

Supreme Court

New South Wales

Case Name: Kennedy Civil Contracting Pty Ltd (Administrators Appointed) v Richard Crookes Construction Pty Ltd; In the matter of Kennedy Civil Contracting Pty Ltd

Medium Neutral Citation: [2023] NSWSC 99

Hearing Date(s): 2 February 2023

Decision Date: 17 February 2023

Jurisdiction: Equity - Technology and Construction List

Before: Ball J

Decision: (1) Direct that within 14 days of the date of this judgment the parties bring in short minutes of order to give effect to this judgment, any agreement in relation to a stay and, if costs can be agreed, the parties' agreement in relation to costs;
(2) If the parties cannot agree on the form of the short minutes of order dealing with the matters referred to in (1), direct that each party within 21 days of the date of the judgment provide to my Associate a form of orders for which they contend and submissions not exceeding 5 pages in support of those orders;
(3) Direct that any remaining issues between the parties be decided on the papers.

Catchwords: CIVIL PROCEDURE — Summary disposal — Judgment for plaintiff — Abuse of process — Claims made under the Building and Construction Industry Security of Payment Act 1999 (NSW) — Where claimant is hopelessly insolvent — Where claimant executed deed of company arrangement to avoid provisions which apply to a claimant in liquidation

CORPORATIONS — Voluntary administration — Deed of company arrangement — Termination for some other

reason under the Corporations Act 2001 (Cth), s 445D(1)(g) — Whether deed of company arrangement has a proper purpose — Where deed of company arrangement was executed to avoid separate legislation which apply to a corporation in liquidation

Legislation Cited: Building and Construction Industry Security of Payment Act 1999 (NSW)
Corporations Act 2001 (Cth)

Cases Cited: Blacktown City Council v Macarthur
Telecommunications Pty Ltd [2003] NSWSC 883;
(2003) 47 ASCR 391
Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69
Grosvenor Constructions (NSW) Pty Limited (in administration) v Musico & Ors [2004] NSWSC 344
Mighty River International Ltd v Hughes and Bredenkamp (as deed administrator of Mesa Minerals Limited) (2018) 265 CLR 480; [2018] HCA 38
Re Sales Express Pty Ltd (Administrators Appointed) [2014] NSWSC 460
Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252; [2010] HCA 23
The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc (1994) 181 CLR 404
University of Sydney v Cadence Australia Pty Limited & Anor [2009] NSWSC 635
Urban Traders v Paul Michael [2009] NSWSC 1072

Texts Cited: Australian Law Reform Commission, General Insolvency Inquiry, Volume 1 (Report No 45, December 1988)
New South Wales Legislative Council, Parliamentary Debates (Hansard), 24 October 2018
Review of Security of Payment Laws (Commonwealth, Department of Jobs and Small Business)

Category: Principal judgment

Parties: Kennedy Civil Contracting Pty Ltd (Administrators Appointed) (Plaintiff in 2022/288266 and Defendant in 2022/353631)
Richard Crookes Constructions Pty Limited (Defendant in 2022/288266 and Plaintiff in 2022/353631)

Representation:

Counsel:

Dr AJ Greinke (Plaintiff in 2022/288266 and Defendant in 2022/353631)

S Robertson SC with HW Somerville (Defendant in 2022/288266 and Plaintiff in 2022/353631)

Solicitors:

Chamberlains Law Firm (Plaintiff in 2022/288266 and Defendant in 2022/353631)

Colin Biggers & Paisley (Defendant in 2022/288266 and Plaintiff in 2022/353631)

File Number(s):

2022/288266 and 2022/353631

Publication Restriction:

None

JUDGMENT

- 1 In the proceeding commenced in the Technology and Construction list (**the T&C Proceeding**) Kennedy Civil Contracting Pty Ltd (Administrators Appointed) (**KCC**) seeks to recover amounts said to be due to it from Richard Crookes Constructions Pty Ltd (**Richard Crookes**) under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the SOP Act**) on the basis that the amounts claimed were the subject of valid payment claims served under the SOP Act and Richard Crookes either has, in the case of some claims, failed to pay an amount specified as a “scheduled amount” (that is, an amount that it agreed to pay) in payment schedules served in respect of the claims or, in the case of other claims, failed to serve a payment schedule in respect of the relevant component of the claim within the 10 business days specified in s 14(4)(b)(ii) of the SOP Act. Amounts of the first type are recoverable “as a debt due to the claimant, in any court of competent jurisdiction” under s 16(2)(a)(i) of the SOP Act. Amounts of the second type are recoverable in the same way under s 15(2)(a)(i) of the SOP Act. Under both provisions, Richard Crookes is not entitled to bring any cross claim against KCC or to raise any defence in relation to matters arising under the relevant construction contracts: see ss 16(4)(b) and 15(4)(b) respectively. However, its right to bring separate proceedings in respect of the relevant construction contracts is preserved by s 32 of the SOP Act. It is for that reason that the

provisions of the SOP Act are often described as introducing a “pay now, argue later” regime. The total amount claimed by KCC under ss 15(2)(a)(i) and s 16(2)(a)(i) of the SOP Act is \$683,928.49 plus interest.

- 2 Richard Crookes resists the claim on two bases. First, in the proceeding commenced in the Corporations List (***the Corporations Proceeding***), it contends that a deed of company arrangement (***DOCA***) executed by KCC’s creditors on 17 November 2022 is liable to be terminated pursuant to s 445D(1) of the *Corporations Act 2001* (Cth) (***the CA***), with the result that KCC will be taken to have passed a special resolution under s 491 that it be wound up voluntarily: see CA s 446AA(2). Under s 32B(1) of the SOP Act, “a corporation in liquidation cannot serve a payment claim under this Part or take action under this Part to enforce a payment claim (including by making an application for adjudication of the claim) or an adjudication determination”. Richard Crookes claims that the DOCA is liable to be terminated under s 445D(1) of the CA because it was entered into for a wrongful purpose — that is, to circumvent the operation of s 32B of the SOP Act. On termination of the DOCA and consequent liquidation, KCC will lose its rights under the SOP Act.
- 3 Second, Richard Crookes claims that, for similar reasons, the Court ought to stay the T&C Proceeding on the basis that that proceeding is an abuse of process.
- 4 It is common ground that, absent a stay, and assuming that the DOCA is not terminated, KCC is entitled to judgment for the amount it claims.

Background

- 5 The relevant facts are not in dispute.
- 6 Richard Crookes is a major construction company that conducts large scale projects throughout New South Wales, Queensland and the Australian Capital Territory. KCC operated a civil construction business providing plant and equipment hire, demolition services, bulk haulage services, stormwater services, labour hire and civil contract works.

- 7 On around 1 November 2021, Richard Crookes engaged KCC under two subcontracts to carry out civil, stormwater and associated works at a project at Bankstown Airport for which Richard Crookes was the head contractor.
- 8 In December 2021, January 2022, February 2022, April 2022, May 2022 and June 2022, KCC served payment claims on Richard Crookes under the relevant subcontracts. The details of the payment claims are not relevant to the issues to be resolved in these proceedings. It is common ground that the payment claims were validly made under the SOP Act. As I have explained, in a number of cases, Richard Crookes failed to serve a payment schedule in response to the relevant claims within the 10 business days specified in the SOP Act. In other cases, it served payment schedules in respect of the relevant claims identifying the scheduled amounts it was willing to pay. However, it has failed to pay those amounts.
- 9 On 1 August 2022, joint and several voluntary administrators were appointed to KCC pursuant to s 436A of the CA. It is common ground that KCC is and was at the time the administrators were appointed hopelessly insolvent.
- 10 In their further report to creditors dated 2 November 2022, the administrators recommended that the creditors resolve that KCC execute what the administrators described as a “Holding DOCA” so as to “enable for the mechanism contained within the [SOP Act] to be utilised”. The administrators said:

If the proposed holding DOCA was to be accepted by the creditors, then this would keep [KCC] out of Liquidation and would enable the Joint and Several Administrators to continue pursuing [KCC’s] outstanding debts using mechanism contained within [the SOP Act].
- 11 At an adjourned creditors’ meeting held on 10 November 2022, KCC’s creditors resolved that the company execute a DOCA in the terms proposed by the Administrators. That deed was executed on 17 November 2022.
- 12 Clause 4.1 of the DOCA provides:

Any funds (**SOPA Funds**) received by the Company after entry into this deed as a result of a claim, adjudication or judgment (other than a cost order) obtained against a debtor (**the SOPA Debtor**) under the *Building and Construction Industry Security of Payment Act 1999* (NSW) will be paid by the Company (by, or with the consent of, the Deed Administrators pursuant to section 468(2)(ab) [of the CA] to the Deed Administrators and held by the

Deed Administrators as trustee (**the Trustee**) on a trust for the Company and each SOPA Debtor on the terms in this clause 4.

- 13 By cl 4.2, the SOPA Funds are held in trust pending the final determination of the SOPA Debtor's claims against KCC, at which time the funds are to be paid in accordance with the resolution of that claim.
- 14 Clause 4.3 of the DOCA provides for the final determination of the claims by way of adjudication of a proof of debt, including any appeal, or by determination of those rights by a court. If the SOPA Debtor defaults in submitting a proof of debt, the funds become the property of the company under cl 4.4.
- 15 By cl 4.5, the trust created by cl 4.1 survives termination of the DOCA.
- 16 It is apparent from what has been said that the DOCA was entered into for the purpose of preserving KCC's rights to recover as debts due to it under ss 15(2)(a)(i) and 16(2)(a)(i) of the SOP Act the amounts it claims notwithstanding its insolvency. So much is conceded by KCC. It is also plain that the DOCA is structured to preserve the "pay now, argue later" principles of the SOP Act. Richard Crookes's rights to seek to recover the amount paid is preserved by the mechanism which requires the amount paid to be held in trust until the final resolution of any claim. The funds do not become available for distribution among KCC's creditors until any claim made by Richard Crookes has been finally resolved in KCC's favour. That claim may be resolved through the lodgement of a proof of debt and an appeal from its rejection (if it is rejected), rather than normal court proceedings.

Termination of the DOCA

- 17 Section 445D(1) of the CA provides:

When Court may terminate deed

(1) The Court may make an order terminating a deed of company arrangement if satisfied that:

(a) information about the company's business, property, affairs or financial circumstances that:

(i) was false or misleading; and

(ii) can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the deed;

was given to the administrator of the company or to such creditors; or

(b) such information was contained in a document that accompanied a notice of the meeting at which the resolution was passed; or

(c) there was an omission from such a document and the omission can reasonably be expected to have been material to such creditors in so deciding; or

(d) there has been a material contravention of the deed by a person bound by the deed; or

(e) effect cannot be given to the deed without injustice or undue delay; or

(f) the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be:

(i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or

(ii) contrary to the interests of the creditors of the company as a whole; or

(g) the deed should be terminated for some other reason.

- 18 It is common ground that s 445D(1)(g) gives the Court a discretion to terminate a DOCA where the DOCA was entered into for an improper purpose. That reading of the provision is consistent with the report of the Australian Law Reform Commission, *General Insolvency Inquiry*, Volume 1 (Report No 45, December 1988), which led to the introduction of what is now Part 5.3A of the CA, which deals with the administration of a company's affairs with a view to executing a DOCA (and which includes s 445D). Paragraph 123 of the report (omitting footnotes) relevantly states:

... The basis for termination of a deed (other than non-compliance with the legislation) can be divided into three types.

...

- A general provision for termination of the deed 'for some other sufficient reason'. This will enable the court to draw on the case law which has been developed in respect of schemes of arrangement. Examples of public policy reasons which may lead a court to avoid or to terminate the deed and which have been cited in cases concerning schemes of arrangement are

- the proposal has a fraudulent or wrongful purpose

- the terms of an arrangement do not comply with the companies legislation generally (for example, a deed of company arrangement must not contain a provision indemnifying an insolvency administrator for wrongful action in administering the deed)

— the deed contemplates that the company would, after the arrangement set out in the deed had been carried out, continue commerce in an insolvent financial condition.

