SUPREME COURT OF QUEENSLAND

CITATION:	*In the Matter of Prime Project Development (Cairns) Pty Ltd; Promoseven Pty Ltd v Prime Project Development (Cairns) Pty Ltd & Ors* [2013] QSC 222
PARTIES:	**PROMOSEVEN PTY LTD ACN 102 606 324** (applicant) v **PRIME PROJECT DEVELOPMENT (CAIRNS) PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT)** (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 respondent)
FILE NO/S:	BS 5934/13
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 July 2013
JUDGE:	Martin J
ORDER:	**Application dismissed**
CATCHWORDS:	CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – TERMINATION OR AVOIDANCE – where the applicant seeks an order pursuant to s 445D of the *Corporations Act* 2000 (Cth) to terminate a Deed of Company Arrangement – where the financial outcome of the DOCA was recommended by the administrators – where each party alleges that the other is supporting or opposing the application for an ulterior purpose – where s 445D of the Act suggests that it is the 'effect' of the deed which must be taken into account – where the administrators or liquidators may not be funded properly if the application were successful – whether the DOCA

should be terminated

Corporations Act 2001 (Cth), ss 435A, 445D, 447A and 600A

Cresvale Far East Ltd (in liq) v Cresvale Securities Ltd (2001) 37 ACSR 394, cited
Deputy Commissioner of Taxation v TMPL Pty Ltd [2011] FCA 1403, considered
Irving v Smith (2008) 68 ACSR 14, cited
In the matter of: ACN 103 753 484 Pty Ltd (in liq) formerly Blue Chip Development Corporation Pty Ltd [2011] QSC 64, cited
Kalon Pty Ltd v Sydney Land Corp (1998) ACSR 593, cited
Public Trustee (Qld) v Octaviar Ltd (2009) 73 ACSR 139, considered
Sydney Land Corp Pty Ltd v Kalon Pty Ltd (1977) 26 ACSR 427, considered
Vero Insurance Ltd v Kassem (2011) 86 ACSR 607, considered

COUNSEL: P A Hastie and J Payne for the applicant
P E Hackett for the second respondent
J W Peden for the third respondent

SOLICITORS: Synkronos Lawyers for the applicant
IDH Legal for the second respondent
McInnes Wilson Lawyers for third respondent

[1] The primary relief sought by the applicant ("Promoseven") is an order, pursuant to s 445D of the *Corporations Act* 2001 (Cth) ("the Act"), terminating a Deed of Company Arrangement ("DOCA") entered into on 17 June 2013.

[2] Other orders are sought in the alternative:

(a) That the resolutions passed at the meeting of creditors on 14 June 2013 resolving to enter into the DOCA be set aside – pursuant to s 600A of the Act.

(b) That the first respondent ("Prime") be taken to have passed a special resolution under s 491 of the Act that it be wound up voluntarily – pursuant to s 446B or S 447A of the Act and Reg 5.3A.07 of the *Corporation Regulations* 2001.

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

The Background

[3] In November 2005, Promoseven and Prime entered into a joint venture to carry out a property development in Cairns. Another company, Blue Chip Development Corporation (Cairns) Pty Ltd ("Blue Chip"), was used as a single venture company to develop the land.

[4] The development finished in May 2009 and, in the following year, Promoseven and Prime fell into dispute. In March 2011, Promoseven filed an application to wind up

Blue Chip in insolvency. That application was successful.[1] An order was made that Prime pay Promoseven's costs of that application and it is that costs order which makes Promoseven a creditor of Prime.

[5] In May 2013, administrators were appointed to Prime and the first meeting of creditors took place on 21 May. A Report to Creditors ("the Report") was issued by the administrators on 5 June 2013 and, in that report, the administrators noted that the only asset of the company (of any importance) was a debt to it in the amount of $8,879,360. That debt was, in fact, related to a shareholding owned by Prime in Refund Property Fees Pty Ltd ("Refund") and Bypass Project Systems Pty Ltd ("Bypass").

[6] This shareholding came to be held by Prime as a result of an agreement for the sale and transfer of a mortgage, debt and loan agreement made between Prime and Refund on 11 August 2011 and a further contract between Prime and Bypass on 30 October 2010. The consideration for the shares in Refund was the transfer by Prime of its interest in a second registered mortgage held by it (with Promoseven) over the development in Cairns.

