NT Pubco Pty Ltd & Anor v DNPW Pty Ltd (Subject to a Deed of Company Arrangement) & Ors [2011] NTSC 51

PARTIES:

IN THE MATTER OF DNPW PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT (ACN 107 484 711)

BETWEEN:

NT PUBCO PTY LTD
(ACN 109 250 982)
First Plaintiff

AND

GARRIHY PTY LTD
(ACN 104 551 724)
Second Plaintiff

AND:

DNPW PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT)
(ACN 107 484 711)
First Defendant

AND

ANDREJS JANIS STRAZDINS and NICHOLAS DAVID COOPER
Second Defendants

AND

DUCKS NUTS PTY LTD
(ACN 101 613 174)
Third Defendant

AND

JALOUISE PTY LTD
(ACN 060 559 328)
Fourth Defendant

TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	CORPORATIONS ACT
FILE NO:	107 of 2010 (21032220)
DELIVERED:	30 JUNE 2011
HEARING DATES:	12 APRIL and 13 MAY 2011
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Corporations – Application for orders for completion of a Deed of Company Arrangement – Subsequent amended application for winding up of the company and removal of Deed Administrators – Applications rendered academic – Application by plaintiff for costs of application – Principles to be applied to the question of costs where proceedings are rendered academic.

Corporations Act ss 444E, 449B, 503
Supreme Court Rules, rr 63.03, 63.11

Re South East Queensland Electricity Board v Australian Telecommunications Commission [1989] FCA 15.
Parap Hotel Pty Ltd & Ors v Northern Territory Planning Authority & Ors (1993) 112 FLR 336.
J T Stratford & Son Ltd v Lindley (No.2) [1969] 1 WLR 1547.
Australian Securities Commission v Aust-Home Investments Limited & Ors (1993) 44 FCR 194.
Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin (1997) 186 CLR 622.
In *Domino Hire v Pioneer Park* [2003] NSWSC 496.
Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd (1994) 14 ACSR 230.
Network Exchange Pty Ltd v MIG International Communications Pty Ltd (1994) 13 ACSR 544.
Re St George Builders Hardware Pty Ltd (1995) 18 ACSR 451.

United Super Pty Ltd & Ors v Randazzo Investments Pty Ltd & Ors [2010] NTSC 31.
One.tel Ltd v Commissioner of Taxation [2000] 101 FCR 548.

REPRESENTATION:

Counsel:

Plaintiffs:	Mr Roper
First and Second Defendants:	Mr Anderson
Third and Fourth Defendants:	Not Represented

Solicitors:

Plaintiffs:	Paul Maher
First and Second Defendants:	De Silva Hebron
Third and Fourth Defendants:	Clayton Utz

Judgment category classification:	B
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OF AUSTRALIA
AT DARWIN

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CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 30 June 2011)

[1] Following the Voluntary Administration of the First Defendant a Deed of Company Arrangement dated 22 September 2008 ("DOCA") was entered into. The Second Defendants were the Administrators of the First Defendant when it was subject to Voluntary Administration and thereafter became the Deed Administrators on the execution of the DOCA. The First Plaintiff was the "Proposer" as that term is defined in the DOCA. Terence George Dowling ("Dowling") is a director of the First Plaintiff.

[2] The Originating Process which commenced the current proceedings sought orders and declarations in respect of the completion of the DOCA. Owing to the withdrawal of a certain offer for lease of premises, an Amended Originating Process was filed on 9 November 2010 where the Plaintiff sought orders by way of termination of the DOCA, the winding up of the First Defendant and, in the alternative, the removal of the Second Defendants as Deed Administrators. Further intervening events culminating in the execution of a Varied Deed of Company Arrangement ("the Varied DOCA") have rendered the proceedings academic.

[3] All that remains is the question of costs. The Plaintiffs seek costs against the Second Defendants on an indemnity basis. The Second Defendants argue that the First Plaintiff should pay their costs, or alternatively that each party should bear their own costs. No costs are sought by or against the Third and Fourth Defendants and they took no part in the costs argument.

[4] The evidence upon which the application for costs is based consists of extensive affidavit material comprising in excess of 700 pages. I will endeavour to set out the necessary facts as succinctly as I can but in sufficient detail to put the arguments into context.

[5] The matter had its genesis in a certain business run by the Third Defendant and known as the Duck Nuts Bar. That business was run from premises leased from a company ("BCC") associated with the adjoining cinemas. That lease commenced in March 2003.

[6] Between April and December 2003 the Second Plaintiff and the Third Defendant agreed to form a joint venture to run the businesses of the Duck Nuts Bar and also another licensed venue known as the Fox Ale House. The First Defendant was incorporated to be the entity to run the joint venture. As part of that arrangement the lease of the Ducks Nuts Bar was assigned to the First Defendant in June 2005.

[7] The First Defendant was placed in Voluntary Administration on 24 April 2008 with the Second Defendants appointed as Administrators. A meeting of creditors was held. At that meeting the First Plaintiff proposed the DOCA.

The Administrators recommended the DOCA to the creditors. It was approved by creditors on 26 August 2008 and was executed on 22 September 2008.

[8] Succinctly the proposal in the DOCA was that the First Plaintiff would acquire the business of the Ducks Nuts Bar, that the First Plaintiff would assume responsibility for certain debts of the First Defendant, that the Fox Ale House would be sold, that a Deed Fund would be established, that an action would be brought by the Second Defendants against BCC seeking relief against forfeiture, that the First Plaintiff would pay the legal costs of that action, that the First Plaintiff would contribute the amount of $200,000.00 to the Deed Fund, that the First Plaintiff would manage the Ducks Nuts Bar pending completion and that the Second Defendants were given certain indemnities for trading liabilities and their fees.

[9] The action against BCC for relief against forfeiture was necessary as BCC purported to terminate the lease of the premises in consequence of the Voluntary Administration. Without that relief, the Ducks Nuts Bar business had minimal value.

