DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Bartolome Durado & Delo Be Isugan
v
Foot & Thai Massage Pty Ltd
(U2015/15119; U2015/15122)

DEPUTY PRESIDENT KOVACIC CANBERRA, 10 AUGUST 2018

Applications for relief from unfair dismissal – request by the Respondent that the applications be dismissed on the basis that they are barred by the Deed of Company Administration executed in respect of the Respondent – Respondent's request declined.

[1] Mr Bartolome Durado and Ms Delo Be Isugan (the Applicants) each made an application under s.394 of the *Fair Work Act 2009* (the Act) alleging that the termination of their employment by Foot and Thai Massage Pty Ltd (the Respondent) on 26 October 2015 was unfair. The applications were received by the Fair Work Commission (the Commission) on 16 November 2015.

[2] Consideration of the applications was held in abeyance as a result of a Deed of Company Arrangement (DOCA) which had been executed in respect of the Respondent on 11 April 2016. The reasons for that are set out in my decision of 10 June 2016[1]. The decision included the following:

> "**[14]** The material before the Commission indicates that:
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> - both Applicants are creditors of the Company;
> - the DOCA binds all creditors of the Company;
> - the applications were made prior to the Appointment Date, i.e. 15 December 2015, and were therefore claims for the purposes of the DOCA;
> - s.444E of the Corps Act applies to the Applicants as they are persons bound by the DOCA [s.444E(1)]; and
> - s.444E(3) precludes the Applicants beginning or proceeding with a proceeding against the Company except with the leave of the Court as defined in s.58AA of the Corps Act."[2] (References to the Corps Act are a reference to the *Corporations Act 2001* (Cth))

[3] On 22 November 2017 the Administrator advised the Commission that the DOCA had been wholly effectuated on 17 October 2017.

[4] The applications were subsequently listed for substantive hearing on 1 and 2 March 2018, with the applications part heard at the conclusion of the second hearing day. Further directions were issued on 13 March 2018 in respect of an issue that arose at the hearing on 2 March 2018, with the applications listed for further hearing on 7 May 2018.

[5] On 2 May 2018 the Respondent's representative (who was appointed after the March 2018 hearings) wrote to the Commission requesting that the applications be dismissed and the hearing on 7 May 2018 be vacated for the following reasons:

> "2. In its Decision of 10 June 2016, the Commission was correct in determining that Ms Isugan and Mr Durado were creditors to whom the DOCA applied. They both commenced Commission proceedings (16 November 2015) prior to the Company administration (15 December 2015): *Corporations Act 2001*, section 444D(1).
>
> 3. Ms Isugan's and Mr Durado's claims, which are the subject of these proceedings, are "Historical Employee Claims" and, as such, "Claims" as those terms are defined in clause 1.1 (pages 2 and 3) of the DOCA which states:
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> > "***Claims*** *means all and any existing, or contingent claims, including Historical Employee Claims, and or causes of action, debts, or liability of whatever nature which exist as at the Appointment Date*."
> >
> > "***Historical Employee Claims*** *means all current or contingent claims by current or former employees of the Company arising out of or in connection with the employees' employment relationship with the Company, including, but not limited to, outstanding employee entitlements, superannuation claims, unpaid overtime and unfair dismissal claims*."
>
> 4. Section 444E of the *Corporations Act 2001* does not authorise creditors such as Ms Isugan and Mr Durado to commence or continue proceedings as against the Company upon termination of the DOCA. Rather, as creditors Ms Isugan and Mr Durado claim are subject to the barring of creditors' claims against the Company as provided by clauses 10.1 and 12 of the DOCA and sections 444A(4) and 444D(1) of the *Corporations Act 2001*.
>
> 5. Clause 12.1(c)(iii) of the DOCA provides:
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> > "*Subject to sections 445C, 445D and 445F of the Act and except as otherwise provided in this Deed:*
> >
> > …
> >
> > *(c) A Creditor must not, before the termination of this Deed, or after termination of this Deed unless the Deed is terminated pursuant to a default on behalf of the Company in compliance with its obligations under this Deed*:

…
(iii) take any further steps (including any step by way of legal or equitable execution) in any proceedings against or in relation to the Company at the Commencement Date;"

6. As the DOCA has been effectuated, there is now no prospect of the Deed being terminated due to default on behalf of the Company with respect to its obligations under the DOCA. Accordingly, the moratorium and barring of creditors' claims under clause 12.1(c) of the DOCA will continue indefinitely."

[6] In response to that letter, the Applicant's representative, Mr Stefan Russell-Uren of United Voice, suggested that the hearing scheduled for 7 May 2018 be vacated and instead a mention and/or directions hearing be scheduled to set a timetable to deal with the issue raised by the Respondent. The Respondent agreed with that approach resulting in the Commission relisting the matter for mention and/or directions on 7 May 2018.

[7] Arising out of that mention and/or directions hearing the Respondent's request was listed for a telephone hearing on 23 May 2018. Prior to the hearing Mr Russell-Uren brought to the Commission's and the Respondent's attention the decision of Commissioner Mansfield in *Gerard Donohue and Oceanair Ltd*[3] *(Donohue)* which involved a near identical factual scenario and in which the Commissioner determined that the DOCA in that case barred the proceedings.

[8] At the telephone hearing on 23 May 2018, Mr Athol Opas of Counsel appeared with permission for the Respondent and Mr Russell-Uren appeared for the Applicants.

[9] For the reasons set out below, I have concluded that the Commission's consideration of the Applicants' unfair dismissal applications is not barred by the DOCA.

