FEDERAL COURT OF AUSTRALIA

Allen in his capacity as administrator of Walden Cloud Group Pty Ltd (Administrators Appointed), in the matter of Walden Cloud Group Pty Ltd (Administrators Appointed) [2021] FCA 97

File numbers:	VID 700 of 2020 VID 58 of 2021
Judgment of:	**BEACH J**
Date of judgment:	10 February 2021
Date of publication of reasons:	12 February 2021
Catchwords:	**CORPORATIONS** – insolvency – voluntary administration – receivers appointed concerning trust assets – sale of property and business – order under s 442C(2)(c) of the *Corporations Act 2001* (Cth) for disposal by administrators of encumbered property – operation of s 441A on the mortgagee – relevance of enforcement action by a predecessor in title – application by mortgagee for leave to enforce mortgage – competing sale of land proposals – leave granted under s 440B(2)(b) for mortgagee to exercise power of sale – application to restrain mortgagee sale of land – sale of business – rival deed of company arrangement proposed – undertaking concerning employee entitlements – order sought under s 447A seeking modification to operation of s 440B – application to restrain mortgagee sale refused
Legislation:	*Corporations Act 2001* (Cth) ss 440B, 441A, 442C, 447A *Supreme Court Act 1986* (Vic) s 52 *Transfer of Land Act 1958* (Vic) s 77
Cases cited:	*Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 *Forsyth v Blundell* (1973) 129 CLR 477 *Samsung Electronics Company Ltd v Apple Inc* (2011) 217 FCR 238
Division:	General Division

Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	133
Date of hearing:	11 and 24 November 2020, 8 and 18 December 2020 and 4, 5, 9 and 10 February 2021
Counsel for the Plaintiffs:	Dr O Bigos QC and Ms R Zambelli
Solicitor for the Plaintiffs:	Gilbert + Tobin
Counsel for the First Defendant:	Mr P Bick QC, Mr C Archibald QC and Mr C Moller
Solicitor for the First Defendant:	SBA Law
Counsel for the Second Defendant:	Mr P Cawthorn QC and Mr M Bearman
Solicitor for the Second Defendant:	Aitken Partners
Counsel for the Third Defendant:	Mr J Styring
Solicitor for the Third Defendant:	Roy Morris & Co
Solicitor for the Fourth Defendant:	The fourth defendant did not appear
Counsel for the Fifth Defendant:	Mr M Wyles QC and Mr R Strong
Solicitor for the Fifth Defendant:	Keypoint Law
Counsel for the First Intervener:	Ms M Hibberd
Solicitor for the First Intervener:	Maddocks
Counsel for the Second Intervener:	Mr J Evans QC

Solicitor for the Second Intervener:	MacPherson Kelley

Allen in his capacity as administrator of Walden Cloud Group Pty Ltd (Administrators Appointed), in the matter of Walden Cloud Group Pty Ltd (Administrators Appointed) [2021] FCA 97

ORDERS

VID 700 of 2020

IN THE MATTER OF WALDEN CLOUD GROUP PTY LTD (ADMINISTRATORS APPOINTED), CLOUD ABACUS HOLDINGS PTY LTD (ADMINISTRATORS APPOINTED), ODYNS HOLDINGS PTY LTD (ADMINISTRATORS APPOINTED) AND YOUTEAM PTY LTD (ADMINISTRATORS APPOINTED)

BETWEEN:	**PAUL A ALLEN AND JASON G STONE IN THEIR CAPACITY AS JOINT AND SEVERAL ADMINISTRATORS OF WALDEN CLOUD GROUP PTY LTD (ACN 618 515 772) (ATF WALDEN CLOUD GROUP TRUST) (ADMINISTRATORS APPOINTED), CLOUD ABACUS HOLDINGS PTY LTD (ACN 618 516 260) (ATF THE CLOUD ABACUS TRUST) (ADMINISTRATORS APPOINTED), ODYNS HOLDINGS PTY LTD (ACN 618 516 322) (ATF ODYNS TRUST) (ADMINISTRATORS APPOINTED) AND YOUTEAM PTY LTD (ACN 619 154 764) (ADMINISTRATORS APPOINTED)** First Plaintiff
	WALDEN CLOUD GROUP PTY LTD (ACN 618 515 772) (ATF WALDEN CLOUD GROUP TRUST) (ADMINISTRATORS APPOINTED), CLOUD ABACUS HOLDINGS PTY LTD (ACN 618 516 260) (ATF THE CLOUD ABACUS TRUST) (ADMINISTRATORS APPOINTED), ODYNS HOLDINGS PTY LTD (ACN 618 516 322) (ATF ODYNS TRUST) (ADMINISTRATORS APPOINTED) AND YOUTEAM PTY LTD (ACN 619 154 764) (ADMINISTRATORS APPOINTED) Second Plaintiff
AND:	**BELLA JOLL PTY LTD (ACN 644 464 513)** First Defendant
	ACN 644 931 108 PTY LTD (ACN 644 931 108) Second Defendant
	DUNES LAND DEVELOPMENTS PTY LTD (ACN 631 883 942) (and others named in the Schedule) Third Defendant
	WEIJIE CHEN First Intervener
	VOYA HOLDINGS PTY LTD (ACN 618 515 370) Second Intervener

ORDER MADE BY: BEACH J
DATE OF ORDER: 10 FEBRUARY 2021

OTHER MATTERS:

Employee entitlements

ACN 644 931 108 Pty Ltd (ACN) undertakes to the Court that, upon the anticipated winding up of Walden Cloud Pty Ltd ACN 618 515 772 (administrators appointed) atf Walden Cloud Group Trust (Walden) and upon on the terms of this undertaking as provided for below, if but for this undertaking any former employees would suffer a shortfall in the payment of their employment entitlements, ACN will pay or procure the payment of the shortfall, and establish or procure the establishment of a trust fund to be set aside for the purpose of paying the amounts and securing the payments of those amounts.

For the purposes of this undertaking:

1. A former employee comprises any person who was an employee of Walden at the date of the appointment of the plaintiffs as the administrators thereof and any current employee at the date hereof but always excluding directors and statutory officers.

2. The employment entitlement of a former employee comprises any amount lawfully due to be paid on the termination of their employment by Walden as at the date of its winding up to the former employee for:

    (a) salary or wages inclusive of all entitlements to which the former employee would have been entitled had the former employee remained employed and which accrued to the date of their termination but which remained unpaid as at that date; and

    (b) any amount of superannuation payable in respect thereupon to the former employee's superannuation fund; and

    (c) further, the amount of any entitlements for redundancy but, for the avoidance of doubt, excluding any such entitlement for any former employee who is or becomes reemployed to work in the businesses conducted on the property the subject of the proceedings.

3. A shortfall is any difference as at that date of winding up between the amount paid or payable to a former employee or their superannuation fund (as the case may be), in respect

of an employment entitlement or in compensation for the loss thereof as is not received by or on behalf of the employee from any other source whatsoever, including Walden and the Commonwealth of Australia under the fair entitlement guarantee scheme established under the *Fair Entitlements Guarantee Act 2012* (Cth) and the superannuation guarantee scheme under the *Superannuation Guarantee (Administration) Act 1992* (Cth) after reasonable attempts by the former employee to be paid from those sources.

4. For the avoidance of doubt, the payment of the amount of any shortfall is to exclude any part thereof lawfully required to be withheld on behalf of income or other taxation, which is to be remitted upon payment on behalf of the employee as required by law.

