FEDERAL COURT OF AUSTRALIA

Yeo, in the matter of Ready Kit Cabinets Pty Ltd (in liq) v Deputy Commissioner of Taxation [2020] FCA 632

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| File number: | VID 695 of 2018 |
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| Judge: | **MIDDLETON J** |
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| Date of judgment: | 15 May 2020 |
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| Catchwords: | **CORPORATIONS** – winding up – deed of company arrangement – voidable transactions – unfair preferences – director-related transactions – source of director’s authority where control of company subject to deed of company arrangement has been returned to the director – where deed of company arrangement required the company to comply with taxation obligations – whether payment made by company director to the Deputy Commissioner of Taxation while the company was subject to a deed of company arrangement is a voidable transaction – use of extrinsic material – meaning of ‘by, or under the authority of’ – Corporations Act 2001 (Cth) ss 444D, 444G, 588FA, 588FE(2B) |
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| Legislation: | *Corporations Act 2001* (Cth)  *Corporations Amendment (Insolvency) Act 2007* (Cth) |
|  |  |
| Cases cited: | *Cargill International s A. v Solid Energy New Zealand Limited (subject to deed of company arrangement)* [1016] NZHC 1917  *Commissioner of Taxation v Eichmann* [2019] FCA 2155  *Deputy Commissioner of Taxation v Foodcorp Pty Ltd* (1994) 13 ASCR 796  *Esso Australia Resources Pty Ltd v Commissioner of Taxation* (2011) 194 FCR 32  *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636  *Reed Constructions Australia Limited v DM Fabrications Pty Ltd* (2007) 25 ACLC 1463  *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252  *Sharp & Anor v Blake & Anor* [2015] EWHC 3220 |
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| Date of hearing: | 31 March 2020 |
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| Registry: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 66 |
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| Counsel for the Applicants: | Mr P Fary with Mr A Silver |
|  |  |
| Solicitor for the Applicants: | SBA Law |
|  |  |
| Counsel for the Respondent: | Mr S Rosewarne |
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| Solicitor for the Respondent: | Craddock Murray Neumann Lawyers |

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| **Table of Corrections** |  |
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| 15 September 2020 | Paragraph 62 has been deleted in its entirety and replaced with the following: |
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| 62 The relevant task of the Court is to construe the words employed by Parliament in the context in which they have been used: *Commissioner of Taxation v Eichmann* [2019] FCA 2155 at [39]. As we are reminded in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 (per French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (see also, *Esso Australia Resources Pty Ltd v Commissioner of Taxation* (2011) 194 FCR 32 at [126]-[129]), extrinsic material is secondary (footnotes omitted):  *As Gummow J observed in* Wik Peoples v Queensland*, it is necessary to keep in mind that when it is said the legislative “intention” is to be ascertained, “what is involved is the ‘intention* manifested*’ by the legislation”. Statements as to the legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.* | |

ORDERS

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|  | | VID 695 of 2018 |
| IN THE MATTER OF READY KIT CABINETS PTY LTD (ACN 131 173 567) (IN LIQUIDATION) | | |
| BETWEEN: | ANDREW REGINALD YEO AS JOINT AND SEVERAL LIQUIDATOR OF READY KIT CABINETS PTY LTD (ACN 131 173 567)  First Applicant  GESS MICHAEL RAMBALDI AS JOINT AND SEVERAL LIQUIDATOR OF READY KIT CABINETS PTY LTD (ACN 131 173 567)  Second Applicant  READY KIT CABINETS PTY LTD (ACN 131 173 567)  Third Applicant | |
| AND: | DEPUTY COMMISSIONER OF TAXATION  Respondent | |

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| JUDGE: | MIDDLETON J |
| DATE OF ORDER: | 15 May 2020 |

THE COURT ORDERS THAT:

1. Within 14 days the parties confer and file any agreed minutes of order reflecting the reasons for judgment (including as to costs) or in the event of disagreement a short written submission as to the orders sought.

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

REASONS FOR JUDGMENT

MIDDLETON J:

# INTRODUCTION

1. These proceedings concern:
2. the third applicant, Ready Kit Cabinets Pty Ltd (in liquidation) (the ‘**Company**’);
3. the first and second applicants, Andrew Yeo and Gess Rambaldi, who are:
   1. former deed administrators of the company (the ‘**Deed Administrators**’);
   2. liquidators of the company;
4. a deed of company arrangement entered into by the Company on 11 December 2013 (the ‘**DOCA**’) pursuant to a resolution of creditors made on 22 November 2013 and which was terminated on 5 July 2017; and
5. payments made by the company to the Respondent, the Deputy Commissioner of Taxation (the ‘**DCT**’), during the administration of the deed totalling $304,772.15 in discharge of the tax liabilities of the Company (the ‘**Payments**’).
6. The Applicants claim the Payments are recoverable from the DCT as unfair preferences under s 588FA of the *Corporations Act 2001* (Cth) (the ‘**Corporations Act**’).
7. The Company made the Payments to the DCT while the Company was the subject of the DOCA.
8. The only issue in this proceeding is whether the requirements of sub-s 588FE(2B)(d) of the Corporations Act have been satisfied; in particular whether the Payments were made on behalf of the Company ‘under the authority of’ the Deed Administrators.
9. The Applicants’ argument can be summarised as follows:
10. Marion Posadowski, the sole director of the Company (the ‘**Director**’), made each of the Payments pursuant to his authority to do so as a director of the Company, such authority being derived from the Company’s constitution and the Corporations Act;
11. the DOCA did not give the Deed Administrators the authority to make the Payments and they were not made ‘by, or under the authority of’ the Deed Administrators;
12. to the extent that there is a dispute as to the meaning of sub-s 588FE(2B)(d), and in particular the meaning of ‘by, or under the authority of’, the wording of the sub-section is plain. Alternatively, extrinsic material confirms that the sub-section is intended to apply in circumstances where the control of a company under deed of company arrangement is returned to the director;
13. a covenant by the Company contained in the DOCA which required the Company to comply with its taxation obligations did not mean that the Payments were made ‘by, or under the authority of’ the Deed Administrators (noting that the Deed Administrators executed the D OCA on behalf of the Company); and
14. as to the covenant referred to in (4), the authority to make the promise is to be distinguished from the authority to make good on the promise.
15. The DCT contends that the Applicants’ claim should fail on the basis that the Payments were made ‘by, or under the authority’ of the Deed Administrators within the meaning of sub-s 588FE(2B)(d). As a result of this contention, it was submitted that the Payments are not unfair preferences and therefore are not voidable.
16. In summary, the DCT’s argument can be summarised as follows:
17. The fact that the Deed Administrators did not make the Payments, or did not otherwise cause the Payments to be made, does not answer the question of whether the relevant transactions were entered into, or done, on behalf of the Company ‘by, or under the authority of’ the Deed Administrators, within the meaning of sub-s 588FE(2B)(d)(i).
18. Rather, the following matters demonstrate that the Payments were made ‘by, or under the authority of’ the Deed Administrators as a matter of statutory construction:
    1. The making of the Payments was specifically required to give effect to, and cause compliance with, the terms of the DOCA. Pursuant to cl 6.1(d) of the DOCA the Company (through Mr Yeo and Mr Rambaldi) expressly covenanted to make the Payments, Mr Yeo and Mr Rambaldi accepted that they were acting as the agents of the Company when exercising the powers conferred by and carrying out their duties under the DOCA (cl 3.2(a) of the DOCA), and by the operation of s 444G of the Corporations Act both Mr Yeo and Mr Rambaldi were bound by the DOCA.
    2. It is an interpretation that is consistent with recommendation 51 of Legal Committee of the Companies and Markets Advisory Committee, *Corporate Voluntary Administration Report, June 1998* (‘**CAMAC June 1998 Report**’), a recommendation that demonstrates it was intended that transactions specifically authorised by a deed of company arrangement, but performed on behalf of the company by the directors (or others) who are in control of the day-to-day management of the company under the terms of the deed, should not be voidable as unfair preferences.
    3. Such an interpretation is also consistent with the objects of Pt 5.3A of the Corporations Act because it maximises the chances of the Company, or its business, continuing in existence.

