SUPREME COURT OF QUEENSLAND

CITATION: *Scott & Ors v Port Hinchinbrook Services Limited & Ors* [2017] QSC 92

PARTIES:
JASON JOHN SCOTT
(First Applicant)
and
PENDAR PTY LTD ACN 112 242 930 as trustee for THE BRETT SCOTT FAMILY TRUST
(Second Applicant)
and
ARTHUR BRUCE CHALMERS and JENNIFER DAWN CHALMERS
(Third Applicants)
and
GREGORY GORDON LANGDON and BRENDA JANE LANGDON
(Fourth Applicants)
and
CLARK ESPIE and SUSAN ESPIE
(Fifth Applicants)
and
GEORGE MASEN
(Sixth Applicant)
and
REGINALD ALVIN LAWRENCE and ROBYN DAWN LAWRENCE
(Seventh Applicants)
and
KENNETH THOMAS
(Eighth Applicant)
and
FELICITY HEATHER BENN
(Ninth Applicant)
and
GRAEME LAKE and DESIREE LAKE
(Tenth Applicants)
and
GARY EDWARD SCOTT and MARILYN KAY SCOTT
(Eleventh Applicants)
and

JANETTE ANN EVERITT
(Twelfth Applicant)
and
A & G DI BELLA INVESTMENTS PTY LTD ACN 010 437 895
(Thirteenth Applicant)
and
MARTIN CORPORATION (NQ) PTY LTD ACN 055 457 586
(Fourteenth Applicant)
v
PORT HINCHINBROOK SERVICES LIMITED ACN 081 055 414
(First Respondent)
and
THE PASSAGE HOLDINGS PTY LTD ACN 602 422 891
(Second Respondent)
and
IAN EDWARD STEPHENS
(Third Respondent)
and
LEWIS IRVING COHEN
(Fourth Respondent)
and
STEPHAN PINTO
(Fifth Respondent)

FILE NO/S:	SC Cairns No 78 of 2017
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Cairns
DELIVERED ON:	25 May 2017
DELIVERED AT:	Cairns
HEARING DATE:	7 April 2017
JUDGE:	Henry J
ORDERS:	**(1) It is declared that clause 17.1 of the deed of company arrangement dated 11 March 2016 is void and of no effect.**

(2) I will hear the parties further on 7 June 2017 at 9.15am as to:

(a) the appropriate form of declaration or other order arising from the finding of non-compliance with s 201A(2);

(b) the appropriate form of order in connection with the injunctions granted on 24 February 2017; and

(c) costs.

CATCHWORDS: CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENTS – GENERALLY – POWER TO AMEND THE CONSTITUTION – Whether there is an implied power that a deed of company arrangement may be a mechanism for constitutional amendment – where court held deed of company arrangement could not amend constitution

CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENTS – GENERALLY – LIMITS TO POWER – Where applicants contend clauses within deed of company arrangement are void – where court held that powers conferred by the deed of company arrangement take precedence over members' powers

CORPORATIONS – VOLUNTARY ADMINISTRATION – ADMINISTRATOR'S POWERS – APPOINTMENT OF DIRECTORS – EFFECT OF DEED OF ARRANGEMENT – Whether an administrator has the power to appoint a director under s 422A of the *Corporations Act* 2001 (Cth) that would not be eligible for appointment as director under constitution – where held that power of appointment of directors under s 422A is broader than powers under constitution

Corporations Act 2001 (Cth) ss 136(2), 137, 140(1), 201A(2), 232, 233(1)(b), 437A, 437A(1)(c) 437A(1)(d), 437F, 442A, 444G, 606 and 611

Corporations Regulations 2001 (Cth) sch 8A

Andrews v Qld Racing Ltd [2009] QSC 338, distinguished
Kirwan v Cresvale (2002) 44 ACSR 21, applied
Lehman Bros Holdings v Swan CC (2010) 240 CLR 509, cited
Link Agricultural Pty Ltd v Shanahan [1999] 1 VR 466, distinguished

Mulvaney v Rob Wintulich Pty Ltd (1995) 60 FCR 81, distinguished
Mulvaney v Wintulich, Unreported Fed Ct O'Loughlin J SG3184 of 1995 BC9507347, distinguished
North Sydney District Rugby League Football Club Ltd and Anor v Hill and Ors [2000] NSWSC 249, applied
Re Pasminco (2002) 41 ACSR 511, applied
Re Smith (2006) 58 ACSR 410, applied

COUNSEL:	D Savage QC with L Copley for the Applicants D Kelly QC with D Turner for the Second and Third Respondents
SOLICITORS:	Connolly Suthers Lawyers for the Applicants Clamenz Lawyers for the Second and Third Respondents

[1] A deed of company arrangement purports to install a controlling share of voting rights formerly held by the defunct developer of Port Hinchinbrook Resort upon a new investor.

[2] The legitimacy of the deed's important provisions is in dispute. Declarations are sought about that and related issues.

Background

Estate Ownership

[3] Port Hinchinbrook Resort ("the estate") is a residential estate, including a canal and marina, near Cardwell at the northern end of the Hinchinbrook Channel.

[4] The estate was owned and developed by Cardwell Properties Pty Ltd which later became named Williams Corporation Pty Ltd ("Williams Corporation"). Williams Corporation sold residential land within the estate to the public, retaining ownership of the balance of the estate including its common areas.

[5] Williams Corporation went into provisional liquidation in around June 2013.

[6] In 2015 the second respondent, The Passage Holdings Pty Ltd ("Passage"), entered into an acquisition contract with Williams Corporation by its liquidators to acquire those parts of the estate owned by Williams Corporation. That included 25 lots of vacant commercial and park land, roads, a silt pond, the estate's sewerage treatment plant, a dredge pond, the marina (on 2 lots), the canal (on 2 lots) and land with improvements, namely an

administration building, restaurant, bar, offices, shops, swimming pool and tennis court. The acquisition contract completed on or about 26 September 2016.[1]

PHS and its constitution

[7] Responsibility for the maintenance and provision of roads, sewerage services and the like did not pass to the local council after the development stage.[2] Rather, that responsibility was assumed by the first respondent, Port Hinchinbrook Services Ltd ("PHS"), a public company limited by guarantee established on 17 December 1997. Williams Corporation had majority control of PHS under PHS's constitution.

[8] Clause 4(b) of the constitution requires the Board to approve any application for membership of the company, provided that "a person shall not be entitled to become registered as or remain as a member" without also being a registered proprietor of estate property.

[9] The constitution provides for two classes of membership: special member and full members. The sole special member is identified in the constitution as Cardwell Properties Pty Ltd which, it is common ground, is Williams Corporation. Under clause 12.1B of the constitution, the special member has 76 per cent of the votes capable of being cast.[3]

[10] As to full members, PHS's constitution provides that persons who acquire an interest in land in the estate shall be admitted on application to full membership of PHS.[4] It appears to have been a condition of the initial sales of land that purchasers made application for membership. The constitution requires members who sell their property interest to include in the contract for sale a condition that the purchaser apply for full membership. By this requirement it appears to have contemplated that all owners in the estate would be members of PHS and thus be obliged to make financial contributions to it.

