SUPREME COURT OF QUEENSLAND

CITATION:	*Promoseven Pty Ltd v Prime Project Development (Cairns) Pty Ltd (Subject to a Deed of Company Arrangement) & Ors* [2013] QCA 405
PARTIES:	**PROMOSEVEN PTY LTD** ACN 102 606 324 (applicant) **v** **PRIME PROJECT DEVELOPMENT (CAIRNS) PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT)** ACN 109 685 332 (first respondent) **MASTER DEVELOPERS ASSOCIATION PTY LTD** ACN 144 067 863 (second respondent) **NICK COMBIS AND PETER DINORIS IN THEIR CAPACITY AS ADMINISTRATORS OF PRIME PROJECT DEVELOPMENT (CAIRNS) PTY LTD** ACN 109 685 332 (third respondents)
FILE NO/S:	Appeal No 8879 of 2013 SC No 5934 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2013
JUDGES:	Holmes, Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the order made in the Trial Division on 26 August 2013.** **3. The parties are granted leave to file any further written submissions identifying the orders which should be made to give effect to these reasons, within 21 days or within such further time as the registrar orders.**

CATCHWORDS: CORPORATIONS – MANAGEMENT AND ADMINISTRATION – RELATED PARTY TRANSACTIONS – where the appellant and the first respondent entered into a joint venture agreement to carry out property development – where the appellant and the first respondent each owned 50 per cent shares in Bluechip Development Corporation (Cairns) Pty Ltd, which they used as a joint venture vehicle to develop the land – where HSBC Banking Corporation Limited largely funded the development, and holds the first registered mortgage – where the appellant originally contributed $1.2 million, while the first respondent originally contributed $962,628 – where both provided additional funds to Bluechip some of which were secured by a second registered mortgage in favour of both the appellant and the first respondent – where the development was completed in May 2009 – where the appellant and the first respondent became involved in disputes with one another, which led to the appellant filing an application in March 2011 for the winding up of Bluechip – where the insolvency application was successful, and the first respondent was ordered to pay the appellants costs – where those costs form the basis for the appellant's claim as a creditor of the first respondent – where in May 2013 administrators were appointed to the first respondent – where the administrators found that the only substantive asset of the first respondent was a debt owed to it by Refund Property Fees Pty Ltd and Bypass Project Systems Pty Ltd – where the first respondent transferred all of its interest in the Bluechip mortgage to Refund for consideration consisting of redeemable preference shares – where the first respondent and Refund are related companies – where the creditors of the first respondent passed a resolution to enter into a deed of company arrangement – where the first respondent and most of its creditors are related companies – where the second respondent, a related company to the first respondent, is the financial sponsor of the deed of company arrangement – where the appellant seeks relief under s 445D and/or s 447D of the *Corporations Act* 2001 (Cth), principally for the termination of the deed of company arrangement – where, alternatively, the appellant seeks: the resolution of the creditors to enter into a deed of company arrangement be set aside pursuant to s 600A; the first respondent be taken to have passed a special resolution under s 491 to be voluntarily wound up; and the administration of the first respondent end, and it be wound up, pursuant to s 447A and ss 459A, 459B or 461 – whether the primary court judge properly considered the provisions of s 445D – whether the primary judge placed too much weight on the fact that the appellant had not committed to fund the liquidation of the first respondent – whether the judge incorrectly balanced the potential harm to Comben Enterprises Pty Ltd, a creditor of the first respondent, against the grounds existing to terminate the deed of company arrangement, in favour of Comben

PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – OTHER MATTERS – where the respondents filed a notice of contention seeking to uphold the appeal on the basis that the appellant had ulterior purposes in pursuing the relief sought – where the respondents alleged special advantage would arise with respect to proceedings presently before the Federal Court of Australia – whether there is any substance to the ulterior motive contention

Competition and Consumer Act 2010 (Cth), Sch 2
Corporations Act 2001 (Cth), s 435A, s 435A(b), s 445D, 445D(1)(e), s 445D(1)(f)(i), s 445D(1)(f)(ii), s 445D(1)(g), s 447A, s 447D, s 459A, s 459B, s 461, s 491, s 600A, Pt 5.3A
Corporations Regulations 2001 (Cth), reg 5.3A.07(1)(a)
Trade Practices Act 1974 (Cth), s 87

Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd (2005) 226 ALR 510; [2005] NSWSC 1235, considered
Deputy Commissioner of Taxation v TMPL Pty Ltd (No 3) (2011) 289 ALR 69; [2011] FCA 1403, applied
Emanuele v Australian Securities Commission (1995) 63 FCR 54, applied
Re Bluechip Development Corporation (Cairns) Pty Ltd [2011] QSC 368, related
Re Octaviar Ltd (No 8) (2009) 73 ACSR 139; [2009] QSC 202, considered

COUNSEL: P A Hastie QC, with J S B Payne, for the appellant
P W Hackett for the first and second respondents
No appearance for the third respondents

SOLICITORS: Synkronos Legal for the appellant
IDH Legal for the first and second respondents
No appearance for the third respondents

[1] **HOLMES JA:** I agree with the reasons of Morrison JA and the orders he proposes.

[2] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Morrison JA. I agree with those reasons and with the orders proposed by his Honour.

[3] **MORRISON JA:** This is an appeal by Promoseven Pty Ltd ("**Promoseven**") from the dismissal of its application to terminate a Deed of Company Arrangement entered into on 17 June 2013, in respect of Prime Project Development (Cairns) Pty Ltd ("**Prime**").

[4] The originating application[1] by Promoseven sought relief under s 445D and/or s 447D of the *Corporations Act* 2001 (Cth) ("**the Act**"). The principal relief sought was the termination of the Deed of Company Arrangement ("**the DOCA**"). Alternative relief was sought as follows:

1 AB 852; Originating Application, dated 28 June 2013.

(a) that the resolutions passed at the meeting of creditors of Prime, when they resolved to enter into the DOCA, be set aside pursuant to s 600A of the Act;

(b) that Prime be taken to have passed a special resolution under s 491 of the Act, that it be wound up voluntarily; and

(c) that the administration of Prime end, and that Prime be wound up, pursuant to s 447A, and sections 459A, 459B or 461 of the Act.

Essential background

[5] In November 2005, Promoseven and Prime entered into a joint venture agreement, to carry out a property development in Cairns. A company, namely Bluechip Development Corporation (Cairns) Pty Ltd ("**Bluechip**"), was used to develop the land as the joint venture vehicle. Both Promoseven and Prime held a 50 per cent share in Bluechip, and therefore had a 50 per cent interest in the joint venture.

[6] Prime originally contributed $962,628 to Bluechip, while Promoseven contributed $1.2 million. The development was largely funded by the HSBC Banking Corporation Limited ("**HSBC**"), which provided about $21 million. HSBC holds the first registered mortgage over the development to secure the funds provided.

[7] Both Prime and Promoseven provided additional funds to Bluechip to progress the development, pursuant to separate loan agreements. Prime advanced about $6 million, and Promoseven advanced about $10 million. Certain of those advances were secured by a second registered mortgage over the development, given by Bluechip in favour of Prime and Promoseven.

