SUPREME COURT OF QUEENSLAND

CITATION:	*Seafarms Group Ltd v McKinnon* [2026] QCA 169
PARTIES:	**SEAFARMS GROUP LTD** ACN 009 317 846 (appellant) **v** **SHAUN McKINNON** (first respondent) **ANDREW FIELDING** (second respondent) **PROJECT SEA DRAGON PTY LTD (IN LIQUIDATION)** ACN 604 936 192 (third respondent) **ROBERT WILLIAM HUTSON AND DAVID MARTIN JOHNSTONE AS LIQUIDATORS OF PROJECT SEA DRAGON PTY LTD (IN LIQUIDATION)** ACN 604 936 192 (fourth respondents) **CANSTRUCT PTY LTD** ACN 008 869 467 (fifth respondent)
FILE NO/S:	Appeal No 1847 of 2025 SC No 15299 of 2024
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2025] QSC 45 (Hindman J)
DELIVERED ON:	4 September 2026
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2025
JUDGES:	Boddice JA, Brown JA, Bradley JA
ORDERS:	**1. Appeal dismissed.** **2. The appellant pay the first, second, fourth and fifth respondents' costs of the appeal.** **3. Order 2 does not detract from the first and second respondents' right to be indemnified for their costs of appeal on an indemnity basis to be agreed or assessed with those costs being paid from the moneys held in Court or by the fourth respondent under order 6 of the Orders made 15 April 2025.**

4. **Pursuant to s 90-15 of the Insolvency Practice Schedule in Sch 2 to the *Corporations Act 2001* (Cth) to the extent that the appellant does not pay the costs awarded to the first and second respondents in Order 2, the first and second respondents are entitled to be paid those costs by the fourth respondents out of the money that is payable to the appellant in the liquidation of the third respondent pursuant to the first and second respondent's right to indemnity.**

CATCHWORDS: CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – TERMINATION OR AVOIDANCE – where the third respondent was a wholly owned subsidiary of the appellant – where the fifth respondent is a creditor of the third respondent – where the third respondent was placed into voluntary administration – where the first and second respondents were appointed as administrators of the third respondent – where pursuant to a deed of company arrangement (DOCA) the appellant provided monies to the third respondent as a "Proponent Contribution" – where the DOCA was terminated by an order of the Federal Court of Australia upon an application by the fifth respondent – where cl 12.2(c)(ii) of the DOCA provided that if the DOCA was terminated by various means, including a court order, the amount of the Proponent Contribution remaining at termination was to be refunded to the appellant – where the appellant sought refund of the remaining Proponent Contribution under cl 12.2(c)(ii) – where the primary judge found that cl 12.2(c)(ii) did not survive court ordered termination and did not provide the appellant a right to return of the Proponent Contribution – whether the primary judge erred in finding that the appellant had no right to a refund of the Proponent Contribution under cl 12.2(c)(ii) as a result of the DOCA's termination by court order

CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – GENERALLY – where the appellant alternatively contended that the right under cl 12.2(c)(ii) was an accrued right that was subject to a condition of the DOCA being terminated by reference to contractual principles – where the primary judge found that any right was contingent on termination – where the primary judge did not determine whether the DOCA was a contract – whether the primary judge should have found that the DOCA was a contract

CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – GENERALLY – where the primary judge further found that the wording of the DOCA did not establish an intention that the Proponent Contribution be held on trust by either the first and second respondents or the third respondent for the benefit of the appellant – whether the primary judge erred in finding that the Proponent Contribution was not held on trust for the appellant

Acts Interpretation Act 1901 (Cth), s 7
Corporations Act 2001 (Cth), s 439C, s 444A, s 444B, s 444C, s 444D, s 444E, s 444G, s 444H, s 445A, s 445C, s 445CA, s 445D, s 445G, s 445H, s 446AA, s 447A
Corporations Regulation 2001 (Cth), sch 8A

Arcfab Pty Ltd v Boral Ltd (2002) 43 ACSR 573; [2002] NSWSC 1188, considered
Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (1978) 141 CLR 335; [1978] HCA 45, considered
Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd (2015) 297 FLR 1; [2015] WASCA 95, considered
Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567; [1968] 3 All ER 651, cited
City of Swan v Lehman Brothers Australia Ltd (2009) 179 FCR 243; [2009] FCAFC 130, considered
Correa v Whittingham (No 2) [2013] NSWCA 471, approved
Dean-Willcocks v ACG Engineering Pty Ltd (in liq) (2003) 45 ACSR 290; [2003] NSWSC 353, disapproved
Federal Commissioner of Taxation v All Suburbs Car Repairs Pty Ltd (1994) 14 ACSR 753; [1994] FCA 1393, cited
FPM Constructions Pty Ltd v Council of the City of Blue Mountains [2005] NSWCA 340, considered
Jessup v Queensland Housing Commission [2002] 2 Qd R 270; [2001] QCA 312, considered
Lombe v Wagga Leagues Club Ltd (2006) 56 ACSR 387; [2006] NSWSC 3, approved
Lucas Drilling Pty Ltd v Armour Energy Ltd [2013] QCA 111, considered
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457; [1933] HCA 25, cited
Mighty River International Ltd v Hughes (2018) 265 CLR 480; [2018] HCA 38, cited
MYT Engineering Pty Ltd v Mulcon Pty Ltd (1999) 195 CLR 636; [1999] HCA 24, considered
Re Antqip Hire Pty Ltd (subject to deed of company arrangement) (in liq) [2020] NSWSC 487, approved
Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491; [1991] FCA 344, cited
Shepard v Sports Mondial of Australia Pty Ltd (in liq) (2005) 53 ACSR 746; [2005] NSWSC 432, disapproved
Surber v Lean (2000) 23 WAR 445; [2000] WASCA 380, considered
Sutherland v Rahme Enterprises Pty Ltd (in liq) (2003) 46 ACSR 458; [2003] NSWSC 673, considered
Wellnora Pty Ltd v Fiorentino (2008) 66 ACSR 229; [2008] NSWSC 483, considered
Westralian Farmers Ltd v Commonwealth Agricultural

Service Engineers Ltd (in liq) (1936) 54 CLR 361; [1936] HCA 6, cited

COUNSEL: M D Martin KC, with J P Hastie, for the appellant
G J Handran KC for the first and second respondents
No appearance for the third respondent
L E Gamble for the fourth respondents
B O'Donnell KC for the fifth respondent

SOLICITORS: Mills Oakley Lawyers for the appellant
Cowen Schwarz Marschke for the first and second respondents
No appearance for the third respondent
Dunham Shaw for the fourth respondents
Thomson Geer Lawyers for the fifth respondent

[1] **BODDICE JA:** I agree with Brown JA.

[2] **BROWN JA:** The appellant, Seafarms Group Ltd (**Seafarms**), seeks to appeal the orders of Hindman J made on 15 April 2025 for the reasons delivered on 21 March 2025 refusing its application to recover amounts paid in respect of a "Proponent Contribution" under a deed of company arrangement (**DOCA**) involving its subsidiary, the third respondent, Project Sea Dragon Pty Ltd (in liquidation) (**PSD**).

[3] The present appeal raises questions as to the effect of termination of a DOCA pursuant to court orders on Proponent Contribution by a third party who is otherwise bound by the DOCA.

[4] PSD was placed into voluntary administration on 14 February 2023 following its failure to pay an adjudicated amount in the amount of approximately $14 million to the fifth respondent, Canstruct Pty Ltd (**Canstruct**) who had undertaken construction works for PSD. Seafarms declined to provide funding to PSD to pay Canstruct. Canstruct is a major creditor of PSD. Mr McKinnon (the first respondent) and Mr Fielding (the second respondent) (the **administrators**) were appointed as administrators.

