# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Lerinda P/L v Laertes Investments P/L as Trustee for the Ap-Pack Deveney Unit Trust* [2009] QSC 251 |
| PARTIES: | **LERINDA PTY LIMITED ACN 010 016 430**<br>(applicant)<br><br>**v**<br><br>**LAERTES INVESTMENTS PTY LIMITED ACN 010 513 087 AS TRUSTEE FOR THE AP-PACK DEVENEY UNIT TRUST**<br>(respondent) |
| FILE NO/S: | BS 11102 of 2008 |
| DIVISION: | Trial Division |
| PROCEEDING: | Hearing |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 28 August 2009 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 18 June 2009 |
| JUDGE: | McMurdo J |
| ORDER: | **The application to terminate the deed of company arrangement is dismissed.** |
| CATCHWORDS: | EQUITY – GENERAL PRINCIPLES – EQUITABLE DOCTRINES AND PRESUMPTIONS – SUBROGATION – where the applicant is one of several unsecured creditors of the respondent – where the respondent is subject to a deed of company arrangement – where the respondent's liability to its creditors arises out of the discharge of its duties as trustee – where the respondent has rights of indemnity as trustee to which the applicant seeks to be subrogated – where the applicant is the only unsecured creditor to have commenced proceedings to enforce its right of subrogation – where the equitable remedy of subrogation is discretionary – whether the remedy of subrogation would be granted in circumstances which would advance the applicant ahead of other unsecured creditors to their detriment<br><br>CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – TERMINATION OR AVOIDANCE – where the deed's administrators included a sentence in their s 439A report to |

creditors that was wrong in law – where that sentence was part of the reasoning towards a conclusion that was ultimately correct – whether this is false or misleading information justifying termination of the deed of company arrangement under s 445D of the *Corporations Act* 2001 (Cth)

CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – TERMINATION OR AVOIDANCE – where it is alleged that on the face of things the directors of the trustee company may have acted in breach of statutory and fiduciary duties to the company by transferring assets to a related company without consent of the creditors while the company was insolvent – where the administrators had informed creditors in their s 439A report that this "may be an uncommercial transaction, although our investigations continue" – whether this was so deficient as to constitute misleading information justifying termination of the deed of company arrangement under s 445D of the *Corporations Act* 2001 (Cth)

CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – TERMINATION OR AVOIDANCE – where the administrators reported that the company may have been trading while insolvent for up to 12 months prior to their appointment – where the administrators concluded through property searches that one director had property worth approximately $130,000 – where the administrators were unable to identify any real property in the name of the other director and were advised that he had no assets in his own name – where the administrators stated in their s 439A report that $130,000 was the value of any insolvent trading claim in a liquidation – where it would have been reasonably clear to creditors from the s 439A report that the directors had access to funds as distinct from their owning property – whether the administrators' failure to refer specifically to the prospect of recovery against the directors other than by recourse to real property was misleading justifying termination of the deed of company arrangement under s 445D of the *Corporations Act* 2001 (Cth) – whether the administrators were obliged to conduct further investigations in the prospect that substantial assets of the directors might be found to meet claims for insolvent trading

CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – TERMINATION OR AVOIDANCE – where a creditor agreed to a transfer from another party of an interest in facilities that was not trust property but which was related to the trust business in return for not claiming under the deed of company arrangement – where the administrators simply

informed creditors in their s 439A report that this creditor "has been provided with an alternative business arrangement in consideration for its debts with the company" – whether the lack of more detail was misleading justifying termination of the deed of company arrangement under s 445D of the *Corporations Act* 2001 (Cth)

*Corporations Act* 2001 (Cth), s 444A, s 445D(1)(f), s 556

*Trusts Act* 1973 (Qld), s 44

*Boscawen v Bajwa* [1996] 1 WLR 328, followed

*Custom Credit Corporation Limited v Ravi Nominees Pty Ltd* (1992) 8 WAR 42, followed

