

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
CORPORATIONS LIST

Not Restricted

S ECI 2021 04688

IN THE MATTER OF MERCHANT OVERSEAS LOGISTICS PTY LTD  
(IN LIQUIDATION) ACN 108 934 685

BETWEEN:

ANDREW SCHWARZ AND JON HOWARTH (IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF) MERCHANT OVERSEAS LOGISTICS PTY LTD (IN LIQUIDATION) ACN 108 934 685 Plaintiffs

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JUDGE: M Osborne J  
WHERE HELD: Melbourne  
DATE OF HEARING: 4 February 2022  
DATE OF JUDGMENT: 28 March 2022  
CASE MAY BE CITED AS: In the matter of Merchant Overseas Logistics Pty Ltd  
MEDIUM NEUTRAL CITATION: [2022] VSC 154

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CORPORATIONS – Liquidation – Whether liquidators should be granted leave pursuant to s 436B(2)(g) of the *Corporations Act* to be appointed as administrators - Deed of company arrangement – Where deed will provide more cost efficient and timely finalisation of liquidation – Whether Court should make orders pursuant to s 447A of the *Corporations Act* – Whether directions should be given under Insolvency Practice Schedule (Corporations) s 90-15 – Whether Court should stay winding up of the company pursuant to s 482 of the *Corporations Act*.

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APPEARANCES:  
For the Plaintiffs Counsel Solicitors  
Mr P Aathreya, solicitor Johnson Winter & Slattery

HIS HONOUR:

1 The plaintiffs, Andrew Schwarz ('Mr Schwarz') and Jon Howarth ('Mr Howarth'); (collectively, 'the plaintiffs') are the joint and several liquidators of Merchant Overseas Logistics Pty Ltd (in liquidation) (ACN 108 934 685) ('the Company'). They bring this application for orders, inter alia, that they be granted leave to be appointed as joint administrators of the Company; deed administrators of a deed of company arrangement to be entered into by the Company in the course of its administration; and various ancillary orders including that the winding up be stayed from the time the plaintiffs are appointed administrators, and in due course be terminated.

2 The orders sought by the plaintiffs are as follows:

(a) An order that pursuant to ss 436B(2)(g) and 448C(1) of the *Corporations Act 2001* (Cth) ('*Corporations Act*'), leave be granted for the plaintiffs to be appointed as:

(i) joint and several administrators of the Company; and

(ii) deed administrators of any deed of company arrangement entered into by the Company in the course of its administration by the plaintiffs as administrators.

(b) An order pursuant to s 447A of the *Corporations Act* and s 90-15 of the Insolvency Practice Schedule (Corporations) ('IPS') that pt 5.3A of the *Corporations Act* is to operate in relation to the administration of the Company (and any administration of a deed of company arrangement made in relation to the Company) on the following terms to prevail to the extent of any inconsistency with the provisions of pt 5.3A of the *Corporations Act*:

(i) there be no requirement that a first meeting of creditors in the administration of the Company be convened or held;

(ii) section 438B(2) of the *Corporations Act* does not apply to the plaintiffs' administration of the Company;

(iii) the plaintiffs (as administrators) may convene and hold the meetings

required under s 439A of the *Corporations Act* at any time during the convening period (as defined in the *Corporations Act*);

(iv) any notices required to be given pursuant any provision in any of pt 5.3A of the *Corporations Act*, pt 5.3A of the *Corporations Regulations 2001* (Cth), the IPS or the *Insolvency Practice Rules (Corporations) 2016* (Cth) (IPR) is validly given to creditors of the Company by taking the following steps:

(a) where the plaintiffs have an email address for a creditor, by sending the notice by email to each such creditor, irrespective of whether the creditor has nominated to receive electronic notifications of documents in accordance with s 600G of the *Corporations Act*;

(b) where the plaintiffs do not have an email address for a creditor, but have a postal address for the creditor (or have received notification of non-delivery of a notice sent by email in accordance with subparagraph ((b)(iv)(a) above), by sending the notice by posting a copy of it to the postal address for each such creditor;

(c) by publishing the notice on the Australian Securities and Investments Commission (ASIC) published notices website appearing at <https://insolyncynotices.asic.gov.au/>; and

(d) by publishing the notice on the website maintained by the plaintiffs at [www.advisory.com.au](http://www.advisory.com.au).

(v) that, to the extent not permitted specifically by ss 75-30, 75-35 and 75-75 of the IPS, the plaintiffs be permitted to hold meetings of creditors during the administration of the Company by telephone or audio-visual conference only at the place of the plaintiffs' offices (without creditors of

the Company being able to attend physically at that place), with such details of the arrangements for using the telephone or audio-visual conference facilities to be specified in each of the notices issued to creditors.

