SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v David Oriel Industries Pty Ltd (Administrator Appointed)* [2019] QSC 191
PARTIES:	**STATE OF QUEENSLAND** (applicant) **v** **DAVID ORIEL INDUSTRIES PTY LTD (ADMINISTRATOR APPOINTED) ACN 001571544** (respondent)
FILE NO/S:	BS No 4499 of 2019
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2019, further written submissions 31 July 2019
JUDGE:	Lyons SJA
ORDER:	**The order of the court is that:** **1. The hearing of the winding up application be adjourned to the applications list on Friday 16 August 2019.** **2. The respondent company pay the costs, including any reserved costs, of the State of Queensland, supporting creditors, and the Voluntary Administrator in relation to the Voluntary Administrator's application pursuant to section 440A of the *Corporations Act* 2001 (Cth) on the standard basis.**
CATCHWORDS:	CORPORATIONS – WINDING UP – APPLICATIONS FOR WINDING UP BY COURT – ORDERS – ADJOURNMENT OF HEARING – where the applicant filed an originating application for the winding up of the respondent company on grounds of insolvency – where the winding up proceedings have been adjourned on several occasions – where the winding up proceedings were most recently adjourned as it was in the bests interests of the creditors to allow the administration to continue – where respondent administrator is seeking a further adjournment of the winding up hearing to allow creditors to determine

whether the proposed DOCA is in their best interests – whether the continuance of the administration is in the best interests of the creditors – whether the court should adjourn the winding up proceedings

Corporations Act 2001 (Cth), Part 5.3A, Part 5.4, Part 5.4A and Part 5.6, s 440A, s 436E, s 444DA, s 465B
Environmental Protection Act 1994 (Qld)
Mining Resources Act 1989 (Qld), s 3C
Personal Property Securities Act 2009 (Cth)

Creevey v DCT (1996) 19 ACSR 456, cited
Deputy Commissioner of Taxation v Bradley Keeling Management Pty Ltd (2003) 44 ACSR 377; [2003] NSWSC 47, cited
Kimberley Diamond Company Pty Ltd (in Liq) (ACN 061 899 634) [2017] NSWSC 538, cited
Offshore and Ocean Engineering Pty Ltd v Greenwich Contractors Pty Ltd [2012] NSWCA 371, cited
Sunstate Orchards Pty Ltd v Citrus Queensland Pty Ltd [2009] FCA 452, cited

COUNSEL:	A Bax (*sol*) for the applicant G Handran for the respondent
SOLICITORS:	Gadens Lawyers for the applicant Taylor David Lawyers for the respondent

This Application

[1] David Oriel Industries Pty Ltd (the respondent company) was incorporated in 1978 and specialises in tin, sand and gravel mining. Whilst it holds several mining interests, namely the Pannikin Mine in North Queensland and the Bolivia Mine in New South Wales, it ceased trading in 2017. The mining lease for the Pannikin Mine, which authorises mining for specified minerals namely ilmenite/leucoxene, iron ore, monazite, rutile and tin ore commenced on 1 October 2012 and expires on 30 September 2027.

[2] On 29 April 2019 the State of Queensland (the applicant) sought an order under Part 5.4, Part 5.4A and Part 5.6 of the *Corporations Act* 2001 (the Act) for winding up of the respondent company on the grounds of insolvency. The basis of the application was an unsatisfied creditor's statutory demand in the amount of $225,509.76. That debt is comprised of the respondent company's annual fees and late payment fees under the *Environmental Protection Act* 1994 (EPA) in relation to the Pannikin Mine. The respondent company has failed to comply with the statutory demand which was dated 10 January 2019.

[3] The winding up proceedings were before the Court on 27 June 2019 at which time Shrimad Pty Ltd (Shimrad) made an application for an order seeking to be substituted as the applicant pursuant to s 465B(1) of the Act. Both matters were adjourned and

listed for 11 July 2019. Graeme Anthony Bourne, another supporting creditor, has also now filed an application for substitution as the applicant.

[4] On 9 July 2019, David Oriel, the sole director of the respondent company appointed Neil Cussen of Deloitte Financial Advisory Pty Ltd (Deloitte) as Administrator.

[5] The matters came before the Court again on 11 and 12 July 2019 and were adjourned until 26 July 2019 to allow further investigation into the respondent company's affairs by the Administrator. At the time of that adjournment the Administrator had indicated that it would take between four to five weeks to properly assess the financial position of the company. The first meeting of creditors was held on 18 July 2019 and the second meeting is scheduled for 13 August 2019.