[10] Terms of the DOCA relevant to the current application are:-

1. Recital G:

> The Deed Fund will comprise of:
>
> (1) The Fox *[Alehouse]* and the net proceeds of sale of The Fox and any surplus trading and gaming floats, up to the date of completion of the sale of that business;

(2) all moneys from surplus trading of Ducks Nuts up to the Settlement Date;

(3) stock, cash and gaming floats of Ducks Nuts as at the Settlement Date;

(4) a contribution of $200,000 by the Proposer; and

(5) any other company assets other than the assets listed in Recital H;

("the Deed Fund").

2. Recital H:

The business assets of Ducks Nuts will remain with the Company and not form part of the Deed Fund.

3. Clause 3.3.

3.3 The Administrators shall have a right of indemnity over the Deed Fund for their remuneration and costs, expenses and liabilities and any GST incurred by them in the administration of this Deed and the Administrators shall have a lien over the Deed Fund to secure their right of indemnity.

4. Clause 6.3.

6.3 The obligations of the Proposer *[the First Plaintiff]* in clause 4 hereof are conditional on the following:

6.3.1 the Administrators applying to Court and obtaining an order for equitable relief pursuant to section 444F of the Act that the Lease be reinstated and that the Notice of Termination of Lease dated the 12th day of June 2008 issued by Birch Carroll Coyle be withdrawn; or, alternatively that Birch Carroll Coyle grant a new lease to the Company *[the First Defendant]* on terms acceptable to the Proposer;

[6.3.2 – 6.3.7 are deliberately omitted]

6.3.8 that of the sum contributed by the Proposer to the Deed Fund the sum of $150,000 shall be applied solely and exclusively to pay a dividend to the unsecured creditors of the Company other than the non-participating creditors.

5. Clause 6.5.

> 6.5 The conditions contained in clause 6.3 hereof must be satisfied or waived within 3 months of the date of this Deed or such further time as may be agreed to by the Proposer and the Administrators in writing;

[11] Clause 6.5 of the DOCA provided for a three month period for the satisfaction or waiver of the conditions contained in clause 6.3, including the condition of obtaining relief against forfeiture. The application for that order was filed in the Federal Court on 17 October 2008 and that matter was heard from 6 February 2009. The decision was delivered on 9 July 2009. Clause 6.5 made provision for extensions of that three month period. The parties clearly contemplated that satisfaction of the conditions might take more than 3 months. The Second Defendants however had exposure to liabilities for trading losses pending completion and presumably that was, at least in part, the reason for the requirement that extensions were to be agreed to by the relevant parties.

[12] The originating process in the proceedings taken against BCC sought a number of orders. Firstly an order pursuant to section 444F of the *Corporations Act* ("the Act"), secondly, for relief against forfeiture pursuant to section 138 of the *Law of Property Act* and, lastly, for relief in equity. When pleadings were filed, the claim for equitable relief was apparently abandoned and subsequently so was the claim pursuant to the *Law of Property Act*.

[13] In December 2008, as relief against forfeiture had not then been obtained and given the approaching lapse of the time period in clause 6.5 of the DOCA, the First Plaintiff sought an extension. Agreement was reached for that extension to 9 March 2009 on the basis that the First Plaintiff would indemnify the Second Defendant for trading debts and liabilities for the period of the extension as well as to give an indemnity up to a maximum of $50,000.00 for their fees.

[14] On 2 March 2009 the Second Defendants wrote to the directors of the First Defendant, which included Dowling, pointing out that the administration had insufficient funds to meet the Second Defendants' costs and fees incurred up to 20 December 2008. That date was within the original timeframe in clause 6.5 of the DOCA hence the indemnity in favour of the Second Defendants' contained in clause 3.3 of the DOCA applied. I have not seen any evidence to support an entitlement on their part to any further indemnities in respect of their fees or liabilities up to 20 December 2008. Notwithstanding that, they sought a guarantee or undertaking from the directors of the First Defendant in the sum of $300,000.00.

[15] Further extensions beyond 9 March 2009 were required again due to the failure to obtain the order for relief against forfeiture by that date. On 5 March 2009 the First Plaintiff offered an indemnity for trading losses and an indemnity for fees up to a maximum of $2,500.00 per week from 9 March 2009 until satisfaction or waiver of the conditions of the DOCA. On 19 March 2009 the Second Defendants advised the Plaintiffs that, as a

precondition to an extension they required a $200,000.00 unconditional bank guarantee covering trading losses and the Second Defendants' fees prior to the 21 December 2008, a further indemnity in the amount of $100,000.00 for those same fees but conditional on performance of the DOCA, an indemnity in full for the trading losses after 21 December 2008 and a full indemnity for their fees after 21 December 2008. In part, they were making indemnities for their fees incurred prior to 21 December 2008 a condition of their assent to an extension. They were also seeking indemnities beyond those that had already been agreed to by the First Plaintiff for the period up to 9 March 2009.

[16] Despite having already reached agreement in respect of the period to 9 March 2009, the First Plaintiff agreed to a full indemnity for trading losses after 21 December 2008, an indemnity for the Second Defendant's fees from 9 March 2009 capped at $5,000.00 per week, and an indemnity for trading losses and fees incurred before 21 December 2008. The latter indemnity was to be capped at $100,000.00 and was conditional upon completion of the DOCA.

[17] Following some further correspondence concerning ancillary issues, on 17 April 2009 the Second Defendants offered an extension of time up to 29 May 2009 inter alia on the proviso that the First Plaintiff waived the requirement that $150,000.00 of the $200,000.00 contributed by the First Plaintiff to the Deed Fund (see Recital G (4) in paragraph 10 above) was to be applied solely to unsecured creditors. The First Plaintiff indicated

agreement to that proviso to the extent that it was able to, pointing out however that the approval of creditors was required in any case. However the First Plaintiff would not agree to one of the Second Defendants' terms, namely a bank guarantee to cover the Second Defendants' exposure for costs in respect of the proceedings against BCC. This was a curious request at that stage as the case had been heard and the parties were only awaiting the decision. It is also curious given that the request was for a guarantee when there was already provision in the DOCA for payment of those costs by the First Plaintiff. Although arguably nothing prevented the Second Defendants from seeking that guarantee as a condition of an extension, I think that remains relevant to the question of potential conflicts of interest. Nonetheless, the failure to agree on all terms meant that final agreement as to an extension beyond 9 April 2009 was not reached.

