FEDERAL COURT OF AUSTRALIA

Decon Australia Pty Ltd v TFM Epping Land Pty Ltd [2020] FCA 1085

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| File number: | NSD 817 of 2020 |
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| Judge: | **STEWART J** |
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| Date of judgment: | 28 July 2020 |
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| Catchwords: | **CORPORATIONS** – companies in voluntary administration – deeds of company arrangement (DOCAs) to be proposed at imminent second meetings of creditors – pre-existing pending applications to wind-up the companies – interim relief sought to restrain the creditors meetings and the execution of DOCAs pending application to terminate administrations of companies pursuant to s 447A of the *Corporations Act 2001* (Cth) and/or setting aside resolutions and DOCAs pursuant to ss 447A and 445D and winding-up the companies – whether administrators have failed to properly investigate and consider the companies’ affairs – whether administrators furnished misleading information to creditors – whether administrators denied plaintiff its proper voting rights – serious questions to be tried – whether balance of convenience favours interim relief – remedies available to plaintiff if the resolutions are adopted and the DOCAs executed – limited prejudice to plaintiff – balance of convenience does not justify Court’s intervention – interim relief refused |
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| Legislation: | *Building and Construction Industry Security of Payments Act 1999* (NSW) s 15*Corporations Act 2001* (Cth) ss 91, 438A, 439C, 440D, 444C, 445D, 447A, 459C  |
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| Cases cited: | *Aloridge Pty Ltd v Christianos* [1994] FCA 123; 13 ACSR 99*Australian Securities and Investments Commission v Midland Hwy Pty Ltd (admin apptd)* [2015] FCA 1360; 110 ACSR 203*Blacktown City Council v Macarthur Telecommunications Pty Ltd* [2003] NSWSC 883; 47 ACSR 391*Chief Commissioner of State Revenue (NSW) v Rafferty’s Resort Management Pty Ltd (in liq)* [2008] NSWSC 452; 217 FLR 230*Lehman Brothers Holdings Inc v City of Swan* [2010] HCA 11; 240 CLR 509*Mighty River International Ltd v Hughes* [2018] HCA 38; 265 CLR 480*Re Recycling Holdings Pty Ltd* [2015] NSWSC 1016; 107 ACSR 406*Re Ten Network* [2017] NSWSC 1247*Vannella Pty Ltd Atf Capitalist Family Trust v TFM Epping Land Pty Ltd* [2020] NSWSC 659 |
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| Date of hearing: | 27 July 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 44 |
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| Counsel for the Plaintiff: | J Giles SC with E Ball |
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| Solicitor for the Plaintiff: | Piper Alderman |
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| Counsel for the Defendants: | R Scruby SC |
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| Solicitor for the Defendants: | Henry Williams Lawyers |

ORDERS

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|  | NSD 817 of 2020 |
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| BETWEEN: | DECON AUSTRALIA PTY LTD ACN 078 021 333Plaintiff |
| AND: | TFM EPPING LAND PTY LTD ACN 605 600 253First DefendantKATOOMBA RESIDENCE INVESTMENT PTY LTD ACN 606 106 405Second DefendantSTEPHEN JOHN MICHELL (and another named in the Schedule)Third Defendant |

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| JUDGE: | STEWART J |
| DATE OF ORDER: | 28 JULY 2020 |

THE COURT ORDERS THAT:

1. Pursuant to s 440D of the *Corporations Act 2001* (Cth), the plaintiff has leave to commence this proceeding against the first and second defendants.
2. The relief sought in order 6 of the originating process is adjourned for future determination.
3. The interim relief sought in the originating process is otherwise dismissed.
4. The costs of the hearing for interim relief are reserved.
5. The matter is listed for case management at 4:15pm on 29 July 2020.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Revised from the transcript)

STEWART J:

## Introduction

1. On 22 June 2020, the plaintiff in this proceeding, Decon Australia Pty Ltd, applied to this Court for orders winding-up the first defendant, **TFM** Epping Land Pty Ltd, and the second defendant, Katoomba Residence Investment Pty Ltd (**KRI**). That application is listed for hearing before a judicial registrar of this Court commencing on 29 July 2020 (i.e. tomorrow).
2. Eight days after the plaintiff filed its winding-up application, which is to say on 30 June 2020, the common sole director of the defendant companies resolved to place each of them in voluntary administration. The third and fourth defendants were appointed as administrators of both companies.
3. The plaintiff now seeks urgent interim relief restraining TFM and KRI from holding second meetings of creditors, or from executing deeds of company arrangement (**DOCA**s) recommended by the administrators in reports to creditors. The creditors meetings are scheduled for 10:00am and 11:00am, respectively, on 28 July 2020 (i.e. today).
4. The plaintiff alleges that information provided to creditors by the administrators in the administrators’ reports on which the creditors will have to rely in voting on the proposed DOCAs includes information that is materially misleading. The plaintiff also alleges that its claims against each of the companies have been incorrectly analysed so as to give it no voting rights by value at the creditors meetings when in fact it should have majority voting rights by value. The plaintiff also raises issues with regard to the analysis of other claims against the companies, and that if the DOCAs were adopted and executed they would likely be set aside in due course.