# Background

1. On 29 October 2013, Mr Yeo and Mr Rambaldi were appointed as joint and several administrators of the Company pursuant to the Corporations Act.
2. The DCT had commenced proceedings seeking to wind up the Company before the appointment of Mr Yeo and Mr Rambaldi as voluntary administrators.
3. The first meeting of the Company’s creditors was convened and held on 7 November 2013.
4. On 14 November 2013, Mr Yeo and Mr Rambaldi issued a circular to creditors in which they advised that the second meeting of the Company’s creditors would be held on 22 November 2013. Mr Yeo and Mr Rambaldi provided creditors with a copy of a s 439A report with the circular.
5. At the second meeting of creditors held on 22 November 2013 a resolution was passed (by the Chairperson, Mr Yeo, exercising his casting vote there having been a deadlock between creditors voting in number and value) that the Company should execute a deed of company arrangement.
6. On or about 11 December 2013, the DOCA was executed by each of the Company (by its then administrators, Mr Yeo and Mr Rambaldi), Mr Yeo and Mr Rambaldi as deed administrators, and the Director.
7. Recital H of the DOCA provided that:

*This Deed binds all Creditors of [the Company] pursuant to Section 444D of the Corporations Act and [the Company], all officers and members of [the Company], and the Administrators pursuant to Section 444G of the* Corporations Act*.*

1. The salient elements of the DOCA are that:
2. management and control of the Company’s day-to-day business affairs were returned to the Director;
3. a fund was established and controlled by the Deed Administrators which constituted the whole of the property available for distribution to participating creditors;
4. the Company and Director made certain covenants and undertakings, including in respect of the Company’s compliance with its taxation obligations; and
5. upon default of the DOCA by the Company or the Director, the Deed Administrators were to convene a meeting of creditors to determine whether to terminate the DOCA and wind up the Company.
6. Between 11 December 2013 and 5 July 2017, the Company was returned to the management and control of the Director and continued to trade.
7. Between 28 February 2014 and 16 June 2017, the Company incurred fresh liabilities with the DCT in the sum of $403,000.76 and made payments to the DCT totalling $304,772.15.
8. On 5 July 2017, a meeting of creditors was convened (being the sixth adjournment of the meeting with the consent of the DCT) pursuant to s 445F of the Corporations Act at which creditors resolved to terminate the DOCA and that the Deed Administrators become the liquidators of the Company.
9. The estimate of unsecured outstanding debts owed by the Company upon liquidation is $652,676.49 (excluding the Payments if voidable).
10. Additional facts were agreed between the parties, in the form of Mr Yeo’s answers to the DCT’s questions put by way of a ‘deposition’ before the hearing (marked Exhibit ‘A’ in these proceedings). I do not consider the additional facts add anything to the dispute between the parties, but the DCT relied upon these particular facts:
11. *Upon being appointed as voluntary administrators of the Company, Mr Yeo and Mr Rambaldi established a separate bank account (the administration account) via which they conducted transactions in the administration of the Company.*
12. *Mr Yeo agrees that it is not uncommon for an insolvency practitioner appointed as voluntary administrator to:*
    1. *write to banks on appointment and request that they freeze all direct debits, but still allow credits to be received into, any pre-appointment bank accounts operated by the company in voluntary administration; and*
    2. *liaise with the banks to establish a process by which all pre-appointment bank accounts of the company are ‘swept’ into an administration account established by the voluntary administrator.*
13. *Were the steps referred to in paragraphs 2 and 3 above taken in relation to the Company? If not, why not?*
14. Yes. When appointed as voluntary administrators Mr Rambaldi and I did open a bank account from which we could conduct the administration of the Company. Upon my appointment as a voluntary administrator of the Company I caused a generic letter to be sent to financial institutions requesting that all payments from bank accounts belonging to the Company be frozen. The Company’s bank accounts that were identified were maintained with the Commonwealth Bank of Australia and the National Australia Bank. After the deed was executed, I caused the Commonwealth Bank of Australia to be notified of the deed and for the accounts to be unfrozen. A copy of the email from Tim Bradd of my office to the Commonwealth Bank of Australia is attached and marked “A”. I do not believe that any communication was sent to the National Australia Bank or that that account was used by the Company thereafter. I did not at any time take any steps to have myself appointed as a signatory on the Company’s bank accounts, nor did I take any steps to have the director, Marion Posadowski, removed as a signatory of the accounts while the Company was in administration.
15. *At paragraph 11 of Mr Yeo’s affidavit dated 3 February 2020, he states that he did not have access to, and was not a signatory of, any of the Company’s bank accounts between 28 February 2014 and 16 May 2017. What steps did Mr Yeo take to ‘unfreeze’ the preadministration bank accounts of the Company so that they could be operated upon by other persons?*
16. Mr Yeo only had access to and was a signatory to the bank account he caused to be opened for the purpose of conducting the administration of the Company and thereafter the deed administration of the Company, being an account maintained by Macquarie Bank. Otherwise, see answer above.
17. *The minutes of the second meeting of the creditors of the Company held on 22 November 2013 record that* “Ms Tongacan [on behalf of the ATO] enquired as to the capacity of the business to move forward given it had failed to this point” *and* “the Chairperson [Mr Yeo] noted that even if the DOCA fails, the security afforded by the DOCA ensured a better return to creditors in the event of a subsequent liquidation.” *Mr Yeo does not have a recollection of these comments.*
18. *…*
19. *In addition to the matters referred to at paragraph 10 of Mr Yeo’s affidavit dated 3 February 2020, Mr Yeo was aware at all times that pursuant to the ongoing requirement for the Company to comply with its statutory obligations and in accordance with the covenant and undertaking of the Company and Director contained in the DOCA the Company was required to comply with all taxation laws including the lodgement of any required business activity statements, together with any other information required under the taxation laws, and to make payments of any amounts due to the Australian Taxation Office within the prescribed time limits.*