[11] The constitution requires all "members to meet Contributions, subscriptions, levies, and other financial obligations in a proper and timely manner, as determined by the Board".[5] The special member has the power to appoint and remove Board members "so that those directors appointed by the special member shall have voting control of the Board of directors".[6]

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1 Affidavit of Clive Scott filed 6 February 2017 ex p177.
2 It appears the only services provided by the local council are garbage collection and potable water supply, per affidavit of Moira Carter filed 8 March 2017 ex p58.
3 Clause 12.1B.
4 Clauses 3(e) and 4(b).
5 Clause 5(c).
6 Clause 18(d).

[12] The subscriptions, levies and other financial obligations which the Board can impose on members are not defined by the constitution. The constitution defines Contribution as follows:

> ""Contribution" means the contribution payable by each of the Full Members as determined by the Board from time to time in order to meet the costs, charges and expenses reasonably paid, charged or otherwise incurred by the Company in carrying out repairs, upkeep and general maintenance of all of the facilities and common property utilised and enjoyed by the Full Members from time to time at the Resort."[7]

[13] Thus "Contributions" are not liable to be met by the special member.

[14] Remarkably absent from the constitution is any protective provision calculated at ensuring all members' contributions, subscriptions, levies and financial obligations as determined by the special member controlled Board are reasonably proportionate to the extent of their lot holdings in the estate. Nor is there any provision scaling back the special member's degree of control as the proportion of the estate owned by it diminishes.

[15] It appears the developer was alive to the perception of dictatorial control. It provided prospective purchasers with a document under the name of Keith Williams "principal executive" and Ben Williams "general manager". The document explained that PHS would be funded by a so called benefitted area maintenance levy ("BAML") comprised of membership levies and contributions "due six monthly in advance, which is applied equitably to all persons or companies who derive a better quality of life as a result of the services and facilities being maintained by PHS".[8] This purportedly equity assuring document appears to have been annexure C to a Deed of Covenant entered into by at least some purchasers. However, the document was not, by the Deed's terms, conditioned to covenants as part of the agreement to purchase and was said to be no more than an explanation of the BAML.[9]

[16] In any event purchasers evidently chose to invest in the estate, despite the risks of inequity in member's obligations to fund PHS. The subsequent manifestation of those risks took several forms. For instance, BAML was never paid by Williams Corporation. Also, some estate property was resold without the vendors ensuring the purchasers applied for membership of PHS, with the apparent consequence that not all owners of estate lots are presently members of PHS.[10] PHS has apparently not enforced the continuing financial obligations to it by former vendors in such circumstances.[11]

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7 Clause 1(a); the Resort as referred to in the constitution equates to the estate as referred to in these reasons.

8 Affidavit of Ian Edward Stephens filed 6 March 2017 (court file document 23) Ex IES-12 p134.

9 Ibid p108.

10 Affidavit of Janette Everett filed 16 February 2017 [9], affidavit of Gary Edward Scott filed 16 February 2017 [9]. The administrator Ms Carter has expressed a contrary view about the consequence (see her affidavit filed 8 March 2017 ex p49).

11 What can or will be done to address this issue is not clear on the materials and it is not an issue for determination in this application.

[17] Sections 232 and 233(1)(b) *Corporations Act 2001* (Cth) ("the Act") allow the court to modify a company's constitution where a company's affairs have been conducted oppressive to, unfairly prejudicial to or unfairly discriminatory against a member or members. It might be thought readily arguable that the conduct of PHS's affairs met that description. However, the materials do not suggest any application has yet been made to the court to modify the existing constitution to remove its inherent risk of inequity and ensure reasonable proportionality between members' lot holdings and their voting rights in, and financial obligations to, PHS.

PHS in Administration

[18] PHS's responsibility to properly maintain the estate floundered in the wake of Cyclone Yasi's damage to the estate in 2011. PHS has been in various forms of external administration under Ms Moira Carter of BRI Ferrier since 2013. It was subject to voluntary administration from 25 April 2013 to 3 May 2013, provisional liquidation from 3 May 2013 to 22 July 2014, liquidation from 22 July 2014 to 21 January 2016, voluntary administration again from 21 January 2016 to 11 March 2016, and has been subject to a Deed of Company Administration ("DOCA") since 11 March 2016.

[19] Ms Carter ascertained PHS's major asset was unpaid BAML. As to the likely recovery of BAML, as at December 2013, 38.54 per cent of debtors disputed their alleged debt, in part or in full, and Ms Carter estimated recovery would likely be at 50 to 70 per cent of the disputed amounts.[12] The unsecured creditors identified by Ms Carter were said to include members of PHS claiming overpayment of BAML.[13]

[20] Ms Carter at one point called a meeting of members in the hope of a majority resolving that PHS "should continue as a single legal entity that represents the interest of owners of property at Port Hinchinbrook".[14] Ms Carter evidently recognised the risk of inequity inherent in the existing constitution. She aspired at the same meeting to secure the passage of a special resolution to amend the constitution to conform with a draft constitution that, inter alia, dispensed with an all controlling special member, accorded members voting rights proportionate to their lot holdings and required the contributions levied on the owner of each lot to be proportionate to the total contribution levied.[15] Both resolutions failed at a meeting of 8 May 2014.[16]

[21] The Supreme Court ordered PHS to be wound up in insolvency on 22 July 2014. On that occasion Ms Carter deposed it was in the interests of creditors for PHS to be wound up

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12 Affidavit of Moira Carter filed 8 March 2017 [21].
13 Ibid ex p 63.
14 Ibid ex p 86.
15 Ibid ex pp 86,116, 121.
16 Ibid [27].

because it did not have the support of a simple majority of its members and remained unable to pay its debts as and when they fell due and payable.

[22] Ms Carter's view apparently changed by the time of a mooted arrangement involving Passage, the company which contracted to acquire Williams Corporation. That arrangement involved Passage guaranteeing the payment of $400,000 by Williams Corporation to PHS in apparent return for Passage being installed in Williams Corporation's place as the all controlling special member of PHS. This was sought to be achieved through a DOCA which was estimated to provide a better return to creditors than liquidation would.[17] A motion to adopt the proposed DOCA was passed at a meeting of creditors of 22 February 2016.[18]

The DOCA

[23] The DOCA was entered into on 11 March 2016 between PHS, Ms Carter and Passage. On its terms, the deed purports to bind members of the company. The applicants emphasise that members were not parties to the deed but that point is academic. Pursuant to s 444G of the Act a DOCA binds the company's members.

