

# SUPREME COURT OF QUEENSLAND

CITATION: *Re Octaviar Ltd (No 8)* [2010] QCA 45

PARTIES: **FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LIMITED**  
ACN 114 624 958  
(respondent/appellant)  
v  
**OCTAVIAR LIMITED (FORMERLY MFS LIMITED) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)**  
ACN 107 863 436  
(respondent/first respondent)  
**PUBLIC TRUSTEE OF QUEENSLAND**  
(applicant/second respondent)  
**COMMISSIONER OF TAXATION**  
(respondent/third respondent)  
**OPI PACIFIC FINANCE LIMITED**  
(respondent/not a party to the appeal)  
**WELLINGTON CAPITAL LIMITED**  
(respondent/not a party to the appeal)

FILE NO/S: Appeal No 9506 of 2009  
SC No 1848 of 2009

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 9 March 2010

DELIVERED AT: Brisbane

HEARING DATE: 22 February 2010

JUDGES: Keane, Muir and Chesterman JJA  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeal dismissed**  
**2. In relation to costs each of the parties is at liberty to deliver to the other parties and to the Court a written submission on or before 4:00pm on 16 March 2010**

CATCHWORDS: CORPORATIONS – WINDING UP – APPLICATIONS FOR WINDING UP BY THE COURT – ORDERS – GENERALLY – where appellant ordered to be wound up in insolvency upon an application for winding up by the Public Trustee of Queensland – where appellant entered into a Deed of Company Arrangement (DOCA) between the application for winding up and the

winding up order – where the primary judge terminated the DOCA and ordered under s 447A(1) of the *Corporations Act* 2001 (Cth) that Pt 5.3A of the Act operate so that s 446B of the Act and reg 5.3A.07 of the *Corporations Regulations* 2001 (Cth) do not apply in relation to the appellant – whether the order made by the primary judge was a proper exercise of the discretion conferred by s 447A(1) of the Act

*Corporations Act* 2001 (Cth), s 435A, s 446A, s 446B, s 446B(4), s 447A, s 447A(1), s 761H, s 992B(1), s 1364(1), Pt 5.3A

*Corporations Regulations* 2001 (Cth), reg 5.3A.07

*Australasian Memory Pty Limited v Brien* (2000) 200 CLR 270; [2000] HCA 30, applied

*Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd*

(2005) 226 ALR 510; [2005] NSWSC 1235, cited

*Jones v Wrotham Park Settled Estates* [1980] AC 74, cited

*Myer Queenstown Garden Plaza Pty Ltd and Myer Shopping Centres Pty Ltd v Corporation of the City of Port Adelaide and the Attorney-General* (1975) 11 SASR 504, distinguished

*Re Centaur Mining & Exploration Ltd (in liq)* (2003) 133 FCR 482; [2003] FCA 1339, cited

*Sunarso v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 125; [2000] FCA 57, cited

*Wicks v Director of Public Prosecutions* [1947] AC 362, cited

COUNSEL: D F Jackson QC, with M J Luchich, for the appellant  
K E Downes SC, with S B Hooper, for the first respondent  
W Sofronoff QC, with D B O'Sullivan, for the second respondent  
R M Derrington SC, with P G Bickford, for the third respondent

SOLICITORS: Baker and McKenzie for the appellant  
Henry Davis York for the first respondent  
Clayton Utz for the second respondent  
Australian Government Solicitor for the third respondent

[1] **KEANE JA:** On 4 June 2008 the Public Trustee of Queensland ("the Public Trustee") applied for the winding up of Octaviar Limited ("Octaviar"). On 9 September 2009 it was ordered that Octaviar be wound up in insolvency and that provisional liquidators be appointed to the company.

[2] Between the filing of the application for the winding up of Octaviar and the winding up order, Octaviar entered into a Deed of Company Arrangement ("the DOCA"). On 31 July 2009 the learned primary judge made an order terminating the DOCA. The learned primary judge ordered in addition that:

"Part 5.3A of the *Corporations Act 2001 (Cth)* operate in relation to Octaviar Limited (Subject to a Deed of Company Arrangement) so that s.446B and reg 5.3A.07 do not operate with any effect in relation to the company."

It is this last order ("the order") which is the subject of the appeal to this Court.

