SUPREME COURT OF QUEENSLAND

CITATION:	*Q.B.I. Corporation P/L v Plantation Rise P/L* [2010] QSC 102
PARTIES:	**Q.B.I. CORPORATION PTY LTD ACN 010 819 002** (plaintiff) **v** **PLANTATION RISE PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED) ACN 097 709 405** (defendant)
FILE NO/S:	BS12528/09
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	1 April 2010
DELIVERED AT:	Supreme Court at Brisbane
HEARING DATE:	26 March 2010
JUDGE:	Margaret Wilson J
ORDER:	**1. pursuant to s 447A of the *Corporations Act* 2001 (Cth), Part 5.3A of Chapter 5 of the Act operate in relation to Plantation Rise Pty Ltd ("the company") so that –** **a. the resolution of creditors on 19 October 2009 that the company execute a Deed of Company Arrangement be set aside;** **b. the Deed of Company Arrangement executed by the company on 23 October 2009 be set aside *ab initio*;** **c. the operation of sections 444H and 445H of the Act be modified such that they provide:** i. **444H The Deed of Company Arrangement releases the Company from a debt insofar as:** **(a) the Deed provides for the release; and** **(b) the creditor concerned is bound by the Deed; and** **(c) the Deed is not 'set aside' by order of a Court made at anytime.** **...** ii. **445H The termination, or setting aside of, or avoidance, in whole or in part, of the Deed of Company Arrangement for the**

company does not affect the previous operation of the Deed, except that any term of the deed providing for or related to the release, extinguishment, or discharge of the company for a debt or claim of a creditor, present or future, actual or contingent, due or which may have become due by the company as a result of anything done or omitted by or on behalf of the company before the day when the administration of the company began (or claim as defined in the Deed of Company Arrangement), is inoperative (from the time of execution of the Deed and at all times thereafter) and will not release, discharge or extinguish that debt or claim.

d. the company be wound up in insolvency;

e. John William Cunningham be appointed as liquidator of the company;

f. the liquidator have the powers specified in the *Corporations Act*;

2. the applicant's costs of and incidental to the application be costs in the winding up;

3. there be liberty to apply.

CATCHWORDS: CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – TERMINATION OR AVOIDANCE – where company was placed in administration – where pursuant to a resolution of creditors it executed a Deed of Company Arrangement ("DOCA") – where deed administrator subsequently gave ASIC notice that it had been wholly effectuated by its terms – where applicant was an unsecured creditor and seeks orders setting aside the creditors' resolution and the DOCA, a declaration that the claims of creditors as at the date of execution of the DOCA have not been extinguished, and an order that the company be wound up – where Court directed that ASIC be fully informed about application – where ASIC subsequently intervened to assist in relation to questions of law arising on the application – where motion to execute DOCA was passed on the voices – where voting was 4:1 in favour of the motion – where DOCA has been terminated by performance and applicant's claim released – where applicant is no longer a creditor of the company – whether applicant has standing to bring application – whether court has power to set aside the resolution of creditors – whether court has power to set aside *ab initio* the DOCA

Corporations Act 2001 (Cth), s 9, s 444H, s 445H, s 447A, s 600A

Corporations Regulations 2001 (Cth), reg 5.6.19, reg 5.6.21

Alcan (NT) Aluminia Pty Ltd v Commissioner of Territory Revenue (2009) 260 ALR 1, considered
Australasian Memory Pty Ltd v Brien (2000) 200 CLR 270, considered
DCT v Wellnora Pty Ltd (2007) 25 ACLA 1,257, considered
Grocon Constructions Pty Ltd v Kimberley Securities (admins apptd) (2009) 72 ACSR 305, considered
Hoath v Comcen Pty Ltd [2005] NSWSC 477, applied
Kantfield Pty Ltd v Plastamatic (Aust) Pty Ltd (1994) 14 ACSR 687, cited
M & G Oyster Supplies Pty Ltd v Nonchalont Pty Ltd (admin apptd) (1995) 19 ACSR 687, cited
Paradise Constructors Pty Ltd (admins aptd) v Sleiman [2004] VSC 92, referred to
Parkview Constructions Pty Ltd v Tayeh (2009) 71 ACSR 65, considered

COUNSEL: C D Coulsen for the applicant.
T P Sullivan SC for the Australian Securities and Investments Commission (Intervening).

