SUPREME COURT OF QUEENSLAND

CITATION:	*Re: CMC Brisbane Pty Ltd (Subject to a Deed of Company Arrangement)* [2004] QSC 416
PARTIES:	**C & E PTY LTD ACN 086 482 840** (applicant) **v** **CMC BRISBANE PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT) ACN 069 532 967** (first respondent)
FILE NO/S:	S5131 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	27 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	28 July 2004
JUDGE:	Douglas J
ORDER:	**Application dismissed**
CATCHWORDS:	CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF CDOMPANY ARRANGEMENT – TERMINATION OF – Where false or misleading information is alleged to have been provided to creditors in the administrators' report – Where there is a delay in bringing the application - Whether the deed should be terminated "for some other reason" where the company, without funds, instigates allegedly void litigation – *Corporations Act 2001* (Cth), s 445D. *Corporations Act* 2001 (Cth), ss 439A and 445D *Re Carey Builders Pty Ltd* (1997) 23 ACSR 754, cited *Khoury v Zambena Pty Ltd* (1997) 23 ACSR 344, referred to
COUNSEL:	R M Kelly for the applicant G W Rodgers (solicitor) for the respondent company P W Hackett for Andrew Corrigan
SOLICITORS:	MacDonnells for the applicant Freehills for the respondent company Crouch & Lyndon for Andrew Corrigan

[1] **DOUGLAS J**: This is an application to terminate a deed of company arrangement pursuant to s. 445D of the *Corporations Act* 2001 (Cth) ("the Act"). The deed was entered into by CMC Brisbane Pty Ltd ("CMC") on 28 November 2003 after a creditor's meeting on 7 November 2003. This application was filed on 11 June 2004.

[2] Initially the application was based on alleged false or misleading information said to have been provided contrary to s. 445D(1)(a), (b) and (c) of the Act to the creditors. The information complained of was contained in the company's administrators' report pursuant to s. 439A of the Act. It was said to have been misleading as to the steps that had been taken by CMC to pursue a claim against the applicant in these proceedings, C & E Pty Ltd ("C & E"). A representative of C & E attended the creditors' meeting in November 2003, was given the opportunity to comment at the meeting but chose not to do so. That raises a serious issue as to whether this Court's discretion should now be exercised in favour of the applicant, it having sat on its hands for so long.

[3] Apart from the reliance by the applicant on alleged misleading information supplied in the s. 439A report it also now submits that the deed should be terminated pursuant to s. 445D(1)(g) of the Act on the ground that the action instituted by CMC against C & E, is unlikely to produce any net return to the creditors.

[4] To put the application in context it is necessary to set out more of the relevant facts. Before CMC had entered into the deed it had been involved in a dispute with C & E arising out of the construction of 10 houses at Paragon Street, Yeronga. It was important to the applicant's submissions, but not, I think, terribly significant otherwise, that the dispute had two aspects. There was a dispute arising out of the building contract and a claim by CMC for payment for whitegoods purchased by it to be installed in the houses to be built in Paragon Street. The significance of the dispute is that the only substantial asset of CMC in the administration is the litigation described as the "Paragon claim" which Mr Corrigan, a former director of CMC, agreed in the deed to pursue with funds that would not otherwise be available in a liquidation.

[5] The information said to be misleading in the s. 439A report was that the Paragon claim was for an amount receivable in relation to a claim by CMC against C & E under the building contract and that CMC had already commenced such litigation, had invested significant time and funds and "had made substantial progress" in it. At the date of the report only the claim for the whitegoods had been instituted but C & E was at pains to establish that that claim was separate from the claim pursuant to the building contract. Nor, in its submission, had the whitegoods action made substantial progress. There were several other alleged material omissions referred to in paragraphs 43(a) to 43(e) of the affidavit of Mr Seirlis. They were not pursued vigorously in argument and, in any event, were answered adequately by CMC's submissions.