- [3] The effect of the order is that when Octaviar was ordered to be wound up on 9 September 2009, it proceeded into a court-ordered winding up. If the order had not been made, the winding up would have been, by virtue of s 446B of the *Corporations Act 2001* (Cth) ("the Act") and Regulation 5.3A.07 of the *Corporations Regulations 2001* (Cth) ("the Regulations"), a creditors' voluntary winding up.
- [4] The significance of this difference in the applicable winding up regime is that the relation-back day<sup>1</sup> for the purpose of proceedings for the recovery of the proceeds of uncommercial or insolvent transactions under the Act is earlier under the court-ordered winding up than it would have been under the creditors' voluntary winding up. The practical importance of this difference for the appellant, Fortress Credit Corporation (Australia) II Pty Limited ("Fortress") and Octaviar's creditors, is that in a creditors' voluntary winding up, certain dealings between Fortress and Octaviar would be outside the reach of such proceedings.
- [5] The genesis of the order is explained in the following passage from the reasons of the learned primary judge:<sup>2</sup>

"The Public Trustee is concerned to have the relation-back day in the winding up of [Octaviar] as the date of filing of its winding up application, 4 June 2008. Accordingly, it seeks an order under s 447A that s 446B and reg 5.3A.07 not apply. Section 446B(1) provides that the regulations may prescribe cases where a company under administration or which has executed a DOCA (even if it has been terminated) is taken to have passed a special resolution under s 491 that the company be wound up voluntarily. By reg 5.3A.07, a company that has executed a DOCA is taken to have passed a special resolution that it be wound up voluntarily if the court makes an order under s 445D terminating the DOCA. In that event the company is taken to have passed the special resolution at the time of the court's order (Regulation 5.3A.07(2)). That would engage s 513B(c), which prescribes when such a winding up is taken to have begun or commenced, on the basis that this would be a case where immediately before the deemed resolution for winding up was passed, a DOCA 'had been executed by the company but had not yet terminated'. If so, then the date of deemed commencement of the winding up would be the s 513C day in relation to the administration that ended when the deed was executed, which would be 12 September 2008."

#### **The decision at first instance**

- [6] The learned primary judge made the order with a view to minimising the prejudice to creditors of Octaviar which might otherwise result from the operation of the DOCA. In this regard, his Honour said:<sup>3</sup>

"An order should be made with the result that the relation-back day would be the date of the filing of the Public Trustee's winding up application. The reasons for that were explained in my judgment given last September (*Re Octaviar Limited (No 1)* [2008] QSC 216).

<sup>1</sup> See *Corporations Act 2001* (Cth), s 9.

<sup>2</sup> *Re Octaviar Ltd (No 8)* [2009] QSC 202 at [184] (citation footnoted in original).

<sup>3</sup> *Re Octaviar Ltd (No 8)* [2009] QSC 202 at [185] (citations footnoted in original).

The administrators agree that it is important to make orders with that effect, and support the particular orders in that respect which are sought by the Public Trustee. Fortress submitted that there was some doubt as to whether an order could be made under s 447A which affected the way in which a regulation made under Part 5.3A was to operate. However, in my view s 447A permits the court to make these orders. The operation of Part 5.3A includes its operation through regulations made under Part 5.3A. Regulation 5.3A.07 operates by the operation of s 446B. Put another way, the reference to 'how this Part is to operate' in s 447A(1) is a reference to the sections within Part 5.3A and regulations made under them. In *Bidald v Miles*, Campbell J terminated a deed and ordered that:

'Part 5.3A ... is to operate in relation to [the company] so that reg 5.3A.07 does not operate with any effect in relation to the company ((2006) 226 ALR 510 at 569).''

### **The appeal**

- [7] No challenge is made to the order on the basis that it was not a proper exercise of the discretion conferred by s 447A(1) of the Act. The only issue in the appeal to this Court is the narrow question of statutory construction as to whether s 447A(1) empowered the learned primary judge to make the order at all. In particular, the issue is said to be whether the words "this Part" in s 447A(1) of the Act refer only to the provisions in Pt 5.3A of the Act or encompass Regulations made for the purposes of that Part pursuant to s 1364(1) of the Act.<sup>4</sup> Fortress argues that, because reference to "this Part" in s 447A(1) is only to the provisions of Pt 5.3A of the Act, s 447A does not confer power on the court to affect the way in which a Regulation operates. If that argument were correct then it would follow that the learned primary judge had no power to make the order.
- [8] This issue was not argued in any meaningful way before the learned primary judge. Indeed, when the learned primary judge raised with the parties the question whether the order should be made, Fortress did not advance any opposition beyond adverting to a doubt as to whether the order could be made. The question which arises now is one of law: no evidence could have been adduced to meet Fortress' argument had it been more fully developed below. There is therefore no reason in terms of procedural fairness why this Court should not determine the issue on appeal.
- [9] I have come to the firm conclusion that the order was indeed authorised by s 447A. It is convenient to proceed immediately to a discussion of the merits of Fortress' argument.

