FEDERAL COURT OF AUSTRALIA

Shafston Avenue Construction Pty Ltd v McCann [2020] FCAFC 85

Appeal from:	*Shafston Avenue Construction Pty Ltd, in the matter of CRCG-Rimfire Pty Ltd (subject to deed of company arrangement) v McCann* [2019] FCA 1426
File number:	QUD 603 of 2019
Judges:	**FARRELL, DAVIES AND MOSHINSKY JJ**
Date of judgment:	22 May 2020
Catchwords:	**CORPORATIONS** – deed of company arrangement – application to terminate deed of company arrangement pursuant to s 445D(1) of the *Corporations Act 2001* (Cth) – where the primary judge refused to terminate deed of company arrangement – whether primary judge erred in finding that there was not a likely prospect of the creditors of the company receiving a better outcome in the liquidation of the company – whether the primary judge erred in making certain factual findings – whether the primary judge erred in the exercise of his discretion **PRACTICE AND PROCEDURE** – new point on appeal – where the appellants sought to rely on certain Australian cases that had not been referred to at first instance to support the proposition that the requirement of reciprocity (for recognition of an Australian judgment in China) would be satisfied – whether the appellants' submission amounted to a new point on appeal – whether the appellants should have leave to make the submission
Legislation:	*Corporations Act 2001* (Cth), ss 444E, 445D, 447A, 461 *Insolvency Practice Rules (Corporations) 2016* (Cth), s 75-115
Cases cited:	*Bloemen v The Commonwealth* (1975) 49 ALJR 219 *Britax Childcare Pty Ltd v Infa Products Pty Ltd* (2016) 115 ACSR 322 *Coulton v Holcombe* (1986) 162 CLR 1 *House v The King* (1936) 55 CLR 499 *Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509 *Linen House Pty Ltd v Rugs Galore Australia Pty Ltd* [1999] VSC 126

	Liu v Ma (2017) 55 VR 104 *O'Brien v Komesaroff* (1982) 150 CLR 310 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 *Suzhou Haishun Investment Management Co Ltd v Zhao* [2019] VSC 110
Date of hearing:	14 February 2020
Registry:	Queensland
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	123
Counsel for the First, Second and Third Appellants:	Mr P Dunning QC with Mr E Goodwin
Solicitor for the First, Second and Third Appellants:	Macpherson Kelley
Counsel for the First, Second and Third Respondents:	Mr SJ Webster
Solicitor for the First, Second and Third Respondents:	Clayton Utz
Counsel for the Fourth Respondent:	Mr P Franco QC with Mr D de Jersey QC
Solicitor for the Fourth Respondent:	Baker McKenzie

ORDERS

QUD 603 of 2019

BETWEEN:	**SHAFSTON AVENUE CONSTRUCTION PTY LTD (ACN 169 409 705)** First Appellant **28 BAXTER STREET CONSTRUCTION PTY LTD (ACN 611 160 215)** Second Appellant **LINCOLN STREET CONSTRUCTION PTY LTD (ACN 603 876 651)** Third Appellant
AND:	**MICHAEL GERARD MCCANN** First Respondent **SAID JAHANI** Second Respondent **CRCG-RIMFIRE PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT) (ACN 611 557 852)** (and another named in the Schedule) Third Respondent
JUDGES:	**FARRELL, DAVIES AND MOSHINSKY JJ**
DATE OF ORDER:	**22 MAY 2020**

THE COURT ORDERS THAT:

1. The appellants be refused leave to rely on [25]-[29] of their outline of submissions dated 16 January 2020 (and the subsequent submissions relying on those paragraphs), which raise new points on appeal.
2. The fourth respondent's interlocutory application dated 23 January 2020 be dismissed.
3. The appeal be dismissed.
4. The appellants pay the respondents' costs of the appeal, as agreed or assessed.

5. In relation to the costs of the fourth respondent's interlocutory application dated 23 January 2020:

   (a) Subject to paragraph (b), the appellants pay the fourth respondent's costs of the interlocutory application, as agreed or assessed.

   (b) If the appellants wish to seek a variation of the costs order in paragraph (a), they must file and serve a written submission (of no more than two pages) seeking a different order within seven days.

   (c) If the appellants file a submission as referred to in paragraph (b), the fourth respondent may file and serve a written submission (of no more than two pages) in response within a further seven days, and the issue of the costs of the interlocutory application will be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 The appellants, Shafston Avenue Construction Pty Ltd, 28 Baxter Street Construction Pty Ltd and Lincoln Street Construction Pty Ltd, claim to be creditors of CRCG-Rimfire Pty Ltd (subject to deed of company arrangement) (the **Joint Venture Company**). At first instance, the appellants applied for an order that a deed of company arrangement (**DOCA**) entered into by the Joint Venture Company be terminated pursuant to s 445D of the *Corporations Act 2001* (Cth). The primary judge dismissed the application and the appellants appeal from that judgment.

2 The first and second respondents, Michael Gerard McCann and Said Jahani, are the administrators of the DOCA (the **Deed Administrators**). Previously, they were the joint and several administrators of the Joint Venture Company. The third respondent is the Joint Venture Company. The fourth respondent, China Railway Construction Group Co Ltd (**China Rail**), is a shareholder of the Joint Venture Company (as to 55%) and was the proponent of the DOCA.

3 The appellants contend that the primary judge erred in finding that there was not a likely prospect of the creditors of the Joint Venture Company receiving a better outcome in the liquidation of the Joint Venture Company. The appellants also contend that the primary judge erred in making certain factual findings and in the exercise of his discretion in deciding not to terminate the DOCA.

4 Two notices of contention have been filed – one by the Deed Administrators and the Joint Venture Company; the other by China Rail.

5 In their outline of submissions filed in advance of the hearing, the appellants sought to rely at [25]-[29] on two Australian cases that had not been referred to at first instance, in support of a submission that a reciprocity requirement (for recognition of an Australian judgment in China) would be satisfied. The respondents objected to those paragraphs (and the subsequent reliance on those submissions) on the basis that they amounted to new points on appeal. Further, China Rail filed an interlocutory application dated 23 January 2020 seeking leave to rely on certain additional evidence (namely, an expert report relating to the recognition and enforcement of an Australian judgment in China) in the event that the appellants were granted leave to make the

new points. China Rail contended that, had the appellants made the submissions they now sought to make at first instance, it would have relied on the expert report at first instance. During the appeal hearing, we ruled that the appellants be refused leave to make the submissions based on the two Australian cases, which constituted new points on appeal. As a consequence, we dismissed China Rail's interlocutory application. Our reasons for so ruling are set out in these reasons.

6 For the reasons that follow, we reject each of the appellants' grounds of appeal. It follows that the appeal is to be dismissed.

Background facts

7 The following summary of the background facts is substantially based on the reasons for judgment of the primary judge (the **Reasons**).

Relevant companies

8 On 29 March 2016, the Joint Venture Company was incorporated. The purpose of the company was to engage in residential, commercial and infrastructure construction projects in Queensland. The two shareholders in the Joint Venture Company were China Rail (as at 55%) and a company named Rimfire Constructions Pty Ltd (**Rimfire**) (as at 45%).

9 China Rail was (and is) a subsidiary of China Rail Construction Corporation Limited (**CRCC**), which is a State-owned entity under the administration of the State-owned Assets Supervision and Administration Commission of the State Council of China. CRCC is listed in Shanghai and Hong Kong.

10 In the draft business plan for the joint venture, Rimfire was described as an Australian construction company with offices in Brisbane and Sydney that undertook construction work in the resource, commercial and residential sectors.

11 Throughout the period in question, the directors of Rimfire were Danny Cain and Adam Moore.

12 According to the executive summary in the administrators' report to creditors dated 27 February 2018 (the **February 2018 Report to Creditors**), the following persons were directors of the Joint Venture Company:

(a) Dapeng Zhao (current; appointed 24 February 2017);

(b) Zaiqiang Lin (current);

(c) Wentao Gao (current);

(d) Kun Li (resigned 24 February 2017);

(e) Fangnan Li (resigned 27 June 2017); and

(f) Adam Moore (resigned 4 October 2017).

The Queensland construction licence and the Deeds of Covenant

13 On or about 7 July 2016, the Joint Venture Company obtained a category 7 licence from the Queensland Building and Construction Commission (the **Commission**) allowing it to undertake construction work in Queensland up to and exceeding the value of $240 million. To obtain the licence, each of China Rail and Rimfire entered into a deed of covenant and assurance (**Deed of Covenant**) with the Joint Venture Company and the Commission. Under each Deed of Covenant, the relevant company (i.e. either China Rail or Rimfire) covenanted that, in the event that the Joint Venture Company were wound up, it would pay a certain amount to the Joint Venture Company.

14 The statutory context in which the Deeds of Covenant were entered into is outlined in the recitals. For example, in the Deed of Covenant executed by China Rail (the **China Rail Deed of Covenant**), which was dated 21 July 2016, the recitals were as follows (noting that "Licensee" referred to the Joint Venture Company and the "Covenantor" referred to China Rail):

> A. The Licensee is a licensee under the provisions of the *Queensland Building and Construction Commission Act 1991* (Qld) ("the Act") or is the applicant for such a licence ("the Licence").
>
> B. The licence authorises the Licensee to conduct the business of carrying out or supervising building work of a class or classes specified in the licence.
>
> C. As a condition of the grant, renewal or upon compliance audit commenced by the Commission of a licence, the Licensee must comply with the Queensland Building and Construction Board policy "Minimum Financial Requirements" in relation to, among other things, a prescribed level or amount of net tangible assets. The Minimum Financial Requirements relating to the Licensee's financial circumstances are referred to in the Act and are to be made or issued under the Act by the Queensland Building and Construction Board ("Minimum Financial Requirements").
>
> D. The Commission is responsible for the administration of the Act and, among other things, compliance by Licensees under the Act with the Minimum Financial Requirements.
>
> E. The Covenantor has requested the Licensee to apply for the licence or comply with the provisions of the Act to enable it to continue to hold the licence. The Licensee has agreed to do so in consideration of, and conditional upon, the

execution of this Deed by the Covenantor.

F. This Deed is entered into to give effect to the agreement between the Licensee and the Covenantor referred to in recital E and also for the purpose of enabling the Licensee to comply with the Minimum Financial Requirements.

15 Clause 2 of the China Rail Deed of Covenant was in the following terms:

The Covenantor:

(a) covenants that if:

(i) the winding up of the Licensee, being a company, begins under the *Corporations Act 2001*; or

(ii) the Licensee, being a natural person, becomes a bankrupt under the *Bankruptcy Act 1966* (Cth),

the Covenantor shall, upon a written demand by the Licensee, pay the Defined Amount to the Licensee;

(b) acknowledges, if the Licensee is a natural person, that the benefit of the covenants in this Deed in favour of the Licensee will vest in, and be enforceable by, the Licensee's trustee in bankruptcy in accordance with the *Bankruptcy Act 1966* (Cth);

(c) covenants not to assign or vary the burden of any covenant or obligation (present or contingent) existing upon it under this Deed;

(d) covenants not to prove in a liquidation or bankruptcy (as the case may be) of the Licensee for the Defined Amount;

(e) covenants that, upon demand under subclause (a) hereof being made upon it, its Subject Property shall be charged with, and secure, payment of the Defined Amount; and

(f) covenants that this Deed is in the same terms as the prescribed pro forma for this Deed.

