SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: BS 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 another according to the attached schedule**
	AND
Respondents:	**PCA (Qld) Pty Ltd (subject to Deed of Company Arrangement) ACN 141 148 245 and others according to the attached schedule**

SUBMISSIONS OF THE RESPONDENTS WADREN PTY LTD AND QIC WERRIBEE PTY LTD

1. Wadren Pty Ltd as trustee for the Hoppers Crossing Unit Trust and QIC Werribee Pty Ltd as trustee for the QIC Werribee Trust are the owners of the Pacific Werribee Shopping Centre in Victoria (***Co-Owners***).

2. Wadren Pty Ltd (***Wadren***), entered into a contract with Probuild Constructions (Aust) Pty Ltd (***Probuild***) on 21 March 2014 for construction of the "Werribee Plaza Shopping Centre" in Victoria (***Centre***). It was a design and construction contract (***D&C Contract***). The work reached practical completion in 2017. On or about 19 February 2018, QIC Werribee Pty Ltd (***QIC***), acquired a 50% interest in the shopping centre. The terms of the D&C Contract required Probuild to maintain a professional indemnity insurance policy with a total aggregate cover of not less than $50m for six years after the issue of the final certificate.

3. By October 2019, the applicants had identified that there were significant structural defects in the Centre. They notified a claim to Probuild in respect of the structural defects on 10 October 2019.[1] That was based on an expert report by MPN Group, Consulting Engineers.[2] Subsequent to that time, other defects have emerged. An expert report of Kusch Consulting Engineers in June 2021 identified a number of significant

---

1 Affidavit of Morcom, para.13
2 Affidavit of Morcom, para.14

non-structural defects.[3] A subsequent report of MNP Group identified further design and construction defects in September 2021.[4] Those further non-structural defects have been notified by the applicants to Probuild at various dates between August 2020 and February 2022.

4. On 14 March 2023, the applicants commenced proceedings in the Supreme Court of Victoria against Probuild (amongst others) in respect of the structural defects in the Shopping Centre. The claims against Probuild are for:

   (a) breach of the design and construction contract;

   (b) loss recoverable under contractual indemnities in the contract;

   (c) misleading or deceptive conduct.

   Leave to proceed was granted by the Supreme Court of Victoria. The matter is no. S ECI 2023 00960.[5] The writ and Statement of Claim are at the second affidavit of David Michael Orr (***Second Orr Affidavit***) pp.215 – 273.

5. The applicants have not yet commenced proceedings in respect of the other defects (i.e. certain other defects identified by MPN and the non-structural defects).[6]

6. The deed administrators have indicated their intention that they anticipate being able to make an interim distribution in respect of Pool C creditors on or before December 2024.[7] The Co-Owners have not yet lodged their proof of debt.[8]

Position of the Co-Owners

7. In summary, the position of the Co-Owners is:

   (a) they support the amendments to the DOCA that are sought by DBC in respect of:

      i. the definitions of 'Claim To Which Clause 8.5 Applies', 'Court', 'Effectuation' and 'Finally Determined';

      ii. c.14.11;

      iii. cl.15.3(d); and

      iv. Schedule 2;

---

3 Affidavit of Morcom, para.16
4 Affidavit of Morcom, para.15
5 Affidavit of Morcom, para.20
6 Affidavit of Morcom, para.20
7 Second Orr Affidavit, exhibit DMO-2 Tab 1, page 56.
8 Affidavit of Morcom, para.64

(b) they are neutral as to the other amendments proposed by DBC;

(c) they say the deed should be varied by the Court pursuant to s.447A;

(d) they make no submissions regarding DBC's application under s.445G;

(e) in respect of the variations to the DOCA proposed by the deed administrators, they oppose the variations in the proposed cls.13.11, 14.11(b), 14.15, and the addition of definitions of terms used in those clauses. They therefore oppose a Court order varying the DOCA to introduce those clauses pursuant to s.447A. To the extent that the variations to the DOCA proposed by the deed administrators duplicate the variations proposed by DBC, they adopt the position identified in (a) above;

(f) they make no submissions regarding the deed administrators' entitlement to seek judicial advice in the circumstances that have arisen, but say that (if the Court does give advice) the Court should advise that the deed administrators would not be justified in convening a meeting of creditors to consider and vote upon the variations to the DOCA the deed administrators propose.

