FEDERAL COURT OF AUSTRALIA

Central Queensland Development Corporation Pty Ltd v Sunstruct Pty Ltd [2015] FCAFC 63

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| Citation: | Central Queensland Development Corporation Pty Ltd v Sunstruct Pty Ltd [2015] FCAFC 63 |
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| Appeal from: | Bluechip Development Corporation (Gladstone) Pty Ltd v Sunstruct Pty Ltd & Ors [2013] FCCA 141Bluechip Development Corporation (Gladstone) Pty Ltd v Sunstruct Pty Ltd & Ors (No 2) [2013] FCCA 1898 |
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| Parties: | **CENTRAL QUEENSLAND DEVELOPMENT CORPORATION PTY LTD (FORMERLY BLUECHIP DEVELOPMENT CORPORATION (GLADSTONE) PTY LTD) ACN 120 112 781 v SUNSTRUCT PTY LTD ACN 104 162 549, LORENZO MARIO REGINATO and ANTONY JAMES SCHOFIELD****SIDNEY CHARLES KNELL v SUNSTRUCT PTY LTD ACN 104 162 549, LORENZO MARIO REGINATO and ANTONY JAMES SCHOFIELD** |
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| File numbers: | QUD 826 of 2013QUD 828 of 2013 |
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| Judges: | **BESANKO, GILMOUR AND RANGIAH JJ** |
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| Date of judgment: | 14 May 2015 |
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| Catchwords: | **CORPORATIONS –** appeal from Federal Circuit Court of Australia **–** administration **–** deed of company arrangement **–** effect of deed of company arrangement on the liability of the company for breach of contract under a counterclaim **–** whether deed of company arrangement compromised unsecured amount of the judgment against the company **–** amendment of the judgment. **COSTS –** cost orders made against company on counterclaim **–** effect of deed of company arrangement **–** whether costs awarded against the company after administration compromised by deed of company arrangement **–** whether costs order was a “claim” within the meaning of s 444D(1) and s 553(1) of the *Corporations Act 2001* (Cth) **–** appeal dismissed.**COSTS** **–** costs awarded against non-party **–** whether the non-party’s conduct makes it just and equitable to make non-party costs order **–** whether notice must be given to non-party of intention to claim non-party costs **–** procedural fairness **–** whether the primary judge erred in his discretion to award non-party costs **–** appeal allowed.  |
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| Legislation: | *Corporations Act 2001* (Cth) ss 444A(4)(i), 444D(1), 553(1)*Bankruptcy Act 1966* (Cth) s 82*Trade Practices Act 1974* (Cth) s 52*Corporate Law Reform Act 1992* (Cth)*Building and Construction Industry Payments Act 2004* (Qld)  |
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| Cases cited: | *BE Australia WD Pty Ltd (subject to a deed of company arrangement) v Sutton* (2011) 82 NSWLR 336*Bischof v Adams* [1992] 2 VR 198*Brash Holdings Ltd (Administrator appointed) v Katile Pty Ltd* [1996] 1 VR 24*Dunghutti Elders Council (Aboriginal Corporation) RNTBC and Others v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4) and Another* (2012) 200 FCR 154 *Environmental & Earth Sciences Pty Ltd v Vouris* (2006) 152 FCR 510*Expile Pty Limited v Jabb’s Excavations Pty Ltd* [2004] NSWSC 284 *FAI Workers Compensation (NSW) Ltd v Philkor Builders Pty Ltd* (1996) 132 FLR 213 *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89*Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 *In Re British Gold Fields of West Africa* [1899] 2 Ch 7 *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319*Knight v FP Special Assets Limited* (1992) 174 CLR 178 *Larkden Pty Limited v Lloyd Energy Systems Pty Limited* [2011] NSWSC 1567*Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509*McCluskey v Pasminco Ltd (Administrators Appointed)* (2002) 120 FCR 326*McDonald v Commissioner of Taxation* (2005) 187 FLR 461*Oshlack v Richmond River Council* (1998) 193 CLR 72 *Sons of Gwalia Ltd (subject to deed of company arrangement) v Margaretic* (2007) 231 CLR 160*Stead v State Government Insurance Commission* (1986) 161 CLR 141*Yates v Boland* [2000] FCA 1895  |
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| Dates of hearing: | 3, 4 November 2014 |
|  |  |
| Place: | Brisbane |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 115 |
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| Counsel for the Appellant: | Dr RJ O’Hair with Mr PW Hackett |
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| Solicitor for the Appellant: | MJB Legal |
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| Counsel for the Respondents: | Mr JW Peden |
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| Solicitor for the Respondents: | Gadens Lawyers |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 826 of 2013 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | CENTRAL QUEENSLAND DEVELOPMENT CORPORATION PTY LTD (FORMERLY BLUECHIP DEVELOPMENT CORPORATION (GLADSTONE) PTY LTD) ACN 120 112 781Appellant |
| AND: | SUNSTRUCT PTY LTD ACN 104 162 549First RespondentLORENZO MARIO REGINATOSecond RespondentANTONY JAMES SCHOFIELDThird Respondent |

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| JUDGES: | BESANKO, GILMOUR AND RANGIAH JJ  |
| DATE OF ORDER: | 14 May 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The appeal be allowed in part.

2. Order 2 of the orders made by the Federal Circuit Court of Australia on 28 November 2013 that the appellant pay the first respondent $343,319.13 be varied by substituting for that amount the amount of $172,467.88.

3. Otherwise the appeal be dismissed.

4. The appellant pay the respondents’ costs thrown away by reason of the appellant’s abandonment of various of its grounds of appeal.

5. The costs, the subject of Order 4, be paid on an indemnity basis forthwith.

6. The appellant pay the respondents’ costs of the appeal.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 828 of 2013 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | SIDNEY CHARLES KNELLAppellant |
| AND: | SUNSTRUCT PTY LTD ACN 104 162 549First RespondentLORENZO MARIO REGINATOSecond RespondentANTONY JAMES SCHOFIELDThird Respondent |

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| JUDGES: | BESANKO, GILMOUr AND RANGIAH JJ |
| DATE OF ORDER: | 14 May 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. Order 4 of the orders made by the Federal Circuit Court of Australia on 28 November 2013 be varied such that the words “and Mr Sidney Charles Knell” be deleted.

3. The matter be remitted to the Federal Circuit Court of Australia for the application for non-party costs to be considered according to law and in light of these reasons.

4. The respondents pay the appellant’s costs.

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

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| JUDGES: | BESANKO, GILMOUR AND RANGIAH JJ  |
| DATE: | 14 May 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

# BESANKO J:

1 I have had the advantage of reading the reasons for judgment of Gilmour J. I agree with his Honour’s reasons and with the orders he proposes. I add the following in relation to the appeal by Mr Knell with respect to the costs order made against him.

