SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER:

IN THE MATTER OF PCA (QLD) PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT) ACN 141 148 245

Applicants	**Destination Brisbane Consortium Integrated Resort Operations Pty Ltd as trustee for The Destination Brisbane Consortium Integrated Resort Operating Trust and QWB Residential Precinct Operations Pty Ltd as trustee for the QWB Residential Precinct Operations Trust**
	AND
First Respondent:	**PCA (Qld) Pty Ltd (subject to Deed of Company Arrangement) ACN 141 148 245**
	AND
Second Respondents:	**Salvatore Algeri, Jason Tracy, David Orr and Matt Donnelly in their capacities as joint and several administrators of the Deed Companies**

OUTLINE OF SUBMISSIONS OF THE APPLICANTS

OVERVIEW

1. The applicants (**DBC**) seek orders under Part 5.3A of the *Corporations Act 2001* (Cth) (the **Act**) to amend provisions of (or the effect of) a deed of company arrangement dated 21 July 2022 (**DOCA)** in order to prevent extinction of causes of action against the first respondent (**PCA**), a company bound by the DOCA, and that DBC wishes to preserve to the extent of any insurance proceeds payable in respect of its claims.

2. The application is brough in circumstances of some urgency, and in which, on the material to be read on the application:

   (a) DBC was not notified by the Second Respondents (**Deed Administrators**) of the meeting of creditors that led to the formulation and execution of the DOCA some nine months ago – and so has not had an opportunity to ask for the deed to be drawn up in a manner that would preserve its claims;

   (b) The DOCA has now been partly performed, by payments to certain classes of creditor (viz. the so-called Pool A and Pool B creditors);

(c) The DOCA provides that DBC's claims will be deemed abandoned when the Deed Administrators make certain further payments (to the so-called Pool C creditors), that are expected to be made in coming months, by about **May 2023**;

(d) If DBC's claim against PCA were to be extinguished, DBC will not have access to the proceeds of certain insurance policies that it is thought exist and may respond to its claims, and that DBC would be entitled to if PCA had instead been wound-up (viz., pursuant to s 562 of the Act);

(e) The changes to the DOCA for which orders are now sought will preserve DBC's claims against PCA, only to the extent of any insurance proceeds payable in respect of those claims, and also will lead to DBC not being a creditor proving in the DOCA (via a proof of debt procedure), and not having access to the assets contributed to the DOCA and available to unsecured creditors;

(f) The effect of the orders now sought will, accordingly, be for the benefit of the other unsecured creditors of PCA, because:

(i) their claims upon the assets available under the DOCA will not be diluted by DBC's claims (which will stand outside the deed);

(ii) payments to the Pool C creditors will not be delayed by the adjudication of DBC's proofs of debt (which will never be lodged, the claims instead being enforced through proceedings in Court);

(iii) any insurance proceeds payable in respect of DBC's claims are assets that the other unsecured creditors of PCA would not be entitled to.

3. The orders sought, and the reasons for them, have been communicated to the Deed Administrators, who are the administrators of the DOCA. The material shows that their attitude to the application is that it is 'premature, unlikely to succeed and an ineffective approach'[1]. It remains unclear whether the Deed Administrators actually oppose the orders now sought – or whether their view is simply that the orders are unnecessary because the DOCA does not impair DBC's right to prosecute its insured claims.

4. DBC also seek orders giving them leave to proceed against PCA, in respect of the claims that it wishes to be removed from the preclusive clauses of the DOCA, in circumstances where the Deed Administrators have so far declined to provide their consent to do so.

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[1] Affidavit of David John Rodighiero sworn 30 March 2023 (**Rodighiero**), ex DJR1, pp134-136 (Letter from King & Wood Mallesons to Carter Newell, dated 24 March 2023)

5. These submissions are organised in the following way:

(a) **first**, the relevant facts are set out, which are drawn from the affidavit of Mr Rodighiero sworn on 30 March 2023. Mr Rodighiero is the solicitor for DBC;

(b) **second,** the relevant legal principles are identified;

(c) **third**, the application of those principles to the facts is addressed, including by dealing with the five different 'pathways' articulated in paragraphs 1 to 5 of the application. These reflect the five different approaches supported by the authorities, in fact-patterns having some similarity to the present (no case on all fours with the present application has been located); and

(d) **fourth,** the submissions address the application for leave to proceed with respect to the underlying claim against PCA.

THE FACTUAL BACKGROUND

DBC's claims against PCA

6. DBC is constructing an integrated resort development at Queens Wharf, Brisbane on the Brisbane River, adjacent to the Riverside Expressway (**REX**). It engaged Multiplex Constructions Qld Pty Ltd (**Multiplex**) as the principal contractor. DBC also engaged PCA to undertake certain demolition, excavation and construction works for the project[2].

