

FEDERAL COURT OF AUSTRALIA

The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd

[2020] FCA 1892

File number: NSD 940 of 2019

Judgment of: **WIGNEY J**

Date of judgment: 27 November 2020

Date of publication of reasons: 4 February 2021

Catchwords: **CORPORATIONS** – representative proceedings pursuant to Pt IVA of the *Federal Court of Australia Act 1976* (Cth) – application for leave to proceed against company subject to deed of company arrangement pursuant to s 444E(3) of the *Corporations Act 2001* (Cth) – leave granted

Legislation: *Corporations Act 2001* (Cth) ss 435A, 439A, 440D, 444D, 444E, 444E(3), 500(2), 562

Cases cited: *Altinova Nominees Pty Ltd v Leveraged Capital Pty Ltd (recs and mgrs apptd) (in liq) (No 2)* [2009] FCA 42
Attard v James Legal Pty Ltd [2010] NSWCA 311; 80 ACSR 585
Austral Plywoods Pty Limited v FAI General Insurance Co Limited [1992] QCA 4; 7 ANZ Ins Cas 61-110
Australian Securities and Investments Commission v Marco (No 5) [2020] FCA 1512
Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 7) [2020] FCA 572; 144 ACSR 621
Foxcroft v The Ink Group Pty Ltd (1994) 15 ACSR 203
Hopkins v AECOM Australia Pty Ltd [2012] FCA 1204; 91 ACSR 391
In the matter of DSHE Holdings Limited (recs and mgrs apt) (in liq) [2018] NSWSC 82
J F Keir Pty Ltd v Priority Management Systems Pty Ltd (administrators appointed) [2007] NSWSC 748
R & B Directional Drilling Pty Ltd (in liq) v CGU Insurance Limited (No 2) [2019] FCA 458; 369 ALR 137
The Owners – Strata Plan No 87231 v 3A Composites GmbH [2019] FCA 811; 369 ALR 315
Toll Holdings Ltd v Stewart [2016] FCA 256; 338 ALR 602

Division: General Division

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Sub-area: Regulator and Consumer Protection

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Date of hearing: 27 November 2020

Counsel for the Applicant: Mr W A D Edwards with Mr J K S Entwisle

Solicitor for the Applicant: William Roberts Lawyers

Solicitor for the Respondent: Mr T Sargeant of Mills Oakley

ORDERS

NSD 940 of 2019

BETWEEN: **THE OWNERS – STRATA PLAN NO 91086**
Applicant

AND: **FAIRVIEW ARCHITECTURAL PTY LIMITED ACN 111 935**
963
Respondent

ORDER MADE BY: **WIGNEY J**

DATE OF ORDER: **27 NOVEMBER 2020**

THE COURT ORDERS THAT:

1. Pursuant to s 444E(3) of the *Corporations Act 2001* (Cth), the Applicant be granted leave to proceed against the Respondent, a company subject to a deed of company arrangement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

WIGNEY J:

1 On 27 November 2020, I granted the applicant, The **Owners** – Strata Plan No 91086, leave to proceed against the respondent, **Fairview** Architectural Pty Ltd, a company subject to a deed of company arrangement, pursuant to s 444E(3) of the *Corporations Act 2001* (Cth). I indicated at the time that I would provide brief reasons for granting leave at a later date. These are those reasons.

BACKGROUND

Owners' claims

2 Owners has commenced representative proceedings against Fairview pursuant to Pt IVA of the *Federal Court of Australia Act 1976* (Cth). The essence of its claim is that Fairview is liable for losses incurred by it and group members who acquired cladding products supplied by Fairview in circumstances where those products were, so it is alleged, combustible and not of merchantable or acceptable quality for the purposes of s 74D of the *Trade Practices Act 1974* (Cth) and ss 54 and 271 of the *Australian Consumer Law* (being Sch 2 of the *Competition and Consumer Act 2010* (Cth)). The causes of action pleaded by Owners are relevantly similar to those considered in *The Owners – Strata Plan No 87231 v 3A Composites GmbH* [2019] FCA 811; 369 ALR 315 at [4]-[19], albeit that the cladding products the subject of that case are not necessarily the same as the cladding in issue in this proceeding and were manufactured and distributed by different entities.

