SUPREME COURT OF QUEENSLAND

CITATION:	*Re Octaviar Limited (in liq)* [2019] QSC 235
PARTIES:	**WILLIAM JOHN FLETCHER in his capacity as liquidator of OCTAVIAR LIMITED (IN LIQUIDATION)** ACN 107 863 436 (first applicant) **KATHERINE ELIZABETH BARNET in her capacity as liquidator of OCTAVIAR LIMITED (IN LIQUIDATION)** ACN 107 863 436 (second applicant)
FILE NO:	BS 4815 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2019
JUDGE:	Bradley J
ORDERS:	**Orders made on 20 September 2019:**

1. Pursuant to section 90-15(1) of Schedule 2 to the *Corporations Act* 2001 (Cth), the applicants in their capacity as joint and several liquidators of Octaviar Limited (In Liquidation) ACN 107 863 436 (the "Company") are advised in relation to the external administration of the Company that:

(a) The applicants would be justified in rejecting the whole of the proofs of debt of Octaviar Investment Notes Limited (In Liquidation) ACN 122 141 986 dated 15 October 2009 and 7 September 2011 (including as amended by a document titled "Detail of OIN & OIB Proofs of Debt" dated 6 November 2017); and

(b) The applicants would be justified in rejecting the whole of the proofs of debt of Octaviar Investment Bonds Limited (In Liquidation) ACN 126 878 608 dated 15 October 2009 and 7 September 2011 (including as amended by a

document titled "Detail of OIN & OIB Proofs of Debt" dated 6 November 2017).

2. The applicants' costs of the proceeding are part of their costs in the winding up of the Company.

CATCHWORDS: CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – APPLICATIONS TO COURT FOR DIRECTIONS OR ADVICE – where the applicants seek orders pursuant to s 90-15 of the Insolvency Practice Rules, schedule 2 of the *Corporations Act* 2001 (Cth), that they would be justified in rejecting certain proofs of debt lodged in the liquidation of Octaviar Limited, by reason of the rule against double proofs – where the prospective creditors contend that the rule against double proofs does not apply to their claims – whether it is appropriate for the court to issue directions pursuant to s 90-15 in the circumstances – whether the applicants would be justified in rejecting the proofs of debt

Corporations Act 2001 (Cth), s 588V, s 588W, sch 2, s 90-15, s 90-20

Barclays Bank Ltd v TOSG Trust Fund Ltd [1984] AC 626, cited
Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd (1997) 42 NSWLR 209, cited
Handberg v MIG Property Services Pty Ltd (2010) 79 ACSR 373; [2010] VSC 336, cited
Macedonian Orthodox Community Church St Petka Inc v Petar (2008) 237 CLR 66; [2008] HCA 42, applied
Re Ansett Australia Ltd (No 3) (2002) 115 FCR 409; [2002] FCA 90, cited
Re Broens Pty Limited (in liq) [2018] NSWSC 1747, cited
Re GB Nathan & Co Pty Ltd (in liq) (1991) 24 NSWLR 674, cited
Re Glowbind Pty Ltd (in liq) (2003) 181 FLR 208; [2003] NSWSC 1190, distinguished
Re Kaupthing Singer and Friedlander Limited (in administration) (No 2) [2012] 1 AC 804; [2011] UKSC 48, cited
Re Magic Australia Pty Ltd (in liq) (1992) 7 ACSR 742, distinguished
Re Murphy; Re BPTC Ltd (in liq) (1996) 19 ACSR 569, cited
Re Octaviar Administration Pty Ltd [2017] NSWSC 1556, cited
Re One.Tel Ltd (2014) 99 ACSR 247; [2014] NSWSC 457, cited
Re Oriental Commercial Bank; ex parte European Bank (1871) 7 Ch App 99, considered
Re Poles & Underground Pty Ltd (administrators appointed) [2017] FCA 486, cited

Re Polly Peck International plc (in administration) [1996] 2 All ER 433, considered
Re Sakr Bros Pty Ltd (in liq) [2019] FCA 547, cited
Re Westnet WA Infrastructure Holdings Ltd (2015) 106 ACSR 583, cited
Westpac Banking Corp v Totterdell (1998) 20 WAR 150, applied

COUNSEL:	J D McKenna QC, with M J May, for the applicants B D O'Donnell QC, with D M Turner, for Octaviar Investment Notes Limited (in liquidation) and Octaviar Investment Bonds Limited (in liquidation)
SOLICITORS:	K + L Gates for the applicants Clayton Utz for Octaviar Investment Notes Limited (in liquidation) and Octaviar Investment Bonds Limited (in liquidation)

[1] The applicants, Mr Fletcher and Ms Barnet, are the liquidators of Octaviar Limited (in liquidation) (**Octaviar**).