(Emphasis added.)

16 The expression "Defined Amount" was defined in cl 1.1 of the DCA to mean:

the amount determined pursuant to the Minimum Financial Requirements, as being the amount assured by the Covenantor to the Licensee by Deed of Covenant and Assurance, as stated in the MFR Report provided to the Commission from time to time. The amount is the difference between the Net Tangible Assets held by the Licensee and the Net Tangible Assets required for the Licensee's Maximum Revenue.

The expression "Minimum Financial Requirements" (**MFR**) was defined in recital C, which has been set out above. The MFR report, also referred to in the definition of "Defined Amount", is discussed below.

17 Clause 3 contained a provision that the Licensee would "account to the Covenantor for any part of the Defined Amount which has been paid to it which remains as a surplus after the payment in full of all of its unsecured creditors".

18 Clause 11 provided for the jurisdiction and forum which governed the operation of the Deed of Covenant. It provided:

> This Deed will be governed by and construed in accordance with the laws of Queensland and each party to this Deed covenants to submit to the non-exclusive jurisdiction of the courts of Queensland and courts with jurisdiction to hear appeals therefrom.

19 Clause 12 contained a number of warranties by the Covenantor as to the legal advice it had obtained before entering into the Deed of Covenant. It was in the following terms:

> The Covenantor represents and warrants to the Commission that the Covenantor:
>
> (a) has obtained legal advice from its solicitors in respect of this Deed (as is evidenced by those solicitors having made the statements set out in the schedule hereto);
>
> (b) has read and understood the contents of this Deed; and
>
> (c) acknowledges that the execution of this Deed was not brought about in any way by collateral representations of any of the parties, their servants or agents or persons connected thereto or by any third party other than specified in this Deed.

20 The Schedule referred to in cl 12 above appeared as Schedule A under the heading "Statement by Covenantor's solicitor". In the China Rail Deed of Covenant, this schedule was signed by Yi (Annie) Wang of Minter Ellison and dated 21 July 2016. It contained the following statements:

> 1. I have explained to the Covenantor (or, if the Covenantor is a company, the Covenantor's director/s) the contents and effect of this Deed and the provisions it contains.
>
> 2. I have asked the Covenantor (or, if the Covenantor is a company, the Covenantor's director/s) whether the Covenantor is executing this Deed of the Covenantor's own free will. He/she/they has/have assured me that the Covenantor is.
>
> 3. I have made enquiries of the Covenantor (or, if the Covenantor is a company, the Covenantor's director/s) from which I have formed the opinion that the Covenantor understands the obligations created by this Deed.
>
> 4. After giving the explanation and making the enquiries to which I have referred above, the Covenantor executed this Deed in my presence and appeared to do so freely, voluntarily and mindful of its implications and consequences.

21 The China Rail Deed of Covenant was signed by Mr Moore and Mr Li (the two directors of the Joint Venture Company) on behalf of the Joint Venture Company, and by Mr Zhao (who was an employee of China Rail and was not, at this time, a director of the Joint Venture Company) on behalf of China Rail. The execution clause that Mr Zhao signed stated that he had signed the Deed of Covenant "in accordance with the authority given to him … by that company". His signature was witnessed by Ms Wang. The following words appeared below Mr Zhao's signature: "executed by Dapeng Zhao under Power of Attorney dated 14 June 2016".

22 The power of attorney in question was in Chinese. There was a dispute at first instance between the appellants and China Rail as to its correct translation: see the Reasons at [86]-[87].

23 As noted above, the expression "Minimum Financial Requirements" was defined in recital C of the Deed of Covenant. Under the policy referred to in that recital (as in force at 9 October 2015), licensees were allocated to a category, depending on their nominated maximum revenue (**maximum revenue** or **MR**). Then, for each category, a net tangible assets figure was designated. For example, a category 7 licence had a maximum revenue of greater than $240 million and a designated net tangible assets figure of greater than $14.4 million. By comparison, a licensee with a turnover of $55 million fell into category 4 ($30,000,001 to $60 million), for which the designated net tangible assets figure was between $1,200,001 and $2.4 million. This distinction is important because a letter dated 7 July 2016 from the Commission to the Joint Venture Company approving its licence application stated that the nominated maximum revenue for the next financial year was $54,673,095.

24 The way in which these provisions operated when a person was applying to the Commission for a building licence was outlined in the February 2018 Report to Creditors as follows:

> In circumstances where a building company applying for a Queensland building licence does not have sufficient Net Tangible Assets (NTA) to meet the level of Maximum Revenue (MR) (as prescribed by the QBCC Act), the [Commission] will require a [Deed of Covenant] to be entered into prior to issuing a licence.
>
> The [Deed of Covenant] will stipulate the Defined Amount (as defined in the QBCC Act), being an amount that is to be assured by the Covenantor in the event of liquidation for the purposes of paying debts of the building company. This amount is calculated as the difference between the NTA held by the [licensee] and the NTA required for the licensee as prescribed by the QBCC Act.
>
> In order to calculate both the NTA and MR a Minimum Financial Requirement (MFR) report is to be prepared with an accompanying Statement of Financial Position.
>
> …
>
> It is important to note that the Defined Amounts are not payable unless a Liquidator is

> appointed to the company. In this instance the [Deed of Covenant] is not available should the Company execute a DOCA.

25 Rimfire executed two Deeds of Covenant in the same form as that executed by China Rail. The first was executed on 23 May 2016 and the second on 1 July 2016. Both Deeds of Covenant were given under Rimfire's original name, Rimfire Constructions (Resources) Pty Ltd. Both Deeds of Covenant were signed by Mr Li and Mr Moore on behalf of the Joint Venture Company and by Mr Cain on behalf of Rimfire. In the February 2018 Report to Creditors, the administrators said that the Deed of Covenant signed on 1 July 2016 was for an amount of $460,000 and that this "was based on a NTA value of $2,186,923 and MR of $12m as at 31 March 2016".

26 In the same report, the administrators said that the China Rail Deed of Covenant was for an amount of $1,095,391,969 and that this "was calculated based on a NTA value of $1,095,391,969 and MR of $18b as at 30 June 2016".

The MFR reports

27 At least three MFR reports were in evidence. All were certified by Anthony Rendall of Rendall Kelly Pty Ltd, chartered accountants, and all identified the Joint Venture Company as "the client". The first in time was dated 20 May 2016 and identified Rimfire Constructions (Resources) Pty Ltd as the Covenantor, although the copy in evidence was not signed by any director on behalf of Rimfire. It related to the period ended 31 March 2016.

28 It stated, among other things, that Rimfire's "Defined Amount" was $2,206,923, the client's (i.e. the Joint Venture Company's) current assets were $1,846,822, its current liabilities were $1,846,821, and the maximum revenue that it could earn per financial year was $55 million.

29 The second MFR report in evidence was dated 10 August 2016. In it, China Rail was identified as the Covenantor. It was signed by Mr Moore and Mr Li as directors of the client. It related to the period ending 30 June 2016. It stated, among other things, that China Rail's "Defined Amount" was $1,095,391,969, the client's (i.e. the Joint Venture Company's) current assets were $1.00, its revenue was nil, and the maximum revenue that it could earn per financial year was $18 billion.

30 The third MFR report in evidence was dated 6 July 2017. In it, a company called "China Railway Construction Company Co Ltd" (not China Rail) was named as the Covenantor. It was signed by Mr Gao and Mr Moore as directors of the client (again, the Joint Venture

Company). It related to the period ending 30 April 2017. It stated, among other things, that the "Defined Amount" was $1,095,391,969, the client's current assets were $7,572,236, its revenue was $17,118,016, its current liabilities were $5,357,974, and the maximum revenue that it could earn was $18 billion.

The period of trading and the appointment of administrators

31 The Joint Venture Company traded for a period of 20 months. During the whole of that period it operated at a loss.

32 On 16 November 2017, Mr McCann and Mr Jahani were appointed jointly and severally as the administrators of the Joint Venture Company. There were no secured creditors. The administrators estimated that the company's unsecured creditors were between $15.2 million and $41.3 million. According to the executive summary in the February 2018 Report to Creditors, those creditors fell into the following categories:

(a) employee entitlements – $357,000 (approximately);

(b) developers – $25.9 million (approximately);

(c) related parties – $9.25 million (approximately); and

(d) sub-contractors and sundry creditors – $5.7 million (approximately).

33 Rimfire has since been placed in liquidation.

Dispute regarding the China Rail Deed of Covenant

34 Shortly after the administrators' appointment, a dispute arose between China Rail and the Joint Venture Company over the enforceability of the China Rail Deed of Covenant. The details of that dispute were outlined in a letter from Baker McKenzie, the solicitors acting for China Rail, to Clayton Utz, the solicitors acting for the administrators, dated 13 February 2018. The letter asserted that the Deed of Covenant was not binding or enforceable against China Rail. Among other things, Baker McKenzie claimed that: Rimfire had misled China Rail about the necessity for the Deed of Covenant; Mr Zhao, who signed the Deed of Covenant on behalf of China Rail, was not aware of the legal effect of the deed as, contrary to the legal certification contained in the deed, he was not given an explanation as to its effect; and Mr Zhao did not hold the requisite authority to sign the Deed of Covenant.

35 The issue concerning Mr Zhao's authority to sign the Deed of Covenant was elaborated in Baker McKenzie's letter dated 13 February 2018 as follows:

> Mr Zhao had no actual authority to sign the [Deed of Covenant]. He also had no apparent authority.
>
> The Letter of Authorisation (styled power of attorney by the person who completed the [Deed of Covenant], which was not Mr Zhao) did not authorise the execution of the [Deed of Covenant]. It only covered "the establishment of [the Joint Venture Company]", as translated from the Chinese word "…".
>
> The [Deed of Covenant] was in its form a promise to pay an amount not expressly limited on its face. Coupled with the undisclosed MFR Report, it became a promise to pay in excess of $1 billion. Given the nature of the promises involved, and because Rimfire was aware it was dealing with a [China] SOE, Rimfire (acting on behalf of the [Joint Venture] Company) was on notice that it could not just rely on a mere signature to bind [China Rail]. It was required to make due inquiry as to the scope of Mr Zhao's authorisation to enter into the [Deed of Covenant] before it could rely on his authority to do so. It did not make such enquiries. Rimfire and the [Joint Venture Company] could not have reasonably believed that Mr Zhao was authorised to commit [China Rail] to such a financial exposure, without making further enquiry.
>
> In short, Mr Zhao's signing of the [Deed of Covenant] did not bind [China Rail], and could not bind [China Rail] in the circumstances.

36 China Rail also claimed that, if the Commission had known the true position when it issued the building licence to the Joint Venture Company, it would not have issued that licence.