[8] The development proceeded until completion in May 2009. In 2010 Promoseven and Prime were involved in disputes with one another. That led to Promoseven filing an application, in March 2011, to wind up Bluechip in insolvency. That application was successful.[2] Because Prime had unsuccessfully resisted Promoseven's application to wind up Bluechip, Prime was ordered to pay Promoseven's costs. The amount of those costs is the basis for Promoseven's claim as a creditor of Prime.

[9] In May 2013 administrators were appointed to Prime.[3] The first meeting of creditors of Prime took place on 21 May 2013. The Administrators' "Report to Creditors"[4] ("**Administrators' Report**") noted that the only substantive asset of Prime was a debt owed to it by Refund Property Fees Pty Ltd ("**Refund**") and Bypass Project Systems Pty Ltd ("**Bypass**") in the sum of $8,879,360.

[10] The transaction which led to that debt is at the heart of the appeal. That transaction is an agreement entitled "Agreement for Sale and Transfer of Mortgage, Debt and Loan Agreement" ("**the Agreement**"), which Prime and Refund entered into on 11 August 2011.[5] I will refer to it in greater detail later, but for present purposes it suffices to note that:

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2 *Re Bluechip Development Corporation (Cairns) Pty Ltd* [2011] QSC 268.

3 Those administrators are the third respondents to both the application and the appeal. They have taken no active part in either the application or the appeal.

4 AB 142-160; Report to Creditors, dated 5 June 2013.

5 See AB 806; Agreement for Sale and Transfer of Mortgage, Debt and Loan Agreement, dated 11 August 2010.

(a) on 11 August 2011 Prime transferred all of its interest in the Bluechip mortgage to Refund;

(b) under that agreement Refund purchased all of Prime's interest in the mortgage for $3,710,701.23 (to be adjusted under cl 4 of the Agreement); that amount was set by reference to the amount which Bluechip owed Prime as at 7 September 2009;

(c) Refund issued 3,710,702 redeemable preference shares to Prime, in part satisfaction of the purchase;

(d) the Agreement contemplated that the purchase price would vary if Prime made further contributions towards the joint venture development; and

(e) the Agreement provided for a final accounting to include those additional amounts; as a result of that Refund issued 4,668,658 further preference shares to Prime; and

(f) Prime also gave an irrevocable power of attorney to Refund, to enable Refund to pursue Prime's interest in the second mortgage.

[11] Once the Bluechip development was completed in May 2009, it was progressively sold down, reducing the indebtedness to HSBC. Bluechip managed to sell all but 16 commercial lots and one residential unit in the development. The consequence was that HSBC's indebtedness has been discharged, save for the claim of one subcontractor. That subcontractor's claim is yet to be quantified, with the receivers and managers of Bluechip advising that it could be "between $250,000 and millions".[6]

[12] HSBC maintains its claim under its first registered mortgage for the amount, once assessed, of the subcontractor's claim. The Administrator's Report to Creditors said of this matter:

> "It is however expected that HSBC's security will be discharged in full, subject to the quantification of the subcontractor's claim, with the balance of funds being paid to the holders of the second registered mortgage".[7]

The sale of the mortgage

[13] The application to terminate the DOCA, and this appeal, turns on the transaction whereby Prime sold its interest in the second registered mortgage granted by Bluechip, to Refund. Proper consideration of this transaction must acknowledge that at all times Prime and Refund have been related companies, within the meaning of the Act, in that their directors and shareholders have included Mr Sidney Knell or Mrs Alison Knell. Mrs Knell is the sole director and shareholder of Refund, while Mr Knell is the director of Prime, and holds 50 per cent of its shares.

[14] That Prime and Refund were related companies was eloquently demonstrated by the fact that Sidney Charles Mr Knell executed the Agreement on behalf of Prime, and his wife, Alison Camille Knell, executed on behalf of Refund.[8]

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6 AB 144; Report to Creditors, p 3, s 4.

7 AB 145; Report to Creditors, p 4, s 4.

8 See identity of signatories at AB 812.

[15] The recitals to the Agreement record the debt owed by Bluechip to Prime, as at 7 September 2009, in the sum of $3,710,701.23.[9] Recital C acknowledges that the actual debt was greater, because there had been "further advances to [Bluechip] pursuant to the loan agreement, however the loan account has not been updated since 7 September 2009".

[16] Recital E records that Refund had agreed to purchase all of Prime's "rights and interest in the mortgage, debt and loan agreement for an amount equal to" $3,710,701.23. Then Recital G provided:

> "It is the intention of the parties that [Refund] will be left to realize the rights sold and that the purchase price will be left outstanding by way of loan or similar transaction, so that the start up business activities of the [Refund] may be funded."

[17] Clause 3 of the Agreement records Prime's agreement to sell to Refund "all of the right title and interest of [Prime] in the mortgage, debt and loan agreement for the purchase price as prescribed in clause 4". It goes on to provide that if Prime provided Bluechip further loans or advances after the date of the Agreement, then those loans or advances "shall be deemed to be a loan/advance of [Refund] and subject to the loan agreement and mortgage".

[18] Clause 4 provides that:

> "The purchase price is $3,710,701.23 plus or minus any adjustment arising as a result of transactions since the date of entry into this Agreement to the loan account as at the date of completion AND further, where the amount of the outstandings as at the date of this agreement or some other date from which the outstandings at this date may be readily derived are conclusively or finally determined to be higher than the above $3,710,701.23 within 3 years of the date hereof, there shall be an adjustment of the final amount paid for the property vended, unless the parties agree otherwise in writing."

[19] Nothing in the Agreement permits or compels the payment of the purchase price by the issue of redeemable preference shares.

[20] Prime holds 4,668,658 preference shares in Refund.[10] It also holds 4,210,702 ordinary shares in Bypass.[11] The Administrators' Report, s 5.9.1, attempts to explain the circumstances in which Refund issued 3,710,702 redeemable preference shares to Prime. The explanation is simply that it happened and was "in consideration of the mortgage value at the time".[12] Once the final accounting under the Agreement was completed on 21 March 2013, Refund issued the further 4,668,658 preference shares to Prime.

[21] The Administrators reported that:[13]

> "It is alleged that [Prime] contracted with Bypass on 30 October 2010 to purchase 4,210,702 shares in Bypass for

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9 AB 808; Agreement, Recital B.
10 AB 147; Report to Creditors, p 6, s 5.9.
11 AB 147; Report to Creditors, p 6, s 5.9.
12 AB 147; Report to Creditors, p 6, s 5.9.1.
13 AB 148; Report to Creditors, p 7, s 5.9.2.

> $4,210,702. Pursuant to the terms of alleged contract, the original preference shares in Refund, noted at section 5.9.1 above, numbering 3,710,702 were transferred to Bypass in part payment of the purchase price. Additionally, it is alleged that [Prime] issued a promissory note to Bypass in the amount of $500,000, being the remainder of the purchase price."

[22] The nature of the preference shares also appears in the Administrator's Report, which says that Refund's constitution[14] shows that those shares have the right:

> "to receive from the profits of the company a non-cumulative preferential dividend at the rate of 5% per annum on the capital for the time being paid up thereon in priority to the payment of any dividend on any other share in the company".[15]

Therefore any dividend payable by Refund to redeemable preference shareholders such as Prime, would be dependant upon Refund making a net profit, and limited to five per cent per annum of the redeemable preference shares on issue.