Why the DOCA needs variation?

8. There is internal tension within the DOCA between:

   (a) clause 8.5; and

   (b) clause 15.3(d). And, to similar effect, cl.15.3(a), cls.15.4, 15.5 and 1.5.

9. The tension can be explained in this way. Where a creditor has a claim against the company, and the company has a contract of insurance indemnifying it against that claim, any proceeds recovered from the insurer in respect of that claim must, after deducting expenses of getting in those proceeds, be paid by the company to the creditor. The section does not give the creditor any legal cause of action against the insurer. But it gives the creditor priority over the claims of other unsecured creditors to proceeds of the insurance, displacing what would otherwise be the priority under s.556(1). It also gives the creditor standing to join the insurer as a defendant, seeking a declaration that the insurer is liable to indemnify the company against the creditor's claim: *CGU Insurance Limited v Blakeley* (2016) 259 CLR 339.

10. Section 562 is found in Part 5.6 of the *Corporations Act*, dealing with liquidations. It is not a section that applies to a company administration, pursuant to Part 5.3A: *Lofthouse v ACN 081 121 495* (2003) VSC 253, Ford *Corporations Law* online, para. 26.200.18.

11. But cl.8.5 of this DOCA provides an equivalent benefit to the creditors of the 16 DOCA companies. Adapted to the DOCA administration, the effect of cl.8.5 is as follows:

> "(1) Where a DOCA company is, under a contract of insurance (not being a contract of reinsurance) entered into before 21 July 2022, insured against liability to third parties, then, if such a liability is incurred by the company (whether before or after 21 July 2022) and an amount in respect of that liability has been or is received by the company or the deed administrators from the insurer, the amount must, after deducting any expenses of or incidental to getting in that amount, be paid by the deed administrators to the third party in respect of whom the liability was incurred to the extent necessary to discharge that liability …;
>
> (2) If the liability of the insurer to the DOCA company is less than the liability of the company to the third party (1) does not limit the rights of the third party in respect of the balance."

12. The DOCA establishes a "deed fund", which is comprised of the Pool A, Pool B, Pool C and Pool D funds. In broad terms, they comprise the $9.08m contribution by the proponent and the proceeds of realizable assets. The proceeds of any insurance contract that is recovered pursuant to cl.8.5 do not form part of the deed fund. The (inadvertent) effect of cl.15.3(d) is that, from the date on which final distribution is made from the deed fund to creditors, claims of all creditors against each DOCA company are released and extinguished. That would have the (inadvertent) consequence that the claim of a creditor against a DOCA company, where the DOCA company has insurance and the creditor has priority pursuant to cl.8.5, would be extinguished upon the final distribution of the deed fund. If on that date the insurer had not paid money to the DOCA company by way of indemnification against the claim, the insurer could then say that the DOCA company had suffered no loss as the creditor's claim against the company had been "released and extinguished".

13. The internal tension within the DOCA cannot readily be resolved as a matter of construction of the deed. That is because:

    (a) clause 15.3(d) provides, in unequivocal language, that upon the final distribution of the deed fund, the claims of all creditors will be fully released and extinguished;

    (b) the discharge of all claims against the company upon the final distribution of the deed fund is reinforced by cl.15.3(a), cl.15.5 and cl.1.5;

    (c) clause 8.5 is expressed to be "… subject to the terms of this deed …";

(d) clause 15.3(b) attempts to preserve rights of recourse a creditor may have in respect of an insurer of the company, but s.562 (as adapted by cl.8.5) does not give a creditor a legal right against the company's insurer. It only gives the creditor a right to priority in distribution as against other unsecured creditors. Clause 15.3(b) would not prevent an insurer saying that there is now nothing to indemnify against, as the creditor's claim against the DOCA company has been released pursuant to cl.15.3(d).