- (vi) in and for the purposes of the plaintiffs' administration (pursuant to pt 5.3A of the *Corporations Act*) of the Company, the plaintiffs accept as proofs of debt in the administration of the Company any proofs of debt submitted by creditors in the course of the liquidation of the Company conducted by the plaintiffs as plaintiffs, without adjustment for interest in respect of the claims the subject of such proofs of debt.
- (c) Pursuant to s 90-15 of the IPS, a direction that the plaintiffs as administrators of the Company are justified in:
- (i) not requiring or receiving a 'Report as to Affairs' or 'Report on Company Activities and Property' from any of the directors (or past directors) of the Company; and
  - (ii) not conducting investigations into, and reporting to creditors about, possible recovery actions that may be available in the event that the Company was to proceed to liquidation under the *Corporations Act* pursuant to div 12 pt 5.3A of that Act.
- (d) An order pursuant to s 482 of the *Corporations Act* that the winding up of the Company be stayed from the time that the plaintiffs appoint themselves as administrators of the Company until the date upon which the order sought in paragraph (e) below takes effect.
- (e) An order pursuant to s 482 of the *Corporations Act* that, upon the expiry of two business days after the plaintiffs (in their capacities as deed administrators of any deed of company arrangement) give written notice to ASIC of the full effectuation of that deed of company arrangement, the winding up of the

Company be terminated.

(f) The plaintiffs' costs of and incidental to this application be costs in the liquidation of the Company, and are to be paid out of the assets of the Company; and

(g) Such further or other orders as the Court deems appropriate.

3 The material relied upon by the plaintiffs in support of the application comprised the following:

(a) an affidavit of Mr Schwarz affirmed 8 December 2021;

(b) an affidavit of Mr Schwarz affirmed 3 February 2022;

(c) an affidavit of Mr Schwarz affirmed 24 March 2022; and

(d) an affidavit of Christopher Shaun Dunphy ('Mr Dunphy'), a director of the Company, sworn 24 March 2022.

4 The Company's creditors and the Australian Securities and Investments Commission ('ASIC') have been notified of the proceeding and the orders sought by the plaintiffs. Aside from the creditor Southern Ports Authority who did not oppose the relief sought as such but made submissions by email in connection with the precise form of the orders, no other creditor or ASIC has made any submissions nor opposed the relief sought.

5 Having considered the plaintiffs' submissions, which included a response to the matters raised by Southern Ports Authority (addressed below), I determined that it was appropriate to accede to the application and on 25 March 2022 made orders consistent with those sought by the plaintiff in the application. These are my reasons for the making of those orders.

### **Background facts**

6 The Company was incorporated on 4 May 2004 and was part of a group of companies that traded in the shipping and transportation industry. The Company initially traded

as an international freight forwarding business; from 2009 it moved towards being a direct shipping business, with a view to moving mineral concentrates from Western Australia. Much of the product it shipped was from the Port of Esperance, Western Australia. From 2015, the Company was adversely impacted by the decline in the mining industry's profitability. As a result of customers opting to use cheaper shipping alternatives and an increase in competition, the Company was unable to compete on price.

7 Subsequently, on 31 October 2017 the Company formed the view that it did not have sufficient cash flow to satisfy its debts, and the plaintiffs were appointed as administrators ('the Administrators') of the Company.<sup>1</sup>

8 As at that date, the Company had the following secured creditors:

- (a) Dos Equis Pty Ltd ('Dos Equis'), the parent entity of the Company who had loaned the company \$734,600 for the Company's purchase of real property at 12 and 16 Flinders Circuit, Chadwick, Western Australia ('the Flinders Circuit Properties'), and had lodged a caveat against those properties; and
- (b) National Australia Bank Limited ('NAB') who had loaned the company a sum of \$1,070,000 in exchange for the grant by the Company of a general security over its assets and a registered mortgage over the Flinders Circuit Properties and real property owned by the Company at 4 McDonald Road, Chadwick, Western Australia (collectively, the 'Chadwick Properties').

9 The Company's creditors resolved to execute a deed of company arrangement ('the first DOCA') which was proposed by Dos Equis and executed on 6 March 2018, under which the Administrators were appointed as Deed Administrators.

10 The first DOCA contemplated the establishment of a Deed Fund of \$1.55 million by 28 February 2020.

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<sup>1</sup> The plaintiffs are variously referred to as the Administrators, the Deed Administrators, and the Liquidators in this judgment.

