SUPREME COURT OF QUEENSLAND

CITATION:	*Traivelog Pty Ltd & Anor v Electrometals Technologies Limited (Subject to a Deed of Company Arrangement) & Ors* [2015] QSC 27
PARTIES:	**TRAIVELOG PTY LTD trading as STAINLESS ENGINEERING SERVICES** ACN 076 603 686 (first applicant) **GEORGE FISCHER PTY LTD** ACN 001 686 399 (second applicant) **v** **ELECTROMETALS TECHNOLOGIES LIMITED (SUBJECT TO A DEED OF COMPANY ARRANGEMENT)** ACN 000 751 093 (first respondent) **MATHEW JOINER as deed administrator** (second respondent) **ANDREW FIELDING as deed administrator** (third respondent)
FILE NO/S:	SC No 7415 of 2014
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 February 2015
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2014
JUDGE:	Philip McMurdo J
ORDER:	**The originating application filed on 11 August 2014 is dismissed.**
CATCHWORDS:	CORPORATIONS — VOLUNTARY ADMINISTRATION — DEEDS OF COMPANY ARRANGEMENT — TERMINATION OR AVOIDANCE — where company was placed under administration — where pursuant to a resolution of creditors it executed a Deed of Company Arrangement ('DOCA') — where the applicants were unsecured creditors and sought orders under s 447A of the *Corporations Act* 2001 (Cth) setting aside the creditors' resolution to adopt the DOCA, setting aside the DOCA *ab initio*, an order that the

company be wound up and an order that the liquidator trace a certain payment — whether grounds made out under s 445D(1) — where the applicants claimed the deed of company arrangement was oppressive or unfairly prejudicial to or unfairly discriminatory — where the applicants' delayed in making an application — where the company continued to trade and those who became creditors, contractors or investors would be likely to be prejudiced from the orders sought

CORPORATIONS — WINDING UP — statutory interpretation — Part 5.3A — discretion to make orders — operation of Part — relationship with regulations — whether the court has power under Part to make order in respect of regulations where company was placed under administration

Corporations Regulations 2001 (Cth), reg 5.3A.07
Corporations Act 2001 (Cth), s 445D, s 447A, s 513B

Australasian Memory Pty Ltd v Brien (2000) 200 CLR 270
Deputy Commissioner of Taxation v Wellnora Pty Ltd (2007) 163 FCR 232; 25 ACLA 1257
Emanuele v Australian Securities Commission (1995) 63 FCR 54
Khoury v Zambena Pty Ltd (1997) 23 ACSR 344, considered
Lam Soon Australia Pty Ltd v Molit (No 55) Pty Ltd (1996) 70 FCR 34, cited
Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd (1996) 19 ACSR 160
Q.B.I. Corporation Pty Ltd v Plantation Rise Pty Ltd [2010] QSC 102, considered
Re Octaviar Ltd (No 8) (2010) 237 FLR 315, followed
University of Sydney v Australian Phototonics Pty Ltd (subject to deed of company arrangement) [2005] NSWSC 412; (2005) 53 ACSR 579
Vero Insurance Ltd v Kassem [2011] NSWCA 381

COUNSEL: R D Green for the applicants
G Beacham for the first respondent
E J Goodwin for the second and third respondents

SOLICITORS: Holman Webb Lawyers for the applicants
Thomson Geer for the first respondent
McCullough Robertson for the second and third respondents

[1] This is an application by two creditors to set aside a Deed of Company Arrangement ("DOCA") which was executed by the first respondent ("the company"). The other respondents are the Deed Administrators.

[2] The company carries on a business of the provision of engineering design and manufacturing services for metal recovery in the mining industry. At all material times, it has been listed on the Australian Stock Exchange.

[3] By the beginning of 2014, the company was experiencing liquidity problems. Creditors, including the applicants, were pressing for payment. The first applicant was owed $167,595.83. The second applicant was owed $102,806.23.

[4] The company was placed under administration on 27 February 2014, only about two weeks after Mr Powell, a director of the company, had emailed all creditors to the effect that the company was then unable to pay them as a direct result of delayed payments from two of the company's debtors, but that "a resolution" was expected that month. But the receipts expected by Mr Powell did not eventuate and the directors decided that it should be placed under administration.

