IN THE SUPREME COURT OF QUEENSLAND No 2358 of 1999

Brisbane

Before Mr Justice WC Lee

[Re: Italo-Australian Centre]

IN THE MATTER of The Corporations Law

- and -

IN THE MATTER of Italo-Australian Centre (ACN 009 805 841) (subject to Deed of Company Arrangement)

REASONS FOR JUDGMENT - LEE J

Judgment delivered 22 March 1999

CATCHWORDS:

CORPORATIONS - company subject to deed of company arrangement - public examination of former directors - whether power of administrator under s.597 limited by the deed - whether deed circumscribes statutory powers - whether administrator limited to questions concerning matters which gives him an immediate right to sue on behalf of the company - whether questions may be asked about insolvent trading, preferences and possible offences - whether examinees entitled to advance notice of topics to be questioned - directions as to conduct of the examination.

Corporations Law **ss.596A, 596B, 596D, 596F, 597, 588FF, 588M(2), 588FE, 438D.**

Cases referred to:

Simionato and Farrugia v Macks and Macks (1996) 19 ACSR 34;

Re Brash Holdings Ltd (1995) 13 ACLC 285;

Flanders v Beatty & Anor (1995) 13 ACLC 529;

Mortimer v Brown (1970) 122 CLR 493;

Hamilton v Oades (1988-9) 166 CLR 486;

Counsel: S Couper QC for applicants
I Perkins for respondent/administrator
Solicitors: McGillivrays for applicants
Hopgood and Ganim for respondent/administrator
Hearing date: 18 March 1999
IN THE SUPREME COURT OF QUEENSLAND No 2358 of 1999

IN THE MATTER of The Corporations Law

- and -

IN THE MATTER of Italo-Australian Centre (ACN 009 805 841) (subject to Deed of Company Arrangement)

REASONS FOR JUDGMENT - LEE J

Judgment delivered 22 March 1999

1 An urgent decision is necessary on this late application because it bears upon the proposed conduct, pursuant to s.597 of the Corporations Law, of a public examination next Wednesday 24 March 1999 by the administrator appointed pursuant to a deed of company arrangement of the above company, Italo-Australian Centre. Why this application was brought in this file, rather than in file 9528/97, which is the whole court file relating to the administration of the company since 22 October 1997, escapes comprehension. That file included the order made 18 January 1999 requiring the three applicants (and others) to attend and be examined. Not only would it have saved a filing fee of $171.70 for the new originating summons, it would more importantly mean that the court has before it the whole file, so important in company matters as I have repeatedly stated over the years. It would also avoid a proliferation of court files.

2 The application, heard on 18 March 1999, is brought pursuant to s.596F(1)(a) of the Corporations Law by three former directors of the company for orders that the administrator, David Lewis Clout, limit the matters to be enquired into at the examination of the three applicants to those matters within the scope of cl. 9.2 of the deed of company arrangement, being those matters which give the company in its present form the immediate right to seek compensation.

3 An order is also sought (wrongly expressed to be pursuant to S.447E of the Corporations Law) that the administrator inform each of the applicants in writing not less than 48 hours prior to the date of the examination of each of them of the matters about which they are to be examined. It was said by Mr S. Couper QC who appeared for the applicants, that this was for the purpose of ensuring that the questions were within the scope of the administrator's powers. However, on my drawing attention to the fact that in any public examination, prior notice of the scope of the examination is rarely given for the simple reason that at times it may defeat or affect the purpose of the examination. This is well settled. See for example, *Simionato and Farrugia v Macks and Macks* (1996) 19 ACSR 34 per Lander J. at 62-63. Mr Couper did not then press for this order. In any event, at any examination, the examinees have the right to be represented by counsel or solicitor, so that their rights can be protected. See for example s.597(16).