[2] On 3 May 2019, they applied to the court for advice concerning proofs of debt lodged in the liquidation. These were the proofs dated 15 October 2009 and 7 September 2011 lodged by Octaviar Investment Notes Limited (in liquidation) (**Notes**) and the proofs dated 15 October 2009 and 7 September 2011 lodged by Octaviar Investment Bonds Limited (in liquidation) (**Bonds**), including the amendments to each proof made by a document titled "Detail of OIN & OIB Proofs of Debt" dated 6 November 2017. The application was listed for hearing on 16 May 2019.

[3] The applicants gave notice of the application and its hearing date to the solicitors for Notes and Bonds, the solicitors for Challenger Managed Investments Limited (**Challenger**), the solicitors for the Public Trustee of Queensland (**PTQ**) and an officer of the Australian Securities and Investments Commission (**ASIC**).

[4] Mr Colwell and Mr Gothard are the liquidators of Notes and Bonds. It is convenient to refer to them as the **liquidators**. At the liquidators' request, the hearing was adjourned on the papers to 30 May 2019. On that day, the applicants and the liquidators appeared by counsel. There was no appearance for PTQ, Challenger or ASIC.

The statutory power

[5] The application is made under section 90-20(1)(d) of Schedule 2 to the *Corporations Act* 2001 (Cth) (**Act**). The applicants seek orders under section 90-15(1) and ancillary orders, including an order for costs.

[6] Section 90-15(1) provides:

> "The Court may make such orders as it thinks fit in relation to the external administration of a company."

[7] Some relevant amplification is found in s 90-15(3)(a):

> "Without limiting subsection (1), those orders may include any one or more of the following:
>
> (a) an order determining any question arising in the external administration of the company".

[8] The Commonwealth Parliament enacted section 90-15 by the *Insolvency Law Reform Act* 2016 (Cth). It commenced on 1 September 2017, replacing the former ss 479(3) and 511 of the Act. It serves the same purpose as the repealed provisions.[1] Like them, it authorises the court to exercise the power when it is "just and beneficial" to do so and where it is "of advantage in the liquidation".[2] The provision stands in a line of statutes traced to s 34 of the *Joint Stock Companies Winding Up Act* 1848 (UK),[3] which in turn reflects the practice of the Court of Chancery in giving directions to those entrusted with the administration of property under the control of the court. The approach to the exercise of the power is informed by similar considerations to those applied by the court to advice to trustees.[4]

[9] In form, s 90-15(1) may authorise a broader range of orders than its predecessors. Of course, broader orders may require the court to afford potentially affected parties an opportunity to be heard.[5] The present application does not seek any broader relief. In any event, the directly affected parties were served and those most interested appeared and were heard.

[10] The court's power to give judicial advice is confined only by the subject matter, scope and purpose of the statutory provision conferring the power. It is not appropriate to read the provision down or imply any limitation on the power or the discretionary factors relevant to its exercise.[6] Section 90-15(1) contains no express words of limitation. It is intended to facilitate the performance of a liquidator's functions. It should be interpreted widely to give effect to that intention; so, the court may give advice where it is in the interests of the liquidation to do so.[7]

[11] An application for advice can be a simple and economical procedure. Its utility arises from the fact that "if the court gave a direction to an official administrator who had made a full and fair disclosure to the court of the material facts, the official administrator might act in accordance with the direction without thereby incurring personal liability".[8] In this way the statutory provision authorises the court to give advice to an applicant that is

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1 *Re Poles & Underground Pty Ltd (administrators appointed)* [2017] FCA 486 at [41] (Gleeson J); *Re Sakr Bros Pty Ltd (in liq)* [2019] FCA 547 at [18] (Griffiths J).

2 *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209 at 212 (Young J); *Handberg v MIG Property Services Pty Ltd* (2010) 79 ACSR 373 at 377 [7] (Warren CJ).

3 (11 & 12 Vict, c 45). See *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 677A-D (McLelland J).