Administration and deed of company arrangement

3 On 7 July 2020, Fairview was placed into voluntary administration by its director. This had the effect of automatically staying the proceeding pursuant to s 440D of the Act.

4 On 20 October 2020, a meeting of creditors was held pursuant to s 439A of the Act. The administrators recommended that Fairview adopt a deed of company arrangement proposed by a related company, Fairview Architectural Holdings Pty Ltd (**Fairview Holdings**).

5 On 6 November 2020, a deed of company arrangement (**DOCA**) substantially in the form assented to by a majority of the creditors was executed by the administrators, Fairview and Fairview Holdings. The DOCA binds all creditors of the company, including Owners and the group members, pursuant to s 444D of the Act.

6 On 19 November 2020, Owners filed an amended interlocutory application seeking leave to proceed against Fairview, now subject to the DOCA, pursuant to s 444E(3) of the Act.

7 In brief, the DOCA provides as follows:

- (1) the business of Fairview is to be sold to Fairview Holdings (cl 3.1);
- (2) trade creditors are to receive 100 cents in the dollar for their claims, by means of a ‘Deed Fund’ constituted by the proceeds of the sale to Fairview Holdings and a top-up amount provided by Fairview Holdings, if required (cl 7);
- (3) creditors with unliquidated claims, which expressly include Owners and the group members, will be provided with a means to recover their losses by:
 - (a) making a claim on a limited Creditors’ Trust (cl 8); and
 - (b) having their claims against Fairview preserved to the extent that Fairview holds an insurance policy that responds to those claims (cl 9).

8 The Creditors’ Trust is the subject of a separate Creditors’ Trust Deed which was signed at the same time as the DOCA. Pursuant to the Creditors’ Trust Deed, a sum of \$1 million is to be held for creditors with unliquidated claims, with an additional \$2 million to be contributed if Fairview Holdings on-sells the Fairview business to an unrelated party before 30 June 2021. Significantly, however, the estimated claims of Owners and group members who lodged proofs of debt in administration exceed \$67 million. It is therefore unlikely that the Creditors’ Trust will provide a significant return if all of their claims are proven in this proceeding.

9 The disparity between the estimated claims of Owners and the group members and the amount available under the Creditors’ Trust Deed largely explains why Owners seeks leave to proceed against Fairview and thereby preserve their claims against it. In short, Owners seeks to recover some or all of the deficit from any insurers who have issued insurance policies which cover amounts for which Fairview may become liable in this proceeding. In this regard, Owners relies on the fact that cl 9 of the DOCA not only expressly preserves its claims from being extinguished by the effectuation of the DOCA, but also requires Fairview and the deed administrators to take all steps that are reasonably necessary to preserve any entitlement under those policies and not oppose any application by it and group members for leave to proceed against Fairview. Owners notes that those obligations are supported by a Deed Poll signed by Fairview, the operation of which continues beyond the effectuation of the DOCA for the benefit of the insurance creditors.