- 19 Richard Crookes submits that the DOCA in this case was entered into for a wrongful purpose (adopting the language of the report) because it was entered into to defeat the operation of s 32B of the SOP Act. That conclusion is said to be supported by the legislative history of the provision. Section 32B was introduced following the publication in December 2017 of a report prepared by Mr John Murray entitled *Review of Security of Payment Laws* (Commonwealth, Department of Jobs and Small Business). Recommendation 10 of the recommendations made by Mr Murray was that “[t]he legislation should **not** apply to a claimant corporation in liquidation”. Mr Murray gave the following reasons (at 118) for that recommendation:

The purpose of a provision like section 15 of the NSW Act (and for that matter also section 16) is to allow a contractor to recover undisputed progress amounts quickly through an application for summary judgement and so maintain its cash flow. The legislation should not, however, be able to be used to benefit a claimant in liquidation which no longer relies upon that cash flow. This policy issue was succinctly set out by the Victorian Court of Appeal’s decision in *Façade Treatment [Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd]* (2016) 337 ALR 452; [2016] VSCA 247 at [81]-[84]:

As has been observed by the courts on numerous occasions, pt 3 of the BCISP Act (or its interstate equivalents) is intended to create an interim payment regime. Section 47(1) of the BCISP Act provides that the regime instituted by pt 3 does not affect the rights of the parties under the construction contract. Courts or tribunals deciding matters under the construction contract must allow for any amount paid pursuant to pt 3, and may make orders for the restitution of any such amount paid. The BCISP Act therefore envisages that a respondent making a payment pursuant to pt 3 may be entitled to claw back some or all of that payment in the future. However, as Multiplex submitted, in the case where the claimant is in liquidation, any payment made by the respondent pursuant to the BCISP Act would enter the general pool for distribution to the claimant’s creditors. The respondent would be unlikely to see much if any of the amount returned, even if the respondent is vindicated in future legal proceedings. In that sense, if pt 3 of the BCISP Act was held to compel payment to a builder in liquidation, such a payment would become final in effect, rather than provisional as intended by the BCISP Act ...

In our view, therefore, s. 9(1) creates an entitlement to progress payments only for persons who have undertaken to, and continue to, carry out construction work or supply related goods and services. The term ‘the claimant’ used throughout pt 3 is commensurately limited. Consequently, the payment regime in pt 3 of the BCISP Act is not available to companies in liquidation, since such companies cannot

carry out construction work or supply goods and services, and thus do not satisfy the requirements for 'a claimant'.

A not too dissimilar conclusion was arrived at by Beech J in *Hamersley Iron Pty Ltd v James* [*Hamersley Iron Pty Ltd v James* [2015] WASC 10 at [171]]:

To my mind, to grant leave to enforce the determination in these circumstances would defeat the purpose and object of s. 553C. A grant of leave to enforce would mean that Forge would receive from Hamersley the full amount of the Adjudicated Sum, whereas Hamersley would be left to prove in the liquidation of Forge in respect of its counterclaim. Moreover, in circumstances where Forge as contractor is insolvent, and in liquidation, the object of the Construction Contracts Act - keeping the money flowing in the contracting chain by enforcing timely payment and sidelining protracted and complex disputes - does not demand the grant of leave to enforce the adjudication determination.

I consider that the policy of the security of payment legislation is to maintain cash flow while a construction company remains solvent. In circumstances where such a company is in liquidation, I consider that the policy consideration for insolvent companies of the Corporations Act should apply. I accordingly recommend that the security of payment legislation should expressly state that it does not apply to a claimant corporation that is in liquidation.