[24] The deed purports to empower the administrator to change clause 3(d) of the constitution, the clause which created and conferred special rights upon the only special member. The DOCA relevantly provides:

> "**5. POWERS OF THE DEED ADMINISTRATOR**
> **5.1 General Responsibilities and Powers**
> During the Deed Period, in addition to the powers under the Act, the Deed Administrator will have the following powers:
> (a) the powers conferred on the Members of the Company to the exclusion of those Members to vote on a change to clause 3(d) of the Constitution only, to give effect to the terms of this Deed;
> (b) the power to alter clause 3(d) of the Constitution; …
> (n) to appoint and remove Officers of the Company to further the objects of the Deed." (emphasis added)

[25] As to the appointment and removal of officers, clause 6.1 of the DOCA removes the named existing directors. Clause 6.2 provides:

> "**6.2 Appointment of Officers**
> By entering into this Deed, the Deed Administrator exercises its power under section 442A of the Act to appoint each of the following persons as Director of the Company:
> (a) Lewis Cohen;
> (b) Stephan Pinto; and
> (c) Ian Stephens."

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[17] Ibid ex p227.
[18] Ibid [50].

[26] Those persons, the third, fourth and fifth respondents, are also directors of Passage which is a guarantor under the DOCA of the payment of at least $400,000 by Williams Corporation to PHS.

[27] Clause 7.1 of the DOCA provides that, subject to clause 5 and to the exclusion of the deed fund, "control and stewardship of the company will revert to the officers" of the company from 11 March 2016.

[28] The DOCA made further provision for constitutional change to clause 12.1B, the clause which gave the special member 76 per cent voting control. Clause 17 of the DOCA relevantly provides:

> "**17. WILLIAMS CORPORATION VOTING POWER**
> **17.1 Amendments**
> The Constitution is amended such that the Guarantor is a party to the Constitution and Article 12.1B is deleted and replaced with the following:
>
> "The Passage Holdings Pty Ltd (ACN 602 422 891) as trustee for The Passage Holdings Unit Trust ("The Passage") has such number of votes on a poll or on a show of hands as shall provide The Passage with seventy-six percent (76%) of the votes that are capable of being cast at the meeting."
>
> **17.2 Condition to be met prior to change in Constitution**
> Any changes to the Constitution brought about by this Deed, as noted in clauses 5.1 and 17.1, are subject to and effective upon written consent to such amendment by either Williams Corporation or the registered proprietor of the land known as Lot 99 in SP 190029 being provided to the Company or Deed Administrator. Prior to such consent being obtained, Williams Corporation shall be entitled to the rights in Article 12.1B of the Constitution.
>
> **17.3 Acknowledgement**
> Subject to 17.2 above, The Guarantor will be entitled to and will have the power to exercise each vote that Williams Corporation is otherwise entitled to exercise pursuant to the Constitution, including without limitation its voting rights contained in Article 12.1B, and any such vote by the Guarantor is made on behalf of Williams Corporation as though Williams Corporation itself had voted in that manner.
>
> **17.4 Members bound by Deed**
> Members consent to the Deed and appoint the Deed Administrator as their proxy and / or attorneys to vote and pass resolutions to give effect to the terms of the Deed and to vote for any changes required to the Constitution to ensure that the proposed amendment to Article 12.1B is implemented." (emphasis added)

Events Prompting this Application

[29] By 2 February 2017 it must have been thought the DOCA had not had the effect of conferring 76 per cent of voting rights on Passage and that its appointment of new

directors required the ratification of members. By an email to its members of 3 February 2017, one of the directors purportedly installed by the DOCA gave notice dated 2 February 2017 of an Annual General Meeting scheduled for 6 March 2017, which included notice of three resolutions to be put to the meeting, namely:

> "Resolution 1 – Amendment of Existing Constitution …
> That the existing Constitution of the Company be amended such that Article 12.1B is deleted in its entirety and replaced with "The Passage Holdings Pty Ltd (ACN 602 422 891) as trustee for The Passage Holdings Unit Trust (The Passage) as such number of votes on a poll or on a show of hands as shall provide The Passage with seventy-six percent (76%) of the votes that are capable of being cast at the Meeting", with the effect immediately from the passing of the resolution.
>
> Resolution 2 – Adoption of New Constitution …
> That the new constitution of the Company in the form annexed to this Notice be adopted as the constitution of the Company in substitution for and to the exclusion of the Company's existing constitution, with effect from the close of the Meeting.
>
> Resolution 3 – Ratification of the Appointment of Directors …
> That the appointment of Mr Ian Stephens, Mr Lewis Cohen and Mr Stephan Pinto as directors of the Company with effect from 11 March 2016 by the Deed Administrator under the power exercised pursuant to section 442A of the Corporations Act 2001 be ratified."

[30] Resolutions one and three curiously seek to validate that which the DOCA already purported to do, namely amend the constitution and install new directors, so as to confer majority control of PHS upon Passage. The new constitution proposed by resolution two was materially different from the existing constitution in ways well beyond the purported replacement of Williams Corporation as special member by Passage via the amendment proposed by resolution one.

[31] On about 13 February 2017 the applicants' solicitor, Mr Scott, was provided with a register of PHS's members, which is exhibited to Mr Scott's affidavit filed 16 February 2017.[19] Williams Corporation is not listed as a member in that register but Passage is. The date recorded against Passage's entry in the register is recorded as 26 September 2016. It will be recalled that was the completion date of Passage's contract acquiring Williams Corporation's interest in the estate. Curiously all other entries in that register bear the date 11 March 2016 against them.

The Application

[32] The present application was filed on 16 February 2017. The substantive orders sought by it were:

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[19] Affidavit of Clive Scott filed 16 February 2017 ex p173 et seq.

"1. Declarations that:

(a) The Second Respondent is a Full Member of the First Respondent ("PHS") and thereby entitled to one vote only at any general meeting of the late company;

(b) Any vote at any general meeting of PHS by the Second Respondent as Special Member in the place of the Williams Corporation Pty Ltd ACN 058 737 643 (in Liquidation) to the effect mentioned in the Explanatory Memorandum attached to the Notice of General Meeting issued by PHS dated 2 February 2017 is void and of no effect (notwithstanding (a) or (b)) as ultra vires and otherwise unlawful or ineffective;

(c) The Third, Fourth and Fifth Respondents purporting to be directors of PHS are not and are not entitled to be directors of PHS ("the purported directors");

(d) Clauses 17.1 to 17.4 of a certain Deed of Company Arrangement dated 11 March 2016 between PHS, Moira Kathleen Carter and the Second Respondent approved by its creditors are void and/or of no effect or (alternatively) the said deed should be set aside;

(e) PHS should be wound up on the just and equitable grounds pursuant to section 461 of the Corporations Act 2001.