2 In support of its application for costs against Mr Sidney Knell, Sunstruct Pty Limited (“Sunstruct”) relied on the way in which Central Queensland Development Corporation Pty Ltd (formerly known as Bluechip Development Corporation (Gladstone) Pty Ltd) (“Bluechip”) conducted its case. Sunstruct alleged that Bluechip pursued its case in a complex and prolix manner, with little regard being had to distilling the matters in dispute to the real issues being determined, and that many days were wasted because of Bluechip’s failure to conduct the matter responsibly. Furthermore, Sunstruct alleged that the primary judge had found that Mr Knell was not a witness of truth, and it followed that it was within Mr Knell’s knowledge that the claim would not be successful had the true position been accepted by him at the outset. He could have settled the action, but he rejected offers which were made, including an offer of $200,000 made on 14 April 2010. Finally, Sunstruct relied on the fact that Bluechip’s pursuit of damages on a global basis was always flawed so that even if it had succeeded in establishing breaches of duty, it would not have obtained an award of damages.

3 The primary judge found in his reasons for judgment with respect to costs that Bluechip was Mr Knell’s alter ego, and that the conduct of the litigation was improper. He found that Bluechip’s claim of $2 million was made on a global basis and made in terrorem in response to a claim made by Sunstruct. He found that Bluechip’s claim was founded on “an untenable contention of the underlying contract, and in respect of a misrepresentation case without merit” (*Bluechip Development Corporation (Gladstone) Pty Ltd v Sunstruct Pty Ltd & Ors (No 2)* [2013] FCCA 1898 at [102]). His Honour also found that the fact that Sunstruct did not make an application that Bluechip provide security of costs did not, in the circumstances, count against it (at [109]). In addition to these findings, it is clear from the primary judge’s reasons for judgment with respect to liability that he formed the view that Mr Knell was an unimpressive witness (Mrs Knell was also an unimpressive witness), and that Bluechip’s claim for damages on a global basis was misguided and precluded it from proving causation (*Bluechip Development Corporation (Gladstone) Pty Ltd v Sunstruct Pty Ltd & Ors* [2013] FCCA 141 at [21], [23] and [331]). For example, as to Bluechip’s claim for global damages, the primary judge said in his liability judgment (at [331]):

For reasons addressed below in this section I would refuse to exercise any discretion in favour of any award for Bluechip because the claim made is a global claim. There are many and varied reasons which occasioned Bluechip’s loss. Even if some element of causation could be established to the alleged offending conduct I am satisfied that the global claim contended for includes a significant claim concerning which there is no causal link to the alleged conduct. *Simply put, Bluechip has failed to reasonably establish the quantum of its loss occasioned by Sunstruct’s conduct. Quantification of its loss causally linked to the alleged offending conduct was not an impossible task. Bluechip’s decision to pursue a global claim was a purely tactical decision. It chose not to place before the Court evidence necessary to reasonably assess that loss which was causally linked to the alleged behaviour.* In the circumstances it cannot reasonably expect a favourable exercise of the discretion to save it from its own tactical decision, particularly so when to do so would have the effect of denying Sunstruct the opportunity to examine the assessment.

(Emphasis added).

4 The point to be made is that there were findings by the primary judge in support of each of the factual matters Sunstruct advanced in support of its claim for costs against Mr Knell. Furthermore, in my opinion those factual matters could have formed a sufficient basis for an order that Mr Knell pay Sunstruct’s costs (see *Dunghutti Elders Council (Aboriginal Corporation) RNTBC and Others v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4) and Another* (2012) 200 FCR 154 at 170-171, [88]-[93]).

5 The difficulty for Sunstruct in this case is that, in reaching his conclusion that Sunstruct was entitled to an order for costs against Mr Knell, the primary judge relied on the circumstances surrounding the Deed of Company Arrangement, and that is a matter in respect of which Mr Knell has been denied procedural fairness.

6 Although it seems to me that Sunstruct had a powerful case for an order for costs against Mr Knell, irrespective of the matters relating to the circumstances surrounding the Deed of Company Arrangement, the question for this Court is whether a rehearing would inevitably result in the same order (*Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145). That conclusion could not be reached on the basis of anything the primary judge said. In fact, his Honour said in his costs judgment (at [114]):

... Except for the DOCA, I may have been inclined to the conventional view that those standing behind a corporation are entitled to the protection of the corporate veil.

7 Nor unfortunately, in view of the time which has passed and the substantial costs no doubt incurred, is this Court in a position to conclude for itself that an order against Mr Knell is inevitable. One example will illustrate the reasons that this is so. The primary judge found that the conduct of the trial by Bluechip was improper. The primary judge had heard the trial and that was, no doubt, an adequate description from his perspective. However, for this Court to assess the appropriate weight to put on this matter, it would be necessary for the Court to be provided with further details of the precise aspects in which it is said the conduct of the trial was improper. That task was not the subject of submissions but, in any event, it is not an appropriate task for this Court to undertake. There is another difficulty. Sunstruct does not abandon any of the matters the primary judge relied on in reaching his conclusion, including the circumstances surrounding the Deed of Company Arrangement. This Court has concluded that Mr Knell is entitled to procedural fairness with respect to that matter, and that means that there would need to be a further hearing with the possibility of one or both parties putting forward evidence with respect to that matter.

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| I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko. |

Associate:

Dated: 14 May 2015

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| GENERAL DIVISION | QUD 828 of 2013 |

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| JUDGES: | BESANKO, GILMOUR, RANGIAH JJ |
| DATE: | 14 May 2015  |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

# GILMOUR J:

8 These are two related appeals. The appeal by Central Queensland Development Corporation Pty Ltd (formerly known as Bluechip Development Corporation (Gladstone) Pty Ltd) (the Bluechip Appeal) raises two issues. The first issue concerns the effect of the Deed of Company Arrangement (DOCA), which was entered into between this appellant and its creditors, on the amount of the judgment entered on the counterclaim at first instance. The second issue concerns the effect of the DOCA upon its proper construction on the costs orders made against this appellant in relation to the counterclaim. I will refer to this appellant as “Bluechip” which is how it was described by the primary judge.

9 The second appeal is brought by Bluechip’s sole director Mr Sidney Knell (the Knell Costs Appeal) who, as a non-party, was ordered together with Bluechip to pay the costs of the proceedings. He complains that he was denied procedural fairness in that he was not put on notice or given an opportunity to be heard on a question which he contends was ultimately dispositive of the applications for costs made against him.

10 Bluechip and the first respondent (Sunstruct) entered into a construction management agreement (CMA) dated 21 September 2007. Pursuant to the CMA, Sunstruct had been engaged as Bluechip’s agent, construction manager and builder for the development of a building at 66 Oaka Lane, Gladstone, Queensland.

11 At first instance, Bluechip claimed for damages caused by Sunstruct engaging in misleading or deceptive conduct in contravention of s 52 of the *Trade Practices Act 1974* (Cth) and/or breach of contract and/or negligence and/or breach of fiduciary duty as the construction manager. Sunstruct counterclaimed for its construction management fees.

