SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 4023/23

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**

FURTHER SUBMISSIONS OF THE APPLICANTS[1]

OVERVIEW

1. By these submissions, the applicants (**DBC**) respond to the Second Respondents' (**Deed Administrators**) interlocutory application filed 19 December 2023[2] and to their outline of submissions filed 13 March 2024. DBC relies on the matters set out in its submissions dated 11 March 2024 in addition to the matters set out below.

2. The Deed Administrators (now) accept that the deed of company arrangement dated 21 July 2022 (**DOCA**) ought to be amended so that it does not extinguish the claims of DBC and other insured creditors[3].

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1 Per the orders of Justice Hindman dated 19 December 2023 (CFI-39), extended by orders dated 25 March 2024 (CFI-46)

2 CFI-27

3 Second Affidavit of David Michael Orr filed 19 December 2023 (CFI-28) (**Second Orr Affidavit**) at para 48

Carter Newell Lawyers
Level 13, 215 Adelaide Street
BRISBANE QLD 4000
Phone: 07 3000 8376
Fax: 07 3000 8488
Ref: DJR:SAE:166583
Email: djr@carternewell.com

3. However, in addition to changes to give effect to that purpose, the Deed Administrators propose changes to the DOCA imposing an unjustified "costs payment mechanism" by which the insured creditors would be required to pay the Deed Administrators' "holding costs" from 21 July 2025, failing which the Deed Administrators would be at liberty to extinguish the insured creditors' claims.

4. The Deed Administrators' primary position is that any amendments to the DOCA ought only to be made by a meeting of creditors[4]. The Deed Administrators apply for (a) judicial advice that they are justified in convening a meeting of creditors to vote upon the two alternative DOCAs, and (b) alternatively, orders under s 447A of the Act which in substance would give effect to the Deed Administrators' preferred form of amended DOCA.

5. DBC's position is that the changes that ought to be made to the DOCA are those proposed in its amended Originating Application and that the changes ought to be made by the Court rather than at a meeting of (remaining) creditors.

NO PREJUDICE TO CREDITORS

6. The Deed Administrators are wrong to allege that DBC's proposed amendments will cause "significant prejudice to the Pool C creditors"[5].

7. DBC's proposed amendments to the DOCA are designed to correct the DOCA so that it has the effect it was originally intended to have. The Deed Administrators (now) accept that the changes proposed give effect to the intention of the Deed Administrators not to adversely affect the right of a creditor such as DBC to access insurance.

8. Mr Orr swears that[6]:

> It was not, and is not, the intention of the Deed Administrators (or the DOCA) to prejudice any rights creditors may have in respect of their claims against a DOCA Company where the DOCA Company held or holds an insurance policy which may respond to the creditors' claim. This position was reflected in the term sheet setting out the key terms of the DOCA which was voted on by Probuild Creditors at the Second Meeting. The term sheet explicitly referred to s 562 of the Corporations Act being incorporated in the DOCA.

9. Mr Orr says that that "intention" was reflected in clauses 8.5 and 15.3(b) of the DOCA, which he says were "intended to expressly confirm those Probuild Creditors' priority entitlement to the proceeds of any responsive insurance policies, and preserve Probuild Creditors' claims and rights in respect of

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4 Second Orr Affidavit, para 51

5 Third Affidavit of David Michael Orr filed 12 March 2024, CFI-45 (**Third Orr Affidavit**), para 22

6 First Affidavit of David Michael Orr filed 7 June 2023, CFI-10 to CFI-11 (**First Orr Affidavit**), para 93

insurers"[7]. Mr Orr later confirmed that "it was not, and is not, the intention of the Deed Administrators to prejudice the rights of insured creditors"[8].

10. Mr Orr's evidence that the DOCA was not intended to prejudice the rights of insured creditors is consistent with what occurred at the second meeting of creditors.

11. According to the minutes of the meeting, the Chairperson (Mr Jason Tracy, another of the Deed Administrators) "advised that the opinion [that the Probuild Group should executed the proposed DOCA] was based on assessing what is in the best interests of **all creditors**" and that "[i]n the Administrators' opinion, the DOCA provided a better outcome **to creditors** than if the Probuild Group than if the Probuild Group were placed into liquidation and wound up"[9]. The Chairperson reiterated that the administrators were of the opinion that it was "in the interests of creditors" of the Probuild Group to resolve to approve the DOCA[10].