- 20 That explanation was picked up in the second reading speech for the Bill that introduced the amendments to the SOP Act that included s 32B. In that speech, Mr Scot MacDonald, on behalf of the Hon Sarah Mitchell, said (New South Wales Legislative Council, *Parliamentary Debates* (Hansard), 24 October 2018 at 61, 63) (**Second Reading Speech**):

Recently, many aspects of New South Wales legislation were considered as the national benchmark by Mr John Murray, AM, in his final report on security of payment laws, commissioned by the Federal Government. However, while the current Act is achieving its objectives, further enhancements are necessary to ensure it operates efficiently and effectively. I turn now to the key reforms in the bill. In response to significant stakeholder concern and confusion, the bill overhauls sections 8 and 13. The reforms simplify and clarify the entitlement to and the process for recovering a progress payment.

...

The bill will insert section 32B to prevent the Act applying to a claimant corporation in liquidation. This reform will ensure that the Act operates consistently with the object of promoting cash flow. The prime objective of the Act is to keep cash flowing in the contracting chain by enforcing timely payment. On this basis, the Act operates on a "pay-now-argue-later" basis, enabling claimants to obtain payment on an interim basis but preserving a respondent's final rights. If a claimant in liquidation were able to access the Act, any payment a respondent would be required to make to the claimant would not be interim as intended. This is because the respondent would not be able to sue for recovery as the payment would enter the general pool for distribution to the claimant's creditors.

- 21 Relying on these passages, Richard Crookes submits that the public policy or purpose behind s 32B was to ensure that the procedures available under the SOP Act were only available to promote cashflow, and were not available where the claimant was in liquidation. It submits that that public policy would be defeated if KCC were permitted to avoid liquidation temporarily by executing a DOCA simply to enable it to exercise its rights under the SOP Act. For that reason, it submits that the DOCA was entered into for an improper purpose and is liable to be terminated under s 445D(1)(g) of the CA.
- 22 KCC takes issue with both limbs of Richard Crookes's argument. It submits that the question whether the DOCA has a proper purpose should be considered exclusively in the context of the CA and Part 5.3A, in particular. Section 445D(1)(g) is not concerned more generally with the question whether the DOCA is consistent with the policies behind other legislation. Rather, other statutes simply form part of the legal and factual context against which the DOCA is made and operates. In the present case, having regard to the legal framework in which KCC operates – and, in particular, the terms of s 32B of the SOP Act – the creditors have chosen to enter into the DOCA, rather than to place KCC into immediate liquidation, as a means of seeking to maximise the return to them. To put the point slightly differently, they have chosen to structure the company's affairs by choosing a DOCA over immediate liquidation so as to avoid the operation of s 32B of the SOP Act and in doing so have sought to maximise the amount that will be available for distribution to them. Relying on the comments of Keifel CJ and Edelman J (with whom Gageler J agreed) in *Mighty River International Ltd v Hughes and Bredenkamp (as deed administrator of Mesa Minerals Limited)* (2018) 265 CLR 480; [2018] HCA 38 at [35]-[37], [58], they submit that the maximisation of the return to creditors is not an improper use of the DOCA process. Indeed, it is consistent with the purpose behind Part 5.3A of the CA. In substance, this case is no different from one where, for example, a DOCA is entered into, rather than the company placed in liquidation, so as to enable the company to realise assets as a going concern or to avoid triggering contractual rights which might have the effect of reducing the amount otherwise recoverable by the company.

- 23 KCC also takes issue with Richard Crookes's statement of the policy of s 32B of the SOP Act. The section itself plainly seeks to deny the benefit of the SOP Act to a company in liquidation, not to any company that is insolvent. Had s 32B intended to operate in all cases where the claimant was insolvent, it could easily have said so. Moreover, the choice of liquidation as the point at which the benefits of the SOP Act cease to be available makes perfect sense. The trigger of liquidation is easily identified (unlike, for example, insolvency). Moreover, the use of liquidation as the trigger is entirely consistent with the mischief that s 32B was designed to address. As the Second Reading Speech points out, if a claimant in liquidation is entitled to the benefit of the SOP Act, any payment it recovered would not be interim as the legislature intended, since any payment would be distributed to creditors in accordance with the CA rather than being available to be returned to the payer in the event that it is successful in Court proceedings under the relevant construction contract.
- 24 In my opinion, KCC's first answer to Richard Crookes's argument states the position too broadly. Section 445D(1)(g) does not contain the limitation that KCC seeks to read into it. It is a general provision that should be interpreted consistently with the broad terms in which it is expressed. As the High Court said in *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421 per curiam, "[i]t is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words". There is no reason in principle why the power conferred by s 445D(1)(g) should not be available where, for example, the effect of a DOCA is to require the company to breach some other legislative provision.
- 25 However, it does not follow that the Court should exercise the discretion conferred by s 445D(1)(g) to give effect to what is said to be a legislative policy that goes beyond the terms of the legislation itself.
- 26 Richard Crookes points to cases in which courts have terminated a DOCA, or brought the administration of a company to an end, where the evident purpose of the DOCA or administration was to postpone the company's liquidation so as to forestall an investigation into the company's affairs: see, for example,

