Annexure B - Roberts v Juniper (2013) ABC(NS) 190

FEDERAL CIRCUIT COURT OF AUSTRALIA

Roberts v Juniper

[2013] FCCA 130

Judge Burnett

7 February, 26 April 2013

Pt X Bankruptcy Act 1966 (Cth) — Personal insolvency agreement — Application to set aside — Terms of personal insolvency agreement unreasonable — Not calculated to benefit creditors generally — False information in statement of affairs — Unexplained voidable transaction — Debtor not admitted for full voting amount — Application to summarily dismiss primary application — Bankruptcy Act 1966 (Cth), ss 188, 188(2C), 118, 120, 121, 122 — Federal Circuit Court Act 1999 (Cth).

This an application by the respondent debtor seeking to summarily dismiss an application brought by a number of creditors to set aside a personal insolvency agreement (PIA) entered into by the debtor. The debtor contended that such application had no real prospects of success. Taking the applicants' case at its highest a "properly directed jury", in this case a Judge, "could not properly reach the necessary factual conclusion".

The primary application was brought on grounds that the terms of the PIA were unreasonable or were not calculated to benefit creditors generally. Alternatively, the PIA was sought to be set aside on the ground that it was not entered into in accordance with Pt X of the *Bankruptcy Act 1966* (Cth).

The applicant creditors' contentions were founded upon the following four factors:

1) The debtor made false statements in his statement of affairs which matters arguably induced a majority of creditors to consent to the PIA.
2) There are unexplained voidable transactions that will not be otherwise open to inquiry.
3) A question remains about the number of creditors who supported the PIA.
4) Whether there was in fact a "clear majority" of creditors in support of the debtor entering into of the PIA, particularly in circumstances where the liability arising under a guarantee was reduced from $22M to $836.00 for voting purposes at the meeting of creditors called under Pt X to consider the PIA.

Held (per Burnett J, dismissing the application for summary dismissal): (1) Except for the issue of the number of creditors comprising the majority who supported the PIA each other matter involves a question of fact. Taken at its highest it would be open to reach the necessary factual conclusion to determine the application in favour of the applicant creditors: [35], [42], [45], [56].

White Industries Australia Ltd v Federal Commissioner of Taxation (2007) 160 FCR 298, followed.

Bernstrom v National Australia Bank Ltd [2003] 1 Qd R 469, referred to.

Cases Cited

Agushi, Re; Ex parte Farrow Mortgage Services Pty Ltd (in liq) v Cole (1992) 8 ACSR 549.

Bernstrom v National Australia Bank Ltd [2003] 1 Qd R 469.

Burns, Re; National Mutual Life Association of A/asia Ltd v Burns, Ex p (1992) 39 FCR 477.

Caruana and Fenech, Re; Ex p Deputy Commissioner of Taxation (1987) 17 FCR 223.

Codrington, Re; Ex parte Don McKay Tourist and Charter Pty Ltd [1989] FCA 514.

Dey v Victorian Railways Commissioners (1949) 78 CLR 62.

Doukidis, Re: Ex parte Consolidated Constructions Pty Ltd v Melsom (unreported, Fed Ct of Aust, Toohey J, 26 June 1985).

Emmett, Re; Ex parte Beneficial Finance Corporation Ltd [1991] FCA 838.

English, Scottish and Australian Chartered Bank, Re [1893] 3 Ch 385.

General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125.

Lawrenson Light Metal Die Casting Pty Ltd (in liq) v Cosmick Pty Ltd [2006] FCA 753.

Moran v Robertson (2012) 6 BFRA 618; 10 ABC(NS) 84.

Paton v Campbell Capital Ltd (1993) 46 FCR 30.

Rana v University of South Australia (2004) 136 FCR 344.

Segal, Re; Lensworth Finance Ltd v Segal (1975) 45 FLR 85.

Stedman v Deputy Commissioner of Taxation (2000) 44 ATR 88.

Swain v Hillman [2001] 1 All ER 91.

SZHUE v Minister for Immigration and Citizenship [2007] FCA 2005.

White Industries Australia Ltd v Federal Commissioner of Taxation (2007) 160 FCR 298.

Mr Coulson, for the applicant.