Insurance policies

- 10 After becoming aware of Fairview’s administration, Owners’ legal representatives took steps to ascertain Fairview’s insurance position with respect to the claims made by it and group members. Various documents have been produced by Fairview and certain insurance companies in response to Owners’ subpoenas and notices to produce. In summary, those documents identify Fairview as holding insurance policies during the period relevant to the proceeding, being the period from 13 June 2009 to 13 June 2019. The policies most relevant to the claims in this proceeding are product liability policies that, in general terms, cover amounts for which Fairview is found to be liable in respect of property damage. The relevant policies are “occurrence” based policies and apply having regard to when the relevant conduct giving rise to liability occurred, rather than when the contested claims were made. They cover, inter alia, losses in the nature of remediating the physical damage to the buildings caused by the affixation of the defective cladding.
- 11 Importantly, the limit under each of the relevant policies is between \$10 million and \$20 million. The total insurance proceeds potentially available under these policies, all other things considered, is potentially up to \$190 million.
- 12 The insurers who wrote policies for Fairview throughout the relevant period include: Allianz (2009); Zurich (2010-2011); AAI/Vero (2012-2015); and Chubb (2016-2019). The cladding the subject of Owners’ claim was supplied in or around November 2014 to March 2015. Accordingly, AAI/Vero is the potentially relevant insurer in respect of Owners’ claim against Fairview. The limit under the AAI/Vero policy in late 2014, being the time when Owners’ claim arose, was \$20 million. The proof lodged by Owners with the administrators prior to the execution of the DOCA valued its claim for removal and remediation at \$5.37 million. It follows that if Owners’ own claim succeeds, and it is also either accepted by AAI/Vero or found that the AAI/Vero policy covers Fairview’s liability arising from that claim, the available insurance cover will likely satisfy Owners’ claim in full.
- 13 The documents produced also identify that Fairview has notified each of the insurers of the claims in this proceeding. As at the date of the hearing of this application, only Chubb had provided a substantive response to the notification. That response was to indicate that it will decline any claim by Fairview in respect of Owners’ claim in this proceeding. All other insurers, including AAI/Vero, had not provided any substantive response to Fairview’s notification.

RELEVANT PRINCIPLES

14 Section 444E(3) of the Act provides that until a deed of company arrangement is terminated, a person bound by the deed cannot begin or proceed with a proceeding against the company except with the leave of the Court.

15 The factors which are generally to be taken into account on an application for leave under s 444E(3) include the following: see *J F Keir Pty Ltd v Priority Management Systems Pty Ltd (administrators appointed)* [2007] NSWSC 748 at [8]; *Attard v James Legal Pty Ltd* [2010] NSWCA 311; 80 ACSR 585 at [146]-[147]; *Hopkins v AECOM Australia Pty Ltd* [2012] FCA 1204; 91 ACSR 391 at [20]; *Toll Holdings Ltd v Stewart* [2016] FCA 256; 338 ALR 602 at [55]; *Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 7)* [2020] FCA 572; 144 ACSR 621 at [71]-[72]; *Australian Securities and Investments Commission v Marco (No 5)* [2020] FCA 1512 at [20]:

- (1) whether the claim has a solid foundation and gives rise to a serious dispute;
- (2) whether the administrator would be unreasonably distracted from his or her statutory duties and be obliged unnecessarily to incur substantial legal costs;
- (3) whether the company is insured against the liability that is the subject of the proceedings;
- (4) who appointed the administrator;
- (5) whether the applicant will suffer any disadvantage if leave is not granted;
- (6) whether there are good reasons for allowing a creditor to depart from the general intention of Pt 5.3A, which is that a creditor ought not be able to take action against the company in such circumstances;
- (7) who is applying for leave; and
- (8) what funds the company has available to defend the litigation.

CONSIDERATION

16 There are good and compelling reasons for granting Owners' leave to proceed against Fairview. Those reasons are readily discernible when each of the above matters is considered seriatim.

17 In summary, however, the critical consideration is that, on the one hand, having regard to the terms of the DOCA, the grant of leave to proceed will not result in any prejudice or disadvantage to any other Fairview creditors, each of whose debts have been met in full. Nor

will the grant of leave distract the administrators from their duties and obligations, or cause them to incur any unreasonable legal costs. The refusal of leave, on the other hand, would essentially mean that the DOCA's express preservation of the claims against Fairview by Owners and the group members would be to no avail. Owners (and in due course the group members) would effectively be unable to have resort to any insurance policies taken out by Fairview during the relevant period so as to recover any losses incurred by them arising from Fairview's supply of the impugned cladding products. Their recoveries would be restricted to the very limited funds in the Creditors' Trust.

