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CASE NOTE: Opes Prime Stockbroking Limited

In the matter of Opes Prime Stockbroking Limited [2009] FCA 813 (Finkelstein J)
Fowler v Lindholm, in the matter of Opes Prime Stockbroking Limited [2009] FCFCA 125 (Emmett, Gordon & Jagot JJ)

FACTS

1. The Opes group of companies engaged in financing its clients' share trading and, as part of that process, entered into securities lending arrangements.
2. In March 2008 the Opes group of companies was insolvent.
3. This insolvency led to the appointment by various creditors of receivers and managers, then voluntary administrators and eventually liquidators.
4. This insolvency also led to a spate of litigation, including against ANZ and Merrill Lynch. The essential allegation was that, when they lent their securities, clients were misled about the true nature of the arrangements they entered into. There were also allegations of breach of trust, breach of fiduciary duty, breach of contract and mistake.
5. The allegations against ANZ and Merrill Lynch were that they received the securities from the Opes group companies, as part of their financing arrangements with those companies, with knowledge of the various allegations detailed above.
6. The liquidators were considering actions against various parties over certain transactions and ASIC commenced an investigation that could have seen ANZ in hot water.
7. The liquidators entered into mediation with the banks, which eventually led to a settlement recorded in an Implementation Agreement dated 1 May 2009.
8. The key terms of settlement were:
   - settlement would be effected by a series of schemes of arrangement under the *Corporations Act* (**Act**);
   - ANZ and Merrill Lynch would contribute $226 million to a scheme fund to be distributed to creditors;
   - certain assets held by the receivers would be returned to the

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liquidators; and

- ANZ, Merrill Lynch, the receivers, Green Frog (an Opes group company) and its liquidators would be released from all claims by the Opes companies, their liquidators and Opes clients. ASIC would indicate it would take no action against ANZ and Merrill Lynch and their officers.

ISSUES

Trial

Finkelstein J considered several issues. The key issues were:

- *Can a scheme of arrangement bar a claim against a third party (the scheme's releases would prevent Opes clients from suing ANZ and Merrill Lynch)?*

Finkelstein J answered the question in the affirmative. His Honour held that, provided there was a sufficient nexus between a release and the relationship between the creditor and the scheme company, the scheme can validly incorporate the release. His Honour considered that the creditors' claim against the Opes companies and the banks largely, and in some cases completely, overlapped. The schemes were in settlement of interlocking claims and, in the absence of the release, none of the claims would have been compromised.

- *Whether s411 of the Act permits the acquisition of property other than on just terms in breach of the Constitution?*

His Honour answered this question in the negative. His Honour held that in effect neither the schemes nor the Act could be characterised as dealing with, or with respect to, the acquisition of property for the purposes of the Constitution. Any acquisition of property was merely an incident of the scheme. His Honour was not satisfied that what was contemplated was other than fair.

The remaining issues concerned procedural matters relevant to schemes of arrangement that need not be dealt with in this case note.

Court of Appeal

The Court of Appeal upheld the findings of Finkelstein J on the issue of the release of third-party claims, which was the main ground of appeal.

The Court confirmed it is permissible to incorporate into a scheme of arrangement an involvement or participation by an outsider, being a person or entity who is not a party to the scheme as a company or creditor. There was nothing in principle to prevent a scheme of arrangement incorporating an arrangement between creditors and third parties provided there was an element of 'give and take'. The contribution by the banks in exchange for the release (and indemnity) was such a give and take.

The Court held there was a sufficient nexus between the release and indemnity and the relationship between the creditor and the company, as creditor and debtor such as to qualify the schemes as schemes of arrangement under the Act. The claims of creditors against the scheme companies and the claims against the banks substantially overlapped and the scheme arrangement involved a settlement of claims that were significantly interrelated. Without the release, there would be no compromise or arrangement.

OBSERVATION

These decisions provide a new possibility for resolving complex insolvencies with multi party interests.

A note of caution, however. The third-party release issue was also recently considered in *City of Swan v Lehman Brothers Australia [2009]* FCFCA 130 in the context of a deed of company arrangement. The Court of Appeal, constituted by Stone, Rares and Perram JJ, found the VA provisions of the Act did not permit the release of third-party claims. This Court of Appeal was not enthusiastic about the findings of the Opes Court of Appeal on the issue, although its observations were not strictly necessary for the findings it made.

The High Court has granted special leave to appeal the decision. The outcome will be known later this year.

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