5. The maximum liability of ACN to pay shortfalls in employee entitlements in accordance with this undertaking is to be $750,000.

6. The trust fund is to be established within 14 days after orders are made by this Court upon condition of this undertaking being given, and must be in a sum that is at all times to be sufficient to meet the maximum liability of ACN under this undertaking as reduced from time to time by any payments of shortfalls in employee entitlements to former employees in accordance with this undertaking.

7. It is to be a term of the trust fund that its capital and income may only be applied for the purposes of this undertaking, the proper and reasonable costs of maintaining the fund, or to meet any taxation liabilities imposed upon the fund from time to time.

8. For the avoidance of doubt, it is to be a term of the trust fund that capital of the trust fund may be repaid to ACN or the provider of the funds from time to time provided that, at all times, clause 6 hereof is complied with.

9. In the event that there any dispute arises between ACN or the trustee of the trust fund and a former employee as to the former employee's entitlement under this undertaking, which is unable to be reasonably resolved, neither ACN nor the trustee is bound to make further payment until further order of this Court, or a court of competent jurisdiction over the trust fund.

10. Unless the fund is expended to a nil amount in accordance with the terms hereof, the trust fund is to be maintained for a period of five years from the date of its establishment, or until further order of this Court, at which time any remaining surplus in the fund is to be returned to ACN.

Offer of employment

ACN further undertakes to the Court that it will offer or procure an offer of employment by an employer to be engaged to manage the property the subject matter of these proceedings to all former employees and current employees as soon as reasonably practicable after it settles the acquisition of the property the subject matter of the proceeding.

THE COURT ORDERS THAT:

1. The fifth defendant's application dated 4 February 2021 be dismissed.
2. The fifth defendant pay the parties' costs of and incidental to its application.
3. The time for completion of the settlement of the sale of the Land in order 7(b) of the orders made on 24 December 2020 be extended to 11.59 pm on 10 February 2021.
4. Liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

VID 58 of 2021

BETWEEN:	**WEIJIE CHEN** Plaintiff
AND:	**BELLA JOLL PTY LTD (ACN 644 464 513)** First Defendant
	ACN 644 931 108 PTY LTD (ACN 644 931 108) Second Defendant
ORDER MADE BY:	**BEACH J**
DATE OF ORDER:	**10 FEBRUARY 2021**

THE COURT ORDERS THAT:

1. The proceeding be dismissed.

2. Subject to order 3, the plaintiff pay the defendants' costs of and incidental to the plaintiff's originating motion filed on 4 February 2021 in the Supreme Court of Victoria proceeding S ECI 2021 00238 and transferred to this Court on 9 February 2021.

3. If the plaintiff does not communicate to the Court within 14 days an intention to oppose an indemnity costs order, then the costs referred to in order 2 are to be paid on an indemnity basis.

4. Liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1 The first plaintiffs are the voluntary administrators of four companies named as the second plaintiffs in this proceeding (the Sands VA entities). They were appointed as joint and several administrators on 11 and 12 July 2020 by resolution of their directors. The administrators previously sought orders to facilitate the sale of the assets of the Sands VA entities, which relevantly comprise:

(a) "Peppers – The Sands Resort" in Torquay, Victoria a substantial tourist operation (the business) owned by one of the Sands VA entities, Walden Cloud Group Pty Ltd (Walden); and

(b) land upon which the business operated, comprised of adjoining parcels of land described in 101 certificates of title (the property) held in various combinations and capacities by the other three Sands VA entities, namely, Cloud Abacus Holdings Pty Ltd (Cloud Abacus), Odyns Holdings Pty Ltd (Odyns Holdings) and Youteam Pty Ltd (Youteam).

2 They have also sought orders to be appointed as receivers over the assets of the Cloud Abacus Trust, the Odyns Trust and the Walden Cloud Group Trust. They sought the receivership orders in order to facilitate a proposed sale and to realise various trust assets for the purpose of exercising the trustees' and administrators' rights of indemnity secured by lien.

3 I should say that the property and the business ownership by the Sands VA entities, and the interests behind each of those entities, are intermingled. The business is situated on the property and cannot be operated independently from it. Further, three of the four entities own the property (Cloud Abacus, Odyns Holdings and Youteam). And Walden owns the business. Further, Walden, Cloud Abacus and Odyns Holdings were 100% owned by the same shareholder Voya Holdings Pty Ltd (Voya Holdings), apparently as trustee under unit trusts for the Zhou Family Trust. And those entities held their interests in the business and property as trustees of various trusts, ultimately for the benefit of the Zhou interests. Further, Youteam is owned by Mr Weijie Chen and Mr Weijian Chen in equal shares. Further, the four entities were co-obligors for a loan which was taken out shortly after their incorporation and remained a liability until their administration.

4 Now the business employed more than 100 staff members prior to its closure due to COVID-19. It operated a 112-room hotel and an 18-hole golf course. But its operations were significantly scaled back from 8 July 2020 due to Victoria's stage 4 lockdowns. The hotel and restaurant were temporarily closed from mid-August 2020. Further, whilst the business traded from the property, Walden did not pay rent and did not have any lease agreement. Its relationship with the owners of the property may be described as a tenancy at will.

5 Further, Bella Joll Pty Ltd (Bella Joll) was a significant secured creditor and as at 17 November 2020 was owed $9.679 million. It held a registered mortgage over the property until 10 February 2021 when it was discharged.

6 Now over the course of November 2020 to February 2021 I have had to deal with various applications concerning the administration of the Sands VA entities at the behest of the administrators and other entities including Voya Holdings and Bella Joll.

7 It is necessary to give reasons for some of my rulings including on the most recent application of Best Capital Investments Pty Ltd (Best Capital).

November and December 2020 orders

8 On 11 November 2020, I made orders appointing the administrators as receivers of the Cloud Abacus Trust and Odyns Trust in circumstances where Cloud Abacus and Odyns Holdings had been replaced as trustee of those respective trusts:

9 These orders included the following:

> 2. To the extent that Cloud Abacus Holdings Pty Ltd (ACN 618 516 260) (Administrators Appointed) (Cloud Abacus) or Odyns Holdings Pty Ltd (ACN 618 516 322) (Administrators Appointed) (Odyns) is no longer trustee of the Cloud Abacus Trust and the Odyns Trust respectively:
>
> (a) pursuant to s 57(1) of the *Federal Court of Australia Act 1976* (Cth), the first plaintiffs be appointed as receivers over the assets of each trust for the purpose of preserving the trust property;
>
> (b) the need for the first plaintiffs to file a guarantee under rr 14.21 and 14.22 of the *Federal Court Rules 2011* (Cth) be dispensed with.
>
> (c) the first plaintiffs have, in respect of the business and assets of the respective trust, the powers that a receiver has in respect of the business and property of a company under s 420 of the *Corporations Act 2001* (Cth) (Act) (other than s 420(2)(s), (t), (u) and (w)) as if the reference in that section to "the corporation" were a reference to the respective trust including without limitation, the power to do all things necessary or convenient to:

(i) carry on the business of the respective trust, if any;

(ii) employ any person in connection with the business of the respective trust, if any;

(iii) pay the creditors of the trust from the proceeds of the assets, pursuant to the priorities prescribed under the provisions of the Act;

(iv) compromise any claim made against Cloud Abacus or Odyns in its capacity as trustee of the respective trust or against any of the trust property on any terms the first plaintiffs see fit;

(v) bring any claim against any party on behalf of the respective trust; and

(vi) execute any tax returns, financial statements or other documents relating to the respective trust.

