

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
DIVISION: GENERAL
ON APPEAL FROM THE FEDERAL COURT**

VID 627 of 2009

ROBERT FOWLER

Applicant

**JOHN ROSS LINDHOLM, ADRIAN LAWRENCE BROWN
AND PETER DAMIEN MCCLUSKEY**

Respondents

RESPONDENTS' OUTLINE OF SUBMISSIONS

Preliminary Note

- 1 At the time of filing this outline, the Respondents only have the 'incomplete' outline that was filed and served by the Applicant on 1 September 2009. That outline is not structured in accordance with the grounds of appeal that are set out in the draft amended Notice of Appeal dated 31 August 2009. Nor has the Applicant served any application for leave to adduce evidence, notwithstanding what the Applicant's Counsel said to the Court on 28 August 2009 and is reflected in paragraph 2 of the order made that day by Justice Gordon.

Leave to appeal

- 2 The Respondents make no submission regarding the application for leave to appeal. If leave is granted, the Court can deal with the substance of the matters that are raised in the draft amended Notice of Appeal.

Power to Approve Scheme (Grounds 1, 5, 6 (first one))

- 3 These grounds appear to raise the issue of whether the Court had power under section 411 of the *Corporations Act 2001* (Cth) to approve schemes that had the three attributes of the Schemes identified in paragraphs A, B and C of the notice of appeal.

4 The Court did have that power, for the following reasons:

- (a) The Schemes involved an ‘arrangement’ between the companies and their creditors, (see the authorities referred to at [28] to [31] of the Reasons at AB 363-364). The Schemes touch and concern, or adjust, the rights of and obligations of the creditors in numerous ways. Most importantly, the Schemes replace the rights and obligations of Scheme Creditors in the windings-up with their rights and obligations under the Schemes: clause 4.1(d) of the Schemes at AB604. The Schemes establish an entire regime for the determination of creditors’ claims against the scheme companies, including an independent valuation process: sections 7, 8 and 9 of the Schemes at AB121-128.
- (b) An arrangement can release claims by the creditors against third parties, see *Re T & N (No. 3)* [2007] 1 All E.R. 851 (Ch.) at 872.8, *Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd* [2001] 4 SLR at 23-24 and 27, *Re Metcalfe & Mansfield Alternative Investments II Corp* [2008] ONCA 587 at [69]-[73]. The article and U.S. cases that are referred to by Justice Finkelstein in [49] to [54] of the Reasons at AB370.4 to AB372.6 point towards the utility of a broad construction of section 411, as His Honour said at [54], AB 372.6. The third party releases effected by the Schemes are integral to the finalisation of creditors’ claims against the scheme companies. These releases represent part of the consideration passing to the parties who provide the funds and assets required to compromise the creditor claims against the scheme companies, to the apparent satisfaction of a vast majority of those creditors. As Finkelstein J recognised at [55] of the Reasons, the third party releases operate with respect to claims that “largely (and in many cases completely overlap) with the creditors’ claims against the scheme companies”.
- (c) The relevance of the decision of Needham J in *Re Buildmat (Australia) Pty Ltd* (1981) 5 ACLR 689 (“*Re Buildmat*”) to the power question is limited. The scheme in question in *Re Buildmat* had already been approved by the Court and the issue before Needham J was whether the releases contained in the scheme could be enforced by a third party directly against a scheme creditor (see *Re Buildmat (Australia) Pty Ltd* (1981) 5 ACLR 689 at 692.1 to 692.4). Needham J did not consider whether the Court had the power to approve the scheme pursuant to section 411(4) or whether the releases contained in the scheme were binding as between the scheme creditors and the scheme company. Further, the Opes Prime Schemes are very different from the scheme that Needham J had to consider. In any event, the reasoning of Needham J in *Re Buildmat* should not be applied by this Court in

relation to the power question for the reasons of Finkelstein J set out at [36] to [39] of the Reasons at AB 365-367 and the reasons of Yong Pung How CJ in *Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd* [2001] 4 SLR at [29] - [30].