SOLICITORS: Sajen Legal for the applicant.

[1] **MARGARET WILSON J:** Plantation Rise Pty Ltd ("the company") was placed in administration. Subsequently, pursuant to a resolution of creditors, it executed a Deed of Company Arrangement ("DOCA"). Four days after the execution of the DOCA, the deed administrator gave notice to the Australian Securities and Investment Commission ("ASIC") that it had been wholly effectuated by its terms.

[2] The applicant, an unsecured creditor, seeks orders setting aside the creditors' resolution and the DOCA, a declaration that the claims of creditors as at the date of execution of the DOCA have not been extinguished, and an order that the company be wound up.

The Facts

[3] The company carried on business as a property developer, in particular subdividing land at Woombye. The applicant provided it with project management consultancy services, and claims to be owed $340,000 for bonuses payable pursuant to its contract with the company, plus interest and costs.

[4] On 14 September 2009 Jonathan Paul McLeod was appointed as the administrator of the company.

[5] Three days later, the Bank of Western Australia Limited ("Bankwest"), which has a fixed and floating debenture over all of the company's assets and undertaking, appointed receivers and managers.

[6] Mr Theodore Anthony Poteri, the sole director of the company, gave the administrator information about its circumstances pursuant to s 438B(2) of the

Corporations Act as at 14 September 2009. He told the administrator that the company had assets totalling $19,101,851 and liabilities totalling $13,886,260.61 (secured creditors of $13,115,000 and unsecured creditors of $771,260.61). Thus, on the information he supplied, there was a surplus of assets over liabilities of more than $5,200,000.

[7] The administrator received proofs of debt from unsecured creditors as follows:-

Mr Poteri	$9,000.00
Ms Sandra Driscoll (wife of Mr Poteri)	$725,882.00
The applicant	$370,331.50
MTM Investments Pty Ltd	$35,762.65
APN Holdings (NZ) Ltd	$1,544.81
NR Barbi	$1,500.00
Micalizzi Accountants	$748.00
TISCA	$619.15
Martin Whips and Souvenirs Pty Ltd	$512.00
All Aussie Products	$126.00
TOTAL	**$1,146,026.11**

[8] He identified –

(a) preferential payments totalling $150,000;
(b) unreasonable director related transactions requiring investigation in the amount of $11,000;
(c) a possible insolvent trading claim; and
(d) suspected offences against ss 438B and 588G of the *Corporations Act* 2001.

[9] On 14 October 2009 the administrator received a DOCA proposal from a third party. The proposal was essentially that $20,000 be contributed to the administration payable by a third party in one lump sum upon the execution of the DOCA, and that Mr Poteri and Ms Driscoll stand aside for dividend purposes but nevertheless participate in voting.

[10] By s 444A(5) of the *Corporations Act* certain standard terms ("prescribed provisions") were taken to be included in a DOCA, subject to any provision to the contrary. Those prescribed provisions are contained in Schedule 8A to the *Corporations Regulations*: see reg 5.3A.06. They include –

> "**5. Discharge of debts**
> The creditors must accept their entitlements under this deed in full satisfaction and complete discharge of all debts or claims which they have or claim to have against the company as at the day when the administration began and each of them will, if called upon to do so, execute and deliver to the company such forms of release of any such claim as the administrator requires.
>
> **6. Claims extinguished**
> If the administrator has paid to the creditors their full entitlements under this deed, all debts or claims, present or future, actual or contingent, due or which may become due by the company as a result of anything done or omitted by or on behalf of the company

before the day when the administration began and each claim against the company as a result of anything done or omitted by or on behalf of the company before the day when the administration began is extinguished.

7. Bar to creditor claims

Subject to section 444D of the Act, this deed may be pleaded by the company against any creditor in bar of any action or claim that is admissible under this deed and a creditor (whether the creditor's debt or claim is or is not admitted or established under this deed) must not, before the termination of this deed … [and certain conduct is set out therein].