*…*

(Emphasis in original)

# The Corporations Act and the effect of the DOCA

1. Section 444D of the Corporations Act provides:
2. *A deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i).*
3. *Subsection (1) does not prevent a secured creditor from realising or otherwise dealing with the security interest, except so far as:*

*(a) the deed so provides in relation to a secured creditor who voted in favour of the resolution of creditors because of which the company executed the deed; or*

*(b) the Court orders under subsection 444F(2).*

*(3) Subsection (1) does not affect a right that an owner or lessor of property has in relation to that property except so far as:*

*(a) the deed so provides in relation to an owner or lessor of property who voted in favour of the resolution of creditors because of which the company executed the deed; or*

*(b) the Court orders under subsection 444F(4).*

*(3A) Subsection (1) does not apply in relation to an owner or lessor of PPSA retention of title property of the company.*

***Note:*** *Subsection (2) applies in relation to an owner or lessor of PPSA retention of title property of the company. Such an owner or lessor is a secured creditor of the company (see section 51F (meaning of* ***PPSA retention of title property****)).*

*(4) Section 231 does not prevent a creditor of the company from becoming a member of the company as a result of the deed requiring the creditor to accept an offer of shares in the company.*

1. Section 444G of the Corporations Act further provides that a deed of company arrangement also binds the company, its officers and members, and the deed’s administrator.
2. In discussing the nature of a deed of company arrangement the High Court in *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636 (per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [25]) noted:

*It may be, however, that the deed of company arrangement is not simply a contract. No doubt a deed of company arrangement will contain stipulations and promises of a kind found in contracts between parties. But a deed of company arrangement is more than a set of promises between those who are parties to it. (The only essential parties to a deed of company arrangement are the company and the deed administrator.) First, it is a document that, on execution, effects a change in status of the company – from a company under administration to a company subject to a deed of company arrangement. Secondly, it is a document that contains terms that bind all creditors of the company “so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i)”. Those obligations stem from the combined operation of the deed of company arrangement and the Law, not from any contractual bargain between the persons bound, and are imposed on all creditors – not just those who voted in favour of any composition or moratorium reflected in the deed of company arrangement.*

1. As further explained by Barrett J in *Reed Constructions Australia Limited v DM Fabrications Pty Ltd* (2007) 25 ACLC 1463 (at [20]):

*Sections 444D and 444G identify persons who are bound by a deed of company arrangement. Those persons are not parties bound together by contract. They are persons whose rights and obligations are created by law by virtue of the execution of the relevant instruments. They are akin, in that respect, to persons bound by a scheme of arrangement under Part 5.1 of the Corporations Act.*

1. Each of the above provisions is found in Pt 5.3A of the Corporations Act. The object of Pt 5.3A, which is headed ‘Administration of a company’s affairs with a view to executing a deed of company arrangement’, is stated in s 435A:

*The object of this Part … is to provide for the business, property and affairs of an insolvent company to be administered in a way that:*

*(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or*

*(b) if it is not possible for the company or its business to continue in existence – results in a better return for the company’s creditors and members than would result from an immediate winding up of the company.*

## The introduction of sub-s 588FE(2B)

1. Section 588FA of the Corporations Act provides:
2. *A transaction is an unfair preference given by a company to a creditor of the company if, and only if:*

*(a) the company and the creditor are parties to the transaction (even if someone else is also a party); and*

*(b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;*

*even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.*

1. *For the purposes of subsection (1), a secured debt is taken to be unsecured to the extent of so much of it (if any) as is not reflected in the value of the security.*
2. Subsection 588FE(2B) of the Corporations Act was inserted by reason of the enactment of the *Corporations Amendment (Insolvency) Act 2007* (Cth). It provides as follows:

*(2B) The transaction is voidable if:*

*(a) the transaction is:*

*(i) an uncommercial transaction of the company; or*

*(ii) an unfair preference given by the company to a creditor of the company; or*

*(iii) an unfair loan to the company; or*

*(iv) an unreasonable director-related transaction of the company; and*

*(b) the company was subject to a deed of company arrangement immediately before:*

*(i) the company resolved by special resolution that it be wound up voluntarily; or*

*(ii) the Court ordered that the company be wound up; and*

*(c) the transaction was entered into, or an act was done for the purpose of giving effect to it, during the period beginning at the start of the relation-back day and ending:*

*(i) when the company made the special resolution that it be wound up voluntarily; or*

*(ii) when the Court made the order that the company be wound up; and*

*(d) the transaction, or the act done for the purpose of giving effect to it, was not entered into, or done, on behalf of the company* ***by, or under the authority of****:*

*(i) the administrator of the deed; or*

*(ii) the administrator of the company.*

(Emphasis added)

1. There is no doubt that the phrase ‘by, or under the authority of’ must be considered by reference to the text and context of the relevant Part of the Corporations Act. On a proper construction of that phrase, and in the circumstances of these proceedings, in my view, the Payments were not made by the Deed Administrators or under the authority of the Deed Administrators. They may have been contemplated by the DOCA, or even required by the DOCA. However, they were not made on behalf of the Company by the Deed Administrators themselves, but by the Director himself. Nor were they made under the authority of the Deed Administrators. The source of the power or authority to make the Payments by the Director on behalf of the Company (which were required to be made by law) is to be found elsewhere, not under the authority of the Deed Administrators.

