Federal Court of Australia

Trygve, in the matter of Pacquola Group Pty Ltd (Administrator Appointed) [2024] FCA 393

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| File number(s): |  |
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| Judgment of: | **MCEVOY J** |
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| Date of judgment: | 17 April 2024 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – Application under s 90–15 of the *Insolvency Practice Schedule (Corporations)* contained in Schedule 2 of the *Corporations Act 2001* (Cth) – where a resolution was passed in favour of a deed of company arrangement proposal – where administrator subsequently identified that the wording of the deed of company arrangement proposal attached to the notice of meeting gave rise to three fundamental problems – where problems are said to undermine the effectiveness of the deed of company arrangement, could unintentionally put employee creditors in a worse position and mean that the deed of company arrangement would not conform with the *Corporations Act 2001* (Cth) – where it is appropriate for the court to make the directions sought. |
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| Legislation: | *Corporations Act 2001* (Cth) ss 435A, 436A, 439, 444A, 444B(2), 444DA, 556, 560, 561; Sch 2, s 90-15  *Federal Court of Australia Act 1976* (Cth) ss 37AF(1)(b)(i) and 37AG(1) |
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| Cases cited: | *Colbran, in the matter of Balsub Pty Ltd (in liquidation)* [2023] FCA 1635  *Joiner (Liquidator), in the matter of CuDeco Limited (Receivers and Managers Appointed) (in liq)* [2020] FCA 1661  *Kitay v Frigger [No 2]* [2024] WASC 113  *Re Le Meilleur Pty Ltd* [2011] NSWSC 1115; (2011) 256 FLR 240 |
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| National Practice Area: |  |
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| Number of paragraphs: | 47 |
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| Date of hearing: | 17 April 2024 |
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| Counsel for the Plaintiffs: | Ms Vicki Bell |
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| Solicitor for the Plaintiffs: | Mills Oakley |

ORDERS

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|  | | VID 290 of 2024 |
| IN THE MATTER OF PACQUOLA GROUP PTY LTD (ADMINISTRATOR APPOINTED) | | |
|  | RICHARD TRYGVE ROHRT IN HIS CAPACITY AS ADMINISTATOR OF PACQUOLA GROUP PTY LTD (ADMINISTRATOR APPOINTED) (ACN 006 968 467)  First Plaintiff  PACQUOLA GROUP PTY LTD (ADMINISTRATOR APPOINTED) (ACN 006 968 467)  Second Plaintiff | |
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| order made by: | MCEVOY J |
| DATE OF ORDER: | 17 APRIL 2024 |

THE COURT ORDERS THAT:

1. Pursuant to r 8.21(1)(c) of the *Federal Court Rules 2011* (Cth), the names of the plaintiffs in the plaintiffs’ originating process filed 12 April 2024 be amended as follows:
   1. the first plaintiff (**Administrator**), to “RICHARD TRYGVE ROHRT IN HIS CAPACITY AS ADMINISTATOR OF PACQUOLA ~~GROUP~~ CORP PTY LTD (ADMINISTRATOR APPOINTED) (ACN 006 968 467)”; and
   2. the second plaintiff (Company), to “PACQUOLA ~~GROUP~~ CORP PTY LTD (ADMINISTRATOR APPOINTED) (ACN 006 968 467)”.
2. Until further order and pursuant to sections 37AF(1)(b)(i) and 37AG(1)(a) and/or (c) of the *Federal Court of Australia Act 1976* (Cth) on the ground that this order is necessary to prevent prejudice to the proper administration of justice, the annexure marked as “Confidential RTR-2” to the affidavit affirmed by Richard Trygve Rohrt on 16 April 2024 be kept confidential and be prohibited from disclosure to any person other than the Court, the plaintiffs and their legal representatives.
3. Pursuant to s 90-15 of the *Insolvency Practice Schedule (Corporations)* (**IPS**), being Schedule 2 to the *Corporations* ***Act*** *2001* (Cth), the Administrator is justified and acting reasonably in executing a deed of company arrangement in substantially the form exhibited at pages 94 to 124 of the Administrator’s affidavit dated 12 April 2024 (**Proposed DOCA**), in circumstances where the Proposed DOCA contains provisions designed to:
   1. meet the requirements of s 444DA of the Act;
   2. preserve debts and claims of eligible employee creditors of the company; and
   3. compromise debts or claims of creditors other than eligible employee creditors of the company,

(together, referred to as the **Additional Provisions**)

but no equivalent provisions were identified in the “Proposal for Deed of Company Arrangement” (**DOCA proposal**) that was annexed to a report to the company’s creditor prepared by the Administrator in advance of the meeting of the company’s creditors on 28 March 2024, at which meeting a resolution was passed to execute a deed of company arrangement “in the same or similar terms of” the DOCA proposal.