- 11 On 18 February 2020, Dos Equis sought a variation to the first DOCA to permit a six month extension to the 28 February 2020 deadline for the establishment of the Deed Fund.
- 12 On 28 February 2020, the Company's creditors resolved to amend the first DOCA to extend the deadline for the establishment of the Deed Fund to 28 August 2020.
- 13 On 28 August 2020 the first DOCA was automatically terminated following Dos Equis' failure to contribute the Deed Fund by the deadline of 28 August 2020, resulting in the company going into liquidation and the deed administrators (the plaintiffs) becoming the liquidators of the Company.
- 14 Between 28 August 2020 and July 2021, the plaintiffs were unable to substantially progress the liquidation due to a combination of the liquidators (the plaintiffs) being without funds and Dos Equis not achieving any material progress in its effort to realise the Company's remaining property.
- 15 Consequently, the plaintiffs expect that a continuation of the liquidation will not deliver any return to the Company's remaining unsecured creditors.
- 16 On 6 July 2021, the plaintiffs met with Mr Dunphy and the other director of the company, Jon Cahill ('Mr Cahill'), for the purposes of discussing the status of the liquidation and the possibility of achieving an acceptable return to the Company's remaining unsecured creditors. Mr Dunphy and Mr Cahill are also directors of Dos Equis.
- 17 On 8 July 2021, the plaintiffs issued a notice pursuant to s 530B of the *Corporations Act* to Mr Dunphy for the production of the Company's books and records.
- 18 On 13 July 2021 the plaintiffs executed a memorandum of understanding ('the MOU') to facilitate a due diligence process for the negotiation of a contract of sale of a subdivided part of the Company's property at 4 McDonald Road, Chadwick, Western Australia ('the Chadwick property').

- 19 On 15 July 2021 the plaintiffs wrote to the lawyers acting for Mr Dunphy setting out their initial views regarding key elements to be addressed in any proposed new DOCA, including their preference that any proposed new DOCA should be on improved terms and result in a higher return to participating unsecured creditors than the terms of the first DOCA.
- 20 On 20 August 2021, Dos Equis provided an initial response to the notice of 8 July 2021, advising that the Company's records were stored in an online cloud-based system administered by Wisetech Global. Access to these records was obtained on 22 November 2021.
- 21 On 9 September 2021, the plaintiffs lodged caveats over the Chadwick Properties to protect creditors against the risk that those properties may be sold without the plaintiffs' knowledge, on unfavourable terms and to the detriment of creditors.
- 22 On 23 September 2021 Mr Schwarz met with Mr Dunphy to discuss his concerns that the proposed new DOCA did not contain a provision for upfront payment of the majority of the deed funds, which would minimise the risk of non-payment of participating creditors.
- 23 On 28 September 2021, the plaintiffs received a revised DOCA proposal from Dos Equis ('the New DOCA Proposal'). The New DOCA Proposal provided for a deed fund of \$450,000 including an up-front payment of \$300,000 to enable participating unsecured creditors to receive 15 cents in the dollar, which represents the same return to participating unsecured creditors as under the first DOCA.
- 24 On 12 October 2021, Dos Equis transferred \$300,000 into the plaintiffs' trust account as an initial contribution towards the deed fund for the New DOCA Proposal.
- 25 Further, at the hearing on 25 March 2022, the solicitors for the plaintiffs informed the Court that Mr Dunphy had advised that the remaining \$150,000 was available and would be paid in short order.

**Relief pursuant to s 436B and 448C of the Corporations Act**

26 The plaintiffs seek an order pursuant to ss 436B(2)(g) and 448C(1) of the *Corporations Act*, that leave be granted for their appointment as:

- (a) joint and several administrators of the Company, which is presently in liquidation; and
- (b) deed administrators of any deed of company arrangement entered into by the Company in the course of its administration by the plaintiffs as administrators.

27 Pursuant to s 436B(1) of the *Corporations Act*, the liquidator may, by writing, appoint an administrator of a company if they think that the company is insolvent, or is likely to become insolvent at some future time. A limitation on that power is placed in s 436B(2), that the liquidator cannot appoint themselves or their partner or employee without a creditors' resolution or leave of the Court.

28 An additional restriction on the self-appointment as liquidator is found in s 448C of the *Corporations Act*, which provides that a person must not, except with the leave of the Court, seek or consent to be appointed as administrator of a company or a deed of company arrangement if the person is a partner of an officer of the company. As the plaintiffs as officers of the company, they require leave pursuant to s 448C to permit their appointment.<sup>2</sup>

29 The question for the Court to consider is 'whether the liquidator ... is an appropriate person to be an administrator'.<sup>3</sup> The question of appropriateness requires the Court to 'consider whether there is any matter such as a conflict of interest, a threat to independence, or anything else offensive to commercial morality' in the proposed appointment.<sup>4</sup> Relevant considerations include:<sup>5</sup>

- (a) The proposed appointees' familiarity with the business and affairs of the

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<sup>2</sup> *In the matter of Equiticorp Australia Ltd (in liq) and Ors* [2020] NSWSC 143, [19] ('*Equiticorp*'); *Re Destra Corporation Limited (Rec & Man Apptd) (in liq)* [2009] FCA 1199, [2].

<sup>3</sup> *Equiticorp* (n 2), [20], citing *Deputy Commissioner of Taxation v Foodcorp Pty Ltd* (1994) 13 ACSR 796.

