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Insolvency & Restructuring Case Summaries

2023

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Joseph Scarcella

Peter Smith

Paul Buitendag

Sam Johnson

Ben Renfrey

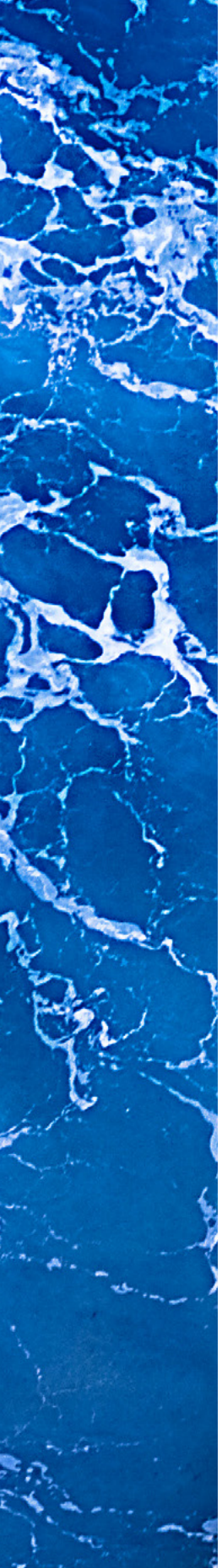
Lucas Wilk

Pravin Aathreya

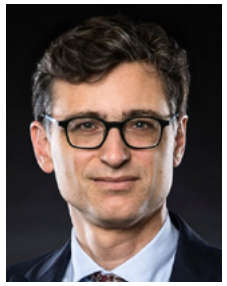
Rena Solomonidis

Eve Thomson

Emily Barrett



Foreword



Michael Izzo SC
Eleven Wentworth

I am honoured to write the Foreword to this second iteration of JWS Insolvency & Restructuring Case Summaries.

This volume is an indispensable tool for directors, lawyers and insolvency practitioners who wish to understand and follow important developments in the field of corporate insolvency.

The need to do so is underlined by the High Court's increased forays into the area. The first two High Court decisions delivered in 2023, *Metal Manufacturers v Morton and Bryant v Badenoch Integrated Logging*, dealt with set off in insolvency and the peak indebtedness rule respectively. In the second half of 2023, the High Court granted special leave to appeal from the New South Wales Court of Appeal's decision in *Greylag Goose Leasing v PT Garuda Indonesia* (concerning the availability of foreign state immunity in a winding up application) and the Full Court of the Federal Court's decision in *McMillan Investment Holdings Pty Ltd v Morgan* (concerning pooling orders under the Corporations Act). All four decisions are carefully and helpfully digested in this year's Case Summaries.

The Case Summaries deal with many other decisions of considerable complexity and importance, such as the appellate decisions in *Anchorage Capital Master Offshore v Sparkes* (addressing the circumstances in which a company is insolvent because of inability to pay future debts and the consequences of company officers making representations as to solvency); *Resilient Investment Group v Barnet* (clarifying the operation of central concepts in the *Personal Property Securities Act 2009* in the context of a priorities dispute); and *Sino Group International v Toddler Kindy Jamberoo* (identifying circumstances when a DOCA may be terminated as misleading).

The contributors are to be congratulated for the breath of their coverage, the clarity of the summaries and the care that has gone into selecting cases and identifying their broader significance. This is an immensely useful work and I commend it to all readers.

Michael Izzo SC

Introduction

It gives us great pleasure to introduce our Insolvency & Restructuring Case Summaries 2023. This is the second year that we have published a collated version of the Case Summaries in addition to our regular *Insolvency InFocus updates*. We received a great deal of positive feedback from many of you in response to the first edition of our Case Summaries and we hope that you will continue to find this annual publication to be a useful resource.

The number of corporate insolvencies for the 2022/2023 financial year almost returned to pre-pandemic levels and were at their highest level since 2019. A number of key indicators point to corporate insolvencies increasing further during 2024: the rise in interest rates since May 2022 is likely to be felt acutely in some sectors; continuing upward inflationary pressures impacting the cost of living; credit being more difficult to source and an increase in enforcement action by the ATO pursuing unpaid corporate tax. An uptick in corporate insolvencies is likely to be accompanied by a commensurate increase in insolvency-related litigation during 2024.

The Courts handed down several landmark insolvency decisions during 2023. Most notable were the High Court decisions in *Bryant v Badenoch Integrated Logging Pty Ltd* and *Morton as Liquidator of Woodman Electrical Contractors (in Liq)*, which provided some long sought after clarity on the application of the peak indebtedness rule and the set off defence in preference claims. Also, in a decision that was welcomed by liquidators, the Court of Appeal of the Supreme Court of NSW in *Commonwealth of Australia v Tonks* resolved the uncertainty created by the interplay between the priority regimes under sections 556 and 561 of the *Corporations Act* when resolving a contest between a liquidator's claim for remuneration and the entitlements of former employees to be paid out of circulating assets.

Johnson Winter Slattery acted in a number of high-profile insolvency cases during 2023, including *Bryant v Badenoch*, and with our expertise around Australia we are well positioned to assist you with solving the complex problems created by insolvent companies, which are reflected in the Case Summaries.

We are extremely grateful to all of our colleagues around Australia who contributed to the Case Summaries and we look forward to working with many of you during 2024.

Johnson Winter Slattery
Restructuring & Insolvency Partners

Joseph Scarcella
Partner
T +61 2 8247 9639
Sydney
joseph.scarcella@jws.com.au

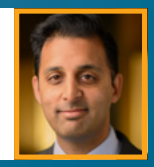
Peter Smith
Partner
T +61 7 3002 2515
Brisbane
peter.a.smith@jws.com.au

Paul Buitendag
Partner
T +61 3 8611 1305
Melbourne
paul.buitendag@jws.com.au

Sam Johnson
Partner
T +61 2 8274 9548
Sydney
sam.johnson@jws.com.au

Ben Renfrey
Partner
T +61 8 8239 7158
Adelaide
ben.renfrey@jws.com.au

Pravin Aathreya
Partner
T +61 3 8611 1344
Melbourne
pravin.aathreya@jws.com.au



Rena Solomonidis
Partner
T +61 3 8611 1306
Melbourne
rena.solomonidis@jws.com.au

Eve Thomson
Partner
T +61 8 8239 7174
Adelaide
eve.thomson@jws.com.au

Emily Barrett
Partner
T +61 2 8247 9682
Sydney
emily.barrett@jws.com.au

Lucas Wilk
Partner
T +61 7 3002 2522
Brisbane
lucas.wilk@jws.com.au

Contents

1. Voluntary administration

Administrator is obliged to investigate allegations of fraudulent appointment

AUTHORS

Sam Johnson, Partner
Sofia Arlotta, Associate

CASE & NAME CITATION

Re Premier Energy Resources Pty Ltd [2023] NSWSC 1185 per Williams J

HYPERLINK

Read more

DATE OF JUDGMENT

28 September 2023

ISSUES

Validity of administrator's appointment, s 447A *Corporations Act*

The Supreme Court of NSW refused to validate the appointment of a voluntary administrator (Administrator) to Premier Energy Resources Pty Ltd (Company) under section 447A of the *Corporations Act 2001* (Cth) (Act) after the Administrator failed to investigate allegations of fraud surrounding his appointment. The decision of Justice Williams confirmed that:

- **a voluntary administrator has an obligation to investigate allegations surrounding the validity of their appointment and if an administrator is still unable to satisfy themselves that they were validly appointed, then they must apply to the Court seeking an order validating their appointment;**
- **a Court validating an appointment under s 447A of the Act must give effect to the objectives of Part 5.3A; and**
- **when determining whether to validate an appointment, the Court may consider factors such as the company's solvency; inquiries made by the administrator into the validity of their appointment; potential disruption caused by a future challenge to the appointment; the work already undertaken by the administrator; and whether validation would cause substantial injustice to a person or involve the Court approving of wrongful conduct.**

Background

The Company entered into an agreement with Delta Electricity (**Delta**) to deliver coal fines to Delta's power station. In October 2022, Delta alleged the Company breached the agreement and threatened legal proceedings. In light of this, the Company's directors considered, and were in dispute about, whether to put the Company into voluntary administration.

The parties attempted to resolve the dispute. However, the threat of litigation continued into June 2023, at which time the directors of the Company were Mr Connor and Mr Clark.

On 20 June 2023, Mr Connor, who since the threat of litigation favoured the Company entering voluntary administration, sent the Administrator (not yet appointed) minutes of a meeting:

(a) stating Mr Clark had resigned as a director; and

(b) that Mr Connor, as the sole director, resolved that the Company was to enter into voluntary administration and that the Administrator be appointed.

Mr Connor then sent the Administrator a copy of Mr Clark's signed letter of resignation (**Letter**). The Administrator subsequently issued his first report to creditors.

On 28 June 2023, Mr Clark informed the Administrator that the Letter was fraudulent. The Administrator dismissed this allegation, reasoning that he had no basis to doubt the validity of the appointment (and related) documents. Notwithstanding this, and after further similar communications, the Administrator advertised the Company's assets and issued his second report to creditors.

Mr Clark requested that the Administrator apply to the Court to confirm the validity of his appointment. After initially refusing this request on the basis that there were insufficient Company funds to cover costs of an application and inviting Clark to bring an application instead, on 15 September 2023, the Administrator made the application almost three months after he had been appointed.

Shortly prior to the hearing of the application, the defendant and shareholder, Australian Rehabilitation Services Pty Ltd (**Aussie Rehab**), initiated the "Deadlock process" being the mechanism available to shareholders under the shareholder's deed to resolve a conflict between directors.

Issues

The key issues before the Court were:

- whether the Administrator acted reasonably and consistently with the obligations of an external administrator after learning of allegations that his appointment was invalid; and
- whether the Court should nevertheless validate the Administrator's appointment because the Company would end up in liquidation anyway given that it did not have the funds to defend the foreshadowed legal proceeding.

Findings

The Court found that Mr Connor, or someone acting on his behalf, forged the Letter. It noted s 447A of the Act has been used to validate an otherwise invalid appointment, and in determining whether to validate this appointment, the Court must consider whether doing so would achieve the objectives of Part 5.3A of the Act in relation to the Company.

The Court declined to validate the appointment under s 447A, reasoning:

(a) the Administrator was obliged to investigate the allegation that the appointment was invalid, and should have applied to the Court in a timely manner if he was unable to satisfy himself that his appointment was valid;

(b) the risk the Company may be wound up or enter liquidation after the appointment is invalidated does not necessarily favour validating the appointment;

(c) no third-party creditors would be substantially prejudiced, whereas validating the appointment would deprive Aussie Rehab the right to determine the dispute by the Deadlock process agreed by the shareholders;

(d) placing the burden on Mr Clark to bring an application to validate the appointment was inappropriate, especially as the Administrator continued to deal with the Company's assets and creditors; and

(e) validating the appointment would give approval to the Administrator's unsatisfactory conduct.

The Court ordered the ASIC register be amended pursuant to s 1322(4)(b) to reflect that Mr Clark did not resign as a director of the Company.

This case serves as a reminder that an administrator has an obligation to promptly investigate any doubts surrounding the validity of their appointment and, if necessary, make an application to the Court to resolve any doubts over whether they have been validly appointed.

Rare denial of application to extend the convening period

AUTHORS

Sam Johnson, Partner
Melissa Liu, Senior Associate

CASE & NAME CITATION

Frisken, in the matter of Xpress Transport Solutions Pty Ltd (Receivers and Managers Appointed) (Administrator Appointed) [2023] FCA 448

HYPERLINK

Read more

DATE OF JUDGMENT

11 May 2023

ISSUES

Extending the period for convening the second meeting of creditors, s 439A(6) *Corporations Act*

The Federal Court of Australia has issued a rare denial to a voluntary administrator seeking to extend the period of time in which the second meeting of creditors must be convened under section 439A(6) of the *Corporations Act 2001* (Cth) (Act). This appears to be the only case in recent memory where such an application has been denied, with Courts routinely granting applications to extend the convening period.

Consequently, the case serves as an important reminder that Courts will not simply "rubber stamp" an application to extend the convening period and highlights:

- **the importance of providing adequate notice and explanation of the application to creditors;**
- **the importance of the application being supported by sufficient evidence; and**
- **that Courts will have regard to whether the proposed extension is in the best interests of creditors and advances the objectives of Part 5.3A of the Act.**

Background

In March 2023, receivers and managers (**Receivers**) were appointed by the National Australia Bank (**NAB**) to Xpress Transport Solutions Pty Ltd and five related companies (**Companies**) that held substantial assets with a recorded book value of almost $100 million. NAB, the Companies' largest creditor, claimed approximately $45 million. The sole director of all of the Companies was also the sole shareholder of five of the Companies – the sixth company was a wholly owned subsidiary of one of the other Companies. When the Receivers were appointed to the Companies under suspicion of fraudulent activity, they promptly caused the Companies to cease trading and made all employees redundant.

On 4 April 2023, Mr Frisken was appointed as the voluntary administrator of the Companies (**Administrator**). Prior to the external administration, the Companies owned and leased petrol stations and were involved in the wholesaling of petroleum products to petrol station proprietors and the transport of various agricultural and consumer products. The plant and equipment of the Companies included trucks and trailers.

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On 10 May 2023, the Administrator brought an urgent application before the Federal Court's Duty Judge to extend the convening period for the second meeting of creditors for a period of six months pursuant to s 439A(6) of the Act. The reason for the urgency was because, without the extension, the convening period expired on the following day, 11 May 2023. The Administrator had not communicated an intention to seek the extension to interested parties until 9 May 2023, and only notified the creditors whose email addresses were known to him.

The Administrator submitted to the Court that a 6 month extension to the convening period was required on the basis that it would:

- allow sufficient time for the receivership to conclude because a deed of company arrangement (**DOCA**) proposal from the sole director (or a third party) could not be made until that occurred; and
- allow time for the Administrator to conduct further investigations which he submitted were required in order to properly report to creditors.

Issues

The key issue before the Court was whether the extension was appropriate, in circumstances where stakeholders had received inadequate, or no, notice and explanation and the extension was unlikely to improve any return to creditors.

Findings

The Court had regard to the objects of voluntary administration under Part 5.3A of the Act, as set out in s 435A of the Act, namely, to maximise the chances of the company or as much as possible of the business continuing in existence or, if that is not possible, to result in a better return for the company's creditors and members than would result from an immediate winding up of the company. Justice Cheeseman was not satisfied that the Administrator had established a proper evidentiary basis for the grant of the extension. In dismissing the application, her Honour observed that:

1. all known relevant stakeholders had not been notified;
2. it was unclear whether a significant extension of six months would benefit the creditors in circumstances where the businesses had been wound down;
3. the prospect of the proposed DOCA emerging was so highly speculative that it did not outweigh the prejudice to creditors impacted by the statutory moratorium on legal proceedings; and
4. it was unclear whether an extension was realistically likely to place the Administrator in a better position to present a meaningful choice to creditors that may enhance any return to creditors.

The Court also noted that the Administrator's evidence failed to disclose to the Court in detail, or at all, a number of concerns raised by the Receivers regarding potential fraud, phoenix activity and creditor defeating dispositions.

The decision is a reminder that Courts will not simply "rubber stamp" applications by voluntary administrators to extend the convening period. While the expedited nature of the voluntary administration process will often necessitate that such applications are brought on an urgent basis, Courts will require that creditors and other stakeholders are given sufficient notice of the application so that they have an adequate opportunity to oppose it. The decision also serves as a reminder that applications need to be supported by sufficient evidence which, among other things, demonstrates that the extension will be in the best interests of creditors and will advance the objectives of Part 5.3A of the Act.

Court finds late appointment of administrator a defensive step to avoid liquidation

AUTHORS

Sam Johnson, Partner
Charlotte Selley, Law Clerk

CASE & NAME CITATION

Re Brew Still Pty Ltd (admin apptd) [2023] NSWSC 256

HYPERLINK

Read more

DATE OF JUDGMENT

17 March 2023

ISSUES

Application to adjourn winding up application, s 440A(2) *Corporations Act*

In *Re Brew Still Pty Ltd* (admin apptd) [2023] NSWSC 256, the plaintiff creditors of Brew Still Pty Ltd (the Company) applied to have the Company wound up. Three days before the winding up application was to be heard, a voluntary administrator (Administrator) was appointed to the Company. The Administrator applied for an order, under section 440A(2) of the *Corporations Act 2001* (Cth) (Act), that the winding up application be adjourned to a later date, so that the Administrator could investigate particular matters to determine if the voluntary administration would result in a better outcome for creditors of the company than immediate liquidation.

In refusing the Administrator's application for an adjournment, Justice Black made the following observations:

- **the late appointment of the Administrator meant that the Administrator could not be sufficiently well informed as to the Company's affairs to form any realistic view that a voluntary administration would be to the creditors' advantage, by comparison with a winding up and there was no evidence to support the propositions that further investigations could lead to that conclusion;**
- **failing to comply with a statutory demand will constitute an event of default even in circumstances where the underlying default judgment is set aside and the failure to comply will not avoid a winding up if no attempt is made to establish solvency or to set aside the statutory demand; and**
- **Courts may use their discretion to make a costs order against an administrator if an application for adjournment under s 440A(2) of a winding up is unsuccessful.**

Background

The plaintiffs, Adhub Pty Ltd and Media Buyers Pty Ltd, were creditors of the Company. By Originating Process filed on 28 November 2022, the plaintiff applied to wind up the Company in insolvency on the basis of the Company's failure to comply with a statutory demand. The Deputy Commissioner of Taxation (the **ATO**) appeared on the application as a supporting creditor, and also sought to have the Company wound up.

The winding up application was set down for hearing on 17 March 2023. On 14 March 2023, the Company appointed the Administrator. The day before the application was to be heard, the Administrator applied for an order that the winding up application be adjourned to 21 April 2023.

The Administrator submitted that "he has not had sufficient time to undertake a detailed review of Brew Still's historical performance, its financial forecast and modelling as prepared by the director, and the director's draft deed proposal". In turn, the Administrator indicated that he was seeking an adjournment of the winding up proceedings so he may investigate particular matters "to determine if the voluntary administration results in a better outcome for creditors of the company". He also expressed the view that it was in the interests of creditors of the company to continue in administration.

The plaintiffs and the ATO opposed the application for the adjournment on the basis that the evidence established that the voluntary administration process had been initiated as a defensive step to the winding up proceedings.

Issues

The key issues before the Court were:

- whether it was in the interests of the Company's creditors for the Company to continue under administration rather than be wound up; and
- if the answer to the above question was no, whether a winding up order should be made on the basis of the Company's failure to comply with the statutory demand.

Findings

In dismissing the Company's adjournment application, the Court found that it was not in the interests of the Company's creditors for the winding up to be adjourned, even for the short period of a month. Justice Black reached this conclusion on several grounds.

1. While the adjournment would allow for the Administrator to undertake further investigations, the Company did not lead any evidence to suggest that the investigations are likely to prove that a restructuring of the Company would benefit their creditors more than the Company being wound up. Further, Justice Black highlighted that the process of voluntary administration would involve the further estimated expenditure of $50,000, which would likely reduce the return to creditors and expose the ATO to further unpaid tax liabilities.
2. Although the Administrator submitted that the director provided him with a deed proposal which proposed that the Company would raise further capital or shareholder loans to recapitalise, neither the deed proposal nor the basis on which the recapitalisation would be funded was never submitted into evidence. The Administrator admitted that he had not had sufficient time to undertake a "detailed review" of the Company's financial position. As a result, the Court found that the submission was mere speculation.
3. As a consequence of the late appointment of the Administrator, he was not sufficiently well informed as to the Company's affairs to form any realistic view that voluntary administration, even for a short period of time, would be to the creditors' advantage.

The Court then determined that a winding up order should be made in favour of the plaintiffs.

The decision reaffirms that companies cannot avoid liquidation by appointing an administrator at the eleventh hour unless they can establish, based on evidence, that the company's creditors will benefit more financially from an administration as opposed to a winding up. Further, in making a determination under s 440A of the *Corporations Act*, the Court has to be satisfied that the administrator has a real understanding of the company's affairs and the prospects of a voluntary administration so that he or she can demonstrate an actual likelihood of a benefit to creditors, as opposed to just mere speculation.

Court considers operation of s 203AB of the Corporations Act (the "last director rule") for the first time

AUTHORS

Sam Johnson, Partner
Sophie Milera, Associate

CASE & NAME CITATION

Re Hutton (as joint and several administrators of) Big Village Australia Pty Ltd (Administrators Appointed) [2023] FCA 48 per Anderson J

HYPERLINK

Read more

DATE OF JUDGMENT

2 February 2023

ISSUES

Validity of administrators' appointment; ss 203AB and 447A *Corporations Act*

The Administrators of Big Village Australia Pty Ltd (Administrators Appointed) sought orders under section 447A of the *Corporations Act 2001* (Cth) (Act) to dispel any uncertainty surrounding the validity of their appointment by virtue of the operation of s 203AB of the Corporations Act (the "last director rule"). In his Honour's judgment, Justice Anderson confirmed that:

- **s 203AB prevents a director's resignation from taking effect if that resignation would leave the company without a director;**
- **a director who has purported to resign but has been prevented from doing so by operation of s 203AB continues to be able to exercise their powers as a director, including to pass resolutions and appoint administrators;**
- **having being prevented from resigning, a director will remain subject to all of the directors' duties; and**
- **s 203AB takes effect notwithstanding any clause to the contrary in a company's constitution.**

Background

On 26 January 2023, Matthew Russell Hutton and Robert Bruce Smith were appointed as joint and several administrators (**Administrators**) of Big Village Australia Pty Ltd (Administrators Appointed) (**Company**).

The Company was part of an international group of companies known as the "BV Group" (**Group**), and in 2022 was reliant on funding from related parties in the Group to remain solvent. Due to a number of challenges, the Group was no longer able to provide the Company with financial or strategic support. The Company's sole director, Ms Dana Kracht (**Ms Kracht**), formed the view in early January 2023 that the Company was insolvent or likely to become insolvent, after reviewing the Company's cash flow forecast and considering the financial issues facing the Company.

On 25 January 2023 (New York time), Ms Kracht passed a number of resolutions, including that the Administrators would be appointed to the Company (**Resolutions**).

Following their appointment, the Administrators formed the view that there may be some doubt as to the validity of their appointment for the following reasons:

- Between 31 October 2022 and 23 December 2022, all but one of the Company's directors resigned, leaving Ms Kracht the sole director. Ms Kracht had also sought to resign on 11 January 2023, shortly before passing the Resolutions, by sending a letter to the Company's registered office pursuant to the Company's constitution. However, she later considered that the resignation was ineffective given the operation of s 203AB of the Act.
- At the time of the appointment, and at all relevant times, Ms Kracht, being the sole director of the Company, was a resident of New York and did not ordinarily reside in Australia, contrary to s 201A(1) of the Act, which requires a proprietary company to have at least one director who mainly resides in Australia.

In order to dispel any uncertainty, the Administrators sought orders under s 447A of the Act, or alternatively s 447C or s 1322 of the Act, that Part 5.3A of the Act was to operate in relation to the Company as though the Administrators were validly appointed as joint and several administrators of the Company on 26 January 2023.

Issues

The key issues before the Court were whether:

- s 203AB of the Act operated to prevent Ms Kracht's purported resignation on 11 January 2011 from taking effect; and
- whether the Administrators were validly appointed as a result of the Resolutions.

Findings

Justice Anderson considered that the terms of s 203AB were clear: "It prevents a resignation from taking effect if that resignation would leave the company without a director".

His Honour concluded that s 203AB of the Act operated to prevent Ms Kracht's resignation from taking effect, notwithstanding the relevant clause in the Company's constitution, which provided that "the office of a Director becomes vacant if the Director … resigns as Director by giving written notice of resignation to the Company …". Therefore, Ms Kracht remained a director of the Company at the time she passed the Resolutions and had the necessary powers to pass them.

Ultimately, Justice Anderson agreed that the preferable approach to dispel any doubt about the validity of the Administrators' appointment was for the Court to make an order under s 447A of the Act. His Honour made orders that Part 5.3A of the Act was to operate in relation to the Company as though the Administrators were validly appointed as joint and several administrators of the Company on 26 January 2023.

Section 203AB of the Act was introduced as part of a suite of reforms enacted to prevent illegal phoenix activity and to prevent a company from being abandoned by its directors and left without a board. This decision marks the first time that s 203AB has been considered by a Court and confirms that Courts will adopt a common sense application of the section where it is inconsistent with the company's constitution or where a director has attempted to resign but his or her resignation has been rendered ineffective by s 203AB.

Court clarifies scope of ipso facto stay under s 451E of the Corporations Act

AUTHORS

Sam Johnson, Partner

Sophie Milera, Associate

CASE & NAME CITATION

Rathner, in the matter of Citius Property Pty Ltd (Administrator Appointed) [2023] FCA 26 per O'Bryan J

HYPERLINK

Read more

DATE OF JUDGMENT

24 January 2023

ISSUES

Ipso facto stay, s 451E of *Corporations Act*, extension of convening period for second meeting of creditors, s 439A *Corporations Act*

In the first reported decision on the ipso facto stay provided for in section 451E of the *Corporations Act 2001* (Cth) (Act), the Federal Court has clarified that the provisions operates as expected, leaving more contentious questions for another day. In his Honour's judgment, Justice O'Bryan confirmed that the ipso facto stay:

- **is available to companies in administration that transition into liquidation but is not available to companies that enter into liquidation without having been in administration immediately prior to the commencement of liquidation;**
- **only applies to contractual rights triggered or pertaining to administration and does not apply to a contracting party's rights to terminate that arise due to a company entering into liquidation;**
- **does not apply to any other rights in the contract or restrain any other rights of termination such as the right to terminate for non-performance; and**
- **is a relevant consideration in applications to extend the convening period because the Court will consider the impact of an extension on contracting parties.**

Background

On 29 December 2022, Mr Gideon Rathner (**Administrator**) was appointed as administrator to Citius Property Pty Ltd (**Citius**).

Citius' principal asset was an agreement (**Dexus Agreement**) with Dexus Wholesale Management Limited (**Dexus**). The Dexus Agreement contained an "ipso facto" clause, giving Dexus the contractual right to terminate the agreement upon Citius entering administration. This clause was the subject of the ipso facto stay under s 451E of the Act, meaning that the clause was unable to be enforced during the period of administration.

Noting that s 451E had not previously been the subject of judicial consideration, the Administrator sought orders to the effect that "if the administration of Citius ends because of a resolution or order for Citius to be wound up, the stay on the enforcement of certain contractual rights described in s 451E(1) of the Act continues to operate until the winding up of Citius is complete, and that the Administrator is justified and is acting reasonably in proceeding on that basis".

The Administrator also sought a 12-month extension of the convening period for the second meeting of creditors to allow Citius to continue to perform its obligations under the Dexus Agreement. It was submitted that this was in the best interests of creditors, as it would result in additional funds being available for distribution to creditors.

Issues

The key issues before the Court were:

1. the scope of the ipso facto stay under s 451E of the Act; and
2. whether to make orders extending the convening period for the second meeting of creditors for a period of 12 months to allow Citius to perform its obligations under the Dexus Agreement.

Findings

The Court confirmed that the ipso facto stay in s 451E(1) is available to companies in administration that transition into liquidation, but was not available to companies that enter into liquidation without having been in administration immediately prior to liquidation. Further, the Court confirmed that the stay operates for the length of the administration and if the administration ends by resolution or a winding up order, for the duration of the winding up. Justice O'Bryan considered that the language and purpose of s 451E(1) was "clear on its terms" in this respect.

Justice O'Bryan also took the effect of the stay into account when considering whether to grant the 12-month extension of the convening period, for the second meeting of creditors, which was sought to allow Citius to continue trading and obtain the maximum revenue possible from the Dexus Agreement. His Honour was cognisant of the fact that by granting an extension of the convening period he would be also extending the operation of the stay in s 451E.

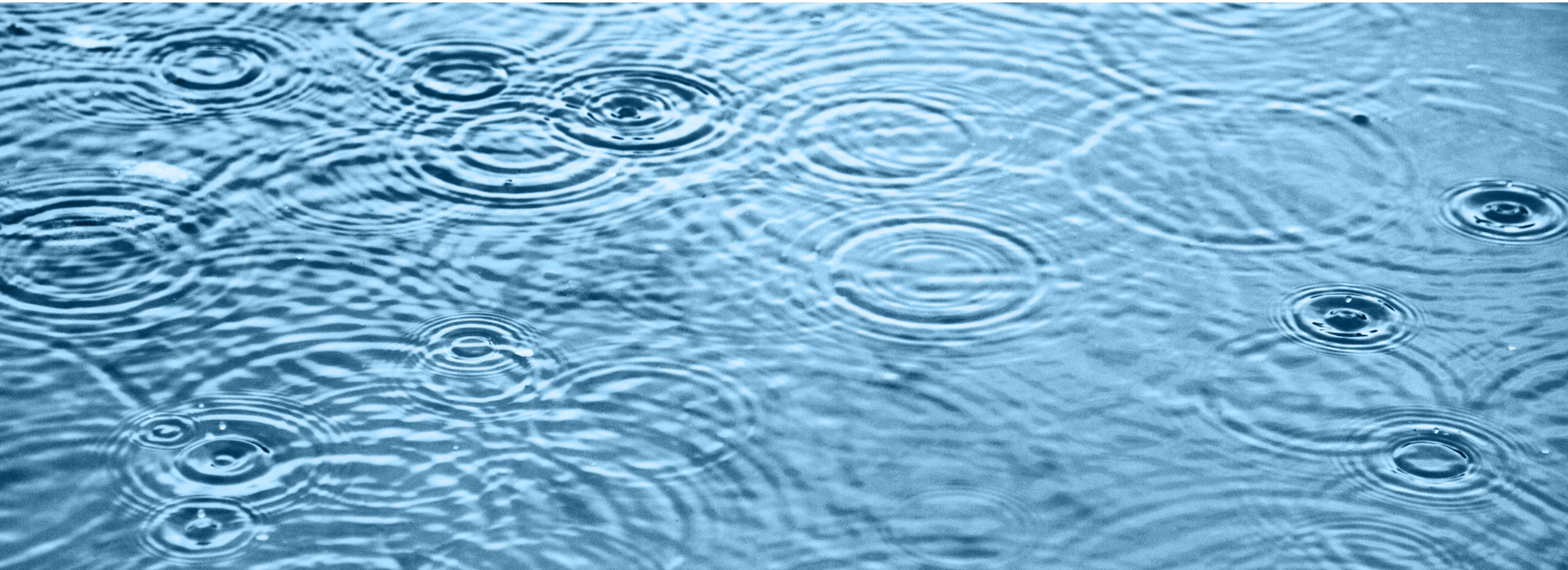
While his Honour regarded the extension application as "unusual" due to the length of the extension sought, ultimately his Honour considered that it was consistent with the objects of Part 5.3A of the Act to make the order sought. His Honour emphasised that the regime was intended to be flexible and, where a restructure was not possible, its purpose was to enable the affairs of the company to be administered in a way that would result in a better return for creditors than in the case of an immediate winding up.

Justice O'Bryan concluded that it was in the best interests of creditors to extend the convening period with the effect that the ipso facto stay would remain in place and Citius could perform its obligations under, and obtain the benefit of, the Dexus Agreement.

Importantly, his Honour noted that as the scope of the statutory stay was limited to the ipso facto provision in the Dexus Agreement, any prejudice suffered by Dexus was also limited, as they could still rely on their other contractual rights such as termination for non-performancee

This decision confirms that the ipso facto stay provisions only apply to contractual rights triggered or pertaining to administration and will not restrain contracting counterparties from exercising rights triggered by a winding up. In contracts with counterparties, "insolvency events" are ordinarily drafted to capture both administration and liquidation, which means that in practice the stay will lose much of its force once a company directly enters liquidation. Further, while confirming that the ipso facto stay provisions in the Act operate as expected, the decision does not shed any light on issues in relation to which judicial guidance would be most welcome, such as the requirements for a Court to order that the stay be lifted under s 451F and clarification as to the types of contracts specified in the legislative instrument which are not subject to the stay provisions pursuant to s 451E(6).

2. Deeds of company arrangement



Preservation of pre-appointment claims via a "holding DOCA" not grounds for termination under section 445(1)(g)

AUTHORS

Sam Johnson, Partner

Caitlin McTaggart, Senior Associate

Amelia Leuchars, Seasonal Law Clerk

CASE & NAME CITATION

Kennedy Civil Contracting Pty Ltd (Administrators Appointed) v Richard Crookes Construction Pty Ltd; In the matter of Kennedy Civil Contracting Pty Ltd [2023] NSWSC 99

HYPERLINK

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DATE OF JUDGMENT

17 February 2023

ISSUES

Holding DOCAs, *Building and Construction Industry Security of Payment Act 1999* (NSW) termination of DOCA, s 445D *Corporations Act*

In his Honour's judgment, Justice Ball confirmed:

- **deeds of company arrangements (DOCAs) approved by creditors for the purpose of avoiding liquidation will not have an "improper purpose" where the ultimate intention behind this purpose is to maximise returns to creditors;**
- **this includes situations where the DOCA enables the company to take advantage of rights conferred by security of payments legislation which are unavailable to companies in liquidation; and**
- **limitations on the rights of insolvent companies to serve payment claims under security of payments legislation only apply to companies in liquidation.**

Background

Kennedy Civil Contracting Pty Ltd (Administrators Appointed) (**Kennedy**) sought to recover amounts owed to it from Richard Crookes Constructions Pty Ltd (**Richard Crookes**) pursuant to sections 16(2)(a)(i) and 15(2)(a)(i) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**). On around November 2021, Richard Crookes engaged Kennedy as a subcontractor to carry out certain works on a project at Bankstown Airport for which Richard Crookes was the head contractor. Over the course of December 2021 to June 2022, Kennedy served six (6) payment claims on Richard Crookes in accordance with s 13 of the SOP Act (**Payment Claims**). Richard Crookes responded to some of the Payment Claims by serving payment schedules but failed to respond to others in accordance with s 14 of the SOP Act.

Kennedy became insolvent, and joint and several administrators were appointed on 1 August 2022, pursuant to s 436A of the *Corporations Act 2001* (Cth) (the **Act**). The Administrators recommended that Kennedy execute a DOCA described by the Administrators as a "holding DOCA", instead of liquidation to enable Kennedy to continue pursuing collection of debts as set out in the SOP Act.