4 A descendant of the Chancery practice may be found in s 96 of the *Trusts Act* 1973 (Qld). The right of a trustee to seek advice and directions from the court is also recognised under the general principles of equity: *Re Permanent Trustee Australia Ltd* (1994) 33 NSWLR 547 at 548 (Young J).

5 *Re Broens Pty Limited (in liq)* [2018] NSWSC 1747 at [38] (Gleeson JA).

6 *Macedonian Orthodox Community Church St Petka Inc v Petar* (2008) 237 CLR 66 at 89 [55] – 90 [59] (Gummow A-CJ, Kirby, Hayne and Heydon JJ) ("*Macedonian Church*").

7 *Re Octaviar Administration Pty Ltd (in liq)* [2017] NSWSC 1556 at [9] (Black J).

8 *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 677E (McLelland J).

private, in the sense that it is for the protection of the applicant, and the potentially affected parties are not parties to the proceeding in the usual way.[9]

The reasons for the present application

[12] In their submissions, the applicants identified six reasons for seeking judicial advice.

[13] First, the proofs the subject of the application are for very large sums. The debt claimed by Notes is $445,775,030. Bonds' claim is for $459,139,762. The applicants have already received and admitted claims from external creditors for approximately $500 million.[10] The admission of the proofs by Notes and Bonds would add two further claims for over $440 million each to the claims on the fund.

[14] The applicants' second point flows from the first. The admission or rejection of the Notes proof and/or the Bonds proof is likely to have a very significant effect on the way the administration is conducted by the applicants.

[15] Their third point is that the validity of each of these claims appears to turn on a threshold legal question, namely, whether they should be regarded as "double proofs". The "true principle" of the rule against double proofs has been said to be "that there is only to be one dividend in respect of what is in substance the same debt".[11] More recently it has been described in this way:

> "The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate."[12]

It follows that the acceptance or rejection of the proofs does not involve a commercial decision.

[16] The fourth point is that the law about double proofs has not been considered by an intermediate appellate court or the High Court since the commencement of the insolvent trading provisions relevant to the claims of Notes and Bonds. As a consequence, there is uncertainty about the relevant principles and how they might apply to these particular claims. Plainly, there is disagreement between the applicants and the liquidators on those matters.

[17] Fifthly, the controversy about the proofs of debt is a real legal controversy. In the course of exchanges between the solicitors for the applicants and those for the liquidators, it was apparent that the application of the rule against double proofs was hotly contested, and led to very different views about whether the proofs of debt should be accepted or rejected.

[18] Finally, it was noted that the solicitors for the liquidators had used quite strong language to describe the position of the applicants as to the application of the rule. They had written that the applicants' position "doesn't withstand proper scrutiny" and that it is "Frankly… nonsense", "nonsensical" and "a simplistic approach", that it applied an

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9 *Macedonian Church* at 91 [64] - 92 [66] (Gummow A-CJ, Kirby, Hayne and Heydon JJ).

10 These are considered below.

11 *Re Oriental Commercial Bank; ex parte European Bank* (1871) 7 Ch App 99 at 103 (Mellish LJ).

12 *Re Kaupthing Singer and Friedlander Limited (in administration) (No 2)* [2012] 1 AC 804 at 814 [11] (Lord Walker of Gestingthorpe JSC).

"unreliable test", and that the applicants' analysis was "wrong", suffered from a "lack of rigour" and led to "financially absurd and perverse outcomes". As Mr O'Donnell QC, who appeared with Mr Turner for the liquidators, noted, "the substance of it is that your analysis doesn't withstand scrutiny".

[19] Mr McKenna QC, who appeared with Mr May for the applicants, identified their concern that the challenge to the applicants' view of the legal questions and their intended course of action with respect to the proofs of debt had been expressed with such vehemence that it presaged other challenges – for example to the applicants recovering their costs or remuneration for dealing with the proofs. In these circumstances, the applicants explained that they came to the court seeking the court's confirmation that they were:

> "acting appropriately and properly in dealing with this difficult question, and so that as between all the people, between whom we are seeking to keep being even-handed, there is no doubt that we are acting in an appropriate and proper way."