# Extrinsic Material

1. The Applicants submitted that there were three pieces of extrinsic material with relevance to sub-s 588FE(2B)(d), namely:
2. the Explanatory Memorandum to the Corporations Amendment (Insolvency) Bill 2007(Cth) (‘**Explanatory Memorandum**’);
3. the CAMAC June 1998 Report; and
4. Legal Committee of the Companies and Markets Advisory Committee, *Issues in External Administration, November 2008* (‘**CAMAC November 2008 Report**’).

## Explanatory Memorandum

1. Paragraphs 7.197 to 7.203 of the Explanatory Memorandum relevantly provide that:

*[7.197] Part 5.7B of the Corporations Act provides for the recovery of property or compensation for the benefit of creditors of an insolvent company. Transactions which may be ‘voidable’ under section 588FE include uncommercial transactions which are also insolvent transactions.*

*[7.198] Companies might enter into uncommercial transactions during the administration or, particularly, under a DOCA when the company remains in the control of the directors. However, if the company later enters liquidation, those transactions may not be voidable because of requirement that the uncommercial transaction is also an insolvent transaction. Under section 588FC of the Corporations Act, the company’s own insolvency is an element of the definition of an insolvent transaction.*

*[7.199] Unfair loans and unreasonable director-related transactions are voidable under subsections 588FE(6) and 588FE(7) of the Corporations Act respectively regardless of whether they are also insolvent transactions.*

*[7.200] Due to the potential for abuse, the Bill will allow uncommercial transactions entered into during a voluntary administration or DOCA immediately preceding a liquidation to be voidable, regardless of whether the company was insolvent at the time of the transaction or became insolvent due to the transaction. However, any transactions done by or under the authority of the administrator or deed administrator will not be voidable. This is consistent with recommendation 51 of the CAMAC Report (1998).*

***Key changes***

*[7.201] New provisions will make voidable uncommercial transactions occurring between the relation-back day and the date of the resolution or court order for winding up, in circumstances where the winding up was immediately preceded by voluntary administration or a DOCA. However, transactions entered into by or on the authority of the administrator or deed administrator will not be subject to the new rules.*

***Notes on items***

*[7.202] Item 68 will add two new subsections to section 588FE. Subsection 588FE(2A) will apply when the company concerned was under administration immediately before the company resolved that it be wound up, or the court ordered that it be wound up. Subsection 588FE(2B) will apply when the company concerned was subject to a DOCA immediately before those events.*

*[7.203] If a liquidation is immediately preceded by a voluntary administration or DOCA, any uncommercial transactions entered into by the company (or an act done to give effect to the transaction) on or after the relation-back day, but before the order or resolution to wind the company up, will be subject to avoidance. However, transactions or acts done on behalf of the company by, or under the authority of, the administrator or deed administrator will not be voidable under the subsections.*

1. The Respondent contended that the addition of the new subsections to s 588FE as noted at [7.200] of the Explanatory Memorandum was intended to be consistent with recommendation 51 of the CAMAC June 1998 Report, which I refer to later in these reasons.

## CAMAC June 1998 Report

1. In the CAMAC June 1998 Report, the Committee of the Companies and Markets Advisory Committee (the ‘**Committee**’) considered the issue of how the voidable transaction provisions should be applied in circumstances where a voluntary administration precedes a winding up (at [8.10]-[8.18]).
2. The Committee also observed that there were two possible policy solutions:
   1. To apply the provisions to all transactions. In relation to this option, I set out [8.12]-[8.13] and [8.16]-[8.17] of the CAMAC June 1998 Report below.
   2. To restrict the provisions to only transactions from which the Company’s directors benefited directly or indirectly. This option was rejected by the Committee (see [8.18] of the CAMAC June 1998 Report, which is set out below).
3. Paragraphs 8.1 to 8.18 of the CAMAC June 1998 Report provide (footnotes omitted):

***Voidable transactions***

*[8.1] One commentary that appeared after the publication of the Discussion Paper has drawn attention to two possible problems in applying the voidable transaction provisions to voluntary administrations:*

* *some transactions are inappropriately excluded from the voidable transaction provisions*
* *some transactions are inappropriately excluded by the voidable transaction provisions.*

***Transactions inappropriately excluded from the voidable transaction provisions***

*[8.2] The voidable transaction provisions do not apply to transactions effected during a voluntary administration that precedes a winding up. The excluded transactions include transactions under a deed of company arrangement that has not terminated when the company goes into winding up. This gap creates the opportunity for abuse, in particular, where directors who resume control of a company under a deed of company arrangement pay creditors whose debts they have personally guaranteed in preference to other creditors. If the deed fails and the company goes into liquidation, a liquidator cannot recover these preferential payments under the voidable transaction provisions, for the reasons set out below.*

*[8.3] Currently, an insolvent transaction is voidable if it was entered into:*

*(i) during the 6 months ending on the relation-back day, or*

*(ii) after that day but on or before the day when the winding up began.*

*[8.4] The problem is that the tests of what constitutes the “relation-back day” and “the day when the winding up began” differ, depending on whether or not a voluntary administration (including a deed of company arrangement) has preceded the winding up.*

Where no voluntary administration precedes the winding up

*[8.5] In this case:*

* *the relation-back day is the day on which the application for a winding up order is filed, and*
* *the winding up begins on the day when the winding up order is made.*

*[8.6] In consequence, the voidable preference provisions apply to all transactions in the six month period prior to the date of the application for a winding up order (applying (i) above) and, in addition, to all transactions in the period between that application and the making of that order (applying (ii) above). The provision therefore works satisfactorily.*