### **The legislation**

- [10] The objects of Pt 5.3A are set out in s 435A of the Act as follows:  
 "The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

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<sup>4</sup> Section 1364 of the Act provides:

**"Power to make regulations**

(1) The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed by regulations; or
- (b) necessary or convenient to be prescribed by such regulations for carrying out or giving effect to this Act.

..."

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding up of the company."

[11] Part 5.3A of the Act was first introduced into the law relating to corporate insolvency by the Corporate Law Reform Bill 1992 (Cth) ("the Bill"). The evident purpose of Pt 5.3A of the Act is to encourage companies to pursue court sanctioned attempts to trade out of solvency difficulties while at the same time ensuring that creditors are not prejudiced by the attempt. The Explanatory Memorandum to the Bill suggests that Pt 5.3A was intended to achieve the result that, in cases where a voluntary scheme of administration was "incapable of saving a company, the transition to winding up should be efficient and not involve a new court process." To that end Pt 5.3A confers a discretion on the court to ensure that steps would be deemed to have been taken towards a winding up "as soon as a stage is reached in the administration where winding up emerges as the only realistic alternative."<sup>5</sup>

[12] Section 447A(1) of the Act provides: "The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company." Section 447A appears within Pt 5.3A of the Act. Within Pt 5.3A of the Act are a number of other provisions relating to the termination of a Deed of Company Arrangement. It is as well to notice them now.

[13] Section 446A of the Act contemplates a number of circumstances in which a creditors' voluntary winding up will be deemed to have commenced. It provides relevantly:

**"Administrator becomes liquidator in certain cases**

- (1) [Application of section] This section applies if:
  - (a) the creditors of a company under administration resolve at a particular time under paragraph 439C(c) that the company be wound up; or
  - (b) a company under administration contravenes subsection 444B(2) at a particular time; or
  - (c) at a meeting convened under section 445F, a company's creditors:
    - (i) pass a resolution terminating a deed of company arrangement executed by the company; and
    - (ii) also resolve at a particular time under section 445E that the company be wound up.
- (2) [Deemed passing] The company is taken:
  - (a) to have passed, at the time referred to in paragraph (1)(a) or (b) or subparagraph (1)(c)(ii), as the case may be, a special resolution under section 491 that the company be wound up voluntarily; and
  - (b) to have done so without a declaration having been made and lodged under section 494.

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<sup>5</sup> Explanatory Memorandum at [614].

- (3) [Deemed creditor meeting] Section 497 is taken to have been complied with in relation to the winding up.

..."

- [14] Section 446B of the Act contemplates that the Regulations may provide for a transition to a creditors' voluntary winding up in other cases. It is in the following terms:

**"Regulations may provide for transition in other cases**

- (1) [Regulation may deem passing] The regulations may prescribe cases where:
- (a) a company under administration; or
  - (b) a company that has executed a deed of company arrangement (even if the deed has terminated);
- is taken to have passed a special resolution under section 491 that the company be wound up voluntarily.
- (2) [Application of Pt 5.5] The regulations may provide for Part 5.5 to apply with prescribed modifications in cases prescribed for the purposes of subsection (1).
- (3) [Regulations effect matters in section] Without limiting subsection (2), the regulations may provide, in relation to such cases, for matters of a kind provided for by any of subsections 446A(2) to (7), inclusive.
- (4) [Effect of regulations] Regulations in force for the purposes of this section have effect accordingly."

- [15] It may be noted here that s 446B(4) of the Act expressly recognises the nexus, in terms of legal "effect", between the Regulations contemplated by s 446B(1) and (3) and those provisions.

- [16] Regulation 5.3A.07 appears in the Regulations in "Chapter 5 External administration". The Regulation provides:

**"Administrator becomes liquidator – additional cases**

- (1) For subsection 446B (1) of the Act, a company that has executed a deed of company arrangement is taken to have passed a special resolution under section 491 that the company be wound up voluntarily:
- (a) if the Court at a particular time makes an order under section 445D of the Act terminating the deed of company arrangement; or
  - (b) if the deed of company arrangement specifies circumstances in which the deed is to terminate and the company is to be wound up — if those circumstances exist at a particular time.
- (2) The company is taken to have passed the special resolution:
- (a) at the time mentioned in paragraph (1) (a) or (b), as the case may be; and
  - (b) without a declaration having been made and lodged under section 494 of the Act.

