JUDGMENT : BARRETT J : Supreme Court, New South Wales, Equity Division, Corporations List. 23rd October 2007

1 I am dealing with two interlocutory applications in a proceeding commenced by originating process filed on 12 September 2007.

2 By that originating process, the plaintiff (which I shall call "Reed") seeks relief under the **Corporations Act** 2001 (Cth) directed towards termination or avoidance of a deed of company arrangement executed by the first defendant, DM Fabrications Pty Ltd ("DM"). I shall come in due course to the basis for that claim which is advanced by reference to s.445D dealing with termination of a deed of company arrangement by the court and s.445G authorising the court to declare such a deed void.

3 The first interlocutory process was filed on 25 September 2007 by DM. It was prompted by a view that a key date stated in the deed of company arrangement is wrongly expressed and that a reference to 13 April 2006 should be read as a reference to 13 April 2007 or be corrected to read accordingly.

4 I indicated at the end of argument on that aspect that relief producing such a result would be granted, although my decision as to the form of and basis for the relief would be reserved.

5 The second interlocutory application was then argued. It is an application by Reed for injunctive relief pending determination of the originating process in order to maintain what Reed considers to be a necessary status quo.

6 I shall deal first with the issue of the correction of the date.

7 On 13 April 2007, Mr Malanos and Mr Purchas, who are the second defendants, were appointed administrators of DM under Part 5.3A of the **Corporations Act**. The first meeting of creditors in the administration was held on 20 April 2007. The administrators initially appointed were continued in office. On 2 May 2007, the administrators' report to creditors was circulated, together with a notice convening the second meeting of creditors. That report contained a proposal for a deed of company arrangement to be considered by creditors at the second meeting. In essence, the deed of company arrangement proposal involved the creation, for creditors' benefit, of two funds, one of an estimated sum of $216,409 "*to be recovered from company assets no later than 30 July 2008*" and the other (which I shall call "Fund 2") consisting mainly of "realisations (if any) in respect of the company's action against Reed Constructions Pty Ltd".

8 The summary description of the proposed content of the deed which accompanied the administrators' report said that all creditors entitled to participate – essentially, all unsecured creditors except certain related parties – would accept their entitlements under the deed "in full settlement of all claims existing at the relevant date". The meaning of "relevant date" was not explained in the summary description. In other parts of the administrators' report, however, there were various calculations made by reference to, and particulars given concerning the financial position as at, 13 April 2007. In particular, the report as to affairs furnished by the sole director of DM, which accompanied the administrators' report, was made up as at 13 April 2007. The administrators' analysis of trading results for periods before their appointment not surprisingly took as the last period 30 June 2006 to 13 April 2007. Furthermore, the administrators' analysis of the likely outcome under a winding up, compared with that under the proposed deed of company arrangement (being a comparison clearly based on the report as to affairs), had regard to the position at 13 April 2007. A great deal of the financial information given to creditors in the report was based on the position at 13 April 2007 as disclosed in the report as to affairs. This was not surprising. Indeed, it was logically to be expected, given that 13 April 2007 was the date of the appointment of the administrators.

9 At the second meeting of creditors, it was resolved that a deed of company arrangement be executed in accordance with the form of deed referred to in the report of 2 May 2007.

10 The deed, as executed, is dated 30 May 2007. It recites the appointment of the administrators on 13 April 2007. It also recites the convening and holding of the second meeting of creditors. Then comes this recital: "*At the second meeting of creditors the creditors resolved that the company execute a deed of company arrangement substantially in the form of this deed and that the deed administrators be the administrators of this deed.*"

11 The deed was expressed to be concerned with the claims of "Creditors". That term was defined as follows:

> "'***Creditors***' *means all unsecured creditors of the Company, including secured creditors to the extent that the value of their security is less than the amount of their debt, that have a Claim against the Company (whether at law, in equity, whether present, prospective or contingent, whether liquidated or sounding only in damages and whether in contract, in tort or howsoever arising) that arose prior to the Commencement date.*"