Where a voluntary administration precedes the winding up

*[8.7] In this case:*

* *the relation-back day is the day on which the voluntary administration began*
* *the winding up begins on the day on which the voluntary administration began.*

*[8.8] In consequence, transactions in the six months prior to the day on which the voluntary administration began are subject to the voidable preference provisions (applying (i) above). However, transactions made after the beginning of the administration (including those made under any deed of company arrangement) are not subject to the voidable preference provisions, given that the test in (ii) only covers transactions on or before the day on which the voluntary administration began.*

Other voidable transaction provisions

*[8.9] The various specific time period for uncommercial transactions, related party transactions, transactions for the purpose of defeating, delaying or interfering with the rights of creditors and unfair loans all end on the day on which the voluntary administration began. Thus none of these transactions will be voidable in a winding up where they take place after the beginning of an administration that precedes a winding up.*

Law reform: two possible approaches

*[8.10] The Legal Committee has considered two possible policy solutions to deal with preferences and other voidable transactions where a voluntary administration precedes a winding up.*

*[8.11]* First Policy Option: Apply the voidable transaction provision. *All transactions that take place during the course of a voluntary administration (including the administration of a deed) that precedes any form of court or voluntary winding up could be made subject to the voidable transaction provisions.*

*[8.12] However, this policy option would make it unnecessarily difficult for an administrator or deed administrator to carry on the business of the company while the company is under administration or under a deed. Creditors would be reluctant to deal with the company if payments made to them could be set aside should the company subsequently go into liquidation (notwithstanding that an administrator would be liable for debts owing to creditors).*

*[8.13] This policy option might be restricted to payments by a company that has been returned to the control of its directors under a deed of company arrangement. However, this approach could require companies to adopt the more costly alternative of retaining an insolvency practitioner as deed administrator, to avoid the uncertainty that would flow from the possibility that payments to creditors might be recovered as preferences. The opposing argument is that a company that has been returned to the control if its directors should be treated in the same manner as any other filly operational company. If that company becomes insolvent while trading under a deed of company arrangement, it might be considered justifiable to apply the general insolvency rules, including the rules regarding preferences.*

*[8.14]* Second Policy Option: Voidable transactions applicable only where directors benefit. *Any payment by a company under a deed of company arrangement that is being administered by the company’s directors (though not payments by administrators and deed administrators) could be voidable where the directors would benefit directly or indirectly from the payment. However, it may be difficult to determine in particular cases whether a director has benefitted directly or indirectly from a payment.*

*[8.15] The Legal Committee favours the first policy option, with some modifications, as outlined at para 8.18 below.*

***Transaction inappropriately covered by the voidable transaction provisions***

*[8.16] Where a company has entered into a deed of company arrangement distributions are made under the deed, the deed is terminated and the company subsequently goes into administration, immediately followed by a winding up, the relation-back day is the date the second administration begins. Distributions under the deed could therefore be liable to challenge by a liquidator under the voidable transaction provisions.*

*[8.17] This anomaly could be removed by having an exception to the voidable transaction provisions for “transactions that are specifically authorised by a deed of company arrangement and carried out by the administrator of that deed”.*

***Legal Committee view***

*[8.18] The Legal Committee considers that the two problems with the* *voidable transaction provisions (namely, transactions inappropriately excluded and transactions inappropriately covered by these provisions) can best be rectified by providing that transactions that take place during the course of a voluntary administration (including during the administration of a deed) that precedes any form of court or voluntary winding up, other than:*

* *transactions performed by or with the authority of an administrator or a deed administrator (even if in fact performed by the directors)*
* *transactions that are specifically authorised by a deed of company arrangement and carried out by the administrator of that deed (who must be a registered liquidator)*

*should be subject to the voidable transaction provisions. Thus, transactions by company directors under a deed of company arrangement which are not authorised by the deed administrator would be subject to the voidable transaction provisions.*

***Recommendations 51.*** *Transactions that take place during the course of a voluntary administration (including during the administration of a deed) that precedes any form of court or voluntary winding up other than:*

* *transactions performed by or with the authority of an administrator or a deed administrator (even if in fact performed by the directors)*
* *transactions that are specifically authorised by a deed of company arrangement and carried out by the administrator of that deed*

*should be subject to the voidable transaction provisions.*

## CAMAC November 2008 Report

1. Ten years after the CAMAC June 1998 Report, the Committee published the CAMAC November 2008 Report in which the Committee considered sub-s 588FE(2B) and recommendation 51.
2. The CAMAC November 2008 Report provided (footnotes omitted):
3. at [4.2.1]:

*Voidable transactions are:*

* *unfair preferences*

*…*

*that were entered into on behalf of the company, before the winding up began, by various parties including:*

*…*

* *(from 31 December 2007) directors or officers pursuant to a DOCA under which the company has been returned to the control of directors (officer-initiated transactions)*

1. at [4.2.2], whilst considering whether the statutory defence to voidable transactions in s 588FG of the Corporations Act should be removed in respect of such ‘officer-initiated transactions’:

***Background***

*… the Referred Proposal (removal of the assumed solvency defence) would only be relevant where a company that is subject to a DOCA has entered into officer-initiated transactions and has subsequently gone into liquidation …*

*…*

***Recommendation 9***

*The assumed solvency defence should remain for transactions entered into by officers of a company while the company is under a deed of company arrangement.*

1. The issue considered in the CAMAC November 2008 Report and its intersection with sub-s 588FE(2B) is summarised by James O’Donovan, Westlaw, *Company Receivers and Administrators* (online at 7 May 2020) (‘***Company Receivers and Administrators***’)at [52.1400]:

***Effect of the deed on voidable transactions***

*The deed administrators do not always take over the management of the company. A company subject to a deed of company arrangement may be managed by its directors in some cases subject to the terms of the deed. Where these directors initiate transactions while the company is subject to the deed and the company later goes into liquidation, these transactions may be challenged as voidable transactions. But third parties will have a defence under Corp Act, s 588FG(2) if they entered into the transactions in good faith and there were no reasonable grounds to suspect insolvency at the time when the third parties entered into the transactions. It has been suggested that this so-called “assumed solvency defence” should be abolished for officer-initiated transactions under a deed of company arrangement. The advantage of this proposal is that it would make it easier for liquidators to challenge transactions entered into with third parties while the company was subject to the deed of company arrangement and it may allow liquidators to recover more funds for unsecured creditors. Conversely, the removal of the “assumed solvency” defence would make it more difficult for company officers to enter into transactions while the company is subject to a deed of company arrangement even if those transactions were intended to assist the company’s recovery. The IPA advised CAMAC that removing the defence could deter creditors from dealing with the company and this would threaten the viability of the company. It would also appear to be harsh to remove the defence where the third party reasonably believes that the company is solvent, but it turns out that the company is insolvent for reasons that the third party could not reasonably have foreseen. For these reasons, CAMAC recommended that the “assumed solvency” defence in Corp Act, s 588FG be retained for transactions entered into by officers of a company operating under a deed of company arrangement.*