Consideration of whether to give judicial advice

[20] The liquidators opposed the court giving advice to the applicants on the basis that it was unnecessary. Mr O'Donnell QC urged that the applicants ought to make a decision on each proof of debt without judicial advice and then deal with the likely challenges to their decisions.[13]

[21] As noted above, the applicants seek advice about a decision on a legal question and not a commercial decision. No question arises about the appropriateness of the request.[14] As Ipp J explained in *Westpac Banking Corp v Totterdell*:

> "the decision of a liquidator to admit or reject a proof of claim is not a discretionary management decision; it is a decision taken by the liquidator acting in a quasi-judicial capacity while discharging an adjudicatory function … The liquidator has no discretion to admit claims which are not legally enforceable; and has no discretion to reject claims which are legally enforceable … The prospects of success in regard to both an appeal against a decision by a liquidator rejecting a proof of debt and an appeal against a decision admitting a proof of debt, are dependent solely on whether the debt in question is a liability in law owing by the company. No element of discretion is involved."[15]

[22] The existence of a legal controversy, even of contested proceedings, about the subject matter for advice is not an automatic bar to the court giving advice. Nor is it a factor of such weight that it would generally cause the court to decline to do so. Indeed, in adversarial situations an external administrator may well be assisted by judicial advice.

[23] The extent to which judicial advice may determine substantive rights in contested proceedings is relevant to the exercise of the discretion, because that is not its purpose. The court's advice should not be directed to deciding disputes between interested

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13 It appears their submissions to that effect were raised for the first time at the hearing, without any prior notice to the applicant liquidators.

14 *Re Ansett Australia Ltd (No 3)* (2002) 115 FCR 409 at 428 [65] (Goldberg J); *Handberg v MIG Property Services Pty Ltd* (2010) 79 ACSR 373 at 380 [19] (Warren CJ).

15 (1998) 20 WAR 150 at 158.

parties.[16] It ought to be directed to whether the external administrator is justified in conducting a winding up in a particular way. The court deals with an application in the same way as an application by a trustee for advice. This requires the court to consider an applicant's reasons and the process by which the foreshadowed decision has been reached.[17] As Young AJA observed in *Re Westnet WA Infrastructure Holdings Ltd:*

> "What the Court does is require the liquidator or trustee to obtain advice from competent counsel in the area. The Court then considers counsel's advice and, unless the Court can see that further material is required, or that there is a real problem with counsel's advice, the usual course that the court takes is to advise the liquidator, or direct the liquidator that he or she would be justified in acting on counsel's advice."[18]

[24] The applicants are not faced with conventional decisions as to the proofs of debt,[19] but with decisions involving the application of a complex area of the law, namely: the rule against double proofs; and its interaction with the operation of the insolvent trading provisions in s 588W of the Act, which the parties submit is arguable or uncertain. The applicants' decision on the proofs must also be considered in the context of what has been called an "all-round group insolvency".[20]

[25] A telling point is the strongly worded challenge to the propriety of the applicants' opinions put in the open correspondence from the solicitors for the liquidators. At the hearing, the court invited the liquidators to withdraw those contentions. The invitation was not accepted. Mr O'Donnell QC explained the limit of his clients' instructions:

> "they will not assert that the liquidators of [Octaviar] would be in breach of their duty as liquidators were they to reject the proofs of debt [submitted by Notes and Bonds]."

[26] On one reading of the solicitors' correspondence, this is precisely what had been asserted. The carefully phrased response at the hearing was expressly not a withdrawal of the correspondence. It follows that the propriety and intellectual rigor of the applicants' analysis remained under challenge. Like the applicants, the liquidators are officers of the court. It is not necessary to reach any concluded view about the appropriateness of court officers authorising communications of the kind sent by the liquidators' solicitors. The fact of such communications, from persons owing duties to the court, as well as to the creditors of Notes and Bonds, is reflected in the appropriate seriousness with which the applicants have taken the remarks. They have engaged with the liquidators on the matters in issue, sought external professional advice and finally brought the present application.

[27] Resolving doubts about the propriety of the applicants adopting a particular course with respect to the proofs of debt will facilitate the protection of the interests of the creditors of Octaviar, because, notwithstanding the limited concession offered to the court by the

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16 *Re Mento Developments (Aust) Pty Ltd (in liq)* (2009) 73 ACSR 622 at 633 [49] (Robson J), applying *Macedonian Church* at 89 [54] - 95 [76].

17 *Re One.Tel Ltd* (2014) 99 ACSR 247 at [36] (Brereton J).

18 (2015) 106 ACSR 583 at [7].

19 Such as those considered in *Re Glowbind Pty Ltd (in liq)* (2003) 181 FLR 208 and *Re Magic Australia Pty Ltd (in liq)* (1992) 7 ACSR 742.