7. The contract between DBC and PCA involved a range of construction activities near the REX, including piling works. The contract required PCA to ensure that the piers of the REX, which carries significant road traffic, did not move at all, and also that it did not move more than 25mm in a lateral direction from a predetermined baseline. A monitoring regime was subsequently implemented to detect movement in the piers, again pursuant to certain terms in the contract between DBC and PCA. The evidence suggests that in April 2020, the monitoring regime detected movement in the piers and various alerts were triggered[3]. The evidence is that two of the REX piers moved approximately 30mm in 2020[4].

8. Soon after the alerts, DBC issued demands against PCA. Correspondence ensued during October 2020 in which PCA denied that the movement was its fault, asserted that any repairs would be minimal, and that it was unable to attend to repair work because it had demobilised from the site[5].

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2 Rodighiero, paragraph 4(a)-(f)
3 Rodighiero, paragraph 4(g)-(l)
4 Rodighiero, paragraph 4(l)
5 Rodighiero, paragraph 7, ex DJR1, pp1-3, 4-7, 8-10

9. Also, on 4 and 8 September 2020, Multiplex lodged a notice of possible prolongation due the alleged delay due to the issues affecting the REX (although at that point, it asserted that no increased cost and delay had occurred)[6].

10. More recently, in 2022, Multiplex asserted claims against DBC for prolongation said to flow from the alleged movement of the REX piers[7].

11. On 20 March 2023, DBC issued a notice of dispute[8] and a letter of demand to PCA[9] in respect of costs and expenses of rectifying the piers, both incurred to date and forecast. The notices and letters also asserted claims in relation to any liability of DBC to Multiplex caused by the alleged wrongful conduct of PCA.

12. The material to be read on the application demonstrates that PCA has the benefit of insurance policies which are likely to respond to DBC's claims against PCA[10] including under the Principal Controlled General Liability Policy, and that DBC's insurance broker has been notified of PCA's claims[11].

The DOCA and its discovery by DBC

13. On 23 February 2022, the Deed Administrators were appointed as administrators of the Probuild group of companies including PCA. DBC became aware of this, and DBC's solicitors corresponded with the administrators by notifying them of DBC's claims against PCA:

    (a) On 24 February 2022, by giving notice, amongst other things, that recourse would be sought to securities provided by PCA[12]; and

    (b) on 23 March 2022, by responding to a letter from the Deed Administrators dated 21 March 2022 referring to previous correspondence about the underlying dispute and setting out the basis upon which DBC was entitled to call upon the security[13].

14. It is not in dispute that despite this correspondence, the Deed Administrators did not inform DBC of the second meeting of creditors of PCA that occurred on 30 June 2022 or of the proposal to execute a deed of company arrangement.

15. The evidence is that DBC[14] (and its solicitors, Carter Newell[15]) were unaware of the meeting, and that had they known of the proposal for a DOCA, DBC would

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6 Rodighiero, paragraph 5
7 Rodighiero, paragraphs 6, 8(d)
8 Rodighiero, paragraph 9(a), ex DJR1, pp11-15
9 Rodighiero, paragraph 9(b), ex DJR1, pp16-35
10 Rodighiero, paragraphs 10-12
11 Rodighiero, paragraph 12
12 Rodighiero, paragraph 20, ex DJR1, pp114-115
13 Rodighiero, paragraphs 21-22, ex DJR1, pp 116-117 and pp118-124
14 Rodighiero, paragraphs 17-18
15 Rodighiero, paragraph 14

have taken the opportunity to ask for the deed to be drawn up in a manner that preserved its insured claims[16].

16. Unbeknown to DBC, on 30 June 2022, the creditors of the Probuild Group (but not DBC) resolved that the companies would execute a deed of company arrangement as propounded by WBHO Construction (Pty) Ltd, a company incorporated under the laws of South Africa[17].

17. Also unbeknown to DBC, the DOCA was executed on 21 July 2022[18]. The relevant terms of the DOCA are:

    (a) WBHO would contribute $9,080,000 to the 'Deed Fund' for distribution to creditors (clause 7.1 and definition of 'Initial Contribution Amount' in clause 1.1);

    (b) distributions under the DOCA are to be staged with pool A (employees) (funded by $6,000,000 of the Initial Contribution Amount) and pool B (small creditors with debts of less than $25,000, funded by $2,500,000 of the Initial Contribution Amount)[19] being paid in or around September 2022 and pool C (remaining creditors) to be paid afterwards (after administration expenses) (and the Deed Administrators advised earlier in March of this year, that it was anticipated that they will be paid in 'the next 1 to 2 months' i.e. March to May 2023[20]);

    (c) clause 1.5 provides:

        Bar to claims

        Subject to section 444D of the Corporations Act, this Deed may be pleaded and tendered by:

        (a) the Deed Companies or the Deed Administrators against any person having or asserting a Claim released, discharged and extinguished by clause 15.3; and

        (b) the recipient of any release or covenant contained in this Deed,

        as an absolute bar and defence to any legal proceeding brought or made at any time in respect of a claim, release or covenant as the case may be.