12 The reference to the "Commencement Date" at the end of this definition must be noted. Other references to the "Commencement Date" appear in the provisions about inviting and lodging proofs of debt. In particular, clauses 3.2 and 3.3 provide as follows:

> "*3.2 The Deed Administrators, at a time as determined by him, after the Execution Date, shall send out a notice to each of those persons who appear from the records of the Company to be Creditors (excluding the Deferred Creditors and the Secured Creditor) inviting each within 14 days of the date of publication of the advertisement referred to in Clause 3.3 below to submit a claim to the Deed Administrators by way of sworn proof of debt specifying in detail the nature and amount of the claim against the Company as at the Commencement Date.*
>
> *3.3 The Deed Administrators, at the time of sending out the notices referred to in clause 3.2, shall advertise once in a principal daily newspaper circulated in the state in which the Company trades, to the effect that any*

> *person claiming to be a Creditor may within 14 days from the date of publication of such advertisement submit a claim to the Deed Administrators by way of sworn proof of debt specifying in detail the nature and amount of the claim against the Company as at the Commencement Date.*"

13 Claims of "Creditors" (as defined) not so proved are, by clause 3.4, barred and extinguished. A number of other provisions are concerned with claims as at the "Commencement Date".

14 The definition of "Commencement Date" is in clause 1.1. That clause says that "Commencement Date" means "13 April 2006".

15 The solicitor who drew the document has deposed to circumstances in which a precedent containing a 2006 date was used but, through oversight, the year was not changed to 2007 even though the day and the month were changed to 13 April. It was the solicitor's intention that the document should refer to 13 April 2007, not 13 April 2006.

16 When proofs of debt were invited after execution of the deed, the relevant invitation referred to 12 April 2007 as the critical date for claims and participation. The form of proof creditors were asked to complete likewise referred to 13 April 2007.

17 As I indicated after submissions on this aspect had concluded, I am satisfied that it is 13 April 2007, not 13 April 2006, that must be taken to be the crucial date for ascertainment and proof of claims under the deed of company arrangement. All the materials that were before creditors (and, for that matter, the administrators) for the purpose of decision-making in relation to the proposed deed referred, either expressly or by necessary implication, to 13 April 2007, which was the date of the appointment of the administrators. All decisions must be accepted as having been made by reference to 13 April 2007. There was nothing in the materials used for decision-making that referred to a date exactly one year earlier. Indeed, in the context of consideration of a deed of company arrangement proposal advanced and considered in May 2007 by creditors whose position was affected by a Part 5.3A administration imposed on 13 April 2007, it would have been quite illogical – even virtually meaningless – to contemplate that claims to be dealt with by the deed would be claims having an origin in circumstances of more than a year earlier.

18 Mr Ashhurst SC, who appeared for DM and the deed administrators, submitted that, in the circumstances to which I have referred, "the fact that a mistake had been made and the nature of the mistake can be ascertained with certainty from a consideration of the relevant instrument in the context of objective circumstances surrounding its execution". These are words used in the judgment in ***North Circular Properties Ltd v Internal Systems Organisation Ltd*** (26 October 1984), a Chancery Division case which is unreported but quoted at p.281 of the 3rd edition (2004) of K. Lewison "The Interpretation of Contracts". In such a case, it is said, the correct approach is to construe the instrument so as to correct the obvious error.

19 Mr Ashhurst also referred to ***Fitzgerald v Masters*** (1956) 95 CLR 420 where Dixon CJ and Fullagar J observed that words can be supplied, omitted or corrected where to do so is necessary in order to avoid absurdity or inconsistency. In that case, the emphasis was upon the intention of the parties as gathered from the content of the document itself. Having regard to that context, the words "not consistent" made no sense at all, while the word "consistent" provided a sensible and compatible meaning. The "not" was therefore ignored as a matter of construction.