12 Following a lengthy trial in what is now the Federal Circuit Court of Australia (FCCA) Bluechip’s claims were dismissed and judgment was entered for Sunstruct on its counterclaim in the amount of $343,319.13.

13 The Liability judgment was delivered on 26 April 2013 and the Costs judgment was delivered on 20 November 2013.

14 The formal orders in respect of both judgments were delivered on 28 November 2013.

# BLUECHIP APPEAL

## The effect of the DOCA: the amount entered for judgment on counterclaim

15 Bluechip under its new name, Central Queensland Development Corporation Pty Ltd, entered into the DOCA on 10 March 2011 which was two weeks prior to the final day of the trial. This recorded that a voluntary administrator was appointed on 3 February 2011 (the Appointment Day).

16 Bluechip contends that upon the proper construction and effect of the DOCA the primary judge erred in entering judgment for the secured and unsecured portions of the counterclaim.

17 This concerns the status of monies held in the trust account (Trust Account)of Garland Waddington Solicitors awaiting the outcome of the proceedings below. In particular it concerns the effect of the DOCA on those monies and on the counterclaim of Sunstruct to the extent that it exceeded the amount in the Trust Account.

18 The money was paid into the Trust Account in circumstances where Sunstruct had the benefit of two adjudications under the *Building and Construction Industry Payments Act 2004* (Qld) and a consequential judgment of the District Court of Queensland. The funds were paid into the Trust Account to forestall execution by Sunstruct in respect of the District Court judgment and to abide the outcome of the proceedings below. As at 31 July 2009, two amounts totalling $324,556.72 had been ordered to be paid by the Federal Magistrates Court of Australia (FMCA) into the Trust Account but pursuant to an order made on 20 October 2009, by consent, half of the monies in the Trust Account, including accretions, were released to Bluechip. Accordingly, at the time of the Costs judgment it appears, as the primary judge found, that there was the amount of $172,467.88 remaining in the Trust Account.

19 However, in the Costs judgment the primary judge accepted that all unsecured claims against Bluechip were compromised by virtue of the DOCA.

20 The DOCA bound Sunstruct (covenant 7) and had the effect that the DOCA may be pleaded by Bluechip against, relevantly, Sunstruct, in bar to any claim incurred or arising on or before the Appointment Day and bound Sunstruct not to take any further steps in the proceedings below (covenant 8).

21 As originally framed the DOCA bound all creditors including secured creditors. It was, however, the subject of an amendment which granted a Special Preference to Sunstruct. Whilst the reasons of the primary judge in the Costs judgment at [48] are not entirely clear the appellant does not challenge his Honour’s conclusion that the amount of $172,467.88 held in the Trust Account was excluded from the reach of the DOCA.

22 The submission put by Sunstruct was that the primary judge in entering judgment was merely declaring the amount owed as a result of breaches of contract. I do not accept this submission. The DOCA was a bar to bringing any claim for the unsecured amount. In these circumstances judgment for that amount ought not to have been entered.

23 It follows that judgment for only the secured amount ought to have been entered. This ground of appeal succeeds. Order 2 of the primary judge dated 28 November 2013 that Bluechip pay Sunstruct $343,319.13 will be varied by substituting for that amount the amount of $172,467.88.

## The effect of the DOCA: the costs orders

24 In its notice of appeal, Bluechip contends that the primary judge was in error in making a costs order of the counterclaim in favour of Sunstruct when that claim was compromised by the DOCA. Bluechip does not contend that the costs order made against it in relation to its claims was compromised by the DOCA.

25 Therefore, this aspect of the DOCA concerns its effect on the costs orders made in relation only to the counterclaim brought by Sunstruct. In any event, for the reasons outlined below, I find that the costs order made against Bluechip in relation to its claims would similarly not be compromised by the DOCA.

26 Bluechip submits that when regard is had to the definition of “Claim” in the DOCA this, relevantly, includes any debt owing by, any liability of or any claim against Bluechip in favour of Sunstruct which was incurred, instituted or made, whether prospective or contingent, or *“the circumstances giving rise to which occurred* on or before the Appointment Day” (emphasis added). The definition of “Claims” in the DOCA is relevant for the purposes of covenant 7 of the DOCA. This covenant incorporates s 444D of the *Corporations Act 2001* (Cth)to indicate which persons are bound by the DOCA.

27 Section 444D(1) provides that a deed of company arrangement binds all creditors of the company so far as concerns claims arising on or before the day specified in the deed under s 444A(4)(i): see also *Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509 at [52]. Section 444A(4)(i) provides that a deed of company arrangement must specify the day (not later than the day when the administration began) on or before which claims must have arisen if they are to be admissible under the deed.

28 As outlined earlier, the DOCA was entered into between Bluechip and its creditors on 10 March 2011. The date for the purposes of s 444A(4)(i) was the Appointment Day on 3 February 2011.

29 Accordingly, the question is whether the primary judge was in error in concluding that the costs awarded to Sunstruct on its counterclaim was not a claim covered by the terms of the DOCA by virtue of s 444D.

30 Section 553(1) of the *Corporations Act* provides that:

Subject to this Division and Division 8, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.

31 The expressions “claims must have arisen” in s 444A(4)(i) and “claims arising” in s 444D(1), in each case, on or before the day specified in the deed, refer to a claim which at that date would have been provable under s 553(1) of the *Corporations Act* in the winding up of the company: see *Brash Holdings Ltd (Administrator appointed) v Katile Pty Ltd* [1996] 1 VR 24, 34-36.

32 Under s 553(1) a claim, which includes a contingent claim, is admissible to proof against the company if “the circumstances giving rise” to it occurred before the relevant date.

33 Bluechip contends that the circumstances giving rise to the costs awarded on the counterclaim occurred before “the relevant date” (the Appointment Day) for the purposes of s 553(1).

34 The expression “the circumstances giving rise to” in s 553(1) are also found in the definition of “Claim” in the DOCA. Bluechip relies upon those words in each case as having the same effect: the circumstances giving rise to the claim for costs arose prior to the Appointment Day and that accordingly the costs order ought not to have been made, the claim for costs having been compromised by the DOCA having regard to the provisions of ss 444D(1) and 553(1) of the *Corporations Act*.

35 The primary judge concluded, in effect, that the claim for costs on the counterclaim was not one where the circumstances giving rise to it occurred on or before the Appointment Day. His Honour followed the judgment in *Larkden Pty Limited v Lloyd Energy Systems Pty Limited* [2011] NSWSC 1567.

36 Bluechip submits that Hammerschlag J in *Larkden* identifies correctly the relevant principles but applied them in a way which was contrary to earlier first instance decisions. It thus invited this Court to resolve these conflicting authorities.