The Respondent's submissions

[10] In its written submission the Respondent among other things elaborated on the points made in its abovementioned correspondence of 2 May 2018 to the Commission and responded to several aspects of the Applicant's written submissions. Key aspects of the Respondent's submissions were that:

- advice provided by the Administrator to the Respondent's representative on 2 May 2018 was that on 19 July 2017 the DOCA Administrator had paid Ms Isugan $33,825.55 and Mr Durado $7,634.03, with those amounts relating to wages, annual leave and superannuation[4];

- the Applicants had not cited any authorities involving an unresolved claim for compensation for unfair dismissal where the employer was subject to a DOCA in support of their contention that at the time the DOCA was executed in this case they were merely 'prospective creditors' and not 'contingent creditors';

- the Applicants apparent attempt to distinguish claims for unpaid entitlements and claims for compensation for unfair dismissal on the basis that one may be a 'contingent claim' whereas the other is only a 'prospective claim' was not a

distinction or submission which they made in the Commission proceedings in April 2016 regarding the impact of the DOCA on the determination of their applications, adding that it was artificial and incorrect in law for the Applicants to contend such a distinction now;

- the Applicants' contention that their claims for compensation for unfair dismissal were not claims to which the DOCA applied is contrary to the Commission's decision of 10 June 2016 in which it found that the applications in their entirety were claims subject to the DOCA;

- the Applicants' assertion that it would be inconsistent with the terms of the *Corporations Act 2001* (the Corporations Act) to find that their claims for compensation for unfair dismissal were 'Claims' to which the DOCA applied was not supported by any particulars or by any authority;

- claims for unfair dismissal, pending Commission orders under s.390 of the Act, were properly claims to which a DOCA can apply and in this case does apply;

- as creditors the Applicants are subject to the barring of creditors' claims against the Respondent as provided by clauses 10.1 and 12 of the DOCA and ss.444A(4) an 444D(1) of the Corporations Act;

- as the DOCA has been effectuated and terminated, the moratorium and barring of creditors' claims under clause 12.1(c) of the DOCA continued indefinitely;

- the Commission should not entertain proceedings such as unfair dismissal claims in respect of which an order cannot be enforced against the Respondent because of these barring provisions; and

- the correct and preferable course is for the Commission to dismiss these proceedings pursuant to s.587 of the Act.

[11] In support of its submission the Respondent relied on the decision of Justice Burns in *Read v Burns & Ors*[5] *(Read)* and also highlighted the comments of Handley JA in *Colley v Futurebrand FHA Pty Ltd*[6] *(Colley)* as cited by Campbell JA in *BE Australia WD Pty Ltd (subject to a Deed of Company Arrangement) v Sutton*[7] *(Sutton)*.

[12] At the telephone hearing the Respondent relied on its written submissions. Beyond that key aspects of its oral submissions were that:

- the DOCA covered all claims by the Applicants, i.e. their claims regarding unpaid entitlements and their unfair dismissal applications, by virtue of the definition of 'Claims' and 'Historical Employee Claims' in the DOCA;

- the distinction between a contingent liability and a prospective liability was not helpful in this case;

- it does not matter if ultimately the amounts paid to the Applicants by the Administrator did not incorporate an element relating to their unfair dismissal applications as the simple fact is they were paid an amount in respect of their claims;

- the Applicant's submissions seek to ignore or avoid the ordinary or plain words in the DOCA;

- it is not the case that the Applicant's claims for unfair dismissal were not payable at the time the Respondent entered the DOCA;

- drawing on the comments of Handley J in *Colley* and having regard to both s.444D(1) of the Corporations Act and the bar in the DOCA, the Applicant's unfair dismissal claims are barred; and

- the Commission should dismiss the applications with immediate effect.

The Applicant's submissions

[13] The Applicants in their submissions characterised the Respondent's request for their applications to be dismissed as premised on the basis that the DOCA captured the obligations pursued in their applications and the effect of the Corporations Act was that those obligations were expunged when the DOCA was effectuated. The Applicants stated that the Corporations Act provides that "A deed of company arrangement binds all creditors of the company, so far as claims arising on or before the day specified in the deed under paragraph 444A(4)(i)", adding that as at 11 April 2016 each of them had claims in relation to unpaid superannuation and annual leave and that they were each paid an amount in respect of those claims. As to the Commission's jurisdiction under Part 3-2 of the Act, the Applicants contended that were the Commission to make an order under s.390 requiring the Respondent to compensate either of them for having been unfairly dismissed, the right to payment only existed when the order was made. As such, the Applicants contended that as at 11 April 2016 neither was a creditor and that the true character of their applications was that each asked the Commission to create a right which did not exist as at that date.

[14] As to whether an application for an unfair dismissal remedy is a claim within the meaning of s.444D of the Corporations Act, the Applicants relying on the decision in *Edwards & Ors v Attorney General & Anor*[8] *(Edwards)* contended that the claim must arise on or before the Deed date. The Applicants also submitted that as at 11 April 2016 the Respondent owed no obligation to either of them to pay an amount on the occurrence of a possible event or on a certain future date. The Applicants referred to several authorities to support their contention as to the importance of an existing obligation being sacrosanct. Those authorities included *Community Development Pty Ltd v Engwirda Construction Co.*[9] and *National Bank of Australasia Ltd v Mason*[10].

[15] Beyond this, the Applicant's submitted that:

- relying on the decision in *Sutton*, the motion to have these proceedings dismissed should fail and the proceedings continue;

- the DOCA should be interpreted in such a way that is consistent with the terms of the Corporations Act, adding that this was achieved by reading the words 'unfair dismissal claims' in the DOCA as referring to any award issued by the Commission under Part 3-2 of the Act prior to 11 April 2016; and

- there was no inconsistency between concluding on the one hand that a proceeding should not continue until the resolution of a DOCA and on the other hand that a claim subsequently arising did not exist at the time of administration.