[5] Prior to PSD being placed into voluntary administration, Seafarms entered into a funding agreement with the (at that time proposed) administrators. Pursuant to that agreement it advanced an Interim Funding Amount of $1.4 million. The DOCA provided that the Proponent[1] would pay the Seafarms Contribution to the Deed Administrators no later than seven business days after the Commencement Date.[2] The Proponent Contribution was defined to be $3.5 million. That amount was paid.

[6] On 21 March 2023, creditors resolved to approve a DOCA which was ultimately entered into on 23 March 2023. On 22 February 2024, the DOCA was terminated by the Federal Court of Australia following an application by Canstruct. Following an unsuccessful appeal, PSD was placed into liquidation. The fourth respondents were appointed as liquidators.

[7] Following the termination of the DOCA, Seafarms sought repayment of what is described under the DOCA as a Proponent Contribution, pursuant to cl 12.2(c) of the

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1 Defined as Seafarms.
2 Clause 5.3(a) of the DOCA.

DOCA. The learned primary judge rejected arguments made by Seafarms that it had a right, preserved by s 445H of the *Corporations Act 2001*, upon the termination of the Deed for the Proponent Contribution to be repaid. Her Honour also rejected an argument that applying contractual principles, cl 12.2(c), created an accrued right for the administrators and Seafarms to refund the remaining amount of the Proponent Contribution. Her Honour also rejected an argument that the monies referred to as the Proponent Contribution were held on trust by the administrators personally.

Issues on appeal

[8] Seafarms contends that the primary judge erred:

(a) in finding that there was no accrued right prior to or upon termination of the DOCA by the Federal Court for the return of the remaining Proponent Contribution;

(b) in not considering and finding that the DOCA was a contract and that there was a separate contractual accrued right arising under the DOCA such that the administrators were bound contractually to repay the remaining Proponent Contribution; and

(c) in determining that no trust was created under the terms of the DOCA whereby the Proponent Contribution was held in trust by the administrators personally, consistent with the principles espoused in *Barclays Bank Ltd v Quistclose Investments Ltd*.[3]

[9] The additional issues raised on appeal which require consideration are:

(a) whether the remaining Proponent Contribution was received by the administrators as agents of PSD for PSD and was thus property of PSD;

(b) whether after termination of the DOCA the administrators had a residual power in any event to transfer the monies to Seafarms; and

(c) whether the administrators or liquidators would be, if the monies are repayable to Seafarms, obliged to pay or responsible for the payment of the monies to Seafarms.

Notice of contention

[10] Canstruct, in addition to contending that the primary judge was correct in her findings, has by way of a notice of contention sought to have the primary judge's decision affirmed on the ground that the legal effect of the termination of the DOCA under s 445C of the *Corporations Act* was that:

(a) the administrators ceased to be administrators of the DOCA;

(b) the DOCA, including cl 12.2(c)(ii) ceased to bind the administrators; and

(c) the administrators ceased to have legal capacity to pay money out of the Deed Fund to Seafarms pursuant to cl 12.2(c)(ii).

[11] Canstruct further contends that the decision should be affirmed on the basis that the DOCA was not enforceable as a contract. If Seafarms has an accrued entitlement to payment, it contends that the liability to pay is a liability of PSD which only arose if

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3 [1970] AC 567; [1968] 3 All ER 651.

Seafarms proved as an unsecured creditor. It further contends if there was a trust in respect of the Proponent Contribution it ended when the DOCA was terminated and what remained was held on trust for PSD.

[12] The administrators only make submissions in relation to whether there was any trust in relation to the Proponent Contribution. The liquidators support Canstruct's submissions. In relation to the administrators and the liquidators, there is a contest in relation to the question of costs.

The Funding Agreement and the DOCA

[13] The DOCA was entered into on 23 March 2023. The parties to the DOCA were PSD, the administrators and Seafarms.

[14] Key clauses of the DOCA include the following.

[15] The DOCA contains definitions in clause 1.1, including:

> "'**Deed Administrators' Account**' means an Australian dollar denominated account operated and specified by the Deed Administrators;
>
> …
>
> **'Interim Funding Amount** means the amount advanced by Seafarms Group Limited to the voluntary administrators under a Funding Agreement dated 17 February 2023".

[16] Clause 2.1 provides:

> "2.1 **Commencement Date**
>
> (a) Subject to clause 2.3, this Deed will commence and take effect on the Commencement Date.
>
> (b) Once this Deed has come into operation, it will continue in operation until the Termination Date."

[17] Clause 4.1 provides:

> "4.1 **Binding Effect**
>
> Subject to clause 4.4, the Deed binds:
>
> (a) the parties to this Deed;
>
> (b) in accordance with section 444D of the Act, all Creditors; and
>
> (c) in accordance with section 444G of the Act, the Company, its Officers and Members and the Deed Administrators."

[18] Clause 5 provides:

> "5.1 **Deed Fund**
>
> (a) The Deed Administrators must establish the Deed Fund as soon as possible after the Commencement Date (or, as

appropriate, as soon as possible after receipt of the relevant property), which will comprise the following:

(i) the Cash Balance;

(ii) any accounts receivable due to the Company in respect of work done or services provided by the Company prior to the Commencement Date that are received by the Administrators before Effectuation of this Deed;

(iii) the Proponent Contribution.

(b) The Deed Administrators must hold all property in the Deed Fund on trust for the benefit of the Deed Administrators and the Dividend Creditors in accordance with the terms of this Deed.

(c) For the avoidance of doubt, the Deed Fund will not comprise any other property of the Company other than the property and assets referred to in clause 5.1(a).

5.2 **Payments to Deed Fund by Deed Administrators**

(a) As soon as reasonably practicable after the Commencement Date, the Deed Administrators will:

(i) apply the Cash at Commencement Date in payment of any Administration Trading Liabilities, and unpaid remuneration or expenses of the Administrators;

(ii) apply the Cash Balance, if any, to the Deed Fund.

(b) The Deed Administrators will apply any Deed Administrators' Receipts to the Deed Fund as soon as reasonably practicable following receipt.

5.3 **Payments to Deed Fund by Proponents**

(a) By no later than the date falling seven Business Days after the Commencement Date, the Proponent will pay the Seafarms Contribution to the Deed Administrators.

5.4 **Distribution of Deed Fund**

The Deed Administrators must distribute the Deed Fund in the following order:

(a) firstly, in repayment of the Interim Funding Amount to the Proponent;

(b) secondly, in payment of priority creditors as determined bythe application of ss 556, 560 and 561 of the Act. This shall include:

(i) payment of the Costs (to the extent not previously paid pursuant to the terms of this Deed);

(ii) payment of the Remuneration (up to the Approved Amounts) (to the extent not previously paid pursuant to the terms of this Deed); and

(iii) payment of any Eligible Employee Creditor in accordance with clause 5.6 below.

(c) fourthly, in payment of any Admitted Claims of Small Claims Creditors;

(d) fifthly in payment of any other Admitted Claims

5.5 **Interim Funding**

Repayment of the Interim Funding Amount, shall be made by direction by the Deed Administrators to the Proponent that a portion of the Proponent Contribution shall be paid to the Proponent, in full and final settlement of any and all amounts of funding due to be repaid by the Administrators to the Proponent.

…"

[19] Clauses 7.3 and 7.4 provide:

"7.3 **Deed Administrators are agents**

In exercising the powers conferred by this Deed and carrying out the duties arising under this Deed, the Deed Administrators will act as agent for and on behalf of the Company.

7.4 **Management of the Company**

(a) Subject to clauses 7.4(b) and 7.7 and save in the case of termination of this Deed in accordance with clause 12.2, on the Commencement Date:

(i) management and control of the Company will revert to the Directors; and

(ii) the power, functions and duties of the Deed Administrators will be limited to:

(1) controlling, administering and distributing the Deed Fund in accordance with this Deed and carrying out any other functions or obligations they may have under this Deed;

(2) monitoring and enforcing compliance by the Directors with performance of their duties and obligations under this Deed; and

(3) considering any requests for consent in relation to any of the matters referred to in clause 7.4(b),

in each case to the exclusion of the Directors.