The purpose of the DOCA was to preserve Kennedy's rights under ss 15(2)(a)(i) and 16(2)(a)(i) of the SOP Act despite the company being "hopelessly insolvent". The terms of the DOCA, required any funds collected pursuant to the SOP Act to be held in trust by the Deed Administrators pending determination of the SOP Act claims. Richard Crookes argued that because the DOCA was entered into to defeat the operation of s 32B of the SOP Act, it was improper and should be terminated in accordance with s 445D(1) of the Act.

Issues

The key issues before the Court were whether:

1. a DOCA could be used for the purpose of defeating or avoiding legislation which specifically restricts actions available to companies in liquidation;
2. s 32B of the SOP Act operates in all cases where the company in question is insolvent (rather than just being in liquidation); and
3. in circumstances where Kennedy was "hopelessly insolvent" and could only take advantage of the provisions in the SOP Act by executing a DOCA to avoid the operation of s 32B, its claims under the SOP Act were an abuse of process;

Findings

The creditors' choice of executing the DOCA instead of immediate liquidation would have the effect of maximising the amount that would be available to the general creditor pool for distribution. Maximisation of creditor returns is not an improper use of the DOCA process and is consistent with the overarching purpose of Part 5.3A of the Act. This finding was made with application of the High Court decision in *Mighty River International Ltd v Hughes & Anors* (2018) 265 CLR 480.

Based on the explanatory memorandum, s 32B of the SOP Act does not apply where a company is insolvent per se. The explicit reference to liquidation indicates that this restriction only applies to a company in liquidation, as the trigger for liquidation is clearly identifiable. The fact that operation of s 32B may be limited is not a reason for giving s 445D(1)(g) of the Act a broader operation than warranted.

The question of whether the DOCA was being used for an improper purpose was not determined by analysing whether the creditors and the company would be in a better position if the DOCA remained on foot. Instead, it was sufficient that creditors reached a reasonable conclusion following the advice of the Administrators that the DOCA "gave them the best chance of maximising the return to them".

Use of a DOCA for a proper purpose and to avoid operation of s 32B is not an abuse of process.

The rights preserved by the DOCA are not substantially different from pursuing a claim through normal Court processes. Even if the DOCA had not preserved Richard Crookes' rights to recover amounts paid under the SOP Act through a trust, designing the DOCA such that it took advantage of payment collection provisions and avoided the liquidation restriction in the SOP Act was not an abuse of process.

Any question of abuse of process could be dealt with at the stage of enforcement or judgment rather than by terminating the DOCA.

This decision emphasises the importance of ensuring that any DOCA that is subject to outstanding payment claims under the SOP Act is drafted with precision so as to preserve the rights of the respondent under the SOP Act to make any final payment claim and so as to avoid the risk of subverting the SOP Act. Further, a DOCA which has the effect of maximising returns to creditors will be considered to have been entered into for a proper purpose and, in those circumstances, drafting the DOCA so as to avoid the operation of the SOP Act will not be an abuse of process.

Interests of property owners must be adequately protected before preventing possession

AUTHORS

Ben Renfrey, Partner
Stephanie Ritchie, Associate

CASE & NAME CITATION

Vincent Cold Storage Pty Ltd v Centuria Property Funds No 2 Limited (No 2) [2023] VSC 314

HYPERLINK

Read more

DATE OF JUDGMENT

8 June 2023

ISSUES

Deed of Company Arrangement, s 444F of the *Corporations Act*

The Supreme Court of Victoria dismissed an application by the deed administrators for orders under section 444F of the *Corporations Act 2001* (Cth) (Act) to restrain the owner of premises from taking possession of the property.

The Court held that:

- **granting orders for possession by the owner would have a material adverse effect on achieving the purpose of the deed of company arrangement (DOCA), having regard to the lack of available warehousing facilities in Victoria;**
- **however, the interests of the owner must also be adequately protected, with the onus on the deed administrators to establish that the owner is adequately protected; and**
- **in the circumstances of this matter, the interests of the owner were not adequately protected.**

Background

The defendant, Centuria Property Funds No 2 Limited (**Centuria**) owned a warehouse and storage facility in Keysborough, Victoria (**Premises**). The Premises were leased to the plaintiffs, Vincent Cold Storage Pty Ltd (subject to a DOCA) (**VCS**) and Vincent Transport Services Pty Ltd (in liq) (**VTS**) (**Lessees**). The lease commenced on 1 December 2019, for a term of five years.

On 27 October 2022, Centuria terminated the lease and effected re-entry of the Premises by notice due to the Lessees' failure to pay the rent and outgoings for a six-month period. In response to the termination, the Lessees sought injunctive relief restraining the retaking of possession or, alternatively, relief against forfeiture.

Centuria offered an undertaking that it would not seek to physically retake possession of the Premises until 31 January 2023. The Lessees failed to comply with the conditions associated with the undertaking.

On 31 January 2023, VCS appointed Stephen Robert Dixon as voluntary administrator. On or around 2 March 2023, Centuria entered into a written licence agreement with VCS and Mr Dixon in respect of the Premises (**Licence Agreement**).

On 1 May 2023, the DOCA was executed. The DOCA contemplated that VCS would vacate the Premises as soon as it was able to secure new premises. After the DOCA was executed and the administration ended, Centuria sought to retake possession, however this was unsuccessful.

On 5 May 2023, Centuria filed a summons seeking orders for possession of the Premises. At this time, VCS had failed to comply with its obligations under the Licence Agreement.

The deed administrator sought orders pursuant to s 444F of the Act to prevent Centuria from re-taking possession of the Premises during the DOCA period.

Issues

The key issues before the Court were whether:

1. the Court should exercise its discretion under s 444F of the Act to prevent Centuria taking possession of the Premises;
2. whether Centuria's interests were adequately protected; and
3. whether possession by Centuria would have a material adverse effect on the DOCA.

Findings

Section 444F of the Act allows the Court to exercise its discretion to limit the rights of a property owner or lessor, where a company subject to a DOCA, occupies the property.

The Court may only make an order if it is satisfied that:

- if the owner or lessor took possession of the property, or otherwise recovered it, it would have a material adverse effect on achieving the purpose of the DOCA; and
- having regard to the terms of the deed, the terms of the order and any other relevant matter, the interests of the owner or lessor would be adequately protected.

The onus is on the deed administrator to establish that the interests of the owner/lessor are adequately protected. The key features to assess the protection of the owner/lessor were considered in *Strazdins v Birch Carroll & Coyle Ltd* (2009) 72 ACSR 563 (**Strazdins**).

The Court held that granting the orders would have a material adverse effect on achieving the purpose of the DOCA due to the lack of available warehousing facilities for VCS to relocate to.

However, the Court ultimately decided not to restrict Centuria's right to take possession of the Premises, applying the reasoning in *Strazdins*. The Court held that Centuria's interests as the owner of the Premises were not adequately protected.

In particular, the proposed orders did not adequately protect Centuria for the following reasons:

- the proposed payment schedule and VCS' history of non-payment meant it was likely Centuria would not be paid;
- Centuria was already an unsecured creditor, with limited prospects of a return through the DOCA;
- no evidence of VCS' financial position was put before the Court to satisfy the Court that the payments could be made;
- there was a lack of appropriate properties for VCS to relocate its business to;
- there was a persistent and significant default by VCS under the original lease; and
- the lease was terminated before the deed administrator was appointed, and before any events occurred in which Part 5.3A of the Act provides protection.

As a result, the Court dismissed the deed administrators' application for orders under s 444F(4) of the Act and made orders for possession of the Premises by Centuria.

This case highlights the Court's considerations when determining an application for orders pursuant to s 444F of the Act. The decision confirms that the Court will ensure the interests of an owner are adequately protected, even if granting orders for possession will have a material adverse effect on achieving the purpose of a DOCA.

Court terminates a deed of company arrangement for improper purpose and effect

AUTHORS

Sam Johnson, Partner
Niki Powell, Associate

CASE & NAME CITATION

RW Pascoe Pty Ltd v Crimson Fresh Produce Pty Ltd (subject to deed of company arrangement) [2023] FCA 705, per Derrington J

HYPERLINK

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DATE OF JUDGMENT

22 May 2023

ISSUES

Termination of a deed of company arrangement, ss 445D and 447A of the *Corporations Act*

On application by a plaintiff creditor of the defendant company, Crimson Fresh Produce Pty Ltd (Company) the Federal Court was asked to consider whether to terminate a deed of company arrangement (DOCA) entered into by the Company and to place the Company into liquidation on the basis that, among other things, the DOCA had been entered into for an improper purpose contrary to the objectives of Part 5.3A of the *Corporations Act 2001* (Cth) (Act). In ordering that the DOCA be terminated, Justice Derrington found that:

- **there were sufficient grounds to conclude that giving effect to the DOCA would involve injustice to the plaintiff, RW Pascoe Pty Ltd (Plaintiff), because it would avoid proper investigation of potential director-related transactions and insolvent trading claims;**
- **the DOCA was unfairly prejudicial to the Plaintiff, or was contrary to the interests of creditors as a whole, because the Plaintiff and creditors were denied the opportunity to pursue the processes available in liquidation; and**
- **the DOCA was entered into for an improper purpose, as it was being used as a de facto winding up for the purpose of avoiding the consequences of a properly conducted liquidation.**

Background

In November 2022, administrators were appointed to the Company by the Company's sole director.

On 2 December 2022, the administrators delivered their report to creditors, which indicated that the Company had been trading at a loss since July 2018 and there were 21 creditors identified as having received possible preferential payments. In addition, the report indicated that a number of unreasonable director-related transactions may have been entered into and there was a potential claim against the director for insolvent trading.

In December 2022, shortly before the second meeting of creditors, the director proposed a DOCA. Under the proposed DOCA, the director would make a contribution of $200,000 to constitute a "Deed Fund". The $200,000 was to be sourced from the Company's own assets, being the net proceeds received from the sale of certain crops that were under cultivation. Any recovery under the DOCA was therefore contingent upon the outcome of the farming venture, and it was far from certain that the Company would recover $200,000 (or any amount) from those crops.

At the second with "creditors'", meeting on 10 February 2023, a resolution to wind up the Company was taken to have failed on the voices. When the resolution to accept the DOCA was put to a vote, six creditors with debts totalling $290,000 voted in favour, with five creditors with debts totalling $690,000 voting against.

The resolution was nevertheless taken to have been carried on the voices and no poll was called for by any party.

The DOCA was entered into on 3 March 2023. The Plaintiff, a creditor of the Company, subsequently sought termination of the DOCA on the following grounds:

1. the DOCA offered the creditors no benefit, as the Deed Fund was to be sourced from the Company's own assets;
2. the maximum return for unsecured creditors was around 2.35 cents in the dollar, but it was likely that there would be no return at all;
3. there were significant potential insolvent trading claims against the director and other voidable transactions that could be investigated and pursued if the Company were placed into liquidation; and
4. the return to creditors in liquidation was likely to be higher than the return predicted under the DOCA.

Issues

The key issue before the Court was whether to terminate the DOCA pursuant to ss 445D or 447A of the Act and order that the Company be wound up in insolvency.

Findings

The Court held that there were sufficient grounds to conclude that giving effect to the DOCA would involve injustice to the Plaintiff, and therefore an order for termination of the DOCA was available under s 445D(1)(e). The injustice consisted of the loss of the opportunity of a proper investigation of the transactions identified in the report to creditors. The Court noted that an important consequence of the DOCA being entered into was that the director would be shielded from the processes of liquidation, including a potential public examination and any subsequent recovery proceedings in respect of director-related transactions or insolvent trading. The Court also considered that it was relevant that no other creditor of the Company sought to oppose the orders sought by the Plaintiff, and one other creditor supported the application.

In relation to s 445D(1)(f), the Court held that the DOCA was unfairly prejudicial to the Plaintiff, or contrary to the interests of creditors as a whole, because the Plaintiff and creditors were denied the opportunity to pursue the processes available in liquidation.

The Court also found that relief could be granted under s 447A of the Act because the DOCA was entered into for an improper purpose. Significantly, no part of the DOCA was directed towards the continuation of the Company, and there was no suggestion that it was intended to ever trade again. The Court found that the execution of a DOCA should not be used as a de facto winding up for the purpose of avoiding the important consequences of a properly conducted liquidation.

The Court ordered that the DOCA be terminated and, consequently, the Company should be wound up in insolvency.

The case demonstrates that the Court will terminate a DOCA that results in a de facto winding up and circumvents the investigations that flow from a properly conducted liquidation. The Court may use its powers under ss 447A and 445D to terminate a DOCA that it considers to be unjust to creditors, unfairly prejudicial or entered into for an improper purpose.

Practitioners should bear in mind that the objectives of Part 5.3A of the Act will be paramount to the independent commercial objectives of a DOCA.

Interlocutory relief granted to majority creditors where administrators provided misleading information

AUTHORS

Pravin Aathreya, Partner
Karen Zhu, Law Graduate

CASE & NAME CITATION

Paddington Gold Pty Ltd v Wave Pty Ltd (Subject to a Deed of Company Arrangement) [2023] WASC 263

HYPERLINK

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DATE OF JUDGMENT

17 July 2023

ISSUES

Interlocutory injunction, termination of DOCA s 445D(1) *Corporations Act*, misleading information by administrators, unfair or prejudicial treatment of creditors

The Supreme Court of Western Australia granted an interlocutory injunction to a major creditor to prevent the effectuation of a deed of company arrangement (DOCA), in circumstances where the administrators provided creditors with misleading information and could not explain the rationale for treating the major creditor differently to other creditors.

Background

The defendants (Wave Pty Ltd (**Wave**) and Wave Projects Pty Ltd (**Wave Projects**)) were subject to DOCA. At the second meeting of creditors for both defendants, a majority of creditors by value voted against the resolutions, but the majority of creditors by number voted in favour of the resolutions. The resolutions were passed on the casting vote of the administrator.

Paddington Gold Pty Ltd (**Paddington**) was a substantial creditor of each of the defendants, its claim being for $16,699,741. Paddington voted against the resolutions.

The DOCAs were proposed by Karli Holdings Pty Ltd (**Karli**), an entity which was not a creditor of Wave or Wave Projects but had the same directors as Wave. The DOCAs gave effect (via a share and asset purchase agreement) to a management buy-out of all of Wave's operations, so that both defendants would no longer have any operational businesses or employees (**Sale Agreement**).

Issues

Justice Lemonis considered whether to grant interlocutory relief to prevent the effectuation of the DOCAs, which included considering:

- whether there was a serious question regarding the existence of matters enlivening the Court's jurisdiction to set aside the DOCAs or set aside the resolutions under section 445D(1) of the *Corporations Act 2001* (Cth) (**Act**); and
- whether the balance of convenience favoured granting the injunction.

Findings

Serious question to be tried

In relation to Wave Projects, Justice Lemonis held there was a serious question as to whether:

- Wave Projects' DOCA was unfairly prejudicial to or unfairly discriminatory against Paddington under s 445D(1)(f). Paddington was the only creditor who would receive a fixed return of $50,000, equating to 0.3 cents in the dollar, when all other creditors with claims above $30,000 would receive a dividend of between 5.6 and 5.9 cents in the dollar. The administrators were unable to explain the rationale for Paddington to receive a such a paltry fixed return. Paddington's return under the DOCA was only marginally better than the return Paddington would receive on liquidation;

- the creditors were given misleading information about the potential returns from liquidation. The administrators projected a return from liquidation between a low of nil and a high of 0.2 by ascribing nil value to insolvent trading claims. However, the quantum of insolvent trading claims was substantial, and the administrators' report did not suggest that the directors lacked assets available to allow material recovery on a successful claim. This misleading information could reasonably be expected to be material to deciding whether to vote in favour of the DOCA (see s 445D(1)(a)); and
- there are other reasons to terminate a DOCA (s 445(1)(g)), including prospects of a greater recovery in a liquidation, and public interest in investigating significant insolvent trading.

In relation to Wave, Justice Lemonis held there was a serious question that the creditors were given misleading information, which can reasonably be expected to have been material to voting in favour of executing the DOCA (see s 445D(1)(a)). Relevantly, the Court found:

- there was a serious question that the administrators did not have a proper basis to conclude that Wave was not insolvent at any relevant time, including because the administrators' opinion was based on the existence of a payment plan with the Commissioner of Taxation, a plan which did not alter the date on which the underlying debt was due and whose existence was evidence of Wave being insolvent;
- the administrators' potentially incorrect conclusions about Wave's insolvency may have infected the administrators' assessment of the existence of insolvent transactions.

Balance of convenience

Justice Lemonis concluded that the balance of convenience favoured granting injunctions in relation to both defendants for reasons that included:

- without the injunction, the claims of creditors would be released and fall into a creditor's trust if the DOCAs were effectuated;
- the creditors would not be significantly prejudiced by the injunction if the matter could be listed in a few months' time;
- the defendants were effectively empty shells without operations or staff, so the costs of keeping the companies under deed administration would not be excessive;
- there was no evidence of a pressing commercial imperative for Karli that was contingent upon effectuation of the DOCAs.

This case is relevant to administrators and majority creditors of companies in voluntary administration. It highlights some factors that a Court will consider when determining whether to award interlocutory relief to prevent the effectuation of a DOCA. The decision is also an important reminder to administrators of their duty to fulsomely and accurately report to creditors all matters that could be material to creditors' voting decisions.

Court terminates misleading deed of company arrangement

AUTHORS

Pravin Aathreya, Partner
Karen Zhu, Associate
Thomas Jenkins, Law Clerk

CASE & NAME CITATION

Sino Group International Limited v Toddler Kindy Gymbaroo Pty Ltd [2023] FCAFC 110; [2023] FCAFC 119 per Farrell, Cheeseman and Feutrill JJ

HYPERLINK

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DATE OF JUDGMENT

14 & 28 July 2023

ISSUES

Termination of DOCA, unfair or prejudicial treatment of creditors, administrator's right of indemnity

The Full Court of the Federal Court ordered the termination of a misleading deed of company arrangement (DOCA). Administrators should consider how they present competing information between a liquidation and a DOCA proposal, and consider which scenario is in creditors' best interests where circumstances change. Administrators who fail to act independently and impartially risk personal liability for costs.

Background

Sino Group International Limited and another company (together, **Sino**), and Toddler Kindy Gymbaroo Pty Ltd (**Gymbaroo**) were parties to an arbitration over a licencing agreement dispute. However, Gymbaroo appointed administrators before the amount of damages owed by Gymbaroo to Sino were determined.

Sino lodged a proof of debt with the Administrators for approximately $5.97 million. Gymbaroo's other creditors included its shareholders and directors (**Related Party Creditors**).

The Administrators' report (**Report**) recommended a DOCA proposal where unrelated party creditors would receive a dividend of 100 cents in the dollar, in contrast to 33-42 cents in the dollar in a winding up. At the second creditors' meeting, a majority of creditors (including the Related Party Creditors) voted in favour of the DOCA. However, Sino voted against it.

After the DOCA resolutions passed (and on the first hearing day of Sino's application to terminate the DOCA), the Related Party Creditors executed subordination deeds delaying Gymbaroo's obligation to repay debts to them by three years (**Subordination Deeds**).

Issues

The primary judge dismissed Sino's application to terminate the DOCA and set aside resolutions executing the DOCA.

On appeal, when determining whether to terminate the DOCA under section 445D(1) of the *Corporations Act 2001* (Cth) (**Act**), the Full Court considered:

(a) whether creditors relied on materially misleading information (provided or omitted) when voting on the DOCA; and

(b) whether the DOCA was oppressive or unfairly prejudicial to creditors.

Misleading report

The Court held that the Report was materially misleading, due to differences between how it presented the DOCA scenario and winding up scenario, including:

- the estimated return to creditors for winding up was a range at 33-42 cents in the dollar. However, the estimated return for a DOCA was 100 cents in the dollar, without reference to a range or worst-case scenario.
- the probability of the winding up return was qualified by stating, "It is likely that … ", whereas the estimated DOCA-scenario return was not similarly qualified.

Under the Full Court's own analysis, if the Report had included a worst-case DOCA scenario, the estimated return would have been between 38 and 100 cents in the dollar.

The Report also:

- made misleading assumptions and omitted material information, including inaccurate and outdated remuneration figures;
- failed to direct readers to the Remuneration report, which disclosed these problems; and
- failed to disclose costs which would reduce the 100 cents in the dollar return under a DOCA (including inaccurate litigation costs, and $40,000 worth of likely administration costs regardless of litigation).

These omissions worsened the misleading impression conveyed by the headline comparison of 100 cents from a DOCA versus 33-42 cents under a winding up.

The Court also held that a DOCA was no longer in the best interests of creditors compared to winding up, because:

- executing the Subordination Deeds meant the Related Party Creditors' debts were no longer presently due and payable; and
- an aide memoire submitted to the primary judge by the Administrators relied on inconsistent assumptions. The DOCA scenario assumed no ongoing litigation, whereas the liquidation scenario assumed further litigation. After factoring in litigation costs, the estimated "worst-case" return of 38 cents under a DOCA calculated by the Full Court fell further to 24 cents.

Oppression to creditors

The Court held that the DOCA was oppressive and unfairly prejudicial against unrelated creditors as a class of creditor. The DOCA would extinguish unrelated creditors' claims against Gymbaroo despite there being a reasonable prospect that they would receive a better return in a winding up.

Terminating the DOCA

The Court ultimately ordered the DOCA's termination under s 445D of the Act.

In addition finding that the DOCA was misleading and oppressive to creditors, the Full Court also considered:

- public interest: terminating the DOCA would allow Gymbaroo's affairs to be investigated by a liquidator (including Gymbaroo's likely insolvency, and the DOCA's execution where arbitration was ongoing); and
- majority creditor vote in favour of DOCA: the flawed and omitted information in the Report meant the Court gave little weight to the majority creditor vote when deciding whether to terminate the DOCA.

Administrators' conduct and costs consequences

The Court held that the Administrators breached their duties of independence and impartiality as they had failed to:

- promptly inform the Court of relevant information within their knowledge; and
- otherwise, make submissions that were balanced and accurate.

Based on these findings, the Full Court ordered that the Administrators:

- pay Sino's costs; and
- be deprived of their right of indemnity for both the adverse costs order made against them, and their own costs for the primary proceeding and the appeal.

Any information (included or omitted) in a creditors' report that could affect how creditors vote may be enough for a Court to terminate a DOCA.

An administrator's report should present both low and high estimated returns when comparing a DOCA against liquidation, and present all assumptions of any estimates and analysis. Where assumptions change, administrators should promptly inform creditors of those changes and consider whether completing a DOCA remains in creditors' best interests.

Administrators who fail to act independently and impartially risk significant personal liability for costs and losing the right of indemnity.

Recovery of arbitration costs against a company under a deed of company arrangement

AUTHORS

Sam Johnson, Partner
Olivia Gerhardy, Associate

CASE & NAME CITATION

Bumbak v Dalian Huarui Heavy Industry Group International Co Ltd, in the matter of Duro Felguera Australia Pty Limited (Subject to a Deed of Company Arrangement) [2023] FCA 765 per Farrell J

HYPERLINK

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DATE OF JUDGMENT

7 July 2023

ISSUES

Arbitrations, Proofs of Debt, Deeds of Company Arrangement, s 90-15 IPS

The Federal Court of Australia considered an application brought by deed administrators seeking judicial guidance on whether claims for costs and interest awarded in two separate arbitrations after the appointment of the administrators were admissible to proof under a deed of company arrangement (DOCA). Justice Farrell confirmed:

- **costs awarded after deed administrators are appointed will only be admissible to proof if there is certainty at the date of the administrators' appointment that an order for costs would be made; and**
- **whether there is certainty a cost order will be made depends on the contract between the parties and the legislation governing the arbitration.**

Background

On 28 February 2020, joint and several administrators were appointed to Duro Felguera Australia Pty Limited (**Company**) and on 26 October 2020, the Company executed a DOCA. The deed administrators sought directions from the Court as to the admissibility of two claims forming part of proof of debt lodged under the terms of the DOCA.

The Company was established in 2013 for the purpose of providing engineering and construction services in relation to the Roy Hill Mine project in the Pilbara region of Western Australia (**Project**). The Company engaged various subcontractors to provide services and equipment for the Project.

Two of the subcontractors, Dalian Huarui Heavy Industry Group International Co Ltd (**DHHI**) and Trans Global Projects Pty Ltd (in liquidation) (**TPG**) commenced arbitration proceedings against the Company in relation to the Project in 2016 and 2018, respectively.

The supply contract between the Company and DHHI required that any dispute was to be governed by the *International Arbitration Act 1994* (Singapore) (**International Arbitration Act**) and the *United Nations Commission on International Trade Law Arbitration Rules 2010* (**UNCITRAL Rules**). The contract between the Company and TPG required any arbitration to be conducted in accordance with the *Commercial Arbitration Act 2012* (WA) (**Commercial Arbitration Act**).

The arbitral tribunals made awards in favour of DHHI and TPG before the Company was placed into external administration. However, costs orders were made against the Company after the deed administrators were appointed. The DOCA stated that debts or claims which arose on or before the appointment date of the administrators would be admissible to proof.

Issues

There was no dispute that the principal and interest amounts awarded in favour of DHHI and TPG were admissible to proof of debt under the terms of the DOCA. The key issue was whether the costs and interest on costs awarded by the arbitral tribunals after the appointment of the external administrators were admissible to proof.

Findings

The Court determined that it was appropriate to give directions to the deed administrators under section 90-15 of the Insolvency Practice Schedule. The Court held that whether a claim for arbitral costs and interest is considered a claim that arose before the appointment of external administrators will depend on whether there is "certainty" that an award for costs and interest would be made.

DHHI Arbitration

In relation to DHHI's proof of debt claim, the Court found that there was certainty an order for costs would be made by the arbitral tribunal. Article 40(1) of the UNCITRAL Rules requires a tribunal to fix costs and article 42(1) provides that the costs of the arbitration are borne by the unsuccessful party, but the tribunal may apportion the costs if reasonable. Therefore, the decision to award costs was not at the tribunal's discretion. The Court held that DHHI's claim for the arbitration costs was a contingent claim at the date of the appointment of the administrators and therefore was admissible to proof.

TPG Arbitration

The costs of TPG's arbitration were governed by s 33B(1) of the *Commercial Arbitration Act*. Section 33B(1) provides that unless otherwise agreed between the parties, the costs of an arbitration may be awarded at the discretion of the arbitral tribunal. The contract between the Company and TPG did not contemplate arbitration costs. This meant that TPG only had a claim for costs upon the making of a cost order, which occurred after the deed administrators were appointed. The Court held that because there was no certainty the tribunal would make an award for costs, TPG's claim for costs was not admissible to proof under the DOCA.

Interest

The Court found that both DHHI's and TPG's claims for interest on costs were not admissible to proof under the DOCA because there was no certainty that an order for interest would be made. The legislation governing each arbitration made it clear that an entitlement to interest on costs is at the arbitral tribunal's discretion and the Court noted that the parties did not have any agreement to the contrary.

This case highlights the importance of careful drafting of arbitration clauses within contracts for the supply of goods or services. To ensure that awards for costs and interest are admissible to proof, contracts should be drafted with an express requirement that an arbitral tribunal makes orders for costs and interest in accordance with the outcome of an arbitration.

Termination of deed of company arrangement

AUTHORS

Ben Renfrey, Partner
Charlotte Selley, Law Clerk

CASE & NAME CITATION

In the matter of ACN 613 909 596 Pty Ltd (formerly Minle Wine Negocients of Australia Pty Ltd) (subject to Deed of Company Arrangement) [2023] NSWSC 753

HYPERLINK

Read more

DATE OF JUDGMENT

3 July 2023

ISSUES

Termination of DOCA, ss 445D and 447A *Corporations Act*

On application by a substantial unrelated creditor, the NSW Supreme Court was satisfied that a deed of company arrangement (DOCA) should be terminated under section 447A of the *Corporations Act* (Cth) (Act) and the Company be wound up.

Justice Black confirmed that the Court has the power to make an order terminating a DOCA where:

- **the entry into the DOCA was an abuse of process of Pt. 5.3A of the Act;**
- **where unrelated creditors of the Company do not benefit from the DOCA;**
- **the DOCA is oppressive and unfairly prejudicial to one or more of the Company's creditors or contrary to the interests of creditors as a whole;**
- **an effective investigation by a liquidator into relevant transactions was precluded; and**
- **it is in the public interest that the company's administration come to an end and that it be wound up.**

Background

The Plaintiff, Monoova Global Payments Pty Ltd (**MGP**), applied for an order under ss 447A, 445D(1)(e), 445D(1)(f) and 445D(1)(g) of the Act that a DOCA relating to ACN 613 909 596 Pty Ltd (formerly Minle Wine Negocients Australia Pty Ltd) (subject to a DOCA) (**Company**) be terminated.

The Company conducted a wholesale and export liquor business. From March 2019, the Company undertook foreign exchange (**FX**) trades with MGP. In February to March 2020, the FX products held by the Company with MGP substantially decreased in value due to movements in AUD/USD exchange rate.

On 16 March 2020, MGP closed out of the FX products, crystallising a loss of approximately $1.6 million for the Company. MGP applied collateral deposited by the Company of $334,944.30 against the loss, and then commenced proceedings against the Company claiming approximately $1.3 million from the Company in December 2020.

During the 2021 financial year, the Company ceased trading. In the same period, another substantial export company (**Wine Vendor**) was developed and controlled by a director of the Company, Mr Le. In December 2022, Mr Le resolved to place the Company into voluntary administration and appointed the Administrators as voluntary administrators to the Company.

MGP's proof of debt was rejected at the first meeting of creditors. Later that month, MGP submitted an amended proof of debt and substantial supporting documentation to the Administrators.

MGP placed the Administrators on notice that in the event a DOCA was proposed and did not substantially benefit MGP, MGP would oppose the DOCA and apply to have it terminated if entered into.

On 1 February 2023, Mr Le proposed a DOCA and this was recommended to creditors by the Administrators.

At the second meeting of creditors, the Company voted in favour of the DOCA and MGP's amended proof of debt was rejected. On 13 February 2012, the DOCA was executed on the terms outlined in Mr Le's DOCA proposal.

MGP criticised the Administrators' report to stating – inter alia – that aspects of the report were implausible. MGP further identified several transactions which it contended warranted further investigation by a liquidator of a Company, namely a purported loan by the Wine Vendor to the Company, the transfer of stock by the Company to the Wine Vendor, and the transfer of motor vehicles from the Company to the Wine Vendor. MGP contended that the Company's affairs warranted further investigation.

Issues

The key issues before the Court were whether:

1. the DOCA should be set aside under s 447A of the Act; or alternatively
2. the DOCA should be set side under ss 445(1)(e) to (g) of the Act.

Findings

The Court held that the DOCA should be set aside under s 447A of the Act and the Company should be wound up. Justice Black found that the entry into the DOCA was an abuse of the process of Pt 5.3A of the Act for the following reasons:

- the DOCA process was being used by Mr Le to shield the Company, Wine Vendor and himself from investigation and scrutiny by a liquidator;
- the Company had ceased to trade and had no operations at the time of entry into the DOCA;
- the DOCA did not promote the continued operations of the Company's business;
- the Company's creditors would only benefit in a minimal way from the DOCA;
- the only creditors that voted in favour of the DOCA were closely related to the Company; and
- the only entities which would benefit with the DOCA are Mr Le and associated entities.

Justice Black was also satisfied to make an order terminating the DOCA under ss 445D(1)(e), 445D(1)(f) or 445D(1)(g), had he not found the DOCA should be terminated under s 447A of the Act, for the following reasons:

- effect cannot be given to the DOCA without injustice, because it will have the effect of preventing or avoiding a proper investigation of relevant transactions;
- the DOCA was oppressive and unfairly prejudicial to MGP and contrary to the interests of creditors as a whole;
- there was public interest in liquidators examining the affairs of the Company and the DOCA had the purpose, or at least the effect, of quarantining third parties [Mr Le and Wine Vendor] from investigation; and
- the DOCA provided no benefits to creditors.

The Court further found that the Administrators too readily accepted the information provided by Mr Le in the voluntary administration process.

The decision in Minle Wine demonstrates the Court's willingness to make an order terminating a DOCA using s 447A of the Act to protect the best interests of creditors not associated with the company and where it is an abuse of process of Pt 5.3A of the Act. The decision also serves as a reminder for administrators to conduct proper investigations into relevant transactions in the process of a voluntary administration and not merely accept information provided to them by directors and DOCA proponents.

3. Personal liability of external administrators

Incorrect understanding of ownership of contested property sees liquidator held personally liable

AUTHORS

Sam Johnson, Partner

Lucy Charleston, Law Clerk

CASE & NAME CITATION

Reel Action Sports Fishing Pty Ltd (ACN 092 732 888) v Marine Engineering Consultants Pty Ltd (liq) [2022] QSC 271 per Brown J

HYPERLINK

Read more

DATE OF JUDGMENT

13 December 2022

ISSUES

Liquidator duties, tort of conversion, negligence of liquidator

In a dispute over the ownership of a catamaran, the Queensland Supreme Court found a liquidator personally liable as a result of decisions he made based on an incorrect understanding of the ownership rights arising pursuant to agreements between the parties. In her Honour's judgment, Justice Brown confirmed:

- **liquidators need to be careful when weighing up competing ownership claims and to ensure that any goods which are the subject of such claims are not damaged during the liquidation; and**
- **that despite being an agent of the Company, liquidators may be found personally liable for the decisions they make on behalf of the Company to which they are appointed.**

Background

In September 2017, Reel Action Sports Fishing Pty Ltd (**Reel**) entered into a Vessel Construction Agreement (**VCA**) with Marine Engineering Consultants Pty Ltd (**Marine**) whereby Marine would construct a catamaran (the **Vessel**) for Reel.

In March 2019, Reel registered its security interest over the Vessel on the Personal Property Securities Register (**PPSR**).

In April 2019, a dispute arose between the parties regarding the construction timeframe of the Vessel. As a result of this dispute, the parties entered into a Deed of Undertaking, Warranty and Forbearance in August 2019, followed by a Deed of Settlement and Guarantee (the **Deed of Settlement**) in October 2019 which stipulated that the Vessel would be sold to a third party. Under the Deed of Settlement, Reel would provide releases of its PPSR registrations and transfer ownership of the Vessel to the third party upon receipt by Reel of payment from Marine.

In November 2020, before the Vessel was completed, Marine went into liquidation. The second defendant, Mr Baskerville, was appointed as liquidator.

Reel requested possession of the Vessel, but the liquidator asserted that Marine was the lawful owner and retained the right to possession. Reel claimed it owned the Vessel by virtue of a payment made in October 2017 by them to Marine under the VCA, which provided a transfer of title to Reel. The liquidator contended that any proprietary right of Reel in the Vessel was extinguished when the parties entered the Deed of Settlement in October 2019, that Reel's PPSR registrations were ineffective and had vested in Marine and that Marine therefore owned the Vessel at the time of liquidation.

