

FEDERAL COURT OF AUSTRALIA

Silvia, in the matter of FEA Plantations Ltd (Administrators Appointed) [2013]

FCA 469

Citation: Silvia, in the matter of FEA Plantations Ltd
(Administrators Appointed) [2013] FCA 469

Parties: **BRIAN RAYMOND SILVIA AND PETER PAUL
KREJCI IN THEIR CAPACITY AS DEED
ADMINISTRATORS OF FEA PLANTATIONS LTD
(ACN 055 969 429) (SUBJECT TO DEED OF
COMPANY ARRANGEMENT) (RECEIVERS
APPOINTED) AND FOREST ENTERPRISES
AUSTRALIA LTD (ACN 009 553 548) (SUBJECT TO
DEED OF COMPANY ARRANGEMENT
(RECEIVERS AND MANAGERS APPOINTED), FEA
PLANTATIONS (ACN 005 969 429) (SUBJECT TO
DEED OF COMPANY ARRANGEMENT)
(RECEIVERS APPOINTED) and FOREST
ENTERPRISES AUSTRALIA LTD (ACN 009 553 548)
(SUBJECT TO DEED OF COMPANY
ARRANGEMENT) (RECEIVERS AND MANAGERS
APPOINTED)**

File number: VID 369 of 2013

Judge: **KENNY J**

Date of judgment: 17 May 2013

Catchwords: **CORPORATIONS** – Application to vary Deeds of
Company Arrangement pursuant to s 447A of the
Corporations Act 2001 (Cth).

Legislation: *Corporations Act 2001* (Cth)

Cases cited: *Memory Limited v Brien* (2000) 200 CLR 270
Re GIGA Investments Pty Ltd (in liquidation) (1995) 17
ACSR 547
Milankov Nominees Pty Ltd v Roycol Ltd (1994) 52 FCR
378
Mulvaney v Rob Wintulich Pty Ltd (1995) 60 FCR 81
*Re Paradox Digital Pty Ltd; ex parte Vincent Anthony
Smith & Anor* [2001] WASC 182
*Re Ansett Australia Ltd; Korda v Ansett Australia Ground
Staff Superannuation Plan Pty Ltd & Anor* (2002) 41

ACSR 598
Re Pasmaico Ltd (No 2) (2004) 49 ACSR 470
*Silvia, in the matter of FEA Plantations Ltd (Administrator
Appointed)* [2010] FCA 468

Date of hearing: 17 May 2013

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 23

Counsel for the Plaintiffs: A P Young with V M Priskich

Solicitor for the Plaintiffs: DLA Piper Australia

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 369 of 2013

IN THE MATTER OF FEA PLANTATIONS LTD (ACN 005 969 429) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS APPOINTED) AND FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS AND MANAGERS APPOINTED)

BETWEEN: BRIAN RAYMOND SILVIA AND PETER PAUL KREJCI IN THEIR CAPACITY AS DEED ADMINISTRATORS OF FEA PLANTATIONS LTD (ACN 055 969 429) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS APPOINTED) AND FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS AND MANAGERS APPOINTED)
First Plaintiff

FEA PLANTATIONS LTD (ACN 005 969 429) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS APPOINTED)
Second Plaintiff

FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS AND MANAGERS APPOINTED)
Third Plaintiff

JUDGE: KENNY J
DATE OF ORDER: 17 MAY 2013
WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. Pursuant to s 447A(1) of the *Corporations Act 2001* (Cth) ('Act'), Part 5.3A of the Act is to operate in relation to the second plaintiff, FEA Plantations Ltd (ACN 055 969 429) (subject to deed of company arrangement) (receivers appointed) ('FEAP'), in such a way as to empower the Court to vary the deed of company arrangement dated 14 December 2010 between FEAP and the deed administrators, Brian Raymond Silvia and Peter Paul Krejci ('FEAP DOCA').

2. Clause 3.1.5 of the FEAP DOCA is varied by deleting clause 3.1.5 and substituting therefor the following:

“3.1.5 On 22 June 2013 unless prior to that time the deed is further extended by court order or the Creditors have resolved to extend the Deed pursuant to a meeting of creditors convened pursuant to s 445F of the Act.”

