SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS 4023 of 23

IN THE MATTER OF PCA (QLD) PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT) ACN 141 148 24

Applicant	**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 QWB Residential Precinct Operations Trust**
	and
Respondents	**PCA (Qld) Pty Ltd (subject to Deed of Company Arrangement) ACN 141 148 245 and others according to the attached Schedule**

SIXTH RESPONDENT'S WRITTEN SUBMISSIONS

List of material

A. Amended originating application (CFI: 41)

B. Affidavit of Gavin Patrick Grahame (to be filed)

C. First affidavit of David Michael Orr (CFI: 10-11)

D. Second affidavit of David Michael Orr (CFI: 28-37)

E. Third affidavit of David Michael Orr (CFI: 45)

Introduction

1. Cbus Property Brisbane Pty Ltd (ACN 169 682 292) as trustee for the Brisbane Unit Trust (**Cbus Property**) was a party to a design and construction contract with PCA (Qld) Pty Ltd (subject to Deed of Company Arrangement) ACN 114 148 245 (**PCA**) for the construction of a large residential project at 443 Queen Street, Brisbane (the **project**).

2. Arising from the project, Cbus Property has a number of different claims for breach of the contract by PCA in failing to complete the project as agreed and in relation to

defective works said to have been undertaken by PCA on the project as part of its design and construction obligations.

3. Cbus Property also has a claim against WBHO Australia Pty Ltd (subject to Deed of Company Arrangement) (ACN 095 983 681) (**WBHO**) pursuant to a guarantee provided by WBHO of the obligations of PCA pursuant to the contract.

4. In respect of the defective works, Cbus Property believes that it is an insured creditor of PCA in that it believes there are 3 insurance policies potentially available to cover some of the claims it has against PCA. [1] It intends to bring a claim against PCA in this Court for those claims and will seek leave to bring that proceeding in a future application.[2] It also believes that it will have claims against PCA which are not insured.

5. Cbus Property has lodged a proof of debt in the deed administration and wishes to vary that proof to ensure that it includes all of its claims against PCA (both insured and uninsured). [3] It will also lodge a proof of debt in respect of the obligations of WBHO.

6. In respect of those claims that are believed to be uninsured, Cbus Property wishes to prove in the deed administration.

7. Cbus Property submits that the applicant's amended originating application ought to succeed and the interlocutory application ought to be dismissed where:

   (a) it is appropriate for the Court to decide the issue of which form of amended deed of company arrangement ought to be put in place and make orders pursuant to s447A of the *Corporations Act 2001* (Cth);

   (b) in terms of judicial advice under s90-15, this is a circumstance where the Court cannot be positively persuaded that it would be just and beneficial (meaning advantageous) or be satisfied that there would be sufficient utility to the administration to exercise its powers under s90-15;

   (c) the amended deed of company arrangement proposed by the deed administrators is unfair and discriminatory against the schedule 2 creditors (as defined in the applicant's submissions).

8. These submissions deal with each of these points starting with a consideration of the two (2) proposed amended deeds of company arrangement.

The competing amendments

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[1] Affidavit of Mr Grahame, paragraphs 10 and 11
[2] Affidavit of Mr Grahame, paragraph 12
[3] Affidavit of Mr Grahame, paragraph 9

9. Cbus Property submits that the amended version of the deed of company arrangement provided by the applicant is the appropriate form of deed to be given effect to.

10. This form of the deed of company arrangement provides for the insured claims of the schedule 2 creditors to be pursued allowing for access to those parties to potentially applicable insurance policies. Such claims will reduce the total creditors' call upon the deed fund and thereby increasing the share available to other Pool C creditors.

11. The essential difference between the 2 versions of the amendments and the focus of dispute as to the versions is the requirement included by the deed administrators' version that the schedule 2 creditors pay what are termed holding costs and direct holding costs (the **costs mechanism**).

12. The effect of the costs mechanism is to provide the deed administrators with upfront funding of their remuneration and costs by the schedule 2 creditors after 21 July 2025 not only for the conduct of the administration but also for the costs of defending the particular claims of each of them.

13. The general proposition for Cbus Property is that to the extent that the deed administrators are called upon by an insurer to assist with defending any particular piece of litigation, any costs or remuneration they incur in so assisting are properly to be paid by the insurer which benefits from that assistance.

14. When an insured claim is being opposed, it is being opposed by the relevant insurer which is seeking to avoid liability or minimise liability under a policy of insurance and it is they that stand to benefit from such opposition and it is they that ought to be meeting any Direct Holding Costs and Holding Costs (as defined).