    (d) clause 8.5 provides:

        Insured Claims

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16 Rodighiero, paragraphs 18-19
17 Rodighiero, paragraph 13, ex DJR1, pp36-113
18 Rodighiero, paragraph 13
19 See definitions in clause 1.1, clause 7 and clause 8 of the DOCA
20 Rodighiero, paragraphs 16, 25, ex DJR1, pp127-129 (Email from KWM dated 21 March 2023)

Subject to the terms of this Deed, section 562 of the Corporations Act is to be incorporated into this Deed as if references to a liquidator were references to the Deed Administrators and with any other amendments as necessary in the context of this Deed.

(e) clause 14.11 provides:

Abandonment of Claim

A Creditor will be deemed to have abandoned its Claim if, before the payment of a final dividend from the relevant Pool, the Creditor:

(a) fails to submit a formal proof of debt or claim in respect of its Claim; or

(b) having submitted a formal proof of debt or claim in respect of its Claim which is rejected, that Creditor fails to appeal to the Court against the rejection, within the time allowed for such an appeal under the Regulations as if the proof were rejected in the liquidation of the Deed Companies.

(f) clause 15.3 provides:

Release and discharge of Claims

(a) Creditors must accept their entitlements under the Deed Fund (if any) in full satisfaction and complete release and discharge of all Claims which they have, or claim to have, against the Deed Companies on or before the Appointment Date.

(b) Notwithstanding any other provision of this Deed except for clause 15.2, this Deed does not affect any rights of recourse Creditors may have in respect of bank guarantees, insurance bonds, other sureties and insurers.

(c) Each Creditor must, if required by the Deed Companies or the Deed Administrators, execute any document that the Deed Companies or a Deed Administrator may require from time to time to give effect to the releases in clause 15.3(d).

(d) Immediately upon and with effect from the Final Distribution Date, the Claims of all Creditors will be fully released and extinguished.

(g) clause 15.5 provides:

Bar to Creditors' Claims

Subject to section 444D of the Corporations Act, this Deed may be pleaded by the Deed Companies or the Deed Administrators against any Creditor as an absolute bar and defence to any Claim to the extent that the Deed Companies' liability has been released and discharged in relation to that Claim pursuant to clause 15.3.

18. The evidence is that DBC discovered the existence of the DOCA by accident. On **8 March 2023**, in the course of considering DBC's claims against PCA, a solicitor employed by Carter Newell obtained an ASIC company search which showed that PCA was subject to a deed of company arrangement. The solicitor obtained a copy of the DOCA from ASIC and discussed it with Mr Rodighiero on 9 March

2023[21]. Later that day, after reviewing the DOCA, Mr Rodighiero contacted DBC's inhouse counsel to discuss the DOCA and the effect of it on DBC's claims[22].

19. On **17 March 2023**, DBC wrote to the Deed Administrators in relation to DBC's claims against PCA and the effect of the DOCA on those claims[23].

20. On **21 March 2023**, the Deed Administrators responded to the 17 March letter to the effect that they considered DBC's potential claims to be 'adequately preserved' and that 'any application to Court [was] unnecessary'[24].

21. On **22 March 2023**, DBC wrote to the Deed Administrators expressing disagreement with the Deed Administrators' view, further outlined the basis for DBC's concerns about the effect of the DOCA, attached a draft of the Originating Application, and explained the basis for each of the orders set out in the draft application. DBC invited the Deed Administrators to consent to the DOCA being amended in the form of annexure A to the application[25].

22. On **24 March 2023**, the Deed Administrators' solicitors responded to reiterate their previous position that in their view, the DOCA by clauses 8.5 and 15.3(b) adequately protects DBC's claims, and that the OA was 'premature, unlikely to succeed and an ineffective approach'[26].

Performance of the DOCA

23. The material to be read reveals that the DOCA has been partly performed and is indeed near to being fully performed[27]:

    (a) the Administrators have paid the 'Pool A' creditors from the Pool A Fund (which was $6,000,000) (see clause 8.1);

    (b) the Administrators have paid the 'Pool B' creditors from the Pool B Fund (which was $2,500,000) (see clause 8.2);

    (c) the Administrators anticipate calling for proofs of debt (clause 14.2) for the 'Pool C' creditors from the Pool C Fund (see clause 8.3) 'shortly' and that they expect to distribute the Pool C dividend, which is the final dividend, 'within 1 to 2 months', that is, by approximately **May 2023**[28].