12. When the floor was opened to questions, the question was asked "Why should I vote in favour of the WBHO Construction SA DOCA proposal?" The minutes record that the Chairman said that "[t]he outcome to **all classes of creditors** would be superior under the DOCA than would be in a liquidation scenario"[11].

13. At that time (30 June 2022), the administrators were aware of DBC's claims against PCA[12] and of the Werribee claims (see paragraph 37(c) below).

The proposed DOCA amendments do not prejudice the Pool C creditors

14. The Deed Administrators contend that DBC's proposed amendments to the DOCA prejudice the Pool C creditors because:

    (a) the continued existence of the insured claims will prolong the deed administration of some of the companies; and

    (b) this will mean that the Pool C creditors will receive a distribution later than they otherwise would have done and the distribution will be reduced because additional holding costs will reduce the pool of money available to the Pool C creditors.

15. Although the Deed Administrators now apparently accept the desirability of amending the DOCA to reverse the effect it has had on the insured creditors' claims, they contend that this asserted prejudice is such that the insured creditors ought to be required to pay in advance the Deed Administrators' holding costs due to the asserted additional time required for the resolution of the insured

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7 First Orr Affidavit, para 94
8 Second Orr Affidavit, para 55(a)
9 First Orr Affidavit, Exhibit DMO-1, Tab 14, p623 (emphasis added)
10 First Orr Affidavit, Exhibit DMO-1, Tab 14, p629.
11 First Orr Affidavit, Exhibit DMO-1, Tab 14, p631 (emphasis added)
12 First Orr Affidavit, para 54

claims or else face the extinguishment of their claims. This 'costs payment mechanism' is dealt with further below in addressing the Deed Administrators' interlocutory application.

16. Contrary to the Deed Administrators' submissions, the proposed amendment to the DOCA benefits the Pool C creditors:

(a) If the DOCA remains unamended such that the insured creditors lose their recourse to the relevant security, those insured creditors' only alternative would be to file a proof of debt with the Deed Administrators under the DOCA. Those proofs of debt would need to be determined by the Deed Administrators and may well be subject to appeals to the Court (which rights are expressly preserved by clause 14.3(b) of the DOCA). It is uncontroversial that DBC's claim is a complex one (as are other insured claims). There is no compelling reason to think that litigating the disputes in the ordinary way would take a significantly longer period than working through the proof of debt determination process and any appeals;

(b) there is, in substance, no difference between the position in which the creditors found themselves at the second meeting as disclosed by the report to creditors[13] and now as regards the estimated time for a return to creditors;

(c) without an insurer funding the defence of the proceedings (even if there is a gap as asserted by the Deed Administrators), working through the proof of debt determination and appeals will likely deplete the pool available to creditors even further;

(d) further, if DBC has access to the insurance, there will be no need for it to seek any recourse to the funds otherwise available to the Pool C creditors; and

(e) in other words, preserving and facilitating access to the proceeds of insurance, rather than the general pool available to creditors, has the effect of preserving that pool rather than letting it be diminished or entirely taken up with the claims which would have otherwise been met by the insurers.

17. The contention that DBC's proposed changes are prejudicial to the Pool C creditors' interests is also artificial in circumstances where (with the exception of a single creditor) no Pool C creditor has on the evidence indicated any opposition to DBC's proposal. As to this:

(a) on about 1 June 2023 the Deed Administrators issued a circular to the "Probuild Creditors":

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13 First Orr Affidavit, para 73, ex DMO-1 tab 13 pp444-445 ('Estimated return to creditors')

(i) informing them of DBC's application and the Deed Administrators' opposition to it; and

(ii) inviting them to provide their views[14];

(b) that circular stated in part:[15]

> **Creditors views**
>
> If creditors believe they will be impacted by DBC's proposed amendments to the DOCA (at Appendix B) of the deed administrators' Proposed Amended DOCA (at Appendix D), they are encouraged to email the Deed Administrators at probuild1@deloitte.com.au as soon as possible.