15. The deed amendments proposed by the deed administrators anticipate funding coming from the relevant insurers[4] yet still place the burden of the costs mechanism on the schedule 2 creditors. Where such an insurer is obligated to fund assistance from a deed administrator, they will be incentivised to deal with the defence of a claim efficiently and expeditiously.

16. It is further submitted that it is not the place of any of the schedule 2 creditors to fund active opposition to their own claims.

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[4] See definition of Direct Holding Costs

17. With respect to the position under s562 of the *Corporations Act 2011* (Cth), both versions of the deed provide that s562 will apply to this administration as if it was a liquidation. [5]

18. The scheme of s562 of the *Corporations Act 2001* (Cth) is that it allows insured creditors to receive the benefit of any insurance proceeds obtained through a claim against the company in liquidation rather than those insurance proceeds being shared amongst all of the creditors as otherwise required by ss555 and 556.

19. The scheme also allows liquidators (in this case the deed administrators) to deduct from the insurance proceeds an amount for "…any expenses of or incidental to getting in that amount…". Such deduction could only occur after insurance proceeds had been obtained.

20. This section has been held to extend to remuneration of a liquidator[6] and authorities indicate that remuneration approval would be required in the usual way. [7]

21. What is sought in the deed administrators' version goes beyond the scheme of s562 of the *Corporations Act* and provides for an upfront entitlement to payment. There is no indication as to whether those funds provided upfront would form of the deed fund or whether the deed administrators would seek remuneration approval in the usual way to pay themselves those monies.

22. It is submitted that the costs mechanism is inappropriate and unfair and the amended deed of company arrangement proposed by the deed administrators ought to be rejected by the Court in making orders pursuant to s447A where:

    (a) it discriminates against the schedule 2 creditors;

    (b) it unfairly requires a plaintiff to fund assistance to the defence to be maintained against its own claim;

    (c) it is raised in circumstances where an insurer seeks the benefit of running a defence against a claim and determines the need for and extent of assistance from the deed administrators;

    (d) it is unlikely that any insurer will provide funding for such assistance where the funding is already in place pursuant to the amended deed of company arrangement;

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[5] Clause 8.5

[6] *Re Morgan* [2013] FCA 970 per McKerracher J

[7] *Morgan, in the matter of Brighton Hall Securities Pty Ltd* [2018] FCA 2029

(e) in terms of the entitlement to Direct Holding Costs, it extends beyond the entitlement anticipated by s562 for remuneration and expenses for getting in insurance proceeds.

23. Such an outcome would be consistent with the objects of Part 5.3A of the *Corporations Act* where the returns to creditors would still be in excess of those that would be available to creditors in an estimated liquidation scenario. [8]

The process - s447A

24. Cbus Property submits that this Court in this application is the proper adjudicator of the form of amendment of the deed of company arrangement to be allowed.

25. Cbus Property adopts the applicant's submissions of 11 March 2024 at paragraph 49 and the submissions as to the relevant pathways at paragraphs 50 to 62.

26. With respect to relevant principles for the exercise of the Court's power pursuant to s447A, the test to be applied by the Court as to whether it should make a decision is not simply one about prejudice to creditors but rather the Court is required to consider the effect on the creditors and the practical commercial consequences or commercial realities of what would happen if the variation was not made. [9]

27. The existence of prejudice alone is not sufficient to preclude the Court from making a decision with respect to the deed amendments. [10]

28. The deed administrators submit that this is not an appropriate occasion for the exercise of the power because there will be a delay to payment of unsecured creditors and a reduction in the amount potentially payable to unsecured creditors if the costs mechanism is not in place.[11] It is further said that the creditors ought to have the opportunity to decide how to vary the deed and it is said that because there will be prejudice to the unsecured creditors arising from the applicant's amendments and the absence of a costs mechanism, the issue ought to be put to creditors.[12]

The effect on creditors and prejudice

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[8] S435A and see second report to creditors at first affidavit of Mr Orr at page 79 of the report and the report to creditors dated 6 December 2023 in the second affidavit of Mr Orr at page 16 of the report

[9] *Re Longley (Deed Admin)* [2024] FCA 70 at [51] and see *Re Alita Resources Ltd; Ex Parte Richard Scott Tucker As Joint And Several Administrator Of Alita Resources Ltd (Subject To Deed Of Company Arrangement)* [2020] WASC 430 at [31] and [32]

[10] *Re Paradox Digital Pty Ltd; Ex Parte Smith* [2001] WASC 182, [16].