14. It could not have been the intention of the DOCA (viewed objectively) that rights equivalent to s.562 that are conferred by cl.8.5 could be taken away if not finally determined and satisfied by a payment from the insurer at the time of distribution of the deed fund. To give effect to the evident intent behind the DOCA, there needs to be a variation to it, such that a creditor's claim that engages cl.8.5 will not be discharged until that claim has been finally determined and satisfied. The Co-Owners submit that the Court can achieve that outcome by varying the DOCA pursuant to s.447A. Such a variation is not so much changing what was agreed, but is more in the nature of giving effect to what must have been the (objective) intention of the DOCA.

15. In broad terms, the amendments proposed by DBC will achieve the following:

(a) clause 8.5 remains unchanged;

(b) termination of the deed against one DOCA company can occur at a different time from termination against another DOCA company: cls.10.1 and 10.2;

(c) in respect of those DOCA companies against whom there is <u>no</u> claim that engages cl.8.5, the deed will be terminated at an earlier time than as against those DOCA companies against which there <u>are</u> claims that engage cl.8.5;

(d) the release or discharge of a creditor's claim against a DOCA company will only occur at the point of "Effectuation" of the deed in respect of that company: cl.15.3(d) and (e);

(e) Effectuation in respect of a DOCA company will occur at the <u>last</u> of:

i. the final distribution from the deed fund;

ii. the final determination of all claims to which cl.8.5 applies;

iii. the deed administrators have attended to all matters necessary to certify that the deed has been effectuated in respect of that deed company.

16. There is a further difficulty with the DOCA in cl.14.11. It has the effect that a creditor who does not submit a proof of debt before payment of a final dividend from the

relevant Pool is deemed to have abandoned its claim. As the DOCA stands, an insured creditor may form the view that it needs to submit a formal proof of debt in order to avoid the deemed abandonment of its claim. That will likely result in:[9]

(a) any final distribution under the DOCA being delayed until all insured creditors' claims are determined, including any appeal from a rejection of the proof of debt; and

(b) the proliferation of proceedings which would otherwise be unnecessary (if, for example, an insured creditor elected not to prove in the general deed fund).

17. Where an insured creditor has not submitted a formal proof of debt, an insurer may say that clause 14.11 has the effect of extinguishing rights under cl.8.5 in respect of that claim. That is sought to be overcome by an amendment to cl.14.11 excluding from its reach a claim to which cl.8.5 applies.

THE DEED ADMINISTRATORS' APPLICATION

18. The Co-Owners object to the following clauses in the variations proposed by the deed administrators: cl.13.11, 14.11(b), 14.15 and to the introduction of definitions of terms that are used in those clauses. The balance of the variations sought by the deed administrators reflect the variations sought by DBC, and the Co-Owners do not object to them.

19. Insofar as the deed administrators seek a Court order for variation pursuant to s.447A, they oppose the order in respect of cls.13.11, 14.11(b), 14.15 and the definitions introduced for the purposes of those clauses, as sought in paragraph 4 of the application. They also oppose the judicial advice sought in paragraphs 1 – 3 of the application.

20. In summary, the principal arguments advanced by the Co-Owners are:

(a) the clauses are inconsistent with cl.8.5;

(b) the clauses are unfairly prejudicial to, or unfairly discriminatory against, those creditors who have a claim that engages cl.8.5, and they unfairly discriminate as between those creditors;

(c) the variations would have the effect that advice given to the creditors before voting on the DOCA would have been misleading;

[9] Affidavit of Morcom , para.64-67.

(d) difficulties with respect to the meetings proposed pursuant to s.445A;

(e) the lack of information from the deed administrators to the creditors as to the extent of insurance cover.