*DiMella v Rudaks* (2008) 102 SASR 582, cited

*Nolan v Collie* (2003) 7 VR 287, followed

*Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, considered

*Orakpo v Manson Investments Ltd* [1978] AC 95, cited

*Re Enhill Pty Ltd* [1983] 1 VR 561, followed

*Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99, considered

*Re Trivan Pty Ltd* (1996) 134 FLR 368, followed

*Ron Kingham Real Estate v Edgar* [1999] 2 Qd R 439, cited

*Spies v R* (2000) 201 CLR 603, followed

*Vacuum Oil v Wiltshire* (1945) 72 CLR 319, cited

*Warman International Ltd v Dwyer* (1995) 182 CLR 544, applied

COUNSEL: B O'Donnell QC for the applicant
S J Lee, with D W Marks, for the respondent

SOLICITORS: Mills Oakley for the applicant
Gadens for the respondent

[1] This is an application by a creditor for the termination of a deed of company arrangement. The respondent is the company, represented by the deed's administrators.

[2] The company carried on business in the Granite Belt as a wholesaler of fruit and vegetables. The applicant was one of its suppliers. Its biggest customer was Coles. It was insolvent by the time it ceased to carry on this business in November 2008, when the business was transferred by the directors to other companies which they controlled for the sum of $14,000. A week later they appointed administrators. The following month a meeting of creditors voted for this DOCA and it was executed by the company, the administrators and others on 20 January 2009.

[3] The company carried on this business as a trustee. It had no other business and all of its assets and liabilities were held and incurred as a trustee of the so-called Ap-Pack Deveney Unit Trust. It is that trusteeship which is the basis for the applicant's principal ground for challenging the DOCA. Because the trustee is insolvent, the applicant says that it is entitled to be subrogated to the trustee's rights of indemnity against the trust assets. In particular, the applicant claims to be entitled to the trustee's right of exoneration, i.e. to have trust property applied in satisfaction of the trustee's liability to the applicant of $151,361.40. The applicant's case is that, absent the DOCA, its debt would be paid in full by being subrogated to the trustee's position. But by the DOCA, the trust assets will be otherwise applied, and according to the administrators' estimate, the applicant will receive about 15 cents in the dollar. Accordingly, it claims that the DOCA is unfairly prejudicial to it, providing a ground for termination under s 445D(1)(f) of the *Corporations Act* 2001 (Cth). There are several other arguments made on the applicant's behalf, but it is convenient to discuss first this ground.

**The subrogation ground**

[4] The company incurred its liability to the applicant, as it did to its other creditors, in the discharge of its duties as a trustee, and therefore has rights of indemnity. A trustee is entitled to apply trust property directly in satisfaction of its liabilities as a trustee (a right of exoneration) and to reimburse itself from trust property where it has discharged a liability from its own funds (a right of recoupment).[1] To enforce the indemnity, a trustee has a charge or right of lien over the whole range of trust assets except for those, if any, which under the terms of the trust deed may not be used for the carrying on of the business. There are thereby two classes of persons having a beneficial interest in the trust assets, the first being the beneficiaries for whose benefit the business was being carried on, and the second being the trustee. The trustee's interest will prevail over that of the beneficiaries.[2] Where the trustee is insolvent, a creditor of the trust may be subrogated to the trustee's rights of indemnity and in particular to its lien or charge securing that right of indemnification.[3]

[5] The applicant argues that it is thereby a secured creditor of the trustee but that the DOCA would treat the property over which it has that security as available for unsecured creditors. It is argued that the applicant is entitled to enforce its security directly against the assets of the trust to the extent of discharging its debt in full. By this means the applicant claims to have bypassed the queue of the company's creditors who, according to the administrators,[4] would receive eight cents in the dollar under a liquidation.

[6] The question which immediately arises is how it could be that the applicant has gained that advantage over other creditors. The debts owing to them were incurred in circumstances no different from those of the applicant's debt. The difference, the applicant seems to argue, is that it has taken steps to enforce its right to subrogation. It did so by these proceedings, commenced by an originating application on 3 November 2008, prior to the appointment of the administrators. The originating

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1 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367.

2 Ibid.

3 Ibid at 367-8; *Vacuum Oil v Wiltshire* (1945) 72 CLR 319 at 335-6; *Ron Kingham Real Estate v Edgar* [1999] 2 Qd R 439 at 443.

