

FEDERAL COURT OF AUSTRALIA

Shepard, in the matter of Palla Pharma Limited (administrators appointed) [2022] FCA 8

File number(s): VID 11 of 2022

Judgment of: **WHEELAHAN J**

Date of judgment: 19 January 2022

Catchwords: **CORPORATIONS** – application for a 90 day extension of the convening period for a meeting of the creditors under s 439A(6) of the *Corporations Act 2001* (Cth) – application under s 447A(1) for an ancillary order that the meeting be permitted to be held at any time with five days after the extended convening period – appropriate case for extension of convening period and ancillary orders – orders accordingly made.

Legislation: *Corporations Act 2001* (Cth) ss 435C(1)(a), 439A(1), 439A(2), 439A(5)(a), 439A(6), 447A(1), Pt 5.3A
Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-225

Cases cited: *Secatore; Re In-Fusion Management Pty Ltd (administrators appointed)* [2016] FCA 1072
Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2) [2020] FCA 717

Division: General Division

Registry: Victoria

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Number of paragraphs: 17

Date of hearing: 19 January 2022

Counsel for the Plaintiffs: Ms R Zambelli

Solicitor for the Plaintiffs: Arnold Bloch Leibler

ORDERS

VID 11 of 2022

IN THE MATTER OF PALLA PHARMA LIMITED (ADMINISTRATORS APPOINTED) ACN 107 872 453

CRAIG SHEPARD AND BRYAN WEBSTER IN THEIR CAPACITIES AS JOINT AND SEVERAL ADMINISTRATORS OF PALLA PHARMA LIMITED (ADMINISTRATORS APPOINTED) ACN 107 872 453
First Plaintiff

PALLA PHARMA LIMITED (ADMINISTRATORS APPOINTED) ACN 107 872 453
Second Plaintiff

ORDER MADE BY: WHEELAHAN J

DATE OF ORDER: 19 JANUARY 2022

THE COURT ORDERS THAT:

1. Pursuant to s 439A(6) of the *Corporations Act 2001* (Cth) (**Act**), the convening period provided for by s 439A(5)(a) is extended by 90 days to midnight on 27 April 2022.
2. Pursuant to s 447A(1) of the *Corporations Act*, Part 5.3A of the Act is to operate, in relation to the second plaintiff, such that the meeting of the creditors required to be held pursuant to s 439A(1) of the Act may be convened at any time during the period up to, or within five business days after, the end of the convening period as extended by order 1 above, notwithstanding the provisions of s 439A(2) of the Act.
3. The following court documents be available for inspection by any person who is not a party, upon the usual application to the court, as though they were listed in r 2.32(2) of the *Federal Court Rules 2011* (Cth) as unrestricted court documents –
 - (a) the affidavit of Mr Craig Peter Shepard sworn 12 January 2022; and
 - (b) the plaintiffs' written submissions dated 18 January 2022.
4. By 4.00 pm on 20 January 2022, the first plaintiff serve a copy of these orders on the members of the Committee of Inspection of the second plaintiff.

5. By 4.00 pm on 20 January 2022, the first plaintiff cause a link to the electronic version of these orders to be published on the website maintained for the purposes of the administration.
6. The plaintiffs and any creditor of the second plaintiff affected by these orders has liberty to apply upon two business days' written notice to the parties.
7. The plaintiffs' costs of this proceeding be paid as a cost of the administration of the second plaintiff.

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

REASONS FOR JUDGMENT

WHEELAHAN J:

1 The plaintiffs seek an order extending by 90 calendar days the period within which the administrators of Palla Pharma Limited (administrators appointed) (the **Company**) are required to convene the second meeting of the Company’s creditors under s 439A(1) of the *Corporations Act 2001* (Cth) (**Act**). The plaintiffs seek an ancillary order in relation to the Company that, notwithstanding s 439A(2), the second meeting be permitted to be convened at any time during the period up to, or within five business days after, the end of the extended convening period. For the reasons that follow, the court will make orders substantially to effect sought.