[11] Deed Administrators' submissions, paragraph 31

[12] Deed Administrators' submissions, paragraphs 37 and 38

29. The starting point for consideration of the effect on the creditors and prejudice is the position that the creditors currently are in.

30. In the report to creditors pursuant to s75-225 of the *Insolvency Practice Rules* which was provided to creditors before the vote on the deed of company arrangement[13], the deed administrators provided their expected return to creditors in table 33 on page 79 of the report. The table set out a range of potential returns from approving the proposed deed of company arrangement against the possibility of a return in a liquidation scenario.

31. This table was identified as an estimate and it was further stated on the same page of the report that:

> *"10.2 Estimated return to creditors*
>
> > *We have provided above a summary of the potential return under the different scenarios. Any final return to creditors under any of the possible outcomes will be dependent on the actual level of asset recoveries and the claims of creditors.*
> >
> > *This is a process that will take time, especially as legal action may be required for the recovery of some assets and as creditors seek to mitigate any losses they have suffered. The quantification of creditor claims has also been complicated by the adoption of certain claims under the Roberts Transaction and other project novations. There are also potential contingent and damages claims by Principals as well defect liability periods to run and therefore final claims may not be known for some time."*[14]

32. Further to the effect on a dividend, it was stated by the deed administrators in the same section as to timing that:

> *"Before a dividend is paid to creditors under any of the scenarios, a detailed process of assessment of all claims, including an assessment of actions undertaken to mitigate loss will be undertaken as is the standard procedure in these circumstances."*

33. The factors influencing the estimated returns were then set out on page 80 at 10.2.1. These factors included that principals may have substantial claims and that quantification of these claims may not be known until projects had been completed and defect liability periods had expired. The final bullet point says that there are a range of

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[13] First affidavit of Mr Orr, paragraph [73] and see exhibit Tab 13, pages 79 and 80 of the report
[14] Report to creditors dated 23 June 2022, page 80

uncertainties and potential developments that could adversely impact the quantum and timing of recoveries for creditors under each scenario.

34. The section finishes with the statement from the deed administrators that the estimated returns presented in the report are reasonable estimates based on available information and the current position.

35. The time for payment of 12 months for Pool C creditors mentioned in the report at page 10 was also expressly referred to as an estimate.

36. The signed form of the deed of company arrangement is consistent with this in that:

    (a) it provides that the deed administrators' remuneration and costs will be paid out of the deed fund for Pool C creditors first; [15]

    (b) there are no caps or limitations on the remuneration and costs of the deed administrators;

    (c) there is no timeline provided for the payment of the Pool C creditors. [16]

37. It arises from this report and the original form of the deed that the creditors were only ever provided with estimates that were subject to change – there was always anticipated to be uncertainty as to amount and timing. The prospect of changes in the estimated return to unsecured creditors because of litigation and the prospect of a delay in payment arising from litigation including claims from principals (such as the schedule 2 creditors) were set out in this report to creditors before they voted on the original deed proposal.

38. Upon voting to approve the deed proposal and upon the deed being signed, the creditors did not obtain any entitlement to any particular sum or to payment within any particular timeframe.

39. Now turning to the deed amendment proposals and their effect on creditors.

40. The proposed amendments to the deed as proposed by the applicant and the deed administrators allow for a mechanism by which some companies are released from the operation of the deed and allow for claims that are insured to progress against the relevant deed company with intended access to an insurance policy issued in favour of that company.

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[15] Third affidavit of Mr Orr, exhibit page 54, clause 13 and clause 8.3

[16] Clause 8.6

41. These changes do not detract from or change the position with respect to the other Pool C creditors. The potential for additional costs and delay arising from litigation of this type was notified to the creditors at the time of approval of the deed.

42. Ultimately, the Pool C creditors will benefit from those claims being insured and litigated where they might otherwise be claimed by the schedule 2 creditors as unsecured creditors participating in Pool C for what are expected to be very significant amounts.

43. With respect to delay, it is accepted that there will be a delay to payment arising from the conduct of the litigation however that is an issue that was informed to the creditors at the time of voting for the deed proposal and the creditors have never had the benefit of any agreement as to payment within any particular timeframe.

44. The position as foreshadowed to unsecured creditors in the second report and in the deed itself is being played out as foreshadowed.