Mr Webster, for the first respondent.

Ms Muir, for the second respondent.

Cur adv vult

26 April 2013

Judge Burnett.

Introduction

1 In the principal application the applicant judgment creditors, John Roberts and Ngaire Roberts, seek orders that a personal insolvency agreement (PIA) executed by the judgment debtor, Scott Christian Juniper, and the controlling trustees, Nick Jim Combis and Peter Dinoris dated 24 September 2012 be set aside on the grounds that the terms of the PIA are unreasonable or are not calculated to benefit the creditors generally. Further or alternatively they seek

orders that the PIA be set aside on the grounds that the PIA was not entered into in accordance with part X of the *Bankruptcy Act 1966* (Cth) (the Act) and or that the PIA does not comply with the requirements of part X of the Act. They seek declarations that they are not precluded from proceeding with the presentation of the creditor's petition on the grounds that the PIA was not entered into in accordance with part X of the Act and that it does not comply with the requirements of part X of the Act. Alternatively, they seek orders that the PIA be set aside on the grounds that the debtor omitted a material particular from the statement of his affairs given under ss 188(2C) of the Act or that it included an incorrect and material particular in his statement of affairs. They seek a sequestration order against the debtor.

2 The principal application is opposed by both the debtor and by his controlling trustee's. The debtor has now cross applied seeking orders pursuant to rule 13.10 of the *Federal Circuit Court of Australia Rules 2001* that the principal application be summarily dismissed. The controlling trustee has not joined in that application and will simply abide the order of the Court.

Background facts

3 On 17 July 2012 the debtor signed a s 188 authority. On 9 August 2012, the Trustees issued a notice to creditors that a meeting of creditors would be held on 22 August 2012. The notice included an invitation to creditors to raise any matters that they thought should be investigated by contacting the Trustees.

4 In the meantime the Trustees prepared their initial report to creditors. The report dated 9 August 2012 stated inter alia:

> a) The controlling trustees had written to all the major banks and financial institutions requiring full details of all accounts operated by the debtor and that they had received responses indicating that no funds were likely to be realised for the benefit of creditors should the debtor be the subject of sequestration;
> b) The debtor held shares in six companies. They concluded that no recoveries were likely to be made from those companies if the debtor was subject to sequestration;
> c) The debtor had unsecured creditors which were listed. They noted that none of the creditors were related parties to the debtor; d) As controlling trustees they had concluded their investigations and were of the view that, inter alia:
>
> i) The debtor had not been involved in any business as a sole trader or in partnership in the last 5 years;
> ii) The debtor's past two tax returns (provided by him to the Trustees) provided no basis to suggest that the debtor had any other sources of income or potential assets which were not disclosed in his statement of affairs;
> iii) There were no voidable transactions of which the Trustees were aware from their investigations and enquiries;
> iv) It appeared unlikely, if the debtor was declared bankrupt, that he would be required to make income contributions given the level of his income.

5 The Trustees also noted in their report of 9 August that the debtor had put forward a proposal for a PIA that involved the contribution of $20,000.00 (in addition to $10,000.00 he had already contributed on account of fees) for his creditors. On the basis of those matters the Trustees recommended the original

PIA proposed by the debtor be rejected as there was unlikely to be a dividend to creditors and no certainty that the sums proposed would be paid by the debtor. This was put to the meeting.

6 The meeting was subsequently adjourned for three weeks to permit the Trustee to explore and if necessary amend and review the debtor's proposal for a PIA; to permit further investigations and obtain further material on the debtor's affairs; and, to report to the creditors on a possible amended proposal.

7 At the adjourned meeting held 12 September 2012 the Trustees informed the creditors that the debtor had varied his proposal for the PIA by increasing the proposal payments from $20,000.00 to $60,000.00 giving a total contribution of $70,000.00. The meeting was adjourned to permit creditors to consider the proposal.

8 Finally, at a meeting of creditors held 24 September 2012 the creditors resolved by special resolution that the debtor execute a PIA in terms of the PIA particularised in the Trustee's report dated 19 September 2012 and which was tabled at the meeting. The PIA executed pursuant to the special resolution of 24 September 2012 relevantly provides, inter alia:

a) The debtor will pay the Trustee's the sum of $70,000.00;
b) There are no income contributions payable by the debtor under the PIA; and,
c) The Trustee's have no power to recover voidable transactions under s 118, s 120, s 121 or s 122 of the Act.

