

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID No. 627 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
(Receivers & 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**
Applicant

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

OUTLINE SUBMISSIONS OF THE MERRILL LYNCH ENTITIES

Application for Leave to Appear

1. By Notice of Motion dated 28 August 2009, Merrill Lynch International and Merrill Lynch International (Australia) Limited (collectively referred to herein as “**Merrill Lynch**”) seek leave to appear and to be heard at the hearing of the Applicant’s application for leave to appeal and the appeal if leave is granted.
2. In support of its application, Merrill Lynch relies on an Affidavit of Andrew Keith Carter affirmed 28 August 2009.

3. The reason that Merrill Lynch seeks leave to appear and be heard is that its financial interests will be directly affected by the orders sought by the Applicant on the appeal. As explained in Mr Carter's Affidavit:
- (a) Merrill Lynch and ANZ are party to numerous proceedings arising out of the collapse of the Opes Prime group ("**Opes Client Proceedings**") and further proceedings against it have been foreshadowed.
 - (b) To resolve all existing and future proceedings arising out of the collapse of the Opes Prime group, on 6 March 2009 Merrill Lynch and ANZ entered into a Settlement Agreement with the Opes Prime entities, the Liquidators and the Receivers which provided for, inter alia:
 - (i) the payment of \$226 million (the "**Cash Settlement Sum**") by Merrill Lynch and ANZ to the Liquidators (clause 2); and
 - (ii) the promotion by the Liquidators of the Schemes of Arrangement which are the subject of this proceeding, essential elements of which included the establishment of a fund for distribution to creditors of the Opes Prime group (which fund would include the Cash Settlement Fund and certain securities held by Merrill Lynch (referred to in the documents as the "**Withheld Securities**")) (clause 1.1(c) and (d)), a release and indemnity in favour of Merrill Lynch and ANZ by Opes Clients (clause 1.1 (i) and (j)) and the disposal of all existing proceedings against Merrill Lynch and ANZ (clause 1.1(k)(iv)).
 - (c) In pursuance of the Settlement Agreement, on 1 May 2009 Merrill Lynch and ANZ entered into the Implementation Agreement with the Opes Prime entities, the Liquidators and the Receivers which contained commercially similar provisions to the Settlement Agreement (and which are discussed further below). On 22 July 2009, the same parties entered into a Supplementary Implementation Agreement to reflect the form of the Schemes (and accompanying Scheme Release and Indemnity Deed) as approved by the Court on 1 July 2009.
 - (d) The Liquidators promoted the Schemes of Arrangement and, on 4 August 2009, Justice Finkelstein approved the Schemes. Consistently with the Settlement Agreement and the Implementation Agreement, the Schemes contained:
 - (i) provisions for the distribution of Scheme Assets (which included the Cash Settlement Sum and the Withheld Securities) to Scheme Creditors;
 - (ii) provisions for the appointment of the Liquidators as each Scheme Creditor's agent and attorney to execute on their behalf the

Scheme Release and Indemnity Deed and to discontinue the Opes Client Proceedings (clause 5); and

- (iii) provisions for the release of ANZ and Merrill Lynch (and others) from all claims relating to Opes Prime (clause 6).
- (e) In pursuance of the Implementation Agreement and following the lodgement with ASIC of the Orders of this Court dated 4 August 2009 (resulting in the Scheme becoming Effective for the purposes of the Implementation Agreement):
- (i) all relevant parties, including Merrill Lynch and ANZ, executed the Scheme Release and Indemnity Deed;
 - (ii) the Cash Settlement Sum was paid to the Liquidators in escrow; and
 - (iii) the Withheld Securities were transferred to the Liquidators in escrow.
4. Merrill Lynch understands that the Applicant is seeking an order from this Court to vary the Schemes by, inter alia, deleting those provisions of the Schemes that provide a release and indemnity in favour of Merrill Lynch and ANZ (essentially clauses 5 and 6 of the Schemes). Such an order will adversely affect Merrill Lynch's financial interests.
5. Merrill Lynch was given leave by Justice Finkelstein to appear and be heard on the applications to convene the Scheme meetings and to approve the Schemes.