[6] At the time of the hearing on 26 July 2019, that administration had only run for two weeks and Counsel for the respondent Administrator sought a further adjournment of the winding up application pursuant to s 440A(2) of the Act to allow further time for investigations. That further adjournment was opposed by a minority of creditors.

[7] On 26 July 2019 I reserved my decision to allow further written submissions by 2 August 2019 in relation to the status of one of the assets of the company, namely a stockpile of sand, and whether it was caught within the definition of a 'mining tenement' in the *Mining Resources Act* 1989. Those submissions have now been provided.

[8] The Act in Part 5.3A provides for a process whereby the property of an insolvent company can be placed under administration to maximise the chances of the company continuing to exist or, if that is not possible, by providing a better return for creditors. It offers the creditors alternatives to winding up. Section 440A(2) provides as follows:

> "The Court is to adjourn the hearing of an application for an order to wind up a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up."

[9] Accordingly the question for this court is whether the application for the winding up of the respondent company, which is currently under administration, should be adjourned because it is in the interests of the respondent company's creditors for the company to continue under administration rather than be wound up. The onus is on the respondent Administrator to persuade the court that it is in the interest of the creditors to allow the administration to continue.

[10] The applications in relation to the substitution of the applicant was not pursued at the hearing. As the applicant submits, those applications are currently premature.

Background

[11] The first meeting of creditors under s 436E of the Act was convened on 18 July 2019 which had the benefit of the administrator's first report which is in evidence. A committee of inspection was installed and a draft Deed of Company Arrangement (DOCA) was tabled.[1] I note that the draft DOCA was in the terms as considered by

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1 Affidavit of Neil Robert Cussen sworn 24 July, NRC-10.

Flanagan J on 12 July 2019.[2] With the exception of one unsecured creditor, no creditor voiced concern about the proposed DOCA, the Administrator or the Administrator remaining in office at that meeting. The State of Queensland, a minority creditor, has since raised some concerns which are pursued in the hearing of this current application.

[12] Counsel for the respondent Administrator seeks to adjourn the winding up application to allow for the continuing administration as it will enable the creditors to consider whether it is in their best interests to execute the DOCA, place the company in liquidation or adjourn the winding up for a further 45 days so that a second report can be prepared by the administrator and considered at the second creditors meeting scheduled for 13 August 2019.

[13] The current DOCA in its draft terms provides that the State of Queensland is to be paid in full by the secured creditor if the creditors resolve to execute the DOCA. The DOCA contemplates the secured creditor subordinating its claim up to 50 cents in the dollar to claims of other creditors, other creditors receiving a dividend of between 10 cents and 50 cents in the dollar within 12 months, the Bolivia Mine being sold, and operations resuming at the Pannikin Mine. Counsel for the respondent Administrator argues that the contrasting position in liquidation is dire for the unsecured creditors as their return appears to be no better than two cents in the dollar.

[14] On 12 July 2019, the applicant had consented to the voluntary Administrator's application for an adjournment for two weeks on the basis that it would allow the Administrator to review the books and records of the company and to consider the terms of the draft DOCA.

[15] As per the applicant's outline of submissions, that draft DOCA provided that:[3]

> "(a) Sun Asia Rural Solutions Pty Ltd ACN 617 268 809 (Sun Asia), a secured creditor of the Respondent would:
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> (i) within 7 days of the execution of the DOCA, discharge the debt owed to the applicant in its entirety, which includes both the invoices included in the Statutory Demand, an additional invoice issued by the Applicant to the Respondent for the EA annual fee for the period from 26 July 2019 to 25 July 2020, which is due for payment on or before 26 July 2019; and
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> (ii) meet future payment obligations (which would provide for a greater return to Deed Creditors from the Deed Fund)…"

[16] In relation to the current proposed DOCA which is essentially in the same terms as that which was before Flanagan J, the applicant now raises the following concerns:[4]

> "By clause 11.3 of the DOCA, there is:
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> (a) no date by which Sun Asia will make payment of debts owed to the applicant, when Mr Shannon's affidavit sworn

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2 Affidavit of Gregory Alberto Grunert sworn 12 July 2019, GAG-2.
3 Applicant's Outline of Submissions filed by leave on 26 July 2019, at [4.6].
4 Applicant's Outline of Submissions filed by leave on 26 July 2019, at [4.11].