4 In their report under s 439A of the *Corporations Act* 2001 (Cth).

application claimed a declaration that the whole of the property of the trust was charged in favour of the applicant for the payment of its debt and the appointment by the court of persons to enforce that charge by taking possession of the trust property. By the same originating application, it sought an order to wind up the company on the ground of insolvency. But none of those orders has been made. The applicant instead has since filed and prosecuted this application to terminate the DOCA.

[7] Subrogation is a remedy, not a cause of action: *Orakpo v Manson Investments Ltd*;[5] *Boscawen v Bajwa*;[6] *Re Trivan Pty Ltd*;[7] *DiMella v Rudaks.*[8] In *Boscawen*, Millett LJ said:

> "Equity lawyers speak of a right of subrogation, or of an equity of subrogation, but this merely reflects the fact that it is not a remedy which the court has a general discretion to impose whenever it thinks it just to do so. The equity arises from the conduct of the parties on well-settled principles and in defined circumstances which make it unconscionable for the defendant to deny the proprietary interest claimed by the plaintiff. A constructive trust arises in the same way. Once the equity is established the court satisfies it by declaring that the property in question is subject to a charge by way of subrogation in the one case or a constructive trust in the other."[9]

In *Re Trivan Pty Ltd*, Young J said that:

> "The next matter that should be noted about subrogation is that it is really not a right, but a remedy, that is, it is a remedy which a court of equity will grant in order to prevent there being an unconscionable situation …
>
> Furthermore, it is an equitable remedy. That means that it will not be granted merely as a right, but will only be granted in circumstances where it is appropriate to do so."[10]

[8] The applicant's case assumes that the equitable remedy of subrogation would be granted in its case, and on terms which would have its debt paid in full. But unless and until that remedy is granted, the applicant has no equitable interest in the trust assets or equity which appears to have priority over those of other creditors of the trustee. The question then is whether the equitable remedy of subrogation would be granted on terms which would advance one otherwise unsecured creditor ahead of the others and to their detriment. The fact that this creditor has applied for the remedy (although at this hearing it did not pursue that relief) whilst other creditors have not so applied, does not indicate some conduct on the part of every other creditor in the nature of, for example, acquiescence or delay, which might disentitle that creditor to the same remedy. If the applicant's right to be subrogated is no greater than that of any other creditor, the relief which it might hope to obtain would

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5 [1978] AC 95 at 104 (Lord Diplock).
6 [1996] 1 WLR 328 at 335 (Millett LJ).
7 (1996) 134 FLR 368 at 372-3 (Supreme Court of New South Wales).
8 (2008) 102 SASR 582 at 590.
9 (1996) 1 WLR 328 at 335.
10 (1996) 134 FLR 368 at 372.

have to be limited to ensure that the rights of the other creditors were not prejudiced.

[9] This question of priorities between the creditors of an insolvent trust is discussed by the authors of *Jacobs' Law of Trusts in Australia* as follows:

> "What is the correct order of priority between trust creditors after payment of administration costs? One suggestion is that where the equities are equal the trust creditors be accorded that priority which reflects the order in which the claims arose, on the basis that as each claim arose it brought with it an interest, via subrogation, in the lien of the trustee over the trust assets. Mr Justice McPherson, writing extra-judicially, has suggested that the claim be ranked pari passu by analogy with the general principle of equity that requires a distribution of company property in a winding-up to proceed on the footing of equality among the creditors of equal degree. It is submitted *first*, that the analogy with company liquidations is a wide one and, in any event, not only corporate but individual trustees may be involved and there may be a shortfall in trust assets where the trustee, in its own right, is quite solvent and neither bankrupt nor in winding-up; *second*, that it is more accurate to see the lien as one which at best attaches only potentially as the liability of the trustee arises, and crystallises only upon proceedings for its enforcement and upon it being clear that there is a balance on the account between trustee and beneficiary in favour of the former; and *third*, that an appropriate analogy is that favoured in cases of competing claims by beneficiaries of different trusts to trace into a mixed fund, and this produces a ranking pari passu."[11]

[10] The applicant's argument would appear to accept that its claim would have no priority according to when its debt was incurred. And there is no evidence as to the timing of its debt compared with others. The notion that some creditors of the trustee would be able to claim ahead of others, according to when their debts arose, seems inconsistent with subrogation being a remedy rather than a right of action. Rather, as I have said, the applicant attributes its supposed priority to its having commenced proceedings to seek that remedy. But there is no basis in principle or authority for that proposition.

