ON THE BEAM

CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

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It's all in the Definition ... Isn't It?

By Schon G Condon RFD

Recently I was booked to give one of our regularly sought after presentations on business risk and failure which incorporates the potentially dire financial circumstances that can arise from either consistent small error making habits, or in the alternate the impact of one great whopper!

What arose out of that presentation was the observation of how today there exist differing ways that people seem to expect that such situations should be dealt with. For those of us in the insolvency arena it appears fairly clear that the instantaneous massive financial penalty is the desired solution of regulators with an intent to ensure that we are all (and remain) perfect.

One other recent event that quickly came to the fore was the problem that occurred in the final stages of the Academy Awards ceremony and the fall out that has come from there. Firstly the decision made by the Firm in question to accept and own the error from the start was certainly commendable, but in reality there was little else they could do. They either erred directly, or in the alternate, a component in their process failed and the system that they had in place was void of appropriate checks and balances to have firstly detected it. Any contrary stance would have been as ludicrous as Saddam Hussain's Minister of Information saying the Americans were not coming as those watching could see the American tanks arriving in the background over his left shoulder.

Flowing on from that though is the much, and apparently increasingly, quoted reminder that we are all human, and that humans make mistakes. Now that is a very true statement, it is plausible and it is without doubt well-meaning; but where is that magical line? What is the tolerable error and what's not? What is acceptably human and what is professionally (or humanly) incompetent or, in the alternate, inept?

Inside this issue:

If the brain surgeon makes an error, or the lawyer at a vital point in a case, or the pilot of the passenger airliner, or the captain of a huge cruise ship or any of the many other situations that can come readily to mind where we would not be very happy about the situation falling to pieces on anyone of us. Are these all just human mistakes.

Increasingly we are seeing machines being developed to take over functions and roles "so as to remove the potential for human error," which in boring repetitive tasks is great, but are we now saying in many other situations that we are simply not willing to enforce a degree of discipline so as to ensure that the job really does get done properly. Are we saying that the underlying acceptance now should always be that near enough is good enough? If that is the case then the predictions that unemployment will overnight rocket from 6 percent to 60 percent will be driven to fact. The problem will then become what all those unemployed will live off.

In my early professional days, and in more than one role that I was involved in, steps were taken to ensure that I knew what I had to do, had and maintained an appropriate focus on what I was doing (including rest) and was adequately supervised to ensure that I did not falter. In the award situation the apparent pre-occupation with a mobile phone camera and the surroundings seem to take a greater priority. Was this

acceptance based on the fact that the opportunity was more important, or was it because we are now willing to accept a lesser standard of performance simply because 'that's the way that generation is'? One thing is for sure, there will be hell to pay if it is ever proven that MH 370 disappeared because the pilot was wandering around snapping pictures!

I have seen some incredible ability amongst the younger generations and some extraordinary demonstrations of patience, dedication and discipline but this tends to be the few, or only for bursts. However for the many, these are not characteristics demonstrated whilst they are just doing routine things like living or working.

In a discussion about the publishing of a news item a request had apparently been made to ensure that it was correct before publishing, the reaction was that it's more about getting the news out than it is about being proper English. It was almost launched with the key individual's name misspelt.

So when is an error fatal? At least at the moment it's not fatal, if you can convince everyone around you that you should not be held responsible, regardless of the ramifications of the error. Potentially good if you have a strong media presence, team and control, but quite potentially fatal otherwise for the majority of businesses.

Worth thinking about though.

Vendors Beware- The dangers of accepting a smaller deposit to gain a sale

By Bob Cruickshanks

It is a generally accepted conveyancing practice that a deposit of 10% of the agreed selling price is to be paid on the exchange of contracts for the sale of a property.

However, with rising property prices and generous lenders and/or vendors anxious to gain a sale of their property, it is becoming common for the purchaser wanting to pay a smaller deposit i.e. 5% of the agreed selling price.

Some solicitors preparing a contract for the vendor in an effort to protect the vendor in such instances, have been adding a condition to the contract whereby if the purchaser defaults and does not complete the purchase, the defaulting purchaser will be required to pay a further 5% of the agreed selling price to the vendor, which would result in the vendor being able to retain 10 % of the agreed selling price on default.

However, conservative lawyers have expressed doubt as to whether such a condition was enforceable. The issue concerning the enforceability of such a condition was examined by Justice White of the NSW Supreme Court in the matter of Kazacos v Shuangling International Development Pty Ltd [2016] NSWSC 1504 in which, his Honour held that the clause requiring the defaulting purchaser to pay a further 5% of the agreed selling price constituted a penalty and was therefore void. Consequently, the vendor could retain only the 5% deposit paid on exchange of contracts.

The other danger of course is that 5% of the agreed selling price may not cover all the additional costs incurred by the vendor especially where there the purchaser extends the time for settlement one or more times but ultimately defaults and there is a substantial mortgage on the property which is not being paid or it is an interest only loan and consequently, the net equity due on settlement is being depleted.

In a bankruptcy scenario or a mortgagee in possession scenario, if the bankruptcy trustee or mortgagee was brave enough to allow a prospective purchaser into possession of the property being sold before settlement occurred by way of a license agreement, then in no way should a 5% deposit be countenanced by the trustee or the mortgagee. This is because if the prospective purchaser ultimately defaults and declines to vacate the property promptly, the trustee or mortgagee will most likely incur significant legal expenses and associated expenses in gaining vacant possession of the property and usually, will need to spend money preparing the property for sale for a second time.