12 July 2019 at paragraph 8(c) stated that amount would be paid within seven days of the execution of the DOCA;

(b) no date by which any future liability to the applicant will be paid by Sun Asia or confirmation that the amount will be paid within the terms of any future invoice issued pursuant to the *Environmental Protection Act* 1994 (Qld) for the EA;

(c) excludes the applicant from the Deed Fund and provides no contingency for payment if Sun Asia does not comply with its obligations to the applicant;

(d) refers broadly to the State of Queensland and does not limit the exclusion from the Deed Fund clause to amounts owing to the applicant."

The arguments in support of a winding up

[17] The applicant argues that the application for the adjournment of the winding up should be refused and the company should be wound up in insolvency as the respondent Administrator has not satisfied the onus on him under the Act to satisfy the Court that it is in the interests of the creditors that the administration should continue. The applicant essentially argues that the terms of the DOCA do not provide certainty for the applicant that it will be paid its debts in full.

[18] The applicant also raises concerns as to whether Sun Asia has funds available to it to pay the debts due and owing to the Environmental Authority for the Pannikin Mine. The applicant also sought an assurance that an amount sufficient to pay the debt would be paid to the trust account of the solicitors prior to a vote by creditors of any proposed DOCA. The applicant also raised concerns that there was no irrevocable direction to the lawyers for the respondent Administrator that they pay the funds held in its trust account to the applicant within seven days of the execution of the DOCA. In this regard the applicant also sought assurances that the current proposed DOCA would be amended to provide that Sun Asia would agree and warrant that it would pay to the applicant the Environmental Authority debt within seven days of the execution of the DOCA and that Sun Asia would agree and warrant to pay any future invoices or liabilities in relation to the Environmental Authority within the terms of those invoices.

[19] The applicant also sought the insertion of a clause in the DOCA, providing that the applicant would have the ability to prove for the amount owed to it in the deed fund and that in the event that Sun Asia did not comply with its obligations under the DOCA, the applicant would be paid from the deed fund in priority to other unsecured creditors. The applicant argues that none of the requested evidence in these terms has been provided either to it or the court.

[20] The applicant has also had regard to the financial position of Sun Asia and in particular, the affidavit of Geoffrey Shannon,[5] which indicates that the Sun Asia must seek finance to meet its obligations to the applicant. Furthermore it is argued that the proposed finance offer from Marcel Underwriting, is equivocal and it was submitted that the enclosed term sheet was indicative only as the letter simply states that Marcel Equity

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5 Sworn 25 July 2019.

will work to procure the facility to support Sun Asia's requirements, and that any loan is subject to terms being agreed and the facility being documented.

[21] The applicant also argued that there are a number of deficiencies with the terms sheets and in particular that the offer is subject to due diligence enquiries by Marcel Underwriting (No1) Pty Limited. Furthermore, the applicant is concerned that there is provision for fees of up to approximately $34,000 plus legal fees to be financed with a total facility amount. Security for the loan will include a second registered mortgage over two New South Wales properties but it is argued that there is no evidence that the first registered mortgagee of the properties will consent to the further encumbrance of the properties or that there is sufficient equity in those properties to secure the advance.

[22] The applicant also submits there is no certainty for it or other creditors that the funds sought by Sun Asia will be available to make the promised payment within seven days of execution of the DOCA or that there will be sufficient funds available after payment of the fees for the loan for Sun Asia to meet any future obligations to the applicant.

[23] Concerns are also raised by the applicant in relation to the financial statement for Sun Asia exhibited to the affidavit of Mr Shannon in that it is unaudited and is to be read in conjunction with the accountant's compilation report but the notes have not been attached. The applicant points out that the cash at bank is $96,500 but that GST liability is $100,263 which indicates that Sun Asia itself may be insolvent. Furthermore, reference is made to the trade debtors being in an amount in excess of $1,000,000 however there are no particulars of those trade debts particularly who owes them. Furthermore it is argued that there are no corresponding expenses identified in that profit and loss statement.

[24] The applicant also raised concerns in relation to the affidavit of the Administrator Neil Cussen sworn 24 July 2019, noting that he deposes that the respondent company has not traded since 2017. Furthermore, that affidavit does not exhibit any independent valuations of the assets of the company and does not exhibit any source documents to substantiate its assessment. Neither is there any assurance that it has the capacity to pay the annual fees owing for the Environmental Authority at the Pannikin Mine and the other amount admitted as owing to the legitimate creditors.