10 For present purposes I do not need to elaborate further on the background to those orders.

11 On 24 November 2020, the administrators sought orders to facilitate the sale of the business and property by the administrators, both in their capacity as administrators and as receivers. For that purpose they sought leave pursuant to s 442C(2) of the *Corporations Act 2001* (Cth) (the Act) to dispose of the property and the business. Specifically, under the sale of the property:

(a) the administrators sought to dispose of property of Youteam that was subject to Bella Joll's mortgage (s 442C(1)(a)); and

(b) to the extent that Cloud Abacus and Odyns Holdings had been replaced as trustees of the Cloud Abacus Trust and Odyns Trust, the administrators (as receivers) sought to dispose of trust property which, although not "property of the company subject to a security interest", was nevertheless property that was used or occupied by or was in the possession of Walden but of which someone else was the owner (s 442C(1)(b)).

12 Such leave was sought to enable the administrators to dispose of the whole mortgaged property. And such disposal would have the effect of extinguishing Bella Joll's mortgage (s 442C(7)). Now as I have said, Bella Joll was a significant secured creditor holding a registered mortgage over the property. Further, by this time on 17 November 2020 Bella Joll had issued default notices under its mortgage. Further, Bella Joll had refused to consent to the proposed sale and refused to agree to forbear from any enforcement action. I note that at this time s 440B precluded Bella Joll from enforcing its mortgage during the administration of the Sands VA entities, although it was not prevented from issuing default notices (s 441E). The question of

the effect of s 440B on Bella Joll was the subject of some contention and I will discuss this in a moment.

13 On 24 November 2020 I made orders which included the following:

> 1. The first plaintiffs, in their capacity as joint and several administrators of the second plaintiffs, being:
>
> (a) Walden Cloud Group Pty Ltd (ACN 618 515 772) (Administrators Appointed) (Walden Cloud);
>
> (b) Cloud Abacus Holdings Pty Ltd (ACN 618 516 260) (Administrators Appointed) (Cloud Abacus);
>
> (c) Odyns Holdings Pty Ltd (ACN 618 516 322) (Administrators Appointed) (Odyns); and
>
> (d) Youteam Pty Ltd (ACN 619 154 764) (Administrators Appointed) (Youteam),
>
> (together, Sands VA Entities),
>
> and in their capacity as joint and several receivers of the assets of the Cloud Abacus Trust and the Odyns Trust (to the extent that Cloud Abacus and Odyns is no longer trustee of the Cloud Abacus Trust and the Odyns Trust), are justified in:
>
> (i) entering into, completing and performing their obligations, and causing the Sands VA Entities to enter into, complete, and perform their obligations under, the sale agreements for the sale of the property and business of the Sands VA Entities (substantially as set out at pages 850-881 (Business Sale) and 882-918 (Property Sale) of Confidential Annexure PAA-2 to the affidavit of Paul Anthony Allen dated 30 October 2020, as amended in the manner described in paragraphs 4 and 5 of the third affidavit of Paul Anthony Allen dated 23 November 2020) (together the Property and Business Sale);
>
> (ii) bringing this proceeding; and
>
> (iii) undertaking all administrative steps necessary to give effect to these directions.
>
> 2. The purpose of the first plaintiffs' appointment as receivers over the assets of the Cloud Abacus Trust and the Odyns Trust be extended to the Property and Business Sale.
>
> 3. The first plaintiffs have, in addition to their other powers in respect of the business and assets of the Cloud Abacus Trust and the Odyns Trust, the power to do all things necessary or convenient to sell the assets of the respective trust in connection with and as part of the Property and Business Sale.
>
> 4. Pursuant to s 442C(2)(c) of the *Corporations Act 2001* (Cth) (Act) in connection with and as part of the Property and Business Sale, the first plaintiffs have leave (to the extent that such leave is required) to dispose of:
>
> (a) such property of the Sands VA Entities as is (or may be) subject to a

security interest (including under the *Personal Property Securities Act 2009* (Cth)), including the registered mortgage of Bella Joll Pty Ltd (ACN 644 464 513) (Bella Joll) bearing registration number AR072897W (Mortgage) over the land held variously by Cloud Abacus, Odyns Holdings and Youteam described in Certificates of Title:

(i) Volume 10887 Folio 461;

(ii) Volume 10954 Folio 530; and

(iii) Volume 11055 Folios 157 to 256; and

(b) such property as is or may be used or occupied by, or is in the possession of, the Sands VA Entities (or any of them), but of which someone else is the owner, including without limitation the property of the Cloud Abacus Trust and the Odyns Trust.

5. At the completion of the Property and Business Sale:

(a) after payment of the Plaintiffs' reasonable costs, expenses and remuneration attributable to the sale, preservation and realisation of the Property and the Business, an amount from the proceeds of the Property Sale is to be paid to Bella Joll in respect of the debt secured by the Mortgage;

(b) the balance of the proceeds of the Property and Business Sale (Retained Proceeds) be deposited into a separate controlled, interest-bearing monies account opened by the first plaintiffs, which monies are to be retained for the purpose of meeting claims that any party has in respect of the property of the Sands VA Entities, including (but not limited to) any claim by the first plaintiffs to recover from the Retained Proceeds amounts in respect of remuneration, fees and expenses incurred in their capacity as voluntary administrators of the Sands VA Entities.

6. Pursuant to s 447A of the Act, Part 5.3A of the Act is to operate in relation to the Sands VA Entities as if, notwithstanding the operation of s 442C(7) of the Act, the claims of any secured creditors of the Sands VA Entities to the Retained Proceeds correspond with their security interests.

14 Now after that time, various events occurred. On the afternoon of 24 November 2020, Bella Joll's solicitors wrote to the administrators' solicitors, requesting copies of the contracts of the sale of the property and the business and evidence to demonstrate that the proposed purchaser had the ability to complete the transactions. Bella Joll reserved its right to exercise its powers as mortgagee in relation to the property. That evening, the administrators' solicitors responded, but did not provide copies of the documents requested nor provide evidence of the purchaser's ability to complete the transactions. Further, the administrators took issue with whether Bella Joll could enforce its mortgage.

15 On 25 November 2020, the Sands VA entities through the administrators entered into inter-alia a contract of sale for the property with a purchaser, Dunes Land Developments Pty Ltd (Dunes Land). There was also a separate sale of business contract.

16 But on 27 November 2020, Bella Joll also purported to enter into a contract of sale for the property with ACN 644 931 108 Pty Ltd (ACN 644); this contract was later substituted by a contract entered into on 3 December 2020.

17 On 8 December 2020, the administrators applied for injunctive and declaratory relief concerning the contract of sale between Bella Joll and ACN 644. The administrators sought to invoke the operation of s 440B and also asserted that Bella Joll's exercise of rights as mortgagee had not been exercised "in good faith and having regard to the interests of the mortgagor" under s 77 of the *Transfer of Land Act 1958* (Vic). I need say nothing further concerning s 77, but let me address the s 440B question.

18 Section 440B limits the ability of certain secured parties to enforce rights in relation to the property of a company in administration, or other property used or occupied by, or in possession, of the company. But the operation of s 440B is subject to exceptions, including an exception under s 441A. Section 441A applies where the whole or substantially the whole of the property of the company is subject to a security interest and before or during the "decision period", the secured party enforced its security interest. In those circumstances, nothing in s 440B prevents the secured party or a receiver or controller appointed in relation to the security interest from enforcing the security interest (s 441A(3)).