(b) In the event that the powers, functions and duties of the Deed Administrators and the Directors overlap in any way, the powers, functions and duties of the Deed Administrators operate to the exclusion of the Directors (unless the Deed Administrators consent in writing to the Directors performing the relevant powers, functions and duties).

(c) For such time as the Company remains under the management and control of the Directors during the Deed Period, the Company and the Directors (as appropriate) must:

(i) meet (and procure that the Company meets) all of the Company's statutory reporting and filing obligations as required by any relevant laws; and

(ii) pay (and procure that the Company pays) all of its liabilities as and when they fall due."

[20] Clauses 8.3 and 8.5 of the DOCA provide:

"8.3 **No Personal Liability**

During the Deed Period, the Deed Administrators act as the agent of the Company and accept no personal liability for any acts, matters or omissions relating to things done or not done in that capacity, including (without limitation) any liability relating to any amounts payable by the Deed Administrators for services rendered, goods bought or property hired, leased, used or occupied by or on behalf of the Company."

"8.5 **Liabilities of the Deed Administrators**

To the maximum extent permitted by law, the Deed Administrators shall not be personally liable for:

(a) any debts incurred or any claims, obligations, demands, actions, loss, damage, costs, charges, expenses or liabilities caused by any act, omission or default by or on behalf of the Deed Administrators or their representatives and advisers in administering this Deed or exercising their duties and obligations under this Deed;

(b) any debts incurred or any claims, obligations, demands, actions, loss, damage, costs, charges, expenses or liabilities caused by any act, omission or default by or on behalf of the Company whether before, during or after the Deed Period; or

(c) any debts incurred or any claims, obligations, demands, actions, loss, damage, costs, charges, expenses or liabilities suffered or sustained or incurred by any Director, Officer, Member or Creditor, except where the loss or damage is occasioned by the gross negligence or fraud of the Deed Administrators."

[21] Clauses 12.2 to 12.4 provide:

"12.2 **Termination on failure of Deed**

Upon the happening of any one of the following events, this Deed will automatically terminate:

(a) the court makes an order terminating this Deed under section 445D of the Act; or

(b) the Creditors pass a resolution terminating this Deed at a meeting convened under the Act and clause 11 by notice setting out the proposed resolution.

(c) If this Deed is terminated by order of the Court or by Creditors resolution:

(i) the Interim Funding Amount (if it has not already been repaid), less payment of any unpaid Administration Trading Liabilities, Remuneration or Costs will be immediately repaid by the Administrators (subject always to the Administrators having sufficient available cash to make such repayment and subject to the terms of the Funding Agreement dated 17 February 2023 between the Proponent and the Administrators); and

(ii) The Proponent Contribution (if it has not already been paid), will no longer be payable and if the Proponent Contribution has been received, the Administrators shall refund it less payment of any unpaid Administrators Trading Liabilities, Remuneration or Costs and less any other amounts distributed by Administrators to Creditors, in accordance with the terms of this Deed.

12.3 **Consequences of termination**

When this Deed terminates:

(a) the powers, functions, duties, obligations and responsibilities of the Deed Administrators will end; and

(b) the Deed Administrators will be released and discharged from the office of Deed Administrators of this Deed and from all obligations, duties and responsibilities imposed on the Deed Administrators by virtue of their appointment under this Deed.

12.4 **Effect of Termination**

In accordance with section 445H of the Act, the termination or avoidance, in whole or in part, of this Deed does not affect the previous operation of this Deed."

[22] Clause 12.6 nominated clauses of the DOCA which survived termination. Clause 12.2 was not one of them.

Corporations Act

[23] The DOCA is a creature of statute, namely the *Corporations Act*.

[24] Section 439C provides:

> "**439C What creditors may decide**
>
> At a meeting convened under section 439A, the creditors may resolve:
>
> (a) that the company execute a deed of company arrangement specified in the resolution (even if it differs from the proposed deed (if any) details of which accompanied any notice of meeting); or
>
> (b) that the administration should end; or
>
> (c) that the company be wound up."

[25] Section 444C provides:

> "**444C Creditor etc. not to act inconsistently with deed before its execution**
>
> (1) Where, at a meeting convened under section 439A, a company's creditors resolve that the company execute a deed of company arrangement, this section applies until:
>
> (a) the deed is executed by both the company and the deed's administrator; or
>
> (b) the period within which subsection 444B(2) requires the company to execute the deed ends;
>
> whichever happens sooner.
>
> (2) In so far as a person would be bound by the deed if it had already been so executed, the person:
>
> (a) must not do anything inconsistent with the deed, except with the leave of the Court; and
>
> (b) is subject to section 444E."

[26] Section 444D(1) provides:

> "**444D Effect of deed on creditors**
>
> (1) 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 paragraph 444A(4)(i)."

[27] Section 444G provides:

> "**444G Effect of deed on company, officers and members**
>
> A deed of company arrangement also binds:

(a) the company; and

(b) its officers and members; and

(c) the deed's administrator."

[28] Section 445A provides:

"**445A Variation of deed by creditors**

A deed of company arrangement may be varied by a resolution passed at a meeting of the company's creditors, but only if the variation is not materially different from a proposed variation set out in the notice of the meeting."

[29] Section 445C provides:

"**445C When deed terminates**

A deed of company arrangement terminates when:

(a) the Court makes under section 445D an order terminating the deed; or

(b) the company's creditors pass a resolution terminating the deed at a meeting; or

(c) if the deed specifies circumstances in which it is to terminate—those circumstances exist; or

(d) the administrator of the deed executes a notice of termination of the deed in accordance with section 445FA;

whichever happens first."

[30] Section 445CA provides:

"**445CA When creditors may terminate deed**

The creditors are not entitled to pass a resolution under paragraph 445C(b) unless:

(a) there has been a breach of the deed; and

(b) the breach has not been rectified before the resolution is passed."

[31] Section 445H provides:

"**445H Effect of termination or avoidance**

The termination or avoidance, in whole or in part, of a deed of company arrangement does not affect the previous operation of the deed."

Accrued right to repayment?

[32] The primary judge determined that the right granted by cl 12.2(c) of the DOCA was not an accrued right at its termination. The primary judge found that the right only

accrued at either the same time as or after the termination of the DOCA by the Full Federal Court on 1 November 2024 and was not an accrued right preserved by s 445H of the *Corporations Act*. The primary judge referred to the observations of Barrett J (as his Honour then was) in *Lombe v Wagga Leagues Club Ltd*[4] where his Honour stated that "it is implicit in s 445H that, upon termination of a deed of company arrangement, the several persons initially bound by the deed ... cease to be bound as to their future conduct, rights and liabilities..." (case references omitted). Justice Barrett further cited the observation of Austin J in *Arcfab Pty Ltd v Boral Ltd*,[5] that upon the deed being terminated the administrator's powers and obligations as administrator ended and they were released and discharged from their office and obligations under the deed.

[33] The primary judge also rejected an argument that the right to refund was an accrued right that was simply subject to a condition of the DOCA being terminated. Her Honour referred to Dixon and Evatt JJ in *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (in liq)* that:[6]

> "In general the termination of an executory agreement out of the performance of which pecuniary demands may arise imports that, just as on the one side no further acts of performance can be required, so, on the other side, no liability can be brought into existence if it depends upon a further acts of performance. If the title to rights consists of vestitive facts which would result from the further execution of the contract but which have not been brought about before the agreement terminates, the rights cannot arise. But if all the facts have occurred which entitle one party to such a right as a debt, a distinct chose in action which for many purposes is conceived as possessing proprietary characteristics, the fact that the right to payment is future or contingent upon some event, not involving further performance of the contract, does not prevent it maturing into an immediately enforceable obligation."