20 The liquidators of Notes and Bonds have contended the approach of the applicants does not appropriately take into account the all-round insolvency of the Octaviar group. As noted in [46] below, it was noted in *Re Polly Peck International plc (in administration)* [1996] 2 All ER 433 that the usual test for the rule against double proofs may be unreliable in such circumstances.

liquidators, it will remove the risk that the interests of the creditors might be subordinated to the applicants' legitimate fears of personal liability or other disadvantage.[21]

[28] At the hearing, I indicated to the parties that, in the circumstances, I proposed to provide advice to the applicants.

The facts

[29] The applicants disclosed to the court what they proffered as the material facts in a series of affidavits with exhibits. Without reciting the whole of those facts, it is convenient to identify some of the most relevant.

[30] The applicants have accepted a proof of debt lodged by PTQ for $384,710,657.65 for the amounts guaranteed by Octaviar in relation to certain notes issued by Notes where the right to payment under the notes was primarily vested in PTQ. For that debt, Notes is the principal debtor and each of Octaviar and Bonds is a guarantor.

[31] The applicants have also accepted proofs of debt lodged by Challenger for $107,363,895 and by Colonial First State Investments Limited (**Colonial**) for $8,081,153 in relation to certain bonds issued by Bonds where the right to payment under the bonds was primarily vested in Challenger or Colonial respectively. For those debts Bonds is the principal debtor and each of Octaviar and Notes is a guarantor.

[32] In its proof of debt, Notes claimed to be owed $360,484,683.00 because Octaviar is liable for the obligation Notes incurred in issuing the notes to PTQ. Notes says: it was insolvent at the time; Octaviar was its holding company; there were sufficient indicators of Notes' insolvency to place Octaviar in contravention of section 588V of the Act; PTQ suffered loss in relation to the notes; Notes is being wound up; and therefore Notes has a claim against Octaviar pursuant to section 588W of the Act.

[33] Notes also claims to be owed $104,057,527 because Octaviar is liable in relation to the obligation Notes incurred in guaranteeing the bonds. Notes says: it was insolvent at the time; Octaviar was its holding company; there were sufficient indicators of Notes' insolvency to place Octaviar in contravention of section 588V; Challenger and Colonial suffered loss in relation to the bonds; Notes is being wound up; and therefore Notes has a claim against Octaviar pursuant to section 588W.

[34] Alternatively, Notes claims to be owed $445,775,030 by Octaviar as an accessory liable for a breach of duty by the directors of Notes causing the notes to be issued and the proceeds lent to another company in the Octaviar group, Octaviar Administration Pty Ltd (**Administration**), and causing Notes to guarantee the bonds.

[35] In its proof of debt, Bonds claimed to be owed $104,057,527 because Octaviar is liable in relation to the obligation Bonds incurred in issuing the bonds to Challenger and Colonial. Bonds says: it was insolvent at the time; Octaviar was its holding company; there were sufficient indicators of Bonds' insolvency to place Octaviar in contravention of section 588V; Challenger and Colonial suffered loss in relation to the bonds; Bonds is being wound up; and therefore Bonds has a claim against Octaviar pursuant to section 588W.

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21 *Macedonian Church* at 93 [71] - 94 [72].

[36] Bonds also claims to be owed $360,508,685 because Octaviar is liable for the obligation Bonds incurred in guaranteeing the notes. Bonds says: it was insolvent at the time; Octaviar was its holding company; there were sufficient indicators of Bonds' insolvency to place Octaviar in contravention of section 588V; PTQ suffered loss in relation to the guarantee; Bonds is being wound up; and therefore Bonds has a claim against Octaviar pursuant to section 588W.

[37] Alternatively, Bonds claims to be owed $459,139,762 by Octaviar as an accessory liable for a breach of duty by the directors of Bonds causing the bonds to be issued and the proceeds to be lent to Administration and causing Bonds to guarantee the notes.

[38] Although the amounts claimed by the liquidators of Notes and Bonds in the two proofs of debt differ from those in the proofs accepted by the applicants from PTQ, Challenger and Colonial, the amounts claimed by Notes and Bonds comprise the value of the notes issued by Notes to PTQ and the value of the bonds issued by Bonds to Challenger and Colonial, in each case plus some interest.