[11] The starting point is that some reason should be demonstrated for departing from what Justice McPherson has described as:

> "the general principle of equity that requires a distribution of company property in winding-up to proceed upon a footing of equality amongst all the creditors of equal degree".[12]

In *Spies v The Queen*,[13] Gaudron, McHugh, Gummow and Hayne JJ said:

> "To give some unsecured creditors remedies in insolvency which are denied to others would undermine the basic principle of pari passu participation by creditors."

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11 (2006, 7th ed) at [2115] (citations omitted).

12 B H McPherson, The Insolvent Trading Trust' in P D Finn (ed), *Essays in Equity* (1985) 142 at 158.

13 (2000) 201 CLR 603 at 636.

And as Owen J said in *Custom Credit Corporation Limited v Ravi Nominees Pty Ltd*:

> "The property of an insolvent company is to be applied in satisfaction of liabilities equally, and the courts look askance at mechanisms which seek to reserve specific assets to settle particular liabilities."[14]

[12] In *Octavo Investments Pty Ltd v Knight*, the joint judgment suggested no possibility that the availability of subrogation might lead to different outcomes between creditors of a trust business according to which of them brought proceedings or to any other matter. Their Honours referred to such creditors as a group when saying that they would be subrogated to the beneficial interest enjoyed by the trustee.[15] In *Re Suco Gold Pty Ltd*, King CJ said that in a case where there was a deficiency in the assets of a particular trust, which had been conducted by a trustee company, creditors not otherwise entitled to priority would rank pari passu.[16]

[13] In *Nolan v Collie*,[17] a claimant who had obtained a judgment against a trustee brought further proceedings to establish that trustee's right to indemnification from the trust and its right to be subrogated to the trustee's position. At first instance, it was declared that the claimant was subrogated to the trustee's rights and thereby to its right of indemnity arising in respect of the earlier judgment. The appeal was unanimously dismissed. One of the unsuccessful arguments was that the declaration ought not to have been made, because the trustee was by then in liquidation and its indemnity had become property available to the liquidator for division amongst other creditors so that the declaration was inconsistent with that position by giving the plaintiff some priority.[18] The principal judgment was given by Ormiston JA, with whom Batt and Vincent JJA agreed, who held that the declaration made in favour of this creditor would not give it a priority over other creditors. Ormiston JA said:

> "The order made by Warren J did not impinge on the liquidator's powers, at least as I would understand the order that she made.
>
> There must therefore be some other reason lying at the back of the appellant's contention. It seems that what in particular is relied upon is the assertion made in the authorities that upon subrogation the party subrogated acquires some equitable interest in the relevant assets. That may be so, indeed there is no doubt that the right of indemnification continues to affect the trust property even though there is a new trustee, but the interest recognised is intended merely to preserve the right of the trustee, not to create a priority of the kind frequently given where other charges are imposed except a right to claim priority over the beneficiaries."[19]

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14 (1992) 8 WAR 42 at 54.

15 (1979) 144 CLR 360 at 367, 370 and 371.

16 (1983) 33 SASR 99 at 109.

17 (2003) 7 VR 287.

18 More precisely amongst all creditors of the trustee, rather than only creditors of the trustee from the carrying out of that trust, consistently with a decision of the Full Court of the Supreme Court of Victoria in *Re Enhill Pty Ltd* [1983] 1 VR 561. In *Re Suco Gold Pty Ltd*, *Re Enhill* was not followed where it was held that the assets of a particular trust had to be applied in payment of liabilities incurred as trustee of that trust.

19 [2003] 7 VR 287 at 313.