[5] In 2009, the company was engaged to supply of services to the National Iranian Copper Industry Company ("NICICO") for a copper mine located in Iran. Subsequently, the company negotiated a contract with an Iranian company called Canymes Engineering Company ("Canymes"), which was located in Tehran, under which the company would design, manufacture, supply and install certain plant for Canymes at NICICO's copper mine. The Canymes contract was made in August 2012. It became the company's largest source of income and was potentially very profitable. However by late 2013, there were delays in the payment of the company's invoices under the contract and by the date of the appointment of the administrators, a total of $1,126,980 was overdue for payment to it. At that time, this constituted nearly all of the debts owing to the company (apart from what was owing to it by a subsidiary of the company and which was considered to be uncollectable). Canymes had not paid invoices of August and September 2013, which totalled $183,780, another invoice of November 2013 for $353,700 and an invoice of 1 January 2014 for $589,500. The prospects of payments to creditors such as the applicants were dependent upon the receipt of payment for those invoices to which I will refer as the Iranian debt. Absent payment to the company of that debt, creditors such as the applicant were likely to receive nothing.

The DOCA

[6] A company called Waverton Holdings Limited ("Waverton") held approximately 81 per cent of the shares in the company. It was a party to the DOCA, under which it promised to contribute a sum, which when added to the balance of the company's cash at the time of the execution of the DOCA, would amount to $175,000. This $175,000 was to be the so-called "Deed Fund", from which some payments were to be made to the company's creditors, save for those creditors which were defined as "Non-Participating Creditors". That latter group was made up of some related entities of the company (who were owed, in total, about $201,000), employees of the company and the company's lawyers. According to the directors' Report to Affairs, there were priority employee entitlements of $415,022. But the administrators reported that they related to employees of subsidiaries of the company, which could not be claimed against the company itself. The administrators also reported that shortly prior to their appointment, the company had borrowed $60,000 from Waverton for the payment of outstanding wages of the company's own employees, for which it would enjoy a priority. In consideration for Waverton's contribution to the Deed Fund, the company agreed that it would, at Waverton's election, either issue further shares to Waverton or transfer to it the company's shares in its subsidiaries and any debts owing by them to the company.

[7] The effect of the DOCA, once it was performed, would be that participating creditors would be paid part of their debts from the Deed Fund, for which their debts would be

discharged and that the company would continue trading with the debts owing to non-participating creditors being unaffected. The administrators reported to the second meeting that it was expected that unsecured participating creditors, such as the applicants, would receive six cents in the dollar. They recommended the DOCA to creditors because, as they then advised, the only alternative was a liquidation under which there would be no payment to unsecured creditors.

The Iranian debt

[8] The administrators reported to the second meeting of creditors that this debt "remains outstanding and may be uncollectible". They explained that "[t]his debtor is based in Iran and the Company has been pursuing payment of part of the debt since November 2012".[1] They noted that the directors believed that the Iranian debt was "uncollectible". At one point in their report, the administrators described the debt as being "in doubt"[2] and in another part, the administrators wrote:[3]

> "As at 27 February 2014, the Company had book debts of $1,165,557. The directors believe that of this amount only $38,577 is collectible. We agree with the directors' assessment that the debt of $1,126,980 … is uncollectible due to the entity being in Iran and the age of the debt. We assign no likelihood to the collectability of the remaining debtors due to ageing."

[9] Subsequently however, the Iranian debt was paid in full. It was deposited on 9 June 2014 by the debtor to an account of the company in Dubai. Mr Powell's evidence is that he noticed its receipt on the following day. Coincidentally, this was the day on which creditors were to have received their dividend under the DOCA, according to a Notice of Intention to Declare a Dividend dated 9 April 2014. But that dividend has not been paid. The company announced to the ASX, on 11 June 2014, that the debt had been paid. A few days later the administrators were contacted by Ms Thirlwell asking for a further meeting of creditors to be convened. That request was declined but the administrators decided not to pay a dividend pending this challenge to the DOCA.

[10] As the parties agreed, the DOCA has not been terminated by its performance so that there remains a power to terminate it under s 445D of the *Corporations Act* 2001 (Cth).[4]

The applicants' case

[11] The applicants seek orders to the effect that:

(1) the resolution of creditors to adopt the DOCA be set aside;

(2) the DOCA be set aside *ab initio*;

(3) the company be wound up;

(4) the liquidator "trace" the "Abo Ali Payment", which means that the liquidator should be directed to seek the recovery for the benefit of the company and all of its creditors of the funds which the company received on payment of the Iranian debt.