## The relief

1. The relief set out in the original originating process is as follows:

General

1. Pursuant to s 440D of the Corporations Act, an order that the Plaintiff have leave to commence proceedings against the First and Second Defendants.

Interim Relief

1. Time for service of this application be abridged and the application for interlocutory relief be heard at 2pm on 27 July 2020.
2. An order restraining the First and Second Defendants holding a meeting of creditors until further order.
3. An order extending the time for the First and Second Defendants to hold the second meeting of creditors be extended until further order.
4. (Alternatively to 3 and 4) An order that First and Second Defendants be restrained from entering into a deed of company arrangement.
5. An order that the Third and Fourth Defendants by 31 July 2020 deliver up to the Plaintiff:

a. all documents relied on by the Third and Fourth Defendants in the preparation of the administrator’s report to creditors of the First Defendant;

b. all documents relied on by the Third and Fourth Defendants in the preparation of the administrator’s report to creditors of the Second Defendant; and

c. all correspondence between the Third and Fourth Defendants of the First Defendant and Second Defendant; Yihao (Eric) Zhang; Serena Gao; Yvonne Liu; and any employee, director or agent of the Tasman Groups.

1. An order that the hearing of the winding up application in proceedings NSD684/2020 be adjourned to a date to be fixed.
2. The orders be entered forthwith.

Final Relief

1. An order that the administration of the First and Second Defendants should end.
2. An order setting aside any resolution that the First or Second Defendants enter into a Deed of Company Arrangement, or if a Deed of Company Arrangement is entered into setting aside that Deed or those Deeds.
3. An order that the First and Second Defendants be wound up and David Ian Mansfield of Deloitte be appointed as liquidator of the First and Second Defendants.
4. The Defendants pay the Plaintiff s costs of the proceedings
5. Such further or other orders as the Court deems fit.
6. Orders 1 and 2 can be made by consent. Also, it was accepted by the plaintiff that if it was to be granted interim relief, either in the form of orders 3 and 4 restraining the holding of the meetings of creditors or order 5 restraining the entering into of DOCAs, fairness would require that the hearing of its winding-up application against the companies (which is in proceeding NSD684/2020) be adjourned. If that was to occur, then the winding-up application and the application for other final relief in this case would be heard together.

## Background

1. TFM and KRI are the developers of a 99-unit residential project in Epping. TFM and KRI entered into a construction contract with the plaintiff for the plaintiff to build the Epping development. An interim occupation certificate for the Epping development was issued in August 2018, and a strata plan was registered in September 2018. About half the units in the Epping development have been sold.
2. In June 2019, the plaintiff served a payment claim on TFM and KRI pursuant to the *Building and Construction Industry Security of Payments Act 1999* (NSW) (**SOPA**) in the amount of $6,355,352.42. That TFM and KRI are liable to pay the plaintiff the money the subject of that claim has now been established beyond question in proceedings in the Supreme Court of NSW, including in the Court of Appeal.
3. Not only were TFM and KRI unsuccessful in appealing against a judgment against them in the stated amount, but they were also unsuccessful in appealing against the refusal of a stay of that judgment. The last appeal judgment was on 19 June 2020. It was the next business day that the plaintiff applied to wind-up the defendant companies.
4. The bases upon which the winding-up applications are made is that TFM and KRI have admitted, through their legal representatives, that they are insolvent, and each is presumed to be insolvent under s 459C(2)(b) of the *Corporations* ***Act*** *2001* (Cth) as writs executed by the Sheriff were returned wholly unsubstantiated.
5. As indicated, on 30 June 2020 the sole director of each of TFM and KRI resolved to place the companies under voluntary administration and appoint the administrators. The first reports to creditors in the voluntary administrations were issued on 2 July 2020, and the first creditors meetings were held on 10 July 2020.
6. At the first creditors meetings, the administrators determined to admit the plaintiff’s claims against each of TFM and KRI for only $1 for the purpose of voting while admitting all other creditors to vote for the amounts which they claimed. I accept the submission on behalf of the plaintiff that that decision, which is reflected in the reports to creditors, is surprising.
7. The reason stated by the administrators for valuing the plaintiff’s claim at $1 is that a cross-claim by the companies against the plaintiff may exceed the plaintiff’s claim. The cross-claim, however, does not prevent the debt owed being immediately due and payable (s 15 of SOPA). The analysis by Stevenson J in the stay application, on the evidence before his Honour merely a few months ago, reveals the cross-claim to be somewhat speculative and, at least at that time, unsubstantiated. See *Vannella Pty Ltd Atf Capitalist Family Trust v TFM Epping Land Pty Ltd* [2020] NSWSC 659 at [62], [63] and [78]-[85].
8. Further, in their report to creditors the administrators said that they are not aware of the prospects of recovery against the plaintiff, and they have seen no legal advice about the merits of the claims. The administrators recognised that “the very nature and outcome of litigation is uncertain”.
9. The second reports to creditors in the voluntary administrations were issued on 20 July 2020, and, as indicated, the second creditors meetings are scheduled to be held on 28 July 2020 at 10:00am in the case of KRI and 11:00am in the case of TFM.
10. According to the reports to creditors, the administrators recommend to creditors that each of TFM and KRI execute a DOCA. According to the administrators, under the DOCAs, creditors of TFM will receive between 2.78 and 5.00 cents in the dollar (compared to between 0.02 and 1.41 cents in the dollar in a liquidation) and creditors of KRI will receive between 1.08 and 2.27 cents in the dollar (compared to nil in a liquidation). On any view, those are very low returns.

