

## FEDERAL COURT OF AUSTRALIA

### Moore, as Debtor-in-Possession of Australian Equity Investors v Australian Equity Investors [2012] FCA 1002

Citation: Moore, as Debtor-in-Possession of Australian Equity Investors v Australian Equity Investors [2012] FCA 1002

Parties: **GREGORY MOORE AS DEBTOR-IN-POSSESSION OF AUSTRALIAN EQUITY INVESTORS (AN ARIZONA LIMITED PARTNERSHIP) AND THE 258 NEST (AN ARIZONA LIMITED PARTNERSHIP) v AUSTRALIAN EQUITY INVESTORS, THE 258 NEST and COLLIERS INTERNATIONAL (NSW) PTY LIMITED ACN 001 401 681**

File number: NSD 882 of 2012

Judge: **EMMETT J**

Date of judgment: 5 September 2012

Catchwords: **CORPORATIONS** – insolvency – application under *Cross-Border Insolvency Act 2008* (Cth) applying UNCITRAL Model Law on Cross-Border Insolvency for recognition of Arizona (US) proceeding as foreign main proceeding – debtor’s centre of main interests – presumption that place of registered office is centre of main interests – whether presumption rebutted – relevance of creditors’ perceptions as to debtor’s centre of main interests – permanence of centre of main interests

Legislation: *Bankruptcy Code* (US) s 362, Chapters 3, 11 of Title 11  
*Cross-Border Insolvency Act 2008* (Cth) s 6  
*Federal Court (Corporations) Rules 2000*, rules 2.11, 2.7(1), 15A.3(3), 15A.7(1)  
*Trade Practices Act 1974* (Cth), ss 52, 53(a)  
*UNCITRAL Model Law on Cross-Border Insolvency*, articles 2, 4, 6, 15, 16, 17, 21  
*Uniform Limited Partnership Act* (Arizona, US) s 59-305

Cases cited: *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, [2005] 1 WLR 3966

Date of hearing: 5 September 2012

Place: Sydney

Division: GENERAL DIVISION  
Category: Catchwords  
Number of paragraphs: 28  
Counsel for the plaintiff: Dr AS Bell SC and J Baird  
Solicitor for the plaintiff: Harris Freidman  
Counsel for Colliers: AJ McInerney  
Solicitor for Colliers: TressCox

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 882 of 2012**

**BETWEEN: GREGORY MOORE AS DEBTOR-IN-POSSESSION OF  
AUSTRALIAN EQUITY  
Plaintiff**

**AND: AUSTRALIAN EQUITY INVESTORS  
Defendant**

**JUDGE: EMMETT J**

**DATE OF ORDER: 5 SEPTEMBER 2012**

**WHERE MADE: SYDNEY**

**THE COURT ORDERS THAT:**

1. Pursuant to s 6 of the *Cross-Border Insolvency Act 2008* (Cth) (**the Act**) and clause 1 of Article 17 of the Model Law, the proceedings in the United States Bankruptcy Court, District of Arizona Cases No. 4:12-bk-10590-EWH (**the First US Proceeding**), by which the first plaintiff was appointed as debtor-in-possession of the first defendant on 23 May 2012, be recognised as a foreign proceeding.
2. Pursuant to s 6 of the Act and clause 2 of Article 17 of the Model Law, the First US Proceeding be recognised as a foreign main proceeding.
3. Each party and each creditor or person claiming to be a creditor of the first defendant have liberty to apply on 3 days' notice.
4. In satisfaction of subrules (c) and (d) of rule 15A.7(1) of the *Federal Court (Corporations) Rules 2000* (**the Rules**), the first plaintiff:
  - (a) within 7 days of the making of orders 1 to 2 above, send to each person in Australia whose claim to be a creditor of the first defendant is known to the first plaintiff, a notice of the making of orders 1 to 3 above in accordance with Form 21; and
  - (b) within 14 days of the making of orders 1 and 2 above, publish a notice of the making of orders 1 to 3 above in accordance with Form 21 in a daily newspaper circulating generally in Australia, but otherwise not be required to comply with rule 2.11.