20 Despite the existence of what is, in the circumstances, clearly an error, I do not think that it is safe to approach its correction merely as a matter of construction. A deed of company arrangement derives its operative force from statute. The statutory process by which the content of an instrument produced and dealt with in a particular way becomes a deed of company arrangement by operation of s.444B(6) was examined by the High Court in ***MYT Engineering Pty Ltd v Mulcon Pty Ltd*** (1999) 195 CLR 636. Sections 444D and 444G identify persons who are bound by a deed of company arrangement. Those persons are not parties bound together by contract. They are persons whose rights and obligations are created by law by virtue of the execution of the relevant instrument. They are akin, in that respect, to persons bound by a scheme of arrangement under Part 5.1 of the **Corporations Act**. In such a context, there is, I think, room to correct, as a matter of construction, errors appearing wholly within the confines of the stipulations made binding by statute. Indeed, that was done in ***Re Co-ownership Land Development Pty Ltd*** (1987) 11 ACLR 527, a scheme of arrangement case.

21 The problem in the present case is that the error is not one appearing wholly within the confines of the stipulations made binding by statute. In theory, a deed put in place on 30 May 2007 but operating by reference to claims as at 13 April 2006 is workable, even though one would have grave doubts whether it served any commercially sensible purpose. It is only when one looks outside the stipulations in the deed of company arrangement and has regard to the materials that were before the administrators and the creditors when they made the decisions culminating in the execution of the relevant instrument that it is clear that the whole of the attendant thinking must have been geared to 13 April 2007, not 13 April 2006.

22 If this were an instrument such as a deed inter partes or a written contract, the solution would lie in resort to equity's jurisdiction to rectify. But because the provisions in question derive their binding force from statute, rectification of the instrument as such would not, I think, achieve anything – or, at least, would not bring about the desired result. I say this because of the way the statute works, as already mentioned.

23 The main statutory impact is upon creditors. By force of s.444D(1), the deed binds them in relation to claims arising on or before the day specified in the deed under s.444A(4)(i). It is that date that is incorrect in this case. A decree purporting to rectify the deed – or, more precisely, the instrument executed in conformity with s.444B(2) – would not, I think, achieve the necessary correction. Section 444B(6) causes the instrument to become a deed of company arrangement when executed by the specified persons. The provisions in the instrument then have statutory force. If the instrument were later rectified so as to contain different provisions, there is no statutory mechanism that would modify the statutory effect already imparted to the original provisions. This is the force of the words "When executed" at the start of s.444B(6).

24 For these reasons, the correct approach to rectification in a case such as this is, in my respectful opinion, that taken by Austin J in ***Brandrill Ltd v Newmont Yandal Operations Pty Ltd*** (2006) 24 ACLC 1179. Where, as his Honour put it, the correction sought would put all relevant persons into the positions they were led to expect, the appropriate course is to make remedial orders under s.447A, without any need for creditors to be put on notice of the application. The same reasoning was applied by me in **Kruger; Re Kruger Engineering Pty Ltd** (2006) 60 ACSR 191. It is also applicable here. It is noteworthy, I think, that the one creditor who is before the court, that is, Reed as plaintiff, although in serious dispute with DM and the deed administrators over the workings and implications of the deed, supports not only its correction but also the notion that the correction should be achieved through s.447A.

25 The appropriate order is an order pursuant to s.447A of the **Corporations Act** that Part 5.3A is to operate in relation to DM Fabrications Pty Ltd as if the day specified under s.444A(4)(i) in the deed of company arrangement dated 30 May 2007 (being the "Commencement Date" referred to in clause 1.1 thereof) had always been 13 April 2007 instead of 13 April 2006.

26 I turn now to Reed's claim for an interlocutory injunction. I note at the outset DM's objection that there is no claim for final relief such as to warrant and support a claim for interlocutory relief: see ***Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*** (2001) 208 CLR 199. Reed's position is that the claim for final relief by way of an order terminating or avoiding the deed of company arrangement is a perfectly sound basis for the interlocutory restraint it seeks. Whether that is so will emerge from a consideration of the circumstances.