1. A declaration pursuant to s 90-15 of the IPS, that the Proposed DOCA is not invalid by reason of the inclusion of the Additional Provisions.
2. Pursuant to s 444B(2)(b) of the Act, the period in which the company must execute the instrument be extended to 4:00PM on 23 April 2024.
3. The Administrator’s costs of the application be costs in the administration of the company.

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

REASONS FOR JUDGMENT

MCEVOY J:

1. By an originating process filed 12 April 2024 the **Administrator** of **Pacquola** Corp Pty Ltd (admin apptd), Mr Richard Rohrt, seeks certain orders in relation to the execution of a deed of company arrangement (**Proposed DOCA**) and ancillary relief.
2. The circumstances in which the application is made are as follows.
3. On 20 March 2024, at the second creditors’ meeting for Pacquola, a resolution was passed in favour of a deed of company arrangement proposal (**DOCA proposal**) which had been advanced by the director of Pacquloa on the last day on which the Administrator was able to convene the second meeting of the company’s creditors.
4. The Administrator has subsequently identified that the wording of the DOCA proposal attached to the notice of meeting gave rise to three fundamental issues which are both unintended and contrary to the way the DOCA was explained by him to creditors at the meeting. The issues are said to be fundamental because they undermine the effectiveness of the DOCA, could unintentionally put employee creditors in a worse position, and mean that the DOCA (if executed as per the DOCA proposal) would not conform with the *Corporations* ***Act*** *2001* (Cth).
5. There is no mechanism in Part 5.3A of the Act which enables an administrator to vary the terms of a DOCA before it is executed. Indeed, if the substance of the arrangement set out in the deed is inconsistent with the resolution put to the meeting, the deed will be invalid: *Re Le Meilleur Pty Ltd* (2011) 256 FLR 240 at 294-295 [268]-[270] (Ward J). Nor do the timing requirements in s 444B(2)(a) of the Act allow for a further meeting of creditors to be convened.
6. In these circumstances the Administrator seeks declarations pursuant to s 90-15 of the *Insolvency Practice Schedule (Corporations)* (**IPS**) contained in Schedule 2 of the Act, that he is justified and acting reasonably in executing the Proposed DOCA containing additional provisions designed to address the issues identified and that the Proposed DOCA is not invalid by reason of the inclusion of those provisions, as well as orders for the extension of time under s 444B(2)(b) of the Act. Orders are also sought for the amendment of the plaintiffs’ names in the originating process, and for the confidentiality of an exhibit to one of the Administrator’s affidavits.
7. The Administrator relies on his affidavits sworn:
8. on 12 April 2024 in support of the application; and
9. on 16 April 2024 in respect of service on the Australian Securities and Investments Commission and the giving of notice to creditors.
10. For the reasons that follow there will be orders in the form sought by the Administrator.

# Background

## Pacquola and the appointment of the Administrator

1. Pacquola was incorporated on 10 May 1988. Its sole member and director is Mr Joseph Pacquola. The company trades as “KPA Concrete Construction Group” providing concrete formwork services throughout Victoria, from premises situated in Cheltenham.
2. Pacquola operates in a group structure with another company, **Gigi X** Group Pty Ltd, of which Mr Pacquola is also the sole member and director. Gigi X holds contracts for construction projects. Pacquola is the employing entity of the group, and provides labour hire services and supplies materials to Gigi X at a rate that incorporates a profit element.
3. On 21 February 2024 (**Appointment Date**), Mr Pacquola passed a resolution pursuant to s 436A of the Act appointing the Administrator as voluntary administrator of the company. The Administrator considers that his appointment was precipitated by cash flow issues experienced as a result of losses on previous projects and increased supply costs.
4. Since his appointment, the Administrator has continued to trade Pacquola’s business. That has entailed the continued provision of labour hire services and supplies to Gigi X, as well as the recovery of amounts due by Gigi X (and other minor debtors). The Administrator’s trade-on of Pacquola was cash positive.
5. Pacquola employed 33 employees as at the Appointment Date. The Administrator has not terminated the employment of the employees during the administration. His investigations have disclosed that:
6. The company does not owe any amounts to employees in respect of wages for periods preceding the Appointment Date;
7. The company has accrued liability for annual leave and other leave entitlements totalling $137,470 – however, these amounts are not due and payable as the employees have not been terminated;
8. The company’s employees have accrued long service leave entitlements totalling $22,396.92 – however, these amounts are not due and payable as the employees have not been terminated, and they are payable by CoInvest in lieu of the company;
9. The company has accrued liability for superannuation in the amount of $47,705.19 for periods preceding the Appointment Date, which is due and payable; and
10. The company a does not owe any amounts to employees in respect of redundancies for periods preceding the Appointment Date.
11. The Administrator has also been informed of claims made by secured creditors (as to $375,066), the Deputy Commissioner of Taxation (as to $2,542,530), related party debts (including Mr Pacquola) of $35,122, and other general unsecured creditors of $194,363.