1. I appreciate that this passage is said by the DCT to provide no support for the interpretation of sub-s 588FE(2B)(d) suggested by the Applicants. However, I note that the CAMAC November 2008 Report draws a distinction between ‘officer-initiated transactions’ and those made under the terms of a deed of company arrangement by a deed administrator or another person, and ultimately recommended that the assumed insolvency defence should remain available even for officer-initiated transactions (ie transactions entered into by a director without the knowledge or authority of the deed administrator) (see recommendation 9 in the CAMAC November 2008 Report which I referred to earlier).

# DOCA

1. The DOCA consisted of the following relevant provisions:

* *3.2 In exercising the powers conferred by this Deed and carrying out the duties arising under this Deed, the Administrators are taken to act as agent for and on behalf of [the Company].*
* *4.1 Upon commencement of this Deed and during the term of this Deed:*

*(a) the management and control of [the Company’s] day to day business affairs shall revert to the Director, subject to the limitations in this Deed and subject to the rights and powers of the [Deed Administrators] under clause 6 of this Deed; …*

* *6.1 Notwithstanding clause 4.1, [the Company] and the Director covenant and undertake that for the duration of the term of this Deed [the Company]:*

*(a) will not sell, transfer or otherwise dispose of any of the Business Assets, or pledge or charge the Business Assets, except in accordance with the terms of the Deed or in the ordinary course of its business or with the prior written consent of the Administrators;*

*(b) will keep proper books and records in accordance with Section 286 of the Act and shall deliver up to the Administrators those books and records, or any part of them, at the request of the Administrators;*

*(c) will cause Financial Statements to be prepared from time to time, but at least upon request by the Administrators prior to the Date of Termination. [The Company] will deliver to the Administrators promptly on completion a copy of all Financial Statements prepared for or on its behalf;*

*(d) will comply with all taxation laws in ensuring lodgement of any required Business Activity Statements together with any other returns or information required under the taxation laws (from time to time) and payments of amounts due from the Appointment Date to the Australian Taxation Office within the prescribed time limits;*

*(e) will pay Employees’ normal entitlements accruing from the Appointment Date on the normal course of trading, excluding superannuation;*

*(f) will pay Employees’ superannuation entitlements accruing from the Commencement Date in the normal course of trading;*

*(g) will keep adequately insured all property and undertakings and risks of the Company and shall provide to the Administrators upon request Certificates of Currency evidencing the insurance position;*

*(h) will immediately and fully inform the Administrators should any event occur or seem likely to occur which will materially affect [the Company’s] ability to comply with the terms of this Deed;*

*(i) will not change in any material particular [sic] the business in which it is engaged or the way in which the business is conducted without first giving to the Administrators adequate written notice of such change, so that the Administrators may consider the effect such change may have on this Deed;*

*(j) will not increase beyond the level payable at the Commencement Date any salary, wage, fee or commission or any other benefit paid to the Director or any Related Party Creditor without the Administrator’s written consent; and*

*(k) forfeits the right to appoint a further Voluntary Administrator during the Moratorium Period.*

* *6.2 If [the Company] does sell the Business Assets (with the Administrators’ consent), then it agrees to pay to the Administrators the balance at that time of any monies payable by the Director into the Fund in accordance with clause 8.1(d) of this Deed from the sale proceeds.*
* *6.3 In support of clause 6.2, [the Company] hereby grants in favour of the Administrators a PPSA Security Interest in all present and after-acquired property owned by [the Company] (including but not limited to Intellectual Property, Plant and Equipment and Stock) and acknowledges that the Administrators are entitled to lodge a financing statement on the Personal Properties* [sic] *Securities Register, and hereby authorises them to do so.*
* *6.4 Within seven (7) days of the date on which the Administrators make a written request for it to do so, or within such further time as the Administrators may agree to in writing, [the Company] will execute a PPSA Security Agreement in such a form as the Administrators may reasonably require to perfect their Security Interest referred to in clause 6.3, failing which [the Company] will be in default of its obligations pursuant to this Deed and the provisions of clause 16 shall apply.*
* *7.1 For the purpose of the administration of this Deed, the Administrators shall have each of the powers set forth in the Prescribed Provisions, the Act, the Regulations and otherwise at law.*
* *8.1 There shall be a Fund established … into which the following monies will be paid:*

*…*

*(d) The sum of $120,000.00 by way of 36 equal monthly payments … .*

* *13.1 Between the Appointment date and the Date of Termination of this Deed … there is a moratorium on Creditors enforcing their debts or claims as at the Appointment Date against [the Company].*
* *14.1 Upon the [Deed Administrators] having paid to the Creditors their full* *entitlements under this Deed, then:*

*(a) the balance remaining of all Debts they had … ; and*

*(b) all debts or claims, present or future, actual or contingent, due or which may become due by [the Company] …,*

*shall be extinguished … .*

* *16.1 Subject to clause 16.2 below, if the [Deed Administrators] determine that it is no longer practicable or desirable to implement this Deed, or if [the Company] or the Director default in the performance of any of the covenants contained in this Deed, the [Deed Administrators]:*

*(a) must summon a meeting of Creditors for the purpose of considering a resolution under section 445C(b) of the Act; …*

* *16.2 Notwithstanding any other provision contained herein, [the Company] and/or the Director shall be deemed to be in default of the performance of this Deed for the purposes of clause 16.1 in the event that:*

*(a) an instalment to be paid by [the Company] to the Deed Administrator pursuant to clause 8.1(d) is not paid by its due date, and remains unpaid seven (7) days after the date on which notice of the failure to pay is deemed to have been given to the Director in accordance with clause 20, in which event, the default shall occur at midnight on the 7th day after notice is deemed to have been given; or*