So whilst it may be tempting for a vendor who is anxious to sell their property, to agree to a less than 10% of the selling price deposit, the vendor should only do so where they are completely satisfied that the prospective purchaser will complete the purchase because if the prospective purchaser defaults, the 5% deposit retained by the vendor may not be sufficient to cover the expenses associated with obtaining another sale of the property.

Protect Yourself from Illegal Phoenix Activities

By Sophie Bai

Genuine company failures do occur, not all company failures are involved in illegal phoenix activities. Illegal phoenix activity involves those in control of companies, such as directors or former directors, intentionally closing down companies (e.g. by appointing liquidator(s) for the company) after transferring the assets of an indebted company to new ("phoenix") companies in order to avoid paying debts owed to creditors, employees and statutory bodies.

Illegal phoenix activities adversely impact the employees, business sectors, creditors and governments, as per advice from the ATO. There are some warning signs that can help you identify a company that may be involved in illegal phoenix activity.

Warning signs for an employee or contractor:

- Not receiving a pay slip
- A different employer name appearing on the pay slip records to whom you believe you work for
- Superannuation or other employment entitlements are not being paid

Warning signs for business owners

- Competitors offering significantly lower quotes
- A quote given that is lower than market value
- Directors of a company you are working with being involved with liquidated entities
- A company you are working with requesting payments to a new company
- Recent changes of company directors and name, but managers and staff remaining the same

The government is endeavouring to combat illegal phoenix activities by assisting those who may have been victims of illegal phoenix activities. A number of ways include:

- ATO offers assistance in chasing lost or unpaid super
- Department of Employment administers the Fair Entitlements Guarantee offering assistance in chasing unpaid employment entitlements.
- Fair Work Ombudsman offers advice as to the minimum wages and conditions of employment

Reasonableness of Insolvency Practitioner's Remuneration

By Adam Chen & Muna Laloo

External administrators are only entitled to an amount of fees that is reasonable for the work that they and their staff properly perform. This is only once these fees have been approved by a creditors' committee, creditors or a court.

What is reasonable will depend on the type of external administration and the issues that need to be resolved.

How are fees calculated?

Fees may be calculated using one of a number of different methods, such as:

- On the basis of time spent by the external administrator and their staff;
- A quoted fixed fee, based on an upfront estimate; or
- A percentage of asset realisations.

The commonly accepted method, and usual practice, is to 'time-charge' for professional insolvency services, but does this method apply proportionality?

Proportionality and time-charging

The concept of 'proportionality' is not clearly dealt with under Australian law. However, the Corporations Act 2001 (Cth) does provide a list of matters which requires a Court to take into account factors including the time properly taken in completing work, the necessity of the work, the complexity of the administration and the value of realisations.

Some common matters which Courts appear to examine in assessing the proportionality of remuneration are:

- **over-servicing -** in respect of the decision to undertake a particular action and the subsequent amount of work undertaken pursuing the action; and

- **inappropriate delegation -** tasks undertaken by a person with inconsistent seniority (and charge-out rate) for the complexity of the task.

In assessing proportionality, courts appear likely to compare the practitioner's time-costed remuneration to the amount of funds available for distribution to creditors. It has been described by Justice Brereton that the situation where remuneration exceeds or comes

close to exceeding the funds available for creditors as extremely concerning and disturbing.

In AAA Financial Intelligence Limited [2014] NSWSC 1270, Justice Brereton assessed the "reasonable and proper costs and expenses" which liquidators were entitled to claim from trust assets under their control.

In determining the reasonableness of a claim for remuneration by the liquidators of AAA Financial Intelligence Ltd (In Liquidation), Justice Brereton stated that:

"Reasonable remuneration cannot be assessed solely by the application of the liquidator's quoted standard hourly rates to the time reasonably spent. While it is a relevant consideration, it is only one of several, and neither the default position nor dominant factor. It is to be considered in the context of other factors, including the risk assumed, the value generated, and proportionality."

In the above case Justice Brereton allowed remuneration in an amount equal to 20% of the assets realised by the liquidators, rather than on the time-charging basis as sought by the liquidators. To reach that decision, his Honour referred to time spent by the liquidators on an 'ultimately value-negative' recovery in the circumstances of that liquidation.

Applying time based charges for professional services is the usual practice. Insolvency practitioners bring a great amount of professional skill to corporate collapses which are often complex and time-consuming to administer. Adding to this, external administrators must undertake some statutory tasks that may not directly benefit creditors such as forms to be submitted to ASIC. The external administrator is entitled to be paid for completing these tasks.

Courts will continue to examine the proportionality of remuneration claims. Therefore it is important to have very detailed narrations in timesheets and sound records of the complexities of the administration, the reasons for and the value of work undertaken, as well as a the prudent review of costs.

Condon Update

On Wednesday 22 March, Condon Associates Group joined forces with interMEDIATE Dispute Management to deliver our very first Family Law Seminar. With a strong array of speakers organised, the session provided a unique insight into the practical, legal and psychological issues surrounding family law matters.

We were delighted to have Naomi Holtring (Managing Partner at interMEDIATE Dispute Management), Amy Jenkins (Partner at Aitken Lawyers), Sarah Deuis (Senior Family Dispute Resolution Practitioner at Interrelate), Dr. Margo Orum (Psychologist at Life Resolutions) and Schon G. Condon (Managing Principal of Condon Associates Group) present to the audience.

Enjoy a couple snapshots from the day…

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