(c) the Deed Administrators only received one response from an uninsured creditor, namely Essence Project Management Pty Ltd, supporting the Deed Administrators' position[16];

(d) Mr Orr has confirmed that no further relevant correspondence has been received from uninsured creditors[17];

(e) the Deed Administrators raised this issue again in the December Report to Creditors (dated 6 December 2023) and encouraged creditors who wished to express a view to email.[18] No responses were received[19];

(f) the minutes of the meeting of creditors convened by the Deed Administrators on 13 December 2023 record that a Mr Linaker (a Director within Deloitte Financial Advisory Pty Ltd) again "welcome[d] creditors to express their views on the Queensland Proceedings via email to probuild1@deloitte.com.au as soon as possible".[20] No responses were received[21].

18. Even if there were prejudice to the Pool C creditors (which is denied), it does not automatically follow that the relief sought by DBC should not be granted. The Deed Administrators rely upon authorities to the effect that generally speaking a court would be reluctant to amend a DOCA under s 447A (bypassing a creditor resolution) except where no prejudice to creditors is involved (Deed Administrator's Outline, [32]-[35]).

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14 First Orr Affidavit, para 153 and tab 21
15 First Orr Affidavit, para 153 and tab 21, p 727.
16 First Orr Affidavit, para 153 and tab 21, para 154(b) and tab 23.
17 Second Orr Affidavit, para 55(b)
18 Second Orr Affidavit, paras 77 to 79
19 Second Orr Affidavit, para 81
20 Second Orr, tab 2, pp 200 – 207 (in particular at 204 – 206 under the heading "Queensland Proceeding").
21 Second Orr Affidavit, para 81

19. However:

(a) there is no absolute rule that any amendment which causes prejudice to some creditors means that the Court would not vary the DOCA. Section 447B confers "plenary powers" on the court "to do whatever it thinks is just in all the circumstances".[22] It has been held that it is inappropriate to impose limitations on section 447A which do not appear in the words of the provision: *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at [17]. It is established that it may be appropriate to vary a DOCA under s 447A even where the amendments do affect creditors.[23] What is relevant is "*the effect on creditors and also the practical commercial consequences of what would happen if the variation of the DOCA was not made*"[24];

(b) in the present case, even if the proposed amendments may have some effect on the Pool C creditors, not amending the DOCA would cause irreparable harm to DBC and other insured creditors; and

(c) the variation proposed by DBC is designed to ensure that the DOCA reflects the original intention of those who created the DOCA. The Court ought not be reluctant to bypass a further meeting of creditors to amend a DOCA where the amendment is to give effect to the intention of those who created the DOCA and upon which it was voted.

THE SECTION 445G GROUNDS

20. The Deed Administrators submit that it is unnecessary for the Court to consider whether s 445G is engaged in the present circumstances, because the Court has power to vary the DOCA under s 447A[25]. While it may be accepted that the Court has the power under s 447A (to which paragraphs 1 and 2 of the amended OA refer), s 445G remains a relevant 'pathway' to effect changes to the DOCA in the circumstances of this case (which all parties accept are necessary). It is also appropriate for the Court to consider the s 445G issues in circumstances where the Deed Administrators are seeking judicial advice about the conduct of the deed administration.

21. The Deed Administrators' contention that they gave written notice of the meeting to as many of PCA's creditors as reasonably practicable ought not be accepted in circumstances where:

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22 *Cawthorn v Keira Constructions Pty Ltd* (1994) 33 NSWLR 607 at 341.

23 For example, *Re Alita Resources Ltd* [2020] WASC 430 at [31], citing *Re Paradox Digital Pty Ltd; Ex parte Smith* [2001] WASC 182 at [16] per Owen J

24 *Re Longley (Deed Admin), Dixon Advisory & Superannuation Services Pty Ltd (subject to deed of Co arrangement)* [2024] FCA 70 at [51] per Beach J

25 Deed Administrators' Outline, para 5

(a) the Deed Administrators *knew* of DBC's claim before the second meeting of creditors (DBC's solicitors having written to the Deed Administrators advising them of this); yet

(b) DBC was not given notice of the meeting.