## Serious questions to be tried

1. The plaintiff submits that the conduct of the administration of each of TFM and KRI gives rise to the serious question of whether the Court should terminate the administrations of those companies. In written submissions the power to do so was identified as being s 445D of the Act, but that provision empowers the Court to make an order terminating a deed of company arrangement. The applicable provision is s 447A of the Act which, relevantly, provides as follows:

(1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.

(2) For example, if the Court is satisfied that the administration of a company should end:

(a) because the company is solvent; or

(b) because provisions of this Part are being abused; or

(c) for some other reason;

the Court may order under subsection (1) that the administration is to end.

1. That s 447A empowers a court to terminate an administration is well established, including because the administration was an abuse of process or for the purpose of ordering a compulsory winding-up. For examples, see *Aloridge Pty Ltd v Christianos* [1994] FCA 123; 13 ACSR 99 at 101-102; *Chief Commissioner of State Revenue (NSW) v Rafferty’s Resort Management Pty Ltd (in liq)* [2008] NSWSC 452; 217 FLR 230 at [9]-[10] and *Blacktown City Council v Macarthur Telecommunications Pty Ltd* [2003] NSWSC 883; 47 ACSR 391 at [16]-[17]. See also ***Mighty River*** *International Ltd v Hughes* [2018] HCA 38; 265 CLR 480 at 507 [65].
2. Section 447A is also available to set aside any resolution to enter into a DOCA. See *Australian Securities and Investments Commission v Midland Hwy Pty Ltd (admin apptd)* [2015] FCA 1360; 110 ACSR 203 per Beach J at [69].
3. The plaintiff submits that the basis for such an order is that the evidence suggests, at least, a lack of attention to detail by the administrators and a failure by them to properly investigate and consider the companies’ affairs as required by s 438A of the Act. Those failures, so it is said, led to materially misleading information being provided to creditors.
4. The plaintiff has identified a number of potentially misleading statements in the administrators’ second report to creditors of both TFM and KRI. These statements include:
* two instances of creditors being identified as a creditor of both TFM and KRI in the reports when the loan documents only identify either TFM or KRI but not both as the borrower;
* a company being identified as a secured creditor of both TFM and KRI in the reports when the loan document indicates that TFM and KRI are merely guarantors of a loan to the company;
* the reports identifying that both TFM and KRI entered into a share subscription agreement loan with other parties when the relevant agreement only identifies TFM as the issuer of shares;
* the reports overstate the cost of acquiring the land for the Epping development by nearly $7 million (which inevitably leads to further errors in the reports);
* the administrators have assessed the available assets in the Epping development as nil while the solicitor for the plaintiff using the documentary evidence assesses that there is approximately $32.5 million in assets available. Further, the Epping development was used to secure borrowed funds, totalling over $100 million after its completion and for the benefit of other companies’ projects;
* the administrators have denied the judgment debt claims brought by the plaintiff against TFM and KRI on the basis of the existence of a cross-claim apparently worth $17 million despite stating they are “not aware of the prospects of recovery against Decon” and “have sighted no legal advice about the merits of both claims”;
* the administrators relied upon expert evidence in assessing the cross-claim which was previously identified by Stevenson J during TFM and KRI’s unsuccessful stay proceedings as containing serious deficiencies; and
* the administrators claim that the cross-claim is worth $17 million despite statements made by TFM and KRI’s (then) Senior Counsel to the NSW Court of Appeal that it was a mistake to suggest that the cross-claims were millions of dollars above the judgment debt and that they were only slightly above that amount.
1. The plaintiff also raises concerns with regard to the effect of the DOCAs overall. It submits that they clearly are targeted to prevent investigation of potential voidable transactions rather than being for the benefit of creditors overall. To this end the plaintiff points to the limited returns to the creditors on offer under the DOCAs, the lack of ongoing business to be preserved by the DOCAs and the disparate treatment of the plaintiff as the major creditor of TFM and KRI under the DOCAs. There is also the point that if the plaintiff was admitted for the whole amount of its debt then the majority of creditors by value would be opposed to the DOCAs.
2. Given the urgent manner in which the matter came on for hearing, it was not practical for the defendants to put on evidence in answer to any of the above points. Senior Counsel for the defendants stated that the administrators stand by their reports to creditors, including their recommendations with regard to the DOCAs and their assessment of the plaintiff’s voting rights. The defendants say that the plaintiff is reaching conclusions based on incomplete information.
3. That notwithstanding, I am satisfied that there are serious issues to be tried with respect to the question of whether the administration should be brought to an end. I am also satisfied that if the DOCA resolutions are adopted and the DOCAs are executed, there will be serious issues to be tried on the question of whether they should be set aside. Also, on the face of it, there appears to be little justification for the recommendation by the administrators that the creditors approve the proposed DOCAs.