24. It is submitted that the proposed amendments will benefit Pool C creditors, for DBC's claims will be limited to the amounts recovered from the relevant insurers

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21 Rodighiero, paragraph 13
22 Rodighiero, paragraph 14
23 Rodighiero, paragraphs 23-24, ex DJR1, pp125-126
24 Rodighiero, paragraph 25, ex DJR1, pp127-129
25 Rodighiero, paragraph 26, ex DJR1, pp130-133
26 Rodighiero, paragraph 27, ex DJR1, pp134-136
27 Rodighiero, paragraphs 16 and 25, ex DJR1, pp 127-129
28 Rodighiero, paragraph 16

and will not diminish the funds otherwise available to distribute to those creditors. As well, the other creditors benefit because the course proposed by DBC will avoid the delay and expense likely to be incurred by the adjudication of proofs of debt in relation to its claims against PCA.

DOCA extinguishes DBC's claims and prevents recourse to insurance

25. It is submitted that:

    (a) the DOCA abandons, releases and extinguishes all claims of all creditors of PCA (and other Deed Companies) which include DBC: clauses 14.11, 15.3 and 15.15;

    (b) clause 15.3(b) is not effective to preserve any creditor's underlying claims against PCA (or the other Deed Companies) because:

        (i) it merely confirms that the DOCA does not affect any rights of recourse to insurers;

        (ii) if DBC's claims are abandoned, released or extinguished in accordance with the DOCA as drafted, PCA will have no right to be indemnified from any insurance policy, because it will incur no loss for which indemnity could be sought, and DBC will accordingly have no right of recourse against any insurers;

    (c) the incorporation of s 562 of the Act into the DOCA (by clause 8.5) does not change the outcome set out above. That section operates to preserve a creditor's rights to recourse to insurance proceeds, but if DBC's claims are extinguished, no insurance proceeds will ever come into being, because PCA will never suffer an insured loss.

26. The result is that the DOCA deprives DBC of not only their claims against PCA, but also the beneficial operation of s 562 which would have obtained had PCA (and the Deed Companies) been placed into liquidation rather than become subject to the DOCA. In this way, the pool of funds available to creditors, including DBC, is diminished, potentially by many millions of dollars, by reason of the DOCA. It is submitted that this amounts to a real and practical prejudice to unsecured creditors, brought about by the DOCA, when compared to the rights that creditors would enjoy in a liquidation scenario.

Purpose and effect of the orders now sought

27. The purpose of the orders that DBC seeks on this application is to amend the DOCA (paragraphs 1 to 4) or the operation of Part 5.3A of the Act (paragraph 5), to bring about the following consequences:

    (a) to preserve, and prevent the extinction of, DBC's claims against PCA, but only to a limited extent;

(b) the claims are to be preserved only to the extent that DBC can obtain satisfaction from the proceeds of insurance available to PCA and that provides indemnity for DBC's claims;

(c) the claims of DBC against PCA (and against other Deed Creditors) are otherwise extinguished by operation of the DOCA;

(d) DBC is therefore unable to obtain satisfaction in respect of a liability of PCA established through judgment, admission, or compromise, from:

(i) the assets made available to creditors pursuant to the DOCA;

(ii) the assets of PCA following the performance of the DOCA (and when PCA can be assumed to continue trading);

(e) DBC will not lodge proofs of debt (pursuant to the arrangements established by the DOCA) in respect of its claims against PCA, and the Deed Administrators will not adjudicate those claims, and such claims as would have been admitted to proof will not dilute the assets made available to creditors of the Pool C Fund (who will not have to effectively share those assets with DBC).

28. **Consistency with Part 5.3A**. The object of Part 5.3A 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[29]. This is also stated to be an object of the DOCA itself, in clause 3.1(a)(i) ("The purpose and object of the arrangements set out in the Deed…are to provide: (i) a better return than liquidation for all Creditors").

29. However, by removing access to the contingently available assets of PCA constituted by its rights of indemnity against insurers, the DOCA does **not** result in a better return for PCA's creditors, than an immediate winding up.

30. Instead, the DOCA brings about a **materially worse** outcome because an asset that would have been available to some creditors in a liquidation – viz. proceeds of insurance available to PCA (via s 562 of the Act) - is effectively taken away from creditors.

31. If the Court accepts DBC's submission that it has a potential claim against PCA, and that insurance policies exist that may provide indemnity for all or part of those claims, the orders now sought can, it is submitted, properly be seen to give effect

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[29] Section 435A of the Act

to the object of Part 5.3A, by reversing an outcome whereby the DOCA will cause creditors to be in a materially worse position.

32. The foregoing is relevant because the authorities, which will be discussed shortly, indicate that when a Court is asked to exercise the wide discretion conferred by section 447A of the Act, whether the orders sought give effect to the objects of Part 5.3A, is a relevant consideration. For the reasons set out above, the Court will be invited to find that the orders sought will indeed have that effect.