[14] If, according to that judgment, a creditor which had obtained final relief in proceedings to enforce its right of subrogation does not thereby enjoy a priority over other creditors of the trustee, it cannot be the case that the mere commencement of such proceedings could have that result. There is no proprietary interest which is derived by the commencement of such proceedings. Unless and until some order is made for the application of property held by the trustee specifically in favour of the applicant, it enjoys no priority over other creditors of the company. It is sufficient to say that such an order is not sought at least within this present application for the termination of the DOCA. But I would not have made such an order had it been sought. According to *Re Suco Gold Pty Ltd*, the company's right to indemnity is property the proceeds of which should be divided according to what is now s 556 of the *Corporations Act* 2001 (Cth). In *Jacobs' Law of Trusts in Australia*,[20] that is said to be incorrect because s 556 is said to deal with the application of the assets beneficially owned by the company and available for distribution between "general" creditors, rather than only creditors from the carrying out of the activities of the relevant trust. Accepting that to be so, still I would have refused such an order because the equitable remedy of subrogation should not be used to engineer an unequal outcome between otherwise unsecured creditors of an insolvent trustee and where to advance one creditor's position would disadvantage that of the others.

[15] Accordingly, this first ground for terminating the DOCA must fail. A related argument for termination of the DOCA is that the administrators' report under s 439A was false and misleading in what it said about the applicant's claim to subrogation. The administrators advised creditors as follows:

> "In addition, Lerinda Pty Ltd has applied to the Court for an order of subrogated rights, priority to the company's right of indemnity, out of trust assets. We have been advised by our solicitors that the case authority relied upon by the solicitors acting for Lerinda Pty Ltd precludes a claim by a creditor(s) to subrogate assets of a trust in circumstances of insolvency, as is the case with the Ap-Pack Deveney Unit Trust. Instead, as voluntary administrators for the company which remains as trustee, we are to ensure that the right of indemnity is exercised in favour of all creditors."

In substance, the creditors were not misinformed. The administrators were correct in saying that the company's right of indemnity was to be exercised for all creditors. Read alone, the statement that a claim to be subrogated to that right of indemnity would be precluded "in circumstances of insolvency" would be incorrect. But in context, it was clear that the administrators were saying that according to their advice, the applicant would not be allowed some priority over other creditors. That was correct.

**The deed**

[16] Before going to the many other grounds argued for the termination of the DOCA, it is necessary to summarise the company's position and the effect of the deed.

[17] According to the administrators' report, in a winding-up the total assets available for distribution would be $1,075,010, including $707,203 recoverable under certain "Loan Accounts" and $130,000 recoverable as claims for insolvent trading. After

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[20] (2006, 7th ed) at [2115].

payment of estimated administration costs, the administrators assessed the funds likely to be available for creditors in a winding-up as $933,103. The Bank of Queensland as a secured creditor for $489,741 would be paid and the balance would next be paid to certain unsecured creditors enjoying priority as employees to the extent of $267,958. The remaining $175,404 would be available for creditors with claims totalling $2,245,675, resulting in that estimated return of eight cents in the dollar.

[18] I turn then to the DOCA, which substantially accords with what was proposed by the directors within the administrators' report. A Deed Fund was established, to be made up by the cash held in the company's name, the trade debtors estimated in the report at $24,584, an amount of $50,000 to be paid by Michael Deveney (a director) for the plant and equipment (said to be worth $24,052 in a liquidation), an amount of $210,000 to be contributed by "Michael Deveney or a third party on his behalf" and $96,320 to come from a repayment by a company called Oldex Pty Ltd. The administrators told creditors that the estimated assets available for distribution under the DOCA would be thereby $382,405. Of course this was much less than the amount which would be available for distribution under a winding-up. One difference was that the estimated recoveries for insolvent trading ($130,000) would not of course be available under the DOCA. The other was that the recovery of the loan accounts (apart from Oldex Pty Ltd), which was estimated at $707,203 in a liquidation, would not exist under the DOCA. This is because those loan accounts were to be "extinguished" upon "the successful completion of this deed", as the DOCA now provides. The estimated administration costs under the DOCA were $76,657, compared with $141,907 under a liquidation. Accordingly, the funds available for creditors were estimated at $305,748, compared with $933,103 under a liquidation.