[6] In my view the complaints about the status of the building contract proceedings and their degree of progress were not relevantly misleading. It was apparent from the s. 439A report that proceedings pursuant to the building contract needed to await the outcome of a decision of the Court of Appeal to determine whether the claim would be heard in the Supreme Court or by the Commercial & Consumer Tribunal; see ex. TS18 to the affidavit of Mr Seirlis filed 11 June 2004 at p. 6. The words in

annexure A to the report, a proposal by Mr Corrigan, the sole director of CMC, that CMC had "made substantial progress in that litigation" were submitted by CMC and Mr Corrigan to have been criticised out of context. They argued that those words should be read as a reference to the claims and their preparation generally and not limited to the whitegoods claim. Their submission was that it was meant to refer to the history of the preparation of the litigation including an arbitration of an extension of time claim and a delay claim. There is merit in that submission. It reflects a reasonable view of the information provided to the creditors' meeting. For these reasons I am of the view that the information provided to the creditors in the s. 439A report was not relevantly false or misleading.

[7] One of the four members of the creditors' committee has sworn an affidavit in this application, Mr McLeod. He has seen a copy of the claim issued by CMC against C & E in the Commercial & Consumer Tribunal and believes it is substantially in line with what he voted for at the creditors' meeting. There is no evidence that any creditors other than C & E claim to have been misled.

[8] There are other discretionary reasons to refuse C & E's application. The most obvious is the delay in the bringing of this application, seven months after the meeting which authorised entry into the deed, after funds had been committed by Mr Corrigan to the litigation and in circumstances where the litigation provides the only prospect to the creditors of any return. Delay in bringing an application like this should be avoided as White J said in *Re Carey Builders Pty Ltd* (1997) 23 ACSR 754, 777:

> "It is a matter of discretion whether the deed should be avoided or set aside. Two matters are of importance. One is the delay in bringing this application and the other is the hearing by Thomas J on 12 April 1996. The application to appoint a provisional liquidator was brought promptly. This application however has been delayed until significant costs have been expended by the administrators and action taken under the deed. It is well recognised that proceedings of this kind must be brought to a hearing promptly: *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd* (1996) 63 FCR 391; 135 ALR 280; 19 ACSR 160; 14 ACLC 366 per Branson J at 375. Mikkelsens submit that Thomas J invited a "wait and see" approach when dismissing the application to appoint a provisional liquidator. The only expression used by his Honour which might lead to that conclusion appears at the end of his reasons for judgment:
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> > 'However, I do not think that it would be overall in the interests of the creditors to change direction at this point.'
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> In my view there is nothing in that statement to suggest the approach of his Honour contended for by Mikkelsens. It cannot be in the interests of the orderly disposal of affairs to allow a deed of company arrangement to progress almost to completion and after nine months seek to set it aside on the ground that it has not had the desired outcome, namely a better return to creditors, in the absence of other compelling facts."

[9] Young J's view in *Khoury v Zambena Pty Ltd* (1997) 23 ACSR 344, 353 that the maximum time within which an application might be made was one month was not pressed on me but the delay here is relevant to the exercise of my discretion.

[10] The expected return from a liquidation is nothing. It is highly unlikely that the Paragon claim would ever be pursued if the company were to be liquidated. Nor is the application supported by the committee of creditors or the scheme administrators. For those discretionary reasons I should dismiss the application.

[11] The only other matter with which I need to deal is the argument raised on the day of the application by the applicant that it could rely also on s. 445D(1)(g) which allows the court to make an order terminating a deed if satisfied that it should be terminated "for some other reason". Ms Kelly submitted that there was no public interest in allowing the company to litigate without funds. Mr Corrigan has agreed to provide a minimum of $65,000 in pursuing the Paragon claim. He also has the right, but not the obligation, to procure and expend further funds in pursuing that claim; see cl. 11.1 and 11.2 of the deed, ex. TS19 to the affidavit of Mr Seirlis filed 11 June 2004. There was no evidence before me of the amount of money that had been spent so far. If the litigation is not supported by Mr Corrigan then that will be significant for the continuation of the deed of arrangement but that situation has not yet arrived.

[12] Ms Kelly also submitted that the claim was not one of a nature which could be brought before the Commercial & Consumer Tribunal successfully because it was a claim in respect of cost escalation and interest and was void because the formal requirements of s. 56(1) of the *Domestic Building Contracts* Act 2000 had not been met and because of problems raised by s. 67(3) of that Act in respect of CMC's claim for completion payments. These matters had not been dealt with either in the application or in the written submissions of the applicant and Mr Hackett was not in a position to respond to them.

[13] It seems to me that they are matters better raised before the Commercial & Consumer Tribunal and are not issues that I should resolve here in those circumstances where they have been raised late and without proper notice. Accordingly I shall dismiss the application and hear the parties as to costs.