12. Termination of deed where arrangement achieves purpose

If the administrator has applied all of the proceeds of the realisation of the assets available for the payment of creditors or has paid to the creditors some of 100 cents in the dollar or any lesser sum determined by the creditors at a general meeting, the administrator must certify to that effect in writing and must within 28 days lodge with ASIC a notice of termination of this deed in the following form [and a form is set out therein]."

[11] The administrator recommended as follows:-

"3. ADMINISTRATOR'S RECOMMENDATION

As advised in my Second Report to Creditors, creditors must vote on one of three (3) motions relating to the company's future. Pursuant to Section 439A(4) of the *Corporations Act* 2001, I am required to provide a statement detailing my opinion on these options, in particular, whether it would be in the creditors' interest for:

1. The company to execute a Deed of Company Arrangement; or
2. The administration to end; or
3. The company to be wound up.

Creditors are advised that the *Corporations Act* 2001 requires an Administrator to form an opinion as to the future of the company. Due to the recent receipt of the Deed proposal I hereby provide an updated recommendation as to the future of the company as follows:-

1. **Execute a Deed of Company Arrangement**

In my opinion, it is not in the best interests of creditors to accept the proposal for a Deed, the company is insolvent and a proposal for a Deed has been received under which it is anticipated that creditors will received a lower return than that under liquidation if potential recoveries for voidable transactions and insolvent trading are litigated under liquidation.

2. **Administration to End**

In my opinion, it is **not** in the best interests of creditors for the administration to end, as the company is insolvent.

3. **The Company to be Wound Up**

In my opinion, it is the best interests of creditors for the company to be wound up as the company is insolvent and a proposal for a Deed has been received under which it is anticipated that creditors will receive a lower return than that under liquidation if potential recoveries for voidable transactions and insolvent trading are litigated under liquidation. "

[12] The creditors met on 19 October 2009 when they resolved that the company execute the DOCA. The motion was passed on the voices. Those voting in favour of it were Mr Poteri, Ms Driscoll, All Aussie Products and Martin Whips and Souvenirs Pty Ltd. The only creditor who voted against it was the applicant. It was resolved that the administrator's remuneration for the period from 14 September 2009 to 7 October 2009 be approved in the sum of $10,084.80 and from 8 October 2009 onwards to a maximum of $11,915.20. It was further resolved that the remuneration of the deed administrator be approved from the execution of the DOCA onwards to a maximum of $11,000.00. The deed provided that priority be given to the administrator's fees and disbursements.

[13] The applicant's position is summarised in the following passage from its solicitor Ms Markula's affidavit affirmed on 6 November 2009:-

"18.1 The passing of the resolution in favour of the deed was contrary to the interest of the creditors as a whole because the payment of $20,000 would result in the unsecured creditors of Plantation Rise receiving little or no dividend;

18.2 Further, the passing of the resolution in favour of the deed was effected by vote of a related creditor of Plantation Rise being Sandra Driscoll**,** the wife of the director of Plantation Rise. If Sandra Driscoll had not voted, the resolution would not have been passed as the applicant, as the second largest creditor of Plantation Rise, voted against the resolution;

18.3 The deed was oppressive, or unfairly prejudicial to, or unfairly discriminatory against the applicant because:

18.3.1 The applicant would receive little or no dividend its unsecured debt under the deed;

18.3.2 If Plantation Rise were wound up, on the evidence currently available, the applicant would recover a significant portion of its unsecured debt.

18.4 The deed was contrary to the interests of the creditors of the company as a whole because the deed funds ($20,000) would be applied to pay McLeod's fees, and there will be no surplus available for the unsecured creditors of Plantation Rise. In contrast, if Plantation Rise were wound up, it is likely that the unsecured creditors would receive a dividend on their unsecured debts."

The DOCA

[14] The DOCA was executed by the company and the administrator on 23 October 2009.

