SUPREME COURT OF QUEENSLAND

Registry: Brisbane
No 4023 of 2023

IN THE MATTER OF **PCA (QLD) PTY LTD (SUBJECT TO 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**
Respondents	**PCA (QLD) PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) AND OTHERS**

RESPONDENTS' WRITTEN SUBMISSIONS

A. Introduction

1. By their interlocutory application filed 7 June 2023, the respondents seek orders varying the deed of company arrangement entered into by the first and second respondents and the proposed third to eighteenth respondents on 21 July 2022 (**DOCA**). The respondents' proposed DOCA variations are intended to achieve two key objectives.

2. The ***first*** is to ensure that all causes of action by creditors against the companies to the deed to which an insurance policy responds (**insured claims**) are preserved.

3. The ***second*** is to minimise prejudice to the creditors as a whole, which will be reflected, in part, by the costs associated with keeping the companies subject to deed of company arrangement whilst the insured claims are prosecuted reducing the available funds.

4. The respondents oppose the variations to the DOCA sought by the applicants on the basis that:

    (a) the variations do not ensure the same protections are conferred on all creditors of the deed companies (defined below) with insured claims;

(b) the DOCA was entered into in accordance with Part 5.3A, such that the Court has no jurisdiction to void or vary it pursuant to s 445G; and

(c) the variations sought by the applicants will result in significant prejudice to creditors who are entitled to distributions under the DOCA Pool C and Pool D funds as the remaining deed funds will be reduced as a result of holding costs incurred in keeping the deed companies in DOCA whilst the insured claims are prosecuted (which well may take years) or the costs associated with a winding up after the effectuation of the DOCA.

5. The first respondent (**PCAQ**) does not oppose the granting of leave under s 440D(1) (or s 444E(3) of the Act to enable the applicants to proceed against it.

6. The respondents rely on the affidavit of David Orr made 7 June 2023 (**Orr Affidavit**).

B. Relevant background

Appointment of administrators and deed of company arrangement

7. On 23 February 2022, Salvatore Algeri, Jason Tracy, Matthew Donnelly, and David Orr, (all partners of Deloitte) were appointed as joint and several voluntary administrators (together, **Administrators**) pursuant to s 436A of the *Corporations Act 2001* (Cth) (**Corporations Act**) in respect of various companies within the **Probuild Group**.[1] At a meeting held on 30 June 2022, creditors of the following companies voted in favour of the execution of DOCA, which appointed the Administrators as the deed administrators (**Deed Administrators**):[2]

(a) PCAQ;

(b) WBHO Australia Pty Ltd;

(c) WBHO Construction Australia Pty Ltd;

(d) Northcoast Holdings Pty Ltd

(e) Probuild Constructions (Aust) Pty Ltd;

(f) Probuild Civil Pty Ltd (formerly Probuild Civil (QLD) Pty Ltd);

(g) Probuild Constructions (NSW) Pty Ltd;

(h) Probuild Constructions (VIC) Pty Ltd;

(i) Probuild Constructions (WA) Pty Ltd;

(j) Probuild Constructions (QLD) Pty Ltd;

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[1] Orr Affidavit, [2].

[2] Orr Affidavit, [3].

(k) ACN 098 866 794 Pty Ltd (formerly Probuild Constructions (NSW) Pty Ltd;

(l) Contexx Holdings Pty Ltd;

(m) Contexx Pty Ltd;

(n) Prodev Murphy Pty Ltd;

(o) Prodev Investments 4 Pty Ltd;

(p) ACP Venture Investments Pty Ltd; and

(q) Monaco Hickey Pty Ltd,

(together referred to as the **deed companies**).

