ON THE BEAM

CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

Volume 12, Issue 1, February 2018

Welcome to 2018, and some thoughts on R&D

By Schon G Condon RFD

Hi everyone and welcome to 2018, no doubt it will continue to be more of "different" but "normal"! 2017 essentially closed quietly notwithstanding that it's been a year of significant change for the Insolvency profession. Whilst steps were taken to align the operations of both the Bankruptcy Act and the Corporations Law, it is still amazing how different they are and how some of the really powerful sections of one Act find it impossible to be transcribed into the other. Enough of that, it is what it is, and we must all learn to work with it.

One thing that has popped its head up of recent times though is the Taxation Commissioners current focus on Research and Development (R&D) claims. Such claims can be extremely valuable to a business in fact amazingly so, if the business truly features R&D as a key part of your operations. The underlying issue however is that there are primarily two fundamental facets to making the claim. Firstly one must actually be running a proper Research and Development programme, and secondly, one must ensure that one's documentation and claim are absolutely correct. This of course is best achieved by seeking the assistance of a specialist in the R&D area, who are commonly paid on a percentage basis of the claim itself. As an aside, we are not such specialists, but can guide you to someone if you need.

The problem with situations or revenue streams like this is that they can easily become the playground of the 'less than professional' professional, one who is out for the quick dollar. The scam essentially works around a theory that if the paperwork looks right, then all will be right in the end. Trust me nothing could be further from the truth.

As a result of, no doubt seeing a stunning commonality in the documentation supporting widely different claims, the Commissioner has increased his level of review and has offered a period of amnesty to claimants where, upon reflection, they may now consider their original intention to lodge a claim may have been misguided. Those that do can come to a financial arrangement with the Australian Taxation Office (ATO) with regard the monies that must be reimbursed and all is well. For those that don't, should their efforts to prove the validity of their claim fail, then they will be faced with not just the primary debt but also potentially significant penalties and interest charges. This will particularly be the case where multiple years are involved.

Regardless of whether you adopt the conciliatory approach, or alternatively a more combative style, clients may well find themselves with a debt that they can't easily afford at this time. Panic should not be the order of the day and a more organised, premeditated and professional approach should be adopted. There are a raft of alternatives; and a conciliatory approach combined with a proper plan to deal with the sudden increase in liabilities will no doubt at the end of the day be the most economical way to proceed. It will certainly offer the greatest chance of survival. The age old adage, 'prior preparation and planning' will (more often than not) overcome the problem.

Regardless of what else happens this year the one thing we can all expect is increasing revenue demands on all. We may well get tax cuts but these will be supported by other revenues that grow as 'industry funding' or 'user pays' models which allow the non-use of the word tax. It is still government revenue though. Businesses will need to plan on paying more as time goes by, and be capable of adapting and/or changing quickly so as to be able to modify methods or processes as new charges come into play.

Likewise make sure that anything that you offset or claim is correct and legitimate. With the increasing data trawling capabilities of systems, and algorithms being built into programmes that can spot errors, irregularities, or inconsistencies, it will only be a matter of time before you are asked to explain; and no doubt repay. This is clearly visible from the R&D issue raised above.

Have a great 2018, and I trust it brings you all you hope for.

Enjoy the read.

139ZQ - A potentially more useful tool

By Gavin King

The recent case of Chamberlain (Trustee) v Tilbrook [2017] FCA 1586, NSD 1039 of 2017 highlights the steps a Trustee and their representatives will need to undertake in the event the receipt of a 139ZQ evades service and the features of a 139ZQ notice.

As you may be aware 139ZQ is a notice that is issued by the Official Receiver upon the request of either a Registered Trustee or the Official Trustee. The notice is in respect of a transaction that the Trustee considers void pursuant to sections 120,121,122,128B or 128C of the Bankruptcy Act.

The issue of a 139ZQ notice may also circumvent proceedings being held in the Courts attempting to recover a void disposition. The recipient of a 139ZQ notice has a period of 60 days with which to lodge an objection to the issue of the 139ZQ notice in the appropriate Court, generally the Federal Circuit Court. This 60 day limit is a mandatory term and as such no application may be brought after its lapsing.