33. **Effect on other creditors**. It is submitted that the orders now sought will not affect the creditors of the Pool A Fund (the Deed Administrators, employees, and certain ATO debts[30]), or the Pool B Fund (small creditors[31]), which funds have been fully distributed[32]. It is submitted that the orders sought will not affect the operation of the DOCA in respect of these creditors.

34. As to creditors of the Pool C Fund and Pool D Fund,[33] it is submitted that the DOCA will not prejudice those creditors, but will, instead, be for their benefit by taking one creditor, DBC, outside of the DOCA. This is for the benefit of those creditors because it will:

    (a) remove the cost and delay associated with the adjudication of DBC's fact-intensive claims;[34] and

    (b) remove the risk of dilution of the Pool C Fund by those of DBC's claims that would have been admitted to proof.

PRINCIPLES

35. **Standing.** An application for an order under s 447A can be made, relevantly, by a 'creditor of the company' or by 'any other interested person'. It is submitted that the material demonstrates that DBC is a creditor of PCA (and is also an "interested person")[35].

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30 See clause 8.1 of the DOCA.

31 See clause 8.2 of the DOCA.

32 Rodighiero, paragraphs 16 and 25, ex DJR1, pp127-129; See *Selim v McGrath* (2003) 177 FLR 85; [2003] NSWSC 927 per Barrett J at [66], [68] as to the meaning of creditor, and *Allatech Pty Ltd v Construction Management Group Pty Ltd* (2002) 167 FLR 324; (2002) 41 ACSR 587; [2002] NSWSC 293 at [18]-[20] per Austin J as to the meaning of 'any other interested person'

33 See clause 8.3 of the DOCA.

34 The proof of debt process under the DOCA is contained in clause 12.1(b)(iii), 14.1, 14.2, 14.3 and 14.4. Clause 14.3(b) refers to "appeal rights under the Corporations Act", which directs attention to Regulation 5.6.54(2) of the Act, whereby a creditor dissatisfied with rejection of the proof of debt following adjudication by the liquidator/administrator, may appeal to the Court.

35 Rodighiero, paragraphs 7-9

36. **Limits of s 447A.** The authorities establish that the wide power conferred by s447A[36] ought be exercised to achieve the objects of Part 5.3A, or to make orders that can be seen to be consistent with those objects, and not otherwise: *BE Australia WD Pty Ltd (subject to a deed of company arrangement) v Sutton* (2011) 82 NSWLR 336; 285 ALR 532; 86 ACSR 507; [2011] NSWCA 414 at [194], [207] per Campbell JA (with whom McColl JA agreed); *Keneally as administrator of Australian Blue Mountain International Cultural & Tourist Group Pty Ltd (admin apptd)* (2015) 107 ACSR 172; [2015] NSWSC 937 at [115] per Black J. Black J observed in *In the matter of Maria's Farm Veggies Pty Ltd (admins appt)* [2016] NSWSC 1899 at [21] as follows:

> The overriding requirement for an order under that section Is that any order made and any directions given must be designed to achieve the objective of Part 5.3A as expressed in s 435A of the Corporations Act, and as Mr Cook pointed out, must have a nexus with how Part 5.3A is to operate in relation to the particular company: *Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd* [2004] FCA 130; (2004) 49 ACSR 1 at 15; *Correa v Whittingham* [2013] NSWCA 263; (2013) 278 FLR 310 at [4].

37. **Varying a deed via s 447A.** The authorities establish that s 447A can be used to vary a deed of company arrangement by order of the Court, notwithstanding that the Act also permits this to occur by resolution of the company's creditors (by s445A): *Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (subject to Deed of Company Arrangement) (No 2)* [2018] FCA 1003 at [11] per Besanko J[37].

38. In *Adelaide Brighton Cement Limited*, Besanko J said[38]:

> The Court's power to vary a deed of company arrangement pursuant to s 447A(1) is well-established. The power conferred by s 447A(1) is not subject to the limitations found in other sections within Part 5.3A of the Act. Relevantly, s 447A(1) of the Act grants the Court power to alter the operation of s 445A (or any other section in Part 5.3A), thereby empowering the Court itself to vary a deed of company arrangement…[39]

39. The authorities establish that in considering whether to order an amendment, the Court will carefully consider the effect on creditors and also the practical

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36 Section 447A confers a wide discretionary power on the Court: *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 280-281

37 Cited with approval by Vaughan J in *Re CCS Equipment Pty Ltd (Subject to a Deed of Company Arrangement); ex parte Shaw* [2019] WASC 431 at [19]

38 [2018] FCA 1003 at [12]