19 Sections 441A(1) to (3) provide:

> **441A Secured party acts before or during decision period**
>
> *Scope*
>
> (1) This section applies if:
>
> (a) the whole, or substantially the whole, of the property of a company under administration is subject to a security interest; and
>
> (b) before or during the decision period, the secured party enforced the security interest in relation to all property (including any PPSA retention of title property) of the company subject to the security interest, whether or not the security interest was enforced in the same way in relation to all that property.
>
> (2) This section also applies if:
>
> (a) a company is under administration; and

(b) the same person is the secured party in relation to each of 2 or more security interests in property (including PPSA retention of title property) of the company; and

(c) the property of the company (the secured property) subject to the respective security interests together constitutes the whole, or substantially the whole, of the company's property; and

(d) before or during the decision period, the secured party enforced the security interests in relation to all the secured property:

(i) whether or not the security interests were enforced in the same way in relation to all the secured property; and

(ii) whether or not any of the security interests was enforced in the same way in relation to all the property of the company subject to that security interest; and

(iii) in so far as the security interests were enforced in relation to property of the company by a receiver or controller appointed for the purposes of Part 5.2 (whether under an instrument relating to the security interest or a court order)—whether or not the same person was appointed in respect of all of the last-mentioned property.

Power of enforcement by secured party, receiver or controller

(3) Nothing in section 198G, 440B, 440F, 440G or 451E, or in an order under subsection 444F(2) or 451G(1), prevents any of the following from enforcing the security interest, or any of the security interests:

(a) the secured party;

(b) a receiver or controller appointed for the purposes of Part 5.2 (whether under an instrument relating to the security interest or a court order, and even if appointed after the decision period).

20 Now Bella Joll argued that the limitation imposed by s 440B did not apply to it and sought the comfort of s 441A.

21 First, it said that the property the subject of Bella Joll's registered mortgage (the mortgage) was not "property of the company". Rather, that property was held on trust by the Sands VA entities. It is said that "property of the company" referred to in s 440B did not include trust property. Further, insofar as there was any argument that the section operated on trust property by the mechanism of the trustee's right of indemnity, the companies as mortgagors had assigned to the mortgagee their rights as trustees to be indemnified from the trust fund.

22 Second, Bella Joll said that the exception provided for in s 441A applied. It said that the relevant security interest had already been enforced. In this context it pointed to the following matters.

23 On 14 July 2020, the (then) mortgagee Smart Wealth Pty Ltd (Smart Wealth) had exercised its powers under the mortgage and had appointed Mr Stephen Hathway as receiver of the property. In October 2020, Mr Zhou paid out the mortgagors' liabilities to Smart Wealth. The mortgage was transferred to Bella Joll. The receiver, Mr Hathway, retired shortly before that transfer.

24 It was said that the appointment of Mr Hathway occurred within the "decision period" under s 441A. The "decision period' begins on the day that the voluntary administration begins, and ends on the thirteenth business day after that day (s 9). Mr Hathway was appointed on 14 July 2020, which was within 13 business days of the appointment of the administrators on 11 and 12 July 2020.

25 Now the administrators advanced two arguments before me about the effect of Mr Hathaway's appointment:

(a) first, that during the decision period Bella Joll did not enforce its security interest; and

(b) second, that Bella Joll could not rely on the appointment of a receiver on 14 July 2020 by its predecessor in title, Smart Wealth, because that enforcement ended with the retirement of the receiver on 12 October 2020.

26 But Bella Joll put essentially two points against this. First, it was said that s 441A expressly contemplates that the relevant action could be taken by either the secured creditor itself or by the receiver or controller (s 441A(3)). Second, it was said that there was nothing in s 441A that restricted or terminated its operation once it had been engaged. In other words, provided that the secured party had enforced its security interest before or during the decision period (in the present context, by the appointment of a receiver), s 441A applied and neutered the operation of s 440B so far as Bella Joll was concerned.

27 In summary then, a receiver having been appointed within the decision period, it was said that Bella Joll was entitled to enforce its mortgage.

28 But I rejected Bella Joll's argument.

29 Let me deal with the trust point first. Section 440B relevantly provides that during the administration of a company, a secured party cannot enforce a security interest over property of the company or other property used or occupied by or in the possession of the company. Now the property, although trust property of the Cloud Abacus Trust and the Odyns Trust, was

"used or occupied by, or in the possession of" at least Walden. The business was conducted at the property. The trust argument went nowhere.

30 Let me then say something about s 441A. As is apparent, s 441A(3) applies only where relevantly "before or during the decision period, the secured party enforced the security interest" (s 441A(1)(b)). The decision period is the period beginning at the start of the administration and ending 13 business days later. The decision period here for Cloud Abacus and Odyns Holdings was between 11 July 2020 and 29 July 2020, and for Youteam it was between 12 July 2020 and 30 July 2020.

31 But during that period Bella Joll did not "enforce" its security interest. Bella Joll cannot rely on the appointment of a receiver on 14 July 2020 by its predecessor in title, Smart Wealth, because that "enforcement" ended with the retirement of the receiver on 12 October 2020.

32 Two points need to be made.

33 First, s 441A(1)(b) in its express terms does not refer to predecessors in title to Bella Joll. It refers to "the secured party", which in this case is Bella Joll. The statute makes no reference to predecessors either in s 441A or any earlier definitional provisions. Of course, commercially it would be convenient to read s 441A as picking up predecessors, but there is no warrant for reading words into the provision. Further, as an exception to, inter-alia, s 440B, it should be construed narrowly.

34 Now in this context Bella Joll sought to make a point in its favour by reference to the fact that s 441A(3) referred to not only "the secured creditor" but also "a receiver or controller appointed for the purposes of Part 5.2 …". I have never seen so much finessed out of so little. The disjunctive optionality cannot avoid in the context with which I am dealing the significance of the definite article in the first option of s 441A(3)(a) which marries up with all the other phraseology in s 441A where "the secured party" is used, such that on one view such optionality implies an intended narrowing of "the secured party" because where flexibility was intended a specific provision (s 441A(3)(b)) was included. Further, whatever be said about s 441A(3)(b) cannot re-write s 441A(1)(b) itself which is confined to "the secured party".

35 Second, it is necessarily implicit in s 441A that even if there was enforcement by the secured creditor during or before the decision period, that if this has come to an end, then later and new enforcement action by a different entity could not in effect leverage off the earlier but terminated enforcement action. In the present case the receiver appointed by a predecessor in

title to Bella Joll has been discharged before the transfer of mortgage. Further, such later action would not be embraced by the width of phrases such as "whether or not the security interests were enforced in the same way".

36 In summary, I rejected Bella Joll's invocation of s 441A.

37 Accordingly, and on the administrators' application, on 9 December 2020 I made orders which included the following:

> 1. Bella Joll Pty Ltd (ACN 644 464 513) (Bella Joll) and ACN 644 931 108 Pty Ltd be joined as the first and second defendants respectively.
>
> …
>
> 3. Bella Joll and ACN 644 931 108 Pty Ltd, whether by themselves, their officers, servants or agents, be restrained from completing their purported contract of sale of land dated 3 December 2020, and from taking any steps to interfere with the plaintiffs' Property and Business Sale as described in the orders made on 24 November 2020.
>
> 4. At settlement of the plaintiffs' Property and Business Sale, Bella Joll deliver-up a discharge of mortgage in exchange for the tender of the secured debt.
>
> …
>
> 8. The purported contract of sale of land dated 3 December 2020 between Bella Joll and ACN 644 931 108 is unenforceable.