## The Administration and the Second Meeting

1. The Administrator was informed early in his appointment that Mr Pacquola intended to pursue a potential restructure through a DOCA. He informed creditors at the first meeting (on 1 March 2024) that he had not received a DOCA proposal, and expected to receive one, prior to the second meeting of creditors.
2. On 20 March 2024, the Administrator received the DOCA proposal from Mr Pacquola. The Administrator also convened the second meeting of creditors on 20 March 2024, which was the last date on which the Administrator was able to do so pursuant to s 439A of the Act. The notice convening the meeting was annexed to the Administrator’s report to creditors (Report). The DOCA proposal was also annexed to the Report.
3. The Report stated that the DOCA proposal had been received by the Administrator from Mr Pacquola. The Administrator recommended the DOCA proposal to creditors of Pacquola as, amongst other things, it:

allows for a payment of priority and secured creditor claims in full’ and ‘continued trading of Pacquola which will provide a substantially greater probability of …. staff retaining their ongoing employment.

1. The second meeting of the ompany’s creditors proceeded on 28 March 2024 (**Second Meeting**). Three creditors attended by proxy. Mr Pacquola was expected to attend, but apparently did not do so by reason of a funeral. The creditors voted on a resolution in respect of the DOCA proposal, which resulted in a deadlock as a majority in value but not number had voted in favour of the resolution. The Administrator elected to exercise his casting vote to break the deadlock and pass the resolution. The resolution was in the following terms:

Pacquola executes a Deed of Company Arrangement in the same or similar terms of the DOCA proposal detailed in the Administrator’s Report of 20 March 2024 and Richard Rohrt be appointed the Deed Administrator

(the **Resolution**)

## Preparation of the Instrument

1. The Administrator engaged solicitors to prepare an instrument setting out the terms of a DOCA in accordance with s 444A(3) of the Act.
2. In the course of preparing that instrument, the Administrator was made aware of three issues arising from the terms of the DOCA proposal.
3. First, that the DOCA proposal releases claims of a “Participating Creditor” (in cl 1(h)) where a “Participating Creditor” is a creditor “who [has] submitted a formal proof of debt which has been accepted by the Deed Administrator”. This issue has the capacity to undermine the DOCA, as creditors can elect whether to take part in it. If they do not, their liabilities will not be extinguished and the DOCA may not return the company to a state of solvency.
4. Secondly, the DOCA proposal’s terms do not distinguish between eligible employee creditors and other creditors of the company. Both classes of creditors fall within the definition of “Participating Creditor” and share in a distribution from the DOCA Fund *pari passu* (in cl 1(d)). The Administrator’s view is that the DOCA proposal’s terms are not compliant with s 444DA of the Act, which stipulates that a DOCA must contain terms to the effect that eligible employee creditors are given a priority equivalent to their entitlement under ss 556, 560 and 561 of the Act.
5. Thirdly, the terms of the DOCA proposal contemplate that creditors’ claims will be compromised if their proof of debt is admitted in the DOCA. The Administrator considers that, if an employee creditor proves for an entitlement (i.e., superannuation), and a claim is admitted, then all claims that the employee has (i.e., superannuation and leave entitlements) will be compromised by the DOCA.
6. The Administrator has prepared an instrument that he seeks to enter into on behalf of the company, being the Proposed DOCA, subject to the orders sought in this application. The Proposed DOCA is in a form agreed between the Administrator and Mr Pacquola.
7. The Proposed DOCA contains terms that seek to resolve the issues identified by the Administrator, as set out in paragraphs 20 to 22 above. Specifically:
8. clause 11.1 compromises the claims of “Participating Unsecured Creditors”, which is in turn “any Creditor to whom an Unsecured Debt was owing by Pacquola as at the Appointment Date”. This has the effect that the compromise in the Proposed DOCA is not conditional on the lodgement or and acceptance of a proof of debt by the Administrator;
9. the compromise does not extend to eligible employee creditors, and as such, their claims will only be discharged in the Proposed DOCA to the extent that their claims are paid and satisfied;
10. clauses 8.3(c), 9.3 and 9.5 designed to comply with s 444DA of the Act, by conferring on eligible employee creditors a priority equivalent to their entitlement under ss 556, 560 and 561 of the Act.