Outline of Submissions on the Appeal

6. Merrill Lynch makes no submissions on the application for leave to appeal. If leave to appeal is granted, Merrill Lynch makes the following submissions.
7. As noted above, Merrill Lynch understands that the Applicant is seeking an order from this Court under s.411(6) to vary the Schemes by, inter alia, deleting those provisions of the Schemes that provide releases and an indemnity in favour of Merrill Lynch and ANZ (essentially clauses 5 and 6 of the Schemes).
8. Section 411(6) provides that:
- “The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just.”*
9. In his reasons dated 4 August 2009, Finkelstein J referred to a number of authorities that have considered the nature and breadth of the court's power under s.411(6) (at paras 16 to 17). Each of the authorities support the view that a court would not alter a scheme in a manner that would take the terms of the scheme outside the reasonable contemplation of the voting shareholders or creditors (as the case may be) or what they would have been likely to agree. This is consistent with the principle that the power under s.411(6) could only be exercised to achieve the purpose of the

legislative scheme; that is, to bring into effect a compromise or arrangement that has the requisite support of the shareholders or creditors freely and properly given. It could not be used to bring into effect a compromise or arrangement that was not considered or contemplated by the shareholders or creditors (as the case may be).

10. The Court should not grant the orders sought by the Applicant, in so far as the orders relate to the release and indemnity granted in favour of Merrill Lynch and ANZ, for the following reasons.
11. First, Justice Finkelstein was correct in concluding that section 411 permits a Court to approve a Scheme of Arrangement that contains provisions by which releases and indemnities are granted in favour of third parties in circumstance where there is a sufficient nexus between those provisions and the compromise or arrangement between the creditors and the scheme company (at paragraphs 28 to 55 of the judgment dated 3 August 2009).
12. Secondly, the releases and indemnity in favour of ANZ and Merrill Lynch are fundamental elements of the Schemes of Arrangement. This is clear from the commercial arrangements that underpin the Schemes of Arrangement, as reflected in the Settlement Agreement and Implementation Agreement (as amended by the Supplementary Implantation Agreement). The releases and indemnity in favour of Merrill Lynch and ANZ is the consideration given in exchange for the contribution of the Cash Settlement Sum and the Withheld Securities to the Schemes, without which there would be no Schemes. Further, the Schemes state expressly that one of the purposes of the Schemes is to “*constitute and appoint each Liquidator as the true and lawful agent and attorney of each Scheme Creditor with authority to execute and deliver the Scheme Release and Indemnity Deed on behalf of each Scheme Creditor*” (clause 2.2(c)).
13. There can be no doubt that this central feature of the Schemes was appreciated by Scheme Creditors who voted on the Schemes. It was referred to in the Explanatory Statement and at the Scheme Meetings of Creditors:
 - (a) The Explanatory Statement (Exhibit MRO-1 to the affidavit of Meg Rose O'Brien sworn 27 July 2009 (**O'Brien Affidavit**)) emphasised that the releases and indemnity were the basis on which the Cash Settlement Sum and Withheld Securities were being provided by the Contributing Banks (ANZ and Merrill Lynch):
 - (i) the Explanatory Statement referred to the cash and securities provided by the Banks being provided "in exchange" for the releases and indemnity in favour of the Contributing Banks (and others) (for instance, at pages 6, 9, 13 and 18);
 - (ii) the first three items under the heading "Why you may consider voting against the Schemes" in the Explanatory Statement related

to the releases and indemnity to be effected by the Schemes in favour of the Contributing Banks (and others) (page 43);