[18] As to the proviso concerning the $150,000.00 of the amount to be paid by the First Plaintiff to the Deed Fund, given the terms of clause 3.3 of the DOCA, had that proviso been implemented, that $150,000.00 would have been subject to the indemnity for the Second Defendants' fees. Therefore despite that the Second Defendants had recommended the DOCA on the basis that $200,00.00 would be available to pay unsecured creditors, as it was then known that there was a shortfall in excess of $150,000.00 in respect of the value of the indemnities available to cover the Second Defendants' fees, that amount would have been directed from the funds

available to pay unsecured creditors to payment of the Second Defendants' fees. That could not be said to be in the interests of the unsecured creditors.

[19] The request for indemnities covering the period up to 20 December 2008 suggests that the Second Defendants had underestimated the level of their fees and liability for trading debts up to that date before agreeing to act as Deed Administrators. This attempt to revisit the indemnities for the periods already set by the DOCA utilising extensions pursuant to clause 6.5 of the DOCA as a bargaining lever is relevant to the allegation, discussed below, that they were in a conflict of interest.

[20] There is a dispute as to the extent of the extensions that were agreed to. Mr Anderson, for the Second Defendants, argued that extensions were only agreed to up to 9 April 2009 and that beyond that date there was only agreement for partial indemnities pending negotiations for further extensions. Mr Roper, for the Plaintiffs however argues that the parties proceeded from that time as if the agreement for extensions beyond that date had been reached. Mr Roper relied on the fact that the Second Defendants invoiced the First Plaintiff for fees based on that apparent agreement. An invoice submitted by the Second Defendants to the First Plaintiff dated 30 June 2009 relates to the Deed Administrator's fees post 29 May 2009, i.e., to 26 June 2009. The position is clouded and there is ample basis for dispute about the status of the extensions beyond 9 April 2009.

[21] On 9 July 2009 Lander J delivered his decision on the application for relief against forfeiture. Relevantly he noted that Strazdins had conceded that he made material errors in his report to creditors. Lander J observed that those errors put in doubt whether or not the DOCA was in fact in the interests of the creditors. He declined the equitable relief as that claim had been abandoned. He gave relief against BCC taking possession pursuant to section 444F(4) of the Act. Consequently the order only had effect while the DOCA remained on foot. In his decision, his Honour said:-

> "80 Mr Strazdins was also cross-examined on the opinion the administrators offered to DNPW's creditors that it was in the creditors' interests for the company to execute the DOCA. In particular, Mr Strazdins was asked about his opinion regarding the claims that might be available against DNPW's directors for insolvent trading having regard to the administrators' expressed opinion in their report that any return on a claim for insolvent trading, estimated at $500,000, would be to the benefit of the secured creditor. He agreed that assumption was contrary to s 588Y of the Corporations Act.
>
> 81 Mr Strazdins agreed that the administrators should have left out of account the interests of the unsecured creditors. He also agreed that the administrators' analysis wrongly assumed that the directors could prove for any payment they would make to the company as a result of any insolvent trading claim. He agreed that such an assumption was only relevant in an unfair preference claim. He also agreed that the report wrongly assumed the total of the administrators' fees in the event of liquidation. Lastly, he agreed that the directors' loan accounts may have been taken into account twice.
>
> 82 It was put to him that having regard to the concessions he made he could not be sure that the return to the creditors would be less disadvantageous than the two proposals for the DOCA. He said that was possibly right.

> 83 I accept, as BCC demonstrated in cross-examination, that the administrators have made errors in the calculation of the benefits which may flow from a DOCA and that those errors raise a question as to whether it was in the creditors' interests to have DNPW execute a DOCA..."

[22] The observations of his Honour at paragraph 81 of his reasons disclose significant material errors regarding matters of importance such that it puts in doubt whether the creditors would have voted in favour of the DOCA had those errors not occurred.

[23] After that decision, the administration proceeded and accounts for Deed Administrators' fees were submitted to the First Plaintiff until the indemnity was withdrawn on 2 October 2009.

[24] Further negotiations led to an offer of further limited indemnities from the First Plaintiff while a potential contribution from Cowell Clarke, the First Plaintiff's former lawyers, for negligence in their handling of the proceedings against BCC was pursued. The indemnity offered was for trading losses and for fees, limited to $3,000.00 per week in the case of the latter. The indemnity was given initially to 20 January 2010 and later extended to 19 February 2010.

[25] On 5 March 2010 the First Plaintiff's lawyers corresponded with the lawyers for the Second Defendants. The quantum of the Second Defendants' claimed unpaid fees were disputed and requests were made for details thereof. Reference was also made to the possibility that the Second Defendants' fees, even if justified, would not be able to be recovered if the DOCA failed.

Accordingly they suggested that negotiations with BCC for a new lease continue. While that occurred the First Plaintiff indicated a willingness to continue to indemnify trading losses in full and to indemnify the Second Defendants' fees up to $3,000.00 per week. Part of the proposal was that the claim against Cowell Clarke would continue and any award obtained would be applied firstly to the payment to the First Plaintiff for the costs expended in pursuing the claim and the balance would then be available to the Second Defendants for any outstanding fees. Importantly, the correspondence acknowledged that the proposal had to be refined and was not then in a form which could be accepted by the Second Defendants.

[26] By letter dated 22 March 2010 the Second Defendants, through their lawyers, agreed that negotiations for a new lease should continue and they stipulated the 30th June 2010 as the date by which those negotiations would have to conclude. It is noteworthy that they have not specifically referred to an extension under clause 6.5 of the DOCA. They agreed to the indemnities which were offered and acknowledged that the proceedings against Cowell Clarke were still contemplated. Importantly also, they stipulated that the proposal had to be refined and specifically said that no binding obligations were to be created until execution of a Deed encompassing the complete and final proposal.

