

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION

No. of 2009.

On appeal from the Federal Court of Australia

IN THE MATTER OF:

OPES PRIME STOCKBROKING LIMITED

(Receivers & Managers Appointed) (In Liquidation)

ACN 086 294 028

LEVERAGED CAPITAL PTY LTD

(Receiver & Managers Appointed) (In Liquidation)

ACN 097 720 495

HAWKSWOOD INVESTMENTS PTY LTD

(Receivers & Managers Appointed) (In Liquidation)

ACN 098 040 683

OPES PRIME GROUP LIMITED

(Receivers & Managers Appointed) (In Liquidation)

ACN 120 372 223

BETWEEN: ROBERT FOWLER
Appellant

AND: JOHN ROSS LINDHOLM, ADRIAN
LAWRENCE BROWN AND PETER DAMIEN
McCLUSKEY
Respondents

NOTICE OF APPEAL

Filed on behalf of the applicant by
John M Barbouttis

Dated 31 August 2009

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The appellant appeals from those parts of the judgment of the Federal Court given *ex tempore* on 4 August 2009 and delivered in writing on 12 August 2009 at Melbourne whereby the Court ordered that the Scheme of Arrangement as approved by the Court should contain provisions:

- A. for the payment under the Scheme as priority payments to the detriment of the general body of creditors and contrary to the *pari passu* rule of a total of \$11,500,000 to two litigation funders and in respect of legal fees incurred in the conduct of litigation, including the amounts of adverse costs ordered which litigants had incurred as a result of unsuccessful interlocutory applications;
- B. for the provision by operation of the Scheme of an indemnity to the ANZ Bank and Merrill Lynch by creditors against liabilities and costs incurred by either of them at the suit of a third party where that third party had been sued by the creditor and had joined either of them; such indemnity to extend not only to the full amount to be received by the creditor under the Scheme but also to any amount recovered by the creditor from third parties held liable to the creditor in respect of the loss and damage suffered by him as a result of the collapse of OPES PRIME;
- C. for the extinction of the third party rights of creditors against the ANZ Bank and Merrill Lynch.

GROUNDS OF APPEAL:

1. Each of the attributes of the Scheme referred to in paragraphs A, B and C of this Notice of Appeal is contrary to law and beyond the power to approve a Scheme under the Corporations Act 2001, s 411.
2. Each of the attributes of the Scheme referred to in paragraphs A, B and C of this Notice of Appeal is unfair.
3. The Court should not have included each of the attributes of the Scheme referred to in paragraphs A, B and C of this Notice of Appeal in the Scheme approved by the Court.
4. By treating privately with particular groups of creditors, their funders and lawyers for the payments other than *pari passu* amounts payable to all creditors and in their other dealings, the liquidators acted in breach of their fiduciary duties and abandoned their duty to remain neutral.
5. The payments provided under the Scheme to funders and lawyers were unlawful.
6. The scheme as finally structured with such payments was a fraud on the power in s 411 of the Corporations Act 2001.
6. His Honour made errors of fact and law and findings without the benefit of evidence in holding that the stock market collapse had caused the losses of the creditors, that the creditors had gambled and lost on the stock market, that the cost of taking actions against the

banks to trial would amount to many millions of dollars and that very few creditors were likely to bring claims against advisers and other third parties.

7. His Honour omitted to take account of facts which were relevant, including the fact that the liquidator had advised creditors not to sign with litigation funders and, if they had signed to seek legal advice as to whether they could withdraw from their contracts.

8. His Honour erred in holding (if he did) that the votes at the meeting indicated that those creditors who did not stand to gain from the priority payments or whose votes were exercised by the liquidator as chairman of the meeting overwhelmingly voted in favour of the priority payments.

9. By voting open proxies in favour of the scheme and against the proposed amendments the liquidator departed from his duty to act impartially.

10 Having concluded that there were troubling aspects of the proposed schemes, his Honour erred in finding that:

(a) the preferential distribution of \$11.5 million was not such as to call for an amendment of the proposed schemes;

(b) the provision for the liquidator to execute a deed of release and indemnity on behalf of creditors was not such as to call for an amendment of the proposed schemes.

ORDERS SOUGHT:

1. Orders 1-4 of the Orders of the Honourable Justice Finkelstein made 4 August 2009 be varied by attaching as Annexure A thereto a copy of the Scheme as varied by this Court on appeal.

2. Declarations that those aspects of the Scheme identified in paragraphs A, B and C of this Notice of Appeal were contrary to law and unfair.

3. Costs

4. Leave to appeal be granted, should leave be necessary.

To the Respondents: Level 29, 600 Bourke Street, Melbourne, VIC. 3000

TAKE NOTICE:

(a) Before taking any step in the proceeding, you must enter an appearance in the Registry, unless you have already entered an appearance under Order 52, rule 7.

(b) The papers in the appeal will be settled before the Registrar
at _____ on _____

(*place, date and time to be inserted by the Registrar*).

Place: Owen Dixon Commonwealth Law Courts Building, 305 William Street,
Melbourne, VIC. 3000
The appellant's address for service is care John M Barbouttis, Suite 515, Eastpoint Tower,
180 Ocean Street, Edgecliff, NSW 2027.

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Solicitor for the Appellant