37 Two of these decisions were referred to in *Sons of Gwalia Ltd (subject to deed of company arrangement) v Margaretic* (2007) 231 CLR 160. That case concerned, relevantly, whether Margaretic’s claims for damages under various enactments may be proved in the winding up of Sons of Gwalia Ltd pursuant to s 553(1) of the *Corporations Act*. As Hayne J observed at [161], the new s 553(1) introduced by the *Corporate Law Reform Act 1992* (Cth) removed the former rules excluding some claims for unliquidated damages from proof in a winding up. To that extent the capacity to prove debts in a company’s winding up by this provision were different to those prevailing under s 82(2) of the *Bankruptcy Act 1966* (Cth) (*Bankruptcy Act*). As his Honour said:

What mattered under the new s 553 was whether “the circumstances giving rise to [the debt or claim in question] occurred before the relevant date”.

38 Then at [168] his Honour explained the application of s 553(1) of the *Corporation Act*;only claims where the circumstances giving rise to them occurred before “the relevant date” were admissible to proof, whether the claims were present or future, certain or contingent, ascertained or sounding only in damages.

39 At [171] his Honour’s observation that neither the High Court nor any intermediate court had previously considered the question of what is meant in s 553 by “debts or claims the circumstances giving rise to which occurred before the relevant date” carried a footnote referring to two first instance judgments in this respect: *McDonald v Commissioner of Taxation* (2005) 187 FLR 461 and *Environmental & Earth Sciences Pty Ltd v Vouris* (2006) 152 FCR 510.

40 Contrary to the submission of counsel for Bluechip and Mr Knell I do not regard this reference to these cases to mean that his Honour approved them. The reference is, in context, neutral.

41 What is apparent as Hayne J set out at [172] is that the legislative intention underpinning s 553 is that provable claims in a winding up are to be defined very widely, as indeed is evident from the text of s 553(1).

42 In *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 the High Court considered the nature of a costs order, albeit in the context of a consideration of s 82(1) of the *Bankruptcy Act.* Mr Foots argued that a costs order made against him by the Supreme Court of Queensland several months after he had become bankrupt upon his own petition, was a provable debt within the meaning of s 82 of the *Bankruptcy Act* as it was a debt or liability arising out of an obligation incurred before his bankruptcy. That obligation was said to arise from the judgment against him in the Queensland Supreme Court some two weeks before his bankruptcy. He contended that the costs order was an obligation incidental to a provable debt.

43 It may be seen at the outset that the language of s 82 is not the same as that of s 553 of the *Corporations Act*. Section 82(1) concerns “debts and liabilities … by reason of an obligation incurred before the date of the bankruptcy …”. Section 553(1) by contrast, is in terms of “debts or *claims* the circumstances giving rise to which occurred before the relevant date” (emphasis added).

44 Indeed the majority at [9] noted that the classes of provable debts (under the *Bankruptcy Act*) are narrower than those encompassed by s 553 of the *Corporations Act* as regards corporate insolvency. This had earlier been identified in *Sons of Gwalia* as I earlier discussed.

45 The majority proceeded to consider the nature of a costs order. In context, these remarks are apposite to a claim for a costs order. A number of characteristics emerged. First an award of costs is discretionary: at [25]. Second, there is no absolute rule that costs follow the event citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [40]-[41]: at [26]. Third, no ‘obligation’ arose until the costs order is made: at [35]. Fourth, the risk that an order for costs may be made is not a contingent liability within the meaning of s 82(1) of the *Bankruptcy Act*: at [36]. Fifth, the order for costs itself is the source of the legal liability: at [36]. Sixth, there is no certainty that the court in question will decide to make an order: at [36]. Seventh, costs are not an incident of a judgment: at [37].

46 Justice Kirby at [99] in dissent, considered that to treat what he characterised as “the prospective costs [obligation] of Mr Foots … as outside the scheme of s 82(1) would be seriously to defeat, or certainly to wound, the operation of the *Bankruptcy Act* in important respects”. Such was not lost on the majority who remarked at [68] that “[i]f it be thought that the result reveal[ed] a lacuna in the text or the operation of the *Bankruptcy Act”* this was a matter for the Parliament.

47 In *Expile Pty Limited v Jabb’s Excavations Pty Ltd* [2004] NSWSC 284 Palmer J rejected the same submission for which Bluechip contends on appeal. In so doing his Honour distinguished the judgment of Goldberg J in *McCluskey v Pasminco Ltd (Administrators Appointed)* (2002) 120 FCR 326 in which his Honour had characterised a claim for costs as a “contingent claim”. This, in effect, is a similar finding to that by the majority in *Foots* (at [36]) that the risk of an adverse costs order is not a contingent liability within the sense of s 82(1) of the *Bankruptcy Act.*

48 The distinction broadly was that in *Expile* the costs claimed were for the costs of the winding-up. There, a costs claim was to be contrasted to one where the costs claimed are related to a claim for wrongdoing against the company. By s 466(1) of the *Corporations Act*the person making the application for the winding up order must pay their own costs until such time as a liquidator has been appointed. Thus, as Palmer J concluded at [35]:

Accordingly, even if it could be said that a claim against a company based on wrongdoing gives rise simultaneously to a contingent claim for the costs of proving the claim, s 466(1) CA [*Corporations Act*] renders the proposition inapplicable to a claim for winding up in insolvency.

49 Whether a claim for costs based on wrongdoing was a contingent claim remained an open question.

50 Accordingly, Palmer J followed the decision of Young J (as his Honour then was) in *FAI Workers Compensation (NSW) Ltd v Philkor Builders Pty Ltd* (1996) 132 FLR 213 where Young J held that the costs order made after the relevant date specified in the deed of company arrangement was not subject to the deed as it was not a “claim arising” within the meaning of s 444D(1) of the *Corporations Law* then in force. Justice Young at 217-218, correctly in my opinion, rejected the submission that the claim for costs was a contingent debt.

51 The judgment of Graham J in *Environmental & Earth Sciences* is to the opposite effect and supports the appellant’s contentions.

52 There, the plaintiff was the beneficiary of a judgment of a Full Court of this Court overturning a judgment in favour of the defendant for damages. Prior to the appeal the plaintiff had paid significant monies in satisfaction of the judgment at first instance. None of those monies actually paid to the defendant were recovered by the plaintiff. After the date of judgment in the Full Court but before any costs orders in relation to the appeal were made the defendant company appointed an administrator.

53 The administrator admitted the plaintiff’s proof for the unpaid balance of the judgment sum but not the legal costs on the basis that no such claim had arisen as at the date of the relevant appointment day.

54 Later the Full Court ordered the defendant to pay 80% of the plaintiff’s costs on the appeal, the costs of the plaintiff on the hearing at first instance and the costs of the plaintiff on the costs application.

55 Justice Graham in granting a declaration that the administrator’s partial rejection of the plaintiff’s proof of debt was invalid held that as at the date of the appointment of the administrator to the defendant company the plaintiff had a “present claim” for costs to which s 553(1) of the *Corporations Act* applied.