[7] Refund's only significant asset is the interest it has in that second registered mortgage and it has a value attributed to it in its balance sheet of $9,391,327.

[8] Of relevance to this application are the following matters contained within the Report:

(a) No related party transactions capable of commercial recovery had been identified (Para. 9)

(b) No transactions involving creditors of the company that might constitute preferential payments capable of commercial recovery had been identified (Para 10.1)

(c) No "uncommercial transactions" (as defined in s 588FB of the Act) had been identified (Para 10.2).

(d) It was noted that if creditors resolved to wind up the company Mr Combis would continue his investigations into insolvent trading but that "it would likely be difficult for a Liquidator … to successfully prosecute any insolvent trading claim …" (Para 10.3)

[9] Paragraph 10.5 of the Report deals specifically with the transaction concerning the mortgage:

> "My 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. Full details of this transaction are noted at sections 4 and 5.9.1 of this report. It would be open for Refund to argue that the transaction was not unreasonable given Refund's granting of preference shares. The value of an unreasonable director-related transaction (if any) would be dependent upon the quantum of any distribution to be made by the liquidators of BDC Cairns.

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1 *In the matter of: ACN 103 753 484 Pty Ltd (in liq) formerly Blue Chip Development Corporation Pty Ltd* [2011] QSC 64

> A liquidator, if appointed at the second meeting of creditors may have the power to overturn the sale and transfer under the provisions of the Corporations Act 2001. Creditors should again refer to sections 4 and 5.9.1 of this report for details of the estimated value of [Prime's] interest in the second registered mortgage. It is noted that should a Liquidator be appointed, it is likely that significant funding from creditors would be required in order to pursue any unreasonable director-related transactions (if any)."

[10] The recommendation of the administrator was as follows:

> "It is my opinion that it would be in the creditors' best interests to accept the proposal for a DOCA
>
> The reasons for my recommendations are as follows:
>
> - the DOCA provides a certain dividend to creditors, which is anticipated to be higher than a dividend (if any) payable in a liquidation scenario;
> - a dividend under a liquidation scenario (if any) is uncertain and will likely require the expenditure of substantial legal expenses;
> - a dividend to unsecured creditors is likely to be declared within a three (3) month period of the acceptance of the DOCA by creditors and the execution of the DOCA by the relevant parties, whereas a dividend in a liquidation scenario (if any) would be dependent upon realisation of the company's shareholdings in private companies which would likely not be readily realisable;
> - substantial related entity creditors will stand aside for dividend purposes under the proposed DOCA increasing the dividend rate to other creditors."

[11] On 7 June 2013 Promoseven's solicitors wrote to the administrators and, among other things, said:

> "It appears from your report that Prime and its director, Mr Knell, are seeking to use the DOCA process to avoid scrutiny of the transfer of Prime's only substantial asset (an interest in a second registered mortgage) through an intricate loop of transactions which have seen the interest in the asset remain under Mr Knell or his wife's control, but purportedly outside of the reach of creditors of Prime, and with Prime receiving no tangible benefit.
>
> …
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> It is further submitted respectfully, the activities of Prime in transferring its only substantial asset warrant further scrutiny, more so when it is apparent that Prime has received no financial return in exchange for the transfer, and when Prime and Refund give such varied estimates as to the value of the asset when it suits them ($100,000 as compared to $9,391,237)."

[12] The administrators responded on 12 June and, among other things, said:

" … I confirm that I have conducted investigations into the following transactions:

1 The company's sale of its interest in the second mortgage to Refund … on 11 August 2010;
2 The sale of Refund preference shares to Bypass on 30 October 2010; and
3 The funding agreement entered into with Prime Group Australasia Pty Ltd on 21 March 2011.

I have investigated the benefit to creditors of the company being placed into liquidation and the above transactions being set aside or overturned on the basis that they may constitute voidable transactions as defined in Division 2, Part 5.7B of the Corporations Act.