[27] Although the First Plaintiff's lawyers responded to that on 29 March 2010 (the details of that are not important for current purposes), nothing further seems to have happened on the evidence before me. Then, nearly three

months later and on 23 June 2010 the First Plaintiff's lawyers write to the Second Defendants' lawyers and advise that they had reached agreement with BCC for a new lease to be granted in respect of the Ducks Nuts Bar premises. The letter advises that the First Plaintiff had decided against suing Cowell Clarke. The letter also points out that the remaining conditions in clause 6.3 of the DOCA had been met or were waived. They suggested 30 June 2010 as the date for completion.

[28] By email letter dated 25 June 2010, the Second Defendants' lawyers responded. They pointed to the *"..material change in direction of significant financial consequence (non pursuit of Cowell Clarke)..."* and said that was a change to the proposal. They then added that resolution of the outstanding Administrator's fees would be a condition to the completion of the DOCA.

[29] The response to this letter from the First Plaintiffs' lawyers was to point out that there was no provision in the DOCA or any other requirement by law which would give the Administrators power to refuse to complete the DOCA for non payment of fees. They alleged that the Administrators only had a right of indemnity over the Deed Fund for their fees. They added *"... the administrators are seeking payment of fantastic sums which they have failed to justify or even account for, despite requests to do so..."*

[30] At about that time lawyers representing BCC forwarded the lease documents to the Second Defendants' lawyers to execute. The First Plaintiff called on the Second Defendants to then complete the DOCA. That does not occur and

further proposals are submitted by the Second Defendants which introduce the requirement of the assignment of the claim against Cowell Clarke to the Second Defendants and for the First Plaintiff to underwrite the claim to the extent of $450,000.00. The First Plaintiff was not prepared to agree to that proposal.

[31] By 24 September 2010 the Second Defendants had still not executed the lease and the First Plaintiff commenced these proceedings. On 15 October 2010 and before the proceedings could be heard, BCC withdrew the offer of lease. The net effect of the withdrawal of the offer of lease was that it was futile to proceed with the then current application. In consequence, on 4 November 2010 when the matter was first mentioned before me, counsel for the First Plaintiff sought, and was granted, an adjournment to enable an amendment to be made to the Originating Process to seek orders for the winding up of the First Defendant and/or the replacement of the Second Defendants as Deed Administrators.

[32] It was subsequently ascertained that Strazdins had been aware, since late September 2010, that BCC were interested in acquiring the Ducks Nuts Bar business. A written offer was submitted to him on 4 November 2010 which he accepted on 5 November 2010. Strazdins claims that BCC required the offer to be kept strictly confidential, particularly in relation to Dowling. The reason given was a concern that Dowling would remove all plant and equipment from the business if he was aware of the proposal. Why Dowling would do that or how he might be entitled to do so was not revealed. That

evidence came late. It was contained in the affidavit of Strazdins in respect of which Mr Anderson was given leave to re-open his case to enable him to rely on it. A contract was executed on 3 December 2010.

[33] Other than a veiled reference in correspondence dated 16 November 2010 from the Second Defendants' lawyers to the First Plaintiff's lawyers to considering *"…options for a better return to all stakeholders…"* the negotiations with BCC were kept in confidence. It was only on 1 December 2010 that the First Plaintiff was notified of the negotiations with BCC.

[34] In Dowling's affidavit sworn 17 December 2010 there is, inter alia, evidence of a conversation between Dowling and Strazdins on 8 December 2010. This was challenged in the Strazdins affidavit sworn 10 May 2011. Dowling recites the conversation as follows:-

> *I said: "I am extremely angry that you did not sign not the BCC Lease and complete the DOCA."*
>
> *He said: "I thought we would negotiate a commercial settlement of my fees."*
>
> *I said: "I never agreed to pay all of your costs. If you had asked me to pay all of your costs instead of just a limited indemnity I would never have agreed to it. You were only ever interested in getting as much money as possible out of us."*
>
> *He said: "We believed you would negotiate a settlement with us."*
>
> *I said: "Time was running out. BCC was becoming impatient. There was no more time to fart around. We decided to go to court and to get the DOCA completed."*

[35] If unchallenged, this evidence would be very telling in respect of the conflict of interest argument. However, Strazdins challenges the accuracy of this account. He says it is incomplete. I note Dowling does not claim that the conversation represents the entirety of what was discussed on that occasion. Strazdins claims that Dowling said that he was upset at not being informed of the sale to BCC, not that he was upset about the failure to complete the DOCA. Strazdins does not deny the words ascribed to him but says that the comments he made about negotiating a settlement between them was with reference to all issues, i.e., past and future indemnities for fees and trading losses, reinstatement of the BCC lease and recovery against Cowell Clarke.

[36] The abandonment of the proceedings means that the dispute regarding this conversation cannot be tested and I must deal with the question of costs without resolution of this dispute.

[37] The sale of the Ducks Nuts Bar business to BCC was not in accordance with the DOCA and therefore steps were put in place to call the necessary creditors meeting for approval of a varied Deed of Company Arrangement ("the Varied DOCA"). The creditors meeting subsequently approved the proposal and the Varied DOCA was ultimately executed in February 2011.

[38] The execution of the Varied DOCA renders the entirety of the proceedings academic. The First Plaintiff seeks an order for dismissal of the proceedings after an order for costs. The parties cannot agree as to the way in which the

proceedings should be finalised. The Second Defendants are of the view that the proceedings should be discontinued. However both parties concede, and I agree, that nothing turns on whether the proceedings end by way of dismissal or discontinuance.

[39] Rule 63.03(1) of the *Supreme Court Rules* essentially provides that the costs of a proceeding are in the discretion of the Court. Rule 63.11(6) is a specific rule dealing with costs when proceedings are discontinued. The effect of that is that ordinarily a party who discontinues an action is liable to pay the other party's costs. Rule 63.11(9) makes rule 63.11(6) subject to any other order the Court may make. At common law, in cases where proceedings become academic, the usual costs order made is that each party bears their own costs. The rule is based on the proceedings being rendered academic and does not turn on whether leave is sought to discontinue proceedings or whether the proceedings are dismissed.