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1 Administrators' Second Report to Creditors, page 12.
2 Administrators' Second Report to Creditors, page 18.
3 Administrators' Second Report to Creditors, page 30.
4 cf *Deputy Commissioner of Taxation v Wellnora Pty Ltd* (2007) 163 FCR 232; 25 ACLA 1257; *Q.B.I. Corporation Pty Ltd v Plantation Rise Pty Ltd* [2010] QSC 102 at [27].

[12] Those orders are sought by reference to s 447A(1) of the *Corporations Act*, which provides that the court may make such order as it thinks appropriate about how Part 5.3A is to operate in relation to a particular company. The applicants' submissions referred to s 600A but did not seek relief under that provision.[5] It was submitted that the court's power under s 447A is broad (citing *Australasian Memory Pty Ltd v Brien*)[6] and reliance was placed upon *Q.B.I. Corporation Pty Ltd v Plantation Rise Pty Ltd*[7] where orders were made under s 447A corresponding with the first three of the orders which are sought by the present applicants. In *QBI Corporation*, Margaret Wilson J had to consider whether there was power to set aside a resolution of creditors for a DOCA where the court did not have power to terminate it under s 445D because, in that case, the DOCA had been terminated by performance.[8]

[13] But as already noted, this DOCA has not been terminated and the court has power to do so under s 445D. Counsel for the applicants does not suggest that there is some potential benefit to his clients' case from a reliance upon s 447A, beyond whatever should be the outcome under s 445D. It is necessary then to address the grounds for termination of a deed under s 445D which are effectively suggested by the applicants' submissions.

[14] Section 445D(1) relevantly provides as follows:

> "(1) The Court may make an order terminating a deed of company arrangement if satisfied that:
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> (a) information about the company's business, property, affairs or financial circumstances that:
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> (i) was false or misleading; and
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> (ii) can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the deed;
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> was given to the administrator of the company or to such creditors; or
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> (b) such information was contained in a report or statement under subsection 439A(4) that accompanied a notice of the meeting at which the resolution was passed; or
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> …
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> (f) the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be:
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> (i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or
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> (ii) contrary to the interests of the creditors of the company as a whole; or

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5 Applicants' Written Submissions, para [32].
6 (2000) 200 CLR 270 at 279 per Gleeson CJ, McHugh, Gummow, Hayne & Callinan JJ.
7 [2010] QSC 102.
8 [2010] QSC 102 at [27].

(g) the deed should be terminated for some other reason."

Section 445D(1)(a), (b)

[15] Counsel for the applicants submits that the Iranian debt "ought not have been regarded as doubtful".[9] He argues that the Iranian debt "ought to have been considered … more likely to have been recovered than what [was] expressed in the [administrators'] report".[10] It should be noted that there is no suggestion that there was any deliberate misrepresentation on the part of the administrators.

[16] The statements which were made by the administrators in their report, as to the recoverability or otherwise of the Iranian debt, must have been material to creditors in deciding whether to vote in favour of the resolution. The administrators' opinions on that subject were largely the result of the information which the directors had provided to them. But the administrators reached their own opinion, no doubt based upon their experience in attempting to collect debts in circumstances where the debtor was in a jurisdiction in which an Australian judgment could not be enforced.

[17] If the information provided by the directors to the administrators was false or misleading in respect of the Iranian debt, then there is a ground under s 445D(1)(a). And because the directors' statement on the subject was repeated in the Administrators' Report, it would provide a ground under s 445D(1)(b) because that report was thereby misleading. Similarly, there would be a ground under s 445D(1)(b) if the information provided by the administrators, in the form of their own opinion about the Iranian debt, was misleading (although not deliberately so).

[18] Were the true prospects of collecting the Iranian debt different from those represented to creditors? Several facts and circumstances are relied upon by the applicants to suggest that they were. First, the applicants rely upon statements made on behalf of the company in the period leading up to the appointment of administrators, in which representatives of the company expressed optimism about the collection of the Iranian debt. I have mentioned already an email from Mr Powell. But there were other representations to a similar effect which were made in December 2013 and January 2014. In January 2014, a Mr Foster of the company emailed Mr Thirlwell (of the first applicant) saying that "[o]ver the Christmas break we have received confirmation from our major customer of processing a payment to us". On 10 January 2014, Mr Powell emailed Mr Thirlwell saying that "[o]ur client has informed us that they will receive their funds from the end user (a $6 billion corporation) next week. I have had this information corroborated independently, as they have missed the previous date".