The February 2018 Report to Creditors

37 In the February 2018 Report to Creditors, the administrators outlined the three options available to the creditors and provided their recommendation on each of those options as follows:

> In accordance with Section 75-225 of the Insolvency Practice Rules, the Administrators are required to make a recommendation to creditors as to which of the options available to them is in their best interests. The following options are available for creditors to vote on at the meeting pursuant to Section 439C of the Act:
>
> - That the administration should end;
> - That the company execute the proposed DOCA; or
> - That the company be wound up.
>
> **1. The administration should end**
>
> It is possible that creditors may consider ending the Administration which would return the [Joint Venture] Company to the control of its Director. Ordinarily, the Director would resume control of the [Joint Venture] Company's assets and be able to deal with them as they deem appropriate.
>
> ***Administrator's recommendation:*** It would not be in the creditors' best interests for the Administration to end as the [Joint Venture] Company is insolvent and therefore requires a mechanism to deal with creditors' claims.
>
> **2. The [Joint Venture] Company executes a [DOCA]**
>
> The provisions of Part 5.3A of the Act allow the [Joint Venture] Company and its creditors to negotiate a proposal to deal with the [Joint Venture] Company's

affairs and in such circumstances execute a DOCA.

Details of the proposed DOCA are included **at Section 8** of this report.

Administrator's recommendation: It is our recommendation that it would be in creditors' best interests for the [Joint Venture] Company to execute a DOCA due the following:

– A return under a DOCA is estimated to be higher than liquidation under both a optimistic and pessimistic scenario.

– The return under liquidation is significantly risky with real prospects that there may be no return for employee superannuation and unsecured creditors, should litigation seeking enforcement of the [Deeds of Covenant] fail.

– To commence proceedings to enforce the [Deeds of Covenant], substantial funding would be required which will need to be provided by creditors or a litigation funder, which is not guaranteed.

– Even if funding is provided by a litigation funder, and successful judgment was obtained and enforced, then unsecured creditors would still not receive 100 cents in the dollar as the success fee of c.30% would be deducted along with legal and liquidation costs.

3. The [Joint Venture] Company be wound up (liquidation)

Creditors may resolve to wind up the [Joint Venture] Company which would result in the [Joint Venture] Company being placed into liquidation. If there is no alternative nominee, Said Jahani and I will be taken as having been nominated as Joint and Several Liquidators of the [Joint Venture] Company.

A more detailed review of the [Joint Venture] Company's financial affairs would be conducted and as a consequence a report on its affairs and the conduct of its officers would be prepared and the findings conveyed to ASIC.

Further investigations in relation to voidable transactions and insolvent trading would be made as well as a determination to proceed with such claims, if any.

To pursue recoveries under the Deed of Covenants executed by [China Rail] and [Rimfire] funding will be required. Whilst funding can be requested from creditors and/or government departments (such as the [Commission] or the ASIC) we believe that the source of any funding would likely be from a litigation funder who would require a premium and would require payment from funds recovered. Please refer to section X of this report in respect to pursuing amounts under the Deed of Covenants.

In the event sufficient funds are recovered, monies would be distributed in accordance with the provisions of Section 556 of the Act.

Administrator's recommendation: Given the risks highlighted in this report in enforcing the [Deed of Covenant] along with the level of a return and timing under a DOCA we are of the view that it is not in the creditors' best interests for the Company to be placed into liquidation.

38 The details of the calculations underpinning the estimated returns that the creditors could expect to receive under the DOCA and liquidation scenarios were set out in a table which

appeared earlier in the February 2018 Report to Creditors. A copy of that table was attached as a Schedule to the Reasons.

39 The February 2018 Report to Creditors concluded with the following recommendation:

> Given the risks highlighted in this report in enforcing the [Deed of Covenant], along with the level of a return and timing under a DOCA, we are of the view that it is in creditors' interests for the [Joint Venture] Company to execute a DOCA.

The second meeting of creditors (7 March 2018)

40 The second meeting of creditors of the Joint Venture Company was held on 7 March 2018. The meeting was chaired by Mr McCann. The meeting was attended by 50 creditors in person, or by proxy, and 17 observers. A representative of the appellants attended the meeting.

41 In his affidavit dated 8 February 2019, Mr McCann described the business conducted at that meeting in the following terms:

> 59. The creditors attending the meeting had gross debt claims totalling approximately $35 million. Of those claims, approximately $12.7 million had been admitted for voting purposes at the meeting. I explained to creditors that the adjudication of proofs of debt conducted to date was for the purposes of the meeting and did not represent a final adjudication of the proof or claim. In that respect, I informed the meeting that I had formed the view that the major proofs of debt would be adjudicated as follows for the purposes of voting at the meeting:
>
> (a) 28 Baxter Street Pty Ltd – $1.00 (it had submitted a proof of debt for $4,526,095.97);
>
> (b) Lincoln Street Construction Pty Ltd – $1.00 (it had submitted a proof of debt for $3,380,780.67);
>
> (c) Shafston Avenue Construction Pty Ltd – $1.00 (it had submitted a proof of debt for $10,027,894.74);
>
> (d) Australian Taxation Office – $695,751 (it had submitted a proof of debt for $895,000);
>
> (e) [China Rail] – $2,605,000 (it had submitted a proof of debt for $3,060,000);
>
> (f) Linton Developments Pty Ltd – $7,072,279.69 (it had submitted a proof of debt for $7,365,890.00);
>
> (g) Rimfire – $329,000 (it had submitted a proof of debt for $3,009,333.00); and
>
> (h) Rimfire Constructions (QLD) Pty Ltd (In Liquidation) (Receivers and Managers Appointed) – $1.00 (it had submitted a proof of debt for $920,142.87.
>
> 60. A key aspect of discussion during the Second Creditors' Meeting was the enforceability of the Deed of Covenant and Assurance entered into by [China

Rail]. In that respect, I informed the meeting that:

(a) the voluntary administrators and their advisors had spent considerable time investigating the enforceability of the Deed of Covenant;

(b) [China Rail] disputed the validity of the Deed of Covenant and had indicated that it would defend any claim seeking to enforce the Deed of Covenant in Australia and overseas; and

(c) that the voluntary administrators were not aware of [China Rail] having any assets in Australia against which a successful judgment could be enforced;

(d) the voluntary administrators had engaged with 5 litigation funders and that, while no funder had confirmed that it would fund a recovery action, there was a possibility that funding may be available to seek to enforce the Deed of Covenant.

61. I then provided a summary of the DOCA proposal received from [China Rail]. I noted that it would result in a payment of $8 million from [China Rail] but that payment was subject to a number of conditions (as outlined above). I expressed my view that, given the size of the DOCA fund, creditors would be best served by resolving that the [Joint Venture] Company enter into the proposed DOCA.

62. Mr Ian Innes of Baker McKenzie, representing [China Rail], addressed the Second Creditors' Meeting. He indicated that:

(a) the board of [China Rail] had approved the DOCA contribution of $8 million;

(b) the amount of the contribution had been determined following an assessment by [China Rail] of the amounts owing to creditors and [China Rail] believed that the contribution represented a fair offer to take control of the [Joint Venture] Company;

(c) that it was his view that the Deed of Covenant and Assurance purportedly executed by [China Rail] did not have legal force or effect as the person who signed it did so without authorisation; and

(d) [China Rail] did not have assets in Hong Kong and that the entity listed on the Hong Kong Stock Exchange was a separate legal entity to [China Rail].

42 During the meeting, an equal number of creditors by number voted for and against a resolution that the Joint Venture Company enter into the DOCA. The representative of the appellants exercised a general proxy to vote against the resolution. As there was no majority either in favour of, or against, the resolution, Mr McCann exercised a casting vote (pursuant to s 75-115 of the *Insolvency Practice Rules (Corporations) 2016* (Cth)). Mr McCann voted in favour of the resolution, resulting in it being passed.

43 In his affidavit dated 8 February 2019, Mr McCann explained why he decided to take that course, in the following terms at [67]:

> Given that creditors in value but not in number approved the resolution, the Deed Administrator, as chairperson of the meeting, was required to exercise a casting vote. I exercised that casting vote in favour of the resolution and the resolution was passed. I voted in favour of the resolution because my professional judgment was that entry into the [DOCA] was in the interests of the creditors as a whole, including the interests of the unsecured creditors. I reached this judgment based on the following factors:
>
> (a) under a DOCA, employees would receive their full entitlements and unsecured creditors would receive a substantial return;
>
> (b) the DOCA is likely to result in a timelier dividend to creditors with payment of the DOCA contribution occurring within two months. Following receipt of that contribution, subject to the adjudication of creditor claims, a dividend could be paid;
>
> (c) any dividend in a liquidation was highly dependent on enforcing the Deed of Covenant against [China Rail];
>
> (d) [China Rail] was very likely to resist enforcement;
>
> (e) on my analysis, even an optimistic assessment of the likely return to creditors in a liquidation would result in creditors receiving a lower return than the pessimistic assessment under a DOCA scenario;
>
> (f) it was uncertain whether litigation funding could be obtained to bring proceedings in Queensland and in other jurisdictions;
>
> (g) even if funding were obtained, there was a substantial risk that either a favourable judgment would not be obtained or that any judgment would not be able to be enforced against [China Rail] in a jurisdiction in which it had substantial assets;
>
> (h) accordingly, there was a substantial risk that there would be no dividend to creditors if the [Joint Venture Company] entered into liquidation, and the payment of any dividend was likely to take several years.

The DOCA

44 The DOCA was executed on 19 March 2018.

45 The relevant terms of the DOCA, for present purposes, were admitted on the pleadings in the following terms:

> At the creditors' meeting the creditors were asked to consider a deed of company arrangement (the DOCA proposal) proposed by [China Rail] which contained the following terms:-
>
> (a) [China Rail] would provide a contribution of $8 million in addition to funds previously provided to the [administrators] in the sum of $330,000;
>
> (b) the $8 million was to be advanced by [China Rail] by way of secured loan to the [Joint Venture Company] in the amount of $7.96 million;
>
> (c) $40,000 was to be paid by [China Rail] in consideration of the purchase of 400 million new ordinary shares in the [Joint Venture Company] by [China Rail];

(d) [China Rail], its employees, agents and advisors are released from the operation of and all claims arising under or in relation to the [Deed of Covenant].

46 Additionally, the following provisions of the DOCA should be noted. First, its overall effect on any creditors' claims was set out in cl 3.1 as follows:

> Creditors must accept their rights and entitlements specified in this [DOCA] in substitution for all Claims which they have or claim to have against the [Joint Venture] Company.

47 Next, the provisions dealing with its termination were contained in cl 3.2 as follows:

> If this [DOCA] terminates in accordance with clause 14.1, all Claims of Creditors against the [Joint Venture] Company are released in full and extinguished upon termination of this [DOCA] (whether or not they have been proved or accepted to participate in a distribution under this [DOCA]), and this [DOCA] may be pleaded against any Creditor in bar of its Claim against the [Joint Venture] Company. Each of the Creditors will, if called upon to do so, execute and deliver to the [Joint Venture] Company such forms of release of any such Claim as the Deed Administrators require.