[15] It bound all creditors (cl 5.1). The property available to pay entitlements to admitted creditors was the Fund. By cl 5.4 and 7.3 –

> "**5.4 All Claims against the Company Released and Extinguished**
>
> (a) Subject to the terms of the Arrangement, all Claims, including the claims (if any) of the Related Parties, are released, discharged and extinguished when the Administrator has made all distributions to Admitted Creditors in accordance with clause 7.3.
>
> (b) Upon the satisfactory completion of the terms of the Arrangement, each creditor, including the Related Parties will, if called upon to do so, properly execute and deliver to the company such form of release of its claim as the Administrator may require.
>
> **7.3 Entitlement of Each Admitted Creditor**
>
> The administrator shall (in his absolute discretion as to timing) apply the Fund as follows:
>
> (a) **FIRSTLY**, in payment of the Administrator's Remuneration and the expenses, debts and liabilities incurred by the Administrator in the course of the Company's administration of this Arrangement that have not already been satisfied;
>
> (b) **SECONDLY**, in payment of any Creditor with a Claim which has a priority in accordance with the legislation as set out in the Act and the priorities conferred by the Act as if the company were taken to be in liquidation at the Appointment Date; and
>
> (c) **THIRDLY**, in payment by way of full and final dividend to all Admitted Creditors."

By clause 7.5 Mr Poteri and Ms Driscoll were excluded from any entitlement to distribution.

[16] Termination was dealt with in cl 15, which included –

> "**15.4 Early Termination of the Arrangement by Performance**
>
> If, during the Arrangement Period all payments to be made to Admitted Creditors pursuant to the Arrangement are made:

15.4.1 The Administrator may give notice in writing to the Admitted Creditors certifying that fact and stating that the Arrangement shall terminate on the giving of notice of the Australian Securities and Investment Commission ('ASIC'); and

15.4.2 Regardless of whether the Administrator gives the notice in writing to Admitted Creditors as set out in clause 15.4.1 the Administrator shall lodge with ASIC a notice of termination of the Arrangement in the form of that set out in Schedule 2 to the Arrangement and such notice is to be advertised in a newspaper or newspapers circulating generally in each capital State or Territory of Australia in which the company conducted business.

Upon execution and lodgement of the notice with the Australian Securities and Investment Commission the Arrangement is terminated.

…

15.7 Consequences of Termination

15.7.1 Upon termination, whether under this clause or any other provision of the Arrangement (unless otherwise expressly provided), the Arrangement is at an end as to its future operation, except for the enforcement of any right or claim which arises on, or has arisen before, termination; and ... "

[17] Clause 18.14 provided –

"**18.14 Surviving Clauses**
Clauses 4.3, 10, 15, 16, 17.1 and 18.7 will continue to apply despite the termination of this Agreement."

[18] During the term of the DOCA, the director Mr Poteri was responsible for the day to day management, operation and control of the company (cl 4.5).

[19] Apart from $51.22 held in a bank account and the $20,000 paid by the third party, no funds were apparently collected by the deed administrator. All of the fund established under the DOCA was applied to the administrator's remuneration. No dividend was paid to admitted creditors.

[20] On 27 October 2009 the administrator gave ASIC notice that the DOCA had been wholly effectuated by its terms under s 445C(c) of the *Corporations Act*.

Subsequent events

[21] In an affidavit sworn on 23 November 2009 Mr Poteri said that there are no assets available to pay unsecured creditors. He estimated that if the various parcels of land owned by the company were sold, about $1.625 million would be payable in GST and commission.

[22] The receivers and managers remain. As at about 17 November 2009 the company owed Bankwest approximately $11.5 million. The receivers and managers are slowly selling off the undeveloped and developed parcels of land, but the company still owes a significant amount of money to Bankwest. It also owes about $1.2 million to another secured creditor Wickham Securities Limited.

[23] On 2 February 2010 Mr Poteri became bankrupt.

ASIC's intervention in the proceeding

[24] The originating application came before Byrne SJA on 25 November 2009. His Honour directed that ASIC be fully informed about the application. It subsequently intervened to assist the Court in relation to the questions of law arising on the application. It did not seek any relief in its own right, and its counsel was punctilious in not levelling criticisms at the administrator.