Blacktown City Council v Macarthur Telecommunications Pty Ltd [2003] NSWSC 883; (2003) 47 ASCR 391; *Re Sales Express Pty Ltd (Administrators Appointed)* [2014] NSWSC 460. In the latter case, Brereton J said (at [19]) the following in relation to an application under s 447A(2) (which gives the Court power to bring an administration to an end “because provisions of this Part are being abused” or “for some other reason”):

In *Workers Compensation Nominal Insurer v Perfume Empire Proprietary Limited* [2011] NSWSC 379, Barrett J, as his Honour then was, observed (at [22]) that the cases in which the Court had intervened under that provision to terminate a voluntary administration were cases in which there had been what might be termed as some ulterior element or purpose. His Honour referred to cases in which the directors had put the company into administration not for a purpose envisaged by the legislation but with a view to installing an administrator who might be more compliant than the provisional liquidator already in office [*Aloridge v Christianos* (1994) 13 ACSR 99]; where a secured creditor had imposed an administrator when an appeal by the company was pending against the dismissal of its application for an order setting aside a statutory demand served by that creditor, [*Spacorp v Australia Pty Ltd v Fitzgerald* [2001] VSC 61; (2001) 19 ACLC 1979]; where a sole director imposed voluntary administration with a view to the adoption of a deed of company arrangement by a decision of creditors (being himself and two persons allied with him) of doubtful value, which would bar particular claims already being litigated against the company [*Blacktown City Council v Macarthur Telecommunications Pty Ltd* [2003] NSWSC 883; (2007) 47 ACSR 391; and where an administrator was imposed by the sole director in the face of a pending winding up application, in order to manipulate the relation-back day to his own personal advantage [*St Leonards Property Pty Limited v Ambridge Investments Pty Ltd* (2004) 210 ALR 265; (2004) 50 ACSR 443; [2004] NSWSC 851].

- 27 Richard Crookes seeks to characterise those decisions as cases where the company was placed into administration as a means of circumventing the operation of the CA. In the present case, it seeks to characterise the DOCA as a means of circumventing the operation of the SOP Act. By analogy to the earlier cases, it submits that that the DOCA should therefore be terminated.
- 28 In my opinion, this submission mischaracterises both the earlier decisions and the facts of this case.
- 29 In the cases referred to by Richard Crookes, the administration was brought to an end because it was apparent that the purpose of the administration was not to maximise the return to creditors, but rather to achieve some ulterior purpose, such as the protection of the directors of the company. That was an improper purpose because it was inconsistent with the purpose for which the power was

conferred. In the present case, however, it is apparent that the purpose of the DOCA is to maximise the return to creditors by permitting the company to exercise the rights conferred by the SOP Act. The effect of Richard Crookes's submission is that greater weight should be placed on achieving what are said to be the goals of the SOP Act than achieving the aims of Part 5.3A of the CA in deciding whether the power conferred by s 445D(1)(g) should be exercised. Why that should be so is unclear.