I note that my investigations revealed the following:

- It appears that it would be difficult for a liquidator to establish the essential elements of the aforementioned provisions to have the transactions set aside (notwithstanding that the company may not have received sufficient commercial benefit as consideration for entering into the transactions);

- It is anticipated that any application to set aside the aforementioned transactions would be defended by the respective parties and a liquidator would require substantial funding from creditors to maintain any proceedings. In this respect, I note the substantial legal fees incurred by all parties involved in any of the associated litigation relating to the matters to date;

- There is significant risk of adverse costs being ordered against the company (and a liquidator) should the liquidators' recovery actions prove unsuccessful, and liquidators appointed would likely require an indemnity in respect of any such adverse cost orders;

- If it were possible for a liquidator to void each of the above three transactions, then this would result in the company regaining a beneficial interest in the second mortgage, the amount of which has been admitted by the Liquidators of BDC Cairns at $283,830. After accounting for the first registered mortgage and the substantial costs to be incurred, the net amount paid (if any) to the company, pursuant to the second registered mortgage, would need to be distributed in accordance with the priorities as set out in the Corporations Act, and would involve a distribution to all parties entitled to claim, including related creditors. It appears that such a distribution (if any) would likely be less than that offered under the proposed DOCA to non-related creditors."

The Corporations Act

[13] The parts of the Act upon which the applicant relies are as follows

[14] Section 445D provides

> "(1) The Court may make an order terminating a deed of company arrangement if satisfied that:
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> …
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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 deed 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
>
> (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."

[15] Under s 445D(1)(e) it is the "effect" of the deed rather than the purpose of the deed which is to be considered and taken into account. In the context of this section, the question is whether the effect of the deed is unfair or inequitable in the impact it has upon one or more of the creditors bound by it.[2]

[16] In considering the application of s 445D(1)(f) a court does not proceed "upon mere possibility or speculation, it makes a determination on the characteristics of the deed as they are seen to be at the date of the hearing".[3] Again, one looks to the effect of the deed as a whole and assess its unfairness, if any, to the applicant bearing in mind the scheme of Pt 5.3A and the interests of other creditors, the company and the public generally.[4]

[17] Section 600A provides:

> 600A Powers of Court where outcome of voting at creditors' meeting determined by related entity
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> (1) Subsection (2) applies where, on the application of a creditor of a company or Part 5.1 body, the Court is satisfied:
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> (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
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> (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

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2 *Cresvale Far East Ltd (in liq) v Cresvale Securities Ltd* (2001) 37 ACSR 394 at [188]; *Irving v Smith* (2008) 68 ACSR 14 at [53]

3 *Vero Insurance Ltd v Kassem* (2011) 86 ACSR 607 at [83], [144]

4 *Sydney Land Corp Pty Ltd v Kalon Pty Ltd* (1977) 26 ACSR 427, approved on appeal, *Kalon Pty Ltd v Sydney Land Corp* (1998) ACSR 593

(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.

[18] Section 446B provides that the Regulations may prescribe cases where a company that has executed a deed of company arrangement is taken to have passed a special resolution under section 491 that the company be wound up voluntarily.

[19] Regulation 5.3A.07 provides:

5.3A.07 Administrator becomes liquidator—additional cases

(1) For subsection 446B(1) of the Act, a company that has executed a deed of company arrangement is taken to have passed a special resolution under section 491 that the company be wound up voluntarily:

(a) if the Court at a particular time makes an order under section 445D of the Act terminating the deed of company arrangement; or

(b) if the deed of company arrangement specifies circumstances in which the deed is to terminate and the company is to be wound up—if those circumstances exist at a particular time.

(2) The company is taken to have passed the special resolution:

(a) at the time mentioned in paragraph (1)(a) or (b), as the case may be; and

(b) without a declaration having been made and lodged under section 494 of the Act.

(3) Section 497 of the Act is taken to have been complied with in relation to the winding up.

(5) The liquidator must:

(a) within 5 business days after the day on which the company is taken to have passed the resolution, lodge a written notice in the prescribed form stating that the company is taken because of this regulation to have passed such a resolution and specifying that day; and

(b) cause the notice to be lodged with ASIC in accordance with subregulation 5.6.75(4) within 15 business days after that day.

…

(6) Section 482 of the Act applies in relation to the winding up as if it were a winding up in insolvency or by the Court.

…

(7) An application under section 482 of the Act as applying because of subregulation (6) may be made:

(a) despite subsection 499(4) of the Act, by the company pursuant to a resolution of the board; or

(b) by the liquidator; or

(c) by a creditor; or

(d) by a contributory.