[25] I adopt the shrewd assessment of what was done contained in its counsel's submissions –

> "10. In light of the above matters, in real terms the only persons who stood to benefit from entering into this Deed of Company Arrangement were the administrator who would receive some moneys as remuneration, and the directors and other persons who might be exposed to voidable transactions, who would be protected from any such actions which could be undertaken by a liquidator. Unsecured creditors, in practical terms, stood to gain **no return** as opposed to an unquantifiable possibility of a return in liquidation. ……..
>
> 11. The proposal has the appearance of a structure designed to allow the director of the company and any parties who may be susceptible to voidable transactions, to be protected.
>
> 12. It is ASIC's position that such a structure is contrary to the purpose and objects of the Part as explained above. It is a structure which is designed to operate to the detriment of creditors as a whole. There is, of course, not even a continuing business being apparently preserved. Here there are receivers and managers appointed to the full assets of the company and they have indicated an expectation of a shortfall in the amount of security held.
>
> 13. ASIC's concern is that a structure such as this could come to represent a model for abuse of the operation of Part 5.3A"

The Court's powers

[26] The DOCA has been terminated by performance pursuant to cl 15.4 and the applicant's claim has been released pursuant to cl 5.4. The applicant is no longer a creditor of the company.

[27] Because the DOCA has been terminated by performance, the Court does not have power to terminate it under s 445D: *DCT v Wellnora Pty Ltd* (2007) 25 ACLA 1,257. Does it nevertheless have power to set aside the resolution of creditors and set the DOCA aside?

[28] In the originating application the applicant sought relief pursuant to s 447A of the *Corporations Act*. At the hearing it relied also on s 600A.

[29] It is instructive to note where these provisions fit into the scheme of the legislation before considering questions of the standing of the applicant to invoke them and what orders the court has power to make.

[30] The scheme of the legislation is as follows –

CHAPTER 5 EXTERNAL ADMINISTRATION

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 13 Powers of Court

ss 447A – 447F

Part 5.9 Miscellaneous

Division 3 Provisions applying to various kinds of external administration

ss 600A – 600G.

Section 600A

[31] Section 600A provides –

> "**Powers of Court where outcome of voting at creditors' meeting determined by related entity**
>
> (1) Subsection (2) applies where, on the application of a creditor of a company or Part 5.1 body, the Court is satisfied:
>
> (a) that a proposed resolution has been voted on at:
>
> (i) in the case of a company – a meeting of creditors of the company held:
>
> (A) under Part 5.3A or a deed of company arrangement executed by the company; or
>
> (B) in connection with winding up the company; or
>
> (ii) in the case of a Part 5.1 body – a meeting of creditors, or of a class of creditors, of the body held under Part 5.1; and
>
> (b) that, if the vote or votes that a particular related creditor, or particular related creditors, of the company or body cast on the proposed resolution had been disregarded for the purposes of determining whether or not the proposed resolution was passed, the proposed resolution:
>
> (i) if it was in fact passed – would not have been passed; or

(ii) if in fact it was not passed – would have been passed; or the question would have had to be decided on a casting vote; and

(c) that the passing of the proposed resolution, or the failure to pass it, as the case requires:

(i) is contrary to the interests of the creditors as a whole or of that class of creditors as a whole, as the case may be; or

(ii) has prejudiced, or is reasonably likely to prejudice, the interests of the creditors who voted against the proposed resolution, or for it, as the case may be, to an extent that is unreasonable having regard to:

(A) the benefits resulting to the related creditor, or to some or all of the related creditors, from the resolution, or from the failure to pass the proposed resolution, as the case may be; and

(B) the nature of the relationship between the related creditor and the company or body, or of the respective relationships between the related creditors and the company or body; and

(C) any other relevant matter.

(2) The Court may make one or more of the following:

(a) if the proposed resolution was passed – an order setting aside the resolution;

(b) an order that the proposed resolution be considered and voted on at a meeting of the creditors of the company or body, or of that class of creditors, as the case may be, convened and held as specified in the order;

(c) an order directing that the related creditor is not, or such of the related creditors as the order specifies are not, entitled to vote on:

(i) the proposed resolution; or

(ii) a resolution to amend or vary the proposed resolution;

(d) such other orders as the Court thinks necessary.

(3) In this section:

'related creditor', in relation to a company or Part 5.1 body, in relation to a vote, means a person who, when the vote was cast, was a related entity, and a creditor, of the company or body."