In September 2021, the incomplete Vessel was sold to a third party.

The liquidator moved the Vessel from storage, a move which was opposed by Reel due to the risk of water damage to the Vessel from inclement weather. The Vessel subsequently sustained water damage just as Reel had predicted.

Reel initiated proceedings against Marine and the liquidator, claiming that the Deed of Settlement did not extinguish its ownership, and the decision to move the Vessel was an act of conversion and negligence by the liquidator.

Issues

The main issues before the Court were whether:

1. the terms of the Deed of Settlement superseded and replaced the terms initially agreed to under the VCA in relation to ownership; and
2. if not, whether the liquidator was liable for damages for conversion and the negligent handling of the Vessel.

Findings

On a proper construction, the rights under the Deed of Settlement were additional to those of the VCA rather than in derogation of them. Clause 9 of the Deed of Settlement stated that the terms contained therein "supersedes any prior Deed or understanding on anything connected with that subject matter". Notably, the VCA was not a Deed, nor was it referred to in the Deed of Settlement. Additionally, the Deed of Settlement was only intended to affect Reel's rights of ownership under the VCA if the Deed of Settlement was actually performed. The Deed of Settlement was not performed, as the first instalment and initial payment were never made. Ultimately, Justice Brown held that the Deed of Settlement did not supersede and extinguish the terms agreed to in the VCA, and found that Reel was the lawful owner of the Vessel at the time of liquidation.

Since Reel was the lawful owner at the time of liquidation, the liquidator's decision to move the Vessel having been asked by Reel not to do so was held to constitute a conversion. Justice Brown ultimately dismissed the negligence claim, finding that the liquidator did not owe Reel a duty of care to prevent the damage to the Vessel because of the competing statutory duties under the *Corporations Act 2001* (Cth).

The Court ordered that damages should be payable by the liquidator personally, such damages being the amount of the reduction in value caused by the water damage to the Vessel.

This decision serves as a timely reminder that liquidators may be found personally liable for the decisions they make when acting on behalf of the company to which they are appointed. Where there are competing ownership claims, liquidators must take care to ensure that goods which are not damaged otherwise, personal liability may arise.

Relief from personal liability granted to administrators seeking to rebuild power stations

AUTHORS

Ben Renfrey, Partner
Cameron Ram, Associate

CASE & NAME CITATION

Sparks, in the matter of IG Energy Holdings (Australia) Pty Ltd [2023] FCA 538 (Halley J)

HYPERLINK

Read more

DATE OF JUDGMENT

28 April 2023

ISSUES

Personal liability of external administrators, ss 447A *Corporations Act* and 90-15 IPS, s 37AF *Federal Court Act* 1976 (Cth)

This decision serves as a useful illustration of the broad application of section 447A of the *Corporations Act 2001* (Cth) (Act) to shield administrators from liability for unforeseeable future risks. The case highlights that:

- **the Court has broad powers to limit personal liability of administrators under s 447A of the Act and s 90-15 of the *Insolvency Practice Schedule (Corporations) 2016* (IPS) for future undetermined costs in relation to a particular project; and**
- **the importance of considering the efficiency and cost-effectiveness of the administrator's proposed course of action as well as the cost benefit to the company.**

Background

The case concerned a joint venture in the Callide Power Project (**Project**) between IG Power (Callide) Ltd (**IGPC**), a company in the Genuity Group of companies, and Callide Energy Pty Ltd, a Queensland Government owned company (**CEP**). The joint venturers were equally liable for expenses and liabilities of the Project, which developed and operated the Callide Power Station.

Prior to an explosion in one of the Project's turbines in 2021 and a structural failure of the other turbine in 2022, the Callide Power Station provided approximately 30% of Queensland's electricity. As a result of the failures, the Power Station's operations were suspended.

In March 2023, IGPC and three other related entities in the Genuity Group entered voluntary administration. Pursuant to its joint venture agreement (**JVA**) with CEP, IGPC was stripped of its voting rights upon the appointment of administrators.

The Administrators determined that a new turbine, cooling structures and other infrastructure and equipment was necessary to bring the Callide Power Station back online and that doing so quickly was of critical importance given that it was relied upon by the State of Queensland to meet its electricity needs. Under the JVA, IGPC was required to pay 50% of the costs of the rebuild which it did not have capacity to do. The Administrators sought funding through a confidential funding agreement.

Under the JVA, IGPC was exposed to adverse action and could lose its share in the Project to CEP if CEP exercised its option to acquire IGPC's interest.

Issues

The Administrators sought relief from personal liability which they would incur under s 443A(1) of the Act in relation to the confidential funding agreement and any future contracts entered into for the purpose of getting the Callide Power Station operational again. The Administrators also sought directions pursuant to s 90-15 of the IPS that they were justified and acting reasonably in entering into the confidential funding agreement and future contracts in relation to the Project.

The key issue before the Court was whether the Administrators' proposed course of funding the rebuild and the rebuild itself were consistent with the objectives of Pt 5.3A of the Act given the uncertainty from exposure to debt and risk.

Decision

Justice Halley of the Federal Court made an order under s 447A(1) of the Act that any personal liability of the Administrators incurred under s 443A of the Act by entering into future contracts for the purpose of the rebuild be limited to the assets of IGPC.

In granting the relief, the Court noted that the Project was the primary asset of the IGPC and that the nature and the scale of the rebuild created risks that might not be presently apparent. Granting the Administrators the protection requested enabled them to enter into the necessary agreements. Without that relief, the Court was satisfied that the Administrators could not have been expected to continue pursuing the rebuild of the Project which would likely generate significant cash flow for the business.

The Court made directions pursuant to s 90-15 of the IPS that the Administrators were justified and acting reasonably in entering into the confidential funding agreement. The Court noted the time pressure and complexity of the transaction, as there was a real prospect of adverse action eventuating and IGPC's interest in the Project being acquired by CEP for less than market value.

An ancillary issue related to the Administrators' application for a suppression order under s 37AF of the *Federal Court Act 1976* (Cth). The Administrators sought to prevent the disclosure of material relating to the cost of the rebuild. The Court accepted the Administrators' contention that disclosure of this material would prejudice negotiations and impact the wholesale energy market in Queensland.

The decision in *Sparks* serves as a useful illustration of the broad application of s 447A of the Act to shield administrators from liability for unforeseeable future risks. It also serves as a useful reminder that the Court can and will grant appropriate relief from personal liability in circumstances where it is in the best interests of creditors, and consistent with Pt 5.3A of the Act to do so. Finally, the decision confirms the importance of weighing up the risk and reward of a proposed course of action in a voluntary administration and having that course ratified by the Court under its general power to make directions pursuant to s 90-15 of the IPS.

Administrators' early restructure gains judicial approval

AUTHORS

Sam Johnson, Partner
William Honeysett, Associate

CASE & NAME CITATION

Re Richstone Plumbing Pty Ltd [2023] VSC 112 (Delany J)

HYPERLINK

Read more

DATE OF JUDGMENT

10 March 2023

ISSUES

Restructuring, orders limiting personal liability of administrators, s 90-15 IPS and s 447A *Corporations Act*

In *Re Richstone Plumbing Pty Ltd (Administrators Appointed)* [2023] VSC 112, the Supreme Court of Victoria granted a judicial direction that the administrators of a group of companies were justified and otherwise acted reasonably in executing a restructure prior to the first meeting of creditors. The Court also held that it was appropriate to limit the administrators' resultant personal liability in circumstances where the administrators were not themselves seeking to trade the business.

Background

On 3 March 2023, the Richstone Group (**Group**) appointed voluntary administrators (**Administrators**) to seven of its companies. The Group operated a large plumbing contractor business, which needed to restructure to continue trading. The Group had approximately 150 employees, operated its business from premises leased by an unrelated party, and owed significant debt that included approximately $18 million to the Australian Taxation Office (**ATO**) and $6.375 million to secured creditors. The Group leased or purchased (assisted by finance) various motor vehicles, plant, machinery and equipment. Negligible cash was available to the Group and, in circumstances where the costs of employee wage and salary expenses was approximately $500,000 per week gross, the Administrators did not seek to continue trading.

The first meeting of creditors was not scheduled until 15 March 2023. However, shortly after the Administrators' appointment, Richstone Victoria Pty Ltd (**Richstone Victoria**) proposed to purchase the Group's business. The offer included the purchase of all of the Group's trade debtors, work in progress, material contracts, plant and equipment, motor vehicles, stock, intellectual property, goodwill and business records. The purchase price included the assumption of liabilities and an additional cash payment.

On 10 March 2023, the Administrators executed a series of sale asset agreements. Each agreement contained conditions subsequent that, if not satisfied, all of the assumed liabilities and sale assets would transfer back to the Group. One condition was to obtain a judicial direction that the Administrators were justified and otherwise acting reasonably in executing the sale (**Judicial Direction**). The Administrators sought the Judicial Direction pursuant to section 90-15 of the *Insolvency Practice Schedule (Corporations)*, and orders modifying s 443A of the *Corporations Act 2001 (Cth)* (**Act**) to limit their personal liability which arose from executing the transaction. In support of the application, the Administrators submitted that the sale terms were fair and reasonable, in the interests of the Group's creditors, and allowed the business to continue trading.

Issues

The key issues before the Court were whether the Administrators were justified in executing an early restructure and whether the Court should limit their resultant personal liability.

Findings

Judicial Direction

The Court granted the Judicial Direction, notwithstanding that:

- secured creditors were not provided adequate time or information to consider the transaction;
- no consultation was provided to unsecured creditors;
- the Group's sale was to a related party;
- the sale of the business was not publicly advertised; and
- the sale was executed prior to the first meeting of creditors.

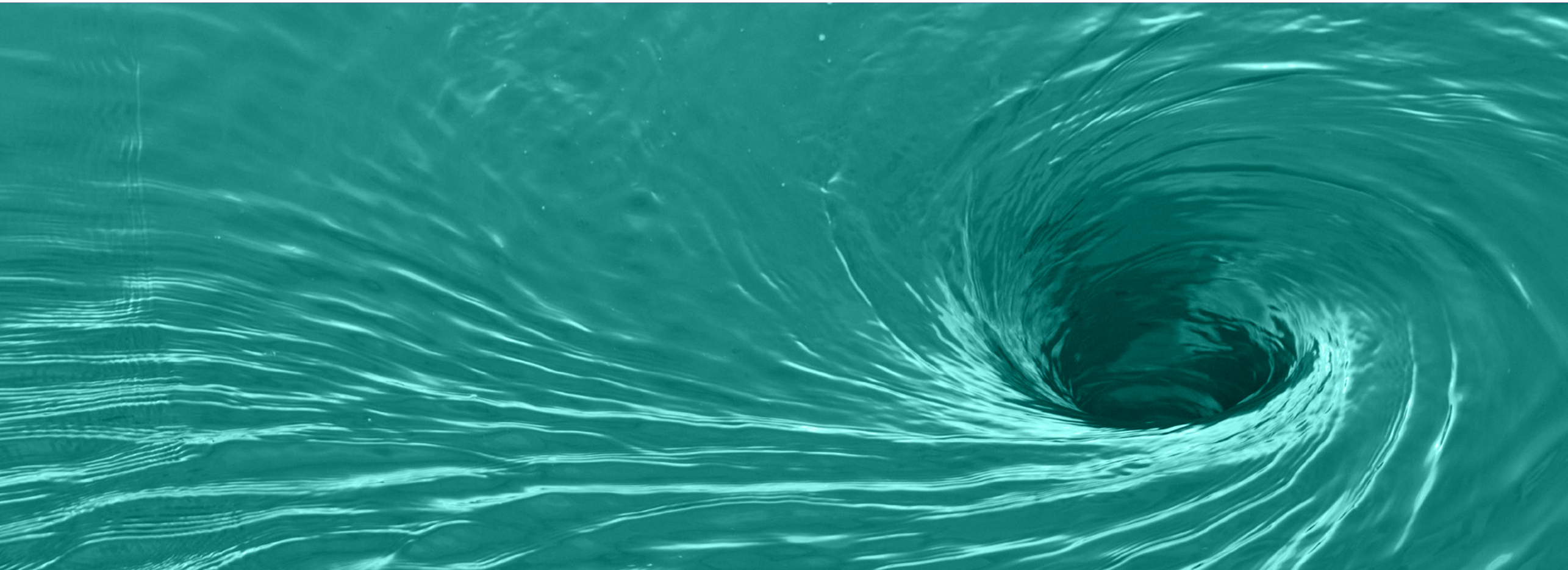
The Court held it was appropriate to give the Judicial Direction because, without it, the first of the conditions subsequent would be unsatisfied and the sale would not proceed. Justice Delany accepted that the only alternative available to the Administrators, in circumstances where they were without sufficient funds to continue to trade the business, was to immediately cease trading and terminate the employment of the Group's 150 employees. His Honour noted that the potential loss of employment was an important consideration in support of granting the Judicial Direction and that the sale price reflected the available valuation information and the best available price. In those circumstances, the Court held that the satisfaction of the conditions subsequent was consistent with the interests of the creditors as a whole and with the objectives of Pt 5.3A of the Act.

Limitation of liability

The Court observed that if the conditions subsequent were not satisfied, the Administrators would be exposed to personal liability. The Administrators had no control over the trading activity of Richstone Victoria. While the sales agreements purported to limit the Administrators' personal liability, Justice Delany observed that pursuant to s 443A of the Act, the parties could not contract out of the statutory liabilities. In those circumstances, including where the sale was in the best interests of the creditors and consistent with the objectives of Part 5.3A of the Act, the Court found that it was appropriate to make orders under s 447A to modify the application of s 443A of the Act.

The judgment is useful in identifying the circumstances where Courts may approve a restructure by administrators without creditor consultation, and demonstrates that retaining employees is an important factor in that determination. The decision also provides an example of a Court granting orders limiting an administrator's personal liability in circumstances where the administrators were not themselves seeking to trade the company's business for the benefit of creditors.

4. Liquidation



Determining the relation-back day when there are multiple applications for winding up

AUTHORS

Sam Johnson, Partner
Charlotte Selley, Law Clerk

CASE & NAME CITATION

Re 52 The Esplanade Pty Ltd (in liq) [2023] QSC 57

HYPERLINK

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DATE OF JUDGMENT

24 March 2023

ISSUES

Relation-back day, s 91 *Corporations Act,* winding up application

The Queensland Supreme Court was asked to determine the relation-back day for 52 The Esplanade Pty Ltd (Company) in circumstances where there were multiple winding up applications. In his Honour's judgment, Justice Kelly confirmed that:

- **where there are multiple winding up applications before a Court, consideration needs to be given to the precise terms and basis of the application in respect of which orders were made for the winding up of the Company;**
- **there cannot be more than one relation-back day; and**
- **determining the relation-back day can have significant ramifications for creditors and liquidators and, therefore, needs to be ascertained with certainty.**

Background

On 28 June 2022, the Supreme Court of Queensland ordered that the Company be wound up in insolvency and that liquidators be appointed to the Company (**Liquidators**). Following the appointment of the Liquidators, a dispute arose between the Liquidators and the Australian Taxation Office (**ATO**), a creditor of the Company, as to what was the correct relation-back day for the winding up.

As a result of that dispute, the Liquidators applied to the Court for declaratory relief as to which filing with the Court constituted the operative application in respect of the winding up order.

The relevant procedural history of the application was as follows:

- on 17 September 2021, 100 Brisbane Street Proprietary Limited (**Brisbane Street**), the holder of 50 per cent of the shares in the Company, filed an originating application (**Originating Application**) to wind up the Company pursuant to section 461 of the *Corporations Act 2001* (Cth) (**Act**);
- Brisbane Street later alleged in pleadings that the winding up of the Company was on the grounds of 'oppression or on the just and equitable ground', not on the ground of insolvency;
- on 3 December 2021, the Court appointed a provisional liquidator to the Company;
- on 3 June 2022, the provisional liquidator filed an interlocutory application (**Provisional Liquidator's Application**) in which the provisional liquidator sought, inter alia, that the Company be wound up in insolvency; and
- on 28 June 2022, the Court ordered in the Provisional Liquidator's Application that the Company be wound up in insolvency and appointed the Liquidators.

Issues

The key issue before the Court was whether the relation-back day was the date on which the Originating Application was filed or the date on which the Provisional Liquidator's Application was filed.

Both parties agreed that the relation-back day was the "day which the application for the order [for the winding up] was filed", pursuant to s 91 of the Act.

The Liquidators submitted that the relation-back day was the date that the Originating Application was filed. However, the ATO, a creditor of the Company, submitted that the relation-back day was the date on which the Provisional Liquidator's Application was filed.

Findings

His Honour emphasised that the relation-back day is an important day for the administration of a winding up, and can have significant implications for both liquidators and creditors given that it is the commencement date of the prescribed period during which transactions entered into by the Company may be considered void and set aside by the Liquidator.

His Honour observed that the Originating Application and the Provisional Liquidator's Application were made on different grounds. The Court further observed that the issues raised in Brisbane Street's pleadings were not before the Court for determination on 28 June 2022, and never related to winding up the company "in solvency".

His Honour concluded that for the purposes of item 14 of s 91 of the Act, the relation-back day was determined by the Provisional Liquidator's Application, as it was the only application which sought the winding up of the company on the grounds of insolvency. The winding up order was not an order made pursuant to, and on the hearing of, the Originating Application.

This judgment clarifies that where there are multiple applications to wind up a company, in order to determine the relation-back day, consideration will need to be given to the precise terms and basis of the application before the Court in respect of which orders for winding up were made. Accordingly, the relation-back day will not necessarily be determined by the first application filed with the Court.

Federal Court green lights funding agreements

AUTHORS

Pravin Aathreya, Partner
Niki Powell, Associate

CASE & NAME CITATION

Jahani, in the matter of Ralan Property Services Pty Ltd (Receivers and Managers Appointed) (In liq) [2023] FCA 738

HYPERLINK

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DATE OF JUDGMENT

26 June 2023

ISSUES

Approval for funding agreements and retainer agreements; s 477(2B) *Corporations Act*; s 90-15 IPS; ss 37AF and 37AG *Federal Court Act*

In this case, the Federal Court of Australia provided the following useful guidance regarding orders for approval of litigation funding agreements and suppression of confidential information:

- **factors relevant to the Court's consideration of section 477(2B) of the *Corporations Act 2001* (Cth) (Act) include whether the terms of the agreement are clear and well documented, whether the liquidator has determined that the agreement is in creditors' interests and whether the liquidator has acted in bad faith, with impropriety, or upon some error of law;**
- **the circumstances in which the Court will make a direction under s 90-15 of the *Insolvency Practice Schedule (Corporations) 2016* (IPS) include where a liquidator is appointed over multiple companies in a group, and there is potential conflict in duties owed.**

Background

On 30 July 2019, administrators were appointed to the Ralan Companies following a collapse resulting from a "Ponzi" scheme involving development projects run by the group.

On 17 December 2019, creditors of the Ralan Companies resolved to wind up the companies and liquidators were appointed. In 2022, the liquidators commenced two sets of proceedings in the Federal Court. The first was against the former Head Sales Agent (**Qiu Proceeding**) in which the liquidators sought to recover payments made to Mr Qiu. The second was against the Australian Taxation Office (**ATO**) (**ATO Proceeding**) in which the liquidators sought to recover unfair preference payments.

The liquidators sought orders under s 477(2B) of the Act in relation to litigation funding agreements for the Qiu Proceeding (**Qiu Funding Agreement**) and the ATO Proceeding (**ATO Funding Agreement**), and retainers and cost agreements with Norton Rose Fulbright (**Retainers**). The liquidators also sought approval to enter into a litigation funding deed with Ralan Beaconsfield Pty Ltd (in liquidation) (**Beaconsfield**) (over which two of the liquidators were also appointed) in relation to the ATO Proceeding (**Beaconsfield Deed**).
The Beaconsfield Deed arose from the liquidators' concern that funding provided under the ATO Funding Agreement would not be sufficient to cover the costs of the ATO Proceeding. The liquidators also sought directions that they were justified in:

- entering into, and causing certain Ralan Companies to enter into, the Beaconsfield Deed; and
- causing certain Ralan Companies to pursue the claims in the Qiu Proceeding (given that the claims in the Qiu Proceeding likely fell within security interests held by secured creditors who did not wish to pursue the claims themselves, and did not support the liquidators doing so).

Findings

The Court ordered the suppression of confidential information regarding the funding agreements, noting the information was not publicly available and disclosed the liquidators' lines of inquiry regarding funding and the funding arrangements' terms.

The Court was satisfied that s 477(2B) approval should be granted for the three litigation funding agreements and the Retainers. Importantly, the Court noted that the terms of the Qiu Funding Agreement, ATO Funding Agreement and Beaconsfield Deed were clear and documented. The Court emphasised the liquidator's experience and his commercial judgement that both proceedings were in the interests of creditors, following protracted exploration of numerous potential funding options. The Court was satisfied that the funding offered was the only means of continuing to pursue the claims for the benefit of creditors. Further, there was no suggestion that the liquidators had acted in bad faith, with impropriety, or upon some error of law. The Court also found that there was no reason to conclude that entry into the Retainers was not a proper exercise of the liquidators' powers.

Regarding the Beaconsfield Deed, the Court noted that the proposed funding arrangement gave rise to a potential for a conflict of liquidators' duties. This was because the funding provided by Beaconsfield may benefit another company in the group over which the liquidators were appointed. The Court gave the judicial direction sought, noting that it was consistent with the established practice of providing judicial directions to liquidators of related companies whose affairs are intermingled. The Court cited the following additional factors in support of the direction:

- it was plainly desirable that sufficient funding be available for the ATO Proceeding;
- Beaconsfield was the only entity in the group with funds available to it and was also a plaintiff in the ATO Proceeding;
- Beaconsfield had its own claim in the ATO Proceeding, meaning that this was not a case where a company in liquidation was funding claims that did not belong to it;
- the funding provided by Beaconsfield was secondary to the primary funding agreement, and therefore it may ultimately not be required; and
- the commission payable to Beaconsfield was structured in exactly the same way as that payable to the primary funder. Given that Beaconsfield was potentially providing funding for the ATO Proceeding (and putting those funds at risk) not just for its own benefit but for the benefit of the other plaintiffs, it was fair and reasonable for Beaconsfield to enjoy an uplift on its invested capital commensurate with that potentially payable to the primary funder. The Court noted the liquidators' evidence that any commission payment might ultimately have a neutral effect on the other plaintiffs, either because of their status as major creditors of Beaconsfield or a subsequent pooling of the assets of the Ralan Companies.

The Court also found it appropriate to make the judicial directions sought regarding pursuit of the Qiu Proceeding, given the potential risk of criticism from unsecured creditors if the secured creditor later asserted that any proceeds of the claims fell within its security interest.

The Court noted that despite receiving notice, the relevant secured creditor had not sought to appear to oppose the relief sought by the liquidators. Further, the absence of that consent was not a bar to the liquidators bringing legal proceedings in the company's name, subject to the secured creditor's security interest in any proceeds in due course.

This decision is yet another illustration of Courts' reluctance to second-guess considered commercial judgements of liquidators regarding the appropriateness of proposed litigation funding agreements. The decision also reflects Courts' corresponding willingness to make judicial directions to protect liquidators from potential liability.

Privilege against self-exposure to a penalty revisited in the context of production of books

AUTHORS

Lucas Wilk, Partner
Laura Baulch, Associate

CASE & NAME CITATION

Deane, in the matter of MSB Capital Holdings Pty Ltd (in liq) [2023] FCA 919 per Justice Downes

HYPERLINK

Read more

DATE OF JUDGMENT

8 August 2023

ISSUES

Penalty Privilege, ss 597(7)(d) and 597(12) *Corporations Act*

A summons was issued by company liquidators to Mr Rowan Lyndon as a person:

- **who had taken part in or been concerned in the examinable affairs of the company and may have been guilty of misconduct in relation to the company; or**
- **may be able to give information about the examinable affairs of the company.**

The Federal Court found that:

- **section 597(7)(d) of the Corporations Act impliedly abrogates the privilege against exposure to penalty in connection with the production of books pursuant to a s 596B summons; and**
- **Mr Lyndon could not raise the privilege in answer to the production of books in response to the s 596B summons served upon him.**

Background

On 12 March 2021, MSB Capital Holdings Pty Ltd (in liquidation) (**the Company**) was wound up and the liquidators were appointed.

On 15 February 2023, a summons was issued to Mr Lyndon under s 596B of the *Corporations Act 2001* (Cth) (**Corporations Act**) by the liquidators requiring Mr Lyndon to:

(a) be examined about the examinable affairs of the Company; and

(b) produce to the Court various books defined in the summons (including certain documents).

In the course of his examination, Mr Lyndon claimed the privilege against exposure to a penalty (**Penalty Privilege**) in respect of certain documents required to be produced under the summons.

The liquidators contended that the Penalty Privilege was not available to Mr Lyndon because it had been abrogated.

Ordinarily, the Penalty Privilege operates to excuse a person from being compelled to answer any question, or produce any document, if the answer or the production would tend to expose that person to a penalty. The Penalty Privilege is distinct from the privilege against self-incrimination and is considered a 'lesser' privilege, in the sense that it provides a weaker and more easily abrogated protection.

Issue

The key issue before the Court was whether s 597(7)(d) of the Act impliedly abrogates the Penalty Privilege in connection with the production of books pursuant to a s 596B summons.

Johnson Winter Slattery | Insolvency & Restructuring Case Summaries 2023: **Liquidation**

Findings

The Court held that three factors will ordinarily be present for the Penalty Privilege to apply:

(a) Penalty Privilege is claimed in curial (or judicial) proceedings;

(b) the proceedings expose the claimant to a penalty or forfeitures; and

(c) Penalty Privilege is claimed as protection from compulsory disclosure of information.

The first factor was satisfied here because the Court concluded that an examination, where it is incidental to a Court-ordered winding up, is a curial proceeding. The second and third factors were also clearly present.

The Court then considered whether the Penalty Privilege had been abrogated by relevant legislation. It held that the requisite necessary implication to abrogate the Penalty Privilege arose from the provisions of the Act.

Section 597(7)(d) only contained one qualification to the obligation to produce the books, being the existence of a "reasonable excuse". The Act does not contain guidance on the meaning of a reasonable excuse. Mr Lyndon argued that reasonable excuse must encompass the Penalty Privilege. The Court held that a claim for the Penalty Privilege is not a reasonable excuse within s 597(7)(d) because:

1. it would defeat one of the purposes of the statutory scheme if a recipient of a summons to produce books could claim Penalty Privilege as a reasonable excuse for not complying with it, being the purpose of enabling a liquidator to examine possible misconduct; and
2. s 597(12) recognises expressly that the Penalty Privilege has been abrogated (specifically in relation to answers to questions), and s 597(12A) then provides a code for extending qualified protections to examinees when answering a question at an examination, but not in relation to the production of books.

The Court concluded that s 597(7)(d) of the Act impliedly abrogates the Penalty Privilege in connection with the production of books pursuant to a s 596B summons.

This decision clarifies whether a person being publicly examined can assert the privilege against exposure to a penalty to resist production of books, in addition to answering questions. For administrators and liquidators, this strengthens the right to force public examinees to give up documents.

The decision also has potential application to notices issued by ASIC to produce documents under s 33 of the *Australian Securities and Investments Commission Act 2001* (Cth). This power is often used in conjunction with s 19 notices for examination before ASIC. The Courts have previously held that the Penalty Privilege can be claimed in an examination under s 19. However, the decision in ***Deane*** now casts doubt on whether the Penalty Privilege can be claimed in response to a notice to produce documents under s 33.

Court upholds liquidators' rejection of proof of debt due to deed of guarantee

AUTHORS

Lucas Wilk, Partner

Emily Leggett, Associate

Jack Bruce, Law Clerk

CASE & NAME CITATION

Re Eliana Construction and Developing Group Pty Ltd [2023] VSC 639

HYPERLINK

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DATE OF JUDGMENT

2 November 2023

ISSUES

Proofs of debt, equitable subrogation

The liquidator of Rock Development and Investments Pty Ltd brought an application against the liquidator of Eliana Construction and Developing Group Pty Ltd to challenge the rejection of a proof of debt.

Hetyey AsJ dismissed the application on the basis that the parties had agreed that while debts were outstanding to the principal creditor, Rock Development and Investments Pty Ltd could not prove for the debt owed to it as guarantor or exercise the rights of the principal creditor by subrogation.

Background

Eliana Construction and Developing Group Pty Ltd (**Eliana**) and Rock Development & Investments Pty Ltd (**Rock**) were related companies with a shared sole director, Mr Magdy Sowiha. In April 2016, Eliana, Rock and Mr Sowiha entered into a Deed of Agreement, Guarantee and Indemnity (**Deed**) with the Commissioner for Taxation (**Commissioner**) whereby Rock provided a guarantee and indemnity for Eliana and Mr Sowiha's repayment of tax debt. Rock also provided a property it owned (**Bond Street Property**) as security for performance of Eliana and Mr Sowiha's repayment obligations.

Relevantly, clause 7.5 of the Deed provided that Rock would not be entitled to issue a proof of debt in relation to Eliana or to exercise any right of the Commissioner by way of subrogation until the debt under the Deed had been discharged in full.

Eliana was placed into liquidation in October 2016 and Mr Sowiha became bankrupt, with both defaulting on their repayment obligations under the Deed and triggering Rock's obligations as guarantor.
In February 2017, Rock sold the Bond Street Property and made payment of $1,361,248.76 to the ATO pursuant to the Deed. The ATO allocated $1,278,465.80 towards Eliana's superannuation guarantee charge (**SGC**) debt and the rest towards Rock's running balance account.

Subsequently, the ATO amended its proof of debt in Eliana's liquidation to remove any claims in relation to the SGC, leaving only claims in relation to income tax and running balance account deficiencies.

In July 2017, Rock was placed into liquidation. Rock's liquidator successfully commenced proceedings to claw back part of the payment of the Bond Street sale proceeds to the ATO as a voidable transaction and the Commissioner was required to repay $550,000 to Rock. In the ATO's most recent proof of debt, it claimed the sum of $565,469.19 as an SGC debt owed by Eliana.

In March 2019, Rock submitted a proof of debt in the liquidation of Eliana which claimed the $1,278,465.80 paid by Rock towards Eliana's SGC liabilities as well as approximately $2.54 million in relation to income tax and running balance account deficiencies which Rock was required to pay as a guarantor under the Deed to the Commissioner. Eliana's liquidator initially partially admitted the debt. However, the liquidator revised his decision and rejected the entirety of the proof on the basis that:

1. clause 7.5 of the Deed precluded any proof of debt until the entire debt was repaid to the Commissioner; and
2. the rule against double proofs prevented Rock from proving any outstanding debts to the principal debtor and therefore provable by the Commissioner.

Rock's liquidator challenged the decision of Eliana's liquidator to reject the proof of debt in an application to the Supreme Court of Victoria.

Issue

The key issue before the Court was whether Rock was entitled to prove its debt in Eliana's liquidation or subrogate to the rights of the Commissioner under the Deed while a debt remained outstanding to the Commissioner under the Deed.

Findings

The Court upheld the decision to reject Rock's proof of debt on the basis that:

1. the entire sum claimed by Rock's proof of debt, including the $1,278,465.80 paid to the Commissioner and applied to Eliana's SGC liability, was a taxation debt subject to the Deed; and
2. the relevant taxation debts owed to the Commissioner under the Deed remained outstanding, and therefore, pursuant to clause 7.5(b) of the Deed, Rock could not prove for the debts or subrogate to the rights of the Commissioner.

Although not necessary to decide the application, the Court also confirmed that equitable subrogation is not available until the principal creditor's debt has been paid in full. The Court dismissed Rock's contention that the SGC liability had been paid in full, as part of the payment was clawed back as a voidable transaction by Rock's Liquidator in 2017.

The Court also held that the rule against double proofs would further preclude Rock from proving its debts against Eliana, as the Commissioner had proved for the same debts.

The decision is a reminder of the importance of carefully considering the terms of a guarantee when it is relevant in the process of adjudicating proofs of debt. Additionally, the decision demonstrates the impact that arrangements made between parties can have on the proof of debt process and reinforces the importance of carefully considering the wording of guarantee clauses when negotiating agreements.

5. Insolvent trading

The devil is in the detail: Federal Court strikes out insolvent trading claim pleading for lack of detail

AUTHORS

Sam Johnson, Partner
Eve Thomson, Partner
Sophie Milera, Associate

CASE & NAME CITATION

Copeland in his capacity as liquidator of Skyworkers Pty Ltd (in liq) v Murace [2023] FCA 14 per Halley J

HYPERLINK

Read more

DATE OF JUDGMENT

18 January 2023

ISSUES

Pleadings, Insolvent trading, ss 286 and 588G *Corporations Act*

When a liquidator is pursuing an insolvent trading claim:

- **the Statement of Claim should identify the date or dates on which the relevant debt/s were incurred, and how those debt/s arose; and**
- **if the liquidator is relying on presumed insolvency by reason of a failure to keep written records under section 286(1) of the *Corporations Act 2001* (Cth), the claim should identify which records the company failed to maintain.**

Background

Insolvent trading proceedings were brought by the liquidator of Skyworkers Pty Ltd (In Liquidation) (**Company**) against the Company's former director, Mr Paul Murace pursuant to s 588G of the *Corporations Act 2001* (Cth) (**Act**). The liquidator relied on a presumption of insolvency pursuant to s 588E(4) of the Act, by reason of a failure to keep records, and in the alternative, actual insolvency pursuant to s 95A of the Act.

Mr Murace sought an order for summary dismissal of the proceedings, or alternatively an order striking out the statement of claim due to alleged deficiencies in the pleading.

Issues

The Court considered whether:

- for the purposes of a claim under s 588G, a liquidator must plead the date on which each debt is alleged to have been incurred and how the debt was created, and whether the liquidator had included sufficient particulars of each debt in this case; and
- the liquidator had provided proper particulars of presumed and actual insolvency.

Findings

Particulars of insolvent trading

In the statement of claim, the liquidator had particularised the debts the subject of the insolvent trading claim in a table containing the name of the creditor and the total amount of each debt. Further particulars identified the dates on which some debts were incurred, but no date or date range was supplied for around 40 other debts.

In argument, the liquidator submitted that the evidence had not yet closed, and that the table contained all of the information available in the accounting software used by the company. The director had not produced any other books and records.