[19] In or about January 2014, another representative of the company, Mr Neve, went to the place of business of the first applicant and spoke to Mr and Mrs Thirlwell. Mr Neve was the production manager of the company. According to Mr and Mrs Thirlwell, Mr Neve then said words to the effect that "the Iranian money had been paid to a broker and that the Canadian part of Electrometals had their lawyers currently dealing with it". Mr Neve disputes that he said anything of that kind. That contest cannot be easily resolved. Each of the witnesses was cross-examined but not at length. It is more likely that Mr and Mrs Thirlwell would have a recollection of this conversation, given the importance of the recovery of the debt to their business. But beyond that factor, there is

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[9] T 1-70.
[10] T 1-71.

nothing to indicate that one version is inherently more probable than the other. But it should be noted that the resolution of that question is not critical to the applicants' argument. The applicants did not submit that creditors were misled because the Iranian debt, in truth, had been paid. Importantly, when Mr Powell was cross-examined, it was not put to him that the Iranian debt had been paid to a broker or some other party prior to the appointment of the administrators or the second meeting of creditors. Had the debt been paid in or by January 2014, it would seem to follow that the directors had set about a fraudulent scheme of appointing administrators and proposing a DOCA upon a dishonest representation that a solvent company was insolvent. No case of that kind was put to Mr Powell or argued for the applicants. The argument that there was misleading information must be considered upon the premise that, in truth, there had been no payment to the company or anyone on its behalf of any part of the Iranian debt prior to the execution of the DOCA.

[20] On 12 February 2014, Mr Powell emailed creditors, including the applicants, saying that "we have now had further assurances from our client that our outstanding invoices will be paid by February 24th" and that "[w]e have additionally been advised that their client, the end user, has authorised the payments". The email added that "[t]hese payments are not in dispute and we still anticipate a resolution this month".

[21] Ms Edwards is the Creditor Controller for the second applicant. In December 2013, she was advised that "a large overseas payment was expected" and that there would be a payment to the second applicant. On 8 January 2014, Mr Powell telephoned her and said that he was "anticipating a large payment in excess of $1M [in that week]". Ms Edwards received further calls from Mr Powell in which he made assurances of payment to the second applicant on the basis of the expected receipt from this overseas customer.

[22] At the first meeting of creditors, which was held on 11 March 2014, Mr Powell said that he remained of the view that the company would "be able to see the main debtor contract through for the benefit of the company and the creditors"[11] (which was a reference to the Iranian debt and the contract from which it was owing). The change from this position to the advice which the directors gave the administrators ahead of the second meeting of creditors does not seem to have an explanation in the sense of some particular event which could have affected Mr Powell's expectations. In the cross-examination of Mr Powell, the subject of what he had said to the first meeting of creditors was not mentioned.[12]

[23] In summary, there were many representations to creditors during January, February and early March which were to the effect that a large payment would be received from overseas. Clearly, these were representations about the Iranian debt. It is submitted that they are difficult to reconcile with the pessimism subsequently expressed by the directors to the administrators. I am asked to infer that the expressed pessimism was not genuine or at least had no reasonable basis. These prior representations about the likely collection of the Iranian debt are clearly relevant in this respect. But they do not provide a strong basis for such an inference. There are other possibilities. One is that these more optimistic representations to creditors were themselves misrepresentations, a possibility which was not at all unlikely in circumstances where those representing the

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[11] Minutes of the first meeting of creditors.

[12] Although it was mentioned in the applicants' written submissions which were filed shortly before the hearing.

company may have been trying to avoid a liquidation of the company. A further possibility is that the directors became less confident about collecting the debt as time passed. And if the company had received information to the effect that the debt would be paid to it by a certain date, the emerging unreliability of that information might then have induced pessimism.

[24] One curious circumstance was that when the debt was paid, it was accompanied by a further payment by the same debtor. The further payment was of an invoice or invoices which had been issued prior to the payment. Mr Powell said that he believed that these invoices had been sent in January 2014.[13] He appeared to suggest that they had not been disclosed to the administrators because they were not then due for payment.[14] That evidence is of some concern, suggesting as it does that the administrators may not have been given a complete picture. However, those invoices were not in evidence and Mr Powell could well have been mistaken in saying that they had been issued in January. There appears to be no reason why the directors would have withheld them from the information which they provided to the administrators. It is more likely that the invoices were issued after the execution of the DOCA. If so, then some doubt is cast over Mr Powell's evidence insofar as he suggested that the Iranian debt was ultimately paid without any prior indication.