[16] Key aspects of the Applicant's oral submissions were that:

- the importance of an existing obligation was clear from the various High Court decisions they relied upon;

- nothing was owed to them in respect of their unfair dismissal claims until such time as the Commission had determined their applications;

- the various NSW Court of Appeal decisions cited in this case which concerned s.106 of the *Industrial Relations Act 1996* (NSW) (the IR Act) should be followed as the powers exercised by the NSW Supreme Court under s.106 were almost a parallel to those exercised by the Commission under Part 3-2 – Unfair Dismissal of the Act;

- the decision in *Read* should not be followed in this case as it was not a case where an obligation was created at a later date;

- they were neither contingent nor prospective creditors in this matter as they only had a mere expectation that a right might be created;

- s.444D(1) of the Corporations Act makes it clear that a DOCA only binds creditors with a claim arising on or before the day specified in the Deed;

- the Corporations Act should not be read such that it provides immunity to a claim that materialises after a DOCA has concluded;

- were the Commission to decide that the applications were compromised by the DOCA, any order dismissing the applications should only take effect 21 days after the Commission's decision so that any appeal would preserve the hearings held to date regarding the applications;

- the letter of 13 April 2016 from the Deed Administrator to creditors (see below) is irrelevant because at that date there was no obligation or entitlement owed to them as a result of their unfair dismissal applications, adding that the Respondent was not justly and truly indebted to them at that time; and

- the fact that the Administrator paid out amounts to them in respect of wages, annual leave and superannuation had no bearing on their unfair dismissal claims.

The DOCA

[17] The following are key elements of the DOCA in the context of this matter:

"**Recital**

A. …

C. This Deed binds all Creditors of the Company pursuant to section 444D of the Act and the Company's officers and members in accordance with section 444G of the Act.

Operative Clauses

1. Specific Definitions

Unless the contrary intention appears:

(a) **Act** means the *Corporations Act 2001* (Cth).

(b) …

(e) **Claims** means all and any existing, or contingent claims, including Historical Employee Claims, and/or causes of action, debts, or liability of whatever nature which exist as at the Appointment Date.

(f) **Commencement Date** means the date specified in Item 9 of Schedule 1, being the date of this Deed [i.e. 11 April 2016].

…

(i) **Creditors** means the creditors of the Company.

…

(r) **Historical Employee Claims** means all current or contingent claims by current or former employees of the Company arising out of or in connection with the employees' employment relationship with the Company, including but not limited to, outstanding employee entitlements, superannuation claims, unpaid overtime and unfair dismissal claims.

(s) …

(u) **Participating Unsecured Creditors** means any person or entity, including any body corporate, whose Claim against the Company would have been provable in the winding up of the Company, if the Company had been wound up on the Appointment Date, excluding any Excluded Creditors.

10. Employees

10.1 The Deed Administrator will adjudicate on Historical Employee Claims like all other Claims in accordance with clauses 11 and 12 of this Deed.

10.2 …

11. Claims

11.1 Subject to the provisions of this Deed, sub-divisions A, B, C and E of Division 6 of Part 5.6 of the Act apply to the proof of acceptance of debts or claims, of Participating Unsecured Creditors under this Deed as if references in those sub-divisions to "liquidator" and "relevant date" were, respectively, references to "Deed Administrator" and "Commencement Date" as defined in this Deed.

11.2 …

12. Moratorium and barring Creditors' debts or Claims

12.1 Subject to sections 445C, 445D and 445F of the Act and except as otherwise provided in this Deed:

(a) …

(c) a Creditor must not, before the termination of this Deed, or after termination of this Deed unless the Deed is terminated pursuant to a default on behalf of the Company in compliance with its obligations under this Deed:

(i) …

(ii) except for the purpose of and to the extent provided by this Deed, institute or prosecute any legal proceedings against the Company in relation to any debts or Claims;

(iii)…

(v) commence or take any further step in any arbitration against the Company or to which the Company is a party; or

(vi) take any other step whatsoever to recover any debt or Claim."

Other relevant documents

[18] On 10 March 2016 Deloitte Touche Tohmatsu, who were appointed as Administrators of the Respondent, provided a Creditor Update which identified the two options available to creditors to consider at their meeting on 18 March 2016, i.e. resolve to accept the proposed DOCA or resolve to place the Company into liquidation. Attached to the letter was an analysis of the "optimistic and pessimistic positions" under the two options. Of note, the

pessimistic DOCA analysis included an amount of $23,290 for 'Contingent Liability – Unfair Dismissal Claims.'

[19] On 13 April 2016 the Deed Administrator wrote to creditors of the Respondent advising that a DOCA had been executed on 11 April 2016. Attached to that correspondence was among other things the terms of the DOCA and a list of creditors who had to date submitted a Proof of Debt or Claim. The attached Terms of the DOCA stated *inter alia* that "The DOCA captures all contingent employee claims (such as unpaid overtime and unfair dismissal)" and "Following payment of the first and final dividend to creditors under the DOCA, all creditors' claims of the Company will be completely discharged." The attached 'Proofs Received List' named both Ms Isugan and Mr Durado, specifying that 'Formal/Informal Proof of Debt Received' of $131,720.82 and $49,118.01 respectively had been received and also identifying those amounts as 'Proofs of Debts Not Yet Adjudicated."

[20] As previously mentioned, the Administrator provided email advice to the Respondent's representative on 2 May 2018 regarding the distribution paid to the Applicants under the DOCA[11]. The email advice included the following table:

	Summary of distributions paid		Nett	PAYG
Wages Dividend	100C/$	**$289,732.18**	189,774.5800	99,957.60
Super	100c/$	**$27,134.70**		
ATO Super POD	100c/$	**$73,397.00**		
Balance for Annual Leave	8.943c/$	**$16,073.10**	10,543.10	5,530.00

[21] The following table is drawn from that email and is a summary of the gross amounts paid to the Applicants under the DOCA (the amount paid in respect of annual leave reflects the dividend ratio specified in the table above, i.e. 8.943 cents in the dollar):

	Wages	**Superannuation**	**Annual Leave**
Delo Be Isugan	$20,834.89	$1,940.46	$988.18
Bartolome Durado	$4,012.05	$381.14	$289.82

The Corporations Act

[22] The relevant provisions of the Corporations Act are set out below:

"**SECTION 444D – Effect of deed on creditors**

(1) A deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i).