- (d) The Applicant's outline asserts at [6] that *Re Boral Johns Perry Industries Pty Ltd v Kurt and Gerlinde Piccardi; Dick & Dons Pty Limited; Fire Fighting Sprinkler Co Limited and George Gregory Grivas* [1989] FCA 227 (23 June 1989) ("**Re Boral**") referred to *Re Buildmat* with approval. That is incorrect. The judgment referred to with approval in *Re Boral* was the judgment of Needham J in the later case of *Re Buildmat (Australia) Ltd* (1983) 1 NSWLR 291 in which Needham J considered an entirely different scheme of arrangement proposed in relation to a different company. Much emphasis is placed at [3] to [6] of the Applicant's outline on *Bridges v Hershon* [1968] 3 NSW 47. However, the decision in that case turned entirely on its own facts, namely the terms of the scheme documents, which were found not to require the relevant shareholder to sell, even if the scheme bound him. Both Wallace P (at 48.25) and Asprey JA (at 55.9) stated that they did not need to determine whether a scheme of the kind before them (which had already been approved by an earlier decision of the Court) was within the then equivalent of s 411. Each expressed, by way of obiter, doubt that it would. In the passage referred to by Needham J in *Re Buildmat*, Asprey JA (at 55.6 - 55.8) doubted whether a scheme whereby all the members become bound to sell their shares to a third party was a scheme which 'altered or modified the relationship between the company and its members in their membership capacity', which he thought was the test for whether a proposal was an 'arrangement between a company and its members'. In *Re Bank of Adelaide Ltd* (1979) 4 ACLR 393 the majority of the Full Court of the Supreme Court of South Australia dispelled the doubts expressed by Asprey JA and found that a "takeover by scheme" fell within the terms of the section. Since that time, schemes whereby members are required to transfer their shares to a third party, and which frequently authorise the company to execute such a transfer on their behalf have become by far the most common form of members' schemes of arrangement.
- (e) For the reasons set out in paragraphs 4(b) to (d) above, the Court has the power to approve schemes of arrangement containing Attributes B and C.
- (f) With regard to Attribute A, the fact that some aspect of the arrangement "contravenes the pari passu rule" is no bar to approval: *Re HIH Casualty and General Insurance Ltd & Ors* (2005) 53 ACSR 12 per Barrett J at [110] - [121]; *Re Anglo American Insurance Ltd* [2001] 1 BCLC 755 at 756.6-766.9. There is in fact no such rule applying to schemes of arrangement: the so-called rule is to be found expressed in

relation to winding up in sections 501 and 555 of the Act, but is subject to numerous exceptions and qualifications (see ss 556 – 563AAA). The proper characterisation of the “Plaintiffs’ Costs Fund” and the payments to the two litigation funders is that they are legitimate costs of the Schemes in that they contributed to the securing of the settlement funds which are now available to effect the compromise between the scheme companies and the creditors. The payment of these costs is intended to place all creditors on an equal footing. After payment of all legitimate costs, the Schemes treat all creditors rateably and consistently with normal insolvency principles.

- 5 The first Ground 6 (and [33] of the Applicant’s outline, apparently referring to [7] to [32] and [83] to [86] of Mr Gleeson’s submissions dated 10 June 2009) is unintelligible. Fraud on a power involves notions that the power has not been exercised in good faith and for the purposes for which the power was conferred: see, e.g. *Lancedale Holdings Pty Ltd v Heath Group Australia Pty Ltd* [1999] NSWSC 609 at [71] per Bryson, J. The power in section 411 is conferred upon the Court. Who is it alleged committed a ‘fraud’ on that power?

Discretion to Approve Scheme (Grounds 2, 3, 6 (second one), 7, 8 and 10)

- 6 It seems that these grounds are directed to the contention that, if the Court has power to approve the Schemes, there was a miscarriage in the exercise of that discretion because of ‘unfairness’ (grounds 2, 3 and 10) or because the Court took into account irrelevant matters or did not take into account relevant matters (grounds 6 -the second one- and 7 and 8).
- 7 The Respondents adopt His Honour’s statement of the role of the Court at [8] and [9] of the Reasons at AB394.
- 8 In relation to unfairness, it is clear that the learned Judge carefully weighed up whether it was fair that the payments be made in respect of legal costs to litigation funders: see especially [23] to [24] of Reasons at AB 399-400. The issue was fully debated. The principal contradictor, Lavan Legal, opposed the legal costs payments: see [83] to [86] of Mr Gleeson SC’s submissions which have been adopted by the Applicant.
- 9 The payments were also opposed by Counsel for the present Applicant, appearing for Dover Gardens Pty Ltd.¹

¹See [8] - [13] of the Dover Gardens outline dated 25 May 2009, [1] -[11] of the Dover Gardens outline dated 15 June 2009, [1] - [9] and [13] of the Dover Gardens outline dated 23 June 2009 and [2] - [5] and [2] - [24] of the Dover Gardens outline dated 4 August 2009. See also pages 71-72 of the transcript of the hearing on 11 June 2009, page 140 of the transcript of the hearing on 12 June 2009, page 27 of the transcript of the hearing on 23 June 2009, page 14-17 of the transcript of the hearing on 30 June 2009 and pages 8 and 12-17 of the transcript of the hearing on 4 August 2009.