[40] Mr Roper argues that the First Plaintiff is entitled to an award of costs on the basis of the authorities which recognise exceptions to the general rule. He submitted that those exceptions are:-

(a) Where it can be established that a party would likely have succeeded;

(b) Where it was reasonable for the party to commence the proceedings and that the commencement of the proceedings bought a consequent reaction by the other party;

(c) Where the commencement of the proceeding was considered necessary due to the pre-action conduct of one of the parties.

[41] A number of authorities were relied on commencing with *Re South East Queensland Electricity Board v Australian Telecommunications Commission*[1] (*"SEQEB"*). That decision acknowledges that the approach taken by courts in such situations is that although wishing to accommodate finality of proceedings, courts will not predict the likely outcome of proceedings simply to assist in the determination of an appropriate cost order. As a result the general rule in situations where proceedings have become academic is that there will be no order as to costs.

[42] The principle has been considered in this jurisdiction by Mildren J in *Parap Hotel Pty Ltd & Ors v Northern Territory Planning Authority & Ors.*[2] In that case, after noting that the whole subject matter of the litigation had ceased to exist through the actions of a non party, his Honour said:-

> "The courts will not try a purely academic question; and in any event, neither side wishes the action to be tried on its merits, except in so far as it is necessary to do so to determine the question of costs. Is the case to go on, then, simply to determine costs? Neither side was able to refer me to any authorities on the point, but it seemed to me at the time of hearing the application that the general rule should be that each party should bear their own costs, but that in an exceptional case the court might depart from that general rule if one party could show that it was plain beyond doubt that, <u>without having to decide any facts in contention</u>, it must inevitably have succeeded."[3] (Emphasis added).

[1] [1989] FCA 15
[2] (1993) 112 FLR 336
[3] (1993) 112 FLR 336 at p 340

[43] His Honour then considered the decision of the English Court of Appeal in *J T Stratford & Son Ltd v Lindley (No.2)*[4] and then proceeded to say:-

> "Nevertheless, whilst *J T Stratford & Son Ltd v Lindley (No.2)* establishes that, as a general rule, the court will not go into the theoretical prospects of success and will ordinarily grant the plaintiff leave to discontinue and order that each party bear their own costs, there must be exceptional circumstances where such a result would be unjust, and, without wishing to lay down any limits to the circumstances under which it would be just to depart from the general rule, it seems to me that one such exception would arise in a case such as this, where the action was well short of being ready for trial, if one party or the other could show that they would have been entitled to summary judgment on the undisputed facts known to the court at the time the court was asked to exercise its discretion."[5]

[44] An oft quoted authority in this context is the decision of Hill J in *Australian Securities Commission v Aust-Home Investments Limited & Ors*[6] (*"Aust-Home Investments"*). In that case his Honour set out five relevant propositions. Only the first four of these are relevant to the current case and they are as follows:-

(1) "Where neither party desires to proceed with litigation the Court should be ready to facilitate the conclusion of the proceedings by making a cost order.

(2) It will rarely, if ever, be appropriate, where there has been no trial on the merits, for a Court determining how the costs of the proceeding should be borne to endeavour to determine for itself the case on the merits or, as it might be put, to determine the outcome of a hypothetical trial. This will particularly be the case where a trial on the merits would involve complex factual matters where credit could be an issue.

(3) In determining the question of costs it would be appropriate, however, for the Court to determine whether the applicant acted

[4] [1969] 1 WLR 1547
[5] [1969] 1 WLR 1547 at p 341
[6] (1993) 44 FCR 194

reasonably in commencing the proceedings and whether the respondent acted reasonably in defending them.

(4) In a particular case it might be appropriate for the Court in its discretion to consider the conduct of a respondent prior to the commencement of the proceedings where such conduct may have precipitated the litigation."[7]

[45] The decision in *Aust-Home Investments* was considered by McHugh J in the High Court in *Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin*.[8] His Honour discussed the relevant general rule and, apparently adopting proposition (3) from *Aust-Home Investments* said:-

> "In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action."[9]

[46] In *Boscaini Investments Pty Ltd v Corporation of the City of Kensington and Norwood*[10] Debelle J, refined the third of Hill J's propositions. There his Honour said:-

> "I immediately acknowledge the assistance of Hill J but suggest that proposition (3) is of limited assistance. The fact that a party has not conducted himself reasonably may disentitle him to costs. But, beyond that, the reasonableness of the conduct of the parties is not likely to assist in determining whether the applicant should recover

[7] (1993) 44 FCR 194 at p 201
[8] (1997) 186 CLR 622
[9] (1997) 186 CLR 622 at p 624
[10] (1999) SASC 327

> his costs. The real question is whether the applicant had reasonable prospects of success. It seems preferable, therefore, to express proposition (3) in different terms.
>
> Depending on circumstances, where the applicant had acted reasonably in commencing proceedings, has an arguable case, and it is reasonable to conclude that that respondent has acted in consequence of the commencement of proceedings, the court may be prepared to make an order as to costs in favour of the applicant."[11]

[47] His Honour therefore suggests that the emphasis on the purposes of proposition (3) should not so much be on reasonableness alone but in the context of the prospects of success and specifically in regard to whether or not it is clear that the other party had reacted in consequence of the commencement of the proceedings.

[48] The most recent decision of this Court on point is *United Super Pty Ltd & Ors v Randazzo Investments Pty Ltd & Ors*[12] (*"United Super"*).

[49] In that case, Kelly J, after reciting with approval the relevant factors identified by Hill J in *Aust-Home Investments*, dealt with an argument from the plaintiffs that they had acted reasonably in commencing the litigation which ultimately resolved by settlement of the litigation.

[50] The defendants in that case however categorised the events leading to the settlement as a total capitulation by the plaintiffs. The defendants there

[11] (1999) SASC 327 at p 27
[12] [2010] NTSC 31

relied on *One.tel Ltd v Commissioner of Taxation*[13] particularly the passage where Birchett J said:-

> "In my opinion, it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except out of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the court's discretion otherwise then by an award of costs to the successful party or parties."

