SUPREME COURT OF QUEENSLAND No 9188 of 1997

CIVIL JURISDICTION

MOYNIHAN J

IN THE MATTER OF THE CORPORATIONS LAW

and

IN THE MATTER OF COALLEEN PTY LTD (ADMINISTRATORS APPOINTED) ACN 010942 402

BRISBANE

..DATE 05/02/99

JUDGMENT

HIS HONOUR: This is a judgment in the matter of Coalleen. For the reasons which I now publish, I set aside the resolution that the company enter into a Deed of Company-Arrangement.

IN THE SUPREME COURT OF QUEENSLAND No. 9188 of 1997

Brisbane

IN THE MATTER of the *Corporations Law of Queensland*

- and -

IN THE MATTER COALLEEN PTY LTD (ADMINISTRATORS APPOINTED) (ACN 010 942 408)

REASONS FOR JUDGMENT - MOYNIHAN J.

Judgment delivered 5 February 1999

CATCHWORDS:

CORPORATIONS LAW - Application to set aside resolution of creditors meeting to execute a deed of company arrangement - person presiding at creditors meeting exercised casting vote - whether creditors would suffer prejudice - whether administrator's valuation defective.

***Corporations Law* Part 5.3A, ss.477A, 600B.**

Counsel: S. Doyle S.C. for the applicant.
C. Coulsen for the respondent.
Solicitors: Corrs Chambers Westgarth for the applicant.
Whitman & Co for the respondent.
Hearing Dates: 20 & 22 October 1997.
IN THE SUPREME COURT OF QUEENSLAND No. 9188 of 1997

Brisbane

IN THE MATTER of the *Corporations Law of Queensland*

- and -

IN THE MATTER COALLEEN PTY LTD (ADMINISTRATORS APPOINTED) (ACN 010 942 408)

REASONS FOR JUDGMENT - MOYNIHAN J.

Judgment delivered 5 February 1999

1 This is an application by Raine & Home (Holdings) Pty Ltd to set aside a resolution passed at a meeting of creditors of Coalleen Pty Ltd (administrator appointed), I will refer to it as the company, that it execute a deed of company arrangement in accordance with Part 5.3 A of the *Corporations Law*. Attempts to dispose of the matter

consensually after the application was heard have failed and it is now necessary for this court to dispose of it.

2 In 1989 the applicant advanced $60,000.00 to the company for the acquisition of units in the Raine & Home Queensland Unit Trust. The trustee of that trust is Raine & Home (Qld) Pty Ltd and the trust's income is principally from franchise fees paid by real estate agents for the use of the Raine & Home name and associated advantages and commission from real estate sales.

3 On 30 July 1997 the applicant served a notice of statutory demand on the company and on 21 August 1997 administrators were appointed pursuant to Part 5.3 A of the *Corporations Law*. A meeting of creditors was held on 1 October 1997 to decide the company's future as required by Part 5.3A. A report by the administrators to the creditors recommended that the company execute a deed of company arrangement on the basis that this would provide a better return to creditors than a winding up. The applicant expressed dissatisfaction with the report on the basis that it did not satisfactorily deal with a preferential payment to directors, identified in an earlier preliminary report as being $18,000.00 and in the final report as $8,457.00 and because it was unduly pessimistic as to the prospects of the real estate market and the effect of that on the value of the units trust and on the company's income.

4 The position with respect to the money owed to creditors was as follows:—

Raine & Horne (Holdings) Pty Ltd (the applicant)	$90,903.31
White Hancock (Accountants)	200.00
Clarke and Kann (Solicitors)	1,500.00
The directors of the company	1.977.00
Total	**$ 94.580.31**

Those present at the meeting of 1 October were two employees of the administrators, one of whom chaired it and the applicant's solicitor. He held the applicant's proxy

and the administrator's employees held proxies from the balance of the creditors.

5 The precise sequence of events at the meeting is contentious but it is accepted that nothing turns on this for present purposes. The minutes show that it was moved that the company enter into a deed of company arrangement. On the voices there were three for and one (the applicant's) against; representing 96.3% of the company's indebtedness. A poll was in fact held but it may be that it had not been called for. The chairman used his casting vote in support of a motion that the company execute a deed of company arrangements. He stated he was taking particular account of the fact that the administrators had made an independent assessment of the value of the company's assets and the potential return to the creditors and that on a commercial assessment a deed was in the best interests of creditors. Those no doubt were relevant considerations.