22. As to (a), Mr Orr has acknowledged that he was provided with or became aware of DBC's solicitors dated 24 February 2022 (which gave notice, among other things, of DBC's allegation that PCA was in breach of contract and that DBC would have recourse to securities provided by PCA) on 23 March 2022.[26]

23. The Deed Administrators make an attempt to make something of the circumstance that DBC's solicitors' 24 February 2022 letter was emailed to what they describe as a "generic" Deloitte inbox[27]. However, even if that were otherwise a valid complaint (which it is not), it is rendered moot by Mr Orr's acknowledgement that he was aware of and provided a copy of the letter on 23 March 2022 (well before the DOCA was voted upon)[28].

24. Further, the Deed Administrators ignore that part of the s 445G grounds relied upon (see the amended OA) to establish the relevant "doubt", is that the Deed Administrators failed to properly investigate the business, property, affairs and financial circumstances of the companies because they failed to make any or any adequate enquiries about the nature and quantum of DBC's claims and how those claims may impact upon a return to creditors under a deed of company arrangement or under liquidation. It was at least incumbent upon the administrators to make further enquiries once they had the February 2022 correspondence. They did not do so.

25. Much of Mr Orr's evidence is directed to showing that the Deed Administrators appropriately searched Probuild's books and records to identify creditors of the relevant companies, including PCA. The thoroughness of that process may be doubted given that it apparently did not reveal that DBC was a creditor even though DBC had sent letters to PCA about its claim prior to the appointment of the Deed Administrators. However, ultimately nothing turns on this because, as just noted, at the time of the DOCA was proposed Mr Orr (at least) *did* know of DBC's claim through DBC's solicitors' correspondence to the Deed Administrators.

26. The Deed Administrators submit that they were not aware of the applicants' "existence as a creditor seeking damages against PCAQ"[29]. As to this:

(a) the requirement in s 75-225(1) of the *Insolvency Practice Rules (Corporations) 2016* is to give notice to as many "creditors" as reasonably practicable. There is no requirement that a creditor be one that is "seeking

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26 First Orr Affidavit, para 48
27 Deed Administrators' Outline, para 8; First Orr Affidavit, paras 50-51
28 First Orr Affidavit, para 54
29 Deed Administrators' Outline, para 19(a)

damages". On any view, the 24 February 2022 letter made it clear that DBC was a creditor;

(b) in any event, although DBC's solicitors' letters to the Deed Administrators had indicated that DBC had called on the security, it did not state that the insurers had agreed to pay any amount or that DBC would accordingly not be seeking damages. There could be no basis for any such assumption; and

(c) that is all the more so because DBC's 24 February 2022 letter to the Deed Administrators had expressly said that the damages it had incurred and would incur would be "in excess of the total value of the securities".

27. The Deed Administrators submit further that DBC, knowing PCA was in administration, "failed" to take steps to be admitted to vote at the first or second creditors' meetings[30]. Respectfully, that is beside the point and inverts the administrators' obligations. There is nothing unusual about a creditor choosing not to register to vote but to instead pursue its claims outside the administration or DOCA process including by way of seeking leave to pursue its claims so that it can attempt to recover under any relevant insurance policies available to the companies. Choosing that alternative does not remove or ameliorate the Deed Administrators' obligations.

28. The Deed Administrators submit that, even if DBC had been admitted to vote and had done so, their vote would not have changed the outcome of the relevant resolution. However:

(a) as Mr Orr has confirmed, there was no intention for the DOCA to extinguish the insured creditors' claims;

(b) indeed, well after the DOCA was entered into and DBC's solicitors had written to the Deed Administrators about this, the Deed Administrators continued to take the position that the DOCA did no such thing[31]; and

(c) in those circumstances, the question is not whether DBC's *vote* would have changed the outcome of the resolution. DBC could have attended the meeting and raised the problem with the DOCA and taken steps to ensure that the deed was drafted in a form that preserved DBC's right to prosecute its insured claims. The evidence is that this is what it would have done.[32] Given there was no intention to extinguish the insured creditors' claims, there is every reason to consider that DBC would have been successful in this endeavour.

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30 Deed Administrators' Outline, para 19(b)

31 See, for example, the correspondence from the Deed Administrators discussed in paragraphs 17 and 19 of DBC's outline of argument dated 11 March 2024).