Justice Halley held that it is essential in an insolvent trading claim to plead the specific date or dates on which each debt was incurred, along with how it was alleged that the debt arose. Halley J noted that:

- whether or not evidence was closed in the case did not excuse the need to plead essential elements of the cause of action; and
- an inability or failure to identify the essential elements of a cause of action, irrespective of the reasons for that inability or failure, does not relieve a plaintiff liquidator from pleading sufficient material facts to establish the necessary elements of a cause of action.

His Honour acknowledged the practical difficulties often confronting liquidators, and commented that the amount of specificity required to satisfy pleadings requirements may change depending on the nature of the debt. However, his Honour ultimately concluded that it was insufficient to simply identify the creditor and the total amount of debts for each.

Particulars of presumed insolvency

The liquidator had pleaded that the Company failed to keep and/or retain financial records as required by s 286(1) and/or (2) of the Act for the whole of the relevant period (being the two year period between the registration of the Company and the date on which the winding up application was made). As a consequence, the liquidator claimed that the Company was presumed to have been insolvent throughout the relevant period pursuant to s 588E(4) of the Act.

Justice Halley, applying an earlier decision of Justice Parker in *Devine v Liu; Devine v Ho* (2018) 338 FLR 208, held that where presumed insolvency under s 588E(4) is relied upon, the liquidator must identify in which of the various alternative ways canvassed in s 286(1) the company failed to keep written records.

For example, the failure to keep written records under s 286(1) could involve either a failure to keep records that correctly record and explain the company's transactions, or its financial position, or its performance over the relevant period. Alternatively, there could be a failure to keep records that enable true and fair financial statements to be either audited or prepared.

The pleading must identify which of the alternatives set out in s 286(1) is relied upon, and for each, the particular records whose absence is relied upon to sustain the allegation.

Particulars of actual insolvency

As to actual insolvency, the liquidator pleaded that, among other things, the Company was unable to pay its debts as and when they fell due, and identified a number of the usual indicia of insolvency.

Justice Halley held that the allegation of actual insolvency did not require further particularisation, as the question of whether a company was able to meet its debts as and when they fell due at a particular date was essentially a matter for evidence. His Honour was satisfied with this aspect of the pleading.

Nevertheless, the statement of claim was struck out in its entirety, because the claims were dependent on an adequate pleading of the debts. The liquidator was granted leave to re-plead the claim upon payment of Mr Murace's costs from the commencement of the proceeding.

This decision is a stark reminder to liquidators that where an insolvent trading claim is pursued, adequate particulars of the debts forming the basis of the insolvency and any presumed insolvency must be pleaded, even where the state of the company's records make that task difficult. Failure to do so may result in strike out, costs liability, or worse, summary dismissal of the claim.

Court clarifies proper procedure to commence claims for insolvent trading

AUTHORS

Pravin Aathreya, Partner
Lara So, Seasonal Clerk

CASE & NAME CITATION

H2 Migration & Education Pty Ltd v Gu [2023] WASC 199

HYPERLINK

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DATE OF JUDGMENT

9 June 2023

ISSUES

Insolvent trading ss 477, 588G, 588M *Corporations Act*, s 100-5 IPS, pleading GST debts

The Supreme Court of Western Australia has clarified the proper procedure to bring a claim against a director for breaching their duty to prevent insolvent trading. The Court also provided guidance on pleading GST debts. The judgment confirms the following key points:

- **a proceeding for breach of a director's duty to prevent insolvent trading enables recovery of loss "as a debt due to the company", however, the action is not one in debt; and**
- **when pleading GST debts as a component of the loss suffered, care must be taken to plead the date on which the debt was incurred with precision.**

Background

The liquidator of Smartlink Corporation Pty Ltd (**Smartlink**) assigned H2 Migration & Education Pty Ltd (**H2 Migration**) the right to sue the director of Smartlink for permitting the company to trade while insolvent pursuant to section 588G of the *Corporations Act 2001* (Cth) (**the Act**). On 27 September 2022, H2 Migration commenced proceedings in the Supreme Court of Western Australia by filing a writ of summons indorsed with a statement of claim. H2 Migration sought damages under s 588M of the Act, including the payment of $730,608.46 for a series of unsecured debts.

On 7 October 2022, the director of Smartlink filed a conditional appearance on the basis that:

- the application to commence proceedings was in an irregular form, and sought to strike out the writ and statement of claim;
- the liquidator could not assign the right to sue because the right to recover damage and loss suffered was "a debt due to the company", and not to the liquidator. Moreover, the proceeds of the action could not be assigned under s 477(2)(c) of the Act or, alternatively, s 100-5 of the Insolvency Practice Schedule (Corporations); and
- the material facts needed to establish that a GST debt was owed by Smartlink were improperly and unusually pleaded.
- The director further sought summary judgment and a series of declarations.

Issues

The key issues before the Court were whether:

1. the proceedings were commenced "under the Corporations Act" rather than as a common law action in debt and therefore whether they should have been commenced by way of originating process accompanied by an affidavit;
2. a liquidator could assign both the right to bring a claim for insolvent trading and the proceeds of that claim; and
3. the GST debt was incorrectly pleaded.

Findings

The Court accepted the director's argument that the cause of action advanced by H2 Migration arose under the Act because all elements of the cause of action had their source in ss 588G and 588M of the Act and H2 Migration's reliance on s 477(2)(c) of the Act and s 100-5 of Schedule 2 to the Act. Accordingly, the proceeding should have been commenced by way of originating process with a supporting affidavit. However, Justice Seaward held that the incorrect mode of commencement of the proceeding was a procedural irregularity that did not cause substantial injustice. Consequently, her Honour ordered that the writ of summons be retroactively approved to stand as an originating process and that H2 Migration file a supporting affidavit.

Further, Justice Seaward concluded that the liquidator was entitled to assign both the right to sue for insolvent trading and the proceeds of the action. Her Honour accepted that the proceeds of a claim under s 588M are recoverable by the liquidator as a debt due to the company and therefore were 'property' of Smartlink able to be sold or otherwise disposed of by the liquidator under s 477(2)(c).

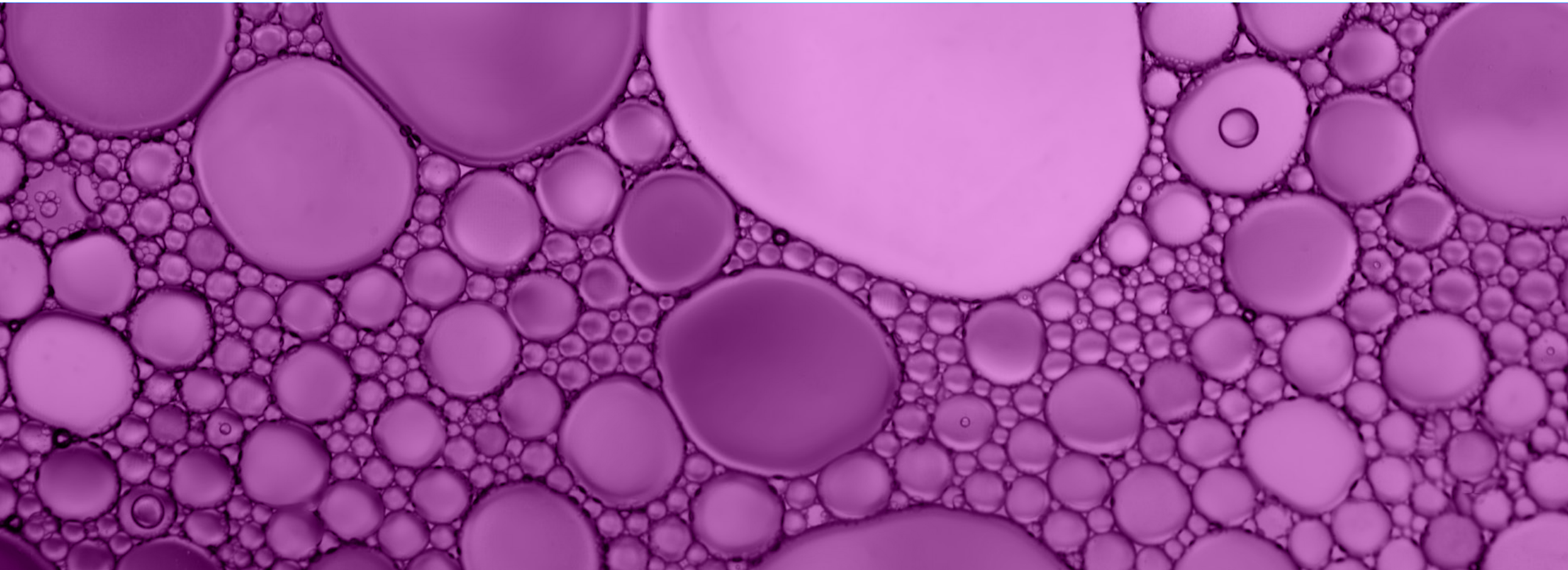
In relation to the pleading of the GST debts to the Commissioner of Taxation incurred while Smartlink was insolvent, the Court noted that H2 Migration had pleaded more generally that the GST debts arose from the sale and settlement of each subdivided lot after 31 January 2018 under sale contracts between Smartlink and members of the public. Justice Seaward held that the lack of a specific pleading in relation to each individual sale denied the director the opportunity to properly plead a defence.

While noting that each taxable supply comprising the debt did not need to be pleaded, the Court held that H2 Migration had obscured the case the director had to meet by pleading the GST debt at too high a level of generality. Consequently, the Court granted leave for H2 Migration to file and serve an amended statement of claim and refused the defendant's application for summary judgment.

This decision confirms that recovery for a debt due to the company for a breach of a director's duty to prevent insolvent trading is an action under the Corporations Act, not one in debt. Accordingly, an insolvent trading claim should be commenced by originating process and supporting affidavit rather than a writ of summons.

Further, the decision illustrates that GST debts must be pleaded with sufficient detail to meet all necessary elements of proving the debts. The defendant must be provided with the opportunity to properly plead in relation to each debt incurred.

6. Solvency



Present solvency and future debt: the relevance of future debt in determining solvency

AUTHORS

Sam Johnson, Partner
Emily Barrett, Partner
Caitlin McTaggart, Senior Associate
Madison Copland, Law Graduate

CASE & NAME CITATION

In the matter of IOUpay Limited ACN 091 192 871 (Administrators Appointed) [2023] NSWSC 568 per Williams J

HYPERLINK

Read more

DATE OF JUDGMENT

26 May 2023

ISSUES

Relevance of future debt, solvency, termination of administration s 447A(2)(a) *Corporations Act*

JWS represented Daniel Walley and Philip Carter of PricewaterhouseCoopers in their capacity as voluntary administrators (Administrators) of IOUpay Limited (Administrators Appointed) (Company) in an unusual application to the Supreme Court of NSW. In the application, the directors of the Company sought orders to end the administration of the Company by authorising the directors to execute a refinancing agreement to restore the Company to solvency. In her Honour's judgment, Justice Williams confirmed that:

- **the question raised by section 447A(2)(a) of the *Corporations Act 2001* (Cth) (Act) is whether the company is solvent, not whether it is likely to be solvent in more than 12 months' time;**
- **the question of the likelihood of future insolvency will be relevant to the Court's exercise of discretion when deciding whether to make an order ending an administration, however, clear unequivocal evidence of future insolvency is needed; and**
- **the terms of any refinancing proposal are central to the Court's assessment, including, in particular whether debts arising at the date of appointment are discharged.**

Background

On 26 April 2023, Daniel Walley and Phillip Carter of PricewaterhouseCoopers were appointed Administrators of the Company.

While the Company did not carry on business itself, it operated as the holding company for various subsidiary companies registered in Malaysia (**the IOU Group**), which provided financial technology services and digital commerce software to customers primarily in Malaysia and its neighbouring countries. Following their appointment, the Administrators concluded that only one subsidiary (of which the Company was the indirect holding company), i-Destinasi Sdn Bhd (**IDSB**) operated a profitable business; the remainder were either dormant or loss-making.

Following the discovery of significant fraud committed against the IOU Group, imposition of a trading suspension on 16 March 2023 and failed capital raising in April 2023, the Company's directors formed the view that it was cash flow insolvent and appointed the Administrators.

Shortly after that appointment, a shareholder of the Company, Finran Pty Ltd (**Finran**), put forward a refinancing proposal to the Administrators which would return the Company to solvency and provide a basis for the administration to end (**Finran Proposal**). In short, the Finran Proposal proposed:

- an advancement of a secured revolving facility in the amount of $4.5 million for a term of 13 months;
- repayment of the principal and capitalised interest (at 6 per cent) at the end of the term; and
- security granted over the assets of the Company to secure repayment obligations.

There was no dispute that the Finran Proposal would provide sufficient working capital to discharge the Company's pre-appointment creditors (mainly comprising debts owed to the ASX and the Company's directors and advisors) such that it would return to a state of cash flow solvency.

However, in circumstances where the Company did not generate any revenue and relied solely on distributions from its subsidiaries, the issue at hand was whether the Finran Proposal would truly return the Company to solvency such that it would enable the Company to repay the loan upon expiry of the 13-month term and thereby justify the Court making an order under s 447A(2) terminating the administration on that basis.

A notable aspect of the voluntary administration was that an extraordinary general meeting (**EGM**) seeking to replace the Company's directors had been requisitioned prior to the appointment of the Administrators with the EGM being held on 3 May 2023, during the voluntary administration. At the EGM, resolutions were passed replacing the Company's directors.

The application was brought by one of the Company's new directors, Mr David Halliday, who also sought orders pursuant to ss 198G(3)(b) and 437D(2) of the Act approving the directors of the Company exercising their powers and functions to cause the company to enter into the Finran Proposal (given their powers were suspended by the appointment of the Administrators).

Ultimately, the Administrators did not oppose the application once satisfied that there were mechanisms in place to ensure that the facility funds would be paid to the Company and pre-appointment creditors would be paid.

Findings

Relying on the findings of the NSW Court of Appeal in *Anchorage Capital Master Offshore Ltd v Sparkes* [2023] NSWCA 88, the Court found that, on the evidence provided, the Company would immediately return to solvency upon entering and drawing down funds under the Finran facility.

Crucial to that assessment was that the Finran Proposal (as amended by the Administrators) required the Company to first apply the funds advanced to discharge all pre-appointment debts.

In assessing solvency, while the Court did not dismiss the relevance of future creditors and the potential that the Company may be unable to repay the loan, it reaffirmed that there needed to be clear evidence indicating, with a high degree of assuredness, that there was a sufficient risk that the Company would be unable to meet its debts at that future time for it to determine that the Company was not solvent.

In that regard, the Court considered:

- the willingness of Finran to provide ongoing financing and support to the Company;
- evidence that the Company had sufficient assets to repay the loan facility within 13 months; and
- the possibility that the Company could take further steps to restructure its debt obligations during the term of the loan.

Her Honour was satisfied that *"there was a very real likelihood that the Company would be able to repay the Finran loan facility when it falls due in June 2024"*.

In arriving at the decision to exercise the Court's discretion to end the administration, her Honour also considered that the Finran Proposal achieved the purpose of Part 5.3A of the Act by maximising the chances of the Company continuing in existence.

This decision confirms that a company's potential future inability to meet its debt obligations may not prevent it being presently solvent. While potential future insolvency may be a consideration, save there being clear evidence that the company cannot meet a future maturing liability, the relevant question is (and remains) whether the company can pay its debts as and when they fall due and payable. However, where a company is returned to solvency as a consequence of a new facility, the terms of that facility will be crucial to the Court's assessment as to whether to exercise its discretion to end an administration on the basis of solvency pursuant to s 447A.

Court decides an inability to pay a future debt does not render a company presently insolvent

AUTHORS

Ben Renfrey, Partner
Rachel Zeng, Associate

CASE & NAME CITATION

Anchorage Capital Master Offshore Ltd v Sparkes [2023] NSWCA 88 per Ward P, Brereton JA, Griffiths AJA

HYPERLINK

Read more

DATE OF JUDGMENT

9 May 2023

ISSUES

Relevance of future debt, solvency

In an application where the lenders accepted representations as to solvency, the NSW Court of Appeal's decision has highlighted:

- **the increasing difficulty in convincing the Courts that a company is insolvent because of an inability to pay future debts. The prediction of a company's inability to pay a future debt is complex due to the natural contingencies and possible refinancing of debts;**
- **a duty of care is unlikely owed to a lender by company officers authorised to complete drawdown and rollover notices; and**
- **company officers will not be held personally liable for representations made on behalf of the company where they did not have any specific knowledge or expertise.**

Background

Arrium Limited (**Arrium**) was an Australian listed public company in the steel business with a number of subsidiaries. Its business included MolyCop, which Arrium's Board decided to sell due to falling ore prices. The board also agreed to a restructuring proposal to address Arrium's debt position.

During the restructuring, Arrium issued drawdown and rollover notices to its lenders with representations that there had been no change in Arrium's financial position constituting a Material Adverse Effect under its facility agreements, and that Arrium was still solvent.

Ultimately, Arrium's Board deemed the final bids for MolyCop unacceptable and the lenders rejected the restructuring proposal and informed Arrium that they had lost confidence in its management. Arrium's directors consequently placed the company in voluntary administration and later Arrium entered liquidation.

Various proceedings were commenced following Arrium's collapse. The plaintiffs contended that:

- because of misrepresentations in the drawdown and rollover notices, they advanced funds to Arrium which they would not have otherwise advanced; and
- Arrium should have been placed into administration earlier when the returns would have been better for the creditors.

Issues

The key issues before the Court of Appeal were:

1. whether Arrium was insolvent between the first drawdown notice issued and the last drawdown advanced by lenders, such that the solvency representation was false;
2. whether company officers were personally engaged in misleading or deceptive conduct by authorising the impugned notices; and
3. whether Arrium owed and subsequently breached a duty of care to the Anchorage appellants in making the representations.

Findings

The NSW Court of Appeal upheld the primary judge's decision and found that Arrium was not insolvent at the time drawdown notices were issued. The Court distinguished between present insolvency and future predictions of insolvency, noting that present insolvency concerns a company's present inability to pay all debts, as and when they become due and payable. At the time of the notices, Arrium's long-term debts would not mature for another 16 months and they were also of the kind that were typically refinanced upon becoming due. Consequently, the representations were not false at the time the drawdown notices were made.

The Court also decided that the company officers did not engage in misleading or deceptive conduct as they were 'organs of the company'. A reasonable reader would not have deemed the representations to be made personally. The drawdown notices were made by the "Authorised Officer" of Arrium as an agent rather than in any personal capacity.

Finally, the Court agreed with the primary judge's finding that the Company did not owe a duty of care to the lenders for the representations. As the lenders were financial institutions, the Court held that they had the ability to protect their commercial interests by careful monitoring and assessments. The lenders could not rely solely on the Company's representations to inform their business decisions.

This decision highlights the need for companies facing financial difficulties to be careful when preparing financial reports to ensure accuracy and transparency as well as diligent risk assessment. Importantly, the decision also demonstrates the complexity of determining present solvency based on considerations of future debts in circumstances where the company would ordinarily be likely to refinance their debts or raise funds from shareholders. Finally, the case sheds light on the difficulty of establishing the personal liability of company officers in relation to misrepresentations. This means that lenders must take steps to protect their commercial interests, such as conducting due diligence and independent assessments, and cannot rely solely on representations made by the company.

7. Voidable transactions

High Court confirms set-off no longer available as a defence to an unfair preference claims

AUTHORS

Sam Johnson, Partner
Arya Sarath, Associate

CASE & NAME CITATION

Metal Manufacturers Pty Limited v Morton as liquidator of MJ Woodman Electrical Contractors (In Liq) [2023] HCA 1

HYPERLINK

Read more

DATE OF JUDGMENT

08 February 2023

ISSUES

Set-off, s 553C *Corporations Act*, preference claims, s 588FA *Corporations Act*

The High Court of Australia has unanimously upheld the decision of the Full Federal Court that the set-off defence under section 553C of the *Corporations Act 2001* (Cth) (Act) is not available to creditors defending a liquidator's unfair preference claim under s 588FA of the Act, settling once and for all the competing lines of judicial authority on the issue.

Section 553C of the Act provides an automatic set-off for mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company as long as the creditor is not on notice of the insolvency of the company in liquidation. In finding that the creditor's case was flawed, the High Court found that there were no mutual dealings that satisfied the requirements of s 553C of the Act.

The High Court also found that it would be a distortion of the statutory scheme of liquidation if a creditor could avoid the consequences of an unfair preference claim by virtue of the fact that it was also owed money by the company.

Unfortunately, the High Court did not address the applicability of the set-off defence in relation to other claims brought by liquidators. Nevertheless, there appears to be a strong argument that the High Court's analysis would also be applicable to other types of voidable transaction claims available to liquidators.

Background

Six months prior to its liquidation, MJ Woodman Electrical Contractors Pty Ltd (**MJ Woodman**) paid Metal Manufacturers Pty Ltd (**Appellant**) the sums of $50,000 and $140,000. Separately, MJ Woodman owed the Appellant a debt of $194,727.23 for additional goods obtained from the Appellant.

MJ Woodman's liquidators sought to recover payments made to the Appellant on the basis that the payment was an unfair preference pursuant to s 588FA of the Act. The Appellant contended that pursuant to s 553C it could set off the potential liability to repay the alleged unfair preferences against the $194,727.23 that it was separately owed.

The Full Federal Court had previously found that the statutory set off under s 553C was not available to the Appellant as a defence. The Appellant then subsequently appealed that decision to the High Court.

Decision

The High Court unanimously agreed with the Full Federal Court's reasons and dismissed the appeal holding that:

- any liability arising from the making of an order under s 588FF(1)(a) was not eligible to be set off against the debt owed to the Appellant;
- construed in the context of the statutory scheme of liquidation, s 553C(1) requires that the mutual credits, mutual debts or other mutual dealings be credits, debts or dealings arising from circumstances that subsisted in some way or form *before* the commencement of the winding up;
- here, immediately before the winding up there was nothing to set off as between the Appellant and the company in liquidation as the company owed money to the Appellant, but the Appellant owed nothing to the company;
- the contingent right held by the liquidator to sue for an order under s 588FF could not and did not exist before then; and
- there was no mutual dealing within the meaning of s 553C(1) because there had been no dealing between the same persons and there was no mutuality of interest.

The High Court decision provides long sought after clarity on the availability of the set-off defence to preference claims. The decision will be of comfort to liquidators who wish to bring unfair preference claims and will assist to speed up recoveries of those claims. There also appears to be a strong argument that the High Court's analysis on the availability of a set-off defence will also be applicable to other types of voidable transaction claims available to liquidators.

Gunns: peak indebtedness is shot

AUTHORS

Paul Buitendag, Partner
Pravin Aathreya, Partner
Ben Bishop, Senior Associate
Ben Gibson (Victorian Bar)

CASE & NAME CITATION

Bryant v Badenoch Integrated Logging Pty Ltd [2023] HCA 2

HYPERLINK

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DATE OF JUDGMENT

8 February 2023

ISSUES

Preference claims, s 588FA *Corporations Act*, peak indebtedness rule

On 8 February 2023, the High Court of Australia delivered judgment in *Bryant v Badenoch Integrated Logging Pty Ltd* [2023] HCA 2. JWS acted for PwC, the appellant liquidators of the Gunns group, and Ben Gibson appeared as junior counsel for the liquidators.

The High Court confirmed:

- **that Part 5.7B of the *Corporations Act 2001* (Cth) (Act) does not incorporate the peak indebtedness rule;**
- **the first transaction that can form part of a "continuing business relationship", for the purposes of section 588FA(3)(a) of the Act, is the first transaction after either of the beginning of the prescribed period, the date of insolvency, or the commencement of the continuing business relationship, whichever is later; and**
- **in assessing when a "continuing business relationship" has ended, the relevant test is an objective factual enquiry having regard to all the evidence.**

Peak indebtedness and the commencement of the continuing business relationship

The "peak indebtedness rule" operated such that where a running account arose in a claim for an unfair preference, a liquidator could elect to impugn only the transactions from the highest point of indebtedness between the creditor and the company, maximising the preference sought to be returned to the company. Despite the introduction of s 588FA(3) in 1992, most Courts continued to apply the peak indebtedness rule on the assumption it had been incorporated into s 588FA(3).

The High Court held that the peak indebtedness rule cannot be assumed to have been incorporated into the Act. The words "all the transactions forming part of the relationship" in s 588FA(3)(c) mean all the transactions within the prescribed period in s 588FE and entered into when the company was insolvent. Section 588FA(3) gives effect to the running account principle whereby a creditor continues to supply to a company in circumstances of suspected insolvency enabling the company to continue to trade, to the likely benefit of the creditors. While a liquidator is entitled to elect which transactions to impugn as a voidable transaction, he/she cannot determine the first transaction forming part of "the relationship".

The commencement of a "continuing business relationship" for the purposes of s 588FA(3)(a) is the first transaction after either commencement of the prescribed (relation-back) period under s 588FE or the date of insolvency, whichever is later.

Cessation of the continuing business relationship

The High Court also determined the proper approach to assessing when a transaction is an "integral part of a continuing business relationship" for the purposes of s 588FA(3)(a). If a transaction is not an integral part of the continuing business relationship, then that relationship may have ceased and subsequent payments might be voidable on a standalone basis.

The High Court held that the appropriate enquiry is an objective factual exercise that considers the whole of the evidence and business relationship between the parties. The parties' subjective intentions, including an intention to make a payment for the sole purpose of discharging an existing debt, is instructive but not determinative.

In determining that a continuing business relationship between Gunns and Badenoch existed until 10 July 2012, the High Court found that:

1. the creditor believed Gunns would be in a position to pay all of Badenoch's outstanding invoices;
2. the parties were working towards their business relationship continuing;
3. a change in credit terms in March 2012 did not terminate the relationship; and
4. it was not determinative that Gunns and Badenoch wanted to reduce Gunns' past indebtedness.

By contrast, in determining that the continuing business relationship had ended by at least 2 August 2012 and supplies after that date were made pursuant to an agreed transition plan to another contractor, the High Court found that:

1. the parties had agreed that the agreement would cease and agreed a transition plan towards the cessation of supply;
2. Badenoch was intent on maximising the reduction in Gunns' debt before handing over to another contractor; and
3. Gunns knew from Badenoch's correspondence that it would need to find another contractor.

Liquidators can no longer choose the point of peak indebtedness to maximise the quantum of any unfair preference.

Where there is a continuing business relationship or running account, each payment will not be recoverable as an unfair preference, but the existence and amount of any preference will be determined by the net movement in the running account from the beginning of the continuing business relationship or the prescribed statutory period, or the date of insolvency (whichever is later), until the date of the winding up.

The judgment also exemplifies the importance of collating all relevant evidence in relation to each voidable transaction during the relation-back period to make an objective assessment as to whether a continuing business relationship existed at the time of each impugned payment.

Court denies default judgment for liquidator to avoid risk of inconsistent findings against other defendants

AUTHORS

Sam Johnson, Partner
Lauren Connolly, Associate

CASE & NAME CITATION

In the matter of Bleecker Property Group Pty Ltd (In Liq) [2023] NSWSC 1071 per Williams J

HYPERLINK

Read more

DATE OF JUDGMENT

7 September 2023

ISSUES

Default judgment, voidable transactions – ss 286, 588E, 588FE, 588FF *Corporations Act*

In what appears to be the first published case that considers whether an order can be made under s 588FF(1) of the *Corporations Act 2001* (Cth) (Act) by way of default judgment against a defendant where there are multiple defendants in the proceedings, Justice Williams of the Federal Court confirmed:

- **an applicant must plead all of the elements with necessary detail for the Court to be satisfied that the payments in issue were voidable transactions as against each of the defendants, particularly where a plaintiff wishes to apply for default judgment against one of the defendants; and**
- **the Court will not grant default judgment against only one of multiple defendants where there is a risk that the judgment will be inconsistent with findings arrived at in the final proceeding, including findings as to solvency.**

Background

On 22 September 2020, the plaintiff companies, Bleecker Property Group Pty Ltd (**Bleecker Property**), N & K Gazal Pty Ltd (**NKG**), Greenacre Garden Development Pty Ltd and Bleecker Development Pty Ltd, were wound up voluntarily.

Bleecker Property alleged that certain payments made by Bleecker Property and NKG to the defendants during the period from February 2018 to September 2020 were voidable transactions pursuant to s 588FE of the *Corporations Act 2001* (Cth), and that some of those payments were made in breach of duties owed by the alleged directors and shadow directors of those companies.

Bleecker Property sought default judgment against the seventh defendant, NG Property Management Pty Ltd (**NG Property**) in relation to property payments. With the exception of NG Property, the remaining defendants all filed defences. NG Property did not file any defence or notice of appearance in the proceedings.

Bleecker Property's main contention was that the transactions were voidable because the books and records of Bleecker Property failed to correctly record and explain the company's transactions and financial position in contravention of s 286 of the Act, and did not enable true and fair financial statements to be prepared and audited. As a result, Bleecker Property would have been presumed to be insolvent pursuant to s 588E(4) at the time the payments in issue were made.

Issues

The main issue to be considered by the Court was whether the Court should order default judgment in relation to a voidable transaction claim pursuant to s 588FF(1) of the Act as against a single defendant in circumstances where the proceedings involved multiple voidable transaction claims against multiple defendants.

Findings

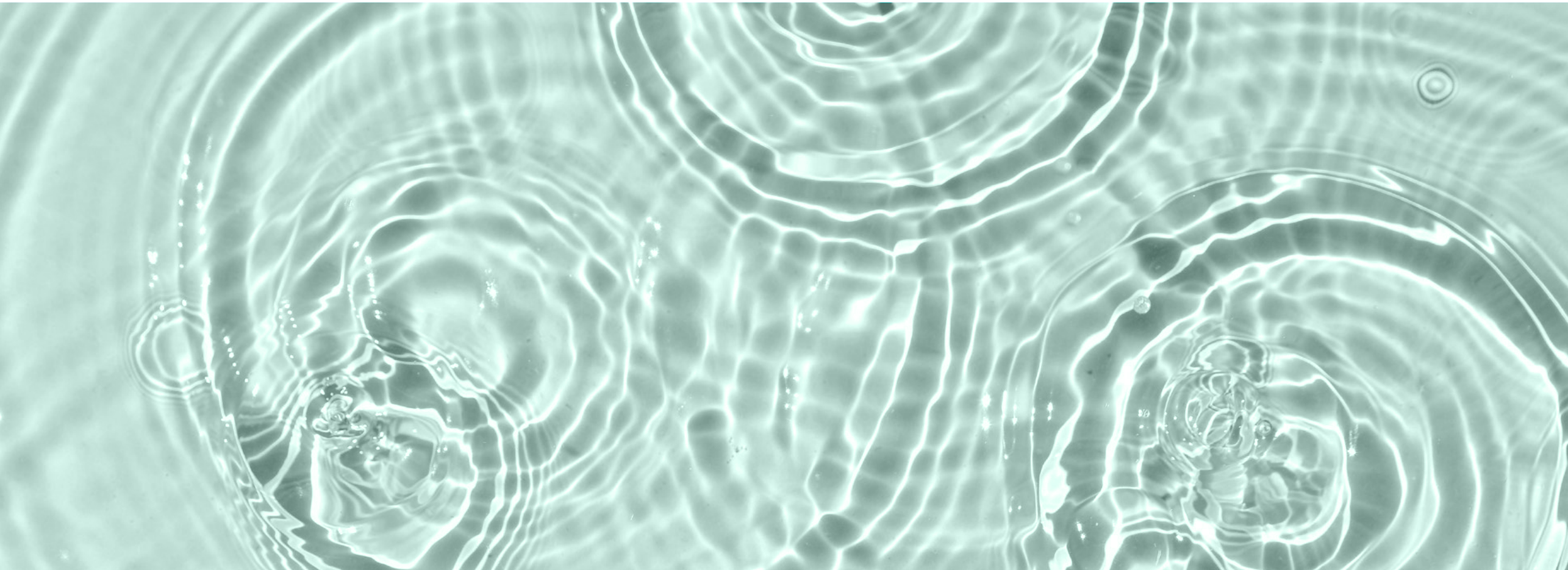
The application for default judgment against NG Property was dismissed.

First, Justice Williams held Bleecker Property's claim did not plead all of the elements needed to establish that the property payments were unfair preferences or unreasonable director-related transactions. Each of the pleadings were presented as a global allegation directed to all of the property payments, and did not address each of the transactions individually, which was not enough for the Court to be satisfied that the transactions were voidable. Accordingly, NG Property's failure to file a defence to the allegations did not give rise to an admission that the property payments were unfair preferences or unreasonable director-related transactions.

Second, for the Court to make a default judgment against NG Property, it would need to be satisfied that Bleecker Property was insolvent at the time the payments were made. If the Court found that Bleecker Property was insolvent in the default judgment application, but later came to a different conclusion in the contested application, this would create inconsistency between judgments and risk bringing the administration of justice into disrepute. The risk of inconsistency arises from the fact that the Bleecker Property had applied for default judgment against only one of several defendants, in circumstances where the insolvency allegation was common to its claims under s 588FF(1)(a) as against all of the defendants.

This case serves as a reminder that plaintiffs should ensure their pleadings are comprehensive as against each defendant and address all the necessary elements in order to prove the relevant transactions were voidable. Where there is a common issue across multiple claims involving multiple defendants, Courts will be reluctant to order default judgment against one of the defendants given that there is a risk that the judgment could be inconsistent with findings made at trial.

8. Pooling orders



Splash! Court grants pooling order

AUTHORS

Sam Johnson, Partner
Eve Thomson, Partner
Rachel Zeng, Associate

CASE & NAME CITATION

In the Matter of Atlas Gaming Holdings Pty Ltd [2023] VSC 91 per Osborne J

HYPERLINK

Read more

DATE OF JUDGMENT

2 March 2023

ISSUES

Pooling orders, ss 579E and 579G *Corporations Act*, ss 65-45 and 90-15 IPS

In an application for a pooling order, the Supreme Court of Victoria has highlighted the usefulness of section 579E of the *Corporations Act 2001* (Cth) (Act) in allowing a liquidator of multiple companies in a corporate group to:

- **save on the costs of conducting multiple administrations;**
- **deal with proceeds of sale where there are uncertainties as to ownership within the group of the assets sold;**
- **increase the distribution to secured and unsecured creditors; and**
- **eliminate difficulties with intercompany debts where there is confusion as to which company is liable.**

Background

Four companies constituted the Atlas Trading Group (the **Group**). The Group manufactured and sold gaming machines to the Australian market over a period of nine years.

In October 2021, the Group was placed into administration and unsuccessful attempts were made by directors and administrators to sell the business as a going concern.