# The statutory regime and relevant principles

1. The statutory provisions relevant to deeds of company arrangements in the context of this application are as follows.
2. Section 444A of the Act applies where the creditors of a company should resolve that a company execute a DOCA. Subsection 444A(3) provides that the administrator of Pacquola must prepare an instrument setting out the terms of the deed and ss 444A(4) prescribes certain matters that must be specified in the instrument.
3. Subsection 444B(2) provides that a company must execute the instrument 15 business days after the end of the meeting of creditors, or such further period as the court allows on an application made within those 15 business days. Accordingly, in the present circumstances, unless that period is extended, Pacquola must execute an instrument by 22 April 2024.
4. Subsection 444DA(1) provides that:

A deed of company arrangement must contain a provision to the effect that, for the purposes of the application by the administrator of the property of Pacquola coming under his or her control under the deed, any eligible employee creditors will be entitled to a priority at least equal to what they would have been entitled if the property were applied in accordance with sections 556, 560 and 561.

1. Subsection 444DA(2) provides that a DOCA need not contain the term required by subsection 444DA(1) if eligible employee creditors pass a resolution agreeing to the non-inclusion of such a provision, or the court makes an order approving the non-inclusion of such a provision.
2. In the present circumstances no such resolution was passed by creditors and no order for the omission of such a provision is sought given that was not the intention of the DOCA proponent or the Administrator.
3. In *Colbran, in the matter of* ***Balsub*** *Pty Ltd (in liquidation)* [2023] FCA 1635 at [29] – [40], the court summarised the principles applicable to s 90-15 of the IPS. Those principles may be regarded as uncontroversial for present purposes, and they include the following:

[32] That power may be exercised where it is just and beneficial to do so: see *Federal Commissioner of Taxation v ACN 154 520 199 Pty Ltd (in liq)* [2017] FCA 444 at [64] (Gleeson J), citing *Gusdote Pty Ltd v North Queensland Land Development Pty Ltd (No 4)* [2012] FCA 759 at [6]-[8] (Emmett J); *Lo v Nielsen & Moller Autoglass* (NSW) Pty Ltd [2008] NSWSC 407 at [29]-[31] (Barrett J). Alternatively, the power may be exercised where a liquidator’s decision to act in a particular way is likely to be contentious: *Re One. Tel Ltd and Others* (2014) 99 ACSR 247 at 256 [35] (Brereton J), citing *Re Ansett Australia Ltd and Korda* (2002) 115 FCR 409 at 428 [65] (Goldberg J), *Re 7 Steel Distribution Pty Ltd (in liq) (recs and mgrs apptd)* [2013] NSWSC 669 at [20] (Black J), and *Re S&D International Pty Ltd (in liq) (No 7)* (2012) 92 ACSR 38; [2012] VSC 551 at [58]-[59] (Robson J). Directions will not generally be granted in relation to a decision that is purely commercial, but may be granted where there is a “particular legal issue raised for consideration or attack on the propriety or reasonableness of the decision in respect of which the directions are sought”: *Krejci, in the matter of Union Standard International Group Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 1111 at [10] (Stewart J), citing *Re Ansett* at 428 [65] (Goldberg J).

1. The Administrator also seeks declarations under s 90-15 of the IPS, pursuant to the court’s broad jurisdiction to make orders that affect rights and obligations or conclusively determine controversies arising in relation to an external administration: see *Balsub* at [30(b)]. It is well accepted that the court has power to make declarations under s 90-15 of the IPS: *Kitay v Frigger [No 2]* [2024] WASC 113 at [185] (Hill J); *Joiner (Liquidator), in the matter of CuDeco Limited (Receivers and Managers Appointed) (in liq)* [2020] FCA 1661 at [99] (Banks‑Smith J).