38 Subsequently, Bella Joll then sought leave before me under s 440B to enforce its mortgage and to sell the property to ACN 644. The background to the application was as follows.

39 Since late November 2020, the parties to the proceeding had proceeded on the assumption that the sale of the property by the administrators to Dunes Land was imminent. But the contract of sale the administrators had entered into was not capable of immediate settlement and would not be settled until mid-January 2021. Bella Joll considered that that timeframe was inconsistent with the positions and material the administrators had previously put before me. Further, and contrary to the administrators' belief, Dunes Land had not secured the finance necessary to complete the sale. So, Bella Joll considered that the delay was causing prejudice.

40 It was in these circumstances that Bella Joll sought leave under s 440B to enforce the mortgage and to make its sale to ACN 644.

41 Now s 440B restricts the ability of a third party to enforce its security interest over property of a company in administration, or property used or occupied by or in the possession of the company. But the restrictions do not apply if the secured party's rights in property are

exercised with the leave of the Court. I do not need to linger on well accepted principles concerning the application of s 440B.

42 I determined that Bella Joll should have leave to enforce the mortgage and to proceed with the sale to ACN 644, but only if the administrators' sale to Dunes Land fell through.

43 On 24 December 2020 I made detailed orders to cover off the relevant contingencies which included the following:

> 1. The first defendant (Bella Joll) have leave under section 440D of the *Corporations Act 2001* (Cth) (the Act) to bring its interlocutory application filed on 16 December 2020 against the second plaintiffs.
>
> …
>
> 3. Dunes Land Developments Pty Ltd (ACN 631 883 942) (Dunes) be joined as the third defendant to the proceeding.
>
> 4. Except with the leave of the Court, the date for settlement of the contract of sale dated 25 November 2020 commencing at page 122 of exhibit PAA-7 to the affidavit of Paul Anthony Allen made on 8 December 2020 (Agreement) is not to be extended, and the consideration under the Agreement is not to be otherwise varied, and any application for such leave is to be made on reasonable notice to Bella Joll and the second defendant (ACN Co).
>
> 5. If the Agreement does not settle by 10.00 am on 27 January 2021, or any of the plaintiffs propose to enter into any further or other sale agreement for the land the subject of the Agreement, the first plaintiffs are to notify Bella Joll and ACN Co forthwith and no such further or other agreement may be entered into until ten business days after such notice.
>
> 6. If the Agreement does not settle by 5.00 pm on 11 January 2021 the first plaintiffs are to cause a 14 day notice of rescission of the Agreement to be served on Dunes on 11 January 2021 and provide a copy of that notice to Bella Joll and to ACN Co forthwith.
>
> 7. If the Agreement does not settle by 10.00 am on 27 January 2021, whether or not it has been terminated, then as of 10.01 am on 27 January 2021:
>
> (a) paragraphs 3, 4 and 8 of the orders made on 9 December 2020 are vacated;
>
> (b) Bella Joll has leave under section 440B of the Act to enforce its registered mortgage (bearing registration number AR072897W) over the land located in Torquay, Victoria, being the land more particularly described in Certificates of Title Volume 10887 Folio 461, Volume 10954 Folio 530 and Volume 11055 Folios 157 to 256 (Land) by selling the Land to ACN Co for the sum of $12,800,000 with settlement to be completed by 5.00 pm on 10 February 2021;
>
> (c) the caveats lodged by Dunes over the Land, registered on the Register of Titles, and bearing dealing numbers AT827300Q, AT827328R, AT827309V, AT827317W, AT827326V and AT827333Y be removed forthwith; and

(d) upon the settlement of any such sale of the Land by Bella Joll, Bella Joll must deal with the proceeds of sale forthwith in accordance with the provisions of section 77(3) of the *Transfer of Land Act* (1958), save that the payment of the residue under section 77(3)(d) is to be made to the first plaintiffs.

44 What I had in mind should be self explanatory from the text of these orders.

February 2021 orders

45 Now the administrators' contract of sale did not settle by 5.00 pm on 11 January 2021. And notwithstanding the issue of rescission notices, the contract did not settle by 27 January 2021 either.

46 So, by reason of my orders made on 24 December 2020 and the failure of the administrators' sale to settle by 10.00 am on 27 January 2021, settlement of the contract of sale between Bella Joll and ACN 644 could proceed. Settlement of that contract was due at noon on 5 February 2021.

47 Further, on 28 January 2021 Bella Joll took possession of the property in anticipation of settling the sale to ACN 644.

48 But on 4 February 2021, Best Capital filed an application seeking to postpone the settlement of the Bella Joll sale to ACN 644. I will say something more about Best Capital later.

49 It sought an order in the following terms:

> Pursuant to section 447A of the Act, Part 5.3A of the Act apply in relation to each of the second plaintiffs as if section 440B provided that where leave has been given under paragraph 440B(2)(b) to a secured party to enforce a security interest over property of a company, the secured party shall not complete the sale of any property of the company subject to that security interest without the further leave of the Court.

50 It also sought an interlocutory injunction.

51 Best Capital's application came on before me at 2.15pm on 4 February 2021. At that time I expressed dissatisfaction with the state of the material filed by both Best Capital and the administrators and made orders adjourning the application to 3.15pm on 5 February 2021, on the basis that Bella Joll and ACN 644 would not settle their contract before the hearing on 5 February 2021. I should say that during the course of the hearing on 4 February 2021, Best Capital accepted the proposition that ACN 644 was a bona fide purchaser for value without notice of any prior or disqualifying interest.

52 Now on 5 February 2021, Mr Weijie Chen sought and obtained an ex parte injunction until further order against Bella Joll in the Supreme Court of Victoria seeking to restrain the exercise of Bella Joll's power of sale. Apparently, Mr Chen had attempted to redeem Bella Joll's mortgage. I will put to one side for the moment the conceptual confusion in his case concerning mixing questions of redemption with questions of subrogation.

53 The Supreme Court proceeding was drawn to my attention. At the adjourned application before me at 3.15pm on 5 February 2021 I referred to the orders made against Bella Joll in the Supreme Court proceeding and indicated that I assumed that the application to the Supreme Court had been made by reason of a misconceived perception that Mr Chen's application did not involve a federal matter. In my view, Mr Chen's proceeding should have been brought before me in the Federal Court's accrued jurisdiction and possibly its associated jurisdiction. I was told that the Supreme Court proceeding had been listed for hearing on Monday afternoon, 8 February 2021, and that Bella Joll would be applying to dissolve the injunction made against it. Mr Peter Bick QC for Bella Joll also confirmed that, if the injunction was dissolved, Bella Joll would give Best Capital at least two hours' notice before settling the sale to ACN 644, thereby giving Best Capital time to seek any injunctive relief from me. I confirmed that, if necessary, the proceeding before me could be relisted on short notice. Otherwise, I made orders adjourning Best Capital's application to 2.15 pm on 9 February 2021.

54 On 8 February 2021, the matter came back before the Supreme Court for the hearing of an interlocutory injunction. The matter was heard on the afternoon of 8 February 2021 and again on the morning of 9 February 2021. On 9 February 2021, the Supreme Court ordered that the proceeding be transferred to the Federal Court and further ordered that the injunction be discharged on and from 4.15 pm on 9 February 2021, which it was.