56 His Honour, adopting the language of Barrett J in *McDonald,* went on to state that the eventual liability of the defendant company under the costs order following the appointment of the administrator had its “genesis” in the judgment of the Full Court in the plaintiff’s favour. Putting it another way his Honour characterised delivery of the Full Court judgment as “the seeds” of the costs order. His Honour regarded this conclusion as being generally in sympathy with the judgment of the English Court of Appeal in *In Re British Gold Fields of West Africa* [1899] 2 Ch 7 to the effect that a creditor’s costs are incidental to a provable debt and therefore such costs themselves are provable even where the costs order was made after the company was wound up.

57 However, *British Gold Fields* was the subject of detailed and critical analysis by the majority in *Foots*: at [38]-[60]. At [60] it was stated that the case should no longer be “accepted as authority for a proposition which compels a construction of s 82 of the *Bankruptcy Act* whereby an untaxed order for costs made after bankruptcy is a provable debt”.

58 The Court of Appeal in New South Wales considered s 553(1) of the *Corporations Act*generally in *BE Australia WD Pty Ltd (subject to a deed of company arrangement) v Sutton* (2011) 82 NSWLR 336.

59 There, a taxation consultant had her services terminated by her employer but without prior notice or payment in lieu of notice. Proceedings were instituted by her in the Industrial Relations Commission for relief under s 106 of the *Industrial Relations Act 1996* (NSW) (*IR Act*) to the effect that her employment contract was unfair and that it be varied so as to prohibit her termination other than on reasonable notice, as well as an order for compensation in respect of the breach of the term as varied.

60 Prior to the Commission hearing the s 106 application, the employer company was placed in voluntary administration. Subsequently a deed of company arrangement was approved. Consequently, the proceedings in the Commission were stayed. Thereafter, the consultant lodged a proof of debt in respect of her s 106 claim. However, it was rejected by the deed administrators.

61 Then she instituted proceedings in the Supreme Court seeking either an order under s 1321 of the *Corporations Act* reversing the decision of the deed administrators to reject her proof of debt, or an order under s 447A enabling the administrators to consider her claim.

62 Section 447A was in Pt 5.3A of the *Corporations Act*, a Part which, relevantly, contained provisions relating to the entry into of a deed of company administration, and in which the terms “creditor” and “claim” were consistently used.

63 To the extent that Young JA dissented from the opinions of Campbell JA (McColl JA agreeing) his reasons for so doing are not relevant to the issue arising in respect of the meaning and effect of s 553(1) of the *Corporations Act.*  Justice Campbell (McColl JA agreeing) held that a person had a “claim” within the meaning of s 553 if he or she had a basis, founded on an existing legal right, for asserting a right to participate in the division of the assets of the company.

64 Accordingly an undetermined application to the Industrial Relations Commission under s 106 of the *IR Act* was not a “claim” under s 553 of the *Corporations Act* as an applicant for an order under s 106 had nothing more than a right to take proceedings and no legal obligation of the defendant in those proceedings existed until such time as the Commission had made an order pursuant to that provision ([1]; [106]-[108]; [223]-[224]).

65 That a person has a “claim” at the time administrators are appointed does not, as Campbell JA correctly observed at [105], render it a claim within s 553(1) of the *Corporations Act.*  Thus the respondent’s claim before the Industrial Relations Commission was not a “claim” within s 553(1). Likewise, Hammerschlag in *Larkden* (at [63]) held that “only the making of the order itself can constitute circumstances giving rise to the claim”. In the same vein, in my opinion, is Sunstruct’s claim for its costs on the counterclaim.

66 Justice Campbell considered by analogy claims for costs. His observations are helpful in the present matter. His Honour traversed the authorities to which I have referred including *Foots* as to which he said at [113]-[115]:

[113] In *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52, the High Court considered a situation where judgment for damages was given against a man before he became bankrupt, and an order for costs arising from that litigation was made against him after the bankruptcy. The Court held that the costs so ordered were not provable in his bankruptcy. The joint judgment of Gleeson CJ, Gummow, Hayne and Crennan JJ stressed (at [2]) that the decision essentially turned upon the construction of s 82 of the *Bankruptcy Act 1966* (Cth). Their Honours also observed (at [9]), that under s 82 “the classes of provable debts are narrower than those encompassed by s 553 of the Corporations Act 2001 (Cth) as regards corporate insolvency”.

[114] Even so, there are some aspects of the judgment of the plurality that expound the nature of costs awards in a way that does not depend upon the text of s 82. Their Honours (at [35]) rejected the proposition that exposure to an adverse costs order arose from an obligation incurred prior to the bankruptcy. Similarly (at [37]) their Honours rejected the proposition that exposure to an adverse costs order is “incidental” to liability for the underlying judgment debt. This rejection was accompanied by a footnote that referred to *McCluskey*, preceded by a “cf”. I suspect that that indicates disapproval of *McCluskey*.

[115] There is a strong analogy, in my view, between the position of a litigant who seeks but has not yet obtained an order under s 106 of the IR Act, and that of a person who seeks but has not yet obtained an order for the costs of seeking a winding up order. In each case, whether an order will be made is an exercise of discretion, and that discretion does not arise from any legal right that the applicant has (beyond the bare right to seek the order) before the order is actually made. Until the order is made, the applicant does not have a “claim” that falls within the meaning of s 553.

67 Although obiter, the opinion of the majority that claims for costs ordered after the appointment of an administrator are not “claims” within s 553(1) ought be afforded considerable weight. Indeed I think respectfully that it is correct.

68 The reasons of the majority are in substance akin to those of Hammerschlag J in *Larkden* at [61]-[62] where his Honour stated:

[61] Section 553(1) of the Corporations Act does not require the existence of a debt or liability at the relevant date as does s 82(1) of the *Bankruptcy Act*. However, it is no less pertinent to s 553(1) of the Corporations Act than it is to s 82(1) of the *Bankruptcy Act* that, as the High Court pointed out in *Foots* at [24] to [37], an order for costs itself is the source of the legal liability. Su**c**h orders turn on discretionary considerations that arise independently of the entry of judgment against the losing party. There is no certainty that the Court in question will decide to make the order. Indeed, there is no certainty that any party will move for an order.

[62] However widely one considers the notion of provable claim to be, the substantive obligation under the costs award has only one element, namely, the making of the costs award by the arbitral tribunal in the exercise of its discretion under s 33B(1) of the Commercial Arbitration Act.

69 Again these are views which I would respectfully adopt, as did the primary judge.

70 Where an administrator was appointed after judgment was entered but before a costs order was made it might be thought that where a claim for costs is made in those circumstances that this would answer the statutory criterion under s 553(1) of the *Corporations Act* of whether it was a “present” claim “the circumstances giving rise to which occurred before the relevant date”. This was what occurred in *Environmental & Earth Sciences*. However, I do not agree with such an analysis. As the majority in *Foots* observed at [37], when considering the nature of a costs order “it cannot be said that exposure to an adverse costs order is ‘incidental’ to liability for the underlying judgment debt” and that “… as a factual and legal matter, costs are no longer an ‘incident’ of either verdict or judgment … the making of an adverse costs order turns upon discretionary considerations that arise independently of the entry of judgment against the debtor”.