# the administrator’s submissions

1. Section 444A of the Act does not oblige a company to enter into any particular form of DOCA, save as to the extent terms are prescribed by subsections (4) or (5). The section applies where creditors resolve that Pacquola execute “a” DOCA. The Resolution constrains the terms of the DOCA that may be entered into by Pacquola. In this case, the relevant resolution authorised the company to enter into a DOCA “in the same or similar terms of the DOCA proposal detailed in the Administrator’s Report of 20 March 2024”.
2. The Administrator’s difficulty is that, if the company were to execute a DOCA in the terms provided for by the DOCA proposal, then the DOCA:
3. would breach the s 444DA of the Act, because it does not provide for the appropriate priority for payment of employees’ claims;
4. would unjustly prejudice those employees who prove, as their leave and other entitlements may be compromised, despite them continuing their employment; and
5. may be futile, if creditors elect not to prove, and so their claims may not be compromised at all (and the company may, in turn, remain insolvent).
6. The Administrator is constrained by the terms of the Resolution, and so in these circumstances he seeks comfort that the Proposed DOCA sits appropriately within the terms of that Resolution. He contends that this is an appropriate course for the following reasons.
7. First, this case raises a legal issue appropriate for the exercise of the court’s power to grant directions pursuant to s 90-15. The Administrator is faced with an issue of propriety, namely, whether it is open for him to enter into the Proposed DOCA – which departs from the terms of the DOCA proposal – in order to avoid a breach of the Act. There are questions, on which reasonable minds may differ, as to whether the Administrator’s construction of the Resolution – and the extent of departure between the DOCA proposal and Proposed DOCA – are appropriate in all of the circumstances.
8. Secondly, the Resolution requires Pacquola to enter into a DOCA in “similar terms of the DOCA proposal detailed in the Administrator”s Report of 20 March 2024”. The Resolution does not, by its terms, refer to the DOCA proposal. It refers to the “DOCA proposal detailed” in the Report.
9. The Report contained statements which were inconsistent with the express terms of the DOCA proposal, and included (or were to the effect) that:
10. employee entitlements (namely, superannuation) would be paid in full in a DOCA, and that they would be paid in priority to other unsecured claims; and
11. only superannuation would be proved in the DOCA (as a claim that was debt and payable) but leave entitlements would not be paid or proved in the DOCA.
12. The statements in the Report are instead consistent with – and similar to – the terms of the Proposed DOCA. The Administrator submits that it is open to read the Resolution to incorporate the statements made in the Report, to hold that the Proposed DOCA is in “similar terms’ to the “DOCA proposal detailed in the Administrator’s report.”
13. Thirdly, the Administrator submits that creditors formed their views, and exercised their votes, as to whether the company should execute a DOCA based on the Report as a whole. The explanation in the Report is consistent with the usual operation of a DOCA, whilst the terms of the DOCA proposal are (at best) unorthodox and (at worst) illogical.
14. Fourthly, the Administrator did not have a significant opportunity to interrogate the terms of the DOCA proposal before circulating it amongst creditors. His evidence is that he received the DOCA proposal, in signed form, on 20 March 2024, being the last date on which he could convene the Second Meeting. The Administrator did not, in his review of the DOCA proposal, identify the problems until after the Resolution had been passed.
15. Fifthly, there are powerful practical considerations in favour of the orders sought by the Administrator. The Proposed DOCA will facilitate the continuing employment of the company’s employees, continued operation of its business, and maximisation of the company’s debtor recoveries. These outcomes are consistent with the objects stated in s 435A of the Act.

# Determination

1. In the circumstances which have arisen I accept the Administrator’s submissions that the Proposed DOCA sits comfortably within the terms of the Resolution and that it is appropriate to make the declarations sought.
2. Insofar as the Administrator also seeks orders for the amendments of the originating process, I accept that such orders are appropriate and should be made.
3. As to the issue of the confidentiality of the annexure marked as “Confidential RTR-2” in the affidavit dated 16 April 2024, I am satisfied that it is necessary to prevent prejudice to the proper administration of justice for that document to be kept confidential and be prohibited from disclosure to any person other than the Court, the plaintiffs and their legal representatives pursuant to ss 37AF(1)(b)(i) and 37AG(1)(a) and/or (c) of the *Federal Court of Australia Act 1976* (Cth).
4. There will be orders as set out at the commencement of these reasons.

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| I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McEvoy. |

Associate:

Dated: 17 April 2024