39 Citing: *Milankov Nominees Pty Ltd v Roycol Ltd* [1994] FCA 1276; (1994) 52 FCR 378 at 383 per Lee J; *Mulvaney v Rob Wintulich Pty Ltd* (1995) 13 ACLC 1649; (1995) 60 FCR 81 at 83 per Branson J; *Re Paradox Digital Pty Ltd (subject to Deed of Company Arrangement); Ex parte Smith (in his capacity as Deed Administrator)* [2001] WASC 182 at [13]–[15] per Owen J; *Re Ansett Australia Ltd (all admins apptd); Korda (as admins) v Ansett Australia Ground Staff Superannuation Plan Pty Ltd (as trustee)* [2002] VSC 114; (2002) 41 ACSR 598 at 602 and 604 per Warren J; *Pasminco Ltd (Subject to Deed of Company Arrangement) (No 2)* [2004] FCA 656; (2004) 49 ACSR 470, at 481 per Finkelstein J

commercial consequences of what would happen if the variation of the deed was not approved: *Ansett Australia Ground Staff Superannuation Plan Pty Ltd (as trustee) v Ansett Australia Ltd (subject to a deed of company arrangement)* (2004) 49 ACSR 1 at [59] per Goldberg J; see also *Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (subject to Deed of Company Arrangement) (No 2)* [2018] FCA 1003 at [13] per Besanko J; *Re Derwent Howard Media Pty Ltd* [2011] NSWSC 1164 at [12] per Barrett J.

40. Two examples have been found where s 447A was employed to alter a deed of company arrangement in order to prevent debts being released:

    (a) In the first decision, *Winterton Constructions*, this was done so that the set-off provisions that should have applied (s 553C of the Act), would operate. In that case, the creditor was not notified of the meeting of creditors.

    (b) In the second decision, *Brandrill*, changes were made to a deed of company arrangement so that the company's creditor could be sure of having access to insurance proceeds. The creditor in *Brandrill* had been notified of the meeting, but there was a concern that the deed as executed, did not preserve claims to insurance proceeds, in the manner that had been intended.

41. The two decisions will be considered in turn.

42. In *Winterton Constructions Pty Ltd v MA Coleman Joinery Co Pty Ltd* (1996) 20 ACSR 671 at 676, the company and administrator were aware that the plaintiff may have been a creditor, but the plaintiff was not notified of the meetings of creditors and was not given the opportunity to vote on the deed of company arrangement. Had the plaintiff's claim been considered, the mutual set-off provisions would have applied to the claim. As it was, the deed arguably had the effect that the company was entitled to bring proceedings against the plaintiff for the company's claim against it, but the plaintiff was not permitted to raise its own claim against the company as a set-off.

43. It was held to be appropriate for the Court to make an order to 'neutralise the 'unconscionable position' that had arisen (at 677). The Court ordered a variation of the deed under s 445G(4), with the consent of the administrator.

44. Young J also said, *obiter,* that the options available to the Court to ameliorate the effects of the deed included terminating the deed under s 445D on the basis that effect could not be given to it without injustice (see s 445D(1)(e)), declaring the deed void in whole or part under s 445G, or making an order under s 447A that the effect of the deed would be otherwise than it would if no order were made (at 676).

45. In *Brandrill v Newmont Yandal* [2006] NSWSC 74, Austin J considered an application to amend a deed of company arrangement to reflect what the parties were '*led to expect would be the position obtaining under the Deeds, when the issue was raised at the second creditors meeting'* (at [52]).

46. Brandrill was a claimant in proceedings against the companies who were the subject of the deed and also against their insurers. Provisions in the deed had the effect of extinguishing Brandrill's claim and, despite the (ineffective) attempt to incorporate the provisions of s 562 and s 562A of the Act into the deed, the parties were concerned that the extinction of Brandrill's claim meant that no claim could be made against the insurers.

47. The issue had been discussed at the meeting of creditors and the administrators had expressed the view that no creditor would be worse off by the execution of the deed in lieu of liquidation. Austin J considered it appropriate (at [59]) for the court to exercise its power with a view to giving effect to the intention that the relevant parties had when the proposed deed was considered by creditors and that they continued to have thereafter.

48. Austin J considered a court-ordered rectification of the deed was appropriate, rather than the administrators seeking its variation under s 445A, because the deed could be read as if it had always been in the rectified form, and because complex technical issues had arisen that were better dealt with by the court than in a general meeting of creditors (at [60]).

49. The submissions will next summarise the reasons why, in the circumstances set out above, and having regard to the authorities just discussed, the Court should make the orders now sought by DBC.

ORDERS AMENDING THE DOCA SHOULD BE MADE

50. It is submitted that the DOCA should be amended in the manner now sought, because the amendments:

    (a) are consistent with the position that DBC would have adopted if the Deed Administrators had given it notice of the meeting of creditors, and which DBC had been unable to advance, because it was not notified of the meetings of creditors (paragraph 15 above);

    (b) bring about the outcome that the administrators seem to have thought would obtain under the DOCA as drafted, in which creditor's insured claims are preserved (paragraph 20 above);

    (c) are consistent with the objects of Part 5.3A of the Act in that they reverse the present unsatisfactory position, whereby creditors are materially worse off under the DOCA than they would have been under a liquidation because the assets represented by insurance proceeds are not available,

which is contrary to the objects of Part 5.3A (see paragraphs 28 to 32 above).