(2) …

PART 5.6 WINDING UP GENERALLY
Division 6 – Proof and ranking of claims
SECTION 553 – Debts or claims that are provable in winding up

(1) Subject to this Division and Division 8, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.

(2) …"

Case law

[23] Of all the authorities cited by the parties the circumstances in *Donohue* appear most closely aligned with those in this case. In *Donohue* the respondent raised a threshold argument that the application of the Corporations law arising from it being under a DOCA was a bar to the applicant bringing his unfair dismissal claim. In *Donohue* Commissioner Mansfield set out his reasons for dismissing the unfair dismissal application as follows:

"**[10]** Mr Donohue argued that any payment received by him was in relation to unpaid entitlements and not to settle any unfair termination claim. Mr Millar responded by alleging that the settlement was specifically related to the claim for unfair termination and went on to state that *"...but it does not matter because of the operation of the release which says: everything is released, all debts are put at an end, no matter how they arise, by the making of this payment."* [PN200]

[11] In taking account of the provisions of the Corporations Act and considering the arguments from the applicant and respondent my conclusions are;

- The Deed of Company Arrangement [DCA] at clauses 12.1 and 12.2 deals with `Release from Debts and Claims' and provides that upon the Administrators paying the creditors their full entitlements under the DCA, all debts and claims against the Company shall be extinguished and creditors will have no further rights against the Company.

- The clauses in the DCA are consistent with the prescribed provisions contained in Schedule 8A of the Corporations Regulations 2001.

- The Creditor Schedule to the DCA contains an entry for the applicant recording a claim of $32,525 and a payment of $1,015. The applicant's wife received and banked a cheque for that amount on 17 March 2003. The fact that the applicant tried to return the cheque and subsequently had the amount placed in trust with a third party is of no consequence. In accordance with s.444D of the Corporations Act the DCA binds all creditors.

- When examining the Creditor Schedule to the DCA I note that the entry relating to the applicant records him as an *"Unsecured Creditor"*. There are other entries in the Schedule which set out entries to various persons which lists their priority as *"Employee wages/superannuation"*. A letter from the Administrator to the Commission states. *"...Mr Gerard Donohue was classified as an "excluded employee" for the purposes of providing as a*

priority creditor. However, Mr Donohue was entitled to prove in full as an unsecured creditor..."

- On the basis of the above it would appear that provisions made in the DCA for the applicant were not related to his employment entitlements such as wages and superannuation etc.

- Commissioner Foggo in her decision, on whether the applicant in this matter received remuneration in excess of the specified rate, concluded the rate of remuneration immediately before termination was $62,500 plus approximately $4,800 for superannuation. It does appear that the proof amount of $32,525 for the applicant entered in the Creditor Schedule to the DCA could represent something more closely related to six months pay, the maximum amount that could be awarded by the Commission in lieu of reinstatement.

- The applicant's contention that the amount represents payment for entitlements owed at termination is not consistent with the materials contained on the Commission's case file. There was evidence put before Commissioner Foggo in relation to the calculation of entitlements due to the applicant on termination. There were though, some discrepancies in the documents setting out the calculations prepared by the respondent and the document apparently received by the applicant. Whilst noting the applicant disputed the information contained in the documents and he claimed to have never received payment, the figures shown are nowhere near the amount of $32,525.

- On balance I find that the payment made of $1,015 (approximately 3 cents in the dollar), was in consideration of the unfair dismissal claim. It would appear therefore that the applicant is prevented from pursuing his claim for unfair dismissal due to the payment made under the DCA extinguishing all debts and claims against the Company.

[12] As payment has been made under the Deed of Company Arrangement, the applicant's claim is extinguished and he is therefore prevented from pursuing his unfair dismissal claim."[12]

[24] As previously mentioned, the Applicants relied on the decision in *Sutton* among others. The circumstances in *Sutton* are summarised in the opening paragraphs of the judgment of Campbell JA. I set them out below:

"3 Between 3 August 2004 and 7 October 2005 Ms Mary Sutton performed work as a taxation consultant for the benefit of BE Australia WD Pty Ltd (**"BEA"**). She had no direct contractual relationship with BEA. Rather, her services were provided to BEA through labour hire companies. The arrangements under which she worked were terminated on 7 October 2005, without prior notice or payment in lieu of notice.

> 4 On 1 November 2005 Ms Sutton commenced proceedings in the Industrial Relations Commission (**"IRC"**) against BEA. She alleged that the arrangements with BEA were unfair within the meaning of s 106 ***Industrial Relations Act 1996*** (**"IR Act"**) (NSW) in various respects. She sought to have the relevant contract or arrangement varied so that her services could not be dispensed with except upon reasonable notice, and a monetary payment for breach of the contract or arrangement as so varied.
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> 5 On 1 October 2009, shortly before the proceedings in the IRC were due to be heard, BEA was placed in voluntary administration.
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> 6 A Deed of Company Arrangement (**"DOCA"**) was subsequently approved by BEA's creditors. Section 444E ***Corporations Act 2001*** (Cth) prevents any person bound by the DOCA from proceeding with a proceeding against the company except with leave of the Court.
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> 7 Ms Sutton lodged a Proof of Debt in respect of her claim under s 106 **IR Act**. Ultimately, the Deed Administrators rejected that Proof.
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> 8 Ms Sutton then began proceedings in the Equity Division of the Supreme Court of New South Wales seeking either an order under s 1321 reversing the decision of the Deed Administrators to reject her proof of debt, or an order under s 447A ***Corporations Act*** the effect of which would justify the Deed Administrators in admitting Ms Sutton's proof under the DOCA. The primary judge held that the Deed Administrators had correctly rejected the Proof of Debt. However, the judge also held that an order under s 447A should be made, the effect of which was that Ms Sutton was treated as though she was a creditor for the purpose of the DOCA. Finally, the judge ordered under s 447A that the Deed Administrators should adjudicate her Proof of Debt: ***Sutton v BE Australia WD Pty Ltd (admin apptd)*** [2010] NSWSC 772.
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> 9 In the present proceedings BEA and the Deed Administrators seek leave to appeal against this decision. Their application for leave to appeal has been heard as a concurrent hearing, so that all arguments that the applicants would wish to put if leave were granted have been placed before the Court. The applicants challenge both the primary judge's finding that there was power under s 447A to make an order of the type he made, and his decision that it was an appropriate exercise of discretion to make such an order.
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> 10 …
>
> 13 I have reached the conclusion that the judge was right to conclude that Ms Sutton was not a *"creditor"*, but that it was an error to seek to use s 447A to enable Ms Sutton to be treated as if she were a creditor."[13] (Emphasis as per original)