- 30 Richard Crookes submits that KCC has failed to establish that the return to creditors will be maximised if it is permitted to exercise the rights conferred by the SOP Act. If it is not, it remains free to commence proceedings to recover the amounts it claims under the subcontracts. The likelihood is that, in that case, KCC will need to provide security for Richard Crookes's costs. But the costs of those proceedings and the provision of security need to be weighed against the costs of investigating any proof of debt lodged by Richard Crookes and defending an appeal against its rejection (assuming it is rejected). It is not obvious that the costs of the latter course outweigh the costs of the former one.
- 31 The question whether Part 5.3A of the CA is being used for an improper purpose is not to be resolved by a careful analysis of whether creditors and the company will be in a better position if the DOCA remains on foot than if it does not. In the present case, it is apparent that the DOCA was entered into because the creditors accepted the advice of the administrators that gave them the best chance of maximising the return to them. In doing so, they reached what appears to be a reasonable conclusion on a matter that they were properly entitled to consider. That is sufficient to make the purpose of the DOCA a proper one.
- 32 There is also a difficulty with Richard Crookes's contention that the purpose or effect of the DOCA was to circumvent the operation of the SOP Act. That submission has two limbs. First, it is submitted that the legislative policy behind the SOP Act is that the rights created by it should only be available where the exercise of those rights assists the cashflow of a solvent company. Second, it submits that the DOCA in this case should be characterised as an attempt to

avoid the operation of the SOP Act, since liquidation is inevitable. In my opinion, both limbs of the argument must be rejected.

- 33 As to the first, to the extent that the legislative policy of a statute is relevant, that policy must be identified from the terms of the statute properly construed, not the individual opinions of those involved in the drafting or passing of the legislation. As French CJ, Gummow, Hayne, Crennan and Keifel JJ observed in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 at [31]:

As Gummow J observed in *Wik Peoples v Queensland*, it is necessary to keep in mind that when it is said the legislative “intention” is to be ascertained, “what is involved is the ‘intention *manifested*’ by the legislation [(1996) 187 CLR 1 at 168-169 (emphasis added)(footnote omitted)]. Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

- 34 In *Saeed* (and *Wik*) the Court was concerned with ascertaining the legislative intention for the purpose of construing the statute. But it is plain that the principle applies to the ascertainment of legislative intention more generally to the extent that legislative intention is relevant. It is also plain from the terms of s 32B of the SOP Act that the purpose of the section is to deny the benefits of the legislation to companies in liquidation, not more generally. The fact that the report that led to the amendments which included s 32B and the Second Reading Speech suggested that the policy of the SOP Act “is to maintain cash flow while a construction company remains solvent” (to quote from the report at 118) is irrelevant and cannot be reconciled with the provisions of the statute itself.
- 35 As to Richard Crookes’s second point, it is difficult to see how it could be said that the DOCA was designed to avoid the operation of the SOP Act. It would be more accurate to say that it was designed to take advantage of the limited operation of s 32B. The evident purpose of s 32B is to prevent a situation from arising where an interim payment made under the Act becomes permanent because, on liquidation, the payment is no longer available to be returned to the payer if the payer is successful in its claim under the construction contract. But the DOCA in this case specifically preserves Richard Crookes’s rights to recover the amount it pays under the construction contract. On the other hand,

if Richard Crookes is correct, it will be entitled to avoid the operation of the SOP Act, and the obligation to make interim payments, simply because it refused to pay amounts that the Act obliges it to pay. If any party has sought to avoid its obligations under the Act, it is Richard Crookes.