5. In respect of rule 15A.3(4) of the Rules, the first plaintiff not be required to serve a copy of the originating process and accompanying documents in accordance with rule 2.7(1).
6. Pursuant to s 6 of the *Cross-Border Insolvency Act 2008 (Cth)* (**the Act**) and clause 1 of Article 17 of the Model Law, the proceedings in the United States Bankruptcy Court, District of Arizona Cases No. 4:12-bk-10610-EWH (**the Second US Proceeding**), by which the second plaintiff was appointed as debtor-in-possession of the second defendant on 23 May 2012, be recognised as a foreign proceeding.
7. Pursuant to s 6 of the Act and clause 2 of Article 17 of the Model Law, the Second US Proceeding be recognised as a foreign main proceeding.
8. Each party and each creditor or person claiming to be a creditor of the second defendant have liberty to apply on 3 days' notice.
9. In satisfaction of subrules (c) and (d) of rule 15A.7(1) of the Rules, the second plaintiff:
  - (a) within 7 days of the making of orders 1 to 2 above, send to each person in Australia whose claim to be a creditor of the second defendant is known to the second plaintiff, a notice of the making of orders 1 to 3 above in accordance with Form 21; and
  - (b) within 14 days of the making of orders 1 and 2 above, publish a notice of the making of orders 1 to 3 above in accordance with Form 21 in a daily newspaper circulating generally in Australia, but otherwise not be required to comply with rule 2.11.
10. In respect of rule 15A.3(4) of the Rules, the second plaintiff not be required to serve a copy of the originating process and accompanying documents in accordance with rule 2.7(1).
11. Colliers International (NSW) Pty Limited pay the plaintiffs' costs of 5 September 2012 and 50% of the plaintiffs' costs of 31 August 2012.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 882 of 2012**

**BETWEEN: GREGORY MOORE AS DEBTOR IN POSSESSION OF  
AUSTRALIAN EQUITY INVESTORS  
Plaintiff**

**AND: AUSTRALIAN EQUITY INVESTORS  
Defendant**

**JUDGE: EMMETT J**

**DATE: 5 SEPTEMBER 2012**

**PLACE: SYDNEY**

**REASONS FOR JUDGMENT**

1 I have before me two proceedings. One is an application under the *Cross-Border Insolvency Act 2008* (Cth) (**Cross-Border Insolvency Act**) in proceeding NSD 882 of 2012. The other is an application for summary dismissal of proceeding NSD 1344 of 2009. The two are connected, in a way that will become apparent.

2 The first defendant, Australian Equity Investors (**AEI**), is an Arizona limited partnership. The second defendant, The 258 Nest (**258 Nest**), is also an Arizona limited partnership. Each was formed under the *Uniform Limited Partnership Act* adopted by the State of Arizona in the United States. Gregory Moore Real Estate Company, Inc. is a one per cent general partner in both AEI and 258 Nest. The other 99 per cent limited partnership interest in AEI is held by The Laundryman of Arizona, Inc. and the 99 per cent limited interest in 258 Nest is held by GMREC, LLC.

3 In 2003, AEI invested money in a property development situated at 258 Pacific Highway, North Sydney, by providing mezzanine finance to the owner. Following default, AEI took over the development of the property and, in December 2005, the property was transferred to 258 Nest, which completed the development. Subsequently, AEI and 258 Nest commenced proceeding NSD 1344 of 2009, against Colliers International (NSW) Pty Limited (**Colliers**).

4 On 5 May 2011, Cowdroy J made declarations in proceeding NSD 1344 of 2009 that Colliers had engaged in conduct that was likely to mislead or deceive AEI and 258 Nest, in contravention of ss 52 and 53(a) of the *Trade Practices Act 1974* (Cth), in that Colliers made a false or misleading representation concerning the price payable for the property. His Honour ordered that Colliers pay the costs of AEI and 258 Nest, partly on the indemnity basis and partly on the party-party basis.

5 It appears that a sum of \$100,000 had been provided on behalf of AEI and 258 Nest as security for costs that might be ordered to be paid by them to Colliers. That fund appears to have been held in a trust account of the solicitors for AEI and 258 Nest. In addition, on 15 February 2011, Cowdroy J ordered that a further sum of \$100,000 be provided by AEI and 258 Nest as security for costs of the proceeding. On 5 May 2011, Cowdroy J ordered that that second sum be returned to AEI and 258 Nest, but granted leave to Colliers to file an application seeking further security.