In December 2021, the companies in the Group went into liquidation. On 24 December 2021, the major assets of the Group were sold for $4.115m and various other assets were sold for $1.965m in February 2022. The debts of unsecured creditors of the Group amounted to $4.4m.

The liquidators and the Group sought a pooling order under s 579E of the Act. Under s 579G(1)(d) of the Act, and ss 90-15 and 65-45 of the Insolvency Practice Schedule (Corporations), the liquidators also sought to be relieved from the requirement to establish separate bank accounts for each company and to lodge separate annual returns.

The evidence relied upon by the liquidators was to the effect that the Group carried on business by commonly utilising their collective property, staff, and capital in the business. The state of the records of the Group was so poor that the task of restructuring the separate accounting records of Group members was unlikely to be accurate and would be costly.

Issues

The key issues before the Court were:

- whether it was just and equitable for a pooling order to be made as required by s 597E(12); and
- whether such an order would materially disadvantage unsecured creditors, such that under s 579E(10) a pooling order must not be made.

Findings

Justice Osborne granted the pooling orders noting that the factors favouring pooling included:

- the four companies in the Group worked with each other;
- the difficulty in identifying the true owner of the business assets which gave rise to the bulk of the proceeds to be distributed from the Group in liquidation;
- in respect of one of the companies, it was incorporated by the Group for the purposes of pursuing the common business online;
- the intermingling of the business among the Group companies was strong, given the common operation of the business, utilisation of staff, management, shareholder funding and external funding;
- the intermingling was also reflected in the liquidators' difficulties in identifying the proceeds of the sale of business post appointment;
- the collapse of the Group was caused by the intercompany indebtedness and interoperation of the companies in the Group;
- the management team was common, including the directors; and
- the pooling would permit co-ordination of distribution of proceeds of asset sales across the Group for the benefit of unsecured creditors.

Justice Osborne was also satisfied that there was no material disadvantage to the unsecured creditors because:

- there was no fair way to distribute the asset sale proceeds given the lack of allocation basis in the Group's records, and the absence of any allocation in the sale documents themselves;
- the liquidators had considered various arbitrary distributions and analysed them;
- the pooling would not affect priority employee claims;
- no creditors opposed the orders sought;
- the cost of the liquidation would be significantly higher if a pooling order was not made; and
- it would cost a significant amount to separately determine which company was entitled to assets in the Group.

Ultimately, the relief granted to the Group was "necessary to enable the liquidators the best possible chance to distribute the proceeds of asset sales for the benefit of creditors, without incurring costs of maintaining separate liquidations, in particular, the arbitrary allocation of sale proceeds between the defendants".

A Court may be more willing to grant a pooling order under s 579E where each company within a group is a related body corporate, where their assets cannot be clearly identified, and where a pooling order would enable significant cost savings. The Court may favour granting a pooling order where there is no fair method for distributing the funds and assets of a Group, and where the refusal of such an order would negatively impact unsecured creditors.

Liquidators' application for pooling order goes swimmingly

AUTHORS

Sam Johnson, Partner
Emily Leggett, Associate

CASE & NAME CITATION

Hathway v Stacey Apartments Pty Ltd (In Liquidation), in the matter of Stacey Apartments Pty Ltd (In Liq) [2023] FCA 776

HYPERLINK

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DATE OF JUDGMENT

7 July 2023

ISSUES

Pooling orders, s 579E, ss 70-5 and 70-6 of the IPS

On application by the liquidators for a group of companies, the Federal Court granted pooling orders to allow for the companies' affairs to be pooled pursuant to section 579E of the *Corporations Act 2001* (Cth) (Act). Additionally, the Court also ordered that the liquidators may file a single joint administration return and end of administration return for all of the pooled companies. In his Honour's judgment, Justice Halley confirmed that:

- **using property to secure debt for the benefit of a business operated by a corporate group is sufficient to satisfy the requirements of s 579E(1) of the Act;**
- **pooling orders will not materially disadvantage a creditor if there are very low prospects that any meaningful amount of further dividends will be paid to creditors unless the pooling orders are made; and**
- **the ability of pooling orders to promote the efficient administration of companies, especially if without a pooling order the liquidators would remain unfunded, is an important factor favouring the granting of pooling orders.**

Background

The Merhis Group was a group of companies controlled by the Merhi family that operated a property development and construction business.

In July 2019, Jagot J of the Federal Court ordered that five Merhis Group companies **(First Pooled Companies**) that were in liquidation be treated as a pooled group for the purposes of s 579E of the Act. In September 2019, the liquidators for the First Pooled Companies entered into a settlement deed with other Merhis Group companies and members of the Merhi family (**Settlement Deed**). Relevantly, the Settlement Deed required that the other members of the Merhis Group and Merhi family pay the First Pooled Companies a settlement sum of $25 million.

The relevant members of the Merhis Group failed to make payment of $16,433,326 under the Settlement Deed and were consequently wound up, with the liquidators of the First Pooled Companies also appointed as liquidators for the defaulting Merhis Group companies. In May 2023, the liquidators brought an application under s 579E of the Act for all of the Merhis Group companies in liquidation to be treated as a pooled group.

Issues

The key issue for determination by the Court was whether an order should be made under s 579E of the Act for the Merhis Group companies to be treated as a pooled group. This required the Court to be satisfied that:

1. the proposed pooled group consisted of two or more companies that were being wound up;
2. the proposed pooled group was connected in some manner contemplated by s 579E(1) of the Act, such as being related bodies corporate, jointly liable for one or more debts or claims, jointly owning property, or carrying on a joint business using property owned by one or more members of the group;
3. it was just and equitable to make the pooling order in accordance with s 579E(12) of the Act; and
4. the Court was not precluded from making the order pursuant to s 579E(10) of the Act due to the proposed order causing material disadvantage to:
   (a) an eligible unsecured creditor that did not consent to the order; or
   (b) in the case of a members' voluntary winding up, a member of the company that was not a member of the group and did not consent to the order.

The Court also considered whether it was appropriate for only one joint annual administration return and end of administration return to be lodged for the relevant entitles under ss 70-5 and 70-6 of the *Insolvency Practical Schedule (Corporations)* (**IPS**).

Findings

The Court held the criteria under s 579E of the Act were satisfied and made the requested pooling order, as well as orders under ss 70-5 and 70-6 of the IPS.

In doing so, the Court was content that the criteria in s 579E(1)(b)(iv) of the Act were met as property owned by one or more of the defendants was used as security for facility agreements that were entered into in connection with the business carried out by the Merhis Group.

The Court was also satisfied that it was just and equitable to make the order in light of the factors outlined in s 579E(12) of the Act. In particular, the Court considered that the following factors supported the granting of pooling orders:

1. the paucity of records and funding available to the liquidators;
2. the enhanced administrative efficiencies and opportunities for investigation into potential recovery actions that would be facilitated by pooling orders; and
3. the intermingling of the defendants' activities and businesses, with the defendants holding themselves out to creditors as a group.

Section 579E(10) of the Act did not preclude the Court from making a pooling order as the largest unsecured creditor, the ATO, had no objection to the pooling order being made. Moreover, the Court found that it was unlikely that sufficient funds could be recovered to enable further dividend distributions and therefore the other creditors would not suffer material disadvantage.

Given the small number of judgments on s 579E of the Act, the decision is significant as it provides insight into the degree of association required between companies for a pooling order to be awarded. The decision also offers assurance to liquidators that the Court is willing to lend weight to factors such as liquidators' lack of funding when deciding pooling applications.

Full Federal Court provides guidance on criteria for granting of pooling orders

AUTHORS

Emily Barrett, Partner
Rachel Zeng, Associate

CASE & NAME CITATION

McMillan Investment Holdings Pty Ltd v Morgan [2023] FCAFC 9 per Yates, Beach and Markovic JJ

HYPERLINK

Read more

DATE OF JUDGMENT

16 February 2023

ISSUES

Pooling orders, s 579E *Corporations Act*

In an appeal against an order for the pooling of assets under section 579E(1) of the *Corporations Act 2001* (Cth) (Act), the Full Court of the Federal Court confirmed that s 579E(1)(b)(iv) should be interpreted as follows:

- **"particular property" must exist prior to a pooling order;**
- **the "use" of the particular property must be prior to or at the time of making of the pooling order; and**
- **the particular property needs to be in connection with a joint undertaking carried on prior to the making of the pooling order.**

Background

In 2013, Sydney Allen Printers Pty Ltd (**SAP**) and Sydney Allen Manufacturing Pty Ltd (in liq) (**SAM**) operated a colour printing business. SAM owned the equipment used in the business and SAP did all the printing.

In May 2014, McMillan Investment Holdings Pty Ltd (**MIH**) became a secured creditor by entering into a financing facility with SAP and SAM. MIH then appointed receivers to the companies. The assets and business operated by the companies were sold to Print Warehouse Australia Pty Limited (**Print Warehouse**) as a going concern for $1.3 million.

On 7 April 2016, administrators were appointed to SAP and liquidators appointed to SAM. Subsequently, SAP was voluntarily wound up.

On 4 May 2016, McMillan Group Services Pty Limited (**MGS**), an associated entity of with MIH, issued an invoice to Print Warehouse for $330,000 for services it provided. The liquidators of SAP and SAM alleged that the invoice was a sham as no services from MGS were provided to Print Warehouse.

In June 2018, ASIC deregistered SAM and all its property vested in ASIC.

SAM's liquidator sought pooling orders under s 579E of the Act so that the assets of SAP and SAM could be administered together. Concurrently, the liquidator sought an order for the reinstatement of SAM.

The primary judge granted the orders on the basis that SAP and SAM had a present chose in action to recover the $330,000, which was "particular property" within the meaning of s 579E(1)(b)(iv). The judge accepted that the "right to sue" was being used or would be used, if SAM was reinstated and a pooling order made, by both companies in connection with their undertaking carried on jointly to recover their assets.

MIH appealed the decision and SAP and SAM issued a Notice of Contention that the pooling order could be made on an additional ground under s 579E(1)(b)(ii) that SAP and SAM were jointly liable for debts at the time when the pooling order was made, on the basis that MIH was a creditor of both of them.

Johnson Winter Slattery | Insolvency & Restructuring Case Summaries 2023: **Pooling orders**

Issues

The key issues before the Full Court were whether:

- a right to the chose in action is "particular property that is or was used, or for use… in the connection with a business, scheme, or an undertaking carried on jointly by the companies" under s 579E(1)(b)(iv) of the Act; and
- SAP and SAM were jointly liable for debts at the time when the pooling order was made under s 579E(1)(b)(ii).

Findings

The Full Federal Court allowed the appeal.

Justice Yates (with Justice Beach agreeing) rejected the primary judge's reasoning, finding that:

- the chose in action, the alleged joint right to sue, was not particular property, as it was not used or in use at the time of the making of the pooling order;
- it was also not particular property in connection with a past or present joint undertaking, noting the chose in action only arose once the business was sold; and
- the recovery of money owed was not a joint undertaking of SAP and SAM with no evidence to suggest that it was, and no such joint undertaking could have been undertaken after SAM's deregistration.

Regarding the Notice of Contention, the Court held that SAP and SAM were not jointly liable for debts at the time the pooling order was made. This was because there was no successful appeal of the liquidator's rejection of MIH's proof of debt in the liquidation of SAP. Given this, the liquidator's decision stood and MIH was not a creditor of SAP.

Justice Markovic dissented, finding that:

- the chose in action was in use simply by being held by each of SAP and SAM;
- the chose in action was in connection with an undertaking being the business previously undertaken by SAP and SAM, the nature of which had changed upon the sale (adopting the wide meaning of "carrying on a business in Australia" found in authorities for sequestration orders); and
- the deregistration of SAM did not disrupt the carrying on of the undertaking, noting that once the order for reinstatement was made, the effect was that SAM was taken to have continued in existence as if it had not been deregistered.

This decision is a guide to insolvency practitioners on the interpretation of s 579E(1)(b)(iv) of the Act and the meaning of 'particular property', the temporal element required by 'used' and 'is used', and the meaning of 'undertaking'. It also provides a concise summary of the principles associated with the adjudication of proofs of debt and the effect of the decision of a liquidator to reject a proof of debt on a claimant's status as a creditor.

Note: On 15 September 2023, the High Court granted special leave to the liquidator to appeal the Full Court's decision. The appeal is anticipated to be heard in early 2024.

9. Security interests

Section 588FM order not required to avoid vesting for post-appointment security interests

AUTHORS

Emily Barrett, Partner
Melissa Liu, Senior Associate
Fergus Miller, Law Graduate

CASE & NAME CITATION

Revroof Pty Ltd (Recs and Mgrs Apptd) (Admins Apptd) v Taminga Street Investments Pty Ltd [2023] FCA 543 per Jackman J

HYPERLINK

Read more

DATE OF JUDGMENT

19 May 2023

ISSUES

Security interests, ss 588 FL and 588 FM *Corporations Act*, registration of security interests after the "critical time"

This case continues a recent line of single-judge Federal Court authorities to the effect that an order under section 588FM of the *Corporations Act 2001* (Cth) (Act) is not required to avoid the vesting of security interests granted after the "critical time", being the date which the company first enters external administration. In his judgment, Justice Jackman noted:

- **The reasoning of Brereton JA in *Re Antqip Hire* [2021] NSWSC 1122 (Antqip), which commenced this line of authorities, is compelling and results in a harmonious reading of the related provisions of the Act.**
- **Nevertheless, this reasoning goes against a substantial body of previous Federal Court authorities, both previously decided cases and cases decided after *Antqip* where, "regrettably", the Court was not referred to Justice of Appeal Brereton's (Brereton JA) judgment.**
- **Although Justice Jackman agreed with Brereton's JA reading of s 588FM, there was no intermediate appellate authority confirming that it was the correct view. Therefore, his Honour made orders under s 588FM "to the extent necessary", which in the Court's view was not at all.**

Background

On 6 December 2023, the Revroof Group, a number of related companies involved in the manufacture of steel-based products, entered voluntary administration. Several weeks later, on 23 December 2023, Earlypay, a secured lender to the Revroof Group of companies, appointed Receivers to the Group.

When the Receivers were appointed, they refinanced several facilities between Earlypay and the Revroof Group for the purpose of funding the costs of the Receivership. Revroof granted security interests to Earlypay in respect of these facilities, which were securities registered on the PPSR on 24 December 2023. Notably, this was after the critical date for the purposes of s 588FL, being 6 December 2023, when the Revroof Group entered voluntary administration.

The Receivers, represented by JWS, then approached the Court for, amongst other things, an order under s 588FM to prevent the security interests from vesting in the companies.

Issues

The key issue before the Court was whether, on the correct interpretation of s 588FL of the Act, the Receivers were required to make an application under s 588FM to avoid vesting of post-appointment security interests.

Findings

Justice Jackman agreed with the reasoning previously expounded by Brereton JA in *Re Antqip Hire* [2021] NSWSC 1122 and a line of authorities following that decision that held that s 588FL did not apply to security interests granted after the critical date. In that case Brereton JA distinguished between the "granting" of a security interest and when a security interest "arises", which is the language used in s 588FL. He held that s 588FL only applies to security interests which were granted before the critical time but which attach after the critical time.

Because of this distinction between "granted" and "arises", Justice Jackman agreed that the section does not affect security interests granted by insolvency practitioners after the critical date, being when the company first enters external administration. This is because they are both granted and attach to collateral after the critical date.

Justice Jackman and Brereton JA preferred this view because it results in a more harmonious operation of s 588FL with other provisions of the Act dealing with the disposition of property after the commencement of an external administration, as well as provisions of the *Personal Property Securities Act 2009* (Cth) dealing with the vesting of unperfected security interests when a company enters external administration.

For these reasons, Justice Jackman expressed his agreement with Brereton JA and subsequent authorities following *Re Antqip Hire*. However, his Honour noted that the *Antqip* line of authorities were all single-judge decisions and inconsistent with a previous line of Federal Court authority. Therefore, Justice Jackman still made orders under s 588FM to avoid vesting of Earlypay's security interests, but only "to the extent necessary." Justice Jackman made these orders out of an abundance of caution, noting that in his opinion the phrasing "to the extent necessary" should be "not at all".

The *Revroof* decision is another in a line of authorities supporting the proposition that security interests granted after the critical date do not vest under s 588FL and may reduce the administrative burden for insolvency practitioners by removing the need to make a Court application for relief under s 588FM.

However, as at the date of publication, there have not been any appellate judgments on whether this new line of authority is correct. Insolvency practitioners should still, out of an abundance of caution, approach the Court for orders "to the extent necessary" under s 588FM to avoid the vesting of post-appointment security interests.

Court of Appeal finds that secured creditors, not employee creditors, take priority over R&D tax refunds

AUTHORS

Pravin Aathreya, Partner
Karen Zhu, Law Graduate

CASE & NAME CITATION

Resilient Investment Group Pty Ltd v Barnet and Hogkinson as liquidators of Spitfire Corporation Limited (in liq) [2023] NSWCA 118

HYPERLINK

Read more

DATE OF JUDGMENT

30 May 2023

ISSUES

Creditor priority, s 340 *Personal Property Securities Act*, s 561 *Corporations Act*, research and development tax refunds and circulating security interests

In the liquidations of Spitfire Corporation Limited (Spitfire Corporation) and its related entity Aspirio Pty Ltd (Aspirio), the NSW Court of Appeal considered the priority between competing claims of secured creditors and employee creditors over Commonwealth Research and Development Tax Refunds (R&D Refunds) under section 561 of the *Corporations Act 2001* (Cth) (Act).

The Court held the R&D Refunds were not circulating assets and the secured creditor had priority over the R&D Refunds because:

- **the R&D Refunds were not an 'account' for the purposes of s 340(5)(a) of the *Personal Property Securities Act 2009* (Cth) (PPSA); and**
- **the R&D Refunds did not arise from Spitfire Corporation providing services 'in the ordinary course of a business providing services of that kind' under s 340(5)(a), where Spitfire Corporation provided financial platform services to its customers.**

Background

Spitfire Corporation's business was developing and acquiring wealth management and share analysis technology platforms. As part of that business, Spitfire Corporation engaged in research and development activities that qualified it to receive a research and development tax offset from the Australian Tax Office (**ATO**) at the end of each financial year.

After Spitfire Corporation's winding up commenced, the Liquidators submitted tax returns that allowed it to receive approximately $2 million in R&D Refunds from the ATO over two financial years (FY2019 and FY2020) for research activities.

Main issue

The key question for the Court of Appeal was whether the secured creditor or the subrogated employee creditor had priority over the R&D Refunds under s 561 of the Act. If the R&D Refunds were 'circulating assets' under s 340(1)(a) of the PPSA, the employee creditor would have priority. Otherwise, if the R&D Refunds were non-circulating assets, the secured creditor would have priority.

The determination of this issue was dependent on resolution of the question of whether the R&D Refunds were 'personal property' under s 340(1)(a) of the PPSA upon the Liquidators' appointment date (**Appointment Date**). One type of personal property is an 'account' arising from providing services 'in the ordinary course of a business providing services of that kind' under s 340(5)(a) of the PPSA.

Johnson Winter Slattery | Insolvency & Restructuring Case Summaries 2023: **Security interests**

The Court of Appeal's findings

Whether the R&D Refunds were an 'account'

The Court first determined whether R&D Refunds were an 'account' under s 340(5)(a) of the PPSA on the Appointment Date, which depended on whether the ATO had a 'monetary obligation' to pay the tax refund at the end of the relevant financial year.

The Court held that a taxpayer cannot bring an action to recover excess over tax liability until he or she submits the tax return for the relevant financial year. Consequently, Spitfire Corporation did not have a chose in action against the ATO at the end of FY2019 and FY2020 for the R&D Refunds, and the R&D Refunds were therefore not an 'account' under s 340(5)(a) and not 'personal property' captured by s 340(1)(a) of the PPSA.

The conclusion that the R&D Refunds were not an 'account' was decisive in determining that the R&D Refunds were not a circulating asset.

Whether the R&D Refunds 'arose from' providing services

Notwithstanding the above conclusion, the Court also considered whether the R&D Refunds 'arose from providing services in the ordinary course of a business providing services of that kind' under s 340(5)(a).

The Court held that a causal connection was required between the account (namely, the monetary obligation) and 'providing services' in the requisite sense of 'the ordinary course of a business providing services of that kind'.

Spitfire Corporation's service to its end customers was the provision of financial platform services for wealth management and private banking activities. However, the Court held that the entitlement to the R&D Refunds arose from undertaking research activities, and not the provision of financial platform services to customers. In response to the Commonwealth's argument that the R&D Refunds arose from research activities undertaken by the Spitfire group for the ultimate benefit of the group's external customers, the Court found that it was erroneous to equate experimental R&D activities whose outcome could not be known in advance and which were conducted to acquire new knowledge, with the provision of services in the ordinary course of a business of providing intra-group services of paying wages of staff engaged in research activities. Even if it was accepted that the research activity's purpose was to advance customer service delivery, the Court held that this did not satisfy the causal requirement in s 340(5)(a). Consequently, the R&D Refunds did not arise in the ordinary course of business of providing financial platform services and did not constitute a circulating asset.

A tax refund entitlement is not necessarily a circulating asset for the purposes of s 340 of the PPSA, particularly where the tax return has not yet been lodged or where the refund is not directly connected with the services provided to customers.

The decision is significant for secured creditors, financiers, employees and liquidators of failed startups or companies, particularly where the key asset is a potential entitlement to R&D tax refunds and secured parties and a priority employee creditor are competing for priority to proceeds of R&D tax refunds under s 561 of the Act.

Orders extending critical time for registration of security interest granted "to the extent necessary"

AUTHORS

Pravin Aathreya, Partner
Emma McIntyre, Law Graduate

CASE & NAME CITATION

Hutton in the matter of Caydon Flemington Pty Ltd (Receivers and Manages appointed) (In Liq) [2023] FCA 796 per Anderson J

HYPERLINK

Read more

DATE OF JUDGMENT

11 July 2023

ISSUES

Security interests, receivers and ss 588FL and 588 FM *Corporations Act*

The Court considered whether it should grant an order seeking to extend the 'critical time' for registration of security interests. In the judgment, Justice Anderson considered two approaches to the issue and ultimately confirmed that while the relief sought was not strictly necessary, there was utility in making an order under s 588FM of the Corporations Act (Cth) (Act) "to the extent necessary".

Background

On 29 July 2022, receivers were appointed to various companies within the Caydon Property Group (**Companies**), four days after the appointment of liquidators. Since their appointment, the receivers had been carrying on the business of the Companies.

The receivers were seeking to arrange the sale of apartments, commercial premises and retail premises owned by the Companies (**Residual Stock**). If the sale of the residential apartments, scheduled for December 2024, was successful, the amounts owing under the Companies' current financing arrangements were set to be repaid by September 2024. However, from 31 July 2023, the lenders would be entitled to charge default interest rates and enforce their rights over the assets of the Companies if the Companies failed to make the outstanding payments. The receivers consequently determined that alternative finance needed to be obtained on better economic terms.

On 1 November 2022, the lenders agreed upon the New Residual Stock Facilities Lenders term sheet. A key term of this agreement was for the Companies to enter into a general security deed (**Receivership General Security Deed**), which allowed for cross-collateralisation of the security to be granted by the Companies under the proposed refinancing arrangements. This offered various benefits to the Companies, including more favourable interest rates and a revised deadline for payment, being 31 December 2024, which aligned with the anticipated date for sale of the Residual Stock. The security interests arising from the Receivership General Security Deed were registered on the Personal Property Securities Register (**PPSR**) on 26 June 2023.

Issues

The receivers sought an order under s 588FM(1) of the Act seeking to extend the 'critical time' for registration of the security interests for the purpose of s 588FL(2)(b) of the Act. The application was motivated by the receivers' concern that in the absence of such an order, the security granted by the Companies under the Receivership General Security Deed would automatically vest in the Companies under s 588FL of the Act, irrespective of the registration of the security interests.

Findings

Section 588FL of the Act provides that a security interest granted by a company which is being wound up or is subject to administration, will vest in the company, if it is not registered within six months of the 'critical time', or within 20 business days after the security agreement comes into force. In this case, the 'critical time' was the date that the liquidators were appointed, being 25 June 2022.

The security interests were granted on 19 June 2023, being the date the Companies entered into the Receivership General Security Deed. While registration of the security interests occurred on 26 June 2023, which was within 20 business days of the date that the security interests were granted, the critical time was the date that the Liquidators were appointed. This meant that the security interests were granted after the critical time.

The receivers' application represented the third recent Federal Court case featuring a s 588FM extension request, with the other decisions being *Re Cubic Interiors and Re Revroof Pty Ltd* (in which JWS acted for the receivers and are summarised in our separate case summaries contained in this publication).

In considering this issue, Justice Anderson acknowledged the uncertainty of the operation of s 588FL in these circumstances, with specific reference to the *Cubic Interiors* decision. In that case, Justice Cheeseman identified the following competing approaches arising from prior decisions of the Federal Court and the NSW Supreme Court:

(a) a security interest that arises after the critical time may be covered by s 588FL(2), on the basis that no distinction is to be drawn between a security interest being 'granted' and a security 'arising'. Under this approach, a Court order under s 588FM would be required; or

(b) security interests that are granted after the critical time are not covered by s 588FL(2) because there is a distinction between the use of 'granted' in s 588FL(1)(b) and 'arises' in s 588FL(2)(a). Accordingly, only a security interest which 'arises' after the critical time will be covered by s 588FL(2) if it was granted at or before the critical time.

The receivers argued that the second approach (as endorsed in *Revroof* and *Cubic Interiors*) was to be preferred. In response, the Court found it unnecessary to express a concluded view as to which approach was preferable, but noted that the reasoning of JA Brereton in *Re Antqip* provided compelling support for the second approach. The Court agreed with the approach taken by both Justice Cheeseman in *Cubic Interiors* and Justice Jackman in *Re Revroof* that in the absence of intermediate appellate authority on the point, there is utility in making an order under s 588FM of the Act which is expressed to be made 'to the extent necessary'. The Court was satisfied that such an order was just and equitable, as:

- no creditor of the Companies would be prejudiced by the preservation of the security interests granted by the Receivership General Security Deed;
- the Court accepted the receivers' evidence that the Receivership General Security Deed was in the best interests of the Companies and the Caydon Group as a whole, which by extension was beneficial to the Companies' creditors; and
- the property – the subject of the security interests granted under the Receivership General Security Deed–was the same property over which security was granted under the previous financing arrangements, thus effectively replacing the security interest currently registered on the PPSR in respect of facilities more favourable to the Companies.

Given the current absence of appellate authority, the decision confirms that secured creditors who obtain the grant of security interests after commencement of the borrower's external administration should continue to seek an order 'to the extent necessary' under s 588FM of the Act to preserve those security interests.

No PPSA security interest in security for costs

AUTHORS

Pravin Aathreya, Partner
Sofia Arlotta, Associate

CASE & NAME CITATION

Laurus Group Pty Ltd (admin apptd) v Mitsui & Co (Australia) Ltd (No 2) [2023] VSC 412 per Osborne J

HYPERLINK

Read more

DATE OF JUDGMENT

20 July 2023

ISSUES

Security for costs, security interests, ss 8, 12 and 267 *Personal Properties Securities Act*

The Supreme Court of Victoria held that moneys paid into Court pursuant to a security for costs order, even when made by the consent of the parties, did not give rise to a security interest under section 12(1) of the *Personal Property Securities Act 2009* (Cth) (PPSA). This decision illustrates:

- **an agreement to submit consent orders to the Court does not constitute a transaction that provides for a security interest;**
- **a "transaction" for the purpose of s 12(1) of the PPSA must involve an agreement between the parties that contains terms regulating the provision of the relevant security; and**
- **it may be possible for an interest in property to fall within both s 8(1) and s 12(1) of the PPSA.**

Background

In December 2019, Laurus Group Pty Ltd (**Laurus**) commenced proceedings against Mitsui & Co (Australia) Ltd (**Mitsui**) and Mitsui brought a counterclaim. During the proceedings, Laurus paid $100,000 into Court (**Funds**) pursuant to a security for costs order made with the parties' consent (**Order**).

In June 2022, the Court ruled in favour of Mitsui's counterclaim and ordered Laurus pay the costs of the proceedings.

Before costs were finalised, an administrator was appointed to Laurus. The Administrator applied to the Court seeking that the Funds be paid to Laurus on the basis that the Order gave rise to an unperfected security interest as at the date of the Administrator's appointment and thereby vested under s 267 of the PPSA.

In response, Mitsui argued that when the Funds were paid into Court, Mitsui acquired an interest of an equitable lien or charge arising from the operation of the general law within the meaning of s 8(1)(c), meaning the PPSA would not apply.

The Administrator conceded that Mitsui's interest in the Funds might be a lien or equitable charge, but contended that this did not prevent that interest from also being a security interest within the meaning of s 12, in which case s 12 prevails.

Findings

The Court held that Mitsui acquired an interest in the Funds in the nature of an equitable lien or charge which arose by reason of the general law and thereby fell within the scope of s 8(1)(c) of the PPSA.

The Court then went on to assume that an interest in property can fall within both ss 8(1)(c) and s 12(1), which necessitated consideration of whether the parties' agreement that culminated in the consent order (**the Agreement**) gave rise to a "transaction" for the purpose of s 12(1).

In considering this question, the Court noted that "transaction" is not defined in the PPSA but Courts generally accept that a "transaction" involves conduct giving rise to the consensual creation of rights between parties, for example, entering into an agreement.

The Court considered whether the Agreement on its terms gave rise to a security interest. It concluded the Agreement did not do so because:

(a) in giving effect to consent orders, a Court must determine whether such orders submitted are appropriate. As the making of the Order was an independent act of judicial discretion, it was the Order that gave rise to the rights and obligations surrounding the security payment, and not the Agreement;

(b) payment of the Funds into Court, out of Court and the consequence of non-payment were determined by the Order or would be determined by the Court, and not by the Agreement; and

(c) the Agreement was limited to the execution of proposed consent orders and their provision to the Court. The Agreement did not include an obligation to pay the Funds into Court or any grant by Laurus of an interest over the Funds in favour of Mitsui.

Ultimately, the Court found against the Administrator and ordered the Funds be paid to Mitsui.

Insolvency practitioners cannot rely on s 267 of the PPSA to recover funds paid into Court by a company prior to commencement of its external administration pursuant to a security for costs order, particularly in the absence of a private commercial agreement between the parties under which a litigant agrees to provide security through steps such as placement of funds in a solicitors' trust account or an interest-bearing account.

10. Remuneration of external administrators

Court approves recovery of general liquidation expenses from trust assets

AUTHORS

Sam Johnson, Partner

Stephanie Ritchie, Associate

CASE & NAME CITATION

Lawrence, Ozfin Tech Pty Ltd (in liq) v AGM Markets Pty Ltd (in liq) [2022] FCA 1478

HYPERLINK

Read more

DATE OF JUDGMENT

9 December 2022

ISSUES

Remuneration of external administrators, trust assets, constructive trusts, ASIC, declaratory relief, s 90-15 IPS, s 918H *Corporations Act* and reg 7.8.03 *Corporations Regulations*

***In Lawrence, Ozfin Tech Pty Ltd (in liq) v AGM Markets Pty Ltd (In Liq)* the liquidators of AGM Markets Pty Ltd (AGM), OT Markets Pty Ltd (OT) and Ozfin Tech (Ozfin) (collectively, the entities) were successful in obtaining directions and declarations regarding the allocation and distribution of statutory trust funds and other funds said to be held under constructive trusts for the investors, including obtaining payment from trust assets of their "general liquidation" remuneration and expenses (i.e. remuneration and expenses which did not directly relate to trust assets). ASIC intervened in the application primarily to oppose the proposed distributions from the trust funds, which included deductions for general liquidation remuneration and expenses.**

The decision of Justice Beach provides helpful guidance as to when a liquidator may recover general liquidation remuneration and expenses from trust assets. His Honour confirmed that:

- **trust assets can be used to satisfy a liquidator's remuneration and expenses incurred in the liquidation when no other assets are available; and**
- **that will be particularly so in circumstances where a company acted as corporate trustee to a significant extent (as opposed to acting exclusively as a trustee in all aspects);**
- **there is a public interest in insolvent companies, including trustee companies, being properly administered which justifies the liquidators being entitled to their general liquidation remuneration and expenses being paid from the trust assets; and**
- **an institutional constructive trust will not arise automatically because of misconduct; it requires the exercise of judicial discretion which was denied in this case partly because it would have denied the liquidators their general liquidation remuneration and expenses.**

Background

This application arose from related proceedings brought by ASIC against the entities, who were engaged in the promotion of derivative instruments to Australian investors. In the related proceedings, various contraventions of the *Corporations Act 2001* (Cth) (**Act**) were established, and, as a result, AGM's Australian Financial Services Licence (**AFSL**) was cancelled, pecuniary penalties of $75 million were ordered and the entities were placed into liquidation.

The entities provided a web-based trading platform to retail clients. OT and Ozfin were authorised to provide financial services on behalf of AGM. AGM held a number of accounts – in particular, it held accounts for the benefit of clients of OT and Ozfin. Justice Beach considered these accounts to be "client money accounts", which imposed a statutory trust over the funds held by AGM in accordance with section 918H of the Act and reg 7.8.03 of the *Corporations Regulations 2001* (Cth).

The liquidators of the entities applied for directions and declarations concerning the allocation and distribution of the statutory trust funds and other trust funds said to be held under constructive trusts for the investors.

ASIC intervened in the applications and was primarily concerned that the liquidators ought only be able to recover their remuneration and expenses from the trust funds to the extent that the costs were attributable to the administration of the trust assets. ASIC's position was that, in respect of the non-statutory trust assets, an institutional constructive trust arose in favour of the investors such that the liquidators were not entitled to be paid their general liquidation remuneration and expenses from the non-statutory trust funds. ASIC argued that an institutional constructive trust arose because of misconduct that had been identified in an earlier judgement of Justice Beach.

Issues

The key issues before the Court were whether:

- the constructive trust that was imposed on the non-statutory trust funds was institutional (i.e. arising automatically at the time of the established misconduct) or remedial (i.e. arising retrospectively as a matter of judicial discretion); and
- if the constructive trust was found to be institutional, whether the liquidators could use the funds in the constructive trusts to pay their general liquidation remuneration and expenses.

Findings

In rejecting ASIC's submissions, the Court confirmed that the existence of an institutional constructive trust was a matter of discretion for the Court. In this case, the Court found that the more appropriate course was the imposition of a remedial constructive trust which meant that the liquidators could have their general liquidation remuneration and costs paid out of trust assets. That was because the remedial constructive trust only arose at the time of the Court orders, meaning it was subject to the liquidators' pre-existing entitlement to their general liquidation remuneration and costs.