Solid foundation and serious dispute

18 Owners' submitted that its claim against Fairview has a solid foundation and gives rise to a serious dispute. It did not, however, adduce any evidence in support of that submission. It simply asserted (in the absence of evidence) that the relevant cladding products which were supplied by Fairview are now "banned for safety reasons in many Australian jurisdictions" and relied on the fact that in *3A Composites GmbH*, the Court was satisfied that the applicant had established that it had a prima facie case for relief such as to justify leave to proceed against a foreign entity. In that case, however, the applicant adduced evidence sufficient to establish a prima facie case and the leave granted was leave to serve the originating process outside the jurisdiction.

19 Despite the paucity of evidence, it may be accepted that Owners' claim gives rise to a serious dispute and raises significant factual and legal issues. It may also be accepted that the claim has a reasonable foundation, in the sense that there is no suggestion or indication that it is frivolous or demonstrably without merit or reasonable prospects of success. As has already been noted, the application for leave to proceed was not opposed and neither Fairview nor the administrator adduced any evidence or submitted that Owners' claim was frivolous or had no reasonable foundation in fact or law.

Administrator not unreasonably distracted, no unnecessary costs incurred

20 There was nothing before the Court to suggest that the grant of leave to proceed would unreasonably distract the administrators from their statutory duties or unnecessarily oblige them to incur substantial legal costs. Indeed, quite to the contrary.

21 It was the administrator who recommended a DOCA that ensured, as an essential element of the scheme, that claims against Fairview would be preserved. The express intent of the DOCA,

which was approved by a majority of Fairview’s creditors, is to preserve Owners’ and group members’ claims against Fairview for the purpose of allowing access to any available insurance proceeds. The administrators also undertook not to oppose any application for leave to proceed against Fairview.

22 Significantly, the DOCA also provides that upon its commencement, the day-to-day control and stewardship of Fairview will return to its director (cl 11). Accordingly, the defence of the proceeding is therefore a matter for the director to attend to, subject to the deed administrators’ responsibility to ensure that any insurance policies are preserved (cl 9). It inescapably follows that the grant of leave to proceed against Fairview could not distract the administrators from their duties and responsibilities or cause them to incur any costs.

Fairview’s insurance against liability

23 It has been observed, albeit in the context of applications under s 500(2) of the Act for leave to proceed against a company in liquidation, that it is generally sufficient that a claim is likely to be, or is arguably, covered by insurance: see *Foxcroft v The Ink Group Pty Ltd* (1994) 15 ACSR 203 at 204-205; *In the matter of DSHE Holdings Limited (recs and mgrs apt) (in liq)* [2018] NSWSC 82 at [18]; *Altinova Nominees Pty Ltd v Leveraged Capital Pty Ltd (Receivers and Managers Appointed) (In Liquidation) (No 2)* [2009] FCA 42 at [42]-[45]. There is no reason in principle why those observations would not apply equally to an application under s 444E(3).

24 Owners’ submitted that the relevant insurance policies are likely to respond to the claims advanced by it against Fairview. The basis of that submission was that the policies covered Fairview in respect of any liabilities it may incur in respect of property damage and that the affixation of defective cladding to their buildings had caused those buildings physical damage.

25 It is at least reasonably arguable that Owners’ claims are likely to be covered by insurance taken out by Fairview. The 2014 AAI/Vero policy covers all amounts for which Fairview shall become liable in respect of property damage (cl 2.1), with property damage defined as physical loss, destruction of or damage to tangible property (cl 1). It is at least reasonably arguable that Fairview’s conduct in supplying the relevant cladding caused property damage because it caused damage to the building to which the cladding was affixed. The damage arises from the need for Owners to remove the cladding and remediate the building.

26 The contention that the need for Owners to remove the impugned cladding from its building constitutes or gives rise to damage to the building is supported, to an extent, by authority. In

Austral Plywoods Pty Limited v FAI General Insurance Co Limited [1992] QCA 4; 7 ANZ Ins Cas 61-110 it was held that the affixing of defective plywood to the hull of a vessel physically affected the hull, not only because of the screw holes which were made to affix the plywood, but also because the physical change to the hull caused by the affixing of the defective plywood meant that it was unsuitable to use. The decision in *Austral Plywoods* was referred to with apparent approval by Allsop CJ in *R & B Directional Drilling Pty Ltd (in liq) v CGU Insurance Limited (No 2)* [2019] FCA 458; 369 ALR 137 at [101].