- (3) Section 497 of the Act is taken to have been complied with in relation to the winding up.

..."

- [17] Regulation 5.3A.07 was made pursuant to s 1364(1) of the Act which empowers the Governor-General to "make regulations prescribing matters: ... required or permitted by this Act to be prescribed by regulations; or ... necessary or convenient to be prescribed by such Regulations for carrying out or giving effect to this Act."

**The arguments of the parties**

- [18] Crucial to Fortress' argument is the circumstance that s 447A does not, by its terms, refer to "Part 5.3A and regulations made under this Part": it refers only to "this Part". In this respect it is to be contrasted with other sections of the Act which expressly expand references to "a Part" of the Act to include Regulations made under the Act.<sup>6</sup> It is said that the learned primary judge erred in reading s 447A as if it notionally interposed the words "or the regulations made for the purposes of this Part" after the words "this Part". It is argued on Fortress' behalf that the contrast between such provisions and s 447A displaces the general principle that a Regulation made under an Act is encompassed by a reference to the Act<sup>7</sup> and supports the conclusion that the absence of an express inclusion of Regulations in s 447A must be taken to evince a deliberate legislative intention that s 447A does not permit the making of orders which refer to Regulations made for the purposes of Pt 5.3A of the Act.<sup>8</sup>
- [19] On behalf of the respondents it is emphasised that s 447A empowers the court to make "such order as it thinks appropriate about how this Part is to operate in relation to a particular company". They argue that an order "about how this Part is to operate in relation to a particular company" does not cease to be within the scope of s 447A simply because it operates by reference to Regulations made for the purposes of Pt 5.3A. They point to s 446B(4) and say that Regulations in force for the purposes of s 446B have effect expressly for the purposes of the section which is, of course, a provision of Pt 5.3A of the Act. They point to a number of cases in which it has been accepted that "how this Part is to operate" can relevantly be affected by an order directed at a Regulation or a section of the Act outside Pt 5.3A of the Act.<sup>9</sup> The respondents also argue that the contrast between the language of s 447A and the other provisions of the Act to which Fortress refers does not support the negative implication on which Fortress' argument depends.
- [20] In my respectful opinion, the submissions of the respondents should be accepted.

**Discussion**

- [21] In *Australasian Memory Pty Limited v Brien*,<sup>10</sup> the High Court said that the powers conferred on the Court by s 447A are wide (though not without limit), and there is

<sup>6</sup> Cf s 5D(2) of the Act, s 992B(6), s 1020F(7) and s 1075A(7).

<sup>7</sup> *Wicks v Director of Public Prosecutions* [1947] AC 362 at 365; *Sunarso v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 125 at 135.

<sup>8</sup> *Jones v Wrotham Park Settled Estates* [1980] AC 74 at 105.

<sup>9</sup> *Gibbons v LibertyOne Ltd (in liq)* (2002) 41 ACSR 442; *Re Walker* [2002] NSWSC 705; *Re Love* (2003) 44 ACSR 367; *Re Centaur Mining & Exploration Ltd (in liq)* (2003) 133 FCR 482 at [8]; *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510 at 568 – 569; *Re Bosnjak Holdings Pty Ltd; Fexuto Pty Ltd v Lombe & Ors* (2009) 72 ACSR 337; *Re Priceright Construction Pty Ltd* (2006) 57 ACSR 206.

<sup>10</sup> (2000) 200 CLR 270 at 279 [17], 280 [20].

no reason to read them down. The only limitation on the power conferred on the court by s 447A(1) is that the order must be one which affects how Pt 5.3A is to operate. The precise means whereby the operation of Pt 5.3A is to be affected in relation to any given company is left to the discretion of the court.

[22] Fortress' argument requires one to read s 447A(1) as if it authorised the court to do no more than dispense with the application of some sections of the Act in respect of a given company. That is distinctly not what s 447A(1) of the Act sets out to do.

[23] In this respect the contrast between the language of s 447A and the other provisions of the Act on which Fortress relies to generate the negative implication on which its argument depends is instructive. One may take s 992B(1) by way of example. It is in the following terms:

**"Exemptions and modifications by ASIC**

(1) ASIC may:

- (a) exempt a person or class of persons from all or specified provisions of this Part; or
- (b) exempt a financial product or class of financial products from all or specified provisions of this Part; or
- (c) declare that this Part applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions of this Part were omitted, modified or varied as specified in the declaration."