Inconsistency with cl.8.5 and unfair prejudice/discrimination

21. Significant features of s.562 are:

(a) a deduction for expenses is made from the money the company receives from the insurer. The creditor does not pay out of its own pocket;

(b) if a creditor's claim does not succeed, or the insurer is not liable to indemnify, or there is insufficient remaining insurance cover, the creditor does not pay the expenses at all;

(c) the deduction from the insurance proceeds is limited to "... any expenses of or incidental to getting in that amount ...". The expression "that amount" is a reference to the payment from the insurer;

(d) the creditor does not pay for expenses incurred by the company in defending the creditor's claim, or, if the insurer has taken over conduct of the defence, in assisting the insurer to defend the creditor's claim or to otherwise to conduct the litigation;

(e) the creditor does not pay for the general expenses of conducting the liquidation.

22. The deed administrators' proposed cls.13.11, 14.11(b) and 14.15 are inconsistent with (a) – (e). They are therefore inconsistent with cl.8.5, in its adaptation of s.562 to the administration.

23. The combined effect of cls.13.11, 14.11(b) and 14.15 are:

(a) the creditor pays out of its own pocket. The creditor pays <u>in advance</u> of receiving any insurance proceeds. The creditor has to pay, even if it (later) turns out that the creditor receives no insurance proceeds (e.g. the creditor's claim against the company fails, the insurer was not obliged to indemnify, there is no remaining insurance cover, etc);

(b) the creditors whose claims engage cl.8.5 have to pay the <u>entire costs</u> of the administration after the Longstop Date, 21 July 2025;

(c) each creditor with a claim that engages cl.8.5 must pay Direct Holding Costs, being the remuneration of the deed administrators, costs, charges, liabilities and expenses incurred by the deed administrators (including legal expenses) "... in

respect of or in relation to a specific insured claim ..." to the extent that such costs are not indemnified under an insurance contract.

i. That would embrace costs incurred by the deed administrators (including their legal expenses) in defending the creditor's claim or, if the insurer is managing that defence, of assisting the insurer in defending the creditor's claim. The Second Orr Affidavit at paras.36, 39, 40, 41, 49(b), 71 and 72 makes plain that all costs being incurred by the deed administrators, including all fees to KWM as its solicitors, in handling Court proceedings will be charged to the creditor who is plaintiff in that proceeding under proposed cl.13.11. The Second Orr Affidavit at para.41 gives, as examples, fees to counsel and other disbursements "... incurred in relation to insured litigation, for example in respect of leave to proceed applications." Further examples are at the Second Orr Affidavit, para.71 (assisting with discovery, assisting with the production of evidence, responding to interrogatories, providing affidavits in support of applications that may need to be made by a DOCA company). The Second affidavit of Patrick MacKenzie, para.18 confirms that despite requesting insurers pay for or at least contribute to the Deed Administrators' (including their legal) costs, "almost invariably the insurer... either does not agree to pay for these costs, or the costs offered are not adequate to completely indemnify the Deed Administrators". Creditors with a claim that engage cl.8.5 do not benefit from this work by the Deed Administrators. The only persons who could benefit from this work are the insurers (to the extent the insurers avoid or reduce payments to the company under insurance policies by the Deed Company's defence of the claim) or uninsured creditors (to the extent any uninsured portion of the claim is avoided or its quantum reduced).

ii. Further, the Direct Holding Costs also include costs associated with any appeal arising out of the Deed Administrators' adjudication of proofs of debt based on claims that engage cl.8.5. Those costs are well beyond the scope of expenses that can be deducted under section 562;

(d) if the creditor fails to make payment due under cl.13.11 by the date stipulated, the creditor is deemed to have released and discharged its claim against the company, and therefore loses the benefit of cl.8.5 and its ability to otherwise prove in the deed fund: cl.13.11(g).

24. Section 562 sets a balance between benefit (receiving insurance proceeds in priority to other creditors) and burden (deduction from the insurance proceeds of the expense of getting in the insurance proceeds). The proposed cl.13.11 changes that balance. And it does so in a way that:

    (a) increases the burden on the creditor whose claim engages cl.8.5;

    (b) discriminates between different categories of creditors who have claims that engage cl.8.5.