6 Pursuant to that leave, an application was made and, on 7 September 2011, Cowdroy J ordered AEI and 258 Nest to provide security in the sum of \$250,000 within 28 days. An appeal from that order was unsuccessful and, on 17 May 2012, Cowdroy J ordered that proceeding NSD 1344 of 2009 be stayed until further order. Neither AEI nor 258 Nest has at this stage complied with the order made on 7 September 2011.

7 In the meantime, on 14 May 2012, each of AEI and 258 Nest filed a voluntary petition under Chapters 3 and 11 of Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Arizona. On 18 May 2012, a bankruptcy judge in that court made an order that each of the proceedings brought by AEI and 258 Nest should be jointly administered. On 23 May 2012, the bankruptcy judge made orders that AEI and 258 Nest were entitled to, and had availed themselves of, the protections of the automatic stay, as prescribed in s 362 of the United States Bankruptcy Code. Mr Gregory Moore was appointed as debtor-in-possession for each of AEI and 258 Nest.

8 By originating process filed on 25 June 2012 in proceeding NSD 882 of 2012, Mr Moore, in his capacity as debtor-in-possession of AEI and 258 Nest, applied to this Court for orders under the Cross-Border Insolvency Act. On 10 August 2012, Colliers filed an interlocutory application in proceeding NSD 1344 of 2009, claiming orders that security be

provided by 31 August 2012, in accordance with the order made on 7 September 2011, and that in the event of failure, the proceeding be dismissed. Counsel for Colliers sought leave to be heard, in proceeding NSD 882 of 2012. Colliers contended that the requirements for recognition had not been satisfied or, alternatively, that there were discretionary grounds on which the Court should decline to grant the relief claimed by Mr Moore.

9 In order to put Mr Moore's application in context, it is necessary to say something briefly about the Cross-Border Insolvency Act. Under s 6 of the Cross-Border Insolvency Act, the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law* (**the Model Law**), the text of which is set out in schedule 1 to the Cross-Border Insolvency Act, has the force of law in Australia. For present purposes, the pivotal provision of the Model Law is article 17. Article 17 provides that, subject to article 6, a foreign proceeding should be recognised if the foreign proceeding is a proceeding within the meaning of article 2(a) and the foreign representative applying for recognition is a person or body within the meaning of article 2(d). The application must meet the requirements of article 15(2) and must be submitted to a court referred to in article 4. The Federal Court is one of those courts.

10 Under article 17(2) of the Model Law, the foreign proceeding is to be recognised as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests. Content is given to those provisions by the definitions in article 2 of the Model Law. A **foreign proceeding** is a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency, in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. A **foreign main proceeding** is a foreign proceeding taking place in the State where the debtor has the centre of its main interests.

11 Under article 16(3), in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests. Under article 2(d), a **foreign representative** is a person or body authorised in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

12 I do not understand there to be any question but that each of the proceedings in the US Bankruptcy Court involving AEI and 258 Nest satisfies the definition of foreign proceeding. I have evidence consisting of the relevant parts of the Bankruptcy Code in that regard. I do not understand there to be any issue as to the proposition that Mr Moore is a foreign representative within the meaning of article 2. The issue that has been raised by Colliers is the question of whether or not Arizona is the centre of the main interests of AEI and 258 Nest. Colliers also calls in aid article 6 of the Model Law, which provides that nothing in the Model Law prevents the Court from refusing to take an action governed by the Model Law if the action would be manifestly contrary to the public policy of Australia.

13 I have some difficulty in understanding the propositions advanced in reliance upon article 6. The proposition is that the cause of action that AEI and 258 Nest have asserted against Colliers is a statutory right that is not capable of assignment. The argument is that the effect of the proceedings in the US Bankruptcy Court is that the cause of action has become, or may become, part of the estate of the two limited partnerships being administered in bankruptcy.

14 Whether or not the cause of action is capable of assignment, and whether there has been an assignment, appears to me to be irrelevant in terms of the question of the public policy of Australia. There is nothing in the recognition of the two proceedings in the US Bankruptcy Court that, in my view, is contrary to the public policy of Australia. What the consequences of that recognition may be will no doubt be the subject of argument. That, however, is not presently to the point. It is an argument for another day.