[51] Kelly J agreed and found that the result that the plaintiff sought could have been achieved at any time without issuing proceedings and accordingly ordered costs in favour of the defendants.

[52] With that background, Mr Roper submits that the Plaintiffs would have succeeded in the application, particularly for the order under section 449B of the Act for removal of the Deed Administrators owing to the Second Defendants being in a position of conflict of interest. I will deal with that aspect first.

[53] Section 449B of the Act is the provision which empowers the Court to remove an administrator. It provides as follows:-

> **449B Court may remove administrator**
>
> On the application of ASIC or of a creditor, liquidator or provisional liquidator of the company concerned, the Court may:
>
> (a) remove from office the administrator of a company under administration or of a deed of company arrangement; and

[13] [2000] 101 FCR 548

(b) appoint someone else as administrator of the company or deed.

[54] I am satisfied, on the unchallenged evidence in this respect (paragraphs 2 and 3 and annexure PGM 1 of the affidavit of Paul Maher sworn 17 December 2010), that both Plaintiffs are creditors of the First Defendant, hence the Plaintiffs had standing to apply under section 449B of the Act.

[55] Although there is little authority concerning section 449B, there is extensive authority on section 503 of the Act. Section 449B of the Act is similar in terms and application for current purposes to section 503 of the Act which provides as follows:-

> **503 Removal of liquidator**
>
> The Court may, on cause shown, remove a liquidator and appoint another liquidator.

[56] I accept that appropriate guidance can be taken from the authorities on section 503 in determining the application of section 449B. I note that the threshold for section 503 applications is higher given that it requires *"cause shown"* whereas section 449B has no prerequisites and appears on the face of it to be entirely discretionary.

[57] In *Domino Hire v Pioneer Park*[14] and in dealing with this requirement under section 503, Austin J relevantly said:-

> "The words "cause shown" indicate that a liquidator is not to be removed unless there is some ground for removal, and the ground must be established by evidence. However, "cause shown" is not a

[14] [2003] NSWSC 496

narrow concept. It is open to the applicant for removal to a point to any conduct or inactivity on the liquidator's part that provides a basis for the conclusion that he or she should be removed, ranging from moral turpitude, to bias or partiality, lack of independence, incompetence or other unfitness for office. But the concept of "cause shown" is not limited to matters relating to the unfitness of the liquidator to hold office. In *Re Adam Eyton Ltd; ex parte Charlesworth* (1887) 36 Ch D 299, speaking of a statutory formulation where the words used were "due cause shown" rather than "cause shown", Bowen LJ said (at 306):-

> In many cases… unfitness of the liquidator will be the general form which the cause will take upon which the Court in this class of case acts, but that is not the definition of due cause shown. In order to define due cause shown you must look wider afield, and see what is the purpose for which the liquidator is appointed…due cause is to be measured by reference to the real, substantial, honest interests of the liquidation and to the purpose for which the liquidator is appointed. Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation."[15]

[58] In *Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd*[16] (*"Advance Housing"*), Santow J considered the appropriate test to be applied on an application to remove a liquidator and said:-

> "…the correct balance is struck by permitting a liquidator to act as such even if there be a prior involvement with the company in liquidation, provided that involvement is not likely to impede or inhibit the liquidator from acting impartially in the interests of all creditors or be such as would give rise to a reasonable apprehension on the part of a creditor that the liquidator might be so impeded or inhibited. In short the question should be whether there would be a reasonable apprehension by any creditor of lack of impartiality on the liquidator's part in the circumstances, by reason of prior

[15] [2003] NSWSC 496 at p 58
[16] (1994) 14 ACSR 230

> association with the company or those associated with it, including creditors, or indeed any other circumstance."[17]

[59] In *Network Exchange Pty Ltd v MIG International Communications Pty Ltd*[18] and in dealing with section 449B under the then Corporations Law (which provision was for all intents and purposes in corresponding terms to the extant section 449B), Hayne J relevantly said:-

> "I note at the outset that s 449B is cast in terms different from s 473 dealing with the removal of liquidators. Section 473(1) provides that a liquidator appointed by the court may resign or "on cause shown" be removed by the court. It is to be noted that s 449B makes no reference to cause being shown. In my view, however, it must be accepted that an order for removal should be made only if it is demonstrated that such an order would be for the better conduct of the administration. It is not to be contemplated that the power under s 449B is to be exercised save in circumstances that justify or require its exercise and those, speaking generally, would appear to be circumstances in which the order would conduce to the better conduct of the administration concerned. Thus perhaps s 449B is not markedly different from s473 as the different drafting would suggest:"[19]

[60] *Advance Housing* was applied by Santow J in *Re St George Builders Hardware Pty Ltd*[20] (*"Re St George")* in conjunction with an application for leave under section 448C of the Act which deals with the necessity of obtaining the leave of the court before certain persons can be appointed as administrators. His Honour said:-

> "In giving leave in applications of this kind, the court should have regard to analogous principles to the removal of a liquidator on the ground of actual or perceived conflict of interest. In *Advance*

[17] (1994) 14 ACSR 230 at p 234
[18] (1994) 13 ACSR 544
[19] (1994) 13 ACSR 544 at p 550
[20] (1995) 18 ACSR 451

Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd (1994) 14 ACSR 230, the relevant principles are set out and may be summarised as follows:-

1. The cases show that there must be a real and not merely theoretical possibility of conflict and that the guiding principle in the appointment by the court of a liquidator is that he must be independent and must be seen to be independent.

2. Those who assert that a liquidator should be removed are under a duty to establish at least a prima facie case that this is for the general advantage of the persons interested in the winding up and the onus of proof will not be easy to discharge if the liquidator has become well acquainted with the business and affairs of the company.