55 Now Mr Chen's proceeding was misconceived. Accordingly, when his proceeding came before me on 9 and 10 February 2021 I dismissed that proceeding in its entirety and also indicated that I would be prepared to make an indemnity costs order against Mr Chen.

56 Without lingering on the detail, I briefly note the following matters which moved me to dismiss Mr Chen's proceeding.

57 Of course, there is jurisdiction to restrain a mortgagee from exercising its power of sale where a mortgagor or someone else entitled to do so has sought redemption by tendering the full amount of principal and interest. But such a restraint may only be imposed *before* there is a

binding contract for sale of the mortgaged property with a bona fide purchaser for value under a valid exercise of the power of sale. In *Forsyth v Blundell* (1973) 129 CLR 477, Walsh J said at 499:

> If a contract of sale had been made which was not affected by any impropriety, it would not have been open to the mortgagor to claim that until the contract had been completed his right to redeem the mortgage continued notwithstanding the contract and was superior to the right of the purchaser. Although he retained his title to the land this was subject to the power of sale as defined in the Ordinance and as incorporated into the mortgage instruments. In my opinion, a contract of sale properly made in the course of the exercise of that power is binding upon the mortgagor, not because the mortgagee contracts as agent for the mortgagor, but because by entering into a mortgage to which the Ordinance applies the mortgagor makes his own rights subject to its provisions, including those which confer and regulate the power of sale, and, therefore, subject to any action which is properly taken in good faith by the mortgagee. On this question, I regard as applicable and as correct the decision in *Waring (Lord) v. London and Manchester Assurance Co. Ltd.*, approved in *Property &: Bloodstock Ltd. v. Emerton*, that a contract by the mortgagee to sell the property is binding, before completion, upon the mortgagor unless it be proved that the mortgagee exercised his power of sale in bad faith.
>
> (full citations omitted)

58 Let me deal with another matter which apparently arises because Mr Chen also asserted various rights of subrogation.

59 Section 52 of the *Supreme Court Act* 1986 (Vic) allows a right of subrogation to a surety who has paid in full the amount of the guaranteed debt. But under the loan deed, Mr Chen was only liable for the "Youteam Guaranteed Amount" of $1.6 million. In other words he was never a guarantor on any view for the majority of the debt owed to Bella Joll.

60 Now ss 52(1) and (3) provide:

> **52 Surety discharging liability to be entitled to securities**
>
> (1) A person who is—
>
> (a) surety for the debt or duty of another; or
>
> (b) liable with another for a debt or duty—
>
> and who pays that debt or performs that duty, is entitled to have assigned to that person or to a trustee for that person every judgment specialty or other security held by the creditor in respect of that debt or duty.
>
> …
>
> (3) A person who pays a debt or performs a duty as referred to in subsection (1) is entitled—
>
> (a) to stand in the place of the creditor; and

(b) to use all the remedies of the creditor; and

(c) if necessary and on a proper indemnity, to use the name of the creditor—

in any proceeding to obtain from the principal debtor or any co-surety, co-contractor or co-debtor (as the case requires) indemnity for the advances made and loss sustained by the person who paid the debt or performed the duty.

61 So, even if Mr Chen had purported to tender the mortgaged debt, he could not come within s 52 as he was not a surety "for the debt" (viz the whole debt (s 52(1)(a)) or "liable for a debt" (s 52(1)(b)).

62 But there were other difficulties for Mr Chen in any event.

63 Under the loan deed, the guarantors waived the right to subrogation in any event.

64 Further, the effect of subrogation, if it could have been invoked, would have been to assign the security in equity to the guarantor. But on any view the equitable interest of the purchaser (ACN 644) came into existence before that of the guarantor as equitable assignee. Accordingly, even if Mr Chen could rely on rights of subrogation, he would have taken them subject to the prior rights of the purchaser, ACN 644. In other words, even on the best view of the world for Mr Chen, his reliance on s 52 could not have thwarted ACN 644.

65 In summary then, I drew the following conclusions.

66 First, there was no right in anyone to redeem the mortgage after Bella Joll, as mortgagee in possession, had sold the property to a bona fide purchaser for value without notice.

67 Second, Mr Chen had no right, by the tender, to subrogate himself to Bella Joll's rights under the mortgage.

68 Third, even if Mr Chen did have such a right of subrogation in equity, ACN 644's interest as a prior equitable interest holder of which Mr Chen had notice, took priority.

69 So, Mr Chen had no right to interfere with the Bella Joll sale or to prejudice the interests of ACN 644 by seeking to interfere therein with settlement.

70 Finally, in terms of the Supreme Court proceeding I do not need to linger on any material non-disclosure questions involved in the obtaining of the ex parte injunction.

71 For all these reasons, I disposed of this transferred proceeding at the earliest opportunity.

72 Let me turn back then to Best Capital's application before me, which came back before me on 9 and 10 February 2021.

73 Best Capital relied upon a modification to the operation of s 440B to restrain Bella Joll completing the sale, pending the creditors' meetings foreshadowed for 22 February 2021 by the administrators.

74 Best Capital said that it was willing to fund a DOCA which would inter-alia pay out Bella Joll in full, pay the administrators' expenses and pay 100% of employee entitlements.

75 In those circumstances, it said that the interests of Bella Joll would be protected in that it would receive full payment of the sum secured by the mortgage.

76 Further, it said that if the creditors approved the DOCA and the mortgagee sale to ACN 644 was frustrated, ACN 644 would receive a refund of any monies paid under the sale contract and any reasonable expenses it had incurred on and after 27 January 2021 on the assumption that the mortgagee sale would be completed. Further, it said that if the creditors did not approve the DOCA and the mortgagee sale was subsequently completed, Bella Joll and ACN Co would be protected by an undertaking as to damages occasioned by the delay in settlement.

77 Further, it said that ACN 644 as a purchaser under an uncompleted contract of sale of land could have acquired an equitable interest in the land, commensurate with its right to obtain specific performance. But it said that ACN 644 chose to eschew any such entitlement. Accordingly, ACN 644 would have been limited to demanding repayment of its deposit if Bella Joll could not complete the contract. It said that it had not yet acquired any proprietary interest in the land.

78 Further, it said that the opinion of the administrators was that the DOCA proposed by Best Capital would produce a better outcome for unsecured creditors than the alternative sale to ACN 644.

79 Now as I have said, Best Capital sought the following order under s 447A:

> Pursuant to section 447A of the Act, Part 5.3A of the Act apply in relation to each of the second plaintiffs as if section 440B provided that where leave has been given under paragraph 440B(2)(b) to a secured party to enforce a security interest over property of a company, the secured party shall not complete the sale of any property of the company subject to that security interest without the further leave of the Court.

80 Further, in addition to the order sought under s 447A, Best Capital also sought an interlocutory injunction.

81 Now as in other contexts, on that latter aspect of the matter I have applied the two-pronged test of:

(a) whether Best Capital made out a prima facie case; and

(b) whether the balance of convenience favoured the grant of the injunction sought.