71 I agree with the observation by Campbell JA in *BE Australia* at [114] that the footnote in *Foots* referring to *McCluskey* which accompanied the rejection by the High Court in *Foots* of the “incidental” liability contention rather indicates disapproval of *McCluskey* on this point.

72 Nor for the same reasons can such a costs claim be properly characterised as a contingent claim: see *Foots* at [36].

## Conclusion

73 I am satisfied, for these reasons, that Sunstruct’s costs of prosecuting the counterclaim against Bluechip were not compromised by the DOCA having regard to s 444D of the *Corporations Act*; the same can be said with respect to Sunstruct’s costs in defending the claims brought by Bluechip.

# KNELL COSTS APPEAL

74 Mr Knell submits, as he did below, that no costs order could be made against him because, by reason of the DOCA and those relevant provisions, Sunstruct’s claim for costs against Bluechip was compromised. I do not acceptthis submission. No authority to support such a contention was cited. I see no basis in principle to support it. Even assuming that a claim for costs against Bluechip was barred by reason of the DOCA this does not preclude a claim being made for those costs against Mr Knell as a non-party.

75 In any event, I have found that none of the costs awarded against Bluechip whether relating to the claim or the counterclaim were compromised by the terms of the DOCA having regard to s 444D of the *Corporations Act.*

76 The only remaining challenge to the order of the primary judge that Mr Knell pay the costs of Sunstruct was on the ground that he was denied procedural fairness.

77 The background was this. The primary judge ordered that both Bluechip and Mr Knell should pay Sunstruct’s costs of and incidental to the claim and counterclaim: Order 4 made 28 November 2013. In so ordering the primary judge had regard to certain conduct of Mr Knell on behalf of Bluechip which he described as being “more than merely confluent with the interests of the applicant” (Costs judgment at [102]). Significantly however, his Honour had particular regard to the circumstances surrounding the DOCA which he described as bearing “a certain stench” (at [114]). His Honour then concluded that except for the matter of the DOCA he may not have ordered costs against Mr Knell.

78 The findings made are redolent with findings of impropriety:

(a) The circumstances surrounding the DOCA were cynical on the part of Mr Knell and directed to his self-interest (at [102]).

(b) Mr Knell used the corporate veil (via the DOCA) to stymie the respondents from recovery of their just entitlement by fashioning the DOCA (at [113]).

(c) The circumstances surrounding the DOCA bear a stench (at [114]).

(d) The DOCA was entered into because Mr Knell knew the trial (his evidence particularly) had gone badly for Bluechip and its case was at risk (at [114]). This was a significant incentive for Mr Knell to design a scheme (the DOCA) to permit Bluechip to retain any (unspecified) profits, ultimately for Mr Knell’s benefit (at [114]).

(e) Mr Knell caused the DOCA to be entered into to defeat Sunstruct as a creditor (at [114]).

79 It is apparent that the conclusions reached by the primary judge as to the circumstances surrounding the DOCA coming into existence, whilst not the only reasons, nonetheless formed the critical reasons for the orders made. I do not accept the respondents’ submissions to the contrary.

80 I am also satisfied that Mr Knell was not put on notice that his conduct referrable to the circumstances giving rise to the DOCA would be relied upon to support the application for a costs order against him.

81 Upon the delivery of judgment on the claim and counterclaim costs were reserved. The primary judge on 11 June 2013 directed the respondents to serve Mr Knell with a copy of their submissions and a list of material relied upon in support of their application for a costs order against Mr Knell.

82 At first instance, the respondents filed an outline of argument which relevantly contained the following:

50. The relevant factors are as follows:

(a) Mr Knell was put expressly on notice of this prospect by the letter from Gadens dated 5 October 2010;

(b) Mr Knell was the driving force behind the applicant, including being the only director and only shareholder at the commencement of the proceedings and at trial, including when the letter of 5 October 2010 was sent to his solicitors;

(c) Whilst the respondent did not apply for security for costs, there was no reason for the respondent to suspect insolvency or difficulty in paying – indeed the evidence of Mr Knell was that his group was successful and worth in excess of AUD$20M;

51. This is an exceptional case, for the following reasons;

(a) The claim was pursued in a complex and prolix manner, with little real regard being had to distilling the matters in dispute to the real issues being determined;

(b) There was no regard had by the applicant to the proper conduct of its case, with many days wasted because of the applicant’s failure to conduct the matter responsibly. As pointed out in the letter from Gadens dated 21 May 2010, of the 13 hearing days to that date, three days had been lost due to the applicant amending its pleadings and two days lost due to the applicant’s reliance on clearly inadmissible evidence in its affidavit material;

(c) As found by the primary judge, Mr Knell and Mrs Knell were not witnesses of truth. This finding, entirely consistent with all of the evidence, means that it was within their knowledge that the claim would not be successful, had the true position between the parties been accepted by them from the outset. It was within the control of Mr Knell to settle the action when the opportunity presented itself when offered $200,000 on 14 April 2010. Instead, the determination of Mr Knell to thwart the respondent from the fruits of its legal entitlement continues to today, as the applicant seeks to rely on an intervening insolvency, initiated by it, to prevent payment to the respondent of the funds in Court. For all of the reasons set out above, even that argument is flawed; and

(d) The pursuit of the applicant’s damages claim on a “global” basis was always flawed, such that even if it had established any breaches, it could not have succeeded in any award of damages.

83 Importantly, none of the matters relied upon touches on the DOCA quite apart from the circumstances surrounding it.

84 The DOCA was mentioned in the course of argument on 11 June 2013 on the costs question. Bluechip sought to refer to the terms of the DOCA upon the issue of what were the appropriate remedies to be afforded by the Court.

85 Later, the primary judge mentioned that he would take into account the “existence” of the DOCA for the purpose of hearing arguments in relation to costs:

HIS HONOUR: And obviously for – I need to take into account the existence of the DOCA to understand the arguments you make in relation to the sort of orders that ought be made but beyond that I don’t need to go into the DOCA and make any orders that flow from the effect of the DOCA.

86 The existence of the DOCA or, more precisely, its terms were of course relevant to Bluechip’s contentions, albeit ultimately unsuccessful, that any costs claimed were compromised by the DOCA.

87 A further hearing on the issue of costs took place before the primary judge on 13 August 2013 where, relevantly, the following exchange occurred between the primary judge and Mr Hackett, counsel for Bluechip:

HIS HONOUR: Well before we go – we move onto the next point, well then why shouldn’t Mr Peden have leave to cross-examine Mr [Knell] about the deed of company arrangement?

MR HACKETT: Well, because, I would submit to your Honour, there’s no relevance in that. There’s no - - -

HIS HONOUR: Any why not?

MR HACKETT: Well there’s been no application made to a court of competent jurisdiction to set aside the deed. I ask – sorry, rhetorically – what would - - -

HIS HONOUR: But – well - - -

MR HACKETT: - - - the utility be in adjourning – cross-examining Mr [Knell] as to the motive in relation to the entry into a document which has the current force of law?