2. Injunctions (interim, interlocutory and perpetual):-

(a) restraining the Second Respondent from casting more than one vote at any general meeting of PHS;

(b) restraining the purported directors from conducting the business of PHS including any general meeting of PHS."

[33] On 24 February 2017 I heard submissions only as to interim relief. Upon the usual undertaking as to damages I ordered:

"1. Until further order, the first respondent (subject to a Deed of Company Arrangement), third respondent, fourth respondent and fifth respondent are restrained from putting to the members at the annual general meeting of the first respondent scheduled to take place on Monday, 6 March 2017 or at any other meeting of the first respondent, resolutions 1, 2 and 3 as set out in the agenda to the notice of annual general meeting dated 2 February 2017.

2. Until further order, the second respondent be restrained from exercising voting rights as special member of the first respondent in the place of Williams Corporation Pty Ltd (in liquidation) to the effect mentioned in the explanatory memorandum attached to the notice of annual general meeting dated 2 February 2017."

[34] Orders were also made as to the filing of material. The substantive hearing of the application was adjourned to 10 March 2017.

[35] On 6 March 2017 an affidavit by the third respondent, Mr Stephens, was filed. It exhibited what is purportedly a more recent register of PHS's members than that which had been exhibited to Mr Scott's affidavit. That register contains a number of anomalies.[20] It again records Passage as a member and again dates that membership 26 September 2016. However, it also records Williams Corporation as a member, dating that membership as 11 March 2016. It is not apparent on the materials how it could be that subsequent to 13 February 2017, when Williams Corporation was not recorded as a member of PHS and was no longer entitled to be a member of PHS having sold its interest to Passage, Williams Corporation became recorded as a member and in an entry purportedly dated 11 March 2016.

[36] Mr Stephens also deposes to PHS having caused his name and the names of the fourth and fifth respondents to be entered on its register of members on about 3 March 2017, their applications having been submitted on about 2 March 2017 and they having become lessees of an interest in the estate on about 1 March 2017.[21] The copy of the register exhibited to Mr Stephen's affidavit does record them as members but, in a further anomaly in that register, the date against their respective entries is 22 February 2017, which apparently precedes the date of any event entitling them to be members.

[37] On 10 March 2017 the listed hearing was adjourned by consent and it eventually proceeded before me on circuit in Mackay on 7 April 2017.

[38] By that time it was announced the third, fourth and fifth respondents had decided not to pursue the putting of resolution two.[22] Resolutions one and two are still sought to be put.

[39] Further it emerged in the course of the hearing that the consent of Williams Corporation, required on the terms of clause 17.2 to give effect to the constitutional change purportedly brought about by the DOCA, had not been given.

Discussion

[40] The determination of the present application turns principally upon the lawful effect of the DOCA's various and overlapping means of trying to place Passage in majority voting control of PHS.

DOCA's appointment of directors

[41] One of those means is the DOCA's articulation of Ms Carter's appointment of the third, fourth and fifth respondents as directors of PHS. This the DOCA does in clause 6.2, wherein it is stated:

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[20] Affidavit of Ian Stephens filed 6 March 2017 ex p82 et seq.
[21] Ibid [30]-[33].
[22] Ibid [68].

> "By entering into this Deed the Deed Administrator exercises its power under s 442A of the Act to appoint each of the following persons as Directors of the Company …"

The persons thereafter named are the third, fourth and fifth respondents. The DOCA defines the deed administrator at clause 1.1 as meaning "the previously appointed Voluntary Administrator of the Company, Moira Carter".[23]

[42] The DOCA's execution section bears two signatures by Ms Carter. The first is expressed as being in her capacity as administrator of PHS, executing "on behalf of" PHS. The second is expressed as being in her capacity as voluntary administrator and deed administrator.

Was Ms Carter still empowered to appoint directors?

[43] Section 442A of the Act expressly empowers an administrator of a company under administration to appoint a person as a director.[24] As clause 6.2 of the DOCA records, Ms Carter exercised that power "by entering into" the DOCA. The applicants advance a technical argument that Ms Carter had lost her power of appointment of directors by that time. That is said to be because, pursuant to s 435C(1)(b), an administration ends when a DOCA is executed by both the company and the deed's administrator.

[44] Importantly it is not the DOCA which purports to appoint the third, fourth and fifth respondents as directors. On its terms the DOCA merely articulates and marks the timing of what is expressed to be the administrator's exercise of a statutory power to appoint directors under s 442A.

[45] Clause 6.2 refers to the power being exercised under s 442A as that of the deed administrator. That is obviously a mistake because the power exercisable under s 442A is that of the administrator of a company under administration. Obvious mistakes in an instrument may be corrected by construction without the need to rectify the instrument.[25] Construing clause 6.2 in the light of clause 1.1 and s 442A, it is apparent the clause's reference to the deed administrator was a means of identifying Ms Carter, who unquestionably held the power of appointment referred to in s 442A as administrator of a company under administration.

[46] Ms Carter continued to hold that power until the point in time when the DOCA was executed by both the company and the deed's administrator. That moment must logically have been when the process of execution was complete, that is, when Ms Carter

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[23] Clause 1.1.

[24] Clause 5.1(n) of the DOCA purportedly confers the same power on the deed administrator but it is unnecessary to consider the effectiveness of that clause in respect of the appointment of the third, fourth and fifth respondents as directors of PHS because that appointment is referred to in clause 6.2 as having occurred pursuant to s 442A.

[25] *Fitzgerald v Masters* (1956) 95 CLR 420.

completed signing in the second of her two capacities as signatore for the company and as deed administrator. That point in time was at once both an end and a beginning, much like midnight is both the end of one day and the start of another.[26] The conclusion of the execution process marked both the end of administration and the commencement of the DOCA.

[47] Ms Carter's power of appointment of directors pursuant to s 442A only came to an end when the execution process had ended. By that same time Ms Carter had entered into the DOCA. It follows she entered into the DOCA at a time when she still held the power conferred by s 442A. It is not to the point that the completion of her entry into the DOCA marked the moment when that power ended because the same moment marks the point in time by which she had exercised the power.

[48] Section 442A does not prescribe any particular means by which the act of appointment ought to be articulated. Here it was adequately articulated in the DOCA by reference to the act of Ms Carter entering into the DOCA. That act occurred at a time when, for the reasons just explained, Ms Carter still held the power of appointment conferred by s 442A.

Directors ineligible because they were not members?

[49] A further argument raised by the applicants is that the directors purportedly appointed by Ms Carter in entering into the DOCA were ineligible for appointment as directors.

[50] It will be recalled that the third, fourth and fifth respondents did not become members of PHS until after the filing of the present application. Clause 20 of PHS's constitution requires that every director of PHS be a member of the company. Because the third, fourth and fifth respondents were not members of the company at the time of their purported appointment, the applicants submit their appointment was invalid.

