ON THE BEAM

CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

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Governance, a World Issue with Divided Views

By Schon G Condon RFD

After a fairly short trip to Europe I feel I have returned to what has a real sense of continuing interested times. One's perspective is certainly varied when one reads and listens to the views expressed internally elsewhere.

I left Australia with the government talking up the future and there being positive signs of future growth. This was further supported by a sense of advancement being made in the United States and a belief that the underlying figures are positive.

Upon arriving in Europe the headlines are awash with the fact that the English pound has collapsed under the BREXIT decision and that Scotland has reopened the thought of independence. This was then later added to by the fact that the British Prime Minister, Theresa May's announcement that she had executive salaries fairly and squarely in her sights. With a health system on the brink and the level of debt increasing there are many expressing serious concerns for a real future solution.

News then continues to bubble of the circumstances of Deutsche Bank, according to Relbanks 2015 statistics, the 11th largest Bank in the world by total assets is in dire straights with a potential US fine that could make the bank insolvent possibly two (or more) times over. In this the German Chancellor, Angela Merkel, has clearly indicated that there will be no bail out of DB by the German Government.

All of the above is just considered normal daily news by those we talked to and it's simply treated as the new norm. Not surprisingly though the one point that was very much on centre court for just about anyone is the United States (US) Presidential election and what appears, from every one that we spoke to, an absolute fear of a Trump victory. In fact the level of fear of such a result was to me quite concerning.

Leaders of countries come and go, some are good and some are not, but there are in most countries, and definitely in the US, a whole system of governance that seeks to protect itself and it is not truly possible for one individual person to run rampant uncontrolled. Look at what President Obama could not get through Congress during his term.

The concern going forward is that hype could be allowed to overtake reality and then the whole system could lose control. It is seeing something that is not there that does damage.

Inside this issue:

Unfortunately in business many seek to exert control based on their own beliefs, that they are right and all else wrong. They then seek to support such stances with legal support that may well argue the cause but not necessarily be the genuinely correct solution. Often defined by money upfront please, but you are the client and you call the shots!

As owners and/or operators of businesses we must be ever vigilant about what we put our faith in. It is not wrong, in fact it is critical, that one believes in ones self and ones business. However one must not lose sight of reality; and one must keep reality in perspective.

In the late 1980's I remember triggering a passionate conversation with a senior Andersen's partner from the US, with a finger in my chest I was advised, "that there was not a company on this planet big enough to bring this firm down." Clearly my concerns were not supported.

It's amazing how reality will in the end catch up with itself.

Governance is about the whole community, not business, not the government, not the individual; but the whole community.

Understanding Investigations

By Andrew McCarthy

A number of creditors have recently contacted our office to ask what forms part of our investigation process within a liquidation. The Corporations Act requires liquidators to investigate and report on the following areas:

Preferential Payments
This is where a creditor receives an unfair preference over other creditors during the six months prior to liquidation (the Relation Back Period). The creditor suspects or knows that the company is insolvent and receives payments ahead of other creditors. For this situation to be proven, the payments must place the receiving creditor in a more favourable position than other unsecured creditors. Should a creditor refuse to repay any amounts deemed to be preferential, the Liquidator has the ability to obtain a court order to recover the funds.

Uncommercial Transactions
A transaction of a company is an uncommercial transaction if it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to the following:

a) the benefits to the company of entering into the transaction;
b) the detriment to the company of entering into the transaction;
c) the respective benefits to other parties to the transaction of entering into it; and
d) any other relevant matter.

Examples of an uncommercial transaction could include items given for no value, undertaking engagements for no value or selling property at an amount below market value.

Related Party Transactions
A related party transaction is a business deal or arrangement between two parties who are joined by a special relationship prior to the deal. For example, a business transaction between a major shareholder and the business, such as a contract for the shareholder's company to perform renovations to the corporation's offices, would be deemed a related-party transaction.

Just because a related party transaction has occurred does not mean that any illegal activity has occurred, the transaction may be at an "arm's length" value and therefore acceptable. However, if other creditors have been disadvantaged in the process, and the company is insolvent then these transactions may be deemed to be illegal.

Insolvent Trading
A review is undertaken to assess if insolvent trading has occurred, this review assesses the financial activities of the business and will examine the following factors:

a) Continuing losses;
b) Liquidity ratio below 1/Negative working capital ratio;
c) Inability to produce timely and accurate financial information;
d) Ongoing negative net assets;
e) Unrecoverable loans to related parties;
f) Creditors unpaid outside trading terms;
g) Demands,judgements or warrants against the company;
h) Dishonoured and post-dated cheques;
i) Payments to creditors of rounded sums not reconcilable to specific invoices; and
j) Overdue tax balances

The process of conducting investigations is not a quick exercise, creditors must understand that in order for investigations to be completed it may take many, many months for all information to be gathered in order to draw a final conclusion. As the results of investigations may form part of litigation action, it is vital that all activities are reviewed thoroughly in order to draw a conclusion that is acceptable to a court.

The Father of Double-Entry Bookkeeping

By Damian Shuttleworth

Luca Pacioli, was a Franciscan friar born around 1446, in Borgo San Sepolcro in what is now Northern Italy. It is believed that he died in the same town on 19 June 1517. He is best remembered for his 615-page mathematical compendium, Summa de Arithmetica Geometria Proportioni et Proportionalita, published in 1494 and for his friendship with Leonardo da Vinci.