[32] In *Grocon Constructors Pty Ltd v Kimberley Securities Ltd (admins apptd)* (2009) 72 ACSR 305 Barrett J relied on s 600A to set aside a resolution of creditors, terminate a DOCA and wind up the company. Unlike the present case, the DOCA had not already been effectuated.

[33] The Court's powers under s 600A are exercisable on application of a creditor. What does "creditor" mean in s 600A(1)? In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 260 ALR 1 Hayne, Heydon, Crennan and Kiefel JJ said at [47] –

> "This court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself.[1] Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text.[2] The language which has actually been employed in the text of legislation is the surest guide to legislative intention.[3] The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision,[4] in particular the mischief[5] it is seeking to remedy."

[34] The purpose of s 600A is to allow creditors who were outvoted by related creditors to apply to set aside a resolution that has the undesirable features described in subsection (1)(c). The resolution resulted in the company executing the DOCA which was prejudicial to the interests of creditors generally. The purpose of the section is best met by an interpretation of "creditor" which at least includes a person who was a creditor at the time the resolution was passed.

[35] In *Hoath v Comcen Pty Ltd* [2005] NSWSC 477 the applicant was not a creditor at the time the relevant resolution was passed. He initiated an application under s 600A to set aside the resolution and terminate the DOCA (apparently under the misapprehension that the company owed a debt to him). He subsequently took an assignment of the debt. Barrett J struck out the statement of claim. His Honour relied in part on the fact that the applicant did not have the status of creditor when he initiated the proceeding, and so did not satisfy r 2.2(1) of the *Supreme Court (Corporations) Rules* 1999 (NSW). But, significantly for present purposes, he said at [18] –

> "In the case of s.600A and its focus on the interests of creditors, it is in my view plain that the section is concerned with persons who were creditors when the resolution was passed. The section is concerned with circumstances pertaining at and in relation to the meeting and the passing of the resolution and thus has in contemplation the creditor constituency as it existed at that time."

---

1 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72; 181 ALR 307; [2001] HCA 49 at [9] per Gaudron, Gummow, Hayne and Callinan JJ, [46] per Kirby J; *Stevens v Kabushiki Sony Computer Entertainment* (2005) 224 CLR 193; 221 ALF 448; 65 IPR 513; [2005] HCA 58 at [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ, [167]-[168] per Kirby J; *Carr v Western Australia* (2007) 232 CLR 138 at [6]; 239 ALR 415; [2007] HCA 47 (*Carr*) per Gleeson CJ; *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562; 240 ALR 204; [2007] HCA 52 at [85] per Kirby and Crennan JJ; *Northern Territory v Collins* (2008) 235 CLR 619; 249 ALR 621; 78 IPR 225; [2008] HCA 49 at [99] per Crennan J.

2 *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529; 225 ALR 643; 45 MVR 133; [2006] HCA 11 at [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ, [82]-[84] per Kirby J. Se also *Combet v Commonwealth* (2005) 224 CLR 494; 221 ALR 621; [2005] HCA 61 at [135] per Gummow, Hayne, Callinan and Heydon JJ; *Northern Territory v Collins* (2008) 235 CLR 619; 249 ALR 612; 78 IPR 225; [2008] HCA 29 at [99] per Crennan J.

3 *Hilder v Dexter* [1902] AC 474 at 477-478 per Earl of Halsbury LC.

4 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397; [1955] ALR 645 at 648-9; [1955] HCA 27 per Dixon CJ, quoted with approval in *Project Blue Sky* at [69] per McHugh, Gummow, Kirby and Hayne JJ.

5 *Re Heydon's Case* (1548) 3 Co Rep 7a at 7b; 76 ER 637 at 638.

[36] I respectfully adopt what His Honour said. In this case the applicant was a creditor when the resolution was passed. That is enough to give him standing to bring an application under s 600A.

[37] Mr Poteri and Ms Driscoll were within the definition of "related entities" in s 9, and creditors of the company, to the extent of $9,000 and $725,882 respectively. Thus, they were "related creditors" within s 600A(3).

[38] The resolution that the company execute the DOCA was passed 4 – 1 on the voices. None of the creditors demanded a poll.