[25] The following paragraphs set out the basis on which Campbell JA reached the conclusion outlined at paragraph 13 of the above extract:

"104 There is one sense in which Ms Sutton had a claim at the time that the administrators were appointed. In that sense, she had a claim because she had litigation on foot in the Industrial Relations Commission, in which she was claiming an order from the Commission.

105 However, just because something is a "claim" in one sense of the word does not mean necessarily mean that it is a "claim" within the meaning of s 553. The particular shade of meaning that "claim" has in s 553 can be ascertained from the purpose of the section. That purpose is that all the legal obligations to which a company is subject should be ascertained, and each of them valued as at a common date, so that those obligations can be taken into account in a winding up or other administration that is under way. Someone has a "claim" within the meaning of s 553 if he or she has a basis, founded on an existing legal right, for asserting a right to participate in the division of the assets of the company. Ms Sutton did not have one of those.

106 In *Majik Markets*, Handley JA recognised that the former s 88F created substantive rights. However, as recognised in the passage that Handley JA quoted from the judgment of Latham CJ in *Ex parte Barrett*, the substantive right that the section created is one that arises *when* the Commission exercises its discretion in favour of applicant. When McHugh JA, in *Minister for Youth and Community Services* said that the power conferred by s 88F is not an exercise of judicial power he was drawing attention to the power not being one that depended upon the ascertainment and enforcement of existing rights of the parties. The judgments in *Fisher v Madden* all proceed on the basis that an applicant for an order under s 106 has nothing more than a right to take proceedings, that did not arise from any existing legal obligation of the defendant in those proceedings, and did not result in there being any legal obligation of the defendant in those proceedings until such time as the Commission had made an order. In *Colley v Futurebrand* Handley JA recognised that the filing of an application under s 106 resulted in the applicant acquiring a legally enforceable right to have the Commission hearings determine the application according to law, and that that was a new right, different from the right to take advantage of the section. Ms Sutton had rights of that kind at the commencement of the administration, because by that time she had already begun proceedings in the Commission. However, those rights were not ones that resulted in her having any legal entitlement to participate in the division of the assets of the company.

107 That Ms Sutton does not have a "claim" within the meaning of s 553 is also consistent with the decisions of the High Court in *Engwirda Constructions* and *Mason*, with the decision of this court in *Edwards v Attorney General*, and with the exposition of provable claims in the Full Court of the Federal Court in *Lam Soon*. Each of those decisions required that there be an existing legal obligation that a company owed at the relevant date to someone before that person has a "claim" that is provable in the winding up of the company.

108 The trial judge in the present case was right in concluding that Ms Sutton did not have a "claim". There is no occasion to overrule the decisions in *One.Tel* and *Buckingham*."[14] (Underlining added)

[26] Special leave to appeal the decision in *Sutton* was subsequently refused by the High Court[15].

[27] The Respondent *inter alia* relied on the decision in *Read*. *Read* concerned an application by the second defendant in that matter that a claim against it initiated by the plaintiff be dismissed. By way of background, the plaintiff in *Read* was prosecuting proceedings against several defendants in respect of losses he allegedly sustained as a result of purchasing a property in NSW and participating in a managed investment scheme in respect of the property. Those proceedings commenced in 2008. However in December 2013 the second defendant executed a DOCA which led to the plaintiff being invited to provide a formal proof of debt to the administrator of the DOCA. The plaintiff declined the invitation. The DOCA in that case provided that a third party would contribute $40,000 for distribution to creditors of the second defendant in accordance with the terms of the DOCA. Specifically, clause 17.2(ii) of the DOCA provided that "Otherwise, the Creditors… must accept (whether the person's Claim is or is not actually admitted or established under this Deed) their entitlements under this Deed in full satisfaction and complete discharge of Claims and each of them will, if called upon to do so, execute and deliver to the Company such forms of release of any Claim as the Company of the Deed Administrator requires."[16] In early August 2015 the second defendant, which had by then been discharged from voluntary administration on account of performance of the DOCA, wrote to the plaintiff requiring him to execute and deliver a form of release in which he released the second defendant with respect to the claim he had made against it in the proceedings. The plaintiff failed to do so. The plaintiff in his submissions submitted *inter alia* that clause 17.2(ii) of the DOCA was invalid and that at the time of the second defendant entering into voluntary administration he did not have a "provable claim" against the company given the existence of a genuine dispute concerning his claim.

[28] In rejecting the plaintiff's submissions Justice Burns stated as follows:

> "**[13]** I am satisfied that the plaintiff is bound by the DOCA. In *Lehman Brothers Holdings v City of Swan* (2010) 240 CLR 509, the plurality (French CJ, Gummow, Hayne and Kiefel JJ) after receiving the provisions of the CA [Corporations Act] concerning deeds of company arrangement, said at [38]:
>
> > The subject matter, scope and purpose of the provisions that have been mentioned readily yield the inference that the subject matter of the compromise or arrangement must be debts or claims against the company. And the debts or claims the subject of the compromise or arrangement can, and ordinarily will, extend to any debt or claim that would be provable in a winding up. That is, in the words of the provision identifying provable debts and claims (s 553(1)), the debts or claims the subject of the compromise or arrangement, whether by way of moratorium or release, will be "all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date".
>
> **[14]** It is clear from the above, and from the provisions of the CA, that the deed of company arrangement provisions concerning what debts or claims may be

compromised by a deed of company arrangement are not to be read narrowly. The deed may bind not only creditors whose debts are due and payable, but also contingent and prospective creditors who have claims for unliquidated damages: *Hoath v Connect Internet Services* (2006) 229 ALR 566 per White J at [190]. Not only may contractual claims be compromised, but so may claims in tort: *Re: RL Child & Co Pty Ltd* (1986) 5 NSWLR 693.