9 At the meeting the resolution was passed in the following manner:

a) 9 creditors voting for and 3 creditors voting against the PIA;
b) $48,478,575.00 voting for the PIA and $186,588.00 voting against.

10 The applicant creditors submitted that as a matter of significant note a proof of debt in the sum of $22 million submitted by Bankwest was adjudicated upon by the Trustee in the amount of $836.00. Bankwest voted against the resolution.

11 Prior to the execution of the PIA the debtor had paid the Trustees a sum of $10,000.00 on account of fees. The applicant creditors contend that from the $10,000.00 paid on account, the $60,000.00 paid under the PIA and after allowance for the Trustee's forecast further costs a sum of $31,120.00 would be used in respect of fees, expenses and outlays leaving approximately $38,880.00 available for distribution to creditors. While there was some debate between the parties as to the precise quantum to be allowed for costs in the administration that debate ought not cloud the fact that on any case the sum available for distribution will be minimal.

12 Based on those figures the estimated dividend to creditors is to be 0.005 cents in the dollar. That is to say $38,880.00 is available to meet claims of $70,000,913. If Bankwest is not excluded from proving for dividend purposes, then the dividend becomes 0.008c in the dollar.

13 Mr Charles Perry an officer with the Commonwealth Bank of Australia, responsible for the Bankwest debt has estimated that:

a) eight of the creditors will receive a divided of less than $5.00;
b) three of the creditors will receive dividends of $6.11, $20,36 and $72.50 respectively;
c) BOS International Australia Ltd (BOSI) will receive a dividend of $24,227.70; and,

d) CBA Bankwest if admitted will receive $11,140.77.

In any event as eight of the nine creditors who voted in favour of the PIA will receive less than a $5.00 dividend by operation of Regulation 6.21 those creditors will not be entitled to receive any dividend. In particular the applicant creditors note that as matters currently stand the only creditor to receive a substantial dividend will be BOSI.

14 Of particular concern to the applicant creditors and Bankwest, which supports the applicant creditors' application, is that the PIA excludes the recovery of voidable transactions and the Trustees will have no power to conduct any examination notwithstanding the size of the dividends to be distributed relative to the size of the claims.

15 It is not in issue that the Trustees' are experienced and reputable insolvency practitioners. Nor is there any suggestion that the Trustees had a pre-existing relationship with the debtor or parties associated with him. There is no suggestion that they were not and at all times did not act entirely independently.

Basis for the application

16 The applicant creditors seek to have the PIA set aside on the basis that:

a) The dividend is small in comparison with the total debt;
b) Bankruptcy together with associated rights which flow to the Trustees in bankruptcy may see a better return to creditors;
c) The PIA was entered into other than in accordance with Part X of the Act; and
d) The debtor's statement of affairs contains errors such that the creditors were misled into voting in favour of the PIA.

17 The debtor submits that despite the apparent complexity of the matters raised by them the applicant creditors' application ultimately has no real prospects of success and accordingly ought be summarily dismissed. He contends this is so because:

a) The majority of the relevant allegations made by the applicant creditors are simply wrong and unsustainable on the face of the material before the court;
b) The balance of the allegations, even if assumed in favour of the applicant creditors do not establish any material omission from the statement of affairs, any material non-compliance with the Act, or anything beyond a "mere speculative possibility" of some benefit to all creditors on a bankruptcy. He contends this is simply insufficient to justify setting aside a PIA validly entered into with the approval of a majority of creditors;
c) Ultimately, the applicant creditors' opposition to the PIA is based upon its disgruntled "complaints about the [operation of the] provision of the Act that arise as a consequence of the acceptance" by the majority of creditors of the debtor's PIA.[1]

Legislative framework

18 The relevant rule contained within the *Federal Circuit Court Rules 2001*, r 13.10, provides for disposal by summary dismissal. It provides:

1 *Re Emmett; Ex parte Beneficial Finance Corporation Ltd* [1991] FCA 838at [37].