4 A further order is sought declaring void, as contrary to s.596D(2), the requirement and the summons issued pursuant to S.596D that each applicant produce to the Registrar of the Magistrates Court certain documents before 10 March 1999. That subsection only compels an examinee to produce specified books at the examination, although Rule 79(2) of the Companies Rules provides that the court may order that books be delivered the day before. Reference was made to *Re Brash Holdings Ltd* (1995) 13 ACLC 285. The 10th of March 1999 was long past when the matter

came before me on 18 March 1999. As indicated, the examination is fixed for next Wednesday 24 March 1999. Mr Perkins of counsel, for the administrator, conceded that the summons was incorrect in this regard and asked that the books be produced by tomorrow, Tuesday 23 March 1999. This was not opposed by Mr Couper and both parties indicated that they would cooperate to have delivery of those books as soon as possible. As Mr Clout stated in his affidavit, the precise scope of his examination cannot be fully known until those books are examined by him.

5 This leaves the main issue viz the scope and effect of cl. 9.2 of the Deed of Company Arrangement which is Exhibit "JM2" to the affidavit of John Ian McGaw filed 12 March 1999. It provides as follows:—

> "Upon receipt into Hopgood and Ganim's Trust Account of the sum of $25,000.00 referred to in clause 9.1, the Administrator shall conduct an investigation into the Business and affairs of the Company to determine, inter alia, whether any person has breached any provision of the Law or other obligation or duty owed to the Company for which the Company may be entitled to seek compensation." (Emphasis added)

The words underlined were the crux of Mr Couper's submissions. In essence, he submitted that an administrator of a deed of company arrangement may only conduct a s.597 public examination for proper purposes and that it must be in the performance of the administrator's duty under the deed. In this regard he referred to the decision of the Appeal Division of the Supreme Court of Victoria in *Flanders v Beatty & Anor* (1995) 13 ACLC 529, and in particular to the judgment of Ormiston J. with whom Tadgell J. and Harper J. agreed at 539 column 1. That passage is as follows:—

> "However, as to the extent of the powers of administrators of deeds of company arrangement to seek examination of examinable officers there can be no doubt. They have not only been added to the limited list of persons who may seek examination but they have also been added in circumstances where they have a right to obtain

> the issue of a summons for examination almost as of course under S.596A, without the need to satisfy the tests laid down in s. 596B(1)(b), except in the circumstances and for the purposes there defined. Consequently the power given to such administrators is confined only by the need to show that they are acting in the performance of their duties under the deed and not for any extraneous purpose." (Emphasis added)

6 In short, Mr Couper submitted that it is clear from the passage just quoted that whatever may be the powers conferred on the administrator by various statutory provisions, the administrator's powers were limited to the performance of his obligations as strictly confined by the deed of company arrangement. He submitted that the words in cl 9.2 governed and limited the scope of the subject matters into which the administrator could lawfully enquire i.e. only matters in which the company itself in its present state, could seek compensation i.e. by action or other means. Thus, it was submitted, as the administrator had asserted a right to question the applicants not only as to any possible negligence or breach of duty as directors (see eg s.232), (which Mr Couper conceded was perfectly proper), but also as to any possible preferential payments or insolvent trading or offences in respect of which the company, in its present form, was not entitled to seek compensation, a direction should be given limiting the administrator's powers to matters in respect of which the company could now seek compensation. He pointed, for example, to S.588FF and s.588M(2) which conferred only on a company's liquidator the right to recover from the director, "as a debt due to the company, an amount equal to the amount of the loss or damage" which flows from insolvent trading. So also with preferences which it was said, were recovered only when the company was being wound up: see for example S.588FE.

7 It was also submitted that speculation should not be made that creditors may seek a termination of the deed pursuant to a meeting convened pursuant to S.445F (see also S.445E which also confers a power on the creditors to resolve that the company be wound up) or that the company

might be wound up pursuant to a court order: S.445D. Nor could it be speculated whether the administrator might subsequently form an opinion that it would be in the creditors' interest for the company to be wound up. It was also submitted that as the deed binds all creditors of the company: eg S.444D, as well as the company, its officers and members, and the deed's administrator: S.444G, this was a pointer to reinforce the submission advanced, i.e., the overriding force of the deed itself. Also, it was submitted that the liquidator himself had recommended in his various reports (i.e. at the dates thereof) that it was not in the best interests of the creditors that the company be wound up but that it should continue to operate, so that it was not envisaged that a winding up would occur so that a liquidator could sue for recovery where the administrator could not.

