It’s not your money: director refused access to company’s frozen funds

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As an interim measure to recovering a debt, creditors may seek freezing orders against debtors where they feel there is a risk that the defendant will dissipate its assets so as to avoid orders. Litigants will usually be allowed limited access to frozen funds so as to fund the litigation they are involved in as well as pay for their reasonable living expenses.

In *Super Vision Resources Ltd v AC Holdings Co Pty Ltd* [2020] NSWCA 244 the NSW Court of Appeal considered an application by AC Holdings to access funds that were the subject of freezing orders. AC Holdings had successfully opposed Super Vision’s claim to recoup the proceeds of a property sale as being a transfer to defeat creditors pursuant to section 37A(1) of the *Conveyancing Act 1919* (NSW), in which AC Holdings was the purchaser. Super Vision was appealing that decision.

AC Holdings sought access to an amount of $185,000 from funds in a controlled account for two

purposes:

1. To pay its legal fees; and

2. To pay for its director's costs of living.

Super Vision had consented to some of the costs. McCallum JA allowed most of the remaining amount sought for legal costs however refused an amount of $20,000, sought as a "buffer". Her Honour refused this amount on the basis that it was speculative and that a substantial amount was already allowed.

As to the director's costs of living, McCallum JA refused to allow AC Holdings to access funds simply to fund its director's living costs. Citing *Goumas v McIntosh* [2002] NSWSC 713, Her Honour acknowledged that the purpose of a freezing order is not "to stop people spending their money", but to prevent the dissipation of assets for the purpose of avoiding meeting a judgment debt. However in this case, her Honour identified that the funds sought did not belong to the director but to the company. Whilst emphasis had been placed on the proposed form of orders suggested by the High Court of Australia in *Cardile v Led Builders Pty Ltd* [1999] HCA 18, that case dealt with allowing directors subject to freezing orders to fund their company's expenses – not the other way around as with AC Holdings. Her Honour said:

"[26] … The decision in *Cardile* is not authority for the proposition that an asset preservation order against a company can properly include an exception that permits the company's directors to deal with the frozen company assets for their own personal use."

Super Vision v AC Holdings serves as a warning to directors who fund their lifestyle through the assets of their companies (as some often do), as they will necessarily have problems if their companies become subject to freezing orders.

If you would like more information or advice in relation to debt recovery and commercial litigation, contact Andrew Hack at andrewh@matthewsfolbigg.com.au or a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

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