15 The other matter raised by Colliers concerns the question of the centre of the main interests of AEI and 258 Nest. It says that, on the basis of the material before the Court, the presumption raised by article 16(3) has been rebutted. Colliers points to the following matters:

- In March 2003, AEI was formed as a vehicle for investment in Australia.
- In 2003, AEI sought and received proposals for investment in small property development projects in Mosman, Gosford, and Sydney.
- In 2003, AEI advanced funds for the purpose of the acquisition of the property at 258 Pacific Highway, Crows Nest by Zepher Pty Limited.

- In 2003, AEI provided finance to Owaptwelve Pty Limited in relation to a development site at Seaforth.
- In December 2003, AEI took *de facto* control over the Crows Nest property, following a default by Zepher Pty Limited under the loan agreement made with AEI;
- In February 2004, AEI appointed its agent as mortgagee-in-possession of the Crows Nest property.
- In July 2004, AEI appointed Project Risk Management Group Pty Limited to administer a contract for the construction work on the Crows Nest property.
- In July 2005, AEI gave instructions to Project Risk Management Group Pty Limited for construction work at the Crows Nest property to be mothballed.
- In December 2005, the Crows Nest property was transferred from AEI to 258 Nest and the mortgage from AEI to RFLA Investors, an Arizona limited partnership.
- In February 2006, 258 Nest applied to Eclipse Prudent Mortgage Corporation Limited for construction finance and, in July 2006, construction works on the Crows Nest property recommenced.
- Finally, in 2008, the commercial building and each of the residential apartments constructed on the Crows Nest property were sold; I draw the inference that the proceeds of sale, if they were any, were repatriated to the United States.

16           It appears that the only asset that the two limited partnerships have consists of the cause of action that has been asserted against Colliers in proceeding NSD 1344 of 2009. On the other hand, the evidence also indicates that all of the investors in the affairs of the two limited partnerships were US corporations or individuals. The vast majority of creditors of the two limited partnerships, both by number and value, reside in Arizona.

17           The two limited partnerships were formed under the law of Arizona, and the law of Arizona governs the partnership agreements as a matter of contract. Under the relevant law of Arizona, a limited partnership must continuously maintain an office in Arizona, which office may, but need not be, a place of business. A limited partnership must keep at that office the records required by the Arizona law, which include a current list of the full name and last known business address of each partner; a copy of the certificate of limited

partnership; and copies of the limited partnership's federal, state, and local income tax returns and reports, if any, for the three most recent years.

18 The term **centre of main interests** has been used in international arrangements for some years. It is not a term of art under Australian law. It is important, in terms of international comity and consistency in the administration of a municipal law that incorporates the Model Law, that terms used in the Model Law be given consistent constructions. One starts with the clear presumption in article 16(3). The question before me is whether or not Colliers have rebutted that presumption. A debtor's centre of main interests is to be determined at the time that the Court is called upon to make a relevant decision. Thus, it is necessary for me to determine whether, at the time of dealing with this recognition application, Arizona is the centre of main interests of the two limited partnerships.

19 The centre of main interests is to be determined in the light of the facts as at the relevant time for determination, but those facts may include historical facts that have led to the position as it is at the time for determination. In making a determination, the Court must have regard to the need for the centre of main interests to be ascertainable by third parties, creditors and potential creditors in particular. It is important, therefore, to have regard not only to what the debtor is doing, but also to what the debtor would be perceived to be doing by an objective observer. It is important also to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence.

20 The Court should be slow to accept that an established centre of main interests has been changed by activities that may turn out to be temporary or transitory. There is no principle of immutability (see *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, [2005] 1 WLR 3966 at [55]). The centre of main interests should correspond to the place where the debtor conducts the administration of the debtor's interests on a regular basis and that is therefore ascertainable by third parties. It must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment are necessary to ensure legal certainty and foreseeability concerning the determination of which court has jurisdiction to consider insolvency proceedings. In determining the centre of the main interests of a debtor company, the simple presumption laid down by the Model Law can be rebutted only if factors that are both objective and

ascertainable by third parties enable it to be established that an actual situation exists that is different from that which locating it at the registered office is deemed to reflect.