32 Rodighiero Affidavit, paragraphs 18-19

THE DEED ADMINISTRATORS' APPLICATION

29. By their interlocutory application the Deed Administrators seek judicial advice that they would be justified in convening a meeting of the creditors of the companies the subject of the DOCA (including PCA) to consider certain proposed resolutions to vary the DOCA under section 445A of the Act.

30. In the alternative, the Deed Administrators seek relief under section 447A which would have the same substantive effect.

31. The material difference between the Deed Administrators' proposed Amended DOCA and DBC's proposed amended DOCA is that the Deed Administrators have included by clause 13.11 (and associated definitions) a costs regime which, at a high level, works in the following way:

    (a) the insured creditors (including DBC) would be required to pay the so-called "Holding Costs" (that is, the Deed Administrators' liabilities – subject to certain direct costs – capped at $10,000 per month) incurred from 21 July 2025 (or such other later date as the Deed Administrators notify acting reasonably but in their sole discretion) in advance of those costs actually being incurred by the Deed Administrators; and

    (b) if an insured creditor does not pay its contribution amount within the time required and does not comply with a default notice, the Deed Administrators may in their absolute discretion issue a termination notice which has the effect that the insured creditor is deemed to have irrevocably elected to fully release and discharge each deed company from the relevant claim (clause 13.1(g)).

32. For reasons addressed further below, it is submitted that this regime is both unnecessary and unfairly prejudicial to the insured creditors, including DBC.

33. It may be accepted the Deed Administrators have a discretion whether to call a meeting of creditors at which they could propose amendments to the DOCA: s 75 -10 if the Insolvency Practice Schedule (Schedule 2 to the Corporations Act).

34. The question presently before the Court is whether the Deed Administrators ought to receive the Court's imprimatur to do so. Orders under s 90-15 of the IPS require that such orders be made in pursuit of the objects of Part 5.3A of the Act[33]. The power is available to give an administrator advice as to the *proper* course of action to be taken in the administration: *Re Lewis* (2020) 145 ACSR 459 at [30] to [31] per White J. However, "*there is a need for the Court to be positively persuaded of the propriety of the course for which the [administrator] seeks the Court's sanction, before the Court will give the [administrator] the*

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33 *Nipps (Admin) v Remagen Lend ADA Pty Ltd, Adaman Resources Pty Ltd (Admin Apptd) (No 4)* [2021] FCA 644 at [23] per Banks-Smith J; see also *Re Pindan Group Pty Ltd (Admins Apptd) (No 4)* [2022] WASC 143 at [52]-[65] per Stryk J

protection of its sanction" per Bond J (as his Honour then was) in *Re Octaviar Ltd (in liq)* [2020] QSC 353 at [18].

35. The decision of the New South Wales Supreme Court in *Application of Whittingham; Re The Spanish Club Ltd (subject to DOCA)* [2009] NSWSC 1426 is instructive. In that case, Brereton J dismissed an application by a deed administrator for judicial advice (under a predecessor provision, s 447D to the Act) that he be permitted to hold a meeting of creditors to consider varying the DOCA (or alternatively terminating it and placing the company into liquidation).

36. The proposed amendment was to vary the DOCA by deleting a requirement that member approval be given for sale of certain company property. His Honour considered that proposal to involve "a radical change to the balance of interests" reflected in the DOCA (at [25]). His Honour found further that it was "at least arguable" that the proposed variation might be cancelled under s 445B, or that the deed administrator's proposed concurrence in it might be held to be prejudicial to the interests of members within s 447D (at [25]). His Honour found that "[t]hose possibilities, which should be examined if at all in ordinary adversarial litigation, ought not be pre-empted by judicial advice to the deed administrator" (at [25]). Accordingly, his Honour dismissed the deed administrator's application (at [26]).