[34] Her Honour stated that the passage did not assist Seafarms as "the right to a refund is contingent on a contractual event – the termination of the DOCA. There is no immediately enforceable obligation".

Submissions

[35] Seafarms contends that the fact that the timing of the repayment obligation occurred at the time of termination of the DOCA does not have the consequence that cl 12.2(c) ceased to be an accrued right. The nature of the right is the same as identified in contractual authorities such as *McDonald v Dennys Lascelles Ltd*[7] and *Westralian Farmers Ltd*. Seafarms contends that the fact that the repayment obligation is contingent on a later event occurring does not militate against a right being an accrued right provided that the later event does not involve further performance of the contract.[8] In this regard, Seafarms contends that the primary judge's determination that *Westralian Farmers Ltd* did not assist the contention that the right to repayment

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4 (2006) 56 ACSR 387 at 407 [80].

5 (2002) 43 ACSR 573 at 581 [37].

6 (1936) 54 CLR 361 at 379-380.

7 (1933) 48 CLR 457.

8 *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340.

of the remaining Proponent Contribution under cl 12.2(c) was an accrued right misconstrued the effect of that authority. The termination of the DOCA did not involve further performance of the DOCA, given it was an act independent of the DOCA which brought about its termination and where the right to repayment was not dependent upon any further performance. The right to repayment under cl 12.2(c) was only contingent upon termination and automatically followed termination. Thus, consistent with s 445H of the *Corporations Act* it was a right which arose under previous operation of the DOCA.

[36] Further, Seafarms contends that the primary judge gave s 445H too broad an operation in relying on *Lombe* insofar as the primary judge regarded it as defeating an accrued right at the time of termination. It contends that such an interpretation of s 445H would have broad and unintended consequences.

[37] Alternatively, Seafarms contends that even if s 445H did defeat Seafarms' rights under cl 12.2 to the return of the contribution, the DOCA took effect as a contract between Seafarms and the administrators which bound them apart from the provisions of the *Corporations Act* and Seafarms' right to the refund of the Proponent Contribution survived termination as a matter of contract.

[38] Canstruct submits the primary judge was correct. Until termination of the DOCA there was no right to repayment. That right only accrued at the same time or after the termination of the deed. It contends that the legal effect of termination under s 445C of the *Corporations Act* precludes the DOCA creating a new right either at the same time or after termination of the DOCA. Canstruct submits that the DOCA is an instrument which has statutory force and is not a contractual document.

[39] Canstruct contends that even if there was an accrued right under cl 12(2)(c)(ii) of the DOCA, that right was not properly enforceable under the *Corporations Act* given the legal effect of the termination of the DOCA.

Consideration

[40] A DOCA is a creature of statute. It binds all creditors (s 444D *Corporations Act*) as well as the company, its officers and members and the deed's administrator (s 444G *Corporations Act*). It becomes effective once signed by the company and the deed administrators (s 444B(6) *Corporations Act*). It was uncontentious that Seafarms was a creditor and shareholder and therefore bound by the DOCA notwithstanding it was also a signing party of the DOCA.[9]

[41] Clause 12.2 of the DOCA provided for it to automatically terminate upon the events in cl 12.2(a) and cl 12.2(b). Clause 12.2(a) refers to the making of a court order terminating the DOCA under s 445D of the *Corporations Act*. Section 445C(a) of the *Corporations Act* however also provides for the termination of the DOCA upon the Court making an order under s 445D. Clause 12.2(b) refers to creditors passing a resolution terminating the deed. However, s 445C(b) also provides for termination in that event. Justice Barrett in *Wellnora Pty Ltd v Fiorentino*[10] stated that "Termination of a deed of company arrangement is also a purely statutory matter, in the sense that there can be no termination except as is produced by the Corporations

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9 Clause 2.3 of the DOCA made it conditional upon the execution of the Deed by each party named as a party.

10 (2008) 66 ACSR 229 at 238 [40].

Act and the consequences of termination are those produced by the Act." As such, cl 12.2(a) and cl 12.2(b) appears to simply reiterate the statutory provision rather than have operative force themselves. Clause 12.2(c) then provides for what was to occur in respect of the interim funding arrangement and the Proponent Contribution if the DOCA was terminated.

[42] Clause 12.2(c) provided for a right of repayment of monies upon the happening of a certain event, namely the termination of the DOCA, in circumstances where the monies were otherwise not to be repaid but distributed in accordance with cl 5.4 of the DOCA. Any right to be refunded in respect of the amount of the Proponent Contribution was not one with respect to a certain amount but contingent on whether monies remained after various amounts referred to in the clause had been paid.

[43] While an accrued right may be contingent upon an event, there was no right to repayment under cl 12.2(c)(ii) of the DOCA unless it was terminated. Prior to it being terminated, the only effect of the DOCA concerning the Proponent Contribution was for it to become part of the of the Deed Fund which was to be distributed by the administrators in accordance with cl 5.4. There was no right for the repayment of any part of the Proponent Contribution until the Deed was terminated.

[44] Seafarms contends that s 445H has a similar operation to s 7 of the *Acts Interpretation Act 1901* (Cth) which provides by s 7(2)(c) that the repeal of legislation does not "affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act…". Given the difference in language, it does not provide great assistance in this context, but in any event for the reasons stated above it was not a right "acquired, accrued or incurred under the affected Act". The question is whether s 445H applied to preserve the right on the basis that it would not affect the previous operation of the DOCA. Was it a matter which arose as part of the previous operation of the DOCA? In the present case it did not. The DOCA did not operate to create a right of refund or debt in respect of any amount remaining of the Proponent Contribution prior to its being terminated. The right itself was only created upon termination of the DOCA and was contingent upon there being monies still remaining.

[45] The primary judge found that the right arising under cl 12.2(c)(ii) arose at the same time or after termination. The wording of cl 12.2(c)(ii) suggests that the right is consequential on termination of the deed by order of the Court and in fact does not arise until after termination. The reference to the "Deed will automatically terminate" is otiose since the DOCA came to an end by the effect of the Court Order under s 445D and s 445C of the *Corporations Act*.

[46] The effect of termination under s 445C was that the DOCA terminated and no new rights could be created at the time of or after termination. As the primary judge found, the DOCA could have no effect after termination to create any new rights. In that regard her Honour relied on *Lombe* that "it is implicit in s 445H that, upon termination of a deed of company arrangement, several persons initially bound by the deed ... cease to be bound as to their future conduct, rights and liabilities".[11]

[47] The fact that s 445H does not preserve a right created at or after termination is further supported by the fact that upon the DOCA's termination, consistent with cl 12.3, the tenure of the administrators came to an end.

[11] (2006) 56 ACSR 387 at 407 [80].

[48] While Seafarms relies on the fact that Barrett J in *Wellnora*, which was a later case, left open the question of whether there was a right to payment which survived termination, his Honour's observations provide greater support to it not surviving termination. In *Wellnora*, Barrett J observed that decided cases had not provided any comprehensive analysis of the effect of s 445H of the *Corporations Act*.[12] In that case a statutory demand had been issued by the administrators to the company for payment after termination of a DOCA. The remuneration of administrators related to work done prior to termination of the DOCA. There was a saving clause which provided that termination of the deed would not affect the priorities given by the deed to the administrator's remuneration and costs and provided that "except to the extent that the Act provides otherwise … the administrator's remuneration and costs up to the date of such termination ... must be paid in full...". Justice Barrett identified one of the questions to be whether, as to remuneration of the administrator for work done in the period before termination, the relevant clause "caused to arise upon termination of the deed and to subsist thereafter an independent payment obligation on the part of the [the company], such that the remuneration quantified by the court order [after the termination of the deed] was recoverable by [the administrators] from [the company]" regardless of the limitations in the DOCA for remuneration to be paid out of the creditor's fund.