21 I am not persuaded that the matters identified by Colliers are sufficient to rebut the presumption raised by article 16(3). It follows, therefore, that Arizona is the centre of main interests of each of the limited partnerships, AEI and 258 Nest. It follows, in my view, that each of the proceedings in the United States Bankruptcy Court is a foreign main proceeding within the meaning of the Model Law. I am satisfied that the prerequisites of articles 15 and 16 have been satisfied. Accordingly, it is appropriate that an order be made recognising those proceedings. Mr Moore also seeks additional relief under article 21, however, for reasons which I shall explain, I do not consider that it is appropriate to deal with that aspect of the application at this stage.

22 Arrangements have now been put in place for a letter of credit in the sum of A\$250,000 to be established in favour of the solicitors presently acting for AEI and 258 Nest. Under the terms of the letter of credit, issued by JP Morgan Chase Bank NA, a drawdown may be effected in full if orders are made by the Federal Court recognising the two United States Bankruptcy Court proceedings as foreign main proceedings under s 6 of the Cross-Border Insolvency Act and a plan of reorganisation is confirmed in the United States bankruptcy proceedings. An application for confirmation of such a plan was filed on 27 August 2012 in the US Bankruptcy Court. That application for confirmation has been fixed for hearing on 10 October 2012.

23 The plan of reorganisation provides, in essence, that unsecured creditors will receive 10 per cent of the allowed amount of their claims. There is also a provision for a variation in the equity interest of the parties who are described as shareholders holding ownership interests in the limited partnerships. Of some concern for Colliers, however, is article 5 of the plan, which refers expressly to the letter of credit. Colliers' concern is that article 5 provides that, except to the extent that AEI and 258 Nest are successful in proceeding NSD 1344 of 2009, Colliers must look to the letter of credit as its sole right of recourse from AEI and 258 Nest.

24 Colliers contends that that is an unjust and unfair interference with the rights that it might otherwise have in the event that the proceeding is unsuccessful and it obtains an order

for costs. However, that is a matter that is irrelevant to the question of whether or not the US Bankruptcy Court proceedings should be recognised. I consider the appropriate course is to stand over the question of any further relief under the Cross-Border Insolvency Act until it is known whether or not the plan is confirmed by the US Bankruptcy Court and whether the letter of credit is drawn on, such that there is a fund of A\$250,000 available in Australia as security for costs.

25 In addition, I consider that it is appropriate that Colliers' interlocutory application be stood over until the same time. It may well be, as is contended on behalf of Mr Moore, that the effect of recognition is that there will be a stay of the interlocutory application. It is not necessary at this stage for me to determine that question. However, before the proceeding in which the interlocutory application is brought can be reactivated on the part of AEI and 258 Nest, it will be necessary for an order to be made lifting or discharging the stay ordered by Cowdroy J.

26 Whether that will occur will certainly depend upon whether or not security is provided. It may be that, as a term of making any such order in relation to the stay, arrangements would need to be put in place in relation to the further fund of \$100,000 to which I have referred. It may also be necessary that a term be imposed in relation to the effect of article 5 of the proposed plan of reorganisation. Those matters, however, are not matters that I consider it is appropriate to anticipate at this stage. In my view, the preferable course is to stand over the interlocutory application for hearing at the same time as any further application by Mr Moore for further relief under the Cross-Border Insolvency Act. It would be appropriate for any application in proceeding NSD 1344 of 2009 in relation to the stay to be dealt with at the same time.

27 Mr Moore asks for his costs of the application for recognition. As I have indicated, I do not propose to resolve that proceeding finally at this stage. However, in so far as any orders have been resisted, Colliers has been unsuccessful. To that extent, I consider that it is appropriate that an order for costs be made. Not all of the costs incurred to date, of course, can be attributable to Colliers. Only to the extent to which further costs have been incurred by reason of Colliers' opposition is it appropriate that any order be made. Had there been no opposition, costs would have been incurred in any event.

28           Rather than requiring a taxing officer to apportion costs as between the opposition and the costs that would have been incurred in any event, I consider that it is appropriate to make an order that Colliers bear a proportion of the costs of the application to date. I propose to order that Colliers pay Mr Moore's costs of 5 September 2012 and 50% of his costs of 31 August 2012.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Emmett.

Associate:

Dated: 23 October 2012