

Deeds of company arrangement and landlords

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Summary

A recent Supreme Court case has highlighted the importance of careful drafting and consideration to the landlord's position where a company enters into a deed of company arrangement and intends to continue trading.

In the case of *Baseline Constructions Pty Ltd (Subject to a Deed of Company Arrangement¹)*, leave was granted to the landlord to commence proceedings against a company under a deed of company arrangement, notwithstanding the landlord was a "Creditor" for the purpose of the deed and a person bound by the deed.

Facts

Place Management NSW (formerly known as Sydney Harbour Foreshore Authority) (Landlord) owned premises in Science House, 157-161 Gloucester Street, The Rocks (Premises). In October 2011, the Landlord entered into a lease of the Premises to Baseline Constructions Pty Ltd (Subject to a Deed of Company Arrangement) (Company) for five years.

On 10 March 2015, the Company entered into a Deed of Company Arrangement (DOCA). The DOCA included the following relevant definitions:

Creditor was defined in a conventional way to mean:

a person other than the Deferred Creditors and the Secured Creditor who has a debt payable by or Claim against the Company whether present or future, certain or contingent, ascertained or sounding only in damages, the circumstances giving rise to which occurred on or before the Relevant Date...

Creditor's Claim was defined as meaning "in relation to a Creditor, the Creditor's debt payable by or Claim against the Company as at the Relevant Date". Relevantly

this definition provided that in order to be a "Creditor's Claim", the "Claim" must arise out of circumstances which occurred on or before the "Relevant Date", and also be a debt payable or Claim against the Company as at the Relevant Date².

Relevant Date was defined as 1 January 2015, being the date of appointment of the voluntary administrators.

Landlord was defined as the lessor of the Company's premises.

Relevantly, the DOCA provided (amongst other things):

- control of the Company was to return to the director on execution;
- the Company was required to pay, from the date of the deed and amongst other things, all monies due to the Landlord as and when they fell due (Clause 5.4);
- a moratorium preventing each Creditor from taking action during the period of the deed without leave of the Court (subject to Clause 5.4); and
- a bar to creditors' claims in respect of any debt or claim admissible under the deed.

On 15 May 2015, the Landlord terminated the lease due to the Company's failure to comply with its obligations under the lease including payment of the rent. The Landlord took possession of the Premises and determined that the Company had not left the Premises in a state which would satisfy its make good provisions.

The Landlord sought leave under section 444E(3) of the *Corporations Act 2001* (Cth) (Act) to commence proceedings against the Company in the District Court of New South Wales for unpaid rent due from 15 March 2015 to 15 May 2017 (being a period after the Relevant Date), make good costs and damages for rent owed under the future term of the lease (being from 15 June 2015 to 16 October 2016), together with interest and costs.

Submissions

The Landlord asserted that under the terms of the DOCA, the Company was obliged to pay all monies due to the Landlord from the date of execution of the DOCA. It said that Clause 5.4 clearly obliged the Company to pay those monies as and when they fell due and the terms of the DOCA prevented the Landlord from proving for those amounts.

The Company opposed the application, alleging:

- the DOCA binds the Landlord and places a moratorium on the Landlord's right to pursue any claim;
- the make good claims were contingent claims, and thus were extinguished by the DOCA; and
- the Landlord was not a party to the DOCA and could not sue to enforce monies to be paid as and when they fell due.

The Company relied on the decision of White J (as his Honour then was) in *Henafor Pty Ltd v Strathfield Group Ltd*³, for the proposition that where a lease was entered into before the relevant date (as defined in the DOCA as the day on which before claims must have arisen to be admissible), then the DOCA has the effect of extinguishing a claim for future rent⁴.

Decision

His Honour agreed with the submissions made by the Landlord.

He found that section 444D(1) of the Act only has the effect of binding all creditors (whose claims arise on or before the relevant date) to the extent that the DOCA purports to have that effect⁵. This was consistent with White J in *Henafor* where his Honour said *"It follows that if, on its proper construction, the DOCA has extinguished the plaintiff's claim for future rent, the deed is binding on the plaintiff"*⁶.

His Honour found that the proper way to construe the terms of the DOCA was to preserve the obligations on the Company to pay all monies due to the Landlord (from the Relevant Date), as and when they fell due, together with

the Landlord's right to claim against the Company for breach of the make good provisions.

While the expression *"Claim against the Company...the circumstances giving rise to which occurred on or before the Relevant Date"* in the definition of "Creditor" has previously been held to encompass the obligations under a lease of premises in force at the Relevant Date, the express term in Clause 5.4 clearly obliged the Company to pay the Landlord all monies due to the Landlord after the date of the DOCA and as and when they fell due⁷.

Implications

This decision highlights the importance of careful drafting and consideration of a landlord's position where a company intends to continue trading under a deed of company arrangement. The parties to a deed can usually include appropriate terms in the deed to protect existing lessors, and should be encouraged to do so, to ensure the continuation of the business and satisfaction of its ongoing obligations.

¹ [2017] NSWSC 1018

² [2017] NSWSC 1018 at paragraph 15

³ [2009] NSWSC 539

⁴ [2017] NSWSC 1018 paragraph 43

⁵ [2017] 1018 paragraph 50

⁶ [2017] 1018 paragraph 52

⁷ [2017] NSWSC 1018 paragraph 21

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