[49] In addressing that particular question, Barrett J stated at [41] that:

> "…It is reasonably clear that, by operation of this section, the position after termination is that the effects produced by the deed before termination continue to prevail (so that, for example, persons who have received distributions in accordance with the deed are entitled to retain them: *Cresvale* (above)), but the deed provisions no longer have an operative force capable of grounding any further changes to rights and obligations: so that, for example, the deed administrator is discharged from office and has no further role to perform: *Arcfab Pty Ltd v Boral Ltd* (2002) 43 ACSR 573; [2002] NSWSC 1188 at [37]. It has been said that the several persons bound cease to be bound as to their future, conduct, rights and liabilities: *Sutherland v Rahme Enterprises Pty Ltd* (2003) 46 ACSR 458; [2003] NSWSC 673 at [14]. This may be subject to such rights and liabilities as had accrued before termination, although it has been observed that, after termination, a person who was previously statutorily bound by the deed provisions can no longer look to another person so bound for the performance of some duty imposed through the deed: *Lombe v Wagga Leagues Club Ltd* (2006) 56 ACSR 387; [2006] NSWSC 3 at [83]. Once termination occurs, there is no longer extant any collection of presently operative provisions that can properly be regarded as a deed of company arrangement: *Kyle House Pty Ltd v ACN 000 016 213 Pty Ltd* [2007] NSWSC 224 at [15]. The statutory force imparted by ss 444B, 444D, 444G and 444H no longer applies to the previously operative provisions."

[50] In that case, unlike the present, the administrators' had done work pursuant to the DOCA but had not been paid at the time of termination, such that an independent payment obligation sourced in a clause of that deed may have come into existence

[12] (2008) 66 ACSR 229 at 238 [41].

before termination of the deed. Although his Honour canvassed the possibility that after the termination of the deed, the DOCA was no longer available as the source of the payment obligation,[13] his Honour did not ultimately decide the question.

[51] *Wellnora* was followed in *Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd* where Newnes and Murphy JJA stated:[14]

> "Section 445H provides:
>
> > The termination or avoidance, in whole or in part, of a deed of company arrangement does not affect the previous operation of the deed.
>
> The tenure of a voluntary administrator or the administrator of a deed of company arrangement ceases when applicable statutory provisions cause the administration to end, or the deed of company arrangement to be terminated: *Ariff v Fong* (2010) 79 NSWLR 392; 240 FLR 300. When the deed is terminated, the administrator's powers and obligations as administrator of the deed ends, and he or she is released and discharged from office: *Arcfab Pty Ltd v Boral Ltd* (2002) 43 ACSR 573; *Wellnora Pty Ltd v Fiorentino* (2008) 66 ACSR 229. Whilst the termination does not affect its previous operation, it is implicit that following termination the persons initially bound by the deed, by force of statute, cease to be bound as to their future conduct, rights and liabilities." (footnotes omitted)

[52] The primary judge was correct in her determination that cl 12.2(c) was not a right which was preserved by the operation of s 445H of the *Corporations Act*.

An accrued right under contractual principles?

[53] The primary judge considered an alternative argument that the right to a refund was an accrued right that was simply the subject to a condition of the DOCA being terminated and on that basis remained enforceable post-termination by reference to contractual principles and the statements of Dixon and Evatt JJ in *Westralian Farmers Ltd* referred to above.

[54] While the primary judge did not determine whether or not the DOCA constitutes a contract to which the above principles would apply, the primary judge found that the right was contingent on a contractual event, namely, the termination of the DOCA. In that regard the primary judge observed that the Federal Court could have been asked to make orders carving out cl 12.2(c) from the effect of the termination but that was not done.

[55] Seafarms contends that there was an accrued right for repayment of monies applying by reference to contractual principles set out in *Westralian Farmers Ltd* as further clarified in *FPM Constructions Pty Ltd v Council of the City of Blue Mountains*[15] as to determining whether a right is an accrued right:

> "The passage ... from the joint judgment of Dixon and Evatt JJ in *Westralian Farmers Ltd v Commonwealth Agricultural Service*

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13 (2008) 66 ACSR 229 at 238 [42].

14 (2015) 297 FLR 1 at 40-41 [194]-[195].

15 [2005] NSWCA 340 at [192].

> *Engineers Ltd* (1936) 54 CLR 361 at 378-380 ... makes clear a distinction between a right to payment in the future which is contingent upon an event which does not involve further performance of a contract and one which does. It is only in the former case that an accrued right can be said to have arisen. That distinction returns one to the terms of the contract in order to determine whether a future contingency depends upon the further performance of the contract."

[56] Seafarms further contends that the DOCA constituted a contract, which is a matter which should have been found by the primary judge.

[57] Seafarms particularly relies on the fact that it is a party to the DOCA and signed it as supporting its contractual nature between the administrators, PSD and Seafarms. In effect it contends that the DOCA has statutory force and to that end is binding upon creditors (which would include Seafarms) even if they did not sign or vote in favour of the deed but is also contractual in nature between those parties which signed it. While such a duality is a theoretical possibility, I do not consider it is the preferable view.

[58] Canstruct contends that that a DOCA is not a contract nor that contractual principles as to an accrued right apply.

[59] For the reasons set out below, I do not consider that whether there is an accrued right should be determined by reference to contractual principles. In any event I do not consider that there is an accrued right under cl 12.2(c)(ii) even if contractual principles apply. While the primary judge referred to the right to refund being contingent on a contractual event, namely the termination of the DOCA such that there was no immediately enforceable obligation, it is evident from her Honour's reference to *Lucas Drilling Pty Ltd v Armour Energy Ltd*[16] and particularly the proposition that "Where a contract is terminated, the parties are not divested of such rights as they had already 'unconditionally acquired'", that she did consider there was no pre-existing right. Consistent with her Honour's earlier view it was a right that only arose at or after termination.

[60] Clause 12.2(c) created a right that was contingent on an event, namely termination of the DOCA. It was not until that event that Seafarms had a right to a refund. That is in contrast to the right to payment of the refund being contingent upon the termination of the DOCA, the latter being an accrued right as discussed in *FPM Constructions*.

[61] In any event, whether a right is accrued and survives termination under a DOCA is not one appropriately determined by reference to contract when the determination of whether an inchoate right is enforceable or not enforceable under a contract depends on the intention of the parties.[17] A DOCA has statutory force which is binding on multiple parties, including those who do not sign it or in the case of some creditors, vote in favour of it. If not a contract, the DOCA should be construed as a statutory instrument.[18]

[62] Nor do I consider the DOCA should be treated as contract between the Administrators, PSD and Seafarms. While Seafarms was a named party and executed

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16 [2013] QCA 111 at 53-54.

17 (1936) 54 CLR 361 at 379 per Dixon and Evatt JJ.

18 *City of Swan v Lehman Brothers Australia Ltd* (2009) 179 FCR 243 at 246-247 [5]-[9] and Rees J in *Re Antqip Hire Pty Ltd (subject to deed of company arrangement) (in liq)* [2020] NSWSC 487 at [68].

the DOCA, the recital stated that the parties "have agreed to execute this Deed to give effect to section 439C Resolution". Seafarms as a shareholder and an apparent creditor[19] was bound by the DOCA upon its execution by PSD and the administrators by operation of s 444B(6) of the *Corporations Act*. Thus, there did not need to be a contractual relationship for Seafarms to be bound, notwithstanding it was a proponent making a monetary contribution.

