SUPREME COURT OF QUEENSLAND

CITATION:	*Promoseven Pty Ltd v Prime Project Development (Cairns) Pty Ltd (Subject to a Deed of Company Arrangement) & Ors* [2014] QCA 24
PARTIES:	**PROMOSEVEN PTY LTD** ACN 102 606 324 (appellant) **v** **PRIME PROJECT DEVELOPMENT (CAIRNS) PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT)** ACN 109 685 332 (first respondent) **MASTER DEVELOPERS ASSOCIATION PTY LTD** ACN 144 067 863 (second respondent) **NICK COMBIS AND PETER DINORIS IN THEIR CAPACITY AS ADMINISTRATORS OF PRIME PROJECT DEVELOPMENT (CAIRNS) PTY LTD** ACN 109 685 332 (third respondents)
FILE NO/S:	Appeal No 8879 of 2013 SC No 5934 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Holmes, Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Pursuant to ss 445D and 447A of the *Corporations Act* 2001 (Cth), the Deed of Company Arrangement with respect to Prime Project Development (Cairns) Pty Ltd be terminated.** **2. Pursuant to s 447A of the *Corporations Act* 2001 (Cth), s 446B of the *Corporations Act* 2001 (Cth) and reg 5.3A.07(1)(a) of the *Corporations Regulations* 2001 (Cth), apply in such a manner that Prime Project Development (Cairns) Pty Ltd be taken to have passed**

a special resolution that it apply to be wound up by the Court.

3. **Pursuant to s 447A of the *Corporations Act* 2001 (Cth), the administration end, and Prime Project Development (Cairns) Pty Ltd be wound up by the Court.**
4. **The third respondents, Nick Combis and Peter Dinoris, be appointed, jointly and severally, as liquidators.**
5. **The first and second respondents pay the appellant's costs of the proceedings before the primary judge, and the appeal, to be assessed on the standard basis, if not agreed.**
6. **The third respondents' costs of the proceedings be costs in the winding up.**

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – GENERALLY – where appeal allowed – where dispute as to costs between appellant and first and second respondents – where third respondents will abide by order of court – where first and second respondents submit that first respondent should be ordered to pay appellant's costs – where first and second respondents submit that there should be no order as to costs against the second respondent due to the proceedings needing to be defended in the public interest – whether the proceedings were not merely an agitation of private interests, but involved an element of public interest – whether the usual rule, that costs follow the event, should be displaced

Corporations Act 2001 (Cth), s 445D, s 446B, s 447A
Corporations Regulations 2001 (Cth), reg 5.3A.07(1)(a)
Uniform Civil Procedure Rules 1999 (Qld), r 681

Alborn & Ors v Stephens & Ors [2010] QCA 58, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited

COUNSEL: No appearance for the appellant, the appellant's submissions were heard on the papers
No appearance for the first and second respondents, the first and second respondent's submissions were heard on the papers
No appearance for the third respondents

SOLICITORS: No appearance for the appellant, the appellant's submissions were heard on the papers
No appearance for the first and second respondents, the first and second respondent's submissions were heard on the papers
No appearance for the third respondents

[1] **HOLMES JA:** I agree with the reasons of Morrison JA and the orders he proposes.

[2] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.

[3] **MORRISON JA:** On 20 December 2013 the Court delivered its reasons for allowing the appeal. The parties were granted leave to file further submissions as to the orders that should be made to give effect to those reasons. As part of the reasons the Court proposed a number of orders including that the first and second respondents pay the appellant's costs of the proceedings before the primary judge, and the appeal, to be assessed on the standard basis, if not agreed.

[4] The parties have filed submissions addressing the question of costs and the nature of the orders otherwise.

Costs

[5] The only dispute which has arisen as to costs is as between the appellant on the one hand, and the first and second respondents on the other. The third respondents announced at the commencement of the appeal that they would abide the order of the court.

[6] The first and second respondents submit that only the first respondent should be ordered to pay the appellant's costs, and that there should be no order as to costs against the second respondent, both on the appeal and at first instance. The main contention advanced is that the proceedings were not merely an agitation of private interests, but involved questions of public interest which needed to be defended in the public interest.