Background

2 The Company is listed on the Australian Stock Exchange, and carries on a business of manufacturing and distributing narcotic raw material, active pharmaceutical ingredients and finished dosage form products in Australia, the United Kingdom and Europe. The Company is part of a corporate group which comprises three direct and wholly-owned subsidiaries based respectively in Australia, the United Kingdom and Norway. Because of the nature of its pharmaceuticals business, which involves controlled opiate-based compounds, the Company and its subsidiaries are subject to considerable regulation in various of the jurisdictions in which they operate.

3 The Company appointed Mr Shepard and Mr Webster as joint and several administrators on 17 December 2021 by a resolution of its directors. Administration of the company began on that date and is currently continuing: s 435C(1)(a).

4 The administrators convened a first meeting of the Company’s creditors on 31 December 2021. Part 5.3A of the Act confers obligations on the administrators to convene and hold a second meeting of the creditors within certain time limits. The administrators must convene the second meeting of the Company’s creditors within a period of 25 business days of the day administration began: ss 439A(1) and relevantly (5)(a). This period is referred to in the Act as the “convening period”. The second meeting must be held within five business days before, or within five business days after, the end of the convening period: s 439A(2). In respect of the Company, the convening period is due to end on 27 January 2022, and the second meeting must be held between 19 January and 3 February 2022.

5 The court may extend the convening period on an application made during or after the convening period: s 439A(6). The court also has a general power to make orders as it thinks appropriate about how Part 5.3A is to operate in relation to a particular company: s 447A(1).

Plaintiffs' application

6 On 12 January 2022, the plaintiffs applied by way of originating process for the relief sought pursuant to s 439A(6) and s 447A(1). The application was made before the expiry of the convening period. The application was accompanied by an affidavit of one of the administrators, Mr Shepard, sworn 12 January 2022. In the circumstances, the application was referred to me in my capacity as the Duty Judge. A hearing of the application took place on 19 January 2022, at which Ms Zambelli, counsel for the plaintiffs, appeared. Written submissions prepared by counsel and a further affidavit sworn by the plaintiffs' solicitor on 19 January 2022 were filed before the hearing. The court was most assisted by the submissions prepared by Ms Zambelli.

7 Mr Shepard's affidavit provided details about, *inter alia*, the Company's operations and those of the corporate group of which it was a part, the background to the Company's administration, the present state of the administration, and the administrators' opinion as to why an extended convening period is appropriate. Mr Shepard's evidence was that, in the administrators' opinion, an extension of the convening period should be granted because it is in the best interests of creditors and stakeholders and consistent with Part 5.3A of the Act, having regard to the following –

- (a) **Ongoing expression of interest campaign.** The administrators commenced an expression of interest campaign on 24 December 2021 for the recapitalisation or sale of all or part of the assets controlled by the Company. The administrators sent correspondence to 34 potentially interested parties, published advertisements in the newspaper, engaged with parties who had previously expressed interest in the Company's business, and established an electronic data room with a Q&A function for interested parties to make inquiries. The campaign is not due to conclude until 14 February 2022. An extension would allow sufficient time to conduct that campaign and thereby maximise the prospects of preserving the Company's business, or as much of it as possible, by selling the business as a going concern or recapitalising the Company. The extension would provide the administrators with the necessary time to determine whether a transaction can be completed to sell or recapitalise the business as

a going concern, and negotiate and obtain advice on an appropriate transaction structure, which may require a deed of company arrangement.

- (b) **Complexity due to highly regulated opiates industry.** The Company operates in a highly regulated industry and is subject to a number of different licensing regimes in different jurisdictions. The administrators anticipate that a recapitalisation or restructure may involve a deed of company arrangement because, among other things, there are complexities with transferring licences and regulator authorisations held by the Company.
- (c) **Possible deed of company arrangement.** The administrators require more time to formulate, negotiate and report to creditors on any deed of company arrangement that may be preferred.
- (d) **Foreign subsidiaries.** The operation of subsidiaries in the United Kingdom and Norway has required the administrators to liaise with the Company's management in those jurisdictions, and also engage advisors in those jurisdictions.
- (e) **Preparation of report to creditors.** The administrators are required by r 75-225 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) to give creditors a report about the Company's business, property, affairs and financial circumstances together with notice of the second meeting, no later than five business days before the meeting. More time is needed to investigate the corporate group's affairs to prepare that report with the administrators' recommendations as to the Company's future, including because of complexities in the licenses held in foreign jurisdictions, the Company's strict obligations to maintain security at its production site, and offshore operating subsidiaries.
- (f) **Christmas and New Year period.** The holiday period in Australia and overseas, during which interested parties' personnel and advisors are typically on leave, has fallen between the time of the administrators' appointment and the due expiry of the convening period. Some of the business days counted in the default convening period fell between Christmas and New Year's Day, when many people were on annual leave. These matters have delayed progress.