[63] Seafarms particularly relies on *Surber v Lean*,[20] where Malcolm CJ and Pidgeon J held that, in considering whether a DOCA could be varied by resolution of creditors without the consent of the administrators of the deed, a DOCA was a contract between the company subject to the deed and the administrator of the deed.[21] In that regard, Malcom CJ referred to the observation of the majority in *MYT Engineering Pty Ltd v Mulcon Pty Ltd*[22] as supporting that view. Malcom CJ however found that s 445A of the *Corporations Act* had to be read subject to s 444B so that the consent of the administrator of the deed was required before a variation by a resolution of creditors could take effect.[23]

[64] The majority in *MYT Engineering Pty Ltd* did not however regard the binding effect of a DOCA on creditors as being a contractual bargain but rather the effect of the DOCA and the law.[24] In reliance upon that observation, Malcom CJ stated that a DOCA was more than a contract containing a set of promises between those who are parties to it because it has statutory effect to bind creditors who voted against as well as in favour of the DOCA.[25]

[65] It should be observed that the majority in *MYT Engineering Pty Ltd* expressly did not determine whether the DOCA was a contract.[26]

[66] While the question of whether a DOCA has contractual force was left open by Barrett JA in *Sutherland v Rahme Enterprises Pty Ltd (in liq)*,[27] his Honour, together with Tobias AJA agreed with Gleeson JA in *Correa v Whittingham (No 2)*[28] that a DOCA did not have contractual force. In that case an administrator who had been invalidly appointed contended that despite the invalidity of his appointment, a DOCA continued to be binding upon the company under the general law of contract which governed his entitlement to reimbursement from company property. While a short judgment, Gleeson JA forcefully rejected that argument stating that:

> "[75] The premise of Mr Whittingham's argument is incorrect. A deed of company arrangement derives its force from the *Corporations Act*, s 444D and 444G. It cannot achieve its statutory effect in binding the company, its creditors and other persons (being its officers and members, and the deed administrator) by its own force: *Brandrill Ltd v Newmont Yandal Operations Pty Ltd* [2006] NSWSC 974; 24 ACLC 1,179 at [47] per Austin J.

19 As was conceded by counsel for Seafarms at the hearing.
20 (2000) 23 WAR 445.
21 (2000) 23 WAR 445 at 461 [56].
22 (1999) 195 CLR 636 at 649 [25].
23 (2000) 23 WAR 445 at 463 [64].
24 (2000) 23 WAR 445 at 463 [65], citing (1999) 195 CLR 636 at 649 [25].
25 (2000) 23 WAR 445 at 463 [66].
26 (1999) 195 CLR 636 at 649 [26].
27 (2003) 46 ACSR 458 at 462-463 [17].
28 [2013] NSWCA 471 at [75] – [76].

[76] As explained by Barrett J (as his Honour then was) in *Reed Constructions Australia Ltd v DM Fabrications Pty Ltd* [2007] NSWSC 1190; 25 ACLC 1,463 at [20]:

> '… A deed of company arrangement derives its operative force from statute. The statutory process by which the content of an instrument produced and dealt with in a particular way becomes a deed of company arrangement by operation of s 444B(6) was examined by the High Court *in MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636. Sections 444D and 444G identify persons who are bound by a deed of company arrangement. **Those persons are not parties bound together by contract.** They are persons whose rights and obligations are created by law by virtue of the execution of the relevant instrument. They are akin, in that respect, to persons bound by a scheme of arrangement under Part 5.1 of the *Corporations Act*.' (emphasis added).

[77] In the present case, Mr Whittingham was invalidly appointed administrator of the Club. What was done in procuring a deed of company arrangement is likewise invalid: *McIntosh v CMX Technologies Pty Ltd (Administrators Appointed)* [2005] NSWSC 1282; 56 ACSR 283 at [31] per Palmer J.

[78] If a deed of company arrangement has never come into force, its provisions would never become the source of any obligation: *Parkview Constructions Pty Ltd v Tayeh* [2009] NSWSC 186; 71 ACSR 65 at [69] per Barrett J.

[79] There is simply no room for the argument that independently of the *Corporations Act*, a company may be bound by contract by a deed of company arrangement with a purported 'deed administrator', let alone bound by ratification by the act of the member of the Club in court proceedings concerning a deed of company arrangement. This is because the binding force of a deed of company arrangement, insofar as it binds the company and the deed's administrator, only arises by force of s 444G of the *Corporations Act*." (emphasis added)

[67] Notwithstanding the gallant arguments put forward by Seafarms, *Correa* is clear authority for the proposition that a DOCA does not have contractual effect, even though in that case the DOCA never came into force. While Seafarms contends that there is conflicting authority given the decision of *Surber*, that case concerned a variation of a DOCA and the ultimate decision more significantly relied on the provisions of the *Corporations Act* in determining the variation to the deed was not effective if it did not comply with the statutory provisions and the consent of the administrator under the deed was not obtained, rather than determining that to be the case on contractual principles.

[68] *Correa* was followed by Rees J in *Re Antqip Hire Pty Ltd (subject to deed of company arrangement) (in liq)*.[29] That case involved two companies subject to DOCAs which

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29 [2020] NSWSC 487 at [66].

then resolved to go into voluntary liquidation, incurring additional indebtedness to a secured creditor in the intervening period. One of the issues was whether monies which were held on trust for the creditors who approved the DOCAs had to be transferred to the liquidators which would have been to the benefit of the secured creditor. In a useful summary of the authorities her Honour referred to *Correa* but also to the conclusion of Stone J (Rares J and Perram J not deciding) in *City of Swan v Lehman Brothers Australian Ltd*[30] that DOCAs should be construed as statutes rather than contracts as a DOCA derives its operative force from statute. Rees J concluded that "Consistent with these authorities, it seems to me that DOCAs should be construed as statutes or, more precisely, as subordinate legislation".[31]

[69] As stated above, a DOCA is a creature of the *Corporations Act* given force by the *Corporations Act*. It binds a creditor even if that creditor had not been a signatory, given the operation of s 444C and s 444D of the *Corporations Act*. The deed also binds company officers and members as well as the company itself and administrators,[32] the latter two being the only parties obliged to sign the deed. Further support that a DOCA is governed by the *Corporations Act* and statutory principles is given by s 444A of the *Corporations Act*, which provides for the administrator of a company to "prepare an instrument setting out the terms of the deed" and provides for matters which must be included in that instrument.

[70] Once effective, a person bound by the DOCA cannot apply to wind the company up or bring proceedings against the company without leave of the Court.[33]

[71] If the DOCA provides for the release of the company from a debt, the company is released and the creditor is bound by the deed.[34] Section 445C and s 445D provide for when a DOCA will terminate. Section 445G provides for an application to be made to the Court to declare a DOCA void or to validate it where it fails to comply with Part 5.3A. Under s 446AA, if a DOCA is terminated under s 445D, the company is taken to have resolved that the company be wound up voluntarily. Section 447A of the *Corporations Act* gives the Court broad powers to make such orders as it considers appropriate about how Part 5.3A is to operate in relation to a particular company and provides that the company, creditor or deed administrator may apply to the Court for such an order.

[72] Given the analysis above, even if the rights under the DOCA in favour of Seafarms were contractual in nature, such that an analysis using contractual principles was appropriate, Seafarms has not established that the primary judge was in error in finding that there was no accrued right of repayment of the remaining Proponent Contribution which survived the termination of the Deed.

[73] While given the findings above it is not necessarily to finally decide the question, I consider that the view expressed in *Correa* is the more authoritative view. I do not consider that case is plainly wrong and for the reasons stated above find it is more directly on point than *Surber*, albeit as all the parties accepted, there is no case on all fours with the present which has decided the question definitively. In the circumstances of this case, I do not consider that the DOCA was contractual in nature.

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30 (2009) 179 FCR 243 at [5]-[7]. This aspect was not considered by the High Court which upheld the Full Federal Court's decision see *Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509.

31 [2020] NSWSC 487 at [70].

