



# Update

Commercial Dispute Resolution

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## A win for property owners and lessors: enforcing rights of possession during the administration of a company



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Section 440C of the *Corporations Act 2001* (Cth) prohibits owners or lessors from taking possession of their property when that property is used or occupied by a company which is in administration. However, the provision provides an exception to the prohibition where the administrator's written consent or the leave of the court is acquired. *Re Colorado* involved an analysis of the various factors a court will take into account when determining an application for leave under s 440C(b).

### Background

The Colorado Group lost its struggle to stay solvent in March of this year when it was placed into administration and receivers and managers were appointed. The Group had accumulated approximately \$440 million in debts and approximately 30% of its stores were closed. Prior to these proceedings, Justice Judd in the Victorian Supreme Court had extended the second creditors' convening period by nine months to enable the receivers and managers to sell the business as a going concern and the administrators to consider a possible deed of company arrangement.

The plaintiffs in this case, Ventana Pty Ltd (**Ventana**) and PT Limited (**PT**) (represented by **Holding Redlich**), owners of Westfield shopping centres at Westfield Southland in Victoria and Westfield Carousel in Perth respectively, leased premises within their shopping centres to Colorado.

### Findings of the Court

Associate Justice Gardiner referred to the objective of Part 5.3A (which contains s 440C) and noted that the purpose of the exception in s 440C "is to enable the court to relax the prohibition where it would be inequitable for the prohibition to apply." Gardiner AsJ recognised that determining cases of this nature is a balancing exercise. That is, "an administration for the benefit of unsecured creditors should not be conducted at the expense of those who have proprietary rights... save to the extent that this may be unavoidable and even then this will usually be acceptable only to a strictly limited extent."

With this in mind, and referring to a number of Australian and United Kingdom decisions, Gardiner AsJ found in favour of the plaintiffs, deciding:

- that there was no evidence that closing the two stores would affect the administration of Colorado "as the stores represent such a minor part of the undertakings of the respective chains";
- there was no goodwill attached to the stores which could be passed on to a purchaser under a deed of company arrangement because the leases had already expired. The plaintiffs would not be bound by the deed unless they consented to it. The only means by which Colorado could remain in occupation is if the deed administrator successfully applied to prevent the plaintiffs from regaining possession by obtaining an order under section 444F(4) of the Act;
- the plaintiffs were suffering identifiable and substantial loss as a result of the moratorium in terms of not being able to engage new tenants, one lessee indicating a compensation claim for being unable to take up its tenancy, lower rents being paid and difficulties in securing long term commercial tenants because of the moratorium period;
- the receivers had previously rejected a reasonable relocation offer made by Ventana;
- there would be no opening of "floodgates" with other landlords making similar applications if leave was granted as each application will be determined on its own merits. Every owner is entitled to make an application under section 440C and it is not part of the Court's function to dissuade them from exercising those rights.
- the position of Colorado was such that the unsecured creditors would receive no dividends as there will be no surplus after the secured creditors have been paid. The moratorium period enables the receivers to enhance a return to the secured creditors but the unsecured creditors will not benefit from it; and
- there was no "commercially impeachable" conduct on the part of the plaintiffs (i.e. the plaintiffs raised their concerns with the administrators and receivers in a timely manner).

### Implications of the decision

The decision in *Re Colorado* appears to give some structure to the factors a court will take into account when determining an application for leave under s 440C(b). Where the grant of leave is unlikely to impede the administration of the company and/or where the lessor can show that it will suffer identifiable and substantial loss if leave is not granted, then a court is likely to be satisfied of the merits of the application. There are further factors which may weigh in the court's consideration, for example, how significant is the property in question to the administration of the company? Has there been any "commercially impeachable" conduct on the part of the owner/lessor? How long has the lease to run?

The onus lies with the owner/lessor to prove more than simply a proprietary entitlement to possession of the property. Administrators (and receivers as the case may be) will also need to submit evidence squarely demonstrating the prejudice to the company and/or its creditors in losing the premises. In addition, it is likely that the court will give attention to evidence of prior open commercial discussions and the parties' respective positions regarding commercial

alternatives explored.

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