Having found that the funds were subject to a remedial constructive trust, Justice Beach recognised that there was no general principle which prevents general liquidation remuneration and expenses being paid from trust assets and it was a matter for the Court's discretion. In reaching the view that it was appropriate in this case for the liquidators' general liquidation remuneration and expenses to be paid from the trust assets, Justice Beach found that the facts before him were analogous to those in the matter of *Halifax Investment Services Pty Ltd (in liq) (No 6)* where the Court focused on whether the trustee had acted as a trustee to a very significant extent (as opposed to acting solely as a trustee).

The Court also relied upon the salvage principle arising out of the decision in *Re Universal Distributing Company Limited (in liq)* and other cases which established general principles permitting the payment of general liquidation remuneration and expenses from trust assets in circumstances where there are no other assets from which the general liquidation remuneration and expenses can be paid. The Court found that the liquidators' position was further bolstered by the public interest in insolvent companies, including trustee companies, being properly administered.

This decision provides useful guidance for liquidators seeking to have their general liquidation remuneration and expenses paid out of trust assets. Further, the decision resolves, to some extent, the uncertainty arising out of a line of authority which pointed towards a more restrictive approach by the Courts when considering whether to permit liquidators to recover general liquidation remuneration and expenses from trust assets.

Priority to circulating assets: does a liquidators' remuneration or employee priority creditors rank first?

AUTHORS

Sam Johnson, Partner
Emily Barrett, Partner
William Honeysett, Associate

CASE & NAME CITATION

Commonwealth of Australia v Tonks [2023] NSWCA 285

HYPERLINK

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DATE OF JUDGMENT

30 November 2023

ISSUES

Creditor priority, circulating assets, remuneration of external administrators, ss 556 and 561 *Corporations Act*, s 90-15 IPS

In this decision, the Court of Appeal of the Supreme Court of NSW considered the interplay between the priority regimes under sections 556 and 561 of the *Corporations Act 2001 (*Cth) (Act) in resolving a contest between a liquidator's claim for remuneration and the entitlements of former employees to be paid out of circulating assets.

The Court of Appeal confirmed the first instance decision of Justice Black in finding that:

- **s 561 applies only in respect of a contest over access to circulating assets as between a secured creditor (with security over the circulating assets) and priority employee creditors and only where there is an insufficiency of circulating assets to satisfy both sets of creditors;**
- **in those circumstances, s 561 of the Act will give priority creditors an entitlement to be paid ahead of secured creditors out of the circulating asset pool;**
- **however, where s 561 is not engaged, s 556 of the Act will provide the appropriate priority regime to deal with contests between a liquidator's remuneration and expenses and priority employee creditor claims**
- **accordingly, s 561 will not override the priority regime set out in s 556 of the Act, which sets out the specific priority positon as to unsecured creditors in the winding up of a company.**

The Court also provided guidance as to when a liquidator is to determine when s 561 applies and at what point a company's assets are characterised as circulating assets.

Background

On 18 March 2019, BCA National Training Group Pty Ltd (**Company**) by a resolution of its members appointed a liquidator, Mr Bradley Tonks (**Liquidator**). Westpac held a security interest over all the Company's property. The Liquidator realised $168,709.91 from the Company's non-circulating assets and paid out the company's debt to Westpac from those funds. The Liquidator then realised $550,344.64 from the Company's circulating assets. The claims of the priority creditors, including the Department of Employment and Workplace Relations on behalf of the Commonwealth of Australia (**Commonwealth**), amounted to $480,293.65. The Liquidator's remuneration, costs and expenses amounted to $570,613.44.

At first instance, the Liquidator obtained a direction pursuant to s 90-15 of the Insolvency Practice Schedule in Sch 2 to the Act that authorised distribution of the Company's circulating assets in accordance with the order of priorities set out in s 556 of the Act. The Court agreed with the Liquidator that his remuneration, costs and expenses took priority over the Commonwealth's claim to pay out entitlements of the Company's former employees according to s 556 of the Act.

The Commonwealth had sought to rely on s 561 of the Act, which provides that if the property of a company available for payment of creditors other than secured creditors is insufficient to meet payments of certain debts, employees' claims have priority over circulating security interests.

On appeal, the Commonwealth submitted that the purpose of s 561 of the Act was to entitle employees to be paid out of circulating assets in circumstances where their entitlements could not be met from the free assets of the company. On that basis, the Liquidator's claim did not rank ahead. Further questions that arose before the Court regarded the operation of s 561 of the Act, namely, as to when it applies (whether at the appointment date or when the liquidator determines that the free assets are insufficient to meet the priority employee entitlements) and at what point company assets are characterised as circulating assets.

Issues

The key issue before the Court of Appeal was whether ss 556 or 561 of the Act applied to determine the priority dispute between the Liquidator's claim for remuneration and expenses and the priority employee creditor claims.

Findings

The Court of Appeal (in upholding the primary judge's decision) held that:

1. s 561 of the Act provides a priority regime which deals with contests between secured creditors and priority employee creditors with respect to a company's circulating assets where the free assets of a company are insufficient to satisfy the priority creditor claims; and
2. s 561 of the Act does not apply unless there is a contest for payment out of a company's circulating assets between a secured creditor and a priority creditor.

Therefore, s 561 of the Act did not apply on the facts as (following discharge of the debt to Westpac) there was no secured creditor claim that competed with priority employee creditor claims.

The Court also held that the insufficiency threshold in s 561 of the Act would usually only be determinable after a liquidator had been appointed and was in a position to determine that the free assets of the company were insufficient to meet the payments of priority creditors. Further, assets which are characterised as circulating at the date of appointment of the liquidator will retain that character for the purpose of s 561 of the Act as long as the section otherwise applies.

In a decision that will be welcomed by liquidators, the Court of Appeal has made it clear that the operation of s 561 of the Act is contingent in nature. The section will only apply where there is a contest between secured creditors and priority employee creditors for the proceeds of circulating assets. Its application is assessable at the time when there is an insufficiency of free assets to satisfy priority employee creditors. The decision confirms that where a secured creditor has been paid out of fixed assets so that there is no competing secured creditor claim, s 556 of the Act provides the sole regime for dealing with contests between a liquidator's claim for remuneration and expenses and priority employee creditor claims.

The standard of information required to determine a receiver's remuneration

AUTHORS

Pravin Aathreya, Partner

Danya Balakrishnan, Seasonal Clerk

CASE & NAME CITATION

Palmer & Anor v Palmer & Ors [2023] QSC 278

HYPERLINK

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DATE OF JUDGMENT

8 December 2023

ISSUES

Receivers, remuneration of external administrators

The Supreme Court of Queensland considered the extent of information required to determine whether a receiver's remuneration was reasonable.

A partnership between Keith and Garry Palmer was to be wound up by Court order. Receivers were appointed by the Court over the partnership property because the relationship between the partners had become hostile. The receivers were partners at Worrells Solvency & Forensic Accountants. The partnership owned and operated cattle property and the Royal Hotel at Mundubbera. It also owned residential property and shares. The receivers achieved gross realisations of those assets exceeding $26 million, of which $19 million had already been distributed to the partners at the time of the receivers' application to finalise the receivership, including an order approving their remuneration of approximately $1.15 million.

Mr Garry Palmer challenged the receivers' remuneration claim on the grounds that the receivers had not provided sufficient information to the Court and concerns as to the necessity of that work and the reasonableness of the charges incurred. Mr Palmer requested access to Worrells' Workbench electronic file management system so that KPMG could access the system on his behalf and analyse it. The receivers denied access, claiming that Workbench was proprietary software which contained confidential, privileged and commercially sensitive information.

In May 2021, the Court dismissed Mr Palmer's application for orders permitting access to Workbench. Instead, Worrells prepared a Workstream Summary Report (**WSR**) which summarised the work undertaken based upon the file notes in Workbench but did not identify when tasks were done, who performed tasks, the rate that work was charged at, the time taken to complete the work or the total charge for the work.

Issues

The key issues before the Court are set out below.

1. Had the receivers provided sufficient information and material to enable the Court to assess their claim?
2. Was the work undertaken by the receivers necessary and were the charges incurred reasonable?
3. What amount should the Court fix for the receivers' remuneration?

Findings

The Supreme Court referred to the established principles for evaluating the reasonableness of remuneration claimed by a receiver, including the need for the Court to be persuaded of the proportionality between the work done and the remuneration claimed for it, given the nature, complexity and value of the work undertaken.

The Court accepted the receivers' argument that the overriding principle that sufficient information must be provided to the Court to enable it to perform its function did not automatically require the receivers to provide the Court with a document analogous to a bill of costs; each case depends on its own circumstances.

In finding that the material provided to the Court was sufficient to enable determination of the reasonableness of the claimed remuneration, the Court found that the WSR was not to be considered in isolation. When considered with reports which collated all the time cost entries recorded in relation to the receivership, there was enough information to make an assessment of the necessity and reasonableness of the work performed and charges incurred.

The Court also made specific findings regarding the reasonableness of the work undertaken by the receivers, including the following:

- The decision to continue trading on a cattle station was sensible and yielded sale proceeds far in excess of the associated trading costs. The decision to continue trading at the Royal Hotel was logical and supported by advice from the selling agent. Continuing trading was likely to achieve a higher return for the partners. Additional costs incurred during delays in settlement were necessary because these delays were caused by external factors and so the receivers were contractually obliged to continue trading.
- Substantial work was undertaken in collating and preparing the Court application, including by reason of Mr Palmer's repeated requests for further information, as well as Mr Palmer's unsuccessful application to seek access to Workbench and the enduring acrimony between the partners.
- Obtaining the details of a domestic violence order in place between the partners was necessary to ensure that the receivers did not breach the order in the discharge of their duties.
- Time charged for updating file notes in Workbench was not unnecessary or unreasonable because in most cases the time charged for this included time for other work as well.
- The WSR was necessary because it allowed the receivers to record details of the work being performed and the accompanying charges. Although there was some duplication of work, this was necessary because Mr Palmer insisted on additional information and Worrells did not wish to grant Mr Palmer access to Workbench.
- The decision to undertake work relating to seeking a variation of the appointment orders in order to avoid a dispute with CommSec was a reasonable commercial decision.
- It was reasonable to charge for 'attempted' work, namely, work which may not have been achieved at first, through no fault on the part of the receivers.
- Given the value of the assets to be realised and the hostility between the partners, it was necessary that the receivers provide regular, detailed updates, including projections as to likely returns.

The Court found there was proportionality between fees charged and the size, value and nature of the property the subject of the receivership, and the nature, value and complexity of services provided.

This judgment is a useful distillation of the key principles relevant to determining whether charges incurred by receivers are reasonable and necessary, as well as a helpful guide for the practical application of those principles.

11. Duties and independence

Liquidators removed over $69 million demand: when is a demand an abuse of process?

AUTHORS

Pravin Aathreya, Partner
Karen Zhu, Associate

CASE & NAME CITATION

Gadsden v MacKinnon (Liquidator), in the matter of Allibi Pty Ltd (in liq) [2023] FCA 647 per O'Callaghan J

HYPERLINK

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DATE OF JUDGMENT

15 June 2023

ISSUES

Removal of liquidators, abuse of process, ss 90-10, 90-15 and 90-20 IPS, s 70-40 Insolvency Practice Rules (Corporations)

The liquidators of Allibi Pty Ltd (in liq) issued a $69 million letter of demand to Allibi's directors. The letter alleged the directors breached several obligations under the *Corporations Act 2001* (Cth) (Act) and threatened litigation, criminal proceedings and referral to ASIC. In circumstances where the allegations and threatened proceedings were without foundation, the Court held this was an abuse of process and ordered the removal of the liquidators.

Background

Allibi Pty Ltd (in liq) (**Allibi**) was the trustee of the Billi Unit Trust, whose main business was water filtration and dispensing systems (**Billi business**). In 2018, Allibi sold the Billi business to Waterlogic Holdings Pty Ltd (**Waterlogic)**, by transferring the Billi business' assets into a newly incorporated entity (**Newco**) and selling Newco's shares to Waterlogic. The Billi Unit Trust vested after the proceeds were distributed among unitholders.

In 2022, one of the Billi business' suppliers, Asian Electronics Manufacturing Services Pty Ltd (**AEMS**) successfully applied to wind up Allibi in respect of a default judgment it obtained against Allibi.

Allibi's liquidators (**Liquidators**) issued a $69 million demand to Allibi's directors, asserting that the directors had breached several obligations under the Act when selling the Billi business (e.g. entered into an unreasonable-director related transaction; entered into an uncommercial transaction; and breached directors duties). The letter threatened litigation and referral to ASIC if the directors did not pay the $69 million within 14 days. After sending the letter, the Liquidators sent a statutory report to creditors (which was lodged with ASIC), listing the $69 million claim as an asset of Allibi.

The Liquidators then issued a further letter to Allibi's directors, threatening that they may be criminally liable if they did not pay.

Issues

The plaintiffs applied to remove the Liquidators, on the basis that the Liquidators:

- made and maintained serious allegations against Allibi's directors, and demanded payment of $69 million under the threat of proceedings and ASIC referral; and
- published the same on the public record, without first taking sufficient steps to satisfy themselves that there was any proper basis to make those allegations or the demand.

Johnson Winter Slattery | Insolvency & Restructuring Case Summaries 2023: **Duties and independence**

Court's Findings

Demand was for collateral purpose and not justified

The Court found that the Liquidators' demand for $69 million was unjustified in circumstances where:

- there was no evidence supporting the allegations against the directors; and
- the only known debt was the debt of $497,723 owed to AEMS.

The Court held the Liquidators' reasons for the demand were insufficient to substantiate the $69 million amount and were speculative. The Court also found that the demand was an ambit claim issued with the collateral purpose of facilitating a commercial resolution and was therefore an abuse of process inconsistent with a liquidator's role as an officer of the Court.

Statutory creditors report lodged with ASIC

The Liquidators argued that they complied with their obligations under s 70-40 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (**IPR**) by referring to a "potential legal recovery" of $69 million, being "a claim we have made against the directors …". Under s 70-40, a liquidator is required to provide a report to creditors containing, among other things, the estimated amounts of assets and liabilities of the company and possible recovery actions.

However, the Court held that s 70-40 did not entitle the Liquidators to make serious but purely speculative allegations to pressure Allibi's directors into paying, or driving them to the bargaining table.

Although a liquidator may not know as much about a company's affairs compared to its former directors and others, the Court clarified that a liquidator has special powers that overcome these information disadvantages, such as powers to summons directors to give evidence.

In circumstances where the Liquidators were concerned that undisclosed creditors may step forward, the Court found that the Liquidators should have cited the interim value of the potential claims as the total of known unrelated creditors to date, subject to increase if and when more unpaid creditors came to light.

The Court also rejected the Liquidators' submission that they had no power to amend the statutory report. The Court stated that another report may also be lodged with the effect of setting the record straight, and that to construe s 70-40(3)(c) otherwise would be absurd.

Liquidators' removal justified despite no dishonesty

Ultimately, the Court concluded that removing the Liquidators was appropriate even though they had acted honestly. The Court held that the Liquidators lacked a sufficient understanding about a fundamental aspect of their role, given their issuance of a demand for $69 million founded on causes of action without a proper foundation, conduct which would cause a reasonable bystander to lose confidence in the integrity of the liquidation.

Liquidators should be aware that making a demand without a proper foundation accompanied by threatened proceedings, is an abuse of Court process and inconsistent with their duties. The better course for a liquidator faced with limited information is to use their special investigative powers, including obtaining examination summonses against directors or other parties.

The impact of pre-appointment dealings on independence and remuneration

AUTHORS

Sam Johnson, Partner

Audrey Lian, Associate

CASE & NAME CITATION

Australian Securities and Investments Commission v Jones [2023] WASCA 130 per Buss P, Mitchell JA, Beech JJA

HYPERLINK

Read more

DATE OF JUDGMENT

1 September 2023

ISSUES

Duties and independence, remuneration of external administrators, ASIC, ss 6, 11 and 60-11 IPS

The Court of Appeal of the Supreme Court of Western Australia considered whether pre-administration work gave rise to a potential conflict of interest or apprehension of bias in the administrators' performance of their duties and functions. The Court of Appeal considered whether the existence of a conflict or bias would justify a review of the remuneration determinations made by creditors pursuant to section 60-11 of the Insolvency Practice Schedule (Corporations) (IPS).

Although the Court of Appeal found that that there was a real and sensible possibility of a conflict of interest, it took a pragmatic approach when considering the circumstances and outlined the discretionary reasons against reviewing the administrators' remuneration.

Background

Martin Jones and Andrew Smith of Ferrier Hodgson (**Administrators**) were appointed as voluntary administrators of two related corporations, GD Pork Pty Ltd and GD Pork Holdings Pty Ltd (**Companies**) from October 2018 to May 2019.

Three months prior to the voluntary administration, Mr Jones and Ferrier Hodgson were engaged to advise the Companies. They gave advice and assistance in relation to negotiations with the Companies' secured creditors as to a proposed restructure of the Companies, and in relation to negotiations with unsecured creditors as to standstill/debt reduction arrangements. Ferrier Hodgson were paid circa $100,000 in fees for this work.

At first instance and on appeal, ASIC's case was that the pre-administration work done by Ferrier Hodgson gave rise to conflicts of interest or apprehended bias on the part of the Administrators. Notably, ASIC expressed concern over the Administrators' independence in investigating and reporting on whether Ferrier Hodgson's fees from the pre-appointment services might be a voidable preference. ASIC contended that the Court should review the remuneration determinations made by the creditors of the Companies and reduce the quantum of remuneration to be retained by, and paid to, the Administrators.

In the primary decision of *Jones (Administrator), in the matter of GD Port Holdings Pty Ltd (Admins Apptd)* [2021] WASC 428, Justice Martin found in favour of the Administrators, permitting them to draw down the remuneration and dismissing ASIC's application. ASIC appealed that decision.

Issues

The key issues before the Court of Appeal were whether:

1. there was a real or sensible possibility of conflict and apprehension of bias;
2. the existence of a conflict or bias would, either as a matter of statutory construction or as a matter of discretion in the circumstances of this case, justify a remuneration review; and
3. the review methodology proposed by ASIC was inappropriate.

Findings

The Court of Appeal found that there was a real and sensible possibility that the Administrators' interest in avoiding any disgorgement of the pre-appointment fees paid to Ferrier Hodgson might influence them in discharging their duties of investigating and reporting on potential recoveries of voidable transactions.

The Court of Appeal held that as a matter of construction of Schedule 2 of the *Corporations Act 2001* (Cth) – the Insolvency Practice Schedule (Corporations) (**IPS**), a Court does have a discretion pursuant to s 6 or s 11 of the IPS to review an external administrator's remuneration in respect of work which the administrator should not have done by reason of conflict of interest or apprehension of bias.

However, the Court of Appeal ultimately declined to review the Administrators' remuneration for the following discretionary reasons:

- the work which related to the investigation and reporting of unfair preferences, and which would justify a denial of remuneration, represented a small proportion of the fees charged in the administration;
- the Administrators' acceptance of the appointment while subject to a real and sensible possibility of conflict of interest and a reasonable apprehension of bias was inadvertent;
- there is no suggestion that the Administrators were deflected from due performance of any aspect of their duties, nor was any criticism made of their analysis of the date of insolvency;
- the Administrators' recommendation to the creditors was not affected by their interest in avoiding a possible preference claim as their view that liquidation was the only option was plainly correct (if a DOCA had been recommended and approved then their fee for the pre-appointment work would not have been at risk of disgorgement as an unfair preference);
- there were considerable benefits and cost savings to appointing the Administrators, given Mr Jones' and Ferrier Hodgson's knowledge of the Companies' business and financial position; and
- the Companies' creditors resolved to approve the remuneration after the Administrators had fully disclosed the relevant facts and ASIC's concerns;

Although some of ASIC's grounds of appeal were established, the appeal was dismissed and the primary judge's orders were not disturbed.

The judgment confirms that where pre-appointment dealings give rise to conflicts of interest or apprehended bias in the performance of duties or functions it will not necessarily disqualify an insolvency practitioner from acting where the conflict was inadvertent and they were not deflected from the due performance of their duties. It also confirms that Courts do have a discretion under the IPS to review an external administrator's remuneration in respect of work which the administrator should not have done by reason of conflict of interest or apprehension of bias.

Further, whilst indicating that Courts are willing to take a pragmatic approach to dealing with conflicts, the decision reinforces some key messages for insolvency practitioners, namely, practitioners should keep good records of all pre-administration tasks so that they have evidence to address any conflict of interest concerns; the scope of the pre-appointment advice will be an important factor in determining whether there is a conflict; and practitioners need to take care to make fulsome disclosure in their DIRRI.

Court confirms high bar for Liquidators' liability for company director and officer conduct

AUTHORS

Pravin Aathreya, Partner
Edwin Fah, Special Counsel

CASE & NAME CITATION

Australian Securities and Investments Commission v Bettles [2023] FCA 975

HYPERLINK

Read more

DATE OF JUDGMENT

18 August 2023

ISSUES

Duties and independence, ASIC, ss 79, 180, 181 and 182 *Corporations Act*, s 45-1 IPS

In a recent case heard by the Federal Court of Australia, the Australian Securities and Investments Commission (ASIC) asserted that the liquidator of a large corporate group, Mr Jason Bettles (Bettles) aided and abetted the companies' directors to engage in illegal phoenixing activity involving the diversion of corporate assets.

In finding against ASIC, the Court held that:

- to hold a liquidator liable for wrongful conduct of others connected with the liquidated company, that conduct must be factually proved against those other parties;
- circumstantial evidence of what the liquidator knew or ought to have known about this conduct will not be sufficient to find that liquidator liable for that conduct. Every element of an allegation needs to be considered. Simply inviting a Court to find liability based on a general suspicion of wrongdoing will likely fail; and
- large group insolvencies can be complex and liquidators should proceed with scepticism. A liquidator needs to be alert to risky situations and obtain appropriate advice promptly.

Background

In 2016 and 2017, Bettles was appointed as administrator and liquidator of a number of companies in the Members Alliance Group (**MA Group**).

Bettles facilitated the following transactions:

- a settlement deed was entered into by two directors of companies in the MA Group (**MacVicar Deed**); being Richard Marlborough (**Marlborough**), and Colin MacVicar (**MacVicar**) pursuant to which MacVicar was paid $250,000 from MA Group assets (**MacVicar Payment**);
- MA Group managed rental properties (**rent roll**). Bettles entered into management agreements with other MA Group companies for them to provide staff to manage the rent roll (**Management Deeds**);
- disclaiming the balance of the rent roll contracts as "unprofitable contracts"; and
- MA Group provided financial services, entitling it to ongoing commissions (**Client Book**). Bettles received two offers for the Client Book, one being from Crest Wealth Pty Ltd (**Crest**). Bettles did not oppose the sale of the Client Book to Crest.

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In early 2015, Bettles provided MacVicar with some general advice regarding insolvency processes (**MacVicar Advice**). Bettles did not consider that the provision of this general advice precluded him from taking appointments in the MA Group but in any event declared it in the relevant declarations of independence, relevant relationships and indemnities (**DIRRI**).

ASIC asserted that the external administration of the MA Group was essentially a sham, and that the above transactions were part of a strategy designed to divert assets away from the MA Group (**Strategy**).

Issues

ASIC asserted that Bettles either directly facilitated the Strategy, in breach of his common law and statutory duties pursuant to ss 180, 181 and 182 of the *Corporations Act 2001* (Cth) (**Act**), or that he was "involved" in its facilitation by other people (such as Marlborough and MacVicar), in breach of s 79 of the Act (**Duties**).

Bettles' conduct, according to ASIC, warranted an order pursuant to s 45-1 of the Insolvency Practice Schedule (Corporations) cancelling his registration as a liquidator (and prohibiting any re-registration).

ASIC alleged that Bettles breached his Duties by:

- not challenging the MacVicar Deed and the MacVicar Payment;
- entering into and complying with the Management Deeds when no services were provided;
- disclaiming and not realising the rent roll;
- allowing the Client Book to be sold to Crest; and
- making inadequate disclosures of the MacVicar Advice in the relevant DIRRIs.

Findings

Save for one instance, the Court did not consider that Bettles breached any of his Duties, including because:

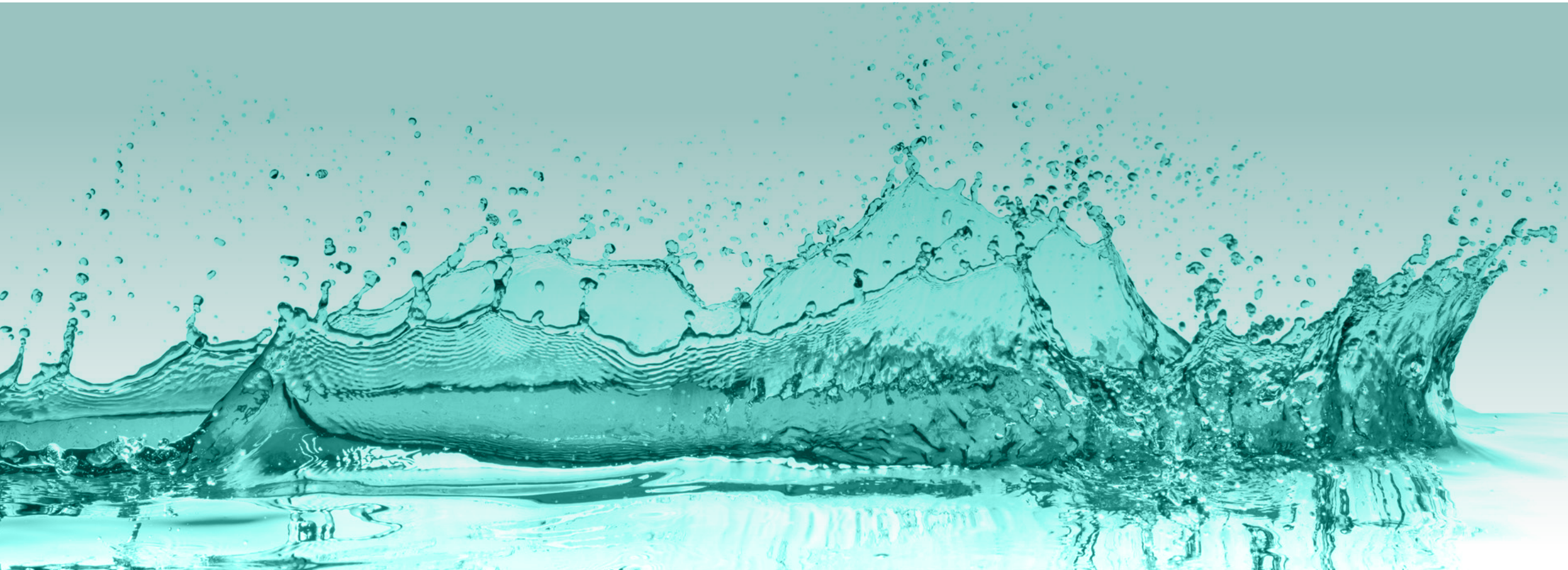
- Bettles did not know of the MacVicar Deed prior to the MacVicar Payment being made;
- ASIC did not prove that no services were provided pursuant to the Management Deeds;
- ASIC did not prove that the rent roll was realisable; and
- Bettles acted prudently in deciding not to oppose the sale of the Client Book.

The Court found that Bettles provided defective DIRRIs, but these were minor infractions not justifying orders adversely affecting Bettles' registration as a liquidator.

Although criticising his lack of experience in large group insolvencies, and finding that he was "naïve" and "too trusting", the Court complimented Bettles on his conduct in the proceeding, noting that he did his best to assist the Court by giving detailed and frank answers and making appropriate concessions.

This case confirms that given the complexity of conducting large group insolvencies, Courts will not rush to condemn liquidators with the benefit of hindsight. However, this case is a timely reminder of the importance of making full and frank disclosures, and admitting fault where appropriate. Further, as a general litigation practice point, this case is a reminder that every element of an action needs to be proved. ASIC raised interesting arguments in relation to the scope of Bettles' "secondary" liability for the alleged wrongful conduct of MacVicar and Marlborough, but the Court was not ultimately required to address this question because ASIC failed to prove that MacVicar and/or Marlborough engaged in wrongful conduct in the first place.

12. Foreign companies



National airline granted foreign state immunity against a winding up application

AUTHORS

Pravin Aathreya, Partner
Lucy Charleston, Law Clerk

CASE & NAME CITATION

Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda Indonesia Ltd [2023] NSWCA 134 per Bell CJ, Meagher JA, Kirk JA

HYPERLINK

Read more

DATE OF JUDGMENT

14 June 2023

ISSUES

Winding up applications, ss 9 and 14(3) *Foreign State Immunities Act*, s 583 *Corporations Act*

The New South Wales Court of Appeal has confirmed that foreign state immunity extends to a national airline subject to a winding up application. The Court held that there is nothing in the *Foreign State Immunities Act 1985* (Cth) (FSIA) to suggest that Parliament intended to render a foreign State and its separate entities vulnerable to bankruptcy, insolvency or winding up proceedings in Australia. The Court held that:

- **the reference to a 'body corporate' in section 14(3)(a) of the FSIA should be understood as referring to a body corporate "in and of the Commonwealth"; and**
- **on its proper construction, s 14(3)(a) relates to a bankruptcy, insolvency or winding up proceeding in which a foreign State has or claims an interest in property with which the relevant proceeding is concerned.**

Background and primary judge decision

PT Garuda Limited (**Garuda**) is Indonesia's national airline and a foreign company registered under Div 2 of Pt 5B.2 of the *Corporations Act 2001* (Cth) (**Act**). Greylag Goose Leasing 1410 Designated Activity Company and Greylag Goose Leasing 1446 Designated Activity Company (together, **Greylag Goose**) are companies incorporated in Ireland which leased aircraft to Garuda.

On 15 August 2022, Greylag Goose applied to wind up Garuda under s 583 of the Act on the basis that Garuda was unable to meet its payment obligations. On 22 September 2022, Garuda sought a declaration that the Court had no jurisdiction over it by reason of the immunity from jurisdiction for separate entities of foreign states arising under s 9 of the FSIA.

Greylag Goose contended that Garuda was not immune as the winding up proceedings concerned a "body corporate" within the meaning of the following exception to foreign state immunity set out in s 14(3)(a) of the FSIA:

> *"A foreign State is not immune in a proceeding in so far as the proceeding concerns:*
>
> (a) *Bankruptcy, insolvency or the winding up of a body corporate;"*

The primary judge held that the literal construction advanced by Greylag Goose was inappropriate, and Garuda was consequently immune from the winding up proceedings. The Court's reasoning comprised the following limbs:

- the words of s 14(3) refer to the object of the immunity (being the foreign State or foreign State-owned entity), whereas the "body corporate" referred to in s 14(3)(a) is not the object of the immunity but someone different, namely, the body corporate the subject of the winding up proceeding;
- a practical reading of the provision stipulates that Garuda has no immunity in winding up proceedings against a body corporate;
- if the legislature had intended to expose a foreign State or foreign State-owned entity to winding up by an Australian Court, the legislature would have said so;
- a logical consequence of Greylag Goose's construction would be the removal of immunity of natural persons falling within the definition of "foreign State" (such as the head of a foreign State), thereby making them subject to bankruptcy proceedings in Australia, resulting in an unjustified different treatment of natural persons compared with bodies corporate.

Greylag Goose appealed the decision to the NSW Court of Appeal. A key argument underpinning the appeal was that the FSIA's purpose was to give effect to the restrictive theory of foreign state immunity, a concept referred to in the Australian Law Reform Commission Report (**ALRC Report**) and the second reading speech for the Bill that became the FSIA. In support of this argument, Greylag Goose contended that the FSIA created a series of broad exceptions to immunity, extending from commercial transaction to employment, personal injury and taxation, thereby demonstrating the FSIA's intention to derogate from absolute immunity for foreign states by indicating a broad and literal construction of the exception to immunity in s 14(3)(a) of the FSIA.

The NSW Court of Appeal's decision

The Court of Appeal found that the purpose of s 14(3)(a) of the FSIA can be identified by examining the legislation as a whole, including the nature and context of the statute's enactment, which in turn included secondary materials such as the ALRC Report, of which the FSIA was a direct product.

The Court of Appeal observed the ALRC Report "makes plain" that the legislative reforms recommended by that report for partial implementation of a restrictive theory of foreign State immunity were in no way intended to subject a foreign body corporate having the benefits of foreign State immunity to winding up proceedings in Australia. The Court considered the ALRC Report, the International Law Commission Report, and several foreign State Immunity Acts, and found that unless a foreign State had or claimed an interest in property in Australia that fell to be administered in a local Court, foreign State entities will be immune from winding up applications in Australian Courts.

Additionally, the Court held that the reference to a "body corporate" in s 14(3)(a) refers to a body corporate "in and of the Commonwealth", which means that the section cannot refer to Garuda as a body corporate of Indonesia.

The Court ultimately held that s 14(3)(a) does not subject a foreign State (or separate entity of a foreign State) to a winding up proceeding, and that on its proper construction, that section relates to a bankruptcy, insolvency or winding up in which a foreign State has or claims an interest in property with which the relevant proceeding is concerned. Garuda was therefore immune from the winding up proceedings.

Consequently, the Court of Appeal dismissed the appeal.

This decision clarifies that State-owned or controlled foreign entities will be immune from bankruptcy, insolvency or winding up proceedings in Australia, except for those entities who hold or claim an interest in property in Australia. As State-owned entities increasingly become commercial actors in this global economy, they should know they might be susceptible to bankruptcy, insolvency or winding up proceedings if they hold or claim an interest in property in Australia.

Foreign company defendants subject to Australian jurisdiction

AUTHORS

Lucas Wilk, Partner

Lauren Connolly, Associate

CASE & NAME CITATION

Horizon Capital Financial SARL v BCC Trade Credit Pty Ltd [2023] NSWSC 917 per Stevenson J

HYPERLINK

Read more

DATE OF JUDGMENT

4 August 2023

ISSUES

Foreign companies, winding up applications, stays and leave to proceed, s 471B *Corporations Act*, Rule 11.8AA and Schedule 6 *Uniform Civil Procedure Rules 2005* (NSW), *Cross Border Insolvency Act 2008* (Cth)

Subject to the rules of each Court, Australian Courts can give leave to proceed against foreign defendants despite them being:

- **subject to insolvency proceedings in their home countries; and**
- **protected in their home countries from Court proceedings by way of statutory stays by reason of their insolvency.**

The Court must be satisfied that the usual requirements for leave to proceed are met and that there had not been any attempt to have the foreign insolvency proceedings recognised in Australia.