8 It was also submitted that the administrator pursuant to the deed does not have a duty to make a report regarding possible offences to the Australian Securities and Investments Commission so that this administrator was not entitled to ask questions about possible offences. In other words, it was submitted that the duty under S.438D was cast upon the administrator of a company under administration only. That administration ceased upon the execution of the deed of company arrangement: s.435C(2). Accordingly, it was submitted that a deed administrator has no duty under S.438D and so was not entitled to ask questions about possible offences. Various other sections were referred to.

9 Mr Perkins, for his part, submitted that pursuant to S.596A and the definition of “eligible applicant” in s.9, the deed administrator has an as of right ability to examine the applicants as “examinable officers” about all of the “examinable affairs” of the company. Those definitions, on their face, are very wide. It was not in dispute that the former directors are “examinable officers” within the meaning of s.9. It was submitted that “Examinable affairs” in s.9 should be widely interpreted.

These are defined as "(a) the promotion, formation, management, administration or winding up of the corporation", and "(b) any other affairs of the corporation (including anything that is included in the corporation's affairs because of s.53)". Section 53 substantially broadens the scope of the other matters of the corporation by reference to several other sections in the Corporations Law to which reference will be made later.

10 His basic submission was that it was misconceived to argue that "eligible persons" referred to in S.596A may be examined only as to matters in respect of which the company as presently constituted might conceivably have a cause of action. Rather, it was submitted that the power was constrained only by the need to show that the administrator is acting in the performance of his duty under the deed and not for any extraneous purpose. It was said that the use of the wide power is not even limited by reference to the benefit of the company or creditors or contributories. In this regard, he also drew attention to the decision of *Flanders v Beatty* per Ormiston J. but in particular to the passage commencing at the bottom of p.538 column 2 and over to p.539 column 1 which immediately preceded the quote relied upon from the judgment by Mr Couper QC as set out above. The passage referred to by Mr Perkins reads as follows:—

> "Nevertheless it is unnecessary to doubt the opinion expressed in *Worthley's Case* that under the unamended provisions of s.597 it was necessary to show that the proposed examination was for the benefit of the corporation, its contributories or its creditors. What is clear, however, is that the scope of the examination provisions was greatly expanded by the 1992 amendments. Though I would doubt that the former section was intended to be constrained by any need to ensure that an examination was for the company's benefit in the sense of keeping the company alive by paying out its creditors, it was part of a scheme derived from liquidators' examinations. Liquidators, it is accepted, owe certain duties to the company, whatever be the outcome of the winding up: cf. *CCA v Harvey (Liquidator of Timberlands Ltd (in liq) and Equitable Forestry Services Pty Ltd (in*

> *liq))* (1979) CLC 40-564 at 32, 318-32, 320 and 32, 322-32, 323; [1980] V.R. 669 at 691-692 and 695 and the cases there cited.
>
> Now the powers given under s.596A to 597B are clearly so wide and so easily exercised by 'eligible applicants' (cf. S.596A) that the purposes to be served by examinations ought not be limited by reference to the benefit of the company or its creditors or contributories. The objects to be served by the issue of an examination summons and the making of orders for examination should be discerned only by reference to the statutory provisions which invest those powers. If those powers are being used for oppressive purposes or to serve ends entirely outside the scope of the sections, such as to gather evidence for libel proceedings, then the Court will intervene to prevent the examination. As to the precise ambit of the power of the Commission to authorize applications under the new sections, it is unnecessary to express any further opinion." (Emphasis added)

11 Then follows the passage above relied upon by Mr Couper. Mr Perkins' submission was that the comment of Ormiston J. in the passage relied on by Mr Couper and underlined above, should be understood in the context of what His Honour said in the passages just referred to.

