAL BANK OF AUSTRALIA (ACN 004 044 937) v VERDI CLUB INCORPORATED AND THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY AT ALICE SPRINGS
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AS 29 of 1996
DELIVERED:	27 January 1998
HEARING DATES:	23 January 1998
JUDGMENT OF:	Kearney J

REPRESENTATION:

Counsel:

Plaintiff:	J. Stirk
First Defendant:	J. Stirk, for Receiver of First Defendant
Second Defendant:	D. Lisson

Solicitors:

Plaintiff:	McBride & Stirk
First Defendant:	McBride & Stirk, for Receiver of First Defendant
Second Defendant:	Office of the Director of Public Prosecutions

Judgment category classification:
Judgment ID Number: kea98004
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kea98004

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AS 29 of 1996

BETWEEN:

NATIONAL AUSTRALIA BANK LIMITED (ACN 004 044 937)
Plaintiff

AND:

VERDI CLUB INCORPORATED
First Defendant

AND:

THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY
Second Defendant

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 27 January 1998)

Last Friday I heard the application by Mr Stirk of counsel for both the plaintiff and the Receiver of the first defendant, for the relief sought in the draft Minutes of Order annexed hereto and marked with the letter “A”.

As Mr Stirk explained, the purpose of seeking the 6 orders in annexure "A" is to finalise the receivership of Mr Garraway who was appointed by this Court on 3 May 1996 as Receiver of the whole of the assets and undertaking of the first defendant.

It was Mr Garraway's duty to take possession of and secure the first defendant's property, and in due course deliver his accounts and pay any balance due, as the court might direct. A later Court order of 12 December 1996 authorised the sale by the Receiver of the real property of the first defendant. The Receiver has now realised the assets of the first defendant. Hence this application.

Mr Stirk moved on the affidavit of the Receiver of 23 January 1998. The list of creditors of the first defendant appears at annexure "A" to that affidavit. The plaintiff is by far the largest creditor, admitted at $852,387.13. Like the other unpreferred creditors, it will be paid out at 23c in the dollar, resulting in a payment to it of $196,049.64. The total of preferred creditors is $10,557.96, and of unpreferred creditors, $930,651. The total dividend to be paid out to both preferred and unpreferred creditors is $224,607.69; the preferred creditors are of course paid out in full at $10,557.96, and the unpreferred creditors at 23c in the dollar.

The funds available for this payment total $291,474; from this is to be deducted the Receiver's costs claimed at some $55,000, and other costs said to be $11,866.

I agree with the Receiver's opinion that there is no commercial benefit in prolonging his receivership in an endeavour to recover some $10,000 allegedly owing by the Centralian Darts Association as unpaid rental for part of the subject premises. See par7 of the Receiver's affidavit of 23 January 1998 for the details.

The Receiver was appointed pursuant to Order 39 of the *Supreme Court Rules*. Rule 39.06 enables the Court to provide for a receiver's remuneration. The Court order of 3 May 1996 provided in general terms for the costs charges and expenses of the Receiver to be payable out of the sums realised from the sale of the first defendant's assets, as a first charge. I am told that no such remuneration has yet been paid to the Receiver. A summary of the Receiver's receipts and payments appears at p4 of annexure "A" to his affidavit of 23 January 1998; it discloses total receipts of $327,145.43, and payment out of various expenses totalling $35,670.99.

I understood from Mr Stirk that the Receiver proposed to charge for his remuneration at the Court scale used for the remuneration of insolvency practitioners in this Court.

Proposed order no.2 in annexure "A" seeks that the Receiver's obligation under r39.07 to pass his accounts in this Court, be dispensed with. The basis of this application was, as Mr Stirk put it, that the Receiver has been regularly submitting his accounts every 6 months to the Registrar of Associations, the

first defendant being an association incorporated under the *Association Incorporation Act*. Mr Stirk submitted that against that background, the Receiver should not be obliged to comply with r39.07, since there was now an adequate record of his administration available at the office of that Registrar.

Mr Lisson of counsel for the second defendant, the Attorney-General for the Northern Territory, indicated that the Attorney-General and the Registrar of Associations were satisfied with the way in which the available funds were to be distributed under the proposed order. However, he drew several matters to the Court's attention.

First, I note that I was informed by Mr Stirk that there had been some dispute as to the validity of the plaintiff's Mortgage securing its loan to the first defendant. Ultimately, this dispute was resolved without recourse to the Court, on the basis that the plaintiff would prove as an unsecured creditor (as it has), rather than as a secured creditor under its Mortgage.

Against that background Mr Lisson informed me that the plaintiff's claim, admitted by the Receiver at $852,387.13, included all interest due to the plaintiff to date, all legal expenses to which it would have been entitled under its Mortgage, and the fees of a former receiver which it had appointed pursuant to that Mortgage. I note that Mr Garraway, the present Receiver, is a receiver appointed independently of the plaintiff. Mr Lisson informed me that his understanding was that the capital amount due to the plaintiff – that is, the amount of the loan monies advanced by the plaintiff to the first

defendant – constituted about one half of the $852,387.13 for which the plaintiff has been admitted as a creditor by the Receiver. He pointed out that while the plaintiff now stands simply as an unsecured creditor, receiving 23c in the dollar like the other unsecured creditors, none of those other unsecured creditors have components within their respective claims such as the three Mr Lisson had identified.

Mr Stirk responded that the plaintiff's claim to include interest was quite legitimate; it arose from its contract of loan pursuant to the Mortgage. He noted that the Receiver had adjudicated that the amount in question was a fair amount.

I note that, speaking generally, a receiver holds any funds he receives in the course of his receivership for the entity which is in receivership, and not for its creditor, and interest continues to accrue under any loan contract between that entity and its creditor until the receiver pays over funds to the creditor in repayment; see *Visbord v F.C.T.* (1943) 68 CLR 354 at 367-8. However, I was informed that the plaintiff did not seek to rely on its Mortgage. The precise legal basis of the plaintiff's present claim needs to be further clarified to me; in particular, I need to be informed of the basis upon which it presently claims to be entitled to the payment of interest to date, its Mortgage having apparently been set aside for the purposes of this litigation. I will need to hear further from counsel on this aspect.

Mr Lisson drew attention to the sum of $10,000 claimed to be the amount due by the Centralian Darts Association, as rent. I have already dealt with that matter.

Mr Lisson finally drew attention to the remuneration claimed by the Receiver, at some $55,000. He noted that the Court had not been provided with any details warranting that payment. Mr Stirk noted that in par9 of his affidavit Mr Garraway had deposed that his claim was in accordance with the scale. I consider that the Receiver's accounts should be passed before the Registrar of the Court, as required by the Rules. Those final accounts would also indicate the basis and justification for the amount of remuneration claimed. I am not aware of any scale specifically applicable to receivers as such, but in its absence the scale applicable to insolvency practitioners appears to be appropriate.

As is apparent from the foregoing, at this stage I do not propose to make any of the 6 orders sought in annexure "A". I will hear counsel further as to any orders which should now flow from the conclusions expressed above. I will also hear counsel further on the basis for the plaintiff's claim to have an interest component (and the other components referred to) included in its claim against the first defendant.

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