32 S 444G *Corporations Act*.

33 S 444E *Corporations Act*.

34 S 444H *Corporations Act*.

[74] Seafarms contends that such a construction would defeat the purpose of a DOCA by deterring parties such as it from supporting a DOCA, as a DOCA is a creature of statute which provides for a mechanism to administer an insolvent company to maximise the chance the company or its business will continue to exist, or at least to maximise the return to creditors that otherwise would occur if the company was immediately wound up.[35] There are however mechanisms which parties can utilise which would protect a proponent's contribution, such as a trust, so that any contribution does not become company property and is kept as trust monies, although in the present case I have not found that not to have occurred here.

[75] Canstruct contends that even if cl 12.2(c)(ii) creates an accrued right prior to termination of the DOCA, on the proper interpretation of the legislation, the legal effect of the DOCA under s 445C entails that that right is not enforceable post termination. While the arguments raised by Canstruct have merit, given I have found that there is not an accrued right under cl 12.2(c)(ii) it is unnecessary for me to address this argument and it is more appropriate that it be determined when it is a matter directly raised on the facts.

Was there a trust?

[76] Seafarms contended that the Proponent Contribution was held on trust either by the administrators of PSD for the administrators and dividend contributors if the DOCA was fully performed and secondly, in default of the DOCA being fully performed, for Seafarms.

[77] After a careful analysis of the authorities, the primary judge rejected an argument that the Proponent Contribution was held on a trust or two trusts, one of which was in favour of Seafarms in the event the DOCA was terminated. Her Honour considered various features of the DOCA including the language of the deed and found that they did not disclose an intention to create a trust over the Proponent Contribution as contended for by Seafarms. The primary judge considered a strong factor against the finding of a trust was the fact that the DOCA provided for a single fund and did not require the Proponent Contribution to be kept separate from company funds. Nor was there any provision for the separation of the $3.5 million by PSD once those monies were received. Her Honour considered the mixing of funds was a factor strongly supporting the absence of an intention to create a trust. While her Honour stated that at a high level Canstruct's construction did not make sense insofar as it deprived Seafarms of the funds contributed to effect a DOCA which was terminated, she found that "there is no commercial necessity to impose a trust" and that an "intention to create the trust contended for by [Seafarms] is not sufficiently clear, and it would be to strain the construction of the DOCA to find the same".

[78] Seafarms does not contend that the primary judge erred as matter of principle, nor do they identify any other specific error. Rather it contended that the application of the primary judge was incorrect insofar as the outcome was in error.

[79] It is contended that, in effect, the primary judge gave too much weight to the fact that there was a single account for the Deed Fund and there was a mixing of funds, when the majority of funds in the Deed Fund consisted of monies contributed by Seafarms and in particular the Proponent Contribution. In that regard, Seafarms particularly

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35 *Mighty River International Ltd v Hughes* (2018) 265 CLR 480 at 489 [7] per Kiefel CJ and Edelman J.

referred to statements by McPherson JA[36] in *Jessup v Queensland Housing Commission*[37] where his Honour noted that there could be the coexistence of a funding agreement that was a formal contract, and that the absence of a provision to keep funds separate "may not be conclusive of the absence of a trust because it may in fact be no more than some evidence of a breach of trust".[38]

[80] Seafarms particularly emphasised the reference by McPherson JA in *Jessup* to *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd*[39] where his Honour stated that a trust would be created where money is advanced by A to B, with a mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose with an implied stipulation absent a contrary intention that if the purpose fails the money will be repaid. Seafarms contends that the primary judge should have found that was the case here.

[81] Seafarms contends that in addition to the language used by the parties, the nature of the transaction and the relevant circumstances attending the relationship between them[40] supported the fact that there was a trust.

[82] The DOCA itself does not support an intention to create a trust given that:

(a) the DOCA provided for a single fund to be established as the Deed Fund into which not only the Proponent Contribution was to be paid, but all accounts receivables due to the company and any cash balances.[41] Unlike the passage in *Jessup* referred to by Seafarms, in this case there was not simply an absence of an obligation to keep funds separate, express provision was made for a mixing of the funds;

(b) the Deed Fund was to be used not only for the payment of admitted claims, but for the payment of costs, payment of the remuneration and any eligible employee creditor of the remuneration of the deed administrators[42] and the payment of costs, save as provided for the other provision of the Deed such as cl 5.2. How the fund was to be distributed was provided for in cl 5.4;

(c) while clause 5.1(b) of the DOCA expressly provided that "The Deed Administrators must hold all property in the Deed Fund on trust for the benefit of the Deed Administrators and the Dividend Creditors in accordance with the terms of the Deed",[43] it is best characterised as a direction as to the application of PSD's property particularly given the terms of the DOCA included cl 7.3 which provided that the deed administrators would act as agent for and on behalf of PSD in exercising the powers conferred by the DOCA and carrying out duties arising under the DOCA. A similar clause had been considered by Barrett J in *Lombe* where his Honour had particular regard to the fact that the deed administrators were, under the deed, agents of the company and the clause, like the present clause, referred to the Deed Fund being held for the benefit of the persons nominated not "by the deed administrators". His Honour

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36 With whom Davies JA and Philippides J agreed.
37 [2002] 2 Qd R 270 at 272 [6].
38 At [12].
39 (1978) 141 CLR 335.
40 *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 503.
41 Clause 5.1 of the DOCA.
42 Clause 10.1 of the DOCA.
43 5.1(b) of the DOCA.

also considered that the provision for the creation of a Deed Fund was a provision about how the deed administrators, as agents of the company, were to segregate and apply part of the company property and that the Deed Fund was company property and no provision was made for it to be divested of all legal and beneficial interest in the relevant property in a way that the deed administrators became owners at law and other persons became entitled in equity. His Honour stated that:[44]

> "… I do not think that it was intended by the deed of company arrangement that the various persons referred to in cl 4.1, including creditors whose claims were to be dealt with under the deed, should be the beneficial owners of the deed fund. Rather, it was intended that the deed fund should be applied by reference to the claims of those persons, being claims against the club. Application of the deed fund was thus to be by way of quid pro quo: payment of part of the fund to a particular person was the reward for elimination of a claim that person had against the club. That intention is incompatible with the creation of a trust in respect of the property concerned. It is consistent with the application of company property for company benefit."

The terms of the DOCA support a similar conclusion in the present case; and

(d) while cl 12.2(c)(ii) provided for the remaining Proponent Contribution to be "refund[ed]" to Seafarms "less payment of any unpaid Administrators, Trading Liabilities, Remuneration or Costs and less any other amounts distributed by Administrators to Creditors in accordance with the terms of the Deed", it does not contain the language of a trust and is of a contractual nature being a direction as to how monies are to be paid if the DOCA is terminated. Such a clause is more supportive of the absence of a trust than to the contrary since if a trust was created there would be no need for such a clause. Further, the remaining Proponent Contribution funds did not correlate with the Proponent Contribution originally made, given they were not segregated and accounted for separately.

[83] Individually none of the above factors is determinative of whether or not there was an intention to create a trust but in this case they do not support the creation of a trust.

[84] Nor do they support the creation of a secondary trust consistent with the principles in *Quistclose* as the terms of the DOCA do not suggest that there is a mutual intention that the proponent contribution should not become part of the assets of PSD. The Proponent Contribution is paid to deed administrators[45] but is not held by them. The DOCA provides for the administrators acting as agents of PSD in exercising the powers under the DOCA.[46] Personal liability of the administrators is excluded by cl 8.3 which provides "During the Deed Period, the Deed Administrators act as the agent of the Company...". While it would be possible for the administrators to act in a dual capacity, the terms of the DOCA do not support that being the case.

[85] Further cl 5.1(c) supports the fact that the money in the Deed Fund is PSD property, providing that "…the Deed Fund will not comprise any other property of the

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44 (2006) 56 ACSR 387 at 406 [74].