12 Mr Perkins also submitted that there were genuine reasons why the issue of insolvent trading was of relevance because it was a matter the administrator would wish to report to the Australian Securities and Investments Commission, because of a possible future liquidation upon termination of the administration, and because the creditors and members have a legitimate interest in knowing about governance issues, particularly as the entity is likely to continue trading.

13 It was further submitted that the wording of cl. 9.2 is sufficiently wide to incorporate investigations of actions for insolvent trading: S.588FC, and preference actions: S.588FE, in respect of which compensation is payable to the company: s.588FF(1)(a).

14 It was further submitted that those executing the deed of company arrangement or voting to enter into a deed did not have the power to limit the matters to which an administrator might examine pursuant to S.596A or S.596B and in that sense, the whole of cl. 9.2 is, in effect, surplusage. His submission, in short, was that the power to examine was a statutory one. He also relied upon what he submitted was the public interest element in corporate governance issues which he submitted was apparent from s.597(4) - examination to be held in public, and s.597(14A) - written record open for inspection, as well as s.597(12) and (12A) - examinee not excused from answering questions on the ground of self-incrimination. In short, he submitted that cl.9.2 of the deed did not limit a liquidator's statutory powers and the clause should not be read as limiting any matters into which the administrator could properly enquire to those in which the company, in its present form, could forthwith bring an action.

15 In reply, Mr Couper drew attention to ell. 9.3, 9.4, 9.5 of the deed which he submitted reinforced, and made abundantly clear, that the words "for which the company may be entitled to seek compensation" in cl. 9.2 meant matters in respect of which the administrator could commence an action on behalf of the company. Those clauses are as follows:—

"9.3 If, after taking all legal or other advice deemed necessary by him, the Administrator determines that a cause of action is available against any person, then he shall be at liberty to commence legal proceedings in the name of the Company to recover damages for and on behalf of the Company.

9.4 Any proceeds which are derived from such legal proceedings will be applied as follows:

(a) First, to the Administrator on account of his remuneration and costs, including legal and other costs incurred in relation to the provision of advice and the legal proceedings; and

(b) The balance proceeds (if any) will form part of the Fund.

9.5 If the net amount recovered from any such legal proceedings after deducting the legal costs and other costs is in excess of all Creditors' claims, then the surplus will be paid by the Administrator to the Club."

16 There is a superficial attraction in Mr Couper's submissions. However, before considering its merits, it is necessary to say something about the history of the club and the administrator's involvement.

17 The Italo-Australian Centre commenced in May 1970 in premises at Newmarket. Its purpose is to develop and provide a place for the Italian community of Brisbane to develop their cultural pursuits and to allow non-Italians to experience the Italian culture and way of life. It operates as a registered licensed club and has a full liquor licence. It also has poker machines and a large function centre. The club was incorporated on 27 February 1970 and is a company limited by guarantee.

18 On 4 October 1997, the administrator was appointed pursuant to a resolution of the board of directors which, by s.436A, required the directors to form the opinion that the company was insolvent. The material shows that the three applicants, along with some others, ceased to be directors on 9 September 1997. It does not appear whether they were otherwise "examinable officers" prior to their respective directorships. That definition includes "a director, secretary, or executive officer ... ". Alan Salpietro was a director from 26 March 1995 to 9 September 1997. Angelo Catalano was a director from 31 October 1994 to 9 September 1997 and Dimenico Cacciola was a director from 29 March 1993 to 9 September 1997. A substantially new board was appointed between 9 September 1997 and 14 September 1997.

19 The first meeting of creditors was held on 10 October 1997: s.436E. The Supreme Court on 22 October 1997 extended the convening period to 14 November 1997. At a meeting on 21 November 1997, convened under s.439A, the creditors considered a resolution that the company execute a deed of arrangement. The meeting was adjourned to 16 January 1998 when the creditors resolved pursuant to s.439C that a deed of company arrangement be entered into, rather than any of the other two options referred to in that section i.e. that the administration end or that the company be wound up. The deed is exhibit "JM2" referred to above. It was entered into on 6 February 1998 after doubtless careful consideration by the directors and creditors of two detailed reports by the administrator, the first on 14 November 1997 (exhibit "JM4") and the second on 9 January 1998 ("JM5").