48 Finally, clauses 3.3 and 3.4 contained provisions relating to the release and extinguishment of claims against China Rail and certain officers and employees:

> 3.3 If the preconditions in clauses 14.l(a) and (b) of this [DOCA] are met, then prior to making the certification required by clause 14.1 the Deed Administrators:
>
> (a) must take all reasonable steps to return to [China Rail] the original of any [Commission] [Deed of Covenant] held by the [Commission];
>
> (b) execute on behalf of the [Joint Venture] Company a deed in the terms at Schedule F, and deliver that deed to [China Rail].
>
> 3.4 If this [DOCA] terminates in accordance with clause 14.1:
>
> (a) the [Joint Venture] Company releases and discharges [China Rail] from all Claims the [Joint Venture] Company may have, or might at any time arise in the future, against [China Rail] under or in respect of any [Commission] [Deed of Covenant];
>
> (b) the [Joint Venture] Company, including by any agent or liquidator appointed to it, will not make any demand under any [Commission] [Deed of Covenant];
>
> (c) in the event that the [Joint Venture] Company is any time paid any amount under the [Commission] [Deed of Covenant], the [Joint Venture] Company will repay that amount in full to [China Rail];
>
> (d) the [Joint Venture] Company forever releases and discharges its past and present employees or Officers who also are or have been employees or agents of [China Rail], or of any related entity of [China Rail], in respect of any and all actions, claims, suits, causes of action, debts, costs, or demands, whether certain or contingent, present or future, ascertained or sounding only in damages, the circumstances

giving rise to which occurred on or before the Relevant Date.

49 On 7 August 2018, the appellants submitted their final proofs of debt to the administrators. On 17 September 2018, two of those proofs of debt were adjudicated by the administrators at nil value. In relation to the third, the administrators sought further information before an adjudication could be made. As at the date of the hearing before the primary judge (1 April 2019), that information had not been provided.

50 As at the date of the hearing before the primary judge, a number of steps had been taken to implement the DOCA. These included:

(a) the payment to the administrators of the balance of the DOCA fund in the sum of $7,670,000;

(b) the payment of a dividend to the priority (employee) creditors; and

(c) the submission and adjudication of the majority of the proofs of debt submitted by creditors.

The proceeding at first instance

51 The appellants commenced the proceeding at first instance on 18 September 2018. Initially, their originating process was limited to a challenge to the administrators' adjudication of their proofs of debt. It also sought an order that the parties be given leave to proceed against the Joint Venture Company under s 444E(3) of the *Corporations Act*.

52 On 31 October 2018, the appellants filed an amended originating process. Among other things, that amended originating process sought an order for the termination of the DOCA under s 445D of the *Corporations Act* on the ground that the administrators had provided materially false or misleading information to creditors. It also sought an order that the Joint Venture Company be wound up under s 461(1) and an order that the administrators be removed under s 447A.

53 On 14 November 2018, the appellants filed a further amended originating process. That amended version added reliance upon ss 75-41 and 75-42 of the Insolvency Practice Schedule (Corporations), which is Sch 2 to the *Corporations Act* (the **Insolvency Practice Schedule**).

54 At a case management hearing on 15 November 2018, the appellants withdrew the claim that the administrators had provided materially false or misleading information to creditors. At that hearing, the appellants were given leave to add China Rail as the fourth defendant to the

proceeding. The appellants filed a second further amended originating process on 21 November 2018 reflecting these changes.

55 As noted above, the hearing before the primary judge took place on 1 April 2019. At the hearing, the appellants sought and were granted leave to further amend their originating process and their statement of claim to return to their reliance on s 445D, specifically ss 445D(1)(f) and (g). The appellants filed the amended documents on 2 April 2019. It is convenient at this point to set out s 445D(1)(f) and (g) of the *Corporations Act*:

> **445D When Court may terminate deed**
>
> (1) The Court may make an order terminating a deed of company arrangement if satisfied that:
>
> …
>
> (f) the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be:
>
> (i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or
>
> (ii) contrary to the interests of the creditors of the company as a whole; or
>
> (g) the deed should be terminated for some other reason.

56 In their amended originating process filed on 2 April 2019, the appellants relevantly sought the following relief:

> 5. In the alternative, an Order pursuant to Sections 445D(1)(f) and 445D(1)(g), 447A of the Act and sections 75-41 and 75-42 of the Insolvency Practice Schedule that the [DOCA] dated 19 March 2018 be terminated forthwith.
>
> 6. An Order pursuant to Section 461(1) of the Act, that the Company be wound up in insolvency.
>
> 7. An Order that Jonathon Paul McLeod and Bill Karageozis be appointed as liquidator to conduct the said winding up.
>
> 8. An Order that the Liquidator have the power specified in the Act to conduct the said winding up.
>
> …
>
> 10. An Order that Jonathon Paul McLeod and Bill Karageozis be appointed a Deed Administrator in respect to the Company.

57 Although the amended originating process referred to ss 75-41 and 75-42 of the Insolvency Practice Schedule, in the appellants' oral submissions before the primary judge they placed almost complete reliance on s 445D(1)(f) and (g): Reasons, [22].

58 The evidence for the hearing was by affidavit. None of the deponents were cross-examined.

The reasons and orders of the primary judge

59 The primary judge set out the relevant statutory provisions and summarised the relevant principles at [42]-[71] of the Reasons. The appellants do not take issue with his Honour's statement of the relevant principles.

60 The primary judge set out the detailed factual context at [72]-[129], much of which has been reproduced above.

61 The primary judge's core reasoning was at [130]-[160]. In summary, his Honour rejected the appellants' contentions based on s 445D(1)(f)(i) and (ii), and (g). For the purposes of the appeal, the main focus is on his Honour's reasons in relation to s 445D(1)(f)(ii).

62 The primary judge dealt with s 445D(1)(f)(ii) at [134]-[151] of the Reasons. The primary judge noted, at [134], that the appellants relied on two matters. First, they claimed that it was contrary to the interests of the creditors as a whole not to pursue a proceeding to enforce the China Rail Deed of Covenant against China Rail when, on its face, the covenant was expressed in clear terms, the amount of the covenant far exceeded the total amount of the unsecured creditors of the Joint Venture Company, and there appeared to be no dispute that China Rail was a company of substance. Secondly, the appellants claimed that it was contrary to the interests of the creditors as a whole not to pursue investigations against the directors of the Joint Venture Company for insolvent trading. The second contention can be put to one side for present purposes, as it is not pursued by the appellants on the appeal.

63 The primary judge stated, at [135], that the principles discussed in the authorities demonstrated that the appellants bore the onus of establishing that there was a "not unrealistic prospect" (or a "serious case for the recovery" or a "real prospect") of obtaining a better return for the creditors of the Joint Venture Company by pursuing the proceedings and investigations that the appellants had identified.

64 His Honour summarised the appellants' contentions at [136]:

> The plaintiffs have claimed that the Administrators have overstated the difficulties and costs associated with obtaining and enforcing a judgment against China Rail and they have therefore underestimated the amount the company's creditors would obtain from pursuing that course in a liquidation. In particular, they have claimed that, with respect to the [Deed of Covenant], there is "nothing to investigate" because China Rail is "prima facie liable" under it. Accordingly, they claim that the real issue is whether a judgment can be successfully enforced against China Rail. On the former, they have

> contended that China Rail's postulated challenges to the enforceability of the [Deed of Covenant] have little, if any, merit. On the latter, they have contended that, since China Rail intends to continue to conduct business in Australia, the enforcement of any judgment obtained against it should be unproblematic.

65 The primary judge considered the issues raised by these contentions in two stages: first, he considered the issues associated with obtaining a judgment against China Rail; secondly, he considered the issues associated with enforcing any such judgment. His Honour observed, at [137], that the latter issue was the most contentious, as it had the greatest effect on the prospects of recovery against China Rail in a liquidation scenario.

66 In relation to the issue of obtaining a judgment against China Rail, the primary judge stated:

> 138 The first question to arise with respect to obtaining a judgment against China Rail is the forum for those proceedings. Clause 11 of the [Deed of Covenant] requires the parties to "submit to the non-exclusive jurisdiction of the courts of Queensland" … The plaintiffs have claimed this clause requires that the proceeding be pursued in the Supreme Court of Queensland. While the Administrators did canvass the option of commencing proceedings in China without first obtaining a judgment in Australia, they appear to have rejected that option because of the likelihood of failure and the expense involved … There would therefore appear to be agreement between the parties that a judgment would first need to be obtained against China Rail in the Supreme Court of Queensland.
>
> 139 The next question is the costs of obtaining that judgment. On this issue, the parties also appear to be agreed. In his affidavit, Mr Thornton, the sole director of the plaintiffs, accepted the Administrators' estimate of those costs of $275,000 … The only dispute relates to the necessity to obtain a litigation funder and pay the 30% premium associated therewith. On this aspect, Mr Thornton also said in his affidavit that the plaintiffs would fund the costs of the litigation and would not charge any premium for doing so. I accept this evidence. The result is a saving of approximately $80,000 (30% of $275,000). This sum, it should be noted, is relatively minor. It represents approximately 1% of the DOCA fund or between 0.2% and 0.5% of the total value of the Joint Venture Company's creditors. The question whether a 30% premium should be included in the judgment recovery costs is addressed separately below.
>
> 140 The third question with respect to obtaining a judgment against China Rail concerns the challenges China Rail has made against the enforceability of the [Deed of Covenant]. Those challenges fall into three groups as follows:
>
> (a) the claim that it was misled into signing the [Deed of Covenant] by the statements made by Mr Cain of Rimfire …;
>
> (b) the claim that Mr Zhao had no authority to sign the [Deed of Covenant] under the Power of Attorney provided to him …; and
>
> (c) the claim that the solicitor's certificate signed in conjunction with the [Deed of Covenant] was false because Ms Yi was not its solicitor at the time ...
>
> 141 The factual background to those three grounds of challenge have been outlined

in some detail above, as follows:

(a) Mr Cain's alleged misleading conduct at [107]–[109];

(b) Mr Zhao's lack of authority at [85]–[88]; and

(c) the alleged falsehoods in the solicitor's statement at [93]–[96].

142 It is neither necessary, nor appropriate, for the purposes of determining this application, to make an assessment of China Rail's prospects of success in any of these three grounds of challenge. **It suffices to say that each, to varying degrees, appears to have a foundation in fact and to be arguable, at least on a *prima facie* basis.** The stark contrast between the defined amount in Rimfire's [Deed of Covenant] of $460,000 and that stated in China Rail's [Deed of Covenant] of approximately $1.095 billion provides one illustration of this. Whether the responses raised by the plaintiffs above will defeat some, or all, of these challenges is a matter that will ultimately be determined at trial. **But the important point is that, given China Rail's stated intention to pursue these challenges, it is reasonable to conclude that there will be some risk associated with any proceedings to obtain a judgment against China Rail and that those proceedings will take some time to conclude**.