Background

The plaintiff, Horizon Capital Financial S.A.R.L (**Horizon**) alleged it was entitled to the proceeds of a trade credit insurance policy issued by the first and second defendants to the fourth and fifth defendants (**Lemarc Singapore** and **Lemarc HK**, respectively).

Lemarc Singapore is a company registered in Singapore. Lemarc HK is a company registered in Hong Kong. At the time of Horizon's application, foreign winding up proceedings were on foot against Lemarc Singapore and Lemarc HK was in provisional liquidation.

The provisions of the foreign legislation applicable to Lemarc Singapore and Lemarc HK in Singapore and Hong Kong had the same effect as s 471B of the *Corporations Act 2001* (Cth), namely that once winding up proceedings are on foot against a defendant, no further steps can be taken in Court proceedings against the defendant. Horizon served Lemarc Singapore and Lemarc HK with the originating Court documents in Singapore and Hong Kong. However neither appeared before the Court.

Issues

With Lemarc Singapore and Lemarc HK Horizon not appearing in response to the Court process started against them, Horizon required leave to proceed against foreign defendants under Rule 11.8AA of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**). In deciding the application for leave, Justice Stevenson identified four matters to be considered:

1. the defendants must have been properly served in accordance with the laws of the local jurisdiction;
2. the claim made must fall within one of the categories in Schedule 6 of the UCPR;
3. the plaintiff must show an arguable case in the sense that it would survive a summary judgment application; and
4. it must be shown that New South Wales, where the case was being heard, is not a clearly inappropriate forum.

Findings

Justice Stevenson held that leave should be granted for Horizon to proceed against Lemarc Singapore and Lemarc HK. Justice Stevenson addressed all four matters and concluded these were satisfied.

First, Lemarc Singapore and Lemarc HK were served in accordance with the relevant laws of Singapore and Hong Kong, respectively.

Second, Horizon's claim fell within a number of the Schedule 6 of the UCPR categories, including a claim of enforcement of a contract made in Australia.

Third, Horizon provided documents showing assignments of the kind propounded in the proceeding, satisfying the Court that there was an arguable case.

Fourth, the first and second defendants (the insurers) were located in New South Wales and the law of the policy of insurance was the law of New South Wales. This satisfied the Court that New South Wales was not a clearly inappropriate forum.

Finally, the Court had been provided searches that showed that no steps had been taken in Australian Courts to have the foreign insolvency proceedings recognised in Australia under the *Cross-Border Insolvency Act 2008* (Cth).

This decision confirms that if a defendant company is being wound up overseas and a stay of proceedings operates in that foreign jurisdiction by reason of that insolvency process, Australian Courts may still have jurisdiction and continue with Court proceedings despite the foreign stay.

In circumstances where there are defendants in foreign jurisdictions who hold assets in Australia, there should be careful consideration of the relevant foreign insolvency laws and how they interact with the Australian jurisdiction.

Federal Court grants administrators' and liquidators' powers in Corporations Act to Swiss trustee of bankrupt estate

AUTHORS

Pravin Aathreya, Partner
Karen Zhu, Associate
Emma McIntyre, Associate
Jack Bruce, Seasonal Clerk

CASE & NAME CITATION

Bankruptcy Office of the Canton of Geneva v Amoma SÀRL (in liq) (No. 2) [2023] FCA 1379 per McEvoy J

HYPERLINK

Read more

DATE OF JUDGMENT

8 November 2023

ISSUES

Articles 2, 4, 15, 17 and 21 of the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law*; *Cross Border Insolvency Act 2008* (Cth)

The plaintiff was authorised under Swiss law to administer the liquidation and bankruptcy of Amoma SÀRL (in liq). The Federal Court of Australia granted powers to the plaintiff to:

- **examine witnesses, take evidence and obtain information concerning Amoma's affairs; and**
- **have all powers available to liquidators or administrators in Australia,**

under the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law* (Model Law), in relation to Amoma's claim for misleading and deceptive conduct against online hotel room reseller, Trivago N.V.

Background

The plaintiff, The Bankruptcy Office of the Canton of Geneva, was the trustee of the bankrupt estate of Amoma SÀRL (**Amoma**), a Swiss company in liquidation. The plaintiff was authorised by order of the Bankruptcy Court of the Canton of Geneva (**Bankruptcy Court**) and the *Swiss Federal Act on Debt Enforcement and Bankruptcy 1889* to administer Amoma's liquidation and bankruptcy (**the Geneva Liquidation Proceeding**).

Amoma advertised hotel rooms on the online platform operated by Trivago N.V. (**Trivago**). The Federal Court of Australia previously found that Trivago made false and misleading representations under the Australian Consumer Law. Amoma's only Australian asset was its claim against Trivago for loss that it suffered because of Trivago's misleading conduct.

Issues

The plaintiff proposed to bring proceedings against Trivago in the Supreme Court of Victoria, where it would have up to 12 months to investigate the viability of the claim prior to serving Trivago, without risking the claim from becoming statute-barred. Prior to bringing these proceedings in the Supreme Court, the plaintiff sought the following orders from the Federal Court:

1. to recognise the Geneva Liquidation Proceeding as a 'foreign proceeding' under Articles 15 and 17 of the Model Law (incorporated into Australian law by the *Cross-Border Insolvency Act 2008* (Cth) (**CBIA**); and
2. to be granted powers under Article 21 of the Model Law in relation to the proposed Trivago proceedings, including:
   - power to examine witnesses, take evidence and obtain information; and
   - all powers available to liquidators or administrators under the provision of the *Corporations Act 2001* (Cth).

Recognising foreign insolvency proceedings

Justice McEvoy found that the criteria for recognising the foreign proceeding under the Model Law were satisfied.

Firstly, his Honour found that the Geneva Liquidation Proceeding was a foreign proceeding under Article 2(a) of the Model Law because it was:

- a collective proceeding (i.e. it considered all creditors' rights and obligations; it was instigated to restructure the debtor's liabilities for all creditors' benefit; and all creditors were entitled to participate);
- a judicial proceeding, where the plaintiff was appointed as Amoma's trustee and representative;
- being conducted under Swiss insolvency law; and
- subject to the control of the Bankruptcy Court.

His Honour also found that the plaintiff was a foreign representative under Article 2(d) of the Model Law and had complied with the procedural requirements for recognition of a foreign insolvency proceeding.

Further, the application was appropriately submitted to the Federal Court, which is "competent to perform functions under the Model Law" pursuant to Article 4 of the Model Law and section 10 of the CBIA. His Honour also held that the Geneva Liquidation Proceeding was a "foreign main proceeding" under the Model Law, as Switzerland was the location for both the foreign proceeding and Amoma's "centre of main interests" (including the location of its registered office, books, records, key management personnel, board meetings, shareholders, principal assets and banking activities).

Plaintiff granted powers under Article 21

Justice McEvoy considered whether to grant relief under Article 21 of the Model Law, which would allow the plaintiff to conduct investigations, examine witnesses, and have all the powers of an insolvency practitioner in Australia, insofar as those activities related to the proposed proceeding against Trivago.

To be granted with relief under Article 21, the plaintiff had to show that the relief was "necessary to protect the assets of the debtor or the interests of the creditors".

Trivago argued that the Court's discretion to grant relief under Article 21 was not enlivened because it was not "necessary" for the plaintiff to have the powers sought, as the plaintiff could simply serve the application immediately after filing, and then be entitled to the benefit of the usual Court processes, including discovery and interrogatories.

Conversely, the plaintiff advanced the following arguments in favour of relief under Article 21.

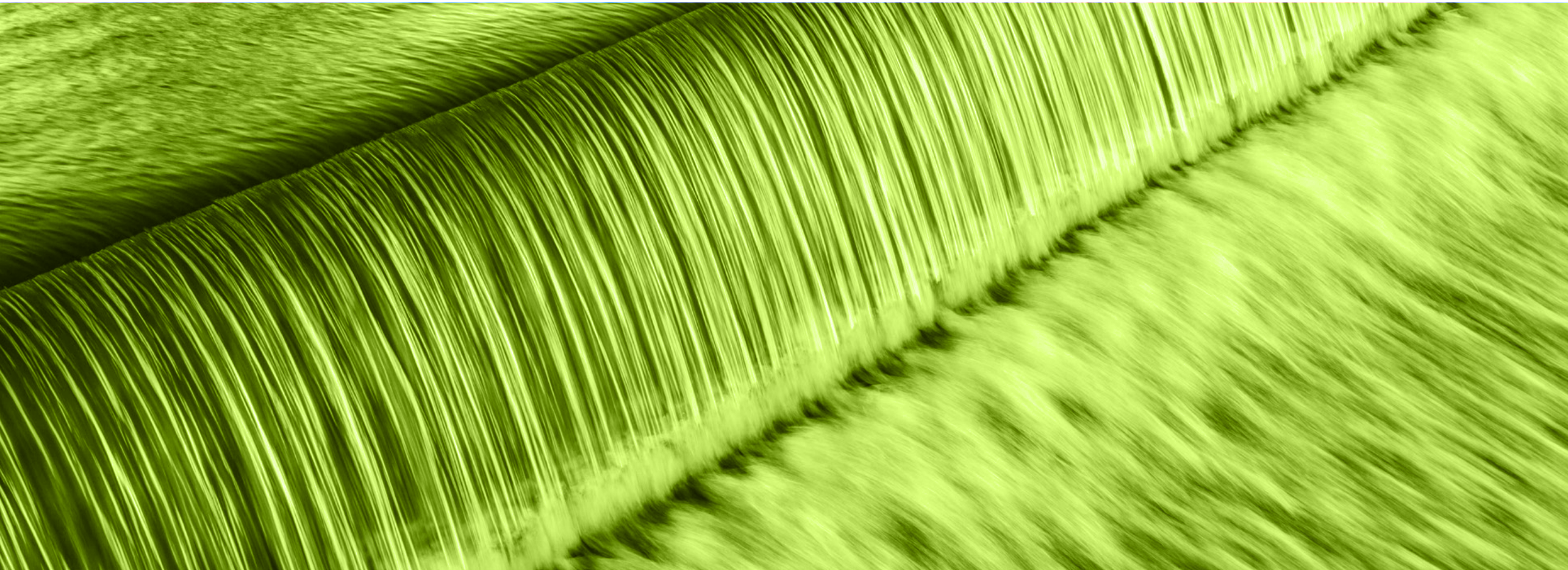
- The grant of the powers sought was consistent with the overarching purpose of the civil practice and procedure provisions of the *Federal Court of Australia Act 1976* (Cth), constituted the most efficient approach by its avoidance of the need for repeat Court applications and was an uncontroversial step, given the Court's already established practice of making recognition orders without requiring specific evidence of how the powers are proposed to be exercised.
- "Necessary" in this context does not mean "essential", and instead, is about whether it was reasonable for the plaintiff to have the powers.
- The powers would be granted for a reasonable purpose, given the Court knew that the chose in action existed and that a proceeding would be brought.
- After the orders are made, a person can apply to modify or terminate the orders under Article 22(3) of the Model Law where they are concerned that the powers may be exceeded or exercised improperly.

The Court ultimately accepted the plaintiff's submissions and granted the relief sought.

The Federal Court granted the powers of an Australian liquidator to a Swiss insolvency practitioner under the Model Law, in circumstances where the foreign insolvency practitioner showed that it was reasonable, but not necessarily essential, for the practitioner to have those powers.

This case highlights the practical benefits of adoption of the Model Law in Australia since its introduction in 2008. The Model Law endeavours to give certainty to creditors and insolvency practitioners by establishing a predictable and global framework for mutual recognition and cooperation for cross-border restructuring and insolvency.

13. Trusts



Court confirms the priority regime between former and successive trustees

AUTHORS

Eve Thomson, Partner
Lucy Charleston, Law Clerk

CASE & NAME CITATION

Francis (Trustee), in the matter of Fotios (Bankrupt) v Helios Corporation Pty Ltd (No 3) [2023] FCA 251 per Colvin J

HYPERLINK

Read more

DATE OF JUDGMENT

22 March 2023

ISSUES

Creditor priority, receivers, trust assets, deeds of company arrangement

On application by the receivers of trust assets, the Federal Court ordered that the priorities between the creditors of the successive trustee should be dealt with in accordance with the general equitable principle (that is, first in time) and what was contemplated under the out of Court agreements between the parties. In his Honour's judgment, Justice Colvin confirmed:

- **where there is uncertainty over priority in competing claims over trust assets, the Court will consider legal principles as well as any out of Court agreements between the parties; and**
- **in accordance with the first in time rule, creditors of a former trustee will have priority over successive trustees (even with security) in the absence of a vitiating factor (i.e. if there is inequality in the merit, or the subsequent trustee takes office without knowledge of the prior equity).**

Background

Mr Michael Fotios was the trustee of the Michael Fotios Family Trust (**the Trust**), until he declared bankruptcy. Helios Corporation Pty Ltd (**Helios**) became the successive trustee. Mr Fotios' trustees in bankruptcy sought a subrogation claim against Helios to exonerate from the assets of the Trust and to enforce the associated right of indemnity out of the assets.

Helios went into voluntary administration, and there was uncertainty as to the value of the net Trust assets. It was necessary to resolve the priorities for competing claims on those assets.

The Court appointed joint and several receivers to the Trust, who were also the administrators of Helios (**Receivers**). The Court gave judicial advice to the Receivers on the competing claims to the Trust assets by Mr Fotios and Helios: *Francis (Trustee), in the matter of Fotios (Bankrupt) v Helios Corporation Pty Ltd (No 1) [2022] FCA 199; and Francis (Trustee), in the matter of Fotios (Bankrupt) v Helios Corporation Pty Ltd (No 2)* [2022] FCA 652. In the advice, the Court recognised that Mr Fotios had priority over Helios as replacement trustee.

Since that judicial advice was given, the Privy Council's decision in *Equity Trust (Jersey) Ltd v Halabi, ITG Ltd & Ors v Fort Trustees Ltd & Anor* [2022] UKPC 36 *(**Halabi**)* was delivered, where the majority reasoned that the interests of successive trustees should rank equally, while the minority maintained that first in time has priority.

In their application, the Receivers sought to implement a proposed compromise with the creditors of the Trust by way of the Deed of Company Arrangement (**DOCA**) of Helios and a composition of the bankruptcy of Mr Fotios.

Issue

In light of the Privy Council's decision in *Halabi*, the central issue before the Court was whether priority claims against trust assets by successive trustees should be determined in order of time or equally.

Findings

In his reasoning, Justice Colvin considered two main elements: the relevant legal principles, and the steps taken by the parties outside of Court.

In terms of legal principles, Justice Colvin maintained the view that the appropriate priority between creditors of successive trustees should be determined by the general principle of first in time. However, Justice Colvin recognised that this is not an absolute rule, and that equity will depart from affording priority to the former trustee where there are vitiating factors. Justice Colvin discussed that such vitiating factors include where there has been inequality in merit, or if the subsequent trustee takes office without knowledge of the prior equity that may affect their position. There was no inequality in this case, as there was a family connection between Mr Fotios and Helios, and Helios' appointment took place at the time of Mr Fotios' bankruptcy.

In terms of the steps taken by the parties out of Court, the creditors had agreed to the terms of the DOCA and the bankruptcy composition of Mr Fotios. There were also several instruments (such as a Settlement Deed) that provided for the resolution of competing claims. Justice Colvin therefore approved the Receiver's use of the Trust assets by way of proposed compromise under the terms of the DOCA and the bankruptcy compromise.

This decision confirms that where there are competing claims over the distribution of trust assets, the general equitable principles as to competing priorities prevail (that is, first in time), provided there no vitiating factors. Where there is uncertainty in the priority regime, the Court is informed by both legal principles and the steps taken by the parties outside of Court. Creditors of successive trustees should be aware that value can be extracted from out of Court agreements in the assessment of priority claims, and retiring trustees may want to ensure they take precautionary measures to maintain their priority.

The potential susceptibility of trust assets to disclaimer by liquidators

AUTHORS

Pravin Aathreya, Partner
Olivia Gerhardy, Associate
Aditi Tamhankar, Law Clerk

CASE & NAME CITATION

Australia and New Zealand Banking Group Limited v State of Western Australia [2023] WASC 409

HYPERLINK

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DATE OF JUDGMENT

30 October 2023

ISSUES

Disclaimer by liquidator, trust assets s 568 *Corporations Act*

The Supreme Court of Western Australia considered an application brought by ANZ, seeking orders under s 568F of the *Corporations Act 2001* (Cth) (Act) that property purported to be disclaimed by a liquidator be vested in it for the purpose of ANZ exercising its powers of sale under a mortgage. Justice Solomon confirmed:

- **a liquidator of a company may have power to disclaim property even where the company holds the property on trust;**
- **a trustee's right to indemnity or exoneration out of the trust estate confers on it a proprietary interest in trust assets themselves; and**
- **a proprietary interest in the trust assets may constitute "property of the company", enabling property to be disclaimed and subsequently vested in a mortgagee.**

Background

The plaintiff, Australia and New Zealand Banking Group Limited (**ANZ**), agreed to loan the sum of $350,000 (**Loan**) to Tri Star Group Pty Ltd (**Tri Star**) on the basis that ANZ was granted a registered mortgage over the property at Unit 26, 38 Fielder Street, East Perth (**Property**) as security. On 13 October 2014, the mortgage was registered (**Mortgage**).

Tri Star was the registered proprietor of the Property and it held the Property solely in its capacity as trustee for the Terry Spiro Family Trust (**Trust**). Tri Star entered into the Loan in its own capacity and as trustee of the Trust.

On 13 April 2018, Tri Star defaulted on the terms of the Loan. ANZ sent Tri Star a notice of termination and demand and on 14 June 2018, ANZ issued a default notice under s 106 of the *Transfer of Land Act 1893* (WA) requesting payment of the overdue amount within one month. Tri Star did not make payment.

On 17 January 2023, the Court appointed a liquidator to Tri Star. At that date, Tri Star owed $616,939.32 under the Loan. This amount owing was well in excess of the value of the property, which was estimated to be around $360,000.

On 10 February 2023, the liquidator sought to disclaim the property pursuant to s 568(1)(a) of the Act on the basis that the Property was "property of the company and consists of land burdened with onerous covenants".

Issues

The key issues before the Court were:

1. whether the liquidator could validly disclaim the Property under s 568 of the Act, given that the Property was held by Tri Star solely in a trustee capacity; and
2. whether the property could be vested in ANZ pursuant to s 568F of the Act for the purpose of ANZ exercising its powers of sale as mortgagee of the Property.

Findings

As the Property was held by Tri Star solely as a trustee, the Court was required to consider whether the Property was "property of the company", a requirement for the purpose of disclaiming property pursuant to s 568 of the Act. The State of Western Australia (**the State**) was the first defendant in the application because when real property is disclaimed by a liquidator, the interest of the fee simple owner in the property expires and reverts to the Crown.

The State argued that the Property was a trust asset and not "property of the company" capable of being disclaimed. The State relied on *Jones (Liquidator) v Matrix Partners Pty Ltd Re Killarnee Civil and Concrete Contractors Pty Ltd (in liq)* (***Jones***) to suggest that while a trustee may have a right of exoneration allowing a trustee to access trust assets to satisfy debts incurred, the trust assets do not form "property of the company". Analogous to Jones, where the liquidator was not entitled to sell trust assets as "property of the company", the State asserted that the Property was not property of Tri Star that could be validly disclaimed by the liquidator.

The State also contended that the decision of Justice Colvin in *AFSH Nominees Pty Ltd v State of Western Australia* (***AFSH***) was "plainly wrong". In *AFSH*, the property was held to be validly disclaimed and orders were made under s 568F vesting the property in AFSH to enable it to enforce its mortgage.

Justice Solomon held that the reasoning in *Jones* could not be applied to conclude that trust assets cannot constitute "property of the company" for any statutory purpose. The Court emphasised that it is necessary to consider the specific statutory context when applying the term "property of the company". Justice Solomon was not persuaded by the State's position, nor its contention that the decision in *AFSH* was plainly wrong.

Ultimately, following further submissions and exchanges between the parties' counsel, the parties filed a minute of consent orders in favour of ANZ, which the Court accepted. Those orders included an order under s 89 of the *Trustees Act 1962* (WA) conferring power on the liquidator retrospectively to validate the disclaimer of the Property, and the vesting order under s 568F sought by ANZ to enable it to exercise its powers of sale as mortgagee.

This case highlights that determining whether a trustee's right of indemnity constitutes "property of the company" is a statute-specific contextual inquiry. For the purposes of disclaimer under s 568, a liquidator of a corporate trustee may in certain circumstances validly render trust assets "property of the company".

14. Small business restructuring regime

Court's discretion to lift a stay under the small business restructuring regime

AUTHORS

Paul Buitendag, Partner
Pravin Aathreya, Partner
Lauren Connolly, Associate

CASE & NAME CITATION

Benjamin Hornigold Ltd v John Bridgeman Ltd [2023] FCA 1195 per Markovic J

HYPERLINK

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DATE OF JUDGMENT

7 September 2023

ISSUES

Statutory stay, leave to proceed against company under the appointment of a small business restructuring practitioner, s 453S *Corporations Act*

This decision is the first instance of judicial consideration of section 453S of the *Corporations Act 2001* (Cth) (Act), which imposes a stay on the commencement or continuance of proceedings against a company subject to a Part 5.3B small business restructuring process without the consent of the small business restructuring practitioner or leave of the Court.

Background

Benjamin Hornigold Limited (**BHL**), a listed investment company, sought leave to commence proceedings against the fourth defendant, JB Markets Pty Ltd (**JBM**) pursuant to s 453S(1)(b) of the Act.

There were four defendants to the proceeding, including John Bridgeman Limited (**JBL**), JBM and two former directors of BHL. Mr Bryan Cook was a former director of BHL and Mr Vincent Gordon was a former director of both BHL and JBL. JBL provided investment management services and was the holder of an Australian Financial Services Licence.

BHL entered into an exclusive agreement with JBL under which JBL agreed to manage BHL's investment portfolio and provide financial advice. BHL alleged the former directors breached their duties by allowing BHL to enter into over $4 million worth of loan transactions. BHL also alleged that JBM breached its duties under s 912A of the Act by failing to adequately monitor and/or train JBL in connection with JBL's provision of financial services.

On 25 August 2023, JBM appointed a small business restructuring practitioner (**SBRP**), Andrew Weatherley, under section 453B(1) of the Act. Mr Weatherley's appointment came to BHL's attention on 5 September 2023. The following day, BHL sought urgent relief from the Court for leave to commence proceedings against JBM.

Given that the earliest loan referred to in BHL's claim was advanced on 11 September 2017, the six-year limitation period was due to expire on 11 September 2023.

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Issues

The Court had to decide whether it should grant leave to BHL to proceed against JBM, despite the appointment of the SBRP.

Findings

BHL was granted leave to commence the proceeding against JBM, on the condition that no further steps were to be taken in the proceeding without the leave of the Court.

Justice Markovic held that the principles in relation to a grant of leave despite a stay of proceedings during voluntary administration under 440D of the Act apply equally to an application for leave under s 453S. In short, the Court seeks to balance the policy imperative of maximising the prospects of rescuing the distressed company by giving the practitioner adequate opportunity for the development of viable restructuring proposals against countervailing factors in support of a grant of leave to proceed with a claim against the company. This includes whether the claim has a solid basis, gives rise to a serious dispute and would not unreasonably hamper the restructuring process.

Applying those principles, Justice Markovic granted leave for the following reasons:

1. BHL's draft statement of claim had a solid foundation and indicated the existence of a serious dispute between the parties;
2. the SBRP would not be unreasonably distracted by the proceeding nor required to incur substantial legal costs;
3. although the SBRP did not consent to the grant of leave, he had no objection to it;
4. the imminent expiry of the limitation period meant BHL would be prejudiced if it was unable to commence the proceeding against JBM;
5. JBM likely held an insurance policy which would respond to BHL's claims, which is a relevant factor to be considered under s 440D of the Act, and by analogy s 453S; and
6. having regard to the value of BHL's claim, which exceeded $1 million, there was a real likelihood that the restructuring process would soon come to an end. As a result, JBM would no longer meet the eligibility criteria for the restructuring process in Pt 5.3B of the Act.

In this first judicial consideration of s 453S of the Act (given the SBR regime's recent introduction in 2021), the Federal Court has confirmed the functionally similar operation of the stay on proceedings under the SBR regime compared with the stay applicable in a voluntary administration, and the consequent portability of the principles applicable to grant of leave to proceed with claims against the company despite the operation of the stay. The judgment also indicates that the Courts will consider factors specific to the SBR regime, including the viability of the restructuring process in the imminent future.

15. Statutory demands

Setting aside a statutory demand: genuine dispute and abuse of process

AUTHORS

Emily Barrett, Partner
Lucy Charleston, Law Clerk

CASE & NAME CITATION

Big Pineapple Corp Pty Ltd v Rankin Investments (Qld) Pty Ltd and others [2023] QSC 26, per Ryan J

HYPERLINK

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DATE OF JUDGMENT

20 February 2023

ISSUES

Criteria to set aside a statutory demand; improper purpose, genuine dispute, conflict arising where joint venture is a director of both creditor and debtor entity; s 459G *Corporations Act*

On application by a debtor, the Supreme Court of Queensland set aside a statutory demand issued by a creditor of a joint venture on the bases that:

- **the evidence raised genuine issues about the common intention of the parties as to when the debt was to be repaid and there was a genuine dispute, based on reasonable grounds, as to whether the debt was in fact due and payable on the relevant date; and**
- **the evidence also supported the conclusion that the statutory demand had been issued to exert commercial pressure upon the debtor to sell the joint venture assets before a compulsory buy-out of one joint venture party's interest in the joint venture could occur.**

Background

Big Pineapple Corp Pty Ltd (**BPC**) is the corporate trustee of a joint venture of several individuals and their associated investment entities for the development of the Big Pineapple in Queensland. At the time the application was heard, there were two joint venture parties remaining referred to as "the Rankin parties" and the "Kendall parties".

The joint venture parties agreed, via a "Property Agreement" that they would fund the joint venture themselves; however, some individuals contributed from their self-managed super funds that were not parties to the joint venture and without the consent of the board. Rankin Super was one of those non-party super funds who contributed to the joint venture and was associated with the Rankin parties.

In 2019, the Rankin parties defaulted under the Property Agreement, which entitled the Kendall parties to buy out the Rankin parties' interests and assume ownership and control of the whole venture. An independent accountant was appointed in October 2021 to value the buy-out figure.

In May 2022, the Rankin parties presented the Kendall parties with an offer from a third party to purchase the land subject of the joint venture. The Kendall parties' position was that the joint venture was not for sale as the buy-out process was in train.

On 1 July 2022, Rankin Super then served a statutory demand on BPC seeking repayment of $1,992,140.76 in loans it asserted were due and payable on 30 June 2022.

BPC applied to have the statutory demand set aside under section 459G of the *Corporations Act 2001* (Cth) (**Act**) on the basis that there was a genuine dispute about whether the debt was payable on 30 June 2022, and/or because there had been an abuse of process by Rankin Super in issuing the statutory demand because it had an ulterior motive to disrupt the buy-out process.

Issues

The key issues before the Court were whether:

1. there was a 'genuine dispute' under s 459G of the Act regarding whether the debt was due and payable on 30 June 2022;
2. there was an abuse of process by Rankin Super in issuing the statutory demand for an improper purpose; and
3. there was a conflict of interest with Mr Rankin being both a director of the debtor (BPC) and a director of the creditor (Rankin Super).

Findings

The Court approached the matter having regard to the question of whether there was good reason to deny effect to the statutory demand as creating a ground for BPC's winding up, consistent with existing authorities.

It was found that the evidence raised genuine issues as to the common intention of the parties as to when loans made by the joint venture parties and entities associated with them, like Rankin Super, were to be repaid. Of significance was the Court's finding that it was artificial to characterise Rankin Super as an unrelated corporate entity that had lent money at arm's length and was merely seeking to enforce its rights. Relevantly, the evidence did not suggest that the Kendall parties understood Rankin Super to be a third-party lender as opposed to a de-facto member of the Rankin parties. In fact, the evidence from Mr Rankin was that the loans were not to be repaid until the joint venture ended or a joint venture party left.

The Court also held that Rankin Super issued the statutory demand for an improper purpose, in an attempt to avoid the Kendall parties buying out the interests of the Rankin parties. The issuance of the statutory demand undermined the contractual bargain reached by the joint venture parties under the Property Agreement. Justice Ryan inferred from the evidence that Mr Rankin issued the statutory demand to exert commercial pressure on BPC to achieve his desired outcome: to avoid his forced withdrawal from the joint venture.

Turning to the conflict of interest issue, the Court considered that BPC relied upon the contributions of joint venturers to meet its financial obligations, including the repayment of loans such as that advanced by Rankin Super. By demanding repayment of his loans but not contributing funds to BPC to enable it to meet the demand was deemed by Justice Ryan as "unfair and a complication of his position of conflict as a director of both Rankin Super and BPC".

Ultimately, the Court granted BPC's application and set aside the statutory demand.

The decision serves as a timely reminder that statutory demands are to be issued only for the intended purpose of establishing a company's insolvency, not as a coercive tool to pressure the debtor to pay a disputed amount.

16. Curriculum vitae

Sam Johnson

Partner – Restructuring & Insolvency, Dispute Resolution & Media

T +61 2 8274 9548
M +61 410 308 626
sam.johnson@jws.com.au

Sam is a Partner in our dispute resolution group specialising in commercial dispute resolution, insolvency and media law. Sam has 20 years' experience advising clients across many sectors including the banking and finance, investment funds, media, education, energy and government sectors.

Sam's experience spans many of the most complex and substantial insolvencies that have taken place in Australia across the last 20 years including Ovato, Halifax Investment Services, RiverCity, One.Tel, Allco and Harris Scarfe. He is a Professional Member of ARITA, a member of INSOL and the TMA and advises insolvency practitioners in their capacity as voluntary administrators, deed administrators, receivers and liquidators in relation to all aspects of their administration. He has authored over 50 published articles on insolvency related issues.

Sam also has extensive experience advising both print and television media in relation to defamation, legislative restrictions on publication and copyright.

Sam has been listed as a leading lawyer in Alternative Dispute Resolution and Insolvency and Reorganisation Law in Best Lawyers Australia since 2019 and as a key lawyer in restructuring and insolvency and also media and entertainment law in Asia Pacific Legal 500 2021.

Prior to joining JWS Sam studied at the University of Cambridge where he received a Masters of Law degree and was awarded the Clifford Chance CJ Hamson Prize for Comparative Law. He then worked in the London office of a large US law firm, Cadwalader Wickersham & Taft where he worked on some of Europe's largest restructurings and insolvencies including TXU Europe, British Energy and Parmalat

Experience

Insolvency-related dispute resolution

- **Ovato Group** – advising the administrators of the Ovato Group in relation to all aspects of this substantial and ongoing administration including managing several successful applications to the Federal Court and successfully applying to the Commonwealth Minister for Employment & Workplace Relations for a rare declaration under s 49 of the FEG Act.
- **Rhodium** – acting for the liquidators of a major global commodities trading firm out of Singapore in relation to potential claims.
- **Octaviar** – acted for the liquidators on the most significant remaining litigation including the liquidator's major negligence action against the global auditors, Supreme Court proceedings against the ATO and progressing all necessary court approvals for the steps taken by the liquidators
- **Halifax Investment Services** – acting for Ferrier Hodgson (now KPMG) in their capacity as voluntary administrators of Halifax Investment Services.
- **Flow Systems Group of Companies** – advised Brookfield, in its capacity as a shareholder and major secured creditor on the DOCA proposal and the acquisition of the business through DOCA (involving the preservation of business) and related litigious issues.
- **One.Tel** – assisting with the firm's representation of the Special Purpose Liquidator, Mr Stephen Parbery, including obtaining a novel release for the Special Purpose Liquidator pursuant to s 480(c) of the *Corporations Act* (Cth) (Act) *(In the matter of One.Tel (in liquidation)* [2014] NSWSC 1892).
- **PrimeSpace Property Investment (in liquidation)** – assisting with the firm's representation of the liquidators in relation to various contentious issues.

- **RiverCity** – assisting with the firm's representation of the liquidators in large and complex litigation heard by the Federal Court of Australia.
- **Wine Investment Services (in liq**) – managing complex interlocutory applications on behalf of the liquidators seeking orders that they be appointed Court appointed receivers over certain wine stock and directions that they should adjudicate on claims to the wine stock, sell any surplus wine stock and distribute the sale proceeds *(In the matter of Wine National James Estate Wines & Liquor National* [2014] NSWSC 1516).
- **AWA** – assisting with the firm's representation of the liquidators (and formerly the administrators), including obtaining an order pursuant to s 447D of the Act that the administrators would be justified entering into a proposed transaction with a commercial lender to pay out a secured creditor and to retire receivers *(In the matter of AWA (Administrators Appointed) (Receivers and Managers Appointed)* [2014] NSWSC 249).
- **CMA** (subject to deed of company arrangement) – successfully defending an appeal brought by a creditor pursuant to s 1321 of the Act against the deed administrators' decision to reject a proof of debt *(Schmitt v Carter* [2014] FCA 1370).
- **TXU Europe** – acting on behalf of the administrators and liquidators in securing a US$235 million pre-action settlement of claims against directors and shareholders, and defending a minority creditor challenge to voluntary arrangements giving effect to the settlement.

Commercial litigation

- **Rivalea Australia** – acting for Rivalea Australia in successful Supreme Court proceedings seeking access to a substantial amount of grain.
- **Broken Hill Prospecting (BPL)** – advisor to the ASX listed company on contentious legal issues, including managing substantial Supreme Court litigation involving BPL.
- **Macquarie Bank** – managed numerous litigated matters including substantial Supreme Court litigation, facilitated settlement negotiations on behalf of the client, and advised in relation to various ad hoc legal issues.
- **University of Adelaide** – assisting with the firm's representation and advising in relation to defamation, copyright and various contentious issues.
- **University of Newcastle** – managing the firm's representation and advising in relation to defamation and administrative law issues.
- **University of New England** – managing the firm's representation and advising in relation to defamation and administrative law issues.
- **University of South Australia** – managing the firm's representation and advising in relation to defamation, copyright and various contentious issues.
- **Westpoint** – assisted with the firm's representation of ASIC and bringing to a successful conclusion, compensation claims instituted by ASIC pursuant to s 50 of the ASIC Act against the auditors and former directors of the failed Westpoint Group of Companies. This litigation was one of the largest and most complex claims ever made in Australia.