8 Mr Shepard's evidence was that, in the administrators' view, a 90 day extension of the convening period is appropriate having regard to those matters, though noting that if the administrators are in a position to convene the meeting at an earlier date, they will do so.

Relevant principles

9 The relevant principles and authorities were set out by Middleton J in *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* [2020] FCA 717 at [64] to [68]. For convenience, I repeat those paragraphs here –

64 The circumstances in which the Court will extend a convening period are well established. In making such an order, the Court must reach an appropriate balance between an expectation that the administration will be relatively speedy and summary, and the countervailing factor that undue speed should not be allowed to prejudice sensible and constructive actions directed to maximising a return for creditors: *Mann v Abruzzi Sports Club Ltd* (1994) 12 ACSR 611 (Young J); *Re Diamond Press Australia Pty Ltd* [2001] NSWSC 313 at [10] (Barrett J).

65 The approach to be adopted was recently set out by Thawley J in *Farnsworth v About Life Pty Limited (Administrator Appointed), in the matter of About Life Pty Limited* [2019] FCA 11 at [3]-[8], where his Honour endorsed the comments of Austin J in *In the matter of Riviera Group Pty Ltd (admins apptd) (recrs & mgrs. apptd)* [2009] NSWSC 585 (***Re Riviera***) at [13] as to the categories of cases in which an extension is granted including, relevantly:

- (1) where the size and scope of the business in administration is substantial (citing *Lombe, in the matter of Babcock & Brown Limited (Administrators Appointed)* [2009] FCA 349; *Worrell; In the matter of Storm Financial Ltd (Receivers and Managers Appointed) (Administrators Appointed)* [2009] FCA 70; and *ABC Learning Centres Limited, in the matter of ABC Learning Centres Limited; application by Walker (No 5)* [2008] FCA 1947);
- (2) where the extension will allow sale of the business as a going concern, citing *Lombe re Australian Discount Retail Pty Ltd* [2009] NSWSC 110; *Stewart, in the matter of Kleins Franchising Pty Ltd (administrators appointed) (ACN 007 348 236)* [2008] FCA 721; *Uni-Aire Security Pty Ltd (Administrators Appointed) ACN 085 430 619, in the matter of Uni-Aire Security Pty Ltd (Administrators Appointed) ACN 085 430 619* [2006] FCA 1423; and
- (3) more generally, where additional time is likely to enhance the return for unsecured creditors: *Deputy Commissioner of Taxation v Scottsdale Homes No 3 Pty Ltd (No 2)* [2009] FCA 190; *Fitzgerald, in the matter of Primebroker Securities Limited (Administrator Appointed) (Receivers and Managers Appointed)* [2008] FCA 1247; *Ex parte Vouris; in the matter of Marrickville Bowling & Recreation Club Ltd (under Administration)* [2008] FCA 622

66 An extension of the administration period to facilitate either (or both) of: (a) the sale of the business of the company as a going concern, so as to maximise the value of the company's assets; or (b) the progression and assessment of a DOCA proposal that may provide a better return to creditors than a winding up, are well recognised examples of situations where the Court has extended the convening period: *Mentha, in the matter of Hans Continental Smallgoods Pty Ltd (Administrators Appointed)* [2008] FCA 1933 (Jacobson J); *Re Riviera* (Austin J); *Silvia, in the matter of Austcorp Group Ltd (Administrators Appointed)* [2009] FCA 636 (Lindgren J) (***Re Austcorp***); and *In the matter*

of Kavia Holdings Pty Limited (administrators appointed) (receivers and managers appointed) [2013] NSWSC 737 (Black J).