3. A liquidator may act as a liquidator of a company even if there is a prior involvement with the company in liquidation provided that involvement is not likely to impede or inhibit the liquidator from acting impartially in the interests of all creditors or give rise to a reasonable apprehension that the liquidator might be so inhibited or impeded."[21]

[61] With that background the First Plaintiff's claim for costs is based on the exception of the expected successes of its claims. The argument concerning the expected success of the application for removal of the Deed Administrators was advanced on the basis that the Second Defendants were in a position of at least perceived, but possibly actual conflict of interest such that the requirements set out in the foregoing authorities were satisfied. It was submitted that the conflict of interest arises firstly in respect of the Second Defendants' potential liability to the First Defendant and to creditors with respect to their failure to execute the lease negotiated between the First

[21] (1995) 18 ACSR 451 at p 452

Plaintiff and BCC. In my view, this is inextricably linked to the issue of the extent of the agreement as to extensions pursuant to clause 6.5 of the DOCA and for the reasons which appear below, I am unable to resolve the dispute. Therefore I do not accept that the Plaintiffs can rely on this.

[62] Mr Roper however also alleges that the Second Defendants put their interests in securing payment of their fees ahead of the interest of the creditors, most apparent by the proposal to redirect $150,000.00 of the Deed Fund, and are thereby in a conflict of interest. The Second Defendants have clearly attempted to deflect $150,000.00 from funds available for distribution to unsecured creditors to their fees in lieu without seeking the approval of creditors. They had no right to do so. That it was not pursued beyond a proposal is not material in my view as the conflict of interest, at least to the extent that it is required by the authorities referred to, arises on the making of the proposal. That the Second Defendants purported to threaten refusal of extensions under clause 6.5 of the DOCA absent agreement to indemnities already provided for in the DOCA also highlights that. Requiring the bank guarantee referred to in paragraph 17 above is also relevant albeit to a lesser extent. In my assessment, each instance amounts to an obvious conflict of interest. It is inconsistent with the Second Defendants being said to be *"…acting impartially.."* and *".. in the interests of all creditors…"* per *Re St George* .

[63] Mr Roper also submitted that the findings of Lander J, where he found that Strazdins had made significant errors in his report to creditors and that it

was not therefore clear that the DOCA was in the interests of the creditors also created a conflict of interest situation. I agree. Given that the Second Defendants had recommended the DOCA to the creditors based on flawed assumptions and errors I would have expected that faced with those findings, the Second Defendants would have referred the matter back to the creditors. There is no evidence of any attempt to do so.

[64] Mr Anderson disputed the conflict argument and added that in any event the Plaintiffs abandoned that issue by firstly settling the proceedings and, secondly, by voting in favour of the Varied DOCA at the creditors meeting. As the matters had developed up to 20 December 2010 I do not consider it unreasonable that the Plaintiffs settled the substantive proceedings and later voted in favour of the Varied DOCA. That does not excuse nor change the existence of the conflict of interest.

[65] Therefore I am of the view that the Plaintiffs would have succeeded in their action for an order for the removal of the Second Defendants as Deed Administrators based on those identified conflict of interest situations.

[66] I deal next with the initial Originating Process which sought orders primarily to force the Second Defendants to complete the DOCA. The First Plaintiff's argument turns on the assertion that extensions pursuant to clause 6.5 of the DOCA had been given to 30 June 2010. Mr Anderson submitted that extensions were only given to 9 April 2009 and that an extension to 29 May 2009 was proposed but not agreed to. He claims at that point there were

only ongoing negotiations to agree an extension and indemnities. He categorised the partial indemnities agreed upon subsequent to that date as simply indemnities pending negotiation of the full indemnities.

[67] Save that I consider that there was an extension to 29 May 2009 see paragraphs 17 and 20 above), the documentary evidence otherwise lends support to Mr Anderson's argument. At the very least it is not clear whether an extension beyond 29 May 2009 was agreed to.

[68] The Second Defendants' position is that there was no obligation to complete the DOCA because there was no agreement reached for an extension of the time for satisfaction of the conditions in clause 6.5. The correspondence is ambiguous at best and the latest letters passing between the lawyers on this point evidenced, on both sides, a lack of intention to be bound until formal Deeds were executed. This raises a number of issues which no doubt would have been addressed had the case proceeded to hearing. However the very existence of these issues is an impediment to the making of a costs order on the authorities referred to as things currently stand. I cannot resolve this on the documentary evidence and without going into the merits of the dispute.

[69] However, it was on that basis that Mr Anderson submitted that the orders sought in the initial Originating Process were doomed to fail and his application for costs is based on that. I disagree with that assessment. There are a number of unsatisfactory aspects of the position contended by the Second Defendants. They were content to invoice the First Plaintiff pursuant

to what they claim were only limited indemnities at various stages and thereby permitted the DOCA to continue for many months. This was despite the Second Defendants' regularly expressed concern about their exposure to trading losses and lack of funds to cover their fees. They continued the administration for a 12 month period from mid 2009 to mid 2010 supposedly in the expectation of an agreement being reached for the Second Defendant's fees to be fully indemnified. There were a number of these so called interim extensions which were of 3 months duration or thereabouts, which is the initial time period set in the DOCA for compliance with the conditions precedent. All of that is inconsistent with those claimed concerns.

[70] On the other hand, from the First Plaintiff's point of view, as it had given an indemnity for trading losses, it is difficult to see what it had to gain if they were meant to be a limited indemnity for fees pending negotiations for a higher level of indemnity. All indemnities offered by the First Plaintiff since the very first extension was sought were in comparable terms and of approximately the same amount. That would support a contention that the First Plaintiff did not consider those indemnities to be interim in nature. It has never been expressly and clearly stated by the Second Defendants that the indemnities were interim and pending further negotiations. Overall, the true position is that I am unable to determine the likely result either way without proceeding with a hearing on the merits which I will not do. To that extent the general rule should apply.

[71] Mr Anderson also relied on and highlighted the default by the First Plaintiff in payment of the undisputed indemnities for the period 22 December 2009 to 4 July 2010 as another basis upon which the initial Originating Process was likely to fail. The amount involved was $92,000.00. There does not seem to be any dispute by the First Plaintiff that such a sum was owing or that it was unpaid. Although I think that the Second Defendants could rightly have required that indemnity to be paid first, they did not do so and therefore nothing can turn on that. The documentary evidence sufficiently establishes that the indemnities sought by the Second Defendants went beyond simply requiring payment of agreed and outstanding sums. The documentary evidence satisfies me that the Second Defendant was not simply making completion conditional on payment of the outstanding sums but sought payment in respect of substantially greater sums as a pre-requisite before agreeing to completion.