27 Reed is a building company. Somewhat more than a year ago, it retained DM as a sub-contractor to do certain work for it. Things did not go smoothly. In Reed's view, DM did not complete its assignment. DM, however, was apparently of the view that it was entitled to a final payment. It resorted to procedures under the **Building and Construction Industry Security of Payment Act** 1999 (which I shall call the "**Security Act**") in order to recover moneys from Reed. On 31 August 2007, an adjudication determination was made in DM's favour under the **Security Act** in a sum of $614,843.77. An adjudication certificate was later filed by DM in the District Court under s.25 of the **Security Act**. A judgment in favour of DM and against Reed thereby arose.

28 The processes that culminated in the adjudication determination began on 24 April 2007 (eleven days after commencement of the Part 5.3A administration) when DM served a payment claim on Reed. A second payment claim for a larger amount was served on 25 May 2007. Pursuit of the claim DM considered itself to have can thus be seen to have been in train during the administration.

29 Reed, for its part, claims to have valid and subsisting claims against DM in a sum exceeding $2.25 million. These claims arise from the sub-contract. I need describe their basis only briefly. The contract sum (that is, the price to be paid by Reed to DM under the sub-contract) was about $2.4 million. Of that, some $2.2 million was paid, leaving a balance of about $200,000. But against that balance, Reed says, stand back charges, off-sets and liquidated damages attributable to defaults and delays of DM, so that the credit of about $200,000 is really a debit of some $2.25 million.

30 It is the contention of Reed that the sole director of DM knew, or ought reasonably to have known, that Reed had such a claim against DM as at 13 April 2007. Yet Reed was not included in any list of creditors supplied by the sole director to the administrators, with the result that Reed was not given notice of the meetings of creditors and did not attend. On the evidence as it stands at this point, there is apparent substance in the allegation by Reed that the sole director knew of its claim. In saying that, however, I am not suggesting that the claim had been quantified in the sum of about $2.25 million by the time the Part 5.3A administration began. In the very early days of the administration, there was correspondence containing reference to a contention of Reed that its alleged liability to DM was entirely off-set by liability of DM to Reed, so that the true state of the account between them was a zero balance. Quantification of the counter-claim at about $2.25 million is something that appears to have occurred at a later stage.

31 The circumstances just mentioned are significant when it comes to the operation of the deed of company arrangement. I have referred to the deed's procedures for identifying creditors and to the provisions which say, in effect, that receipt by creditors of the distributions for which the deed provides are to operate so as to satisfy their claims, with all debts then being barred and extinguished. I have also referred to the provisions for the creation of two funds under the deed, one for an estimated sum of $216,409 "to be recovered from company assets no later than 30 June 2008" and the other (Fund 2) consisting of "*realisations (if any) in respect of the company's action against Reed Constructions Pty Ltd*". While the deed itself does not quantify the sum involved in Fund 2, an estimate was ascribed to the action against Reed in the report sent to creditors in connection with the second meeting of creditors. In an overview section, the administrators said:

"By way of overview the Deed contemplates two funds (No 1 and No 2) with sufficient monies to pay a dividend of approximately 5 cents in the dollar to participating (unrelated) creditors. The second Deed Fund will receive the net proceeds of the monies owed by Reed Constructions Pty Limited estimated to be $781,125. Because of issues of privilege, it is inappropriate to particularise the claim any further herein."

32 Later, in a more detailed section, which was expressed to be "subject to the merits and prospects of litigation" the following statement appeared:

"It is inappropriate to speculate whether the matter will proceed to litigation and as to the prospects of success. By way of observation however D.M. Fabrications Pty Limited maintains a claim of $781,125 which is disputed by Reed Constructions Pty Limited. Should any claim be successful net proceeds (if any) [likely after litigation funding costs (possible range 20%-40%] would be distributed among participating creditors estimated as per the RATA at $1,754,618 (not including Dapto Property Investments Pty Limited.)"

33 It is thus clear that, subject to caveats about the vagaries of litigation, readers of the report were given the impression that there were prospects that the deed administrators would recover $781,125 for the benefit of Fund 2.