[25] The applicant also argued that there is no evidence offered to support the Administrator's opinion that if the company continues in administration, Deed Creditors are guaranteed a dividend of not less than 10 cents in the dollars as opposed to no more than 2 cents to unsecured creditors if there was an immediate winding up.

[26] Reference is also made to the fact that the expected dividend, should a DOCA scenario eventuate is solely reliant on Sun Asia agreeing to subordinate any claim up to 50 cents in the dollar to the claims of the deed creditors, honouring its obligation to pay the debts to the applicant and providing security to pay all cost related to the respondent company's mining interests together with its general trading liabilities.

[27] The applicant also noted that there is currently a dispute between the Pannikin Mine and Paterson Mining Pty Ltd (Paterson).

[28] The applicant argues therefore that the respondent company has had enough time to resolve its debts owing to the applicant and other legitimate creditors and irrespective

of whether it has assets whose value exceeds its liabilities it has not produced evidence to satisfy the Court that the assets could be released within a reasonable time to enable it to discharge its liabilities in full. The applicant submits it has complied with all the procedural requirements for the winding up as outlined in the affidavit material and the order for the winding up should follow. The applicant also seeks the appointment of 2 liquidators from KPMG for the purposes of the winding up.

[29] Counsel for the supporting creditors Shimrad and Graeme Bourne also argued that there is no persuasive evidence before the Court that the adjournment would be in the interests of the creditors and that the evidence such that it is, amounts only to speculation. In particular Counsel argued that whilst the affidavit of the sole director of Sun Asia, Geoffrey Shannon, sworn 12 July 2019 referred to the financial position of the company by reference to its balance sheet, he noted some aspects of concern. He argued that the balance sheet was bolstered by the value of the buildings at 8.8 million but that the New South Wales Land Registry records the purchase price of one property owned by the company as $236,500 and a second at $264,000. He submitted therefore that "there's a big difference between the property values of these two properties that are owned in New South Wales by Sun Asia and the $8.83 million that's been allocated in the balance sheet".[6]

[30] Counsel also noted that the two mortgages that were referred to on the title deed were not reflected on the balance sheet. Accordingly it was argued that reliance could not therefore be placed on the balance sheet being accurate.

[31] Counsel also submitted that there was a fundamental error in the reasoning of the Administrator and his reasoning that the secured creditor would receive 100 cents in the dollar in an optimistic winding up and 89 cents in the dollar in a pessimistic winding up based on the fact that the secured creditor would come in and take everything including the minerals and the stockpiles. In this regard he referred to the affidavit of Geoffrey Shannon sworn 12 July 2019 where he referred to the stockpile of sand at the Pannikin Mine being valued at $2.4 million. He argued that the assumption that the secured creditor would have access to those assets was in fact wrong because it is not personal property for the purposes of the *Personal Property Securities Act* 2009 (Cth) (PPSA). In particular he referred to s 3C of the *Mineral Resources Act* 1989 (Qld) which provides that a 'mining tenement' is not personal property for the purposes of the PPSA.

[32] This argument was subsequently endorsed by the further written submissions dated 31 July 2019 which are summarised as follows. Counsel argued that:[7]

1. The mining lease held by David Oriel Industries Pty Ltd is not secured by the PPSA.

2. The stockpiles of sand are not the property of David Oriel Industries Pty Ltd, as sand is not a mineral under the MRA; miners are only allowed to take the minerals specified in the mining lease.

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6 Transcript 1-38, ll 14-16.

7 Written Submissions on behalf of the Supporting Creditors Shimrad Pty Ltd and Graeme Anthony Bourne, filed by leave 31 July 2019 at [1]-[4].

3. The security interest created by the General Security Agreement does not include the mining lease by operation of law.

4. It is not necessary to reach a definitive view on any of these issues; the standard of satisfaction that the Court is required to find is no higher than that there be "a rational possibility" that the security could be set aside which might result in potential benefits for the general body of creditors.

[33] Whilst counsel submitted that the appointment of an Administrator on the eve of a winding up should also be treated with scepticism, I note that such an argument was put into its proper context and rejected by Campbell JA in *Offshore and Ocean Engineering Pty Ltd v Greenwich Contractors Pty Ltd*. [8] The supporting creditor also seeks to appoint a different liquidator.

[34] The solicitor for Paterson Mining Pty Limited, one of the other supporting creditors, also argued that the adjournment should be opposed. He referred to the current contested proceedings in the Land Court where Paterson as plaintiff alleges that the company terminated a contract for the sale of the Pannikin Mine and claims damages and an order that respondent company transfer the Pannikin mine to Paterson Mining.