143 In their Report to creditors, the Administrators appear to have assessed the former at 75%, that is, that proportion of the amount claimed is likely to be recovered on a "high recovery" basis …. As for the latter, in his affidavit Mr McCann provided an estimated finalisation date of November 2021, not including any appeals that may ensue …

144 The plaintiffs have claimed the former does not "take into account that the full $1b is recovered and then a refund is made to [China Rail] after payment of all unsecured creditors". This is an apparent reference to cl 3(a) of the [Deed of Covenant] … **I reject this contention. It assumes a 100% recovery in those proceedings and, therefore, does not take any account of the risk associated with pursuing them. In the absence of any evidence from the plaintiffs bearing on this question, I consider it is reasonable to accept the Administrators' estimate.** The plaintiffs have not made any challenge to the latter estimate. In all the circumstances, I consider it is also reasonable to accept that estimate.

145 Finally on this issue, given the fact that China Rail intends to continue to conduct business in Australia, the suggested difficulty with serving the proceedings on it in Australia would appear to have little merit …

146 To sum up on this issue, it appears to be agreed that any proceeding to obtain judgment against China Rail will be conducted in the Supreme Court of Queensland and will cost approximately $275,000, not including any litigation funding premium. Furthermore, the risk associated with recovery in that proceeding is approximately 25% and it is not likely to be finalised, to first instance stage, until approximately November 2021.

(Emphasis added.)

67 The primary judge then considered the issue of the enforceability of any judgment obtained against China Rail:

147 I turn, then, to the second issue mentioned above: the plaintiffs' claim that the Administrators have overstated the difficulties associated with enforcing a

judgment against China Rail. As mentioned above, this matter is at the heart of their claims that there is a "not unrealistic prospect" of obtaining a better return for the creditors of the Joint Venture Company by terminating the DOCA and pursuing the liquidation scenario.

148 The first question that arises under this issue is whether any such enforcement action is likely to be undertaken in Australia, or in China, or somewhere else. On this question, the Administrators' inquiries have revealed China Rail does not have any significant assets in Australia, or anywhere else outside China, excluding Hong Kong … Beyond pointing to China Rail's intention to continue conducting business in Australia and its statement to the Foreign Investment Review Board in connection therewith …, the plaintiffs have not adduced any evidence which would counter the accuracy of these statements. The fact that China Rail intends to continue to conduct business in Australia and will abide by Australia's laws does not, in my view, bear on this question. That intention and commitment does not require China Rail to retain any assets in Australia to meet any judgments that may be obtained against it, much less bring assets from China to Australia for that purpose. Accordingly, I accept the Administrators' opinion that it will be necessary to attempt to enforce any judgment obtained against China Rail, in China.

149 It is then necessary to consider what difficulties may be associated with pursuing that course of action. **In summary, the Administrators' views on this question are that it will be difficult and quite expensive** … It is important to note that those views are based upon advice the Administrators have obtained from their Australian lawyers and from the Chinese law firm, Zhong Lun Law Firm …

150 **In contrast, the plaintiffs have not sought to put forward any differing legal advice, or any countering evidence**. Instead, apart from relying on China Rail's intention to continue conducting business in Australia, which I have rejected as irrelevant to this issue above, it has made a number of contentions about the inaccuracy of the Administrators' costs estimates. The fallacy with this approach is that, even if all of those contentions were to be accepted, that will not mean that they have discharged their onus to show that there is a realistic prospect of a better recovery for creditors from obtaining and enforcing a judgment against China Rail.

151 In summary on this issue, having regard, on the one hand, to the reasonableness of the Administrators' opinions concerning the risks and delays that are likely to be associated with obtaining a judgment against China Rail in Australia, and the difficulties and expense that are likely to be encountered in enforcing that judgment in China, and, on the other, the dearth of evidence or other materials from the plaintiffs on these questions, I do not consider that the plaintiffs have discharged their onus to show that there is a realistic prospect of obtaining a better recovery for the creditors of the Joint Venture Company by pursuing that course in a liquidation scenario. It follows that I do not consider that the plaintiffs have established the ground contained in s 445D(1)(f)(ii). That being so, for the purposes of this ground, it is also unnecessary to consider whether the DOCA should be terminated as a matter of discretion (but, again, see further at [156] below).

(Emphasis added.)

68 The primary judge dealt with the appellants' contentions based on s 445D(1)(g) at [152]-[157]. It is not necessary to set out this part of his Honour's reasons in full for present purposes.

However, it is relevant to note the following observations, at [156], in relation to the exercise of discretion:

> Alternatively, if this ground were to be approached as a matter of discretion, for the following reasons, I would not have exercised my discretion to terminate the DOCA. First, I would have taken account of the caution that is urged when a court is considering whether to terminate a DOCA that has been supported by a majority of the creditors of a company (see at [62] above). Secondly, I would have taken account of the fact that the period of insolvent trading concerned is relatively short (seven weeks) and the amount involved is relatively small (approximately $800,000). The latter is demonstrated by the fact that it represents approximately 2%–5% of the total creditors of the company of between $15,200,000 and $41,300,000. Thirdly, I would have had regard to the fact that there is no evidence of any unlawful activity on the part of the company or its officers. Fourthly, it is common ground that the Joint Venture Company is presently solvent. Fifthly, and perhaps most importantly, the evidence shows that the DOCA is supported by the largest creditor by value (Linton Developments (QLD) Pty Ltd) and by the largest public creditor, the Australian Taxation Office. The latter is, in my view, of particular significance when one is considering the public interest.

69 After considering, and rejecting, the specific grounds raised by the appellants, the primary judge dealt with a number of miscellaneous matters at [158]-[160]. The first of these was the appellants' delay in bringing the application. The primary judge noted that the delay from the vote at the meeting where the DOCA was adopted (7 March 2018) to the issuing of the proceeding (18 September 2018) was approximately six months, and that there then followed a further delay of approximately six weeks (until 31 October 2018) until the appellants included an application seeking to terminate the DOCA. His Honour stated that none of that delay was explained and that, accordingly, if it had been necessary to consider the issue, he would have concluded that the delay would, of itself, have provided a further reason why he would not have exercised his discretion to terminate the DOCA.

70 His Honour concluded, at [161], that the appellants had not established any of the grounds relied upon for termination of the DOCA. His Honour also stated that, even if the appellants had established one of these grounds, in the circumstances outlined above, he would not have exercised his discretion to terminate the DOCA.

71 On 9 September 2019, the primary judge made orders to give effect to his reasons. These orders were subsequently varied on 3 October 2019. The orders made on 9 September 2019, as varied on 3 October 2019, were as follows:

> 1. Paragraphs 1 to 8 and 10 of the Second Further Amended Originating Application filed on 2 April 2019 are dismissed.
>
> 2. The Plaintiffs pay the First, Second, Third and Fourth Defendants' costs of the

proceeding to date to be taxed, if not agreed.

3. The First, Second and Third Plaintiffs be jointly and severally liable for the costs of the First, Second, Third and Fourth Defendants in Order 2.

4. The matter be listed for a case management hearing at 9.30 am on 3 October 2019 in respect of paragraphs 1 to 3 inclusive of the Second Further Amended Originating Application filed on 2 April 2019.

72 Although paragraph 1 of the orders refers to paragraphs "1 to 8 and 10" of the second further amended originating application, at the hearing of the appeal it was common ground that the reference should be to paragraphs "5 to 8 and 10". We will proceed on that basis.

The appeal

73 The appellants appeal from the whole of the judgment and orders of the primary judge. The amended notice of appeal filed on 17 February 2020 contains the following four grounds:

1. The trial judge erred in the exercise of his discretion to not terminate the Deed of Company Arrangement in respect of the [Joint Venture Company].

2. The trial judge erred in finding that there was not a likely prospect of the creditors of the [Joint Venture Company] receiving a better outcome in the liquidation of the [Joint Venture Company].

3. The trial judge erred in fact, at paragraph 117 of the judgment, that there was a majority of creditors in favour of the resolution for the [Joint Venture Company] to enter into a Deed of Company Arrangement.

4. The trial judge erred in fact and law at paragraph 144 of the judgment in that:

   (a) the full amount of $1,095,391,969 is recoverable under the Deed of Covenant; and

   (b) that this was taken into consideration in calculating a return to creditors.

74 The appellants seek an order that the DOCA in respect of the Joint Venture Company be terminated and the company be wound up.

75 As noted above, two notices of contention have been filed. The first was filed by the Deed Administrators and the Joint Venture Company; the other by China Rail. It is not necessary to set out the grounds in the notices of contention.

76 We will deal first with the issue of new points on appeal, and then consider the appellants' grounds of appeal.

The issue of new points on appeal

77 The parties filed outlines of submissions in advance of the hearing of the appeal. In the appellants' outline of submissions at [25]-[29] they sought to rely on two judgments of the Supreme Court of Victoria, namely *Liu v Ma* (2017) 55 VR 104 (***Liu***) and *Suzhou Haishun Investment Management Co Ltd v Zhao* [2019] VSC 110 (***Suzhou***), in support of a submission that a reciprocity requirement (for recognition of an Australian judgment in China) would be satisfied. These cases had not been referred to or relied on by the appellants at first instance.

78 In their outline of submissions in response, the respondents objected to those paragraphs of the appellants' outline of submissions (and the subsequent reliance on those submissions) as seeking to raise new points on appeal. Further, China Rail filed an interlocutory application dated 23 January 2020 seeking leave to rely on certain additional evidence (namely, an expert report relating to the recognition and enforcement of an Australian judgment in China) in the event that the appellants were granted leave to make the new points. China Rail contended that, had the appellants made the submissions they now sought to make at first instance, it would have relied on the expert report at first instance.

79 China Rail's interlocutory application was supported by an affidavit of David James Walter, a partner of Baker McKenzie, the solicitors for China Rail, dated 23 January 2020 that annexed an expert report of Associate Professor Andrew Godwin dated 18 March 2019 relating to the recognition and enforcement of an Australian judgment in China. In his affidavit, Mr Walter stated:

> 2. At the trial of these proceedings the [Deed Administrators and the Joint Venture Company] relied on affidavit evidence of advice received by the administrators in respect of the enforceability of an Australian judgment in the People's Republic of China (**PRC**) (**Administrators' Advice**). The evidence of Mr McCann, which was not challenged in cross-examination, was that 'it would be very difficult, if not impossible, to seek to enforce the judgment of a Queensland Court in China'.
>
> 3. In paragraphs 25 to 29 and 55 of its submissions on this appeal filed 16 January 2020, the appellants now seek to challenge Mr McCann's evidence on this issue, arguing that the Administrators proceeded on the wrong basis of the ability to enforce Australian judgments in the PRC.
>
> 4. Neither this argument, nor either of the cases relied upon by the appellant in support of the argument, were raised by the appellants in either written or oral submissions as first instance. Further, the appellant did not make any allegation in its Statement of Claim, written submissions, oral submissions, or otherwise at any time prior to or during the hearing, or at any time prior to receipt of its submissions in this appeal that it contested the evidence in respect of the law of the PRC in respect of the difficulties of the enforcement of an

order of an Australian court in the PRC.

5. As the Administrators' Advice was uncontested at the trial of these proceedings, it was not necessary for [China Rail] to lead additional evidence as to why an order of an Australian court would not be recognised or enforced in the PRC. Had the appellants contested the Administrators' Advice at first instance, it was the intention of [China Rail] to lead expert evidence of Associate Professor Andrew Godwin concerning the approach of a court of the PRC recognising an order of an Australian court in respect of the Deed of Covenant and Assurance the subject of dispute in these proceedings.