[39] The difference between the total claimed by Notes and that claimed by Bonds arises in this way. The proof lodged for Notes allows a deduction for the amount received by PTQ as a dividend in the liquidation of Administration, relating to the notes. Bonds' proof allows a deduction for the sum Challenger and Colonial have recovered as a dividend in the liquidation of Administration relating to the bonds. These deductions indicate some acceptance by the liquidators of a relationship between the amount owing to PTQ for the notes and to Challenger and Colonial for the bonds and the amounts that Notes and Bonds may claim.

Applicability of the rule against double proofs

[40] The applicants have taken the view that, if the sums owed to PTQ, Challenger and Colonial were paid in full by Octaviar, then neither Notes nor Bonds would have any claim against Octaviar. They contend this is so because, if those debts were paid, PTQ, Challenger and Colonial would suffer no loss or damage in relation to the debts. The statutory claim under s 588W by each of Notes and Bonds is for an amount equal to the loss or damage suffered by PTQ, Challenger and Colonial. Similarly, if PTQ, Challenger and Colonial were paid in full, then PTQ, Challenger and Colonial would have no claim against either Notes or Bonds and neither would suffer the loss or damage that is subject of the accessorial liability claims.

[41] On this view, the discharge of the debts to PTQ, Challenger and Colonial would extinguish the debts claimed by Notes and Bonds in their proofs. Applying the test adopted in *Re Oriental Commercial Bank*,[22] the applicants have concluded Octaviar was only ever liable to pay a single debt in respect of the issue of the bonds by Bonds and a single debt with respect to the issue of the notes by Notes, and the debts claimed by Bonds and Notes in their respective proofs are substantially the same debts as those owed to PTQ, Challenger and Colonial.

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[22] (1871) 7 Ch App 99 at 103. This test was explicitly endorsed in *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] AC 626 at 636. These two decisions have been approved and applied in Australia, including in: *Re Bruce David Realty Pty Ltd (in liq)* [1969] VR 240; *McColl's Wholesale Pty Ltd v State Bank of New South Wales* [1984] 3 NSWLR 365; *Western Australia v Bond Corporation Holdings Ltd and Ors (No 2)* (1992) 37 FCR 150; *Lumley General Insurance Ltd v Oceanfast Marine Pty Ltd* [2001] NSWCA 479; and *Re Master Painters Association of Victoria Ltd* (2004) 211 ALR 316.

[42] The applicants have also reasoned that PTQ, Challenger and Colonial are the primary creditors and Notes and Bonds are in a position analogous to a guarantor and that PTQ, Challenger and Colonial have the better claims on the broad equity of the position because they are out of pocket.

[43] Finally, the applicants contend that the rule against double proofs is consistent with the *parri passu* rule, which is the most fundamental principle of insolvency law. It finds statutory form in s 555 of the Act, so that, where there is an insufficient fund, there is to be a proportionate distribution.

[44] The liquidators of Notes and Bonds have a different view. They have asserted that claims under s 588W of the Act should not be reduced by the repayment of an obligation that arose from an act of insolvent trading. The liquidators' position appears to be that the statutory liability for insolvent trading remains at full value even if the obligations that gave rise to it are discharged in whole or part. They contend that to do otherwise would undermine the policy rationale for the insolvent trading provisions of the Act, which they identify as including "to discourage trading by corporations while insolvent and to impose liabilities on those who are in a position to prevent that happening but fail to do so".[23] They identify s 588W as a "disincentive for holding companies to prevent their subsidiaries trading whilst insolvent". Relying on the reasoning in *Westpac Banking Corporation v Gollin & Co*,[24] the liquidators argue that a dividend from Octaviar directly to a creditor, as guarantor, would not reduce the liability owed by Notes or Bonds to either the creditor or Octaviar (by right of subrogation), and that s 588W requires Octaviar, as the holding company of Notes and Bonds, to be ultimately liable for that debt at full value.

[45] In this way, the liquidators contend that s 588W ought to be understood as operating independently of the *pari passu* system. In the liquidators' submission, money recovered under s 588W is not recovered for the benefit of a specific unpaid creditor, but rather forms part of the company's assets, which can then be distributed as part of the liquidation for the benefit of all creditors on a *pari passu* basis.

[46] The liquidators also identified that, according to *Re Polly Peck International plc (in administration)*,[25] the *Oriental Commercial Bank* test may not be wholly reliable "in circumstances of all-round group insolvency". This led the liquidators to disparage the applicants' use of the test to classify the claims by Notes and Bonds as double proofs.