20 In his report of 14 November 1997, Mr Clout correctly set out at length the objectives of the legislation and his appointment. He referred in detail to the history of the club and, in particular, his extensive examination of its financial affairs. Investigation revealed that the company had lost $500,000 in the 2½ year period prior to his appointment during which the three applicants (and others) were directors. After an operating profit for the year ended 31 December 1993, a substantially reduced profit was recorded to the year ended 31 December 1994, with significant losses occurring in each year thereafter with losses progressively becoming worse. For the period of eight months to 31 August 1997 alone, a loss of $212,000 was reported. Mr Clout formed the opinion that the financial position was continually worsening from some time during the year ended 31 December 1994 up to the time of his appointment. Having considered all the financial affairs available to him up to that time, he expressed the following opinion:—

> "Given that the proposed Deed of Company Arrangement would maximise the return to creditors on a pessimistic basis as opposed to the return to creditors if the Company is wound up or handing the Company back to the

> control of the Directors, it is my opinion that it would be in creditors' interests for the Company to execute a Deed of Company Arrangement. It is not in the creditors' best interests to wind up the Company or bring the administration to an end."

21 In paragraph 6.3 of the report Mr Clout referred in detail to investigation into various matters including insolvent trading, voidable transactions, and various other recovery actions based upon possible breach of director's duties to the club. Mr Clout continued:—

> "It is proposed that under the Deed, the Deed Administrator will have the power to conduct public examinations of various parties to assist with an investigation of this nature. It is also proposed under the Deed that the Deed Administrator would have the power to continue and prosecute any potential action that may be available to the Company for breach of duty or negligence by any party which resulted in the Company suffering a loss. Such a right of action would also be available to a Liquidator. Accordingly, any such recovery action would be available in liquidation and the proposed Deed of Company Arrangement. The possible recovery actions have no bearing on whether creditors should accept the proposed Deed of Company Arrangement or wind up the Company." (Emphasis added)
>
> Considerable more investigation would need to take place in respect of any potential actions."

22 After discussing alternatives available to creditors, he expressed the opinion (based upon his examination of the affairs to that time only) that the anticipated return to unsecured creditors would be approximately 37.58 cents in the dollar and, as indicated, that it was in the best interests of the creditors that the deed be executed as it would provide a better return to creditors than if the company was placed into liquidation. He also said that it would allow the company to continue operating and a number of creditors would benefit from continued trading with the company. He also stated in his report that if the company is wound up, further investigation would need to be undertaken in the aspect of

insolvent trading and other insolvent transactions. He expressed the tentative view that the former directors may have incurred debts at a time when the company was insolvent and stated that a liquidator may have a claim against the former directors personally for debts incurred by the company after it became insolvent. He also stated that he was required to report to the Australian Securities Commission where he had become aware of offences that may have been committed by a past or present officer of the company.

23 By his second report dated 9 January 1998 (exhibit "JM5"), Mr Clout repeated at p.2 the opinion he expressed in the earlier reports, and again set out details of his investigation for the consideration of the directors and the creditors. There was a reference to a secured creditor, Westpac Banking Corporation, which was expected to inject further funds into the deed of company arrangement to allow a return to unsecured creditors.

24 Mr Clout prepared a further report dated 18 February 1998 (exhibit "JM7") in which he again analysed the matter in some detail including details of his remuneration. A meeting was convened for Thursday 26 February 1998. At that meeting, the creditors resolved that the deed of company arrangement dated 6 February 1998 be varied in accordance with the minutes of the meeting dated 26 February 1998 (exhibit "JM3") to Mr McGaw's affidavit. The variations gave some matters of definition, matters concerning administrator's remuneration and an extension to his powers. Those variations do not affect the construction of cl. 9.2.