13.10 — Disposal by summary dismissal

The Court may order that a proceeding be stayed, or dismissed generally or in relation to any claim for relief in the proceeding, if the Court is satisfied that:

(a) the party prosecuting the proceeding or claim for relief has no reasonable prospect of successfully prosecuting the proceeding or claim; or …

19 Applications for summary dismissal pursuant to FCCR 13.10 are interlocutory and not final in character *Rana v University of South Australia* (2004) 136 FCR 344 *SZHUE v Minister for Immigration and Citizenship* [2007] FCA 2005.

20 Notwithstanding the interlocutory character of the application the test to be applied is consistent with the test applicable under s 17A of the Federal Circuit Court of Australia Act.

21 So far as is relevant s 17A of the *Federal Circuit Court of Australia Act 1999* provides:

17A Summary judgment

(1) …

(2) The Federal Circuit Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

(4) This section does not limit any powers that the Federal Circuit Court has apart from this section.

22 The meaning of these provisions is now well settled. In *White Industries Australia Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 298 Lindgren J when discussing the analogous provisions contained in the *Federal Court Act 1976* (Cth) and *Federal Court Rules 2011* (Cth) stated at page 310:

> [54] Under s [17A] I must be satisfied that the applicants have no reasonable prospect of success, but as s [17A] makes clear, this does not mean that I must be satisfied that the proceeding is hopeless or bound to fail. I suggest that the legislature's intention in enacting s [17A] was to lower the bar for obtaining summary judgment (including summary dismissal) below the level that had been fixed by such authorities as *Dey v Victorian Railway Commissioners* (1949) 78 CLR 62 at 91-92, and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130: see *Lawrenson Light Metal Die Casting Pty Ltd (in liq) v Cosmick Pty Ltd* [2006] FCA 753 at [15].

23 His Honour continued at page 312:

> [59] I do not propose to add greatly to the discussion of the meaning and effect of s [17A]. In the United Kingdom it has been held in the context of the similar r 24.2 of the CPRs noted at [53] above, that the expressions "no real prospect of succeeding" and "no real prospect of successfully

> defending" require attention to be given to real, as opposed to "fanciful" or "merely arguable" prospects: *Swain v Hillman* [2001] 1 All ER 91 at 92; *Three Rivers District Council v Governor and Company of the Bank of England* (No 3) [2003] 2 AC 1 at [90], [95], [133]-[134], [158]-[162]; *ED & F Man Products Ltd v Patel* [2003] EWCA Civ 472 at [8]. The *Queensland Court of Appeal has similarly held, following Swain v Hillman* and *Three Rivers District Council v Governor and Company of the Bank of England*, that the "no reasonable prospects of success" test requires the court to determine whether there are "real" as opposed to "fanciful" prospects of success.

24 In the context of a factual dispute of a court of appeal, Queensland in *Bernstrom v National Australia Bank Ltd* [2003] 1 Qd R 469 observed at page 476:

> [39] … The power to enter summary judgment exists where the judge concludes that the evidence, taken at its highest, is such that a properly directed jury could not possibly reach the necessary factual conclusion.

The debtor's submissions

25 The facts observed above are not in dispute. It was upon that basis that the debtor contended that the Court was being asked to set aside a PIA recommended to creditors by an independent trustee and accepted by a clear majority of those creditors. In that case it was contended that for the applicant creditors to succeed they needed to:

> Satisfy the Court that they are entitled to obtain orders that countermand the wishes of the majority of the creditors whose debts equal or exceed 75% in value of all debts; they must put before the Court sufficient material to establish that grounds exist for granting the relief sought. Absent such material, the Court would be entitled to proceed upon the premise that the compromise was prima facie reasonable and was prima facie for the benefit of the creditors generally.[2]

26 Accepting that position the debtor's counsel submitted that accordingly it would be quite wrong to reverse the onus and require the debtor to positively demonstrate that the creditors are better of under the PIA; *Moran v Robertson* (2012) 10 ABC(NS) 84 at [55] (per Flick J). There his Honour was considering an appeal against the decision by this Court to refuse an application to set aside a Part X arrangement. In his judgment Flick J reviewed the relevant authorities. There is no contest concerning the principles emanating from those authorities however they serve to emphasise the discretionary nature of the relief sought and that plainly that such a discretion can only be exercised after a consideration of all the facts.