[35] I also note the contents of Exhibit 1 which was tendered at the hearing. It is a letter from four creditors; James Cody, Judith Cody, Benjamin Cody and Joy Evans who collectively have seven unsecured, short term loan agreements with the respondent company totalling $920,000. The letter indicated that based on the DOCA which was provided at the first creditors meeting, they supported the adjournment of the winding up to allow further time for the administrator to develop a formal DOCA for the consideration of all of the creditors as they "…strongly believe that a DOCA scenario will provide a greater return to all unsecured creditors than a liquidation scenario".[9]

Should an adjournment be granted to enable the continuance of the administration because it is in the interest of the company's creditors?

[36] The onus is on the voluntary administrator to satisfy the court that the continuance of the administration is in the best interests of the creditors. It is clear that the relevant principles mean that there has to be a possibility, as distinct from optimistic speculation, that it is in the interests of the creditors for the respondent company to continue in administration, in that it would likely produce a larger dividend or at least an accelerated dividend for the creditors than on an immediate winding up.

[37] The relevant principles applicable to s 440A(2) were discussed by McPherson J in *Creevey v DCT*:[10]

> "It is evident from the terms of that subsection that before it applies the court must be satisfied not only that there is an administration but also as the subsection says, that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up. The Judge in the present case was not satisfied that it was

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8 [2012] NSWCA 371.
9 Exhibit 1, admitted at hearing on 26 July 2019.
10 (1996) 19 ACSR 456 at 457.

> in the creditor's interests for the administration to continue and it is his decision to that effect that is challenged here.
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> The question of whether an administration should continue, rather than that there be a winding up, is obviously closely related to the further question of whether the creditors could hope to get more by way of payment of their debts from one form of process or administration than from the other.
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> In order to satisfy the court of the matter referred to in s 440A(2) of the Corporations Law, one would expect that there would have to be some persuasive evidence to enable it to be seen that there were assets which, if realised under one form of administration rather than the other, would produce a larger dividend, or at least an accelerated dividend for the creditors."

[38] I have had regard to the current proposed draft Deed of Company Arrangement which has been exhibited.[11] That company arrangement provides that for twelve months from the execution of the DOCA, a deed fund will be established, which will be comprised of the net sale proceeds from the immediate sale of the company's interest in the Bolivia mining site in New South Wales and the net trading profits from the operation of the Pannikin Mine in Queensland for twelve months.

[39] The document specifically provides that during the period of the DOCA, Sun Asia will underwrite any trading liabilities incurred by the company and that Sun Asia would pay in full the outstanding fees to the State of Queensland in relation to the Pannikin Mine. It would seem that whilst there could be some further elaboration in relation to that undertaking, the intent is clear and unambiguous.

[40] The DOCA also stated that Sun Asia (the secured creditors) would subordinate their claims after the unsecured creditor claims as adjudicated by the deed administrator to the extent unsecured creditors received a distribution of up to an amount of 50 cents in the dollar from the deed fund. The deed fund provided that the order of distribution subject to s 444DA of the Act was to be distributed firstly in paying the petitioning costs of the State of Queensland; second, in paying the administrator's fees; third, in paying the deed administrator's fees; fourth, payment of unsecured creditor's claims up to an amount of fifty cents in the dollar; fifth, the payment of the secured creditor's claims; sixth, the payment would be in accordance with the priorities set out in s 556 of the Act as if the company were in liquidation; and finally, in payment of all other secured creditor claims.

[41] In coming to a determination on the current application I have had particular regard to the affidavit of the Administrator Neil Robert Cussen and his analysis of the company's present position and particularly to his Preliminary Report to Creditors which was exhibited. The report also indicated that independent valuers were being engaged and that proposals from several reputable mining valuers/brokers to ascertain the estimated realisable value of the assets.

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[11] Exhibit NRC-10 to Court File Doc 39.