34 As I have said, there was no reference in the material sent to creditors to the claim that Reed maintains against DM. There was some reference to the contention of Reed, already mentioned, that DM's true claim against it was zero. But the strongest message that seems to have been conveyed to creditors is that the anticipated fund of $781,125 was subject only to the ordinary vicissitudes of disputation and litigation.

35 As things now stand, however, it may well be the case that any hope that there will ever be a Fund 2 is illusory. By clause 2.1 and Schedule 1 clause 3, the deed of company arrangement is taken to incorporate subdivisions A, B, C and E of Division 6 of Part 5.6 of the **Corporations Act**. Imported in that way is s.553C, a provision in Subdivision A. The effect of s.553C is, of course, that, in the case of mutual credits, mutual debts or other mutual dealings, there is provable in the administration only any balance standing to the account of the creditor or, if the balance stands to the credit of the insolvent company, only that balance is payable to the company. If Reed's counter-claim referable to the "Commencement Date" of 13 April 2007 is ultimately established to the extent of $2.25 million – or even to some lesser extent that nevertheless exceeds the sum owing to DM – s.553C, as imported into the deed of company arrangement, will be seen to have operated on 30 May 2007 so as to deprive DM of any right to be paid by Reed and so that there is provable under the deed the excess of the established amount of Reed's claim over the debt owed by Reed to DM.

36 It is the contention of Reed that, both at the time of execution of the deed of company arrangement and in the period during which the deed proposal was being developed and considered by creditors, DM was aware that it was liable to Reed in respect of its failure to perform the sub-contract. The claim of Reed since quantified by it at $2.25 million existed at each such point. Unless that claim is fanciful and even allowing for indebtedness of Reed as crystallised by the determination under the S**ecurity Act**, the true position, in Reed's view, is that set-off occurred pursuant to s.553C on 30 May 2007 and that the deed of company arrangement was propounded and executed without regard for the circumstance that that set-off would eliminate altogether the possibility of any Fund 2. Furthermore, the absence of reference to Reed's off-setting claim from discussion of possible outcomes in a winding up was, on the approach Reed takes, productive of distortions in that respect as well, since s.553C would have operated in any winding up that eventuated in default of a decision of the creditors to approve the deed. Section 553C will also be relevant to any winding up that follows on from termination or avoidance of the deed.

37 Support for such an operation of s.553C in a context such as the present is provided by the decision of McDougall J in ***Veolia Water Solutions & Technologies Pty Ltd v Kruger Engineering Australia Pty Ltd*** [2007] NSWSC 459. Kruger had become subject to a deed of company arrangement on 26 April 2006. It obtained an adjudication determination against Veolia in the sum of about $428,000 under the **Security Act** on 26 July 2006. Judgment in favour of Kruger was entered accordingly pursuant to s.25, the judgment debtor being Veolia which maintained against Kruger a claim in a significantly greater sum. McDougall J said (at [24]):

"The effect of the application of s 553C (in a case where the offsetting claim exceeds the amount of the progress claim) is that the progress claim is satisfied by set-off. The person entitled to the progress claim has received the benefit of payment. That is so regardless of whether the progress claim has given rise to an adjudication determination or a judgment debt. Operation of the statutory scheme of set-off under the Corporations Act does not impeach the progress claim (or any adjudication determination or judgment founded on it). On the contrary, the effect of the progress claim is accepted, because its amount is brought to account in the process of set-off. It may be that the process of satisfaction through set-off rather than satisfaction through payment has an adverse effect on other creditors. But that is a necessary consequence of the application of the scheme of set-off that the legislature, in s 553C, saw fit to enact."

38 This, in my respectful opinion, correctly reflects the operation of s.553C in such a case. In addition, and as McDougall J noted (after referring to the decision of Young CJ in Eq in **Brodyn Pty Ltd v Dasein Constructions Pty Ltd** [2004] NSWSC 1230), the prohibition under s.25(4) of the **Security Act** upon the assertion of any set-off in proceedings to have set aside a judgment arising under s.25 is irrelevant to a case of this kind. There is no attempt here to have the judgment set aside – added to which, as decisions about s.553C and its counterparts show (see, for example, **Stein v Blake** [1996] AC 243; ***Gye v McIntyre*** (1991) 171 CLR 601), s.553C produces set off by operation of law at the inception of the administration, without being invoked or set in train by anyone.