27 The debtor referred to a number of authorities supporting the general principle that a court would be "cautious in substituting its own judgment for that of the creditors",[3] Since:

> If the creditors are [as here]acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much betters judges of what is to their commercial advantage than the Court can be.[4]

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2 Per O'Lachlan J in *Re Emmett; Ex parte Beneficial Finance Corporation Ltd* [1991] FCA 838 (Unreported, 16 December 1991, O'Lachlan J, FCA).

3 *Segal, Re; Lensworth Finance Ltd v Segal* (1975) 45 FLR 85 at 95 per Reilly J.

4 *English, Scottish & Australian Chartered Bank, Re* [1893] 3 Ch 385 per Lindley LJ.

28 The debtor for instance referred to the decision of O'Loughlan J in *Re Emmett; Ex parte v Beneficial Finance Corporation & Ors* [1991] FCA 632 (16 December 1991) where his Honour refused an application to set aside Part X composition. In that case it was of significance that none of the factors in contest suggested that there might be a need to conduct an investigation into the debtors affairs, or that there might be a need for or justification to examine the debtor. Nor did the evidence suggest that there had been any transactions that might be challenged as a voidable settlement disposition or preference. In deciding to reject the application to set aside the Part X arrangement his Honour considered a number of earlier decisions of the Court. Each decision turned largely on its individual facts. However for present purposes his Honour materially referred to a decision in *Re Doukidis: Ex parte Consolidated Constructions Pty Ltd v Melsom* (unreported, Fed Ct of Aust, Toohey J, 26 June 1985).

29 In that case the debtor had omitted from his statement of affairs certain assets and information which were regarded as material leading to Toohey J making a finding that "certain questions asked at the meeting of creditors suggest that enquiries into his affairs may have proved fruitful". Accordingly on that occasion Toohey J concluded that it was appropriate to make an order setting aside the composition. Likewise in *Re Codrington; Ex parte Don Mckay Tourist & Charter Pty Ltd* [1989] FCA 514 the Court concluded that it was an appropriate case to interfere with a Part X composition and exercise the discretion under s 239 to set it aside in circumstances where the debtor there had made false statements as was the case then before him.

30 Given the comments of O'Loughlan J, particularly at [36], I think it can be fairly concluded that while generally a court will be reluctant to interfere with a Part X composition that had been properly entered into, if there is any evidence to suggest that it was agreed following misstatement by the debtor then that may enliven and entitlement to relief. For reasons which follow that matter has significance in this application particularly in the context of an application which expressly seeks relief for s 222(5)(d) where it is alleged the debtor gave false or misleading information.

31 The debtor's reference to *Agushi, Re; Farrow Mortgage Services Pty Ltd (In Liq) v Cole, Ex p* (1992) 8 ACSR 549 is of no assistance. In that case a creditor sought to set aside the Part X arrangement on the basis that its vote was rejected. An issue in that case concerned the state of the proxy documents. If in this case the only issue in contest was whether or not Bankwest's vote ought to have been allowed at the reduced sum this authority may have been of some assistance as it examines the disposition of that issue, at least on an analogous basis. However that is not this case.

32 Finally the debtor's counsel also referred to the authorities of *Re Caruana; Ex parte Deputy Commissioner of Taxation* (1987) 17 FCR 223 at 233-234; *Re Burns; Ex parte National Mutual Life Association of A/asia Ltd v Burns* (1992) 39 FCR 477 at 494; *Paton v Campbell Capital Limited* (1993) 46 FCR 30 and *Stedman v Deputy Commissioner of Taxation* (2000) 44 ATR 88. Each of those cases can be distinguished on their even facts and add nothing to the principles relevant to determining this interim application.

33 The applicant creditors' complaint has at its heart four factors, namely:

a) The debtor made false statements in his statement of affairs which matters arguably induced a majority of creditors to consent to the PIA;

b) There are unexplained voidable transactions that will not be otherwise open to inquiry;
c) A question remains about the number of creditors who supported the PIA; and
d) The issue of whether there was in fact a "clear majority" of creditors in support of the Part X composition, particularly in circumstances where the Bankwest Debt sought in respect of a guarantee was reduced by the Trustees from of $22 Million to be adjudicated in an amount of $836.00.