25 It is clear that the directors and creditors of the company very carefully considered the scope and effect of the deed of company arrangement and the various options open to them. They did not purport to bind their hands as to any future options which might be available to them on further investigation. As the reports of Mr Clout indicate, he was of the view that the scope of his examination would

extend to cover the various areas which have been placed in issue by the applicants. He recognised in his reports that recovery action in respect of insolvent trading, for example, could be brought only by a liquidator if the company was wound up. As indicated above, he also made it clear that the precise scope of his examination will be dependent, to some extent, on the books he has not yet seen and which the applicants are to produce tomorrow, Tuesday 23 March 1999.

26 In his affidavit filed 17 March 1999 he stated that he would be severely hampered in his investigation if he was not allowed to ask questions in relation to insolvent trading and preferential payments and investigations into whether or not any provisions of the Corporations Law, or any obligation or duty owed to the company, were breached. He expressed the view that he was required to report to the Australian Securities Investments Commission where he had become aware of any offences and that it was always open to himself or some of the creditors to convene a further meeting whereby they might resolve to place the company into liquidation. He again recognised that it was necessary that the company be in liquidation before any actions could be commenced based upon insolvent trading and recovery of preferential payments, but he also recognised that if the company was not placed into liquidation, action could be commenced in relation to, inter alia, breaches of duty to the company. The question for determination is whether or not his opinion, and the submissions by Mr Perkins on his behalf, ought to be accepted.

27 The only authority directed to my attention is that of *Flanders v Beatty* in which Ormiston J. examined in great detail the history of the scope of public examinations and, in particular, the object and scope of examinations conducted by administrators pursuant to a deed of company arrangement. At 536 column 1, His Honour did not accept that the powers given under ss.596A to 597B should be circumscribed by the requirement to show that the examination would be for "the benefit of the company as a

whole”. In any event, it is not in dispute in the current matter before me, that the scope and purpose of the examination to be conducted was for the benefit, at least, of the creditors, if not also for the benefit of the corporation and its contributories. In the passages cited above, His Honour clearly stated that the scope of the examination provisions was greatly expanded by the 1992 amendments. At 539 column 1 after stating that the powers given under the relevant sections were clearly so wide and so easily exercised by “eligible applicants”, His Honour said that the purposes to be served by examination ought not to be limited by reference to the benefit of the company or its creditors or contributories. His Honour said that the objects to be served by the issue of an examination summons and the making of orders for examination should be discerned only by reference to the statutory provisions which invest those powers. Of some importance are His Honour's comments which follow, namely, that if the powers were being used for oppressive purposes to serve ends entirely outside the scope of the sections, “such as to gather evidence for libel proceedings”, then the court would intervene to prevent the examination. It may be noted that no such extraneous purpose was suggested in this case. The only matters asserted to be “extraneous” to the administrator's powers on the public examination were if questions were asked in respect of matters for which neither he nor the company could bring an action, as the company is presently constituted, pursuant to the deed of company arrangement.

28 Clause 9 of the deed is headed INVESTIGATION INTO AFFAIRS OF COMPANY. Clause 9.1 provides that the directors will, within 30 days, pay into the trust account of the administrator's solicitors the sum of $25,000. Clause 9.2 then provides that the administrator shall conduct an investigation into the business affairs of the company which, according to the broad scope of the statutory provisions referred to, is a very wide power indeed. However, the clause goes on to say “to determine, inter alia, whether any person has breached any provision of the

law or other obligation or duty owed to the company for which the company may be entitled to seek compensation.

29 On its own, the expression "for which the company may be entitled to seek compensation", does not limit or prescribe the time at which the company may be entitled to seek compensation. A company may be able to seek compensation whilst it is under administration if a case can be shown by the administrator, or the company may be able to seek compensation at a subsequent time, either if the deed is brought to an end or at the instance of a liquidator if the company is wound up either at the instance of the creditors or the administrator. Without more, nothing would appear from the terms of that clause on its own, to limit the administrator's powers on the public examination in the way contended for by the applicant. It is expressed in very wide terms.