[42] Mr Cussen stated that his enquiries to date had revealed the following assets of the company:[12]

1. A mining lease ML20633 granted by the Queensland Government in relation to the Pannikin Mine just 50km west of Coen;

2. Exploration Licence EL8519 granted by the New South Wales Government in relation to the site 18.54kms east/north-east of Torrington, NSW;

3. Various plant and equipment;

4. Sand stockpile located at the Pannikin Mine;

5. Contingently, various legal proceedings.

[43] The affidavit of Mr Cussen indicated that:[13]

"The Minutes reveal, amongst other things, that:

(a) The following creditors, admitted for voting purposes in the total sum of $2,919,321.69, were in favour of the Proposal and the adjournment of the winding up proceedings so that the Proposal could be formally considered:

Creditor	**Admitted Amount**
Avoca Tenement Consulting Pty Ltd	$1,584.75
B&B Connolly Waste Disposal	$26,301.00
Benjamin Cody	$300,000.00
Cherie Oriel	$45,000.00
Geoffrey Shannon	$14,741.78
Griffith Transport	$16,305.00
Heavy Haulage Australia (NSW) Pty Ltd	$21,700.00
James Cody	$80,000.00
Valley Business Accountants	$45,000.00
Joy Evans	$300,000.00
Judith Cody	$260,000.00
Mervyn Oriel	$441,731.00
MNC Holdings Pty Ltd	$12,338.40
MNC Pipelines & Civil Pty Ltd	$7,800.00
Secured Creditor	$1,100,000.00

12 Affidavit of Neil Robert Cussen sworn 24 July.
13 Affidavit of Neil Robert Cussen sworn 24 July at [5].

Wild Engineering Pty Ltd	$21,310.00
State of Queensland	$225,509.76
TOTAL	**$2,919,321.69**

(b) A committee of inspection (COI) was formed which is comprised of the following:

(i) Mr James Cody;

(ii) Ms Judith Cody;

(iii) Mr Graeme Bourne; and

(iv) Mr Jon Patty as a representative of Paterson.

(c) No creditor stated that it was opposed to the Proposal, however the proxy for Paterson expressed reservations about the Proposal whilst there was a dispute between Paterson and the Company regarding the ownership of the Pannikin Mine."

[44] The affidavit of Mr Cussen also provided that apart from the DOCA, he had also discussions with two other third parties who had shown interest in relation to proposing alternative deeds of company arrangement which may include a proposal to purchase the assets of the company.

[45] In relation to the Land Court proceedings, the administrator noted that Paterson Mining is the plaintiff in the Land Court proceedings in which it alleges that it terminated a contract for the sale of the Pannikin Mine to the company and is therefore entitled to various forms of relief including damages and/or an order that the company transfer its interest in the Pannikin Mine back to Paterson Mining. It would seem that the further amended defence filed in the Land Court proceeding on 14 June 2019 denies that Paterson Mining is entitled to any relief sought. I also note that Mr Cussen refers to the affidavit of Mr Ameer Jaggessar sworn 24 July 2019 which provides that once the company pays the outstanding fees and rent owed to the State of Queensland and a site manager is appointed, the Pannikin Mine can become fully operational again. If the company is wound up however, it is likely that the company's mining interest will be cancelled by the State of Queensland and the State of New South Wales and it is probable that the State of Queensland will impose remediation costs on the company which are likely to dilute the assets of the company.

[46] I also note that the affidavit of Mr Cussen outlines the particular steps he has taken to have the Bolivia Mine valued. The investigations to date reveal that its main assets include an exploration licence but that there is no equipment located on the site and there is no evidence that the company has traded from the site for some time.

[47] Significantly Mr Cussen also swears that since his appointment as administrator he has not uncovered any clear evidence of any transactions which would be voidable pursuant to Part 5.7B of the Act despite having conducted investigations into the affairs of the company and the transactions it has undertaken. He stated that that was partly as a result of the fact that at least two years has expired between the company stopping

trading and thereby incurring trading liabilities, and the date of the filing of the application in this proceeding on 29 April 2019.

[48] Mr Cussen also stated that if the winding up application was further adjourned, he intended to progress negotiations with third parties and to progress the current DOCA including performing, with the assistance of staff, further investigations into the employees and other support services which are required to enable the Pannikin Mine to become fully operational again and to estimate the net profit position of the Pannikin Mine on a month-to-month basis for the administration.

[49] I also note in particular the fact that Mr Cussen also stated in his affidavit that he could say with reasonable certainty that if the company were to be wound up on 26 July 2019, unsecured creditors are likely to receive a dividend of no more than two cents in the dollar. He also stated that a valuation of the Pannikin Mine was performed by a valuer on 8 July 2019 for Marcel Equity and from that valuation he has had regard to the sand stockpiles and the items of plant and equipment that do not appear to be fixtures.