- (iii) section 7 of the Explanatory Statement (headed "Overview of the Schemes") described four consequences of the Schemes coming into effect, the fourth of which was the provision of releases in favour of the Contributing Banks (and others) (page 47); and
 - (iv) the effect of the releases and indemnity in favour of the Contributing Banks was described in detail in sections 8.6-8.10 of the Explanatory Statement (pages 53-55).
- (b) Part 7.9 of the Explanatory Statement (headed "Modification of the Schemes or the Scheme Release and Indemnity Agreement at the Scheme Meetings") stated:
- "Although it is permissible for a Scheme Creditor to propose a modification and for the Scheme Meeting to consider a resolution to approve the modification, Scheme Creditors should be aware that the consequences of modifying the terms of the Schemes or the Scheme Release and Indemnity Agreement are that:
- ...
- (b) the Contributing Banks, the Receivers or Green Frog may refuse to pay the Scheme Consideration upon the modified Schemes becoming effective. It is a requirement of the Implementation Agreement that the Schemes be governed by an instrument substantially in the form set out in Schedule 2 to the Implementation Agreement (which includes the terms of the Scheme Release and Indemnity Deed), as amended or modified by the Court pursuant to section 411(6) of the Corporations Act. This requirement may not be satisfied if the terms of the Schemes or the Scheme Release and Indemnity Agreement are modified by the Scheme Creditors."
- (c) In providing an overview of the Schemes at the Scheme Meetings of Creditors Mr Lindholm, as Chair of the meetings, described the releases and indemnities in favour of the Banks as a "key element" of the Schemes (page 9 of Exhibit JRL-10 to the affidavit of John Lindholm sworn 28 July 2009 (**Third Lindholm Affidavit**)).
 - (d) At the Scheme Meetings of Creditors, in addition to the resolutions to approve each of the Schemes, a resolution was proposed to amend the Release and Indemnity Deed by deleting cl 6.6(b) (the third party claims aspect of the indemnity (**Resolution A**) (page 9 of Exhibit JRL-9 to the affidavit of Third Lindholm Affidavit)). Mr Nicholas McKenzie-McHarg, a proxy holder, asked Mr Troiani (legal advisor to the Liquidators) to indicate whether he had a view as to whether the Contributing Banks would oppose

the Schemes if the indemnity were amended as proposed. Mr Troiani said that the releases and indemnities were "important to the banks" and "part of the reason why they made the payment", and cautioned that any changes to the Schemes introduced a risk that the Schemes would be defeated (page 9 of Exhibit JRL-9 to the Third Lindholm Affidavit).

- (e) The proposal to amend the Scheme Release and Indemnity Deed to delete part of the indemnity (Resolution A) was defeated at the Meetings of Scheme Creditors. At the meeting for Opes Prime Stockbroking Limited, about 90.02% of creditors by value and 82.3% by number voted against the resolution; at the meeting for Leveraged Capital Pty Ltd, about 99.71% of the creditors by value and 77.78% by number voted against the resolution (Exhibit JRL-7 to the Third Lindholm Affidavit).
14. Thirdly, the reasonableness and fairness of the release and indemnity terms of the Scheme are capable of being assessed by Scheme Creditors. Through the Schemes, the Scheme Creditors were presented with a commercial choice. Either they could accept the compromise that was offered (involving a substantial payment in return for the release and indemnity) or they could pursue whatever claims they may have against Opes Prime (which is insolvent) and ANZ and Merrill Lynch. There is nothing unreasonable or unfair about that commercial choice. To the contrary, it is inherently fair. It is capable of being understood by Scheme Creditors, and Scheme Creditors must be assumed to be in a position to take their own legal advice about the merits of, timeliness and prospects of success in any claims they may have against Opes Prime and ANZ or Merrill Lynch.
15. The Scheme Release and Indemnity Deed may affect, to some extent, claims that may be brought by Scheme Creditors against persons other than Opes Prime and ANZ or Merrill Lynch (for example, financial advisors). The effect of the indemnity is that if the Scheme Creditor issues proceedings against such a person, and that person claims against ANZ or Merrill Lynch, the Scheme Creditor must indemnify ANZ and Merrill Lynch (as the case may be) up to the aggregate of the amount received by the Scheme Creditor from the Scheme and from the claim. Again, there is nothing unfair about this aspect of the Release and Indemnity Deed. It provides commercial protection for ANZ and Merrill Lynch against the risk that the benefit of the release would be avoided by such third party claims. It also appropriately balances the interests of Scheme Creditors by ensuring that the Scheme Creditor could not be required to pay to ANZ or Merrill Lynch more than is received from the Scheme and the third party claim. Although ANZ and Merrill Lynch continue to bear the risk that such proceedings will be instituted by Scheme Creditors and they may not be fully indemnified, ANZ and Merrill Lynch have judged this to be an acceptable commercial risk.
16. The test of fairness and reasonableness is that an intelligent and honest shareholder or creditor (as the case may be), acting alone, might approve the scheme: *Re NRMA*