[19] But under the DOCA, two former employees Mr Dillon and Mr Hendry, as parties to the deed, agreed not to claim or participate in any distribution out of the Deed Fund, as did Oldex Pty Ltd, Opalbay Pty Ltd, Favap Pty Ltd and the directors. The priority unsecured creditors under the DOCA were estimated by the administrators at $68,383. Under the DOCA the secured creditor, Bank of Queensland, was to be paid out by Michael Deveney or related parties. This has since occurred.

[20] Accordingly, the estimated funds for unsecured creditors under the DOCA were $237,365, compared with $175,404 under a liquidation. And because three unsecured creditors, Oldex Pty Ltd, Favap Pty Ltd and Opalbay Pty Ltd agreed not to claim, those funds are to be distributed to creditors whose claims total $1,552,030, resulting in that estimated return of 15 cents in the dollar.

**Other arguments for termination**

[21] The administrators referred to some seven loan accounts, in various amounts owed to the company which totalled $1,129,179. Two of those debtors were Phaidra Investments Pty Ltd (which owed $151,196) and Zeus Holdings Pty Ltd (which owed $174,460). At one point in the administrators' report, they advised that these companies were not "associated entities" and that the directors of them had advised that the companies did not have any assets from which to repay the debts. The applicant says that this was false or misleading, in that each company held units in the unit trust: together they held about 22 per cent of the units. But

the report did inform creditors of that unit holding. It further informed them that these were entities related to Mr Dillon and Mr Hendry, who as priority creditors had agreed to "stand aside from any distribution made to creditors" under the proposed DOCA. There was an argument here as to whether these two companies, which were admittedly "related entities" within the meaning of s 9 of the *Corporations Act* 2001 (Cth), were "associated entities" within the meaning of its s 50AAA. The administrators appear to be correct in saying they were not, but it is unnecessary to resolve the point. The extent of the connection between those companies and the subject company was explained and creditors were not relevantly misinformed.

[22] As mentioned already, the company ceased to carry on business about one week prior to the appointment of the administrators. Packaging, stock and other items used in the business were then transferred by the company to Favap Pty Ltd, for which it paid $14,240. That company and Favco Qld Pty Ltd thereafter conducted the same business including its substantial trading with Coles. These two companies are under the control of the directors of the subject company, Michael and Paul Deveney. This was done without the consent of the company's creditors in circumstances where it was insolvent. On the face of things, as the applicant submits, the directors acted in breach of their statutory and fiduciary duties to the company and these new proprietors of the business could be held to account for the benefits to them which resulted from those breaches of duty. The applicant says that it was also available to the subject company to rescind that transaction by which its assets had been transferred. The applicant claims that the administrators did not adequately assess the value to the company of claims which could be made against the directors and their companies in consequence of these events.

[23] The administrators told creditors about this transaction. They said that further investigations would be conducted if the company were wound up. They wrote:

> "The benefits derived in favour of Favap Pty Ltd and Favco Qld Pty Ltd from trading with Coles from the time prior to our appointment may be an uncommercial transaction, although our investigations continue. The fact that there is no fixed contract in place with Coles (as far as our investigations can tell), such that any arrangement may be determinable at will, means that it is difficult to quantify any uncommercial transaction."

In my view the administrators' reference to this transaction, although brief, was not misleading or deficient. The absence of a written agreement with Coles was clearly relevant, because it would affect the quantification of any claim which the company might have against the directors, for reasons which are explained in *Warman International Ltd v Dwyer*.[21] And as the personal involvement of the directors was apparently important for the conduct of this business, the value of the assets transferred under this transaction, if returned to the company, would be unlikely to be substantial. This ground for challenging the DOCA is not established.