[50] I have also had particular regard to Mr Cussen's opinion that he believed, based on his conduct of an investigation in the administration to date, that the majority of creditors were supportive of the proposal and supported the continuing administration of the company as opposed to winding up and that he believed it was in the interests of the creditors of the company to continue under administration than be wound up, as unsecured creditors are likely to receive more in administration than they would in liquidation.

[51] It is clear that there must be some persuasive evidence giving details about the respondent company's financial position and the likely realisation of debtors and other assets. As Greenwood J stated in *Sunstate Orchards Pty Ltd v Citrus Queensland Pty Ltd*:[14]

> "The hope must however be a real and not a remote possibility, unclouded by cascading contingencies all of which must fall in before an asset might become available to the creditors as a group. In *Creevey,* the court discounted a contended claim as a possible asset available to creditors."

[52] I note that in *Creevey,* McPherson J considered that there was no, or practically no, evidence that the company there had any assets whatsoever. Indeed the largest asset was a right of action, which was capable of being instituted and capable of producing a judgment in the order of $1.5million, but the Court considered that there was very little evidence to explain the nature of the action and what the value of the right might be. That is clearly not the case here given the affidavit of Mr Cussen in relation to the assets and the nature of the particular proceedings in the Land Court.

[53] Some of the matters that are relevant to the exercise of the court's discretion include:[15]

(a) details of the respondent's assets and liabilities, namely its solvency position;

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14 [2009] FCA 452 at [28]

15 *Deputy Commissioner of Taxation v QBridge Pty Ltd ACN 010 542 793 (In Voluntary Administration)* [2008] FCA 1300; *GRD Building Pty Ltd v Total Development Supplies Pty Ltd (Administrators Appointed)* [2008] FCA 2017

(b) if the respondent continues to trade, whether a sale as a going concern is in the interests of creditors;

(c) if the interests of all creditors are accommodated to a greater degree by administration rather than in the course of the winding up;

(d) if an adjournment is prejudicial to the interests of any creditors; and

(e) if there have been breaches of the Act by the directors of the respondent, which may be better addressed by a liquidator rather than voluntary administrators.

[54] It is always important of course to consider these provisions in the context of the Act as a whole. As Campbell JA in *Offshore and Ocean Engineering Pty Ltd v Greenwich Contractors Pty Ltd*:[16]

> "The policy arises from it being of general public importance that the court system can provide remedies concerning unpaid debts with speed and certainty. In saying that, I also recognise that there is a public policy in the provisions of the *Corporations Act* concerning administration that creditors be given the opportunity to consider a DOCA when it appears that creditors will do better under a DOCA than under a liquidation. When those policies come into conflict, as they have done in the application in relation to which the present application for leave to appeal is brought, the decision as to where the balance lies is given to one of the judges of the Equity Division who have experience of corporate and commercial matters."

[55] Having considered the affidavit material and the submissions I consider on balance that there is some persuasive evidence that it is in the interests of the creditors that the company continue in administration rather than be wound up.

[56] Whilst I note the arguments raised by the applicant, the State of Queensland, I consider that some of the issues raised can be readily addressed. In particular, the concerns raised about a lack of certainty as to a date for payment to the State of Queensland. This is capable of calculation once the DOCA is adopted, as the Draft DOCA provides at 11.3 that the Secured Creditor:[17]

> "hereby confirms and clarifies its undertaking given to the Supreme Court of Queensland on 12 July 2019 that it will pay, to the extent that the company is unable to pay them, all of the outstanding fees, rent, royalties, rates and charges, security and any other expenses owed to the State of Queensland until the administration of the Company concludes."

[57] The affidavit of Geoffrey Shannon, [18] the sole director of Sun Asia, sworn 12 July 2019, then expressly provides at paragraph 8(c) that:

> "Conditional upon a resolution being passed for the company to execute the DOCA, Sun Asia will, within 7 days of the execution of the DOCA, discharge the

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16 [2012] NSWCA 371 at [16].
17 Affidavit of Neil Robert Cussen sworn 24 July, NRC-10.
18 Court File Doc 35.

> debt owed to the State of Queensland in its entirety. Discharging that debt is aimed at lifting the suspension of the Mining Lease to enable mining to resume, and to ensure that the mining lease is not lost or otherwise jeopardised by the Company being would up."