37. It is submitted that, in the present case, and for similar reasons, the Court ought to refuse to give the Deed Administrators the judicial advice sought. That is because:

    (a) the Deed Administrators' proposed costs arrangements would work a fundamental change to the balance of interests in the DOCA *cf.* DBC's proposed amendments which reflect the effect the DOCA was understood to have by those who created it;

    (b) such a costs payment mechanism is inconsistent with the regime that would apply by operation of section 562 of the Act – that would not require payment in advance or lead to extinguishment of otherwise valid claims, and would not require the schedule 2 creditors to assist in the funding of a defence of their own claims (rather than such costs being deducted once the insured funds have been received as would occur under section 562);

    (c) it is no answer to say that circumstances have changed because complex litigation has emerged. There was always every reason to think that there would be complex and lengthy litigation arising from an insolvency as large as the Probuild insolvency. Indeed, prior to 30 June 2022 when the DOCA was voted upon, the Deed Administrators apparently knew about

the looming Werribee claim[34]. Correspondence had been exchanged between the Deed Administrators and the solicitors for the plaintiffs in the Werribee claim between 1 March 2022 and 6 June 2022[35];

(d) moreover, the Deed Administrators' changes are unnecessary and unfairly prejudicial to DBC and the other insured creditors:

(i) the underlying premise for why the insured creditors should pay the holding costs is that the existence of their claims pursued in court will cause the administrations of some of the deed companies to continue for longer than they otherwise would have, thereby increasing holding costs. However, the premise is wrong: see paragraph 16(a) above;

(ii) the amendments visits a harsh result on the insured creditors. They must pay potentially significant holding costs and, if they do not do so, they lose their right to pursue valuable claims;

(iii) that is so even though the fact that the insured creditors are pursuing their claims through the courts (with a view to accessing the proceeds of insurance policies) works to the benefit of the Pool C creditors because it means the Pool C funds will not otherwise be reduced by the insured creditors seeking a (significant) share of them; and

(iv) the alternative to the insured creditors amending the DOCA in the way that is now accepted by all parties and obtaining leave to proceed, is a proof of debt procedure with the attendant costs and delays associated with the Deed Administrators adjudicating those proofs of debt and dealing with any necessary appeals to the court from any refusals to accept those proofs of debt, which would further reduce the pool of funds otherwise available to Pool C creditors;

(e) the Court need not be concerned about circumventing the will of the creditors. DBC's changes are consistent with the circumstances and intention at the time of the second meeting. This is also not a case where the creditors have called a meeting to vote upon the proposed alternative DOCA. They have always been entitled to do so[36] but have not done so;

(f) the unfairly prejudicial nature of the Deed Administrators' proposed amendments leads to a substantial risk that if the variation is approved at a meeting, it will be challenged in court (for example, by one or more of

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34 First Orr Affidavit, para 113(c), which refers in turn to paragraphs 59 to 60 of the affidavit of Corin Morcom exhibited to Mr Orr's affidavit (tab 19) – correspondence first exchanged in October 2019

35 First Orr Affidavit, para 113(c)

36 Insolvency Practice Schedule (Schedule 2 to the Act), s 75-15(1)(b)-(e)

the insured creditors). This is addressed further in paragraphs 38 to 45 below. Mr Orr has himself recognised this.[37] Consistently with *Whittingham*, these are matters which should be examined, if necessary, in adversarial litigation and ought not be pre-empted by judicial advice; and

(g) it is no answer for the Deed Administrators to say that, if the insured creditors lodge proofs of debt (even after they have leave to proceed and have commenced litigation), then they may admit those proofs of debt for voting purposes such that the insured creditors could vote upon the proposed variations to the DOCA. This is addressed in paragraphs 49 to 50 below.

The proposed amendments to the DOCA are susceptible to challenge

38. **Section 445B.** Section 445B(1) provides that where a DOCA is varied under section 445A, a creditor of the company may apply to the Court for an order cancelling the variation. The Court may make an order cancelling (or confirming) the variation in whole or in part (on such conditions, if any, as it specified) and make any such other orders as it thinks appropriate: s 445B(2).

39. There is limited authority on the circumstances in which a Court will apply section 445B. Examples where it has been suggested it may apply include where a variation would affect creditors by removing a veto right of sale (*Whittington*, discussed above) and where the proposed variation deprived the deed proponent of the contemplated benefit it was to receive and conferred it instead on shareholders (*Re Gulf Energy Ltd (subject to deed of company arrangement)* [2020] NSWSC 1323 at [34] and [36]).