82 Let me first say something on the prima facie case limb. In relation to the test in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [65] to [72] per Gummow and Hayne JJ and the prima facie case limb, it is necessary to show a sufficient likelihood of success to justify the grant of the injunction, with such sufficiency being dependent upon the nature of the right being asserted and the practical consequences that are likely to flow if an injunction was granted. The prima facie case formulation commanded majority support in *ABC v O'Neill*. It was expressly referred to by Gummow and Hayne JJ, supported by *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618; further, Gleeson CJ and Crennan J agreed with the exposition of the principles set out by Gummow and Hayne JJ. Further, many decisions of this Court have used the prima facie case language. Contrastingly, the serious question to be tried formulation had its genesis in earlier authority where the bar might be perceived to have been set too low as a consequence of the use of such phraseology. Earlier authority did not colour such a formulation with the flexibility and nuance that is now required.

83 As to the second limb, the balance of convenience looks at what the inconvenience, injury or injustice to the applicant would be if the injunction were refused and seeks to weigh that against the inconvenience, injury or injustice to the respondent if the injunction were granted. Only if the balance lies in favour of the applicant, that is, if the inconvenience, injury or injustice to the applicant if the injunction were refused outweighs the respondent's prejudice, would an injunction be granted. Further, it is necessary to assess the balance of convenience in the context of considering the strength of the prima facie case (see *Samsung Electronics Company Ltd v Apple Inc* (2011) 217 FCR 238 at [67]). The stronger the prima facie case, the less strong the balance has to weigh in favour of the applicant. Putting it slightly differently, if the balance is more equally poised, but the applicant has a strong prima facie case, then the interaction between the two limbs may tip the balance in favour of granting an injunction. Further, under the second limb the interests of and potential prejudice caused to third parties by either granting or refusing the injunction may need to be taken into account.

84 Let me deal with Best Capital's case.

85 In my view, Best Capital was not entitled to the order it sought under s 447A. Indeed, to the extent that it also sought an interlocutory injunction, in my view the prima facie case limb was not established.

86 First, as is apparent, I exercised my power under s 440B(2) and gave Bella Joll leave to proceed to enforce its mortgage. Pursuant to that leave, Bella Joll entered into a contract to sell the property to ACN 644, a bona fide purchaser for value without notice of any prior or disqualifying interest.

87 Now once this occurred, it is difficult to see how that interest of ACN 644 could be defeated. Let it be assumed that I postponed the settlement and allowed the creditors to vote on Best Capital's alternative DOCA. And let it be assumed that there had been a favourable vote. Now although such a resolution (or the subsequent execution of the rival DOCA) may have purported to have over-ridden ACN 644's interest under the contract, the creditors' resolution or such a DOCA could not have achieved that effect. Moreover, in my view, whatever the width of s 447A, I do not see how I could sensibly have over-ridden the interests of a third party created by reason of the earlier exercise of power under s 440B(2). And even if I could exercise power under s 447A to so over-ride, in the circumstances of the present case clearly I would not do so.

88 Once I exercised power under s 440B(2) I could not, in essence, re-wind the clock. Further, I note that there has been no appeal from my s 440B(2) order or any application by any party to directly vary it.

89 So, if all this be correct, there was no basis for the orders sought or even an interlocutory injunction. To so grant it would be an exercise in futility. If I had postponed the settlement, even on the best view of subsequent events from Best Capital's perspective, ACN 644's interest would not have been and indeed could not have been over-ridden. And as I have already indicated, there has been and could be no challenge to Bella Joll's exercise of its power of sale or ACN 644's rights as an innocent third party.

90 Further, there were strong discretionary reasons against giving Best Capital the orders that it sought.

91 First, there has been significant laches on the part of the entities and persons who stood behind Best Capital. Let me digress at this point and say something about Mr Chen, Best Capital and its backers.

92 Mr Chen is the sole director and secretary of Youteam. And as I have said, Mr Chen also holds 50% of the shares in Youteam, the other 50% being held by his brother.

93 Youteam was incorporated on 17 May 2017 as a special purpose vehicle to hold an interest in the property. Youteam's interest equates to 15% of the property.

94 On 30 June 2017, the Sands VA entities entered into a loan deed with Collinsville Finance Pty Ltd. Youteam's liability under that loan deed was $1.6 million, which was guaranteed by Mr Chen. On 28 February 2020, the Collinsville loan was assigned to Smart Wealth.

95 Smart Wealth was incorporated on 10 February 2020. Its directors include Mr Rico Wing Chau Chow and Mr Dongli Wei, the latter of whom is also the sole shareholder. Mr Chow and Mr Wei are also directors, together with Ms Dandan Ren, of Best Capital. Best Capital was incorporated on 12 January 2021 for the purpose of funding the Dunes Land purchase. The sole shareholder of Best Capital is Mr Chow, an employee of Ms Ren who was apparently asked by her to hold the share capital in the company. Both Smart Wealth and Best Capital are effectively controlled by Ms Ren and her family. As will become apparent, Ms Ren as the backer of these two entities is a key player in the events that transpired in late 2020 and early 2021.

96 Now in February 2020 Smart Wealth took an assignment of and held the mortgage over the property.

97 And as I have said, on 14 July 2020, Smart Wealth appointed a receiver over the property, some two to three days after the appointment of the administrators on 11 and 12 July 2020.

98 On 1 August 2020, the administrators received a DOCA proposal from Smart Wealth. Between 11 August 2020 and 14 September 2020, the administrators engaged in discussions and negotiations with Smart Wealth in relation to its DOCA proposal.

99 In mid-October 2020, Smart Wealth assigned its mortgage to Bella Joll and the receiver appointed by Smart Wealth was retired.

100 On 25 November 2020, the administrators entered into contracts for the sale of the property and the business with Dunes Land. Apparently, Mr Chen was involved with Dunes Land by way of a beneficial interest in the equity of that company, though I should say that the evidence on this point was scant.

101 Now Ms Ren and her solicitor, Mr Samuel Li, gave affidavit evidence. On 17 December 2020, according to Mr Li, he was contacted by Mr Glenn Campbell, the director of Dunes Land. Mr Campbell informed Mr Li that Dunes Land did not have financing and asked Mr Li if Smart Wealth would consider lending money to Dunes Land to fund the purchase. Mr Li presented the proposal to Ms Ren, who declined. According to Mr Li, he was then approached a second time by Mr Campbell who asked Mr Li whether Smart Wealth would consider being nominated as purchaser under the Dune Lands contract. On 12 January 2021, Dunes Land and Tyche Capital Investment No. 5 Pty Ltd entered into a nomination deed, which was then provided to the administrators for their consideration. Tyche Capital is apparently another entity associated with Smart Wealth.

102 On 22 January 2021, the administrators received an email from Maddocks, the solicitors for Mr Chen, informing them that Mr Chen did not consent to the nomination of Tyche Capital as purchaser. That afternoon, the administrators informed Dunes Land that they did not consent to the nomination.

103 According to Mr Li, it is around this time that he arranged for the incorporation of Best Capital, which as I have said was incorporated on 12 January 2021. According to Mr Li, he was then approached a third time by Mr Campbell to ask whether Best Capital would be interested in purchasing the shares in Dunes Land. Ms Ren agreed to this proposal.

104 On the morning of 25 January 2021, the administrators were informed that Dunes Land was being financed by Best Capital. The administrators were told by Mr Li that representatives of Best Capital were awaiting instructions in order to draw the settlement funds. However, by mid-afternoon on 25 January 2021, the administrators were informed that the Dunes Land sale was not proceeding.

105 On the evening of 25 January 2021, according to Mr Li, he was approached again, now by the administrators to ask whether Best Capital would finance the Sands VA entities to repay the outstanding amount under the Bella Joll mortgage. I should say that on the evidence of the administrators it was in fact Mr Li who approached them with such a proposal. In any event, a terms sheet was drawn up for the purchase of the property and the assets and business of Walden. Pursuant to this terms sheet Best Capital transferred $13.8 million to a Gilbert + Tobin trust account.