[23] Prime's director, Mr Knell, had advised the administrators that in his view the preference shares had an estimated realisable value of $100,000.[16] The Administrators' view was that his estimate was optimistic and the likely value of the preference shares was "extremely uncertain" because:[17]

(a) The value of Refund would be dependant on a distribution from Bluechip, which in turn would be dependant upon a number of factors in Bluechip's liquidation, including how much might be achieved for the sale of the remaining stock; and

(b) it would depend on Refund making distributions to preference shareholders.

The Deed of Company Arrangement

[24] Administrators were appointed to Prime on 9 May 2013. On 21 May the Administrators held the first meeting of creditors, and their first report to the creditors was issued on 5 June 2013. The report included a proposal for a Deed of Company Arrangement, proposed and sponsored by the second respondent, Master Developers Association Pty Ltd ("**MDA**").

[25] MDA is owned and controlled by Mrs Knell, and is a related company to Prime. MDA proposed to contribute $70,000 for the purposes of the Deed of Company Arrangement. The sponsorship amount was to be applied to the Administrators'[18] and Deed Administrators'[19] fees and expenses, with the expenses and fees not to exceed 90 per cent of the funds to be provided.[20] The balance of the sponsorship amount was to be applied to the claims of priority creditors (if any), and then ordinary unsecured creditors.

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14 The constitution is not in evidence.
15 AB 147; Report to Creditors, p 6, s 5.9.1.
16 AB 147; Report to Creditors, p 6, s 5.9.1.
17 AB 148; Report to Creditors, p 7, s 5.9.1.
18 As defined in the DOCA: AB 285.
19 As defined in the DOCA: AB 286.
20 AB 155; Report to Creditors, p 14, s 11.

[26] Under the proposal the two largest, but related, creditors namely Endeavour ACT Pty Ltd ("**Endeavour ACT**") and Prime, offered to stand aside for dividend purposes, though not for voting purposes.

[27] All of the creditors, except Bypass and Promoseven, voted to accept the proposed DOCA.

[28] On 12 July 2013, MDA joined with Endeavour ACT in requisitioning a second meeting of the company creditors. This was for the purpose of enabling MDA to increase the Sponsorship Amount[21] under the DOCA, from $70,000 to $80,000. At the second meeting, on 29 July 2013, that resolution was passed.

[29] The terms of the proposed DOCA[22] are unexceptional. MDA is obliged to pay the Administrators or Deed Administrators the fees and expenses they incur, up to 90 per cent of the Sponsorship Amount of $80,000.[23] The money available to creditors is to be in total satisfaction of their claims, with a bar to any further claims.[24] There are provisions specifying that the creditors must accept their entitlements under the Deed in full satisfaction and complete discharge of all of the claims they have,[25] though that does not apply to Prime Property Investment Pty Ltd and Endeavour ACT.[26] Those two companies maintain their rights beyond the DOCA, but under a five year moratorium. Clause 19.21 provides that upon receipt of the Sponsorship Amount or execution of the DOCA, whichever is later, control of Prime is restored to its board.

Relevant legislation

[30] The application by Promoseven was brought under s 445D of the Act, which provides:

> "(1) The Court may make an order terminating a deed of company arrangement if satisfied that:
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> (a)
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> …
>
> (e) effect cannot be given to the deed without injustice or undue delay; or
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> (f) the deed or a provision of it is, an act or omission done or made under the http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html - deeddeed was, or an act or omission proposed to be so done or made would be:
>
> (i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or

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21 See AB 165.
22 See AB 283.
23 DOCA, cl 13.
24 DOCA, cl 14.
25 DOCA, cl 17.2.
26 DOCA, cl 17.2(iv) and Sch 3.

(ii) contrary to the interests of the creditors of the company as a whole; or

(g) the deed should be terminated for some other reason."

[31] The court is given general powers under s 447A of the Act thus:

"(1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.

(2) For example, if the Court is satisfied that the administration of a company should end:

(a) because the company is solvent; or

(b) because provisions of this Part are being abused; or

(c) for some other reason;

the Court may order under subsection (1) that the administration is to end."

[32] The appellant places reliance upon s 600A of the Act, which deals with the powers of the court where the outcome of voting at a creditors' meeting has been determined by related entities. That is the case here because parties related to Prime carried the vote at the creditors' meeting. Section 600A provides:

"(1) Subsection (2) applies where, on the application of a creditor of a company or Part 5.1 body, the Court is satisfied:

(a) that a proposed resolution has been voted on at:

(i) in the case of a company – a meeting of creditors of the company held:

(A) under Part 5.3A or a deed of company arrangement executed by the company; or

(B) in connection with winding up the company; or

(ii) in the case of a Part 5.1 body – a meeting of creditors, or of a class of creditors, of the body held under Part 5.1; and

(b) that, if the vote or votes that a particular related creditor, or particular related creditors, of the company or body cast on the proposed resolution had been disregarded for the purposes of determining whether or not the proposed resolution was passed, the proposed resolution:

(i) if it was in fact passed – would not have been passed; or

(ii) if in fact it was not passed – would have been passed;

or the question would have had to be decided on a casting vote; and

(c) that the passing of the proposed resolution, or the failure to pass it, as the case requires:

(i) is contrary to the interests of the creditors as a whole or of that class of creditors as a whole, as the case may be; or

(ii) has prejudiced, or is reasonably likely to prejudice, the interests of the creditors who voted against the proposed resolution, or for it, as the case may be, to an extent that is unreasonable having regard to:

(A) the benefits resulting to the related creditor, or to some or all of the related creditors, from the resolution, or from the failure to pass the proposed resolution, as the case may be; and

(B) the nature of the relationship between the related creditor and the company or body, or of the respective relationships between the related creditors and the company or body, and

(C) any other relevant matter.

(2) The Court may make one or more of the following:

(a) if the proposed resolution was passed – an order setting aside the resolution;

(b) an order that the proposed resolution be considered and voted on at a meeting of the creditors of the company or body, or of that class of creditors, as the case may be, convened and held as specified in the order;

(c) an order directing that the related creditor is not, or such of the related creditors as the order specifies are not, entitled to vote on:

(i) the proposed resolution; or

(ii) a resolution to amend or vary the proposed resolution;

(d) such other orders as the Court thinks necessary.

(3) In this section:

related creditor, in relation to a company or Part 5.1 body, in relation to a vote, means a person who, when the vote was cast, was a related entity, and a creditor, of the company or body."

[33] As can be seen, the court has power to set aside a resolution passed in circumstances where it would not have been passed if the votes of the related creditors were disregarded, and the passing of the resolution is contrary to the interests of the creditors as a whole or to a particular class of creditors as a whole, or has prejudiced the interests of those creditors who voted against it to an extent that is unreasonable, having regard to the benefits that resulted to the related creditor and the nature of the relationship between the related creditor and the relevant company.

[34] Reference needs to be made to reg 5.3A.07(1)(a) of the *Corporations Regulations* 2001 (Cth). It provides that a company that has executed a deed of company of arrangement that is later terminated under s 445D by the court, "is taken to have passed a special resolution under section 491 that the company be wound up voluntarily". That provision lays the foundation for putting such a company into liquidation upon termination of the deed of company of arrangement.