- 10 At [19] of the Reasons at AB398.8, His Honour posed the question to be answered as being whether the impugned provisions were such as to render the Schemes so unfair that they should not be approved. This formulation correctly emphasises that it is the Schemes as a whole that have to be evaluated for fairness. The conclusion that His Honour reached was that what was proposed in relation to the payments for costs and to litigation funders was reasonable: [24] of the Reasons at AB399.9. No error in the exercise of His Honour's discretion can be identified in this approach, even if a different judge might have reached a different conclusion.
- 11 It should be emphasised here that Finkelstein J found (at [18] of the Reasons at AB398.7) that he could not be satisfied that if the Schemes had been put to the creditors with the amendments that he had been asked to make, it would still have been approved. His Honour therefore concluded that he should not exercise the discretion to approve the Schemes with amendments that would give effect to the excision of Attributes A and B. In doing so, His Honour correctly applied the principles emerging from the authorities which he cited at [16] – [18] of the Reasons at AB397.9.
- 12 It was not submitted to Finkelstein J by any party that the Court should make an amendment of the kind that would excise the Applicant's Attribute C, but otherwise approve the Schemes. Obviously, of and by itself such an amendment would benefit creditors. So would an amendment that doubled or quadrupled the Cash Settlement Sum of \$226 million which the Contributing Banks had agreed to pay under the Implementation Agreement (AB 739-952) after a lengthy mediation. But the compromise with the Contributing Banks is what it is, and it is that compromise that was overwhelmingly approved by creditors (see [11] of the Reasons at AB 395-396).
- 13 There was no miscarriage of discretion in the manner in which his Honour exercised his discretion to approve schemes that included that characteristic.
- 14 The second ground 6 is that His Honour 'made errors of fact and law and findings without the benefit of evidence ...'. Only the last of the matters mentioned in the second ground 6 is referred to in the Applicant's outline.
- 15 Looking at the matters mentioned in the second ground 6:
- (a) The first is an incorrect statement of the comment which is found in the Reasons at [3] (AB 393), which in any event was an introductory remark which is quite immaterial to the decision.

- (b) The second and third matters may be found in the Reasons at [6] (AB 393-394) and are also introductory remarks, but are relevant to His Honour's conclusion that the Schemes were cast in such terms that "an intelligent and honest member of the class might reasonably approve", that being the established test for the exercise of the Court's discretion: see the Reasons at [8] – [9] (AB 394) adopted above.
- (c) The fourth matter refers to [25] of the Reasons (AB 400) in which Finkelstein J expressed doubt that many creditors would in fact pursue claims against an adviser. Of course, His Honour did not have evidence of a survey of creditors. Nevertheless, His Honour was entitled to entertain it and in any case, the gravamen of his point came in the next part of [25] to the effect that clause 6.1(b) was unlikely to trouble any creditor who did bring such a claim.

16 More generalised facts and alleged errors of fact are alluded to in grounds 7 and 8. The grounds themselves are not mentioned in the Applicant's outline. There is reference to some of the content of ground 7 in [31] of the Applicant's outline, but the significance or relevance of what is there stated is not explained. Paragraph 35 of the Applicant's outline refers to matters that bear a passing resemblance to ground 8, but no attempt is made there to demonstrate error on the part of Finkelstein J.

Criticism of the Liquidators (grounds 4 and 9)

- 17 These grounds allege that the Liquidators "acted in breach of their fiduciary duties and abandoned their duty to remain neutral" and "[b]y voting open proxies in favour of the scheme and against the proposed amendments the liquidator (sic) departed from his duty to act impartially." These allegations were not mentioned to the Court on 28 August 2009. Nor are they supported by any evidence despite paragraph 2 of the order of 28 August 2009.
- 18 In any event, the determination of these allegations one way or another could not affect the result of the appeal, and is irrelevant to the relief sought.
- 19 Further, the minutes of the scheme meetings (Exhibit JRL-9 to the Third Affidavit of John Ross Lindholm sworn on 28 July 2009, page 7 of which is contained as annexure "A" to this outline of submissions) indicate that the chairman did not vote any open proxies in favour of the Schemes.
- 20 Justice Finkelstein mentioned the role of the Liquidators at Reasons [23], AB 362.1. His Honour said that "...the liquidators' central role in bringing about the implementation agreement which led to the schemes being propounded meant they were best suited to assist

the court'. In the last sentence of the same paragraph His Honour noted that in any event there were other proponents and opponents of the Schemes.