It is worthwhile mentioning that if the notice remains uncontested then the Trustee has the right to recover the amount as stated in the notice as a debt due, the court is unable to review the underlying circumstances but must proceed on the basis the transaction is void. However if the receipt of the 139ZQ does make an application to set aside the notice the onus to prove the transaction was void rests with the Trustee. As such, in the event you or a client of yours receives a 139ZQ notice you should contact us for specialist advice as soon as possible.

Now to the Tilbrook matter, below is a brief outline of the facts of the case:

- On 8 February 2011 Malcolm John Tilbrook became bankrupt when his debtors' petition was accepted by the Official Receiver.
- On 8 February 2011 the Applicant, Christopher Mel Chamberlain, was appointed Trustee of the bankrupt estate of Malcolm John Tilbrook.
- The Respondent Patricia Susan Tilbrook is the spouse of Malcolm John Tilbrook.
- On 10 July 2015 the Official Receiver issued a Notice pursuant to section 139ZQ of the Bankruptcy Act 1966 (Cth) (Notice) to the Respondent demanding payment of the sum of $339,725.09 within 28 days of receipt of the Notice.

Upon lodging the application a number of direction hearings were undertaken by the Court. These occurred on:

24 July 2017 – Stood over to allow service

24 August 2017 – Personal service is not required, and an alternative means of service be allowed,

22 September 2017 – Matter stood over to affect service of the prior orders

11 October 2017 – Set the matter down for hearing

Part hearing being held on 28 November 2019 and the balance of the hearing was held on 19 December 2017 with judgment being given on that day.

As can be seen from the time delays the recipient of the 139ZQ appeared to be evading service of the court documents.

The court ultimately found that as no defence had been filed that the Trustee's evidence of the non-compliance with the 139ZQ was sufficient to prove the matter and the Court ordered Ms Tilbrook be liable to pay the Trustee the sum of $339,725.09, plus interest and the Trustee costs of the proceedings. Ultimately it is unclear form the Judgment how the Trustee will enforce the debt. So prior to starting any sort of action one must be aware of any underlying asset position which can be realised to pay any judgments and costs orders.

Be aware when proving Your Claim as a Creditor in an Insolvent Estate from South African Perspective?

By Muna Laloo

It is interesting how the differences in insolvency law from one country to another affects creditors' decisions when lodging their Formal Proof of Debt Form ("POD") in an insolvent Estate.

I was stunned when I received an email from one of the creditors of a Bankruptcy refusing to provide me with his POD, he was reluctant to do so as he was afraid that he would have to contribute toward the Estate. This incident interested me enough to find out about the South African law when it comes to lodging a claim in an insolvent Estate.

According to South African Insolvency Law, if you are a creditor and you are determined to lodge a claim in an insolvent Estate and there is no money to cover fees and costs, you have to make a contribution according to the size of your claim.

Knowing the difference between Voluntary and Sequestration Surrender is important when proving your claim as this depends on the advantage to creditors.

Voluntary surrender:
An application by the debtor for the sequestration of his estate for the benefit of creditors is termed a "voluntary surrender" of the estate. A court may accept the surrender if the debtor proves, among other things, that his liabilities exceed his assets. The court, therefore, has to be satisfied that the surrender will be to the advantage of creditors.

Sequestration surrender:
Unlike the voluntary surrender, the creditor has to show merely that there is a reason to believe that there will be an advantage to the creditors. The onus, then, is more strenuous in the case of voluntary surrender than in the case of compulsory sequestration.

One reason for this is that a debtor can normally be expected to provide a detailed account of his own financial position, whereas a sequestrating creditor would generally not have access to this information.

Another reason is to reduce the ever-present risk of the debtor abusing the sequestration procedure and resorting to sequestration when it holds little or no real benefit for creditors and simply gives the debtor a means of escaping his liabilities.

The court may not grant a sequestration order unless it is established that "there is a reason to believe that there will be an advantage to the creditors".

Insolvency law in South Africa states that there must be sufficient benefit for the creditors to have an application for sequestration awarded. Creditors are thus not eager to apply for compulsory sequestration, because they find the process too expensive for what they will receive as a dividend.

Burden of POD
The burden of proof rests on the sequestrating creditor. This onus is less stringent in the case of compulsory sequestration than for voluntary surrender. This is because of the fact that the sequestrating creditor does not have the personal knowledge of the debtor's financial affairs as the debtor himself would have in the case of the voluntary surrender.