39 Reed propounds more generally the thesis that failure to recognise Reed's claim for $2.25 million distorted the whole basis on which the deed proposal and alternatives to it were assessed and considered, so that creditors' decisions on the deed proposal and alternatives proceeded on a false basis. This related not only to the failure to recognise the impact of s.553C but also to the entire absence of any appreciation of the relevance of Reed's claim to the overall analysis of the financial position, including as a significant addition in calculating the claims of creditors among whom the deed funds would be shared on a pro rata basis.

40 Of course, no problem would arise if Reed's claim were patently baseless. But, it cannot be said to be patently baseless A large volume of material has been filed in the form of Reed's proof of debt. The material is detailed and comprehensive. I cannot say with certainty at this point that it supports Reed's claim. But I can say that it has a clear capacity to do so, if presented, verified and accepted at trial.

41 The situation is thus one in which there is a serious question to be tried regarding, first, the existence and substance of Reed's claim against DM said by Reed to be of the order of $2.25 million and to have existed at the "Commencement Date" as defined by the deed of company arrangement (by which I mean 13 April 2007); second, as to the impact that accurate and relevant information about such a claim would or could have had upon decision-making in relation to the deed of company arrangement, if disclosed and known to creditors; and, third, as to whether, in the circumstances, there exist grounds for terminating or avoiding the deed of company arrangement.

42 In relation to this last matter, a substantial avenue of attack on the deed that is quite arguably available in the circumstances outlined is that emerging from s.445D and recently summarised, by reference to ***Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd*** (2006) 226 ALR 510, by Layton J in **Mondello Farms Pty Ltd v Annatom Pty Ltd** [2007] SASC 296 at [92] to [101]:

"*[92] Section 445D(1)(a) has two limbs. A court may terminate a deed if false or misleading information is given to the administrator of the company or if false or misleading information is given to the creditors. Where false or misleading information is given to creditors, s 445D(1)(a) can be invoked in two situations: where the false or misleading information is given by the administrator or where the false or misleading information is given by some other person.*

[93] Information that is determined to be false or misleading must also meet the materiality test outlined in s 445D(1)(a)(ii). The materiality test is discussed later in these reasons.

*[94] The court is not concerned with the origins of the false or misleading information. As Campbell J recently stated in **Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd**, ("Bidald") the policy behind this reasoning is that:*

… administrations require important decisions to be made in a short space of time, on the basis of such information as can be gathered in the time, and it is understandable that the ground upon which a deed can be terminated depends upon the adequacy of the information ultimately provided to the administrator, or the creditors, regardless of where that information might have come from.

[95] The question is whether creditors were given the information to which they were entitled so as to make an informed decision to enter into a deed, and not who was at fault.

[96] Section 445D(1)(b) is a subspecies of s 445D(1)(a). A deed may be terminated if the false or misleading information is contained in the administrator's s 439A(4) Report or the false or misleading information is relayed to the creditors by some other means, such as a notice of a meeting.

False or misleading information under s 445D(1)(a) and (b) — an objective test

*[97] In **Bidald,** Campbell J held that the court employs an objective test in determining whether information is false or misleading for the purposes of s 445D(1)(a) and (b) and does not concern itself with the state of mind of the person who provides the information. As His Honour said:*

— The expression looks at an objective quality of the information, not at whether anyone was actually misled.

— The expression looks at whether the information was actually false or misleading, not whether anyone intended it to be false or misleading, or did not care whether or not it was false or misleading.

— Whether the information is false or misleading is judged at the time of the hearing, not on the basis of information available at the time of giving the information.