[15] The plaintiff's claim against the second defendant is for unliquidated damages for misrepresentation in contravention of the Trade Practices Act 1974 (Cth), the CA and the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act). Although the plaintiff's claim was contingent, in the sense that liability on the part of the second defendant had not been established as at the date of execution of the DOCA, the plaintiff's claim is one that would have been provable on a winding up of the company, and accordingly is a claim which was, at the relevant date, capable of being compromised by a deed of company arrangement.

[16] I am further satisfied that the plaintiff's claim against the second defendant falls within those debts or claims compromised by the DOCA.

…

[18] There is no merit in the submission of the plaintiff that the second defendant's application should be refused because of the alleged invalidity of clause 17.2 (ii) of the DOCA. First, the validity or invalidity of clause 17.2 (ii) is irrelevant to determining whether the plaintiff's claim has been compromised by the DOCA. Secondly, consistent with conventional principles governing the interpretation of deeds, the DOCA should be interpreted so as to preserve the validity and efficacy of the document and all its provisions. As such, where the provisions of 17.2 (ii) permit the company to call for a creditor to complete a form of discharge, this should be interpreted as limited to the period after the termination of the DOCA and the role of the Deed Administrator. The continuation of clause 17.2 in force after the termination of the DOCA is provided for by clause 19.14. Provisions such as clause 19.14 are quite common and necessary provisions which ensure the efficacy of the deed after the DOCA has terminated under its terms.

…

[20] … the plaintiff's claims against the second defendant will be dismissed."[17]

[29] The Respondent also relied on the decision of Handley JA in *Colley* which concerned whether an application under s.106 of the IR Act was barred by s.108A(1) of the IR Act which excluded contracts of employment with a remuneration of more than $200,000 from the NSW Industrial Relations Commission's jurisdiction under s.106. Specifically, Handley JA stated as follows in his decision:

"**[30]** Given that the only right expressly conferred by s 106 is a right to apply to the Commission for specific relief, a would be applicant, as Meagher JA said [para 12] "has the right to apply for an order, nothing more". Even if the contract is unfair and an experienced practitioner could give some estimate of the likely order, there is, as Meagher JA said [para 12], no "right to a quantifiable order". The claimant had no

> ascertainable right or entitlement defined by reference to past facts similar to the rights to compensation in *Hamilton-Gell v White* [para 22] and *Resort Management* [para 20 & foll], the right to the hardship allowance in *Chief Adjudication Officer v Maguire* [para 24 & foll], or the land rights claim in *New South Wales Aboriginal Land Council v Minister* (1988) 14 NSWLR 685.
>
> **[31]** The filing of an application under s 106 causes a right to accrue because the applicant acquires (*Esber* [para 13], *Gerrard* [para 14]) a legally enforceable right to have the Commission hear and determine the application according to law. This is a new right, different from a mere right to take advantage of the section.
> **[32]** There is no other act or event which can convert the general right to take advantage of s 106 into an accrued or acquired right. This is not a case where a right or entitlement automatically accrues or is acquired on an event such as an unfair dismissal, the injurious affection of land (*Resort Management*), the giving of a notice to quit (*Hamilton Gell v White*), or an illness causing a special disability (*Maguire*).
>
> **[33]** Until an application under s 106 is made the right under that section can fairly be characterised as a mere right to take advantage of the section, to use the language of Lord Herschell LC [para 17], and an abstract rather than a specific right to use the language of Atkin LJ [para 22]."[18]

[30] In its written submissions the Respondent highlighted the reference to unfair dismissal in paragraph [32] of *Colley*, contending that Handley JA considered that a right or entitlement automatically accrued or was acquired upon an unfair dismissal. It is not clear from the decision as to on what basis Handley JA considered a right or entitlement accrued or was acquired upon an unfair dismissal as paragraph [32] is the only time unfair dismissal is referred to in the decision in *Colley*. Irrespective of this, the decision could not be construed as referring to the unfair dismissal provisions in the Act given that it predates the enactment of the Act by several years. For these reasons, I attach no weight to the reference to unfair dismissal in *Colley*.

[31] The Applicants contended that they were neither contingent nor prospective creditors in this case. The meaning of the term contingent creditor was considered by the High Court in *Community Development Pty Ltd v Engwirda Construction Co.*[19] *(Engwirda)*. *Engwirda* was cited in *Sutton* (see paragraph 108 of the above extract from *Sutton*). In *Engwirda* Kitto J stated:

> "Clearly the respondent was not a creditor of the appellant in the sense of one to whom money is presently owing … The respondent's right to maintain the petition depended therefore upon its being a contingent creditor of the appellant, and upon its not being debarred by the arbitration clause from presenting and prosecuting the petition. The arbitration clause precluded "any action upon" a dispute or difference within the clause and the quoted expression in this context means, I think, an action in which an adjudication upon the dispute or difference is involved. By the winding-up petition the respondent did not seek an adjudication upon the question whether it was entitled to a final certificate. It claimed, in effect, that the contract imposed on the appellant a liability to pay the respondent $12,973.87 (the contract price less the amount covered by certificates already given), plus the value of extras, contingently upon the respondent's doing the relevant work to the architect's (or ultimately the arbitrator's)

satisfaction and that the fact sufficed to make the respondent a contingent creditor of the appellant.