6. Now produced and shown to me marked "DJWl" is a copy of a report prepared by Associate Professor Godwin, incorporating his curriculum vitae and annexing the letter of instruction provided to him by Baker McKenzie for that purpose. This is the report which was prepared for that purpose.

7. I am informed by Associate Professor Godwin and believe that the report is an accurate statement of his opinion as to the matters contained in it, and that his curriculum vitae is true and correct.

8. At the hearing of the appeal [China Rail] will oppose the appellants' reliance on the points made at paragraphs 25 to 29 of its submissions (and its subsequent reliance in its submissions on those same matters) as they were not raised at trial. In the event that it is unsuccessful, [China Rail] applies to the Court for the receipt into evidence on the appeal of the report of Associate Professor Godwin.

80 At the outset of the appeal hearing, the parties made oral submissions on the respondents' objections to [25]-[29] of the appellants' outline of submissions (and the subsequent reliance on those submissions). After a short adjournment, we ruled that the appellants be refused leave to make the submissions based on the two Australian cases, which constituted new points on appeal. As a consequence, we dismissed China Rail's interlocutory application. Our reasons for so ruling are as follows.

81 It is well-established that, although an appeal to this Court is an appeal by way of rehearing, this does not mean that the issues and the evidence to be considered are at large. As Gibbs CJ, Wilson, Brennan and Dawson JJ stated in *Coulton v Holcombe* (1986) 162 CLR 1 at 7: "It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main area for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish." Their Honours also stated (at 7-8) that, in "a case where, had the issue been aired in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards", citing *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438 and *Bloemen v The Commonwealth* (1975) 49 ALJR 219. Their Honours also referred to *O'Brien v Komesaroff* (1982) 150 CLR

310, in which it was accepted that in "some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interests of justice that the question should be argued and decided" (at 319 per Mason J, with whom the other members of the High Court agreed). These principles apply equally to an intermediate appellate court: *Coulton v Holcombe* at 8.

82 In the present case, the appellants' proposed submissions relate to the issue of the enforceability in China of any Australian judgment obtained against China Rail (considered by the primary judge at [147]-[151] of the Reasons, set out above). As the primary judge noted at [149], the administrators' views were that enforcement of an Australian judgment in China "will be difficult and quite expensive" and those views were based on advice the administrators had obtained from their Australian lawyers and from a Chinese law firm. The relevant parts of Mr McCann's affidavit evidence at first instance were set out at [124]-[125] of the Reasons. In his affidavit dated 8 February 2019, Mr McCann gave the following evidence. First, he recorded his understanding as to the assets China Rail held in Australia as follows:

> 46. At the time of preparing the [February 2018] Report to Creditors, I did not understand that [China Rail] held any assets in Australia. It remains my understanding that [China Rail] holds no, or very few, assets in Australia. The only asset I am presently aware of is a shareholding of 10 ordinary shares in CRCG Australia Pty Ltd ACN [621] 922 781. CRCG Australia Pty Ltd has capital of only $10 and, based on the following searches, has no substantial assets:
>
> (a) National Property Ownership Search – CRCG Australia Pty Ltd dated 23 November 2018 (appearing at page 14 of the Affidavit of Benjamin Rooks sworn on 28 November 2018 and filed in these proceedings);
>
> (b) Personal Property Security Register Search – no registrations exist with respect to CRCG Australia Pty Ltd.

83 Next, Mr McCann addressed the consequences of that state of affairs as follows:

> 47. Given [China Rail] is a company based in PRC, I considered that the jurisdiction in which [China Rail] was most likely to hold substantial assets against which a judgment might be enforced was PRC.
>
> …
>
> 49. Prior to the Second Meeting I sought legal advice from my Australian lawyers, Clayton Utz, and through them, from the Chinese law firm Zhong Lun Law Firm about obtaining and enforcing a judgment against [China Rail].
>
> 50. Having considered that advice, I formed the following views:
>
> (a) a liquidator could (without first obtaining judgement in Australia)

apply to the courts of PRC to obtain judgment enforcing the Deed of Covenant and Assurance. However, given that [China Rail] is a state owned enterprise, there would be a substantial risk that the Courts of PRC would find in favour of [China Rail]. Making such an application would be expensive;

(b) another approach would be to first obtain judgment in the Australian courts and then to seek to enforce that judgment in PRC;

(c) there were no treaties between PRC and Australia under which it was likely that the courts of the PRC would automatically recognise and enforce a judgment of an Australian court;

(d) **a Court in the PRC was likely to enforce an Australian judgment only if it could be demonstrated that there was reciprocity – that is, that Australian courts enforced judgments of the courts of the PRC. This would be difficult as there were not any clear examples of Australian courts enforcing judgments of a court of PRC**.

51. I also considered whether [China Rail] held assets in jurisdictions other than China against which an Australian judgment could be enforced. I was unable to identify substantial assets held by [China Rail] (as opposed to some entity that may have been related to [China Rail]) outside of PRC.

(Emphasis added.)

84 In that context, the submissions at [25]-[29] of the appellants' outline of submission were as follows. The appellants referred to Mr McCann's evidence at first instance about the enforcement of an Australian judgment in China, in particular the evidence at [50(d)] of his 8 February 2019 affidavit relating to the need to demonstrate reciprocity. The appellants then submitted that, in fact, there were cases of Chinese judgments being enforced in Australia, referring to *Liu* and *Suzhou.* After describing these cases, the appellants submitted that neither of the cases suggested that there was any special obstacle to the recognition and enforcement of a Chinese judgment in Australia.

85 There was no dispute at the appeal hearing that the appellants had not referred to these cases at first instance and had not challenged Mr McCann's evidence regarding the enforcement of an Australian judgment against China Rail, in China. This was accepted by senior counsel for the appellants at the appeal hearing (T3, T14).

86 In response to the respondents' contention that the appellants were seeking to raise new points on appeal, senior counsel for the appellants submitted that the material sought to be relied on (i.e. the two cases) went to a legal question and was not "fresh evidence". He referred to the legal advice upon which Mr McCann's evidence had been based, namely a letter from Clayton Utz dated 23 February 2018. It was submitted that it was unrealistic to think that the trial would have taken a different course had the submissions now sought to be made been made at trial.

Senior counsel for the appellants submitted that the appellants were not seeking to change the legal framework (i.e. that it was necessary to demonstrate reciprocity), but merely to fill in the "missing piece".

87 In our view, contrary to those submissions, the appellants were seeking to raise new points on appeal. The fact that the material sought to be relied upon was case law rather than, for example, affidavit evidence does not resolve the question whether the points sought to be made were new, in the sense that they had not been raised at first instance. The points were new because they put in issue McCann's evidence at [50(d)] of his affidavit that it would be difficult to establish reciprocity because "there were not any clear examples of Australian courts enforcing judgments of a court of PRC", a proposition that had not been challenged at first instance. Further, the appellants' proposed submissions constituted a new basis upon which to challenge the broader proposition in Mr McCann's evidence, namely that it would be difficult to enforce an Australian judgment against China Rail, in China. Given that the points were new, the appellants needed leave to raise them. We considered it unfair to permit the appellants to raise the new points on appeal because, had they been raised at first instance, it was likely that they would have been met by further evidence, as demonstrated by the affidavit of Mr Walker. For these reasons, we refused the appellants leave to raise the new points. As a consequence, we dismissed China Rail's interlocutory application, which was contingent on the appellants obtaining leave to rely on the new points.

Consideration of appeal

88 We now turn to the appellants' grounds of appeal. Consistently with the order in which the grounds are dealt with in the appellants' outline of submissions, we will deal with the grounds in the following order: grounds 2, 4, 3 and 1.

Ground 2

89 By this ground, the appellants contend that the trial judge erred in finding that there was not a likely prospect of the creditors of the Joint Venture Company receiving a better outcome in the liquidation of the Joint Venture Company.

90 The appellants note that the primary judge referred, at [135] of the Reasons, to the requirement that they show that there was a "not unrealistic prospect" of obtaining a better return in a liquidation than under the DOCA. The appellants submit that the primary judge correctly stated that the test was sometimes referred to as showing a "serious case for recovery" or "real

prospect" of obtaining a better return. The appellants submit that they were not required to establish on the balance of probabilities that there would be a better return in the liquidation than under the DOCA. The appellants submit that, having regard to the following matters, the primary judge should have found that the ground in s 445D(1)(f)(ii) of the *Corporations Act* had been established by the appellants. The appellants' submissions in support of this ground can be summarised as follows:

(a) First, on the question of whether judgment might be obtained in Australia against China Rail on the Deed of Covenant, his Honour found that China Rail had arguable defences on a prima facie basis and that there would therefore be "some risk associated with any proceedings" to obtain judgment against it (Reasons, [142]). It is implicit in the way his Honour expressed himself that he accepted the Joint Venture Company had a realistic prospect of obtaining a judgment in Australia against China Rail.

(b) Secondly, irrespective of how the trial judge expressed himself on this point, the Joint Venture Company did have a realistic prospect of obtaining judgment against China Rail. The Deed of Covenant was entirely in writing, the respondents led no evidence from China Rail's signatory, Mr Zhao, that he had been misled, a solicitor from MinterEllison witnessed Mr Zhao sign the Deed of Covenant, the Deed was governed by the laws of Queensland and, irrespective of for whom MinterEllison was acting, Ms Wang stated that she gave advice to China Rail.

(c) The appellants' third submission relies on the new points referred to above.

(d) Fourthly, the administrators estimated in the February 2018 Report to Creditors a return of between 40.3 and 58.1 cents in the dollar under the DOCA. They estimated a return of between nil and 30.3 cents in the dollar on liquidation. The liquidation estimate was based on: (a) a worst-case scenario of the claim against China Rail failing completely; and (b) a recovery rate of 75%. However, the administrators also calculated that if the maximum amount was recovered under the Deed of Covenant (i.e. unsecured creditors were paid "in full") the maximum estimated return to creditors would be 45 cents in the dollar. The only plausible interpretation of the Deed of Covenant is that it requires China Rail to first make a payment of the Defined Amount (i.e. just over $1 billion), which is then used to pay "in full" all of the Joint Venture Company's unsecured creditors. The company then has to account to China Rail for the surplus. The company therefore had at least a real prospect of recovering the maximum amount from China Rail and, even on the administrators' own estimate, achieving a return of 45 cents in

the dollar. Given that the estimated return in the DOCA scenario was between 40.3 and 58.1 cents, there was a reasonable prospect of a return of 45 cents in the dollar exceeding some of the estimated returns under the DOCA scenario.

(e) The appellants' fifth submission relies on the new points that have been discussed above.

(f) Sixthly, the appellants offered to fund the litigation in Australia without charging a success fee. They also offered to fund the registration of the judgment in Hong Kong. While this offer was made at trial rather than at the time of the second creditors' meeting (on 7 March 2018), there is nothing on the face of s 445D that says the offer should be ignored.