Pravin Aathreya

Partner –
Restructuring & Insolvency,
Dispute Resolution

T +61 3 8611 1344
M +61 421 134 761
pravin.aathreya@jws.com.au

Pravin has 18 years' experience in complex large-scale commercial litigation and dispute resolution, with a particular focus on corporate insolvency and reconstruction. Pravin has represented numerous corporate clients across a range of industries, including automotive and transport, infrastructure, energy and resources and financial services.

Pravin has significant expertise in complex commercial disputes, including contract disputes, disputes between participants in the energy and resources industries (including with regulators), negligence claims, misleading and deceptive conduct claims, directors and professional liability claims, commercial leasing disputes, shareholder disputes, product liability issues, corporate insolvency and reconstruction, government litigation and disputes involving the *Personal Property Securities Act 2009* (Cth).

In the corporate insolvency context, Pravin has advised insolvency practitioners, banks, secured creditors and unsecured creditors on issues surrounding external administrations of companies and managed investment schemes, proof of debt claims, insolvent trading claims, enforcing security interests and post-liquidation sales of businesses. He also has considerable experience in bringing and defending voidable transaction claims (including unfair preferences, uncommercial transactions and unreasonable director-related transactions) and prosecuting claims for breaches of directors' and auditors' duties.

Pravin was recognised by Doyle's Guide 2023 as a recommended lawyer in restructuring, insolvency, commercial litigation and dispute resolution and in Best Lawyers.

Pravin is currently serving as Deputy Chair of the Victorian chapter of the Law Council of Australia's Insolvency and Restructuring Committee.

Experience

- **Gunns Group of Companies** – acting for the liquidators of the Gunns Group of Companies in pursuing voidable transaction claims and claims against former directors and auditors of the Gunns Group. The voidable transactions claims comprised 73 claims commenced in the Federal Court of Australia and Supreme Court of Victoria, one of which culminated in an appeal before the High Court of Australia in October 2022 (judgment delivered in February 2023) regarding issues of great significance to liquidators seeking to pursue unfair preference claims.
- **Revolution Roofing and Nexteel Group** – acting for Cashflow Finance Australia (trading as Earlypay), the first-ranking secured creditor of Revolution Roofing and the Nexteel Group, as well as Grant Thornton in their capacities as the receivers and managers of those companies. Pravin's duties in this matter included advising Earlypay regarding its security interests (including in relation to priority disputes with other secured parties) and advising the receivers regarding issues arising in the conduct of the receivership (including dealings with the administrators and other creditors and strategy with respect to progression of asset sales).
- **Probuild Group** – acting for the administrators (Deloitte) in relation the administration of the Probuild Group of construction companies (with a workbook value of over $5 billion).
- **Ovato Group** – acting for FTI Consulting in their capacities as voluntary administrators of the Ovato Group regarding the collapse of one of the only two printing business in Australia (with $194.2 million in revenue at the time of its collapse).

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- **Calia Australia & Puzzle Coffee** – acting for Jirsch Sutherland in their capacities as voluntary administrators (and subsequently, deed administrators) of those companies, including advising in relation to various issues arising during the conduct of the external administration, including negotiation of competing DOCA proposals and completion of the DOCA transactions (including a section 444GA *Corporations Act 2001* (Cth) (Act) share sale).
- **Balmaine Gold and Castlemaine Gold** – acting for Alcrest Royalties Australia in the external administrations of Balmaine Gold and Castlemaine Gold, including advising Alcrest in negotiations that culminated in successful preservation by a deed of company arrangement of Alcrest's royalty rights of approximately A$50 million with respect to the Ballarat gold mine.
- **Buddy Capital** – acting for Buddy Capital in enforcing its security interest against a defaulting counterparty, including obtaining the appointment of Court-appointed receivers.
- **Gemwood Projects** – acting for SV Partners in pursuit of insolvent trading and voidable transaction claims in the Supreme Court of Victoria valued between $5 million and $11 million.
- **Merchant Overseas Logistics Pty Ltd (in liquidation) (MOL)** – acting for the voluntary administrators and liquidators in relation to the external administration of MOL, including in an application for appointment of the liquidators as voluntary administrators for the purpose of facilitating consideration and implementation of a deed of company arrangement.

Peter Smith

Partner –
Restructuring & Insolvency

T +61 7 3002 2515
M +61 405 223 596
peter.a.smith@jws.com.au

Peter is a commercial litigator who has specialised for over 30 years in all aspects of corporate restructuring and contentious insolvency. He is known for leading complex litigation, which has included oppression actions, insolvency litigation, construction disputes, tax disputes, and defending professional negligence actions against accountants and directors.

With his training in alternate dispute resolution procedures (ADR), he is an advocate for seeking to resolve disputes in the earliest timeframe possible. In 2021, his peers recognised Peter as the Lawyer of the Year for ADR in the 14th Edition of Best Lawyers.

Peter is endorsed as a leading restructuring and insolvency practitioner in Chambers Asia-Pacific (Australia) 2023 guide (and other publications). In 2019, Peter was acknowledged in Best Lawyers as 2020 Queensland Lawyer of the Year for Insolvency and Reorganisation.

Peter is publicly recognised for his "strategic approach" and good commercial mind' and as a lawyer who focuses on the end game, working with his clients to achieve the right outcomes.

Experience

- **Directors of 2 subsidiaries of New Hope Corporation Limited** – acted for to defend Supreme Court of NSW proceedings commenced against them, other former officers and New Hope Corporation by the liquidators of those subsidiaries. The proceedings concerned very complex and *Corporations Act 2001* (Cth) claims, including allegations of breach of duty, totalling circa $174 million arising out of inter-company restructures and transactions executed within the New Hope Group over a period of 4 years prior to the liquidation of the subsidiaries. The proceedings settled during the trial.
- **Directors of various Australian companies (including two ASX listed companies)** – providing safe-harbour advice.
- **Domestic arbitration** – acting for a mining services contractor seeking substantial amounts owing from a Qld mine owner under a now terminated mining services contract.
- **National Australia Bank** – co-lead the team assisting throughout rounds 5 and 7 of the Royal Commission into Financial Services, supervising a team of up to 80 lawyers and paralegals charged with responding to over 50 notices to produce issued to NAB by the Commission.
- **Board of Mackay Sugar** – advised the Board throughout the company's successful restructure that was implemented over an 18 month period.
- **Department of Environment and Science** – acted for the party to a test case commenced by the Liquidators of Linc Energy seeking directions as to whether the property of the company should be applied to fund substantial rehabilitation costs in priority to claims of priority creditors, including employees.
- **Queensland Department of Health** – acted for the former Director-General of the Qld Department of Health in the Barrett Adolescent Centre Commission of Inquiry.
- **Legal officer employed by a local authority** – represented an individual who was summoned to appear at private hearings before the Crime and Misconduct Commission.

- **Major shareholder and financier of Cockatoo Coal** – advised on successful restructured under consecutive deeds of company arrangement and creditors trusts.
- **Receivers and managers** – advised in many receiverships involving property developments, management rights business, retail business, agriculture, commercial and residential property.
- **Storm Financial** – lead the team at his previous firm on implementing one of the major bank's review and resolution process for its customers affected by the collapse of Storm Financial.
- **I-MED Group** – was part of his former firms' restructuring team that advised the Senior Banking Syndicate on the restructuring of the I-MED Group, Australia's largest, privately owned diagnostic imaging network. The transaction was one of the most significant restructuring transactions in the Australian market of the last seven years and has been referred to in the press as a 'model debt-for-equity swap deal for a few private equity situations ahead'.
- **Octaviar Limited (formally MFS Limited)** – senior member of the turnaround and reconstruction team.
- **Bank of Western Australia Limited** – conducted the defence for Bank of Western Australia Limited of a $2 million priority dispute issued by a second mortgagee in the Supreme Court of Queensland and related proceedings by the liquidator of the borrower. The bank was successful at trial, on appeal to the Queensland Court of Appeal and on the application of the liquidator for special leave to appeal to the High Court of Australia.
- **North American gold producers** – conducted the successful defence in an oppression suit issued in the National Court of Papua New Guinea.
- **United Medical Protection Limited** – acted for the provisional liquidator of United Medical Protection Limited and was actively involved in the implementation of the Federal Government's rescue package for, and the reconstruction of, UMP.
- **Compass II airlines** – acted for the liquidator of Compass II airlines in respect of an extensive number of issues arising out of the administration of the company. The administration was large and complex, complicated by the necessity for extensive investigations (conducted in conjunction with the ASIC) of fraud by the company's former deputy chairman.
- **Solomon Islands fishing company** – acted for appointed receivers of a Solomon Islands fishing company sued by the company in its former directors in the High Court of Solomon Islands for damages exceeding SI$4 million for trespass, negligence and fraud. Peter also acted for the receivers in separate proceedings before the High Court to quash private criminal prosecutions issued by the directors against the receivers. In 1996, Peter appeared with junior counsel on behalf of the receivers in seven weeks of public sittings before a Solomon Island Royal Commission of Inquiry commissioned to investigate the appointment and conduct of the receivers.
- **International supplier of stainless steel** – conducted the defence against whom significant claims have been made by users. The claims are the subject of both litigation and an international arbitration.
- **Taxpayer** – acted for individual who issued judicial review proceedings to challenge an amended assessment of stamp duty issued by the Commission or an inter-company transaction, which increased duty by $10 million.
- **Taxpayer** – acted for individual in successful Federal Court Proceedings to challenge the Commissioner's incorrect FBT ruling in relation to a proposed employee share scheme.
- **Leading Bank** – advised in relation to two ACCC investigations of conduct by officers of the Bank.

Joseph Scarcella

Partner and Practice Group Head – Restructuring & Insolvency; Dispute Resolution

T +61 2 8247 9639
M +61 498 988 067
joseph.scarcella@jws.com.au

Joseph is the Practice Group Head of the JWS restructuring team. He is widely recognised as one of Australia's leading restructuring lawyers with vast experiences in all aspects of insolvency administrations, security enforcement, insolvency related litigation, restructuring techniques and workouts. He has instructed in respect of almost every major corporate insolvency in Australia; is an expert litigator and advocate and handles complex litigious matters both in out of the insolvency arena.

Joseph's experience spans complex insolvencies such as the collapse of building and property development companies, multi-jurisdictional hedge fund, finance and insurance companies. He acts for corporate clients in respect of their exposure to lenders or financially precarious counterparties.

Joseph also has experience in representative proceedings (class actions) and is responsible for some groundbreaking decisions in this field.

His clients include domestic and international insolvency practitioners, ASX listed corporations, investment banks, and litigation funders.

Joseph is retained for the commerciality and speed of his advice. Clients particularly value his tenacity and passion, especially in litigious circumstances. He is recognised as a leading lawyer in Restructuring & Insolvency by Chambers Asia-Pacific, Best Lawyers Australia and preeminent by Doyle's Guide to the Australian Legal Profession. Joseph also sits on the Federal Court User Group in relation to Commercial and Corporations (Insolvency) matters.

Experience

- **Adaman Resources** – acted for shareholders and creditors of WA gold miner in respect of its administration.
- **Allco** – acted as the principal legal advisor to the liquidators of the group of companies.
- **Babcock & Brown** – acting as principal legal advisor to the liquidator, including in respect of prosecution of major claims and successful defence of several shareholder class actions.
- **CBD Energy** – acted for the administrators, which is the first successful reconstruction of an Australian entity publicly listed on the NASDAQ in the United States.
- **Clough** – acting on key aspects of administration for Deloitte as administrators.
- **[Confidential]** – acting for a global professional services firm in respect of two separate frauds, including advising on recovery option, dealing with regulators and overseeing changes of internal protocols.
- **Crown Group Provisional Liquidation** – acting for BDO in their capacity as Provisional Liquidators of Crown Group Holdings and its 39 subsidiaries. The appointment arose by reason of a protracted shareholder dispute which left the Group companies unable to be managed. This is the largest insolvency appointment in Australia at present.
- **Cubic** – acting on the restructure of a high-end commercial interior fit out group.
- **Dyldam** – acting for the administrators of the holding company of this construction group.

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- **Griffin Coal** – acting for the receivers (Deloitte) of this West Australian coal mine.
- **Grocon** – appointed as strategic advisor to the directors of the Grocon Group to help navigate it through a complex administration process, secure the future of the Group and provide an adequate return to creditors.
- **HIH** – acted for the liquidators, which remains Australia's largest corporate insolvency.
- **Lagardare Group** – acted for this multinational retailer in respect of the impact of COVID-19 on its business, including restructuring its domestic operations and in respect of a joint venture with its competitor.
- **Macquarie Bank** – advised in relation to its exposure to the Dick Smith Group.
- **Probuild** – acting for Deloitte as administrators of the Australia's largest building collapse.
- **Rapid Securities** – acted in respect of the successful "pre-pack" restructure of this group.
- **Revolution Roofing** – acting for Earlypay (secured creditor) and Grant Thornton (receivers and managers) in respect of one of the largest insolvencies in South Australia.
- **Safe Harbour** – various mandates for Australian boards and directors in assisting them restructuring their companies by use of the safe harbour provisions in the Corporations Act.
- **Theta Asset Management** – acted for the liquidators of the responsible entity of the collapsed Sterling Group.
- **Range of liquidators** – acting for in respect of prosecutions by various regulators.

Paul Buitendag

Partner – Restructuring & Insolvency, Dispute Resolution

T +61 3 8611 1305
M +61 477 413 794
paul.buitendag@jws.com.au

Paul specialises in large-scale and complex legal and commercial disputes, including in the insolvency, engineering and construction industries. Paul successfully led disputes in Australia and New Zealand and multiple commercial disputes in South Africa, where he was managing partner of a law firm in Pretoria for over 14 years.

Paul is a pre-eminent insolvency lawyer, whose expertise includes advising liquidators, administrators, banks and creditors on receiverships, deeds of company arrangement, insolvent trading, voidable transactions, unfair preferences, proof of debt claims, as well as enforcing securities. He advises on all aspects of workouts, recovery and reconstructions including representing insolvency appointees and borrowers and restructuring of managed investment schemes.

He is renowned for identifying and offering cost-effective and commercially sound alternatives to litigation. Clients value Paul's unique and unparalleled "big picture" perspective, his strategic advice and his team's ability to manage the complexities of their disputes and deliver commercial outcomes.

Paul is recommended for Dispute Resolution in Asia Pacific Legal 500 2020 - 2022.

Experience

Insolvency litigation

- **Gunns Ltd (In Liq)** – acting for the liquidators of Gunns Ltd (In Liq) and its group of companies in three claims with a combined value of approximately $250 million arising from the collapse of one of Australia's largest timber and forestry management companies, namely:
  - recovery actions against 200 separate defendants. 73 voidable preference claims were issued and created authority on issues such as continuous business relationship, peak indebtedness, ultimate effect, discretion, good faith and set off;
  - claims against Gunns' auditors (KPMG) for professional negligence and breach of contract in relation to their conduct of their audits and its directors in respect of misstatements in their annual report, valued at approximately $200 million. This transaction is one of the largest insolvency recoveries in the country;
  - defending a class action against Gunns for alleged losses by growers of forestry timber from investments in managed investment schemes.
- **Bill Express (In Liq)** – acted for the liquidators of one of Australia's largest pre-paid phone card and bill payment facility collapses, regarding claims against former auditors, Pitcher Partners and KPMG, for professional negligence and misleading or deceptive conduct for the claim value in excess of $200 million as well as against the former directors and officers of the company for insolvent trading.

Reconstruction and turnaround

- **Botanic Homes (In Liq)** – acting for liquidators of a domestic building company regarding:
  - obligations under developer contracts;
  - completion of properties, insurance and building permit issues, intellectual property, sale of property and equipment, validity of security;
  - sale of assets, including display homes subject to obligations novated to purchasers.

- **Jones the Grocer Stores** – acted for a private equity fund, as major shareholder and Deed Proponent, regarding the restructure of one of its businesses in Australia, through a voluntary administration, proposed deed of company arrangement and a transfer of share application pursuant to section 444GA of the *Corporations Act 2001* (Cth).
- **Protea Tyres (National Franchise)** – opposed the appointment of an administrator of a retail and manufacturing corporation. As the lead partner, implemented a scheme of arrangement and assisted auditors, KPMG, with the financial restructure and business turnaround plan.

Commercial litigation

- **ASC AWD Shipbuilder Pty Limited** – defended to trial in the Supreme Court of NSW and a subsequent appeal for claims against our client by Donau Pty Ltd for alleged breaches of contract relating to the construction of ships, Australian Warfare Destroyer, for the Australian Navy. Paul successfully led the team in ASC receiving in excess of $30 million at trial.
- **Inductotherm Group (a division of Indel Group)** – managed international large-scale litigation for an engineering company specialising in induction heating, melting, hot rolling and other processed electronic engineering methods regarding a dispute against NZ Steel (a former subsidiary of Blue Scope Steel) for repudiation and termination of contracts.

Class actions

- **Allianz class action** – acting against Allianz Australia Insurance Ltd and Allianz Australia Life Insurance Ltd in the Supreme Court of Vic concerning the sale of "add-on" motor vehicle insurance products. It involves claims of misleading and deceptive conduct, unconscionable conduct and mistake. It was the first proceeding in Australia to apply for a group costs order (currently adjourned) to allow JWS to be paid a contingency fee on any settlement or judgment over and above the payment of our fees. A competing action was issued by Maurice Blackburn and both firms applied to consolidate the two proceedings and run the matter together, including the group costs order.
- **Westpac securities class action** – acted for the lead applicant in an action on behalf of investors of Westpac securities that alleged market disclosures and statements made about the bank's compliance with its obligations under the Anti-Money Laundering and *Counter-Terrorism Financing Act 2006* (Cth) (**AML-CTF Act**) in contravention of Westpac's and/or its CEO's continuous disclosure obligations and related statutory provisions. It followed civil penalty proceedings issued by AUSTRAC in November 2019 alleging systematic non-compliance with the AML-CTF Act.
- **BHP Billiton securities class action** – represented Los Angeles Country Employees Retirement Association, a Californian public pension fund with over 168,000 members and net assets in trust for over US$45.7 billion, in a securities class action commenced in the Federal Court against BHP Billiton Ltd and BHP Billiton Plc. The action arose out of the collapse of the Fundao tailings dam at the Samarco iron ore mine in Minas Gerais, Brazil in 2015 killing 19 people and damaging the surrounding environment and community. It concerned violations of continuous disclosure obligations by BHP in failing to inform the market of the risks of the failure of the dam and engaged in misleading and deceptive conduct as to the safety of the operations.

Ben Renfrey

Partner –
Restructuring & Insolvency,
Dispute Resolution

T +61 8 8239 7158
M +61 422 602 634
ben.renfrey@jws.com.au

Ben is an insolvency and reconstruction lawyer with extensive experience in insolvency, reconstruction and recovery related litigation. He acts for insolvency practitioners in their capacity as liquidators, voluntary administrators, deed administrators and receivers, as well as for corporate borrowers seeking to restructure.

Ben has over 20 years' experience acting in various large and complex disputes and Court related matters. He has particular experience in advising insolvency practitioners and secured creditors on insolvency related matters and insolvency recovery actions (acting for both liquidators and defendants), insolvency and other Corporations Act Court applications, general commercial and contractual disputes, judicial review applications and appeals.

Ben is a past Deputy Chair of the Law Council of Australia's Insolvency and Restructuring Committee. He has been regularly recognised since 2015 as a leading lawyer in Insolvency and Restructuring, Commercial Litigation and Alternative Dispute Resolution by Best Lawyers and Doyles Guide. Ben was recognised as a pre-eminent lawyer in Insolvency and Restructuring in Doyles Guide in 2020 and 2021

Experience

Insolvency

- **Angas Securities Limited** – acted for non-bank lender on its scheme of arrangement to restructure its $220 million debenture fund.
- **Liquidators of Gunns Limited and the Gunns Group of companie**s – acted for in relation to claims against Gunns' former auditors and directors for approximately $160 million.
- **Foreign exchange trading business** – acting for the liquidator which suffered losses of circa $20 million as a result of director fraud against investors in the company.
- **Electrical contractor** – acting for the liquidator with losses of circa $10 million.

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Dispute resolution

- **Angas Securities Limited** – acted for in numerous Federal Court proceedings commenced by the trustee of Angas' $220 million debenture fund. The proceedings were resolved by a consensual run-off of the debenture fund approved by investors on 3 occasions and finally by a scheme of arrangement to restructure the fund.
- **Liquidator of Gunns Limited** – acted for in relation to approximately 74 unfair preference claims, all but three of which settled prior to trial.
- **Liquidator of Australian Property Custodian Holdings Limited** – acted for in relation to claims against APCH's former auditors and directors.
- **Civil & Allied Construction Pty Ltd (CATCON)** – acted in a $35 million arbitration commenced by a subcontractor regarding the construction of a wind farm for AGL at Silverton, NSW against CATCON.
- **Australian corporate involved in renewable energy projects** – acted for the company in protracted negotiations relating to complex disputes with its international consortium partner concerning four partly completed major projects.

Lucas Wilk

Partner –
Dispute Resolution

T +61 7 3002 2522
lucas.wilk@jws.com.au

Lucas is a leading restructuring and insolvency lawyer known for managing, complex administrations, workouts and related litigation. Lucas also represents clients in large and complex commercial disputes for leading Australian listed companies, multinationals and foreign corporations with a focus on energy and resources and major projects.

He has an exceptional reputation in acting in business restructuring. He is very well regarded for simplifying complex financial matters and assisting clients to achieve their commercial objectives with the aid of insolvency and litigation strategies.

In the area of commercial disputes, Lucas' work includes strategic pre-advice, mediation, litigation and arbitration.

Clients value Lucas' discerning approach, technical ability, commerciality and tenacity in difficult and protracted matters.

He has acted in high-profile oil and gas, iron ore, royalty, project infrastructure, rail access and joint venture disputes.

Lucas is known for his client-centric strategic approach and dynamism.

Lucas is recognised as a leading restructuring and commercial litigation lawyer by Legal 500 and Best Lawyers.

Experience

Restructuring

- **Deloitte** – representation of receivers and managers of the Griffin Coal Mining Company, involving a secured debt in excess of USD2.4 billion and an operating coal mine that provides key feedstock for coal fired power stations that produce a significant portion of electricity for the south west of Western Australia.
- **Voluntary administrators** – representation in potential restructure of Commonwealth funded renewables project and related litigation.
- **EDF Energy** – represented EDF, the largest creditor of ASX listed uranium miner Paladin Energy in its restructure by way of debt for equity swap and related proceedings.
- **Queensland Investment Corporation** – representation in the restructure of Virgin Australia, involving a debt and equity investment by QIC in the $3.5 billion restructure of the airline by Bain Capital.
- **Global construction contractor** – acting in relation to alleged unfair preferences received by the contractor from an ASX listed company that subsequently entered liquidation.
- **Insolvency practitioners** – represented insolvency practitioners in all aspects of their appointments to various insolvent entities.

Disputes – litigation and arbitration

- **Oil & gas majors** – advised on various disputes including operator v venturer, operator v contractor and disputes with operators of contiguous acreages.
- **Western Metropolitan Regional Council** – represented the WMRC in the successful trial and defence of an appeal concerning the Shenton Park Waste to Energy project operated by DiCOM AWT.
- **US based royalty holder** – represented a US based royalty holder in Court proceedings concerning the right to additional royalties on LNG cargo sales and return of coal seam gas assets in Queensland.
- **Co-operative Bulk Handling** – represented in the railway infrastructure access arbitration against Arc Infrastructure.
- **Wheatstone project** – represented in a high-value arbitration concerning ancillary vessels used in the installation of topsides on the off-shore platform that is part of the Wheatstone LNG project.
- **BHPIO** – advised on disputes with iron ore royalty stream holders.
- **Nickel project** – represented project operator in dispute with AGL concerning operation of a remotely located power station and related power purchase agreement.
- **Rio Tito and BHP** – various representations concerning royalty and access disputes with native title holders under ILUAs for mining operations in Western Australia and South Australia.

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Rena Solomonidis

Partner –
Dispute Resolution

T +61 3 8611 1306
M +61 498 835 714
rena.solomonidis@jws.com.au

Rena is a dispute resolution lawyer specialising in commercial litigation, corporate insolvency and class actions.

Rena advises insolvency practitioners in prosecuting claims from national insolvencies including for breaches of auditors' and directors' duties, insolvent trading claims as well as issues in external administrations including restructuring via deeds of company arrangement and enforcing security interests.

Rena also prosecutes and defends class actions relating to investments in securities, insurance purchases and audit failures. The claims have involved financial institutions, auditors, lawyers, a resources multinational and companies in liquidation.

Rena's experience in commercial litigation includes contractual disputes, professional liability claims, misleading and deceptive conduct claims, commercial leasing disputes, disputes in corporate trustee services, the engineering industry and resources sector. She also has experience in Royal Commissions.

Rena is active in the industry and has held leadership positions at Women in Insolvency and Restructuring Victoria (**WIRV**) and the Law Institute of Victoria.

Rena was recognised by Doyle's Guide as a Rising Star in Litigation, Dispute Resolution & Insolvency in Australia.

Experience

Insolvency matters

- **Aus Streaming Ltd (in liq)** – acted in proceedings in the Supreme Court of Victoria to appoint special purpose liquidators to investigate spurious investments of the company in the Australian and international critical metals/resources markets valued at $145M.
- **Gunns (in liq) (Receivers and Managers Appointed) (Gunns)** – acted for liquidators in one of Australia's largest timber and forestry management companies in the Supreme Court of Tasmania:
  - against auditors of Gunns for professional negligence and breach of contract in relation to their audits for losses of approximately $160 million; and
  - against various directors and officers for claims relating to the financial accounts for losses of approximately $60 million.
- **Bill Express (in liq) (BXP)** – acted for liquidators of one of Australia's largest pre-paid phone card and bill payment facility collapses against auditors of BXP for professional negligence and misleading and deceptive conduct regarding their audits for losses in excess of $200 million.

Class Actions

- **Allianz class action** – acting for the lead plaintiff on behalf of consumers who purchased "add-on" motor vehicle insurance from Allianz Australia Insurance Ltd and Allianz Australia Life Insurance Ltd, in a consolidated proceeding with Maurice Blackburn, for claims including misleading and deceptive conduct. It was the first class action in Australia to apply for a group costs order to allow JWS to be paid a contingency fee on any settlement or judgment over and above payment of legal fees.

- **Westpac securities class action** – acted for the lead applicant on behalf of investors of Westpac securities alleging that market disclosures about the bank's compliance with obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) were in contravention of continuous disclosure obligations.
- **Slater & Gordon (S&G)** – acted for the lead applicant, Babscay Pty Ltd, in the Federal Court of Australia, in shareholder class actions against:
  - S&G for representations to the market regarding recognition of revenue in its financial accounts for no win no fee retainers; and
  - auditors of S&G, regarding S&G's accounts.
- **Gunns Growers class action** – acted for the liquidators in proceedings against Gunns Ltd in liq and Gunns Plantations Ltd in liq in the Supreme Court of New South Wales by investors in managed investment schemes.
- **BHP Billiton securities class action** – acted for Los Angeles Country Employees Retirement Association, a Californian public pension fund with over 168,000 members and net assets in trust for over US$45.7 billion, in a securities class action in the Federal Court of Australia against BHP Billiton Ltd and BHP Billiton Plc. The action concerned the collapse of the Fundão tailings dam at the Samarco iron ore mine in Minas Gerais, Brazil regarding breaches of continuous disclosure obligations and misleading and deceptive by BHP.

Commercial litigation

- **Equity Trustees (EQT)** – acting for EQT against its currency manager Tactical Global Management Limited. The proceeding involves claims of breach of contract, negligence and breach of fiduciary duties arising out of an over-hedging error, which caused losses of approximately $5 million.
- **ASC AWD Shipbuilder Pty Limited (ASC)** – acted for ASC in the Supreme Court of NSW for claims by Donau Pty Ltd for alleged breaches of contract regarding the construction of ships for the Australian Navy.
- **Ok Tedi Mine** – acted for the Independent State of Papua New Guinea concerning the Ok Tedi Mine in the Western Province of the country regarding breaches of corporate governance and financial reporting in the mining industry and failure to account for multi-million dollars in profit.
- **Inductotherm Group (a division of Indel Group)** – acted in international litigation for an engineering company in a contractual dispute against NZ Steel.

Regulatory

- **Royal Commission into Casino Operator and Licence** – acted for a Senior Executive of Crown Casino in the Royal Commission into Casino Operator and Licence led by the Honourable Ray Finkelstein AO KC and in associated regulatory investigations.
- **Australian Securities and Investment Commission** – assisting ASIC in conducting preliminary investigations into a retailer in relation to possible false and misleading statements.
- **Financial Services Royal Commission** – acted for ASIC in the Royal Commission led by the Honourable Kenneth Hayne AC KC.

Eve Thomson

Partner –
Dispute Resolution

T +61 8 8239 7174
M +61 413 583 762
eve.thomson@jws.com.au

Eve has broad experience in the conduct and resolution of complex disputes, and advising on regulatory matters.

Eve has acted for clients in litigation at both State and Federal levels, and in other forums such as investigations, expert determinations and tribunals.

Eve assists a wide range of clients including large listed and unlisted corporations, regulators and local government. Eve has advised administrators, receivers and liquidators, including in seeking judicial advice, approvals and directions, and in proceedings against former officers, advisers and third parties.

Experience

- **Various separate Lehman Brothers Australia investors** – assisting in preparing and submitting claims in the liquidation of Lehman Brothers Australia for losses incurred through investments in synthetic collateralised debt obligations.
- **RiverCity Group (involved in the failed Clem7 Tunnel project in Brisbane)** – acting for the liquidators in relation to the conduct of the liquidation, including applications for directions under the *Corporations Act 2001* (Cth) (Act) concerning the liquidators' powers and functions in connection with litigation against and by RiverCity companies, directions in respect of the winding up of registered schemes.
- **Octaviar Group** – acting for the liquidators seeking various Court directions, including remuneration approvals.
- **DDH Graham Ltd** – acting for in defence of a Federal Court class action brought by a number of former clients of Sherwin Financial Planners against DDH Graham and the Bank of Queensland.
- **PrimeSpace Property Investment Pty Ltd** – acting for the liquidators, including investigating claims against the former solicitors of the company, the commencement and resolution of proceedings in respect of those claims, liquidators' examinations under Part 5.9 of the Act, and defence and resolution of New South Wales Supreme Court proceedings commenced against the company seeking rectification of guarantee documentation.
- **SkyCity Entertainment Group** – acting for in proceedings in the Supreme Court of South Australia concerning casino operations, and the calculation of casino duty.
- **Are Media Group** – acting for, on an ongoing basis providing prepublication advice to various Australia wide print and online publications.
- **Australian Energy Market Commission** – advising in relation to various statutory matters.
- **Western Power, Power & Water Corporation** – advising in relation to aspects of the regulatory regime.
- **SEA Gas** – acting for SEA Gas in judicial review proceedings in the Supreme Court of South Australia.
- **Queensland Competition Authority** – assisting in judicial review proceedings.
- **United Water International (a subsidiary of Veolia Water, a French based world leader in water and wastewater services)** – acted in two consecutive expert price determinations in respect of a multi-million dollar legal dispute over Adelaide metropolitan water and wastewater infrastructure outsourcing contract.
- **Large civil construction group** – acting for, in relation to the enforcement of multiple insurance policies relating to the construction of wind farms across Australia, including in the prosecution of Federal Court proceedings.
- **ACCC** – assisting in relation to a confidential cartel investigation.

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Emily Barrett

Partner –
Restructuring & Insolvency

T +61 2 8247 9682
M +61 477 479 471
emily.barrett@jws.com.au

Emily is a restructuring and insolvency and commercial litigation lawyer specialising in all aspects of external administrations, security enforcement, insolvency related litigation and dispute resolution.

She has experience in all facets of external administrations from formal insolvency appointments through to restructuring via Deeds of Company Arrangement and other workouts, advising on pre and post appointment issues, litigation, both on an urgent basis, for example freezing orders and extensions of convening periods, to more substantive litigation such as commercial disputes and applications to the Court for judicial advice.

Emily's clients include insolvency practitioners, medium to large corporate entities, including ASX listed corporations, and directors and officers of corporate entities.

Emily is recognised as a rising star in the insolvency and litigation space by Australasian Lawyers and Doyle's Guide. She was also a nominee in 2023 for Private Practice Lawyer of the Year at the Australasian Law Awards.

Experience

- **BDO** – as provisional liquidators of the Crown Group of companies.
- **PWC** – as voluntary administrators of IOUpay Limited a listed entity with various Malaysian subsidiaries conducting businesses in the fintech space.
- **PWC** – as special purpose liquidators of the Youpla Group in relation to the collapse of the Aboriginal Community Benefit Fund, which controversially targeted First Nations people, leaving more than 14,500 people without funeral insurance.
- **FTI** – in relation to the collapse of Ovato, one of only two printing businesses in Australia with $194.2 million in revenue at the time of the collapse. This role involved various Court applications, including the extension of the convening period and the decision period in s 443B of the *Corporations Act 2001* (Cth) (Act), advising on finance for continued trading and making a corresponding application to limit the personal liability of the administrators, preparing a rare and novel s 49 application for early access to the Fair Entitlements Guarantee Scheme and advising on various leasing issues.
- **Earlypay and Grant Thornton** – as receivers and managers of RevRoof and PST including advising in respect of an asset sale, insurance claims, recoveries against secured assets, and management of a team in the conduct of three sets of litigation, first under s 420B of the Act, second in relation to a repossession application by a landlord and third regarding the recovery of stolen intellectual property.

Johnson Winter Slattery | Insolvency & Restructuring Case Summaries 2023: **Curriculum vitae**

- **Deloitte** – in relation to their appointment as receivers and managers of Griffin Coal and Carpenter Coal Mines including the contentious negotiation of the appointment documents with the syndicated lenders.
- **Deloitte** – in relation to the voluntary administration of the Probuild Group, which left debts of more than $311 million, advising on pre-appointment issues as well as various employee claims for entitlements and adjudication on proofs of debt.
- **Worrells** – in relation to the voluntary administration and subsequently liquidation of Lottah Mining including advising on all aspects of the administration, defending an application for the appointment of provisional liquidators in the Supreme Court of Western Australia, a dispute with a former director in the Supreme Court of Victoria, conducting public examinations and an appeal from an adjudication of a proof of debt by a related entity.

17. Index

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

R

S

T

U

V

W

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