[35] Finally, reference needs to be made to the objects of Part 5.3A of the Act. They are contained in s 435A in these terms:

"The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or

(b) if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding up of the company."

Approach of the primary judge

[36] The learned primary judge found it unnecessary to resolve the competing allegations that the parties were bringing and resisting the application for ulterior purposes.[27] This was because, as his Honour said, "other matters dictate the result of this application".[28]

[37] In referring to those other matters, his Honour turned first to the objects of Part 5.3A of the Act. Having recited them his Honour expressed his conclusion in this way:

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27 Reasons [29].

28 Reasons [30].

> "[31] The argument for the applicant is that, if the DOCA was set aside, a possible result might be that the transfer of the second registered mortgage would be set aside. If that is, for the sake of argument, assumed, the applicant has failed to demonstrate the 'unfairness' or 'prejudice' required by the various sections on which it relies. The result sought by the applicant would, on the unchallenged evidence, result in a lower, or no, return for all creditors. Such a result would be inconsistent of the object of Part 5.3A.
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> [32] Similarly, it follows that the applicant cannot demonstrate the effect necessary to engage s 445D or the prejudice which s 600 requires to be shown."

[38] It is evident that in [31] his Honour focused on the object in s 435A(b); that is, the effect on creditors in the event that the DOCA was set aside. That focus was also the reason for the primary judge's conclusion in [32], as demonstrated by his use of the phrase "it follows" at the start of that sentence.

[39] His Honour then turned to an issue which was ventilated during the application, namely, that if the DOCA was set aside and Prime went into liquidation, whether there was any prospect that the liquidator would be appropriately funded to conduct an investigation and any necessary litigation in respect of the second mortgage granted by Bluechip. His Honour observed that there was evidence suggesting that the funding required might be of the order of $350,000, and that the appellant "would venture no further than to say it was 'willing to … consider a process of investigation and funding and indemnities …'."[29]

[40] His Honour made no finding in that respect beyond distinguishing the decision of Perram J in *Deputy Commissioner of Taxation v TMPL Pty Ltd*.[30]

[41] The only remaining paragraph of his Honour's reasoning is [34]:

> "The overwhelming weight in the balance of this application must be that, even if the liquidation was carried out and the applicant was shown to be correct, the creditors would suffer. While the public interest is an element to be considered, the applicant's case did not rise high enough to demonstrate that it was sufficient to overcome the other factors to which I have referred."

Discussion

Objects of Part 5.3A of the Corporations Act

[42] Under s 445D there are effectively four grounds upon which a DOCA can be terminated. They are:

> (a) if effect cannot be given to the deed without injustice or undue delay;[31]

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29 Reasons [33] quoting Transcript 1-21.

30 *Deputy Commissioner of Taxation v TMPL Pty Ltd* [2011] FCA 1403; 289 ALR 69 ("***TMPL***").

31 Section 445D(1)(e).

(b) if the deed, or something done under it, would be oppressive, unfairly prejudicial to, or unfairly discriminatory against, one or more of the creditors;[32]

(c) if the deed, or something done under it, is contrary to the interests of the creditors of the company as a whole;[33] and

(d) if the deed should be terminated for some other reason.[34]

[43] His Honour's reference to unfairness or prejudice in [31] reveals that he was there addressing s 445D(1)(f)(i). Further, the comments in [32] reveal that his Honour addressed s 445D(1)(e) and s 600A.

[44] However, it seems clear that the main thrust of his Honour's approach was in respect of the effect on creditors in terms of the return from administration on the one hand and liquidation on the other. The key to the reasoning is in the sentence in [31]: "The result sought by the applicant would, on the unchallenged evidence, result in a lower, or no return for all creditors."

[45] The appellant placed reliance upon the decision of Perram J in *TMPL*, where his Honour said:[35]

> "The court's power to terminate the deed of company arrangement is not enlivened because it forms the view that irregular transactions may have occurred. But in my opinion there is more than a slight chance that CCRN transactions will turn out to be, at least, uncommercial transactions. They warrant scrutiny by a liquidator, more so where one is left with the distinct impression the *TMPL* has, in effect, been depleted of the money advanced to MIR Asia in the face of an audit, two adverse position papers and, from June 2008, adverse taxation assessments. If the matter is viewed that way then the effect of the deed of company arrangement is to prevent any liquidation scrutiny of the CCRN transactions. **The powers in s 445D(1) of the Corporations Act include a capacity in the court to terminate a deed where effect cannot be given to a deed 'without injustice'. That power has been held to be sufficiently enlivened where a deed has the effect of denying proper liquidation scrutiny**: *Cresvale Far East Ltd (in liq) v Cresvale Securities Ltd* (2001) 37 ACSR 394; [2001] NSWSC 89 at [191] … per Austin J; followed *Mondllo Farms Pty Ltd v Annatom Pty Ltd (subject to a deed of company arrangement)* (2007) 64 ACSR 91; [2007] SASC 296 at [112] per Layton J."

[46] Later in *TMPL* the following appears:[36]

> "[133] However, I do accept that the deputy commissioner's contentions in relation to s 445D(1)(e) and (g). Subsection (e) permits termination of a deed where its effect causes

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32 Section 445D(1)(f)(i).
33 Section 445D(1)(f)(ii).
34 Section 445D(1)(g).
35 *TMPL* at [96] (emphasis added).
36 *TMPL Pty Ltd* at [133]-[134] (emphasis added).

> injustice; **subs (g) permits the court to terminate 'for some other reason'. The latter provision may be available 'where the proposal for the [deed of company arrangement] has a fraudulent or wrongful purpose or the [deed of company arrangement] offers an unconscionable premium, contrary to public policy, as a bribe to creditors to support an arrangement under which the conduct of the directors will not be investigated':** *Fleetbroadband Holdings Pty Ltd v Paradox Digital Pty Ltd* (2005) 228 ALR 598; [2005] WASC 261 at [63] per Newnes M; *Young v Serman* (2002) 170 FLR 86; [2002] NSWCA 281 at [67] per Sheller JA and [92] per Davies AJA.
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> [134] In this case, the deed of company arrangement is a device by which Mr Triguboff and his associated companies are avoiding scrutiny of a number of highly questionable transactions the net result of which is to allow TMPL to walk away from a tax debt of $19,551,033.77 paying nothing. The public interest demands that was has been done with TMPL be brought out into the light."

[47] The primary judge's reasoning did not advert to the question whether s 445D(1)(g) applied, or whether the effect of the deed was to deny proper liquidation scrutiny, or to deny the opportunity to have the conduct of the directors of Prime investigated.

[48] The comments in *TMPL* reflect what was said by the Full Federal Court[37] in *Emanuele v Australian Securities Commission.*[38] Having pointed out that under s 445D the fate of a deed of company arrangement, and of the company, rests with the court, the Full Court said:

> "The powers of the Court under these sections are discretionary, and are to be exercised having a regard both to the interests of the creditors as a whole, and in the public interest. An analogy may be drawn between the powers of the Court arising under these sections, and the power of the Court to refuse a stay of a winding-up order considered in *Re Data Homes Pty Ltd* [1972] 2 NSWLR 22 at 26 where Mason JA (as he then was), in whose judgment Holmes and Hardy JJA agreed, said:
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> > 'It has been held here and in the Supreme Court of Victoria that, in considering an application under s 243 of the *Companies Act* 1961 (Cth), the Court should have regard, not merely the interests of creditors, but also to the public interest, including the question whether granting of a stay would be detrimental to commercial morality … This principle accords with the principle that has been applied to rescission or annulment of a bankruptcy. Buckley J expressed it in these terms in *Re Telexcriptor Syndicate Ltd*

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37 Spender, Von Doussa and Hill JJ.