3. Pursuant to s 447A(1) of the Act, Part 5.3A of the Act is to operate in relation to the third plaintiff, Forest Enterprises Australia Ltd (ACN 009 553 548) (subject to deed of company arrangement) (receivers and managers appointed) (‘FEA’), in such a way as to empower the Court to vary the deed of company arrangement dated 14 December 2010 between FEA and the deed administrators, Brian Raymond Silvia and Peter Paul Krejci (‘FEA DOCA’).

4. Clause 3.1.5 of the FEA DOCA is varied by deleting clause 3.1.5 and substituting therefor the following:

“3.1.5 On 22 June 2013 unless prior to that time the deed is further extended by court order or the Creditors have resolved to extend the Deed pursuant to a meeting of creditors convened pursuant to s 445F of the Act.”

5. An order pursuant to s 477A(1) of the Act that Part 5.3A of the Act is to operate in relation to the second plaintiff, FEAP, and the third plaintiff, FEA, as if its provisions permitting notice of any future meeting of creditors (‘Notice’) and any other documents (‘Documents’) is to be given to creditors of the company by:

- 5.1 not less than 5 business days before the meeting, sending the Notice to the personal electronic address of each creditor of the company who has requested that the deed administrators communicate with her, him or it by electronic means;

- 5.2 not less than 5 business days before the meeting, sending the Notice to the personal electronic address of each creditor of the company, for whom or which the deed administrators have a personal electronic address, by electronic means;

- 5.3 not less than 5 business days before the meeting, sending a paper copy of the Notice to all known creditors of the company to whom or which no notification is sent pursuant to sub-paragraphs 5.1 or 5.2 of this Order, along with a statement that the Documents are available on the deed administrators' website, www.briferrier.com.au, and on the third plaintiff's website, www.fealtd.com; and
- 5.4 causing a notice to be published in a national newspaper (at least 5 business days before the meeting of creditors) providing:
 - 5.4.1 notice of the date, time and location of the meeting of creditors;
 - 5.4.2 notice that the Documents are available on the deed administrators' website, www.briferrier.com.au, and on the third plaintiff's website, www.fealtd.com; and
 - 5.4.3 details of a telephone hotline number by which any creditor may contact the deed administrators to request a paper or electronic copy of the Documents.
6. An order that the costs and expenses of this application be costs and expenses in the deed administration of FEAP and FEA.

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

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 369 of 2013

IN THE MATTER OF FEA PLANTATIONS LTD (ACN 005 969 429) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS APPOINTED) AND FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS AND MANAGERS APPOINTED)

**BETWEEN: BRIAN RAYMOND SILVIA AND PETER PAUL KREJCI IN THEIR CAPACITY AS DEED ADMINISTRATORS OF FEA PLANTATIONS LTD (ACN 055 969 429) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS APPOINTED) AND FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS AND MANAGERS APPOINTED)
First Plaintiff**

**FEA PLANTATIONS LTD (ACN 005 969 429) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS APPOINTED)
Second Plaintiff**

**FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (RECEIVERS AND MANAGERS APPOINTED)
Third Plaintiff**

**JUDGE: KENNY J
DATE: 17 MAY 2013
PLACE: MELBOURNE**

REASONS FOR JUDGMENT

1 The plaintiffs seek orders pursuant to s 447A(1) of the *Corporations Act 2001* (Cth) ('Act'), principally, to vary the deed of company arrangement of:

- (a) the second plaintiff, FEA Plantations Ltd ('FEAP'), dated 14 December 2010; and
- (b) the third plaintiff, Forest Enterprises Australia Ltd ('FEA') dated 14 December 2010 (collectively referred to as the 'Deeds of Company Arrangement').

2 The variation proposed to the Deeds of Company Arrangement is to amend the
termination dates to 22 June 2013 from 31 May 2013.

3 In addition to orders for variation of the termination dates in the Deeds of Company
Arrangement, the first plaintiffs, as the deed administrators, seek orders concerning the
method of giving notice to creditors of FEAP and FEA regarding future creditors' meetings.