*(b) [the Company] fails to lodge any document it is required by law to lodge with the Australian Taxation Office within seven (7) days of the date on which [the Company] was to have lodged the document, in which event the default shall occur at midnight on the 7th day after the date on which the lodgement was due; or*

*(c) [the Company] fails to make a payment it is required to pay to the Australian Taxation Office within seven (7) days of the date on which the payment was to have been made in which event the default shall occur at midnight on the 7th day after the date on which the payment was due.*

* *16.5 … the claims of a Creditor shall, in the case of the termination of this Deed prior to the payment to such Creditor of its full entitlement under this Deed, be extinguished only to the extent of the payment actually made by the [Deed Administrators] to such Creditor.*
* *21.1 [The Company], the Director and the [Deed Administrators] shall execute such Deeds and other documents and do such acts and things as may be necessary or expedient to implement this Deed.*

1. There is some lack of clarity in the DOCA as to the distinction between ‘powers’, ‘duties’ and ‘rights’ when addressing the position of the Deed Administrators, but this is of no moment for the purposes of these proceedings. However, it is worth noting that in cl 6.1 the responsibility in relation to complying with taxation laws is upon the Company and the Director and not upon the Deed Administrators. Whilst the Company (by covenant) has the obligation to actually comply with the taxation laws, no consent of or prior notice to the Deed Administrators needs to be given by the Director (see eg *contra* sub-cls 6.1(a), (h), (i) and (j)).

# Constitution

1. Item 61 of the Company’s constitution (‘**Constitution**’) provides:

***Management Vested in Directors***

*The management of the Company’s business is vested in the directors who shall exercise all the powers of the Company as are not required to be exercised by the Company in general meeting PROVIDED that the directors may not dispose of the Company’s main undertaking or approve the transfer of a controlling share interest in the Company without the approval of a general meeting previously given. No such resolution of a general meeting shall be retrospective in its effect.*

# CONSIDERATION

1. As I have mentioned, the Payments were made by the Company between 27 September 2013 and 5 July 2017. That is, all the Payments took place during the period that the DOCA was in force.
2. I should mention that as a consequence of defaults by the Company in complying with the obligations imposed by cls 6.1(d) and 16.2(c) of the DOCA, Mr Yeo and Mr Rambaldi convened a meeting of creditors for the purposes of proposing a resolution to terminate the DOCA.
3. Then, as I have already mentioned, on 5 July 2017, the creditors of the Company resolved to terminate the DOCA and wind up the Company and Mr Yeo and Mr Rambaldi were appointed as the liquidators.
4. There was no suggestion that the Deed Administrators made the payments. Each of the Deed Administrators in their written evidence said that he did not make the Payments and did not know about the Payments until after they were made.
5. Accordingly, the question the Court must consider is whether the Payments were in fact made by the Company to the DCT ‘under the authority of’ the Deed Administrators. The focus is not ‘under’ the DOCA, but ‘under the authority of the Deed Administrators’.
6. I accept that the fact that the Mr Yeo and Mr Rambaldi as Deed Administrators did not themselves make the Payments, or did not specifically instruct anyone to make the Payments does not determine the question of whether the relevant transactions were entered into, or done, on behalf of the Company under the authority of the Deed Administrators, within the meaning of sub-s 588FE(2B)(d)(i). However, if this is not the case, then the Court needs to find where the so called authority of the Deed Administrators to make the Payments comes from in the Corporations Act, the DOCA or the Constitution.
7. In the end, the principal submission of the DCT was that the making of the Payments was specifically contemplated (and required) under the terms of the DOCA and pursuant to cl 6.1(d) the Company (through Mr Yeo and Mr Rambaldi) expressly covenanted to make the Payments. In so doing, Mr Yeo and Mr Rambaldi accepted that (i) they were acting as agents of the Company in carrying out their duties in accordance with the terms of the DOCA (see cl 3.2) and (ii) by the operation of s 444G of the Corporations Act both Mr Yeo and Mr Rambaldi were bound by the DOCA. Mr Yeo and Mr Rambaldi were aware of the amendments that were made to the then proposed deed of company arrangement at the second meeting of the Company’s creditors on 22 November 2013 to take into account the need for the Company to comply with its taxation obligations during the life of the DOCA, the various terms that were subsequently incorporated into the DOCA to address the obligations imposed on the Company to make the payments, and the fact that if the Company was to continue trading under the terms of the DOCA it would necessarily accrue taxation liabilities as a result of its trading. All of these matters demonstrate, it was contended by the DCT, that as a matter of fact, the Payments were made under the authority of Mr Yeo and Mr Rambaldi.
8. It is important to go back to basic principles before looking at the DOCA, but the essential point is that the Payments were made by the Company (as it covenanted to do) pursuant to sub-cl 6.1(d), but not through or under the authority of the Deed Administrators. The responsibility to make the Payments was upon the Company and the Director as covenanted in sub-cl 6.1(d) with the consequence of default set out in sub-cl 16.2(c).
9. The basic principles cannot be in contention. A company cannot act other than through people who act as its agents (eg directors, liquidators, deed administrators): *Sharp & Anor v Blake & Anor* [2015] EWHC 3220 (Ch) at [9].
10. The powers of directors of a company, which are suspended upon appointment of administrators, are revived upon the entering into of a deed of company arrangement: *Deputy Commissioner of Taxation v Foodcorp Pty Ltd* (1994) 13 ASCR 796, at 798; see also *Cargill International s A. v Solid Energy New Zealand Limited (subject to deed of company arrangement)* [1016] NZHC 1917 at [43] (‘***Cargill***’). By contrast, the powers and obligations of a deed administrator are provided solely from the terms of the deed of company arrangement: *Cargill* at [43]. A deed administrator is not an administrator under Pt 5.3A of the Corporations Act. While it is open to the creditors to provide in a deed of company arrangement for the deed administrator to have managerial powers or assume managerial obligations, or to limit or exclude the reinstatement of a director’s authority, they are not required to do so: *Cargill* at [41]-[44].
11. Then, as I have alluded to already, the DOCA operates in the way contended for by the Applicants.
12. The DOCA does not empower the Deed Administrators to conduct managerial affairs of the Company, such as making of the Payments. Although Sch 8A of the *Corporations Regulations 2001* (Cth)is incorporated into the DOCA, the subclauses that might otherwise be relevant were not enlivened because there was no obligation imposed on the Deed Administrators to manage the Company.
13. As seen above, sub-clause 4.1(a) of the DOCA expressly returns management of the day-to-day business affairs to the Director. The Payments were made by the Director from his own authority in managing the Company.
14. While sub-cl 4.1(a) of the DOCA provides that the Director’s own authority is ‘subject to the rights and powers of the [Deed Administrators] under clause 6 of this Deed’, there are in fact no rights or powers granted in cl 6 that might affect, override or supersede the Director’s own authority to make the payments; or to support the submission that the Director was acting under an authority or power granted to the Deed Administrators. In fact, cl 6 indicates the responsibility for the Payments was effectively upon the Company and the Director.
15. I am aware that recommendation 51 in the CAMAC June 1998 Report provides that transactions performed by or with the authority of an administrator or a deed administrator, even if in fact performed by the directors, were to be excluded from the voidable transaction regime. The policy reasons for this are outlined at [8.12] and [8.13] of the CAMAC June 1998 Report, which I have already mentioned. However, these comments must be seen in context, and must be read in view of the DOCA itself. It cannot be the position that all transactions carried out (even by a director if permitted) during the operation of the DOCA are carried out by or under the authority of the Deed Administrators. In my view, even transactions contemplated or required to be undertaken by the DOCA cannot be necessarily said to be made on behalf of the Company under the authority of the Deed Administrators, when the DOCA contemplates and requires itself the entry into of some transactions on behalf of the Company by the Director with no involvement by the Deed Administrators.
16. The position before the Court in these proceedings is that the relevant terms of the DOCA make it clear that that Payments were not made by the Director ‘under the authority’ of the Deed Administrators.
17. I should mention cl 21.1 of the DOCA, which was relied upon by the DCT. Clause 21.1 of the DOCA is of no assistance to the DCT. Under cl 21.1 of the DOCA there was no need for the Deed Administrators to do any act in order to give effect to, or expedite the Company’s obligations to comply with all taxation laws (as provided for in sub-cl 6.1(d) of the DOCA) and the power or authority of the Director to effect the Payments.
18. The fact is that the Company had an obligation to make the Payments by operation of taxation laws and the Director did in fact make the Payments on the Company’s behalf. This may have been done during the currency of, and as contemplated and required by, the DOCA, but not under the authority of the Deed Administrators.
19. For the reasons above, I reject the submissions of the DCT and accept the submissions of the Applicants.
20. I make one final comment. This case turns on the question of whether the Payments were in fact made by the Company to the DCT ‘under the authority of’ the Deed Administrators.
21. The relevant task of the Court is to construe the words employed by Parliament in the context in which they have been used: *Commissioner of Taxation v Eichmann* [2019] FCA 2155 at [39]. As we are reminded in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 (per French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (see also, *Esso Australia Resources Pty Ltd v Commissioner of Taxation* (2011) 194 FCR 32 at [126]-[129]), extrinsic material is secondary (footnotes omitted):