30 Clause 9.3 then appears to empower the administrator if he so chooses, to commence legal proceedings in the name of the company to recover damages for and on behalf of the company. That clause appears to be facilitative and not mandatory. There is nothing to say that he must bring the action in his scope as administrator. Although, if he does, then cl. 9.4 provides that any proceeds derived from any such legal proceedings will be applied in a particular way. So also with cl. 9.5.

31 I am inclined to accept the submissions of Mr Perkins that the comment by Ormiston J. at p.539 column 1 relied upon by Mr Couper must be read in context with the whole passage that preceded it. The submission by Mr Perkins appears to be that his Honour's reference to an "extraneous purpose" was a purpose entirely outside the scope of the sections which conferred the power to conduct a public examination. A typical example of oppression was if a person was merely trying to gather evidence to bring a libel action. However, even if, in an appropriate case, a deed of company arrangement can curtail or circumscribe the extent of the very broad powers conferred by the statutory

provisions, I conclude that in this particular case, on a true construction of cl. 9 and the deed as a whole, the administrator's powers on the public examination are not limited in the way submitted for the applicants so as to exclude questioning about such matters as possible insolvent trading, preferences and the like. They are not "extraneous purposes" as the term is used by Ormiston J.

32 It is impossible in the short time available to examine all of the statutory powers and regulations bearing upon the administrator's powers. As both counsel have indicated, the Corporations Law is very difficult to follow. Sections 444(3) and (4) set out the matters which must be included in the deed. Of importance is s.444A(5) which provides that the deed is taken to include prescribed provisions contained in Reg.5.3A.06 as in schedule 8 to those regulations. Clause 2 of schedule 8 sets out the widest powers in the administrator, including the power in cl. 2(y) which authorises him to bring or defend applications to wind up the company. See also Reg. 5.3A.07 which prescribes the circumstances under which the administrator becomes the liquidator on a voluntary winding up. The deed itself, in cl. 17, sets out conditions under which the deed is terminated.

33 As already indicated, neither the creditors nor the administrator have purported to limit their options in the future. Indeed, had such limitations been attempted, they might well have been in contravention of statutory provisions. Also, it should be stated that whilst the liquidator was initially of the view that a winding up was not in the best interests of the creditors, and the creditors accepted that view in their resolution to enter into the deed of company arrangement, this was based upon information then available. If, as a result of questioning, it appears to all concerned that substantial amounts could be recovered by way of an action for insolvent trading, or preferences or otherwise, their express view might well change, particularly if there was some prospect of

recovering a dividend substantially greater than the estimated dividend of 37.58 cents.

34 As to the question of whether the administrator has any duty to make a report as to possible offences to the Australian Securities Commission pursuant to S.438D, that section refers to an administrator "of a company under administration". Mr Couper appears to be correct when he says that the "administration of a company" ends when a deed of company arrangement is executed by both the company and the deed's administrator: s.435C(1)(b), s.435C(2)(a).

35 I was not referred to any other provision of the Corporations Law analogous to s.43 8D which imposes a positive requirement on an administrator acting pursuant to a deed of company arrangement, to report to the Australian Securities and Investments Commission accordingly. There is a similar obligation imposed on a liquidator: s.533. It is odd, if it be the case, that there is no similar requirement expressly imposed on an administrator pursuant to a deed of company arrangement. However, if that is the case, then it appears that Mr Couper is correct in so far as there is no statutory obligation to make any such report. It may be noted, however, that cl. 9.2 purports to give the specific power to the administrator to "conduct an investigation into ... whether any person has breached any provision of the law...", but that phrase must be read in conjunction with the concluding phrase of cl. 9.2.