[39] Had the votes of Mr Poteri and Ms Driscoll been disregarded, the resolution would still have been passed 2- 1 on the voices. Counsel for the applicant submitted that absent the votes of Mr Poteri and Ms Driscoll, there would have been utility in his client demanding a poll. Had there been a poll, there would have been a majority in number in favour of the resolution, but not a majority in value, and the administrator, as chairman of the meeting, would have been called upon to exercise a casting vote: *Corporations Regulations* reg 5.6.21. It followed, in his submission, that s 600A(1)(b) has been satisfied.

[40] I am not persuaded that the subsection has been satisfied. In my view, attention must be focussed on the way the meeting was actually conducted. See *Kantfield Pty Ltd v Plastamatic (Aust) Pty Ltd* (1994) 14 ACSR 687; cf *M & G Oyster Supplies Pty Ltd v Nonchalont Pty Ltd (admin apptd)* (1995) 19 ACSR 27. No-one demanded a poll "before or on the declaration of the result of the voices", which was the time at which the applicant might have done so under reg 5.6.19(1).

[41] If I am wrong about that and subsection (1)(b) has been satisfied, then I would have no difficulty in finding that subsection (c) had been satisfied, and that orders should be made under subsection (3) setting aside the resolution and setting aside the DOCA, and that the company be wound up.

Section 447A

[42] Section 447A provides –

> "**447A(1) [General powers of Court]** The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.
>
> **447A(2) [Example of Court order]** For example, if the Court is satisfied that the administration of a company should end:
> (a) because the company is solvent; or
> (b) because provisions of this Part are being abused; or
> (c) for some other reason;
> the Court may order under subsection (1) that the administration is to end.
>
> **447A(3) [Order subject to conditions]** An order may be made subject to conditions.

> **447A(4) [Who may apply for order]** An order may be made on the application of:
> (a) the company; or
> (b) a creditor of the company; or
> (c) in the case of a company under administration – the administrator of the company; or
> (d) in the case of a company that has executed a deed of company arrangement – the deed's administrator; or
> (e) ASIC; or
> (f) any other interested person."

[43] As the persons who may bring an application under this section include not only a creditor of the company but also "any other interested person", the applicant clearly has the necessary standing.

[44] The Court's powers under s 447A are wide. In *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 the High Court said at 279 –

> "It is important to notice that the orders that may be made under s 447A(1) are described as orders about how Pt 5.3A is to operate 'in relation to a particular company'. The power is not cast in terms of a power to make orders to cure defects or to remedy the consequences of some departure from the scheme set out in the other provisions of Pt 5.3A. Its operation is not confined to such cases. Nor is there anything on the face of s 447A(1) that suggests that it should be read down. In particular, the words of the provision are wide enough to confer power to make orders which will have effect in the future but which are occasioned by something that has been done (or not done) under the other provisions of Pt 5.3A before application is made under s 447A(1). As was said in the judgment of the Court of *Owners of 'Shin Kobe Maru' v Empire Shipping Inc*:[6]
>
> 'It is quite important to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.'
>
> Cogent reasons must be advanced, then, if the power given by the general words of s 447A(1) is to be read down."

[45] The applicant relied on s 447A as a source of power to set aside the resolution, set aside the DOCA and wind up the company.

[46] If the DOCA had not been effectuated, then I think that the Court would clearly have had power to make the orders sought. In *DCT v Wellnora Pty Ltd* Lindgren J relied on s 600B to set aside a resolution and to set aside a DOCA which had been terminated by performance. His Honour identified s 447A as an alternative source

---

[6] (1994) 181 CLR 4040 at 421. See also *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284, per Wilson J; at 290, per Gaudron J; *PMT Partners Pty Ltd((In Liq) v Australian National Parks and Wildlife Services* (1995) 184 CLR 301 at 313, per Brennan CJ, Gaudron and McHugh JJ; *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 275-276, pr Gummow J; *Oshlack v Richmond River Council* (1993) 193 CLR 72 at 81, per Gaudron and Gummow JJ.

of power to set aside a DOCA which had been terminated by performance. I respectfully adopt His Honour's dictum. And in *Paradise Constructors Pty Ltd (admins aptd) v Sleiman* [2004] VSC 92 Mandie J held that the Court has power under s 447A to make a winding up order.