[24] One may also refer to s 761H of the Act. It is in the following terms:

**"References to this Chapter include references to regulations or other instruments made for the purposes of this Chapter**

(1) A reference in a provision of this Chapter to this Chapter, or to a particular provision or group of provisions of this Chapter, includes (unless a contrary intention appears) a reference to regulations, or other instruments, made for the purposes of this Chapter, or for the purposes of that provision or any of those provisions, as the case requires.

(2) Subsection (1) has effect as if provisions in Part 10.2 (transitional provisions) that relate to matters dealt with in this Chapter were part of this Chapter."

[25] In contrast to these provisions which are concerned with what the content of the law shall be, s 447A(1) of the Act expressly empowers a court to make an order "about how [Pt 5.3A] is to operate in relation to a particular company".

[26] Regulation 5.3A.07 operates, and operates only, as an adjunct to s 446B of the Act in that it establishes the substantive content of the law contemplated by s 446B of the Act. The legal validity and effect of Regulation 5.3A.07 derives from the circumstance that it is "permitted ... to be prescribed by [the] Act" or "necessary or convenient to be prescribed ... for carrying out or giving effect to [the] Act." In particular, it is in force "for the purpose of" s 446B of the Act and has "effect" accordingly. An order which effects the operation of regulations which themselves have effect only for the purposes of this Part of the Act to which they are an adjunct is properly characterised as an "order ... about how this Part is to operate ...".

- [27] By virtue of the order made in this case, the legal effect which would otherwise be achieved by Pt 5.3A of the Act is altered. The operation of Pt 5.3A of the Act in relation to Octaviar is different than it would have been if the Regulation 5.3A.07 did apply. Accordingly, it can be seen that an order that Regulation 5.3A.07 not operate in relation to the company is clearly an order about how Pt 5.3A of the Act is to operate in relation to Octaviar.
- [28] It is quite beside the point to refer, as Fortress does, to cases such as *Myer Queenstown Garden Plaza Pty Ltd and Myer Shopping Centres Pty Ltd v Corporation of the City of Port Adelaide and the Attorney-General*.<sup>11</sup> That was a case where Wells J of the Supreme Court of South Australia construed s 40 of the *Planning and Development Act 1966 – 1972 (SA)* in which it was said that "the provisions of this Part to do not limit the application of, or derogate from, any other provision of this Act". Wells J held, quite unremarkably, that, in context, the reference to "this Part" did not encompass any other Act or "any species of subordinate legislation".<sup>12</sup>
- [29] The contrast between the provision construed by Wells J and s 447A(1) is stark. The former provision was concerned to declare the maximum extent of the scope of the Part of the Act in which it appeared. Section 447A(1) is concerned to facilitate variations in the operation of the Part of the Act in which it appears.
- [30] Similarly it is not to the point to refer to authorities such as *Jones v Wrotham Park Settled Estates*,<sup>13</sup> which are concerned with the principles which control the occasions when a court obliged to construe legislation may legitimately adopt a construction which involves reading words into the legislation.
- [31] In this case no question arises as to the reading of words into s 447A(1): the only question is whether the order in question is one which is "about how [Pt 5.3A of the Act] is to operate." The order contains a succinct statement of how Pt 5.3A of the Act is to operate in relation to Octaviar. That this prescription is articulated explicitly by reference to an adjunct to Pt 5.3A of the Act found in the Regulations does not mean that the order is not one "about how [Pt 5.3A of the Act] is to operate." An order which can be accurately characterised as one about how the Act is to operate in a given case does not lose that character because it refers to a Regulation. Especially is this so when the Regulation to which reference is made has no operation but to establish the legal effect of the Act.

### **Conclusion and order**

- [32] The making of the order was authorised by s 447A(1) of the Act.
- [33] The appeal should be dismissed.
- [34] In relation to the issue of costs each of the parties is at liberty to deliver to the other parties and to the Court a written submission on or before 4:00pm on 16 March 2010.
- [35] **MUIR JA:** I agree with the reasons of Keane JA and with his proposed orders.
- [36] **CHESTERMAN JA:** I agree with the orders proposed by Keane JA, for the reasons given by his Honour.

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<sup>11</sup> (1975) 11 SASR 504.

<sup>12</sup> (1975) 11 SASR 504 at 556.

<sup>13</sup> [1980] AC 74 at 105.