8. Prior to the Administrators' appointment, the Probuild Group provided project management, building and infrastructure construction services across Australia.[3]

9. At the time of their appointment, the Probuild Group had 19 active commercial and public sector projects in varying stages of development in Melbourne, Sydney, Brisbane and Perth.[4] The integrated resort development at Queens Wharf, Brisbane (**PCAQ project**), the subject of the applicants' application, was a project which had concluded on 3 September 2020.[5]

Identification of and notice to creditors

10. On the day of their appointment, the Administrators instructed their staff to review the books and records of the 19 companies to which they had been appointed to identify potential creditors. 1,533 potential creditors were identified through this process.[6]

11. Deloitte staff then liaised with the Probuild Group's finance team to obtain current aged payables, creditor listings and contingent claims identified in the Probuild Group's books. PCAQ was not identified as a creditor or potential creditor of PCAQ as part of this process.[7]

12. The Administrators published a notice on the ASIC Insolvency Notices website, giving notice of their appointment and details of the first meeting of creditors to be held on 4 March 2022.[8] They also set up a public website containing information regarding the

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[3] Orr Affidavit, [13].
[4] Orr Affidavit, [17].
[5] Orr Affidavit, [19].
[6] Orr Affidavit, [20].
[7] Orr Affidavit, [21], [22].
[8] Orr Affidavit, [23].

administration of the Probuild Group, including a link to the Halo Platform where creditors could lodge a proof of debt.[9]

13. On 24 February 2022, an initial circular to creditors was sent to creditors who had been identified through the initial review process to their email address as recorded in the books and records of the Probuild Group.[10]

14. The appointment generated significant media attention. Searches undertaken by the respondents' solicitors have identified 53 press articles about the administrations in the period from 22 February 2022 to 22 May 2022 alone; including in *The Australian Financial Review*, *The Australian*, *Sydney Morning Herald*, *The Guardian* and the *ABC*.[11]

Communications from the applicants

15. The applicants were aware that PCAQ was in administration, but they took no steps to lodge a proof of debt or to ascertain when the meetings of creditors were to be held.

16. On 24 February 2022, Carter Newell sent an email to 'webenquiry@deloitte.com.au', a generic inbox attaching a letter on behalf of DBC (**24 February letter**). The letter foreshadowed DBC having recourse to security held by it in satisfaction of 'the costs it had incurred and considered it will incur in the future' arising out of its claims against PCAQ (**DBC claim**).[12]

17. On 3 March 2022, the Administrators became aware that DBC had called on insurance bonds totalling $5,237,754.53 that it held as security for the PCAQ project.[13] Through correspondence on this issue, the 24 February letter was sent to the Administrators on 23 March 2022.[14] It was the first time the Administrators were aware of it.[15] In any event, neither the 24 February letter nor the correspondence relating to the bonds stated that DBC intended to pursue any outstanding claim against PCAQ for any amount in excess of the bonds.[16]

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[9] Orr Affidavit, [27], [29].
[10] Orr Affidavit, [25].
[11] Orr Affidavit, [31].
[12] Orr Affidavit, [48].
[13] Orr Affidavit, [52].
[14] Orr Affidavit, [49], [54].
[15] Orr Affidavit, [49], [54].
[16] Orr Affidavit, [56].

18. The second meetings of creditors were held for the deed companies on 30 June 2022. At the meetings, which were held concurrently, the creditors of the deed companies overwhelmingly resolved in favour of executing the DOCA.[17]

19. In relation to PCAQ, 12 of its 14 creditors, representing approximately 91.2% of the value of admitted claims against PCAQ, voted in support of the resolution under s 439C (**Section 439C resolution**). No creditors of PCAQ voted against the Section 439C resolution, and only two creditors of PCAQ, representing approximately 8.8% of the value of admitted claims against PCAQ, abstained.[18]

20. It was not until 17 March 2023, in a letter from Carter Newell, that DBC advised the Deed Administrators of the intended claim and its intention to make this application.[19]

21. On 20 March 2023, under cover of a letter from DBC to PCAQ (care of the Deed Administrators), DBC purported to serve a notice of dispute on PCAQ pursuant to the relevant contract (**DBC Notice of Dispute**). This was the first articulation of the DBC Claim provided by DBC to PCAQ and the Deed Administrators since the date of their appointment.[20] The Deed Administrators then caused their staff to register DBC on the Halo Platform on 6 June 2023.[21]

22. Solicitors' correspondence followed.

The DOCA

23. The key features and purpose of the DOCA are:[22]

    (a) the deed companies are pooled, such that, from 16 September 2022:

        (i) the assets of the deed companies and any other amounts received by the deed companies during the deed period are pooled (and inter-company liabilities are extinguished);

        (ii) the deed companies are treated as a single company (namely, as if the deed companies were Probuild); and

[17] Orr Affidavit, [82] – [83].
[18] Orr Affidavit, [83].
[19] Orr Affidavit, [58].
[20] Orr Affidavit, [59].
[21] Orr Affidavit, [42].
[22] Orr Affidavit, [89].