[25] A further factor to be considered, of course, is that the debt was repaid. Whilst again that is relevant in considering the likelihood of its payment as at the date of the resolution of the creditors, it is not a fact which itself proves that there was a misrepresentation about that likelihood.

[26] The second respondent was not able to attend the cross-examination due to illness. In the course of argument as to whether the hearing should be adjourned so that he could be cross-examined, I asked counsel for the applicants whether it was part of his case that misleading information or false information had been given to creditors and counsel responded that:

> "I wouldn't put it as high as misleading, but – well, it's misleading in the sense that it was considered doubtful, but, in fact, was paid, but in the sense that it is a view which was reliant upon the information provided by the company …"[15]

It was not then suggested that the applicants would argue that the administrators had no reasonable basis for the opinions which they expressed. Rather, the cross-examination of Mr Joinder seemed to be intended to provide further evidence, as Mr Joinder had already related in his affidavit, that he was substantially reliant upon information which had been provided by the directors. In any case, in the ultimate submissions for the applicants, there was no specific argument that the administrators had expressed their opinions without reasonable basis. And in the written submissions for the applicants, it was said that upon the basis of the representations by Mr Powell to the administrators about the prospects of recovering the Iranian debt, "it is unsurprising the administrators made the recommendations they did concerning the deed".[16]

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[13] T 1-55.
[14] T 1-55.
[15] T 1-6.
[16] Applicants' Written Submissions, para [28].

[27] It is not difficult to understand the suspicion of the applicants that the true position about the Iranian debt was not fully disclosed to them and other creditors. However, in so far as the applicants so contend, I am not persuaded that the creditors were provided with information which was false or misleading. The directors said that the debt might be "uncollectable". It is not demonstrated that they thought otherwise or that this was a prediction without any reasonable factual foundation. Much of the debt had been outstanding for more than six months, several deadlines for payment had apparently passed, the debt was entirely unsecured and the debtor was in a foreign jurisdiction in which an Australian judgment could not be enforced. The "collectability" of the debt was also affected by the fact that the company did not have the necessary funds to pursue the debtor, if possible, in Iran and nor would there have been any such funds for that purpose which were available to a liquidator.

[28] Therefore, there is no ground established under s 445D(1)(a) and (b).

Section 445D(1)(f)

[29] The principal argument for the applicants is that it would be oppressive or unfairly prejudicial to participating creditors for the DOCA to remain in effect. Non-participating creditors voted influentially in favour of the DOCA and have received payment in full. Participating creditors, some of whom opposed the DOCA (such as the applicants), will receive a very small proportion of their debts. Although the argument was made by reference to s 447A, it was effectively a submission for the existence of a ground for the termination of the deed under s 445D(1)(f). As already noted, it was not suggested by counsel for the applicants that this or any other argument was stronger if made upon s 447A rather than s 445D.

[30] The question of oppression or unfair prejudice or discrimination must be considered at the time when the court is asked to terminate the DOCA.[17] The respective outcomes for the participating and non-participating creditors must be considered. But other circumstances must be considered. The DOCA was more beneficial for the participating creditors than the only alternative which was a liquidation. The possibility that any recovery from the Iranian debt might become available to those creditors, under a different DOCA, had been rejected by Waverton. Absent the contribution by Waverton to the Deed Fund, it was likely that the unsecured creditors would receive nothing. The DOCA at least provided certainty of some receipt by the participating creditors. The extent to which the non-participating creditors would be paid was then uncertain. It was a possibility which depended upon not only the prospects of a payment of the Iranian debt, but also upon the company's future trading. The evidence here does not allow any assessment to be made about the company's prospects in that latter respect. The applicants have not demonstrated the magnitude of the risk which the non-participating creditors took in voting for the DOCA. That risk is not proved from the fact that, as it happened, the Iranian debt was paid.

[31] In *Khoury v Zambena Pty Ltd*,[18] Young J (as he then was) said that "the mere existence of the deed procedure usually means that some creditors will gain something and some

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[17] O'Donovan, "Company Receivers and Administrators" at [56.180] citing *University of Sydney v Australian Phototonics Pty Ltd (subject to deed of company arrangement)* [2005] NSWSC 412; (2005) 53 ACSR 579 and *Vero Insurance Ltd v Kassem* [2011] NSWCA 381 at [83] and [144].