HIS HONOUR: Well it might be relevant to the question of whether or not he ought pay the costs on a personal basis. I would have thought that would be extremely relevant under a Knight v Sp Assets sort of approach as to whether or not he has been the – as I understand it – the only shareholder or principal shareholder in the company, puts the company into a deed of company arrangement, persuades the administrator to afford his – one of the principal creditor’s credit value to the extent of $1 and then, miraculously, the company finds its way out of administration, essentially leaving the creditor, on your argument, entitled to nothing but having put to the expense of running a very expensive trial.

MR HACKETT: Well none of those factual scenarios is quite correct.

HIS HONOUR: Well no, possibly not. But the point is that no doubt they’re matters that might be explored in cross-examination.

MR HACKETT: Your Honour, the question of Mr [Knell’s] entitlement to an order for costs against him is a live issue before your Honour, I accept. But if your Honour can’t make an order against the company because of the DOCA, I’ve made my submissions as to how your Honour would properly exercise a discretion in relation to a non-party in those circumstances.

HIS HONOUR: I understand.

MR HACKETT: Your Honour, my primary submission about the cross-examination of Mr [Knell] on the motive for the DOCA is (1) it’s irrelevant, (2) motive doesn’t become an issue merely because Mr Peden raises it in an outline. The DOCA has the effect of law until set aside, and no application has been brought by the first respondent to do that.

88 At least two things may be observed from this. First, the issue of possible cross-examination of Mr Knell about the circumstances surrounding the DOCA was raised by the primary judge and not by the respondents. Second, the factual premises thought to be relevant by the primary judge were expressly put in issue, prompting the observation by his Honour that they could be explored in cross-examination.

89 However, the matter was not pursued either by the primary judge or by counsel for the respondents. He did not apply to have Mr Knell made available for cross-examination in order to explore the circumstances surrounding the DOCA.

90 Moreover, as I have said, the respondents’ submissions at first instance did not advert to the DOCA at all. The submissions which were made at [50]-[51] of the outline of written submissions which I set out above were substantially replicated by the primary judge at [93] and [94] of the Costs judgment. They say nothing about the DOCA or the circumstances surrounding it.

91 The primary judge’s conclusions and principle reasoning are to be found in the following paragraphs of his reasons which I have set out in full:

102. In particular, in this case the relevant considerations militate in favour of a finding of exceptional circumstances. First, the unsuccessful party to the proceedings was the applicant, the party which was the alter ego of Mr Knell. Secondly, the conduct of the litigation was improper. It had its genesis in the applicant’s efforts to restrain the respondent from access to its entitlement to enforce a BCIPA award. It sought to set up a claim, *in terrorem*, for damages in excess of $2 million which were claimed on a global basis, founded upon an untenable contention of the underlying contract, and in respect of a misrepresentation case without merit. Significantly, Mr Knell had an impact on the litigation which was more than merely confluent with the interests of the applicant. The circumstances surrounding the DOCA and the various transfers and retransfers of shareholdings between himself and others are indicative of cynical conduct on his part directed to his self-interest rather than those of the applicant, and highlight the true indifference Mr Knell had to the independent and separate legal character the applicant sought to have enjoyed from him.

. . .

113. Earlier I addressed the criteria relevant to this application. However, in addition to those matters it is important to note that I do not consider this a case where Mr Knell’s involvement as director could be seen as merely passive, with his only interest to see the applicant’s rights prosecuted and, if appropriate, defended. In this instance, as I have noted earlier, Mr Knell has sought to cynically use the applicant to advance his own interests above those of the corporation, and it is for that reason I consider he ought indemnify the respondent in respect of costs. Mr Knell has sought to use the corporate veil in an attempt to stymie the respondents from recovery of their just entitlement by fashioning a DOCA which was clearly intended to neutralise the value of any victory.

114. The circumstances surrounding the DOCA bear a certain stench. The DOCA followed a demand made by the ATO for the payment of approximately $975,000. At the time the total value of the creditors was listed at about $3,408,000. There were 23 creditors listed. Of the 23, at least 11 by name can be seen to be associated with the applicant. Some of the other creditors have an association by address. Two of the associated creditors, Bypass Payments Systems Pty Ltd and Harbour Lights Trust, by value, approximate half the creditors. The DOCA was concluded following the trial and before the judgment. At that time it would have been reasonably apparent to Mr Knell from his attendance on each day of the proceedings that there were significant difficulties in the case he had the applicant prosecute. Furthermore, he would reasonably have appreciated that his evidence did not go well, and that the applicant’s case was consequently at risk. These matters, in addition to the outstanding tax liability, would have provided significant incentive to see a scheme designed to permit the retention of any profits by the applicant. Ultimately, Mr Knell would be a beneficiary of such profits. Except for the DOCA, I may have been inclined to the conventional view that those standing behind a corporation are entitled to the protection of the corporate veil. However, I consider Mr Knell to have overreached in this instance and accordingly he should not be protected from the downside on the risk he took in entering the applicant into an arrangement to defeat the respondent as a creditor, a prospect which remains a clear and present danger given his demonstrated propensity to date.

115. I am mindful that the costs orders will include costs incurred long before the events which I also consider relevant to the exercise of my discretion and which I have related above. However, as my primary judgment reveals I did not form a particularly favourable impression of Mr Knell. He appeared to me a person who would use whatever means available within the technical limits of the law to achieve his desired outcome. I have no doubt in concluding that he would always have had it in mind to structure an outcome to see him enjoy the profit of the applicant’s project and leave losses where they could be left, if that was at all possible. To that end I am satisfied that he is of a nature to use corporations to his advantage for profit but also, where possible, to avoid his just creditors. He is not the sort of person to whom Basten JA was referring in *FPM Constructions*. The non-party being referred to by Basten JA was the company shareholder/officer who took the good with the bad. In such a circumstance it is inappropriate to look behind the corporate veil and nullify its effect. That is not this case, for the reasons I have stated.

(Footnotes omitted)

92 Mr Knell was not given notice of what were the circumstances surrounding the making of the DOCA which were relevant to the making of a costs order against him.

93 In *Dunghutti Elders Council (Aboriginal Corporation) RNTBC and Others v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4)* (2012) 200 FCR 154 the Full Court considered the principles going to the making of non-party costs orders and specifically, in that case, against the directors of the appellant corporation. Relevantly at [88], and again at [94], the Court identified thepower to make a non-party costs order where the non-party’s conduct makes it just and equitable to do so. The Court noted with approval what Gobbo J had said in *Bischof v Adams* [1992] 2 VR 198 at 202-204 that the categories of cases are not closed.

94 The conduct need not be improper or dishonest conduct. The following example was given in *Dunghutti* at [76]. It sets out an excerpt from what was stated in *Knight v FP Special Assets Limited* (1992) 174 CLR 178 at 192-193 per Mason CJ and Deane J:

76. . . .

