



Case in Brief:

Craftiness is not an abuse of process

With cashflow a persistent concern for companies in the construction industry, a recent decision in the New South Wales Supreme Court may alleviate some of the stress. The decision should affirm to struggling parties that there is no problem with taking strategic measures to ensure payment.

In *Kennedy Civil Contracting Pty Ltd (Administrators Appointed) v Richard Crookes Construction Pty Ltd*; in the *matter of Kennedy Civil Contracting Pty Ltd* [2023] NSWSC 99, the Court found that the creation of a deed of company arrangement (**DOCA**) in the face of liquidation does not amount to an *improper purpose* under section 445D(1)(g) of the Corporations Act 2001 (Australia) (the **Corporations Act**). The survival of the DOCA meant that liquidation proceedings were delayed, denying the application of section 32B of the Building and Construction Industry Security of Payments Act 1999 (NSW) (the **SOP Act**). The inapplicability of the section meant that Kennedy Civil Contracting (**Kennedy**) could pursue a payment claim against Richard Crookes Construction (**Richard Crookes**).

The facts

Kennedy was engaged by Richard Crookes to carry out civil, stormwater, and associated works under two separate subcontracts. As the works were being performed, Kennedy served various payment claims. Not all of these received a response. Some months later, Kennedy was put under voluntary administration. Joint and several voluntary administrators were appointed under section 436A of the Corporations Act.

Kennedy sought summary judgment under sections 15 and 16 of the SOP Act after time had passed without a response from Richard Crookes. In response, Richard Crookes attempted to dismiss the proceedings commenced by Kennedy, on the grounds that they were an abuse of process. This was based on section 32B of the SOP Act's prohibition on companies in liquidation being able to serve payment claims.

After the application was made, Kennedy's creditors underwent a meeting in which they voted to approve the entering into of a *holding DOCA*.¹ No secret was made of the fact that they knew the company was *hopelessly insolvent*; and the holding DOCA was only being entered into so payment claims could be enforced under the SOP Act. Richard Crookes considered this an *improper purpose* as stated under section 445D(1)(g) of the Corporations Act, a provision which lists reasons for enabling the termination of a DOCA. This became central to Richard Crookes' argument throughout proceedings.

The decision

Upon the dispute being heard in the NSW Supreme Court, two main issues were to be determined:

1. Considering that the DOCA had been entered into to evade the



restrictions at section 32B, was this an *improper purpose* as set out by section 445D of the Corporations Act?

2. If the answer was "no", did the actions nevertheless amount to an abuse of process?

On the first question, the Court found in favour of Kennedy, with the view that the purpose of a holding DOCA fits comfortably under the SOP Act. By entering into a DOCA, Kennedy had given effect to the *pay now, argue later* ethos of statutory adjudication. Furthermore, the DOCA was used in a way envisioned by the Corporations Act. It was therefore irrelevant that it had the effect of avoiding the section contained in the SOP Act.

On the second issue, Kennedy also found success. An abuse of process had not occurred merely because its

affairs were managed in a way which sat outside the scope of section 32B of the SOP Act. In fact, as the Court stated, the DOCA strategy was done in a way which followed the provisions – avoiding liquidation for the purpose of serving a payment claim.

Conclusion

The decision of the NSW Supreme Court should be welcomed by construction companies experiencing trouble with cashflow. The ability to enforce payment claims will be enhanced and, specifically, the decision should highlight the efficiency of DOCA holdings. This is a legitimate tool and even fits the purpose of statutory adjudication. Clearly, being *hopelessly insolvent* is not a real barrier to receiving what you may be owed.

¹ A DOCA is a binding arrangement between a company and its creditors which establishes the process of managing the company's affairs and assets.