<sup>4</sup> *Equiticorp* (n 2), [22], citing *Australian Securities and Investments Commission v Diploma Group Limited (No 5)* [2017] FCA 1147, [40].

<sup>5</sup> *Equiticorp* (n 2), [23], citing *Re Gordon Smith Marketing Pty Ltd (admin apptd)* [2016] FCA 1378, [32(b)]; *ASIC v Diploma Group Limited (No 5)*, [58].

subject companies;

- (b) The likely reduction in duplication and associated costs where a liquidator is appointed as administrator, including where considerable work has already been undertaken; and
- (c) Where continuity of appointees is desirable having regard to ongoing negotiations and/or complex arrangements.

30 In the present case, the plaintiffs submit that their appointment as administrators of the Company is in the best interests of the creditors as they have an in-depth understanding of the Company's affairs and the New DOCA Proposal, given the substantial work undertaken in their previous roles as voluntary administrators and their current role as plaintiffs.

31 It is well established that provided there is no potential for conflict, where considerable work as already been undertaken, it would be in the creditors' interests to grant leave, as it would save time, trouble and expense in the course of the administration.<sup>6</sup>

32 Mr Schwarz deposes in an affidavit affirmed 8 December 2021 that the plaintiffs have undertaken substantial work in connection with the external administration of the Company, including:

- (a) holding discussions with Mr Dunphy;
- (b) conducting a preliminary assessment of the viability of the business of the company;
- (c) convening and holding the First Meeting of Creditors on 13 November 2017;
- (d) attending to creditor enquiries and questions;

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<sup>6</sup> *Hughes, in the matter of Vah Newco No. 2 Pty Ltd (in liq)* [2020] FCA 1121, [29]; *Taylor, in the matter of Origin Internet Solutions Pty Ltd (in liq)* [2004] FCA 382, [7]; *Delsana Holdings Pty Ltd, in the matter of Delsana Holdings Pty Ltd (in liq)* [2013] FCA 500, [4]; *Diploma Group Limited (No 5)* [2017] FCA 1147, [58].

- (e) attendance at the Company's Esperance and Melbourne offices to assess the Company's assets;
- (f) a review of the Company's records and investigations into its operations and reasons for failure;
- (g) a review of the Company's insurance policies for their adequacy and arranging brokers for the placement of insurance policies;
- (h) liaising with Mr Dunphy in relation to the location and condition of the Company's assets, ascertaining the Company's debtors and the likelihood of recovery of debtors;
- (i) liaising with banking institutions regarding bank accounts currently or previously in the name of the Company;
- (j) liaising with the secured creditor in relation to security interests;
- (k) arranging for valuations of the Company assets;
- (l) holding meetings of creditors;
- (m) reviewing related entity payments;
- (n) preparing reports for the Company's secured creditor; [WHO]
- (o) liaising with directors of the purpose of eliciting DOCA proposals; and
- (p) preparing five reports to the Company's creditors on 1 November 2017, 23 November 2017, 1 February 2018, 8 March 2018 and 27 November 2020.

33 The plaintiffs further submit that:

- (a) no creditor, nor ASIC, has opposed the orders sought in this application;
- (b) the appointment of other qualified persons as voluntary administrators would lead to duplication of work and additional costs;

- (c) they would not be affected by any real or potential conflict of duty or interest if they were appointed as administrators, and all prior relevant relationships and indemnities between the plaintiffs, the Company's directors and related entities have been fully and appropriately disclosed to creditors;
- (d) the fact that Dos Equis as proponent of the New DOCA Proposal has made provision for payment of the plaintiffs' fees does not in itself introduce any element of lack of independence or impartiality;<sup>7</sup> and
- (e) there is no evidence that the proposed new voluntary administration of the Company would be contrary to the public interest.

34 Having had regard to the submissions and the facts as set out above, I am satisfied that it is appropriate for the present plaintiffs to be appointed as the administrators and/or deed administrators of the Company. Accordingly, I granted leave pursuant to s 436B(2) of the *Corporations Act*.

35 Southern Ports Authority submitted that an order appointing the plaintiffs as deed administrators was too vague and the orders should provide for the administrators to put the New DOCA Proposal to creditors. Relatedly, Southern Ports Authority submits that the orders should impose obligations on the plaintiffs to put the New DOCA Proposal to creditors within a specific time period. I do not consider such additional orders are required. The plaintiffs have stated in open court that they intend to move expeditiously and put the New DOCA Proposal to the creditors within the next 14 days, and the further relief that they seek pursuant to s 447A of the *Corporations Act*, to which I shall turn next, are all designed to expedite the necessary steps to facilitate those matters (in respect of which the *Corporations Act* prescribes time periods in any event).