For our part, we consider it appropriate to recognize a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made.

95 These obiter remarks were adopted by the Full Court in *Yates v Boland* [2000] FCA 1895 at [11].

96 Nonetheless there must be conduct. Counsel for the respondents was repeatedly invited by the Court to identify what was the relevant conduct of Mr Knell which related to the circumstances surrounding the making of the DOCA. He was unable to do so.

97 It is apparent that there were important findings made by the primary judge beyond those concerning the circumstances surrounding the making of the DOCA.

98 It is important to bear in mind that notice to a non-party against whom a costs order is being sought will not always be necessary. As was pointed out by the Full Court in *Yates v Boland* at [34] whether such a requirement arises will depend on the facts and circumstances of the individual case: “the necessity to warn a non-party of an intention to claim costs is not a principle applicable in every case … Rather it may be a material consideration depending on the situation disclosed in the case under consideration”.

99 Failure to take account of the fact that there was no such warning may amount to a failure to take into account a material consideration.

100 Counsel for the respondents, in this context, advised the Court that he would not abandon reliance on the findings at [114] of the Costs judgment. These concern the circumstances surrounding the DOCA. It seems to me that they cannot seek to do before us what they did not do before the primary judge.

101 It is evident that the primary judge placed central reliance upon his findings as to the circumstances surrounding the making of the DOCA. No reliance had been placed on them or any of them by the respondents. Accordingly, there was a denial of procedural fairness to the appellant. His counsel had foreshadowed that there was a factual contest in play were the circumstances surrounding the DOCA to be taken into account. That contest was not entered upon. A court should not determine a matter on a basis not relied upon by a party as was the case here: *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319 at [146] and *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89 at [132]-[133]. Moreover, the other side of that coin is that these unproved and contestable circumstances were not material considerations and ought not to have been taken into account.

102 In my opinion, the discretion of the primary judge miscarried. I do not think, despite the findings in [102] of the Costs judgment, that this Court should not only set aside the costs order against Mr Knell but re-exercise the discretion.

103 The central barrier to this is that whilst there is a general finding that the conduct of the litigation by Bluechip was improper, to the extent that this is specified to Mr Knell, it is couched in terms of the circumstances surrounding the DOCA and other factors (at [102]) and responsibility for “much of the elongation of the proceedings” (at [106]). However, there are not specific findings, either quantitative or qualitative, which would enable the Court to re-exercise the discretion. To do so would have required the Court to embark on a full consideration of the relevant evidence. The Court was invited to do so by counsel for Mr Knell but only in reply. The invitation, reasonably enough, was declined. Accordingly the matter of the non-party costs application should be remitted to the FCCA to be determined according to law and in light of these reasons.

## Costs of the appeals

104 The Bluechip Appeal challenged the entirety of the judgments of the FCCA given on 26 April 2013 and 20 November 2013.

105 The Knell Costs Appeal appeals from part of the Costsjudgment given on 20 November 2013 and Order 4 made on 28 November 2013.

106 On the morning of the first day of the hearing of the appeals, which was originally set down for a four day hearing, counsel for the appellants informed the Court that he wanted to highlight but two grounds of appeal. The first concerns the effect of the DOCA on the orders made including costs orders. The second concerned the failure to warn Mr Knell that certain conduct would be relied upon in support of a non-party costs order against him. These confined grounds were contained in a document entitled “Appellants’ Summary” then provided to the Court.

107 When pressed as to the status of the grounds of appeal in the Notices of Appeal in light of the confinement of oral submissions, counsel for the appellants after lunch informed the Court that other than those grounds of appeal in the “Appellants Summary” all other grounds of appeal in the Notices of Appeal were abandoned.

108 This resulted in a considerably truncated hearing which extended to about one and a half days and the attendant waste of considerable preparation by the respondents and indeed by the Court. This kind of eleventh hour revision of what is going to be argued is the antithesis of what this Court expects from practitioners. It is wasteful of scarce public resources. It has financial and other consequences for the other parties. It has a tendency generally to diminish the standing of the legal profession.

109 The respondents should have their costs thrown away by reason of the abandonment of the grounds in the Notices of Appeal not advanced in the “Appellants’ Summary” document.

110 Bluechip has been successful in its appeal against the Liability judgment in respect to the amount of the judgment entered. This did not occasion much argument. Otherwise it was unsuccessful in its challenge to the finding in the Costs judgment and consequential orders that the costs, including the costs of the counterclaim were compromised by the DOCA. Bluechip should pay the respondents’ costs of this appeal.

111 In the Knell Costs Appeal Mr Knell has been successful. He should have his costs of the appeal against the respondents. I do not accept the submission by counsel for the respondents that he should not have his costs but rather (together with Bluechip) should pay 80% of the respondents’ costs to reflect that “they”, presumably meaning Bluechip and Mr Knell, “ran a very large appeal” but belatedly abandoned many of those grounds. However, Mr Knell didnot abandon any of his grounds of appeal. This submission can relate only to the Bluechip Appeal.

112 This belated abandonment reflects the considered view of the appellant’s counsel who argued the Bluechip Appeal that most of the grounds were without merit. A consideration of the grounds of appeal and the reasons for judgment of the primary judge supports this conclusion. Indeed counsel for the appellant in the Bluechip Appeal, it seems to me, implicitly conceded as much when the issue of costs was being debated.

113 These circumstances, in my opinion, warrant an order that the costs thrown away by reason of the abandonment of most of the grounds of appeal should be paid on an indemnity basis. This is not because of the late notice, although that may be a factor, but because the grounds were manifestly without merit.

114 If, as contended for by the appellants, this had been a case where there was a failure to put Mr Knell on notice of factors relied upon by the respondents (and it was not) I would have upheld such a ground and still remitted the matter to the FCCA.

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| I certify that the preceding one hundred and seven (107) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour. |

Associate:

Dated: 14 May 2015

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 826 of 2013 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | CENTRAL QUEENSLAND DEVELOPMENT CORPORATION PTY LTD (FORMERLY BLUECHIP DEVELOPMENT CORPORATION (GLADSTONE) PTY LTD) ACN 120 112 781Appellant |
| AND: | SUNSTRUCT PTY LTD ACN 104 162 549First RespondentLORENZO MARIO REGINATOSecond RespondentANTONY JAMES SCHOFIELDThird Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 828 of 2013 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | SIDNEY CHARLES KNELLAppellant |
| AND: | SUNSTRUCT PTY LTD ACN 104 162 549First RespondentLORENZO MARIO REGINATOSecond RespondentANTONY JAMES SCHOFIELDThird Respondent |

|  |  |
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| JUDGES: | BESANKO, GILMOUR AND RANGIAH JJ |
| DATE: | 14 May 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

**RANGIAH J:**

115 I agree with the reasons for judgment of Gilmour J and the further reasons of Besanko J. I agree with the orders their Honours propose.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 14 May 2015