Not much assistance is to be gained, I think, from observations that are to be found in reported cases as to the import of the word "contingent", and I shall refer to one only. In *In re William Hockley Ltd.* (1), Pennycuick J. suggested as a definition of "a contingent creditor" what is perhaps rather a definition of "a contingent or prospective creditor", saying that in his opinion it denoted "a person towards whom, under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date". The importance of these words for present purposes lies in their insistence that there must be an existing obligation and that out of that obligation a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that must happen or only an event that may happen. A building contract creates, as soon as it is entered into, an obligation upon the building owner to pay the contract price, either as a whole upon a future event or, more usually, by progress and final payments each of which is to be made on a future event. The event or events may not happen, but if and when one of them does happen the building owner, by force of the contractual obligation, must pay the builder a sum of money. It is, I think, nothing to the point that the event may be complex, as where the payment is agreed to be made when the whole or some part of the work has been done to the satisfaction of an architect as expressed in a certificate or to the satisfaction of an arbitrator as expressed in an award: the building owner is bound from the time the contract is made to pay money to the builder upon a contingency; and that in my opinion makes the builder a contingent creditor of the owner."[20] (Underlining added)

[32] Also in *Engwirda*, Owen J stated as follows:

"The appellant's second submission raises the question whether, having regard to c1. 26 of the contract, the respondent was, at the date of the presentation of the petition, a contingent creditor of the appellant …

In the present case the appellant was, at all material times, under a contractual obligation to pay to the respondent the amount, if any, which might be found by an arbitrator to be due to it under the building contract. Whether or not that obligation would ultimately result in a debt becoming payable by the appellant to the respondent was dependent on a contingency, namely the making of an award in the respondent's favour by an arbitrator acting under cl. 26 of the building contract. In these circumstances I am of opinion that the respondent was, at the date of the presentation of the petition, a contingent creditor of the appellant. It follows that the respondent was entitled to present the winding-up petition and the appeal should be dismissed."[21]

[33] The terms contingent and prospective creditors were also mentioned in *Edwards*. In that case Young CJ in Equity described the terms as follows:

"**[59]** … A contingent creditor is a person to whom a corporation owes an existing obligation out of which a liability on its part to pay a sum of money will arise in a future event, whether that event be one which must happen or only an event which may happen: *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455; *Re International Harvester Australia* (1983) 1 ACLC 700 at 703.

> Again, the liabilities in this case must be distinguished from the case of a prospective creditor, a prospective creditor being one who is owed a sum of money not immediately payable but which will certainly become due in the future either on some date which has already been determined, or on some date determinable by reference to future events: *Stonegate Securities Ltd v Gregory* [1980] Ch 576; *Commissioner of Taxation v Simionato Holdings Pty Ltd* (1997) 15 ACLC 477.
>
> **[60]** The distinction is vital because whilst contingent or prospective creditors are taken into account in assessing solvency, possible future claims that might crystallise are not ..."[22] (Underlining added)

[34] A number of principles can be gleaned from the above decisions. Those principles are:

- someone has a "claim" within the meaning of s.553 of the Corporations Act if he or she has a basis, founded on an existing legal right, for asserting a right to participate in the division of the assets of the company (*Sutton* at paragraph 105)

- a claim that would have been provable on a winding up of the company is a claim which was, at the relevant date, capable of being compromised by a DOCA (*Read* at paragraph [15]);

- to be considered a contingent creditor there must be an existing obligation out of which arises a liability on the part of the company to pay a sum of money which will arise as a result of a future event, whether it be an event that must happen or only an event that may happen (*Engwirda* as per Kitto J; *Edwards* at paragraph [59]); and

- a prospective creditor is one who is owed a sum of money not immediately payable but which will certainly become due in the future (*Edwards* at paragraph [59]).

[35] I will apply these principles in this matter.

Consideration of the issues

[36] Based on a literal reading of the DOCA it is clear that the Applicants' unfair dismissal applications are 'Claims' for the purposes of the DOCA on the basis that they come within the definition of 'Historical Employee Claims.' While I accept the Respondent's contention that the Commission in its decision of 10 June 2016 found that the Applicants' unfair dismissal claims were claims for the purposes of the DOCA (see paragraph [2] above), it needs to be pointed out that it was not argued at that time by either the Applicants or the Administrator (the Respondent did not participate in the proceedings) that the practical effect of that was that the applications would be barred by virtue of the operation of the DOCA. Accordingly, I do not accept that the issue raised in the Respondent's letter of 2 May 2018 has been effectively determined by default by the Commission in its decision of 10 June 2016 in circumstances where there was no consideration of the issue.

[37] With particular regard to the issue, the legislative scheme in Pt 3-2 of the Act empowers the Commission to order the remedies of reinstatement or compensation once a dismissal has been found to be unfair. In this respect s 390 specifically provides:

"**Division 4 – Remedies for unfair dismissal**

390 When the FWC may order remedy for unfair dismissal

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
  (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
  (b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394

(3) The FWC must not order the payment of compensation to the person unless:
  (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
  (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies." (Underlining added)

[38] To date the Commission is yet to determine whether the Applicants' dismissal were unfair. Only if the Commission determines that their dismissals were unfair is it empowered under s.390 of the Act to order a remedy for unfair dismissal. Further, an order for the payment of compensation can only be made if the Commission is satisfied that reinstatement is inappropriate and it considers such an order appropriate in all the circumstances of the case. In other words a decision to order compensation is a discretionary one. As such, drawing on the language in *Sutton*, it cannot be said that at the time the DOCA was executed that there existed a legal obligation for the Respondent to pay either of the Applicants an amount of money as compensation for unfair dismissal. The only right that the Applicants had in respect of their unfair dismissal applications as at 15 December 2015 (the Appointment Date specified in the DOCA) was the right to have those applications considered by the Commission. Beyond that there is no certainty that the Commission would determine that the Applicants' dismissals were unfair. In short, the Applicants are not guaranteed any remedy in respect of their applications. As is clear from s.390(1)(b) of the Act a finding a dismissal is unfair is a prerequisite to the Commission considering the issue of remedy.