4 In support of their application the plaintiffs relied upon:

- (a) the affidavit sworn by Philip Hanley Armstrong on 15 May 2013;
- (b) the affidavit sworn by Mark Bland on 15 May 2013; and
- (c) the two affidavits sworn by Stephen Sawyer on 16 May 2013.

BACKGROUND

5 The first plaintiffs are the deed administrators of FEAP and FEA and were appointed
on 14 April 2010. On the same day receivers were appointed to FEA and FEAP by ANZ
Fiduciary Services Pty Ltd.

6 FEA is the parent company within the FEA group and wholly owns FEAP. FEAP is
the responsible entity of 17 forestry managed investment schemes.

7 A different managed investment scheme was established for each year from 1993 to
2009 inclusive. The schemes have a total of 14,068 members, who are known as 'Growers'.
The schemes occupy approximately 76,000 hectares of land across Tasmania, New South
Wales and Queensland. The trees planted in the 1993 and 1994 schemes have already been
harvested. The trees planted in the 1995 to 2009 schemes have not yet been harvested.
Generally speaking, the value of the trees increases as they grow and mature.

8 The creditors of FEA and FEAP are:

- (a) the 14,068 Growers, who by number are the largest group of ordinary unsecured
creditors, and are admitted under the Deeds of Company Arrangement as contingent
unsecured creditors.

- (b) 327 ordinary unsecured creditors (FEA) and 296 ordinary unsecured creditors (FEAP). Those creditors are primarily trade and leasehold creditors.
- (c) Commonwealth Bank of Australia ('CBA') and Australia and New Zealand Banking Group Limited ('ANZ'), who are secured creditors.

9 The total value of creditors' claims is approximately \$833,105,000.

10 The creditors of FEA and FEAP have appointed Committees of Inspection under the Deeds of Company Arrangement.

11 Over the last 7 months CBA and ANZ have engaged in without prejudice negotiations with the deed administrators to resolve a dispute which is currently before the Supreme Court of Victoria and in respect of all future claims concerning the land used in the schemes.

12 The deed administrators, CBA and ANZ are very close to finalising the terms of a proposed settlement agreement. The settlement agreement will consist of an Implementation Deed and new deeds of company arrangement for each of FEAP and FEA.

13 The Implementation Deed must be executed before creditors meetings can be convened to vote on the adoption of the new deeds of company arrangement. Although there remain some outstanding matters to resolve, it is anticipated that the Implementation Deed and the new deeds of company arrangement will be finalised and, so far as necessary, executed within the next two weeks. It is anticipated that the terms of the proposal will not be finalised in time to put to the vote of creditors on or before 31 May 2013, but will be finalised in time to put to a vote of creditors before 22 June 2013.

CONSIDERATION

14 Section 445A of the Act provides that deeds of company arrangement may be varied by a resolution of creditors passed at a creditors' meeting. However, s 447A(1) of the Act gives the Court power to alter the operation of Part 5.3A of the Act as it operates in relation to a particular company. Section 447A has been held to confer wide discretionary power in this regard: see *Memory Limited v Brien* (2000) 200 CLR 270 at 280 [20] - 281 [24] per Gleeson CJ, McHugh, Gummow, Hayne & Callinan JJ; *Re GIGA Investments Pty Ltd* (in

liquidation) (1995) 17 ACSR 547 at 549 per Branson J; *Milankov Nominees Pty Ltd v Roycol Ltd* (1994) 52 FCR 378 at 383 per Lee J.

15 The Court has a well-established power to vary deeds of company arrangement pursuant to s 447A(1). The power conferred by s 447A(1) is not subject to limitations found in other sections within Part 5.3A of the Act. Relevantly, s 447A(1) of the Act grants power to the Court to alter the operation of s 445A (or any other section in Part 5.3A) thereby empowering the Court to itself vary a deed of company arrangement: *Milankov Nominees Pty Ltd v Roycol Ltd* (1994) 52 FCR 378 at 383 per Lee J; *Mulvaney v Rob Wintulich Pty Ltd* (1995) 60 FCR 81 at 83 per Branson J; *Re Paradox Digital Pty Ltd; ex parte Vincent Anthony Smith & Anor* [2001] WASC 182 [13]-[15] per Owen J; *Re Ansett Australia Ltd; Korda v Ansett Australia Ground Staff Superannuation Plan Pty Ltd & Anor* (2002) 41 ACSR 598, 602 [17]-[20] and 604 [26] per Warren J; *Re Pasmenco Ltd (No 2)* (2004) 49 ACSR 470, 481 [35] per Finkelstein J.