25. As regards Holding Costs, other than Direct Holding Costs, cl.13.11 discriminates amongst creditors with claims that engage cl.8.5. The burden of Holding Costs (other than Direct Holding Costs) is to be borne by those creditors who have non-workers' compensation claims against a DOCA company. Those cl.8.5 creditors who have workers' compensation claims are not to bear any of the Holding Costs. The third affidavit of Mr Orr sworn on 12 March 2024 (***Third Orr Affidavit***) at para.15 shows that the majority of the currently known claims that might engage cl.8.5 are "personal injuries/workers compensation claims". So, on and from the Longstop Date, the whole financial burden of the administration (other than direct holding costs) will fall on a relatively small number of creditors whose (non-workers' compensation) claims engage cl.8.5. This amounts to unfair discrimination, even amongst those creditors whose claims come within cl.8.5.

26. Further, requiring creditors with claims that engage cl.8.5 to bear the administration costs from the Longstop Date is unfairly prejudicial having regard to the specified date. The justification advanced by the deed administrators is that, but for insured creditors pursuing those claims for which leave to proceed has been granted (other than workers compensation claims), the DOCA would have been able to be fully effectuated by 21 July 2025 (the ***Longstop Date***).[10] That seems unlikely. Clause 14.11 of the DOCA provides a powerful incentive for all creditors that have a claim that engages cl.8.5 to lodge a proof of debt. All such proofs of debt are likely to be for unliquidated damages. And some of them are likely to be in respect of a large and complex claim, such as that of the Co-Owners. It would normally be expected that the deed administrators would not be prepared to admit such proofs of debt in full (because of the existence of insurance contracts, and not wanting to make an admission that might jeopardise the insurance). It might be expected that the deed administrators would either:

---

10 Deed Administrators' submissions dated 12 March 2024, para. 27(b)(ii).

(a) reject the proof of debt, or admit the proof of debt only for a reduced amount (pursuant to cl.14.3 of the DOCA); or

(b) apply to the Court for directions or judicial advice in respect of determination of the proof of debt.

27. Anything less than full admission of the proof of debt may well lead the creditor to appeal to the Court against the decision of the deed administrators exercising the right conferred by (cl.14.4 of the DOCA, applying s.5.6.54 of the *Corporations Regulations*). Resolution of that appeal through Court proceedings is likely to take time. Such proceedings may only be determined concurrently with the determination of the creditor's Court proceedings claiming damages against the DOCA company. It seems unlikely that all proofs of debt by creditors with unliquidated claims against a DOCA company, being claims that engage cl.8.5, would be finally resolved by 21 July 2025. The more likely scenario is final resolution of all proofs of debt lodged by Pool C creditors will take far longer than 21 July 2025 to be finally resolved. Consequently, it is unlikely that the DOCA would have been able to be fully effectuated by 21 July 2025, but for the insured creditors pursuing those claims for which leave to proceed have been granted.

The effect of the proposed variations would render advice given to the creditors prior to voting on the DOCA misleading

28. In the report to creditors dated 23 June 2022, the deed administrators advised creditors as follows:

> "We estimate that creditors will receive a higher return on their outstanding debts in the event the WBHO Construction SA DOCA proposal is approved by creditors as compared to liquidation.[11]
>
> ...
>
> It is our opinion that it is in the creditors' interests to approve the DOCA proposed by WBHO Construction SA as this will result in a greater return to creditors than would be achieved if the Companies were wound up.[12]
>
> ...
>
> The expected return to creditors under the WBHO Construction SA DOCA is expected to be better than under a liquidation scenario.[13]
>
> ...