[51] Two sections of the Act hold particular relevance to this argument. Section 442A relevantly provides:

> "**442A Additional powers of Administrator**
> Without limiting section 437A, the administrator of a company under administration has power to do any of the following:
> (a) remove from office a director of the company;
> (b) appoint a person as such a director, whether to fill a vacancy or not; …
> (d) whatever else is necessary for the purpose of this part." (emphasis added)

[52] Section 437A, to which s 442A refers, provides:

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[26] *Prowse v McIntyre* (1961) 111 CLR 264, 274.

"**437A Role of Administrator**

(1) **[Powers of administrator]** While the company is under administration, the administrator:

(a) has control of the company's business, property and affairs; and

(b) may carry on that business and manage that property and those affairs; and …

(d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.

(2) **[No general limitation]** Nothing in subsection (1) limits the generality of anything else in it." (emphasis added)

[53] It is noteworthy that s 437A(1)(d) permits the administrator to exercise any power which PHS could have exercised "if the company were not under administration". If PHS were not under administration it held the power pursuant to paragraphs 18 and 19 of its constitution to appoint and remove directors. However, as explained above, that power was subject to the appointee being a member of the company. It follows from the terms of s 437A(1)(d) that it would only allow an administrator to appoint a director if appointing a member as a director.

[54] The issue then is whether an administrator's power to appoint a director under s 442A is broader than the administrator's implicit power to appoint a director contained in s 437A(1)(d). That is, does s 442A empower an administrator to appoint as director a person who would not ordinarily be eligible under the company's constitution for appointment by the company as director?

[55] The applicants emphasise s 140(1) of the Act provides a company's constitution has effect as a contract between the company and each member and each director, from which it is said to follow the applicants are entitled to have the election or appointment of directors decided lawfully in accordance with that statutory contract. In support of that proposition the applicants cite *Link Agricultural Pty Ltd v Shanahan*[27] and *Andrews v Qld Racing Ltd*[28] but neither of those cases involved the purported appointment of directors by the administrator of a company under administration pursuant to s 442A of the Act. In any event it is difficult to see how the constitution's effect as a contract could prevent the exercise of a power conferred by statute upon a person who is a stranger to that contract.

[56] The respondents emphasise that under a voluntary administration it is the interests of creditors, not members, which is paramount. As much is uncontroversial but the present issue does not involve a contest of competing interests. It turns upon an exercise in statutory construction with focus upon the extent of the powers conferred by ss 437A(1)(d) and 442A.

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27 [1999] 1 VR 466 [20].

28 [2009] QSC 338 [29-30].

[57] Both sections appear in part 5.3A of the Act, "Administration of a company's affairs with a view to executing a deed of company arrangement".[29] A comparison of those sections compels the conclusion the administrator's express power to appoint directors under s 442A is broader than the administrator's implied power to appoint directors under s 437A(1)(d).

[58] The limiting words present in s 437A(1)(d) – "any power, that the company or any of its officers could perform or exercise if the company were not under administration" – are not present in s 442A. The absence of such limiting words in s 442A, when considering it in isolation, supports the conclusion s 442A ought be read without such limitation. That conclusion becomes more compelling when s 442A is considered in the broader context of part 5.3A. The fact of the legislature's use of such words in s 437A(1)(d) but not in s 442A compels the conclusion that s 442A is not so limited. Furthermore, s 442A's inclusion of the words "whether to fill a vacancy or not" are consistent with the power of appointment of directors under s 442A going beyond appointments the company could make under its constitution if not under liquidation.

[59] It follows the applicants' submission Ms Carter was confined only to appointing members of PHS as directors must be rejected. That is not to suggest the administrator could simply appoint any person as director. Quite apart from the relevance of the administrator's fiduciary obligations[30] to the selection of directors to appoint there are statutory provisions regulating the eligibility of directors.[31] There is nothing in s 442A or elsewhere in part 5.3A to suggest the normal statutory requirements for eligibility to serve as a director would not apply to persons to be appointed by an administrator pursuant to s 442A.

Were the directors eligible for appointment under the Act?

[60] The applicants submit the fourth and fifth respondents were ineligible for appointment because they reside in the United States. Section 201A(2) of the Act provides:

> "A public company must have at least three directors (not counting alternate directors). At least two directors must ordinarily reside in Australia." (emphasis added)

[61] The respondents accept the fourth and fifth respondents do not ordinarily reside in Australia. However, they contend the need for a minimum two directors to reside in Australia does not actually effect eligibility for appointment. The acknowledged problem is the fact only one, rather than two, of the three purportedly appointed directors is ordinarily resident in Australia.

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[29] The statement of objects of that part at s 435A does not directly assist the resolution of the present issue.
[30] See for example s 437B and *Re Krejci as liquidator of Eaton Electrical Services* (2006) 58 ACSR 403.
[31] Eg s 201B.

[62] The respondents submit that problem has now been addressed, by Passage appointing Australian resident and PHS member David Hutchen on 20 March 2017. Passage would have had the power to make that appointment as special member under PHS's constitution but it could only have become special member by that time if the DOCA was effective in its purported amendment of the constitution to install Passage as special member. If it was, then such an appointment would have cured the existing non-compliance in the array of directors. For reasons given below, the DOCA was not effective in so appointing PHS. It follows PHS did not have the power to validly appoint Mr Hutchen and it therefore remains the case that the combination of directors appointed by Ms Carter does not comply with s 201A(2) of the Act.

[63] The consequence of such a conclusion did not attract detailed attention in the course of submissions. Of the declarations sought on the application the only relevant declaration was that "the third, fourth and fifth Respondents purporting to be directors of PHS are not and are not entitled to be directors of PHS". However, that declaration was more apt to the applicants' unsuccessful argument there was no power for the appointments to have been made than to their successful argument about the problem of non-compliance with s 201A(2). Actually, the directors are in an individual sense entitled to be directors – the problem lies in their combination – so a declaration to the contrary would mislead.

[64] Other developments and considerations may have the consequence the applicants seek no consequential order in respect of this conclusion. To cater for the possibility the applicants do seek such an order I will hear the parties further as to the appropriate form of declaration or other order arising from the finding of non-compliance with s 201A(2).[32]

[65] Even if the third, fourth and fifth respondents had been legitimately appointed as directors in combination that would not be determinative of the issues in this application. It would not follow from their position, if they were directors, that the third, fourth and fifth respondents could exercise the 76 per cent voting control once held by Williams Corporation. That control cannot be conferred other than through control of other members' votes or by constitutional change.

DOCA's conferral of voting control

[66] The DOCA purports to confer the voting control once held by Williams Corporation in three ways.