[18] (1997) 23 ACSR 344.

creditors will lose something out of the rearrangement".[19] Young J there cited *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd*,[20] noting that the decision was reversed on appeal but without an impact on the presently relevant part of the judgment. In that appeal, the Full Court of the Federal Court (von Doussa, O'Loughlin and Lehane JJ) said that an administrator advising creditors upon a proposed deed of company arrangement should at least form a view as to the whether the deed would unfairly prejudice or discriminate against a creditor or group of creditors by giving consideration to what those creditors would, or would be likely, to receive on a winding up.[21] In the present case, no creditor will receive less than they would had the deed not been executed. In that event, the company would have been wound up last April, with no return to the applicants or other unsecured creditors. I infer that the Iranian debt was paid because the other party to the contract wanted the company to perform it. I could not infer that, more probably than not, there would have been a voluntary payment of the Iranian debt had the company been in liquidation. Nor is it established that the administrators could have recovered that debt, if appointed as liquidators from an unwilling debtor.

[32] The DOCA was therefore more beneficial to all creditors at that time than a liquidation. Participating creditors were assured of a dividend. Non-participating creditors had the chance of being paid some or all of their debts. As events have occurred, the non-participating creditors have done much better than participating creditors from the DOCA. But I am not persuaded that this made the DOCA unfairly prejudicial to or unfairly discriminatory against the participating creditors.

Discretionary considerations

[33] The establishment of a ground for termination under s 445D (or s 447A) does not compel the court to make an order for termination. There remains a discretion which is to be exercised having regard to the interests of the creditors as a whole and to the public interest: *Emanuele v Australian Securities Commission*.[22] Had I been persuaded that a ground was established, still I would have refused this application for the following reasons.

[34] The company continued to trade from the execution of the DOCA. It incurred new debts and paid new creditors. It entered into further contracts. In particular, it entered into a substantial contract on 10 June 2014 with a company called North American Hoganas Inc, worth more than US$700,000 of which it had been paid about one half by the time of this hearing. It continued (or resumed) the performance of the contract from which the Iranian debt arose. It remained a company listed on the ASX. Therefore it may be inferred that a liquidation of the company, as the applicants seek, with effect from the commencement of the administration in February 2014, would prejudice many interests of those who were not involved in the voting for the DOCA.

[35] The potential prejudice to creditors, contractors and investors might have been at least reduced, had the applicants made a prompt application to terminate the deed. They did not do so after the second meeting and the execution of the DOCA. They applied only

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19 (1997) 23 ACSR 344 at 353.
20 (1996) 19 ACSR 160 at 171.
21 *Lam Soon Australia Pty Ltd v Molit (No 55) Pty Ltd* (1996) 70 FCR 34 at 49.
22 (1995) 63 FCR 54 at 69.

on 11 August 2014, some four months after the execution of the DOCA and two months after learning of the repayment of the Iranian debt.

[36] Regulation 5.3A.07 of the *Corporations Regulations* provides that a company that has executed a DOCA is taken to have passed a special resolution that it would be wound up voluntarily if the court makes an order under s 445D terminating the DOCA. It is taken to have passed the special resolution at the time of the court's order.[23] That would engage s 513B(c), which prescribes when such a winding up is taken to have begun or commenced, because it 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". Therefore, the date of the 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 the date of the appointment of the administrators: 27 February 2014. An order can be made under s 447A which affects the way in which a regulation made under Part 5.3A is to operate.[24] But no such order was sought by the applicants. They wished to have the company wound up apparently with the effect of reg 5.3A.07.

[37] It should also be noted that the applicants do not suggest that there could and should be an order made under s 447A by which the termination of the DOCA would not cause a liquidation of the company.

[38] Whilst the DOCA stands, the company is solvent. Mr Powell's evidence is that the company does not have the ability to pay the participating creditors if their debts now have to be fully paid.

[39] The applicants do not attempt to prove the extent to which they would now receive more from the liquidation than under the DOCA.

[40] The court is therefore asked to terminate a deed without an estimate of the benefit to the participating creditors. And this is in circumstances where, as a result of the applicants' delay in making this application, it was heard more than five months after the execution of the DOCA, during which time the company continued to trade with the consequence that those who became creditors, contractors or investors in that period would be likely to be prejudiced from the orders which were sought.

Order

[41] The originating application filed on 11 August 2014 will be dismissed.

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[23] *Corporations Regulations* 2001 (Cth), reg 5.3A.07(2).
[24] *Re Octaviar Ltd (No 8)* (2010) 237 FLR 315.