[72] Dealing next with the application for the order for winding up, Mr Anderson also submits that this was doomed to fail as a winding up order could only result in a benefit to BCC, namely that they would then be entitled to possession of the premises without any significant payment. However as BCC had no obligation to either transfer the lease or to grant a new lease or for that matter to do anything, they could otherwise have simply waited until the Second Defendants had no choice but to end the administration. The frequently expressed concern of the Second Defendants about their exposure to trading losses and not having funds to pay their fees suggests that

termination of the DOCA was inevitable in the short term. If that occurred then possession of the premises would have defaulted to BCC.

[73] Mr Anderson also submitted that the BCC's withdrawal of the lease indicated that BCC were sick of dealing with Mr Dowling resulting in their approach and offer to Strazdins. On my view of the evidence that assertion is incorrect. The evidence supports an assertion that if BCC were sick of anything, it was of the delays of the Second Defendants in executing the lease. The form of lease was forwarded by BCC's lawyers to the Second Defendants before 30 June 2010 and the offer was withdrawn in late October 2010. Noting that from sometime in September 2010 BCC had indicated an interest in purchasing the business of the Ducks Nuts Bar, this adds weight to the conclusion that BCC's withdrawal of the offer for lease had nothing to do with Dowling.

[74] The authorities recognise in any event that costs may still be ordered where the conduct of the opposing party pre-action makes it reasonable to commence proceedings. This needs to be looked at in the context of what the First Plaintiff knew at the time that the order for winding up was sought. As the Second Defendants kept the discussions with BCC confidential and accepting for the present the reasons given by Strazdins for not advising the First Plaintiff of the negotiations with BCC, in my view it was not unreasonable for the Plaintiffs to seek a winding up order. I accept the submission of Mr Roper that had Dowling been aware of the sale to BCC he would have accepted that. Given the negotiated price it would be impossible

for him to do otherwise. Moreover his support for the proposal when it was disclosed to him is indicative of that also.

[75] It was also submitted that the winding up application would have failed due to the precondition in section 444E of the Act. That section provides as follows:-

444E Protection of company's property from persons bound by deed

(1) Until a deed of company arrangement terminates, this section applies to a person bound by the deed.

(2) The person cannot:
(a) make an application for an order to wind up the company; or
(b) proceed with such an application made before the deed became binding on the person.

(3) The person cannot:
(a) begin or proceed with a proceeding against the company or in relation to any of its property; or
(b) begin or proceed with enforcement process in relation to property of the company;
except:
(c) with the leave of the Court; and
(d) in accordance with such terms (if any) the Court imposes.

(4) In subsection (3):
property, in relation to the company, includes property used or occupied by, or in the possession of, the company.

[76] Mr Anderson relied on the documentary evidence which indicated that the First Plaintiffs were put on notice of the limitations imposed by that section and that the First Plaintiff's lawyers simply ignored that requirement. Although it is apparent that the First Plaintiff's lawyers only addressed that

in a very general way by simply claiming a standing to apply for the winding up order, in the end I am satisfied that nothing turns on that.

[77] However, as to the effect of section 444E, Mr Anderson's submission overlooks that the relevant application also sought termination of the DOCA. The application stated that it was based in part on section 444E. If an order for termination of the DOCA as sought was granted then clearly the operation of section 444E became superfluous. The requirement for leave cannot operate in respect of an application for termination of the DOCA. I reject Mr Anderson's submission in that respect.

[78] Nonetheless, and although I do not consider it unreasonable for the Plaintiff's to have applied for a winding up order, I am also satisfied that as things transpired the order would have been refused. Hence there are arguments of equal merit on both sides. This leads me to conclude that each party should pay their own costs with respect to that aspect.

[79] The Second Defendants also relied generally on *United Super* and characterised the various applications by the Plaintiffs and their resolution as a complete capitulation. Mr Anderson submitted that the First and Second Defendants were merely responsive to the Plaintiffs' actions and had no choice but to defend the proceedings. Moreover Mr Anderson submitted that the Plaintiff could have achieved the result ultimately arrived at in the settlement by way of approval of a varied DOCA as opposed to the commencement of proceedings. He argued that it was unreasonable for the

Plaintiffs to commence the proceedings and he submitted that applied to each of the various applications made by the Plaintiffs. Mr Anderson said that nothing of any substance occurred between 1 December 2010 and 20 December 2010 when the proceedings were resolved. He claimed that this reinforced his submission that the resolution of the proceedings was a capitulation and not a settlement as the Plaintiffs, despite having previously insisted on the removal of the Second Defendants, thereafter agreed to let the Second Defendants remain in office.

[80] Mr Roper in reply said notwithstanding that, the proceedings were reasonable and the fact that this settlement provided for a varied DOCA meant that the resolution of the proceedings did not amount to a complete capitulation. I agree. It was also necessary for the Second Defendants to secure the Varied DOCA before the sale of the business to BCC as that was not permitted by the DOCA as it stood.

[81] In conclusion, in my view and subject to the qualification below, it is appropriate that there be no order as to the costs of the Originating Process. I think the Second Defendants should pay the costs of the Amended Originating Process save and except in so far as that related to the order for the winding up of the First Defendant. The qualification is that as part of the work for the initial Originating Process was relevant to the application for orders for removal of the Second Defendants as Deed Administrators, some part of that should be allowed. Assessing that as best I can from the extent of the affidavit material and the argument before me, I fix that at 30%. I am

of the view that all costs should be on the standard basis. Any interlocutory appearances are certified as fit for counsel.

[82] I therefore order the Second Defendants to pay the costs of the Plaintiffs, fixed at 30% in respect of the Originating Process filed on the 24 September 2010 and the costs of the Amended Originating Process filed on the 9 November 2010 save and except for any attendances relating to the application for the order for the winding up of the First Defendant.

[83] The proceedings are otherwise dismissed.