(iii) a creditor of any deed company is treated as a creditor of the deed companies as a whole. (Clause 5.1);

(b) WBHO contributed a cash contribution of $9,080,000 (**Cash Contribution**) to create a deed fund, which is augmented by other assets, for distribution to creditors. The deed fund is comprised of four pools:

(i) **Pool A:** Available assets are all monies and asset realisations of the Deed Companies, except for the Pool B amount. Pool A is applied to the Administrators' liabilities, then to employee entitlements, then to Pool D then to Pool C.

(ii) **Pool B:** Pool B contains $2,500,000 to be paid pro-rata to creditors with total claims against the deed companies of $25,000 (incl. GST) or less. Surplus funds are paid to Pool A.

(iii) **Pool C:** Available assets are the remaining amounts in Pool A after the Pool A payments have been made. Pool C is applied to the Deed Administrators' liabilities and the remainder pro rata to all unsecured creditors and insurance bond creditors.

(iv) **Pool D:** Available assets are the proceeds of the asset realisations that the Commissioner of Taxation (**ATO**) would have access to in liquidation as the only (known) potential creditor of certain of the deed companies. Pool D will be applied to pay the ATO in respect of GST and income tax claims in respect of those entities; and

(c) insured claims were intended to have the benefit of the operation of s 562 of the Corporations Act, through clause 8.5 of the DOCA which provided:

> *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.*

24. Since the commencement of the DOCA, the Deed Administrators have made the following distributions to creditors:[23]

    (a) Pool A Fund distribution of $12,044,647.62 made to employees; and

    (b) Pool B Fund distribution of $1,764,992.70 made to approximately 230 Admitted Small Creditors (as that term is defined in the DOCA).

25. The remaining distributions to be made prior to effectuation of the DOCA are the distribution of the Pool C and Pool D Funds. The Deed Administrators anticipate having approximately $10 million to make the Pool C and Pool D Fund distributions.[24]

26. The Deed Administrators do not intend to make the Pool C and Pool D Fund distributions until they have resolved outstanding litigation prosecuting claims for the benefit of creditors.[25] The most significant litigation is the Deed Administrators' special leave application in the High Court of Australia filed on 27 April 2023.[26] If the Deed Administrators are granted leave, the application could take approximately 12 months.[27] If successful, there would be an additional recovery in excess of $6.5 million.[28]

27. In the circumstances, the Deed Administrators will provide two months' notice to creditors before any Pool C or Pool D distributions are made. An undertaking to that effect has been provided by the Deed Administrators' solicitors to the solicitors for the applicants.[29]

Other insured claims

28. There are a number of ongoing proceedings against the deed companies in respect of which leave to proceed has been granted pursuant to s 444E of the Corporations Act in some instances on the basis that the relevant deed company holds responsive insurance. Those proceedings include:[30]

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[23] Orr Affidavit, [96].
[24] Orr Affidavit, [98].
[25] Orr Affidavit, [99].
[26] Orr Affidavit, [99].
[27] Orr Affidavit, [101].
[28] Orr Affidavit, [100].
[29] Orr Affidavit, [112].
[30] Orr Affidavit, [112].

(a) 16 personal injury / workers compensation claims (of which nine have obtained leave to proceed and the balance may do so); and

(b) six proceedings in respect of allegedly defective works (one of which has leave to proceed, one of which has confined leave and the balance may yet seek leave).