34 For the debtor to succeed in its application for summary dismissal it must demonstrate that the applicant creditors have no real prospects of success on those grounds. Given the issues raised by the applicant creditors are factual that means the debtors need to satisfy the Court that when taken at their highest a "properly directed jury", in this case a judge, "could not properly reach the necessary factual conclusion".[5]

35 Until those issues particularly identified at (a),(b) and (d) are resolved there can be no certainty concerning the underlying foundation of the PIA supporting the debtor's contentions in principle. Respectfully, and for this reason, the focus of the debtor's contentions are in my view in error.

Misleading statements

36 The applicant creditor complains that the debtor made no disclosure concerning his involvement with an entity known as Cube Developments. This matter was addressed at the creditor's meeting on 24 September 2012 when the creditors' solicitors inquired of the Trustees about the debtor's association with Cube Developments. In the minutes of the meeting with the creditors it was noted that in response to this inquiry:

> The President advised that the debtor is not a known director or shareholder of any entity by the name of Cube Developments. He further advised:
> - His review of the debtor's prior income tax returns does not indicate any source of income from an entity in the name of Cube Developments;
> - He has conducted searches in relation to any known company, however all searches failed to locate any company in the name of Cube Developments.

37 The applicant creditor contended that while the Trustee's had not disclosed the Part A of the statement of affairs they reported:

a) The debtor had not been a sole trader or in partnership;
b) Companies associated with the debtor as investigated by the Trustee's do not include any association with Cube Developments;
c) The debtor's income for the next twelve months is to be approximately $50,000.00;
d) The report did not say the debtor is employed by Cube Developments.

38 However it appears from the evidence that there is some linkage between the debtors' stated profession of property developer and an entity (legal or otherwise) titled Cube Developments. The business name "Cube Developments" was registered on 11 July 2011. Its principal place of business was noted as "Level 6, 45 Brisbane Road, Mooloolaba QLD 4557" with the business name holder being identified as "Kirsten Juniper". Email correspondence appears to be addressed to the debtor at "scott@cubedevelopments.com.au" and material

5 *Bernstrom v National Australia Bank Ltd* [2003] 1 Qd R 469 at [39].

before the Court includes an email with a footer identifying the debtor as being associated with Cube Developments including particulars of Cube Developments itself referring to "retail/commercial/residential" a mobile number, the debtor's email address as earlier noted and a website address for Cube Developments. Although Mrs Juniper denies the entity "Cube Developments" is a legal entity and carries on business or employs Mr Juniper such denials are somewhat puzzling in the context of the Cube Development get up evident at the foot of the email exhibited to the affidavit of Ms Jefferies filed 22 October 2012 at page 239.

39 The debtors statement of affairs was completed on or about 11 July 2012, that is 12 months after the registration of the business Cube Developments and certainly after the incurring of expenses which have been identified as appearing to be related to the conduct of a property type businesses. Although the Trustees noted that an examination of the debtor's tax returns did not reveal any income had been claimed from such activity the evidence demonstrates there has been some activity and it may well be that the non-disclosure of income in those tax returns reflects a cash flow timing issue. In any event there are clearly factual issues surrounding the debtor's disclosure of those matters in his statement of affairs which lends support to the contention that the statement of affairs may be misleading and that accordingly any vote by creditors based upon the statement was tainted.

40 Further the creditors have placed into evidence tax invoices which support that contention. For instance a tax invoice from KHA Development Managers to the debtor "Re Papillion Villas, Coolum Beach" for professional services including "general planning advice" dated 31 January 2012 in respect of "professional services rendered to 31 January 2012" was accepted by the trustees. Likewise a tax invoice dated 10 February 2012 from a Locality Planning & Consulting directed to the debtor was also allowed. That latter tax invoice was directed to the debtor care of "scott@cubedevelopments.com.au", other tax invoices from the same creditor dated 24 May 2012 and 20 June 2012 were also allowed. Those invoices relate to "South Coolum Rd Vacant Land" and the "Cooroy Site". Invoices from On Cue Properties Pty Ltd dated 25 February 2011 and 5 July 2012 in respect of "Print Advertising 31 Yakaola Parade" and "Property valuation and consultation Forestry Rd Glenview" were also allowed. Those invoices too also appear to relate to the conduct of property enterprises. While it is less clear that there is a connection between those later invoices and Cube Developments it was not in dispute that the debtor uses that web domain for his email.