[39] Further, I note that there is no evidence in this case that the proof of debts submitted by the Applicants included an amount for unfair dismissal, though given the amounts involved I consider it likely that those proof of debts did. Nor is there any evidence before the Commission indicating that if the proof of debts did include an amount for unfair dismissal the Deed Administrator rejected that element of the Applicants' proofs of debt. However, based on the material before the Commission, it is clear that, unlike the circumstances in *Donohue*, the amounts paid to the Applicants under the DOCA did not include any amount for unfair dismissal. It is for this reason that I do not consider it appropriate to follow the approach taken in *Donohue*.

[40] While it was argued that the decisions in *Sutton* and *Read* were inconsistent, in my view a key consideration in both decisions was whether there existed a claim that was provable on a winding up of the company's involved. In *Sutton* Campbell JA concluded that such a claim did not exist[23] whereas in *Read* Burns J concluded that such a claim did exist[24]. Those differing conclusions in large part appear to stem from the different legislative

provisions involved in the particular matters, i.e. s.106 of the IR Act in *Sutton* and s.75B of the *Trade Practices Act 1974* (Cth) in *Read*.

[41] Section 106 of the IR Act although it deals with the issue of contract is similar to the unfair dismissal provisions in the Act in that it provides for a number of discretionary decisions by the NSW Supreme Court. This is highlighted in the following extract from s.106:

> "**106 Power of Supreme Court to declare contracts void or** varied
>
> (1) The Supreme Court may make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if the Supreme Court finds that the contract is an unfair contract.
>
> (2) …
>
> (5) In making an order under this section, the Supreme Court may make such order as to the payment of money in connection with any contract declared wholly or partly void, or varied, as the Supreme Court considers just in the circumstances of the case.
>
> (6) …" (Underlining added)

[42] Given the abovementioned similarity, I consider the decision in *Sutton* particularly relevant in this case. In *Sutton* the Court concluded that having made an application under s.106 of the IR Act which was yet to be determined by the Court did not create a legal entitlement for the plaintiff to participate in the division of the assets of the company and that therefore the plaintiff did not have a claim within the meaning of s.553 of the Corporations Act. The Court also upheld the finding below that the plaintiff was not a 'creditor' for the purposes of the DOCA in that case. As previously mentioned the High Court subsequently refused special leave to appeal the decision in *Sutton*.

[43] Applying the ratio adopted in *Sutton* to the circumstances in this case does not support a finding that the Applicants had a claim in respect of their unfair dismissal applications which was provable on a winding up of the Respondent. This is because, drawing on the language in *Sutton*, for a claim to be provable in the winding up of a company there had to be an existing legal obligation that the Respondent in this case owed to the Applicants in respect of their unfair dismissal applications as at the Appointment Date.

[44] The importance of a claim being provable in the winding up of the company is reinforced by:

- the definition of 'Participating Unsecured Creditors' in the DOCA (the Applicants were unsecured creditors) which states that the term "means any person or entity, including any body corporate, whose Claim against the Company would have been provable in the winding up of the Company, if the Company had been wound up on the Appointment Date, excluding any Excluded Creditors" (underlining added); and

- clause 11 of the DOCA which provides that, subject to the provisions DOCA, sub-divisions A, B, C and E of Division 6 of Part 5.6 of the Corporations Act apply to

the proof of acceptance of debts or claims – s.553 appears at sub-division A of Division 6 of Part 5.6 of the Corporations Act.

[45] Further, in circumstances where the Commission is yet to determine whether or not the Applicants were unfairly dismissed it cannot be said that:

- there is an existing obligation for the Respondent to pay the Applicants a sum of money in respect of the termination of their employment which will arise as a result of a future event; or

- the Applicants are owed a sum of money by the Respondent in respect of the termination of their employment which will certainly become due in the future.

[46] This does not support a finding that the Applicants were either contingent or prospective creditors as at the Appointment Date specified in the DOCA.

[47] The above analysis does not support a finding that despite the terms of the DOCA, in respect of their unfair dismissal applications the Applicants were either creditors or had a claim for the purposes of the DOCA. Accordingly, the applications are not capable of being compromised by a DOCA. This in turn supports a finding that the Commission's consideration of the Applicants' unfair dismissal applications is not barred by the DOCA.

Conclusion

[48] For all the above reasons, I find that the Commission's consideration of the Applicants' unfair dismissal applications is not barred by the DOCA. Against that background, the applications will shortly be listed for a mention and/or directions hearing to settle a timeframe for completing the hearing of the applications.

DEPUTY PRESIDENT

Appearances:

S. Russell-Uren for the Applicants.
A. Opas of Counsel for the Respondent.

Telephone Hearing details:

2016.
Canberra:
May 23.

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[1] [2016] FWC 3759
[2] Ibid at [14]
[3] PR947300
[4] Exhibit 1
[5] [2016] ACTSC 1
[6] [2005] NSWCA 223
[7] [2011] NSWCA 414 at [79]
[8] [2004] NSWCA 272
[9] [1969] HCA 47
[10] [1975] HCA 56 at [15]
[11] Exhibit 1
[12] PR947300 at [10]-[12]
[13] [2011] NSWCA 414 at [3]-[13]
[14] Ibid at [104]-[108]
[15] [2012] HCATrans 167
[16] [2016] ACTSC 1 at [5]
[17] Ibid at [13]-[20]
[18] [2005] NSWCA 223 at [30]-[34]
[19] (1969) 120 CLR 455
[20] Ibid at 458-459
[21] Ibid at 461-462
[22] [2004] NSWCA 272 at [59]-[60]
[23] [2011] NSWCA 414 at [106]
[24] [2016] ACTSC 1 at [15]