29. One of the proceedings relating to alleged defective works is a claim totalling between $314 million and $339 million in relation to the Pacific Werribee Shopping Centre (**Werribee Claim**).[31]

30. The Deed Administrators consider that given their size and complexity, the Werribee Claim and the DBC Claim could each take several years to reach a final conclusion.[32]

31. If the Deed Administrators resolve to delay the Pool C and Pool D distributions, they will incur holding costs in maintaining the deed companies in the DOCA (**holding costs**). The holding costs relate to tasks such as: maintaining accounts, ASIC lodgements, bank reconciliations, preparation of Australian Taxation Office Business Activity Statements, file reviews, creditor correspondence, final adjudications, dealing with ongoing and new insurance claims and reporting.[33] The Deed Administrators estimate that the holding costs would be approximately $400,000 per year (excluding third party disbursements such as legal costs).[34]

32. The holding costs will have to be borne by the Pool C and Pool D funds, thereby reducing the funds available to those creditors. This affects the interests of all Pool C and D creditors of the deed companies given the pooled nature of the DOCA.[35] The Deed Administrators consider that they will be unlikely to make any, or any substantial, interim distributions as they will need to withhold sufficient funds to meet the holding costs.[36]

C. Respondents' Proposed Amendments

33. The amendments proposed by Deed Administrators operate as follows:

(a) a definition of Insured Claims in clause 1.1 which captures all insured claims:

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[31] Orr Affidavit, [113].
[32] Orr Affidavit, [116] – [119].
[33] Orr Affidavit, [133].
[34] Orr Affidavit, [134] – [136].
[35] Orr Affidavit, [137].
[36] Orr Affidavit, [138].

***Insured Claim** means a Claim where:*

*(a) immediately prior to the appointment of the Administrators on the Appointment Date a Deed Company was named as an insured under a policy of insurance (not being a contract of reinsurance) (**Applicable Insurance**);*

(b) the relevant Deed Company is insured, whether fully or partially, against the Claim under the Applicable Insurance; and

(c) in a winding up the relevant Deed Company, the Creditor would be entitled to proceeds of the Applicable Insurance in respect of their Claim in accordance with section 52 of the Corporations Act in accordance with clause 8.5 of this Deed.

(b) a payment mechanism whereby after the Longstop Date, Insured Creditors must fund the Holding Costs in accordance with their rateable share of the total quantum of Insured Claims (as notified by the Deed Administrators):

*(i) **Insured Creditor** means 'a Creditor who has an Insured Claim and has provided the Deed Administrators with an Insured Claim Notice' (clause 1.1);*

*(ii) **Longstop Date** means 21 July 2025 (clause 1.1);*

*(iii) **Deed Administrators' Liabilities** is defined as 'the remuneration (as approved in accordance with the Corporations Act), costs, charges, liabilities and expenses (including legal expenses and claims made against the Deed Administrators) of the Deed Administrators' (clause 1.1);*

*(iv) **Holding Costs** means all Deed Administrators' Liabilities incurred after the Longstop Date (clause 1.1);*

(v) Insured Claim Contributions (clause 13.11)

(a) No less than 5 Business Days before the Longstop Date, the Deed Administrators may issue each Insured Creditor with a notice setting out:

(i) the estimated Holding Costs anticipated to be incurred by the Deed Administrators to 31 August 2025 (or such earlier other date as determined by the Deed Administrators); and

(ii) stating each Insured Creditor's Rateable Proportion of the estimated Holding Costs,

*(**Initial Insured Claim Contribution Notice**).*

(b) Each Insured Creditor must pay their Rateable Proportion of estimated Holding Costs notified in any Initial Insured Claim Contribution Notice with 5 Business Days of the Longstop Date.

(c) a mechanism to enable the Deed Administrators to discontinue proceedings in respect of Insured Claims where the Insured Creditor does not pay the Insured

Claim Contribution after the provision of a default notice and 20 business days to rectify the payment default (clause 13.11 (d)-(g));

(d) an alteration to the effectuation mechanism to be triggered by the later of a month after the Final Distribution Date or the Determination Date (being the determination / resolution of all Insured Claims):

(i) ***Distribution Date*** *means the earliest date by which, in respect of all known Insured Claims, at least one of the following has occurred:*

(a) *an insurer pays all amounts which it assumes liability for or agrees to pay or is found by a court to be liable to pay under the Applicable Insurance in respect of an Insured Claim;*

(b) *the date on which the Insured Creditor or the relevant Deed Company exhausts all reasonably available remedies against the insurer;*

(c) *the date on which the insurer is found by a court to be not liable to pay under the Applicable Insurance; or*