Ltd (No 2) (2000) 34 ACSR 261. The court approaches its task under s.411 on the basis that the shareholders or creditors in their meeting are better judges of what is to their commercial advantage than the court: *Re Chevron (Sydney) Ltd* [1963] VR 249 at 255. As stated by Finkelstein J at first instance (in his reasons dated 4 August 2009 at para 27):

“This is a very good example of a scheme the reasonableness of which is best judged by the creditors. It is clear from the voting that the creditors prefer to take what they will get out of the schemes rather than face the uncertain risks and hazards of litigation.”

17. Fourthly, the order will result in the frustration of the Schemes and thereby frustrate the will (and commercial interests) of the majority of Scheme Creditors who voted in favour of the Schemes and also the will and commercial interests of ANZ and Merrill Lynch. As is clear from the Settlement Agreement and the Implementation Deed, ANZ and Merrill Lynch have agreed to transfer the Cash Settlement Sum and the Withheld Securities in consideration of the release and indemnity. The Cash Settlement Sum and the Withheld Securities have been transferred to the Liquidators "to be held in escrow until released in accordance with the Scheme Release and Indemnity Deed" (clauses 4.1(c) and 4.2(b) of the Implementation Agreement). The release of the Cash Settlement Sum and the Withheld Securities from escrow is governed by clause 4(a) of the Release and Indemnity Deed. If the Release and Indemnity Deed in its present form does not proceed, there is no legal basis for the Cash Settlement Sum and Withheld Securities to be released from escrow.
18. In order for the Cash Settlement Sum and Withheld Securities to be released from escrow, a new agreement would have to be reached between all relevant parties including ANZ and Merrill Lynch to replace clause 4(a) of the Release and Indemnity Deed. Neither ANZ nor Merrill Lynch is under any legal obligation to enter into such an agreement. Their obligation under the Implementation Agreement is to execute the Release and Indemnity Deed in the form annexed to the Schemes as approved by Justice Finkelstein on 1 July 2009 (see clause 5.2 of the Implementation Agreement as amended by clause 3.2 of the Supplementary Implementation Agreement).
19. Merrill Lynch would not agree to enter into a new release and indemnity deed that materially altered the terms of the releases and indemnity given in its favour. Merrill Lynch would regard the deletion of the whole or part of clause 6 of the Scheme Release and Indemnity Deed as a material alteration. Accordingly, if the Court were to order a variation to the release and indemnity provisions of the Schemes, the Schemes are likely to fail.
20. Further, clauses 4.1(d) and 4.2(c) of the Implementation Agreement provide that if the Schemes cease to be effective prior to the Release Date the Liquidators must return the Cash Settlement and the Withheld Securities to ANZ and Merrill Lynch. For that purpose, the Schemes are defined as Schemes substantially in the form of the

Schemes approved by Justice Finkelstein on 1 July 2009 (see also clause 3.1 of the Supplementary Implementation Agreement). If the Court were to vary the Schemes in a manner such that they were no longer substantially in that form, the Liquidators would be required to return the Cash Settlement Sum and the Withheld Securities to ANZ and Merrill Lynch.

21. The effect of the orders sought is necessarily to frustrate the Schemes and in effect amounts to an order declining to approve the Schemes. The Applicant seems to have determined not to seek such an order.

Dated: 2 September 2009

Noel Hutley
Michael O'Bryan
Counsel for Merrill Lynch