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<sup>7</sup> *Re Nardell Coal Corporation Pty Ltd (recs and mgrs apptd) (in liq)* (2003) 47 ACSR 122, [11]-[13]; *C.A.R.E Employment & Training Services Pty Ltd, in the matter of C.A.R.E Employment & Training Services Pty Ltd* [2020] FCA 374, [10].

Relief pursuant to s 447A of the *Corporations Act* and s 90-15 of the *Insolvency Practice Schedule*

36 The plaintiffs also seek an order pursuant to s 447A of the *Corporations Act* and s 90-15 of the IPS that pt 5.3A of the *Corporations Act* is to operate in relation to the administration of the Company (and any administration of a deed of company arrangement made in relation to the Company) on the following terms to prevail to the extent of any inconsistency with the provisions of pt 5.3A of the *Corporations Act*:

- (a) there be no requirement that a first meeting of creditors in the administration of the Company be convened or held;
- (b) section 438B(2) of the *Corporations Act* does not apply to the plaintiffs' administration of the Company;
- (c) the plaintiffs (as administrators) may convene and hold the meetings required under s 439A of the *Corporations Act* at any time during the convening period (as defined in the *Corporations Act*);
- (d) any notices required to be given pursuant any provision in any of pt 5.3A of the *Corporations Act*, pt 5.3A of the Corporations Regulations 2001 (Cth), the IPS or the Insolvency Practice Rules (Corporations) 2016 (Cth) ('IPR') is validly given to creditors of the Company by taking the following steps:
  - (i) where the plaintiffs have an email address for a creditor, by sending the notice by email to each such creditor, irrespective of whether the creditor has nominated to receive electronic notifications of documents in accordance with s 600G of the *Corporations Act*;
  - (ii) where the plaintiffs do not have an email address for a creditor, but have a postal address for the creditor (or have received notification of non-delivery of a notice sent by email in accordance with subparagraph (d)(i) above), by sending the notice by posting a copy of it to the postal address for each such creditor;
  - (iii) by publishing the notice on the ASIC published notices website

appearing at <https://insolcencynotices.asic.gov.au/>; and

- (iv) by publishing the notice on the website maintained by the plaintiffs at [www.advisory.com.au](http://www.advisory.com.au).
- (e) that, to the extent not permitted specifically by ss 75-30, 75-35 and 75-75 of the IPS, the plaintiffs be permitted to hold meetings of creditors during the administration of the Company by telephone or audio-visual conference only at the place of the plaintiffs' offices (without creditors of the Company being able to attend physically at that place), with such details of the arrangements for using the telephone or audio-visual conference facilities to be specified in each of the notices issued to creditors.
- (f) in and for the purposes of the plaintiffs' administration (pursuant to pt 5.3A of the *Corporations Act*) of the Company, the plaintiffs accept as proofs of debt in the administration of the Company any proofs of debt submitted by creditors in the course of the liquidation of the Company conducted by the plaintiffs as plaintiffs, without adjustment for interest in respect of the claims the subject of such proofs of debt.

37 Section 447A of the *Corporations Act* empowers the Court to 'make such order as it thinks appropriate about how [pt 5.3A of the *Corporations Act*] is to operate in relation to a particular company'.

38 The High Court of Australia has recognised that the powers of the Court under s 447A of the *Corporations Act* are wide, but not entirely without limit, stating that:<sup>8</sup>

Some particular limitations ... must be examined: first, that s 447A does not permit a court to make an order altering the times fixed by those provisions of Pt 5.3A which contain express provision for variation of the time so fixed; second, that it permits only orders having prospective effect; third, that it does not permit the making of orders affecting vested rights; and fourth, that it does not apply unless there is a continuing administration (or, presumably, an extant deed of company arrangement).

39 The plaintiffs seek orders to modify the operation of pt 5.3A of the *Corporation Act* in

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<sup>8</sup> *Australasian Memory Ptd Ltd v Brien* (2000) 200 CLR 270, [20].

relation to the Company in the following ways:

- (a) there be no requirement that a first meeting of creditors in the administration of the Company be convened or held;
- (b) dispensing with the operation of s 438B(2) of the *Corporations Act*, which requires the Company's directors to deliver reports to the plaintiffs concerning the Company's business, property, affairs and financial circumstances;
- (c) convening meetings at any time during the convening period per s 439A of the *Corporations Act*;
- (d) allowing for electronic notifications and conducting meetings by telephone or AV conference; and
- (e) accepting of proofs of debts lodged in the liquidation without adjustment or interest.

40 The plaintiffs submit that these orders would further an efficient and economical approach with respect to the administration of the Company. The plaintiffs submit that they would minimise unnecessary costs and superfluous administrative burden,<sup>9</sup> in circumstances where Company's creditors are aware of its affairs and circumstances.

41 I am satisfied that orders pursuant to s 447A of the *Corporations Act* facilitate the efficient administration of the Company and therefore made those orders.