[67] Firstly, subject to the requirement in clause 17.2 of consent by Williams Corporation, the DOCA purports at clause 17.1 to amend the constitution, substituting Williams Corporation with Passage as the entity holding 76 per cent of votes capable of being cast at a meeting. Secondly, the DOCA purports at clause 17.3 to empower Passage to

[32] This may require consideration of s 201M of the Act.

exercise each vote which Williams Corporation is otherwise entitled to exercise under the constitution as though Williams Corporation had so voted. Thirdly, the DOCA purports at clause 17.4 to deem that members appoint the deed administrator as their proxy and or attorney to vote and pass resolutions to ensure the amendment purportedly effected by clause 17.1 is effected.

[68] Clause 17.1 requires consideration of the question whether a DOCA can lawfully amend a company's constitution, to change the entity upon which the constitution confers special majority voting rights. Clauses 17.3 and 17.4 require consideration of the extent to which a DOCA can confer voting rights inconsistently with the constitution.

Can a DOCA lawfully amend a company's constitution, to change the entity upon which the constitution confers special majority voting rights? Clause 17.1

[69] The DOCA purports at clause 17.1 to amend PHS's constitution, substituting Williams Corporation with Passage as the entity holding 76 per cent of votes capable of being cast at a meeting.

[70] The applicants submit a company's constitution cannot be amended by a DOCA.

[71] The respondents submit the powers conferred on administrators during voluntary administration and on deed administrators by the Act are very broad. For instance, s 437A of the Act (quoted above) provides an administrator of a company under administration has power to carry on and control the company's business, dispose of the business or its property and "perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration".

[72] As to the powers of an administrator under a DOCA, they include, in the absence of the DOCA providing otherwise (there was no such provision otherwise here), those powers set out in clause 2 of Schedule 8A of the Act's regulation. Those powers include the power:

> "(a) to enter upon or take possession of the property of the company; …
> (c) to grant options over property of the company on such conditions as the administrator thinks fit; …
> (f) to call in, collect or convert into money the property of the company; …
> (h) to purchase, hire, lease or otherwise acquire any property or interest in property from any person or corporation;
> (i) to borrow or raise money, whether secured upon any or all of the assets of the company or unsecured, for any period on such terms as the

administrator thinks fit and whether in substitution for any existing security or otherwise; …

(m) to convene and hold meetings of the members or creditors of the company, for any purpose the administrator thinks fit; …

(s) to sell, call in or convert into money any of the property of the company, to apply the money in accordance with this deed and otherwise effectively and properly to carry out his or her duties as administrator;

(t) to do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents, using the company's common or official seal when necessary; …

(z) to carry on the business of the company on such terms and conditions and for such purposes and times and in such manner as the administrator thinks fit subject only to the limitations imposed by this deed; …

(zb) to close down the whole or any part of any business of the company;

(zc) to enter into and complete any contract for the sale of shares in the company; …

(zf) to do anything that is incidental to exercising a power set out in this clause;

(zg) to do anything else that is necessary or convenient for the purpose of administering this deed."

[73] Despite the wide range of powers aforementioned none expressly empower a DOCA or its administrator to amend a company's constitution.

[74] The breadth of the powers raises the possibility there will sometimes be cases where an exercise of power pursuant to a DOCA is inconsistent with the requirements of the company's constitution. In such cases the power's parameters are constrained by the nature and scope of the arrangement entered into under the DOCA, independently of the constraints of the constitution. As much is consistent with the general principle, adopted by Santow J in *North Sydney District Rugby League Football Club Ltd and Anor v Hill and Ors,*[33] that powers conferred by a DOCA exist in conjunction with the members' powers and if exercised take precedence to and override the exercise of the members' powers during the currency of the DOCA to the extent there provided.

[75] The application of that general principle was well illustrated in the decision of Barrett J in *Re Smith.*[34] There the administrator of an RSL and bowls club considered it necessary to sell the bowls club property in the exercise of an administrator's power under s 437A(1)(c) but was concerned the sale infringed the company's constitutional requirement that it continue to maintain bowling greens. An attempt to pass a special resolution amending that constitutional requirement failed. Barrett J concluded the power

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[33] [2000] NSWSC 249.

[34] (2006) 58 ACSR 410.

of sale was not a power of the company and its exercise was not constrained by the constitution. His Honour explained:

> "Voluntary administration is a regime under which decision-making is confined to the administrator and, as to certain matters and in certain ways, the creditors assembled in a meeting and the court. Members and the interests of members are relegated. This is made clear by the decision of Beach J in *Brash Holdings Ltd v Shafir* … The circumstance that, in words of Beach J, "members are excluded from contemplation during the process of an administration" means that an administrator, in exercising the specific and statutory power to terminate part of the company's business and to sell part of its property, is neither constrained by nor bound to have regard to provisions of the constitution … which may regulate – or even prohibit – those steps. The administrator, when exercising statutory powers, is a stranger to that statutory contract. And the administrator's acts are not acts of the company, even though they are to be regarded as having been performed by an agent of the company."[35] (citations omitted)

[76] Those observations herald what will in the present case be a determinative distinction between the validity of clause 17.1 and clauses 17.3 and 17.4. Clause 17.1, unlike clauses 17.3 and 17.4, is not an instance of an exercise of power which happens to be inconsistent with the constitution. The power purportedly exercised by clause 17.1 is itself an amendment of the constitution.

[77] The respondents submit in effect that the power to amend the constitution purportedly exercised by the DOCA arises by implication for the purposes of administering the arrangement contemplated by the deed.

[78] A challenge attending the limits of an implication of power to administer a deed of arrangement is, as was observed by the High Court in *Lehman Bros Holdings v Swan CC*,[36] that the Act and the Regulations are largely silent about the nature and the content of the "arrangement" which may be made by a DOCA. However, there is no basis to conclude as a general proposition that any provision of the Act not specifically relating to DOCAs can be avoided merely by adopting an arrangement under which it would meet the purposes of administering the deed to do something contrary to that provision.

[79] A central feature of the arrangement contemplated by the present DOCA was obviously intended to be the installation of Passage as the controller of the special majority voting rights hitherto enjoyed by Williams Corporation, apparently in return for Passage's guaranteed injection of capital. Reasoning by example, the respondents submit that arrangement "is no different to an arrangement concerning a company limited by shares

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35 Ibid 412.
36 (2010) 240 CLR 509, 523.

in which a controlling stake is transmitted from the controlling shareholder of the insolvent company to an incoming shareholder".[37]

[80] However, the Act prescribes the circumstances under which such a transmission of shareholding can legitimately occur. For instance, an arrangement to transfer shares when a company is in voluntary administration is void under s 437F, unless the administrator gives written consent and any conditions of that consent are satisfied or the court authorises the transfer. As to the power of an administrator of a DOCA to transfer shares, s 444G requires the administrator to obtain the written consent of the owner of the shares or the leave of the court. Further, an arrangement to transfer a controlling stake in shares may attract the operation of the Act's takeover provisions, particularly ss 606 and 611.