40. **Section 447A.** The breadth of section 447A has been addressed previously. It is well-established that it empowers the Court to vary a DOCA. It follows that it empowers the court to vary a DOCA by reversing a previous variation made by the creditors pursuant to section 445A. *Gulf Energy Ltd (subject to deed of company arrangement)* [2020] NSWSC 1323 at [34] and [36] is authority for that proposition.

41. **Insolvency Practice Schedule – s 90-15(1).** Section 90-15(1) provides that "[t]he Court may make such orders as it thinks fit in relation to the external administration of a company". Division 90 broadly concerns the Court's supervision of an external administrator. Section 447E ("Supervision of administrator of company or deed") (now repealed) provided that where the Court was satisfied that a deed administrator was managing the company's affairs in a way that was prejudicial to the interests or some or all of the company's creditors, or proposed to an act that would be prejudicial to such interests, the Court may make such order as it thinks just. In *Application of Whittingham; Re The Spanish Club Ltd (subject to DOCA)* [2009] NSWSC 1426 Brereton J considered that that

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37 Third Orr Affidavit, para 34

section was also a basis to challenge a variation of a DOCA approved by creditors under s 445A: [24]-[26]. It is submitted that section 90-15(1) of the Insolvency Practice Schedule now provides a source of power for the Court to reverse such a variation.

42. **Section 445D.** Pursuant to section 445D(1)(f)(i) of the Act, the Court may make an order termination of a DOCA if satisfied that it, or a provision of it, is "oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors". Such an order brings the DOCA to an end pursuant to section 445C(a).

43. Whether a deed of company arrangement is oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more of the company's creditors will be determined by reference to the general principles underlying Part 5.3A of the Act, including the creditors' right to be paid or to have the company wound up or have it administered in a way which will see the creditor paid from the company property: *Re SBL Solutions Pty Ltd (subject to a deed of company arrangement)* [2021] NSWSC 1002, [80].

44. A relevant consideration is whether the creditor will receive less than it would have if the company had gone into liquidation: *BGC Contracting Pty Ltd v Kimberly Gold Pty Ltd* (2000) 35 ACSR 633; [2000] WASC 264 at [13]-[14] and [121]. The Deed Administrators' proposed costs mechanism would produce exactly that result: a less beneficial outcome for the insured creditors that liquidation given the availability of s 562 without any such cost mechanism.

45. It is submitted that there is a compelling argument that the Deed Administrators' proposed DOCA is oppressive and unfairly prejudicial to, and unfairly discriminatory against, the insured creditors.

The authority relied upon by the Deed Administrators does not support their position

46. The only authority relied upon by the Deed Administrators in support of their position that the insured creditors ought to provide the proposed indemnity is *Matheson Property Group Pty Ltd v Virgin Australia Holdings Limited* (2022) 165 ACSR 550; [2022] FCA 1243. Respectfully, that case does not provide support for the Deed Administrators' position.

47. The original deed of company arrangement in that case provided for the extinguishment of creditors' claims against the deed companies but with a carve-out for (relevantly) insured claims (although only to the extent of the insurance) (at [4] and [9]-[12]). The deed provided that creditors of insured claims could take action to recover amounts due to them subject to certain conditions. One of the conditions was that, if requested by the relevant deed company or companies, the creditor was required (prior to taking enforcement action) to provide an indemnity in the form set out in a schedule to the deed (along with evidence of capacity to meet the indemnity ([14], paragraphs (d)-(1)-(2) of the extracted clause). The deed further provided that the deed company could plead the deed

as a bar to any enforcement action if the creditor had not, prior to commencing enforcement action, given the required indemnity (([14], paragraphs (d)-(3) of the extracted clause).