[58] It would seem clear therefore that the date for the payment is able to be calculated once the DOCA is signed and, given the resumption of mining is pivotal to the whole DOCA, there is some further certainty that there will be some added impetus to fulfil that step. Counsel for the respondent Administrator also relied on the affidavit of Geoffrey Shannon sworn 25 July 2019 where he swore that:

> "Further to the matters set out at paragraph 8(c) of the First Affidavit, within seven days of the date of execution of the DOCA by the Company, I will cause Sun Asia to pay the State of Queensland the whole of the debt owed by the Company to the State of Queensland, in respect of the Mining Lease and any other fees, costs or debts which are owing, or which may become owing by the Company to the State of Queensland in relation to the operation of the Pannikin Mine, including but not limited to annual fees in the sum of approximately #354,000.00 (Debt) which is currently owed to the State of Queensland in relation to environmental authority EPLM00564113."

[59] In relation to the concerns about Sun Asia's financial position I have regard to the affidavit of Geoffrey Shannon sworn 25 July 2019 and his statements in relation to the financial position of Sun Asia. In relation to the non-payment of rates and the ASIC fee, Mr Shannon stated that the oversight was due to a change of the registered office of the company and the outstanding amounts have been paid in full. He also stated that Sun Asia supports the DOCA and "will not appoint a receiver" and will, if applicable, pay a contribution into the Deed Fund on the basis set out in clause 2.3 of the DOCA. Whilst under the DOCA, the management of the company reverts back to the director who is required to provide a monthly report on the financial operating results for the Pannikin mine in the previous month together with a report confirming all the trading liabilities have been paid and providing an update on the sale of the assets.

[60] I also note that the affidavit also exhibited the letter of offer from Marcel Equity[19] which contained the offer to make available to Sun Asia a facility in the sum of $500,000 and that within 7 days of the date of the execution of the DOCA, Sun Asia undertakes to the Court not to draw down on the facility other than for the purpose of paying out the debt in its entirety. He also swore that having perused the books and records of Sun Asia prior to the hearing he believed that its financial position had not deteriorated and that it had the capacity to meet its financial obligations under the DOCA as well as the undertaking provided to the Court.

[61] In relation to whether the sand in the stockpile forms part of the assets of the company there is no doubt that the Administrator is currently having the assets valued and the sand stockpile is included in that analysis. Having considered the submissions of Counsel on this point it is clear that views in this regard differ, with Counsel for the respondent Administrator submitting that the stockpile of sand is not a 'mining tenement' within s 3C of the *Mineral Resources Act* and therefore arguing that is not an asset. Whilst I can take those arguments into account in relation to the determination of

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19 Affidavit of Geoffrey Anthony Shannon sworn 25 July 2019, GAS-9.

the current application, that issue is not a matter which can be determined on this application. In this regard the note Gleeson JA's statement in *Kimberley Diamond Company Pty Ltd (in Liq) (ACN 061 899 634)*[20] per Gleeson JA at [71]:

> "In the present case, the proposed s 588FJ claim raises questions of construction which are disputed, and as I have noted, there is a contest as to certain factual issues. However, it is not necessary to come to a definitive view on the proper construction of the provisions of the Corporations Act, the PPSA or the security deed: Re Green at [8]. There seems to me to be a rational possibility that the proposed s 588FJ claim might result in potential benefits for the general body of creditors: CBA Corporate Services at [53]; Re Green at [8]. Beyond that it is not appropriate to make findings, let alone attempt to predict the likely prospects of the proposed s 588FJ claim.

[62] In *Deputy Commissioner of Taxation v Bradley Keeling Management Pty Ltd* Campbell J said: [21]

> "Ultimately what the court needs to do is to be persuaded. The amount of proof which can result in persuasion, differs with the circumstances in which litigation comes before the court. It is common enough, in applications under s 440A, for an administrator to need to seek an adjournment very soon after his or her appointment, at a time when he or she knows very little about the affairs of the company. In that sort of situation, comparatively little material might be needed to justify a short adjournment. As time goes on, however, and the occasion that there has been for the collecting of evidence increases, so the amount of material which might need to be put before the court before it is persuaded, will increase."

[63] This application for the adjournment of the winding up was brought just two weeks into the Administration against a background where the early initial indications of the Administrator were that it would take four to five weeks for the initial investigations to be complete. The evidence before me is therefore incomplete, and obviously preliminary, but I consider that the evidence as it stands is such that there is some persuasive evidence that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up.

[64] Accordingly, I consider that pursuant to s 440A(2) of the Act the hearing of the application for an order to wind up the company should be adjourned.

[65] I shall hear from the parties as to the form of the Order and as to costs.

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20 [2017] NSWSC 538 at [71].

21 (2003) 44 ACSR 377; [2003] NSWSC 47 at [18].