(d) *the Insured Creditor has been issued with an Insured Claim Termination Notice in respect of their Insured Claim. (Clause 1.1)*

(ii) ***Effectuation*** *means the date upon which effectuation of this Deed is to occur, being one month after the latest of:*

(a) *the date on which :*

(i) *the final distribution is made from the Deed Fund (or the Deed Administrators notify all Creditors there are insufficient funds in the Deed Fund for any further distributions to be made); and*

(ii) *the Deed Administrators have attended to all matters necessary to certify that the Deed has been effectuated; or*

(b) *the date on which the Deed Administrators have attended to all matters necessary to certify that the Deed has been effectuated and the Determination Date has occurred. (Clause 1.1)*

(iii) *Clause 15.3:*

(d) *Immediately upon and with effect from Effectuation, the Claims of all Creditors (including Insured Claims of Insured Creditors) will be fully released and extinguished.*

(e) *Notwithstanding any other provision of this Deed, Effectuation will not occur until the Determination Date has occurred in respect of all Insured Claims other than those in respect of which an Insured Claim Termination Notice has been issued.*

D. Relevant legal principles

Variation of DOCAs under s 445A

34. The only express mechanism in the Corporations Act enabling the variation of a DOCA is s 445A which enables a variation by resolution passed at a meeting of creditors, provided the variation is not materially different from the variation proposed in the notice of meeting.

35. However, the Court has power pursuant to s 447A(1) of the Act to vary s 445A so as to empower the Court to vary a deed of company arrangement.[37] In *Adelaide Brighton Cement Ltd v Concrete Supply Pty Ltd* [2018] FCA 1003, Besanko J observed:

> 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 ...

36. In *Re Derwent Howard Media Pty Ltd* [2011] NSWSC 1164, Barrett J stated:

> ... the court should be reluctant to exercise this power (and thereby to deprive creditors of their role under s 445A) except in circumstances that are uncontentious, in the sense that no prejudice to creditors is involved: *Re Paradox Digital Pty Ltd (subject to deed of company arrangement); Ex parte Smith (in his capacity as deed administrator)* [2001] WASC 182.

37. Similarly, in *Re Flow Systems Pty Ltd (subject to deed of company arrangement)* [2019] NSWSC 888, Black J observed that in determining whether to vary a deed of company arrangement '[t]he Court should have regard to whether the exercise of those powers will promote the interests of Pt 5.3A of the Corporations Act, and the interests of creditors generally'.

38. The objects of Part 5.3A are therefore relevant. They are found in s 435A which provides that the object of the Part:

> Is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

[37] See, eg *Milankov Nominees Pty Ltd v Roycol Ltd* (1994) 52 FCR 378 at 383; *Mulvaney v Rob Wintulich Pty Ltd* (1995) 60 FCR 81 at 83; *Re Paradox Digital Pty Ltd; Ex parte Vincent Anthony Smith* [13]–[15]; *Re Ansett Australia Ltd; Korda v Ansett Australia Ground Staff Superannuation Plan Pty Ltd* (2002) 41 ACSR 598 at [17]–[20] and [26]; *Re Pasminco Ltd (No 2)* (2004) 49 ACSR 470 at [35].

(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.

39. Where a company has executed a deed of company arrangement, orders under s 447A may be made on the application of a deed administrator: s 447A(4)(d).

Variations of DOCAs under s 445G

40. Section 445G of the Corporations Act provides:

> (1) Where there is doubt, on a specific ground, whether a deed of company arrangement was entered into **in accordance with this Part or complies with this Part**, the administrator of the deed, a member or creditor of the company, or ASIC, may apply to the Court for an order under this section.
>
> (2) On an application, the Court may make an order declaring the deed, or a provision of it, to be void or not to be void, as the case requires, on the ground specified in the application or some other ground.
>
> (3) On an application, the Court may declare the deed, or a provision of it, to be valid, despite a contravention of a provision of this Part, if the Court is satisfied that:
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> (a) the provision was substantially complied with; and
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> (b) no injustice will result for anyone bound by the deed if the contravention is disregarded.
>
> (4) Where the Court declares a provision of a deed of company arrangement to be void, the Court may by order vary the deed, but only with the consent of the deed's administrator.