[47] The applicant seeks an order setting aside the DOCA *ab initio*.

[48] In *Parkview Constructions Pty Ltd v Tayeh* (2009) 71 ACSR 65 Barrett J considered whether s 447A could or should be used to make an order terminating a DOCA *ab initio.* In *Brien* at 283 the High Court had identified two kinds of case in which rights might have accrued between the end of an administration and the making of an order under s 447A. Barrett J said –

> "In *Australian Memory Pty Ltd v Brien* (2000) 200 CLR 270; 172 ALR 28; 34 ASCR 250; [2000] HCA 30, the High Court emphasised both the breadth and the limitations of s 447A. At [30]-[32] of their joint judgment, Gleeson CJ, McHugh J, Gummow J, Hayne J and Callinan J discussed the possible effects of an order under s 447A varying the operation of Pt 5.3A in a way that would, in effect, reinstate a terminated voluntary administration. Their Honours referred to two different kinds of cases. The case relevant for present purposes is that where, following actual termination of the administration (which did not entail either winding up or a deed of company arrangement), shares in the company were traded and the directors resumed management of the company and dealt with assets. The distinct possibility that, in such a case, reinstatement of the administration might be beyond the power given by s 447A (or, at least, face 'an insuperable discretionary obstacle;) was recognised at [32]. The possibility was seen to arise because reinstatement 'may well be inconsistent with the rights which were created in the intervening period'."

[49] The High Court had left open the question whether in such a situation there was an absence of power under s 447A or alternatively an insuperable discretionary consideration against making an order under that section.

[50] In this case, receivers and managers were appointed to the assets and undertaking of the company before the resolution was passed. It is unlikely that the director incurred any obligation on behalf of the company after they were appointed. The director is now bankrupt. It is most unlikely that rights have accrued since the DOCA was effectuated.

[51] By cl 5.4 of the DOCA the creditors' claims against the company were released.

[52] Sections 444H and 445H provide –

> "**SECTION 444H EXTENT OF RELEASE OF COMPANY'S DEBTS**
> A deed of company arrangement releases the company from a debt only in so far as:
> (a) the deed provides for the release; and

(b) the creditor concerned is bound by the deed.

…

445H EFFECT OF TERMINATION OR AVOIDANCE
The termination or avoidance, in whole or in part, of a deed of company arrangement does not affect the previous operation of the deed."

[53] The inter-relationship between these two sections is not clear. There is a risk that by force of s 445H the release of the creditor's claim pursuant to cl 5.4 is not affected by the DOCA's being set aside. Cf the observation of Barrett J in *Wellnora* at [41].

[54] This risk can be overcome by further orders under s 447A modifying the operation of ss 444H and 445H as follows –

"444H **The** Deed of Company Arrangement releases the Company from a debt only insofar as:
(a) the Deed provides for the release; and
(b) the creditor concerned is bound by the Deed; and
(c) the Deed is not 'set aside' by order of a Court made at anytime.
...

445H The termination, **or setting aside of,** or avoidance, in whole or in part, of **the** Deed of Company Arrangement **for the company** does not affect the previous operation of the Deed, **except that any term of the deed providing for or related to the release, extinguishment, or discharge of the company for a debt or claim of a creditor, present or future, actual or contingent, due or which may have become due by the company as a result of anything done or omitted by or on behalf of the company before the day when the administration of the company began (or claim as defined in the Deed of Company Arrangement), is inoperative (from the time of execution of the Deed and at all times thereafter) and will not release, discharge or extinguish that debt or claim.**"

Conclusion

[55] There should be orders setting aside the resolution of creditors passed on 19 October 2009, setting aside *ab initio* the DOCA executed by the company on 23 October 2009, modifying the operation of ss 444H and 445H as above, and for the winding up of the company in insolvency.

[56] At my request, counsel made submissions on the date of commencement of the winding up and the relation back period. Those questions are somewhat complex, and are best left for consideration after full argument by all persons whose interests may be affected by their determination. I record my gratitude to counsel for addressing them at my request.