11 First Orr Affidavit, p.374, para.1.6
12 First Orr Affidavit, p.376, para.1.8
13 First Orr Affidavit, p.444

As the WBHO Construction SA DOCA proposal results in a greater return than a liquidation, we are of the opinion it would not be in creditors' interest to place the Companies into liquidation."[14]

29. At the meeting to vote on the DOCA, the administrators advised creditors as follows:

> "*Why should I vote in favour of the WBHO Construction SA DOCA proposal?*
>
> The Chairperson advised to vote in favour of the proposed DOCA would be a commercially sensible decision. The outcome to all classes of creditors would be superior under the DOCA than would be in a liquidation scenario.
>
> ...
>
> He concluded that it was the Administrators' view the proposed DOCA provided for a more certain and superior outcome."[15]

30. The proposed variations would place those creditors with a claim to which cl.8.5/s.562 would apply in a financially worse position under the DOCA than they would have been in a liquidation with respect to that claim. The net recovery to the creditor from the insurance proceeds is likely to be far less under the DOCA than it would have been in a liquidation. If the variations are adopted, creditors voting in favour of the DOCA based upon the advice from the administrators may be seen, with hindsight, to have been misled.

Difficulties with respect to the proposed s.445A meetings

31. The DOCA is a deed for each of the 16 companies. When the DOCA was approved, 16 meetings of creditors were held. The DOCA had to be approved by a majority in the number of creditors, and by a majority in the value of the creditors, for each individual company. The meetings were held concurrently,[16] but the voting was taken separately. The results of the voting are recorded in the first affidavit of Mr Orr sworn on 7 June 2023 (***First Orr Affidavit***), p.635.

32. Pursuant to s.445A, variations to the DOCA would need to be passed by the creditors of each company comprising the 16 companies, so a separate meeting would need to be held for each company. In order to be passed, both a majority in number of creditors voting, and a majority by value of creditors voting, would need to be in favour of the variations: s.75-115(1) of the *Insurance Practice Rules (Corporations)* 2016 (***IPR***).

33. At the present time, all of the employee creditors and the creditors for less than $25,000 (comprising the Pool A and Pool B creditors) have been paid out: First Orr Affidavit, para.96. This represents about $13.8m in value. It includes some 195 small creditors.

---

14 First Orr Affidavit, p.446

15 First Orr Affidavit, p.631.

16 First Orr Affidavit, p.620

The number of employee creditors is not disclosed by the deed administrators. As they are no longer creditors, they could not vote: s.75-85 of the IPR. The absence of those creditors means it would not now be possible to hold a creditors meeting for each company which would establish whether, if these variations had been proposed at the outset, they would or would not have been approved.

34. There are likely to be difficulties as to the value for which the deed administrators would admit the proof of debt of those creditors with a cl.8.5 claim. All claims engaging cl.8.5 are likely to be unliquidated claims, and therefore the creditor must lodge a proof of debt, together with a just estimate of the value of the claim: s.75-85(3)(b) and (4). Under s.75-90 the administrator determines the amount for which the claim or proof of debt will be admitted. The creditor has a right to appeal to the Court against any such decision: s.75-100(4). The Co-Owners have claims for damages for defects of $310 - $335m, together with interest. As at March 2023, DBC was said to have a claim for at least $27,221,854 in presently-quantified remediation works, plus further unquantified amounts for further remediation works, delays and possible third-party contribution.[17] While not currently quantified, the claims foreshadowed by Cbus Property Brisbane Pty Ltd as trustee (***Cbus***) and Dexus Funds Limited as trustee (***Dexus***) are said to be large and complex.[18] The deed administrators are likely to be reluctant to admit these claims for the full claimed value (inter alia so as not to make any admission that would compromise insurance cover). In the First Orr Affidavit at para.70, Mr. Orr said that had DBC submitted a proof of debt prior to the June 2022 meeting to vote on the DOCA, the deed administrators would likely have admitted the DBC claim to proof to the value of $1 for voting purposes.

35. If the proofs of debt are not admitted in full, there may be an appeal to the Court. Such an appeal would not be straightforward. It may need to be resolved concurrently with the determination of the creditor's claim in the proceeding against the DOCA company. Such an outcome could lead to ongoing uncertainty as to the outcome of the meetings.