(g) Seventhly, there is the possibility of a result in the liquidation scenario where judgment is obtained against China Rail in Australia for the full amount owing under the Deed of Covenant and China Rail complies with the judgment without the need for enforcement in China or reaches a compromise. This should increase the return beyond 45 cents in the dollar because the significant estimated cost of litigation in China is avoided. This is not an unrealistic possibility. The primary judge said during the trial that he would proceed on the assumption that if a judgment was obtained in Australia against China Rail, it would abide by the judgment of the court (trial transcript, p 84).

91 Before directly addressing these submissions, we note that, if and to the extent that the appellants' submissions are premised on the proposition that the statutory test in s 445D(1)(f)(ii) is necessarily satisfied in any case in which an applicant shows that there is a "not unrealistic prospect" of a better recovery on a liquidation, we would not accept that proposition. While it is right to say that the Court is not required to, in effect, prejudge the outcome of future proceedings and so an applicant is not required to prove a claim will succeed on the balance of probabilities, it is not sufficient merely to show there is some claim with a realistic prospect of success. It is not sufficient because the statutory test is not whether there exists a claim with a realistic prospect of success, but whether the DOCA is "contrary to the interests of creditors of the company as a whole" assessed in light of all relevant circumstances. If there is a realistic prospect of a better recovery on a liquidation this is plainly relevant, but it is not to be equated with the ultimate question posed by the provision. In particular, the mere existence of a realistic prospect of a better return does not take into account the following matters, which may be relevant: whether the possible "better return" is substantially better, or only a little better, than the return provided by the DOCA; how much longer the return may

take to realise on a liquidation; and the nature of the risks to achieving that return in the particular case, such as the existence of specific defences to a claim, the risks in obtaining funding and uncertainties about foreign law. This list, of course, is not exhaustive.

92 The appellants' first submission is that it is implicit in the way his Honour expressed himself that he accepted the Company had a realistic prospect of obtaining a judgment in Australia against China Rail. This may be accepted. While the primary judge stated, at [142], that it was neither necessary nor appropriate to make an assessment of China Rail's prospects of success in any of its three grounds of challenge (to the enforcement of the China Rail Deed of Covenant), he accepted, at [143]-[144], the administrators' estimate of the "high recovery" on a liquidation basis, which was based on a 75% prospect of recovery under the Deed of Covenant (as set out in the February 2018 Report to Creditors at pp 68-69). After reduction for the estimated associated costs, the administrators' estimate of the high recovery on a liquidation scenario (in respect of both the China Rail Deed of Covenant and the Deed of Covenant executed by Rimfire) was $4,730,467.

93 The appellants' second submission, namely that the Joint Venture Company did have a realistic prospect of obtaining a judgment in Australia against China Rail, may also be accepted. As indicated in the preceding paragraph, we consider this to reflect the view of the primary judge. That said, the primary judge also found, at [142], that there was "some risk" associated with any proceeding to obtain judgment against China Rail, and that any such proceeding would take some time to conclude. See also the Reasons at [146]. Further, the recovery of a judgment in Australia against China Rail was only one step towards the recovery of money for the benefit of creditors; it would also be necessary to enforce any such judgment in a jurisdiction in which China Rail had assets. In respect of that issue, the primary judge accepted, at [148]-[149], the evidence of Mr McCann that it would be necessary to enforce any judgment obtained against China Rail in China, and that pursuing that course of action would be difficult and quite expensive.

94 The appellants' fourth submission relies on the administrators' statement, at p 16 of the February 2018 Report to Creditors, that "[u]nder an optimistic scenario where the maximum amount is recovered under the [Deed of Covenant], as opposed to a recovery rate of 75% as estimated in this report after considering a possible settlement or reduced amount awarded, unsecured creditors are estimated to receive no more than 45 cents in the dollar". It should be noted that the next sentence in the report stated: "The risks in respect to obtaining funding (as

highlighted above) would still apply with the possibility of no return whatsoever." In our view, it was open to the primary judge to proceed as he did in [143] and [144] of the Reasons, that is, to accept the administrators' estimated recovery. As the primary judge stated, the appellants' submission assumes a 100% recovery, whereas the administrators' estimate took into account the risk of pursuing litigation against China Rail.

95 The appellants' sixth submission is that the appellants offered to fund a proceeding in Queensland against China Rail and the registration of any such judgment in Hong Kong. The primary judge had regard to these matters at [139] of the Reasons. Accordingly, this does not provide a basis to impugn the primary judge's conclusions.

96 The appellants' seventh submission, to the effect that there was the possibility that, if judgment was obtained against China Rail, it would pay or compromise the judgment, goes against the thrust of the evidence. There was substantial evidence that China Rail would not do so. Insofar as the appellants rely on observations made by the primary judge during the course of the hearing, the relevant part of the trial transcript appears to be at p 85 rather than p 84. In any event, we do not take his Honour as doing any more than raising questions with counsel or indicating tentative views in the course of submissions. Accordingly, the appellants' seventh submission does not indicate error by the primary judge.

97 For these reasons, the appellants' submissions in relation to ground 2 do not establish any error by the primary judge in his consideration of the prospect of recovery from China Rail on a liquidation scenario.

98 We note for completeness that, by its notice of contention, China Rail contends that: there was significant uncertainty whether there would be sufficient funding to prosecute a claim in Queensland to enforce the China Rail Deed of Covenant; there was a risk that any claim commenced in Queensland to enforce the China Rail Deed of Covenant would be stayed on *forum non conveniens* grounds or following a successful application for security for costs; any such proceeding would be unlikely to succeed; and the risk that any such claim would fail was significantly higher than 25%. However, in light of our conclusions in relation to the appellants' submissions in relation to ground 2 in the amended notice of appeal, it is unnecessary to consider these grounds.

Ground 4

99 By this ground, the appellants contend that the primary judge erred in fact and law at [144] of the Reasons in that:

(a) the full amount of $1,095,391,969 is recoverable under the Deed of Covenant; and

(b) this was taken into consideration in calculating a return to creditors.

100 In their outline of submissions, the appellants describe ground 4 as a "subset" of ground 2. In support of ground 4, the appellants make the following additional submissions:

(a) The reference to the "Administrators' estimate" in [144] of the Reasons must be to the estimate of between nil and 30.3 cents in the dollar.

(b) There was an alternative estimate in the evidence, namely the administrators' estimate that if the maximum amount was recovered under the Deed of Covenant, the return could be as high as 45 cents in the dollar. This should have been taken into account by the primary judge when considering whether there was a realistic prospect of the liquidation return being higher than in the DOCA scenario.

(c) While Mr McCann was not cross-examined on the estimate of nil to 30.3 cents, it was wrong for the primary judge to find there was no challenge to that estimate. The appellants' case was that the Deed of Covenant required the unsecured creditors to be paid "in full" and that a recovery of up to 100 cents in the dollar was possible.

(d) The Deed of Covenant was in evidence and there was no need to formally put to Mr McCann the legal submission that it might, on its correct interpretation, require the unsecured creditors to be paid in full. The February 2018 Report to Creditors expressly stated that the Defined Amount was $1,095,391,969 and that the Defined Amount was payable if the Joint Venture Company was put into liquidation. Mr McCann knew that the Defined Amount exceeded the amount of money owed by the Joint Venture Company to its unsecured creditors.

(e) If and to the extent that the primary judge concluded (at [144]) that the appellants failed to establish the reasonable prospect of a better return in a liquidation because they did not challenge the administrators' estimate of nil to 30.3 cents in the dollar, the primary judge was wrong so to conclude.

101 There is a substantial overlap between this appeal ground and ground 2. We refer to our reasons, above, for rejecting ground 2. In summary, the matters relied on by the appellants

were taken into account, and rejected, by the primary judge, particularly at [143]-[144]. It was open to his Honour to accept the administrators' estimate of the likely recovery. As noted above, the appellants' submission assumes a 100% recovery, whereas the administrators' estimate took into account the risk of pursuing litigation against China Rail. Further, insofar as the primary judge relied, at [144], on the appellants' failure to cross-examine Mr McCann on his estimated recovery, it was open to his Honour to rely on that matter.

102 For these reasons, the appellants' submissions in relation to ground 4 do not establish any error by the primary judge.

Ground 3

103 By this ground, the appellants contend that the primary judge erred in finding, at [117] of the Reasons, that there was a majority of creditors in favour of the resolution for the Joint Venture Company to enter into a DOCA.

104 The appellants submit that: at [133] and [151] of the Reasons, the primary judge stated that it was unnecessary to consider in the respective contexts of ss 445D(1)(f)(i) and 445D(1)(f)(ii) whether the DOCA should be terminated as a matter of discretion; in each paragraph the primary judge cross-referred to [156] of the Reasons; the intention of the primary judge appears to have been to use what was said in [156] of the Reasons to explain why he would not have exercised his discretion even if he was incorrect about ss 445D(1)(f)(i) and 445D(1)(f)(ii).

105 The appellants also submit that: the primary judge found at [10] of the Reasons that there was no majority for or against the resolution at the second meeting of creditors; at [117] of the Reasons the primary judge extracted part of the minutes of the second meeting of creditors which recorded that 23 creditors voted for the resolution and 22 voted against it; it appears that this passage from the minutes led the trial judge to err at [156] of the Reasons, where his Honour stated that he should exercise caution "to terminate a DOCA that has been supported by a majority of the creditors of company"; there was no such majority of creditors; his Honour's discretionary analysis therefore proceeded on an incorrect factual basis; this Court may therefore re-exercise the discretion for itself on the correct factual basis that there was no majority of creditors.

106 It appears from these submissions that the appellants' ground of appeal is primarily, if not exclusively, concerned with the primary judge's observations regarding the exercise of the discretion at [156], which were cross-referenced at [133] and [151]. As such, this ground of

appeal does not appear to provide an independent basis of challenge to the primary judge's decision. This is because the primary judge's comments about the exercise of the discretion were an *alternative* reason for not terminating the DOCA. Accordingly, to succeed in the appeal, the appellants need to establish *both* that the primary judge erred in rejecting one or more of the appellants' grounds relying on s 445D(1)(f)(i) and (ii) and (g) *and* that he erred in his observations regarding the exercise of the discretion. As the appellants have not established any error by the primary judge in rejecting their grounds, it may be unnecessary to consider this ground of appeal. In any event, for the following reasons, we reject this ground.

107 In [117] of the Reasons, which formed part of the detailed description of the facts, the primary judge stated:

> With respect to that part of the meeting where those present resolved to enter into the DOCA, the minutes of the meeting record the following:
>
> **RESOLUTION 1** The Chairperson read the first resolution, being:
>
> *"That the Company execute a [DOCA] as proposed by [China Rail] detailed in the report to creditors dated 27 February 2018 including specifically the draft [DOCA] document."*
>
> The motion was moved by Peter Gribble of Linton Developments. The motion was seconded by Ian Innes representing [China Rail].
>
> A request was made to put the resolution to a poll. The Chairperson noted that there were no objections to the resolution to be decided by a poll.
>
> The results of the poll were as follows:

	Number	*Value*
In favour	23	$10,732,598
Against	22	$1,942,108
Abstained	1	$1

> The Chairperson declared that the resolution was passed.
>
> It was noted that a majority in value for the resolution had been obtained, as $10.7 million (representing 84% of the creditor pool) had voted in favour of the resolution. The total value against the resolution was $1.9 million.
>
> There were 23 votes received for the resolution, with 22 against and 1 abstained. The Chairperson noted that proxies in his favour were all special proxies.
>
> A question was raised by Ginette Muller in respect to the

> resolution being passed due to [China Rail's] related party vote and whether it was capable of being overturned due to this vote. The Chairperson advised that he is of the view that it would not be overturned due to the vote by [China Rail] and even if one vote was removed a casting vote would be used by the Chairperson and it was likely that as Chairperson the casting vote would be used to support the DOCA. The Chairperson also noted that creditors, as they do in any matter, have the right to object to the vote if they wish to on the basis of [China Rail's] related party vote.