[24] The applicant argues that the directors might be personally liable to the company for making loans to companies associated with beneficiaries of the trust at a time when the company was or may have been insolvent. The administrators reported that,

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[21] (1995) 182 CLR 544 at 560-561 and 565.

according to their preliminary investigations, the company may have been trading whilst insolvent for up to 12 months prior to their appointment. They said that any claim for insolvent trading against a director would need to be assessed on commercial grounds taking into account the cost to prosecute such a claim and the directors' ability to meet it. They referred to property searches in relation to Paul Deveney and concluded that he had property worth approximately $130,000. They said they had not identified any real property in the name of Michael Deveney and had been advised that he had no assets in his own name. They therefore concluded that there were not sufficient assets to satisfy an insolvent trading claim exceeding $130,000. It was for that reason that they included this amount as the value of such claims in a liquidation. In my view no basis is demonstrated for criticising the information given to creditors in this respect. The applicant complains that the administrators did not investigate companies associated with the directors and the prospect of recovering funds from them by recourse to their interests in those companies. However, the creditors were informed of the directors' connection with those companies. They were also informed of the directors' proposed DOCA in which, as I will discuss, funds would be contributed for the benefit of creditors by the directors. So it was clear to creditors that the directors had access to funds, as distinct from their owning property. The theoretical prospect of recovery against the directors other than by recourse to real property was not something which the administrators, in my view, needed to refer to specifically. Nor were they obliged to conduct investigations (if possible) to identify the prospect that through one or more of those companies, substantial assets of the directors could be found to meet claims for insolvent trading.

[25] The next complaint of the applicant is in relation to that creditor Opalbay Pty Ltd. In the administrators' report, there was a note against the reference to its agreeing not to claim for its debt of $635,529 as follows:

> "We understand the [sic] Opalbay Pty Ltd has been provided with an alternative business arrangement in consideration for its debts with the company."

According to an affidavit by the solicitor for the applicant, at the creditors' meeting it was revealed that Opalbay was to receive a benefit not available to other creditors. Opalbay owned one-third of packing facilities which were not trust property but were related to the trust business. It was to receive a transfer from another party of the remaining two-thirds interest in those facilities in exchange for not claiming under the DOCA. That two-thirds interest was not property of the trust. The applicant's complaint is that creditors were not informed, in the administrators' report, that Opalbay had that incentive to vote in favour of the DOCA. But creditors were informed that Opalbay was making a "business arrangement" in exchange for not claiming under the DOCA. The fact that more detail was not provided is not, in my view, significant. It should have been clear enough that this company had its own reasons for voting in favour of the DOCA.

[26] In the course of argument, a further complaint made by the applicant became the more general one that the DOCA improperly treated assets of the trust as assets of the company. By s 444A(4)(a) such a deed must specify

> "the property of the company (whether or not already owned by the company when it executes the deed) that is to be available to pay creditors' claims".

The relevant property of the company is its right of indemnity, for which, as already noted, the trustee has a beneficial interest in the available assets of the trust. The term "property" is defined to mean "any legal or equitable estate or interest … in real or personal property of any description and includes a thing in action". In that way the various assets, described as the company's property in the administrators' report and treated as such in the DOCA, could be regarded as property of the company. As long as the DOCA was consistent with that limited nature of the company's property in the assets, its beneficial interest securing its rights of indemnity, there is no basis for criticism of the DOCA.

[27] But in one respect, that limitation was not observed in the DOCA, where it was provided that the so-called Related Party Loan Accounts were to be extinguished upon "the successful completion of this Deed". Accordingly, the assets constituted by these debts were not to be used to indemnify the trustee, by their being applied to trust liabilities. The administrators argue that the trustee, by the trust instrument and by statute,[22] had a power to abandon any trust property, including these debts. That is correct, but it is a power which the trustee would have to duly exercise. In the present case, the trustee has regarded itself as effectively compelled to exercise that power by the resolution of its creditors. It is difficult to see that the creditors could have authorised the company to deal with property which was not its own.

[28] But it is unnecessary to resolve that last question. Overall the DOCA is apparently advantageous for the creditors, who, through the trustee, have the prior beneficial claim to the assets of the trust. According to the administrators' report it was in their interests to vote for this deed and the contrary is not established. Moreover, the deed has been substantially performed. Pursuant to the deed the Bank of Queensland facility has been refinanced. There is no prospect that unit holders would receive anything from a winding up, if the DOCA were terminated. Nor does it appear that any unit holder objects to this purported dealing with trust property. The DOCA should not be terminated on this ground.

[29] It follows that the application to terminate the deed of company must be dismissed. I shall hear the parties as to further orders, including costs.

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22 *Trusts Act* 1973 (Qld), s 44.