45. In that event, the existence of delay and a potential impact on returns does not create and adverse effect or prejudice to the Pool C creditors where they are in the same position as that which was informed to them and to which they agreed.

46. The deed administrators see the existence and volume of insured litigation as a material change in circumstances to that which was informed to creditors in the 75-225 report[17] however the content of that report does not contain any constraints on or estimates of the amount of litigation which have now been shown to be incorrect or different to that which was stated. The deed administrators might be subjectively surprised by the amount of litigation however their communications to creditors and the deed itself did not confine the potential for litigation in any way.

47. The costs mechanism which is sought to be included by the deed administrators would achieve those things identified in the deed administrators' submissions at [38(a)] however that would essentially put the Pool C creditors other than the schedule 2 creditors in a better position than that advised to them in the s75-225 report. It would provide an unexpected inflow of funds into the administration and thereby put those creditors in a better position than that communicated; this would be achieved at the expense of and to the detriment of the schedule 2 creditors.

Commercial consequences

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[17] Third affidavit of Mr Orr, paragraph 44

48. Further to this and as anticipated by Mr Orr in his third affidavit[18], if the creditors were to vote in favour of the deed proposed by the deed administrators then there is a prospect that one or more of the schedule 2 creditors will bring a proceeding pursuant to s445D(f)(i) of the *Corporations Act 2001* (Cth) to have the deed terminated on the basis that it is oppressive or unfairly prejudicial to, or unfairly discriminatory against one or more creditors.

49. This section is enlivened where the deed proposed by the deed administrators distinguishes between the position of those creditors that have insured claims and those that do not and where it imposes on a small number of creditors an obligation to pay holding costs and defence costs to fund a defence against their own claim.

50. Where such a claim is brought, it could be anticipated to be a substantial piece of new litigation dealing with the same or similar issues which are before the Court here being in particular the costs mechanism.

51. Any such application would likely involve any applicant seeking an injunction against the deed administrators dealing with the deed fund or advancing the deed administration until the application had been finally determined, further delaying the administration.

52. This is not an occasion for the Court to make findings about a potential claim under section 445D(f)(i) however, the chance of such a claim is a consequence that may arise from the vote being put to unsecured creditors where it is likely that such a vote would result in the costs mechanism being imposed.

Conclusion on the process

53. It is submitted that the effect on creditors of the amendments to allow for insured claims to proceed (as provided in both versions) is not a change that adversely impacts Pool C creditors above the position informed to them and to which they agreed.

54. The inclusion of the costs mechanism would operate detrimentally to the schedule 2 creditors and would discriminate against their claims in favour of the other Pool C creditors' claims.

55. The potential commercial consequences of a referral to the creditors operate against such referral.

56. This is not a circumstance where there is prejudice or an adverse effect on creditors which would require the competing amended deeds need to be referred to creditors.

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[18] Paragraph 35

The interlocutory application

57. The interlocutory application seeks an order pursuant to s90-15 of the Insolvency Practice Schedule (Corporations) that the deed administrators would be justified in convening a meeting of creditors to consider both versions of the amended deeds of company arrangement.

58. The power of the Court pursuant to s90-15 is broad however as stated by Farrell J in *GDK Projects Pty Ltd v Umberto Pty Ltd (in liq)*, it is difficult to envisage circumstances where the power would be exercised if the Court could not be satisfied that it would be just and unless the applicant had demonstrated sufficient utility to the external administration. [19]

59. This application for advice pursuant to s90-15 ought to be dismissed where the Court can't be positively persuaded that the decision to call a creditors' meeting as proposed is in all the circumstances, the proper decision for them to take.[20]

60. The likelihood is that on conferring a meeting of creditors the deed administrators' version of the amended deed will be approved given its inclusion of the costs mechanism.

61. Such a vote will give rise to the issues identified above, in particular the unfairness and discrimination associated with the costs mechanism and the potential for further litigation pursuant to s445D of the *Corporations Act 2001* (Cth).

62. The decision to call a meeting to consider both versions of the amendments is not justified in light of these circumstances and this Court is the appropriate adjudicator of which amended version of the deed ought to be given effect to.

Conclusion

63. For the reasons submitted above, the originating application should be allowed and the Court should dismiss the interlocutory application.

Paul O'Brien

Counsel for the sixth respondent

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[19] [2018] FCA 541 at [33]

[20] *Re Octaviar Ltd* [2020] QSC 353 at [17] to [22]