27 As noted earlier, as at the time of the hearing AAI/Vero had been notified of Fairview's claim or potential claim and had not declined coverage. That is not to say that it may not decline coverage in the fullness of time. If it does so, Owners may seek leave to join AAI/Vero pursuant to the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW). One of the other insurers, Chubb, had declined coverage and had detailed its reasons for so doing in correspondence which was in evidence. Chubb contended, amongst other things, that there was no evidence of any property damage and that certain exclusions in its policy nevertheless applied. Owners addressed each of Chubb's contentions in its submissions.

28 It is unnecessary and perhaps undesirable, for present purposes, to address either Chubb's contentions or Owners' submissions in response to them. It suffices, for present purposes, to conclude that it is at least arguable that Fairview's liability for some of the losses claimed by Owners in this proceeding are likely to be covered by the AAI/Vero policy. That is a factor that weighs considerably in favour of the grant of leave.

Who appointed the administrator

29 The administrators were appointed by Fairview. This factor neither weighs in favour nor against the grant of leave to proceed.

Owners will suffer disadvantage

30 As has already been noted, Owners' and group members' claims in this proceeding are likely to exceed, perhaps significantly, the amount of money held in the Creditors' Trust. Accordingly, Owners will likely suffer significant disadvantage if leave to proceed is not granted as it would then effectively lose its ability to recover any losses incurred by it from Fairview's insurer. The same can be said in respect of the group members. This is a factor which weighs in favour of the grant of leave.

Part 5.3A of the Act

31 The object of Pt 5.3A of the Act is to maximise the chances of the company, or as much as possible of its business, continuing in existence or, if that is not possible, providing a better return to creditors than an immediate winding up: see s 435A. It is for that reason that the general position is that a creditor ought not to be able to take action against a company subject to a deed of company arrangement. There are, however, good reasons for allowing Owners to depart from the general position.

32 The predominant purpose and effect of the DOCA in this proceeding is to preserve Fairview's business by selling it to another entity, while simultaneously preserving the ability of Owners and the group members to make claims against any responsive insurance policies taken out by Fairview. Fairview will effectively continue as a shell company for the purpose of maintaining the insurance policies.

33 It should perhaps also be noted in this context that if Fairview had been wound up, Owners and group members would have been entitled to the proceeds of any insurance policies under s 562 of the Act. The grant of leave and the resulting preservation of their claims against Fairview effectively ensures that they have a comparable return to as if the company had been wound up.

Who is applying for leave

34 This factor neither weighs in favour nor against the grant of leave.

Fairview's funds to defend the proceeding

35 Given that the effect of the DOCA is that Fairview will continue as a shell company without any business or assets, it will obviously have insufficient funds to defend the proceeding. It does not necessarily follow that the proceeding will not be defended. Much will depend on the position taken by one or more of the relevant insurers and whether, if cover is declined, one or more of the insurers is joined. It is perhaps not fruitful to speculate as to what may occur in that regard.

36 In the particular circumstances of this case, the fact that Fairview itself does not have sufficient funds to defend the proceeding is not a factor which weighs significantly against the grant of leave. Even if, following the grant of leave, the proceeding goes undefended, that will not result in any prejudice to Fairview's other creditors, whose claims have already been met as a result of the DOCA. And, while the end result of any non-defence of the proceeding may be

that Fairview will be wound up, the effect of the DOCA is that Fairview's business has been preserved, albeit that it is operated by a different entity.

CONCLUSION AND DISPOSITION

37 The grant of leave to Owners to proceed against Fairview pursuant to s 444E(3) of the Act was not opposed. For all the above reasons, I considered that the grant of leave was appropriate and made an order to that effect on 27 November 2020.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney.



Associate:

Dated: 4 February 2021