36 Whilst it is true that S.438D imposes an obligation only on an administrator of a company under administration (and not on an administrator acting pursuant to a deed of company arrangement), to report any offences or possible offences to the Australian Securities and Investment Commission, that section does not prevent an administrator acting pursuant to a deed of company arrangement for asking questions in relation to any possible offences. Also it may be noted that if the administrator pursuant to a deed of company arrangement is entitled to question a former officer about insolvent trading, that trading, if

established, comprises a contravention of S.588G: see 588G(2). Section 588G(3) provides for civil and criminal consequences of contravening s.588. See also Part 9.4 dealing with offences generally and Part 9B concerning civil and criminal consequences of contravening civil penalty provisions. Also s.1311 imposes a general penalty for an offence where a person does any act or thing that the person is forbidden to do by or under a provision of the Corporations Law.

37 A necessary incident of inquiry into insolvent trading may often be questions and evidence which might tend to incriminate persons. Indeed, Kitto J. in *Mortimer v Brown* (1970) 122 CLR 493 at 496, said that, in the particular case, the purpose of the relevant section was compelling, i.e. to enable the suggestion of fraud and concealment of a material fact to be fully investigated so that the section should not be read down to allow a danger of self-incrimination to be a ground of objecting to answer a question. His Honour continued that such questions might frequently involve consideration of evidence tending to incriminate individuals. His Honour's comments were cited with approval by Mason C.J. in *Hamilton v Oades* (1988-9) 166 CLR 486 at 496, where his Honour referred to two important public purposes of a public examination:

1. To gather information which will assist the liquidator in the winding up, i.e., to protect the interests of creditors, and

2. To enable evidence and information to be obtained to support the bringing of criminal charges (not by him but by relevant authorities).

38 His Honour said:

> "The examination is designed to elicit, amongst other things, evidence and information relating to the question whether the witness 'has been, or may have been, guilty of fraud, negligence, default, breach of trust, breach of duty or other misconduct in relation to' the corporation."

39 As a matter of policy, it is difficult to see why the broad object of a public examination conducted by a liquidator does not also apply in the case of an administrator properly acting pursuant to a deed of company arrangement.

40 In an appropriate case, s.592 might provide an example which would aid in the construction of the administrator's powers. That section deals with fraudulent conduct and incurring of debts when the company could not pay all of its debts. If established, it is an offence, but the company and any person who was a director of the company at the time the debt was incurred, are jointly and severally liable to pay the debt. Broadly speaking, the fact that the company might be jointly and severally liable means that if it were to pay the debt, it would have a right to contribution from the person or persons jointly and severally liable. Had the facts of this case fell within the scope of s.592 (which, of course, applies only to a debt incurred prior to the commencement of Part 5.7B on 23 June 1993), it could not be said that such questions in relation thereto were outside the scope of the administrator's powers.

41 In order to ask questions about the "examinable affairs" of the company, i.e. about the promotion, formation, management, or administration of the company or any other affairs of the company including those which are included by virtue of s.53, questions may at times be necessarily asked which establish an offence. Also s.53 expressly extends the meaning of "examinable affairs" to a company the subject of a deed of company arrangement. For the purposes of the definition of "examinable affairs" in s.9, (and various other sections referred to including s. 1307(1) in relation to falsification of records, subparagraph (d) of s.53 provides that the expression "examinable affairs" includes "any act or thing done by or on behalf of the body, or <u>to or in relation to the body</u> or its business or property, at a time when "(iia) a deed of company arrangement executed by the body has not yet

terminated" (emphasis added). Also it may be noted that s.597(12) provides that a person is not excused from answering a question put to the person at an examination on the ground that the answer might tend to incriminate the person or make the person liable to a penalty. This recognises that such questions may fairly arise.

42 The foregoing seems to make it clear that the obligation imposed only on the administrator of a company under administration pursuant to S.438D to report on possible offences to the Commission, does not in any way purport to prohibit the administrator of a company under a deed of company arrangement from asking questions of an examinee about possible offences, either directly in relation to an offence alone or in the course of leading to proof of other matters into which the administrator may properly enquire. Accordingly, the submission by the applicants that any such questions should not be asked is rejected.

43 In the result, I decline to direct the administrator to limit the scope of his examination in the way contended for by the applicant. The application is therefore dismissed.