41 Further doubt surrounded the debtor's disclosures given the address of at least one of the invoice. One invoice was addressed to 63 Esplanade Cotton Tree. That was in contrast to another which was addressed to 9 Nye Avenue, Buderim which was his residential address.

42 Overall when taken at their highest I think it would be open to a properly directed jury to make the necessary factual findings that misleading statements were made by the debtor to his creditors which arguably in turn induced them to agree to the proposed PIA. In my view there is an issue for trial in respect of those matters.

Unexplained mortgage transactions

43 The next matter raised by the applicant creditors concerns the sale of property at 10 Minyama Island, Minyama. The property was sold for $5.7 million and

the Trustees advised that there was no surplus as the mortgage facility provided by the NAB was satisfied from the sale proceeds. They contend that there was also another property at 3 Kumbada Circuit, Minyama which was sold for $1.625 million. The Trustees reported in respect of that property the debtor advised that the proceeds of sale had been applied against the mortgage that was outstanding to the NAB on the property located at 10 Minyama Island. It would seem the proceeds of both sales totalled $7.325 million which was in turn remitted to the NAB notwithstanding that the purchase price of both properties totalled only $5 million. The applicant creditors contend there was no explanation as to why the NAB was entitled to the surplus of $2.5 million even allowing for additional interest. It was submitted that the most obvious explanation was that the two properties were collateral security for third party unsecured debt. Secondly insofar as the surplus which Mr Juniper was otherwise entitled to was applied to other entities by the NAB then Mr Juniper has rights against those entities.

44 In response the debtor contends that the Trustees reported at the final creditor's meeting at which the PIA was approved that the NAB had provided the Trustees with copies of statements which showed that all the funds relating to the property settlements were paid to the NAB and that he had not located any information or documentation that would indicate any instance of voidable transactions that would be available to a trustee in bankruptcy. Prima facie it does appear that the NAB was paid a sum greater than that necessary to discharge its secured indebtedness. That matter bears particular significance against the background of the PIA which expressly provided that "the Trustee's of the PIA will not have the power to recover all payments or transactions made by the debtor or entered into by the debtor pursuant to s 118, 120, 121 and 122 of the *Bankruptcy Act 1966* as if the debtor were a bankrupt". In other words the Trustee's eschew all power to pursue voidable transactions.

45 The debtor's counsel pointed to authority noting a court would be "cautious in substituting its own judgment for that of the creditors"[6] and of the general reluctance of courts to interfere with PIAs entered into after informed consideration: (*Re Emmett; Ex parte Beneficial Finance Corporation*). However the facts, when taken at their highest, could lead to a properly directed jury reaching the necessary factual conclusion concerning a voidable transaction. It follows I do not think the applicant creditors' claim on this ground can be summarily dismissed.

Proof of debts

46 The applicant creditors contend that the most obvious defect preceding any vote on the PIA concerns the acceptance of various proofs of debt. For instance the creditors point to the acceptance of the proof of debt from Thompson Nichol Lawyers in the sum of $2,200.00 for legal fees for legal services provided. The proof of debt appointed the Chairman as proxy and in that event was voted in favour of all resolution. However, the debt itself was supported by a tax invoice in respect of work done for "Property Forum Pty Ltd" and purchasing property at Noosa Blue Resort at Noosa Heads. The applicant creditors contend that there is no mention of Property Forum Pty Ltd in the Trustee's report, nor any explanation as to why the debtor would be obliged to play legal fees for a

6 *English, Scottish & Australian Chartered Bank, Re* [1893] 3 Ch 385 per Lindley LJ.

company in respect of which he had no apparent connection. It was submitted that this creditor ought not to have been permitted to vote at the meeting.