16 In the present case, the evidence establishes that:

- (a) It will be difficult to convene meetings of creditors of FEA and FEAP to occur on or before 31 May 2013.
- (b) In the event that it is not possible to convene creditors' meetings to extend the Deeds of Company Arrangement on or before 31 May 2013, FEAP and FEA would enter into liquidation. That outcome would be detrimental to the Growers because it is unlikely that they would receive any return in relation to those trees which have matured and are ready for harvest.
- (c) If the meetings could be convened on or before 31 May 2013 they will only be to extend the Deeds of Company Arrangement until new deeds of company arrangement can be presented to creditors. It is inevitable that another meeting would need to be convened to vote on those new deeds of company arrangement. That meeting is expected to occur before 22 June 2013, that is, within no more than 22 days of any meeting of creditors to vary the Deeds of Company Arrangement. It is costly to convene creditors' meetings, with the anticipated costs being in the order of \$60,000 to \$80,000. Thus, even if creditors' meetings can be convened prior to 31 May 2013, the costs of doing so will adversely affect unsecured creditors by reducing the available pool of funds for distribution.

- (d) The nature of the variation proposed to be made to the Deeds of Company Arrangement is simple and merely involves extending the operation of the Deeds of Company Arrangement by changing the termination date in clause 3.1.5 of the Deeds of Company Arrangement.
- (e) Although the variation to the termination date is itself simple, a number of meetings within a short space of one another may cause confusion to the Growers, or at least cause inconvenience and expense in travelling to Tasmania twice within 22 days if creditors choose to attend the meetings.
- (f) The variation does not adversely affect the interests of creditors. Conversely, the variation is in the interests of creditors because it will allow time for the negotiations between the deed administrators and CBA and ANZ to be finalised; and all new deeds of company arrangement to be put to a vote at creditors' meetings. The terms of the new deeds of company arrangement are expected to benefit creditors, particularly the Growers.
- (g) The plaintiffs' application is supported by representative growers joined in the Supreme Court proceeding and by members of the Committee of Creditors of FEA and FEAP.
- (h) The receivers of FEAP and the receivers and managers of FEA, the CBA and ANZ have all indicated that they know of and do not oppose the plaintiffs' application.

17 These factors favour the exercise of the Court's discretion under s 477A(1) to vary the Deeds of Company Arrangement. There would not appear to be any significant countervailing factors. Accordingly, the Court should, in exercise of its discretion, make the orders sought, to vary the Deeds of Company Arrangement, so that 22 June 2013 is substituted for 31 May 2013 as the termination date.

18 The plaintiffs also seek orders pursuant to s 447A(1) to vary the operation of Part 5.3A of the Act regarding the method by which notice is given to creditors for creditors' meetings.

19 The orders proposed today seek to notify creditors individually by email, for those creditors that have requested the deed administrators to communicate with them by email. That method of communication already applies pursuant to s 445F(2) of the Act (when read

with s 600G) to creditors' meetings convened to vary a deed of company arrangement. Further, it is proposed that the deed administrators communicate with creditors by email for those creditors for whom the deed administrators have a personal email address (whether or not the creditor has requested the deeds administrators to communicate with her, him or it by email). In the case of other known creditors, there is to be a paper notice sent, accompanied by a statement that documents are available on the deed administrators' website. In addition, it is proposed that a notice be published in a national newspaper. Similar measures were approved in *Silvia, in the matter of FEA Plantations Ltd (Administrator Appointed)* [2010] FCA 468.

20 The proposed orders will substantially reduce the cost of notifying the very large number of creditors of future creditors' meetings, including a creditors' meeting to vote on the new deeds of company arrangement anticipated to occur before 22 June 2013, in an appropriate fashion. I would, therefore, make the orders sought.

21 I would also order that the costs of the plaintiffs' application be costs and expenses in the deed administration.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny.

Associate:

Dated: 17 May 2013