(d) do not affect the creditors of Pool A or Pool B, and are beneficial to the creditors of Pool C, in the respects set out in paragraphs 33 to 34 above;

(e) are 'uncontentious' as understood in the authorities such as *Derwent Howard Media Pty Ltd* [2011] NSWSC 1164 at [12] per Barrett J, in the sense that no prejudice to creditors is involved, and no accrued rights of creditors will be affected: *Brandrill v Newmont Yandal* [2006] NSWSC 74 at [53] per Austin J.

51. Further, it is submitted that there is insufficient justification for calling another meeting of creditors, notifying the proposed changes, and seeking a resolution from the creditors, because:

(a) the DOCA has been on foot for some nine months, and is almost completely performed;

(b) a root cause of the present situation is the Deed Administrator's non-compliance with the statutory notice provisions;

(c) returning the matter to the creditors will cause delay and expense that can be avoided by the matter being dealt with by the Court now;

(d) the present application concerns one among a large number of Deed Companies (listed at Schedule 1 of the DOCA);

(e) the interests of the unsecured creditors are adequately represented by the Deed Administrators, who have been served with drafts of the application, as well as the filed application and supporting material;

(f) the reasons for making the amendments are compelling, and the material discloses that creditors will not be prejudiced, and will, instead, benefit from the proposed changes to the DOCA; and

(g) the questions are of some technical complexity, and which Austin J has held was a reason for the Court addressing the matter by its own orders rather than requiring the matter to be placed before the creditors (paragraph 48 above).

The relevant pathways

52. The OA provides the Court with alternative pathways to achieve an amendment of the DOCA. These are addressed next.

53. **Paragraph 1** seeks orders that would allow the Court to amend the DOCA by its own orders instead of that being done by resolution of creditors pursuant to s 445A, or by means of the two-step process contemplated by s 445G: see *Re Alita*

Resources Ltd; Ex Parte Tucker as joint and several administrator of Alita Resources Ltd (Subject to a Deed of Company Arrangement) [2020] WASC 430 per Sanderson M and *Derwent Howard Media Pty Ltd* [2011] NSWSC 1164 at [12] per Barrett J;

54. This is the simplest form of order, if the Court is otherwise satisfied that relief ought to be granted.

55. **Paragraph 2**, as an alternative to paragraph 1, seeks an order varying the terms of the DOCA in terms of Annexure A by an order under s 447A: see *Brandrill v Newmont Yandal* [2006] NSWSC 74 at [40], [41] and [49] per Austin J.

56. This order is appropriate if the Court is satisfied that the Deed Administrators' intention was to preserve the s 562 rights for DBC's claims and that it is otherwise appropriate to grant relief, for this form of order matches the orders made in *Brandrill*, where the key consideration was that the DOCA had failed to give effect to the intention of those who created it.

57. **Paragraph 3** seeks orders under s 445G. That provision is engaged if two conditions are met. First, the Court must be satisfied that there is doubt about whether the DOCA was entered into in accordance with or complies with Pt 5.3A; and second, the Deed Administrators must consent to the changes made to the DOCA (under s 445G(4)): see *Winterton Constructions Pty Ltd v MA Coleman Joinery Co Pty Ltd* (1996) 20 ACSR 671 at 676.

58. The evidence to be read establishes that neither DBC nor their solicitors received notification of the second meeting of creditors at which it was proposed to consider the entry into of a deed of company arrangement, and that this was contrary to s 439A(1) of the Act and 75-225 of the *Insolvency Practice Rules (Corporations) 2016*[40]. The specific grounds giving rise to the doubt about whether the DOCA was entered into in accordance with or complies with Part 5.3A are otherwise set out in the OA (defined as the 'section 445G grounds'), to which the Court is respectfully referred.

59. The evidence is that had DBC known of the meeting, it would have attended and raised the 'problem' with the DOCA in its present form, and taken steps to ensure that the deed was drafted in a form that preserved DBC's right to prosecute its insured claims.[41]

60. If the foregoing submission is accepted, the Court should find that there exists a doubt, on a specific ground, about whether the DOCA was entered into in accordance with Part 5.3A of the Act or complies with Part 5.3A, and that the

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40 Rodighiero, paragraphs 14, 17
41 Rodighiero, paragraphs 18-19

Court therefore has power[42] to declare the DOCA or provisions of it to be void: see s445G(1)-(3)[43].

61. The power of the Court under s 445G is discretionary and is to be exercised having regard to both the interests of creditors and the public interest: *Emanuele v Australian Securities Commission* (1995) 63 FCR 54 at 69 per Spender, von Doussa and Hill JJ.