67 In *Mighty River International Ltd v Hughes (as deed administrators of Mesa Minerals Ltd)* (2018) 359 ALR 181 at 201-202, [73], Nettle and Gordon JJ (in dissent, but not relevantly in this respect) referred to a number of cases including *Re Riviera* and concluded:

... Generally speaking, courts have been disposed to grant substantial extensions in cases where the administration has been complicated by, for example, the size and scope of the business, substantial offshore activities, large numbers of employees with complex entitlements, complex corporate structures and intercompany loans, and complex recovery proceedings, and, more generally, where the additional time is likely to enhance the return to unsecured creditors. Provided the evidentiary case for extension has been properly prepared, there has been no evidence of material prejudice to those affected by the moratorium imposed by the administration, and the administrator's estimate of time has had a reasonable basis, the courts have tended to grant extensions for the periods sought by administrators. ...

68 Finally, the administrator's own opinion as to the need for an extension will be given weight in an application of this kind: *Owen and Others in their capacity as joint and several administrators of Rivercity Motorway Pty Ltd (ACN 116 665 304) (admins apptd) (recs and mgrs. Apptd) v Madden (No 4)* (2012) 92 ACSR 255 at [26] (Logan J); *In the matter of Belmont Sportsmans Club Co-Operative Limited (Administrators Appointed)* [2015] NSWSC 543 at [9] (Black J); *Jahani, in the matter of Northern Energy Corporation Ltd (Administrators Appointed) (No 2)* [2019] FCA 382 at [67] (Farrell J); *Bumbak (Administrator), in the matter of Duro Felguera Australia Pty Limited (Administrators Appointed)* [2020] FCA 422 at [32] (Gleeson J).

10 Particularly relevant to the circumstances of the present application are the following observations of Beach J in *Secatore; Re In-Fusion Management Pty Ltd (administrators appointed)* [2016] FCA 1072 –

13 The power to extend the time for convening the second meeting of creditors should not be exercised lightly let alone as a matter of course. But Pt 5.3A should be given a commercial construction and application which reflects the reality of the setting in which both the company under administration and the administrator find themselves. The Court must balance the expectation that administration will be a relatively speedy and summary matter against the consideration that undue speed should not be allowed to prejudice constructive commercial actions directed to maximising the return for creditors and potential return to shareholders. The perspective from which Pt 5.3A should be applied should not be narrow, and its application should not be refracted through the pessimistic lens of an insolvency technician. After all, an optimistic outcome of Pt 5.3A may be a restructuring that enables the company under administration and its activities to continue to the benefit of creditors and other stakeholders. The Court must be astute to facilitating such a potentially positive outcome where it is commercially viable. The first step in that process is usually the consideration of an application of the present type. Generally, there is usually greater upside than, downside in granting an extension for a reasonable period, where the reasonableness of the duration of

the extension is contextualised by the company's and the administrator's particular circumstances..

Consideration

- 11 Having regard to the guidance in the authorities referred to above, for the reasons given by Mr Shepard, summarised at [7] above, I accept that the convening period should be extended by 90 calendar days pursuant to s 439A(6).
- 12 It is clear from Mr Shepard's evidence that the prospect of maximum return to creditors will likely be improved if the convening period is so extended. The extension will allow the administrators to complete the expression of interest campaign which is presently on foot, and will allow for additional time to negotiate, structure and possibly finalise any sale or recapitalisation transaction. The possibility of selling or recapitalising the business as a going concern, which would likely maximise the value of the Company's assets, would in my opinion be diminished were the extension not granted. I accept that the Company's business, by its nature, is highly regulated and subject to various licensing regimes which may require additional time to investigate for the purposes of an effective administration process. That consideration is amplified by the Company's subsidiaries' operations overseas. The extension will facilitate exploration of a possible deed of company arrangement, together with the time needed to formulate, negotiate and report to creditors on any such deed of company arrangement. I accept that the timing of the administration, having commenced immediately before Christmas and New Year holidays, would have adversely affected the progress of the administrators' work. I place weight on the administrators' opinion that an extension is appropriate, and on the matters deposed to by Mr Shepard who is an experienced corporate insolvency and restructuring practitioner.
- 13 Whilst it is desirable for the administration to proceed quickly and without delay, in this case, the prospective benefit to creditors from a thorough investigation of sale or recapitalisation opportunities outweighs the 90 day delay which the extension will cause. I particularly note that the administrators are trading the Company's business on a business as usual basis, which includes the Company's employees continuing in their roles and receiving their pay in the ordinary course.
- 14 Mr Shepard's evidence was that the administrators will convene the second meeting earlier than obliged, if they are in a position to do so. For this reason, and so as not to prolong the administration if that can be avoided, I will also make the ancillary order sought pursuant to