106 At 9.59 am on 27 January 2021, the solicitors for the administrators sent an email to the solicitors for Bella Joll seeking to pay to Bella Joll the outstanding amounts owing to it. At 11.48 am the solicitors for Bella Joll responded that Bella Joll was party to an unconditional contract for the sale of the land to ACN 644. The tender was rejected.

107 Between 27 and 28 January 2021, the administrators engaged in discussions with Best Capital before ultimately on 29 January 2021 withdrawing from the Best Capital terms sheet and restoring the $13.8 million to the trust account of Mr Li's firm.

108 Following this unsuccessful attempt to discharge Bella Joll's mortgage, according to Mr Li he was approached again, this time by Mr Chen with a proposal that Best Capital loan to Mr Chen $10.5 million in order to fund his discharge of Bella Joll's mortgage. Apparently, Mr Li was told by Mr Chen that he did not want his company, Youteam, to go into liquidation. Ms Ren agreed to the loan in exchange for a first ranking mortgage over the property, and a loan agreement between Mr Chen and Best Capital was drawn up by Keypoint Law. On 1 February 2021 Mr Chen signed the loan agreement. According to Ms Ren, neither she, Best Capital nor its directors had any association with Mr Chen other than providing finance to him pursuant to this loan agreement.

109 On 1 February 2021, Keypoint Law on behalf of Mr Chen attempted during the course of that day to tender $10.5 million to Bella Joll purportedly in payment of amounts owing by Mr Chen as guarantor of the loan. As I have said, the amount owed by Youteam and guaranteed by Mr Chen was $1.6 million. Bella Joll's solicitors again declined to accept the payment on the basis that it was party to an unconditional contract for sale.

110 Apparently, around this time Ms Ren was told by Mr Li that Mr Chen's attempt to tender payment to Bella Joll was unsuccessful. According to Ms Ren, she was then told by Mr Li that Best Capital could instead propound a DOCA. Now I note that Smart Wealth had been involved in lengthy negotiations with the administrators regarding its own DOCA proposal some six months prior.

111 On 4 February 2021, Best Capital filed the present application.

112 Let me return to and conclude the laches point. The above short chronology adequately demonstrates a pattern of delay and obfuscation on the part of the entities and persons who stood behind Best Capital. And such delays would have caused prejudice to Bella Joll and ACN 644 if I had acceded to the present application.

113 Let me turn to the other discretionary matters.

114 Second, there were significant doubts as to Best Capital's or its backers' ability to both support any undertaking as to damages and also provide the funds necessary under its rival DOCA proposal. All I had before me was murky evidence concerning suspect characters and their wherewithal on such questions. It is unnecessary to elaborate further.

115 Third, there would have been very real prejudice to ACN 644 if I had granted the orders sought, potentially thwarting the contract that may not have been adequately compensated for.

116 Fourth, the rival DOCA proposal of Best Capital was vague and lacked real detail and content to say the least.

117 Fifth, I should say something about the position of employees and unsecured creditors of Walden. I have taken their interests into consideration, including the administrators' opinion on the rival DOCA proposal. But as to the latter, it carried little weight with me given the paucity of information available to the administrators concerning the belated proposal and the limited investigations that they had carried out.

118 As to the interests of employees, in my view the undertaking that I extracted from ACN 644 should adequately fit the bill. And as to the other unsecured creditors of Walden, I have considered this, but such interests do not carry the day given the history of this matter. I may have taken a different approach if Best Capital's backers had acted in a more timely fashion in November or December 2020.

119 Let me say something more about the employees.

120 There are presently 20 full time employees and 15 part time employees of Walden involved with the business.

121 Now the undertaking proffered by ACN 644, which is set out in the order that I made on 10 February 2021, contemplated that offers of employment would be made to all former employees, who were defined to include any employee of Walden at the time the administrators were appointed with the addition of current employees to encompass those employees whose employment by Walden commenced after the administrators were appointed.

122 Further, by the undertaking, ACN 644 has also offered to pay, or to procure the payment of, any shortfall in the payment of accrued employment entitlements. Those entitlements fell into the following categories:

(a) salary or wages;

(b) all entitlements to which the former employee would have been entitled had the former employee remained employed, which is broadly defined so as to encompass entitlements to annual leave, leave loading, long service leave, payments made in lieu of notice and the like provided that the amount was one which fell to be paid to the employee on termination of employment;

(c) superannuation; and

(d) redundancy payments except where an employee accepts re-employment by ACN Co, or a related company.

123 The undertaking is unqualified, save as to one matter concerning the liquidation of Walden which seems likely. Such a liquidation will trigger entitlements in the employees to benefits under the *Fair Entitlements Guarantee Act 2012* (Cth) (FEG Act), and by which time entitlements to payments securing superannuation under the *Superannuation Guarantee (Administration) Act* 1992 (Cth) will have crystallised.

124 The undertaking has been structured to ensure that "former employees", as defined, receive their full employment entitlements to the extent that they are not received from another source, including the FEG scheme. That structure arises because of difficulties if ACN 644 were to seek to pay employees in priority to any claim against the FEG scheme.

125 The FEG scheme operates upon a winding up. Under the scheme, the Commonwealth will pay employees their defined employment entitlements, within certain monetary limits, which accrued upon termination but were unpaid but excludes certain amounts. The entitlements covered include salary or wages, annual leave, long service leave, payment in lieu of notice and certain redundancy payments.

126 Section 16 of the FEG Act contains provisions for the payments of amounts to employees. Section 19 provides for the calculation of those amounts. But s 19(3) concerns amounts by which entitlements will be reduced. They include amounts that are attributable to entitlements payable (but not yet paid) by anyone. Now the payments proposed to be made under the undertaking would not be "payable" for the purposes of s 19(3) as they are not paid pursuant to an obligation, and would likely not operate to reduce an employee's entitlement.

127 So, but for the undertaking defining shortfalls in entitlements to be calculated *after* an employee has received all entitlements under the FEG scheme, the employee might have had an accrued

entitlement to recover from the FEG, notwithstanding that a payment might also be made under the undertaking.

128 Otherwise, ACN 644 will meet the entitlements of employees, notwithstanding the existence of the FEG guarantee.

129 In any event, the definition of "entitlements" in the undertaking is intended to be wider than those in the FEG Act and to include all accrued entitlements to which the former employee would have been entitled to be paid upon termination. For example, the undertaking contains no time limit as to when arrears may have accrued to a former employee.

130 Further, no time limit is placed on any arrears of prior entitlements, although an overall maximum cap on claims is $750,000.

131 Moreover, the undertaking contemplates the immediate establishment of the fund to secure the payment of the payments that are proffered in anticipation of claims.

132 On the foregoing bases, in my view the employees would be better off than they would be under the DOCA proposed by Best Capital.

Conclusion

133 It is for the foregoing reasons that I made the 10 February 2021 orders and earlier orders.

I certify that the preceding one hundred and thirty-three (133) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Beach.

Associate: Jane Hywood

Dated: 12 February 2021

SCHEDULE OF PARTIES

VID 700 of 2020

Defendants

Fourth Defendant:	REGISTRAR OF TITLES FOR THE STATE OF VICTORIA
Fifth Defendant:	BEST CAPITAL INVESTMENTS PTY LTD (ACN 647 094 666)