#### **Relief under s 90-15 of the *Insolvency Practice Schedule***

42 The plaintiffs seek the following relief under s 90-15 of the IPS:

- (a) Dispensation with the requirement for the administrators to require the Company directors to prepare and provide a 'Report on Company Activities and Property' and/or a 'Report as to Affairs'; and

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<sup>9</sup> *Equiticorp* (n 2), [34].

(b) Relief from the requirement to conduct investigations into, and report to creditors about, possible recovery actions that may be available.

43 The plaintiffs rely on *Equiticorp*, in which case similar orders were sought and obtained. It is well established that the function of such an application for directions is to give the administrator advice on the proper course to be taken with respect to the administration.<sup>10</sup> The directions sought are on a legal issue of substance and procedure, which is an appropriate subject matter on which the court may give directions pursuant to s 90-15 of the IPS.<sup>11</sup>

44 The Company has been in external administration for nearly five years. Considering the presently unfunded status of the liquidation and the creditors' interests being best served by expediting the process for consideration and implementation of the New DOCA Proposal, the plaintiffs submit that there is no utility in requiring a 'Report on Company Activities and Property' and/or a 'Report as to Affairs', nor in conducting the investigations and making reports to creditors concerning possible recovery actions in the event that the Company were to ultimately proceed to liquidation.

45 The plaintiffs submit that the appropriateness of the directions sought is exemplified by the fact that they would complement the relief sought under s 447A of the *Corporations Act*, including modifying the operation of pt 5.3A of the *Corporations Act* by dispensing with the requirements of s 438B(2).<sup>12</sup>

46 Having regard to the plaintiffs' submissions, I consider it appropriate to grant the relevant relief sought under s 90-15 of the IPS.

#### **Stay and termination of liquidation pursuant to s 482 of the *Corporations Act***

47 The plaintiffs further seek an order pursuant to s 482 of the *Corporations Act* that the winding up of the Company be stayed from the time that the plaintiffs appoint themselves as administrators of the Company until the date upon which the order

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<sup>10</sup> Ibid, [44].

<sup>11</sup> Ibid, [45].

<sup>12</sup> Ibid, [47].

terminating the winding up of the Company takes effect.

48 Section 482 of the *Corporations Act* grants the court power to stay or terminate the winding-up process of a company at any time. Such an order is a matter of discretion for the courts, and the plaintiffs bear the onus to set out why a stay should be granted.<sup>13</sup>

49 When a court is deciding whether to grant a stay pursuant to s 482 of the *Corporations Act*, a non-exhaustive list of principles applicable to an application under s 482 was endorsed by Ashley JA and Beach AJA in the Court of Appeal of this Court in *Von Risefer v Mainfreight International Pty Ltd* ('*Von Risefer*'):<sup>14</sup>

A long line of authorities establishes the framework within which an application to terminate or stay a winding-up will be considered. In *Re Warbler Pty Ltd*, Master Lee QC of the Queensland Supreme Court said this:

1. The granting of a stay is a discretionary matter, and there is a clear onus on the applicant to make out a positive case for a stay.<sup>15</sup>
2. There must be service of notice of the application for a stay on all creditors and contributories, and proof of this.<sup>16</sup>
3. The nature and extent of the creditors must be shown, and whether or not all debts have been [or will be] discharged.<sup>17</sup>
4. The attitude of creditors, contributories and the liquidator is a relevant consideration.<sup>18</sup>
5. The current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay of proceedings in the winding up is sought.<sup>19</sup>
6. If there has been non-compliance by directors with their statutory duties as to the giving of information or furnishing a statement of affairs, a full explanation of the reasons and circumstances should be given.<sup>20</sup>
7. The general background and circumstances which led to the winding

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<sup>13</sup> *Re Warbler Pty Ltd* (1982) 6 ACLR 526; *Risefer v Mainfreight International Pty Ltd* (2009) 73 ACSR 427.

<sup>14</sup> (1982) 6 ACLR 526, 533.

<sup>15</sup> *Re Calgary & Edmonton Land Co Ltd (in liq)* [1975] 1 WLR 355, 358–9 (Megarry J).

<sup>16</sup> *Re South Barrule Slate Quarry Co* (1869) LR 8 Eq 688; *Re Bank of Queensland Ltd* (1870) 2 QSCR 113.

<sup>17</sup> *Krextil Holdings Pty Ltd v Widdows* [1974] VR 689; *Re Data Homes Pty Ltd* [1972] 2 NSWLR 22, 26 (Mason AJA).

<sup>18</sup> *Re Calgary and Edmonton Land Co Ltd* (n 15).

<sup>19</sup> *Re a Private Company* [1935] NZLR 120; *Re Mascot Home Furnishers Pty Ltd* [1970] VR 593, 598.