45 Clause 5.3 of the DOCA.

46 Clauses 7.3 and 1.6 of the DOCA incorporating schedule 8A of the *Corporations Regulations 2001* (Cth). See discussion in *Re Antqip Hire Pty Ltd* at [102], [104] and [106].

Company other than the property and assets referred to in clause 5.1(a)". That is consistent with the requirements of s 444A(4)(b) of the *Corporations Act* which provides that the deed must specify the property of the company (whether or not already owned by the company when it executes the deed) that is to be available to pay creditors' claims, which contemplates that sums may be paid by third parties for distribution to creditors which will be the property of the company.[47]

[86] Unlike the clause considered in *Dean-Willcocks v ACG Engineering Pty Ltd (in liq)*,[48] in this case there was no clause providing that any monies paid to the administrator by a third party on behalf of the company "shall not be refundable to the Company or third party". That clause had a more obvious operation to prevent the monies becoming company property than cl 12.2(c) of the present DOCA. In that case, Austin J found that the terms of the DOCA created a trust over the amount of the administration fund held in the administration account for the benefit of participating creditors.[49] However, while followed in one decision,[50] *Dean-Willcocks* has not been generally followed. The contrary authority of *Lombe* has been widely followed as discussed by Rees J in *Re Antqip*.[51] Notwithstanding the inclusion of a clause, like clause 5.1(b) of the present DOCA, that the Deed Fund was to be held on trust for the deed administrators and creditors, the reasoning of Barrett J in *Lombe* is in my view compelling. Like the cases discussed by Rees J in *Re Antqip*, the present DOCA contains clauses which provided that the administrators were acting as agents of PSD in discharging their obligations and like those cases there was no clause in the present case divesting legal title in the Deed Fund from PSD to the administrators to be held by them on trust.[52]

[87] The fact that the majority of the funds may have been contributed by Seafarms does not change the characterisation of the Deed Fund as a single fund where monies from different sources were mixed. This characterisation militates against an intention that the Proponent Contribution was to be held on trust.

[88] The fact that funds were not held on trust by the operation of cl 5.1(b) but were PSD property supports the fact that cl 12.2(c) contains an obligation to pay money out of PSD company funds, not funds held on trust for Seafarms.

[89] While cl 12.2(c) of the DOCA suggests that there was an expectation that Seafarms would be refunded much of the funds that were not used, the terms of the DOCA do not support an intention that they were to be held separately on trust for Seafarms and used exclusively for a particular purpose. The purposes for which the Deed Fund were to be used in cl 5.4 are more consistent with them being held as PSD's property. While it may be accepted the administrators were not limited under the DOCA to acting only as agents of PSD, cl 12.2(c) does not signal a clear intention that they were to act otherwise. That is further supported by the fact that upon termination of the Deed the administrators' role came to an end including, their powers and responsibilities, and they were released and discharged from the office of deed administrators. Were they to remain as trustees, one would have expected cl 12.2 to have provided that their role as trustees was to continue insofar as it pertained to the Proponent Contribution.

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47 *Federal Commissioner of Taxation v All Suburbs Car Repairs Pty Ltd* (1994) 14 ACSR 753 at 758-759.
48 (2003) 45 ACSR 290.
49 (2003) 45 ACSR 290 at 294-295 [15]-[16].
50 *Shepard v Sports Mondial of Australia Pty Ltd (in liq)* (2005) 53 ACSR 746.
51 [2020] NSWSC 487 at [100]-[104].
52 See discussion in [2020] NSWSC 487 at [104].

[90] Seafarms suggests that there was a practical necessity for the administrators to keep funds separate that was created by cl 12.2(c) of the DOCA. That contention appears to address the fact Seafarms cannot identify any basis upon which the Proponent Contribution was to be kept separate under the DOCA. That was not a matter that was pursued below and it was a matter that if raised the respondents may have wished to call evidence upon. In any event there is no compelling argument raised by Seafarms supporting such a "practical necessity".

[91] Seafarms has not identified any error in the primary judge's approach. An analysis of the DOCA and the various factors surrounding the funds advanced by Seafarms as the Proponent Contribution, does not demonstrate that there was a clear intention to create a trust, whether a single trust with component parts or a primary and secondary trust whereby monies were to be held on trust to pay the costs of the administrators and creditors of PSD and if the DOCA was terminated the remains of the Proponent Contribution were held on trust for Seafarms. Nor, having regard to the terms of the DOCA and the circumstances of payment of the proponent contribution was a *Quistclose* trust created, the purpose of which failed. The terms of the DOCA do not suggest that the amount of $3.5 million was to be kept separate and not to become part of the assets of PSD. Nor is there any mechanism by which that was property subsequently held on trust by the administrators whereby they acquired title to those monies and a separate trust was created upon termination of the DOCA over the funds were be held separately on trust for Seafarms. That conclusion is further supported by the fact that cl 12.2(c)(ii) only provides for the Proponent Contribution to be refunded after certain deductions are made such that the amount could not have been segregated in advance of termination. The primary judge was correct in her conclusion.

[92] That is not to suggest that a trust could not be created in a DOCA. Such a possibility was discussed in Rees J in *Re Antqip*.

[93] The above findings mean it is unnecessary for the Court to consider the remaining arguments raised by Canstruct in order to dispose of the appeal.

[94] Seafarms has therefore not established that the primary judge was in error and the appeal should be dismissed.

Costs

[95] Given Seafarms has been unsuccessful, costs should follow the event, and it should pay at least Canstruct's costs of the appeal. It however argues that the administrators and liquidators did not need to be parties to the appeal and should not be paid their costs. In the event costs were ordered in their favour it did not oppose the orders being in similar terms to those made by the Court below.

[96] The administrators and liquidators seek their costs of appearing on the appeal. They were named as parties to the appeal. Part of the appeal contended that the administrators held the Proponent Contribution or part thereof on trust for Seafarms and in particularly submitted that there was a practical necessity for the administrators to keep the Proponent Contribution separate, albeit it was not suggested that the administrators had acted in breach of trust.

[97] The administrators were a proper party to the appeal and minimised their involvement in the appeal to those issues which directly related to the administrators. They

appeared in their capacity as having been administrators under the DOCA. Administrators are ordinarily entitled to be indemnified for their remuneration and expenses and the right of indemnity recognised by the primary judge extended to the amounts held by the liquidators for the payment of their reasonably and prudently incurred legal expenses.

[98] In the circumstances it is appropriate that they be entitled to be indemnified for their costs of the appeal on an indemnity basis to be agreed or assessed, with those costs being paid for monies held in court (or by the liquidators).

[99] As to the liquidators, they supported the contentions of Canstruct but otherwise did not make any substantive submissions. Under the orders made below, the monies paid into Court were to be paid to the liquidators in the terms of paragraph 6 of the Court Orders made on 15 April 2025. The party entitled to the fund was in issue in the appeal. The liquidators were named parties to the appeal and in the circumstances properly appeared. Seafarms should pay the liquidators' costs of the appeal.

Orders

[100] The orders of the Court should be:

1. Appeal dismissed.
2. The appellant pay the first, second, fourth and fifth respondents' costs of the appeal.
3. Order 2 does not detract from the first and second respondents' right to be indemnified for their costs of appeal on an indemnity basis to be agreed or assessed with those costs being paid from the moneys held in Court or by the fourth respondent under order 6 of the Orders made 15 April 2025.
4. Pursuant to s 90-15 of the Insolvency Practice Schedule in Sch 2 to the *Corporations Act 2001* (Cth) to the extent that the appellant does not pay the costs awarded to the first and second respondents in Order 2, the first and second respondents are entitled to be paid those costs by the fourth respondents out of the money that is payable to the appellant in the liquidation of the third respondent pursuant to the first and second respondent's right to indemnity.

[101] **BRADLEY JA:** I agree with Brown JA's reasons and with the orders her Honour proposes.