[81] Such prescription of the circumstances under which share transfers can occur tells against the utility of the respondents' example in supporting the implication of a power to achieve a shift in corporate control, free of prescription, by amending the constitution.

[82] In any event the amendment of a constitution is not free of prescription. The means by which a constitution may be amended are the means expressly provided for within a constitution or within the Act. PHS's constitution does not provide for its amendment. As for the Act, it only makes express provision for two ways to amend a company's constitution.

[83] Firstly, as earlier mentioned, ss 232 and 233(1)(b) of the Act allow the court to modify a company's constitution on application where there has been unfairness or oppression of members. Secondly, s 136(2) of the Act provides a "company may modify or repeal its constitution, or a provision of its constitution, by special resolution". A special resolution will only succeed if passed by at least 75 per cent of the votes cast by members entitled to vote on the resolution.[38]

[84] That a court order or special resolution are the only mechanisms for constitutional amendment contemplated by the Act is also apparent from the terms of s 137 of the Act, which provides:

> **"137 Date of effect of adoption, modification or repeal of constitution**
> If a new constitution is adopted or an existing constitution is modified or repealed, that adoption, modification or repeal takes effect:
> (a) if it is the result of a special resolution:
> (i) on the date on which the resolution is passed if it specified no later date; or
> (ii) on a date specified in, or determined in accordance with, the resolution if the relevant date is later than the date on which the resolution is passed; or

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[37] Respondents' written submissions [65(d)].
[38] Per the s 9 definition of special resolution.

(b) if it is the result of a Court order made under section 233:
(i) on the date on which the order is made if it specifies no later date; or
(ii) on a date specified by the order." (emphasis added)

[85] Section 137 has the practical effect of permitting modification of an existing constitution to take effect only in respect of a modification which was made by special resolution or by court order. It is at odds with the existence of an implied power to so modify also residing in a DOCA or administrator.

[86] That conclusion is not to suggest there did not exist a means by which the DOCA could place Passage in effective control of the voting rights of Williams Corporation. Nor is it to suggest that such an object was improper.[39] The difficulty with clause 17.1 is that the means adopted therein involved the exercise of a non-existent power to amend the constitution.

[87] The power did not exist for the DOCA at clause 5.1(b) to confer a power in the administrator to amend clause 3(d) of the constitution or at clause 17.1 to amend the constitution.

[88] The applicants seek declarations that clauses 17.1 to 17.4 are void and or of no effect.[40] In light of the above finding, clause 17.1 may properly be the subject of a declaration that it is void and of no effect. The respondents emphasise I have the discretion under s 445G of the Act to declare a non-compliant provision compliant where it is substantially compliant and no injustice will result for anyone bound by the deed if the contravention is disregarded. However, this was not a close-run thing. The power relied upon was non-existent. The declaration should be made.

[89] In the event the above finding in respect of clause 17.1 is incorrect, I find clause 17.1 is not operative in any event, because the consent required by clause 17.2 has not been given. Such consent as has purportedly been given was contained in a letter from Williams Corporation's solicitors to the respondents' solicitors, advising Williams Corporation "consents to the proposed amendment to the constitution as contained in resolution 1 of the notice being put to any meeting".[41] This consent relates to a resolution proposed to be put to a meeting, not to an amendment to be brought about by the deed. It is not the consent required by s 17.2.

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[39] See for example the observations of Meagher JA in *Kirwan v Cresvale* (2002) 44 ACSR 21, [2].
[40] Alternatively they sought the setting aside of the DOCA but the mixed result in this case makes that an inappropriate order on present information.
[41] Affidavit of Ian Stephens filed 6 March 2017 ex 11.

Can a DOCA confer voting rights inconsistently with the constitution?

[90] Clauses 17.3 and 17.4 each purport to confer voting rights upon Passage and Ms Carter in ways which are inconsistent with the constitution.

Clause 17.3

[91] Clause 17.3 purportedly empowers Passage to exercise each vote which Williams Corporation is otherwise entitled to exercise under the constitution as though Williams Corporation had so voted. Clause 17.3 is said to be "subject to" clause 17.2. Reading those clauses in context this must mean clause 17.3 would only operate until such time as the constitutional change in clause 17.1, requiring the consent referred to in clause 17.2, is effective. That is because there would be no need to continue an arrangement for Passage to be able to exercise William Corporation's voting rights under the constitution once the constitution has been amended to confer such rights upon Passage.

[92] Clause 17.3 involves an exercise of power for the legitimate purpose of implementing a central feature of the arrangement – placing Passage in effective control of the voting rights of Williams Corporation. It does not purport to amend the constitution. Rather it confers a power of control of votes which Williams Corporation is otherwise entitled to exercise under the constitution. That it does so in a manner inconsistent with the constitution's method for allocating members' proxy voting rights does not make it an invalid exercise of power. For the reasons explained by Barrett J in *Re Smith*, it was not an exercise of power constrained by the constitution's provisions ordinarily relevant to it.

[93] Clause 17.3 is valid. However, as the following brief review of events subsequent to the DOCA's execution shows, clause 17.3 now appears to be useless in effecting its purpose.

[94] Williams Corporation's entitlement to be a registered proprietor of property interests in the estate ceased on 26 September 2016 when its interest in the estate was sold to Passage. Passage in turn became a member of PHS on that date by reason of that purchase.

[95] These developments are entirely consistent with the state of the members' register supplied to the applicants' solicitor on about 13 February 2017. That register recorded Passage as a member, from 26 September 2016, but it did not record Williams Corporation as a member.

[96] It will be recalled there was a curious subsequent variation in the members' register exhibited by the third respondent, so that it now purportedly includes Williams Corporation as a member. On the evidence filed, the reinstatement of Williams Corporation to the register as a member cannot be of any legal effect because, pursuant to clause 4(b) of the constitution, a person is not entitled to remain a member unless the

person is a registered proprietor of a property interest in the estate. Williams Corporation therefore lost its eligibility for membership last September.

[97] Pursuant to clause 3(d) of the constitution, Williams Corporation's entitlement to vote continued for so long as it remained a member of the company. It follows it no longer is entitled to exercise any vote under the constitution. Clause 17.3 allows Passage to exercise each vote which Williams Corporation "is otherwise entitled to exercise under the constitution". Because Williams Corporation no longer has such an entitlement, clause 17.3 no longer confers any power on Passage.

[98] The applicants sought a declaration that any vote at any general meeting of PHS by Passage as special member in place of Williams Corporation is void and of no effect. In light of the above findings it is apparent Passage no longer has the prospect, pursuant to clause 17.3, of being able to vote as special member in place of Williams Corporation. However, it is conceivable that at some future time Passage may by legitimate constitutional amendment become entitled to vote as special member in place of Williams Corporation. For that reason and because my findings in any event identify the lapsed operative effect of clause 17.3, it is prudent to refrain from making a declaration.