[7] I do not accept that the proceedings bear that characterisation. The first respondent went into administration and in the course of that administration a Deed of Company Arrangement was put to the creditors and adopted by a majority vote. As appears in paragraph [74] of the reasons on the appeal, there were only 11 creditors whose debts had been assessed and admitted for the purpose of voting. Of them seven were related entities being controlled by the Knell family and represented (at the meeting) by Mrs Knell. The proceedings were conducted on the agreed basis that two others were also related parties, namely Mr Hogg and Dr O'Hair. That meant that only two creditors were non-related.

[8] The second respondent was the sponsor of the Deed of Company Arrangement. It is also a company owned and controlled by Mrs Knell, and is a company related to the first respondent. It is not a creditor of the first respondent.

[9] The circumstances outlined above are sufficient to demonstrate that the second respondent's participation in the proceedings could hardly be said to have been driven by matters in the public interest. This Court's conclusion that the Deed of Arrangement should be terminated turned substantially on the apparent lack of commerciality in the central transaction surrounding the first respondent's transfer of its interest in a mortgage, as well as other transactions in which the first respondent was involved. The conclusion reached was that it would be detrimental to commercial morality to dispense with the opportunity, which the winding up law provides, for the investigation of the affairs of the first respondent.

[10] There is no public interest element in the proceedings. It is a dispute confined to the commercial interests of those involved, in which the second respondent was involved because of its relationship to the first respondent and the first respondent's original controller (Mrs Knell).

[11] In the circumstances I can see no reason why the usual rule, namely that the costs of a proceeding follow the event,[1] should be displaced.

[12] The second respondent cannot avoid its exposure to an order to pay costs, particularly given that it was an active opponent to the relief sought by the appellant, both at first instance and on appeal. It filed a substantial number of affidavits read at first instance, and appeared at both hearings represented by counsel (who also represented the first respondent) and filed its own notice of contention on the appeal. It remains to observe that no aspect of the second respondent's contentions on appeal involved considerations of the public interest.

The orders

[13] Apart from the question of costs, the only difference between the orders proposed by the appellant and those proposed by the first and second respondents was that the first and second respondents proposed an additional order in these terms:

> "The Third Respondents inform the Australian Securities and Investment Commission of their appointment as liquidators and the termination of the Deed of Company Arrangement forthwith."

[14] The effect of the orders will be to put the first respondent into liquidation with the third respondents appointed as liquidators. There is no reason to think that they will not observe their duties as liquidators in all appropriate ways, including whatever is necessary by way of notice to the Australian Securities and Investments Commission. I do not consider that the additional order is necessary.

[15] The orders of the Court are as follows:

1. Pursuant to ss 445D and 447A of the *Corporations Act* 2001 (Cth), the Deed of Company Arrangement with respect to Prime Project Development (Cairns) Pty Ltd be terminated.

2. Pursuant to s 447A of the *Corporations Act* 2001 (Cth), s 446B of the *Corporations Act* 2001 (Cth) and reg 5.3A.07(1)(a) of the *Corporations Regulations* 2001 (Cth), apply in such a manner that Prime Project Development (Cairns) Pty Ltd be taken to have passed a special resolution that it apply to be wound up by the Court.

3. Pursuant to s 447A of the *Corporations Act* 2001 (Cth), the administration end, and Prime Project Development (Cairns) Pty Ltd be wound up by the Court.

4. The third respondents, Nick Combis and Peter Dinoris, be appointed, jointly and severally, as liquidators.

5. The first and second respondents pay the appellant's costs of the proceedings before the primary judge, and the appeal, to be assessed on the standard basis, if not agreed.

6. The third respondents' costs of the proceedings be costs in the winding up.

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[1] *Uniform Civil Procedure Rules* 1999 (Qld), r 681; *Oshlack v Richmond River Council* (1998) 193 CLR 72, at [67]-[70]; *Alborn & Ors v Stephens & Ors* [2010] QCA 58.