The South African Law Reform Commission referred to an investigation conducted in the Master's Office Of High Court in Pretoria, where it appeared that in only 28.6% of sequestrations, creditors received any dividend at all while in 40.6% of the cases the examined creditors actually had to make a contribution.

In essence it would seem that the advantage for a creditor's requirement is that there must be enough assets in the estate to cover all costs of sequestration and yield a not negligible dividend to creditors.

In Australia, creditors can prove their claims even if there is no money in the estate without paying any contribution toward the estate.

Innovation through insolvency law reform: Bankruptcy period to be reduced from three years to one year.

By: Jessica Lin

Given that start-ups and entrepreneurs are a large contributor to new jobs and innovation in Australia, the Federal Government has taken several initiatives to foster a culture where innovation and entrepreneurship is encouraged. One of these initiatives is improved insolvency laws.

As part of the National Innovation and Science Agenda, the Bankruptcy Amendment (Enterprise Incentives) Bill 2017 ("the Bill") was introduced and passed by both the House of Representatives and the Senate. The Bill, which reduces the current default bankruptcy period from three years to one year, is expected to commence in the first half of 2018.

As a result of the Bill, the following restrictions (amongst others) prescribed by the Bankruptcy Act 1966 will also reduce from three years to one year, so that upon discharge, a former bankrupt may:

- Travel overseas without written permission from their trustee in bankruptcy.

- Apply for credit over the prescribed amount without disclosing their bankruptcy status.
- Become a director of a company.

It is also important to note that the following obligations (among others) will no longer only apply during the default bankruptcy period but will continue for a 'prescribed period' (defined in the Bill as the longer of the period of bankruptcy, the period of three years from the date on which the bankrupt files their statement of affairs, or the period for which the bankrupt is or remains liable to make any payments under the Bill). During the prescribed period, the bankrupt is still required to:

- Disclose to the trustee information about their property, dispositions of property, conduct and examinable affairs.
- Keep and retain books that record the bankrupt's income, transactions and other financial affairs.

It is also important to note that the Bill will preserve a Trustee's capacity to object to a bankrupt's automatic discharge to extend the default period of bankruptcy in cases where the bankrupt does not fulfil their obligations.

For example, currently a bankrupt is obligated to pay income contributions to their estate if their income exceeds the applicable threshold. The Bill will preserve a bankrupt's obligation to fulfil their income contribution liability prior to their discharge. To prevent high-income earners from using bankruptcy as a means of avoiding their debts, the Bill includes measures that increase the period in which a discharged bankrupt must fulfil their income contribution liability. Under the Bill, a discharged bankrupt will be required to comply with their income contribution obligations for a minimum period of two years following their discharge (i.e. which is currently the situation) or, in the event where the bankruptcy has been extended due to non-compliance by the bankrupt, for five to eight years.

Australia's insolvency laws must align the competing interests of the predominant stakeholders in a bankruptcy: the debtor, the creditors, the Trustee in Bankruptcy, and the Australian Financial Security Authority (AFSA). Current bankruptcy legislation regarding bankruptcy discharge periods and corresponding restrictions on bankrupts during their period of bankruptcy arguably reflect a scale tipped in favour of the creditors.

Reducing the default bankruptcy period to one year will re-balance the scale in favour of the debtor by encouraging entrepreneurial behaviour and encouraging entrepreneurs to re-engage in business sooner.

It will be interesting to see whether the new one-year bankruptcy Bill will lead to bankruptcies resulting specifically from entrepreneurship risk-taking. We will have to wait and see if the Bill achieves the objectives in the Federal Government's National Innovation and Science Agenda.

Upcoming Events

12 March 2018	-	Parramatta Accountants Discussion Group

Parramatta Accountants Discussion Group

Are you an accountant, lawyer or financier?

Are you interested in discussing the industry's "hot" topics on a monthly basis?

Want to hear what your fellow professionals have to say?

Join our Parramatta Accountants Discussion Group. We meet on a monthly basis for an informative presentation and engaging discussion followed by a tasty lunch.

For more information please contact Angela on (02) 9893 9499 or email padg@condon.com.au.

Hey great, account me in!

Level 6, 87 Marsden Street, Parramatta, NSW 2150
PO Box 1418 Parramatta, NSW 2124
Email: enquiries@condon.com.au
Phone: **1300 939 129**
Sydney CBD | Bankstown | Liverpool | Wollongong | Newcastle