*As Gummow J observed in* Wik Peoples v Queensland*, it is necessary to keep in mind that when it is said the legislative “intention” is to be ascertained, “what is involved is the ‘intention* manifested*’ by the legislation”. Statements as to the legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.*

1. In my view, the meaning of sub-s 588FE(2B)(d) is clear in its application to these proceedings. There are always dangers in interpreting legislation by reference to reports that may have given rise to the implementation of such legislation, but which may not be wholly incorporated into such legislation. Resort to the CAMAC June 1998 Report and the CAMAC November 2008 Report I consider fall within this category, and the Explanatory Memorandum takes the matter no further.
2. If the Court did look to the extrinsic materials (putting aside my reservations as to its utility in these proceedings), the following matters become apparent as submitted by the Applicants:
3. Prior to the enactment of sub-s 588FE(2B) certain transactions which might otherwise be voidable were not voidable when made while a company was under a deed of company arrangement and then subsequently wound up: see Explanatory Memorandumat [7.197]-[7.198]; CAMAC June 1998 Report at [8.2].
4. There was an opportunity for abuse, including in respect of unfair preferences, ‘in particular, where directors who resume control of a company under a deed of company arrangement pay creditors whose debts they have personally guaranteed in preference to other creditors’: CAMAC June 1998 Report at [8.2].
5. The CAMAC June 1998 Report adopted a modified ‘first policy option’ via the following analysis:
   1. the first policy option was that all transactions that take place during the course of a voluntary administration (including a deed of company arrangement) that precedes any form of court or voluntary winding up be subject to the voidable transaction provisions (at [8.11]);
   2. it was considered that the first policy option would make it unnecessarily difficult for an administrator or deed administrator to carry on the business of the company (at [8.12]);
   3. the Committee considered that the first policy option might be restricted to payments by a company that had been returned to the control of its directors under a deed of company arrangement (at [8.13]). The Committee then considered arguments for and against that modification. In summary, the argument against was that such modification would encourage companies to be left in the control of the more expensive insolvency practitioner; and the argument for was that where control of companies is returned to directors, the usual voidable transaction regime ought apply (at [8.13]);
   4. the Committee ultimately recommended the modified first policy option (at [8.15]) as outlined in [8.18], including that ‘transactions by company directors under a deed of company arrangement which are not authorised by the deed administrator would be subject to the voidable transaction provisions’;
   5. the analysis and recommendations in the CAMAC November 2008 Report confirmed they distinguished ‘administrator initiated’ transactions from ‘officer initiated’ transactions: (at [4.2]; see also *Company Receivers and Administrators* at [52.1400]); and
   6. sub-s 588FE(2B) was intended by Parliament to remove potential for abuse by a director in the situation where control of the company is returned to the director under a deed of company arrangement in circumstances where the voidable transaction provisions did not apply.

# Conclusion

1. The Payments are recoverable from the DCT as unfair preferences under s 588FA of the Corporations Act.
2. I will order that within 14 days that the parties confer and file any agreed minutes of order reflecting these reasons (including as to costs) or in the event of disagreement a short written submission as to the orders sought.

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| --- |
| I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Middleton. |

Associate:

Dated: 15 May 2020