108 The above extract from the minutes is incomplete and gives the incorrect impression that there was a majority of creditors (in number) in favour of the resolution. The following passage, which appears later in the minutes, makes clear that an equal number of creditors voted for and against the resolution:

> **REVIEW OF PROXY FORMS HELD**
>
> The Chairperson noted that they had reviewed the proxy forms held by Mr Berry and advised that there was a miscount in the number of votes as a proxy held by Mr Berry had not been confirmed.
>
> This impacted the below resolutions and a recount had been conducted.
>
> After the recount, Resolution 1, which was for the DOCA proposal, was a hung vote, with 23 creditors voting in favour of the DOCA, and 23 voting against. The poll results were:

	Number	*Value*
In favour	*23*	*$10,732,598*
Against	*23*	*$1,979,408*
Abstained	*1*	*$1*

> The Chairperson noted that he would exercise his casting vote in favour of the DOCA proposal. The reasons outlined by the Chairperson were as outlined in the report to creditors. Specifically:
>
> - Under a DOCA, employees would receive their full entitlements.
> - The DOCA return is also estimated to be higher and superior in all scenarios to the liquidation scenario.
> - The DOCA is likely to result in a timelier dividend to creditors with payment of the DOCA contribution occurring within two months (subject to creditor adjudication) as opposed to liquidation which could result in a lengthy period before a dividend can be made, if any.

> - In the event of liquidation a litigation funder would be required to fund any litigation both in QLD and in other jurisdictions, with no certainty of funding and a successful outcome.
>
> The Chairperson declared that the motion was still passed.

109 Although the primary judge did not quote this later passage from the minutes, we do not accept that the primary judge made any finding that there was a majority of creditors (in number) in favour of the resolution, or that he was under any misapprehension about this point. Paragraph [117] does not contain any such finding; it merely extracts part of the minutes of the second meeting of creditors. Paragraph [118], the very next paragraph, commences with the following sentence: "Mr McCann exercised a casting vote in favour of the resolution."

110 Further, it is plain from [10] of the Reasons that the primary judge correctly appreciated that an equal number of creditors voted for and against the resolution. That paragraph is as follows:

> The second meeting of creditors of the Joint Venture Company was held on 7 March 2018. That meeting was chaired by Mr McCann. **During the meeting, an equal number of creditors by number voted for and against a resolution that the Joint Venture Company enter into the DOCA. As there was no majority either in favour of, or against, the resolution, Mr McCann exercised a casting vote in favour of the resolution, thereby ensuring it was passed.** A representative of the plaintiffs was in attendance at that meeting and exercised a general proxy to vote against the resolution. It should be noted that this occurred before the plaintiffs' proofs of debt were disallowed by the Administrators (see at [13] below).
>
> (Emphasis added.)

111 In addition, his Honour referred repeatedly through the Reasons to the exercise of a casting vote: see, e.g., [27], [28], [35] and [70] of the Reasons.

112 In the second sentence of [156] of the Reasons, his Honour referred to the caution that is urged in cases where a court is considering whether to terminate a DOCA "that has been supported by a majority of the creditors of a company". In light of the earlier statements in the Reasons, we would not read this as indicating any misapprehension that the resolution had been supported by a majority *in number* of the creditors. Read in the context of the Reasons as a whole, it is likely that his Honour was referring to a majority of creditors *by value* having supported the resolution. Further and in any event, the second sentence of [156] represented only one of five reasons why his Honour would not have exercised his discretion to terminate the DOCA; in the context of the other reasons, we doubt whether any error in the second sentence was material to his Honour's conclusion as regards the exercise of the discretion.

113 For these reasons, we reject this ground of appeal.

Ground 1

114 By this ground, the appellants contend that the primary judge erred in the exercise of his discretion not to terminate the DOCA in respect of the Joint Venture Company. As with ground 3, this ground of appeal does not appear to provide an independent basis to challenge the conclusion of the primary judge. We refer to the discussion at [106] above. Nevertheless, for completeness, we will consider the ground.

115 The appellants' submissions in relation to ground 1 can be summarised as follows:

(a) First, once the Court concludes that the DOCA is contrary to the interests of the creditors of the company as a whole, the scale should tip towards exercising the discretion to terminate the DOCA: *Linen House Pty Ltd v Rugs Galore Australia Pty Ltd* [1999] VSC 126 at [97].

(b) Secondly, the Deed of Covenant was provided in a specific statutory context designed to protect the unsecured creditors of failed building companies. Public interest and commercial morality favour allowing the unsecured creditors a chance, through a liquidator of the Joint Venture Company, to pursue China Rail under the Deed of Covenant, rather than being forced to accept the lesser amount offered by China Rail because it says it will resist enforcement of any Australian judgment in China.

(c) Thirdly, although an even number of creditors voted for and against the resolution to approve the DOCA, China Rail was one of the creditors that voted in favour of the DOCA. China Rail's vote was not that of an independent unsecured creditor. It was voting, at least in major part, because the success of the DOCA would prevent action against it under the Deed of Covenant. Without the vote of China Rail, the majority of creditors (in number) were against the DOCA. As to value, the administrators decided at the second creditors' meeting to admit the appellants' proofs of $3,380,781, $4,526,096 and $10,027,895 for only $1 each, while reducing China Rail's proof from $3,060,000 to $2,605,000 (85% of the face value). If the appellants had been able to vote their claims in full or even by the same reduced ratio as China Rail, a majority in value would also have been against the DOCA. Moreover, the casting vote was by the administrators, who had been appointed at the behest of China Rail.

(d) The appellants' fourth submission raises the new points discussed earlier in these reasons.

(e) Fifthly, the appellants offered to fund the litigation in Australia and not to ask for a success fee.

(f) Sixthly, liquidators of the Joint Venture Company would be able to further investigate the possible insolvent trading claim for $800,000 and to take action if so advised and funded. Further investigations in a liquidation might reveal other causes of action.

(g) Seventhly, s 445D(1) does not provide any statutory restraint on when an application to terminate can be brought. Mere delay in bringing an application should not of itself prevent the success of an application where it has been established that a DOCA is contrary to the interests of the creditors of the company as a whole. If the DOCA had been fully implemented, the delay might be difficult to overcome but, in this case, the main distribution to unsecured creditors had not occurred.

(h) Finally, the application was supported by 49 creditors. In accordance with *Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509, the Court should leave the commercial judgment about the wisdom of the DOCA to the majority of creditors, including by setting aside a DOCA passed by a casting vote, with the consequence that there should be no compromise of creditor rights unless that decision enjoys majority support of creditors both in number and value, particularly of those independent of the main beneficiary of the DOCA.

116 In our view, the appellants have not established any error in the primary judge's observations as to how he would have exercised his discretion, had any of the appellants' grounds relying on s 445D(1)(f)(i) and (ii) and (g) been made out. In order to impugn this aspect of the Reasons, it would be necessary to show error of the kind identified in *House v The King* (1936) 55 CLR 499 at 504-505. The appellants' submissions do not establish any such error. While public interest and commercial morality may have a role to play in the exercise of the discretion (*Britax Childcare Pty Ltd v Infa Products Pty Ltd* (2016) 115 ACSR 322 at [95] per Burley J), they did not require that a proceeding be brought against China Rail to seek to enforce the Deed of Covenant. The fact that China Rail was one of the creditors that voted in favour of the resolution, while relevant, was not a determinative consideration. There is no reason to think that his Honour did not appreciate this fact, in circumstances where China Rail was also the proponent of the DOCA. Insofar as the appellants offered to fund litigation against China Rail, his Honour referred to this at [139]. It was not necessary for him to refer to this in the context of the exercise of the discretion.

117 It may be accepted that the possibility of an insolvent trading claim was a relevant consideration. His Honour had regard to this matter at [156] of the Reasons. It was open to his Honour to discount its significance in the circumstances of the present case for the reasons he gave at [156].

118 The appellants challenge his Honour's reliance on delay as a discretionary consideration (see [158] of the Reasons). In our view, delay was a relevant consideration and it was open to his Honour to have regard to it in the way that he did in the circumstances of the present case.

119 Insofar as the appellants contend that their application at first instance was supported by 49 creditors, we note that in China Rail's outline of submissions in response it is stated that: in fact what occurred was that the appellants procured a number of smaller creditors to sign forms supporting the appellants' application; and the primary judge was told nothing about what was said to these creditors (typically smaller subcontractors) about the issues in dispute. The appellants did not take the Court to any material to contradict these submissions. Further and in any event, it was open to the primary judge to have regard to the fact that the DOCA was supported by the largest creditor by value (Linton Developments (QLD) Pty Ltd) and by the largest public creditor, the Australian Taxation Office: see the Reasons at [156].

120 We note for completeness that, at [60] of their outline of submissions, the appellants submit that the matters summarised in [115(c)] above also justify a conclusion that the DOCA was "oppressive or unfairly prejudicial" to those 49 creditors and should be set aside on that basis as well. That submission, which picks up the language of s 445D(1)(f)(i), appears to go beyond the grounds in the amended notice of appeal. Further and in any event, the appellants have advanced no substantive submissions seeking to challenge the primary judge's conclusion in relation to s 445D(1)(f)(i). Accordingly, we reject the submission.

121 For these reasons, ground 1 is rejected.

Conclusion

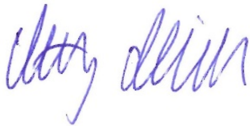
122 For the reasons set out above, each of the appeal grounds is rejected. It follows that it is unnecessary to deal with the notices of contention. Accordingly, we will order that the appeal be dismissed. There is no apparent reason why costs should not follow the event. We will therefore order that the appellants pay the respondents' costs of the appeal.

123 The costs of China Rail's interlocutory application have not been addressed. Our preliminary view is that the appellants should pay China Rail's costs of the interlocutory application, as it

was responsive to the appellants' submissions raising new points on appeal. We will make an order to this effect, but give the appellants a short period of time to file a submission if they wish to seek a different costs order. If the appellants file such a submission, China Rail will have a short period of time in which to file a responding submission, and the issue of the costs of the interlocutory application will be determined on the papers.

I certify that the preceding one hundred and twenty-three (123) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Farrell, Davies and Moshinsky.

Associate:



Dated: 22 May 2020

SCHEDULE OF PARTIES

QUD 603 of 2019

Respondents

Fourth Respondent:	CHINA RAILWAY CONSTRUCTION GROUP CO LTD