## Balance of convenience

1. The plaintiff submits that if TFM and KRI are not restrained from holding their second meeting of creditors, and from thereafter executing the DOCAs recommended by the administrators, three risks will arise. The plaintiff submits that the balance of convenience favours restraining the conduct to avoid those risks.
2. The first element of risk that the plaintiff identifies is in relation to the relation-back day. It submits that if there is no interim relief, and the DOCA resolutions are adopted at the second meetings of creditors and the DOCAs are executed, but later the case for the setting aside of the DOCAs is found to be good, the result will be that under s 91 item 10 the relation-back day will be the date of the administration, i.e. 30 June 2020.
3. In contrast, if the interim relief is granted and the plaintiff is later successful in setting aside the administration and then in winding-up the companies, or ending the administration by winding-up the companies, under s 91 item 2 of the Act the relation-back day will be 22 June 2020, being the day on which the winding-up application was filed. Although the plaintiff is not able to point to any particular transaction having occurred in the eight day period calculated with reference to the different relation-back days, the plaintiff submits that there is a prospect that something may have occurred in that period which will then be beyond the reach of liquidators. In that event, the different relation-back days would be prejudicial to the plaintiff and other creditors.
4. However, the plaintiff’s reference to s 91 item 10 would appear to be mistaken. It is s 91 item 11 which will apply on the first scenario with the result that the relation-back days on each scenario will be the same, namely the date that the application for winding-up was filed. Depending on the events, it is possible that s 91 item 4 would apply, but that would have the same result.
5. There is therefore no prejudice in relation to the relation-back days flowing from whether interim relief is or is not granted.
6. The second element of risk is that if the meetings go ahead and the DOCAs are executed in circumstances where they are later terminated, unnecessary fees and expenses may be incurred by the already insolvent defendants with only limited, if any, benefit to creditors. I accept that this is relevant prejudice to take into account, although it too can be given only limited weight in view of it being unknown what further fees and expenses might be incurred.
7. The third element of risk is that although the Court has the power to set aside the DOCAs, it cannot set aside transactions entered into while the companies operated under the DOCAs. The proposed DOCAs include conclusion of litigation funding agreements on terms which are unclear on the information before me. The plaintiff submits that there is at least a risk that the funding agreements will not be able to be set aside if the DOCAs are executed and performed pending determination of the substantive proceedings.
8. The defendants point out that the liquidators have the power to disclaim or adopt any contracts, which would include the litigation funding agreements. However, the plaintiff’s point remains good, at least to the extent that there may be costs, even substantial costs, attached to terminating such agreements.
9. I therefore accept that there is some prejudice to the plaintiff and the other creditors in relation to the third element.
10. If interim relief is granted and then the plaintiff fails on final relief with the result that the creditors meetings and the DOCAs go ahead, there will be limited prejudice to the defendants. All that would have occurred is that the meetings and the DOCAs were delayed. In circumstances where the defendant companies are not trading and the question of final relief can be decided urgently, the prejudice of delay will not be significant.
11. The defendants’ principal submission is that the Court would only restrain the holding of the second meetings if they would cause irreparable prejudice to the plaintiff’s claims for final relief. They submit that no such prejudice of any kind is identified in the evidence. They submit that it is not generally appropriate to restrain the holding of a second creditors’ meeting where, as in this case, there are available remedies, after the meetings, for the substance of the plaintiff’s complaints. In that regard, they refer to ***Re Ten Network*** [2017] NSWSC 1247 at [49]-[51] and [127].
12. In that case, Black J (at [49]) identified, and apparently accepted, the submission that the existence of remedies under s 445D of the Act provides a strong reason for the court to decline to intervene before a second meeting of creditors is held. Reference was made to the observations of the plurality of the High Court in *Lehman Brothers Holdings Inc v City of Swan* [2010] HCA 11; 240 CLR 509 at [30]-[32], including that:

Earlier provisions required court approval before the scheme was effective; Pt 5.3A provides for disallowance by the Court after the deed has been made.

1. Black J observed (at [51]) that in determining any subsequent application under s 445D of the Act, brought on the basis that the s 439A report was materially misleading or omitted material information – which are complaints in this case, the court would have a discretion whether to grant relief if the relevant information would not have affected the voting at the second creditors meeting. Reference was made to *Re Recycling Holdings Pty Ltd* [2015] NSWSC 1016; 107 ACSR 406 at [72]-[73] and [80]-[81]. His Honour concluded that “these matters would generally tend against granting the injunctive relief that is sought in an application of this kind, although they are not conclusive that such relief could never be granted or should not be granted in this case”.
2. His Honour also observed (at [127]) that “it is important that the Court does not, in applications of this kind, deal with matters that are properly dealt with after the event, when creditors’ views are known, and a full factual examination of the issues can be undertaken without the time pressures of an urgent application for final interlocutory relief”. His Honour was not persuaded that the court should seek to determine, in that case, any substantive application at that point, rather than in the context of an application properly brought under s 445D of the Act.
3. The defendants rightly observe that it is at this stage unknown what will occur at the creditors meetings. It may be that they resolve to wind-up the companies, or to enter into the DOCAs, or to end the administrations (s 439C of the Act). The first and third of those possibilities would render the substantive relief sought by the plaintiffs, or at least much of it, redundant. It is really the second possibility, the resolution to execute the DOCAs, which could then lead to the execution of the DOCAs and the prejudice that the plaintiff complains of.
4. I am satisfied, particularly with reference to the reasoning in *Re Ten Network*, that there is insufficient justification in this case to intervene and restrain the creditors meetings. In view of the identification of serious issues to be tried, particularly with regard to the conduct of the administrators and the potential to bring the administrations to an end, and the prejudice that will flow, or might flow, from the execution of the DOCAs, I have considered whether it is appropriate and justified to allow the meetings to go ahead and to restrain only the execution of the DOCAs in the event that resolutions are passed.
5. There are considerations weighing against that course. First, the fact of execution of the DOCAs being restrained may itself weigh in the creditors’ consideration of whether or not to adopt the resolutions. That will have the effect of the court interfering in the process of the creditors meetings contrary to the principles discussed in *Re Ten Network* and *Mighty River* at [66]. Secondly, mere resolution at the meetings that the companies execute the DOCAs has legal impacts on what creditors can then do (s 444C of the Act). Thus, restraining the execution of the DOCAs but leaving the creditors to adopt the resolutions will create unjustifiable uncertainty.

## Conclusion

1. In the circumstances, I am not satisfied that the prejudice to the plaintiff and the balance of convenience is such as to justify the Court intervening at this stage to prevent the creditors meetings going ahead or to restrain the execution of any DOCAs which may or may not be approved at the meetings. I will, however, bring the matter back for urgent case management tomorrow so that if the resolutions are adopted a programme can be put in place to have the plaintiff’s final relief determined with considerable expedition.
2. I am not satisfied that order 6, which is to say the relief dealing with the provision of documents, is required to be dealt with immediately. Indeed, in view of time constraints the parties did not make oral submissions in relation to this relief. It can be adjourned to be dealt with at a later date.
3. The costs of the application for interim relief should be reserved as the outcome of the creditors meetings and the final relief may have a bearing on them.

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| I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stewart. |

Associate:

Dated: 29 July 2020

SCHEDULE OF PARTIES

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| Defendants |  |
| Fourth Defendant: | JOHN MELLUISH |