Clause 17.4

[99] Clause 17.4 of the DOCA deems that members appoint the deed administrator as their proxy and or attorney to vote and pass resolutions to "ensure the proposed amendment to article 12.1B is implemented". The reference to the proposed amendment is obviously a reference to the amendment articulated in clause 17.1 of the DOCA, that being the only potentially relevant amendment under contemplation at the time of the deed's execution.

[100] The fact that clause 17.1 was of no effect and did not implement the amendment and the fact that clause 17.4 referred to it as a "proposed" amendment when it purportedly was an amendment does not render clause 17.4 meaningless or affect its validity. Its obvious effect is to empower the deed administrator with members' proxies or attorneys to vote to pass a constitutional amendment to the effect which was articulated in clause 17.1. That is, it invests the deed administrator with the voting power of all members so as to provide the special majority of votes required to pass such constitutional amendment if and when it is put to the vote.

[101] The applicants submit clause 17.4 is at odds with members' rights under the constitution to make their own choice of proxy and the mere inclusion of such a provision in a DOCA cannot have the effect of members being bound by it. That submission must fail. As has already been explained, the powers conferred by a DOCA take precedence to and override the exercise of the members' powers. Clause 3.1 of the DOCA provides that the deed binds the members. While that clause cannot itself be a source of power to bind members,

it is in any event consistent with s 444G, which expressly provides a DOCA binds company members.

[102] The applicants submit there must be limits upon the extent to which members can be bound by the terms of a DOCA. They draw by attempted analogy upon cases in which the express provisions of the Act or its regulations have been found to limit the circumstances in which a DOCA can vary shareholders rights. For example, in *Re Pasminco*[42] it was observed that despite the Act's regulation at schedule 8A cl 2(zc) conferring power upon a deed administrator to sell shares, that did not waive the application of the Act's takeover provisions or allow shares to be compulsorily acquired under a deed. The applicants also referred to *Mulvaney v Wintulich,*[43] where it was held s 444G's provision for members to be bound by a DOCA should not be read literally so as to permit a DOCA to require members to transfer their shares for a nominal consideration or as the administrator directed. O'Loughlin J there observed, in an ex tempore decision:

> "It must be read with some measure of constraint. It cannot, in my opinion, mean, for example, that a dissenting shareholder can be forced to do something to his or her detriment. It cannot, in my opinion, mean that his or her shares can be confiscated for no consideration or for no adequate consideration."

[103] The present case is obviously different than either of the cases relied on by analogy. Interference with property rights and protective statutory provisions in respect of such rights are simply not in in play in the present matter.

[104] The nature of the power conferred upon the deed administrator in clause 17.4 is of a similar character as the power conferred upon Passage in clause 17.3. As already explained, such a power derives by implication from the very nature of the arrangement to be implemented and is not an exercise of power constrained by the constitution's provisions ordinarily relevant to it.

[105] Clause 17.4 is valid. It follows it should not be the subject of the declaration sought.

[106] I note for completeness that clause 17.2 was also sought to be included in the declaration but it is only a mechanical provision and there is no utility in making a declaration in respect of it.

What is the membership status of Passage?

[107] The applicants seek a declaration that Passage is a full member of PHS and thereby entitled to one vote only at any general meeting of the company.

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42 (2002) 41 ACSR 511, 524.

43 Unreported Fed Ct O'Loughlin J SG3184 of 1995 BC9507347.

[108] It appears Passage became a member of PHS on its purchase of Williams Corporation's property interests on 26 September 2016. It did not become a special member; Williams Corporation being the "only special member" ever contemplated in the present constitution. At present Passage is therefore only entitled to one vote.

[109] However, it is again conceivable that may change. There may yet be constitutional amendment so as to install it as a special member in the way Williams Corporation once was. Or, for that matter, there may yet be an outbreak of collective wisdom at Port Hinchinbrook resulting in a constitutional amendment which finally confers all members with voting rights proportionate to the extent of their lot holdings in the estate. On either scenario Passage would likely become entitled to more than one vote.

[110] Passage's present membership status is readily apparent from these reasons. However, given that status may change it is again prudent to refrain from making the declaration sought.

Injunction

[111] The applicants sought injunctions in various forms. On 24 February 2017 I made orders giving temporary injunctive relief, until further order.

[112] The need for those orders to continue, or similar fresh orders to be made, is very doubtful in light of the passage of time and the findings reached herein. However, this was not the subject of submissions at the eventual hearing and the parties ought be afforded an opportunity to be heard.

Winding up

[113] The applicants also sought an order that PHS should be wound up on just and equitable grounds pursuant to s 461 of the Act.

[114] The seeking of this order appears to have been premised on the possibility of the complete invalidation of all of clauses 17.1 to 17.4. However, the applicants only enjoyed mixed success on that front. The course intended by the deed administrator in consequence of the mixed result is not known to the court at this time. It is inappropriate for the court as presently informed to order PHS be wound up.

Conclusion

[115] In summary my findings are:

(1) Ms Carter entered into the DOCA at a time when she still held the power conferred by s 442A to appoint directors.

(2) Ms Carter was not confined only to appointing members of PHS as directors.

(3) PHS did not have the power to validly appoint Mr Hutchen.

(4) The combination of directors appointed by Ms Carter does not comply with s 201A(2) of the Act. The parties should be further heard as to the appropriate form of relevant declaration or order.

(5) The power did not exist for the DOCA at clause 5.1(b) to confer a power in the administrator to amend clause 3(d) of the constitution or at clause 17.1 to amend the constitution. Clause 17.1 should be declared void and of no effect.

(6) Williams Corporation did not give the consent required by clause 17.2.

(7) Clause 17.3 is valid but, because Williams Corporation is no longer entitled to exercise a vote under the constitution, clause 17.3 no longer confers any power on Passage. It not appropriate to make a declaration that at any general meeting of PHS voting by Passage as special member in place of Williams Corporation is void and of no effect because it is conceivable the constitution may in the future be legitimately amended to permit such voting by Passage.

(8) Clause 17.4 is valid.

(9) Passage is presently a full member of PHS and thereby presently entitled to one vote only at any general meeting of the company. It is not appropriate to make a declaration to that effect because it is conceivable there may yet be legitimate constitutional amendment which has the consequence of conferring Passage with an entitlement to more than one vote.

(10) The parties should be further heard as to the appropriate form of order in connection with the injunctions granted on 24 February 2017.

(11) It is inappropriate for the court as presently informed to order PHS be wound up.

Orders

[116] My orders are:

(1) It is declared that clause 17.1 of the deed of company arrangement dated 11 March 2016 is void and of no effect.

(2) I will hear the parties further on 7 June 2017 at 9.15am as to:

(a) the appropriate form of declaration or other order arising from the finding of non-compliance with s 201A(2);

(b) the appropriate form of order in connection with the injunctions granted on 24 February 2017; and

(c) costs.