48. The case is distinguishable for the following reasons:

(a) the case was one concerning an express requirement for provision of an indemnity *as a condition of commencing proceedings against the deed company*. In the present case, this Court has already granted unconditional leave to DBC to commence proceedings against PCA[38] (with PCA's consent) and DBC has commenced those proceedings. In other words, the Court has already considered it appropriate that an exception be made to the general position in order to permit DBC to litigate its claims rather than the alternative of a proof of debt procedure;

(b) further and relatedly, the type of indemnity required by the deed in that case was (broadly speaking) for costs and expenses in connection with the proposed litigation but *only* to the extent those costs were not covered by the relevant insurance.[39] It is submitted that it is doubtful that the required indemnity in that case extended to holding costs of the Deed Administrators in the event that the litigation prolonged the duration of the company arrangement;

(c) the indemnity in that case did not, as proposed here, require payment by insured creditors in advance of those costs being incurred;

(d) the indemnity in that case did not, given it was a condition of commencing proceedings, impose a risk of extinguishment of the claims should the indemnity not be met, as the Deed Administrators' proposals do in the present circumstances; and

(e) in any event, Lee J was not called upon to determine the appropriateness of the indemnity provision in the deed. That issue did not arise.

The Deed Administrators' suggestion that the insured creditors could vote at the proposed meeting

49. Mr Orr says that the insured creditors will be invited to participate at any meeting of creditors convened to consider the proposed DOCA amendments (DBC's proposed amendments and the Deed Administrators' proposed amendments) and that *"[w]hile the insured creditors may not be able to precisely quantify the*

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38 Order of Justice Hindman dated 21 November 2023 (CFI-24)

39 The creditor was required to indemnify he company "against any costs, expenses, judgments (including but not limited to any judgment or order obtained by me/us against the Company, or any amounts required to be paid by the Company in connection with any judgment or order), suits or actions incurred directly or indirectly as a consequence of commencing legal proceedings in relation to the Insured Claim (Costs) to the extent that the Company is not indemnified for such costs pursuant to a contract of insurance . . . or such Costs are not otherwise paid by the Company's insurer" (at [15]).

value of their potential claims, the Deed Administrators will assess their proofs of debt for voting purposes in the usual way and decide whether to admit their proofs of debt, and for what value, for the purpose of voting at a meeting".[40]

50. There are, with respect, difficulties with this proposal:

(a) it is, at the least, incongruous for DBC (and other schedule 2 creditors) to:

(i) on the one hand seek and obtain leave to commence proceedings against PCA (which proceedings it has commenced); and

(ii) on the other hand, lodge a proof of debt with PCA in respect of the same claims;

(b) it is far from clear that the Deed Administrators' apparent proposal to admit insured creditors' proofs of debt only for voting purposes is consistent with the terms of the DOCA. Clause 14.3(a) of the DOCA provides that the Deed Administrators "will" determine (including by "adjudicating" proofs of debt that have been submitted) "the amount required to satisfy the relevant Creditor's entitlement to receive a distribution from the Deed Fund in accordance with this Deed";

(c) there is also some risk that the Deed Administrators admitting a proof of debt lodged by DBC or another insured creditor might have an adverse effect on PCA's relevant insurance policies[41];

(d) it is doubtful that, even if a proof of debt lodged by DBC were admitted for voting purposes, that would give DBC any material voting power. Mr Orr said that, if DBC had lodged a proof of debt for the second meeting of creditors, it is likely that he or one of the other Deed Administrators would have admitted it for only $1.[42] Indeed, even now the Deed Administrators rely on this to say that DBC would not have been able to influence the original vote on the DOCA if the Deed Administrators had notified it of the second meeting of creditors.[43] There is no reason to consider that the Deed Administrators will now admit DBC's proof of debt for any greater amount; and

(e) in any event, even if DBC and the other insured creditors were able to vote at the proposed meeting, that would not cure the fundamentally unfair and prejudicial nature of the Deed Administrators' proposed amendments. The Deed Administrators' proposed amendments would

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40 Third Orr Affidavit, para 31

41 See, for example, the affidavit of Colleen Eileen Morcom at para 76(d) and (e) (exhibited at tab 19 to the First Orr Affidavit, at pp677-678)

42 First Orr Affidavit, paras 69 to 70

43 Second Respondents' Outline of Argument filed 13 March 2024, [13] and footnote 7.

not be rendered fair just because DBC and the other insured creditors are outvoted.

CONCLUSIONS

51. For the reasons set out above, the Deed Administrators' interlocutory application ought to be dismissed.

Philip O'Higgins KC
Edmund Robinson
Counsel for the applicants/DBC
10 April 2024