38 *Emanuele v Australian Securities Commission* (1995) 63 FCR 54, at 69-70 (emphasis added) ("***Emanuele***").

> [1903] 2 Ch 174 at 180-181: 'Where application is made in bankruptcy to rescind a receiving order to annul an adjudication, **the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.** The mere consent of the creditors is but an element in the case. … The Court has to exercise a discretion. It is bound to regard not merely the interests of the creditors. It has a duty with regard to the commercial morality of the country: see *Re Hester; Re Flatau* [1893] 2 QB 219; *Re Taylor* [1901] 1KB 744. … **That case provides an illustration of what is meant by the expression 'detrimental to commercial morality'. There had been misconduct in the affairs of the company which required investigation. In the circumstances it would have been detrimental to commercial morality to have stayed the winding up, thereby preventing an investigation from taking place** …"

[49] The primary judge adverted to the public interest as an element to be considered,[39] but did not engage in a consideration of the matters appearing in *TMPL* or *Emanuele*. Had that been done, it would have necessarily entailed looking at the evidence going to the commerciality of Prime's sale of its half interest in the mortgage granted by Bluechip. It may also have required consideration of the subsequent share transfers by Prime to another related company, Radanco Pty Ltd ("**Radanco**"), to which I refer later at [65].

[50] The appellant contends that the purpose or effect of the DOCA was to remove the possibility of an investigation into Prime's transfer of its interest in the mortgage to Refund. It points to a number of factors surrounding that transaction which, it says, warrant investigation. Counsel for the respondent was asked in oral address, to identify the evidence of the commerciality of that transaction. The answer was to point only to the terms of the agreement itself[40] and the description of the transaction appearing in the Administrator's Report.[41]

[51] It is notable that there was no deponent who condescended to detail about the transaction or who attempted to justify it from a commercial point of view. Specifically, no director or officer of Prime or Refund provided any evidence that might explain the transaction.

[52] When one looks at the Agreement there are reasons to have reservations about the commerciality of the arrangement.

[53] On the face of the Agreement there is no attempt to quantify the value of Prime's half interest in the second mortgage. That makes it very difficult to conclude that it was sold for value, particularly as the contract is between Prime and one of its related entities, Refund.

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39 Reasons [34].

40 See AB 806.

41 AB 144, 147 and 154.

[54] In addition, the price that was paid is attended by circumstances that are not transparent. The purchase price is defined to mean "$3,710,701.23 plus any lawful adjustment to the loan account as at the date of completion or revision thereafter made hereunder".[42] The genesis of that definition, and the purchase price, is reflected in Recital B, which acknowledges that the amount was simply the state of the loan account as at 7 September 2009. The loan account had not been updated since that time, and Recital C acknowledged that further advances had been provided. That obviously led to cl 4 which provided that the purchase price was "$3,710,701.23 plus or minus any adjustment arising as a result of transactions since the date of entry into this Agreement to the loan account as at the date of completion". What seems to have been intended was that the loan account would be updated to the "date of completion", which is defined to mean the date of the Agreement. Once the loan account was brought up to date, then the purchase price would be affected by any "transaction since the date of entry into this Agreement". Therefore, as at the date of the Agreement the true purchase price was something not known, though there was a mechanism to set it.

[55] The second aspect of lack of transparency in respect of the purchase price comes from the fact that it was evidently met, not in the form of money, but by the issuing of redeemable preference shares by Refund. The Agreement says nothing about payment being made that way. There is nothing in the material before the Court which reveals how that came to pass. In any event 3,710,702 redeemable preference shares were issued to Prime which, on the face of it, would suggest that the view was taken that each preference share was worth one dollar. But there is nothing to show that is so. In any event, the mechanism under the agreement could theoretically have resulted in the purchase price dropping below $3,710,701.23, rather than increasing.

[56] The next aspect is that the Administrators' Report is the only source of evidence about the adjustments under cl 4 of the Agreement. It states that the "final accounting was completed on 21 March 2013 and required Refund to issue further preference shares to [Prime]. As a result, [Prime] was issued a further 4,668,658 preference shares in Refund".[43] There is no material to show, however, that the adjustments meant that there were actually additional advances in the amount of $4,668,658, even though that might be an inference one could draw. Further, there is nothing to show why Refund was "required" to issue further preference shares.

[57] Further, there is the question of the value of the redeemable preference shares. Once again the Administrators' Report is the only source of information. I hesitate to call it evidence, because the report is not sworn and the basis for some of the information is not apparent. In any event, the Administrators say that Refund's constitution (which is not in evidence) "indicates" that redeemable preference shareholders have a right to "receive from the profits of the company a non-cumulative preferential dividend at the rate of 5% per annum on the capital for the time being paid up thereon in priority to the payment of any dividend on any other share in the company".[44] They go on to point out that the dividend payable by Refund to redeemable preference shareholders would be dependent upon Refund

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42 Agreement, cl 1.

43 AB 147; Administrators' Report, s 5.9.1.

44 AB 147; Administrators' Report, s 5.9.1.

making a net profit, and would be limited to five per cent per annum of the redeemable preference shares on issue. There is no evidence about the profitability of Refund, nor as to the total of redeemable preference shares on issue. The true worth of the preference shares is, therefore, a matter of doubt.

[58] The effect of the agreement is that Prime sold its interest in the mortgage (its only substantive asset) to Refund for a consideration, the value of which would be determined by Refund, and dependent on how Refund chose to structure its business affairs. Related though they were, Prime could not control how Refund went about its affairs. The result is that the consideration was uncertain, if not illusory.

[59] An additional matter, where transparency is absent, concerns Recital G. It provides that the purchase price will be left outstanding, by way of loan or similar transaction, so that "the start up business activities of [Refund] may be funded".[45] Nowhere is it explained why it would be in Prime's interest to defer receipt of the purchase price in order to finance Refund's start up activities. Since Prime was divesting its only substantive asset, it is not at all clear why it had any legitimate interest in being Refund's benefactor.

[60] The final thing to observe about the sale agreement is that, given the matters noted above, the fact that the transaction is between companies controlled by the one set of directors, and the fact that no director[46] has gone on oath to depose as to the rationale of the arrangement, a conclusion that there is commercial justification to the Agreement is very difficult to reach.

[61] On 7 June 2013 Promoseven's solicitors wrote to the Administrators setting out the detail of their concerns surrounding the various transactions, but in particular the sale of Prime's interest in the second mortgage.[47] The response from the Administrators was on 12 June 2013.[48] They reported their view, based on investigations, in respect of Prime's sale of the second mortgage, the sale of Refund preference shares to Bypass on 30 October 2010, and the funding agreement entered into with Prime Group Australasia Pty Ltd ("**PGA**") on 21 March 2011. As to those transactions, it is of significance that the Administrators reported that Prime "may not have received sufficient commercial benefit as consideration for entering into the transactions".[49] It is true that they adhered to their view that a return in liquidation would be less than a return in administration, but their comment goes to the essential commerciality of the central transaction of which Promoseven complains.