41. The applicants allege that s 445G is engaged due to the 'the Deed Administrators' non-compliance with the statutory notice provisions'.

42. The relevant obligations for a meeting convened for the purposes of s 439A of the Corporations Act are found in r 75-225(1) of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (**IPR**), which provides:

> The administrator of a company under administration must convene a meeting under:
>
> (a) section 439A of the [Corporations] Act (meeting to decide the future of company under administration); or
>
> .....;
>
> by written notice given to as many of the company's creditors as reasonably practicable.

43. The notices must specify the matters identified in rr 75-225(2) and 75-225(3) of the IPR.

44. In *Re Ansett Australia Ltd* (2002) 115 FCR 395, Goldberg J considered the meaning of the phrase 'as reasonably practicable' in the context of s 439A(3), which preceded r 75-225 of the IPR:[38]

> I consider that the words "as reasonably practicable" in s 439A(3)(a) refer to the range of creditors to whom notice is to be given, rather than to the manner in which the notice is to be given. Notice is not to be given to all creditors without exception, but rather is to be given to what may turn out to be a lesser number, that is to say, as many as it is reasonably practicable to give notice.

45. According to Gaudron J in *Silvak v Lurgi (Aust) Pty Ltd* (2001) 177 ALR 585:

> The words "reasonably practicable" are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts.

Treatment of insured claims under a deed of company arrangement

46. The preservation of insured claims under a deed of company arrangement was considered by Lee J in *Matheson Property Group Pty Ltd (Trustee) v Virgin Australia Holdings Limited* [2022] FCA 1243 (***Matheson***). Under the terms of the deed of company arrangement in that case, if an insured creditor wished to bring a claim to which insurance responded, then they could only do so after providing the relevant deed company with an indemnity (which was a pro-forma document contained in a schedule to the deed of company arrangement). While *Matheson* involved very specific circumstances, Lee J made the following observations about the preservation of insured claims generally:[39]

> Following the resolution passed at the second meeting of Creditors, an arrangement was put in place to bind all Creditors. At the risk of repetition, one purpose was to prevent the diminution of the assets of the Deed Companies and allow those of the Creditors who can recover against an insurer to be able to obtain a third-party recovery. But allowing such third-party recovery is not unqualified: it must be done in such a way that costs and expenses or judgments are not visited upon the Deed Companies as a consequence of proceedings against the Deed Companies, hence the indemnity.
>
> It did not appear to be in dispute that a person who has an Insured Claim has a choice: they can either commence a proceeding against a Deed Company and provide the required indemnity or, alternatively, they can proceed to enforce the claim (said to be an Insured Claim) against a third party (if there was a co-ordinate liability) or,

[38] At [25].

[39] At [26] – [28].

with leave, against the relevant insurer directly: see ss 4 and 5 of the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW).

MPG correctly asserts that the purpose of cl 8.1 was to preserve claims to which a policy would respond, and to supply a mechanism by which those claims could be vindicated. It does so, but not at the expense of the Deed Companies; nor does it provide an exhaustive or sole mechanism by which claims, said to be Insured Claims, may be vindicated.

E. Application

The respondents' proposed variations are preferable

47. The authorities are clear that a Court should only exercise its discretion to invoke s 447A to vary the DOCA under s 445A 'in circumstances that are uncontentious, in the sense that no prejudice to creditors is involved'. The respondents' proposed variations are expressly designed to avoid prejudice to the broader creditors of the deed companies by ensuring that any additional expenses incurred as a result of keeping the companies subject to the DOCA whilst the insured claims are being prosecuted are met by the small class of creditors with insured claims who opt to prosecute those claims.

48. Conversely, the applicants' proposed amendments will cause prejudice to the broader creditor group by virtue of the delay in distributions of the Pool C and D funds and the inevitable diminution of those funds as a result of holding costs incurred by the Deed Administrators in keeping the deed companies subject to deed of company arrangement. A further deficiency in the applicants' proposed amendments is that they fail to address the rights of other creditors with insured claims. It follows that the respondents' proposed amendments should be preferred.