47 Other challenged creditors included the "Locality Planning & Consulting" proof of debt invoiced to the debtor at scott@cubedevelopments.com.au. Given Mrs Juniper's assertions concerning Cube Developments and the absence of supporting documentation the applicant creditors claimed a real issue arises in respect of the eligibility of this creditor to vote on the PIA.

48 Similar arguments were made in respect of proofs of debt from Q on Properties Pty Ltd and Mc Callum Mining.

49 However, the debtor's counsel correctly submits that this complaint by the creditors is rendered otiose because even at its highest, allowing for the invoices in dispute, the resolution would still satisfy the definition of a special resolution as provided for in s 5(1) of the Act. That would be so except for the question of valuation which is discussed below. However if the valuation issue were decided in favour of Bankwest the issue concerning the "majority of creditors" would fall away.

50 In any event irrespective of the valuation issue I accept there is no basis for trial concerning the issue of the admission of proofs of debt from various creditors except insofar as those matters have relevance to other factual issues such as whether or not the PIA is impugned because of misleading statements made by the debtor.

Bankwest debt

51 In material filed by an officer of Bankwest it was deposed that Bankwest claimed to have been entitled to be admitted for voting purposes in the amount of $22,280,794.00 in respect of the PIA plus a further $750.00 for unpaid costs. It contended therefore it ought to have been admitted for that sum. I also note that Bankwest has not to date exercised its rights of review in respect of the Trustees rejection of its proof of debt in the full amount.

52 The Trustees only admitted Bankwest for the amount of $876.95 notwithstanding that the basis of Bankwest's claim against the debtor was in respect of a guarantee granted by the debtor in support of a loan by Bankwest to S & L Developments Pty Ltd, a company associated with the debtor. Bankwest's enforcement proceedings appear to have come to a halt following his entry into the PIA. I note from the material filed on behalf of Bankwest's lawyers that the debtor appears to have acted throughout the course of those proceedings in a manner designed to frustrate the prosecution of that action.

53 Plainly if Bankwest had been admitted for its correct amount its vote against the PIA would have equated to about 31% of the total value of all debts and the special resolution would have failed.

54 Bankwest has a right of appeal against the decision of the Trustee's in respect of its proof of debt pursuant to s 104(1) of the Act. While an appeal is now out of time the Court does have power to extend the time: s 104(3). As at the date of this interim application Bankwest has not made such application. However the affidavit of Charles James Fletcher Perry, the Manager in the Credit and Asset Management division of the Commonwealth Bank and the person responsible for the recovery of this debt has sworn that Bankwest supports the principal application in part because "had Bankwest's claim been properly admitted for the full amount of $22,281,544.00 that it claimed then the purported special resolution passed for the PIA would have failed".

55 Bankwest plainly has an interest in this proceeding and is supporting it by it having filed an affidavit in the terms of that of Mr Perry's as well as an affidavit from its lawyers acting in the original proceeding between it and the debtor. I apprehend from Mr Perry's affidavit that the bank does intend to make such application and if such application is successful then plainly the special resolution ought to be impugned. This matter must first be determined in order to corral the ambit of the principal application. Bankwest did not appear on the hearing of the interim application and it was suggested that a commercial decision had been made concerning the prosecution of its rights. That does appear to be at odds with Mr Perry's deposition. Plainly if Bankwest does not pursue such an application or indeed if such an application is pursued but dismissed the basis for relief sought by the creditors can be confined to disputes concerning

a) Misleading statements in the debtors statement of affairs tainting the vote in favour of PIA; and

b) Voidable transactions.

However before doing so Bankwest ought be afforded an opportunity to address this matter by either making and prosecuting a discreet application or joining in the principal application for its relief.

Summary

56 In summary the debtor seeks summary dismissal of the applicant creditors' application to have the PIA set aside. Except for the issue of the number of creditors comprising the majority who support the PIA each other matter involves questions of fact. When taken at their highest it would be open to reach the necessary factual conclusion to determine the application in favour of the applicant creditors. The debtor ought not have the relief sought and his application is dismissed.

Solicitors for the applicant: *JHL Lawyers*.

Solicitors for the second respondent: *JHK Legal*.

PAUL P McQUADE