- 21 The last section of the Applicant's outline ([30] - [36]) is sub-titled "The Scheme was Not in the Public Interest" which contains more irrelevant, scandalous and completely unsubstantiated allegations against the Liquidators. That section of the outline is embarrassing.
- 22 In [30] there is a disingenuous and mischievous reference to proceedings against the Liquidators. In that paragraph and in [31] there are more references to alleged misrepresentations by the Liquidators, but again no evidence (despite what the Court was told on 28 August 2009) or any attempt at reasoned argument. Factual descriptions like "large, sophisticated funded groups" have no foundation. Members of funded groups might well not be "sophisticated".
- 23 Paragraph 31 also contains the suggestion that creditors who acted upon the Liquidators' recommendation that they delay issuing proceedings (pending the outcome of settlement negotiations) suffer detriment by reason of the Schemes making an allowance for other creditors' costs and expenses associated with proceedings which were commenced prior to, or in spite of, the Liquidators' recommendation. This makes no sense at all. Creditors who incurred litigation costs did so to the ultimate benefit of all creditors, as the existence of the litigation increased the settlement pressure on the Contributing Banks. Creditors who did not incur litigation costs enjoy that benefit but have not incurred relevant costs which ought to be provided for under the Schemes. To characterise this as 'buying votes' and 'contrary to commercial morality' ([30] of Applicant's outline) is perverse.
- 24 Nor is there any evidence from the Applicant for numerous alleged factual statements in [35]. The references to "creditors who stood to lose from the priority payments" exposes the fact that the Applicant is viewing those payments in isolation from the benefits arising from the Schemes as a whole. The priority payments are part of the price of those overall benefits and cannot be viewed in isolation.

Relief sought on the appeal

- 25 The amended proposed notice of appeal seems to assume that the outcome of a successful appeal would be that the Scheme presently annexed to the order made on 4 August 2009 would be replaced by a different Scheme, being one which omits any or all of the present clauses 13.1(b)(vi) and (vii), 12.3, Chapters 5 and 6 and annexes a different Scheme Release and Indemnity Deed.

- 26 For the reasons indicated by Finkelstein J at [18] of the Reasons (AB398.7), none of that can be done consistently with the authorities which guide the Court in exercising its discretion to approve a scheme of arrangement with modifications. See, for example, *Re Citect Corporation* (2006) 225 ALR 137 at [14] - [16]; *Re HIH Casualty and General Insurance Ltd & Ors* (2006) 200 FLR 243 at [36] - [38].
- 27 Variation of the Schemes by removal of Attributes A, B and (in particular) C would create a Scheme which is not “substantially in the form” contemplated by the Implementation Agreement (as amended by the Supplementary Implementation Agreement): AB739 and 953. Subject to the position of the Contributing Banks, this will result in un-funded Schemes.

Conclusion

- 28 If leave to appeal is granted, the appeal should be dismissed with costs and the orders of Finkelstein J left undisturbed.

C. M. Scerri

R. D. Strong

Mallesons Stephen Jaques

Solicitors for the Respondents

Annexure “A”

“That all creditors not entitled to vote at this meeting be permitted to remain in attendance at this meeting.”

The resolution was moved by Adrian Brown as proxy for HIPL and the Trade and Other Creditors of Opes Prime voted on the resolution. The Chairman declared the resolution carried on the voices.

8 Resolution 1 - approval of the Scheme

Adrian Brown invited questions from the creditors on Resolution 1 at each of the Scheme Meetings, the business of which was recessed and resumed in turn. The Chairman confirmed that quorum remained present for each of the six meetings. No additional question on Resolution 1 was raised at any of the Scheme Meetings.

8.1 Scheme Meeting of Client Creditors of OPSL

The following resolution was moved by Ross Dobinson in his own right at the Scheme Meeting of the Client Creditors of OPSL:

- *“Pursuant to and in accordance with section 411 of the Corporations Act 2001 (Cth), the scheme of arrangement between Opes Prime Stockbroking Ltd and its creditors, as contained and more particularly described in the Explanatory Statement, is approved (with or without modification)”.*

An unidentified creditor asked the Chairman to declare his proxies. The Chairman sought advice from the Returning Officer. It was determined that the Chairman held specific proxies for 39% in value of the creditors present and voting at the Scheme Meeting.

The Chairman also stated that he held a general proxy but would abstain from voting this proxy.

A poll was conducted by Computershare in relation to Resolution 1. The Chairman voted his specific proxies. The conduct of the poll was supervised by Mr Ken Dyer of Computershare Investor Services as Returning Officer.

8.2 Client Creditor class of LCPL

Adrian Brown called for a short recess of the Scheme Meeting of the Client Creditor class of OPSL and resumed the business of the Scheme Meeting of the Client Creditor class of LCPL.

The following resolution was moved by Mr Mark Addison as proxy for Altinova Nominees Pty Ltd:

- *“Pursuant to and in accordance with section 411 of the Corporations Act 2001 (Cth), the scheme of arrangement between Leveraged Capital Pty Ltd (receivers and managers appointed)(in liquidation) and its creditors, as contained and more particularly described in the Explanatory Statement, is approved (with or without modification)”.*

A poll was conducted by Computershare in relation to Resolution 1. The Chairman voted his specific proxies. The conduct of the poll was supervised by Mr Ken Dyer of Computershare Investor Services as Returning Officer.