The submissions and material on the advice to be given

[47] Mr McKenna QC and Mr May relied on their written submissions and the applicants' views outlined in their open correspondence with the solicitors for the liquidators of Notes and Bonds. Mr McKenna QC informed the court that the applicants had obtained written legal advice on the proofs of debt. I formed the view that such advice would be of assistance to the court in providing judicial advice, and called for it to be tendered, without any waiver of legal professional privilege. The advice was tendered and marked as a confidential exhibit.

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23 Citing *Carrello v Perrine Architecture Pty Ltd* [2016] WASC 145 at [222].

24 [1988] VR 397 at 403 (Tadgell J), approved in *Loeskow v Avokah Irrigation* (1996) FCA 1420 at [22]-[25] (Foster J; Lockhart and Ryan JJ agreeing).

25 [1996] 2 All ER 433.

[48] Mr O'Donnell QC made brief oral submissions. He and Mr Turner also provided written submissions to the court. They noted that the substantive issues about the rule against double proofs were complex and complicated. Conflicting opinions were possible, perhaps likely. In the circumstances, Mr O'Donnell QC counselled that the court should be alert to go no further than was necessary to give the advice sought. I adopt that suggestion. It is appropriate. I also note that any advice offered by the court "has no effect on the substantive rights of persons external to the winding up."[26]

[49] At the conclusion of the hearing, I informed the parties that I would reserve my decision. I would read the privileged material called for from the applicants. If that material caused me to think that the court should have further submissions about any point, I would notify the parties and we would see whether that could be done conveniently either in writing or at a further hearing.

[50] I considered the material. I did not find it necessary to call for any further assistance from the parties.

Orders to be made

[51] The legal basis upon which the applicants must determine whether to accept or reject in whole or in part the proofs of debt is complex and complicated. There are differing views about the application of the rule against double proofs to statutory claims, such as those advanced by the liquidators of Notes and Bonds, which may give rise to conflicting opinions. Such a situation is apt for the provision of judicial advice.

[52] As Mr O'Donnell QC identified, it is not the court's role to assess for itself the proofs of debt (as if the court were the liquidator of Octaviar) and determine how each should be treated. Rather, the court must have regard to the steps taken by the applicants in considering the proofs and the relevant facts and documents underlying the proofs. I am satisfied that the applicants' process of reviewing and considering the proofs was comprehensive and included a careful consideration of the legal arguments put on behalf of the liquidators of Notes and Bonds by their solicitors and the taking of specific independent legal advice from counsel with experience in the relevant field.

[53] Having considered the written and oral submissions, the material in the affidavits filed by the applicants and the confidential advice tendered at the hearing, I am satisfied that the applicants have obtained advice from competent counsel in the area, that further material is not required and there is no real problem with the advice received by the applicants. I have concluded that the applicants would be justified in rejecting in whole the proof of debt lodged by each of Notes and Bonds. I will make orders generally in the terms sought by the applicants.

Costs

[54] The applicants seek an order that the costs of the application be costs in the winding up of Octaviar. Given the circumstances leading to the application and the applicants' success, that order is appropriate.

[55] As noted above, in written and oral submissions at the hearing the liquidators of Notes and Bonds took an active role and raised arguments against the giving of advice sought

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[26] *Re Murphy; Re BPTC Ltd (in liq)* (1996) 19 ACSR 569 at 570 (McLelland CJ).

by the applicants. They was unsuccessful in that respect. Absent the liquidators' intervention, to use that word in a non-technical sense, there would have been no contradictor to the applicants. However, the liquidators chose to take an adversarial approach to the proceeding. It could not be said that they participated in the proceeding to represent any public interest. The liquidators' position on the substantive legal issues as to "double proofs" was consistent in the written submissions filed at the hearing and the preceding correspondence from their solicitors. The only new development at the hearing was their opposition to the application for advice, which appears to have been without any notice to the applicants until the matter was called on the morning of the hearing.

[56] It does not appear that the liquidators' opposition to the application caused the applicants' costs of the proceeding to be increased to any extent. The first adjournment might be identified as altering the position that likely would have prevailed had the liquidators permitted the application to proceed in the ordinary course. That adjournment was effected "on the papers".

[57] In the circumstances, it does not appear appropriate that the liquidators should have their costs of the proceeding and this does not appear to be an instance where the liquidators ought to be ordered to pay any of the applicants' costs.