*[98] Further, as Campbell J discussed in **Bidald**, statements about a future event may be misleading, 'if it is a statement with the capacity to lead a recipient of it into error'" In determining whether such a statement ought to be properly characterised as false or misleading, Campbell J also held that 'he court should take into account whether or not it purports to be anything more than the present estimate or prediction of the author'*

The materiality test — s 445D(1)(a), (b) and (c)

[99] For a ground to be made out under s 445D(1)(a), (b) or (c), the paragraphs require that the information or omission to 'reasonably be expected to have been material to creditors'. This test does not require the information or omission to reasonably be expected to have been material to all the creditors, but it must affect a sufficient number. The test is an objective one. Accordingly, the actual views of the creditors do not go to the materiality of the information or omissions, but are instead relevant to the exercise of the court's discretion.

*[100] For the purposes of s 445D(1)(a), and its subspecies s 445D(1)(b), information that is false or misleading will be material if it 'would be relevant to and might be likely to affect the making of the decision of creditors … '. In **Bidald**, Campbell J held that the creditors' decision to enter into a deed of company arrangement was one such relevant decision. His Honour went on to hold that in determining whether the information was material:*

> *… all the information about the company's business, property, affairs or financial circumstances that has been found to be false or misleading should be considered collectively.*
>
> *[101] Undoubtedly, the same considerations would apply to whether omissions were material under s 445D(1)(c).*"

43 I return now to the question whether the injunction Reed seeks is truly an interlocutory measure to maintain the status quo pending determination of the substantive claims attacking the deed of company arrangement. I have not so far mentioned the fact that, relying on the judgment entered in the District Court pursuant to s.25 of the **Security Act**, DM obtained the issue of garnishee orders directed to various debtors of Reed. A successful application to have the position in the District Court frozen by way of stay orders was later made by Reed. At this point, DM is precluded by the regime in force in the District Court from proceeding with measures to enforce the judgment.

44 The interlocutory order now sought would have the effect of continuing the embargo upon enforcement by DM of the District Court judgment it has obtained against Reed under s.25 of the **Security Act**. In the absence of such an embargo, DM could obtain the proceeds of the judgment. Given the terms of the deed of company arrangement, the deed administrators would be obliged to set those proceeds aside as Fund 2 and to apply them accordingly. Such a course of action would undermine the operation of s.553C both as it applies through the deed terms and as it would apply in any subsequent winding up of DM – including, of course, the winding up that would very likely follow an order terminating or avoiding the deed of company arrangement.

45 It can thus be seen that the interlocutory order sought bears a highly relevant relationship to the substantive relief Reed seeks.

46 In relation to the balance of convenience, there is little to be said. The deed of company arrangement is under attack. The moneys that DM and the deed administrators seek to recover upon the basis of the District Court judgment would be applied pursuant to and in the way prescribed by the deed of company arrangement. If the deed were eventually terminated or avoided, that application of moneys would be seen to have been inappropriate. The balance of convenience clearly favours maintenance of the status quo. Hardship in the relevant sense would be visited upon Reed if it were forced to pay out moneys in circumstances where its liability to do so had been eliminated by s.553C. The hardship to DM of having to await a decision on the question whether the deed of company arrangement should be terminated or set aside is, by comparison, minor.

47 There was reference in the course of the hearing to the question whether Reed should be required to pay into court a sum sufficient to meet the District Court judgment. There is, however, no evidence to suggest that Reed is otherwise than solvent and financially sound. In addition, the cogency of the case Reed makes is sufficient to suggest that such a regime is not warranted.

48 Upon the usual undertaking as to damages given to the court on the plaintiff's behalf by its counsel, I order that the defendants be restrained until further order from receiving or demanding payment under, or enforcing, the judgment obtained by the first defendant against the plaintiff in District Court proceedings 4039 of 2007, whether by way of garnishment or otherwise.

49 I shall receive submissions on costs.

Mr B.A, Coles QC/Mr B. Debuse – for the Plaintiff instructed by Home Wilkinson Lowry
Mr M.A. Ashhurst SC – for the Defendant instructed by PMF Legal