49. Another factor relevant to the Court's exercise of discretion in determining whether to vary a deed of company arrangement is whether or not the proposed variations further the objectives of the voluntary administration regime. The objects of Part 5.3A are intended to facilitate a better return for ***all*** of the company's creditors, not just one of them. As was identified by Lee J in *Matheson*, insured claims should be preserved, but not at the expense of the deed companies. It is also for this reason that the respondents' proposed amendments should be preferred.

50. Critically, the respondents' proposed amendments address the applicants' most significant concern which is to preserve its insured claim. The ensuing prejudice which would otherwise be suffered by the creditors as a whole is ameliorated by requiring the

creditors who benefit from the delayed effectuation of the DOCA to pay for the costs associated with the delay.

51. Further, to the extent the applicants rely on the case of *Brandrill v Newmont Yandal* [2006] NSWSC 74 (***Brandrill***) as authority for its amendments, the respondents consider this case can be distinguished. In *Brandrill*, the DOCA had been largely performed and Young J held the proposed amendments would not affect the accrued rights of creditors.[40] For the reasons set out above, the applicants' proposed amendments will inevitably cause prejudice to the interests of other creditors.

52. Creditors have been put on notice of the respondents' application.[41] The only creditor to form a view is strongly supportive of the respondents' application.[42] The DOCA proponent, WBHO is still considering its position in relation to the suites of amendments proposed by the applicants and the respondents.[43]

The allegation that the DOCA does not comply with Part 5.3A is without merit

53. The applicants' argument that the Court is empowered to void or vary the DOCA on the basis of non-compliance with the statutory notice requirements is without merit. The Administrators complied with r 75-225(1) by giving notice to all creditors it had identified as creditors or potential creditors from the review of the books of the companies and as otherwise identified in the conduct of the administrations.

54. The administrations of the Probuild group of companies were extremely complex, involving 19 companies. Those companies were involved in with three different business streams, being large commercial construction projects, earthworks and civil construction and specialised construction projects.[44] The commercial construction arm alone had 19 ongoing large-scale construction projects at the time of the Administrators appointment. Notice of the second meeting was given to 3,951 creditors, published on the ASIC notices website and made available over the Halo platform. In those circumstances, it cannot be said that the Administrators failed to give written notice of the meeting to the company's creditors 'as reasonably practicable'.

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[40] At [52]-[53].
[41] Orr Affidavit, [153].
[42] Orr Affidavit, [154].
[43] Orr Affidavit, [159].
[44] Orr Affidavit, [15].

55. Further, even if there had been non-compliance with the statutory requirements (which is denied), a finding that a deed of company arrangement may be declared void on the basis that a single creditor who ***was*** aware the company was in administration but had elected to not register as a creditor and, as a consequence, was not directly informed of the second creditors meeting would create significant uncertainty for future external administrations. That is particularly the case where:

    (a) the administrators were not aware of the creditors' existence despite reasonable investigations of the companies' books and records;

    (b) the applicants, knowing the company was in administration, failed to take any steps to be admitted to vote at either the first or second creditors' meeting; and

    (c) even if the applicants had been informed of the meeting and admitted to vote, their vote would not have changed the outcome of the relevant resolution.[45]

56. In the event this Honourable Court determines that the relevant statutory notice requirements have not been complied with, the Deed Administrators do not consent to the DOCA being varied in the manner proposed by the applicants for the reasons articulated in paragraph 47 to 52 above.

F. Conclusion

57. The respondents' proposed amendments to the DOCA seek to protect the interests of all creditors, whilst reducing the prejudice which would be suffered by the creditors as a whole if the applicants' amendments were to be adopted. The holding costs payment mechanism will motivate creditors who wish to prosecute insured claims to do so without

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[45] Mr Orr's evidence is that if DBC had submitted a proof of debt in relation to the DBC Claim, it would have been admitted at $1 for the purposes of voting: Orr Affidavit, [69]. In those circumstances, a resolution cast by DBC would not have altered the outcome of the resolution of PCAQ in favour of the DOCA: Orr Affidavit, [84].

undue delay, thereby reducing the risk of the deed administration process being prolonged unnecessarily.

7 June 2023

H Austin

V Bell

King & Wood Mallesons