<sup>20</sup> *Re Telescriptor Syndicate Ltd* [1963] 2 Ch 174.

up order should be explained.<sup>21</sup>

8. The nature of the business carried on by the company should be demonstrated, and whether or not the conduct of the company was in any way contrary to 'commercial morality' or the 'public interest'.<sup>22</sup>

50 The above test was refined in *Vero Workers Compensation v Ferretti*.<sup>23</sup>

- (a) The court has a discretion as to whether the winding up should be terminated;
- (b) In exercising its discretion, the court considers the interests of:
- (i) Creditors of the company (including future creditors);
  - (ii) The liquidator, particularly with respect to costs;
  - (iii) The contributories; and
  - (iv) The public, including the public interest in matters of commercial morality and the public interest that insolvent companies should be wound up.

51 Of note, a particularly relevant consideration for the court is the solvency of the company and the likelihood of the company returning to solvency if a winding up is terminated.<sup>24</sup>

52 The plaintiffs submit that the risk to future creditors and/or the public interest is limited due to the written confirmation received from the Company's directors ('the Confirmation'). The Confirmation provides that if leave is granted pursuant to s 482 of the *Corporations Act*, the directors of the Company do not intend to use the Company for active trading or incurring new debts in the event that the New DOCA Proposal is effected and the Company is returned to their control. The Confirmation also states that the Company's directors are prepared to provide a written undertaking to this effect. Consequently, given the terms of the Confirmation, the Company will

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<sup>21</sup> *Krextil Holdings Pty Ltd v Widdows* [1974] VR 689.

<sup>22</sup> *Ibid*; *Re Data Homes Pty Ltd* (n 17).

<sup>23</sup> [2006] NSWSC 292, [17].

<sup>24</sup> *Su v SNL Group Pty Ltd* [2010] NSWSC 797, [24].

remain a dormant entity, will not actively trade, and therefore, in the plaintiffs' view, does not pose a risk to the public interest or to future creditors (including a risk of trading while insolvent). The Confirmation is also the subject of Mr Dunphy's affidavit sworn 24 March 2022.

53 The plaintiffs submit that if the New DOCA Proposal is effectuated, the result will be that the Company's debts are fully compromised and extinguished. The cumulative effect of that compromise and the Confirmation is that the Company will be solvent.

54 The plaintiffs confirmed that all interested parties to their application have been notified of the application, and the plaintiffs have not received any indications from any of those parties of any opposition to the orders sought, subject to the concerns raised by Southern Ports Authority.

55 The plaintiffs have admittedly had some difficulty progressing the liquidation due to a lack of funds, but have not identified in their reports to creditors any manifestly delinquent mismanagement of the Company. For example, in their reports to creditors dated 23 November 2017 and 20 November 2020 the plaintiffs reported that during their preliminary investigations, the Company may have been trading while insolvent between July and October 2017, but have not formed any conclusive view as to whether the directors may have breached their statutory or fiduciary duties. The 23 November 2017 report notes that the directors may have grounds to defend any insolvent trading claims as it appears the Company took steps to mitigate its losses in the period prior to appointing administrators. The plaintiffs are of the view that the Company maintained adequate books and records.

56 The plaintiffs submit that the solvency of the Company and its current trading position is not strictly relevant for the purposes for which relief pursuant to s 482 of the *Corporations Act* is sought, particularly by reason of the provision of the Confirmation. Consequently, in the event that the New DOCA Proposal is effectuated, there is no prospect of a new group of creditors being unacceptably prejudiced by legacies from the Company's previous life.

57 The s 482 relief is sought as part of a suite of orders to facilitate consideration by the creditors of the New DOCA Proposal and its implementation. Consequently, the policy objectives underlying pt 5.3A of the *Corporations Act* are relevant public interest factors weighing in favour of the Court exercising its discretion to grant such relief.

58 The plaintiffs submit that they will provide comprehensive information to creditors regarding the likely outcomes of a continuation of the Company's liquidation compared with the outcomes of the New DOCA Proposal if implemented. Relevantly, the plaintiffs remain of the view that the New DOCA Proposal will deliver a high return to creditors than in a liquidation scenario. Consequently, the plaintiffs submit that it is in the interests of the Company's present creditors for the Court to grant relief pursuant to s 482 of the *Corporations Act* terminating the winding up of the Company to facilitate the implementation of the New DOCA Proposal.

59 I accept the plaintiffs' submissions that if the New DOCA Proposal is effectuated, the Company may become solvent again. I further accept the plaintiffs' confirmation that all interested parties have been notified, and the directors' Confirmation as well as Mr Dunphy's affidavit that they will not use the Company for active trading or incurring new debts if leave is granted pursuant to s 482 of the *Corporations Act*. I further accept that this does not pose a risk to the public interest or to future creditors. For these reasons, I would grant the orders sought by the plaintiffs.