6 The applicant relies on ss.600B and 477A of the *Corporations Law* to have the application set aside. Section 600B applies when the person presiding at a creditors meeting exercises a casting vote to pass a resolution under Part 5.3A. A party may apply to set aside or vary the resolution if that party voted against the resolution, including by proxy, as happened here. On an application the Court may set aside or vary the resolution and if it does, make further orders and give such directions as it thinks necessary with the consequence that the resolution then has effect as varied by the order. Section 447A empowers the Court on the application of a creditor to make such order as it thinks appropriate about how Part 5.3A (which deals with the administration of a company's affairs with a view to executing a deed of company arrangement) should operate. There is little guidance in the cases as to the operation of s.600B which is a wide but not untrammelled discretion. By way of contrast with s.660B, s.600A, which is founded on a different basis of intervention, requires proof of prejudice to found the Court's intervention.

7 In *Re Bartlett Researched Securities Pty Ltd (Administrator Appointed)*[1] a majority of creditors supported a scheme of arrangement propounded by an administrator while a creditor which held a very substantial majority of the debt opposed it. The administrator used his casting vote to support the deed being executed and the motion was carried. The scheme involved the company leading shareholder injecting an amount to be distributed in a way that lead to the major creditor receiving less than its proportionate share of the injected sum. The court set aside the resolution on the basis that it was not satisfied that a sufficient investigation of proposals had been undertaken.

8 In this case the applicant points to a number of considerations in support of the application. First that it is the major creditor and seeks the winding up of the company. The major creditor's position was taken into account in *Grant Resources Limited*[2], which involved a question of whether or not a provisional liquidator should be replaced. The applicant points out that the company's directors as creditors supported the motion. Although they will not participate in the distribution under the deed, they may well retain a preference which would be recoverable against them in a winding-up. The company will then carry on with debts of $9,4903.00 discharged for $25,000.00.

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1 (1994) 12 ACSR 707. *Bartlett was distinguished in Hamilton v. National Australia Bank* (1995-96) 19 ACSR 647 on a basis which affords the respondents no comfort. Section 445D(1)(f)(i) of the Code was considered with reference to whether the benefits to a creditor would be greater under a deedthanon a winding-up; see also *Sydney Land Corp v. Kalow Pty Ltd (No.2)* (1997) 16 ACLC 95; *Lam Soon Australia Pty Ltd v. Molit (No.55) Pty Ltd* (1996) 22 ACSR 169.

2 (1991) 1 Qd.R. 107 at 115

9 The remaining creditors total $1,700.00. On the projections made by the administrators they will receive:—

(i) on a winding up $323.00

(ii) under the deed $442.00

Those creditors will suffer no prejudice if the court sets aside the resolution as the applicant has offered to pay them the difference between what they would have received had it been implemented, and what they would have received on a winding-up.

10 There is evidence capable of supporting a conclusion that the trust units may be worth more than the 77 cents referred to in the administrator's report. The company paid more than that for the units. It seems there have been more recent purchases of units for $2.00 per unit or more and it appears that there have been sales in mid 1994 and December 1995 at $2.00, and a 1994 valuation for stamp duty purposes was $1.85. The accounts to 30 June 1996 of a company called Sandafield Pty Ltd show the units as worth over $2.00 per unit. There is an issue as to whether the administrators' valuation is based on an unduly depressed view of the market.

11 The applicant further submits that there are deficiencies or defects in the valuation. The matters complained of are:—

(i) an inappropriate methodology has been used;

(ii) prima facie erroneous views have been taken in the application of the Future Maintainable Profits approach of the valuation which are unexplained;

(iii) “high” and “low” valuations have been arrived at which vary enormously if the averages are taken over, say, 5 years instead of 3 and 7 years. It is said there is no logic in the valuation of 3 and 7 years;

(iv) the “low” valuation is below the liquidation basis valuation;

(v) the “notional realisation of assets” basis assumes, wrongly, that there can be no sale of the goodwill. This is said to be wrong given that it is Raine & Horne (Qld) Pty Ltd, and not the company which conducts the business;

(vi) an unrealistic view has been taken of risk in the Risk Index;

(vii) the valuer has ignored the history of actual sales and nowhere explained why this is so.

12 These matters are not as compelling as the applicant's submissions would have it. Some of these matters reflect different rather than incorrect approaches and others are matters of judgment. There is however a basis for concern in some respects.

13 The applicant submits the deed does not advance the objects of Part 5.3A in any real practical way as required by S.435A. This is not clear because the business is conducted by the trustee of the unit trust while the company merely holds units in that trust. There is no good reason why the applicant (who may well have dealt with the company on the basis of its assets) should not be able to have access to those assets. This is particularly so for the applicant which advanced the money to buy the majority of the units.

14 The combined effect of these considerations is, in my view, of sufficient weight to found the intervention of this court to set aside the resolution that the company enter into a deed of company arrangement.