[62] That conclusion is mirrored by what the Administrators reported to the creditors at their second meeting:[50]

> "The Administrators[']investigations into the affairs of the company have revealed that the sale and transfer of [Prime's] interest in the second registered mortgage over the Cairns Central development may constitute a voidable unreasonable director-related transaction."

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45 AB 808.

46 Or anyone else for that matter.

47 AB 265-268.

48 AB 269.

49 AB 270.

50 AB 276; Minutes of Meeting of Creditors, 14 June 2013, p 4. The first meeting of creditors was held on 21 May 2013: see AB 138.

[63] It is true that the Administrators referred to the potential for Refund to argue that the transaction was not unreasonable, given Refund's granting of the preference shares, but that was hardly a reasoned analysis, or indicative, of how that issue might be concluded.

[64] There are associated transactions concerning the preference shares which warrant consideration. Those transactions concern a matter raised in s 5.9.2 of the Administrators' Report,[51] which revealed that Prime is currently the registered holder of 4,210,702 ordinary shares of Bypass. The report goes on to say:[52]

> "It is alleged that [Prime] contracted with Bypass on 30 October 2010 to purchase 4,210,702 shares in Bypass for $4,210,702. Pursuant to terms of alleged contract, the original preference shares in Refund, noted at section 5.9.1 above, numbering 3,710,702 were transferred to Bypass in part payment of the purchase price. Additionally, it is alleged that [Prime] issued a promissory note to Bypass in the amount of $500,000, being the remainder of the purchase price."

[65] According to that account, the preference shares that were transferred to Bypass were the same shares that Refund had issued to Prime, in part satisfaction of the price that Refund had to pay to purchase Prime's interest in the second mortgage over Bluechip.

[66] However, the Administrators' Report goes on to say that the director of Prime[53] maintains that Prime did not, in fact, contract with Bypass in respect of the purchase of Bypass shares, and that the share transfer and the issue of the promissory note were fraudulent. This, apparently, has been the subject of litigation in Victoria.

[67] Promoseven's solicitors provided evidence from the Australian Securities and Investments Commission's records to demonstrate that:

(a) on 7 June 2012 Bypass transferred its 3,710,702 preferential shares in Refund to Radanco, purportedly for $10 million;[54]

(b) Radanco is a company owned and operated by Mr Knell's nephew, Jonathan Radford;

(c) the ASIC document detailing the transaction was signed by Mr Knell's wife;[55]

(d) on 2 August 2012 Radanco purported to transfer the same shares to MDA, another company controlled by Mr and Mrs Knell, for only $15,000;[56] Mrs Knell signed the ASIC document detailing that transaction;[57] and

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51 AB 148.
52 AB 148; Administrators' Report, s 5.9.2.
53 A reference to Mr Knell.
54 See ASIC record of transfer at AB 362. At AB 328, the Affidavit of Mr Litster, sworn 30 July 2013, misstates the figure as $1million at para 8.
55 AB 360-362.
56 AB 328; Affidavit of Mr Litster, sworn 30 July 2013, para 9.
57 AB 363-365.

(e) MDA is the sponsor of the DOCA, and is paying the sponsor amount of $80,000 under the DOCA.

[68] There is no explanation, in the material before this Court, of that series of transactions involving the redeemable preference shares issued by Refund to Prime in part satisfaction of the purchase price under the Agreement. In particular, there is no explanation of how it could be commercially justifiable that the same shares which are transferred for $10 million in June 2012, could then be transferred for $15,000 two months later. Nor is there any explanation of why two companies associated with the Knell family[58] would seek to take a transfer of the preference shares which had been obtained from Prime in circumstances of fraud. One might ask: why did those shares not go back to Prime? And why would Radanco pay $10 million for those shares, but MDA only pay $15,000 two months later?

[69] These unexplained transactions do little to dispel the sense that Prime has been involved in transactions that do not have an apparent commercially justifiable basis.

Funding of administrators or liquidators for an investigation or litigation

[70] One of the issues addressed by the learned primary judge was that concerning the funding of administrators or liquidators if an investigation or litigation might be required. At [33] his Honour records the administrators having assessed the funding they required for a liquidation to be of the order of $350,000. Further, that Promoseven would venture no further than to say it was "willing to … consider a process of investigation and funding and indemnities ….".[59] That was a reference to a letter from Promoseven's solicitors of 26 July 2013.[60] The point being made was that Promoseven would be willing to consider a process of investigation, funding and indemnities, but

> "it hasn't yet got to that stage and we're certainly not at the stage where we could sign off on what's proposed by the administrators themselves, which had a very complex regime that, effectively, wanted to commit our client to a million dollars or so by way of funding and that might change their attitude to … $1.1 million …".[61]

[71] The funding proposal to which that submission was directed was put forward on 29 July 2013 by the solicitors for the Administrators.[62] By its terms it was to cover fees and expenses through to the end of the liquidation, as well as an indemnity in respect of any personal liability of the potential liquidator.[63] Although it provided for funds to be advanced in a staged way, nonetheless the proposal was for a total amount of $1.49 million. Of that sum, stage 1 was for the first year of a liquidation with estimated costs at $348,700,[64] but no proposal was advanced for funding only stage 1 (i.e. investigation only).

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58 Radanco is owned and operated by Mr Knell's nephew, and MDA is owned and controlled by Mrs Knell.

59 The transcript reference given in the Reasons is 1-21, but the correct reference is T 1-19, at AB 19.

60 AB 406; paras 2 and 3.

61 AB 19-20; Transcript 1-19 to 1-20.

62 AB 729-731.

63 AB 729.

64 AB 730-731.

[72] It would not be unusual for creditors to seek that some form of preliminary investigation be conducted by a liquidator, before any commitment is made to litigation. That investigation would, in creditors' normal expectations, reveal whether litigation was worthwhile. One can therefore understand a creditor's reluctance to embrace a funding package which assumed that litigation would ensue, and that the creditor was committed to funding regardless.

[73] Once one understands the true context in which Promoseven's position was advanced, the lack of commitment to funding does not assume the significance which his Honour gave it.