Alleged material change in circumstances

36. The affidavit of the Second Orr Affidavit at paras.42 – 44 says that the expected time to finally determine all claims that engage cl.8.5, and the likely costs associated with those claims and their potential to reduce the assets available for distribution to

---

17 Affidavit of David John Rodighiero dated 30 March 2023, para. 8.

18 Second Orr Affidavit, para. 27.

creditors, amount to a material change in circumstance from that set out in the report to creditors. The report to creditors is at First Orr Affidavit at pp.364 – 619.

37. The Report to Creditors identified that there would be a term of the proposed DOCA to the effect of cl.8.5: First Orr Affidavit, p.614. The report (at p.445 of the First Orr Affidavit) described the foreseeable future of Court proceedings, claims on insurance and disputes with creditors as follows:

    (a) the Probuild Group is seeking to recover funds under various insurance claims and legal actions. Recoveries of this type, especially in a construction context, are inherently complex and uncertain;

    (b) the Probuild Group is party to legal proceedings, and may be party to future legal proceedings. Legal action can be complex and time consuming;

    (c) Principals may have substantial claims for liquidated damages and consequential loss against Probuild companies. Quantification and validation of such claims may not be known until projects are completed;

    (d) there are a range of uncertainties and potential developments that could adversely impact quantum and timing of recovery for creditors.

    In short, creditors were warned of the risks and uncertainty of the companies being tied up in litigation with creditors and insurers, and that that could adversely impact both quantum and timing of a return to creditors.

38. It was inherent in adopting cl.8.5 that, in a course of the deed administration, claims might be made against a DOCA company for which there might be insurance cover, that those claims might be resisted by the insurer and could be tied up in costly litigation. Further, given the nature of the Probuild Group's work, there could be very large construction/design lawsuits made against the companies, involving large amounts of money, and that dealing with such litigation could involve substantial cost and time. All of these could delay the return to creditors. In short, what the deed administrators refer to as a change in circumstances is in fact the realisation of risks that were inherent in adopting s.562 into this DOCA, and which were pointed out to creditors before voting.

Lack of information as to the insurance cover of the DOCA companies

39. There is an unfairness in the proposed cl.13.11 requiring those creditors with claims that engage cl.8.5 to pay "up front" all the costs of the administration as the price for

pursuing claims that may attract insurance cover, but withholding from them information as to the extent of the available insurance cover.

40. The deed administrators do not reveal the extent of insurance cover that may or may not be available in respect of individual claims, or the remaining insurance cover in totality. The Second Orr Affidavit at para.55(a) says that this is confidential and cannot be revealed. So the creditors with claims engaging cl.8.5 are being asked to pay up front, but are not able to assess whether the benefit in terms of potential insurance cover for their claim is worth the cost they are being asked to bear.

41. The Second Orr Affidavit at para.71 says that some of the insurers have taken over the carriage of the DOCA company's defence of a proceeding. But he does not say in respect of which claims that has or has not occurred and, in particular, in respect of which claims the DOCA company is bearing all of the "defence costs". He does say that even where the insurer has taken over the conduct of the defence, the deed administrators are often required to undertake various tasks, including using their solicitors, which incur heavy expenses, including the deed administrators' remuneration: paras.71 – 73, 41, 49(b), 36, 39 and 40. He says that some of these "direct" costs will typically be covered as "defence costs" under the relevant insurance policy, but it still leaves a gap. He does not disclose what is the extent of insurance cover in respect of "defence costs". In short, the creditors with claims that engage cl.8.5 are being asked to accept that the Direct Holding Costs that will be charged to them are not covered by insurance, but without being able to assess for themselves that the insurance cover does not extend to those charges. Nor do they have any control over the expenses the deed administrators and/or their solicitors are incurring. This is unfair.

Date: 11 April 2024

Solicitors for the respondents

Wadren Pty Ltd and QIC Werribee Pty Ltd

Prepared by O'Donnell KC