Many accountants perceive his greatest contribution as being the 27-page treatise on double-entry bookkeeping and business contained within his Summa. Today, we still teach double-entry bookkeeping following the principles set down by Pacioli, and all manual and computerised accounting systems owe much of their processing logic to the principles and processes he described.

Now you ask Pacioli? Insolvency?
Insolvency owes much to its foundations to Pacioli as every insolvency accountant would know with daily work in Insolvency entrenched in debits and credits, journals and ledgers. However, Pacioli would never have been able to envision how entrenched the area of Insolvency Accounting is

in various areas of law whether it be the Corporations Act, the Bankruptcy Act, Common Law, or even the Family Law Act. However, every accountant (worth his/her salt) whether working in Insolvency, Financial Accounting, Management Accounting or Tax Accounting to name just a few of the vast areas of Accounting, would know that contemporary accounting owes much to the double-entry bookkeeping practice that Pacioli first devised.

I know from my own daily work as an Insolvency Accountant that everything I do in an accounting software package such as MYOB, I will enter journals to record financial transactions. I use ledgers for an overview of multiple journal entries, and use functions such as bank reconciliations, and cash book listings to provide a summarised overview of transactions all grouped from journals.

The only thing that has changed since the days of Pacioli is the methods we now use to group and summarise data. Contemporary accountants use information technology to help summarise and automate the process, rather than use pen and paper as Pacioli would have. Although, the underlying elements remain the same, and to this day all accountants can thank him for what we now enjoy.

Insolvency accountants have much to thank Pacioli for, along with all of the other areas of accounting. The main difference in modern insolvency accounting to that of 500 years ago, is the application of law to the practice of insolvency.

Retention of title: Is the debt secured or unsecured?

By Sophie Bai

In the recent Federal Court decision of Hussain v CSR Building Products Limited, in the matter of FPJ Group Pty Ltd (In Liq) [2016] FCA 392, the Liquidators of FPJ Group Pty Ltd (In Liquidation) ("FPJ Group") failed to recover unfair preferences from CSR Building Products Ltd ("CSR"). One of the main reasons is that a retention of title ("ROT") clause had the effect of causing a ROT Suppler to become a secured party and was therefore immune from an unfair preference claim under Section 588FA of the Corporations Act 2001 (Cth) (" the Act").

It is noted that FPJ Group was a building supply company. On 26 September 2010, a credit agreement was executed between FPJ Group and CSR ("Agreement"). The agreement specifically mentioned the following in regards to the retention of title clause:
"You agree that any goods you receive remain the property of CSR until CSR receives payment for them."
On 18 July 2014, the Company was placed into Liquidation. The Liquidators of the company contended that the company was insolvent in November 2013 and therefore, the payments totaling $153,554 ("the payments") made to CSR between the periods January 2014 to June 2014 pursuant to the agreement constituted unfair preferences pursuant to S588FA of the Act. However, His Honour considered that there was no sufficient and clear evidence to substantiate that the Company became insolvent in November 2013. As a result, his Honour considered that the company was not insolvent at the time of the payments.

The Honour then proceeded to consider whether the debt owed by the company to CSR pursuant to the agreement was an unsecured debt for the purposes of Section 588FA of the Act. Pursuant to Section 588FA(1)(b), a transaction is an unfair preference if it results in the creditor receiving from the company, more than they would receive if the transaction were set aside, and the creditor were to prove for the debt in the winding up of the company.

As outlined above, Section 588FA(1)(b) of the Act only relates to unsecured debts. If the retention of title clause within the agreement caused the Supplier's debt to become a "secured debt", then the payments would not be considered as unfair preferences under Section 588FA.

Then his Honour considered the following:-

i. Origins of retention of title clause.
His Honour looked into a number of authorities in respect of the origins of retention of title clause. Clauses contained in ROT were generally established to protect the seller's interest in the goods sold to buyers in the case of the buyer's insolvency by keeping the title in the goods with the seller until full payments were received. According to the relevant authorities, his Honour concluded that it was long established that retention of title clause could be described as a "security".

ii. The broad meaning of "security interest"
Pursuant to Section 51A of the Act, which refer to the Personal Property Securities Act 2009 (Cth) (PPSA). In particular, pursuant to s12 (d) of the PPSA, a security interest includes an interest in personal property provided by any of the following transactions, if the transaction, in substance, secures payment or performance of an obligation. A conditional sale agreement (including an agreement to sell subject to retention of title) is identified in this Section.

iii. The meaning of an "unsecured debt"
Pursuant to Section 442CC of the Act, a debt to which a retention of title clause is not an "unsecured debt". In light of the above, the Judge concluded that a retention of title clause had the effect of rendering a debt a secured debt, thereby avoiding the operation of s 588FA(1)(b) of the Act.

Condon Update

By Anjie Lal

Condon Associates Group Celebrate a Decade under Current Name

Whilst the Practice has actually been in operation for over 25 years, we have now completed ten years under our current brand. We celebrated our birthday in diamond style with excellent company of our valued clients who over the years have supported us to help mark the momentous occasion.

Under the perfect star lit sky, on our wonderful balcony, the ambience was warm and inviting with the strum of music, good food and a wide variety of beverages flowing.

A photo collage commemorating the current and previous staff, who were an integral part of the success and growth of Condon Associates Group brought back happy memories and reminded us of how far we have come.

Schon and the Team are looking forward to a further decade in business and feel blessed to have such wonderful clients and affiliates who we consider friends to celebrate our success with.

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

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