[20] Section 447A provides:

(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.

(3) An order may be made subject to conditions.

(4) An order may be made on the application of:

(a) the company; or

(b) a creditor of the company; or

(c) in the case of a company under administration—the administrator of the company; or

(d) in the case of a company that has executed a deed of company arrangement—the deed's administrator; or

(e) ASIC; or

(f) any other interested person.

[21] Section 459A provides that the Court may order that an insolvent company be wound up in insolvency.

The Applicant's Case

[22] The applicant rests its case on two allegations.

[23] First, that the vast majority of the creditors (including the major creditors apart from Promoseven and Comben Enterprises Pty Ltd) are related entities of Prime in that they either have similar directorships to Prime or are owned by Mr Knell or a company of which he is a director or shareholder. The applicant asks for the

inference to be drawn that the creditors who voted for the DOCA are either controlled by or friendly to Prime. If that inference is drawn it does not, of itself, require that anything be done. As PD McMurdo J observed: "… that does not mean that their views as creditors are to be disregarded. But it detracts from the arguments for the DOCAs that a majority of creditors has made a commercial decision as to what is in the interest of creditors as creditors."[5]

[24] Secondly, it is alleged that the DOCA will have the effect of precluding investigation into the transfer by Mr Knell of a chose in action valued at $9,000,000 to Refund. This transaction, it is said, has the effect of depriving Promoseven of its entitlement to be paid the costs it incurred in winding up Bluechip.

[25] The applicant, though, does not assert any inevitability to the unwinding of the transfer of the interest in the second mortgage. It argues that the transfer of the interest "might be voidable" and "there is a prospect" that if proper enquiries were conducted into the affairs of Prime the return to creditors would exceed that offered under the DOCA.

[26] The powers available to the Court under the provisions of the Act set out above may, the applicant says, "be appropriately exercised where the DOCA is merely a device used by a creditor and associated companies to avoid scrutiny of questionable transactions, and where the net result is to allow the company to walk away from a debt essentially paying nothing."

The financial evidence

[27] The financial outcome of the DOCA was, as I have noted, recommended by the administrators. In addition, there was further (unchallenged) expert evidence from Steven Ponsonby on this area. He was of the opinion that the DOCA would result in a dividend, albeit small, being paid whereas under a winding up the likely return to creditors would be nil.

[28] The return to creditors under the DOCA ranges from 4.3 cents to 7.4 cents in the dollar depending upon the administrator's final determination of the proof of debt by Bypass.

Consideration

[29] Both the applicant and the second respondent asserted that the other was bringing, or resisting, the application for ulterior purposes – the applicant was said to be acting in order to avoid the possible consequences of proceedings in the Federal Court and the second respondent was resisting in order to avoid the scrutiny of liquidators with respect to the transfer of the second registered mortgage.

[30] It is unnecessary to resolve those accusations because other matters dictate the result of this application. I turn, first, to the object of Pt 5.3A of the Act (Administration of a company's affairs with a view to executing a deed of company arrangement). It is set out in s 435A. It provides:

> "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:

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5 *Public Trustee (Qld) v Octaviar Ltd* (2009) 73 ACSR 139 at [177]

(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."

[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 with the object of Pt 5.3A.

[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.

[33] Another issue which arose concerned whether or not the administrators or liquidators would be funded properly if the course sought by the applicant was taken. The administrators assessed the funding they required for a liquidation to be of the order of $350,000. The applicant has not committed to such a process. While the amount seems high, there was no evidence which satisfactorily demonstrated that it was beyond that which might be required. The applicant would venture no further than to say it was "willing to … consider a process of investigation and funding and indemnities …".[6] A higher amount was also referred to but that included the indemnities, among other things, which the administrators would require if they were to conduct a liquidation. It was suggested that one solution to this issue would be to make an order of the kind made by Perram J in *Deputy Commissioner of Taxation v TMPL Pty Ltd*,[7] where his Honour effectively made an order that the company be wound up contingent upon a satisfactory funding arrangement being created. The factual basis for that case differed considerably from this, not least where there was a finding that the report to creditors was misleading.

[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.

[35] The application is dismissed.

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6 Transcript 1-21

7 [2011] FCA 1403