The position of Comben Enterprises Pty Ltd as creditor

[74] The resolutions to accept the DOCA were passed by those creditors whose debts had been assessed and admitted for the purposes of voting. They are as set out in the table shown below:[65]

Name	**Represented By**	**Amount Claimed**	**Admitted (Voting)**
Akuna Street Investments Pty Ltd	Alison Knell	2,750.00	2,750.00
Bypass Payment Systems Pty Ltd	Anthony Torto	544,712.33	544,712.33
Comben Enterprises Pty Ltd	Alison Knell	440,563.00	440,563.00
Dr Robin O'Hair	Bruce Quelch	14,000.00	14,000.00
Endeavour ACT Pty Ltd	Alison Knell	1,505,165.38	1,505,165.38
Ian Hogg	Self	157.08	157.08
Papandrea Partners Pty Ltd	Alison Knell	2,750.00	2,750.00
Prime Group Australasia Pty Ltd	Alison Knell	1,545.00	1,545.00
Prime Property Investment Pty Ltd	Alison Knell	3,682,592.00	nil
Promoseven Pty Ltd	Gregory Litster	298,433.23	179,059.94
S & T Lawyers	Alison Knell	1,375.00	1,375.00

[75] As appears from that table, all of those creditors represented by Mrs Knell are related entities. The appeal was conducted on the basis that Mr Hogg and Dr O'Hair could also be considered to be related parties.[66] That meant that the only non-related creditors were Promoseven and Bypass. On all the substantive motions Promoseven and Bypass voted together, as did the related parties. The proportion by number was 8:2 and the proportion by percentage of votes was 73:27.[67]

[76] Of those creditors in the majority, the only one that is not a related party to the Knell companies, in terms of directorships or shareholdings, is Comben Enterprises Pty Ltd ("**Comben**"). The basis of its claim as a creditor was a promissory note given by Prime.[68] Under that note Prime promised to pay the bearer on demand, the

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65 AB 273; Minutes of Meeting of Creditors, 14 June 2013, p 1.

66 Whether they are actually related is another matter.

67 AB 276-279.

68 AB 309.

sum of $375,000. The promissory note is dated 3 March 2011. The material reveals this much about the circumstances surrounding the promissory note:

(a) Comben, Prime Property Investment Pty Ltd ("**PPI**")[69] and Peter Comben[70] entered into a share issue agreement on 6 March 2011 ("**the Share Issue Agreement**");[71]

(b) Recital B records that Comben had a development management agreement in respect of a significant number of home sites and units in Bowen, Queensland; the management fees were agreed as approximately $1.8 million across three projects;[72]

(c) Endeavour ACT[73] intended to make an investment of $375,000 for a 50 per cent share of Comben, but, as Recital C records, Endeavour ACT had "relinquished the opportunity to PPI and has funded PPI by delivering to it a bearer promissory note from [Prime] …";[74]

(d) Recital E recorded the principal value of Prime as being derived "directly or indirectly from land on which a multistorey unit development in Cairns over which a second mortgage is jointly held";[75]

(e) Recital F recorded that the investment by PPI was to be by way of "the exercise of an option to apply the monies paid by promissory note of $375,000 for the standstill agreement below";[76]

(f) the standstill agreement was an obligation accepted by Comben that it would not issue any further shares, nor negotiate with anyone, but PPI, to issue shares for four years;[77] and

(g) clause 3.6.1 and 3.6.2 provided that on 1 July 2012 (at the latest), Comben agreed to appoint Mr Knell as a director of Comben, effect the resignation of all other directors of Comben except Peter Comben, and deliver share certificates representing 50 per cent of the shares.[78]

[77] It seems from that recitation of the facts that Prime originally provided the promissory note for $375,000 to Endeavour ACT. It may have been that Prime intended to fund Endeavour ACT's acquisition of 50 per cent of Comben, but the material does not permit a final conclusion on that. Nor is there any material which permits an examination of or conclusion about the balance of the matters recorded in Recital C,[79] namely that PPI is:

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69 Another company owned and controlled by Mr and Mrs Knell.
70 The principal of Comben Enterprises.
71 AB 311.
72 AB 314.
73 A company owned by Mr and Mrs Knell.
74 AB 314.
75 AB 314.
76 AB 314.
77 AB 315.
78 AB 317.
79 Bearing in mind that Prime is not a party to the Share Issue Agreement.

> "liable to pay for the note no more than the amount ultimately paid by [Prime] under the note, regardless of whom the holder is at the time of payment and regardless of what PPI has sold the note for, as [Endeavour ACT] has not endorsed the promissory note or made any claims as to the recoverability of the amount payable under the note."[80]

[78] Presumably the claim by Comben to be a creditor of Prime under the promissory note proceeds on the basis that the Share Issue Agreement remains to be performed. The ASIC search of Comben[81] reveals that Peter Comben holds all the shares in the company, and is the current director and secretary.[82] The standstill period would operate until March 2015, and whilst the material does not permit a conclusion as to whether the Share Issue Agreement is still on foot, there is reason to think that it might be, given that Comben was pressing for payment after the completion date,[83] and was continuing to press for payment as late as 6 April 2013.[84]

[79] Those matters suggest that Comben should be regarded as a related party to Prime. However, assuming for the moment that it is not, one relevant consideration is the comparative position between Comben (on the one hand) and Promoseven and Bypass (on the other) in terms of the harm which might be suffered if the DOCA was terminated and liquidation followed.

Effect of termination of DOCA on Comben vis-à-vis Promoseven and Bypass

[80] Comben provided an affidavit[85] which opposed the termination of the DOCA, giving as reasons: the certainty of a dividend under the DOCA as opposed to an uncertain dividend in liquidation; the fact that related creditors would not be paid a dividend under the DOCA; and the cost of investigation with the uncertainty of any outcome thereof.

[81] Comben was, according to the table set out above, the largest creditor which voted in favour of the DOCA, if one disregards Endeavour ACT which is a Knell controlled company. Comben's debt was admitted for voting purposes at $440,563. If one considers the impact on Comben in terms of what it might receive under the DOCA versus a nil return on a liquidation, and compares that with the impact upon Promoseven and Bypass (the parties who voted against the DOCA) the result does not demonstrate, in my opinion, a level of harm that would outweigh termination of the DOCA. The learned primary judge recorded that the return to creditors under the DOCA ranged from 4.3 cents to 7.4 cents in the dollar, depending upon the Administrators' final determination of the Bypass proof of debt.[86] The respective returns are:

Creditor	**4.3cents/$**	**7.4 cents/$**
Comben Enterprises Pty Ltd	18,944.21	32,601.66
Promoseven Pty Ltd	7,699.58	13,250.44

80 AB 314.
81 AB 219-224.
82 AB 220-221.
83 See Letter from Comben to Mr Knell, dated 20 July 2012, at AB 322.
84 See Letter from Comben to Mr Knell, dated 6 April 2013, at AB 323.
85 AB 452; Affidavit of Mr Comben, sworn 23 July 2013.
86 Reasons [28].

Bypass Payment Systems Pty Ltd	23,422.63	40,308.71
Promoseven + Bypass	31,122.21	43,559.15

[82] As can be seen, the harm to Bypass is greater than that to Comben if the DOCA does not proceed, and the combined harm to Promoseven and Bypass well exceeds that of Comben.