- 36 KCC submits that the Court should reach the same conclusion even if the DOCA had not preserved Richard Crookes's rights to recover the amount it pays under the Act through the mechanism of a trust. Even in that case, KCC would simply be taking advantage of the terms of the SOP Act, and s 32B in particular. Moreover, it is not the DOCA that would in that case undermine the purpose of the SOP Act, but rather the enforcement of any judgment obtained by KCC under the Act. Any question of abuse of the powers conferred by the Act could be dealt with at the stage of enforcement and addressed by a stay of the judgment until the underlying claim under the construction contract had been resolved: see *Grosvenor Constructions (NSW) Pty Limited (in administration) v Musico & Ors* [2004] NSWSC 344. That submission has considerable force. It seems preferable in principle to seek to achieve the policy behind the SOP Act by a stay of a judgment obtained under it rather than by terminating a DOCA that was entered into for the purpose of maximising the return to creditors. However, the issue does not arise in this case and its final determination is best left to a case where it does arise.
- 37 Richard Crookes submits that if KCC's submission is accepted the result will be that s 32B of the SOP Act will be rendered ineffective, since its effect can be avoided by the simple expedient of the company entering into what the administrators in this case referred to as a "holding DOCA". I do not accept that submission. The result of the conclusion for which KCC contends may be that there will be fewer cases in which s 32B has any operation because there will be fewer cases in which the exercise of rights under the SOP Act ever arises following liquidation. But that does not alter the fact that s 32B provides protection in the event of liquidation. And the fact that s 32B may have a limited operation because of the ability of a company to enter into a DOCA is not a reason for giving s 445D(1)(g) of the CA a broader operation than principle dictates it should have.

Abuse of process

- 38 Relying on decisions such as *University of Sydney v Cadence Australia Pty Limited & Anor* [2009] NSWSC 635 and *Urban Traders v Paul Michael* [2009] NSWSC 1072 ("*Urban Traders*"), Richard Crookes submits that KCC's claims under the SOP Act are an abuse of the processes of the Act because it is hopelessly insolvent and is only in a position to take advantage of the provisions of the Act because it executed a DOCA that sought to avoid the operation of s 32B.
- 39 In my opinion, there are two main difficulties with this submission.
- 40 First, the cases relied on by Richard Crookes have no application in this case. The relevant process referred to in the cases on which Richard Crookes relies was the adjudication process. The abuse arose because the claimant had sought through the adjudication process to reagitate a claim, or part of a claim, that had already been the subject of an adjudication determination under the Act. What constituted the abuse was the repetitious use of that process in respect of the same claim: see *Urban Traders* at [38] per McDougall J, quoting Allsop P in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 at [2], [16].
- 41 In the present case, there is no repetitious use of the processes of the SOP Act. Rather, KCC seeks by its claim in the T&C Proceeding to exercise rights conferred by the SOP Act to obtain judgment in respect of a number of claims served by it. That is not a process of the Act. It is a right conferred by the Act to use the processes of this Court to obtain judgment. The question must be whether it is an abuse of the processes of this Court to exercise that right. Plainly, it is not. There is no repetitious use of the processes of this Court to obtain judgment.
- 42 Second, for the reasons already given, it is not correct to characterise KCC's claim as an attempt to avoid the operation of s 32B. Rather, it has organised its affairs so that it falls outside the scope of s 32B. That does not involve an abuse of process. Moreover, again for the reasons already given, it could not be said that the DOCA undermines any policy of the SOP Act. The evident policy of the Act is to permit the payer to recover the amount of any judgment

by a claim under the relevant construction contract. That right is preserved by the DOCA in this case. It was not suggested that the rights under the DOCA in that respect were substantially different from the right to pursue a claim through the normal processes of the Court.

Conclusions and orders

- 43 It follows from what has been said the Corporations Proceeding must be dismissed and that KCC is entitled to judgment on its claim in the T&C Proceeding.
- 44 It will be necessary for interest to be calculated on the amount of the judgment to which KCC is entitled. The parties also indicated that it may be appropriate for the judgment of this Court to be stayed for a short period of time to allow the unsuccessful party to consider whether its wishes to appeal. There is also the question of costs, on which the parties did not make submissions. Finally, some ancillary orders may be necessary given that KCC is in administration.
- 45 Accordingly, the orders of the Court are:
- (1) Direct that within 14 days of the date of this judgment the parties bring in short minutes of order to give effect to this judgment, any agreement in relation to a stay and, if costs can be agreed, the parties' agreement in relation to costs;
 - (2) If the parties cannot agree on the form of the short minutes of order dealing with the matters referred to in (1), direct that each party within 21 days of the date of the judgment provide to my Associate a form of orders for which they contend and submissions not exceeding 5 pages in support of those orders;
 - (3) Direct that any remaining issues between the parties be decided on the papers.