s 447A(1) to permit the second meeting to be convened at any time during the period up to, or within five business days after, the end of the extended convening period, notwithstanding the provisions of s 439A(2) of the Act.

15 It is relevant that the plaintiffs have notified interested persons of the application. Evidence was given that –

- (a) At the first creditors' meeting held on 31 December 2021, the creditors in attendance were provided with notice, together with supporting reasons, that the administrators had determined it to be in the best interest of the Company's creditors to make this application. That notice was conveyed in a presentation provided to creditors which included a PowerPoint slide specifically addressing the administrators' intention to seek an extension of 90 days for the convening period, and pointing to the reasons for the proposed application. No creditor in attendance objected to the administrators' proposal.
- (b) On 11 January 2022, by email the administrators sent an unsealed copy of the originating process to the members of the Committee of Inspection of the Company, and confirmed that they would make an application to extend the convening period. The role of the Committee of Inspection is to consult with the administrators and receive reports on the conduct of the administration. One member of the Committee responded advising that he did not have any comments.
- (c) On 13 January 2022, the administrators caused an announcement to be published by the Australian Securities Exchange advising that the application had been filed, the orders sought by the application, and the reasons why the administrators consider the extension to be in the best interests of the creditors.
- (d) On 17 January 2022, the administrators caused a copy of the court's order dated 17 January 2022 fixing today's hearing to be published on the website maintained by the administrators regarding the Company's administration.
- (e) The plaintiffs' solicitors notified the Australian Securities and Investments Commission of the application, and have served on the Commission the originating process, Mr Shepard's affidavit, a copy of the court's order dated 17 January 2022 fixing today's hearing, and a copy of the plaintiffs' written submissions. The Commission has confirmed receipt of the documents served on it. The Commission has a policy regarding applications made under chapter 5 and schedule 2 of the Act, and

according to that policy, the Commission will not provide formal correspondence in response to the application.

- (f) The administrators have not received correspondence from any shareholder or creditor of the Company objecting to the application.

16 Details of today's hearing, together with instructions on how members of the public may attend, were published online in the court's daily list. No person sought to appear at the hearing to object to the making of the orders sought.

17 For all of these reasons, I am of the view that no substantial injustice will be caused by the extension of the convening period or the ancillary orders permitting the second meeting to be convened within any time during the period up to, or within five days after, the convening period as extended. In any event, the orders I will make are interlocutory and may be varied or set aside pursuant to r 39.05(c) of the *Federal Court Rules 2011* (Cth). I will make an order sought by the plaintiffs that the plaintiffs and any creditor of the Company affected by the orders made today shall have liberty to apply upon two business days' written notice to the parties. Given the number of non-parties who may be affected by this application and the court's orders, I will also make orders that the affidavit of Mr Shepard sworn 12 January 2022 and the written submissions of counsel in support of the application be available for inspection by a person who is not a party, upon the usual application to the court, as though they were listed in r 2.32(2) of the *Federal Court Rules* as an unrestricted court document. The plaintiffs should also serve a copy of this order on the members of the Committee of Inspection, and have a link to this order on the website for creditors maintained for the purpose of their administration. Costs will be in the administration.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wheelahan.

Associate:

Dated: 19 January 2022