#### **Sundry matters raised by Southern Ports Authority**

60 Southern Ports Authority submitted that an additional order should be made that the funds currently held by the plaintiffs on trust to implement the New DOCA Proposal should be the subject of an order that they not be released except in accordance with the New DOCA Proposal. I do not think such an order is necessary or appropriate. Mr Schwarz, an officer of the Court, has deposed that the funds are held on trust. There is no apprehension of any breach of trust, and accordingly no further order is necessary.

61 Next, Southern Ports Authority submit that Dos Equis should undertake to vote in support of the New DOCA Proposal. No such undertaking has been provided. In my

view, it is unnecessary; Dos Equis has already provided \$300,000 for the purposes of the New DOCA Proposal. There is no reason to assume that it will not vote in its favour. In any event, I have no power to order that it provide an undertaking and there is no proper basis for me to make an order in equivalent terms.

62 Southern Ports Authority also suggested that Dos Equis should undertake not to seek to participate as a 'partially unsecured creditor'. Clause 14 of the New DOCA Proposal provides that Dos Equis is an excluded creditor. As such, there is no need to make such an order.

### Conclusion

63 For the above reasons, I made orders to the effect sought in the Originating Process, that:

1 Leave be granted for the plaintiffs to be appointed as:

- (a) joint and several administrators of the Company; and
- (b) deed administrators of any deed of company arrangement entered into by the Company in the course of its administration by the plaintiffs as administrators.

2 Part 5.3A the *Corporations Act 2001* (Cth) ('*Corporations Act*') operate in relation to the administration of the Company (and any administration of a deed of company arrangement made in relation to the Company) on the following terms to prevail to the extent of any inconsistency with the provisions of pt 5.3A of the *Corporations Act*:

- (a) there be no requirement that a first meeting of creditors in the administration of the Company be convened or held;
- (b) that section 438B(2) of the *Corporations Act* does not apply to the plaintiffs' administration of the Company;
- (c) the plaintiffs (as administrators) may convene and hold the meetings

required under s 439A of the *Corporations Act* at any time during the convening period;

- (d) any notices required to be given pursuant any provision in any of pt 5.3A of the *Corporations Act*, pt 5.3A of the *Corporations Regulations 2001* (Cth), the IPS or the Insolvency Practice Rules (Corporations) 2016 (Cth) is validly given to creditors of the Company by taking the following steps:
- (i) where the plaintiffs have an email address for a creditor, by sending the notice by email to each such creditor, irrespective of whether the creditor has nominated to receive electronic notifications of documents in accordance with s 600G of the *Corporations Act*;
  - (ii) where the plaintiffs do not have an email address for a creditor, but have a postal address for the creditor (or have received notification of non-delivery of a notice sent by email in accordance with subparagraph (d)(i) above), by sending the notice by posting a copy of it to the postal address for each such creditor;
  - (iii) by publishing the notice on the Australian Securities and Investments Commission (ASIC) published notices website appearing at <https://insolcyncnotices.asic.gov.au/>; and
  - (iv) by publishing the notice on the website maintained by the plaintiffs at [www.advisory.com.au](http://www.advisory.com.au).
- (e) The plaintiffs be permitted to hold meetings of creditors during the administration of the Company by telephone or audio-visual conference only at the place of the plaintiffs' offices (without creditors of the Company being able to attend physically at that place), with such details

of the arrangements for using the telephone or audio-visual conference facilities to be specified in each of the notices issued to creditors;

- (f) in and for the purposes of the plaintiffs' administration of the Company, the plaintiffs accept as proofs of debt in the administration of the Company any proofs of debt submitted by creditors in the course of the liquidation of the Company conducted by the plaintiffs as liquidators, without adjustment for interest in respect of the claims the subject of such proofs of debt.

3 The plaintiffs as administrators of the Company are justified in:

- (a) not requiring or receiving a 'Report as to Affairs' or 'Report on Company Activities and Property' from any of the directors (or past directors) of the Company; and
- (b) not conducting investigations into, and reporting to creditors about, possible recovery actions that may be available in the event that the Company was to proceed to liquidation under the *Corporations Act* pursuant to div 12 pt 5.3A of that Act.

4 The winding up of the Company be stayed from the time that the plaintiffs appoint themselves as administrators of the Company until the date upon which the order in paragraph 5 below takes effect.

5 Upon the expiry of two business days after the plaintiffs (in their capacities as deed administrators of any deed of company arrangement referred to in paragraph 1(b) above) give written notice to ASIC of the full effectuation of that deed of company arrangement, the winding up of the Company be terminated.

6 The plaintiffs' costs of and incidental to this application be costs in the liquidation of the Company, and are to be paid out of the assets of the Company.

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**CERTIFICATE**

I certify that this and the 22 preceding pages are a true copy of the reasons for judgment of Justice M Osborne of the Supreme Court of Victoria delivered on 28 March 2022.

DATED this twenty eighth day of March 2022.