[83] Looked at individually, I do not consider that the harm to Comben if the DOCA is terminated, outweighs considerations otherwise in relation to whether grounds exist to terminate the DOCA on the basis of the principles set forth in *TMPL* and *Emanuele.* Those authorities receive support from the decision of PD McMurdo J in *Public Trustee v Octaviar*[87] where his Honour adopted the following passage from *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd*:[88]

> "[290] For a director to avoid public examination about the affairs of the corporation, and the possibility of the type of claw back litigation which is possible in a winding up, by making a payment to creditors, can also be a factor in favour of termination … It is in a relevant sense "detrimental to commercial morality" to dispense with the opportunity which the winding up law provides for the investigation of the affairs of a failed company. …
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> [291] How much weight is given to the fact that the affairs of the company will not be investigated depends upon whether there are circumstances which suggest that investigation is called for. Sometimes, the fact that only a small dividend will be paid to creditors is itself such a circumstance … Sometimes, the fact that it appears that there may be prospects of preference or uncommercial transaction or insolvent trading recoveries can be such a circumstance."[89]

Conclusion

[84] In my respectful opinion the circumstances surrounding Prime's transfer of its interest in the mortgage to Refund is such that an investigation by a liquidator should not be prevented by the related parties to Prime forcing a deed of company arrangement on the other creditors. The apparent lack of commerciality in that transaction, particularly where the true worth of the consideration is something that will be determined by Refund according to its own priorities without reference to Prime, are such that a public examination of the affairs is warranted, and the institution of claw back litigation may prove to be warranted. It would, in the sense of the terms used in *Emanuele* and *Bidald*, be detrimental to commercial morality to dispense with the opportunity which the winding up law provides for the investigation of the affairs of Prime.

[85] That conclusion is fortified by the fact that the essential commerciality of the arrangement was sought to be demonstrated by reference merely to the contractual

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87 *Public Trustee v Octaviar* [2009] QSC 202, at [180].

88 *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* [2005] NSWSC 1235.

89 Internal references omitted.

terms of the Agreement, and such description as exists in the Administrators' Report. No representative of Prime or Refund provided an affidavit to support the Agreement.

[86] Further, that conclusion is also supported by other transactions surrounding Prime which suggest that an investigation is warranted. In this respect I refer to the question surrounding the transfer of the preference shares and the provision of the promissory note which is the basis of Comben's claim to be a creditor.

[87] I do not consider that the absence, at this point in time, of a final commitment to support a liquidator in the costs of investigation and litigation, weighs against that conclusion. The only proposal put forward to this time was one which required a commitment to approximately $1.5 million, covering all stages of liquidation through to the end. No proposal was put forward which was confined merely to the investigation stage. Of course it is possible that no creditor will ultimately commit to provide that finance to a liquidator, but in my view it is premature to reach that conclusion.

Notice of contention – ulterior motive

[88] The respondents' notice of contention seeks to oppose the appeal on the basis that no relief should be granted to the appellant

> "on account of the ulterior purposes of the Appellant in pursuing the present relief in these proceedings with reference to its obtaining a Special Advantage personal to the Appellant at the expense of the Respondents …".[90]

The special advantage was said to arise with respect to proceedings presently before the Federal Court of Australia.

[89] There are three sets of proceedings in the Federal Court which, to one degree or other, involve the current parties. In the first proceeding Refund seeks relief against Prime, Promoseven and Bluechip for misleading or deceptive conduct which, it says, induced it to enter into the Agreement under which it purchased Prime's interest in the mortgage. The pleading is convoluted and at times lacking in necessary particularity. In essence the contention is that misrepresentations were made about the financial position of Bluechip, whether repayment to Prime and Promoseven would occur, and whether Promoseven and Prime would be able to co-operate to release the second mortgage. The relief sought is damages under the *Trade Practices Act* 1974 (Cth) or the Australian Consumer Law, Sch 2 of *Competition and Consumer Act* 2010 (Cth). There is also a claim for relief under s 87 of the *Trade Practices Act* (and its equivalent under the Australian Consumer Law) "in the nature of partition to ensure that the registered mortgage … is held, at least in equity, separately and distributively over each of the lots therein referred to …".[91] There is no relief claimed to set aside the transaction.

[90] The second set of proceedings consists of an appeal by both Refund and Prime, against the rejection of formal proofs of debt, the rejection being by the liquidator of Bluechip. Promoseven is not a party to that proceeding.

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90 AB 894; Respondents' Notice of Contention, dated 3 October 2013, para 2.

91 AB 503; Amended Originating Application, filed 16 September 2011, para 5.

[91] The third proceeding is an appeal by Promoseven against a partial rejection of its proof of debt by the liquidator of Bluechip. Neither Refund nor Prime are parties to that dispute, though they have apparently intervened (without objection) in the hearing of that appeal.

[92] The contention, as identified in argument, relates to the second proceeding, the appeal by Refund and Prime against the rejection of their proofs of debt. The contention is that if Prime goes into liquidation its ability to fund and prosecute those proceedings, to enhance its entitlement under the second mortgage, will be impeded or disabled.

[93] The difficulty which confronts the respondents is that, whilst it might be true that if Prime goes into liquidation the liquidator will need support in order to continue the Federal Court proceedings, Refund advances the same argument in the same proceedings. Refund only does so because it has taken a transfer of Prime's interest in the mortgage from Bluechip. Its interest in propounding the proof of debt is identical to that of Prime. There is no reason to conclude that Refund will not diligently pursue that litigation.

[94] The respondents also point to the fact that Promoseven has taken the position in that litigation that the transfer to Refund is not valid in law. Whilst that might be so, it is hardly a question which will be determined summarily. Therefore there is every reason to think that Refund will have the fullest opportunity to articulate the challenge to the rejection of the proof.

[95] Finally, the respondents refer to the fact that even if the liquidator continued the litigation, the question of funding would arise, as well as the fact that the control of the litigation would then be in the hands of an insolvency practitioner, as opposed to the board who has knowledge of the matters. The answer to the first point lies, at least in substantive part, in the fact that if there is reason to attack the sale to Refund (as an uncommercial transaction, or as an unreasonable director-related transaction) that is the sort of consideration that would induce creditors to support the liquidator. In any event, Refund is running the same points, as transferee of the mortgage. As to the second point, I do not think this Court should conclude that the relevant directors will ignore their duty to Prime, in terms of providing their assistance to advance the company's interest.

[96] For the reasons above I am not persuaded that there is anything in the ulterior motive contention.

Disposition

[97] I would allow the appeal and set aside the orders made on 26 August 2014. The precise form of the orders to be substituted is a matter which the parties should have the opportunity to address. Therefore, I would propose substituting the following orders, subject to the parties first being given an opportunity to address submissions as to the orders that should be made:

1. Pursuant to s 445D and s 447A of the *Corporations Act* 2001 (Cth), the Deed of Company Arrangement with respect to Prime Project Development Corporation Pty Ltd, be terminated.

2. Pursuant to s 447A of the *Corporations Act* 2001 (Cth), s 446B of the *Corporations Act* 2001 (Cth) and reg 5.3A.07(1)(a) of the *Corporations Regulations* 2001 (Cth), apply in such a manner that Prime Project Development Corporation (Cairns) Pty Ltd be taken to have passed a special resolution that it apply to be wound up by the Court.

3. Pursuant to s 447A of the *Corporations Act* 2001 (Cth), the administration end, and Prime Project Development Corporation (Cairns) Pty Ltd be wound up by the Court.

4. The first and second respondents pay the appellant's costs of the proceedings before the primary judge, and the appeal, to be assessed on the standard basis, if not agreed.

5. The third respondent's costs of the proceedings be costs in the winding up.

[98] Accordingly, the only orders which I would make now are:

1. Allow the appeal.

2. Set aside the order made in the Trial Division on 26 August 2013.

3. The parties are granted leave to file any further written submissions identifying the orders which should be made to give effect to these reasons, within 21 days or within such further time as the registrar orders.