62. It is submitted that the order in paragraph 3 should be made if the Deed Administrators consent to the terms of Annexure A to the Application, and the Court is otherwise satisfied that the order should be made.

63. **Paragraph 4** of the OA, as an alternative to paragraph 1 to 3, seeks orders declaring certain provisions of the DOCA to be void and an order varying the terms of the DOCA (under s 445G(4) of the Act) in the terms set out in Annexure A to the OA, even if the Deed Administrators do not consent. This outcome is achieved by using s 447A to alter the operation of s 445G(4) in relation to this particular DOCA.

64. **Paragraph 5** of the OA seeks orders under s 447A of the Act to alter the ordinary effect of sections 444D(1) and 444H of the Act in relation to PCA and the DOCA..

65. The orders sought in paragraph 5 are supported by the wide and plenary power conferred by s 447A: *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 280-281 per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ.

66. This form of order is the only one proposed that does not involve an amendment to the DOCA itself. The disadvantage of an order in this form is that a third party, such as an insurer, looking at the terms of the DOCA would not be aware of the changes to its effect brought about by the orders. This disadvantage may be ameliorated by the order sought in paragraph 6 (see below) requiring the Deed Administrators to give notice of the making of orders. It is submitted that this is the least attractive form of order. It has been included in the application in the event that the Court were to form a view that it cannot or ought not amend the terms of the DOCA itself.

67. Finally, **paragraph 6** of the OA provides for notice to be given to creditors of the orders made and changes to the DOCA, which is consistent with the requirement to provide notice on execution of a deed of company arrangement under s 450B

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42 Section 445G operates in a narrow field and only where there is a specific ground identified which gives rise to doubt as to whether the deed is entered into in accordance with or complies with Pt 5.3A: see, for example, *Mulvaney v Rob Wintulich Pty Ltd* (1995) 60 FCR 81 at 82 per Branson J.

43 See also *Winterton Constructions Pty Ltd v MA Coleman Joinery Co Pty Ltd* (1996) 20 ACSR 671 at 676; cf *Khoury v Zambena Pty Ltd* (1997) 23 ACSR 344; *Byers v Downie* [2001] QSC 437; *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd* (1996) 63 FCR 391.

of the Act. This order was considered appropriate by Austin J in *Brandrill v Newmont Yandal* [2006] NSWSC 74 at [42].

LEAVE TO PROCEED SHOULD BE GRANTED – PARAGRAPH 7 OF THE APPLICATION

68. Under s 440D(1) of the Act, a proceeding cannot be begun or proceeded with against a company in administration except with the administrator's written consent or with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

69. In the absence of the Deed Administrators' consent (which has been sought, but not provided), DBC seeks the Court's leave to commence a proceeding against PCA. It is submitted that leave to proceed under s 440D of the Act ought to be granted for the following *five* reasons.

70. *First*, the claim has a solid foundation and gives rise to a serious dispute, as detailed in the notice of dispute and the letter of demand, and in the affidavit of Mr Rodighiero; *Kavourkis v Waverley Bowling & Recreation Club Ltd* [2010] NSWSC 439 at [5] per Barrett J; *J F Keir Pty Ltd v Priority Management Systems Pty Ltd* [2007] NSWSC 748 at [8] per Rein AJ. Steps are now being taken to prepare a draft claim and statement of claim, which will be placed before the Court when the order is sought.

71. *Secondly*, PCA is likely to be insured against the liabilities which are the subject of the proceedings: *Foxcroft v Ink Group Pty Ltd* (1994) 15 ACSR 203 at 205 per Young J; *J F Keir Pty Ltd* at [8].[44]

72. *Thirdly*, the Deed Administrators will not be unreasonably distracted from their duties under the DOCA or incur substantial legal costs, as it can be inferred that the insurers will conduct the defence of claims: *Foxcroft v Ink Group Pty Ltd* (1994) 15 ACSR 203 at 204 per Young J; *J F Keir Pty Ltd* at [8].

73. *Fourthly*, DBC would suffer significant disadvantage if leave was not granted, as it would be unable to progress its claims against PCA, and which on the evidence before the Court, exceed $20million: *J & B Records v Brashs Pty Ltd* (1994) 13 ACSR 680 at 683 per Brownie J; *J F Keir Pty Ltd* at [8].

74. *Fifthly*, on the making of the changes to the DOCA, there is good reason to depart from the general intention of Part 5.3A that a creditor ought not be able to take action against a company in administration: *Foxcroft v Ink Group Pty Ltd* (1994) 15 ACSR 203 at 204 per Young J; *J F Keir Pty Ltd* at [8].

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31 March 2023

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44 See also, Rodighiero, paragraph 27, ex DJR1, pp134-136